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Cover Page Footnote

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AID TO EDUCATION — FEDERAL FASHION†

LEONARD F. MANNING*

The President of the United States has touched off a great debate with his recent declaration that the Constitution prohibits federal aid to church-related schools. From an examination of the cases and American traditions as well, Professor Manning concludes that nothing in the Constitution, in case law or in history precludes aid to church-related education in any form or at any level.

“WE ARE a religious people whose institutions presuppose a Supreme Being.”¹ Mr. Justice Douglas’ characterization of our American heritage and of our 1952 society was, naturally enough, warmly indorsed and roundly re-echoed in episcopal circles. In other areas the Douglas pronouncement stirred a mild tremor, particularly among those of his admirers who, even in 1952, had come to regard him as a complete libertarian—French style—with a mind unfettered by conformist traditions.

Mr. Justice Black, albeit a most frequent collaborator of Douglas, had more secular thoughts in 1947. In *Everson v. Board of Educ.*² he added to an otherwise clear and cohesive decision the clouded comment: “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.”³ A few years before Douglas or Black had turned their judicial thoughts to matters of church and state, George Orwell had put forth a more aery aphorism. “All animals are equal,” he said, “but some animals are more equal than others.”⁴ Was Justice Black thinking in terms of the animals on the Orwell farm? Did he mean that all animals are equal but that the irreligious animal is more equal than the religious animal? Or did he simply mean that all animals, both religious and irreligious, are equal and that no ani-

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1. *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).
2. 330 U.S. 1 (1947).
3. *Id.* at 15.
4. Orwell, *Animal Farm*, ch. 10 (1945).

mal, whether religious or irreligious, shall receive preferential treatment from the state?

In recent weeks the President of the United States expressed a point of view equally as perplexing, though more prosaic and perhaps, for that reason, more startling. In proposing his "federal aid-to-education" program, the President wrote: "In accordance with the clear prohibition of the Constitution, no elementary or secondary funds are allocated for constructing church schools or paying church schoolteachers' salaries, and thus non-public school children are rightfully not counted in determining the funds each state will receive for its public schools."⁵

5. 107 Cong. Rec. 2285 (daily ed. Feb. 20, 1961). Curiously enough, on the same day that the President submitted his education message to Congress, Secretary Ribicoff stated that he was strongly opposed to any withholding of federal funds to enforce desegregation of public schools. *N.Y. Times*, Feb. 21, 1961, p. 1, col. 8, at 22, col. 2. The Secretary was reported to be of the opinion that civil rights problems should be solved separately from those of education. *N.Y. Herald-Tribune*, Feb. 22, 1961, p. 1, col. 1. Apparently the Administration's concern lest there be a violation of the first amendment does not include a concern lest federal funds reach schools which are in violation of the fourteenth amendment. This consideration grows "curiouser and curiouser" because an analogy to state attempts to evade *Brown v. Board of Educ.*, 347 U.S. 483 (1954), has been used by certain critics to attack Governor Rockefeller's scholar-incentive plan. The scholar-incentive plan is considered in *Aid to Education—State Style*, p. 525 *infra*, and the inadequacy of the analogy is considered there at p. 534.

The President's present proposal limits federal grants for construction purposes and for payment of teachers' salaries to public elementary schools. On the other hand, it advocates scholarship aid to students at the college or university level, including those attending church-related colleges and universities. Included in the scholarship aspect of the President's plan is a provision for direct federal grants to the colleges or universities, including church-related colleges and universities, of the scholarship-winner's choice. The latter was added in recognition of the fact that "tuition and fees do not normally cover the institution's actual expense in educating the student." Finally the plan contemplates making available to all institutions of higher education, including church-related colleges and universities, federally sponsored long-term, low-interest loans for construction of residential housing for students and faculty and for construction of classrooms, laboratories, libraries and related academic facilities. 107 Cong. Rec. 2285 (daily ed. Feb. 20, 1961).

It has sometimes been represented that the President has shifted his views since his early days in Congress, but the record does not support such a conclusion. In 1949, then-Representative Kennedy introduced a bill, which remained in committee, to provide direct aid to public schools and auxiliary services (bus transportation, nonreligious textbooks, and health services) to all school children. H.R. 5838, 81st Cong., 1st Sess. (1949).

That same year the Senate passed the Thomas bill, S. 246, which left the question of auxiliary services to the states. When it went to the House in 1950, Representative Kennedy offered an amendment in the Education and Labor Committee to assure Government payment of half the costs of bus service for private and parochial schools. The amendment was rejected, *N.Y. Times*, March 8, 1950, p. 28, col. 3, and Mr. Kennedy then voted with a 13-12 majority on the final committee vote to reject the bill itself. *N. Y. Times*, March 15, 1950, p. 1, col. 7, at 27, col. 3.

The National Defense Education Act of 1958, § 305, 72 Stat. 1590, 20 U.S.C. § 445,

The church-state issue so summarily "resolved" in the President's message, the issues which produced the Douglas blessing and the Black dictum, had been left, since 1952, more or less quiescent.

Even before President Kennedy made his educational-aid program a stationary duck for ecclesiastical fire,⁶ Governor Rockefeller in New

provides for loans to non-profit private schools for the acquisition of science, mathematics, and foreign language equipment. Then—Senator Kennedy voted for passage of the bill. 104 Cong. Rec. 17331 (1958).

On Senator Morse's amendment in the 86th Congress extending construction loans to private, nonprofit elementary and secondary schools, discussed in note 6 *infra*, Senator Kennedy was paired against. 106 Cong. Rec. 1910 (daily ed. Feb. 4, 1960). In no instance, then, has he appeared to support any proposals inconsistent with his present position.

If, as indicated herein, federal grants to church-related elementary schools are not unconstitutional, federal grants to church-related colleges are, a fortiori, not unconstitutional. If federal grants to church-related schools are not unconstitutional, federal loans to church-related schools are, a fortiori, not unconstitutional. Other than what is noted at p. 509 *infra*, with respect to loans to church-related schools, the only question considered here is whether Congress can provide grants to church-related elementary schools.

As I use the terms "college" or "university" or "schools" herein, they do not include seminaries or the so-called Sunday schools.

6. A few weeks before the President formalized his aid-to-education message, His Eminence, Francis Cardinal Spellman, was critical of the Report of the President-elect's Task Force Committee on Education because of its failure to take into account children attending private schools. The Cardinal labeled the committee's recommendations "unfair to most parents of the nation's 6,800,000 parochial and private school children." *N.Y. Times*, Jan. 18, 1961, p. 1, col. 4. Similar criticism was voiced regarding the President's specific proposals by, among others, the Most Reverend Joseph F. Flannelly, Auxiliary Bishop of the Archdiocese of New York, and by Monsignor William McManus, superintendent of Catholic schools for the Archdiocese of Chicago. *N.Y. Times*, Feb. 21, 1961, p. 22, col. 6.

The President's views did not produce a partisan religious issue. Criticism came from many nonclerical quarters and from non-Catholics as well. For example, Senator Keating of New York complained that President Kennedy was discriminating against Roman Catholic schools in Florida "which are flooded with Cuban refugees." Senator Keating noted the influx of 7,000 Cuban children into elementary schools in the Miami area, of whom 2,500 are attending parochial schools and 3,500 public schools. He approved a Presidential proposal that Federal assistance be given to public schools for operating costs swelled by the impact of refugee children, but added that it was "apparent, however, that such assistance would not aid the parochial schools which have been confronted with the identical problem." *N.Y. Times*, Feb. 12, 1961, § 1, p. 54, col. 6. Representative McCormack, the House Majority Leader, also criticized the President's proposal for its failure to take into account children attending sectarian and nonsectarian private schools. *N.Y. Times*, March 6, 1961, p. 19, col. 3.

David Lawrence, in his syndicated National Affairs column, noted that "if the Federal government extends aid to public-school children, as is being suggested, and denies such aid to children who go to parochial or other private schools, then it can be accused of handicapping the religious education which is voluntarily sought by parents for their children in order to supplement the regular course of studies." He suggested federal tax

York set afloat a moving target and rippled constitutional waters with his scholar-incentive plan.⁷ The Governor's original proposal was a fluid one—announced without specific details—the essence of which was to provide state tuition grants to all New York students attending New York colleges or universities, including church-related colleges and universities, of their choice.⁸

The Governor's proposal stirred the un-Lordly emotions of the lordly *New York Times*.⁹ The *Times* in turn provoked some letter-to-the-editor writers who found in the proposal a violation of the "traditional principle of separation of church and state,"¹⁰ and the *Times* itself incased state aid to church-related colleges in a "prohibition well founded in public policy and deeply rooted in American tradition."¹¹ The *Times*'

refunds for parents of children attending private schools. N.Y. Herald-Tribune, March 2, 1961, p. 23, col. 1.

