

# The Establishment Clause and Aid to Parochial Schools

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## I

### INTRODUCTION

IN 1947, MR. JUSTICE RUTLEDGE found "[t]wo great drives . . . constantly in motion to abridge . . . the complete division of religion and civil authority which our forefathers made. One is to introduce religious education and observances into the public schools. The other, to obtain public funds for the aid and support of various private religious schools."<sup>1</sup> *Everson v. Board of Education*, the occasion for his observation, was the first significant decision of the Supreme Court in current history interpreting the establishment clause of the first amendment. Involving bussing of children to parochial schools, it concerned the second of the Justice's "two great drives."

Since 1947, the Court has addressed itself extensively to the first of the two issues in controversy—the influence of religion in the public schools.<sup>2</sup> Although litigation on that question continues to arise,<sup>3</sup> the Court's pronouncements, despite some criticism,<sup>4</sup> seem largely to have resolved the

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<sup>1</sup> *Everson v. Board of Educ.*, 330 U.S. 1, 63 (1947) (dissenting opinion). *See also id.* at 14.

<sup>2</sup> *See* *McCullum v. Board of Educ.*, 333 U.S. 203 (1948) (on-premises released time); *Zorach v. Clauson*, 343 U.S. 306 (1952) (off-premises released time); *Engel v. Vitale*, 370 U.S. 421 (1962) (Regents' prayer); *School Dist. v. Schempp*, 374 U.S. 203 (1963) (Bible reading and Lord's Prayer).

<sup>3</sup> *See* *Chamberlin v. Dade County Bd. of Pub. Instruction*, 377 U.S. 402 (1964) (baccalaureate services); *DeSpain v. DeKalb*, 384 F.2d 837 (7th Cir. 1967) (compulsory recitation of thankful-type verse); *Stein v. Oshinsky*, 348 F.2d 999 (2d Cir.), *cert. denied*, 382 U.S. 957 (1965); *Reed v. Van Hoven*, 237 F. Supp. 48 (W.D. Mich. 1965) (prayers before school begins); *Lewis v. Allen*, 14 N.Y.2d 867, 200 N.E.2d 767, *cert. denied*, 379 U.S. 923 (1964) ("under God" in pledge of allegiance). *See generally* Ladd, *Public Education and Religion*, 13 J. PUB. L. 310 (1964); Note, 20 VAND. L. REV. 1078 (1967).

<sup>4</sup> For various views, see Brown, *Quis Custodiet Ipsos Custodes?—The School Prayer Case*, 1963 SUP. CT. REV. 1; Choper, *Religion in the Public Schools: A Proposed Constitutional Standard*, 47 MINN. L. REV. 329 (1963); Fordham, *The Implications of the Supreme Court Decisions Dealing with Religious Practices in the Public Schools*, 6 J. CHURCH & ST. 44 (1964); Griswold, *Absolute is in the Dark—A Discussion of the Approach of the Supreme Court to Constitutional Questions*, 8 UTAH L. REV. 167 (1963); Kauper, *Prayer, Public Schools and the Supreme Court*, 61 MICH. L. REV. 1031 (1963); Kurland, *The Regents'*

matter. Therefore, it is evident that the most sensitive issue involving religion and government today is, as in *Everson*, that of public aid to parochial schools.<sup>5</sup> Intense interest in the constitutional aspect of the topic is reflected in a recent pamphlet reporting that as of December 1, 1967, at least a score of cases involving the establishment clause question were pending in state and lower federal courts.<sup>6</sup> And, on January 15, 1968, the Supreme Court, for the first time in over twenty years, agreed to hear argument on the subject.<sup>7</sup>

### A. *The Concept of Aid*

Forcefully emphasized and oft-repeated language in Supreme Court opinions, beginning with *Everson*, appears to permit little room for debate about aid to religion:

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another . . . 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.<sup>8</sup>

On this basis, President John F. Kennedy declared in 1961 that a "clear prohibition of the Constitution"<sup>9</sup> forbade the allocation of federal funds for parochial schools.

What constitutes aid or support, however, is "obviously a sophisticated and not a simple literal concept."<sup>10</sup> In the *Everson* decision itself, for

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*Prayer Case: "Full of Sound and Fury, Signifying . . .,"* 1962 SUP. CT. REV. 1; Pollak, *Foreword: Public Prayers in Public Schools*, 77 HARV. L. REV. 62 (1963); Sutherland, *Establishment According to Engel*, 76 HARV. L. REV. 25 (1962).

There has been virtually no disagreement with the Court's firm determination that the ban of the establishment clause extends beyond the setting up of a state church. See *McGowan v. Maryland*, 366 U.S. 420, 442 (1961).

<sup>5</sup> See P. KAUPER, RELIGION AND THE CONSTITUTION 109 (1964); Oaks, *Introduction to THE WALL BETWEEN CHURCH AND STATE* 1, 5 (D. Oaks ed. 1963).

<sup>6</sup> American Jewish Congress Commission on Law and Social Action, *Litigation Docket of Pending Cases Affecting Freedom of Religion and Separation of Church and State*, Dec. 1, 1967, at i-ii.

<sup>7</sup> *Board of Educ. v. Allen*, 20 N.Y.2d 109, 228 N.E.2d 791, 281 N.Y.S.2d 799 (1967), *prob. juris. noted*, 36 U.S.L.W. 3278 (U.S. Jan. 15, 1968).

<sup>8</sup> *Everson v. Board of Educ.*, 330 U.S. 1, 15-16 (1947); *accord*, *Torcaso v. Watkins*, 367 U.S. 488, 492-93 (1961); *McGowan v. Maryland*, 366 U.S. 420, 443 (1961); *McCollum v. Board of Educ.*, 333 U.S. 203, 210 (1948). See also *School Dist. v. Schempp*, 374 U.S. 203, 216 (1963).

<sup>9</sup> 107 CONG. REC. 2430 (1961).

<sup>10</sup> Hayes, *The Constitutional Permissibility of the Participation of Church-Related Schools in the Administration's Proposed Program of Massive Federal Aid to Education*, 11 DE PAUL L. REV. 161, 168 (1962).

example, the Court upheld public reimbursement to parents for the expense of bussing their children both to public schools and to Catholic parochial schools; yet the Court acknowledged the "possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the State."<sup>11</sup> Even the *Everson* dissenters seemed to agree that the furnishing of police and fire protection and of water and sewage services to churches and church schools conformed with the establishment clause.<sup>12</sup> Yet it may plausibly be said that all of these "in fact give aid and encouragement to religious instruction."<sup>13</sup> Neither the fact of a "continuing and increasing demand for the state to assume" their cost,<sup>14</sup> nor the fact that their provision by state funds affords the church "greater strength in our society than it would have by relying on its members alone"<sup>15</sup> demonstrates their unconstitutionality. Some additional ingredient—some brighter line of demarcation—is necessary for invalidation of the expenditure of tax funds.<sup>16</sup>

Thus, despite the Court's rather insistent declarations, "[p]redictability is still elusive."<sup>17</sup> It is not clear that "a non-preferential expenditure of public moneys to religious institutions in furtherance of purposes in which government and the churches have concurrent interests may . . . so deeply involve government in religious matters as to violate what the Court conceives to be the basic values served by the First Amendment."<sup>18</sup> In sum, it does not appear that the Court has firmly foreclosed the issue of the constitutionality of aid to parochial education.<sup>19</sup>

### B. *The Relevance of "History" and "Experience"*

Despite the fact that the Court has not absolutely precluded inquiry into the constitutionality of aid to parochial schools, it could be argued

<sup>11</sup> 330 U.S. at 17.

<sup>12</sup> See *id.* at 60-61 (dissenting opinion of Rutledge, J.).

<sup>13</sup> *Id.* at 45.

<sup>14</sup> *Id.* at 46.

<sup>15</sup> *School Dist. v. Schempp*, 374 U.S. 203, 229 (1963) (concurring opinion of Douglas, J.).

<sup>16</sup> See Lardner, *How Far Does the Constitution Separate Church and State?*, 45 *AM. POL. SCI. REV.* 110, 129 (1951).

<sup>17</sup> Kempner, *The Supreme Court and the Establishment and Free Exercise of Religion*, in *Religion and the Free Society*, July 1958, at 65, 91 (pamphlet issued by The Fund for the Republic, New York, N.Y.).

<sup>18</sup> Kauper, *Schempp and Sherbert: Studies in Neutrality and Accommodation*, in 1963 *RELIGION & PUB. ORDER* 3, 28-29 (D. Giannella ed.).

<sup>19</sup> For further discussion, see text accompanying notes 285-318 *infra*. Professor Kurland has observed that "[a]nyone suggesting that the answer [to whether government may contribute financially to parochial education, directly or indirectly], as a matter of constitutional law, is clear one way or the other is either deluding or deluded." Kurland, *Of Church and State and the Supreme Court*, 29 *U. CHI. L. REV.* 1, 96 (1961).

that the history of the religion clauses of the first amendment has already determined the outcome. It has been contended that "history and experience may be sounder guides to locating Jefferson's 'wall of separation between church and state' than abstract logic."<sup>20</sup> But reliance on history alone is futile. Perhaps it is true that "[n]o provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment. It is at once the refined product and the terse summation of that history."<sup>21</sup> But a recent, detailed inquiry into the practices, preferences, fears, and experiences of the entire generation that promulgated the religion clauses catalogues a wide assortment of possible explanations for their phraseology and concludes that "it is impossible to give a dogmatic interpretation of the First Amendment, and to state with any accuracy the intention of the men who framed it . . ."<sup>22</sup>

The historical facts are that free public education was virtually non-existent during the early years of independence,<sup>23</sup> and where it did occur it had a distinctly religious orientation.<sup>24</sup> The relevance of the latter fact for the meaning of the establishment clause, however, is unconvincing in light of the further fact that established religions and churches flourished in the colonies,<sup>25</sup> persisting at times into the nineteenth century.<sup>26</sup> And, if experience is to be our guide, it is perplexing to find that, despite provisions in almost all state constitutions which arguably, and often explicitly, prohibit public aid to sectarian schools,<sup>27</sup> it was calculated twenty years

<sup>20</sup> U.S. Dep't of Health, Education & Welfare, *Memorandum on the Impact of the First Amendment to the Constitution upon Federal Aid to Education*, 50 GEO. L.J. 349, 357 (1961). See also Herberg, *Religion, Democracy, and Public Education*, in RELIGION IN AMERICA 118, 142 (J. Cogley ed. 1958).

<sup>21</sup> *Everson v. Board of Educ.*, 330 U.S. 1, 33 (1947) (dissenting opinion of Rutledge, J.).

<sup>22</sup> C. ANTEAU, A. DOWNEY & E. ROBERTS, *FREEDOM FROM FEDERAL ESTABLISHMENT* 142 (1964). See generally *id.* at 123-42. Also, compare C. MOEHLMAN, *THE WALL OF SEPARATION BETWEEN CHURCH AND STATE* (1951), and Pfeffer, *Church and State: Something Less than Separation*, 19 U. CHI. L. REV. 1 (1951), with J. O'NEILL, *RELIGION AND EDUCATION UNDER THE CONSTITUTION* (1949), and W. PARSONS, *THE FIRST FREEDOM* (1948).

<sup>23</sup> See *School Dist. v. Schempp*, 374 U.S. 203, 238 & n.7 (1963) (concurring opinion of Brennan, J.). See also *Brown v. Board of Educ.*, 347 U.S. 483, 489-90 (1954).

<sup>24</sup> C. ANTEAU, A. DOWNEY & E. ROBERTS, *supra* note 22, at 71.

<sup>25</sup> See *Engel v. Vitale*, 370 U.S. 421, 428 & n.10 (1962).

<sup>26</sup> L. PFEFFER, *CHURCH, STATE AND FREEDOM* 141 (rev. ed. 1967).

<sup>27</sup> A. STOKES & L. PFEFFER, *CHURCH AND STATE IN THE UNITED STATES* 423-24 (rev. ed. 1964); F. BEACH & R. WILL, *THE STATE AND NONPUBLIC SCHOOLS* 15-19 (HEW, Office of Education Misc. No. 28, 1958). See also Note, *Catholic Schools and Public Money*, 50 YALE L.J. 917 (1941).

It may be urged that the existence of explicit constitutional prohibitions against aid to parochial schools in over 80% of the states, see A. STOKES & L. PFEFFER, *supra*, presents compelling evidence as to the construction, in view of widespread tradition, that should be given to the establishment clause in respect to this issue. But there are several reasons why the point is not persuasive. First, the language of the establishment clause is far from being as specifically opposed to such aid as are many of the state mandates. See, e.g., MINN. CONST. art. 8,

ago that both federal and state funds "are actually being allocated, in no less than 350 instances, to American parochial schools today."<sup>28</sup> And it is reasonable to assume that increased public concern with education has caused that number to grow significantly.

Most assuredly, however, history occupies a prominent role in the formulation of establishment clause principles. It has been properly utilized by the Court, not to discover the precise intention of the framers as to the controversial religious questions of today,<sup>29</sup> but rather to "divulge a broad philosophy of church-state relations."<sup>30</sup> History should furnish the informed perspective needed to fashion a rational constitutional standard that serves several purposes, including cognizance of the evil consequences feared by the framers,<sup>31</sup> appreciation of values presently cherished, and capability of consistent application to the relevant problems.<sup>32</sup> Too strong a reliance on history and experience, given their detailed inconsistencies which cannot be rationalized on principled grounds, will result only in ad hoc, unreasoned rulings. Such rulings conceal value judgments that, although inevitable in constitutional decisionmaking, should be laid bare by the articulation of general principles.

### C. *The Purpose of the Article*

It has been seen, at the threshold, that both Supreme Court rulings and first amendment history leave open the constitutional question of aid

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§ 2: "But in no case shall . . . any public moneys or property, be appropriated or used for the support of schools wherein the distinctive doctrines, creeds or tenets of any particular Christian or other religious sect are promulgated or taught." This is evidenced by the fact that despite the Court's interpretation of the establishment clause in 1947 in *Everson v. Board of Educ.*, 330 U.S. 1, permitting public payment of bus transportation of children to parochial schools, a number of state courts have subsequently held the practice invalid under their state constitutions. See, e.g., *Mathews v. Quinton*, 362 P.2d 932 (Alas. 1961), *appeal dismissed and cert. denied*, 368 U.S. 517 (1962); *State ex rel. Reynolds v. Nusbaum*, 17 Wis. 2d 148, 115 N.W.2d 761 (1962). Further, whereas the historical background of the establishment clause is virtually devoid of problems of education, see text at notes 23-24 *supra*, many of the state constitutional limitations were a direct response to Catholic efforts to obtain public funds for parochial education. Note, *Catholic Schools and Public Money*, 50 *YALE L.J.* 917, 919-20 (1941). Thus, both the wording and setting of many of the state prohibitions, in contrast to the first amendment, clearly preclude any argument that certain aid to parochial schools is valid because it is nonreligious and serves a public purpose. Reed, *The "Permeation" Issue in Federal Aid to Education*, 8 *CATHOLIC LAW* 197, 203-04 (1962). See also note 33 *infra*.

<sup>28</sup> A. JOHNSON & F. YOST, *SEPARATION OF CHURCH AND STATE IN THE UNITED STATES* 112 (1948).

<sup>29</sup> See *School Dist. v. Schempp*, 374 U.S. 203, 241 (1963) (concurring opinion of Brennan, J.).

<sup>30</sup> C. ANTHEAU, A. DOWNEY & E. ROBERTS, *supra* note 22, at xi; see, e.g., *Engel v. Vitale*, 370 U.S. 421 (1962); *McGowan v. Maryland*, 366 U.S. 420 (1961); *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

<sup>31</sup> *School Dist. v. Schempp*, 374 U.S. 203, 236 (1963) (concurring opinion of Brennan, J.).

<sup>32</sup> The specific role which each of these sometimes conflicting elements should play in constitutional adjudication is indeed a topic of substantial independent inquiry.

to parochial schools. This article will propose a rule under the establishment clause<sup>33</sup> for testing the constitutionality of aid to those parochial schools that provide at least some secular education. It is particularly appropriate, in dealing with this topic of aid to parochial schools, to recall Mr. Justice Frankfurter's warning that "preoccupation by our people with the constitutionality, instead of with the wisdom, of legislation or executive action is preoccupation with a false value."<sup>34</sup> But it is constitutionality alone that must concern us here, irrespective of any preference as to the desirability of assisting nonpublic schools.<sup>35</sup> Perhaps in resolving this issue "the members of the Court must have recourse to their own convictions about the place of religion in education and public life,"<sup>36</sup> but surely not to the exclusion of other, more consequential determinants.

*In brief, my proposal is that governmental financial aid may be extended directly or indirectly to support parochial schools without violation*

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<sup>33</sup> As has already been observed, see note 27 *supra*, the question under the various state constitutions may be wholly different. Because of the specificity of many of them, decisions thereunder may require a drawing of lines that will not withstand the test of being capable of "consistent application," see text accompanying note 32 *supra*, to a broad range of rationally similar problems. See the comment of Professor Jaffe in Dorsen, *The Arthur Garfield Hays Civil Liberties Conference: Public Aid to Parochial Schools and Standing to Bring Suit*, 12 BUFFALO L. REV. 35, 41 (1962).

The question under the establishment clause arises when a state aid program survives the state constitutional test, see, e.g., *Board of Educ. v. Allen*, 20 N.Y.2d 109, 228 N.E.2d 791, 281 N.Y.S.2d 799 (1967), *prob. juris. noted*, 36 U.S.L.W. 3278 (U.S. Jan. 15, 1968), or in connection with the myriad of federal programs under which institutions with religious affiliation receive federal funds through grants or loans. For a fairly complete listing of such programs, see *Hearings Before the Ad Hoc Subcomm. on Study of Shared-Time Education of the House Comm. on Education and Labor*, 88th Cong., 2d Sess. 32-48 (1964). See also text accompanying notes 559-69 *infra*. Especially important in this latter group is the Elementary and Secondary Education Act of 1965, 20 U.S.C. §§ 236-44, 331-32b, 821-27, 841-48, 861-70, 881-85 (Supp. I, 1965), under challenge in six cases pending at the end of 1967. See American Jewish Congress, *supra* note 6.

<sup>34</sup> Quoted in *THE SUPREME COURT ON CHURCH AND STATE* vii (J. Tussman ed. 1962).

<sup>35</sup> See Kauper, *Church and State: Cooperative Separatism*, 60 MICH. L. REV. 1, 39-40 (1961). A mass of literature and debate exists on the question of wisdom and legislative policy. An excellent brief summary may be found in L. FEEFFER, *CHURCH, STATE, AND FREEDOM* 521-29 (rev. ed. 1967). See generally, *FEDERAL AID AND CATHOLIC SCHOOLS* (D. Callahan ed. 1964). Personally, I have no firm nor even well-informed judgment on the matter, although, as a believer in the virtues of a strong public educational system, I am troubled by the argument that the distribution of tax funds to private and parochial schools would result in their proliferation to the detriment of the public schools. See, e.g., *Hearings on H.R. 2361 and H.R. 2362 Before the General Subcomm. on Education of the House Comm. on Education and Labor*, 89th Cong., 1st Sess. 1533 (1965) (Statement on Behalf of the American Jewish Congress).

<sup>36</sup> Drinan, *State and Federal Aid to Parochial Schools*, 7 J. CHURCH & ST. 67, 71 (1965). Cf. Jones, *The Constitutional Status of Public Funds for Church-Related Schools*, 6 J. CHURCH & ST. 61, 70 (1964): "In the interpretation of the 'no establishment' clause, as in the interpretation of any other provision of the Constitution, it is impossible to achieve a surgically pure separation of 'law' from 'policy.'"

of the establishment clause so long as such aid does not exceed the value of the secular educational service rendered by the school.

The general theorem is not advanced as being wholly novel. It has been suggested by other commentators<sup>37</sup> and implicitly relied upon by state courts facing the question under state constitutions.<sup>38</sup> But a thorough examination of its implications in light of history, precedent, principle, and intricacies in application is called for.<sup>39</sup> No attempt will be made here to predict the Court's future course of action. Rather, the proposed rule seeks to take account of "past event and initial purpose"<sup>40</sup> and, in this light, to elaborate, as dispassionately as possible, a constitutional rationale "suitable for the government of the future."<sup>41</sup>

Part II of the article explores a general rationale for the broad scope of the establishment clause, with particular emphasis on its historical and contemporary goals, and with incidental reference to the fourteenth amendment and to doctrines of standing. Part III describes the functioning of this establishment clause rationale. Part IV discusses the specific

<sup>37</sup> The clearest statements appear in Blum, *Our Federal Constitution and Equal Justice in Education*, in *EDUCATIONAL FREEDOM AND THE CASE FOR GOVERNMENT AID TO STUDENTS IN INDEPENDENT SCHOOLS* 138-43 (D. McGarry & L. Ward eds. 1966); National Catholic Welfare Conference, *The Constitutionality of the Inclusion of Church-Related Schools in Federal Aid to Education*, 50 *Geo. L.J.* 397, 411, 434-35 (1961); Note, 36 *Geo. L.J.* 631, 645-46 (1948). See also Johnson, *A Problem of Culture*, in *Religion and the Schools*, April 1959, at 64, 70 (pamphlet issued by The Fund for the Republic, New York, N.Y.); Blum, *Bus Rides for All Children*, *SCHOOL ACTIVITIES*, Apr. 1967, at 6; Costanzo, *Wholesome Neutrality: Law and Education*, 43 *N.D.L. REV.* 605, 620 (1967); Rafalko, *The Federal Aid to Private Schools Controversy: A Look*, 3 *Duquesne L. Rev.* 211, 222 (1965); Slough & McAnany, *Government Aid to Church-Related Schools: An Analysis*, 11 *Kan. L. Rev.* 35, 69 (1962); *New Republic*, Mar. 2, 1963, at 4-5.

<sup>38</sup> See *St. Hedwig's Indus. School v. Cook County*, 289 Ill. 432, 124 N.E. 629 (1919); *Trost v. Ketteler Manual Training School*, 282 Ill. 504, 118 N.E. 743 (1918); *Dunn v. Addison Manual Training School*, 281 Ill. 352, 117 N.E. 993 (1917); *Dunn v. Chicago Indus. School*, 280 Ill. 613, 117 N.E. 735 (1917); *Murrow Indian Orphans Home v. Childers*, 197 Okla. 249, 171 P.2d 600 (1946). See also *Community Council v. Jordan*, 432 P.2d 460 (Ariz. 1967). In several of these cases, the facts indicated that not only was public aid given to the religiously affiliated "schools" involved, but children of all religious faiths were committed to them by the juvenile court. Thus, although the matter was not raised, first amendment issues—free exercise and establishment—were there present that do not exist in the "ordinary" aid to parochial school case. See text at note 551 *infra*.

For state cases refusing to accept the proposed rationale, see *Bennett v. City of La Grange*, 153 Ga. 428, 112 S.E. 482 (1922); *Synod v. State*, 2 S.D. 366, 50 N.W. 632 (1891).

<sup>39</sup> Without such an inquiry, one might agree with Mr. Justice Holmes that "no general proposition is worth a damn." 2 *HOLMES-POLLOCK LETTERS* 59 (M. Howe 1st ed. 1961).

<sup>40</sup> M. HOWE, *THE GARDEN AND THE WILDERNESS* 3 (1965).

<sup>41</sup> *Id.* I do not believe that the discussion that follows derives in any significant part from my "own prepossessions about the wisdom of encouraging the maintenance of private schools with public funds." Drinan, *supra* note 36, at 71. Nor do I believe that "the underlying [constitutional] issue of the struggle is brutally simple: are parochial schools to be encouraged or not?" Note, *Public Funds for Sectarian Schools*, 60 *HARV. L. REV.* 793, 800 (1947). See also note 35 *supra*.

operation of the proposed rule for parochial schools. Part V places the rule for aid to parochial schools in juxtaposition to competing theories, examining the efficacy of these other approaches and more fully illustrating the workings of the thesis advocated. Finally, Part VI briefly summarizes existing federal programs in aid of parochial education, measuring them against the rule proposed herein.

## II

### AN ESTABLISHMENT CLAUSE RATIONALE

A proposal permitting governmental financial assistance to parochial schools not exceeding the value of secular services they render comports with a general rationale for the establishment clause that reflects both contemporary and historical aims.

#### A. *Historical Support*

Although the indistinctness of the precise historical designs of the establishment clause has already been noted, several aims emerge quite lucidly. Its paramount purpose then, like its major concern today, was to safeguard freedom of worship and conscience—in a word, to protect religious liberty.<sup>42</sup> And it is equally clear that this purpose comprehended the intention that “the conscience of individuals should not be coerced by forcing them to pay taxes in support of a religious establishment or religious activities.”<sup>43</sup> In other words, as part of the general attempt to safeguard religious belief, the establishment clause sought to protect taxpayers from being forced by the federal government to support religion. This is cogently confirmed by Thomas Jefferson’s “Virginia Bill for Religious Liberty” which proclaimed “that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical”;<sup>44</sup> by James Madison’s “Memorial and Remonstrance Against Religious Assessments” (whose title is itself revealing) which condemned even forcing “a citizen to contribute three pence only of his property” to support any religious establishment;<sup>45</sup> by Thomas Cooley’s *Constitutional*

<sup>42</sup> See P. KAUPER, *supra* note 5, at 77; RELIGION AND AMERICAN SOCIETY 41 (Center for the Study of Democratic Institutions 1961); Dunsford, *The Establishment Syndrome and Religious Liberty*, 2 DUQUESNE L. REV. 139, 203-12 (1964); Sky, *The Establishment Clause, The Congress and the Schools: An Historical Perspective*, 52 VA. L. REV. 1395, 1426-27 (1966). For further discussion and citation of authority, see Choper, *supra* note 4, at 333 nn.19-20.

<sup>43</sup> Kauper, *supra* note 35, at 9. See also *id.* at 5-6. “The most serious infringement upon religious liberty before our Bill of Rights was adopted was the use of tax-raised funds for religious purposes.” Pfeffer, *Some Current Issues in Church and State*, 13 W. RES. L. REV. 9, 18 (1961).

<sup>44</sup> 12 HENING, STATUTES OF VIRGINIA 84 (1823). *But cf.* M. HOWE, *supra* note 40, at 26.

<sup>45</sup> ¶ 3, set forth in *Everson v. Board of Educ.*, 330 U.S. 1, 65-66 (1947) (app.). See also

*Limitations* which found clearly unlawful "under any of the American constitutions . . . [c]ompulsory support, by taxation or otherwise, of religious instruction";<sup>46</sup> and by many important Supreme Court opinions in the church-state field—majority, concurring, and dissenting.<sup>47</sup> Whatever other historical bases for the establishment ban,<sup>48</sup> it is beyond reasonable dispute that it purported to secure religious liberty, in particular by prohibiting taxation for religious purposes.<sup>49</sup> That historical intent conforms with the contemporary American view that "it is a violation of religious liberty to compel people to pay taxes to support religious activities or institutions."<sup>50</sup>

### B. *The Scope of the Establishment Clause*

Given this background, the broad philosophy of church-state relations reflected in the nonestablishment precept becomes manifest: Governmental action for *religious* purposes is highly suspect;<sup>51</sup> it is constitutionally objectionable when it impinges on religious liberty either, as I have

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Pfeffer, *Federal Funds for Parochial Schools? No*, 37 NOTRE DAME LAW. 309, 310-11 (1962); *Flast v. Gardner*, 271 F. Supp. 1, 6-7 (S.D.N.Y. 1967) (dissenting opinion of Frankel, J.): "It is now familiar to all who have touched this subject that a central concern—perhaps the most central concern—of the Establishment Clause is to ban utterly the use of public moneys to support any religion or all religions. . . .

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. . . .

"Support' by use of taxpayers' money lay at the heart of Jefferson's and Madison's concern."

<sup>46</sup> T. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS 663-64 (7th ed. 1903).

<sup>47</sup> See, e.g., *Engel v. Vitale*, 370 U.S. 421, 442 n.7 (1962) (concurring opinion of Douglas, J.); *McGowan v. Maryland*, 366 U.S. 420, 453 (1961) (opinion of the Court by Warren, C. J.); *McCollum v. Board of Educ.*, 333 U.S. 203, 248, 249 (1948) (dissenting opinion of Reed, J.); *Everson v. Board of Educ.*, 330 U.S. 1, 8, 10-12 (1947) (opinion of the Court by Black, J.); *id.* at 33, 41, 44, 52, 53 (dissenting opinion of Rutledge, J.).

<sup>48</sup> The contention has been advanced that the clause's purpose was to prevent Congress from interfering with the then existing state establishments. See, e.g., W. KATZ, RELIGION AND AMERICAN CONSTITUTIONS 8-10 (1964); Snee, *Religious Disestablishment and the Fourteenth Amendment*, 1954 WASH. U.L.Q. 371; Note, 61 Nw. U.L. Rev. 760, 769-70 (1966). The late Professor Howe found this argument "[g]rammatically persuasive . . . [but] historically unconvincing," and suggested that the language drafted supported "a related, but less radical, interpretation of the prevailing policy" concerning the power of federal courts "to respect state law when it happened to sustain a religious enterprise." M. HOWE, *supra* note 40, at 23.

<sup>49</sup> See generally, C. ANTIEAU, A. DOWNEY & E. ROBERTS, *supra* note 22, at 1-29.

<sup>50</sup> P. KAUPER, *supra* note 5, at 14. See also, R. DRINAN, RELIGION, THE COURTS, AND PUBLIC POLICY 231 (1963).

<sup>51</sup> The contention is not made that every governmental action that may be fairly characterized as being exclusively for religious ends violates the establishment clause. If neither of the additional elements discussed in text accompanying notes 52-53 *infra* is present, it may persuasively be argued that, even though the governmental purpose is religious, it does not threaten the evils at which the establishment clause (or the free exercise clause) was directed, at least not in any meaningful sense. See also notes 53, 55 *infra*; Mansfield, Book Review, 52 CALIF. L. REV. 212, 219 (1964).

argued elsewhere,<sup>52</sup> by compromising the individual's religious beliefs, or, as outlined above, by directly coercing the individual to support religion by allocating tax funds for sectarian use.<sup>53</sup> On the other hand, governmental action for *secular* purposes does not fall within the core of the establishment clause's concern<sup>54</sup>—the “nonestablishment guarantee is directed at public aid to the *religious* activities of religious groups.”<sup>55</sup>

### 1. *Conflicting Approaches*

(a) *Absolutism*.—This circumscription of the establishment clause has not met with universal approval. Some would have the clause invalidate

<sup>52</sup> Choper, *supra* note 4.

<sup>53</sup> This should be subject to a de minimis test. *See id.*, at 351-53.

<sup>54</sup> If compliance with such governmental action involves compromise of religious or conscientious beliefs, a free exercise violation may result. *See, e.g.,* *Sherbert v. Verner*, 374 U.S. 398 (1963); *In re Jenison*, 265 Minn. 96, 120 N.W.2d 515, *vacated and remanded*, 375 U.S. 14, *rev'd*, 267 Minn. 136, 125 N.W.2d 588 (1963).

Whether such governmental action may still violate the establishment clause because alternative means to obtain its secular end are available that less directly affect religion is discussed in text accompanying notes 325-345 *infra*.

<sup>55</sup> P. FREUND, *RELIGION AND THE PUBLIC SCHOOLS* 11 (1965) (emphasis added). *See also* Sky, *supra* note 42, at 1433: “[T]here is double historical support for the proposition that a law providing tax funds to religious organizations for the specific purpose of supporting *religious* functions is a ‘law respecting an establishment of religion.’” (Emphasis added.)

