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Public Support and the Sectarian University

Cover Page Footnote

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PUBLIC SUPPORT AND THE SECTARIAN UNIVERSITY

WALTER GELLHORN* AND R. KENT GREENAWALT**

In mid-1968 we undertook to advise Fordham University concerning steps that might be appropriate to establish its eligibility for public assistance. As part of that task we tried to determine the extent to which present law requires official differentiation between Church-related and other institutions of higher learning. Since the University sought a wholly detached consideration of its legal posture, our conclusions in this article represent our best judgment of the present state of the law and its probable development. We have avoided indicating our own personal position on debatable legal and ethical issues.

I. THE FEDERAL CONSTITUTION

ALL federal and state grants and loans must comply with the first amendment to the Constitution of the United States.¹ The amendment, which sets the outer limits of permissible aid at both levels²

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1. As originally written, the amendment limited only the federal government. See *Barron v. Baltimore*, 32 U.S. (7 Pet.) 243 (1833). The Supreme Court has held that it was made applicable against the states by the fourteenth amendment, which forbids state deprivations of "life, liberty, or property, without due process of law." See *Everson v. Board of Educ.*, 330 U.S. 1 (1947); *Cantwell v. Connecticut*, 310 U.S. 296 (1940). Although the extension of the establishment clause to the states occurred only two decades ago and has been challenged by some critics, see E. Corwin, *A Constitution of Powers in a Secular State* 109-18 (1951); W. Parsons, *The First Freedom* 69-73 (1948), these critics have yet to win over a single Justice, and the applicability to the states of both the establishment and free exercise clauses is firmly established. See *Abington School Dist. v. Schempp*, 374 U.S. 203, 215-17, 253-58, 310 (1963); L. Pfeffer, *Church, State, and Freedom* 139-49 (rev. ed. 1967).

2. Until 1968, the enforceability of the theoretical limits on federal expenditures was uncertain. The problem was finding someone with standing to bring suit against dubious grants. In *Frothingham v. Mellon*, 262 U.S. 447 (1923), the Supreme Court had held that a federal taxpayer did not have a sufficiently direct or immediate interest to justify his challenging the legality of the ways in which Congress has chosen to use his taxes. Under this doctrine, Congress might spend money in violation of the Constitution without the possibility of juridical scrutiny. See Jones, *Church-State Relations: Our Constitutional Heritage*, in *Religion and Contemporary Society* 156, 197 (H. Stahmer ed. 1963). See generally K. Davis, *Administrative Law Treatise* §§ 22.09, 22.10 (1958); L. Jaffe, *Judicial Control of Administrative Action* 459-500 (1965); Comment, *Taxpayers' Suits: A Survey and Summary*, 69 *Yale L.J.* 895 (1960). But in 1968 the Court sharply restricted the principle of the *Frothingham* case, when a taxpayer challenged expenditures for parochial school students under the *Elementary and Secondary Education Act of 1965*, 20 U.S.C.

of government, is, like most parts of the Constitution, cryptic: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." "Obviously this language gives no plain directive about the permissibility of aid to sectarian colleges and universities. Nor does the history of the amendment's adoption shed light on the matter, though opinions have sometimes been written as though the intent of the framers was unmistakable.⁴ The religion clauses of the first amendment were cast in such general terms that, inevitably, their content has been marked out for the most part in the decisions of courts, and particularly the Supreme Court. The court's efforts to elucidate the first amendment have themselves lacked lucidity or even continuity of attitude. As one commentator has said: "Legal doctrine on church-state relations is unclear. This topic has remained more confused than any other major aspect of American public law, not excluding commerce, desegregation, reapportionment, civil liberties, or even due process. In the handful of leading cases which have arisen from strikingly different visions of the role of religion in American society the Court has failed to demonstrate a consistent line of development."⁵

The Supreme Court has fully considered the validity of aid to parochial education under the first amendment in only two cases, *Everson v. Board of Education*⁶ and *Board of Education v. Allen*.⁷ Neither case

§§ 241a et seq., 821 et seq. (Supp. IV, 1969). *Flast v. Cohen*, 392 U.S. 83 (1968), decided that a federal taxpayer may attack what is essentially a spending program if he claims that the program violates a specific constitutional limitation upon spending, such as the establishment clause of the first amendment, rather than merely the distribution of powers between state and federal authorities, as was the case in *Frothingham*. Taxpayers' suits had long provided a convenient vehicle for establishment clause claims against spending in many states. See, e.g., *Everson v. Board of Educ.*, 330 U.S. 1 (1947); *Horace Mann League v. Board of Pub. Works*, 242 Md. 645, 220 A.2d 51, appeal dismissed and cert. denied, 385 U.S. 97 (1966). *Flast v. Cohen* indicates that they will now be equally effective at the federal level. For a possible effect of *Flast* on New York's restrictive rule on taxpayers' suits, see note 166 *infra*.

3. U.S. Const. amend. I.

4. See, e.g., *Everson v. Board of Educ.*, 330 U.S. 1, 8-15, 33-43 (1947). But see C. Antieau, A. Downey & E. Roberts, *Freedom from Federal Establishment* (1964); M. Howe, *The Garden and the Wilderness* 1-31 (1965).

5. Dixon, *Religion, Schools, and the Open Society: A Socio-Constitutional Issue*, 13 J. of Pub. L. 267, 288 (1964).

6. 330 U.S. 1 (1947).

7. 392 U.S. 236 (1968). The Court has on occasion dismissed appeals from decisions of state courts, e.g., *Snyder v. Town of Newtown*, 365 U.S. 299 (1961). Technically dismissals for "want of a substantial federal question," unlike discretionary denials of certiorari, are decisions on the merits; but the Court has on occasion dismissed cases it does not wish to hear as well as those it believes were correctly decided below. Philip Kurland has called

involved an institution of higher learning, the Court was divided in both, and in both the majority opinions are subject to varying interpretations. Thus, they provide no sure guide to the future. In this area more than most, the complexity of the issues and the multiplicity of possible directions in which the law may develop make predictions hazardous. Because judicial attitudes are still not fully formed, the extensive commentaries of scholars merit analysis along with the few decided cases themselves.

We start our analysis with a description of four cases—the *Everson* and *Allen* cases mentioned above, *Abington School District v. Schempp*,⁸ the so-called school prayer case, which apparently represents an important shift in the Court's doctrinal treatment of the establishment clause, and *Horace Mann League v. Board of Public Works*,⁹ a Maryland case in which aid to sectarian colleges was challenged. We then consider the spectrum of possible interpretations of the establishment clause and conclude with our own suggestions about the likely future development of the law.

A. The Cases

1. *Everson v. Board of Education*¹⁰

In 1947 the Supreme Court first tested a state program against the establishment clause. Under New Jersey law the board of education in each school district could decide to pay for the transportation of children to nonprofit private as well as to public schools. In the district in which plaintiff was a taxpayer, the board authorized payment for transportation to Catholic schools. Since the record contained no evidence that other children attended non-Catholic private schools, and did not receive transportation, the majority of the Court treated the case as if transportation were offered to all schoolchildren. By a 5-4 vote the Court sustained the board's action. After an analysis of the intent of the framers of the establishment clause, Justice Black, in one of the most famous passages in church-state literature, wrote for the majority:

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

a ruling that an issue is not a substantial federal question "technical language for saying 'don't bother us.'" Kurland, *Politics and the Constitution: Federal Aid to Parochial Schools*, 1 *Land and Water L. Rev.* 475, 476 (1966). See A. Bickel, *The Least Dangerous Branch* 126-27 (1962); Gunther, *The Subtle Vices of the "Passive Virtues"—A Comment on Principle and Expediency in Judicial Review*, 64 *Colum. L. Rev.* 1, 10-13 (1964).

8. 374 U.S. 203 (1963).

9. 242 Md. 645, 220 A.2d 51, appeal dismissed and cert. denied, 385 U.S. 97 (1966).

10. 330 U.S. 1 (1947).

Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. *No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.* Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."¹¹

Nonetheless, the Court did not bar the provision of bus transportation. "[W]e must not strike [a] state statute down if it is within the State's constitutional power even though it approaches the verge of that power."¹² Although the state cannot support religion, neither can it inhibit the free exercise of religion.

Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation. While we do not mean to intimate that a state could not provide transportation only to children attending public schools, we must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief.¹³

In the majority's view, providing bus fares, though it helped children attend religious schools, was analogous to general governmental services, like police and fire protection and connections for sewage disposal, which are obviously not forbidden to parochial schools and school children by the first amendment.

That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. . . .

. . . The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools.¹⁴

Justice Jackson in his dissenting opinion emphasized the importance for the Catholic Church of parochial education and its religious purpose. He considered the bus subsidy a form of aid, and found inapposite Justice Black's allusion to general governmental services. In a lengthy dissent, Justice Rutledge, joined by three other Justices, including Justice Jackson, wrote:

11. *Id.* at 15-16 (emphasis added).

12. *Id.* at 16.

13. *Id.*

14. *Id.* at 18.

The prohibition broadly forbids state support, financial or other, of religion in any guise, form or degree. It outlaws all use of public funds for religious purposes.¹⁵ Payment of transportation is no more, nor is it any less essential to education, whether religious or secular, than payment for tuitions, for teachers' salaries, for buildings, equipment and necessary materials. Nor is it any the less directly related, in a school giving religious instruction, to the primary religious objective all those essential items of cost are intended to achieve. No rational line can be drawn between payment for such larger, but not more necessary, items and payment for transportation.¹⁶

Until 1968, *Everson* was the only Supreme Court case dealing with aid to sectarian education under the first amendment, and discussions of relevant issues have frequently taken the form of argument over what *Everson* "really" stands for. Though the holding of the case is permissive of aid, the language of all three opinions is restrictive. So much of this has been quoted because there is such divergence over its significance.

2. *Abington School District v. Schempp*¹⁷

In 1963, the Supreme Court held Bible reading in the public schools unconstitutional. The result, however, was hardly startling, since the Court had previously struck down recitation of a state-authorized non-denominational prayer in *Engel v. Vitale*.¹⁸ The interest of the case lies in the Court's effort to rectify the limited amount of theoretical analysis in the *Engel* opinion.¹⁹ What emerges from the 116 pages of opinions is a strong emphasis on the concept of "neutrality" and a test of constitutionality under the first amendment apparently more hospitable toward aid to sectarian schools than the *Everson* dicta, though *Everson* itself is cited as authority for the test.

Discussing the interrelationship and overlap between the free exercise and establishment clauses, the majority opinion, per Justice Clark, emphasized that the government's role under these clauses is to be "neutral" toward religion.

The test may be stated as follows: what are the purpose and the 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

15. *Id.* at 33 (Rutledge, J., dissenting).

16. *Id.* at 48.

17. 374 U.S. 203 (1963).

18. 370 U.S. 421 (1962).

19. That decision enjoyed widespread unpopularity. One of the reasons was that the concurring opinion of Justice Douglas cast doubt on the validity of many practices not touched on by the majority, including the role of chaplains in the armed forces, grants of money to religious hospitals, and tax exemptions for religious institutions. *Id.* at 437 n.1. Justice Douglas regretted his vote with the majority in *Everson* which "seems in retrospect to be out of line with the First Amendment. . . . Mr. Justice Rutledge stated in dissent what I think is durable First Amendment philosophy . . ." *Id.* at 443.

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.²⁰

Since the primary purpose and effect of the challenged Bible reading was religious, the practice was impermissible. In an extensive concurring opinion in which he also stressed "neutrality" and the conjunction of the two religion clauses, Justice Brennan stated:

What the Framers meant to foreclose, and what our decisions under the Establishment Clause have forbidden, are those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends, where secular means would suffice.²¹

In discussing tax exemptions available to religious institutions, Justice Brennan commented: "If religious institutions benefit, it is in spite of rather than because of their religious character. For religious institutions simply share benefits which government makes generally available to educational, charitable, and eleemosynary groups."²² In a brief concurring opinion joined by Justice Harlan, Justice Goldberg made this general observation:

It is said, and I agree, that the attitude of government toward religion must be one of neutrality. But untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it.²³

The "purpose and primary effect" criterion of *Schempp* was not wholly novel. It had been utilized before in cases sustaining Sunday Closing Laws against claims under both the establishment and the free exercise clauses.²⁴ Specifically in answer to the assertion that these laws infringed the religious liberty of Sabbatarians, Chief Justice Warren wrote, in a plurality opinion, that a general law might be valid despite an indirect burden on religious observance if its "purpose and effect" is to advance the state's secular goals.²⁵ The theoretical significance of *Schempp* is its implication that "purpose and primary effect" may be an all-encompassing test for establishment clause cases. Still, the case did concern

20. 374 U.S. at 222.

21. *Id.* at 294-95 (Brennan, J., concurring).

22. *Id.* at 301 (footnote omitted).