The President's scholarship program, which included students attending church-related colleges and universities and grants to such colleges and universities themselves, was endorsed by the Presidents of Brandeis University (Jewish-sponsored), Harvard University, Notre Dame University (Catholic church-related) and Juniata College (affiliated with the Church of the Brethren) but opposed by the President of Baylor University (a Baptist institution). Dr. Nathan M. Pusey, the President of Harvard, stated that he would prefer a system of direct grants to the colleges and universities rather than the scholarships. N.Y. Herald Tribune, March 5, 1961, § 1, p. 31, col. 1.

Other Senators and Representatives, besides Senator Keating and Representative McCormack, have at other times proposed federal aid to private schools, including church-related schools. Senator Wayne Morse, for example, criticized the education bill introduced at the second session of the 86th Congress because of its failure "to consider the needs of all of American education." The bill, he said, "neglects the 15% of our Nation's youth who are receiving their education in nonpublic schools . . . because they and their parents are exercising their rights within our democracy in choosing the kind of education they desire." 106 Cong. Rec. 1888 (daily ed. Feb. 4, 1960). In fact, Senator Morse's proposal to provide federal construction loans to private elementary and secondary schools had the support of 41 of 95 Senators voting, paired or announced. 106 Cong. Rec. 1911 (daily ed. Feb. 4, 1960).

7. Considered in Aid to Education—State Style, p. 525 *infra*.

8. The first details arose from legislative conferences. N.Y. Times, Jan. 24, 1961, p. 1, col. 7.

9. Editorial, N.Y. Times, Jan. 26, 1961, p. 28, col. 1.

10. Letter of Professors Walter Gellhorn, Horace M. Kallen and Edmond Cahn, N.Y. Times, Jan. 30, 1961, p. 22, col. 5. I do not mean to imply that the editorial epistles were predominantly in opposition to the scholar-incentive plan. Those which arrived in newspaper print in favor of the Governor's plan did, I believe, well outnumber those which were opposed. The *Times* itself backtracked from its original position. It suggested attaching a "needs test" and a "merit test" to the scholar incentive plan, detaching the exclusion of students attending tuition-free colleges and the restriction to students attending colleges in New York State, and editorialized that the grants, thus modified, "ought to go to students as individuals without restriction as to the educational institution chosen (so long as it is not a religious seminary)." N.Y. Times, Feb. 16, 1961, p. 30, col. 2.

11. Editorial, note 9 *supra*.

appeal to such an orthodox thing as "tradition" was, to say the least, not in character. Its editorial policy has seldom reflected a sentimental attachment to pristine principles. But that, I am sure, has, if any, only passing relevancy. What is relevant and what is important is that the tradition to which the *Times* appealed is the same tradition about which Mr. Justice Douglas spoke when he noted that "we are a religious people" and added, "[W]e find no constitutional requirement which makes it necessary for government to be hostile to religion or to throw its weight against efforts to widen the effective scope of religious influence."¹² On that point, too, I am sure, a page of history is worth a volume of editorials.

This is not at all to suggest that tradition has no part in constitutional debate or no relation to the constitutional issues implicit in the Governor's proposal or the President's pronouncement. On the contrary, tradition pierces and entwines constitutional debate. It is a strong thread which winds back from present issues, through decided cases and accepted customs, to the original intent and the intended ideals found in the words and the practices of the men who wrote the Constitution. But it is important to know whether the principle about which we are talking, this "principle rooted in tradition," this principle perched upon the "wall of separation" between church and state, is a principle of constitutional law or whether it is no more than a makeshift metaphor, a figurative phrase, or what Cardozo might have called a mere "illustration of a principle."¹³

No one, so far as I know, has ever argued against separation of

12. *Zorach v. Clauson*, 343 U.S. 306, 314 (1952).

13. See *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511, 527 (1935). Cardozo reasoned that the "original package doctrine" written into our law by Marshall in *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827), was never intended as a principle but as an illustration or an example of what was really the principle, namely, that the states are forbidden to enact laws which have an exclusionary effect on foreign and interstate commerce. We have a kind of analogy in reverse here. The "wall of separation" which is said to exist between church and state appeared in Jefferson's Letter to the Danbury, Connecticut, Baptist Association, Jan. 1, 1802, in 8 Jefferson, Writings 113 (Washington ed. 1861). Jefferson's wall was raised in protest against the establishment of a Congregationalist State Church in Connecticut. Jefferson objected to state support of one religion over all other religions. The Congregationalist State Church was not disestablished in Connecticut until 1818. There were nine established (or state-preferred) churches, all Protestant, in the original states. Not until 1833 was the last of these disestablished. O'Neill, *Religion and Education under the Constitution* 25 (1949). Jefferson, incidentally, was not the first to raise the wall. In a letter to King Louis XIV, Pope Innocent XI (1672-1689) advocated the "wall between the spiritual and the secular power" as a protection of religious liberty. McCluskey, *Catholic Viewpoint on Education* 139-40 (1959). He did not make it an end in itself. The question, then, really is what do we mean by this phrase? That, of course, is the burden of this article.

church and state. When we affirm "separation of church and state" we do no more than abstract an analogy and agree only on the abstraction. But the heart of the matter is the *meaning* of the phrase, "separation of church and state." No one has ever claimed that the affairs of church are the affairs of state. Certainly the state cannot tell me what church or temple I must attend or how much I must drop on the collection plate. Certainly the state cannot dictate the appointment of a Roman Catholic pastor in the Archdiocese of New York, order a merger of Orthodox and Conservative Jews, or tell the Episcopal Bishop of California that his views on the Virgin Birth are heretical. Nor, in the field of education, has anyone, so far as I know, ever claimed or ever sought preferential treatment for any church-related school over any other church-related school. Nor has anyone ever claimed any preferential treatment for church-related schools over nonsectarian private schools, or preferential treatment for the private schools over the common school or the public school system.

It is true, from the very nature of the situation, that when the state provides aid for *all* private schools and continues its complete support for all public schools—though there be no change in the relative position of the private schools *inter sese*—the private schools do, at state expense, gain in relation to the public schools. But that is both unavoidable and unobjectionable—unavoidable because the common school is the creature of the state and is totally dependent upon the state for its continued existence; unobjectionable unless we are ready to constitutionalize the public school. The latter proposition may, as I view one aspect of the present controversy, very well be the very core of the controversy. That is to say or to ask: is the public school the only school possessing constitutional capacity to receive state aid?

There are other aspects of the controversy equally as important. For, even if we give an affirmative answer to that question, must we then distinguish between elementary and secondary education on the lower level and higher education on the upper level? The President obviously believes the distinction is required.¹⁴ There are others apparently of the same opinion.¹⁵ But in neither case have we been told why this distinction must exist. It is a distinction which deserves debate.

There are, too, those who would distinguish between federal grants and federal loans; those who, if the grants be damned, would redeem

14. This is implicit in the President's education-aid message. See note 5 *supra* and accompanying text. The President made the distinction expressly at his press conference on March 8, 1961. N.Y. Times, March 9, 1961, p. 16, col. 3 (Question 5).

15. See Statement of New York State Council of Churches, Feb. 22, 1961, withdrawing its opposition to the New York scholar-incentive plan. N.Y. Herald-Tribune, Feb. 23, 1961, p. 17, col. 4.

the loans.¹⁶ There are, to be sure, countless ways in which governments assist religion. Congress has given our churches the same tax-exemptions it offers to other charitable corporations. When a church is built it receives the same fire protection, the same police protection which the state provides for other property owners. Indeed, even before the church is built it is favored with the same privilege of incorporation which the state offers to other corporate promoters. Mr. Justice Holmes once suggested that the due process clause permits the taking of property provided you do not take too much.¹⁷ It may be that the first amendment permits the giving of aid provided we do not give too much. But this is to ignore a principle and this is to ignore our first beginnings. This is to ignore a history and tradition of *non-preferential* aid to religion. I readily acknowledge that, from the sound of certain cases, the question of aid may very well be a question of degree. That may very well be the law. I simply add, if that be the law, the law has closed its eyes on history.¹⁸ However valid it might otherwise be, our concern here is not for any distinction between federal grants and federal loans. There is a primordial point which must first be examined, that is, whether a grant to a church-related school is a grant to a church, whether a grant to a religious establishment is necessarily an "establishment of religion."