The basic establishment clause rationale just outlined is meant generally to deal with problems traditionally considered as arising under the nonestablishment ban—matters such as direct or indirect public financial assistance to religious groups or institutions, religious activities sponsored by government, religious pronouncements by public officials, coercive state action coinciding with religious precepts—rather than with issues of alleged infringement of individual religious liberty, conventionally adjudicated under the free exercise clause. No comprehensive or final articulation of the establishment clause's every application is intended. That task may not be undertaken without thorough consideration of the fundamental question of the interrelationship between the establishment and free exercise clauses and the seeming “dilemmas” not infrequently posed thereby. *See generally* W. LOCKHART, Y. KAMISAR & J. CHOPER, *CONSTITUTIONAL LAW* 1183-85 (2d ed. 1967).

In resolving a conflict between practices demanded by one's religion and civil regulation, the Court has acknowledged that “to make accommodation between the religious action and an exercise of state authority is a particularly delicate task.” *Braunfeld v. Brown*, 366 U.S. 599, 605 (1961). Decision in favor of the former requires the state to serve the religious interest of the individual. Such state action to prevent a free exercise clause violation may be “defined” as being for a “nonreligious” purpose. *See* Choper, *supra* note 4, at 393, 402. *See also* Moore, *The Supreme Court and the Relationship Between the “Establishment” and “Free Exercise” Clauses*, 42 TEXAS L. REV. 142, 196-97 (1963). In other instances, a state may be permitted, although not required, to facilitate personal liberty by relieving a serious burden placed on religious exercise by government action. *See* Mansfield, *Conscientious Objection—1964 Term*, 1965 RELIGION & PUB. ORDER 3, 70-71 (D. Giannella ed.). *See generally* Katz, *Freedom of Religion and State Neutrality*, 20 U. CHI. L. REV. 426 (1953). Such a course may be characterized as being for a “restorative or equalizing” purpose. *See* Galanter, *Religious Freedoms in the United States: A Turning Point?* 1966 WIS. L. REV. 217, 290-91. These matters may well call for some qualification of the literal reach of the establishment clause rationale set forth above. *But cf.* note 199 *infra* (last three paragraphs).

any governmental support to certain institutions controlled by a church or religious organization "[e]ven if a completely secular part of [the institution's services] could be isolated."<sup>56</sup> This seemingly "absolutist" theory will be discussed below.<sup>57</sup>

(b) *Neutrality*.—Another highly respectable thesis falls on the opposite side of the spectrum. Under the doctrine developed by Professor Kurland, which states simply "that government cannot utilize religion as a standard for action or inaction,"<sup>58</sup> it would seem that government could constitutionally finance the entire operational costs of all state-accredited educational institutions, including those controlled by a religious organization, because the classification—state-accredited educational institutions—which includes most ordinary parochial schools, is not in the religious terms which his doctrine forbids.<sup>59</sup>

<sup>56</sup> G. LANOUÉ, PUBLIC FUNDS FOR PAROCHIAL SCHOOLS? 32 (1963).

<sup>57</sup> See text accompanying notes 346-353 *infra*.

<sup>58</sup> Kurland, *supra* note 19, at 6. See also Hutchins, *The Future of the Wall*, in *THE WALL BETWEEN CHURCH AND STATE* 17, 22 (D. Oaks ed. 1963).

<sup>59</sup> Professor Kurland's doctrine also addresses itself to a proper construction of the free exercise clause, urging that it be considered abridged by a government "classification in terms of religion . . . to impose a burden." Kurland, *supra* note 19, at 6. Under this test, he would find a free exercise violation if government extended financial support to all state-accredited schools except those that are church-related. *Id.* at 15 n.57, 70. See also Kauper, *Separation of Church and State—A Constitutional View*, 9 *CATHOLIC LAW* 32, 42 (1963). But he would find no violation if the government classification were "in terms of public and non-public schools." Kurland, *supra* note 19, at 15 n.57.

A discussion of the implications of the free exercise clause on the aid to parochial school question is generally beyond the scope of this article. It has been stated that the free exercise rights of parents wishing to have their children educated in parochial schools are infringed if aid equivalent to that given to public schools is not also extended to parochial schools. However, it has been vociferously maintained that the suggestion is "wholly unjustified," Letter from Professor Howe to Senator Wayne Morse, in S. Doc. No. 29, 87th Cong., 1st Sess., at 50 (1961), and that the free exercise contention "elevate[s] an argument based on concepts of equity to the dignity of a contention grounded in the Constitution." *Id.* See also U.S. Dep't of Health, Education & Welfare, *supra* note 20, at 374-75; Pfeffer, *supra* note 43, at 14-18. But the contention is by no means "clearly without foundation," W. KATZ, *supra* note 48, at 75.

Although the argument has been extant for some time, see V. BLUM, *FREEDOM OF CHOICE IN EDUCATION* 38-61, 106-32 (1958); W. PARSONS, *THE FIRST FREEDOM* 122 (1948); Henle, *American Principles and Religious Schools*, 3 *ST. LOUIS U.L.J.* 237 (1955); Weclaw, *Church and State: How Much Separation?*, 10 *DE PAUL L. REV.* 1, 19 (1960); 1 *BILL OF RIGHTS REV.* 309 (1941), it has gained significant force from the Supreme Court's decision in *Sherbert v. Verner*, 374 U.S. 398 (1963). *Sherbert* involved a state's denial of unemployment compensation benefits to a Seventh Day Adventist who would not work on Saturday, the Sabbath Day of her faith; the state commissioner thus found that she had failed "without good cause, to accept 'suitable work' . . ." *Id.* at 401. The Court, in holding that her rights under the free exercise clause were violated, made several salient points relevant to the aid to parochial schools issue: First, it pointed out that Mrs. Sherbert's "ineligibility for benefits derives solely from the practice of her religion." *Id.* at 404. Similarly, a Catholic child attending a parochial school is ineligible for the financial benefits granted other state-accredited schools (*i.e.*, public schools) solely because of the dictates of his religion; that

A shortcoming of this approach is that it permits the employment of tax-raised funds for strictly religious purposes. Seemingly, this doctrine would allow the use of public money for the construction of churches and synagogues if the legislative classification were broad enough—say, a statute allocating funds for new structures to house all voluntary associations, enacted on the ground that members lacked requisite resources for

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Catholic parents have "the duty of entrusting their children to Catholic schools wherever and whenever it is possible," Pope Paul VI, Decree on Christian Education (1965), *reprinted in* 1 T. EMERSON, D. HABER, & N. DORSEN, *POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES* 1079, 1081 (3d ed. 1967), hardly requires citation. *See also* the Canon Laws of the Roman Catholic Church, reproduced in *Everson v. Board of Educ.*, 330 U.S. 1, 22-23 (1947) (dissenting opinion of Jackson, J.). *But cf.* R. DRINAN, *supra* note 50, at 190-92. Second, the Court noted that "the pressure upon [Mrs. Sherbert] to forego [her religious] practice is unmistakable," 374 U.S. at 404. Given the well-publicized financial predicament of parochial schools and the importance of effective education to children, a similar pressure exists to attend a better financed public school. Third, as in *Sherbert*, denying financial aid to parochial schools "forces [the Catholic child] to choose between following the precepts of [his] religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of [his] religion . . . on the other hand." *Id.* Finally, the *Sherbert* Court concludes that "to condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties." *Id.* at 406. It is not difficult to reach a similar conclusion in respect to denying public aid to Catholic parochial schools. *See generally* *School Dist. v. Schempp*, 374 U.S. 203, 312-13 (1963) (dissenting opinion of Stewart, J.); Blum, *Our Federal Constitution and Equal Justice in Education*, in *EDUCATIONAL FREEDOM AND THE CASE FOR GOVERNMENT AID TO STUDENTS IN INDEPENDENT SCHOOLS* 154-57 (D. McGarry & L. Ward eds. 1966) [hereinafter cited as *EDUCATIONAL FREEDOM*]; Blum, *Freedom and Equality*, in *FEDERAL AID AND CATHOLIC SCHOOLS* 43, 51-54 (D. Callahan ed. 1964); Drinan, *Does State Aid to Church-Related Colleges Constitute an Establishment of Religion?—Reflections on the Maryland College Cases*, 1967 *UTAH L. REV.* 491, 511-15; Farhat, *The Michigan School Bus Law*, *MICH. STATE B.J.*, Apr. 1964, at 28, 31; Regan, *Religious Neutrality*, 110 *AMERICA* 74 (1964); Rice, *The New York State Constitution and Aid to Church-Related Schools*, 12 *CATHOLIC LAW* 272, 321 (1966); 19 *S.C.L. REV.* 242 (1967).

It may even be argued that the free exercise claim for aid to parochial schools is yet more compelling than Mrs. Sherbert's successful claim. When the state sends Mrs. Sherbert her unemployment compensation check, as the Court ordered that it do, thus excusing her from taking "suitable work" because of her conscientious scruples, the state's action is taken solely to facilitate religious exercise—the state's purpose may be said to be *religious*. *See* note 55 *supra*. In the view of some analysts, such action raises serious establishment clause problems. *See* Kurland, *supra* note 19, at 94; *cf.* *Sherbert v. Verner*, *supra*, at 415 (concurring opinion of Stewart, J.). But when the state finances the nonreligious aspects of education in parochial schools, its purpose, as will be demonstrated *infra*, see text at notes 145-149, is *secular*, thus removing this possible objection. *See* W. LOCKHART, Y. KAMISAR & J. CHOPER, *CONSTITUTIONAL LAW* 1185-86 (2d ed. 1967).

It is not meant by this brief discursiveness to speculate as to the Court's resolution of the free exercise claim if it were advanced. In fact, the Court's denial of certiorari in *Swart v. South Burlington Town School Dist.*, 122 Vt. 177, 167 A.2d 514, *cert. denied*, 366 U.S. 925 (1961), in which the state court rejected the contention, does not bode well for its ultimate success. *See also* *Dickman v. School Dist.*, 223 Ore. 347, 366 P.2d 533 (1961), *cert. denied*, 371 U.S. 823 (1962). Nor is it meant to suggest that the persuasiveness of the free exercise argument follows conclusively from *Sherbert*. Perhaps a "compelling state interest," 374 U.S. at 406, found necessary but wanting in *Sherbert*, to justify the "sub-

such undertaking.<sup>60</sup> Although such a statute may not be said to give intentional and purposeful support to religion,<sup>61</sup> in the sense that it "singles out a religion, or religions generally, for direct financial assistance,"<sup>62</sup> this particular statute's clear effect contradicts a vital value underlying the establishment clause.<sup>63</sup> The breadth of the classification—using tax funds to support buildings for the Rotary, Odd Fellows, and Chamber of Commerce, in addition to recognized (and nonconformist) religions—would seem to many people only to add pocketbook insult to constitutional injury.<sup>64</sup> Even the most avid proponents of aid to parochial schools would seem to agree that such subsidies of religion are not permissible.<sup>65</sup> Whether consciously or not, the "official support of the State or Federal Govern-

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stantial infringement," *id.*, of the free exercise right will be shown in the aid to parochial schools context—perhaps the essentiality of conserving the public fisc, perhaps the notion (with which I disagree) that to grant the aid would itself violate the letter or spirit of the establishment clause. The point is that the free exercise allegation is surely not "sheer sophistry," 78 *CHRISTIAN CENTURY* 508 (1961) (editorial).

Father Drinan has made the following contention for the constitutional compulsion of aid to parochial schools: because "of clear Supreme Court rulings precluding sectarian teaching and religious practices in public schools it can be persuasively argued that the granting of funds only to the public school is a violation of the establishment clause because such a policy endorses and prefers one educational and philosophical orthodoxy [a "religion . . . of secularism," R. DRINAN, *supra* note 50, at 193] over all others." Drinan, *The Constitutionality of Public Aid to Parochial Schools*, in *THE WALL BETWEEN CHURCH AND STATE* 55, 72 (D. Oaks ed. 1963). Even if the "religion of secularism" assumption were to be valid, *but see* note 224 *infra*, the contention as a plea for financial aid must fail. It ignores the Court's unequivocal pronouncement that the establishment clause forbids governmental support of all religions, not merely preference of one religion over another. *School Dist. v. Schempp*, 374 U.S. 203, 216 (1963). *See also* S. HOOK, *RELIGION IN A FREE SOCIETY* 16 (1967).

<sup>60</sup> *See* LaNoue, *The Child Benefit Theory Revisited: Textbooks, Transportation and Medical Care*, 13 *J. PUB. L.* 76, 89 (1964).

With respect to the free exercise clause, the Kurland thesis has been recently rejected by the Court in *Sherbert v. Verner*, 374 U.S. 398 (1963). With respect to the establishment clause, the Court, consistent with the Kurland thesis, has to date invalidated only governmental action strictly directed to religious ends. *McCullum v. Board of Educ.*, 333 U.S. 203 (1948); *Torcaso v. Watkins*, 367 U.S. 488 (1961); *Engel v. Vitale*, 370 U.S. 421 (1962); *School Dist. v. Schempp*, 374 U.S. 203 (1963). But it is fair to note that the thesis has never really been put to the test in the establishment cases, as in a situation just hypothesized in the text.

<sup>61</sup> *Cf.* *McCullum v. Board of Educ.*, 333 U.S. 203, 248 (1948) (dissenting opinion of Reed, J.).

<sup>62</sup> Dunsford, *supra* note 42, at 205.

<sup>63</sup> *See* text accompanying notes 43-50 *supra*. *See also* U.S. Dep't of Health, Education & Welfare, *supra* note 20, at 373.

<sup>64</sup> *But cf.* 77 *HARV. L. REV.* 1353, 1357-58 (1964).

<sup>65</sup> *See* *Hearings on H.R. 2361*, *supra* note 35, at 821 (Statement of Msgr. McManus). *See also* R. DRINAN, *supra* note 50, at 231; statement of Msgr. Gallagher, quoted in *id.* at 29. The fact that a public subsidy of religion may attract more people to it, thus resulting in a net increase in the operating costs of the church, *see* *Matthews v. Quinton*, 362 P.2d 932, 953 (Alas. 1961) (dissenting opinion), is, of course, irrelevant to the analysis.

ment would be placed behind the tenets of one or of all orthodoxies. This the Establishment Clause prohibits."<sup>66</sup>

(c) *Divisiveness*.—It has frequently been declared that the function of the establishment clause is "above all, to keep bitter religious controversy out of public life by denying to every denomination any advantage from getting control of public policy or the public purse."<sup>67</sup> The conflict among religions brought about by a struggle for public funds is surely unfortunate and undesirable.<sup>68</sup> And upholding the constitutionality of some amounts of aid to parochial schools or to the children that attend them might well push in this direction.<sup>69</sup> One might agree that "if government interferes in matters spiritual, it will be a divisive force,"<sup>70</sup> thus making such action constitutionally suspect. But to make "divisiveness" determinative of constitutionality, despite the secular nature of the governmental program in controversy, is neither a desirable nor a workable approach to the problem.<sup>71</sup>

Whether rightly or wrongly, the various churches and religious groups have exerted powerful political influence in national and state legislative halls<sup>72</sup>—frequently in disagreement with one another—concerning such causes as Sunday closing,<sup>73</sup> gambling, prohibition, abolition, integration, overpopulation, birth control, sterilization, marriage, and divorce. Surely such legislation is not therefore invalid. Nor would a denial of aid to parochial schools largely diminish the extent of religious political activity. In fact, it "might lead to greater political ruptures caused by the alienation of segments of the religious community."<sup>74</sup> Those who send their children to parochial schools might intensify opposition to increased governmental aid to public education on the ground that it raises their taxes without direct personal benefit, decreases their financial ability to support the parochial schools, and augments the operational costs of parochial schools seeking to maintain qualitative parity with the improved public schools.<sup>75</sup>

<sup>66</sup> *School Dist. v. Schempp*, 374 U.S. 203, 222 (1963).

<sup>67</sup> *Everson v. Board of Educ.*, 330 U.S. 1, 27 (1947) (dissenting opinion of Jackson, J.). See also *McCullum v. Board of Educ.*, 333 U.S. 203, 228 (1948) (concurring opinion of Frankfurter, J.).

<sup>68</sup> See Van Alstyne, *Constitutional Separation of Church and State: The Quest for a Coherent Position*, 57 AM. POL. SCI. REV. 865, 868 (1963).

<sup>69</sup> See *Everson v. Board of Educ.*, 330 U.S. 1, 53-55 (1947) (dissenting opinion of Rutledge, J.); A. JOHNSON & F. YOST, *supra* note 28, at 113.

<sup>70</sup> *Engel v. Vitale*, 370 U.S. 421, 443 (1962) (concurring opinion of Douglas, J.).

<sup>71</sup> See Choper, *supra* note 4, at 385-86.

<sup>72</sup> See M. HOWE, *supra* note 40, at 62; P. KAUPER, *supra* note 5, at 83-85; RELIGION AND AMERICAN SOCIETY, *supra* note 42, at 71; see text accompanying notes 100-01 *infra*.

<sup>73</sup> See *McGowan v. Maryland*, 366 U.S. 420, 435 (1961).

<sup>74</sup> 77 HARV. L. REV. 1357 (1964).

<sup>75</sup> Cf. Mitchell, *Religion and Federal Aid to Education*, 14 LAW & CONTEMP. PROB. 113, 122-27 (1949); Whelan, *School Question: Stage Two*, 105 AMERICA 17 (1961).

## 2. *Application to the States*

Before proceeding further, certain other peripheral matters may be treated. The discussion to this point has assumed that the first amendment's mandate, that "Congress shall make no law respecting an establishment of religion," is equally applicable, through the fourteenth amendment, to action by the states. This has been the Court's consistent position and, in view of this, the Court has recently noted that contrary arguments "seem entirely untenable and of value only as academic exercises."<sup>76</sup>

Examination of the dispute, however, may help to clarify the scope of the establishment clause. The relevant fourteenth amendment language is that "no State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ." It is therefore asserted that the fourteenth amendment should forbid only those violations of the first amendment's establishment clause that "significantly affect the secured liberties of individuals"<sup>77</sup> so as to deprive them of such liberty without due process of law—the implication being that some establishment clause infractions do not significantly impair fourteenth amendment liberties.<sup>78</sup> It is this suggestion that may be challenged.

The suggestion assumes that while the fourteenth amendment prevents infringements of liberty which "significantly affect" the individual, the first amendment forbids abridgements which do not do so. It bears repeating, however, that a central design of the establishment clause was that it act "as a co-guarantor, with the Free Exercise Clause, of religious liberty,"<sup>79</sup> by preventing the government generally from coercing religious belief and specifically from compulsorily taxing individuals for strictly religious purposes.<sup>80</sup> If nonsecular federal action involves either of these consequences, I would suggest that it has "significantly" affected indi-

<sup>76</sup> *School Dist. v. Schempp*, 374 U.S. 203, 217 (1963). See generally *id.* at 215-16.

<sup>77</sup> Howe, *The Constitutional Question*, in *Religion and the Free Society*, *supra* note 17, at 49, 61. See also P. KAUPER, *supra* note 5, at 56.

<sup>78</sup> See M. HOWE, *supra* note 40, at 138.

<sup>79</sup> *School Dist. v. Schempp*, 374 U.S. 203, 256 (1963) (concurring opinion of Brennan, J.). See also *id.* at 227 (concurring opinion of Douglas, J.); *id.* at 312 (dissenting opinion of Stewart, J.); Lardner, *How Far Does the Constitution Separate Church and State?*, 45 AM. POL. SCI. REV. 110, 128 (1951); note 42 *supra*.

Whatever the historical foundation for the notion that the clause was intended to bar Congress from disestablishing the state establishments, see note 48 *supra*, it is of little pragmatic relevance today because of the nonexistence, and patent invalidity under the fourteenth amendment, of any formal state establishment. Of course, as a matter of logic, this purported goal of the establishment clause could not be made applicable to the states through the fourteenth amendment. See W. KATZ, *supra* note 48, at 11.

<sup>80</sup> See text accompanying notes 43-50 *supra*.

vidual freedom.<sup>81</sup> Thus, if such state action involves either,<sup>82</sup> it has seemingly violated the fourteenth amendment by "significantly" affecting personal liberty.<sup>83</sup> However, if federal action involves neither consequence, then I would suggest that the establishment clause itself—as a matter of constitutional construction—has probably not been breached. The establishment clause, in sum, may well ban no activity that should not also be held to violate the fourteenth amendment, consistent literally with the latter's relevant language.<sup>84</sup>

### 3. *Standing of Federal Taxpayers*

The question of a federal taxpayer's standing to challenge federal aid to parochial schools—or, for that matter, aid for church construction itself—is generally beyond the scope of the discussion.<sup>85</sup> But again, brief inquiry may be enlightening in examining the reach of the establishment bar.

*Frothingham v. Mellon*<sup>86</sup> holds that a taxpayer's interest in federal appropriations is too minute, remote, uncertain, and indeterminable to support a suit challenging federal spending. Whether the decision rests on a finding that the matter therefore does not meet the "case or controversy" requirement of article III of the Constitution, or whether it is

<sup>81</sup> See note 51 *supra*. See *School Dist. v. Schempp*, 374 U.S. 203, 295 (1963) (concurring opinion of Brennan, J.); *id.* at 308 (concurring opinion of Goldberg, J.). See also Choper, *supra* note 4, at 331 n.8. Cf. text accompanying note 333 *infra*.

<sup>82</sup> See text accompanying notes 51-53 *supra*.

<sup>83</sup> Such use of tax funds might also be characterized as a deprivation of property without due process of law.

<sup>84</sup> For an interesting and novel analysis that would make the religion clauses of the first amendment applicable to the states via the equal protection clause of the fourteenth amendment, see Kauper, *The Constitutionality of Tax Exemptions for Religious Activities*, in *THE WALL BETWEEN CHURCH AND STATE* 95, 101-02 (D. Oaks ed. 1963).

<sup>85</sup> The issue of whether the rule of *Frothingham v. Mellon*, 262 U.S. 447 (1923), bars a suit by a federal taxpayer challenging aid to parochial schools is specifically presented in a case now pending before the Supreme Court. *Flast v. Gardner*, 271 F. Supp. 1 (S.D.N.Y.), *prob. juris. noted*, 389 U.S. 895 (1967). See also *Elliott v. White*, 23 F.2d 997 (D.C. Cir. 1928) (no standing); *Protestants and Other Americans United v. O'Brien*, 272 F. Supp. 712 (D.D.C. 1967) (no standing); *Protestants and Other Americans United v. United States*, 266 F. Supp. 473 (S.D. Ohio 1967) (no standing).

That local and state taxpayers have standing in the Supreme Court, if granted standing in the state court, to challenge local and state expenditures seems clear from the decided cases, *Everson v. Board of Educ.*, 330 U.S. 1 (1947); *Cochran v. Louisiana State Bd. of Educ.*, 281 U.S. 370 (1930), although the issue has rarely been discussed by the Court. See *Doremus v. Board of Educ.*, 342 U.S. 429 (1952). The possibility that a taxpayer's suit to enjoin state expenditures allegedly in violation of the establishment clause might lie in the federal district courts despite the state's refusal to recognize such an action is discussed in Sutherland, *Due Process and Disestablishment*, 62 *HARV. L. REV.* 1306, 1330-35 (1949).

<sup>86</sup> 262 U.S. 447 (1923).

based only on a judicial rule of self-limitation, is unclear.<sup>87</sup> But even if it is the former, a taxpayer's suit based on an alleged establishment clause violation is arguably distinguishable from *Frothingham*.

The ordinary federal taxpayer's suit urges simply that the congressional appropriation is ultra vires—beyond the national power and thus “reserved to the States” by the tenth amendment. The gravamen of the claim is that there has been a violation of states' rights (although the allegation is frequently added that this results in a deprivation to the individual of property without due process of law<sup>88</sup>). In such circumstances, the Court has good reason to decline jurisdiction<sup>89</sup>—to find “essentially a matter of public and not of individual concern”;<sup>90</sup> to require the taxpayer “to show . . . that he has sustained or is immediately in danger of sustaining some direct injury . . . and not merely that he suffers in some indefinite way in common with people generally.”<sup>91</sup>

When the federal taxpayer's suit urges that the congressional appropriation violates the establishment clause, however, his claim is not merely one of ultra vires. The expenditure of compulsorily raised tax funds for religious purposes, both historically and contemporarily, may well be characterized as an abridgment of individual religious liberty.<sup>92</sup> The issue is not only one of states' rights; it may be one of alleged governmental infringement of individual rights protected by the Constitution.<sup>93</sup> “Direct injury” has allegedly been “suffered”—and not “in some indefinite way.”<sup>94</sup> Mr. Justice Jackson recognized that “[o]ne of our basic

<sup>87</sup> This issue would be crucial were Congress to enact a statute authorizing taxpayers to attack federal expenditures on establishment grounds. Such legislation has, at different times, passed the House, H.R. 4643, 81st Cong., 1st Sess. § 5 (1949), and the Senate, S. 2097, 89th Cong., 2d Sess. (1966), but never both houses together. If *Frothingham* were based on article III, such legislation would be unconstitutional. Compare Manning, *Aid to Education—Federal Fashion*, 29 *FORDHAM L. REV.* 495, 506 (1961); U.S. Dep't of Health, Education & Welfare, *supra* note 20, at 381; Comment, 8 *VILL. L. REV.* 224, 230-31 (1962-63), with Professor Jaffe's view in Dorsen, *supra* note 33, at 51. On this possibility, a number of legislative devices, other than a taxpayer's suit, have been developed as conceivable avenues for testing federal expenditures under the establishment clause. See Jaffe, *supra*, at 64-65; U.S. Dep't of Health, Education, & Welfare, *supra* note 20, at 382; 77 *HARV. L. REV.* 1357, 1360 (1964). See also TIME, Nov. 25, 1966, at 55-56. The Elementary and Secondary Education Act of 1965, 20 U.S.C. §§ 241k, 827, 869 (Supp. I, 1965), presents this potential. See Drinan, *Standing to Sue in Establishment Cases*, 1965 *RELIGION & PUB. ORDER* 161, 165 (D. Giannella ed.).

<sup>88</sup> E.g., *Frothingham v. Mellon*, 262 U.S. 447, 482, 486 (1923). See generally Lewis, *Constitutional Rights and the Misuse of "Standing,"* 14 *STAN. L. REV.* 433 (1962).

<sup>89</sup> See Choper, *On the Warren Court and Judicial Review*, 17 *CATHOLIC U.L. REV.* 20, 39-40 (1967).

<sup>90</sup> *Frothingham v. Mellon*, 262 U.S. 447, 487 (1923).

<sup>91</sup> *Id.* at 488.

<sup>92</sup> See text accompanying notes 43-50, 79-80 *supra*.

<sup>93</sup> See Choper, *supra* note 89, at 39-41.

<sup>94</sup> *Frothingham v. Mellon*, 262 U.S. 477, 488 (1923).

rights is to be free of taxation to support a transgression<sup>95</sup> of the establishment clause; that the Court "had jurisdiction" "[w]here a complainant is deprived of property by being taxed . . . to support a religious establishment."<sup>96</sup> Thus, *Frothingham* may be inapplicable to a suit based not on the tenth amendment, but rather on the establishment clause.<sup>97</sup>

The establishment clause rationale described herein concludes that the clause generally forbids nonsecular governmental action which infringes religious beliefs and specifically bars coercive taxation for strictly religious purposes. Under this rationale, governmental spending for secular purposes is permissible. This rationale is not only consistent with contemporary and historical values underlying the establishment clause, but also affords an evaluative perspective for the problems of the role of the fourteenth amendment and the question of standing to sue.

### III

#### DEFINITION OF SECULAR PURPOSE

The broad establishment clause rationale described above would generally forbid government expenditures for strictly religious purposes and would bar governmental action for these purposes if infringements of religious liberty followed. On the other hand, it would generally permit the state to act for secular purposes. Thus, it is analytically critical to decide what constitutes a secular purpose and how it should be determined. This is frequently a perplexing inquiry because a law may be enacted for a multiplicity of purposes and may produce a multiplicity of effects.<sup>98</sup> A Sunday closing law, for example, may have the secular purpose of promoting the general welfare by creating a day of respite or the religious purpose of forbidding work to enhance church attendance.<sup>99</sup>

Certain aspects of the problem are quite clear. The fact that religious groups sponsored a law—or even were its sole sponsors—does not make its purpose nonsecular;<sup>100</sup> the Civil Rights Act of 1964 might not have passed without the support of churchmen.<sup>101</sup> Nor, with the rare and

<sup>95</sup> *Everson v. Board of Educ.*, 330 U.S. 1, 22 (1947) (dissenting opinion).

<sup>96</sup> *McCullum v. Board of Educ.*, 333 U.S. 203, 233-34 (1948) (concurring opinion).

<sup>97</sup> An allegation that federal funds are being expended for religious purposes, sufficient to support standing, should not, of course, be misidentified with the question of whether the money is in fact being so used—which goes to the merits of the case. *But see* Drinan, *supra* note 87, at 172.

<sup>98</sup> *See* Van Alstyne, *supra* note 68, at 875.

<sup>99</sup> *See* McGowan v. Maryland, 366 U.S. 420 (1961).

<sup>100</sup> *See* text following note 72 *supra*.

<sup>101</sup> *See* Carroll, *The Constitution, The Supreme Court, and Religion*, 61 AM. POL. SCI. REV. 657, 662 (1967).

limited qualification to be noted below,<sup>102</sup> should existence of a secular purpose turn on judicial examination of legislative motives<sup>103</sup>—a long, forbidden psychoanalytic attempt to find the “*real* reason,” articulated or unspoken, for passing a law.<sup>104</sup> Rather, whether government action is secular or religious should generally be determined by the nature of its *independent* or *primary* effect (a term to be illustrated below, and not to be confused with “principle” or “paramount” effect). If the primary effect is to accomplish a nonreligious public purpose, the action should generally be held immune from establishment clause attack.<sup>105</sup> But if the primary effect is to serve a religious end, the action’s purpose should not be characterized as secular even though an *ultimate* or *derivative* public benefit may be produced.<sup>106</sup>

### A. Illustrations

Specific instances are necessary to illustrate the point. It has been maintained that public school prayer recitation and Bible reading serve the secular purpose of producing profound convictions in children, thus making them better citizens.<sup>107</sup> But if such are the effects, they come about only if the primary goal of these practices—the implanting of spiritual and religious beliefs—is achieved; the purported secular ends are derivative from the primary religious effect. Thus, under the analysis suggested above, the purpose of the governmental action is religious.

Sunday closing laws also serve an undeniably religious end by encouraging church attendance in removing the obstacle of having to report for work. But they also produce an independent secular effect—“a Sunday atmosphere of recreation, cheerfulness, repose and enjoyment.”<sup>108</sup> And this secular effect is in no way dependent on or derived from the religious impact of the statute.

Governmental actions whose secular benefits flow from the achievement of a primary religious effect must be suspect under the establishment clause.<sup>109</sup> Such actions “employ Religion as an engine of Civil

<sup>102</sup> See text accompanying note 114-24 *infra*.

<sup>103</sup> Van Alstyne, *supra* note 68, at 876.

<sup>104</sup> See *McGowan v. Maryland*, 366 U.S. 420, 466, 469 (1961) (concurring opinion of Frankfurter, J.); A. BICKEL, *THE LEAST DANGEROUS BRANCH* 208-21 (1962).

<sup>105</sup> See text accompanying notes 325-45 *infra*.

<sup>106</sup> See Choper, *supra* note 4, at 334-38. See also Hammett, *The Homogenized Wall*, 53 A.B.A.J. 929, 933 (1967).

<sup>107</sup> See discussion in Choper, *supra* note 4, at 336.

<sup>108</sup> *McGowan v. Maryland*, 366 U.S. 420, 448 (1961).