23. *Id.* at 306 (Goldberg, J., concurring).

24. *McGowan v. Maryland*, 366 U.S. 420 (1961); *Braunfeld v. Brown*, 366 U.S. 599 (1961).

25. *Braunfeld v. Brown*, 366 U.S. 599, 607 (1961).

Bible reading in public schools, an issue quite different from financial aid to parochial schools, and it is hazardous to apply language directed at one kind of problem to the solution of another. Moreover, the central terms of the standard contain considerable ambiguity.

3. *Board of Education v. Allen*²⁶

In June of 1968 the Court confirmed the intimations of *Schempp* and exhibited an even more permissive attitude toward aid than it had in *Everson*. The case concerned a textbook law in New York,²⁷ under which local school boards are required to purchase textbooks for loan without charge to students in any public or private school that complies with the compulsory education law. The textbooks for use in private schools must be books that are required for courses in those schools and are either books designated for public school use or approved by the boards of education or other school authorities. By a 6-3 vote, the Court upheld the law. In his relatively brief opinion for the majority, Justice White invoked the *Schempp* rule. That is to say, he considered whether providing textbooks for parochial school children was in furtherance of a "secular legislative purpose" and has a primary effect that neither advances nor inhibits religion. The New York Legislature, he noted, had expressly said that it sought only to further the educational opportunities of children. Those who now attacked the law's validity, he added, "have shown us nothing about the necessary effects of the statute that is contrary to its stated purpose. The law merely makes available to all children the benefits of a general program to lend school books free of charge. Books are furnished at the request of the pupil and ownership remains, at least technically, in the State. Thus no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools."²⁸

Justice White conceded that providing textbooks free of charge might possibly encourage attendance at a sectarian school. But he regarded that as of little significance, remarking that "that was true of the state-paid bus fares in *Everson* and does not alone demonstrate an unconstitutional degree of support for a religious institution."²⁹

As for the books that were to be bought with public funds, the opinion noted that they must be approved by the public school authorities and that "only secular books may receive approval."³⁰ Books—unlike

26. 392 U.S. 236 (1968).

27. N.Y. Educ. Law § 701 (1969).

28. 392 U.S. at 243-44 (footnote omitted).

29. *Id.* at 244.

30. *Id.* at 245.

the bus transportation involved in the earlier Supreme Court case—are concededly “critical to the teaching process;” but sectarian schools are not engaged solely in teaching religion, for, as “this Court has long recognized,” they “pursue two goals, religious instruction and secular education.”³¹

Justice White’s opinion continued with the following comments concerning the educational contributions made by institutions outside the public school system:

Underlying [earlier] cases, and underlying also the legislative judgments that have preceded the court decisions, has been a recognition that private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience. Americans care about the quality of the secular education available to their children. . . . Considering this attitude, the continued willingness to rely on private school systems, including parochial systems, strongly suggests that a wide segment of informed opinion, legislative and otherwise, has found that those schools do an acceptable job of providing secular education to their students. This judgment is further evidence that parochial schools are performing, in addition to their sectarian function, the task of secular education.

Against this background of judgment and experience, unchallenged in the meager record before us in this case, we cannot agree with appellants either that all teaching in a sectarian school is religious or that the processes of secular and religious training are so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion. This case comes to us after summary judgment entered on the pleadings. Nothing in this record supports the proposition that all textbooks, whether they deal with mathematics, physics, foreign languages, history, or literature, are used by the parochial schools to teach religion.³²

Concurring, Justice Harlan expressed his belief that the religious clauses of the first amendment do not forbid governmental activity aimed at achieving a permissible non-religious purpose, so long as “the activity does not involve the State ‘so significantly and directly in the realm of the sectarian as to give rise to . . . divisive influences and inhibitions of freedom’”³³

Two of the three dissenting judges, Justices Black and Douglas, are the only members of the *Everson* court still on the bench. Justice Black, the author of the prevailing opinion in *Everson*, contended that neither that nor any other opinion of the Court supported the present holding. Upholding a state’s power to pay for schoolchildren’s transportation, he maintained, “cannot provide support for the validity of a state law using tax-raised funds to buy school books for a religious school.”³⁴ In a sectarian school, he contended, even the books that relate to secular

31. *Id.*

32. *Id.* at 247-48 (footnote omitted).

33. *Id.* at 249 (Harlan, J., concurring).

34. *Id.* at 252 (Black, J., dissenting).

subjects "will in some way inevitably tend to propagate the religious views of the favored sect."³⁵ Furthermore, since books are "the most essential tool of education"³⁶ and are "the heart of any school,"³⁷ they are readily distinguishable from bus fares, which merely assure convenient transportation to the schoolhouse. State financial aid in supplying books, Justice Black asserted, "actively and directly assists the teaching and propagation of sectarian religious viewpoints in clear conflict with the First Amendment's establishment bar"³⁸ in a way that does not occur when it finances "a general and nondiscriminatory transportation service in no way related to substantive religious views and beliefs."³⁹ He concluded with a categorical statement of belief that "tax-raised funds cannot constitutionally be used to support religious schools, buy their school books, erect their buildings, pay their teachers, or pay any other of their maintenance expenses, even to the extent of one penny."⁴⁰

Justice Douglas, in a separate dissenting opinion, expressed belief that New York school authorities would inevitably find themselves under pressure to approve books with sectarian overtones. "Can there be the slightest doubt," he asked, "that the head of the parochial school will select the book or books that best promote its sectarian creed?"⁴¹ Even when an author's treatment of particular topics is not "blatantly sectarian," he added, a school textbook "will necessarily have certain shadings that will lead a parochial school to prefer one text over another."⁴² Neutral treatment of historical events like the Crusades and the Reformation, Justice Douglas observed, is virtually impossible. Like Justice Black, he thought that a large gulf separated the bus transportation law upheld in *Everson* from the schoolbook law now under discussion. A school might well survive without a bus, but "[t]he textbook goes to the very heart of education in a parochial school. It is the chief, although not solitary, instrumentality for propagating a particular religious creed or faith."⁴³

In the view of the third dissenter, Justice Fortas, the central feature in the case was that the texts furnished were chosen by the sectarian school officials.⁴⁴ In *Everson* students in sectarian schools were merely

35. *Id.*

36. *Id.*

37. *Id.* at 253.

38. *Id.*

39. *Id.*

40. *Id.* at 253-54.

41. *Id.* at 256 (Douglas, J., dissenting).

42. *Id.* at 260 (footnote omitted).

43. *Id.* at 257.

44. *Id.* at 269-70 (Fortas, J., dissenting).

extended the same service as those in public schools; here, however, a special and separate service was provided, and this, in Justice Fortas' view, constituted the use of public money to aid sectarian establishments.

Although the *Allen* case certainly does not settle all the complex issues involved in aid to sectarian education, this recital of the views that prevailed and of the views that were so forthrightly expressed in dissent shows that the Court's judgment was not casually rendered. The decision indicates a willingness to give the *Everson* opinion considerably greater significance than its author, Justice Black, is now willing to attach to it. The Court's most recent expression seems, in summary, to affirm the possibility of compartmentalizing the secular and the religious elements of education in a denominational school.

4. *Horace Mann League v. Board of Public Works*⁴⁵

When the State of Maryland decided to give financial help to four colleges so that they could construct two science buildings, a science wing and dining hall, and a dormitory and classroom building, suits were promptly brought to block the gifts. Ultimately, a 4-3 majority of Maryland's highest court decided that the first amendment is a bar to giving state aid to sectarian institutions, even for such mainly secular purposes as eating and sleeping accommodations. The decision was rendered in 1966, two years before the *Allen* case discussed in preceding paragraphs. Whether the result would have been different had the *Allen* decision then been available, is of course only a matter of speculation. In any event, the *Horace Mann* case deserves close attention because it embodies the only sustained judicial discussion of grants to higher educational institutions.

The Maryland court guided itself by what it thought to be the spirit of the *Schempp* case—the case that forbade Bible reading in public schools because public authorities must remain neutral toward religion and religious organizations. To support a religious institution by outright financial assistance, the majority concluded, was to abandon the required posture of neutrality. Maryland, the judges said, planned to go far beyond the kind of general welfare legislation permitted by *Everson*. The state proposed to make its gifts to specific institutions of higher learning. For the court, therefore, the central issue was whether, purely as a matter of fact, the benefiting institutions were or were not sectarian. For those found to be dominantly religious (as were three of the four colleges involved in the litigation), the constitutionally requisite “neutrality” precluded public generosity.

45. 242 Md. 645, 220 A.2d 51, appeal dismissed and cert. denied, 385 U.S. 97 (1966).

We believe the case to be of very limited authority regarding the constitutional limitation on aid to sectarian colleges, even though the Supreme Court of the United States declined to review it.⁴⁶ The pertinent language in the Maryland case is somewhat at odds with the Supreme Court's subsequent decision in *Allen*. Moreover, the relevant part of the majority opinion is not noteworthy for clarity in tone or reasoning.⁴⁷

B. Possible Principles of Interpretation

The few cases just summarized leave many unanswered questions concerning the scope of the establishment clause and the limits it sets on financial assistance. Cases, other than *Horace Mann*, in state courts have been relatively numerous, but on the whole not very revealing.⁴⁸ Stable legal doctrines have not as yet emerged—nor, for that matter, have religious attitudes toward church-state relations been altogether stable, especially during recent years which have been marked by mutual forbearance and ecumenicity.⁴⁹ Although what is proper constitu-

46. In regard to the three grants declared invalid, the Supreme Court denied certiorari, a discretionary determination. 385 U.S. 97 (1966). In regard to the sustained grant, it did dismiss an appeal. *Id.* Although technically this may have been a decision on the merits, see discussion at note 7 *supra*, it is much more likely that the Court wished to avoid consideration of the three denied grants and did not choose to take only one part of what had been an integrated case.

Even if, contrary to the *Horace Mann* decision, the first amendment were not regarded as barring both federal and state aid to sectarian colleges in support of their secular purposes, state constitutions might nevertheless preclude grants of state funds altogether. The establishment clause of the first amendment, moreover, might still block unrestricted grants to church-related institutions. Hence the second aspect of the *Horace Mann* opinion, analyzing as it does the means of differentiating one type of institution from another, may continue to be basically important whether or not the first part be accepted as soundly reasoned.

47. For critical commentary, see generally Drinan, *Does State Aid to Church-Related Colleges Constitute An Establishment of Religion?—Reflections on the Maryland College Cases*, 1967 *Utah L. Rev.* 491; Kauper, *Religion, Higher Education and the Constitution*, 19 *Ala. L. Rev.* 275 (1967). See also *Vermont Educ. Bldgs. Financing Agency v. Mann*, 127 *Vt.* 262, 247 *A.2d* 68 (1968), appeal dismissed, 396 U.S. 801 (1969), upholding construction assistance for a classroom and science building to a church-related college by a corporate instrumentality of the state. Relying on *Schempp* and *Allen*, the court sustained the aid because “[t]here is no suggestion that the cause of religion will be served or obstructed by the facilities to be constructed . . .” *Id.* at 266, 247 *A.2d* at 74.

48. Of the many state cases concerned with these problems, most turn on language in state constitutions. But see *Vermont Educ. Bldgs. Financing Agency v. Mann*, 127 *Vt.* 262, 247 *A.2d* 68 (1968). The comments of state courts and lower federal courts on the federal establishment clause are not a very reliable indicator of what the Supreme Court is likely to decide.

49. See *M. Konvitz, Religious Liberty and Conscience* 3-26 (1968); cf. *Casad, The Establishment Clause and the Ecumenical Movement*, 62 *Mich. L. Rev.* 419 (1964) (describing some of the legal issues raised by church mergers).

tionally remains a matter of debate, the logic of events pushes both the federal and state governments to come to at least tentative conclusions before the debate ends. They are being pressed to take an increasingly central role in financing private higher education, and they seem likely to do so. In this area constitutional law remains malleable. It is likely to be influenced at least in part by the writings of speculative scholars—perhaps, indeed, more than by the writings of the framers of the Constitution. As the following pages show, however, no single theoretical approach commands united support.

1. No Aid—Absolute Separation

The “no aid” theory is that all government financial aid to religious institutions, direct, or indirect, is forbidden by the first amendment. According to this position, the establishment clause erected, in the language of Jefferson and *Everson*, “‘a wall of separation between church and State’”⁵⁰ which is breached if any expenditures are made on behalf of religion. Both opinions in *Everson* give very strong support to this position, though some language in the majority opinion has provided ammunition for proponents of other views. With minor qualifications, the Department of Health, Education, and Welfare under President Kennedy accepted the principle of “no aid” to primary and secondary sectarian education.⁵¹

The supporters of the “no aid” position believe it is justified by the historical meaning of the first amendment and the *Everson* case, as well as by independently sound policy reasons.⁵² Aid to religious institutions, they believe, is an unfair use of the funds of those who are nonreligious. And since any plan of aid will confer a larger benefit on some religions than others, aid is also unfair to the members of the religions that benefit less. Parochial schools provide an excellent example; since the vast majority are Roman Catholic,⁵³ aid to them plainly helps Catholicism more than other denominations. Moreover, if aid to religious institutions is allowed, the result will be a bitter and divisive political struggle over shares of the pie. A further consequence, opponents claim, will be to undercut the cultural unity promoted by the public schools: “[T]he

50. 330 U.S. at 16.