PRESUMPTION OF CONSTITUTIONALITY

It is, of course, always possible to ascertain affirmatively the original intent and the original purpose of a constitutional clause, but it is by a rejection-of-objection process that the full meaning and application of the clause is better understood. This approach is desirable, too, from the viewpoint of the very sensible rule that a statute is always presumed to be constitutional. The presumption of constitutionality attaches whether the statute emanates from Congress, a legislative body possessing only delegated and, therefore, limited authority, or whether the statute is the product of a state senate and assembly which, in theory at least, possess unlimited governmental power. What Mr. Justice Chase wrote of congressional power in 1796—"The deliberate decision of the national legislature . . . would determine me, if the case was doubtful, to receive the construction of the legislature"¹⁹—and what Mr. Justice Day said in 1920 of the state tax power—

16. See Statement of Cardinal Spellman, N.Y. Times, March 14, 1961, p. 21, col. 2.

17. Interstate Consol. St. Ry. v. Massachusetts, 207 U.S. 79, 86-87 (1907); see also Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

18. No comment is made here on the wisdom of the law. I do not go so far as to agree with Mr. Bumble that "if the law supposes that, the law is a ass, a idiot."

19. Hylton v. United States, 3 U.S. (3 Dall.) 171, 173 (1796).

When the constituted authority of the State undertakes to exert the taxing power, and the question of the validity of its action is brought before this court, every presumption in its favor is indulged, and only clear and demonstrated usurpation of power will authorize judicial interference with legislative action.²⁰

—apply to all federal and state enactments and have never been questioned. The principle is as elementary as it is sensible.

But now, I do believe, certain opponents of federal aid to church-related schools are seeking somewhat to reverse this presumption. They seek, it seems to me, to read into the proposals some illegal-lurking legislative intent, even in advance of consideration by Congress, and then ask that any such proposals be rejected out of hand by Congress itself on the assumption that a court of law might declare the legislation unconstitutional. Quite the contrary, I believe, is true, and for that precise reason I believe that the President has the right and the duty to debate the constitutional issues here involved. I believe that Congress has the same right and the same duty. I believe that both beliefs are true because aid to church-related schools, if incorporated into the context of the President's aid-to-education program, presents issues which the courts cannot and will not consider.

THE TAXPAYER'S STANDING TO SUE

Some years ago when Congress gave thought to the matter of reducing maternal and infant mortality, it resolved to render assistance through the use of state agencies. It proposed, in other words, to assist the states to assist themselves to protect the health of mothers and children. The federal scheme, enacted into the Maternity Act of 1921,²¹ was fashioned loosely along the lines of the President's aid-to-education proposal. The legislation took the form of grants to the states. Mrs. Frothingham, whom I have always pictured as a childless, elderly Beacon Hill patrician, was bothered by such things as taxes—and the tenth amendment. Mrs. Frothingham saw in the Maternity Act a federal invasion of state's rights, an appropriation resulting in increased federal taxes and, to her, a denial of due process of law. She summoned the patrician power of Beacon Hill to bear upon Treasury Secretary Mellon to demand that he cease and desist making payments out of the U.S. Treasury for the care of children, among whom, I do imagine, she envisioned illegitimate children. Mrs. Frothingham was not one to be satisfied by a courteous response to a demanding letter. She took her demand to the courts. She had power—primogeniture, political, financial, whatever it might have been in Massachusetts even in those days—of persuasion to influence the Commonwealth of Massachusetts

20. *Green v. Frazier*, 253 U.S. 233, 239 (1920).

21. Act of Nov. 23, 1921, ch. 135, 42 Stat. 224.

to join her in a companion suit. The Commonwealth sued the Secretary, claiming to represent *parens patriae* all the taxpayers of Massachusetts. Mrs. Frothingham, despite her ancestral claim, had to pursue her case through the lower federal courts before she arrived in the Supreme Court of the United States. The Commonwealth of Massachusetts simply filed an original suit in the Supreme Court. Both decisions were announced in the same opinion.²²

About twenty-four years before Mrs. Frothingham doubted the legality of the Maternity Act, a resident of the District of Columbia, a taxpayer and citizen of the United States, questioned the constitutionality of appropriations by Congress, funneled through the Commissioners of the District of Columbia, to erect a hospital building for an order of nuns of the Roman Catholic Church. Mr. Bradfield, resident in the District, went to the federal courts, too, and sought to enjoin the commissioners from making their expenditures in aid of a "religious society." When Mr. Bradfield's case came to the Supreme Court, the Court had some qualms about its right to listen to his complaint. It assumed, as it were, its own jurisdiction. The Court noted that it was passing over "the various objections made to the maintenance of this suit on account of an alleged defect of parties, and also in regard to the character in which the complainant sues, merely that of a citizen and taxpayer of the United States and a resident of the District of Columbia."²³ The *Bradfield* Court found that there was no violation of the first amendment and so it never decided whether it had power to annul the appropriation. A rather unusual procedure²⁴ but nonetheless the Court's reasoning, and the question remained whether Mr. Bradfield had a standing to sue in the first place.

The *Frothingham* Court looked back upon *Bradfield* and decided that the *Bradfield* Court was correct in its assumption but added that that was just "about as far as they can go."²⁵

The problem presented is whether the plaintiff has actually been injured or sufficiently injured by the allegedly unconstitutional act. The *Frothingham* Court recognized the right of a taxpayer in a municipality to enjoin illegal or unconstitutional appropriations or acts of municipal officers. The appropriation obviously results in a depletion of the

22. *Massachusetts v. Mellon*, 262 U.S. 447 (1923).

23. *Bradfield v. Roberts*, 175 U.S. 291 (1899).

24. Marshall did something akin to this in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), when he first decided the merits, i.e., that Mr. Marbury was entitled to his commission, but then decided that he had no authority to decide the merits in the first place. It is the normal practice of a federal court to determine in limine whether it has jurisdiction before it undertakes consideration of the merits of the controversy.

25. The sense is from Frothingham. The quote is from the "Kansas City" song in "Oklahoma!"

municipal treasury which in turn requires additional taxes to replenish the municipal coffers, which taxes in turn directly or proximately bear upon the municipal taxpayer. Thus the municipal taxpayer, in his or her status as a taxpayer, has a sufficient interest in the controversy to permit the suit. The same interest and standing to sue would belong to a taxpayer in a local school district. In all of the cases to be considered herein, save *Cochran v. Louisiana State Bd. of Educ.*²⁶ and *West Virginia State Bd. of Educ. v. Barnette*,²⁷ the suit brought by the taxpayer was against municipal officers or school districts or against local administrators of a local district within which the plaintiff was a resident and taxpayer. In *Cochran* and *Barnette* the suit was directed by a resident taxpayer against the state board of education. Whether a taxpayer in a state has a right to challenge in court the constitutionality of an appropriation by the state legislature or an expenditure by a state officer, *Frothingham* held, is a matter of state law for each state to decide. Only if the state permits the suit can the case reach the Supreme Court. Obviously if state law does not permit the suit it is impossible to argue the constitutional issues—except to one's self or in public.

But *Frothingham* was concerned with the right of a taxpayer of the United States to maintain what in effect was a permissive suit against the United States. The Court, dismissing Mrs. Frothingham's suit, said:

The interest of a taxpayer of a municipality in the application of its moneys is direct and immediate and the remedy by injunction to prevent their misuse is not inappropriate. It is upheld by a large number of state cases and is the rule of this Court. . . . Nevertheless, there are decisions to the contrary. . . . The reasons which support the extension of the equitable remedy to a single taxpayer in such cases are based upon the peculiar relation of the corporate taxpayer to the corporation, which is not without some resemblance to that subsisting between stockholder and private corporation. . . . 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.

The administration of any statute, likely to produce additional taxation to be imposed upon a vast number of taxpayers, the extent of whose several liability is indefinite and constantly changing, is essentially a matter of public and not of individual concern. If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same, not only in respect of the statute here under review but also in respect of every other appropriation act and statute whose administration requires the outlay of public money, and whose validity may be questioned. The bare suggestion of such a result, with its attendant inconveniences, goes far to sustain the

26. 281 U.S. 370 (1930).

27. 319 U.S. 624 (1943).

conclusion which we have reached, that a suit of this character cannot be maintained.²⁸

The Court also dismissed the companion case brought by the Commonwealth of Massachusetts. It held that the state enjoyed no right *parens patriae* as a representative of all the taxpayers of its commonwealth and it, therefore, also lacked capacity to sue. Put in its boldest effective terms, the Court said that Mrs. Frothingham was but one taxpayer out of approximately 150 million taxpayers in the United States and, therefore, the impact of any resulting tax upon her was *de minimis*. And it added, in effect, that the Commonwealth of Massachusetts could not reduce the ratio to bring the impact of the tax closer to home by its representation of the total of taxable residents within that state.