<sup>109</sup> I have argued that such actions should be invalid if either of two additional factors are present. See text accompanying notes 51-53 *supra*. This distinction should satisfy the objection of Lardner, *supra* note 79, at 132, that “the public welfare argument amounts to the automatic validity of all legislation” because “[a]ll legislation in a democracy arises

policy."<sup>110</sup> Allowing such actions would literally read the clause out of the first amendment; it would justify government subsidization of that church that the government found best inculcates its members with the deep convictions that make for better citizenship.<sup>111</sup> But governmental action that produces independent secular efforts should generally be unassailable even if an equally necessary or inevitable effect is the benefitting of religion. If not, the fire department could not protect burning churches.

### B. Judicial Determinations

This is not to say that the task of distinguishing primary religious and secular effects is always free of difficulty. But usually it is. Thus, in *Torcaso v. Watkins*, the Court observed that there could be "no dispute about the [religious] purpose or effect"<sup>112</sup> of a requirement that public officeholders declare a belief in God. And in *Engle v. Vitale*, the Court had "no doubt that . . . daily classroom invocation of . . . the Regents' prayer is a religious activity."<sup>113</sup>

On occasion, governmental action with a primary religious effect may be wrapped "in the verbal cellophane"<sup>114</sup> of a secular purpose. Thus, in the *Bible Reading Cases* the state argued secular purpose—"the promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature."<sup>115</sup> The Court easily rejected the assertion, agreeing instead with the trial court's finding that the exercises had a religious character.<sup>116</sup>

In such instances, the Court is not—nor should it be—making the

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from the belief that it promotes the public welfare," and that of Carroll, *supra* note 101, at 662-63.

<sup>110</sup> J. MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS, ¶ 5, set forth in *Everson v. Board of Educ.*, 330 U.S. 1, 67 (1947) (app.).

<sup>111</sup> See text at note 107 *supra*. See also McCloskey, *Principles, Powers, and Values: The Establishment Clause and the Supreme Court*, 1964 RELIGION & PUB. ORDER 3, 26 (D Giannella ed.): "[A] religious law for a religious end . . . . offends one religious conscience in the name of another, and unless we reject the sovereignty of religious belief, we must find this blameworthy. Nor is such a law vindicated by the contention that it employs religious means to a secular end, *i.e.*, the development of a moral citizenry which will in turn produce a just and happy society. For whatever tendency the means have to accomplish that end may be canceled by their simultaneous tendency to generate the bitterness that makes such a society difficult." See also *School Dist. v. Schempp*, 374 U.S. 203, 278-81 (1963) (concurring opinion of Brennan, J.).

<sup>112</sup> 367 U.S. 488, 489 (1961).

<sup>113</sup> 370 U.S. 421, 424 (1962).

<sup>114</sup> *United States v. Kahriger*, 345 U.S. 22, 38 (1953) (dissenting opinion of Frankfurter, J.).

<sup>115</sup> *School Dist. v. Schempp*, 374 U.S. 203, 223 (1963).

<sup>116</sup> *Id.* Similarly, I suggest that the Court would reject the contention that requiring the memorization of the Catechism in public schools serves the secular purpose of teaching the technique of memory. *But cf.* *Paul v. Dade County*, 202 So. 2d 833 (Fla. Dist. Ct. App. 1967).

judgment that any secular purpose of the law fails to be paramount over whatever religious end the church obtains by the regulated conduct.<sup>117</sup> For the Court to engage in such an ad hoc balancing process<sup>118</sup>—relying only on the Justices' subjective notions of paramountcy—to treat the problem as “one of degree,”<sup>119</sup> is not satisfactory when more objective standards are available.<sup>120</sup> Even where a religious purpose exists, the state's secular purpose need not be dominant or paramount;<sup>121</sup> the existence of a “legitimate” independent primary secular purpose should be sufficient. The determination of “legitimacy” by the Court undeniably involves the making of a not wholly objective judgment. But, unlike the “dominancy-paramountcy” inquiry, it is a judgment of a quite limited nature, mainly disposed of by common sense and observation of the obvious effects of the enactment.<sup>122</sup> Although the inquiry is necessitated by a recognition that a disingenuous legislature can easily find secular purposes to cover any religious interest it wishes to further,<sup>123</sup> such a cover is almost always revealed as cellophane.<sup>124</sup>

A few additional illustrations may be helpful. In 1921, the California legislature appropriated 10,000 dollars for the restoration of the San Diego Mission,<sup>125</sup> resulting in an unquestionable financial benefit of a strictly religious nature to the Roman Catholic Church, which owned and controlled the mission for the use of its parishioners. There was also an independent primary secular effect, however, in no way derived from the religious impact of the action, which could not be fairly characterized as a mere “cover.” As the court noted, the missions have significant architectural, historical, and educational value, and the aid therefore served a secular esthetic purpose. Under the proposed analysis, this should generally be adequate to establish constitutional validity.<sup>126</sup> It might be added, as a persuasive rather than a constitutional argument,<sup>127</sup> that it is reasonable to believe that reconditioning the mission would pay financial dividends to the state treasury, by increased tourism, in excess of its cost. The mission case thus involved no possible infringement

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<sup>117</sup> *But see* Hammett, *supra* note 106, at 932. *See also* Note, *The Elementary and Secondary Education Act of 1965 and the First Amendment*, 41 *IND. L.J.* 302, 324 (1966).

<sup>118</sup> See text accompanying note 447 *infra*.

<sup>119</sup> *Zorach v. Clauson*, 343 U.S. 306, 314 (1952) (Douglas, J.).

<sup>120</sup> See Choper, *supra* note 4, at 335.

<sup>121</sup> *But see* Hammett, *supra* note 106, at 932.

<sup>122</sup> See, e.g., *School Dist. v. Schempp*, 374 U.S. 203, 223-25 (1963). See text following note 231 *infra*.

<sup>123</sup> LaNoue, *supra* note 60, at 77-78.

<sup>124</sup> See generally Van Alstyne, *supra* note 68, at 876-77.

<sup>125</sup> *Frohlinger v. Richardson*, 63 Cal. App. 209, 218 P. 497 (1923).

<sup>126</sup> The California court, however, found the action violative of the state constitution.

<sup>127</sup> See text following note 158 *infra*.

of religious or conscientious scruples, either directly or through diversion of tax funds to religious purposes.<sup>128</sup>

A municipality should not, however, be permitted to allocate public funds to build houses of worship for the purpose of encouraging church-going people to live in the community. In contrast to the mission restoration example discussed above, which attracted people by appealing to their esthetic and educational interests, this plan would publicly finance the religious needs of individuals in order ultimately to derive a secular goal. Even though the plan might increase the general tax base in the community,<sup>129</sup> thus compensating the public for its religious expenditure, its primary effect—from which the secular end would be derived—would be religious.<sup>130</sup>

Finally, it has been suggested that, as part of a state's mental health budget, funds might be granted to the Roman Catholic Church and the Protestant Episcopal Church to subsidize confession costs because of their therapeutic value.<sup>131</sup> But it would seem here that the purported therapeutic benefit—which we may concede is secular—would come about only as a result of the confessor's having obtained spiritual satisfaction. The exclusive primary effect is religious.<sup>132</sup>

### C. Supreme Court Rationale

The rather specific rationale of several decisions of the Supreme Court is consistent with this "secular purpose" approach. In the *School Bus Case*,<sup>133</sup> the Court acknowledged that the governmental program substantially benefitted religion in the "possibility that some of the children might not be sent to the church schools if the parents were com-

<sup>128</sup> Similarly, an expenditure by the Utah legislature to construct a building for the preservation and display of relics, highly important to the Mormon religion but also of great historical significance in the state's development, serves an independent primary secular goal. See *Thomas v. Daughters of Utah Pioneers*, 114 Utah 108, 197 P.2d 477 (1948). So, too, would an appropriation by the Los Angeles County Board of Supervisors to a religious association for the purpose of preparing a motion picture film of the latter's annual sectarian-oriented Christmas parade, if the film were to be distributed throughout the country "to exploit and make known the resources of the County and thereby increase its trade and commerce." *County of Los Angeles v. Hollinger*, 221 Cal. App. 2d 154, 156, 34 Cal. Rptr. 387, 389 (1963) (invalid under state constitution). See also 37 OP. CAL. ATT'Y GEN. 105 (1965).

<sup>129</sup> *Murray v. Comptroller of the Treasury*, 241 Md. 383, 402-04, 216 A.2d 897, 908-09, cert. denied, 385 U.S. 816 (1966).

<sup>130</sup> See text following note 158 *infra*.

<sup>131</sup> Davidow, *Governmental Aid to Church-Affiliated Colleges: An Analysis of a Possible Answer to the Constitutional Question*, 43 N.D.L. REV. 659, 679 (1967).

<sup>132</sup> This should be contrasted with public aid to divinity schools to train students to recognize mental illness. See U.S. Dep't of Health, Education & Welfare, *supra* note 20, at 375-76 n.18.

<sup>133</sup> *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

pelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the State."<sup>134</sup> Yet, the Court upheld public payment of the bus fares of parochial school pupils as "public welfare legislation" protecting "children going to and from church schools from the very real hazards of traffic."<sup>135</sup> There was a legitimate independent primary secular purpose and effect.<sup>136</sup> The Court utilized the same analysis in the *Sunday Closing Law Case*,<sup>137</sup> recognizing that the establishment clause "does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions."<sup>138</sup>

In the *Bible Reading Case*,<sup>139</sup> the Court was most explicit. It laid down a "test" as follows: "what are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."<sup>140</sup>

If the Court meant that there is an establishment clause violation if *the* purpose and primary effect is religious but that there is no such violation if *a* secular legislative purpose and primary effect exists, and if the Court used the word "primary" as I have used it in the discussion above—that is, as distinguished from "ultimate" or "derivative"<sup>141</sup>—then the Court's test essentially states the reasoning that I have employed.<sup>142</sup>

In fairness, this places undue weight on tiny words which usually denote no such significance. The Court may perhaps have drafted the test not for the specific situation in *Schempp*, but for the question of aid

<sup>134</sup> *Id.* at 17.

<sup>135</sup> *Id.* at 16-17.

<sup>136</sup> See note 510 *infra*; Comment, 45 MICH. L. REV. 1001, 1021 n.89 (1947).

<sup>137</sup> *McGowan v. Maryland*, 366 U.S. 420 (1961).

<sup>138</sup> *Id.* at 442. Neither, it would seem, should the clause ban "federal or state [financial aid] whose reason or effect merely happens to coincide or harmonize with" the aims of some or all religions, if a primary effect of such aid is for "the general welfare of society," *Id.*

<sup>139</sup> *School Dist. v. Schempp*, 374 U.S. 203 (1963).

<sup>140</sup> *Id.* at 222.

<sup>141</sup> Mr. Hammett argues, *supra* note 106, at 933, that the Court's intention on this point was to assure that the enactment does not enhance the financial strength of the church to a greater extent than it augments the influence of or benefit to the state. How the Court is to measure these relative increases in power is not clear. He may mean, as I have suggested, that there must be an independent secular benefit commensurate with the state aid. But if he means that the members of the Court must individually weigh these church and state factors in each case, then serious objection may be raised. See text accompanying notes 117-20 *supra*.

<sup>142</sup> For support of this view, see Kauper, *supra* note 18, at 12-13. See also Kauper, *Religion, Higher Education and the Constitution*, 19 ALA. L. REV. 275, 288 (1967).

to parochial schools.<sup>143</sup> Even so, because of differing inferences that may be drawn, it provides no ready answer. Perhaps, on the other hand, the Court was concerned only with the problem before it.<sup>144</sup> In any case, my only contention is that the *Schempp* "test" is not inconsonant with the "secular purpose" approach proposed herein.

#### IV

#### AID TO PAROCHIAL SCHOOLS

##### A. *Secular Purpose*

At least some governmental aid to support parochial education serves a primary or independent secular purpose. No one can deny the state's legitimate interest in improving the educational quality of all schools,<sup>145</sup> or the benefits to society in general from education,<sup>146</sup> or even the national defense interest in an enlightened citizenry.<sup>147</sup> The fact is that "parochial elementary and secondary schools educate one out of every eight future citizens of this country, and that the teacher and classroom needs of parochial school systems are possibly even more serious than are those of the public school systems."<sup>148</sup>

Even Mr. Justice Rutledge, in his vigorous dissent in *Everson*, admitted that "it is much too late to urge that legislation designed to facilitate the opportunities of children to secure a secular education serves no public purpose."<sup>149</sup> His position was that the establishment clause

<sup>143</sup> Sky, *supra* note 42, at 1441.

<sup>144</sup> See *Horace Mann League v. Board of Pub. Works*, 242 Md. 645, 220 A.2d 51, 64, *cert. denied*, 385 U.S. 97 (1966); LaNoue, *supra* note 60, at 78-79.

<sup>145</sup> *Board of Educ. v. Allen*, 20 N.Y.2d 109, 116, 228 N.E.2d 791, 794, 281 N.Y.S.2d 799, 804 (1967), *prob. juris. noted*, 36 U.S.L.W. 3278 (U.S. Jan. 15, 1968). See also Amdur-sky, *The First Amendment and Federal Aid to Church-Related Schools*, 17 SYRACUSE L. REV. 609, 624 (1966).

<sup>146</sup> Malloy, *How to Talk About Federal Aid*, 105 AMERICA 421, 422 (1962).

<sup>147</sup> Sky, *supra* note 42, at 1448.

<sup>148</sup> Actions of the General Assembly of the United Presbyterian Church in the U.S.A. Supporting Federal Aid to Public Primary and Secondary Education, in 5 *Hearings on S. 370 Before the Subcomm. on Education of the Senate Comm. on Labor and Public Welfare*, 89th Cong., 1st Sess., at 2890 (1965). It is not the purpose here to document the alleged need of parochial schools for financial assistance. But several interesting facts might be mentioned: (a) The U.S. Commissioner of Education recently observed that "[a]t all levels of education, effective teaching has become increasingly contingent on well-stocked libraries. . . ." 2 *id.* at 848. His statistics revealed that 29.6% of public school pupils and 37.2% of non-public school pupils attended schools that had no libraries. *Id.* at 849. (b) Children from "deprived neighborhoods" attending both public and parochial schools "are losing points on their IQ, particularly between the third and sixth grades, and by the time they get to the eighth grade, they are apt to be 2 or 3 or 4 or 5 years behind." 5 *id.* at 2540 (question by Senator Robert F. Kennedy).

<sup>149</sup> 330 U.S. at 50.

forbids state support for "religious training, teaching or observance."<sup>150</sup> I agree. But, "[i]f the fact alone be determinative that religious schools are engaged in education," he could "see no possible basis, except one of dubious legislative policy, for the state's refusal to make full appropriation for support of private, religious schools, just as is done for public instruction."<sup>151</sup> I disagree.

Parochial schools perform a dual function, providing some religious education and some secular education. Government may finance the latter,<sup>152</sup> but the establishment clause forbids it to finance the former. That government money may be used for partial support of church schools does not mean that "it can also be used for the support of our churches, and that we are moving toward a union of church and state in America."<sup>153</sup> Conceding Mr. Justice Jackson's premise that "Catholic education is the rock on which the whole structure rests,"<sup>154</sup> his conclusion does not follow that rendering "tax aid to its Church school is indistinguishable . . . from rendering the same aid to the Church itself."

It must be perceived that by using tax funds to support the secular aspects of parochial education, the state expends no more than would be required either to support parochial school pupils if they attended existing public schools, or to establish additional public schools at various sites for all pupils presently attending parochial schools,<sup>155</sup> neither of which alternatives raises colorable constitutional objection. This point is not made to prove that either the free exercise clause or political fairness demands government aid for parochial schools. Rather, it demonstrates that, where the state affords public money to finance the secular aspects of education in church-related schools, it imposes a tax burden essentially identical with that which it could constitutionally impose for separate secular facilities. To do so in no way violates the historical and contemporary policy underlying the establishment clause against infringing religious liberty through taxation for religious purposes.<sup>156</sup>

<sup>150</sup> *Id.* at 52.

<sup>151</sup> *Id.* at 49-50. Justice O'Connell makes a similar contention in *Dickman v. School Dist.*, 232 Ore. 238, 255-56, 366 P.2d 533, 542 (1961), *cert. denied*, 371 U.S. 823 (1962).

<sup>152</sup> This is considered in detail in text accompanying notes 200-80 *infra*.

<sup>153</sup> A. JOHNSON & F. YOST, *supra* note 28, at 151.

<sup>154</sup> *Everson v. Board of Educ.*, 330 U.S. 1, 24 (1947) (dissenting opinion of Jackson, J.).

<sup>155</sup> See Snapper, *Contributions of Independent Education*, in EDUCATIONAL FREEDOM 103, 104-05 (D. McGarry & L. Ward eds. 1966); cf. Freeman, *Tax Credits and the School Aid Deadlock*, 194 CATHOLIC WORLD 201, 203 (1962).

<sup>156</sup> Thus, Professor Sutherland could write of a proposal granting limited aid to parochial education that it "would not impair any person's free exercise of religion, it would have to be judged as a question of 'ultra vires.'" Letter to Senator Morse, in S. Doc. No. 29, 87th Cong., 1st Sess. 52, 61 (1961). See also Corley, *Objection to Aid Answered*, in *EDU-*

In addition, it is possible that, by affording some state aid to non-public schools (but substantially less than the per capita public school cost),<sup>157</sup> a net decrease in the tax burden would result; a number of nonpublic pupils who are now shifting to public schools for economic reasons might cease doing so and, as is frequently predicted, many public school children might transfer to parochial or private schools.<sup>158</sup> Of course, this latter argument is not of constitutional scope, because a net increase in tax burden should be equally constitutional if the public aid were limited to the secular aspects of education in parochial schools. Nor could government finance religion in the hope, or even with the assurance, that it would in some way produce a smaller overall tax burden. Economically, the argument is appealing. Constitutionally, however, I know of no dissent from the proposition that it would be a patent use of religion as an engine of civil policy in violation of the establishment clause.

### B. Discrimination Among Recipient Schools

The proposal contained in this article assumes that any governmental aid will be extended to parochial schools on a constitutionally nondiscriminatory basis. For the legislature to single out, say, Lutheran parochial schools or their students for aid, while refusing to afford equal privilege to other similarly situated church-related or private schools, would be a patent violation of the establishment clause, as would giving aid only to church-related schools while denying it to others similarly situated. The former action would "prefer one religion over another."<sup>159</sup> The latter would "aid all religions as against non-believers."<sup>160</sup>

This is not to say that if aid is to be extended beyond the realm of public schools it must be afforded nondiscriminatorily to all nonpublic schools. The statute in the *Everson* case itself distinguished between nonpublic schools "operated for profit in whole or in part"<sup>161</sup> and those that were not, as does Title III of the Elementary and Secondary Education Act of 1965.<sup>162</sup> Such a classification, not based on religion, should not

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EDUCATIONAL FREEDOM 184, 186 (D. McGarry & L. Ward eds. 1966). *But see* Editorial, . . . *And in Maryland*, Washington Post, Oct. 11, 1967, at A 16, col. 1.

<sup>157</sup> Calculation and allocation of costs in parochial schools that may be publicly financed is discussed in text accompanying notes 200-84 *infra*.

<sup>158</sup> See McDonough, *Economy of Government Aid to Independent Education: A Taxpayers' Savings Plan*, in EDUCATIONAL FREEDOM 122 (D. McGarry & L. Ward eds. 1966).

<sup>159</sup> *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947).

<sup>160</sup> *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961). *See also* *Tarshis v. New York*, 24 App. Div. 2d 644, 262 N.Y.S.2d 538 (1965). *But cf.* *Packer Collegiate Institute v. University of State of N.Y.*, 273 App. Div. 203, 208-09, 76 N.Y.S.2d 499, 505 (1948).

<sup>161</sup> 330 U.S. 1, 3 n.1 (1947).

<sup>162</sup> 20 U.S.C. §§ 841, 843(b) (5) (Supp. I, 1965).

violate the establishment clause.<sup>163</sup> Nor, despite suggestions to the contrary,<sup>164</sup> should such an economic differentiation be held to contravene the equal protection clause of the fourteenth amendment.<sup>165</sup> Perhaps wealth is "a capricious or irrelevant factor" to measure a voter's qualifications<sup>166</sup> or to determine certain rights of those accused of crime.<sup>167</sup> But surely it is not such a factor for the purpose of distribution of public largesse. It has been suggested that equal protection forbids discrimination both for and against Negroes,<sup>168</sup> but never seriously that it makes poverty an equally neutral factor.<sup>169</sup>

It is true that this profit-nonprofit classification turns on the character of the school, which is the immediate recipient of the aid, rather than on the particular needs of each child in attendance, and that some needy students will be enrolled in schools operated for profit while some affluent children will be registered in nonprofit institutions.<sup>170</sup> Although a more perfect system might look to the individual child rather than base its judgment on the assumption that nonprofit schools educate more needy children,<sup>171</sup> this would be much more difficult to administer.<sup>172</sup> In the context of an essentially economic classification,<sup>173</sup> equal protection "is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective."<sup>174</sup> "It is by . . . practical con-

<sup>163</sup> See Kurland, *supra* note 19, at 70. *Contra*, Stout, *The Establishment of Religion Under the Constitution*, 37 KY. L.J. 220, 231-32 (1949). However, if the amount of aid given to a parochial school within this classification exceeds the value of the secular educational service it renders, the establishment clause would be violated under the terms of the proposal advanced in this article.

<sup>164</sup> See Comment, *The School Bus Law: Transportation of Parochial and Private School Pupils in Pennsylvania*, 27 U. PITT. L. REV. 71, 79 (1965). The statute in *Everson* was not attacked on this ground, but the Court indicated that such a challenge might not be wholly frivolous, 330 U.S. at 4 n.4, 4-5; see Comment, *Constitutional Law—Establishment of Religion, Due Process, and Equal Protection—Public Aid to Parochial Schools*, 45 MICH. L. REV. 1001, 1014 (1947).

<sup>165</sup> Or, in the case of a federal statute, the due process clause of the fifth amendment. See *Bolling v. Sharpe*, 347 U.S. 497 (1954).

<sup>166</sup> *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 668 (1966).

<sup>167</sup> See *Douglas v. California*, 372 U.S. 353 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956).

<sup>168</sup> See Kaplan, *Segregation Litigation and the Schools—Part II: The General Northern Problem*, 58 NW. U.L. REV. 157 (1963).

<sup>169</sup> *But cf. Edwards v. California*, 314 U.S. 160, 184-85 (1941) (concurring opinion of Jackson, J.).

<sup>170</sup> See *Everson v. Board of Educ.*, 330 U.S. 1, 20-21 (1947) (dissenting opinion of Jackson, J.); *id.* at 62 n.58 (dissenting opinion of Rutledge, J.); Allen & Marshall, "Child Benefit" Has Lost Its Glitter, 44 PEH DELTA KAPPAN 77, 78 (1962).

<sup>171</sup> See 5 *Hearings on S. 370, supra* note 148, at 2895 (Statement of Lawrence Speiser, Director, ACLU).

<sup>172</sup> See T. POWELL, *THE SCHOOL BUS LAW* 75 (1960).

<sup>173</sup> *But cf. Horowitz, Unseparate but Unequal—The Emerging Fourteenth Amendment Issue in Public School Education*, 13 U.C.L.A.L. REV. 1147 (1966).

<sup>174</sup> *McGowan v. Maryland*, 366 U.S. 420, 425 (1961).

siderations based on experience rather than by theoretical inconsistencies that the question of equal protection is to be answered.<sup>175</sup>

Statutes constitutionally neutral on their face, however, may be invalid in effect.<sup>176</sup> Under a proper statutory definition, for example, the only "nonprofit" school in town may be a parochial school. Absent a judicial finding that the legitimate statutory definition merely camouflaged an illegitimate preference of religion violating the establishment clause,<sup>177</sup> the statute should not be held invalid. A public appropriation for a primary secular purpose should not be void merely because, under an appropriate neutral standard, a religiously controlled institution happens to be the only recipient.<sup>178</sup>

A more difficult issue, but one apparently of no great consequence, arises where an aid statute by its terms names the parochial schools of one church only, or names only parochial schools, and it is unknown from the statute or its available legislative history whether other similarly situated schools exist.<sup>179</sup> The Court could: (a) strike down the statute, thus forcing the legislature to redraft properly if it can,<sup>180</sup> (b) strike down the statute, unless it were shown that there were no others similarly situated;<sup>181</sup> (c) uphold the statute, unless it were shown that there were others similarly situated.<sup>182</sup>

### C. The Compensable Amount

The constitutional principle proposed herein speaks of the secular educational services rendered by the church-affiliated school. Assuming that these services may be isolated,<sup>183</sup> little difficulty arises where their cost is the same to the parochial school as to the public school system. Because government may properly finance the secular education of all

<sup>175</sup> *Railway Express Agency v. New York*, 336 U.S. 106, 110 (1949). See *Rhoades v. School Dist.*, 424 Pa. 202, 225, 226 A.2d 53, 66, *appeal dismissed per curiam*, 389 U.S. 11 (1967).

<sup>176</sup> See *Lane v. Wilson*, 307 U.S. 268 (1939).

<sup>177</sup> Herein, the question of "motive." See text at notes 114-24 *supra*; W. LOCKHART, Y. KAMISAR & J. CHOPER, *CONSTITUTIONAL LAW* 1209 (2d ed. 1967). For an example, see *State ex rel. Reynolds v. Nusbaum*, 17 Wis. 2d 148, 158, 115 N.W.2d 761, 766 (1962).

<sup>178</sup> See *Kintzele v. City of St. Louis*, 347 S.W.2d 695 (Mo. 1961) (redevelopment authority gave benefit to university, within relevant geographic area, which happened to be religiously affiliated). See also 79 *CHRISTIAN CENTURY* 1057 (1962) (editorial); 78 *id.* at 1135 (1961) (editorial).

<sup>179</sup> This was in fact the situation in *Everson*. The township resolution authorized reimbursement only for parents of public and Catholic schools pupils. 330 U.S. at 4 n.2.

<sup>180</sup> See *id.* at 21 (dissenting opinion of Jackson, J.); *cf. McLeod v. J.E. Dilworth Co.*, 322 U.S. 327 (1944).

<sup>181</sup> *Everson v. Board of Educ.*, 330 U.S. 1, 62-63 n.61 (1947) (dissenting opinion of Rutledge, J.).

<sup>182</sup> This is the action the *Everson* Court took. *Id.* at 4 n.2.

<sup>183</sup> For discussion of this issue, see text accompanying notes 200-284 *infra*.

children, whatever their religious faith, payment to a parochial school under these circumstances of the same amount that such education costs in the public schools should be immune from establishment clause protest: No tax funds are being expended for strictly religious purposes; no more tax funds are being used than would be if the pupils were in public schools;<sup>184</sup> the church obtains no financial benefit except compensation for the cost of secular services rendered.<sup>185</sup> A fortiori, there is no difficulty if the cost of providing this service in the parochial school is less than it is in the public school system, as is not unlikely, and government pays the parochial school only this lesser amount.

But suppose that the cost of providing secular educational services in the parochial school is less than is the cost in the public school system and government pays the parochial school the latter amount.<sup>186</sup> Although here also no more tax funds are being expended than would be if the pupils were in public schools, the church obtains a net financial benefit. Nevertheless, this should not violate the establishment clause. Literally thousands of church-related agencies offer secular services that are funded—or purchased, if you will—by government.<sup>187</sup> If any organization—profit or nonprofit, religious or nonsectarian—provides a secular service to government at the “going rate,” and is able to profit thereby because of low labor costs, efficiency, or any other reason, the Constitution should not be held to prohibit it.<sup>188</sup> In fact, for government to refuse

<sup>184</sup> Cf. *Cook County v. Chicago Indus. School for Girls*, 125 Ill. 540, 569-71, 18 N.E. 183, 196-97 (1888).

<sup>185</sup> See *Schade v. Allegheny County Institution Dist.*, 386 Pa. 507, 512, 126 A.2d 911, 914 (1956); Cushman, *Public Support of Religious Education in American Constitutional Law*, 45 ILL. L. REV. 333, 336 (1950). It may not be denied that the public financing may permit the church now to use funds formerly spent for secular educational purposes for strictly religious purposes. This “freed funds” issue, whose effect is irrelevant to the rationale proposed herein and is produced by every concededly valid direct or indirect public aid to religiously-affiliated institutions, is further considered at text accompanying notes 407-15 *infra*. Neither may it be denied that, as a result of this governmental action, the church will be significantly aided in a nonfinancial way, for gaining attendants at parochial schools “is a powerful instrumentality in the successful prosecution of the work of [many churches].” *Bennett v. City of La Grange*, 153 Ga. 428, 437, 112 S.E. 482, 486-87 (1922). But, since the government’s action has a primary secular effect, the equally present benefit to religion should not invalidate it. See text following note 111 *supra*.

<sup>186</sup> Cf. 2 U.S.C. § 88a(c) (1964), providing that congressional pages may “attend a private or parochial school of their own choice” and that “such . . . school shall be reimbursed” by Congress “in the same amount as would be paid if the page or pages were attending a public school.”

<sup>187</sup> See R. DRINAN, *supra* note 50, at 27. See also Hammett, *supra* note 106, at 936.

<sup>188</sup> Thus, a religiously-affiliated institution may be the successful bidder in a redevelopment project, satisfying a valid public purpose, and this should not violate the establishment clause because the institution thereby acquired valuable property at a lower price than it would have had to pay by negotiation with the private owners, who got full value for the property from the public redevelopment authority. See *Ellis v. City of Grand Rapids*, 257

to deal on equal terms with an organization providing public services because that organization is religiously-affiliated might even be seen as a violation of the free exercise clause.

It must be recalled that government assistance to religion which neither infringes religious liberty nor expends tax funds for strictly religious purposes should not be considered violative of the establishment bar.<sup>189</sup> Thus, in the context of the immediate discussion, it is the "cost" to the public and not the "aid" to religion that is determinative.<sup>190</sup> As long as the government receives in full the secular services purchased, the relative cost or profit to religion of supplying those services should have no relevance to the establishment clause. Its prohibition should be satisfied by a showing that the government is getting the secular services it paid for. Consequently, where something costs the government little or nothing, it should make no difference what secular services it receives. For example, the government may allow religious organizations temporarily to use vacant public buildings for strictly religious purposes. Such occasional use of public buildings may substantially "aid" religious groups, and it may save them significant rental fees. But, if the use is not "regular and extended in duration,"<sup>191</sup> the "cost" to the public is nil or de minimis,<sup>192</sup> and there should be no establishment breach.<sup>193</sup> It may be argued that, even though the use of the building cost the state nothing, it could charge these religious organizations measurable rental fees. But the establishment clause should not require that government profit at religion's expense. It should merely forbid public expenditures for strictly religious purposes.

Therefore, if the government lends money at a rate of interest equal to or above the government borrowing rate but below the commercial

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F. Supp. 564, 569-70 (W.D. Mich. 1966); 64th St. Residences, Inc. v. City of New York, 4 N.Y.2d 268, 150 N.E.2d 396, 174 N.Y.S.2d 1 (1958). See also Adams v. County Comm'rs, 180 Md. 550, 26 A.2d 377, 380 (1942).

<sup>189</sup> See text accompanying notes 43-50, 79-80 *supra*.

<sup>190</sup> *But cf.* McVey v. Hawkins, 364 Mo. 44, 54, 258 S.W.2d 927, 932-33 (1953).

<sup>191</sup> L. PFEFFER, *supra* note 26, at 207.

<sup>192</sup> See note 53 *supra*. *But cf.* Engel v. Vitale, 370 U.S. 421, 441 (1962) (concurring opinion of Douglas, J.).