51. See Constitutionality of Federal Aid to Education in Its Various Aspects, S. Doc. No. 29, 87th Cong., 1st Sess. (1961) (hereinafter cited as HEW Memorandum), reprinted as Memorandum on the Impact of the First Amendment to the Constitution upon Federal Aid to Education, in 50 Geo. L.J. 349 (1961).

52. See generally L. Pfeffer, *supra* note 1, at 524-26.

53. Over 90 per cent of all children who attend non-public schools are in Catholic schools. Drinan, *State and Federal Aid to Parochial Schools*, 7 J. Church & State 67, 71 (1965).

public school, as the ally of social tolerance, class fluidity, and the open mind, is so valuable that alternatives to it should not be encouraged and certainly should not receive public support."⁵⁴

Another argument is that substantial aid would create serious dangers of secular interference with religious enterprises, as well as religious interference in state matters. Advocates of strict separation also believe that no constitutional line can be drawn to limit aid except no aid, that to permit a little aid is to permit unlimited aid. As Justice Rutledge put it: "Payment of transportation is no more, nor is it any the less essential to education, whether religious or secular, than payment for tuitions, for teachers' salaries, for buildings, equipment and necessary materials."⁵⁵

As simple as the "no aid" theory appears on its face, it presents certain difficulties. As Justice Douglas' concurring opinion in the school prayer case pointed out,⁵⁶ American society is honeycombed with direct and indirect aids to religion, among them grants to religious hospitals and tax exemptions for churches. A thoroughgoing proponent of absolute separation would be compelled to argue that these practices are unconstitutional, a position not yet endorsed by the courts.⁵⁷ One may, of course, distinguish these practices on various grounds. Not taking money may be different from giving it. The secular benefits conferred by hospitals may be relatively unrelated to the religion of their operators, while parochial education, according to those opposed to aid to schools, is "permeated" with religion, making any aid to education aid to the religious purposes of the church itself.

Since no one would care to deny parochial schools and school children the benefits of community existence, such as police protection, a second difficulty for the "no aid" position is drawing the line between prohibited aid to the school and incidental benefits extended to all buildings or persons. Most adherents of strict separation believe that the Supreme Court erred when, in *Everson*, it regarded bus transportation for parochial schoolchildren to be simply the extension of a public service

54. Center for the Study of Democratic Institutions, *Religion and American Society* 49 (1961). See also A. Bickel, *Politics and the Warren Court* 201-04 (1965).

55. *Everson v. Board of Educ.*, 330 U.S. 1, 48 (1947) (Rutledge, J., dissenting).

56. *Engel v. Vitale*, 370 U.S. 421, 437 (1962) (Douglas, J., concurring).

57. See, e.g., *Murray v. Comptroller*, 241 Md. 383, 216 A.2d 897, cert. denied, 385 U.S. 816 (1966); *Truitt v. Board of Pub. Works*, 243 Md. 375, 221 A.2d 370 (1966). In June 1969, the Supreme Court noted probable jurisdiction in a case challenging a tax exemption for church property. *Walz v. Tax Comm'n*, 24 N.Y.2d 30, 246 N.E.2d 517, 298 N.Y.S.2d 711, prob. juris. noted, 395 U.S. 957 (1969). The Hill-Burton Act, 42 U.S.C. § 291 (Supp. IV, 1969) authorizes grants and loans for the construction of hospitals, including those that are church-affiliated, and no one has suggested that a challenge to them would be likely to be successful. Cf. R. Drinan, *Religion, The Courts and Public Policy* 33-34 (1963).

rather than an aid to private school systems.⁵⁸ As the 5-4 split in that very case shows, separating the allowed from the forbidden is not easy even when agreement on general principles has been reached.

Critics of the "no aid" position press these difficulties as evidence of the theory's inherent weakness. They argue that some of the policy contentions supporting the theory are misconceived. They maintain, for example, that since Catholics will be embittered if aid be denied, "no aid" is as likely to be socially divisive as some aid.⁵⁹ And even if the underlying policy judgments, such as the cultural assimilation promoted by public schools, do have merit, the critics think they are not of constitutional dimension.⁶⁰

Despite its problems, some version of the "no aid" principle, but by no means its most absolute one, appeared to be in the Supreme Court's mind when it decided *Everson*.⁶¹ The majority admitted that bus transportation approached the "verge" of what the Constitution permitted, and the four dissenters thought the verge had been passed.

Equally clearly, however, the language of the *Allen* case rejects the "no aid" theory. This was perceived by the two Justices who had participated in the *Everson* decision as members of the majority. In *Allen*, they strongly dissented precisely because the Court had cast off the limitations suggested by the earlier case. The rationale in *Allen* is not that textbooks are a "welfare benefit," like school lunches and medical treatment, but rather that education in secular subjects meets a secular need that is properly the concern of the state.

One aspect of the "no aid" theory remains well established. That is that the state cannot itself engage in or finance religious education. The *Engel* and *Schempp* cases forbid religious exercises in the public school.⁶² In an earlier case, *Illinois ex rel. McCollum v. Board of Education*,⁶³

58. See Pfeffer, *supra* note 1, at 566-71.

59. See, e.g., Schwarz, No Imposition of Religion: The Establishment Clause Value, 77 *Yale L.J.* 692, 710-11 (1968).

60. *Id.* at 715-18.

61. See Jones, *supra* note 2, at 196-97.

62. These decisions do not preclude teaching about religion as a relevant part of the experience of man. *School Dist. v. Schempp*, 374 U.S. 203, 225 (1963). Whether religion can ever be taught "objectively," particularly at the lower levels, is a troubling question and one with whose implications the Court has yet to deal. See, e.g., W. Katz, *Religion and American Constitutions* 50-56 (1964); P. Kauper, *Religion and the Constitution* 96 (1964); Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development* (pt. 2), 81 *Harv. L. Rev.* 513, 568-72 (1968); Phenix, *Religion in American Public Schools*, 1965 *Religion and the Public Order* 82, 85; Stahmer, *Religion and Moral Values in the Public Schools*, 61 *Religious Educ.* 20 (1966); Ulich, *The Educational Issue*, in P. Freund & R. Ulich, *Religion and the Public Schools* 42-45 (1965).

63. 333 U.S. 203 (1948).

the Court struck down a "released time" system, under which children received religious instruction from teachers of their own faith for one hour a week in the public school. The Court found that "[t]his is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith."⁶⁴ Although some of the breadth of *McCullum* was undercut by *Zorach v. Clauson*,⁶⁵ which upheld a released time system with classes outside the school, the principle that public money cannot finance religious instruction seems firmly embedded, and is reflected in the federal and state legislative plans to provide aid to education.⁶⁶

2. Aid Permitted For Secular Purposes

Proponents of aid repeatedly argue that parochial schools serve a secular purpose by providing education that equips students for life in American society.⁶⁷ Since education is a public function, they argue, government may help finance it wherever the function may happen to be performed.

Bradfield v. Roberts,⁶⁸ decided in 1899, upheld an agreement of the District of Columbia to construct a building for a hospital to be administered by a religious order. Relying on the absence of any reference to religion in the certificate of incorporation of the hospital, the Court declared it immaterial under the first amendment that in fact the Roman Catholic Church "exercises great and perhaps controlling influence over the management of the hospital."⁶⁹ In any event, the Court said, the hospital had to be managed wholly in accord with the defined purposes and powers of the "non-sectarian and secular corporation"⁷⁰ that legally owned it. The influence of the Church upon the corporation did not convert it into a religious body or alter its legal character, which was fixed beyond change by the act of incorporation.⁷¹

64. *Id.* at 210.

65. 343 U.S. 306 (1952).

66. A possible exception was the original G.I. Bill of Rights, Servicemen's Readjustment Act of 1944, ch. 268, § 400, 58 Stat. 287, under which military veterans were given financial aid to permit them to study as and where they wished, including religious seminaries. See HEW memorandum, *supra* note 51, at 19, 50 Geo. L.J. at 370-71. See also Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 Calif. L. Rev. 260, 317 (1968); Sullivan, *Religious Education in the Schools*, 14 Law & Contemp. Prob. 92, 109-10 (1949).

67. See, e.g., R. Drinan, *Religion, the Courts, and Public Policy* 116-35 (1963); Legal Department, National Catholic Welfare Conference, *The Constitutionality of the Inclusion of Church-Related Schools in Federal Aid to Education*, 50 Geo. L.J. 397 (1961).

68. 175 U.S. 291 (1899).

69. *Id.* at 298.

70. *Id.*

71. *Id.*

The language of *Bradfield* seems broad enough to include any educational institution whose religious ties are not spelled out in the charter. Its applicability to education obtained oblique support in *Quick Bear v. Leupp*,⁷² in which the Court considered a government contract to pay the Bureau of Catholic Indian Missions for educating Indians. The government urged that *Bradfield* established the constitutional validity of spending public money for education under sectarian auspices, comparing the instruction in morality and religion which accompanied education in secular subjects to the religious ministrations in a sectarian hospital. The Court apparently accepted this view: "It is not contended that [the contract] is unconstitutional, and it could not be. . . . *Bradfield v. Roberts*. . . ."⁷³

A case upholding the right of parents to send their children to parochial schools, *Pierce v. Society of Sisters*,⁷⁴ lends some indirect support to the secular benefit argument. The Court struck down an Oregon statute requiring all children to go to public school because it "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control."⁷⁵ Since a state has a sufficient secular interest to compel children to go to school regardless of their parents' wishes, and since the state cannot constitutionally decide that parochial schools are in general inadequate to provide schooling, proponents of aid contend that the state must recognize the secular benefit provided by the schools, and can (or must), therefore, finance them. Robert Drinan has said: "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."⁷⁶

72. 210 U.S. 50 (1908). The central issue was whether Congressional legislation forbidding the use of public money to educate Indians in sectarian schools extended to the "Treaty Fund" involved in the case.

73. *Id.* at 81. In *Everson v. Board of Educ.*, 330 U.S. 1 (1947) and subsequent cases, the Court has not, of course, followed the broader implications of *Bradfield* and *Quick Bear*. See Justice Rutledge's dissenting opinion in *Everson*, 330 U.S. at 43 n.35.

74. 268 U.S. 510 (1925).

75. *Id.* at 534-35. See also *Farrington v. Tokushige*, 273 U.S. 284 (1927) (invalidating excessively detailed control of private schools by government); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (invalidating a statute forbidding teaching a foreign language). At the time of *Pierce* the Court gave the fourteenth amendment an expansive reading to strike down laws it deemed unreasonable. Because the principle of "substantive" due process has since been very narrowly circumscribed, see *McCloskey*, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 *Sup. Ct. Rev.* 34, most decisions based on it have been overruled or are of doubtful authority. Not so with *Pierce*. The Court has recently cited it with approval, *Griswold v. Connecticut*, 381 U.S. 479, 481-83 (1965), and few doubt it would be decided the same way today, though the opinion would read differently.

76. Drinan, *The Constitutionality of Public Aid to Parochial Schools*, in *The Wall*

A later decision cited in support of the secular function argument is *Cochran v. Louisiana State Board of Education*.⁷⁷ The Court sustained the use of state funds to supply textbooks to children in parochial and other private schools, holding that the expenditure was for a public—and, one may presume, secular—purpose.⁷⁸

Of course the proposition that sectarian schools serve some secular purpose is one with which few would quarrel. The central question is whether the government can aid worthwhile secular endeavors when they are undertaken by religious institutions, particularly when the religious and secular purposes are as intermingled as they are in the parochial educational process.⁷⁹ The flatly negative answer *Everson* seemed to provide has been revoked by *Allen*. If the government's purpose is to aid secular education and the primary effect is to promote secular education, then, under *Allen*, aid may be permissible. But even *Allen* does not clearly establish that financial aid can go directly to a sectarian school for expenditure by it. The benefit that was involved in the *Allen* litigation was, at least in outward form, conferred upon the child (to whom textbooks were loaned) rather than upon the school; accordingly, the decision could be read as limited to "child benefits," discussed below.