It seems to me, therefore, that the federal aid to education bill must, if enacted, go without constitutional challenge for want of a plaintiff possessing a sufficient interest to sue.²⁹ That is why I believe the President—however wrong he may be on the substantive issue—is exercising a proper prerogative in raising and discussing the constitutional problem. He cannot be told to proceed with abandon and leave the Constitution to the care of the courts. That is why, I would submit, Congress has the right to debate the constitutional as well as the policy issues involved in the education bill. The constitutional issues will be automatically resolved when and if the bill, with whatever aid to church-related schools may be attached, is enacted by Congress and approved by the President of the United States. And that is why the constitutional issue is properly a public issue. It belongs as well to the electorate at large to decide through its influence on its elected representatives in the Congress.

The constitutional issue, in the context of the proposed Federal aid-to-education bill, is in the nature of a political question. *Frothingham* recognized this when it noted:

In the last analysis, the complaint of the plaintiff State is brought to the naked contention that Congress has usurped the reserved powers of the several States by the mere enactment of the statute, though nothing has been done and nothing is to be done without their consent; and it is plain that that question, as it is thus presented, is political and not judicial in character, and therefore is not a matter which admits of the exercise of the judicial power.³⁰

28. 262 U.S. at 486-87.

29. It would not appear that the Frothingham case is to be distinguished simply because the first amendment was not in issue there. In *Elliott v. White*, 23 F.2d 997 (D.C. Cir. 1928) (suit to enjoin payments to chaplains), the first amendment was in issue and the court of appeals dismissed because the plaintiff taxpayer did not have standing to use.

30. 262 U.S. at 483.

We cannot escape the *Frothingham* case by attaching to a congressional enactment a rider requiring the Court to accept jurisdiction to decide the constitutionality of the enactment itself. It would appear that in our desire to steer away from Scylla we would swing into the swirl of Charybdis. For it would then appear that Congress would be seeking an advisory opinion. An advisory opinion, as *Muskrat v. United States*³¹ told us some years ago, Congress cannot compel. For that would impair the independence of the judiciary and violate the doctrine of the separation of federal powers and would purport to give the Court jurisdiction over an issue which is not presented in the form of a case or controversy.³²

The situation here presented is not at all unusual. There are many parts of the Constitution which do not under all circumstances admit of interpretation by the courts. These sections are, in effect, left to the executive or to the legislature or to the electorate—*i.e.*, to the political quarters of our government—to construe and enforce as best they can. Thus, the question of the validity of a state's ratification of an amendment to the Constitution is automatically determined when Congress counts that state's ratification and orders the promulgation of the amendment. The determination is not reviewable in the courts.³³ Similarly, the meaning of the term "republican form of government," as used in Article IV, Section 4 of the Constitution, is one finally for the President and the Congress to determine within their respective spheres.³⁴ And the enforcing power to be brought against a state Governor who refuses to surrender a fugitive from justice to the state having jurisdiction of the crime lies with the electorate, not with the courts.³⁵ Though the Constitution seemingly commands the surrender,³⁶ the courts cannot compel. Recourse is left to the will of the electorate expressed in the voting booth.

There is a modicum, but not a very small modicum, of reasonableness in this result. It is not always wise to leave the Constitution to the courts to construe. For then what Congress can do and cannot do becomes always dependent upon the philosophies, the prejudices, the mores of nine men who sit in the high-backed chairs in the courthouse in Washington,

31. 219 U.S. 346 (1911).

32. Art. III, § 2 of the Constitution confers jurisdiction upon the Court (and upon federal courts generally) only in certain enumerated instances and limits this jurisdiction to "cases" and "controversies." A "case or controversy" means that there must be between the parties (case) a genuine dispute (controversy) and not a contrived one. See *Muskrat v. United States*, supra note 31, and cases cited therein. See also *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

33. See *Coleman v. Miller*, 307 U.S. 433 (1939).

34. *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849).

35. See *Kentucky v. Dennison*, 65 U.S. (24 How.) 66 (1861).

36. U.S. Const. art. IV, § 2.

D.C. There is, in fact, nothing in the Constitution which requires that the Supreme Court interpret the Constitution and exercise a kind of limited veto over the acts of Congress. That was a power arrogated unto the Court by Marshall in *Marbury v. Madison*.³⁷ I do not suggest that this is wrong. It is far, far too late even to voice such a suggestion. But the Court itself has often said that the precise words of the Constitution are not moulds which fix its meaning for all times and all circumstances.³⁸ I would submit that there are times when the President, the Congress and the electorate itself are entitled to be heard respecting the meaning of the Constitution. And I would suggest that the present issue presented in the context of the President's proposals might well be one which admits of such a resolution.

If, as presented, the issue is taken as a political or popular issue rather than a justiciable one, we have then almost a union of policy considerations and constitutional considerations. I see nothing essentially wrong in that. I see, therefore, nothing essentially improper when the Council of Protestant Churches argues that religious divisiveness will result from federal aid to church-related schools, or when the Cardinal Archbishop of New York complains that an injustice to the parents of children attending Catholic parochial schools will result from the denial of such aid. Neither is a constitutional consideration, but here the Constitution and the policy are both the concern of Congress.

I do think that if, by some procedural maneuver, this issue comes before the Supreme Court, the nine Justices are then required to give pre-eminent consideration to the will of the legislature and the will of the electorate. I do not say that the Congress and the electorate can do no wrong. I do say that in a representative democracy there is a very strong presumption that they can do no wrong.

THE UNITED STATES CONSTITUTION

The first amendment to the Constitution reads in part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."

The fourteenth amendment to the Constitution reads in part, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor

37. 5 U.S. (1 Cranch) 137 (1803).

38. "This provision is made in a Constitution intended to endure for ages to come and, consequently, to be adapted to the various crises of human affairs." Marshall, C. J., in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 415 (1819). "But to the legislature no less than to courts is committed the guardianship of deeply-cherished liberties." Frankfurter, J., in *Minersville School District v. Gobitis*, 310 U.S. 586, 600 (1940).

deny to any person within its jurisdiction the equal protection of the laws.”

The first amendment taken literally and in its original scope imposed restraints only upon Congress. While there is no implication of that fact in the clause itself, the implication lies in history that the clause operates to restrict the judiciary³⁹ and the executive⁴⁰ as well as Congress and, therefore, operates to restrict all branches and agencies of the federal government. This is implicit in the fact that the “rights” acquired with respect to the federal government result only from the imposition of restraints—restraints put upon the federal government for the dual purpose of protecting individual liberties and state sovereignty vis-à-vis federal sovereignty. Thus, while an individual has no affirmative right to religious liberty, he does have a right to be free from federal interference with his religious liberty. And while the federal government was denied the right to support an established church, the states were at the outset free to do so. In fact, as heretofore seen, state established churches did exist and continued to exist until 1833.⁴¹

In brief, neither the first amendment nor the Bill of Rights, *i.e.*, the enumeration of restraints upon federal power which is affirmed in the first eight amendments, operated to restrain the states. The idea that the privileges and immunities clause of the fourteenth amendment, which was promulgated in 1868, incorporated the Bill of Rights so as to impose its inhibitions upon the states, was rejected in 1873 by the Court in the *Slaughter-House Cases*.⁴² Then in 1940, in *Cantwell v. Connecticut*,⁴³ the Court used the due process clause as the vehicle for applying the “free exercise” clause of the first amendment to the states.

It is sometimes said that *Cantwell* incorporated the entire first amendment into the due process clause of the fourteenth. That is not precisely so.⁴⁴ In *Cantwell*, the Court struck down a Massachusetts licensing

39. See *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1872).

40. There has been no court case involving the President or the executive department. Traditionally each President has assumed himself to be bound and has so conducted executive affairs. The tradition has established the principle. In any event the President is required to take an oath to “preserve, protect and defend the Constitution.” U.S. Const. art. II, § 1. The President’s oath, it would appear, would make him subject to the Constitution and to amendments to the Constitution.

41. See note 13 *supra*.

42. 83 U.S. (16 Wall.) 36 (1873).

43. 310 U.S. 296 (1940).