<sup>193</sup> See *Southside Estates Baptist Church v. Board of Trustees*, 115 So. 2d 697 (Fla. 1959); *Nichols v. School Directors*, 93 Ill. 61, 34 Am. Rep. 160 (1879); *State ex rel. Gilbert v. Dilley*, 95 Neb. 527, 145 N.W. 999 (1914); *People ex rel. Lewis v. Graves*, 219 App. Div. 233, 236, 219 N.Y.S. 189, 192 (1927).

Similarly, if public funds were used to construct a research laboratory on the campus of a church-affiliated university, and the building were used for this purpose to the extent contemplated and demanded by the research project, the full secular purpose that the state bargained for will have been achieved. This being so, even a regular use of these facilities (say, on evenings or weekends) by the school for religious purposes should be valid. *But see* Kratz, *Research and Service Programs and Public Funds in the Church-Related School*, 7 J. CHURCH & ST. 207, 211-12 (1965).

rate, it may so lend to sectarian groups, *even though they use the money for strictly religious purposes*. The church benefits, but at no cost to the state. This should not be confused with government loans for *secular* purposes.<sup>194</sup> Since, as to these, grants would be unobjectionable, loans at any rate are obviously valid.<sup>195</sup> It follows that a state may buy textbooks—even religious ones—at quantity prices and sell them to parochial schools at the discounted price.

Finally, suppose that the cost of providing secular educational services in the parochial school exceeds the cost in the public school system<sup>196</sup> and government pays the parochial school the former amount. Although the church here does not obtain funds that may be used for strictly religious purposes, more tax funds are being expended than would be if the children were in public schools. There should, nonetheless, be no violation of the establishment clause.<sup>197</sup> So long as the state expenditure is in fact for a primary secular goal,<sup>198</sup> no tax funds are being used for strictly religious purposes.<sup>199</sup>

<sup>194</sup> See Hayes, *supra* note 10, at 174. See also provisions of the Housing Act of 1950, 64 Stat. 77, 12 U.S.C. § 1749 (1964); the National Defense Education Act of 1958, 20 U.S.C. §§ 421-29 (1964).

<sup>195</sup> The National Defense Education Act of 1958, 20 U.S.C. § 445(b)(3) (1964) sets the interest rate for loans to nonprofit private schools at one fourth of 1% above the average government borrowing rate.

<sup>196</sup> This might result because the marginal additional cost of adding even all the parochial students to the public schools could well be less than the cost of duplicative facilities in the parochial school. Or the per capita cost of transportation for parochial school students might be higher. See *Hearings on H.R. 13160 and H.R. 13161 Before the General Subcomm. on Education of the House Comm. on Education and Labor*, 89th Cong., 2d Sess., at 56 (1966).

<sup>197</sup> *Contra*, 5 *Hearings on S. 370*, *supra* note 148, at 2896 (statement of Lawrence Speiser, Director, ACLU).

<sup>198</sup> In fact, an additional secular purpose might be advanced in that, even though there may be duplicative facilities, there is an educational advantage in smaller classes and diversified and experimental techniques and programs—although the diversified style may not be such as to produce religious rather than secular education, see text accompanying notes 200-80 *infra*—see Snapper, *supra* note 155, at 106-07.

<sup>199</sup> See text accompanying note 155 *supra*.

The entire discussion assumes that the total funds provided by all levels of government—federal, state, and local—including the value of tax exemptions (and such benefits as preferential mailing rates, see Weclaw, *Church and State: How Much Separation?*, 10 DE PAUL L. REV. 1, 23-24 (1960)) given parochial school property and activity, will not exceed the cost of the secular educational services rendered by the church-affiliated school. The general topic of tax exemptions for church property and religious activities is beyond the scope of this discussion. But brief reference to certain aspects of the problem may be helpful.

There appears to be no analytically meaningful way to distinguish a tax exemption from a direct subsidy. Exemptions afford financial benefits and increase the tax burden of others. *Murray v. Comptroller of Treasury*, 241 Md. 399, 216 A.2d 897, 906, *cert. denied*, 385 U.S. 816 (1966). *But see Snyder v. Town of Newtown*, 147 Conn. 397, 161 A.2d 770, 781 (1960) (dissenting opinion) (1960), *appeal dismissed*, 365 U.S. 299 (1961); *cf. Everson v. Board of Educ.*, 330 U.S. 1, 61 n.57 (1947) (dissenting opinion of Rutledge, J.). Unlike the sporadic

### D. The Permeation Issue

#### 1. The Facts

Probably the most complex matter concerning public financial assistance to parochial education is the permeation (or integration) issue. It is frequently contended that "official Catholic doctrine refuses to recognize any distinction between secular and religious teaching."<sup>200</sup> Pope

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church use of public buildings, see text accompanying notes 189-93 *supra*, tax exemption thus clearly results in out-of-pocket cost to taxpayers. It may be true that by tax exemption "the state merely refrains from diverting to its own uses income independently generated by the churches through voluntary contributions." Giannella, *Religious Liberty, Nonestablishment and Doctrinal Development—Part II. The Nonestablishment Principle*, 81 HARV. L. REV. 513, 553 (1968). But, by augmenting the assessment on others, tax exemption effectively "forcibly diverts the income of both believers and nonbelievers to churches." *Id.* Thus, in reference to governmental financial assistance to parochial education, tax exemptions must be computed with other funds provided. *But cf.* *Lundberg v. County of Alameda*, 46 Cal. 2d 644, 298 P.2d 1, *appeal dismissed sub nom.* *Heisy v. County of Alameda*, 352 U.S. 921 (1956).

It has been said that, "No entirely satisfactory rationale for tax exemption has ever been stated in any American judicial decision," R. DRINAN, *supra* note 50, at 9, and its constitutionality has been seriously questioned. Korbelt, *Do the Federal Income Tax Laws Involve an "Establishment of Religion"?*, 53 A.B.A.J. 1018 (1967). *But see* *General Finance Corp. v. Archetto*, 93 R.I. 392, 176 A.2d 73 (1961), *appeal dismissed*, 369 U.S. 423 (1962). There is some indication that, at least in some forms, the Court considers it required by the free exercise clause. *See* *Follett v. McCormick*, 321 U.S. 573 (1944); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943). When afforded to church or synagogue buildings themselves, perhaps it is justified as "compensation" for the public welfare (purely secular) services performed by these religious organizations. *See* *Murray v. Comptroller of Treasury*, 241 Md. 383, 401-02, 216 A.2d 897, 907-08, *cert. denied*, 385 U.S. 816 (1966); Kauper, *supra* note 84, at 97, 108, 112-13. For an excellent general discussion, *see* Kauper, *supra* note 84; *see also* Note, 61 Nw. U.L. Rev. 777, 787-93 (1966).

Professor Van Alstyne has introduced an extremely provocative and penetrating consideration, which logically goes not only to justification of "tax accommodations [for religion] which currently exist in many state and federal laws," Van Alstyne, *supra* note 68, at 882, but is relevant also to the entire question of expenditure of public funds in aid of religion. He observes that "as more of the economy and environment is occupied by the increasing public, governmental sector of our society, the net effect of the shift is to confine religion to the ever shrinking domain of the relatively diminishing private sector," and that "to the extent that the tax revenues thus collected may not be spent by government to support religious enterprises, but must be used exclusively for secular purposes, the net effect, arguably, is to reduce the relative supply of funds available to religion." *Id.* at 881.

Professor Giannella amplifies this point in advancing, as central to his thesis, that "the no-aid aspects of the separation principle should be relaxed in direct proportion to the extent of governmental regulation." Giannella, *supra* at 522. *See generally id.* at 522-26, 537-55.

The rationale is indeed an intriguing one and unquestionably merits further exploration. But, like others, "Once loosed, the idea . . . is not easily cabined." Cox, *Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966). Apart from judicial limitations that are essentially intuitive and involve "large and imponderable factors," Giannella, *supra* at 527, it would suggest that government literally may finance many strictly sectarian efforts of organized religion. It is seemingly a thesis demanding extensive, if not total, reevaluation of the broadly conceived establishment clause goals in light of changed and changing circumstances.

<sup>200</sup> Konvitz, *Separation of Church and State: The First Freedom*, 14 LAW & CONTEMP.

Pius XI and Pope Leo XIII are quoted as ordering "that every . . . subject taught, be permeated with Christian piety,"<sup>201</sup> as are Catholic educators, theologians and philosophers.<sup>202</sup> A Lutheran school manual demands "that all areas of the curriculum reflect an adequate philosophy of Christian education."<sup>203</sup> Seventh Day Adventists declare their "endeavor to permeate all branches of learning with a spiritual outlook."<sup>204</sup> After all, it is asked, "if religion is taught only one or two hours a day in church schools, what is the point of maintaining the separate parochial school system?"<sup>205</sup>

But there is less than universal agreement as to the facts. Others familiar with Catholic—and Jewish<sup>206</sup>—parochial school education explain that the pupil there "learns essentially the same arithmetic, spelling, English, history, civics, foreign languages, geography, and science" as is taught in the public schools, but in addition learns religion "and the religious dimensions of secular knowledge."<sup>207</sup> In the Lutheran school sys-

PROB. 44, 58 (1949). See also Konvitz, *Whittling Away Religious Freedom*, COMMENTARY, June 1946, at 4, 6-7.

<sup>201</sup> Konvitz, *Separation of Church and State: The First Freedom*, 14 LAW & CONTEMP. PROB. 44, 58 (1949). See also Drinan, *Should the State Aid Private Schools?*, 37 CONN. B.J. 361, 366 (1963); Hayes, *Law and the Parochial School: A Formulation of Conflicting Positions*, 3 CATHOLIC LAW. 99, 100 (1957); Slough & McAnany, *supra* note 37, at 61-62.

<sup>202</sup> See A. STOKES & L. PFEFFER, *supra* note 27, at 444; Pfeffer, *Religion, Education and the Constitution*, 8 LAW. GUILD REV. 387, 396 (1948); *Hearings on H.R. 6074 Before the Ad Hoc Subcomm. on Study of Shared-Time Education of the House Comm. on Education and Labor*, 88th Cong., 2d Sess., at 55 (1964).

<sup>203</sup> Quoted in G. L'ANOUÉ, *supra* note 56, at 31.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* See also Gordis, *Education for a Nation of Nations*, in *Religion and the Schools*, *supra* note 37, at 5, 23.

<sup>206</sup> See paper by Dr. Nichols, *summarized in Religion and Freedom 22* (Report by D. McDonald on a Seminar sponsored by the Fund for the Republic, New York, N.Y., May 5-9, 1958); Gilbert, *Symposium: Shared Time*, 57 RELIGIOUS EDUC. 14, 15 (1962). But see Brickman, *id.* at 20, 21, who says that some Jewish parochial school leaders would object to their students taking courses in literature, science, and social studies outside of the Hebrew day school because they "should not be exposed in secular courses to any heterodox or heretical ideas or doctrines."

<sup>207</sup> National Catholic Welfare Conference, *supra* note 37, at 408. See also McCluskey, *A Changing Pattern*, in *FEDERAL AID AND CATHOLIC SCHOOLS* 31, 39-40 (D. Callahan ed. 1964); Copass, *Church Schools Have No Claim on Public Funds*, *NATION'S SCHOOLS*, Aug. 1945, at 29; Coughlan, *Religion and the Schools*, *LIFE*, June 16, 1961, at 110, 122; D'Amour, *Tempest in a Textbook*, 107 AMERICA 443 (1962); Hayes, *supra* note 10, at 176; Kauper, *supra* note 35, at 36; Williams, *Should the Federal Government Aid Parochial Schools*, 111 FORUM 100 (1949). The following statement illustrates the point well: "The Christian teacher of the law, therefore, should know the positive legal fact, but he must also have some concern for the law as an expression of justice. The Christian biologist must know the facts of evolution, but he must also be aware of theological discussion of human creation. The Christian physicist must know his nuclear science, but he must be aware that its applications have had a social and ultimately moral impact on the whole world." Fidelian, *Christian Schools, Secular Subjects*, 81 COMMONWEAL 566, 568 (1965).

tem, it is said that "the main features of the public school curriculum are reproduced."<sup>208</sup> In response to a study showing that many "secular course" textbooks used in parochial schools are permeated with religious symbols, concepts, and doctrines,<sup>209</sup> it has been said that the examples "were highly arbitrary and not representative," and that "Catholic educators . . . as a whole, do not favor textbooks in which dabs of spurious religion serve only to distort the essential subject matter. . . ."<sup>210</sup>

Further evidence that secular subjects in parochial schools need be little different than their counterpart public school offerings is found in the fact that, as part of shared time programs, many parochial school students actually take such courses as mathematics, physics, science, foreign languages, music, industrial arts, home economics, and physical education in the public school itself.<sup>211</sup> Catholic educators have observed that "basic instruction" in such courses as literature and history could well be undertaken in shared time programs in the public schools "with the church adding the distinctive note which it can bear to the revelation

A teacher's manual for a mathematics text prepared for use in Catholic schools begins by pointing out that "the authors . . . have recognized that first and foremost, an arithmetic program for Catholic schools must be mathematically sound. Over and above this, they have recognized that . . . these situations present opportunities for the exercise of Christian virtues." LaNoue, *Religious Schools and "Secular" Subjects*, 32 HARV. EDUC. REV. 255, 274 (1962).

<sup>208</sup> A. STOKES & L. PFEFFER, *supra* note 27, at 419. Lutheran teachers are instructed to "constantly search for materials that can be correlated with basic texts," LaNoue, *supra* note 207, at 281, thus implying that religious values are added to basic secular instruction.

<sup>209</sup> See discussion accompanying note 207 *supra* and notes 252-278 *infra*.

<sup>210</sup> Ball, *Federal Aid—1964*, 61 NAT'L CATHOLIC EDUC. ASS'N BULL. 228, 229 (1964). See also Gallagher, *Observations Arising from the Horace Mann Case*, 63 NAT'L CATHOLIC EDUC. ASS'N BULL. 232, 236 (1966): "A flat judgment concerning the morality or sinfulness of a particular practice simply has no place in the history classroom or the science laboratory." Downey, *Suppose Parochial Schools Receive Federal Aid . . .*, CATHOLIC SCHOOL J., March 1967, at 44, takes the position that parochial schools, "in developing explanations of the life of Christ . . . [should not] step over into anti-Semitism," nor should they in treating "doctrinal differences among Christians, [step] into attack upon the sincerity of Protestants as persons." *Id.* at 50. Further, he points out that the "pursuit of secular learning should be considered hallowed in itself both because of its origin in the Divine Intellect and because it is imparted in a setting sponsored by the teaching Church. Well-meaning attempts at introducing additional devotion and piety into geography, arithmetic, etc." are unnecessary, *id.* at 51. For a similar attitude of Christian Reformed parochial school education, see LaNoue, *supra* note 207, at 284.

The recent testimony of supervising administrators of the Catholic school systems in Chicago and Pittsburgh was that a large percentage of the textbooks used in their elementary and secondary schools was also widely used in the public schools. 2 *Hearings on H.R. 2361*, *supra* note 35, at 809, 810.

<sup>211</sup> *Hearings on H.R. 6074*, *supra* note 202, at 55, 263. In a recent Chicago shared time plan, all courses except English, social studies, music and art were taken in the public school. See *Morton v. Board of Educ.*, 69 Ill. App. 2d 38, 216 N.E.2d 305 (1966).

of God in these areas" in the parochial school.<sup>212</sup> Thus, it is concluded, the reason for maintaining a separate parochial school system is not for the purpose of teaching a wholly different curriculum. Rather, it is to add "the most important of the four R's,"<sup>213</sup> the feeling being that children attending public schools that taught only secular subjects five days a week would consider religious training unimportant, and that this impression could not be overcome by a few after school hours or Sunday school.<sup>214</sup>

Several facts emerge clearly from the foregoing discussion. First, "permeation" is a word of varied and imprecise meaning. Father Drinan can state as "the undeniable fact that secular instruction in a Catholic school is 'permeated' by a Catholic atmosphere and Catholic attitudes,"<sup>215</sup> yet urge that "permeation should avoid every suggestion of quasi-coercion or 'indoctrination.'"<sup>216</sup> Second, the secular courses taught in parochial schools rarely, if ever, mirror exactly the courses taught in the public schools. Third, although "no scientific study has ever been done on the extent of the permeation of sectarian teaching in the instruction in secular subjects in Catholic schools,"<sup>217</sup> it is likely that some secular subject courses in some parochial schools are so "permeated" that they are in reality courses of sectarian indoctrination,<sup>218</sup> despite the regulatory power

<sup>212</sup> Smith, *Symposium*, *supra* note 206, at 10, 11. See also Geoghegan, *id.* at 24, 25.

<sup>213</sup> 2 *Hearings on S. 181 and S. 717 Before the Senate Comm. on Education and Labor*, 79th Cong., 1st Sess., at 651 (1945) (testimony of Edward S. Heffron, Executive Secretary, National Council of Catholic Men).

<sup>214</sup> See Mitchell, *Religion and Federal Aid to Education*, 14 *LAW & CONTEMP. PROB.* 113, 132-33 (1949).

<sup>215</sup> R. DRINAN, *supra* note 50, at 229.

<sup>216</sup> Drinan, *The Challenge to Catholic Educators in the Maryland College Case*, *NAT'L CATHOLIC EDUC. ASS'N BULL.*, May 1967, at 3, 7. The following interesting definition of the term's objectives reveals its latent ambiguity: "We want religion to permeate the curriculum of our schools, so that our children may have the opportunity to learn how to construct for themselves a world view that is rationally theistic, in contrast to the shattering dichotomy between religion and science, between ethics and business or politics, between the supernatural and the natural, that characterizes the world view of so large a part of society today." Hanlon, *Federal Aid?*, 110 *AMERICA* 418 (1964). That the federal government does not regard "permeated" parochial education as intrinsically a religious activity is evidenced by the fact that tuition contributions to its support are not deductible for income tax purposes as religious contributions. See G. LANOUÉ, *supra* note 56, at 43.

<sup>217</sup> Drinan, *The Constitutionality of Public Aid to Parochial Schools*, in *THE WALL BETWEEN CHURCH AND STATE* 55, 64 (D. Oaks ed. 1963).

<sup>218</sup> An article by Sister Carolyn, *Lay Teachers Have a Spiritual Role*, *CATHOLIC SCHOOL J.*, Jan. 1963, at 43, 44, urges that secular course instructors "so teach that the Christian principles become guiding principles. . . . Convinced that Christian principles must be the motivation for acts, you teach differently from a textbook teacher. Your teaching is structured upon principles, the truths of a Christian life. By a gradual buildup of understandings which shape into a generalization, you lead the child to discover truth rather than impose or patch on him a fact of information. . . . All of our units of study are directed to form a person who thinks, judges, and acts like Christ."

of the state—whether exercised or not;<sup>219</sup> that some courses are completely, bona fide secular;<sup>220</sup> that some courses fall between these extremes. Fourth, the problem of the parochial school secular courses being turned into nothing more than religious instruction is not inherent; no religion demands it, nor constitutionally could a religion demand it if contrary to reasonable state requirements.<sup>221</sup>

## 2. *Extent of Permissible Aid*

Under the rationale proposed in this article, public financial assistance to parochial education may not exceed the value of the secular educational service rendered. One relatively effortless way of avoiding the whole problem of permeation in this connection is simply to ignore it by taking the position that “the secular character of secular subjects is not changed by a moral or religious permeation”; “that it is impossible to study and interpret man and his activities apart from his moral and religious values”; and that “the National Merit Scholarship competition . . . is clear evidence that students who attend church-related schools receive a secular education as good as that received by students in our public schools.”<sup>222</sup> On this reasoning, there would be no prohibition to financing accredited parochial schools on a lump-sum parity with public schools without further investigation.<sup>223</sup>

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<sup>219</sup> See A. STOKES & L. PFEFFER, *supra* note 27, at 413 *But see* Hayes, *supra* note 10, at 175 n.33; Kenealy, *Equal Justice Under Law—Aid to Education*, 11 LOYOLA L. REV. 183, 198 (1962-63). For discussion of the exercise of state regulatory power over nonpublic schools, see text accompanying notes 472-89 *infra*.

<sup>220</sup> An article by Sister Alice, *Modern Art in the Religious Class*, CATHOLIC SCHOOL J., Jan. 1963, at 46, 48, recommends that “regardless of our feelings toward modern art, we will not impose our likes, dislikes, and prejudices upon our students.” An article by Sister Paulinus, *Bacteriology in the High School*, *id.* at 49, gives a fully objective account of the technical problems of studying the subject. For similarly written instructional essays by Catholic educators, quite divorced from religious influences, see O’Neill, *The Homeroom in the Guidance Program*, *id.* at 60; Sister Ruth, *Budding Poets*, *id.* at 67; Phillips, *Written Recitation in Teaching Science*, *id.* at 68; Sister Christina Marie, *Geometric Forms Taught in First Grade*, *id.*, Feb. 1963, at 46; Sister Marion Beiter, *Teacher Training for Secondary Mathematics*, *id.* at 50; Sister Marie Joseph, *How We Teach Russian*, *id.* at 51; Sister M. Martin, *Freshmen Really Read*, *id.* at 54.

<sup>221</sup> See discussion in text accompanying notes 477-89 *infra*. See also Drinan, *Does State Aid to Church-Related Colleges Constitute an Establishment of Religion?—Reflections on the Maryland College Cases*, 1967 UTAH L. REV. 491, 494, 505; Manning, *Aid to Education—Federal Fashion*, 29 FORDHAM L. REV. 495, 523-24 (1961).

<sup>222</sup> Blum, *supra* note 37, at 153. See also *id.* at 140; 2 *Hearings, on H.R. 2361, supra* note 35, at 819-20 (testimony of Msgr. Frederick G. Hochwalt).

<sup>223</sup> Until recently, there has been no comprehensive published study comparing the academic and other achievements of parochial school students to those of public school students. See Jencks, *Catholics and Our Schools*, NEW REPUBLIC, Mar. 19, 1962, at 21, 22. Such a major sociological study, comparing Catholic school Catholics and public school Catholics, entitled THE EDUCATION OF CATHOLIC AMERICANS, by Andrew M. Greeley, a

But this may be too simple. Competitive examinations and sociological studies are not so exact as to determine conclusively that the educational services rendered in parochial schools are as complete and effective and have the same impact from a nonreligious perspective on the overall development of the student as does public school education. Viewed from the basis of per-hour input, it is reasonable to assume that this is not the case, given the parochial school time spent on religious instruction. And it is clear that the state may not subsidize religious instruction or indoctrination, no matter where undertaken.

The establishment clause prohibition against using tax funds for strictly religious purposes appears to require a more careful scrutiny to

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Catholic priest, and Peter H. Rossi, a Protestant, was published in 1966 under the auspices of the National Opinion Research Center.

The monograph lends support to the contention just discussed in text accompanying note 222 *supra*. Among the controlled findings were that Catholic school Catholics increased their social class margin over other Catholics, *id.* at 57; that those who went to Catholic primary schools were more likely to graduate from high school than other Catholics and were just about as likely to do so as public school Protestants, *id.* at 49-50; that those who went to Catholic high schools were more likely to go to college than Catholics and almost all classes of Protestants who went to public high schools, *id.* at 50; that Catholic school Catholics scored significantly higher on a brief general knowledge test than did public school Catholics, *id.* at 120; that Catholic school Catholics ranked measurably higher on an occupational-prestige index than did public school Catholics, *id.* at 140. The authors conclude that "there is no evidence that Catholic education interferes with occupational or educational achievement." *Id.* at 146. Relevant thereto is the judgment of Catholic high school Catholics indicating that their schools are no more "repressive" or "authoritarian" than other schools. "There are no significant differences in the proportions saying they are free to disagree in class, that all students are treated equally, or that they are free to talk to the teacher if they think they have been treated unfairly. Indeed, in two of the three instances, the slight associations that do exist suggest that Catholic schools may be somewhat *more* liberal in these matters." *Id.* at 193.

The survey also revealed interesting results as to attitudes. It found no evidence that Catholic school Catholics were less tolerant of members of other groups, *id.* at 122; were less likely to defend civil liberties, were more given to extremist religious attitudes or to distrusting world and worldly effort, or were more rigid in their child-rearing practices, *id.* at 125; that, while Catholic school Catholics do interact less with other Americans while in school, this does not continue in later life, *id.* at 121. Other studies have shown that differences between Catholic and non-Catholic schooling, in respect to such matters as participation in the community, values concerning occupational achievement, or the political goals of American society, are nonexistent. See J. FICHTER, *PAROCHIAL SCHOOLS: A SOCIOLOGICAL STUDY* 116 (1958); Rossi & Rossi, *Some Effects of Parochial School Education in America*, 90 *DAEDALUS* 300 (1961); Rossi & Rossi, *Background and Consequences of Parochial School Education*, 27 *HARV. EDUC. REV.* 195 (1957). See also A. GREELEY & P. ROSSI, *THE EDUCATION OF CATHOLIC AMERICANS* 8-9 (1966).

Finally, it must be observed that the Catholic school education did produce religious consequences. Catholic school Catholics were more likely to engage in sacramental activity, *id.* at 56-57, 71, were more "loyal" to the ecclesiastical system, *id.* at 60, were better informed on the "fine points" of religious knowledge, *id.* at 61, and were more orthodox in their moral beliefs, *id.* at 63. See also Kelley, *Protestants and Parochial Schools*, in *FEDERAL AID AND CATHOLIC SCHOOLS* 71, 77 (D. Callahan ed. 1964).

assure that only the secular aspects of parochial school education will be publicly financed.<sup>224</sup> But to admit "an admixture of religious with secular teaching"<sup>225</sup> is the beginning, not the end, of the inquiry. To concede that "commingling the religious with the secular teaching does not divest the whole [course or activity] of its religious permeation and emphasis,"<sup>226</sup> is not to conclude that no part of the course or activity may be aided with public money.

A secular subject parochial school course or activity may concurrently serve independent, dual purposes—that is, full secular value may be obtained for the time and resources expended, and religious interests may also be served. If such is the case, the entire course or activity serves a primary secular purpose—and may therefore be fully financed—the aid to religion notwithstanding.<sup>227</sup> On the other hand, a secular subject parochial school course or activity may partially serve both religious and secular ends. Here, an allocation must be made; only the secular product may be publicly financed.<sup>228</sup> Of course, if a "secular subject" parochial school course or activity is in reality religious instruction, it cannot be publicly funded at all; and if it is exclusively secular in purpose, it may be totally funded.

(a) *The Relevance of "Atmosphere."*—Before applying this approach, certain other matters should be considered. That the general atmosphere of parochial schools—as created by religious symbols, teachers in religious attire, and compulsory religious exercises and courses—is oriented toward religious goals<sup>229</sup> should not affect the constitutional judgment

<sup>224</sup> It is not an adequate response to say that, since classroom religious neutrality is impossible in interpreting any subject matter, a secularist religion is being taught in the public schools; therefore, the fact that a religious orientation is given a parochial school subject should not disqualify it from full public support. See Blum, *Freedom and Equality*, in *FEDERAL AID AND CATHOLIC SCHOOLS* 43, 45-47 (D. Callahan ed. 1964); cf. note 59 *supra* (last paragraph). Perhaps public schools should avoid any indoctrination in ultimate values, see Kauper, *supra* note 18, at 23; but if a public school teacher illustrates points by calling on universally accepted moral values, derived from classically neutral nonreligious sources, this is not religious indoctrination in the accepted sense. See Choper, *supra* note 4, at 377-79. That a publicly accepted and espoused behavioral standard is adopted by a religious group (say, the Secular Humanists) as its own moral or ideological tenet, does not make it a "religious" tenet for all purposes. Cf. *McGowan v. Maryland*, 366 U.S. 420, 442, 445 (1961); *School Dist. v. Schempp*, 374 U.S. 203, 225 (1963). See generally Giannella, *supra* note 199, at 562-63; Note, 61 *Nw. U.L. Rev.* 705 (1966). See also note 59 *supra* (last paragraph).

<sup>225</sup> *Everson v. Board of Educ.*, 330 U.S. 1, 47 (1947) (dissenting opinion of Rutledge, J.).

<sup>226</sup> *Id.*

<sup>227</sup> See discussion at notes 105, 108, 111, 125-28, 133-38 *supra*. "The real issue is whether the philosophy of education professed in any way diminishes the content and methodology of the secular subjects taught at these church-connected institutions." Costanzo, *supra* note 37, at 649. See also *id.* at 635. But see Note, 62 *Nw. U.L. Rev.* 253, 262 (1967).

<sup>228</sup> See Note, 22 *LA. L. REV.* 266, 269 (1961).

<sup>229</sup> See G. LANOUÉ, *supra* note 56, at 32; Gordon, *The Unconstitutionality of Public Aid*

as to whether the particular course or activity may be publicly funded. The clearly sectarian purpose of these accouterments produces no infringement of religious liberty, since students attend the parochial schools of their own volition.<sup>230</sup> And since public funds are not used to subsidize these items, but only for the proven secular aspects of the educational experience, no expenditure of tax money for religious purposes results.

(b) *Judicial Definition of "Religion."*—Under the analysis proposed herein, the question whether a particular course or activity serves a primary secular purpose, a primary religious purpose, or mixed purposes must ultimately be for the Court. It "must be ready to define religion, religious teaching and religious commitment."<sup>231</sup> But this would not be a novel exercise for the judiciary.

As has already been noted,<sup>232</sup> the Court has on a number of occasions labeled particular governmental activity religious or secular. In the *Sunday Closing Law Cases*, the Court expressed its willingness and obligation to engage in "close scrutiny"<sup>233</sup> to determine if an action's purpose and "its operative effect"<sup>234</sup> were religious. So, too, should the Court examine challenged parochial school courses and activities when necessary.<sup>235</sup>

In the *Regents' Prayer Case*, which is closely analogous to the question in issue, the Court passed judgment on such public school activities as recitation of the Declaration of Independence (or the Gettysburg Address) and the singing of the Star Spangled Banner—all of which are somewhat religiously "permeated"—and concluded that these exercises were "patriotic or ceremonial" rather than "religious."<sup>236</sup> In the *Bible Reading Cases*, the Court ruled that study of the Bible and religion "as

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to Parochial Schools, in *THE WALL BETWEEN CHURCH AND STATE* 73, 90 (D. Oaks ed. 1963); Slough & McAnany, *supra* note 37, at 61-62.

<sup>230</sup> See also discussion in text accompanying note 551 *infra*.

<sup>231</sup> Kauper, *supra* note 142, at 294.

<sup>232</sup> See discussion in text accompanying notes 112-16 *supra*.

<sup>233</sup> *McGowan v. Maryland*, 366 U.S. 420, 449 (1961).

<sup>234</sup> *Id.* at 453. See also *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582, 592 (1961); *Gallagher v. Crown Kosher Market*, 366 U.S. 617, 630 (1961). "After all, the labels a State places on its laws [or a parochial school places on its courses and activities] are not binding on us when we are confronted with a constitutional decision. We reach our own conclusion as to the character, effect, and practical operation of the regulation [course, activity] in determining its constitutionality." 366 U.S. at 573 (dissenting opinion of Douglas, J.).

<sup>235</sup> *Cf.*, e.g., *Sherbert v. Verner*, 374 U.S. 398, 399 n.1 (1961) (practice was found to be a "basic tenet" of religious creed); *Murdock v. Pennsylvania*, 319 U.S. 105, 108 (1943) (practice was found to be an "age-old form of missionary evangelism").

<sup>236</sup> *Engel v. Vitale*, 370 U.S. 421, 435 n.21 (1962). Mr. Justice Douglas found the words "under God" in the pledge of allegiance to have a religious purpose. *Id.* at 440 n.4 (concurring opinion); *cf.* Mr. Justice Brennan's discussion in *School Dist. v. Schempp*, 374 U.S. 203, 304 (1963) (concurring opinion).

part of a secular program of education"<sup>237</sup> was proper, thus addressing itself to the very matter under discussion here.