If a broader reading of *Allen* is correct and sectarian schools can receive public largess beyond the fringe welfare benefits apparently contemplated by *Everson*, what are the constitutional limits to aid? Many possibilities have been advanced. One is that implied by *Bradfield*. If the school is incorporated for a public purpose and aid is given in support of that purpose, the state has no need to inquire how the

Between Church and State 55, 60 (D. Oaks ed. 1963). See R. Drinan, *supra* note 67, at 123-27. Another author has called this "[t]he strongest argument to sustain . . . aid to parochial schools" Kurland, *Politics and the Constitution: Federal Aid to Parochial Schools*, 1 *Land & Water L. Rev.* 475, 491 (1966).

77. 281 U.S. 370 (1930).

78. The case was decided, we must note, before the first amendment had been held to be a limitation upon what states as well as the federal government could permissibly do in the way of giving aid to religion. For Leonard Manning, given the prior extension of the free speech guarantee to the states, "it is hard . . . to conceive how those Justices would lightly turn aside, indeed ignore, the first amendment." Manning, *Aid to Education—Federal Fashion*, 29 *Fordham L. Rev.* 495, 515 (1961).

79. That parochial education is permeated with religion is something that Catholic educators themselves have often claimed. According to one Jesuit: "It is a commonplace observation that in the parochial school religion permeates the whole curriculum, and is not confined to a single half-hour period of the day. Even arithmetic can be used as an instrument of pious thoughts, as in the case of the teacher who gave this problem to her class: 'If it takes forty thousand priests and a hundred and forty thousand sisters to care for forty million Catholics in the United States, how many more priests and sisters will be needed to convert and care for the hundred million non-Catholics in the United States?'" J. Fichter, *Parochial School*, A Sociological Study 86 (1958).

school is operated so long as the public function is realized.⁸⁰ This theory would permit total subsidization of sectarian schools, including their explicitly religious endeavors.

A similar consequence might be arrived at under the "neutrality" theory of the establishment clause developed by Philip Kurland.⁸¹ In his view that clause coalesces with the free exercise clause to require the government to be neutral, neither to aid nor to inhibit religion. "[T]he proper construction of the religion clauses of the first amendment is that the freedom and separation clauses should be read as a single precept that government cannot utilize religion as a standard for action or inaction because these clauses prohibit classification in terms of religion either to confer a benefit or to impose a burden."⁸² If the government decides to aid all schools or all non-public schools in a certain way, religious schools can participate with the others, not because they are religious, but because the state must be blind to whether they are religious or not.⁸³ Some secular purpose would, of course, have to underlie the general granting of aid, but a religious institution's using all or part of its aid for religious purposes would not be prohibited. Thus, a tax exemption extended to all charitable enterprises would be proper even though freedom from taxation would assuredly though indirectly further a church's capacity to carry on the religious activities that justify its being.

Initially advanced by the National Catholic Welfare Conference, a somewhat different rationale for sustaining general aid has recently been supported by Professor Jesse Choper, who contends that parochial schools may be directly or indirectly financed by governmental resources "so long as such aid does not exceed the value of the secular educational service rendered by the school."⁸⁴ The basic argument is that the gov-

80. In fact in *Bradfield* the city's money was spent to acquire a direct reciprocal benefit. In return for having a building or ward constructed by the city, the hospital promised to treat poor patients sent to it by the city. The opinion, however, did not rely on this quid pro quo. Another point noted in *Bradfield* is that the hospital apparently did not confine itself to Catholic patients. An institution so limited might have been treated differently.

81. See P. Kurland, *Religion and the Law* (1962).

82. *Id.* at 18. The language in *Everson* against discrimination in the distribution of public welfare benefits, 330 U.S. at 16, gives qualified support to this view.

83. As Professor Kurland has himself noted, this theory, strictly applied, leads to invalidation of plans, such as shared time, whose purpose is the accommodation of parochial school needs. See Kurland, *supra* note 76, at 494.

84. Choper, *supra* note 66, at 266 (emphasis omitted); see Legal Department, National Catholic Welfare Conference, *supra* note 67, at 411, 434-37; cf. *Schade v. Allegheny County Inst. Dist.*, 386 Pa. 507, 126 A.2d 911 (1956). It is conceivable, though no court has yet held this, that an institution very heavily financed by government funds would be considered an agency of the state, limited in regard to its religious activities as would be the

ernment can properly pay for secular benefits, though the establishment clause forbids its financing religious purposes. As Professor Choper himself recognizes, his proposed approach would enable publicly assisted sectarian schools to divert to directly religious purposes the resources they would otherwise have had to spend on secular subjects; but this, he believes, is not unconstitutional as long as the state actually receives the secular benefits for which it has paid.

Others, alarmed by the support that general grants may give to a school's religious purposes, have advocated more limiting criteria for aid. The most obvious of these and the one reflected in many of the present federal statutes authorizing aid to higher education, discussed in the next section, is that public funds must be earmarked for specific secular purposes. Thus, the government might constitutionally be able to pay for the construction of a science building, but it could not help meet a sectarian institution's general budgetary needs. Of course funds that have been provided to an institution for one of its secular purposes will enable the institution to devote correspondingly more of its own funds to religious purposes; for this reason, the distinction between limited and general aid has been attacked as fallacious.⁸⁵ Possibly this objection would lose its force if a grant were made solely to provide a facility or to finance an activity the recipient would not otherwise have been able to afford.⁸⁶ Unfortunately, ascertaining precisely how money might be spent in the future would be extremely difficult, particularly if an institution were to become aware that by proclaiming its own inability to meet a need, it might legalize the state's meeting the need in its behalf.

Another suggested distinction is between grants and loans. Money that has been loaned must be repaid, and is therefore less likely than an outright gift to free other funds that may further some religious undertaking.⁸⁷ If, however, the loan is a "soft" loan—that is, one that is made on terms more favorable than would normally govern a financial transaction—it is the equivalent of a "hard" loan plus a small subsidy, so the danger of released funds is not eliminated. Perhaps the kind of "aid" that is easiest to detatch from religious purposes is the contract

government. Cf. *Simkins v. Moses H. Cone Memorial Hosp.*, 323 F.2d 959 (4th Cir. 1963), cert. denied, 376 U.S. 938 (1964) (forbidding racial discrimination in hospital aided by government).

85. 77 Harv. L. Rev. 1353, 1354 (1964).

86. See HEW Memorandum, *supra* note 51, at 18, 50 Geo. L.J. at 370. See also 20 U.S.C. § 823(a)(5) (Supp. IV, 1969) (forbidding grants for materials if institutional funds would ordinarily be used for them).

87. See HEW Memorandum, *supra* note 51, at 18, 50 Geo. L.J. at 369-70.

for a specific piece of research or other work not likely to be undertaken as an ordinary function of a school or university.⁸⁸

Yet another possible criterion for judging the constitutional propriety of aid turns not on the nature of the aid itself, but on the alternative possibilities open to the government. In his separate opinion in the Sunday Closing Law cases, Justice Frankfurter wrote, "[I]f a statute furthers both secular and religious ends by means unnecessary to the effectuation of the secular ends alone—where the same secular ends could equally be attained by means which do not have consequences for promotion of religion—the statute cannot stand."⁸⁹ Applying this criterion to parochial education presents real difficulties. The test requires weighing alternative means to a given end but much depends on how a permissible secular end is defined. If the end is the general raising of educational standards, it makes sense to speak of aid to public education and aid to all education as alternatives. If the end is defined, however, as improving the education of all students, then assistance to sectarian schools may be the only means of aiding students in those schools.⁹⁰ Even if improvement of general educational quality is viewed as the end, once a legislature has determined that educational institutions of diverse types (including the sectarian) must be aided, a court might be embarrassed to substitute its own contrary belief that the objectives could be achieved equally well by excluding sectarian schools.

Yet another possible means of limiting public expenditures for education outside the public schools would be a requirement that control over the expenditures must be maintained by the state. If a governmental authority must approve each outlay of funds, so the proponents of this suggestion have said, adequate protection will be provided against using the public's money for religious purposes.⁹¹ The advocates of this device have failed, however, to spell out the precise nature of the fiscal control they have in mind, nor have they shown how it would preclude freeing equivalent funds for other institutional (including religious) purposes.⁹²

Despite these various doubts and difficulties that inhere in the "sec-

88. *Id.* at 18-19, 50 *Geo. L.J.* at 370.

89. *McGowan v. Maryland*, 366 U.S. 420, 466-67 (1961) (separate opinion of Frankfurter, J.). Justice Brennan's concurring opinion in *Schempp*, 374 U.S. at 295, employs somewhat similar language; the government is forbidden to "use essentially religious means to serve governmental ends, where secular means would suffice." Since it is not clear whether he would regard parochial schools as "essentially religious means," it is hard to know whether he thinks this test relevant to the problem of aid to education.

90. See Choper, *supra* note 66, at 308-11.

91. Gordon, *The Unconstitutionality of Public Aid to Parochial Schools*, in *The Wall Between Church and State* 73, 92 (D. Oaks ed. 1963).

92. See Choper, *supra* note 66, at 333-35.

ular purpose" theory no matter how it may be formulated, the theory has unquestionably been reinforced by the recent *Allen* decision, sustaining the public purchase of textbooks for parochial school children. The majority opinion in *Allen* does not deny the essentiality of textbooks in the educational process carried on by parochial schools. Rather, it stresses that those schools have dual purposes; it relates the state-provided textbooks to the purpose characterized as secular. Though the Court mentions that, technically, the books were simply loaned and were not given away permanently, it did not seem to regard that as significant. The Court did remark that the record had not established the religiosity of the secular courses, and it might have decided against the law or restricted its application to subjects taught in a secular way if all or some courses had been proved to have heavy religious overtones. Since the case involved only marginal expenditures, the Court might possibly have viewed more substantial aid differently.⁹³ Subject to these uncertainties, the decision strongly supports the secular function standard, at least when aid is strictly confined to specified secular purposes.

3. Aid Permitted as Benefit to the Child

The "child benefit" or "pupil benefit" theory falls somewhere between the "no aid" and "secular function" approaches; indeed in some of its guises it is virtually indistinguishable from one or the other. Put most simply, the theory would allow aid to children but forbid aid to parochial schools. In *Cochran v. Louisiana State Board of Education*,⁹⁴ in which the Supreme Court upheld supplying textbooks to private school children, it quoted with approval an exposition of the "child benefit" approach by the state court:

One may scan the acts in vain to ascertain where any money is appropriated for the purchase of school books for the use of any church, private, sectarian or even public school. The appropriations were made for the specific purpose of purchasing school books for the use of the school children of the state, free of cost to them. It was for their benefit and the resulting benefit to the state that the appropriations were made. True, these children attend some school, public or private, the latter, sectarian or non-sectarian, and that the books are to be furnished them for their use, free of cost, whichever they attend. The schools, however, are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation, because of them. The school children and the state alone are the beneficiaries.⁹⁵

93. Justice Harlan in his concurrence indicated that government activity would be unconstitutional if it involved the state "so significantly and directly in the realm of the sectarian as to give rise to . . . divisive influences and inhibitions of freedom." 392 U.S. 236, 249 (1968). Conceivably much more substantial aid would fall over this line, though it is impossible to tell from the quoted standard exactly where the line would be drawn.

94. 281 U.S. 370 (1930).

95. *Id.* at 374-75.

Cochran, of course, involved a due process rather than an establishment clause challenge, and the case cannot be taken as upholding the validity of "child benefits" under the first amendment. *Everson*, however, in forbidding aid to schools and permitting the extension of welfare benefits to all citizens, gave impetus to the argument that aid to children was permissible under the establishment clause.

One of the problems with this approach is its almost infinite elasticity.⁹⁶ If it is taken to mean only that benefits marginally related to the educational process may be granted to school children, then it accords with the holding of *Everson*. If it is meant to allow tuition payments and textbook assistance, it represents a genuine mid-point between no aid and more general aid. It can, however, become simply a way of phrasing a principle of general aid. In 1955 an editorial in *The Catholic World* contended:

The questions really resolve themselves into one main question: is the Federal Government planning to offer any help toward the building of non-public schools?

. . . .
 . . . [I]n the matter of erecting new school buildings, it's obvious that American children are entitled to the benefits of public-welfare legislation regardless of race, creed or color. That was the decision of the U.S. Supreme Court in February, 1947, upholding a New Jersey statute providing free bus transportation for children attending Catholic schools. American youths, whether Catholic, Protestant or Jewish, have a right to be educated in school buildings that have decent physical facilities.⁹⁷

Not only is "child benefit" a very flexible theory, it may, by focusing on the recipient of aid, be unresponsive in particular circumstances to the danger posed to establishment clause values.⁹⁸ The construction of a science laboratory may, in actuality, aid the religious purpose of a school far less than an across-the-board tuition grant given to parents.