44. When counsel argued before the Court recently that the Pennsylvania Sunday law violated the establishment clause, Mr. Justice Frankfurter remarked: “I do not think you will find any cases in which a majority of this Court said the specific proscriptions of the first amendment were made applicable to the states.” Mr. Justice Douglas, on the other hand, immediately offered “to give you a good list of them.” 29 U.S.L. Week 3175 (Dec. 13, 1960).

statute which sought to require a permit to disseminate religious literature. Thus the Court was concerned with religious liberty and not with the establishment of a religion. Mr. Justice Roberts, writing for the majority, did speak of both clauses:

The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be.⁴⁵

The *Cantwell* Court considered a state statute which impaired the first amendment. It had no reason to differentiate between the establishment clause as it is applied directly to the federal government in the first amendment and the establishment clause as it might bear upon the states through the operation of the due process clause of the fourteenth amendment. *Cantwell* was doing no more than following the precepts of *Twining v. New Jersey*⁴⁶ and *Palko v. Connecticut*.⁴⁷ The latter cases had already formulated the rule that by reason of the imposition of the fourteenth amendment upon the Bill of Rights the individual had secured, as against the states, only those immunities which are "implicit in the concept of ordered liberty."⁴⁸

It would have been possible, in other words, even after taking into account the *holding* in *Cantwell*, to argue that the free exercise clause operated as a restriction upon the states but that the establishment clause did not apply to the states or, at least, that it applied to the states only insofar as it related to an individual's religious liberty. Religious liberty can coexist with an established church. There is religious liberty in England. There is also an established church. The possibility of such a distinction remained inchoate. In the blur of words which emanated from the Court in the twelve opinions—majority and dissenting—which proclaimed the Court's decisions in *Everson*,⁴⁹ *McCullum*⁵⁰ and *Zorach*,⁵¹ between 1947 and 1952, the principle was established that the establish-

45. 310 U.S. at 303-04.

46. 211 U.S. 78 (1903).

47. 302 U.S. 319 (1937).

48. *Id.* at 325. *Twining* noted that some "rights" recognized and protected under the first eight amendments are protected under the due process clause of the fourteenth amendment. The test, *Twining* said, was whether the rights were "of such a nature that they are included in the conception of due process of law." 211 U.S. at 99.

49. *Everson v. Board of Educ.*, 330 U.S. 1 (1947), discussed p. 516 *infra*.

50. *McCullum v. Board of Educ.*, 333 U.S. 203 (1948), discussed p. 520 *infra*.

51. *Zorach v. Clauson*, 343 U.S. 306 (1952), discussed p. 521 *infra*.

ment clause applied with equal force to both the state and federal governments. It is to be kept in mind, therefore, that whatever limitations the Court, by reason of the first amendment, imposed upon *state* action in those three cases and in *Cantwell* and in other cases to be considered herein, the same limitations apply with equal impact to the acts of *Congress*, and thus cases involving state law need not and will not herein be distinguished from cases involving federal law.

Insistence, however, upon recognition of the precise issue decided by the *Cantwell* Court is not mere insistence upon abstract adherence to accuracy. It may be too late in the day to question the imposition of the establishment clause upon the states, but it is not too late to recall that Mr. Justice Roberts conceived the establishment clause—either as applied to the states or as applied to the federal government—as a guarantee of liberty, a guarantee of individual liberty to believe what one chooses to believe without fear of governmental interference. Despite the many words written about the “wall of separation” between church and state in the many opinions in *Everson* and *McCullum*, it is that guarantee of freedom from compulsion which is recognized and is respected and is at the heart of the majority opinions in *Everson* and *McCullum* and in *Zorach* as well. That proposition brings us full face with the meaning of the establishment clause.

THE ORIGINAL MEANING OF ESTABLISHMENT

“Undoubtedly the Court has the right to make history,” Professor Corwin once remarked, “but it does not have the right to *remake* it.”⁵² Professor Corwin’s comment was prompted by the Supreme Court’s misreading or remaking of history in the *McCullum* case. It would serve no useful purpose to review here the mass of material—historical, conjectural, analytical, superficial, relevant, irrelevant, philosophical, mundane—on the original meaning of establishment. Not only *McCullum* but *Everson* as well loosed a spate of books and articles.⁵³

There is no need to recall the fact that the “wall of separation” is not a constitutional phrase; that it came into our law, in *Reynolds v. United States*,⁵⁴ as a metaphor to explain the guarantee of individual freedom of conscience and as an argument against preferential treatment of any religion; that it was so used by Thomas Jefferson in his letter to the Bap-

52. Corwin, *The Supreme Court as National School Board*, 14 *Law & Contemp. Prob.* 3, 20 (1949).

53. For a rather complete cataloguing of church-state articles see 15 *Record of N.Y.C.B.A.* 424 (1960). A particularly interesting, concise but yet rather complete analysis of historical evidence of the original meaning appears in the form of a debate between two noted authorities, Leo Pfeffer and James Milton O’Neill, in 2 *Buffalo L. Rev.* 225 (1953).

54. 98 U.S. 145 (1878).

tist Congregation of Danbury, Connecticut;⁵⁵ that Jefferson himself and Madison, too, openly advocated the teaching of religion in state-supported colleges.⁵⁶

There is no need to recall that from our first national beginnings we have recognized that religion has a proper place in government; that we have always had stamped upon our coin and upon our currency "in God we trust"; that we have had chaplains in the Armed Forces, chaplains in Congress, Government-built churches at our military and naval academies. Mr. Justice Douglas, in *Zorach*, recounted some of these as among the innumerable instances of the "neutral" cooperation between religion and government in our country.⁵⁷

I am sure that the authors of our Constitution never intended to make religion anathema in our Nation and the religious a pariah in our society. I am sure that in its origin the establishment clause was directed against a federally established church and only at *preferential* federal aid for one religion over another. But I am also sure that, though there be an unreasonable distortion of history in this respect, the distortion—on the present issue—may well be irrelevant. Even those who today feel strong emotions about the wall of separation acknowledge that it is not an adamant wall, that historically there have been many breaches. What they fear, I rather suspect, is the admission of a Trojan horse through the wall. That fear loses its focus on history, but history is, as Professor Corwin implied, what the judges make it out to be.

JUDICIAL CONSTRUCTION OF ESTABLISHMENT

Mr. Justice Roberts told us that the establishment clause "forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship."⁵⁸ What is "compulsion?" What is "compulsion by law"?

In 1934, young Mr. Hamilton was a man of college age with sincere and serious scruples about warfare and military training. He was, in fact, expelled from a state college in California because he had refused to take a prescribed course in military training. The Court sanctioned the expulsion.⁵⁹ The state, reasoned the Court, as a matter of self-defense, can require its citizens to bear arms and, therefore, to be trained to bear arms. Conscientious objectors have escaped military service not by constitutional fiat but by congressional grace. The price plaintiff paid for his religious conviction was the loss of a public college education.

55. Note 13 *supra*.

56. See Reed, J., dissenting in *McCullum v. Board of Educ.*, 333 U.S. 203, 245-48 (1948).

57. 343 U.S. at 312-13.

58. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

59. *Hamilton v. Regents*, 293 U.S. 245 (1934).

Religious conviction made military training a sin in Mr. Hamilton's mind. A religious conviction might also conceive of sin in such a harmless thing as saluting the American flag. It was so considered by young Master Barnette, who nine years later, in West Virginia, refused to salute the flag. Trained in the teachings of Jehovah's Witnesses, the child had been taught that the flag was a graven image and the salute a form of idolatry. Because he refused to sin, young Master Barnette, too, was expelled from school. Only in his case it was a public elementary school. The Court found here a clash with the first amendment and held the expulsion unconstitutional.⁶⁰ Comparing *Hamilton*, Mr. Justice Jackson wrote:

Here . . . we are dealing with a compulsion of students to declare a belief. They are not merely made acquainted with the flag salute so that they may be informed as to what it is or even what it means. . . . This issue is not prejudiced by the Court's previous holding that where a State, without compelling attendance, extends college facilities to pupils who voluntarily enroll, it may prescribe military training as part of the course without offense to the Constitution. It was held that those who take advantage of its opportunities may not on ground of conscience refuse compliance with such conditions. *Hamilton v. Regents*. . . . In the present case attendance is not optional.⁶¹

The state requires attendance at the primary level. It does not require a college education. And, as every wandering lad must know, there are truant laws and truant officers. This, then, would be a form of compulsion, a form of compulsion by law.

Both *Hamilton* and *Barnette* reached toward the free exercise clause. *Pierce v. Society of Sisters*,⁶² in 1925, was wholly confined to the due process clause of the fourteenth amendment. *Pierce*, with a unanimous Court nullifying Oregon's compulsory public school attendance law, recognized the right of private elementary schools, both secular and sectarian, to exist in our society, and the right of the parents to send their child to the school of their choice. The state may require parents to send their children to *some* school. And it may prescribe minimum academic standards for *all* schools.

No question is raised concerning the power of the State reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.⁶³

But the state cannot compel attendance at public schools. It cannot "standardize its children by forcing them to accept instruction from

60. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

61. *Id.* at 631-32.

62. 268 U.S. 510 (1925).