It has been argued that it is extremely difficult to distinguish religious from secular textbooks;<sup>238</sup> that "the task of separating the secular from the religious in education is one of magnitude, intricacy and delicacy."<sup>239</sup> But just as the Court, if called upon to do so, must determine whether a public school textbook is religiously indoctrinatory,<sup>240</sup> or whether a public school history course is really religious instruction, it should make the same constitutional judgment in respect to parochial school affairs.<sup>241</sup> When a public school action is found religious the remedy is to enjoin; when a parochial school practice is held religious, to forbid its public subsidization.

The general undesirability of requiring the Court to define what is religious and what is not need not be disputed. But, although the Court "can and must avoid passing on the truth of particular religious beliefs,"<sup>242</sup> it cannot escape the former task. "This necessity arises out of the constitutional language itself, which sets down religion as a subject for special treatment."<sup>243</sup> A judicial definition must be fashioned under the "absolutist" theory,<sup>244</sup> which bars all aid to "religion." It must be determined under Professor Kurland's thesis,<sup>245</sup> which forbids classifications in terms of "religion."<sup>246</sup> And it must be faced under the rationale proposed herein.<sup>247</sup>

<sup>237</sup> *School Dist. v. Schempp*, 374 U.S. 203, 225 (1963). See also the lengthy discussion by Mr. Justice Brennan, *id.* at 266-78 (concurring opinion).

<sup>238</sup> *Board of Educ. v. Allen*, 20 N.Y.2d 109, 122, 228 N.E.2d 791, 798, 281 N.Y.S.2d 799, 809 (1967) (dissenting opinion), *prob. juris. noted*, 36 U.S.L.W. 3278 (U.S. Jan. 15, 1968). See also U.S. Dep't of Health, Education & Welfare, *supra* note 20, at 358: "[I]t is readily apparent that what one person would classify as simply secular knowledge another would regard as religious instruction." But see Kenealy, *supra* note 219, at 204.

<sup>239</sup> *McCullum v. Board of Educ.*, 333 U.S. 203, 237 (1948) (concurring opinion of Jackson, J.).

<sup>240</sup> It has been asserted that, "Many of the public school textbooks present Protestantism in a more favorable light than Catholicism and Christianity more favorably than Judaism . . . . There are definite sectarian tendencies in the textbooks." Corley, *Objections to Aid Answered*, in *EDUCATIONAL FREEDOM* 184, 192-93 (D. McGarry & L. Ward eds. 1966) (emphasis omitted). See also Pflug, *Religion in Missouri Textbooks*, 36 *PHI DELTA KAPPAN* 258 (1955).

<sup>241</sup> The Court has said of its religious "neutrality" rule that its application "requires interpretation of a delicate sort," *School Dist. v. Schempp*, 374 U.S. 203, 226 (1963).

<sup>242</sup> Mansfield, *Book Review*, 52 *CALIF. L. REV.* 212, 216 (1964), *referring to United States v. Ballard*, 322 U.S. 78 (1944).

<sup>243</sup> Mansfield, *supra* note 242, at 216.

<sup>244</sup> See text accompanying notes 346-53 *infra*.

<sup>245</sup> See text accompanying note 58 *supra*.

<sup>246</sup> See generally Mansfield, *supra* note 242, at 215-16.

<sup>247</sup> It would undoubtedly ease judicial administration if parochial school students took all secular courses in public schools as part of a shared time program and then returned to

As has been the case concerning the Court's handling of the issue of religious exercises and activities in public schools, most decisions under the proposed rationale for adjudicating these problems in parochial schools will not be difficult. The Court, guided by common sense and the obvious effects of the activity,<sup>248</sup> rather than by its own "prepossessions,"<sup>249</sup> may set the standard in a few cases. If abuses occur, they may be checked by federal or state aid administrators,<sup>250</sup> reviewed by state and lower federal courts, with ultimate review always available in the Supreme Court.<sup>251</sup>

*Pragmatically, the issue should rarely arise, at least in the foreseeable future, for it is highly unlikely, as a matter of political reality, that the total amount of governmental assistance to parochial education will even approach the conceded value of the secular educational services it renders.*

(c) *Illustrations.*—Keeping this last point in mind, some specific illustrations of problems that could arise under the proposed rationale may be helpful. The second grade arithmetic text assigned in a Catholic parochial school may use sectarian characters, illustrations or examples, phrasing arithmetic problems in terms of rosary beads instead of apples,<sup>252</sup> and using pictures of parochial schools instead of public schools. Or, if the text is "clean," the teacher may use these illustrations. Trumpet instruction may involve an unusual amount of religiously-oriented music, and French language instruction may include a high concentration of religiously-significant words or reading.<sup>253</sup>

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the parochial school for the requisite "permeation" and other religious instruction. See G. LANOUE, *supra* note 56, at 44. But, when essentially the same secular public school course may be offered in the parochial school, there is little justification for elevating a rule of administrative convenience into a constitutional mandate. And see text following note 251 *infra*.

<sup>248</sup> See text accompanying note 122 *supra*.

<sup>249</sup> *McCollum v. Board of Educ.*, 333 U.S. 203, 238 (1948) (concurring opinion of Jackson, J.).

<sup>250</sup> Mr. LaNoue suggests that a major flaw in granting aid to parochial schools would be that "an authority would have to be set up to supervise local curricula, to censor textbooks for religious material and to investigate infractions and abuses with public money." LaNoue, *supra* note 207, at 291. In respect to the rationale proposed herein, this is an overstatement. Perhaps such a public agency should be set up, irrespective of public financing, as it already is for public schools, to assure that parochial schools offer a sound educational program. See text accompanying notes 472-75 *infra*. If public aid is given, however, the only necessary desideratum (although not, of course, constitutionally required) is to constitute an official to check abuses.

<sup>251</sup> See *McCollum v. Board of Educ.*, 333 U.S. 203, 238 (1948) (dissenting opinion of Reed, J.).

<sup>252</sup> See 107 AMERICA 1201 (1962). See also J. FICHTER, *supra* note 223, at 86; LaNoue, *supra* note 207, at 272-73, 275.

<sup>253</sup> See LaNoue, *supra* note 207, at 276. See also *McGowan v. Maryland*, 366 U.S. 420, 445 (1961) (statutes use religiously oriented terms).

Considerations of religious liberty, not present in voluntarily-attended parochial schools, might prevent all or some of this in public schools.<sup>254</sup> But in the examples above, full secular value seems to have been obtained for the time and resources expended, despite the fact that religious interests may also have been served.<sup>255</sup>

(1) *Burden of Justification.*—Some educators might urge that the above uses of sectarian material did not afford the parochial pupils a secular educational experience completely analogous to that offered in the public schools. If such a case is made, the state or federal financing agency and the recipient parochial school should have the burden of justifying allocation of the full cost of the course to the secular side of the ledger. Although legislative and executive action ordinarily carries a much stronger presumption of constitutionality,<sup>256</sup> the Court has forcefully held that this is not the case when the precious personal freedoms of speech, press, and religion are at stake.<sup>257</sup>

It may seem to some that individual liberty is only indirectly affected when governmental grants to religious bodies are challenged under the establishment clause,<sup>258</sup> thus vindicating use of the usual presumption of constitutionality or something close to it. But the prohibition against the use of compulsorily raised tax funds for strictly religious purposes, central to the concept of nonestablishment as an important guarantor of religious liberty, suggests that here, too, the regular presumption should be modified.<sup>259</sup> Thus, after an opponent of aid initially demonstrates that a parochial school course or activity is in whole or part primarily religious, in the sense used in this article, the obligation of rebuttal should rest with those defending aid. In cases of uncertainty, the issue should be resolved against the public funding.<sup>260</sup>

<sup>254</sup> Cf. *Dickman v. School Dist.*, 232 Ore. 238, 243, 366 P.2d 533, 536 (1961), cert. denied, 371 U.S. 823 (1962).

<sup>255</sup> But see S. HOOK, *supra* note 59, at 111. The constitutional effect would seem to be little different than if a parochial school mathematics, music, or language teacher is trained at public expense, see 20 U.S.C. § 425(b)(3) (1964); *id.* § 1111 (Supp. I, 1965), and then uses the techniques discussed in teaching his parochial school class.

<sup>256</sup> *Metropolitan Cas. Ins. Co. v. Brownell*, 294 U.S. 580, 584 (1935), and cases there cited.

<sup>257</sup> Cases cited by Justice Frankfurter in his concurring opinion in *Kovacs v. Cooper*, 336 U.S. 77, 90-96 (1949).

<sup>258</sup> See Comment, 13 U.C.L.A.L. REV. 1100, 1113-14 (1966).

<sup>259</sup> See Comment, 21 S. CAL. L. REV. 61, 67 (1947); cf. Sullivan, *Religious Education in the Schools*, 14 LAW & CONTEMP. PROB. 92, 107 (1949). But see Reed, *The "Permeation" Issue in Federal Aid to Education*, 8 CATHOLIC LAW. 197, 201 (1962).

<sup>260</sup> But cf. *Mitchell v. Consolidated School Dist.*, 17 Wash. 2d 61, 75, 78, 80, 135 P.2d 79, 85, 86, 87 (1943) (dissenting opinions); *State ex rel. Reynolds v. Nusbaum*, 17 Wis. 2d 148, 171-72, 11 N.W.2d 761, 773 (1962) (dissenting opinion).

(2) *Examples.*—In a parochial school biology text or course, after a full explanation of the theory of evolution, the church's perspective on the matter may also be fully articulated.<sup>261</sup> Or, in the civics course, the concept of racial equal protection may be amplified by presenting both the relevant secular and theological values. Since there would seem to be no constitutional objection to such an objective presentation in the public schools,<sup>262</sup> there should likewise be none here, despite the concurrent religious educational value, and despite the fact that these matters may never be mentioned in the average public school class.<sup>263</sup> They still have significant secular educational value.<sup>264</sup> Even a parochial school course in "religion" itself may so qualify if properly handled.<sup>265</sup>

There is a very fine line, however, between objective presentation and subtle commitment,<sup>266</sup> and this truth is not confined to parochial schools. Some texts used in public schools<sup>267</sup>—and, undoubtedly, some teachers—unintentionally emphasize Humanistic or antireligious values.<sup>268</sup> Undoubtedly, the opposite is also true. Such emphasis will vary from public school to public school, dependent in part on the cultural, religious and racial composition of the students and teachers.<sup>269</sup> To the extent that this is constitutionally permissible, effectively unavoidable, or de minimis in the public schools, it should be similarly unobjectionable in the parochial schools for the purpose of public funding—subject always to the burden of justification discussed above.<sup>270</sup>

<sup>261</sup> See LaNoue, *supra* note 207, at 465.

<sup>262</sup> Cf. *McCullum v. Board of Educ.*, 333 U.S. 203, 235-36 (1948) (concurring opinion of Jackson, J.).

<sup>263</sup> Smith, *Catholic Science Textbooks?*, 110 AMERICA 78 (1964), suggests that some public school textbooks in the natural sciences (that are also used in some parochial schools) fail to mention any relevant religious views. See also the view of Mr. Justice Brennan that "to what extent, and at what points in the curriculum, religious materials should be cited are matters which the courts ought to entrust very largely to the experienced officials who superintend our Nation's public schools." *School Dist. v. Schempp*, 374 U.S. 203, 300 (1963) (concurring opinion).

<sup>264</sup> See Reed, *supra* note 259, at 197. Even if virtually every parochial school course contains an objective presentation of the religious viewpoint, see LaNoue, *supra* note 207, at 290, it might well pass muster so long as it is not done to the detriment of a reasonably well rounded secular education. Separate courses on "the lives of the Saints," see *CATHOLIC SCHOOL J.*, Feb. 1963, at 24 (advertisement), or "the evils of Communism," see *id.*, Jan. 1963, at 22 (advertisement), would present this problem. The defense burden of justification is here relevant. See discussion in text accompanying notes 256-60 *supra*.

<sup>265</sup> See McQuilken, *Religious Instruction*, 86 COMMONWEAL 48 (1967).

<sup>266</sup> "It is too much to expect that mortals will teach subjects about which their contemporaries have passionate controversies with the detachment they may summon to teaching about remote subjects . . ." *McCullum v. Board of Educ.*, 333 U.S. 203, 236 (1948) (concurring opinion of Jackson, J.).

<sup>267</sup> These are sometimes also used in parochial schools. Smith, *supra* note 263.

<sup>268</sup> *Id.*

<sup>269</sup> See *McCullum v. Board of Educ.*, 333 U.S. 203, 237 (1948) (concurring opinion of Jackson, J.).

<sup>270</sup> See discussion in text accompanying notes 256-60 *supra*.

A parochial school history course or text may teach that all major events are related to or produced by one of the basic truths of the religion,<sup>271</sup> or may emphasize the contribution of one religion over all others.<sup>272</sup> Parochial school texts in English composition may "stress Catholic religious words and teachings,"<sup>273</sup> or a current events class may use a weekly magazine whose articles are "Catholic-oriented."<sup>274</sup> An advanced biology text or course may omit all references to birth control, sterilization, and euthanasia,<sup>275</sup> or specifically reject most parts of evolutionary theory and shift scientific concepts so that they appear to be based on religious tenets.<sup>276</sup> A parochial school geography text may describe only Catholic families in various cultures,<sup>277</sup> or the teacher may ask the students to map all Catholic churches in the state of Nebraska.<sup>278</sup>

Clearly, some<sup>279</sup> or all of these parochial school activities, as well as some referred to earlier,<sup>280</sup> cannot be fully supported with public funds. Either the quantity of religious perspective has deprived the course of full secular educational value, or the quality of sectarian permeation has so slanted the material as to have partially undermined or even fully destroyed its secular content. The very description of these courses and texts appears to state a sufficient case to shift the burden of justifying any quantum of secular value to those defending governmental support.

#### *E. Allocation*

It must be reemphasized that, as a realistic matter, problems of the nature just discussed will arise rarely,<sup>281</sup> as will problems of allocating cost between religious and secular parts of "mixed" parochial school activity. As with the issue of permeation, the burden of justifying both the propriety of the allocation and the method used should be on the government or recipient defendant once the assailant has made the requisite initial demonstration.

Several problems of allocation that have disturbed courts may serve as brief illustrations. The cost of bus transportation to parochial schools, for example, cannot be allocated in "proportional shares as between the

<sup>271</sup> See Albert, *Teaching History in the Elementary School*, 51 CATHOLIC SCHOOL J. 10 (1951).

<sup>272</sup> See A. STOKES & L. PFEFFER, *supra* note 27, at 411.

<sup>273</sup> See CATHOLIC SCHOOL J., Jan. 1963, at 86 (advertisement).

<sup>274</sup> See *id.* at 88.

<sup>275</sup> See LaNoue, *supra* note 207, at 265.

<sup>276</sup> See *id.* at 284.

<sup>277</sup> See *id.* at 271.

<sup>278</sup> Sister Julian, *Does Johnny Like Geography?*, CATHOLIC SCHOOL J., Jan. 1963, at 66.

<sup>279</sup> The most obviously suspect are those discussed in text accompanying notes 271, 272, 274, 276, and 277 *supra*.

<sup>280</sup> See text accompanying notes 207, 218 *supra*.

<sup>281</sup> See text following note 251 *supra*. But see G. LANOUE, *supra* note 56, at 32.

secular and religious instruction."<sup>282</sup> The reason is that, as will be amply shown,<sup>283</sup> the activity fully serves an independent secular purpose. Thus, its value, if provided by the parochial school while public school children are bussed at public expense, may be completely listed in the secular services column. No allocation is necessary.

Suppose that public funds are used to construct a building for educational research on the campus of a church-affiliated college, title being vested in the school.<sup>284</sup> If the building is always used for this purpose as contemplated, no allocation problem arises. But suppose, after three years, the building is to be converted into a chapel and utilized exclusively for religious purposes. If in the building's three years as a research center, the total governmental contribution to the college, including the full amount of the grant for the building, did not exceed the value of the secular educational service rendered by the college, the matter is closed. The fact that the building will now be used for religious purposes is irrelevant. The taxpayers have gotten at least full secular value for their contribution. But, if in those three years the total governmental contribution, including the grant, exceeded the value of the college's secular educational services, the building may not be used for religious purposes until the college reimburses the government for the excess amount or some other proper arrangement is made. The science of accounting, with judicial review when appropriate, is neither above nor below the needed task.

#### F. Relevant Supreme Court Decisions

Reference has previously been made to passing remarks by some observers suggesting that existing Supreme Court opinions have already resolved the problem of aid in parochial schools.<sup>285</sup> It is *Everson v. Board of Education*<sup>286</sup> that is most frequently cited for this proposition—by advocates on both sides of the issue. The brief of the National Catholic Welfare Conference reasons: "The underlying principle of the case is plain: government aid may be rendered to a citizen in furtherance of his obtaining education in a church-related school."<sup>287</sup> It points out that the majority opinion's stringent interpretation of the establishment clause,<sup>288</sup> although more than a mere dictum, "must be read in the light of the

<sup>282</sup> *Everson v. Board of Educ.*, 330 U.S. 1, 46 (1947) (dissenting opinion of Rutledge, J.).

<sup>283</sup> See note 510 *infra*.

<sup>284</sup> *Horace Mann League v. Board of Pub. Works*, 242 Md. 645, 683, 220 A.2d 51, 72, *cert. denied*, 385 U.S. 97 (1966).

<sup>285</sup> See text accompanying notes 9, 143 *supra*.

<sup>286</sup> 330 U.S. 1 (1947).

<sup>287</sup> National Catholic Welfare Conference, *supra* note 37, at 417.

<sup>288</sup> The language is set forth in text accompanying note 8 *supra*.

actual result of the case . . . . [which is that] secular education in church-related schools . . . is supportable by government,"<sup>289</sup> and in light of the opinion's edict that the state "cannot exclude . . . [persons], because of their faith, or lack of it, from receiving the benefits of public welfare legislation";<sup>290</sup> that there was "careful avoidance by the majority of any rule which would preclude aid [for] . . . secular subject training."<sup>291</sup> Finally, it reads the Court's language barring any tax support for "any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion,"<sup>292</sup> as only excluding "aid in support of (a) the teaching or practicing of religion . . . ; (b) religious institutions *as* religious institutions."<sup>293</sup>

The argument is incisive and not unpersuasive. But it is by no means conclusive. An argument at least as convincing can be made the other way: The whole tone of the majority opinion<sup>294</sup> strongly implied that bus transportation marked the outermost limit of permissible governmental aid. The Court suggested that the plan at bar went to the "verge"<sup>295</sup> of the state's constitutional power. The Court said, albeit in dictum, that the establishment clause forbade a state to "contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church";<sup>296</sup> that the line to be drawn is "between tax legislation which provides funds for the welfare of the general public and that which is designed to support institutions which teach religion."<sup>297</sup> The latter point seems directly to contradict the "religious institutions *as* religious institutions"<sup>298</sup> conclusion. In the bussing situation presented

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<sup>289</sup> National Catholic Welfare Conference, *supra* note 37, at 418. Mr. Pfeffer concedes that the result leads logically to that conclusion. L. PFEFFER, *supra* note 26, at 568.

<sup>290</sup> 330 U.S. at 16.

<sup>291</sup> National Catholic Welfare Conference, *supra* note 37, at 420.

<sup>292</sup> See note 8 *supra* and accompanying text.

<sup>293</sup> National Catholic Welfare Conference, *supra* note 37, at 420-21. See also Costanzo, *supra* note 37, at 620-26; Drinan, *The Constitutionality of Public Aid to Parochial Schools*, in *THE WALL BETWEEN CHURCH AND STATE* 55, 66 (D. Oaks ed. 1963). *Contra*, AMERICAN JEWISH CONGRESS, *SCHOOLS, SUBSIDIES AND SEPARATION* 3 (1965); 5 *Hearings on S. 370*, *supra* note 148, at 2750 (Statement of Dr. C. Stanley Lowell, Associate Director, Protestants and Other Americans United for Separation of Church and State). See also W. KATZ, *supra* note 48, at 70-71: "This sentence [in *Everson*] is certainly not free from ambiguity. The question is whether the thrust is against *support of religious teaching* or, more broadly, against any *support of institutions* which give such teaching. The latter interpretation is perhaps more easily justified as a matter of grammar." See also R. DRINAN, *supra* note 50, at 131-33; Davidow, *supra* note 131, at 678.

<sup>294</sup> See Jones, *Church-State Relations: Our Constitutional Heritage*, in *RELIGION AND CONTEMPORARY SOCIETY* 156, 194 (H. Stahmer ed. 1963); Gordon, *supra* note 229, at 85; Pfeffer, in Dorsen, *supra* note 33, at 38-39.

<sup>295</sup> 330 U.S. at 16.

<sup>296</sup> *Id.*

<sup>297</sup> See *id.* at 14.

<sup>298</sup> See text accompanying note 293 *supra*.

by *Everson* the Court stressed that the state "contributes no money to the schools,"<sup>299</sup> and that the services provided were "indisputably marked off from the religious function"<sup>300</sup> of parochial schools.

In respect to the proposal advanced in this article for aid to parochial schools, the best that can be said of the *Everson* opinion<sup>301</sup> is that all discussion by the majority beyond that vital to the result of the case itself was dictum and that discussion in subsequent Supreme Court opinions<sup>302</sup> lends some credence to the proposal urged herein.

Advocates on both sides of the issue also rely on *Bradfield v. Roberts*,<sup>303</sup> which held that federal appropriations for ward construction and care of indigent patients to a hospital in the District of Columbia operated by the Roman Catholic Church did not violate the establishment clause. The National Catholic Welfare Conference contends that the Court recognized that "the church exercises great and perhaps controlling influence over the management of the hospital."<sup>304</sup> Thus, it concludes that the Court "did not rule that a direct appropriation to a sectarian institution would be unconstitutional."<sup>305</sup> The Conference asserts therefore that *Bradfield* and *Everson* are "clear precedent for aid."<sup>306</sup>

The language relied on in *Bradfield*, however, may represent not the Court's conclusion, but its statement of the complainant's allegation. For the Court carefully explained that the hospital, incorporated by act of Congress, was simply "a secular corporation being managed by people who hold to the doctrines of the Roman Catholic Church, but who nevertheless are managing the corporation according to the law under which it exists";<sup>307</sup> and that its "property and its business are to be managed in its own way, subject to no visitation, supervision or control by any ecclesiastical authority whatever, but only to that of the Government which created it."<sup>308</sup> This surely may not be said of parochial schools. But neither may it be said, as opponents of aid allege, that "[i]mplicit in this decision is the holding that the Constitution would be violated by a

<sup>299</sup> 330 U.S. at 18. See also Opinion of the Justices, 233 A.2d 832, 835-36 (N.H. 1967).

<sup>300</sup> 330 U.S. at 18. For specific reliance on this point, see *Rhoades v. School Dist.*, 424 Pa. 202, 233, 226 A.2d 53, 70 (concurring opinion of Roberts, J.), *appeal dismissed*, 389 U.S. 11 (1967).

<sup>301</sup> That one member of the five man majority has recently indicated a change of view, see *Engel v. Vitale*, 370 U.S. 421, 443 (1962) (concurring opinion of Douglas, J.), is of little relevance since only he and Mr. Justice Black presently remain on the Court.

<sup>302</sup> See text accompanying notes 137-42 *supra*.

<sup>303</sup> 175 U.S. 291 (1899).

<sup>304</sup> *Id.* at 298.

<sup>305</sup> National Catholic Welfare Conference, *supra* note 37, at 416.

<sup>306</sup> *Id.* at 422.

<sup>307</sup> 175 U.S. at 298-99.

<sup>308</sup> *Id.* at 299.

grant of Federal money . . . to an institution controlled by a sectarian organization"<sup>309</sup> or "subject to ecclesiastical authority."<sup>310</sup>

A more reasonable conclusion is that *Bradfield* leaves open the aid to parochial schools question.<sup>311</sup>

A number of writers consider Supreme Court decisions involving religion in the public schools as bearing directly on the question of aid to parochial schools. It is true that *McCullum v. Board of Education*—in which the Court invalidated "on-premises" released time—does refer disapprovingly to "the use of tax-supported property for religious instruction."<sup>312</sup> But the entire opinion makes clear that it was an additional factor, the "utilization of the tax-established and tax-supported *public school system* to aid religious groups to spread their faith,"<sup>313</sup> that was conclusive.<sup>314</sup>

*Zorach v. Clauson*—in which the Court refused to invalidate the New York "off-premises" released time plan—does contain the dictum that "[g]overnment may not finance religious groups . . ." <sup>315</sup> But it is inaccurate to contend that the *Zorach* Court distinguished *McCullum* on the ground that "public . . . funds were not used in New York."<sup>316</sup> Rather, the Court stressed that in *McCullum* "the force of the public school was used to promote [religious] instruction,"<sup>317</sup> whereas the Court found this not to be so in New York.<sup>318</sup>

Under the rationale proposed in this article the cases dealing with religion in the public schools are clearly distinct from the question of

<sup>309</sup> L. PFEFFER, *supra* note 26, at 534.

<sup>310</sup> G. LANOUE, *supra* note 56, at 16.

<sup>311</sup> The case of *Quick Bear v. Leupp*, 210 U.S. 50 (1908), is also advanced to support the position that aid to parochial schools violates the establishment clause. The case held that the federal government could disburse treaty funds, held in trust for Indians and legally belonging to them, to church-affiliated schools designated by the Indians to pay tuition costs. The opinion provides no support for the assertion by Mr. Justice Rutledge, in *Everson v. Board of Educ.*, 330 U.S. at 43 n.35, that "it was stated also that such a use of public [rather than tribal] moneys would violate . . . the First Amendment," nor does careful reading of the Court's language relied on by Mr. Pfeffer, *supra* note 26, at 535.

<sup>312</sup> 333 U.S. 203, 209 (1948).

<sup>313</sup> *Id.* at 210 (emphasis added).

<sup>314</sup> See also *id.* at 209-10, 212. The author of the *McCullum* opinion thought that he had made "categorically clear [that] the *McCullum* decision would have been the same if the religious classes had not been held in the school buildings." *Zorach v. Clauson*, 343 U.S. 306, 316 (1952) (dissenting opinion of Black, J.).

<sup>315</sup> 343 U.S. 306, 314 (1952). Two authors cite this statement as indicative of the Court's attitude with regard to the invalidity of aid to parochial schools. G. LANOUE, *supra* note 56, at 23; L. PFEFFER, *supra* note 26, at 535.

<sup>316</sup> G. LANOUE, *supra* note 56, at 23; see L. PFEFFER, *supra* note 26, at 535.

<sup>317</sup> 343 U.S. at 315.

<sup>318</sup> This "deeper difference" has recently been emphasized by Mr. Justice Brennan, concurring in *School Dist. v. Schempp*, 374 U.S. 203, 262 (1963). See also *id.* at 223 (opinion of the Court by Clark, J.).

aid to parochial schools.<sup>319</sup> That the former involve governmental programs lacking independent primary secular purpose has been documented elsewhere.<sup>320</sup> That at least certain amounts of governmental financial aid for parochial education serves a primary secular purpose has been documented above.<sup>321</sup> Moreover, religion in the public schools involves infringements of religious liberty by compromising students' conscientious beliefs.<sup>322</sup> Although aid to parochial schools involves the expenditure of public money, it has been noted above<sup>323</sup> that use of tax funds for secular purposes does not violate the constitutionally protected right of conscience.<sup>324</sup>

### G. *The Doctrine of Alternative Means*

Several members of the Court have employed an "alternative means" rationale in establishment clause cases.<sup>325</sup> Mr. Justice Frankfurter has theorized that "[i]f a statute furthers both secular and religious ends by means unnecessary to the effectuation of the secular ends alone . . . the statute cannot stand."<sup>326</sup> Mr. Justice Brennan has opined that "[t]he Constitution enjoins those involvements of religious with secular institutions which . . . use essentially religious means to serve governmental ends where secular means would suffice."<sup>327</sup>

Using this doctrine, opponents of aid for parochial schools have urged its unconstitutionality. They reason that the state's secular goal of maintaining and improving the quality of education for all students may be

<sup>319</sup> Thus, the fact that the Court has invalidated public school prayer and Bible reading, *Engel v. Vitale*, 370 U.S. 421 (1962); *School Dist. v. Schempp*, 374 U.S. 203 (1963), does not render it "most unconvincing to argue that the Court will turn around and permit the government to subsidize" parochial schools. G. LANOUÉ, *supra* note 56, at 23.

<sup>320</sup> Choper, *supra* note 4, at 335, 368-77, 387-400.

<sup>321</sup> See text accompanying notes 145-49, 200-80 *supra*. For this distinction see Korbel, *supra* note 199, at 1021; Sky, *supra* note 42, at 1465.

<sup>322</sup> For a fuller discussion of this problem, see Choper, *supra* note 4, at 368-77, 387-400.

<sup>323</sup> See text accompanying notes 155-56 *supra*.

<sup>324</sup> This reconciles the difficulty of some who find the expenditure of any public funds in aid of parochial education a much wider breach of the "wall of separation" than the on-premises released time condemned in *McCollum* or the distribution of Bibles invalidated in *Tudor v. Board of Educ.*, 14 N.J. 31, 100 A.2d 857 (1953), *cert. denied*, 348 U.S. 816 (1954). See G. SPICER, *THE SUPREME COURT AND FUNDAMENTAL FREEDOMS* 82 (1959); Bryson, *Mending the Breach*, 65 *CHRISTIAN CENTURY* 649, 650 (1948). See also Choper, *supra* note 4, at 361-62.

Since public schools are available to all and are wholly financed by public funds, granting some public aid to parochial schools will not produce "pressures to conform—i.e., to affiliate with some groups which are aided." Davidow, *supra* note 131, at 687. See also text accompanying notes 375-77 *infra*.

<sup>325</sup> See generally Wormuth & Mirkin, *The Doctrine of the Reasonable Alternative*, 9 *UTAH L. REV.* 254 (1964).

<sup>326</sup> *McGowan v. Maryland*, 366 U.S. 420, 466-67 (1961) (concurring opinion).

<sup>327</sup> *School Dist. v. Schempp*, 374 U.S. 203, 231 (1963) (concurring opinion).

achieved without extending governmental financial assistance to parochial schools—that is, without the use of what they characterize as essentially religious means. They recognize that the state is constitutionally forbidden to require all students to attend public schools.<sup>328</sup> But they conclude that the state need only channel aid to the public schools, thus improving their quality, and concomitantly raise the standards of accreditation for private and parochial schools to a similar level.<sup>329</sup>

There are several points to be made in response. First, a majority of the Court has never employed the “alternative means” rationale in an establishment clause case.<sup>330</sup> Second, a close reading of Mr. Justice Frankfurter’s reasoning indicates that he was only suggesting the doctrine’s use when a statute’s *primary effect* was religious and the purported secular end was *derivative*,<sup>331</sup> as I have used these terms herein. Third, in respect to government programs that directly serve independent secular ends, Mr. Justice Brennan stresses utilization of the doctrine when the program jeopardizes “the religious liberties of any members of the community.”<sup>332</sup>

If a statute’s primary purpose is religious, and it presents no real danger to individual religious and conscientious beliefs, perhaps it should be invalid if nonreligious alternative means are available.<sup>333</sup> And, if a

<sup>328</sup> *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *cf.* *Truitt v. Board of Public Works*, 243 Md. 375, 410, 221 A.2d 370, 391 (1966). *But cf.* U.S. Dep’t of Health, Education & Welfare, *supra* note 20, at 379.

<sup>329</sup> See L. PFEFFER, *supra* note 26, at 569.

<sup>330</sup> See *McGowan v. Maryland*, 366 U.S. 420, 450 (1961) in which the Court replied to the argument that it should be used, “However relevant this argument may be, we believe that the factual basis on which it rests is not supportable.” *Cf.* *School Dist. v. Schempp*, 374 U.S. 203, 224 (1963). Professor Van Alstyne has pointed out that “application of the ‘alternative means’ idea might well have produced a different result in the *Everson* case, itself,” *supra* note 68, at 879.