Some commentators, though conscious of these problems, have nevertheless defended the "child benefit" approach. Harry Jones has written, "It is my own judgment, based on some experience with the practical legislative problem since the federal aid-to-education bill of 1949, that the 'pupil benefit' theory, reasonably applied, is a workable compromise interpretation of the First Amendment and no threat to the integrity of American constitutional church-state relationships."⁹⁹

George La Noue has suggested that implicit in *Everson* and *Cochran*

96. See, e.g., L. Pfeffer, *supra* note 1, at 568.

97. 181 *The Catholic World* 1-2 (1955).

98. See Choper, *supra* note 66, at 313-18. Like most of the other aid theories, it cannot prevent the freeing of funds that may then be devoted to religious uses.

99. See Jones, *supra* note 2, at 196. See also Giannella, *supra* note 62, at 576-81; Jones, *The Constitutional Status of Public Funds for Church-Related Schools*, 6 *J. Church & State* 61, 71-73 (1964).

are limits that preclude too expansive a version of the child benefit standard and that keep it responsive to the principle of nonestablishment. The grants whose validity was upheld in those cases, he has pointed out, had three common factors: 1. No religious institution acquired new property by reason of the challenged state action; 2. Complete fiscal control of the administration and spending of public funds remained in the hands of government; and 3. The benefaction conferred by the state was not put to a religious use.¹⁰⁰

He would allow bus transportation, shared time use of facilities operated by the state, and medical care; would forbid tuition grants (which could be used for religious purposes); and would permit textbook grants only, if at all, when their unadaptability for religious use was incontestable.¹⁰¹

The "child benefit" theory underlies much of the Elementary and Secondary Education Act of 1965,¹⁰² which, for example, requires approval by public authorities and public ownership of materials made available to parochial schools. The theory is reflected in parts of the *Allen* opinion. The Court does say:

The law merely makes available to all children the benefits of a general program to lend school books free of charge. Books are furnished at the request of the pupil and ownership remains, at least technically, in the State. Thus no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools.¹⁰³

Yet neither the "secular purpose and primary effect" test that the Court purports to apply nor the language of the rest of the opinion indicates that the decision would have been different if the textbooks had gone directly to the schools. Indeed what seems remarkable is how little emphasis was placed on "pupil benefit," especially in light of the stress on that theory in the New York Court of Appeals.¹⁰⁴ Yet the result is certainly consistent with a "child benefit" rationale, and a majority opinion rarely manages to embody the shades of emphases each of the Justices would have expressed had he written the opinion. In some future case "child benefit" may still emerge as the central analytical tool.

100. La Noue, *The Child Benefit Theory Revisited: Textbooks, Transportation and Medical Care*, 13 J. Pub. L. 76, 90-91 (1964).

101. *Id.* at 91-94.

102. 20 U.S.C. § 825 (Supp. IV, 1969); see Kelley & La Noue, *The Church-State Settlement in the Federal Aid to Education Act, 1965 Religion and the Public Order 110*. See also Giannella, *supra* note 62, at 578-79.

103. 392 U.S. 236, 243-44 (1968) (footnote omitted).

104. *Board of Educ. v. Allen*, 20 N.Y.2d 109, 228 N.E.2d 791, 281 N.Y.S.2d 799 (1967), *aff'd*, 392 U.S. 236 (1968).

4. Aid Permitted to Promote Free Exercise and Prevent Establishment of Secularism

Two other, somewhat interrelated, arguments are advanced to support aid to parochial schools. One is that when parents choose to send their children to a parochial school, they are exercising their religious liberty, an exercise constitutionally protected by *Pierce*. Protecting the exercise of religion is perhaps the predominant and certainly one basic value in the religion clauses of the first amendment. Whatever marginal danger public aid might create in the direction of establishing a state-supported religion must, it is argued, be weighed against the benefit to free exercise.¹⁰⁵ This view finds some, albeit not very direct, support from later cases that, unlike *Pierce*, were decided under the first amendment.

In *Zorach v. Clauson*,¹⁰⁶ in upholding New York's released time system, Justice Douglas wrote for the Court:

We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.¹⁰⁷

In *Sherbert v. Verner*,¹⁰⁸ the Court upheld the right of a Sabbatarian to receive unemployment compensation, despite a general state rule that only those available for work, including Saturday work, could receive the benefits. It would, the Court said, deny Mrs. Sherbert's free exercise of religion so to penalize her for her beliefs. Although excluding individuals otherwise eligible from a general welfare system is different from declining to finance education, the analogy is clear; parents who choose religious schools for their children are arguably in the same position as Mrs. Sherbert if aid is denied to them.

105. Cf. P. Kauper, *supra* note 62, at 42-44. See generally Drinan, *supra* note 47, at 511-15.

106. 343 U.S. 306 (1952).

107. *Id.* at 313-14.

108. 374 U.S. 398 (1963). See also *In re Jenison*, 267 Minn. 136, 125 N.W.2d 588 (1963), sustaining religious claim to exemption from jury duty after the Supreme Court had remanded the case for reconsideration in light of *Sherbert v. Verner*, 375 U.S. 14 (1963); *Arlan's Dep't Store, Inc. v. Kentucky*, 371 U.S. 218 (1962), dismissing an appeal from state decision upholding a legislative exemption for Sabbatarians from Sunday Closing Laws.

The related argument is that for the state to refuse to finance parochial schools is in effect an establishment of a religion of secularism.¹⁰⁹ Such cases as *McCollum*, *Engel*, and *Schempp*, it is argued, effectively exclude religion from the public school. *Torcaso v. Watkins*,¹¹⁰ invalidating a religious test for state office, and *United States v. Seeger*,¹¹¹ broadening the religious criterion for conscientious objection, indicate that irreligion and secular humanism enjoy the protection of the first amendment as do orthodox religions.¹¹² If this is so, then favoring them, the argument goes, is as much a constitutional violation as would be penalizing them, and it is precisely this that the public school does. Strict separationists give a short answer to the crude form of this argument. The public school, they say, inculcates neither religion nor irreligion; efforts to influence value development in that area are not among a schoolteacher's responsibilities.

But this short answer does not entirely satisfy proponents of religious schools. As Robert Drinan, a prominent Jesuit scholar, puts the matter:

[T]he public school's curriculum is "permeated" by a secular or nonsectarian atmosphere and is therefore also "religious" or "nonreligious." No education can exist without a "permeation" of some outlook on life and human existence. An education without an ideological orientation is an impossibility.¹¹³

This comment may overstate the point since the average public school does not purport to provide an all encompassing system of values in the same way as a Catholic school, but the difficulty remains. In the words of Alan Schwarz:

[S]ecular treatment unavoidably tends to belittle both Protestant and Catholic dogma and hence may perhaps be characterized as indoctrination antireligionism or secular religionism. Similarly, a civics class in racial discrimination would invoke the equality value but would ignore its religious source, associating the value with Americanism or some other secular ethic. Ignoring the theological source of the imperative—and, worse, supplying an alternative secular source—tends to belittle, perhaps even negate, the theological. Religion is most necessary, and hence most believable, when it provides the sole explanation for all phenomena. A system which provides answers without reference to religion or which teaches that there are no answers makes religion less necessary, and hence less believable.¹¹⁴

109. See Manning, *supra* note 78, at 522-24.

110. 367 U.S. 488 (1961).

111. 380 U.S. 163 (1965). Technically a reading of congressional intent, the decision has strong constitutional overtones.

112. See Ball, *Religion in Education: A Basis for Consensus*, 108 *American Review of Education* 528 (1963).

113. See R. Drinan, *supra* note 67, at 157.

114. Schwarz, *supra* note 59, at 700-01. This point may be weakened in so far as aspects of religion can be conveyed in the public school. See materials cited in note 62 *supra*, and Freund, *The Legal Issue*, in P. Freund and R. Ulich, *Religion and the Public Schools* 17-24 (1965).

Both the "free exercise" and "nonestablishment of secularism" arguments have interesting consequences if pushed to their logical extremes. In the first place they could provide a basis for general and complete aid, since, given the very nature of the arguments, aid to the religious purposes of the parochial school would not necessarily be foreclosed. The second consequence, perhaps more significant, is that they might not only permit but require aid. If it is actually a denial of free exercise or an establishment of religion to withhold aid, then the government has no choice in the matter. Such a conclusion would mean striking down some state constitutional provisions that forbid aid to religious educational institutions.

The *Everson* opinion provides some scanty support for this position. It says that the state cannot exclude persons from welfare benefits "because of their faith, or lack of it"; but it immediately denies any intent "to intimate that a state could not provide transportation only to children attending public schools . . ." ¹¹⁵ Even if the state can permissibly differentiate public and private schools, it might possibly be barred from treating private religious schools differently from private nonreligious schools. ¹¹⁶ This, of course, is the result that would be reached under a strict application of Philip Kurland's "neutrality" standard, since only a forbidden religious criterion would separate the two classes of schools.

If the "free exercise" and "nonestablishment of secularism" contentions do not require aid, they may still be sufficient to make aid permissible that would otherwise be proscribed. For many scholars, they are important factors to be balanced against conflicting values. Wilber Katz, who favors a "neutrality" that is less formal than Professor Kurland's, has written:

[I]n many fields where laws affect religion incidentally, the promotion of neutrality requires affirmative provision for religion. Here legislatures have been left with discretion; in this area provisions affirmatively fostering religious freedom are not invalid as "establishing" religion, but their omission does not make the legislation invalid as a restraint on "free exercise". . . ¹¹⁷

Paul Kauper, for whom "religious liberty is the central concern of the constitutional order as it relates to the subject of religion," ¹¹⁸ advocates a degree of accommodation or cooperation between government and religion; like Professor Katz, he would approve inclusion of parochial

115. 330 U.S. at 16 (emphasis omitted).

116. Cf. Manning, *Aid to Education—State Style*, 29 *Fordham L. Rev.* 525, 546-48 (1961), arguing that such a classification is inherently unreasonable at the college level and is a violation of the equal protection clause of the fourteenth amendment.

117. W. Katz, *supra* note 62, at 91.

118. P. Kauper, *supra* note 62, at 13.

schools in a program that included aid to all children or all schools. Alan Schwarz reaches a similar conclusion because he believes that the fundamental objective of the establishment clause value is protection against *imposition* of religion.¹¹⁹ Assistance that maximizes opportunities for proselytizing is, in his view, the most pernicious. The danger of aid to parochial schools, however, he regards as relatively speculative and as offset by "the obvious state interest in quality education for all children and the parochial school child's equality, free exercise and establishment claims."¹²⁰

Donald Giannella argues that the underlying value for the religion clauses is voluntarism:

Religious voluntarism . . . conforms to that abiding part of the American credo which assumes that both religion and society will be strengthened if spiritual and ideological claims seek recognition on the basis of their intrinsic merit. Institutional independence of churches is thought to guarantee the purity and vigor of their role in society, and the free competition of faiths and ideas is expected to guarantee their excellence and vitality to the benefit of the entire society.¹²¹

In interpreting the establishment clauses, he believes that a principle of "political neutrality" will best promote that value.¹²² This is not Professor Kurland's rigid no-classification standard, for, like Professor Katz's neutrality, it will at times require government to accord a special place to religious activities.¹²³ Professor Giannella considers aid to parochial schools a difficult problem to which to apply his test, since no aid will put the schools in a worse position than "voluntarism" would justify, and too much aid would put them in a better position. He concludes that the "child benefit" standard is an appropriate compromise.¹²⁴

The "religious liberty" and "nonestablishment of secularism" arguments were apparently regarded as having no relevance in *Allen*, if one judges from the opinion. But with the possible exception of *Sherbert*, the Court has not favored explicit use of a balancing approach to establishment clause cases, and these contentions may conceivably have influenced some of the Justices to some degree in a way not expressed.

5. Aid Permitted to Colleges Even if Not to Schools

Thus far, we have assumed that the relevant principles for aid to parochial elementary and secondary schools are equally applicable to

119. Schwarz, *supra* note 59, at 701.

120. *Id.* at 737.

121. Giannella, *supra* note 62, at 517 (footnote omitted).

122. For an energetic criticism of this view, see Schwarz, *The Non-establishment Principle: A Reply To Professor Giannella*, 81 *Harv. L. Rev.* 1465 (1968).

123. See Giannella, *supra* note 62, at 527.

124. *Id.* at 572-81.

sectarian colleges and universities. Since the Supreme Court has never dealt with aid to higher education, its opinions provide no basis for knowing whether it would treat colleges differently from schools, but others have contended that it should do so when the occasion presents itself. With one possible exception, no differences between the two levels of education have been advanced that would suggest more restrictive criteria for aid to colleges, but a number might lead to a more permissive standard.

At the same time that the Department of Health, Education and Welfare defended a fairly strict separationist position in regard to school aid, it took a very different view of public assistance to higher education. Responding to a senatorial request for a position statement, the Department's general counsel remarked, first, that colleges, unlike the lower schools, were not available to all students. He continued:

The process is more selective, the education more specialized, and the role of private institutions vastly more important. There are obvious limitations upon what the Government can hope to accomplish by way of expanding public or other secular educational facilities. If the public purpose is to be achieved at all, it can only be achieved by a general expansion of private as well as public colleges, of sectarian as well as secular ones.