63. *Id.* at 534.

public teachers only.”⁶⁴ The Court made uncommon common sense when it recognized that “the child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.”⁶⁵

Compulsion, as it was found to exist or not to exist in *Pierce, Hamilton* and *Barnette*, was not forgotten. It added a touch of color, if not a penetrating dye, to the later cases of *Everson*, *McCullum* and *Zorach*. That is interesting because *Pierce, Hamilton* and *Barnette* talked in terms of liberty, and if they were to be grouped under the first amendment they would relate exclusively to the free exercise clause. *Everson*, *McCullum* and *Zorach* commingled considerations of compulsion—or the free exercise of religion—with considerations of the establishment clause. The establishment clause—insofar as it was alleged to conflict with governmental aid to a particular religion or a religious society—first had the Court’s attention in *Bradfield v. Roberts*⁶⁶ in 1899.

Bradfield could find nothing objectionable in a “contract” between the District of Columbia and Providence Hospital, even though Providence Hospital was owned and operated by a religious order of Roman Catholic nuns and even though the District Commissioners had undertaken at Government expense to erect two buildings for the religious order. The Court found this to be “simply a case” of “a secular corporation” managed by people who hold to the doctrines of the Catholic Church but who, nevertheless, ministered to all and not merely to Catholic patients. Thus a religious establishment is not synonymous with an establishment of religion.

Are we required, at this juncture, however, to distinguish between education and health? Are we to deny to religious schools the federal aid we allow to religious hospitals? This potential distinction, even if reasonable to conceive, never quite quickened. The Indian brave, Quick Bear, suggested it in 1908 but the Court found it a distinction without a difference.

*Quick Bear v. Leupp*⁶⁷ sanctioned direct payments out of “treaty funds” and “trust funds”—both created by Congress in settlement of Indian land claims and in accord with Indian treaties and both administered by the Secretary of the Interior—to the Bureau of Catholic Indian Missions to educate the Sioux in sectarian elementary schools conducted under the auspices of the Roman Catholic Church. The Court reasoned that this money appropriated by Congress really belonged to the Indians and that if the Sioux elected to have it spent to

64. Id. at 535.

65. Ibid.

66. 175 U.S. 291 (1899); also considered p. 503 supra.

67. 210 U.S. 50 (1908).

erect and maintain sectarian schools the first amendment was not opposed. The first amendment, it is to be noted though, was not directly in issue. The complaining brave had argued that congressional policy, as well as the Constitution, precluded payments to sectarian schools. The legislative policy, put into the form of a statutory declaration⁶⁸ only a few years before, was, as counsel for the Government pointed out, actually the reversal of an eighty-year-old congressional practice of subsidizing religious education among the Indians.⁶⁹ The subsidies had during those years been appropriated not out of any obligated treaty funds or obligated trust funds but out of the general treasury of the United States. If there had been a constitutional objection to the earlier practice, the Government argued, surely it would have been discovered in the course of those eighty years.⁷⁰ The Court, citing *Bradfield*, briefly replied, "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."⁷¹

At this turn two things were apparent. In *Quick Bear*, education was involved, education in elementary schools among those who were supposedly less civilized and less literate than their white brethren and, for that reason, more susceptible to proselytism. We do not distinguish then the church-related school from the church-related hospital. The mind of man as well as corporeal man is a legitimate concern of government. Secondly, the Government quite apparently felt that it got a good bargain from the Sisters of Charity in *Bradfield* and from the Bureau of Catholic Indian Missions in *Quick Bear*. It was apparently cheaper to pay for educational services and medical services than to build government schools and government hospitals.

It is true that the Court in *Quick Bear* noted the fact that Congress had not established a system of public schools upon the Indian reservations, and thus it might be said that only where no adequate public school system existed would Congress or the states be free to provide direct subsidies for church-related schools. And it might be possible to speculate that the Commissioners of the District of Columbia were faced with a quasi-emergency kind of need for hospital rooms in the *Bradfield* case. Are we, therefore, required to isolate *Bradfield* and *Quick Bear* to their independent facts? Are we required to limit the principles implicit in those cases to the kind of emergency or quasi-emergency presented there? *Cochran v. Louisiana State Bd. of Educ.*,⁷²

68. Act of June 7, 1897, ch. 3, § 1, 30 Stat. 79.

69. 210 U.S. at 56 n.1, at 58-62.

70. Argument of counsel, id. at 74.

71. Id. at 81.

72. 281 U.S. 370 (1930).

decided in 1930, talked about schools in a state where a public education system had been adequately established, and *Cochran* seems to give us a negative reply.

In the period between *Quick Bear* and *Cochran*, the period between 1908 and 1930, liberty was the Court's concern. It found no occasion to re-examine the establishment clause. It was almost as if disestablishment having been completed in the states in 1833, we would hear no more of it. In the twenty-two years following *Quick Bear*, only in the *Selective Draft Law Cases*,⁷³ which sustained the power of Congress to conscript citizens for military service, did the Court speak of the establishment clause and then, with presidential spontaneity, it summarily disposed of plaintiff's first amendment objection to the exemption of conscientious objectors:

And we pass without anything but statement the proposition that an establishment of a religion or an interference with the free exercise thereof repugnant to the First Amendment resulted from the exemption clauses of the act to which we at the outset referred, because we think its unsoundness is too apparent to require us to do more.⁷⁴

Then, as noted, came *Cochran v. Louisiana State Bd. of Educ.* in 1930. *Cochran* found that education served a public purpose and that the state's supplying of secular textbooks to children attending parochial elementary school also served a public purpose and was not unconstitutional. Whatever "emergency" qualification *Quick Bear* might require to be put on aid to sectarian schools, whatever limitation might have been implied from the absence of a public school system, whatever distinction—howsoever valid—we read into *Bradfield* between hospitals and schools, are certainly now removed.

Cochran was the product of a unanimous Court, enriched by the presence of Justices Holmes, Brandeis and Stone. I mention that fact specifically because it is hard for me to conceive how those Justices would lightly turn aside, indeed ignore, the first amendment. There are authorities who would have us note with technical nicety, but with absolute accuracy, that *Cochran* did not discuss the establishment clause, that it was not until *Cantwell* in 1940 that the religious guarantees of the first amendment were expressly "incorporated" into the fourteenth amendment and thus expressly made applicable to the states. The plaintiff in *Cochran* had argued that the tax imposed upon him for the purchase of books for children attending church-related schools was a taking of private property for a private purpose. The Court simply found education to be a public purpose. But as long ago as

73. 245 U.S. 366 (1918).

74. *Id.* at 389-90.

1908, in *Twining v. New Jersey*,⁷⁵ the Court had said that there were certain substantive rights, basic and fundamental to man, which cannot be denied without denying due process of law. And in *Gillow v. New York*,⁷⁶ in 1925, the Court had reasoned that the fourteenth amendment incorporated the first amendment's guarantee of freedom of speech. This became an express holding in *Fiske v. Kansas*,⁷⁷ decided in 1927, and was accepted as common knowledge in 1930. *Gillow* had not passed without the usual volume of legal comment.⁷⁸ And only months after *Cochran*, in 1931, the same Court, presided over by Mr. Chief Justice Hughes, tripped Minnesota⁷⁹ and California⁸⁰ statutes which fell before the first amendment.

Are we to say now that Hughes, Holmes, Brandeis and Stone did not read what had been written before 1930? That would be rather difficult, because Mr. Justice Holmes wrote a dissenting opinion in *Gillow* in which he found that freedom of speech had been denied one of its citizens by the state of New York.⁸¹ And Mr. Justice Brandeis joined in that dissent. It is more reasonable to conclude that the *Cochran* Court necessarily found that whatever impairment of the first amendment there may have been present, it was not serious enough to require the annulment of the state statute. It is equally reasonable to conclude that the Court found no impairment of the first amendment at all because the educational interests which the state promoted by supplying secular textbooks to children attending sectarian schools served a public purpose. In an event, the *Cochran* case was cited and accepted without rebuke by Mr. Justice Black, writing for the majority in *Everson v. Board of Educ.*,⁸² and even Mr. Justice Rutledge in his *Everson* dissent noted that *Cochran* "by oblique ruling" had opened the way for the later decision.⁸³

On that point Rutledge was right. After *Cochran*, *Everson* was inevitable.⁸⁴ So was a change in the personnel of the Court. Perhaps

75. 211 U.S. 78, 99 (1908).

76. 268 U.S. 652 (1925).

77. 274 U.S. 380 (1927).

78. See, e.g., Warren, The New "Liberty" Under the Fourteenth Amendment, 39 Harv. L. Rev. 431 (1925).

79. *Near v. Minnesota*, 283 U.S. 697 (1931).

80. *Stromberg v. California*, 283 U.S. 359 (1931).

81. 268 U.S. at 672.

82. 330 U.S. 1, 7 (1947).

83. *Id.* at 29.