<sup>331</sup> His principal illustration concerned the use of a religion as an engine of civil policy: “A State may not endow a church although that church might inculcate in its parishioners moral concepts deemed to make them better citizens, because the very *raison d’être* of a church, as opposed to any other school of civilly serviceable morals, is the predication of religious doctrine.” 366 U.S. at 467. Further, he acknowledged that “the State may guard its people’s safety by extending fire and police protection to the churches,” *id.* In this instance, where there was an independent primary secular purpose—guarding safety—and an equally necessary and inevitable aid to religion, the Justice would not require the use of an alternative means—demanding that churches obtain private police and fire protection. Finally, he concludes his discussion of “alternative means” with the statement that the “‘establishment’ contention can prevail only if the absence of any substantial legislative purpose other than a religious one is made to appear.” *Id.* at 468. Thus, he would find that if there is a legitimate, independent primary secular purpose, the statute is immune from establishment attack despite the existence of alternative means.

<sup>332</sup> 374 U.S. at 281. He also applies his rationale to action whose primary effect is religious, that is, action that uses religion as an engine of civil policy—and which endangers religious liberty. See his discussion of *Torcaso v. Watkins*, 367 U.S. 488 (1961), in this context, 374 U.S. at 265.

<sup>333</sup> *But see* note 51 *supra*; text following note 83 *supra*.

statute's primary purpose is secular, and it presents threats to religious freedom, a persuasive argument may be made that the alternative means doctrine should be employed.<sup>334</sup> But if a statute's primary purpose is religious, and it is likely to result in compromising the individual's religious or conscientious beliefs, as I have argued here<sup>335</sup> and elsewhere,<sup>336</sup> it should violate the establishment clause even in the absence of an alternative means. And, finally, if a statute's primary purpose is secular, and it does not impinge on rights of conscience, I would suggest that the alternative means doctrine should not apply even though the statute inevitably affords some aid to religion. Such a statute presents none of the evils at the core of the establishment ban, and to subject all such legislation to judicial review, for a search for alternative means that afford no aid whatever to religion, would bring innumerable measures before the Court and unnecessarily involve it in an essentially legislative task.<sup>337</sup> Governmental aid to support the secular aspects of parochial education falls into this final category.

Even if the alternative means rationale were applicable to this final category, it is not clear that aid to parochial schools would be invalid. Mr. Justice Brennan apparently did not exclude this final category discussed above from the doctrine's coverage,<sup>338</sup> but he did state that the means used would be invalid only if the secular objectives of the state could be "effectively achieved in modern society"<sup>339</sup> by the alternative nonreligious means. So, too, Mr. Justice Frankfurter would have applied his thesis only "where the same secular ends could *equally* be attained by means which do not have consequences for promotion of religion."<sup>340</sup> Similarly, commentators speak in terms of "*practical* alternatives less likely to offend the first amendment," and achievement of the public purpose "by nonsectarian methods without unreasonably increasing costs or administrative burdens."<sup>341</sup>

A forceful argument may be made that it would be highly ineffective

<sup>334</sup> See Choper, *supra* note 4, at 370 n.240, 383; Moore, *The Supreme Court and the Relationship Between the "Establishment" and "Free Exercise" Clauses*, 42 TEXAS L. REV. 142, 188 (1963).

<sup>335</sup> See text accompanying note 53 *supra*.

<sup>336</sup> Choper, *supra* note 4, at 332-34, 348-50.

<sup>337</sup> Cf. *Southern Pac. Co. v. Arizona*, 325 U.S. 761, 794 (1945) (dissenting opinion of Black, J.). For example, challenge to the constitutionality of fire protection for church buildings could be made on this basis, see note 331 *supra*.

<sup>338</sup> He treated the establishment clause objection to Sunday closing laws which conceded "secular purpose"—and did not comprehend a violation of religious liberty claim (which was made by Sabbatarians under the free exercise clause, see *Braunfeld v. Brown*, 366 U.S. 599 (1961))—as being subject to the "alternatives" rationale. 374 U.S. at 265.

<sup>339</sup> 374 U.S. at 265 (emphasis added). See also *id.* at 281.

<sup>340</sup> 366 U.S. at 467 (emphasis added).

<sup>341</sup> Comment, 13 U.C.L.A.L. Rev. 1100, 1109 (1966) (emphasis added). See also *Truitt v. Board of Pub. Works*, 243 Md. 375, 221 A.2d 370 (1966).

and impractical to aid only public schools and simultaneously raise the accreditation standards for all others.<sup>342</sup> Apart from the limits that the free exercise clause might place on the state's ability so to regulate parochial schools,<sup>343</sup> such action could well result in a large influx of private and parochial school students to the public schools. Tax funds would have to be used for construction of expanded public school facilities, and an inefficient and uneconomic waste of existing parochial school facilities would result.<sup>344</sup> "Such pragmatic considerations would be irrelevant if the command of the Constitution were clear . . . [but] the lack of an effective alternative should be highly relevant when a plausible constitutional defense can be made . . . ."<sup>345</sup>

To summarize briefly, the establishment clause should be held to prohibit nonsecular government action that infringes religious belief, and to forbid taxing for strictly religious purposes. Therefore, as applied to questions of parochial school aid, the establishment clause should not be held to prevent government from subsidizing these schools to the extent that they provide secular services. As long as the government gets its money's worth of things secular, it should make no difference that the supplying institution is somehow religious in nature. The establishment clause, rather than asking whether religious institutions inevitably benefit thereby, should instead ask whether the government is receiving the full value of secular services purchased. The question, consequently, is not *whether* to aid parochial schools which supply secular services, but rather *how much* aid to extend. In resolving that inquiry, the courts must first characterize an educational service or activity as generally religious or secular. If secular, the government may subsidize it at full value; if religious, those defending the aid should carry the burden of showing that the activity contains specific secular aspects entitled to aid. In conclusion, however, it must be remembered as a political reality that the necessity for such allocation will generally remain academic as long as parochial schools continue to provide considerably more in secular services than they receive in aid.

## V

### OTHER THEORIES

Earlier discussion has traced the operation of a proposed rule for testing the constitutionality under the establishment clause of aid to

<sup>342</sup> On the question of whether the state may obtain its educational objectives by merely aiding public schools and doing nothing in respect to parochial schools, compare Van Alstyne, *supra* note 68, at 878, with Kauper, *Religion, Higher Education and the Constitution*, 19 A.L.A. L. REV. 275, 288 (1967).

<sup>343</sup> See discussion at notes 479-89 *infra*. See also Sky, *supra* note 42, at 1448-49.

<sup>344</sup> Note, 41 N.Y.U.L. REV. 983, 987 (1966).

<sup>345</sup> 77 HARV. L. REV. 1353, 1358 (1964).

parochial schools. Reference will now be made to other theories involving aid to parochial schools and the establishment clause, with particular examination of their own internal consistency and viability and with the intention of further illuminating certain aspects of the constitutional proposals made in this article.

### A. Absolutism

The so-called "absolutist" theory, mentioned earlier,<sup>346</sup> would prohibit all aid which benefits religious institutions either directly or indirectly,<sup>347</sup> sustaining "appropriations only when it can be found that in fact they do not aid, promote, encourage or sustain religious teaching or observances, be the amount large or small."<sup>348</sup> This view "assumes both that state and religion coexist in mutually exclusive and self-contained spheres and that each sphere can be sharply defined."<sup>349</sup> It would seemingly invalidate use of public library books for reading assigned by a parochial school teacher,<sup>350</sup> the stationing of policemen near parochial schools, fire protection and other municipal services for parochial schools,<sup>351</sup> and the laying of sidewalks at public expense in front of parochial schools. All these publicly funded activities may fairly be said directly or indirectly to benefit parochial schools and aid, promote and encourage the religious teaching that takes place therein.<sup>352</sup> It may accurately be concluded that the absolutist theory is "of such far-reaching consequence, and in conflict with so many practices, that it is neither administratively, politically, nor ethically [nor constitutionally] tenable."<sup>353</sup>

<sup>346</sup> See text accompanying note 57 *supra*.

<sup>347</sup> See Greenawalt, in Dorsen, *supra* note 33, at 44.

<sup>348</sup> *Everson v. Board of Educ.*, 330 U.S. 1, 53 (1947) (dissenting opinion of Rutledge, J.).

<sup>349</sup> 77 HARV. L. REV. 1353, 1357 (1964).

<sup>350</sup> Cf. Linde, *Constitutional Rights in the Public Sector: Justice Douglas on Liberty in the Welfare State*, 40 WASH. L. REV. 10, 28 n.239 (1965).

<sup>351</sup> It does not do to distinguish these as "matters of common right, part of the general need for safety. Certainly the fire department must not stand idly by while the church burns." *Everson v. Board of Educ.*, 330 U.S. 1, 60-61 (1947) (dissenting opinion of Rutledge, J.). Secular education is as much a matter of common right, part of the general need for an intelligent citizenry. Certainly the state must not stand idly by while children are inadequately educated.

Nor does it do to say that "education which includes religious training and teaching" has been made a matter "of private right and function" by the free exercise clause, see *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and that the use of public funds to defray its cost, therefore, cannot be said to be "for a public purpose." *Everson v. Board of Educ.*, 330 U.S. 1, 51 (1947) (dissenting opinion of Rutledge, J.). Eating fish on Friday may also have been a matter of private right protected by the free exercise clause. But government distribution for health purposes (a primary secular purpose) would not have been barred by the establishment clause.

<sup>352</sup> See National Catholic Welfare Conference, *supra* note 37, at 455; Comment, *A Constitutional Analysis of the Wisconsin Bus Law*, 1962 WIS. L. REV. 500, 516.

<sup>353</sup> LaNoue, *supra* note 60, at 79.

B. *Child Benefit v. Aid to School Itself*

The so-called "child-benefit theory"<sup>354</sup> also fails in its purpose of both presenting a viable constitutional test and confining the amount of permissible public aid for parochial education. This approach takes several forms. Principally, the theory distinguishes between valid public assistance to aid the child and invalid public assistance to aid the parochial school itself. Under it, "lunches, textbooks, bus transportation, and health services" are "clearly constitutional";<sup>355</sup> appropriations for "language instruction and laboratory facilities"<sup>356</sup> are uncertain; grants "for building, maintenance and teachers' salaries are foreclosed."<sup>357</sup>

Although this theory may be characterized as "a workable compromise interpretation of the First Amendment,"<sup>358</sup> it places form over substance. The hard fact is that aid for any secular educational purpose, from transportation and textbooks to construction of a science laboratory and payment of a Spanish teacher's salary, helps the child to take his proper place in society.<sup>359</sup> "There is no logical stopping point."<sup>360</sup> The "child benefit theory" thus has no reasoned limits and misses "the real issue, which is the nature of the benefit and its relationship to the 'Establishment Clause.'"<sup>361</sup> a subject already discussed at length herein.

The implicit rationale of the majority in the *Everson* decision suffers the same defect. It upheld public payment of bus transportation on the ground that the children were merely "receiving the benefits of public welfare legislation,"<sup>362</sup> yet suggested, in strongest dictum,<sup>363</sup> that this was as far as the establishment clause would extend. But it must be granted that state subsidization of all secular education similarly affords

<sup>354</sup> For judicial development of the theory, see Cushman, *supra* note 185, at 337-39. For description of the congressional attempt to fashion the Elementary and Secondary Education Act of 1965 to fit the theory, see Kelley & LaNoue, *The Church-State Settlement in the Federal Aid to Education Act*, 1965 RELIGION & PUB. ORDER 110 (D. Giannella ed.); Taylor, *Federal Aid for Children and Teachers in All Schools*, 12 CATHOLIC LAW. 193, 195 (1966).

<sup>355</sup> Jones, *The Constitutional Status of Public Funds for Church-Related Schools*, 6 J. CHURCH & ST. 61, 72 (1964).

<sup>356</sup> *Id.*

<sup>357</sup> Jones, *supra* note 294, at 196.

<sup>358</sup> *Id.* See also Giannella, *supra* note 199, at 572-81.

<sup>359</sup> See, e.g., Note, 12 MO. L. REV. 465, 468 (1947); Comment, 6 U. DET. L.J. 174, 176 (1943).

<sup>360</sup> *Everson v. Board of Educ.*, 133 N.J.L. 350, 359, 44 A.2d 333, 339 (1945) (dissenting opinion). See also 35 CONN. B.J. 119, 125 (1961); 1 BILL OF RIGHTS REV. 307, 309 (1941).

<sup>361</sup> Note, 41 IND. L.J. 302, 309 (1966).

<sup>362</sup> 330 U.S. at 16.

<sup>363</sup> See text accompanying notes 294-300 *supra*.

children the benefits of public welfare legislation.<sup>364</sup> The establishment clause should forbid no aid in that category.<sup>365</sup>

The *Everson* majority seemingly also sought to draw a line by emphasizing that in the case at bar "the State contributes no money to the schools."<sup>366</sup> On the basis of this reasoning, it has been concluded that "direct grants to sectarian schools are prohibited,"<sup>367</sup> and that "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."<sup>368</sup>

Closely akin to the "child benefit theory,"<sup>369</sup> this rationale also places form over substance. The constitutional result turns on the payee of money or recipient of property, whatever the primary effect of the government action or whoever the true ultimate beneficiary.<sup>370</sup> It would invalidate a consignment of microscopes to a parochial school or a grant of funds to construct a science laboratory regardless of the clear secular purpose. "Similarly, if the only reasonable or practicable means of providing fire and police protection were to give a religious school public funds and have it perform this function itself,"<sup>371</sup> such granting of funds would also be unconstitutional. Surely, it should make no constitutional difference if arithmetic textbooks are given to the parochial school rather than to the pupil or a public library from which he may withdraw them.<sup>372</sup>

It is argued by some that if direct grants to parochial schools do not violate the establishment ban, then nothing does except discrimination among religions,<sup>373</sup> thus challenging the Supreme Court's unequivocal position that governmental support of all religions is forbidden.<sup>374</sup> Not true. Under the rationale I propose, governmental aid may not exceed the value of the secular services even where given to every religion.

It is contended that providing school bussing or laboratory equip-

<sup>364</sup> See, e.g., P. KAUPER, *FRONTIERS OF CONSTITUTIONAL LIBERTY* 136 (1956); Boyer, *Public Transportation of Parochial School Pupils*, 1952 WIS. L. REV. 64, 85; Comment, 21 S. CAL. L. REV. 61, 75 (1947); Note, 60 HARV. L. REV. 793, 800 (1947); 3 INTRA. L. REV. 147, 153 (1948).

<sup>365</sup> See Katz, *Freedom of Religion and State Neutrality*, 20 U. CHI. L. REV. 426, 440 (1953).

<sup>366</sup> 330 U.S. at 18. See text accompanying notes 296-99 *supra*.

<sup>367</sup> U.S. Dep't of Health, Education & Welfare, *supra* note 20, at 361.

<sup>368</sup> *Id.* at 373. Cf. P. KAUPER, *supra* note 5, at 106-07.

<sup>369</sup> See Cushman, *supra* note 185, at 347.

<sup>370</sup> See *Everson v. Board of Educ.*, 330 U.S. 1, 55-56 n.50 (1947) (dissenting opinion of Rutledge, J.).

<sup>371</sup> Comment, 11 ST. LOUIS U.L.J. 464, 471 (1967).

<sup>372</sup> Cf. Sky, *supra* note 42, at 1457-58. See text accompanying notes 530-33 *infra*.

<sup>373</sup> U.S. Dep't of Health, Education & Welfare, *supra* note 20, at 373-74.

<sup>374</sup> See note 59 *supra* (last paragraph).

ment to a parochial school should be invalid because this makes "access to this public welfare benefit . . . dependent on conditions set by a religious group. These conditions will generally involve conformity to a religious creed or practice as the price for admission to the school and its publicly donated equipment."<sup>375</sup> It may be true that "placing citizens in the position of having to accept church authority in order to obtain necessary public welfare benefits . . . constitutes an establishment of religion."<sup>376</sup> But it is not true that providing parochial schools with secular educational services has this effect. Under the rationale I propose, parochial schools would get no greater benefits than are already accorded public schools. Thus, access to the benefits is in no way dependent on the acceptance of church authority.<sup>377</sup>

Perhaps the greatest weakness in the "child benefit theory" and the "no money to the parochial school" rationale<sup>378</sup> is that they permit public funds to be used for strictly religious purposes, beyond use for secular purposes, in contravention of a basic thrust of the establishment clause. Proponents of the "aid the child" approach advocate direct state subsidies to parents who may then choose any school for their children's education,<sup>379</sup> subject to the state's right of accreditation.<sup>380</sup> "Thus the schools would in no way be subsidized with public funds; only parents and their children would be subsidized."<sup>381</sup>

No one denies that these subsidies would ultimately reach the parochial school's treasury; such a result would probably be a specific condition of the awards.<sup>382</sup> After all, that is their precise purpose. Thus, if

<sup>375</sup> LaNoue, *supra* note 60, at 91.

<sup>376</sup> *Id.* at 91-92. The free exercise claim is even more apparent.

<sup>377</sup> Other considerations are present if the church-related school is in fact the only realistically available school. See text accompanying notes 436-39 *infra*.

<sup>378</sup> As is true of other approaches to be discussed, both the "child benefit" and "no money to parochial school" rationales fail to fulfill their purported aims because of the freed funds factor, which produces precisely the effects they seek to avoid. See text accompanying notes 407-15 *infra*.

<sup>379</sup> V. BLUM, FREEDOM OF CHOICE IN EDUCATION 29-30 (1958). See also Hayes, *supra* note 201, at 111; Note, 29 FORDHAM L. REV. 578, 580 (1961).

<sup>380</sup> The subsidy may take several analytically indistinguishable forms: (a) Direct appropriation. (b) Tax Credit. For discussion, see V. BLUM, *supra* note 379, at 19-22 *passim*. See also Freeman, *Tax Credits and the School-Aid Deadlock*, 194 CATHOLIC WORLD 201, 207 (1962), for the view that a tax credit is "free from constitutional challenge . . . because it funnels out no public money and avoids contact between government and the private school." (c) Tax deduction.

<sup>381</sup> V. BLUM, *supra* note 379, at 30.

<sup>382</sup> See Brown, *State Constitutions and Religion in Education*, in EDUCATIONAL FREEDOM 163, 183 (D. McGarry & L. Ward eds. 1966). "Since tuition charges are flexible and in Roman Catholic schools are often far below operating costs, the charges could readily be adjusted upward to take advantage of the parents' subsidies." Nelson, *Proposal on the School-Aid Impasse*, 78 CHRISTIAN CENTURY 448, 449 (1961). See also *Almond v. Day*, 197

the public subsidy exceeds the value of the secular educational service rendered, tax funds are being utilized for strictly religious purposes.<sup>383</sup> The parent subsidy theory fails to recognize this difficulty. Tax funds could be used for religion even if the amount given is only "equal to the sum expended on every child who attends the free schools,"<sup>384</sup> because there is no guarantee that the parochial school offers the same quantum of secular education as the public schools, nor that the lesser quantum offered costs the parochial school as much as the sum made available to it.<sup>385</sup> The strictly religious use of tax monies could result even if the amount given is only "part of a tuition which is itself considerably less than the cost of education at the school attended,"<sup>386</sup> because even this smaller governmental subsidy might exceed the cost or value of the secular educational service rendered.<sup>387</sup>

A "subsidy-to-the-parent-for-school-tuition" plan is not analogous to a government old age assistance program.<sup>388</sup> In the latter instance the subsidized citizen may spend the money in any way he wishes, save it, or give it away. Government does not condition its grant, as it does the parent subsidy scheme, on the recipient's channeling the funds to a specific, limited class of ultimate beneficiaries, which class includes church-affiliated institutions.

That a person receiving old age assistance donates a portion to his church presents no colorable establishment clause issue. It is analytically

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Va. 419, 426, 89 S.E.2d 851, 856-57 (1955); Lowell & Southgate, *POAU Position on Church-State Relations*, 5 J. CHURCH & ST. 41, 51 (1963); Note, 36 *FORDHAM L. REV.* 129, 131 (1967); Note, 42 *VA. L. REV.* 437, 438-39 (1956).

<sup>383</sup> This may explain the result in *Swart v. South Burlington Town School Dist.*, 122 *Vt.* 177, 167 *A.2d* 514, *cert. denied*, 366 *U.S.* 925 (1961), which invalidated a tuition plan. The Vermont statute authorized payment of full tuition "but not in excess of \$325.00 unless authorized by a vote of the town school district," 122 *Vt.* at 179, 167 *A.2d* at 515. The amounts appropriated to Roman Catholic high schools may have covered both secular and religious educational costs, although the opinion gives no indication. It has been argued that "without doubt the real reason for the decision lay in the fact that tuition payments, which were made directly to the schools, were not in some manner apportioned to support of the nonreligious instruction given." Slough & McAnany, *supra* note 37, at 69. See also Alciatore, *Federal Aid to Church-Related Schools and the Constitution*, 65 *CATHOLIC EDUC. REV.* 383, 393 (1967); National Catholic Welfare Conference, *supra* note 37, at 420 n.54. The court's opinion affords scanty support for this view.

<sup>384</sup> R. DRINAN, *supra* note 50, at 196.

<sup>385</sup> See discussion accompanying notes 183-199 *supra*.

<sup>386</sup> V. BLUM, *supra* note 379, at 28.

<sup>387</sup> It has been argued that a tax deduction, see note 380 *supra*, "would not corrupt the Constitution any more than the tax deduction now allowed those who make charitable donations to churches." *THE REPORTER*, Mar. 30, 1961, at 12. Perhaps the latter deduction survives attack on the ground that the benefit to the ultimate beneficiary religious groups does not exceed the value of the secular services they render. The topic, although obviously pertinent, is generally beyond the scope of the discussion.

<sup>388</sup> *Contra*, V. BLUM, *supra* note 379, at 32-34.

identical to a public employee's donating a portion of his compensation to his church.<sup>389</sup> There is not the slightest government compulsion to utilize tax funds for religious purposes. But a government condition that a tuition subsidy be transferred to some school of the parent's choice (including a parochial school) is analytically identical to a state payment to any voluntary association that a recipient joins (including his church or synagogue). Government has thereby restricted full freedom of choice as to how tax funds will be spent. It has singled out religion, albeit as part of a somewhat larger category, for government financial aid. If the ultimate religiously-affiliated beneficiary does not render secular services in return, tax raised funds will be used for strictly religious purposes. As has already been observed,<sup>390</sup> this result is contrary to the underlying purposes of the establishment clause.

For these reasons, under the theory advanced in this article, certain provisions of the old "G. I. Bill of Rights"<sup>391</sup> seem to violate the establishment clause.<sup>392</sup> Under that bill, as reportedly administered, the government paid tuition directly to the veteran's school, even if it was a theological seminary.<sup>393</sup> This was not a case in which "GI's are paid a certain amount which they can use in any way they want . . . [as] compensation for their serving in the armed forces."<sup>394</sup> That would be like old age assistance. The G. I. Bill, however, was a case of "conditioned" benefits, within a fairly limited category, as described above.<sup>395</sup>

The funneling of tax money to theological seminaries appears to serve a strictly religious purpose.<sup>396</sup> That this is "education they would

<sup>389</sup> Cf. *Rawlings v. Butler*, 290 S.W.2d 801, 806 (Ky. 1956); *Zellers v. Huff*, 55 N.M. 501, 522, 236 P.2d 949, 961-62 (1951); *Hysong v. Gallitzen Borough School Dist.*, 164 Pa. 629, 656-57, 30 A. 482, 483-84 (1894).

<sup>390</sup> See text accompanying note 60-66 *supra*.

<sup>391</sup> Serviceman's Readjustment Act of 1944, 58 Stat. 287.

<sup>392</sup> See Sullivan, *Religious Education in the Schools*, 14 LAW & CONTEMP. PROB. 92, 109-10 (1949). But see Blum, *Academic Freedom and Tax Support for Independent Education*, 40 PHI DELTA KAPPAN, 349, 353 (1959).

<sup>393</sup> Secretary of Health, Education & Welfare, Federal Programs Under Which Institutions With Religious Affiliation Receive Federal Funds Through Grants or Loans, March 28, 1961 (memorandum), in S. Doc. No. 29, 87th Cong., 1st Sess. 37, 44 (1961). Blum, *supra* note 392, at 352, reports that "approximately 36,000 veterans used federal money to pay for training as Protestant ministers. . . ."

<sup>394</sup> Comment of Mr. Pfeffer, in *Religion and Freedom*, *supra* note 206, at 13.

<sup>395</sup> It is of interest to note that the Higher Education Act of 1963, 20 U.S.C. § 751(a)(2) (1964), bars funds for use in divinity schools. See also PA. CONST. art. III, § 18.

<sup>396</sup> For the suggestion that there might be some exception due to an exercise of the war power, see Note, 8 LA. L. REV. 141 n.20 (1947); cf. *Bowker v. Baker*, 73 Cal. App. 2d 653, 655, 167 P.2d 256, 257 (1946). But cf. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866). Perhaps all or some of the tuition might be justified on the ground that clergymen perform a number of primary secular services. See also note 132 *supra*.

have undertaken had they not been taken in the Army"<sup>397</sup> is irrelevant. On this theory, the government could make contributions to any voluntary association to which the veteran had belonged because he would have done so had he been at home. Moreover, excluding theological seminaries from the Bill would not appear to have been a denial of free exercise for religion does not demand attendance there.<sup>398</sup> Further, every veteran, whatever his religion, could have his tuition paid for secular education at any accredited institution, including those that are church-related.<sup>399</sup>

### C. "Earmarking"

#### 1. Restricted Grants

Another effort to draw a line regarding the constitutionality of aid to parochial education may be described as the "restricted purpose" or "earmarking" theory. Its thrust is that, where the public funds awarded to church-affiliated schools—or to students attending them—are designated for specific secular purposes, the nonestablishment precept is satisfied because such grants, unlike more general grants, would not finance religious functions.<sup>400</sup> Thus, allocation of public funds for improving secular educational methods, construction of dormitories, acquisition of science, mathematics and foreign language equipment,<sup>401</sup> textbooks also used in public schools,<sup>402</sup> and scientific and medical research<sup>403</sup> are valid.<sup>404</sup> On the other hand, governmental appropriations "with no restrictions and no direction as to the purposes for which the money can be spent would be unconstitutional."<sup>405</sup>

The majority opinion in *Everson* lends some support to this "restricted purpose" theory. It spoke of bus transportation, ordinary police and fire protection, connections for sewage disposal, and public highways

<sup>397</sup> 2 *Hearings on H.R. 2361, supra* note 35, at 1614.

<sup>398</sup> *Cf.* note 59 *supra*. See also note 55 *supra*.

<sup>399</sup> See *State ex rel. Atwood v. Johnson*, 170 Wis. 251, 176 N.W. 224 (1920).

<sup>400</sup> 52 IA. L. REV. 571, 574 (1966). *Cf.* Kauper, *Separation of Church and State—A Constitutional View*, 9 CATHOLIC LAW. 32, 42 (1963).

<sup>401</sup> See U.S. Dep't of Health, Education & Welfare, *supra* note 20, at 375-76.

<sup>402</sup> See *id.* at 368; *Borden v. Louisiana State Bd. of Educ.*, 168 La. 1005, 123 So. 655, 661 (1929).

<sup>403</sup> See Lowell & Southgate, *supra* note 382, at 52-55.

<sup>404</sup> Some would distinguish among these items. Thus, of those items mentioned in the text, Protestants and Other Americans United (POAU), see *id.*, would seem to approve only of research grants. But since all serve strictly primary secular purposes, they appear analytically indistinguishable. In fact, it has been pointed out that research grants afford the recipient institution significant additional assistance in attracting strong faculty, "enriching the educational program, developing better facilities, drawing higher quality students, and diversifying sources of income." Kratz, *supra* note 193, at 210.

<sup>405</sup> 5. *Hearings on S. 370, supra* note 148, at 2524 (Statement of Senator Morse).

and sidewalks as "general government services . . . separate and . . . indisputably marked off from the religious function."<sup>406</sup>

## 2. *Freeing of Funds*

The "restricted purpose" or "earmarking" rationale, however, is not a viable constitutional test. Although use of the public funds may be strictly limited to the ends designated, their allocation releases additional church funds for strictly religious purposes<sup>407</sup>—be it for religious proselytizing, the purchase of religious insignia, or any of a countless number of other purely religious ends. Because of this "freed funds" effect—hardly a matter that may be deemed "immaterial"<sup>408</sup> by the advocates of this rationale—the theory effectively fails to fulfill its own purposes and places form over substance.

To avoid this consequence, it has been argued that a grant may be "earmarked for a specific purpose which would not otherwise be undertaken by the recipient . . ." <sup>409</sup> But this is an inquiry more easily stated than demonstrated. For example, that the cost of textbooks or transportation had formerly been borne by the parents,<sup>410</sup> does not mean that their provision now by the state will not provide additional funds to the religious institution.<sup>411</sup> The latter could now easily and justifiably increase its tuition charge, thus providing it with funds available for strictly religious use.<sup>412</sup>

Even if the property or service which the government finances had not previously been part of the parochial school's—or parents'—activities, it cannot be said with any confidence that funds are not freed. It

<sup>406</sup> 330 U.S. at 17-18. Since these serve strictly secular purposes, it is difficult to distinguish them, on this "earmarking" analysis, from other such services. *But see* text accompanying note 443 *infra*.

<sup>407</sup> *See* Letter from Professor Sutherland to Senator Morse, in S. Doc. No. 29, 87th Cong., 1st Sess. 60 (1961); 79 *CHRISTIAN CENTURY* 617 (1962) (editorial); 77 *HARV. L. REV.* 1353, 1354 (1964); 59 *MICH. L. REV.* 1254, 1255 (1961).

<sup>408</sup> Opinion of the Justices, 99 N.H. 519, 522, 113 A.2d 114, 116 (1955).

<sup>409</sup> U.S. Dep't of Health, Education & Welfare, *supra* note 20, at 370. *See also* Moore, *supra* note 334, at 161. The Elementary and Secondary Education Act of 1965 attempts to meet this qualification. It forbids grants for instructional materials if institutional funds would ordinarily have been used for like materials, 20 U.S.C. § 823(a)(5) (Supp. I, 1965), and for specialized educational services if normally provided by the nonpublic school, 45 C.F.R. § 116.19(d) (1967).

<sup>410</sup> In respect to textbooks, see *Board of Educ. v. Allen*, 27 App. Div. 2d 69, 72, 276 N.Y.S.2d 234, 238 (1966). Regarding transportation, compare Comment, *Hospital Aid and the Establishment Clause: Conflict or Accommodation*, 13 U.C.L.A.L. Rev. 1100, 1107 (1966), with L. PEEFFER, *supra* note 26, at 178; *State ex rel. Reynolds v. Nusbaum*, 17 Wis. 2d 148, 152, 115 N.W.2d 761, 763 (1962).

<sup>411</sup> *But see* *Cochran v. Board of Educ.*, 281 U.S. 370, 375 (1930); LaNoue, *supra* note 60, at 80; 36 *KY. L.J.* 228, 330-31 (1948).

<sup>412</sup> *See* note 382 *supra*.

would be extremely difficult to prove that the parochial school, or the parent, would not have itself undertaken the matter in the near future<sup>413</sup>—the question not infrequently turning on the subjective thoughts of the school's administrators or all parents, or on the credibility of their testimony in respect thereto. In addition, a court may "be compelled to examine the financial structure of the school, its previous success or failure in fund-raising campaigns, and the proposed allocation of its resources."<sup>414</sup> This approach might produce an undesirable situation whereby the parochial school administrators or the parents would defer providing a particular service because to provide it now would make a subsequent government subsidy unconstitutional. Finally, it would be virtually impossible to prove that the parochial school would never have itself undertaken the project—be it special remedial reading, field trips, special tutoring, or even a "head-start" program.<sup>415</sup> It is more natural to assume that any service provided by public schools is also within the reasonable contemplation of parochial schools.