. . . [I]mportant are the distinctive factors present in American higher education: . . . the fact that free public education is not available to all qualified college students; the desirability of maintaining the widest possible choice of colleges in terms of the student's educational needs in a situation no longer limited by the necessity of attending schools located close to home; the extent to which particular skills can be imparted only by a relatively few institutions; the disastrous national consequences in terms of improving educational standards which could result from exclusion of, or discrimination against, certain private institutions on grounds of religious connection; and the fact that, unlike schools, the collegiate enrollment does not have the power of State compulsion supporting it.¹²⁵

This 1961 memorandum contains at least the seeds of most of the arguments for more favored treatment for colleges. The weakest point is the fact that school education is compulsory whereas college education is not. In both instances the student, or his parent, has voluntarily chosen a sectarian school and the argument for aid may debatably be even stronger if he can claim he was compelled to choose between sectarian and secular education.¹²⁶ Nor does the availability of free public education seem of more than historical relevance, since the possibility of free public higher education should not affect the issue of aid to sectarian education.

Certainly one of the fundamental points is that private higher education plays a much more important role than does private education at the

125. HEW Memorandum, *supra* note 51, at 26, 50 *Geo. L.J.* at 379-80.

126. Kauper, *supra* note 47, at 295.

school level. And few regard this as unhealthy.¹²⁷ If creative diversity rather than cultural homogeneity is desired at the college level and if, as now is the case, injections of public funds are needed to keep many private institutions above water and many more at an acceptable level of academic excellence, some form of assistance is required. Exclusion of sectarian institutions from this assistance would raise serious problems. The argument that the student who chooses a sectarian institution is discriminated against is much stronger if the comparison is with students at other private institutions rather than at public schools.¹²⁸

The "discrimination" may extend in some form to faculty members as well. Religiously concerned scholars are said to feel less inhibited to pursue their interests in an institution with religious direction.¹²⁹ Permitting secular institutions to receive public funds while withholding them from church-related institutions, Professor Giannella has argued, would discriminate against teachers "who find a religiously oriented institutional commitment congenial" and would therefore (in his view) be "basically inconsistent with full academic freedom."¹³⁰

A difficulty of a different order is the sheer number of church-related colleges. Of 1,189 private colleges and universities in 1966, 817 were said to have significant church relationships.¹³¹ Presumably not all of these would be found to be "sectarian" for purposes of legal classification, but enough would be to make the exclusion numerically large if all were to be deemed ineligible for public aid.¹³² Further, the exceeding difficulty of winnowing the sectarian from the secular would in itself perhaps be a reason for not drawing a line that would require the task to be undertaken.

If reasons for aiding private higher education seem more clearly compelling than the reasons for aiding private lower schools, so too do the dangers to establishment clause values seem markedly less. Whatever is the case at parochial schools and despite some declarations about "permeation" by religious colleges themselves, most sectarian colleges ap-

127. Compare Giannella, *supra* note 62, at 584: "[T]he staunchest advocates of a dominant public school system for the lower levels of education admit the value and necessity of the private college and university."

128. See, e.g., Kauper, *supra* note 47, at 291; Manning, *supra* note 116, at 546-47.

129. M. Pattillo & D. MacKenzie, *Church-Sponsored Higher Education in the United States 167-70* (1966).

130. Giannella, *supra* note 62, at 586. Professor Giannella also asserts that "the development of a departmental or institutional point of view might prove academically desirable. In a sympathetic atmosphere a band of scholars dedicated to the same values and ideals can encourage and reinforce one another's efforts."

131. M. Pattillo & D. MacKenzie, *supra* note 129, at 19.

132. 77 *Harv. L. Rev.* 1353, 1358 (1964).

parently teach most secular subjects in an essentially non-religious style.¹³³ In any event, students of college age to whom religious themes are presented, whether in secular or avowedly religious courses, are better able than elementary and high school pupils to evaluate what they are told and to avoid the passivity that makes indoctrination easy. Moreover, since courses in religion are offered in many private nonsectarian universities as well as in public universities, the difference between sectarian and other education, even though still significant, is not as striking as at the elementary level. Finally, since only 41 per cent of the church-related institutions are Catholic, aid to sectarian colleges is not, as is aid to sectarian schools, overwhelmingly aid to one faith.

In terms of the test of secular purpose and primary secular effect employed in *Allen*, these differences might lead a court concerned solely with the implications of the federal Constitution to accept aid more easily when it goes to a sectarian college than when it goes to a parochial school. Colleges might also enjoy a favored position if an "alternative means" standard,¹³⁴ or the "principle of political neutrality,"¹³⁵ or some other balancing test were used.

C. Conclusion

Predicting the course of Supreme Court decisions is hazardous. Without intimating absolute confidence in our estimate of how judges will treat future cases, we regard a reversion from *Allen* to the restrictions of *Everson* as unlikely. Federal and state aid to private education seems virtually certain to increase rather than diminish in years to come. We strongly doubt that the Court will insist that none of the aid be allowed to flow to sectarian institutions. Conceivably the Court will rest its permissive decisions on a moderate "child benefit" rationale, but we suspect that it will find nothing constitutionally objectionable in aid that goes directly to schools for earmarked secular functions. On the other hand, we think that general aid to parochial schools will not be judicially sustained, if legislatively attempted, for some time to come.

Aid to higher education, as distinct from aid to the lower levels, seems to us to be likely to gain ready judicial acceptance whether given in the form of "pupil benefits" or directly in support of identifiably secular functions. This judgment, we recognize, implies belief that issues like those in the *Horace Mann* case, in which the Maryland Court of Appeals invalidated grants, would be differently decided if they were now to come before the Supreme Court.

133. Compare Drinan, *supra* note 47, at 503.

134. See Kauper, *supra* note 47, at 289-90.

135. See Giannella, *supra* note 62, at 583-90.

The Court's readiness to allow general aid to sectarian colleges is far more doubtful. We think the greatest chance for approval would occur in connection with a program of across-the-board grants to private colleges based on some principle that excludes those students not pursuing a primarily secular course, but even a program limited in that manner might well be held invalid.

To some extent, these estimates are based on the present and probable future patterns of aid, discussed in the following sections, since the Court gives at least some deference to the judgments of legislatures, particularly those of Congress. We deem it unlikely that in the near future the Court will strike down state constitutional provisions which forbid aid to sectarian colleges while allowing it to other private colleges. In this area, we believe the states will be given a very large range of choice.

A single prediction can be made with near certainty: This will be a heavily litigated area.

II. FEDERAL LEGISLATION

Legislative provisions permitting the flow of federal funds to institutions of higher education fill hundreds of pages in the United States Code. Many of them are parts of a few major acts designed to assist colleges and universities, but many more are items in programs undertaken essentially for other purposes. For example, the Atomic Energy Act of 1946, as amended, authorizes the Atomic Energy Commission to make grants to institutions of higher education for such things as nuclear laboratory equipment and research reactors.¹³⁶

Before engaging in a relatively brief description of the major educational programs, we can state three simple but significant conclusions. Every existing federal program is for a secular purpose, usually stated with clarity. In no program are sectarian institutions treated differently from other private colleges and universities, though only public institutions are eligible for some forms of aid. Many, but not all of the programs, specifically declare the ineligibility of divinity schools and institutions or departments preparing students for a religious vocation or for teaching careers in religion.

Extensive federal aid to higher education, or, indeed, any education outside federal territories, is a relatively recent phenomenon. In the first half of the nineteenth century the federal government did make some monetary grants to states for general educational purposes, and in the latter half of the nineteenth century aids for certain specialized purposes were developed. Perhaps the most notable of these was the establishment

136. 42 U.S.C. § 2051 (1964); see HEW Memorandum, *supra* note 51, at 37; Sutherland, *Establishment of Religion—1968*, 19 Case W. Res. L. Rev. 469, 479-82 (1968).

under the Morrill Act of 1862 of land grant colleges. Although proposals for general federal assistance to education were often discussed in Congress, they were not enacted. Increasingly in this century such proposals foundered on the issue of aid to parochial schools. Catholics opposed aid limited to public education and many others thought that financing parochial education would be unconstitutional or unwise. Not until 1965 was this logjam broken by the compromise Elementary and Secondary Education Act of 1965. Meanwhile, however, important legislation relating to higher education had been adopted without the rancor that marked discussion of aid to schools.¹³⁷

In 1944, the G.I. Bill of Rights provided tuition for veterans who wished to attend colleges and universities, including theological seminaries.¹³⁸ As originally approved the payments were made directly to the institution attended, but the law was changed to provide payments to the veterans themselves. Subsequent programs with similar benefits have also involved payments to the veterans. As in the original act, no distinction has been drawn between study at secular and sectarian institutions, and the funds may be used at each recipient's option for theological, as well as other professional education.¹³⁹

In 1958 the National Defense Education Act provided fresh aids for higher education, some in the form of funds for students and some in the form of funds for institutions. Subchapter II authorizes the allotment of funds to public and nonprofit private institutions of higher education, without limitation as to their nature, so that they can make low-interest loans to students.¹⁴⁰ Subchapter IV establishes National Defense Fellowships,¹⁴¹ primarily designed for graduate students interested in teaching at colleges and universities, with stipends going to both the students and the institutions they attend. Sectarian institutions are not excluded but in 1964 the following restriction on eligibility was passed:

No fellowship shall be awarded under this subchapter for study at a school or department of divinity. For the purposes of this subsection, the term "school or department of divinity" means an institution, or department or branch of an institution, whose program is specifically for the education of students to prepare them to become ministers of religion or to enter upon some other religious vocation or to prepare them to teach theological subjects.¹⁴²

137. For a historical summary of federal aid to education, see L. Pfeffer, *supra* note 1, at 579-604; Mitchell, *Religion and Federal Aid to Education*, 14 *Law & Contemp. Prob.* 113 (1949).

138. *Serviceman's Readjustment Act of 1944*, ch. 268, §§ 400-03, 58 Stat. 287-91.

139. See HEW Memorandum, *supra* note 51, at 44; 38 U.S.C. §§ 1651-87 (Supp. IV, 1969).

140. 20 U.S.C. §§ 421-26 (Supp. IV, 1969).

141. 20 U.S.C. §§ 461-65 (1964), as amended, 20 U.S.C. §§ 462-64 (Supp. IV, 1969).

142. 20 U.S.C. § 463(d) (1964).

Two other programs in the act—grants to improve the training of guidance counselors¹⁴³ and grants, authorized in 1964, to set up institutes of advanced study—¹⁴⁴ are available to sectarian universities without limitation.

The Higher Education Facilities Act of 1963¹⁴⁵ represented a considerable breakthrough in aid to higher education. It authorizes direct grants to institutions of higher education to construct both undergraduate and graduate “academic facilities.” Church-related colleges and universities are eligible, but:

The term “academic facilities” shall not include . . . (C) any facility used or to be used for sectarian instruction or as a place for religious worship, or (D) any facility which (although not a facility described in the preceding clause) is used or to be used primarily in connection with any part of the program of a school or department of divinity [T]he term “school or department of divinity” means an institution, or a department or branch of an institution, whose program is specifically for the education of students to prepare them to become ministers of religion or to enter upon some other religious vocation or to prepare them to teach theological subjects.¹⁴⁶

As the Senate debates on the bill make plain, this formulation was designed to avoid constitutional doubts.¹⁴⁷ Senator Ervin proposed an additional amendment that would have had the effect of barring any assistance at all to church-related colleges, contending that their receiving federal grants was unconstitutional. Many senators opposed the amendment on the purely pragmatic ground that eliminating church-related colleges might arouse political opposition that would spell the end of the whole bill; but Senator Ribicoff, among others, responded to the constitutional point. He argued that the bill conformed with the secular purpose and primary secular effect test of *Schempp*, and added:

Aid for the religious aspects of church related colleges has been specifically excluded. There will be no assistance for sectarian instruction, for places of worship or for schools of divinity. We are concerned with providing these young men and women with the best in educational opportunities. . . .

That is our purpose, and that will be our effect. The constitutional issue has been met and answered by the terms of the bill itself.¹⁴⁸

Two years later yet additional funds for various purposes were authorized by the Higher Education Act of 1965.¹⁴⁹ Subchapter I provides grants that flow through the states to institutions of higher education

143. Id. § 491.

144. 20 U.S.C. § 591 (Supp. IV, 1969), amending 20 U.S.C. § 591 (1964).

145. 20 U.S.C. §§ 701-57 (1964), as amended, 20 U.S.C. §§ 711-19, 731-33, 743-46, 751, 758 (Supp. IV, 1969).