84. In *Cochran*, plaintiff's attorneys specifically argued that private schools, which charge tuition and which require children to buy their own books, received an indirect aid when the books are supplied by the state, and that if the legislature cannot tax to aid private schools it cannot do the same thing by indirection. 281 U.S. at 371-72. It is interesting to note that plaintiff's attorneys concluded that if the textbook provision were

the latter affected the former. One observation is accurate. The Justices became more voluble. The Justices of more recent years will never be charged with indolence. They spread confusion as easily as they spread words. Confusion comes not because they write too little but because they write too much—and too little of the too much is pertinent to the point at issue. And so the majority opinion of Mr. Justice Black in *Everson* was sprinkled with dicta. To the language to which I referred at the outset, Mr. Justice Black appended the admonition 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.”⁸⁵ It is the dicta in *Everson* which the President entertained when, with rather arbitrary abandon, he announced that *Everson* foreclosed debate on the constitutionality of federal aid to church-related schools.⁸⁶ Dictum, to begin with, is not an ingredient of the doctrine of stare decisis. A dictum has never been considered a command requiring obeisance in subsequent cases, particularly not in cases formulating principles of constitutional law.⁸⁷ What is more, I would suggest that the President misread the *Everson* dicta and, what is worse, ignored what *Everson* held.

Everson held that reimbursement of transportation costs which New Jersey gave to the parents of children attending parochial schools was not in conflict with the establishment clause of the first amendment. “The fact that a state law, passed to satisfy a public need,” wrote Mr. Justice Black, “coincides with the personal desires of the individuals most directly affected is certainly an inadequate reason for us to say that a legislature has erroneously appraised the public need.”⁸⁸ Citing *Cochran*, he added: “It is much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose.”⁸⁹

Mr. Justice Black looked upon the providing of transportation as

sustained, then tuition of those attending private schools can be paid, transportation furnished, the salaries of instructors supported and the construction of buildings subsidized. *Id.* at 372-73.

85. 330 U.S. at 16.

86. Transcript of President's News Conference, N.Y. Times, March 2, 1961, p. 12, col. 8 (Question 23).

87. “The Court will not ‘formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.’” *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring), quoting *Liverpool, N.Y. & P.S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39 (1885).

88. 330 U.S. at 6.

89. 330 U.S. at 7.

a safety provision for the protection of all children,⁹⁰ and it is therefore somewhat our fashion to label *Everson* with a "child safety" or a "child health" tag and to embroider upon *Cochran* an "auxiliary aid" emblem. A "child benefit" theory of explaining aid to church-related schools is warranted and reasonable enough, I do suppose, but any terminology of labels has a modern advertising appeal and, with it, a Madison Avenue weakness. A principle of constitutional law or constitutional construction cannot, with propriety, turn on a catch-phrase or on a slogan any more than it can turn on a figure of speech.⁹¹

The blunt and inescapable fact is that education is the legitimate concern of Government and the Government has the right to lend its aid to education, to lend its aid to all schools which satisfy the community's educational needs and which satisfy the state's requirements respecting secular courses. Church-related schools do satisfy those needs and those requirements. Is it not immaterial that they might *in addition* teach religion or satisfy the religious needs of segments of their respective communities? The President, it seems to me, has said this, too. But in the flashing of the *Everson* dicta he failed, I would submit, to realize that he had said it.

The President distinguished loans to private elementary and secondary schools made pursuant to the National Defense Education Act⁹² from "across-the-board" loans for the construction of such schools including therein church-related schools. He suggested that the latter posed constitutional problems not present in the former. Loans pursuant to the National Defense Education Act, the President indicated, were constitutionally acceptable because they were made for a specific purpose and in the interest of national defense.⁹³ I should rather think that in this day of sputniks whirling through our and Venus' skies, education per se is a sufficiently specific purpose and that education per se is in the interest of national defense. But that is not the critical point. The point is that everyone concedes that education is of national concern and that it admits of the exercise of the national power. The very submission of the federal aid-to-education bill presupposed that fact. But national defense is only one source or occasion for the exercise of federal power. It may also find its source in the national welfare,⁹⁴ in the war powers, in the commerce power, in the tax power

90. Actually the New Jersey township (Ewing Township) did not provide bus transportation. Rather it reimbursed parents who provided their own transportation.

91. See criticism of the inordinate use of the metaphor, "wall of separation," *supra* note 13.

92. See note 5 *supra*.

93. N.Y. Times, March 9, 1961, p. 16, col. 3 (Question 5).

94. See, e.g., *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937).

or in any of the other powers specifically delegated to Congress and read liberally in the context of the auxiliary power contained in the "necessary and proper" clause. These powers are affirmatively given in rather broad language, but the first amendment is a limitation applicable to any and all of these powers. In other words, the federal government cannot exercise any power in a way which would violate the first amendment. If federal aid to church-related schools does not violate the first amendment when the Government acts in the interest of national defense, it does not violate the first amendment when the Government acts in the interest of the national welfare. The restriction on power, expressed in the establishment clause, is, as it were, omnipresent. That restriction always remains. Only the reason for the affirmative exercise of power changes.

Mr. Justice Rutledge dissented in *Everson*, and quite vigorously, too. Rutledge apparently objected to any aids to any children which would help to get them to any school where they might obtain any religious instruction. He found the establishment clause, "broadly but not loosely phrased," a "compact and exact summation of its author's views" and, borrowing James Madison's characterization of Jefferson's Virginia Bill for Establishing Religious Freedom, "a Model of technical precision, and perspicuous brevity."⁹⁵ The model of technical precision and the compact clarity which Mr. Justice Rutledge found in the first amendment does not sit well with the rest of the Constitution. It is rather difficult to reconcile this clarity and technical exactitude with the fact that we required almost immediately the first ten amendments to clarify what was granted to the national government in the first place, or with the fact that only five years after the Constitution became effective we needed the eleventh amendment to clarify the meaning of article III of the original document,⁹⁶ or with the fact that it took the sixteenth amendment to resolve certain ambiguities in the term "direct tax,"⁹⁷ or with the fact that we were never told when the President's term commenced, or with the fact that the twentieth amendment was added, in part, to clarify the rights which devolve upon the Vice President when he succeeds to the office of the Presidency, or with the fact that we do not know to this day what is meant by the President's "inability to discharge the powers and duties of the said

95. 330 U.S. at 31.

96. To overcome *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), which had held that art. III, § 2, insofar as it gave the Court jurisdiction over controversies to which a state shall be a party, was a waiver of the state's sovereign immunity, an interpretation said never to have been intended by the authors of the Constitution.

97. See *Pollock v. Farmers Loan & Trust Co.*, 157 U.S. 249, vacated en rehearing, 158 U.S. 601 (1895).

office,⁹⁸ or with the fact that there was always skepticism about the meaning of the term "privileges and immunities."⁹⁹

Notoriety, nevertheless, attended the Rutledge dissent. Perhaps it was the sheer force of the dissent, perhaps it was the dilation of the Black dicta which betokened *McCullum v. Board of Educ.*,¹⁰⁰ decided in 1948. And, as if to formulate a rule (which has some accuracy and merit in recent years) that today's dissents make tomorrow's law, Mr. Justice Reed's dissent in *McCullum*¹⁰¹ anticipated *Zorach v. Clauson*.¹⁰² Neither is precisely in point because both were concerned with the introduction of religious teaching into the public schools and not with state aid to church-related schools. But, at the same time, both cases found cause to be concerned for the establishment clause. *McCullum* used establishment to belabor free exercise.

McCullum found unconstitutional a "released-time" program adopted in Champaign, Illinois. The "Champaign Plan," to which little Vashti McCollum objected, permitted religious instruction to be given by private or outside religion teachers to children in the public elementary school who, or whose parents, requested it. The classes were conducted in the public school building. Attendance records were required to be kept and reported to the school principal in the same manner as attendance at other classes was required to be reported. Children who did not attend religion classes were required to attend classes in secular studies. The Court agreed with younger Master McCollum. Fault was found not only with the fact that the public school buildings were used for the dissemination of religious doctrines but with the fact, so found by the Court, that the state afforded sectarian groups an invaluable aid, the state's compulsory education laws, to teach religion. The Court, with Mr. Justice Black again writing its opinion, seemed to regard students in the public school as a kind of captive audience. Justice Black rebelled at the idea of subjecting a captive audience to any religious indoctrination, even those who freely choose to receive it.

Here again we have "compulsion by law"—looked upon this time not as a curtailment of religious liberty but as an aid to religious societies. Although no one compels the child to receive religious in-

98. U.S. Const. art. II, § 1.

99. U.S. Const. art. IV, § 2. Regarding these and many others, it can be said,

Big fleas have little fleas
Upon their backs to bite 'em
And little fleas have littler fleas
Et ad infinitum.

100. 333 U.S. 203 (1948).

101. *Id.* at 238.