"Earmarking" is of no consequence under the rationale proposed in this article. Nor is the freeing of funds which is an effect of even police and fire protection.<sup>416</sup> Rather, the crucial inquiry is whether the total government assistance exceeds the value of the secular educational service rendered. The state funds may be paid to the parent or directly to the school so long as they serve a primary or independent secular purpose, as defined herein.

Even if the parochial school endorsed the government's bank draft directly to a seller of religious books or insignia, it should be of no constitutional significance;<sup>417</sup> this is logically no different than the school's endorsing the draft to a seller of dictionaries or bus transportation, and then drawing a check on funds in its own account—which it would otherwise have used for the dictionaries or bus transportation—to pay for the religious books or insignia. Even if the state, at the parochial school's request, were itself to supply religious tracts to the school<sup>418</sup>—unlikely as this may be—there should be no issue if the total public appropriation to the school were not greater than the value of the secular services rendered; this is analytically the same as the state supplying dictionaries to the parochial school and the school then buying the reli-

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<sup>413</sup> See Note, *The Elementary and Secondary Education Act of 1965 and the First Amendment*, 41 IND. L.J. 302, 314-315 (1966); Comment, *supra* note 410, at 1107.

<sup>414</sup> 41 N.Y.U.L. REV. 983, 986 (1966).

<sup>415</sup> See CATHOLIC SCHOOL J., June 1965, at 13-15.

<sup>416</sup> See note 185 *supra*.

<sup>417</sup> Cf. *State ex rel. Nevada Orphan Asylum v. Hallock*, 16 Nev. 373, 387-88 (1882).

<sup>418</sup> But see *Board of Educ. v. Allen*, 20 N.Y.2d 109, 121, 228 N.E.2d 791, 797, 281 N.Y.S.2d 799, 808 (1967) (dissenting opinion).

gious tracts with the funds freed. Of course, the state should not be able to condition its grant on use for religious purposes. In that case, although the parochial school might use the funds thus freed for secular purposes, the grant would not assure this result. Only a religious end would be guaranteed, and by conscious government dictate. This the establishment clause forbids without further inquiry or computations.<sup>419</sup>

#### D. Child Benefit "Revisited"

Having considered the "child benefit" and "earmarking" theories, what may be termed the "LaNoue-child benefit revisited" theory merits some attention. Mr. LaNoue submits three criteria as the bases for a constitutional formulation respecting aid to parochial schools.<sup>420</sup> First, if the aid goes directly to the parent or child, no religious institution should acquire new property through the state action. (The shortcomings of this criterion have already been fully explored.<sup>421</sup>) Second, all control over administration and spending of the public funds should remain with the state—for example, the state should select any textbooks provided.<sup>422</sup> (But, whoever the selecting agency, establishment clause values are preserved if the book is to be used for a primary secular purpose.<sup>423</sup>) Third, no religious use should be made of what the state provides. (This ignores the freed funds effect.<sup>424</sup>)

#### E. Aid to Hospitals Distinguished

Government grants and loans for hospital construction, to institutions including those that are church-affiliated,<sup>425</sup> generally conceded to present no establishment clause problems,<sup>426</sup> are analogous to public financing of the secular aspects of parochial education.<sup>427</sup> Just as the state may

<sup>419</sup> Cf. text following note 158.

<sup>420</sup> LaNoue, *supra* note 60, at 90-91.

<sup>421</sup> See discussion in text accompanying notes 354-390 *supra*.

<sup>422</sup> Cf. *Chance v. Mississippi State Textbook Rating & Purchasing Bd.*, 190 Miss. 453, 462, 200 So. 706, 708 (1941); *Board of Educ. v. Allen*, 20 N.Y.2d 109, 116, 228 N.E.2d 791, 794, 281 N.Y.S.2d 799, 804 (1967); W. VA. CODE ANN. § 1782(2) (1961).

<sup>423</sup> For elaboration, see discussion accompanying notes 200-80 *supra*. See also text accompanying notes 464-65, 520-33 *infra*.

<sup>424</sup> See text accompanying notes 407-15 *supra*.

<sup>425</sup> The Hospital Survey and Construction Act, 42 U.S.C. § 291 (1964), better known as the Hill-Burton Act, authorizes grants and loans for up to two-thirds of the cost of construction of general hospitals and other medical facilities.

<sup>426</sup> See text accompanying notes 303-11 *supra*.

<sup>427</sup> In *Quick Bear v. Leupp*, 210 U.S. 50, 74 (1908), the Solicitor General argued, "A school, like a hospital, is neither an establishment of religion nor a religious establishment, although along with secular education there might be, as there commonly is, instruction in morality and religion, just as in a hospital there would be religious ministrations." While there may be differences in degree beyond those he indicated, they should not be consequential for establishment clause purposes. See discussion at notes 428-39 *infra*.

"care for the destitute ill,"<sup>428</sup> so, too, may it provide for the educational advancement of its citizenry. To paraphrase Mr. Pfeffer, "As long as the sum paid to the denominational [school for the cost of its nonreligious education] does not exceed the amount the state would be required to expend to [provide this education in public schools], the [parochial school] is not really receiving government aid."<sup>429</sup>

The cases have been distinguished by some, principally on the grounds that admission to religiously-affiliated hospitals is on a nonsectarian basis and that the hospitals make no attempt to promote religious dogmas.<sup>430</sup> Apart from the facts that at least Catholic parochial schools are not restricted to members of that faith,<sup>431</sup> and that sectarian hospitals not infrequently have religious insignia in the rooms,<sup>432</sup> have religiously significant requirements for doctors who may enter,<sup>433</sup> and follow medical codes differing from that of the American Medical Association,<sup>434</sup> there is a more constitutionally relevant response. When government funds are being expended only for primary secular purposes—either ministering to the sick or serving the secular educational needs of the young—the religious affiliation of the recipient institutions or those in attendance should be inconsequential—as should be the fact that "parochial schools are created specifically for religious as well as secular purposes."<sup>435</sup>

Religious restrictions on admission to an institution supported by public funds or such an institution's general religious tone should be similarly irrelevant constitutionally so long as the benefits provided may conveniently be obtained elsewhere.<sup>436</sup> On the other hand, if "the gov-

<sup>428</sup> L. PFEFFER, *supra* note 26, at 201.

<sup>429</sup> *Id.*

<sup>430</sup> *Id.* See also *Lien v. City of Ketchikan*, 383 P.2d 721 (Alas. 1963); *Kentucky Bldg. Comm'n v. Effron*, 310 Ky. 355, 358, 220 S.W.2d 836, 838 (1949); *Truitt v. Board of Pub. Works*, 243 Md. 375, 404, 221 A.2d 370, 387-88 (1966); 62 Nw. U.L. Rev. 256 (1967); Comment, *supra* note 410, at 1116.

<sup>431</sup> For statistics, see 5 *Hearings on S. 370*, *supra* note 148, at 2547.

<sup>432</sup> L. PFEFFER, *supra* note 26, at 201-02.

<sup>433</sup> *Id.* at 202.

<sup>434</sup> *Lowell & Southgate*, *supra* note 382, at 54.

<sup>435</sup> Note, *The Elementary and Secondary Education Act of 1965 and the First Amendment*, 41 IND. L.J. 302, 321 (1966).

<sup>436</sup> See text accompanying notes 375-77 *infra*. But see *Giannella*, *supra* note 199, at 528, 554, 589. Likewise, the fact that denominational social welfare units "believe that all children of their faith should be cared for by agencies representing the same faith," R. WERNER, *PUBLIC FINANCING OF VOLUNTARY AGENCY FOSTER CARE* 141-42 (1961), should not disqualify them for public financial assistance.

The decision in *Simkins v. Moses H. Cone Memorial Hospital*, 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964)—holding that "private" hospitals receiving Hill-Burton Act funds and participating in a federal-state program for satisfying community hospital needs were sufficiently involved with "state action" to be subject to the fifth and fourteenth amendments' prohibitions against racial discrimination—is sometimes cited for the proposition that religious institutions receiving governmental aid may similarly be charged

ernment has chosen to aid a religious institution to save the expense of building new public facilities"<sup>437</sup> or has "granted a government financed monopoly over certain services in a particular geographical area,"<sup>438</sup> the result may be different. Under these circumstances, an otherwise private institution is performing what has traditionally been, or what has effectively become, a "public function." Therefore, there is a forceful argument that it should be subject to the "state action" restrictions of the Constitution<sup>439</sup>—that either governmental assistance must be terminated or the institution must be bound by the constitutional obligations of the state.

### F. Balancing

Probably the most forthright school of thought that wishes to have the Constitution permit some public financial assistance to parochial

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with the obligations of the state. Thus, it is argued that publicly assisted church-related schools and hospitals may constitutionally be barred from giving any religious preference in the choice of admittees, administrators and staff, from conducting religious observances, and even from placing religious symbols in rooms. Comment, *Public Control of Private Sectarian Institutions Receiving Public Funds*, 63 MICH. L. REV. 142 (1964). See also P. KAUPER, *supra* note 5, at 116-18; Kelley, *Protestants and Parochial Schools*, 79 COMMONWEAL 520 (1964).

But the *Simkins* case is distinguishable on several grounds. First, the court noted that it did not merely rely on the fact that the recipient hospitals were publicly financed. It stressed that the hospitals operated "as integral parts of comprehensive joint or intermeshing state and federal plans or programs designed to effect a proper allocation of available medical and hospital resources for the best possible promotion and maintenance of public health." 323 F.2d at 967. Thus, the court was impressed with the argument that these private hospitals were performing a "State function," *id.* at 968, that is, that they served in fact as substitute facilities for those the state would have otherwise provided and that the state selected them to be put to this use. See text at notes 437-39 *infra*. See also Lewis, *The Meaning of State Action*, 60 COLUM. L. REV. 1083, 1104 n.77 (1960). This "state function" notion is not to be confused with the fact that these hospitals (like nonpublic schools or other private hospitals) were simply rendering public services that other existing state institutions also happen to provide. *But see* Comment, *supra*, at 146-47.

Further, even if the fact that the hospitals were publicly financed is considered to be the crucial ingredient, there is a vital distinction between "state action" of this kind involving racial discrimination and "state action" of this kind involving religious preferences and observances. A publicly supported "private" institution's claim of right to racial discrimination is weak at best. But a publicly supported church-affiliated school's contention that religious preference for students and faculty is necessary or desirable for execution of its purposes raises a substantial claim under the free exercise clause. Similar and even stronger claims may be made for religious observances and insignia. See generally Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion*, 110 U. PA. L. REV. 473 (1963); Horowitz, *Fourteenth Amendment Aspects of Racial Discrimination in "Private" Housing*, 52 CALIF. L. REV. 1 (1964); Van Alstyne & Karst, *State Action*, 14 STAN. L. REV. 3 (1961).

<sup>437</sup> LaNoue, *supra* note 60, at 92 n.75.

<sup>438</sup> *Id.*

<sup>439</sup> See *Evans v. Newton*, 382 U.S. 296 (1966); *Public Utilities Comm'n v. Pollak*, 343 U.S. 451 (1952); note 436 *supra*. The "public function" issue is generally beyond the scope of the discussion. For further consideration, see W. LOCKHART, Y. KAMISAR & J. CHOPER, *CONSTITUTIONAL LAW* 1235, 1290, 1293, 1322-25 (2d ed. 1967).

education but forbid public subsidization of all the secular aspects is that which contends that "today . . . most of the distinctions of the law are distinctions of degree."<sup>440</sup> The view is that the Court must decide "when a little becomes too much,"<sup>441</sup> and must engage in "the process of balancing the many competing considerations and ultimately weighing them on policy considerations."<sup>442</sup> The *Everson* majority's clear implication that bus transportation lay at the brink of unconstitutionality<sup>443</sup> may be relied on for substantiation.<sup>444</sup>

This test is sometimes phrased in terms of a "direct-indirect"<sup>445</sup> or "active-passive" standard.<sup>446</sup> But, in essence, the approach requires the Court to juggle a nearly infinite number of diverse factors—for example, whether the state's purpose is religious or secular, the importance in terms of priorities of the public purpose, the relative probability of its accomplishment, the type and quantum of benefit given to religion, whether funds will be freed, the relative strength of sectarian influences operative within a particular recipient institution, the relationship of the benefit to the religious aspects of the institution aided, the extent to which the state selects the institutions to be aided. These, in turn, must be measured by the implications of the free exercise clause as tempered by the force of the establishment clause, considered in light of the existence and adequacy of alternative means, and perhaps bolstered by a presumption of unconstitutionality (or maybe constitutionality).<sup>447</sup>

The defect of this approach is by now apparent. If "the method of weighing constitutional objectives in order to choose among them affords no guidance for further action, except on what Holmes called a 'pots and pans' basis,"<sup>448</sup> then subjective assessment of the multitudinous elements at issue here is presumptively inappropriate for an independent judiciary as we know it. Only in limited and compelling circumstances is such a process even justifiable, much less desirable.<sup>449</sup> The advocates of this approach themselves acknowledge that, as applied to aid to parochial

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<sup>440</sup> *Panhandle Oil Co. v. Knox*, 277 U.S. 218, 223 (1918) (dissenting opinion of Holmes, J.).

<sup>441</sup> Sutherland, *supra* note 85, at 1310.

<sup>442</sup> Note, 52 CORNELL L.Q. 814, 826 (1967). See also Moore, *supra* note 334, at 192-93.

<sup>443</sup> See discussion at note 295 *supra*.

<sup>444</sup> See U.S. Dep't of Health, Education & Welfare, *supra* note 20, at 368-69. See also *Horace Mann League v. Board of Pub. Works*, 242 Md. 645, 671, 220 A.2d 51, 65, *cert. denied*, 385 U.S. 97 (1966).

<sup>445</sup> See Hayes, *supra* note 201, at 108.

<sup>446</sup> See Note, 8 LA. L. REV. 136, 140 (1947).

<sup>447</sup> See generally U.S. Dep't of Health, Education & Welfare, *supra* note 20, at 365-73; Comment, *supra* note 410, at 1109-14. See also Note, 52 CORNELL L.Q. 814, 826 (1967); Note, 8 LA. L. REV. 136, 140 (1947).

<sup>448</sup> Kurland, *supra* note 19, at 96.

<sup>449</sup> See text accompanying notes 32, 117-20, 337 *supra*.

schools, "it is futile to hazard a prediction of the outcome"<sup>450</sup> and that the consolation to "[t]hose who see no distinction between transportation and any other form of assistance whatsoever [is that they] should keep in mind that, apparently, the Court [in *Everson*] did."<sup>451</sup>

### G. Horace Mann

The recent, celebrated *Horace Mann* decision in Maryland,<sup>452</sup> invalidating under the establishment clause the allocation of state funds to three of four church-related colleges for construction of science and classroom buildings, a dining hall, and a dormitory, employed a somewhat more limited but analytically similar balancing approach. The state court, interpreting the relevant Supreme Court opinions as barring any direct grants to "sectarian" institutions,<sup>453</sup> utilized a six-criteria formula to determine whether each recipient college met this test.<sup>454</sup> The court itself recognized the inappropriateness of this constitutional approach—"to decide each case upon the totality of its attendant circumstances."<sup>455</sup> It admitted that application of its test was "a rather elusive matter, being somewhat ephemerical in nature."<sup>456</sup>

The more basic defect in the *Horace Mann* decision was that, for establishment clause purposes,<sup>457</sup> it ignored the fact that, no matter how "sectarian" the recipient college, the state expenditures seemingly served a primary secular purpose;<sup>458</sup> undoubtedly, the colleges found to be "sectarian" receive many indirect public benefits that "aid" them as significantly as the funds in issue.<sup>459</sup> Thus, to bar all direct governmental

<sup>450</sup> Moore, *supra* note 334, at 193.

<sup>451</sup> U.S. Dept't of Health, Education & Welfare, *supra* note 20, at 369.

<sup>452</sup> *Horace Mann League v. Board of Pub. Works*, 242 Md. 645, 220 A.2d 51, *cert. denied*, 385 U.S. 97 (1966).

<sup>453</sup> 242 Md. at 654-72, 220 A.2d at 55-66.

<sup>454</sup> The court examined in detail (a) the college's stated purposes, (b) the college personnel, (c) the college's relationships with religious organizations and groups, (d) the place of religion in the college's program, (e) the product of the college program vis-à-vis accreditation and character of activities of alumni, (f) the work and image of the college in the community. *Id.* at 672, 220 A.2d at 65-66. For a more direct, less complicated approach, under a state constitutional provision, see *Collins v. Kephart*, 271 Pa. 428, 117 A. 440 (1921).

<sup>455</sup> 242 Md. at 678, 220 A.2d at 69.

<sup>456</sup> *Id.*

<sup>457</sup> The court, in rejecting attacks under the Maryland constitution, held that the expenditures were "for public purposes." 242 Md. at 685, 220 A.2d at 73.

<sup>458</sup> See Drinan, *The Challenge to Catholic Education in the Maryland College Case*, NAT'L CATHOLIC EDUC. ASS'N. BULL., May 1967, at 3, 5.

<sup>459</sup> For example, various forms of student scholarships and assistance. See note 382 *supra*; Brown, *supra* note 382, at 182-83; Blum, *supra* note 37, at 147-48; 3 *Hearings on S. 600 Before the Subcomm. on Educ. of the Senate Comm. on Labor and Public Welfare*, 89th Cong., 1st Sess., at 1226 (1965) (Statement of Lawrence Speiser, Director, Washington ACLU).

grants to church-affiliated educational institutions simply because they engage in certain practices that foster religion, while acknowledging that "not every activity of a religious group is necessarily a religious activity,"<sup>460</sup> not only jeopardizes a host of existing state and federal programs,<sup>461</sup> but places form over substance and is constitutionally unsatisfactory.

### *H. Manipulation*

#### *1. Lending Textbooks*

The test for determining whether governmental assistance to religion breaches that neutrality demanded by the first amendment, it has recently been argued, should be whether "the aid could be manipulated by church or state to dominate the other."<sup>462</sup> The aid involved, for example, in the *Allen* case now pending before the Supreme Court<sup>463</sup>—lending secular textbooks to parochial school students—is found to violate that standard on several counts.

First, "since textbooks are used in the classrooms as an integral feature of the educational process, there is no certainty that they would not be manipulated for religious instruction in parochial schools."<sup>464</sup> True. But even assuming that similar manipulation could not occur with respect to state-provided school lunches (by prayers in connection therewith, for example), or state-financed school medical examinations (by their illustrative use in classroom theological discussions), or state-laid sidewalks providing access to the denominational school, the point is not well taken. Even public aid that is itself immune from sectarian manipulation frees church funds either for uses subject to manipulation, or for strictly religious uses. This being so, the attempted limitation only formalistically accomplishes the end sought. The sole criterion should be whether the total public support exceeds the value of the secular service rendered. If allegedly secular activities are so manipulated as to be no longer fairly characterized as nonreligious, they may not be included in valuing the secular service provided.<sup>465</sup>

Second, it is contended that lending textbooks "will create and foster a pressure to dominate the choosing of books that shall be used in the public schools (so that they may also be used in parochial schools)."<sup>466</sup>

<sup>460</sup> 3 *Hearings on S. 600*, *supra* note 459, at 1223 (Statement of Lawrence Speiser, Director, Washington ACLU).

<sup>461</sup> See Davidow, *supra* note 131, at 668-69.

<sup>462</sup> Note, 36 *GEO. WASH. L. REV.* 246, 250 (1967).

<sup>463</sup> *Board of Educ. v. Allen*, 20 *N.Y.2d* 109, 228 *N.E.2d* 791, 281 *N.Y.S.2d* 799 (1967), *prob. juris. noted*, 36 *U.S.L.W.* 3278 (U.S. Jan. 15, 1968).

<sup>464</sup> Note, 36 *GEO. WASH. L. REV.* 246, 249 (1967).

<sup>465</sup> See text accompanying notes 200-80 *supra*.

<sup>466</sup> Note, 36 *GEO. WASH. L. REV.* 246, 250 (1967), quoting from the dissenting opinion

That may be true. But if such pressures occur and are unconstitutional,<sup>467</sup> they should be dealt with specifically rather than by striking an entire program. And, however irresistible such pressures would be, they seemingly exist even in the absence of the program because approximately half of Catholic children presently attend public schools.<sup>468</sup>

## 2. Control Follows Aid

Finally, it is urged that if "parochial schools become dependent on state financing of books for children, manipulative conditions could attach which would compel sectarian schools to restrict religious instruction or which could ultimately result in dissolution of a separate parochial system altogether."<sup>469</sup> This "control follows aid" assertion, frequently heard<sup>470</sup> and already referred to,<sup>471</sup> deserves further consideration.

It was said ten years ago that "examination of the state constitutional and statutory provisions reveals little public control of private schools and teachers."<sup>472</sup> An authoritative and comprehensive federal study reported at that time that in only five states do departments of education "have explicit statutory responsibilities for the certification of teachers of nonpublic schools,"<sup>473</sup> and indicated that curriculum regulation was indeed minimal.<sup>474</sup> And there is little reason to believe that much significant change has taken place since then.<sup>475</sup>

It is argued that increased state financial assistance to parochial schools will bring additional state supervision because it is "discrimi-

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in *Board of Educ. v. Allen*, 20 N.Y.2d 109, 123, 228 N.E.2d 791, 798, 281 N.Y.S.2d 799, 810 (1967) *prob. juris. noted*, 36 U.S.L.W. 3278 (U.S. Jan. 15, 1968).

<sup>467</sup>See also discussion in text accompanying notes 67-74 *supra*.

<sup>468</sup>L. PFEFFER, *supra* note 26, at 510.

<sup>469</sup>Note, 36 GEO. WASH. L. REV. 246, 249-50 (1967).

<sup>470</sup>See, e.g., *Everson v. Board of Educ.*, 330 U.S. 1, 27 (1947) (dissenting opinion of Jackson, J.); *Gurney v. Ferguson*, 190 Okla. 254, 256, 122 P.2d 1002, 1005 (1941); *Davidow*, *supra* note 131, at 683.

<sup>471</sup>See note 436 *supra*.

<sup>472</sup>Kohlbrener, *Some Practical Aspects of the Public Character of Private Education*, 86 SCHOOL & SOC'Y 348, 351 (1958). In 1956, the National Education Association concluded that state supervision of nonpublic schools was "conspicuous by its absence rather than by its presence." *State and Sectarian Education*, 34 N.E.A. RESEARCH BULL. 210 (1956).

<sup>473</sup>F. BEACH & R. WILL, *supra* note 27, at 26.

<sup>474</sup>*Id.* at 25.

<sup>475</sup>A 1964 study of state curriculum requirements for nonpublic schools showed that 41 states provided for some regulation. But the instructional areas covered included only the following: common branches of education (31 states), U.S. Constitution (27), English language (26), American history (16), state constitution (16), other national documents (15), state and national civics (15), safety education (10), moral education (6), state history (6), other areas of special state interest (6), physical education (4). Stolee, *Non-public Schools: What Must They Teach?*, 92 SCHOOL & SOC'Y 274, 275 (1964), *reprinted in* 1 *Hearings on S. 370*, *supra* note 148, at 469. Further, in 15 of these 41 states, there was no enforcement whatever of the regulations. *Id.* at 470.

natory . . . to allow public funds to be spent by private schools without public control and yet insist on such public control for public schools."<sup>476</sup> Perhaps this will be true as a realistic political matter. However, government may believe controls are unnecessary or undesirable, and aid conditioned on controls thought unsatisfactory by the recipient may be refused. More importantly, as a constitutional matter, the state's power to regulate nonpublic schools is wholly independent of any allocation of public funds.<sup>477</sup> This is confirmed in practice by requirements already noted<sup>478</sup> and by a number of others.<sup>479</sup> On the other hand, public aid or not, the Constitution forbids unreasonable restriction of religious instruction or dissolution of the parochial school system.

The landmark decision of *Pierce v. Society of Sisters*<sup>480</sup> is relevant on both counts. Invalidating a state requirement of compulsory public school education, the case held that due process of law forbids unreasonable state interference with parents' liberty to direct their children's education. The parental right being grounded in the Constitution, state authority to curtail it would not appear to be augmented by the grant of governmental funds.<sup>481</sup> But *Pierce* also recognized state authority "reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require . . . that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare."<sup>482</sup>

Those whose conscientious scruples constitutionally entitle them to attend a church-related school plainly have no absolute right under the free exercise clause to maintain those schools free of state regulation,<sup>483</sup> whatever the amount of public financial support given them. Although the state may have no right "to standardize its children by forcing them to accept instruction from public teachers only,"<sup>484</sup> to attain important

<sup>476</sup> Bemis, *What is Discrimination?*, 42 PHI DELTA KAPPAN 329 (1961).

<sup>477</sup> See Brickman, *Public Aid to Religious Schools*, 55 RELIGIOUS EDUC. 279, 287 (1960). See also Whelan, *Textbooks and the Constitution*, 107 AMERICA 399, 401 (1962).

<sup>478</sup> See note 475 *supra*.

<sup>479</sup> See, e.g., 20 ME. REV. STAT. ANN. § 1281 (1965) (commissioner shall establish requirements for accreditation including quality of instruction, school facilities and curriculum content); MICH. COMP. LAWS ANN. §§ 340.732(a), 388.551 (1967) (courses of study shall be comparable to and of same standard as in public schools); NEV. REV. STAT. § 394.130 (1963) (same instruction as is required in public schools, *but no right to share in public school funds*); N.Y. EDUC. LAW § 3204 (McKinney 1953), *as amended*, (McKinney Supp. 1967) (course of study for first eight years must include twelve designated subjects); N.C. GEN. STAT. § 115-255 (1966) (*religious instruction should not be interfered with* but minimum standards for courses of study must be met).

<sup>480</sup> 268 U.S. 510 (1925).

<sup>481</sup> See note 490 *infra*.

<sup>482</sup> 268 U.S. at 534.

<sup>483</sup> *But see* A. JOHNSON & F. YOST, *supra* note 28, at 139.

<sup>484</sup> *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925).

societal goals it clearly may regulate action demanded by religion or conscience.<sup>485</sup> This is especially true where the interests of children are concerned.<sup>486</sup> Although the free exercise and due process clauses may assure private or sectarian schools the liberty "to inculcate whatever values they wish,"<sup>487</sup> those clauses do not hamper the state's power reasonably<sup>488</sup> to promote children's welfare through basic secular education.<sup>489</sup> Thus, the "control follows aid" argument, as least as to its constitutional relevance, loses its force.<sup>490</sup>

### I. Accreditation

By virtue of *Pierce v. Society of Sisters*,<sup>491</sup> states must make it possible for parochial schools to gain accreditation. It is therefore contended that "public money . . . cannot logically be withheld from the private school if it is publicly accredited as an institution where children may fulfill their legal duty to attend school."<sup>492</sup> This reasoning, acclaimed as the

<sup>485</sup> *Braunfeld v. Brown*, 366 U.S. 599, 603-04 (1961); *Cantwell v. Connecticut*, 310 U.S. 296, 303-04 (1940).

<sup>486</sup> *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944).

<sup>487</sup> *School Dist. v. Schempp*, 374 U.S. 203, 242 (1963) (concurring opinion of Brennan, J.).

<sup>488</sup> In making the "accommodation between the religious action and an exercise of state authority [which] is a particularly delicate task," *Braunfeld v. Brown*, 366 U.S. 599, 605 (1961), the state's interest in demanding that certain courses be taught would seem more substantial than its concern in forbidding inquiry into some field of knowledge. See *Meyer v. Nebraska*, 262 U.S. 390, 392 (1923) (argument for plaintiff in error). State control "need not be so restrictive that the independent school is precluded from having ample flexibility in determining how these common learnings will be taught, what additional subjects will be offered, what personal values will be imbued, and what experiments will be conducted." Fountain, *A Plea for Public Support of Pluralism in America*, 44 *PHI DELTA KAPPAN* 415, 418 (1963). See *Farrington v. Tokushige*, 273 U.S. 284, 298 (1927). Nor should the state's requirements be so onerous as to preempt time for religious instruction. See Choper, *supra* note 4, at 392-93.

<sup>489</sup> See *State v. Garber*, 197 Kan. 567, 419 P.2d 896 (1966), *cert. denied*, 389 U.S. 51 (1967), and cases there cited, 197 Kan. at 574-75, 419 P.2d at 902. See also 5 *Hearings on S. 370*, *supra* note 148, at 2073 n.21 (Statement of Edgar Fuller).

<sup>490</sup> It has been contended that public financial assistance to parochial schools with resultant controls would be contrary to the prohibition in *Everson v. Board of Educ.*, 330 U.S. at 16, of government participation "in the affairs of any religious organizations or groups and *vice versa*." Lowell & Southgate, *supra* note 382, at 50. But the *Everson* opinion itself recognized that parochial schools must meet "the secular educational requirements which the state has power to impose." 330 U.S. at 18. With or without financial assistance, this is not the government participation in religious affairs obviously referred to by the Court, its exact language notwithstanding. Further, if the state enters into a contract with a religious organization (here, for secular education), the state may enforce reasonable terms. Just as surely, the state may not "condition the availability of benefits upon . . . [the recipient's] willingness to violate a cardinal principle of . . . religious faith." *Sherbert v. Verner*, 374 U.S. 398, 406 (1963).

<sup>491</sup> 268 U.S. 510 (1925).

<sup>492</sup> Drinan, *The Constitutionality of Public Aid to Parochial Schools*, in *THE WALL BETWEEN CHURCH AND STATE* 55, 60 (D. Oaks ed. 1963).

"strongest argument to sustain . . . general aid to parochial schools,"<sup>493</sup> may be misleading.

The fact of accreditation should not be determinative. Under the establishment clause analysis proposed herein, a state could constitutionally "accredit" a parochial school course in religious instruction for the purpose of satisfying the minimum number of units required for graduation under state law. Since the purpose and effect of such a course could be religious—sectarian indoctrination—accreditation by the state would serve a primary religious end. But it would neither compromise anyone's religious scruples nor involve the use of compulsorily raised tax funds.<sup>494</sup> However, for the state to support such an accredited course with public funds would have the latter effect and, therefore, should be held to violate the bar against establishment of religion. Similarly, accreditation of a parochial school should not necessarily permit its being financed with public money on a par with schools that are not church-affiliated. The establishment clause should bar any grant of public funds exceeding the value of the secular services rendered.

#### *J. The Public Welfare-Educational Process Distinction*

Many opponents of public aid to parochial education, conceding the validity of certain "health" measures<sup>495</sup> like free medical and dental services and free hot lunches for children in parochial schools, would draw the line there. Aid beyond this—in the form of school bus transportation, textbooks, or science equipment—is aid "to the educational process itself"<sup>496</sup> and falls within the constitutional ban. Medical care and hot lunches are "true welfare benefits," it is contended, needed by a child "whether he goes to a public school, to a parochial school, or to no school at all."<sup>497</sup> But school transportation and textbooks "are essential aids to the function of education as such . . . [and] cannot constitutionally be provided where the education is religious, since the function [aided] thus becomes religious education."<sup>498</sup>

<sup>493</sup> Kurland, *Politics and the Constitution: Federal Aid to Parochial Schools*, 1 *LAND & WATER L. REV.* 475, 491 (1966).

<sup>494</sup> See text accompanying notes 51-53 *supra*; Choper, *supra* note 4, at 406-07.