146. 20 U.S.C. § 751(2) (Supp. IV, 1969).

147. See 109 Cong. Rec. 19467-504 (1963).

148. Id. at 19494-95.

149. 20 U.S.C. §§ 1001-150 (Supp. IV, 1969).

for community service and continuing education programs.¹⁵⁰ No grant can be made for programs, activities or services related to sectarian instruction or religious worship, or provided by a school or department of divinity (defined as in the other statutes).¹⁵¹ Subchapter II (A), which authorizes grants for the acquisition of library materials, contains a similar limitation.¹⁵² Subchapter III¹⁵³ authorizes funds for cooperative arrangements that would allow "developing institutions" to draw on the talent and resources of the country's finest universities; developing institutions are defined to exclude institutions and branches of institutions that prepare students for the ministry, some other religious vocation, or to teach religion.¹⁵⁴ The provisions of subchapter IV(A) and (B),¹⁵⁵ which authorize grants to high school graduates of exceptional need and which strengthen programs of low interest insured loans, contain no such restrictions. The only relevant limit in the work study grants of subchapter IV(C)¹⁵⁶ is that students may not help construct, operate, or maintain facilities used for sectarian instruction or religious worship. Subchapter V(C)¹⁵⁷ allots fellowships to teachers, but not to those at schools or departments of divinity.

The Higher Education Amendments of 1968¹⁵⁸ extend and expand some of these programs, but without fundamentally altering their content or their treatment of sectarian institutions.

Whatever may ultimately be the constitutional law on this subject, the provisions described here, as well as others in these and different acts, demonstrate that Congress has been much more willing to channel funds to church-related colleges and universities than to parochial schools.¹⁵⁹ We have no reason to doubt that the pattern in the near future

150. *Id.* §§ 1001-11. Arguably, a state with a strict prohibition on giving money to sectarian institutions could not even expend the time and manpower necessary to plan the use of federal funds and to serve as their conduit. Were this argument to succeed in any number of state courts, Congress would probably alter the legislation to avoid the difficulty by designing some other mechanism for disbursing its grants.

151. *Id.* § 1011.

152. *Id.* § 1027.

153. *Id.* §§ 1051-56.

154. *Id.* § 1052(h).

155. *Id.* §§ 1061-87.

156. 42 U.S.C. §§ 2751-57 (Supp. IV, 1969).

157. 20 U.S.C. §§ 1111-18 (Supp. IV, 1969).

158. Pub. L. No. 90-575, 82 Stat. 1014; see S. Rep. No. 1387, 90th Cong., 2d Sess. 1 (1968), H.R. Rep. No. 1649, 90th Cong., 2d Sess. 1 (1968).

159. Compare the various provisions of the Elementary and Secondary Education Act of 1965, tits. I-IV, 79 Stat. 27, (codified in scattered sections of 20 U.S.C.). See also La Noue, *Church-State Problems In New Jersey: The Implementation Of Title I (ESEA) In Sixty Cities*, 22 Rutgers L. Rev. 219 (1968). His careful study of the operation of this title

will continue to be grants, loans, and contracts, earmarked for specific secular purposes, with all private nonprofit colleges and universities (other than "divinity" schools and branches as broadly defined) having equal access to benefits.

If the Supreme Court were to follow the same course as the *Horace Mann* case, which disallowed Maryland's grants to sectarian colleges, institutions of higher learning having close church ties would, obviously, be deprived of considerable federal help that has only recently been tendered. As indicated earlier, we believe this will not occur. Federal programs of the same general type as those just described are, in our opinion, likely to be sustained.

If, as we now deem to be probable, the basic pattern of federal law does not change in any very dramatic way, and if, as we have forecast, church-related colleges will not be judicially blocked from sharing in the benefits Congress has provided or is likely soon to provide, one must conclude that a church-related college would gain little, if any, additional *federal* money by severing its present religious links. "Independence" would make for economic advantage only if Congress were to become markedly more openhanded or the Supreme Court were to become markedly more restrictive than we have predicted.

But these comments, we emphasize once more, relate to eligibility for *federal* funds. Independence may have substantially greater significance with respect to benefits conferred by the *state*.

III. THE NEW YORK STATE CONSTITUTION

Whatever be its status under federal law, a sectarian college or university is seriously disadvantaged under the constitution and statutes of New York.¹⁶⁰ These have counterparts in many other states. Although our discussion here will be confined to New York law, much of the commentary that follows may bear significantly on the legal position of church-related institutions in other states.

In the second half of the nineteenth century numerous states, New York among them, debated whether parochial schools should or could receive public funds.¹⁶¹ Since this was long before the first amendment's applicability to the states had been established, political leaders—sometimes moved by a genuine concern for church-state separation and sometimes moved simply by hostility to Catholicism—attempted to establish

indicates a number of abuses of the guarantees intended to avoid unconstitutional applications of the act.

160. We assume for the rest of this article that the relevant portions of New York's constitution do not themselves conflict with the federal constitution.

161. See L. Pfeffer, *supra* note 1, at 530-33.

in federal and state constitutions prohibitions against state involvement with religion. The high water mark of the federal effort was the amendment proposed by James G. Blaine in 1875 which stated:

No State shall make any law respecting an establishment of religion or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect or denomination; nor shall any money so raised or lands so devoted be divided between religious sects or denominations.¹⁶²

The amendment failed of adoption in Congress, but Blaine-like provisions sprang up in the constitutions of most states. New York was no exception, though its restrictions are atypical in being limited to education. What is popularly, though inexactly, called the "Blaine Amendment" in New York's fundamental law was adopted by the Constitutional Convention of 1894, virtually two decades after Blaine's unsuccessful efforts at the federal level. Located in the education article rather than in the bill of rights, it provides:

Neither the state nor any subdivision thereof shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught . . .¹⁶³

This language, plainly much more specific than the first amendment, provides answers on the state level to many of the questions left open in federal constitutional law. That direct monetary assistance to private sectarian schools has been foreclosed seems clear.¹⁶⁴ Nor are sectarian institutions of higher learning in any better position.¹⁶⁵

Though most of the litigation arising under the provision has concerned the meaning of "aid," two cases, at least, have arisen because direct grants had been made to institutions. One of these was dismissed on the ground that the plaintiff (suing simply as a taxpayer who objected to the manner in which his tax payments were being spent) lacked standing to challenge a grant from the Emergency Housing Board to build a

162. 4 Cong. Rec. 5580 (1876).

163. N.Y. Const. art. IX, § 4, as amended, N.Y. Const. art XI, § 3.

164. But cf. Opinion of the Justices, 258 A.2d 343 (N.H. 1969); *Schade v. Allegheny County Institution Dist.*, 386 Pa. 507, 126 A.2d 911 (1956).

165. Leonard Manning has advanced an intricate argument that the section might be deemed inapplicable to higher education. See Manning, *supra* note 116, at 544-46. Both the legislative and the executive branches apparently now assume that the section does apply to higher education and we doubt that a court would reach a contrary interpretation in the face of its broad language. But cf. *Sargent v. Board of Educ.*, 177 N.Y. 317, 69 N.E. 722 (1904).

dormitory at Canisius College, a Jesuit institution.¹⁶⁶ In the other case, New York's highest court sustained payments to a Catholic orphan asylum and to its teachers.¹⁶⁷ A constitutional provision dealt specifically with orphanages.¹⁶⁸ New York has had a long history of aid to them,¹⁶⁹ and discussions at the Constitutional Convention had focused on schools rather than on homes for waifs.¹⁷⁰ All these considerations led easily to the conclusion that orphan asylums were not "institutions" of the kind to which no public help could be extended.

Most of the cases in which the courts have tried to define "aid" have turned on the viability of the "child benefit" theory under the state constitution. One exception was *64th St. Residences, Inc. v. City of New York*.¹⁷¹ In that case the city had condemned property in the Lincoln Center area and set aside part of it for educational purposes. Fordham University submitted a bid, as did other educational institutions. The property was ultimately sold to Fordham at a price below its fair value on the open market. The Court of Appeals, in a unanimous decision, held that the sale involved no forbidden grant or subsidy; the court even intimated that an unconstitutional discrimination would have occurred if Fordham had been excluded from the bidding.¹⁷²

In 1922, in the first of the "child benefit" cases, the New York intermediary court, the Appellate Division, held that textbooks could not legally be furnished to parochial school pupils by a governmental body.¹⁷³ Even though the books were given to the schoolchildren and not to the schools, the court deemed the legislative generosity to be clearly prohibited by the New York Constitution. The gift, the judges said, was certainly an indirect aid to the parochial schools. The pupils, the court

166. *Bull v. Stichman*, 273 App. Div. 311, 78 N.Y.S.2d 279 (3d Dep't), aff'd mem., 298 N.Y. 516, 80 N.E.2d 661 (1948). The present status of the rule of this case is somewhat unclear. Traditionally, New York has not permitted mere taxpayers to challenge state expenditures, although the status of a taxpayer has been sufficient to attack municipal outlays. See *Schieffelin v. Komfort*, 212 N.Y. 520, 106 N.E. 675 (1914). The United States Supreme Court in 1968, however, did allow federal taxpayers standing to challenge federal grants claimed to violate the establishment clause, *Flast v. Cohen*, 392 U.S. 83 (1968) (discussed in note 2 supra), and the effect of that decision on state law is uncertain. It is also conceivable that some plaintiff other than a taxpayer would be found to have standing for a suit against a grant to a sectarian institution. See *Board of Educ. v. Allen*, 20 N.Y.2d 109, 228 N.E.2d 791, 281 N.Y.S.2d 799 (1967), aff'd, 392 U.S. 236 (1968).

167. *Sargent v. Board of Educ.*, 177 N.Y. 317, 69 N.E. 722 (1904).

168. N.Y. Const. art. VIII, § 11, as amended art. XVII, §§ 2, 6.

169. *Sargent v. Board of Educ.*, 177 N.Y. 317, 320, 69 N.E. 722, 722-23 (1904).

170. *Id.* at 326-27, 69 N.E. at 725.

171. 4 N.Y.2d 268, 150 N.E.2d 396, 174 N.Y.S.2d 1, cert. denied, 357 U.S. 907 (1958).

172. *Id.* at 276, 150 N.E.2d at 399, 174 N.Y.S.2d at 5.

173. *Smith v. Donahue*, 202 App. Div. 656, 195 N.Y.S. 715 (3d Dep't 1922).

pointed out, "do not use textbooks and ordinary school supplies apart from their studies in the school. They want them for the sole purpose of their work there. There is no question but that the textbooks and ordinary supplies are furnished direct to the public schools; there is no thought that they are furnished to the scholars as distinct from the schools; neither can there be such a thought in the case of the parochial schools."¹⁷⁴

Sixteen years later, in *Judd v. Board of Education*,¹⁷⁵ the Court of Appeals, 4-3, struck down a law authorizing the use of public funds to pay for bus transportation for parochial school pupils. It strongly rejected a child benefit contention:

The argument is advanced that furnishing transportation to the pupils of private or parochial schools is not in aid or support of the schools within the spirit or meaning of our organic law but, rather, is in aid of their pupils. That argument is utterly without substance. It not only ignores the spirit, purpose and intent of the constitutional provisions but, as well, their exact wording. The object of construction as applied to a written constitution is to give effect to the intent of the people in adopting it and this intent is to be found in the instrument itself unless the words or expressions are ambiguous . . . There is nothing ambiguous here. The wording of the mandate is broad. Aid or support to the school "directly or indirectly" is proscribed. The two words must have been used with some definite intent and purpose; otherwise why were they used at all? Aid furnished "directly" would be that furnished in a direct line, both literally and figuratively, to the school itself, unmistakably earmarked, and without circumlocution or ambiguity. Aid furnished "indirectly" clearly embraces any contribution, to whomsoever made, circuitously, collaterally, disguised, or otherwise not in a straight, open and direct course for the open and avowed aid of the school, that may be to the benefit of the institution or promotional of its interests and purposes.¹⁷⁶

The dissenters contended that payments for transportation did not aid or maintain the institutions themselves and were not proscribed by the Constitution.¹⁷⁷ The Constitutional Convention of that year sided with the dissenters, at least on the issue of bus transportation, adding what is now the last clause of the section, "but the legislature may provide for the transportation of children to and from any school or institution of learning."¹⁷⁸

The most recent case dealing with Section 3 is *Board of Education v. Allen*,¹⁷⁹ discussed above. The textbook law under attack was challenged in the state courts primarily on the basis of the state constitution. The

174. Id. at 661, 195 N.Y.S. at 719.

175. 278 N.Y. 200, 15 N.E.2d 576 (1938).

176. Id. at 211-12, 15 N.E.2d at 582.

177. Id. at 221, 15 N.E.2d at 586.

178. N.Y. Const. art. XI, § 3.

179. 20 N.Y.2d 109, 228 N.E.2d 791, 281 N.Y.S.2d 799 (1967), aff'd, 392 U.S. 236 (1968).