102. 343 U.S. 306 (1952).

struction, he is there because the state requires him to be there—or at a private school. And he cannot escape unless he be an artful dodger, more sly of mind or fleet of foot than the truant officer. While there is no immediate compulsion to receive religious instruction, he is, if agnostic, subjected to embarrassment when he elects not to receive religious instruction or, if a member of a minority creed, when he elects not to follow the crowd. The immediate compulsion upon the child is more the equivalent of embarrassment. But it does have roots in the Black dictum which I quoted at the outset of this article. There is a preference, however remote, given to all religions over irreligion.

McColum has two aspects—there was, so it was claimed, aid to religious groups by giving them free of charge the use of the public school buildings and there was, as noted, the compulsion. It was, in particular, or so it seems to me, the first aspect of the majority opinion which stirred Mr. Justice Reed to dissent, and his dissent, I do believe, has led to the silent overruling of that aspect of *McColum*. Justice Reed objected to the monotonous repetition of and reliance on Jefferson's "wall of separation"—particularly here when it was used to reject an in-school released time program, the very thing which Jefferson advocated. Jefferson, while Chancellor of the University of Virginia (a state-supported university), had, in fact, recommended that university facilities be made available to all religious denominations to teach their religious beliefs.¹⁰³ Reed was wrong only if we must distinguish between elementary education and higher education. It would appear that Reed was right, historically at least, simply because Jefferson was never known to have made such a distinction.

Four years later *Zorach v. Clauson*¹⁰⁴ was decided. This time the released time program, the one currently in effect in New York State,¹⁰⁵ simply released children from public school classes, during the customary school hours, so that they might attend religious instruction given elsewhere than in the public school building. Mr. Justice Douglas, for himself and five other Justices, could not find here the captive audience which *McColum* counted or, at least, the moral persuasion or "compulsion" was not so readily present as it was when religious instruction was given within the public school building during regular school hours. Mr. Justice Douglas quoted some of the examples of cooperation between church and state which Mr. Justice Reed had noted in his *McColum* dissent. He noted that no child was forced to attend religious

103. 333 U.S. at 246.

104. 343 U.S. 306 (1952).

105. N.Y. Educ. Law § 3210(b).

classes, that the school authorities were neutral towards religion, that the separation idea must not be pressed to its dry extreme, that the establishment clause does not require religion and government to sit apart in hostile camps, and that the state cannot prefer those who believe in no religion over those who do believe in some religion.

It would be easy to shift *McCollum* and *Zorach* on the basis of the in-the-school, out-of-the-school distinction, on the ground that government property was used in *McCollum* but not in *Zorach*. Mr. Justice Douglas noted this difference and stated his adherence to *McCollum*. He also stated that he spoke, in this regard, for two of his colleagues.¹⁰⁶ A three-way split was discernible. The silence of the other three Justices in the majority, Reed, Clark and Minton, would indicate that they were as much opposed to *McCollum* as they were in agreement with *Zorach*. The three dissenting Justices were with the majority in *McCollum* and, therefore, were apparently of the opinion that compulsion in any form was to be discountenanced and that the use or nonuse of state property as an aid per se was not controlling. It is certain enough, after *Zorach*, that it is not the use of state property or state funds which constitutes the aid but rather the use of state property and state funds in such a way as to constitute compulsion. And it might possibly be that Mr. Justice Douglas, by his rather casual reaffirmation of *McCollum* and his recognition of his *need* to reaffirm was simply damning *McCollum* with faint praise.

This conclusion becomes compelling when we recall that the Court has never denied the use of state or municipal property, state or municipal parks to those who would teach or preach religion so long as the audience was free to turn away.¹⁰⁷ If it could not be said, simply out of deference to young Vashti McCollum's insistence upon irreligion, that the first aspect of *McCollum*, the idea that the use of state property was per se an aid, was by *Zorach* consigned to "God's small acre," then, ironically enough, the Reverend Carl Jacob Kunz saw to it that this part of *McCollum* got a decent burial.¹⁰⁸

The Reverend Mr. Kunz was a Baptist preacher who testified that he was commanded by God to "go out into the highways and byways" and preach the word of God. So the Reverend Mr. Kunz regularly mounted a loudspeaker on the roof of his Model T, parked it in the city streets or in a convenient municipal park and blasted his religious beliefs upon the unwilling ears of those who sought the quiet of the

106. 343 U.S. at 315 n.8.

107. See, e.g., *Saia v. New York*, 334 U.S. 558 (1948); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

108. *Kunz v. New York*, 340 U.S. 290 (1951).

park for Sunday relaxation.¹⁰⁹ The City of New York denied Reverend Kunz a permit to proselytize upon its streets or in its parks. The New York City licensing statute was found to be unconstitutional. The Court apparently felt that it would be preferable for the city or the state to regulate decibels rather than regulate religion.

Kunz suggested, therefore, that the state cannot *prohibit* sectarianism on public property. *McColum* suggested that the state cannot *permit* sectarianism on public property. The secret of the paradox, so it seems to me, is the presence or the absence of compulsion—compulsion as that concept is conceived by the Supreme Court of the United States. And we are back to the question: what is compulsion? How is it present when the government provides aid to church-related schools? State law may require a child to attend some school until he is old enough or capable enough to shift for himself. But we do not present the teacher of religion in the private school with a captive audience. The parent of the child is free, free from any form of persuasion from the state, free to choose in advance to send his child to a Catholic Parochial School or a Jewish Day School or the Zionist School of the Missouri Synod of the Lutheran Church. This is the freedom of choice constitutionally guaranteed to the parent by *Pierce v. Society of Sisters*.¹¹⁰ Would this not appear to be quite the antithesis of compulsion?

Or does the compulsion come into being simply because there *is* governmental aid? Does the compulsion come simply because governmental aid, howsoever small, somehow reaches the religious institution? Certainly *Cochran* and *Bradfield* contradict that conclusion. If state aid to church-related schools is inadmissible, it is inadmissible only because it constitutes aid to religion as such rather than aid to education as such and, though given without preference to any religion, might conceivably be an aid to all religion over irreligion. How that can be when we would, in the logic of *McColum*, secularize the public school and strip it of all religious vestiges, I cannot see. Nor can I see how there can be a preference of all religion over irreligion when we aid the secular aspects of sectarian education. *Cochran* again attests that we can do that—unless we are ready to say that in the church-related school religion permeates the whole of education and that we cannot sever the secular from the sectarian. Surely this is an arbitrary assertion. For it is to assert that a child is taught the Catholic multiplication tables, the Jewish geography or, if English be taught at all nowadays,

109. The Reverend Mr. Kunz did not so much preach his religion as he attacked that of others. The Reverend Kunz called Catholicism "a religion of the devil," the Pope "the anti-Christ," and Jews "Christ-killers." *Id.* at 297.

110. 268 U.S. 510 (1925); see text accompanying notes 62-65 *supra*.

the Lutheran parts of speech. The fact is that these are secular subjects which, if characterization or coloration be objectionable, cannot possibly be discolored. These are secular subjects whose content and whose standards are fixed by the state, and if there be no compliance with the state's standards, the sectarian school can, by state law, quite forcefully be compelled to close its doors.

In brief, even if we must accept, though obviously we need not, *all the dicta* in *Everson*, we do not, so long as we are guaranteed by *McCullum* that we shall have an irreligious public school system, prefer all religion over irreligion. Nor do we, so long as we can sever the secular subject taught in the church-related school from the sectarian subject taught there, provide tax money for religious indoctrination. We are observant of Mr. Justice Black's caveat. We are, it seems manifest to me, simply using tax money to assist secular instruction, instruction which serves a public purpose. If we are to deny aid to any private school because it, in addition to secular education, teaches religion or because it provides what is commonly called a God-centered education, then certainly we are preferring irreligion over all religion. Then we are breaching the wall of separation because then we are making the teaching of religion the concern of government so much so that government is forbidden to lend aid *only because* the private school undertakes to teach religion. And at that juncture we are at the ultimately fine point not only of secularizing the public school but of constitutionalizing irreligion.

How that ever could have been the intent of Mr. Jefferson, Mr. Madison and their co-authors I cannot understand. How that can possibly be the present posture of our law I cannot perceive, particularly when we recall that the latest word we have heard from the Supreme Court on this subject is that "we are a religious people whose institutions presuppose a Supreme Being." Not only the latest word, but the earliest word. And if they hear that, out of respect for a venerable tradition, we must, when we provide federal funds in aid of education, turn away the church-related school because and only because it is church-related, Mr. Jefferson and Mr. Madison—in whatever part of paradise they may be preparing new articles of confederation—must smile, but not as sultans smile, as they settle back the quill. For if this be a tradition, it is, surely, a tradition which began in 1948.