<sup>495</sup> Archer, *Protestants Reply: The Bishops Demand Subsidy*, *U.S. NEWS & WORLD REPORT*, Dec. 2, 1955, at 104, 105.

<sup>496</sup> Statement of Mr. Greenawalt, in Dorsen, *supra* note 33, at 44. See also Tockman, *The Constitutionality of Furnishing Publicly Financed Transportation to Private and Parochial School Students in Missouri*, 1963 *WASH. U.L.Q.* 455, 491-92, 505; 33 *CORNELL L.Q.* 128 (1947); Comment, *A Constitutional Analysis of the Wisconsin School Bus Law*, 1962 *WIS. L. REV.* 500, 516.

<sup>497</sup> L. PFEFFER, *supra* note 26, at 570.

<sup>498</sup> Rosenfield, *Separation of Church and State in the Public Schools*, 22 *U. PITT. L. REV.* 561, 580 (1961). This "which function is aided" theory seems first to have been developed at length by Cushman, *supra* note 185, at 348-49.

This rationale may be challenged on a number of grounds. First, it is inconsistent with a conclusion drawn by its own advocates. The public welfare-education distinction would invalidate all school medical, nurse and dental care and milk and hot lunch programs for parochial school students. Although such services may be needed by every child, these state and federal programs do not "go to pupils as minor citizens . . . [but rather] to them as school-children."<sup>499</sup> They are not provided to the unfortunately substantial number of school-age children not enrolled in any school,<sup>500</sup> nor to children absent from school, nor to any children on those days when schools are closed.<sup>501</sup> Similarly, this thesis would disqualify parochial school students from the benefit of such municipal services as school area traffic control devices<sup>502</sup>—including stationing traffic officers on school corners<sup>503</sup>—home instruction for those temporarily unable to attend school, the public library school bookmobile, school driver training,<sup>504</sup> reduced rates by a publicly owned system for pupils traveling to school or school activities,<sup>505</sup> and publicly sponsored educational television programs for classroom use.<sup>506</sup>

Conceding that "transportation, where it is needed, is as essential to education as any other element,"<sup>507</sup> this is equally true of medical care and hot lunches. Hot lunches in particular, we know today, are no less important for many children than, as Mr. Justice Rutledge said of transportation, "the very teaching in the classroom or payment of the teacher's sustenance. Many types of equipment, now considered essential, better could be done without."<sup>508</sup> Any distinction between them does not hold.<sup>509</sup>

But the more basic objection to distinguishing between medical care and school lunches, on the one hand, and bus transportation, science

<sup>499</sup> Williams, *Church-State Separation and Religion in the Schools of Our Democracy*, 51 RELIGIOUS EDUC. 369, 373 (1956), who states the converse as being the fact.

<sup>500</sup> In 1949, the National Education Association pointed out that there were then 4 million such children. 66 CHRISTIAN CENTURY 166 (1949) (editorial).

<sup>501</sup> For illustrative description, see T. POWELL, *THE SCHOOL BUS LAW 69-74* (1960).

<sup>502</sup> See *Rhoades v. School Dist.*, 424 Pa. 202, 211, 226 A.2d 53, 59, cert. denied, 389 U.S. 11 (1967).

<sup>503</sup> See 25 NOTRE DAME LAW. 367-68 (1950); 11 U. PITT. L. REV. 321 (1950).

<sup>504</sup> See R. DRINAN, *supra* note 50, at 138.

<sup>505</sup> See *id.* at 139.

<sup>506</sup> See 5 *Hearings on S. 370, supra* note 148, at 2538.

<sup>507</sup> *Everson v. Board of Educ.*, 330 U.S. 1, 47 (1947) (dissenting opinion of Rutledge, J.). Its cost has been estimated at "10 to 15 per cent of total school costs." *Christian and Public Schools: Some Specific Problems*, 40 PHI DELTA KAPPAN 302, 303 (1959).

<sup>508</sup> *Everson v. Board of Educ.*, 330 U.S. 1, 48 (1947) (dissenting opinion).

<sup>509</sup> See *Johnson, Religion and Public Education*, BULL. OF NAT'L ASS'N OF SECONDARY SCHOOL PRINCIPALS, April 1947, at 95, 97, suggesting that a lunch program should be viewed as direct aid to the school because "without it they would be forced by the competition of public schools to provide lunches at their own expense." See also Blum, *Religious Liberty and Bus Transportation*, 30 NOTRE DAME LAW. 384, 420 (1955).

equipment, and the like, on the other, is that all of these items fulfill independent primary secular purposes.<sup>510</sup> Even if they are all classified as essential to the educational function,<sup>511</sup> none has the primary effect of aiding religious education in violation of the establishment clause.<sup>512</sup> A child needs secular education "whether he goes to a public school, to a parochial school, or to no school at all"; secular education is a "true welfare benefit."<sup>513</sup>

The *Everson* dissenters found the bussing plan the same as furnishing "free carriage to those who attend a Church,"<sup>514</sup> or paying "the cost of transportation to Sunday school, to weekday special classes at the church or parish house, or to the meetings of various young people's religious societies."<sup>515</sup> State action of these sorts would obviously violate the

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<sup>510</sup> The *Everson* dissenters complained that the reimbursement of parents for bus transportation costs was in no way related to "the child's safety or expedition in transit," 330 U.S. at 20 (Jackson, J.), because riding on public busses was "subject to all the hazards and delays of the highway and the streets." 330 U.S. at 60 (Rutledge, J.). But the New Jersey plan assured that children would ride busses to school whereas without compensation they might walk, drive their own cars, or be transported by busy parents or friends. Surely, the state could find that public busses provided for greater safety than the first two, and it was reasonable to believe that it might be more secure than the last. That the parochial school or the religious education therein was also benefited should be of no constitutional consequence. See *Nichols v. Henry*, 301 Ky. 434, 443, 191 S.W.2d 930, 934-35 (1946).

Even if the motivating consideration or main effect was not protecting children from traffic hazards but rather relieving the hardship of distance, see *Board of Educ. v. Wheat*, 174 Md. 314, 326, 199 A. 628, 634 (1938) (dissenting opinion); L. PFEFFER, *supra* note 26, at 567, the primary purpose is no less secular. Perhaps "a child going to visit a neighbor or to a motion picture theatre is just as much subject to the hazards of the road as a child going to school," L. PFEFFER, *supra* note 26, at 566. See also Pfeffer, *supra* note 202, at 395-96. But see *LaNoue*, *supra* note 60, at 89. However, the fact that the state chooses only to safeguard the child going to school does not contradict its secular purpose. "The legislature may do what it can to accomplish what is deemed necessary for the public welfare, and stop short of those cases where the detriment to a few, not afforded state aid, is considered less important than the expense or inconvenience to the state which might result if the rule laid down were mathematically exact." *Matthews v. Quinton*, 362 P.2d 932, 957 (Alas. 1961) (dissenting opinion), *cert. denied*, 368 U.S. 517 (1962). See discussion in text accompanying notes 170-75 *supra*. Thus, the state may provide bus transportation for all school children, all poor school children, all school children who attend nonprofit schools (see discussion in text accompanying notes 170-75 *supra*. But see *Rhoades v. School Dist.*, 424 Pa. 202, 250, 226 A.2d 53, 85 (dissenting opinion), *cert. denied*, 389 U.S. 11 (1967)), or all nonpublic school children who live on existing public school bus routes. But see *Matthews v. Quinton*, 362 P.2d 932, 940 (Alas. 1961), *cert. denied*, 368 U.S. 517 (1962). Public undertaking of any of these programs, like public funding of all secular educational costs, serves a primary nonreligious purpose.

<sup>511</sup> See *Sherrard v. Jefferson County Bd. of Educ.*, 294 Ky. 469, 478, 171 S.W.2d 963, 967 (1943); *Gurney v. Ferguson*, 190 Okla. 254, 255, 122 P.2d 1002, 1004 (1942).

<sup>512</sup> See discussion in text accompanying note 498 *supra*.

<sup>513</sup> L. PFEFFER, *supra* note 497.

<sup>514</sup> 330 U.S. at 24 (Jackson, J.). See also Powell, *Public Rides to Private Schools*, 17 HARV. EDUC. REV. 73, 82 (1947).

<sup>515</sup> 330 U.S. at 47 (Rutledge, J.).

establishment clause. Although a secular purpose would be served (convenience of citizens, protection against traffic hazards), it would be accomplished by unconstitutionally singling out one religion or all religions for preferential advantage.<sup>516</sup>

Aid to all schools, or all school children, or all school children in nonprofit schools does not so discriminate. Such aid is as constitutionally nonpreferential as providing free carriage to all citizens or subsidizing all public transportation costs. Because these general programs have a primary secular purpose, they should not violate the establishment bar when the transportation happens to be used to get to church, to religious meetings, or to parochial schools. The programs are logically the same as all other municipal services afforded all property without classification reflecting its religious ownership.<sup>517</sup>

It appears both logically and pragmatically ironical to contend<sup>518</sup> that bus transportation for school children alone violates the establishment clause but that bus transportation for everybody, including school children, does not. The latter not only provides the same benefit to religious education as the former, but, unlike the former, it also subsidizes trips to Sunday school and church services.<sup>519</sup> These apparent inconsistencies disappear under a rationale that looks to whether the government service provided—transportation and textbooks, for example—serves a primary secular purpose.

### K. The "Who Controls" Test

Whether "it is the church (or church institution) or the state that performs or controls the performance of the services paid for by the state" has been submitted as the "ultimate test,"<sup>520</sup> under the establishment clause, for permitting public financial assistance to parochial education. Its basis is that "[i]t is reasonable to assume that services performed or controlled by a religious institution could and would be used to further the religious objectives of that institution, whereas services performed or controlled by a public body would be secular in purpose and form."<sup>521</sup> This thesis would permit "the transportation of school children

<sup>516</sup> See text accompanying notes 159-60 *supra*.

<sup>517</sup> State *ex rel.* Reynolds v. Nusbaum, 17 Wis. 2d 148, 157, 115 N.W.2d 761, 766 (1962). To say that, for religious property or activities, the establishment clause "forbids support, not protection from interference or destruction," Everson v. Board of Educ., 330 U.S. 1, 61 n.56 (1947) (dissenting opinion of Rutledge, J.), is effectively to urge an untenable distinction between sidewalks and fire protection.

<sup>518</sup> See discussion in text accompanying notes 495-98 *supra*.

<sup>519</sup> See LaNoue, *supra* note 60, at 89.

<sup>520</sup> Gordon, *supra* note 229, at 92.

<sup>521</sup> *Id.*

by a *public* bus,<sup>522</sup> despite the fact that this would be "ultimately beneficial to parochial school students and incidentally or indirectly of aid to the church institutions they attend."<sup>523</sup> But it would forbid the supplying of textbooks because "the use of texts in an educational context which is privately, rather than publicly, managed and administered directly serves a religious educational purpose."<sup>524</sup>

### 1. *General Criticism*

The principal difficulty with this proposal is in its basic assumption. It is possible that a parochial school will so structure its services as to further, exclusively or partially, its religious objectives. If so, as was discussed earlier,<sup>525</sup> such services cannot be supported by government to a greater extent than the value of the secular ends served. Further, it is clear beyond doubt that public schools may also so structure some of their services.<sup>526</sup> If so, the courts must intervene when called upon. And it is also manifest that services controlled by a religious institution frequently do in fact further society's nonreligious objectives.<sup>527</sup> If not, public financial support could not even be given to a religiously-affiliated hospital, a result apparently required by this thesis.

Transportation of parochial school children in a bus leased by the school would probably be described, under this approach, as a service "controlled" by the religious institution and thus the rental fee could not be paid by government.<sup>528</sup> But bus transportation would nonetheless have a secular purpose. Even religious instruction given during the bus ride would not affect the primary secular purpose of safety and convenience. And if the government closed its fire department and instead paid any

<sup>522</sup> *Id.*

<sup>523</sup> *Id.*

<sup>524</sup> *Id.* at 93.

<sup>525</sup> See text accompanying notes 200-80 *supra*.

<sup>526</sup> See, e.g., cases cited note 2 *supra*.

<sup>527</sup> The fact that a parochial school, in contrast to a public school, may have controlled admission policies and religious exercises and instruction to further its religious objectives, see G. LANOUE, *supra* note 56, at 29-30, should not affect the result. See discussion in text accompanying notes 375-77, 436-39 *supra*. To say that a school may not serve a public purpose or function because of these factors, see G. LANOUE, *supra* note 56 at 34-35, is a misleading use of the word "public." Government is not restricted to supporting only activities that are "open to the public." It may finance action for a secular or public purpose even though undertaken by an institution not subject to public management or to the constitutional responsibilities of the state itself. See note 436 *supra*; Herberg, in RELIGION AND FREEDOM 13 (D. McDonald ed. 1958). May a person, wholly supported by public welfare be forbidden to discriminate racially in the purchase of necessary food and services?

<sup>528</sup> Query, under this approach, if a publicly financed program of hot lunches, taken in the parochial school building, is a service controlled by church or state, especially if a school-directed blessing precedes and concludes it.

private fire protection agency selected by the parochial school, the establishment clause should not invalidate this action.<sup>529</sup>

The "who controls" approach has also been applied to library books. Mr. LaNoue argues that a constitutional distinction should be drawn between housing books in a parochial school library on "indefinite" or "permanent" loan<sup>530</sup> and having books "housed in public buildings" being "removed . . . only for the period necessary for reasonable educational use . . . for a textbook one semester or one year."<sup>531</sup> But the purpose of either alternative is plainly secular; the "control" exerted over the books by the parochial school seems essentially the same;<sup>532</sup> the public cost of each program appears identical, as does the benefit to the child and his school. This should not be the stuff of which constitutional distinctions are made.

He asserts that "since the books will not be centrally catalogued, students and teachers from other schools will be unable to borrow the public materials."<sup>533</sup> True. But so long as the primary purpose is secular and parochial schools are not given preference over other schools similarly situated, the fact should be of no constitutional significance.

## 2. Shared Time

Proponents of the "who controls" rationale would permit public financing of shared time or dual enrollment programs<sup>534</sup> in which parochial school pupils take part of their course work in the public schools.<sup>535</sup> Yet, not only would they bar use of these funds to pay for secular services of parochial schools, they would also invoke the establishment clause to

<sup>529</sup> *But see* Gordon, *supra* note 229, at 92.

<sup>530</sup> LaNoue, *The Title II Trap*, 47 *PEI DELTA KAPPAN* 558, 561 (1966).

<sup>531</sup> *Id.* at 562. Mr. Pfeffer would distinguish constitutionally between public library books lent to parochial pupils for up to two weeks and those lent for six months. The latter is "in effect taking that book out of the public domain and putting it into private domain." 2 *Hearings on H.R. 2361*, *supra* note 35, at 1631. But, contrary to his analogy, if adequate books are provided for all to borrow on a six month basis, this is not the same as a religious group appropriating a public park for six months. See also text accompanying note 532 *infra*, and following note 533 *infra*.

<sup>532</sup> Mr. Pfeffer would find a constitutional difference between public library loans to parochial school students of books, records and magnetic tapes, on the one hand, and equipment for playing the records and tapes, on the other. 2 *Hearings on H.R. 2361*, *supra* note 35, at 1619. This surely is irrelevant in terms of "who controls." It would seem, under that theory, that libraries would be barred from any loans to parochial school students for school use.

<sup>533</sup> LaNoue, *supra* note 530.

<sup>534</sup> *See* G. LANOUE, *supra* note 56, at 43-44; L. PFEFFER, *supra* note 26, at 578-79. *See also* Note, 65 *MICH. L. REV.* 1224, 1231 (1967). *But see* American Civil Liberties Union, Position on Shared Time, Apr. 4, 1965.

<sup>535</sup> For discussion of rulings under state constitutions, *see* Katz, *Note on the Constitutionality of Shared Time*, 1964 *RELIGION & PUB. ORDER* 85, 89-94 (D. Giannella ed.).

forbid public school instructors teaching courses in the parochial schools themselves.<sup>536</sup> Therefore, the very same public school teacher who taught, say, a section of a course in home economics or geography to a class including parochial school students, as part of a shared time program in the public school, could not teach the same course at the parochial school at what might very well be the same total public expense. Nor would it appear that a publicly hired speech therapy<sup>537</sup> or driver training<sup>538</sup> teacher could instruct parochial pupils at the church-affiliated school.<sup>539</sup> Of course, these results would not obtain under the establishment clause approach suggested in this article.<sup>540</sup>

(a) *Parochial School Representation.*—The fact that a parochial school representative may participate with public school officials in the planning and administration of shared time programs<sup>541</sup> has been condemned under the establishment clause.<sup>542</sup> But this is not the type of religious participation in the affairs of government<sup>543</sup> that must be thwarted. If the participant seeks to inject religion into the shared time curriculum, he may not do so. But if his participation is addressed to secular educa-

<sup>536</sup> 2 *Hearings on H.R. 2361*, *supra* note 35, at 1618 (testimony of Leo Pfeffer).

<sup>537</sup> See *Special Dist. v. Wheeler*, 408 S.W.2d 60 (Mo. 1966). Under the Elementary and Secondary Education Act of 1965, public school personnel are providing remedial instruction in mathematics and reading on parochial school premises. The question is raised in *Polier v. Board of Educ.*, a pending case described in *American Jewish Congress*, *supra* note 6, at 4. The National Defense Education Act of 1958 finances state plans for academic testing of nonpublic school students. 20 U.S.C. §§ 483(a)(1), 484(b) (1965). Apparently this could be done by public personnel in parochial schools. See generally, 1 *Hearings on S. 370*, *supra* note 148, at 471-72.

<sup>538</sup> But see 2 *Hearings on H.R. 2361*, *supra* note 35, at 815.

<sup>539</sup> Query as to extension of home teaching services to physically handicapped children who will return to parochial schools. See *Scales v. Board of Educ.*, 41 Misc. 2d 391, 245 N.Y.S.2d 449 (Sup. Ct. 1963).

<sup>540</sup> Professor Kurland suggests that shared time programs "have no rationale except benefit for church schools," (*supra* note 493, at 494. See also *Burton, Public Funds for Public Schools Only*, 78 *CHRISTIAN CENTURY* 415, 417 (1961)) and therefore violate the first amendment. But, while seemingly judging legislative "motive," see text accompanying notes 103-04 *supra*, this disregards the clear effect of these programs which seek broader distribution of public funds to the goal of an improved secular education for all. If only parochial school students could participate, the issue would be different. See text at notes 159-60 *supra*. The dual enrollment provision in Title I of the Elementary and Secondary Education Act of 1965 requires participation "of educationally deprived children . . . who are enrolled in private elementary and secondary schools" 20 U.S.C. § 241e(a)(2) (Supp. I, 1965) (emphasis added).

<sup>541</sup> See Elementary and Secondary Education Act of 1965, 20 U.S.C. § 844(a) (Supp. I, 1965).

<sup>542</sup> 1 *Hearings on H.R. 13160 and H.R. 13161 Before the General Subcomm. on Education of the House Comm. on Education and Labor*, 89th Cong., 2d Sess., at 340 (1966); 2 *Hearings on H.R. 2361*, *supra* note 35, at 1610-11; Note, *supra* note 435, at 316.

<sup>543</sup> See note 490 *supra*.

tional concerns, no establishment issue should arise. Surely, a meeting of government officials and community leaders to discuss publicly funded programs for riot prevention may constitutionally include church representatives, who may suggest a secular role that their institutions might play.

(b) *Preference to Catholicism.*—Especially in respect to shared time,<sup>544</sup> it has been alleged that public financial aid to parochial schools is in fact preferential aid to Roman Catholicism because that religion is the principal one engaged in the field of education<sup>545</sup> whereas other denominations emphasize different endeavors.<sup>546</sup> But numerous civil regulations for secular purposes affect the interests of different religious groups disproportionately—obvious examples being laws requiring Sunday closing, enforcing monogamy, and prohibiting usury.<sup>547</sup> So long as the state's purpose and primary effect is nonreligious, the establishment ban should be held satisfied.

#### L. Higher Education Distinguished

It is frequently asserted that aid to church-related colleges and universities is constitutionally distinguishable from aid to elementary and secondary parochial schools.<sup>548</sup> The principal reason advanced is that college attendance is voluntary,<sup>549</sup> whereas public support of parochial schools is support of coerced religious instruction.<sup>550</sup> There is little doubt that, if children are assigned by public authority—that is, coerced—to attend what is in effect a parochial school, their first amendment rights of religious liberty have been breached, whatever their religious faith. Public support of the school under those circumstances merely compounds the evil.<sup>551</sup> But, in the usual case, government compulsory education laws coerce no child to attend a parochial school, and public aid to both public and parochial schools “would not make attendance at either

<sup>544</sup> See Archer, *The Truth about Shared Time*, EDUC. DIG., Nov. 1966, at 10, 12.

<sup>545</sup> A recent estimate placed 5½ to 6 million children in Catholic schools; 310,000 in Protestant schools (mostly Lutheran, also Seventh Day Adventist, Reformed Church and Mennonite); 50,000 in Jewish day schools. L. PFEFFER, *supra* note 26, at 509-10.

<sup>546</sup> Kelley, *supra* note 223, at 78.

<sup>547</sup> See *McGowan v. Maryland*, 366 U.S. 420, 462 (1961) (concurring opinion of Frankfurter, J.).

<sup>548</sup> See generally Giannella, *supra* note 199, at 581-90.

<sup>549</sup> See U.S. Dep't of Health, Education & Welfare, *supra* note 20, at 377-78; National Catholic Welfare Conference, *supra* note 37, at 450.

<sup>550</sup> The argument is articulated by P. KAUPER, *supra* note 5, at 115.

<sup>551</sup> Such was the case in *Millard v. Board of Educ.*, 121 Ill. 297, 10 N.E. 669 (1887); *Knowlton v. Baumhover*, 182 Ia. 691, 166 N.W. 202 (1918); *Harfst v. Hoegen*, 349 Mo. 808, 163 S.W.2d 609 (1942); *State ex rel. Pub. School Dist. v. Taylor*, 122 Neb. 454, 240 N.W. 573 (1932); cf. *Berghorn v. Reorganized School Dist.*, 364 Mo. 121, 260 S.W.2d 573 (1953); *Moore v. Board of Educ.*, 4 Ohio Misc. 257, 212 N.E.2d 833 (1965).

type of institution any more or less compulsory.<sup>552</sup> For both higher and lower levels of education, a public purpose is achieved if the amount of governmental financial assistance does not exceed the value of the secular educational service rendered.<sup>553</sup>

The further argument is made that, since a much higher percentage of students is enrolled in private colleges than in private elementary and secondary schools, the national interest in affording the former financial assistance is much stronger.<sup>554</sup> But, again, a secular purpose would be served in both instances.<sup>555</sup> Finally, there are two responses to the argument that "church colleges are not in the business of religious indoctrination, unlike church grammar and high schools."<sup>556</sup> First, it may be contradicted by the facts: "[I]n many church-related colleges, religion is just as central a part of the educational program and objectives as it is in parochial schools."<sup>557</sup> Second, as has already been shown, the "permeation" issue should not act as a complete bar to aid.<sup>558</sup>

## VI

### EXISTING FEDERAL PROGRAMS

It has recently been calculated that at present there are more than one hundred federal programs allocating property or funds worth billions of dollars to religiously-affiliated institutions, the Department of Health, Education, and Welfare alone aiding close to two thousand church-connected educational agencies.<sup>559</sup> Those programs involving the transfer of commodities or equipment for the achievement of specific secular goals, clearly fall within the class of permissibility under the establishment

<sup>552</sup> S. Doc. No. 29, 87th Cong., 1st Sess. 69 (1961) (Senator Keating).

<sup>553</sup> See *State ex rel. Johnson v. Boyd*, 217 Ind. 348, 28 N.E.2d 256 (1940). Cf. *Wright v. School Dist.*, 151 Kan. 485, 99 P.2d 737 (1940), where it is obvious that the public aid exceeded the secular value.

<sup>554</sup> U.S. Dep't of Health, Education & Welfare, *supra* note 20, at 379.

<sup>555</sup> Former Senator Keating has pointed out that "it is about as unrealistic to plan a comprehensive aid-to-education bill at the elementary school level which isolates" the "more than 5 million children" attending sectarian schools "as it would be to plan an aid to higher education which ignored . . . students attending sectarian colleges." S. Doc. No. 29, *supra* note 552, at 69. Professor Kauper has noted that the "enrollment" argument "will be weakened as time goes on, since more and more public institutions will have to assume the lion's share of meeting increased demands for college education." P. KAUPER, *supra* note 5, at 115.

<sup>556</sup> Note, 61 Nw. U.L. Rev. 777, 787 (1967). See also U.S. Dep't of Health, Education & Welfare, *supra* note 20, at 380.

<sup>557</sup> Kauper, *supra* note 35, at 37.

<sup>558</sup> The distinction between colleges on the one hand and grammar and high schools on the other may be relevant under state constitutional provisions. See *In re Opinion of the Justices*, 214 Mass. 599, 601, 102 N.E. 464, 465 (1913).

<sup>559</sup> See Ervin, *Mrs. Frothingham and Federal Aid to Church Schools*, 43 N.D.L. Rev. 691, 692-93 (1967).

clause approach proposed herein, as do others affording direct grants for research of a designated nonreligious nature<sup>560</sup> and for training personnel for these purposes.<sup>561</sup> Taxpayers' dollars are plainly not being used for religious purposes. Nor are they so being utilized when public funds are appropriated for the construction or purchase of facilities or property that will be employed for strictly secular purposes<sup>562</sup> or for the establishment of special programs for the achievement of public ends.<sup>563</sup>

Somewhat more suspect, at least in principle, are those plans that grant money to church-affiliated educational institutions for part-time employment assistance to students.<sup>564</sup> It is possible under such programs that public funds will be employed for strictly religious purposes—for example, to pay a student assistant in a religious indoctrination course. But the statutory scheme may protect against this,<sup>565</sup> and even if it does not, it is highly unlikely, given present realities and those of the foreseeable future in respect to the quantum of public financial assistance, that any establishment clause issue would arise under the proposed rationale.<sup>566</sup>

A substantial number of current federal programs pay tuition grants to deserving students.<sup>567</sup> The possible dangers inherent in this form of government monetary assistance have already been discussed.<sup>568</sup> But,

<sup>560</sup> See, e.g., 16 U.S.C. §§ 581, 581a (1964) (agriculture and forestry); 42 U.S.C. §§ 1891-93 (1964) (science and national defense); 42 U.S.C. §§ 702(b), 712(b), 726, 729a (1964) (child and maternal welfare); 42 U.S.C. § 241 (1964) (health); 42 U.S.C. § 1310 (1964) (public welfare and social security); 42 U.S.C. § 1857 (1964) (air pollution); 20 U.S.C. §§ 331-32 (1964) (education); 42 U.S.C. § 712 (1964) (crippled children); 42 U.S.C. §§ 2542-44 (1964) (juvenile delinquency); 20 U.S.C. 512 (1964) (foreign languages); 20 U.S.C. § 542 (1964) (communications media for educational services); 20 U.S.C. § 35c(c) (1964) (vocational education); 29 U.S.C. § 34 (1964) (rehabilitative medicine); 42 U.S.C. § 2473(b)(5) (1964) (aeronautics and space).

<sup>561</sup> See, e.g., 10 U.S.C. § 4382 (1964) (ROTC); 42 U.S.C. §§ 2801-07 (1964) (teachers of illiterates); 42 U.S.C. § 242(d) (1964) (nurses); 42 U.S.C. §§ 282-83 (1964) (cancer control); 20 U.S.C. §§ 1031-34 (1964) (library science); 20 U.S.C. § 611 (teachers of physically handicapped).

<sup>562</sup> See, e.g., 42 U.S.C. §§ 292-93 (1964) (medical training); 20 U.S.C. §§ 701-33 (Supp. I, 1965) (construction of higher education facilities).

<sup>563</sup> See, e.g., 42 U.S.C. § 2000b (1964) (racial desegregation in education).

<sup>564</sup> See, e.g., Economic Opportunity Act of 1964, 42 U.S.C. §§ 2751-56 (1964) (work-study).

<sup>565</sup> 42 U.S.C. § 2754(a) (1964) provides "that no such work shall involve the construction, operation, or maintenance of so much of any facility used or to be used for sectarian instruction or as a place for religious worship."

<sup>566</sup> See text following note 251 *supra*.

<sup>567</sup> See, e.g., 20 U.S.C. §§ 1061-69 (Supp. I, 1965) (needy students in higher education); 20 U.S.C. § 511(b) (1964) (modern foreign languages); 20 U.S.C. § 464 (1964) (national defense). See also the "Delaney proposal," H.R. 9803, 87th Cong. 2d Sess. (1962) (\$20 annually for each elementary and secondary school child); the "Church proposal," H.R. 4978 & H.R. 340, 87th Cong., 1st Sess. (1961) (tax benefits for parents of all students).

<sup>568</sup> See discussion in text accompanying notes 379-87 *supra*.

again, as a practical matter, there should be no real nonestablishment problems.<sup>569</sup> In conclusion, whatever the eventual judicial decision concerning the constitutionality of parochial school aid, the federal legislature has long given implicit recognition to its administrative viability, in respect to the rule proposed herein.

#### CONCLUSION

This article has attempted to serve several purposes. One has been to explore the broad scope of the first amendment's mandate that "Congress shall make no law respecting an establishment of religion," from both a traditional and normative perspective, accounting for both historical and contemporary goals. As a rationale for the constitutional adjudication of issues arising under the establishment clause, it suggests that a distinction be drawn between state action for religious and secular purposes and that the first amendment was designed to safeguard personal religious liberty by preventing the government from coercing religious belief and from taxing for religious purposes. The recommended approach is advanced, however, only as a point of departure. It does not mechanically produce answers, nor is it intended to articulate a "completely coherent system applicable across the board."<sup>570</sup> Further, it demands a delicate judicial judgment in close cases, although it would seem that the really difficult applications are more frequently created by imaginative hypotheticals than by the authentic dynamics of government action.

The article's second major purpose has been to propose a constitutional rule for the thorny political issue of governmental financial assistance to parochial education. Specifically, the rule advises that governmental aid to parochial schools is constitutional to the extent that it does not exceed the value of their secular services. Whatever the incidental benefits to religious institutions, the establishment clause should be satisfied by ensuring that government receive secular returns from those institutions commensurate with its financial expenditure.

It is easier to describe briefly what tasks have deliberately been omitted. No reconciliation of the pertinent state, federal, or Supreme Court decisions has been attempted. No prediction as to the outcome of

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<sup>569</sup> More substantial issues have been presented by the Ordinances for the Northwest and Southwest territories which set aside land grants for the support of religious education and by 18th and 19th century congressional support of religious education of Indians by Christian missionaries. See Costanzo, *Federal Aid to Education and Religious Liberty*, 36 U. DET. L.J. 1, 34 (1958). See also 16 U.S.C. § 479 (1964), authorizing a group of persons residing in the vicinity of national forests to use forest land for the erection of a church. The primary effect of these programs would appear to be the employment of tax funds for religious purposes.

<sup>570</sup> Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 STAN. L. REV. 169, 190 (1968).

Supreme Court decisions in relevant present and future litigation has been advanced. I have not endeavored to make a carefully balanced appraisal, on the basis of my own likes or dislikes or those of others, of what is a desirable, feasible or politic legislative course.<sup>571</sup>

If the constitutional rationale advocated will sustain enactments thought unwise by some, they must be reminded that it does not command results thought abhorrent by others. For the Court to decide that some parochial school aid may be constitutional does not preclude the legislature from finding that it is unwise or improper. The realm of what is sound and just in this highly complex and emotionally charged area should remain open for informed debate and expedient resolution so long as the basic underlying freedom guarded by the establishment clause is preserved.

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<sup>571</sup> See *Oaks*, *supra* note 5, at 8.