Court of Appeals sustained the loan of textbooks by a bare majority, explicitly rejecting the reasoning of *Judd*:

The architecture reflected in *Judd* would impede every form of legislation, the benefits of which, in some remote way, might inure to parochial schools. It is our view that the words "direct" and "indirect" relate solely to the means of attaining the prohibited end of aiding religion as such.

The purpose underlying section 701, found in the Legislature's own words . . . belies any interpretation other than that the statute is meant to bestow a public benefit upon all school children

Since there is no intention to assist parochial schools as such, any benefit accruing to those schools is a collateral effect of the statute, and, therefore, cannot be properly classified as the giving of aid directly or indirectly.¹⁸⁰

The three judges in dissent would have adhered to *Judd* as consistent within the meaning of Section 3 and reflective of wise policy.¹⁸¹

The main thrust of the majority opinion is to justify only assistance that can be rationalized as child benefit. As to what may be regarded as, factually, a benefit to the child and not to his school, the opinion intimates a rather broad readiness to accept measures that might have been looked at askance in earlier years. Depriving parochial school children of many of the benefits now enjoyed by other school children under state and federal programs was simply regarded as an unfairness. One may anticipate that the majority would be likely to resolve other borderline cases (such as scholarships) in favor of aid rather than in favor of strict construction. Although some isolated language in the opinion could conceivably be interpreted to suggest acceptance of aid to church-related educational institutions for secular purposes, as a whole it does not indicate that grants or any other public assistance going directly into the school's hands would receive judicial approval. And of course one cannot wholly ignore the danger that the precarious majority will shift back to the *Judd* approach, in which event aid to students, let alone aid to schools, would again be in jeopardy.

The New York courts have as yet given no indication of readiness to approve the constitutionality of indirect financial assistance like that embodied in a recent Massachusetts plan. The Massachusetts Constitution, in language similar to that of New York, provides:

[N]o grant, appropriation or use of public money or property or loan of public credit shall be made or authorized by the commonwealth or any political division thereof for the purpose of founding, maintaining or aiding any school or institution of learning . . . wherein any denominational doctrine is inculcated, or any other school, or any college . . . which is not publicly owned¹⁸²

180. *Id.* at 116, 228 N.E.2d at 794, 281 N.Y.S.2d at 804.

181. *Id.* at 118, 228 N.E.2d at 795, 281 N.Y.S.2d at 805.

182. Mass. Const. art. XLVI, § 148.

Massachusetts law permits the judges of the Supreme Judicial Court to give the legislature advisory opinions concerning the constitutional propriety of pending bills. In 1968 the judges were asked to evaluate a proposal to create a state authority which would raise money by selling bonds and then lend sums to colleges and universities, sectarian and non-sectarian alike, for new construction projects. Repayment of the loans was expected to be made out of the revenue derived from the projects (such as dormitories and dining facilities), and the state authority was in turn to pay off its indebtedness as its loans were repaid. Since the authority's revenues from the sale of its bonds were not to be public monies, and since the bonds were not to be backed by public credit, the Massachusetts judges concluded that the state constitution would not prevent effectuation of this plan.¹⁸³ The decision is noteworthy because the state-created authority was clearly expected to provide participating institutions with less expensive financing than they could otherwise obtain. The case suggests that even fairly absolute prohibitions on financial assistance may possibly be circumvented by ingenuity and a sympathetic state court. Nonetheless, such efforts, even if successful, are unlikely to provide the massive financial support that colleges and universities may need to survive.

IV. NEW YORK STATE LEGISLATION

Until 1968, the primary vehicles for assistance to private higher education in New York have been scholarships and loans to students. This is not a coincidence; the aim has been to find mechanisms through which sectarian institutions may benefit on a parity with independent colleges and universities.

Each year New York provides scholarships to support four years of study in colleges within the state.¹⁸⁴ In addition to these so-called Regents scholarships, virtually every New York resident studying in an undergraduate or graduate school within the state has been eligible since 1961 for a scholar incentive award.¹⁸⁵ According to the Select Committee on the Future of Private and Independent Higher Education, the \$144 million disbursed by the state during the first six years of the Scholar Incentive Program "accounted for about two and one-half times more state scholarship money than was provided by all the other states combined"¹⁸⁶

In addition to these basic programs, various scholarships and fellow-

183. Opinion of the Justices, 236 N.E.2d 523 (Mass. 1968).

184. N.Y. Educ. Law § 601 (1969), as amended, N.Y. Educ. Law § 601 (Supp. 1969).

185. *Id.* § 601(a).

186. N.Y. State and Private Higher Educ., Report of the Select Committee on the Future of Private and Independent Higher Education in New York State 26 (1968).

ships have been authorized for specific purposes and for special classes of persons.¹⁸⁷ College and vocational students have also been made eligible to receive loans of state funds.¹⁸⁸ None of the pertinent statutes has sought to confine its benefits to students enrolled in nonsectarian institutions.

Certain kinds of New York aid can go directly to institutions of higher education to help meet the needs of "[m]edical schools, dental schools, research centers and similar institutions or facilities operating specified training or research programs or projects pursuant to contracts with the state university."¹⁸⁹ If grants of this kind have been made, their validity has apparently not yet been challenged. Conceivably a state contribution toward the costs of a medical school or research center operated by a sectarian university might be deemed unconstitutional. On the other hand, state aid might, in this setting, be regarded simply as the purchase price of a benefit sought by the state, and therefore not really "state aid" of the prohibited variety.¹⁹⁰

This rationale was not serviceable, however, in regard to the Albert Schweitzer chairs in the humanities. In 1964 the legislature set up these distinguished professorships, along with Albert Einstein chairs in science, to attract renowned scholars to the state's universities. The regents are authorized "to contract with outstanding scholars" to fill the chairs and

to contract with any college in this state . . . in relation to the provision of proper facilities, equipment, supplies, professional assistants, clerical and other personnel and such other services as may be . . . appropriate to enable the holder . . . to carry out his work Every college in this state is hereby authorized to enter into such a contract with the regents.¹⁹¹

The Board of Regents awarded a Schweitzer Chair for 1967 to Fordham University, to be filled by H. Marshall McLuhan. The Attorney General decided that the proposed contract with Fordham, involving payments up to \$70,000, constituted "direct aid to a sectarian institution" in violation of Article XI, § 3.¹⁹² "Although the grant of an Albert Schweitzer Chair to Fordham does not involve a financial gain to the strictly religious posture of that institution," the Attorney General wrote, "the award of such chair to the University enhances

187. N.Y. Educ. Law §§ 620-39 (Supp. 1969).

188. N.Y. Educ. Law §§ 650-51, 654-58 (1969); N.Y. Educ. Law §§ 652-53(b) (1966), as amended, N.Y. Educ. Law §§ 652-53(b) (Supp. 1969).

189. N.Y. Educ. Law § 358 (Supp. 1969), amending N.Y. Educ. Law § 358 (1969).

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

191. N.Y. Educ. Law § 239(4) (1969).

192. Letter from Louis J. Lefkowitz, Attorney Gen., to Honorable James E. Allen, Jr., Comm'r of Educ., Sept. 13, 1967 at 3.

the general reputation of the school and in turn benefits the 'whole living organism.'"¹⁹³ The proposed contract with Professor McLuhan was also declared invalid, because interlinked with the Fordham contract. Fordham, rather than contesting the decision of the state's executive branch, undertook to compensate Professor McLuhan and to provide the proper accoutrements out of its own funds.

Recent developments, however, point out the fine distinction between sectarian and non-sectarian institutions. After denial of the Schweitzer Chair, Fordham sought to implement certain changes in order to qualify for state aid. The State Education Department, in response to these changes, has declared Fordham a secular institution qualified to receive state aid.¹⁹⁴

Far more disadvantageous than the occasional loss of compensation for a Schweitzer or Einstein Chair is the position of sectarian universities under the legislation approved in June of 1968 upon the recommendation of the Select Committee, popularly called the Bundy Committee.¹⁹⁵ The committee, with an imposing membership appointed by the Governor and the Regents, unequivocally found a pressing need for public financing of higher education. The state's scholarship program, the committee held, had usefully benefited students, but had not produced fresh income for the educational institutions as a whole, partly because their tuition charges had not risen to absorb the amount of the grants.¹⁹⁶ Direct assistance to higher educational institutions was urgently needed, the committee concluded. Candidly facing the impediment of Article XI § 3, it recommended unanimously that the section be repealed as it applies to higher education, so that grants could be made to all private colleges and universities, whether or not of a denominational character, so long as they were essentially devoted to education and not to religion. In words that echo some of the policy arguments already discussed herein, the Bundy Committee stated:

The democratic argument for a single comprehensive public school system in each community simply does not apply, in our view, at the level of the four-year college and the university. The clear-cut tradition of this country is that there should be a wide variety of colleges and universities, supported in a wide variety of ways. Moreover, there has been a general recognition for many generations that privately controlled colleges and universities—if they are good—serve the public interest in a wider and deeper way than most private elementary and secondary schools. We in-

193. *Id.* at 2.

194. Statement by Ewald B. Nyquist, New York State Education Commissioner, Feb. 19, 1970.

195. See N.Y. State and Private Higher Educ., *supra* note 186, at 40-55.

196. *Id.* at 26.

tend no criticism of private schools; we are simply making the point that there is a pronounced and recognized difference between the public contribution of Columbia or Cornell and the public contribution of even the most distinguished of private elementary and secondary schools. The service of the schools is almost entirely a service through the students to whom they may offer unusual educational advantages. The service of the colleges and universities is wider—including as it does the learning of the faculties, the public value of their libraries, the professional service of the lawyers, doctors and engineers they train, and their general civic meaning as major institutions serving the community as a whole.

We are far from concluding that all religious institutions should have state assistance. On the contrary, we would oppose any assistance to institutions whose central purpose is the teaching of religious belief. We suggest that each institution applying for state funds be examined as a whole to determine if it is primarily a religious institution or primarily an institution of higher education. Clearly no seminary should have state help, in our view. We do not favor aid to those which are mainly concerned with the indoctrination of their own faithful. Nor should there be state assistance to any institution which discriminates in its admissions on religious grounds, any more than there should be aid to any which discriminates on grounds of race or color.

But we firmly reject the wider argument that all institutions of higher education having any religious connection should be ineligible. We think this kind of rigidity flies in the face of both logic and experience. History demonstrates that there is no automatic connection between the presence or absence of religious affiliation and the presence or absence of those qualities which make a college or university a major instrument of public service. There are secular institutions which are narrow and restrictive in their conception of their task; there are religious institutions which stretch outward to all men and to all human concerns.¹⁹⁷

Though the proposal to amend the New York Constitution was laid aside without action, the state legislature did enact the basic authorizations proposed by the Committee.¹⁹⁸ After July 1, 1969, private institutions of higher education are to receive an annual apportionment of \$400 for each earned bachelor's or master's degree and \$2400 for each earned doctorate; but to qualify, "[t]he institution must be eligible for state aid under the provisions of the constitution of the United States and the constitution of the state of New York."¹⁹⁹ Under the new law, a church-related college or university that is precluded from participation by Article XI will suffer badly in comparison (and in competition) with independent educational institutions.

Part or all of Article XI, § 3 may of course be eliminated. In his address that opened the 1970 legislative session, Governor Rockefeller recommended that the Blaine Amendment be repealed and that "the less restrictive language of the federal constitution" be substituted.²⁰⁰ Subse-

197. *Id.* at 49.

198. N.Y. Educ. Law § 6401 (Supp. 1969).

199. *Id.* § 6401(2)(d).

200. N.Y. Times, Jan. 8, 1970, at 30, cols. 1, 2. In any event, constitutional amendments

quent to the Governor's address, both houses of the state legislature have passed measures (in somewhat different versions) to repeal the amendment. Since opposition to repeal was widely assumed to have been instrumental in defeating the proposed 1967 Constitution (which had embodied the result now desired by the Governor), softening of New York's language will not be achieved without bitter public debate, the outcome of which is by no means certain. And repeal would not, in any event, guarantee the validity of this aid under the federal constitution. Meanwhile, state funds will be poured into the treasuries of eligible, independent institutions to be expended for their needs as they themselves perceive them, while the institutions that preserve their religious identity will be no worse than at present, because it will be no different. In comparative terms, however, they may find that the independent institutions, taking advantage of their state subsidies, may move faster and farther on the road to academic excellence—or possibly even on the road to academic survival.

must be passed by two successive legislatures and then approved in a general election. N.Y. Const. art. XIX, § 1. So, even in the most optimistic view from the stand-point of sectarian colleges, implementation of that portion of the Bundy Committee recommendations is some time away from possible realization.