

September 2016

Separation of Church and State - A Constitutional View

Paul G. Kauper

Follow this and additional works at: <https://scholarship.law.stjohns.edu/tcl>



Part of the [Catholic Studies Commons](#), and the [Constitutional Law Commons](#)

Recommended Citation

Paul G. Kauper (1963) "Separation of Church and State - A Constitutional View," *The Catholic Lawyer*. Vol. 9 : No. 1 , Article 4.

Available at: <https://scholarship.law.stjohns.edu/tcl/vol9/iss1/4>

This Article is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in The Catholic Lawyer by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

SEPARATION OF CHURCH AND STATE — A Constitutional View

PAUL G. KAUPER*

THE TERM, "SEPARATION OF CHURCH AND STATE," used so freely, is not a term found in either the federal or the state constitutions. It is a symbolic term used to describe relationships between law and religion, between government and the churches, between the civil community and the religious community. In terms of the American constitutional tradition, separation of Church and State rests on the premise that the functions of Church and State are not to be commingled, that each has its separate task to perform, that the Church is concerned with spiritual and moral matters affecting both its members and the whole community and that the State, as a secular instrument which enjoys a monopoly of coercive power, is concerned with the government of the civil community. It is not the State's business to operate a church or to prescribe an official creed for its citizens, and it is not the function of the churches to run the government. Each within its own sphere is supreme. Neither is to dominate the other. This separateness serves the cause of human freedom. Because it is not the State's business to interfere with or intervene in religious matters, whether by restricting the exercise of religious freedom or by using its coercive power to compel belief, separation, while assuring the freedom of religion for the individual and churches, also assures freedom for the nonconformist and nonbeliever. Likewise, by assuring the freedom of the state from ecclesiastical domination, the separation principle protects against the imposition by the Church, through the State, of its beliefs and views upon the civil community.

Having in mind the long history of this problem and the unfortunate consequences of either State domination over the Church or the Church's

* A.B., J.D., Professor of Law, University of Michigan.

domination over the State, we can be grateful in this country for a tradition of separation that has contributed so much to freedom, to civic peace, and to the strength and vitality of religion and of the churches. In a land with as many diverse religious groups as the United States, separation of Church and State is essential to secure the conditions of civil peace and harmony. Our experience amply demonstrates that religious life flourishes best when religion depends on the voluntary adherence and support of the believer and not on coercive power exercised by the State.

Co-operative Separatism

It should be equally clear, however, that in the American tradition the doctrine and practice of separation of Church and State and the concept of the secular and neutral State has not meant, as in some countries, the hostility of government to religion or even indifference to the significance of religion in the life of the community. On the contrary, American experience has demonstrated that consistent with separation of Church and State, the State and the churches can live in a state of friendly cooperation. We may describe this situation as "co-operative separatism."

To describe this relationship in terms of a metaphor like "the wall of separation of Church and State" is inaccurate and misleading. This is so for several reasons. In the first place, the figure of a "wall" suggests the drawing of a fixed and clear line between the domain of government, on the one hand, and of religion, on the other. By nature this is impossible. We see this more clearly when we realize that what we are talking about is the relation between the civil and religious community. All are members of the civil community. But a

part are members of the smaller religious community embraced within the larger civil community. There can be no wall dividing those citizens who are members of both communities.

Secondly, the "wall" concept suggests that a line can be drawn which clearly separates the function of Church and State. This is not an accurate portrayal. The truth is that even though the principal functions of government and of organized religion are separate and distinct, there is an area of overlapping or concurrent function in which they have a common interest, the area, indeed, which is the source of our chief problems today. Thus, in the field of education and social welfare, government and religious organizations have common interests.

Finally, the "wall" metaphor is misleading in so far as it suggests that Church and State have nothing to do with each other. Perhaps it would be better to speak of a fence since, as Mr. Justice Frankfurter has said, "Good fences make good neighbors."

But the really important point is that government and law, on the one hand, and religion, on the other, serve each other's needs. The churches and their members depend upon the State to provide those conditions of public peace and security and the public services necessary to enable the churches to enjoy freedom and to accomplish their mission. The authority of the State and the effective maintenance of the peace of the community are indispensable to the free exercise of religion. Conversely, the churches perform a valuable function for the State by helping to create the spiritual climate and the respect for moral and ethical values that furnish the foundation of our free and democratic society. Whether we put the matter in terms of natural law,

or in terms of the churches' discharge of a prophetic ministry, or the spiritual leavening of the community, the churches and the intangible forces generated by their witness and teaching make their contributions to the welfare of the civil community.

Just as the relationship between Church and State cannot be described in terms of a "wall of separation," so it is equally true that at no time in our history has this relationship been characterized as "absolute and complete separation of Church and State." This is true only if we are thinking of formal control arrangements. To be sure our governments operate no churches and have no voice or representation in the affairs of the churches, and in turn the churches have no representation or voice in government. Here we have absolute and complete separation. But if we turn to the substance of things, it is readily apparent that in the American tradition of Church-State relations and consistent, therefore, with the historic American understanding of separation of Church and State, government has recognized the importance and relevancy of religion in American life and has accommodated its policies to this situation. The acknowledgment in many of our state constitutions of dependence upon God, the references to a Deity in our national anthem, the annual Thanksgiving proclamations, the opening of sessions of Congress by prayer, the commissioning of chaplains for the armed forces and the recognition of the place of chaplains in providing a spiritual ministry for those in hospitals and prisons, the authorization of marriages by ministers, priests and rabbis—all signify the awareness by government of the place of religion in American thought and life. Moreover, government has recognized the service ren-

dered by churches to the community by granting them immunity to property taxes for property owned and held for religious purposes, as well as deductions under the income, estate and gift tax laws for contributions made to religious organizations. The laws of the states have facilitated the work of religious bodies by authorizing the incorporation of churches, congregations and auxiliary organizations. Finally, it should be noted and emphasized that the federal government, in disbursing funds and property for specified purposes coming within the power of the federal government to spend for the general welfare, has extended this aid impartially to all organizations and institutions that help to achieve the public objectives of the spending program, including aid to institutions under the control of religious bodies. This is in the area of concurrent or overlapping functions. Thus, under the Hill-Burton Act, grants to assist in the construction of new hospital facilities have been made to all qualified hospitals, including those operated under religious auspices. Similarly, colleges operated by church bodies have shared in loans from the federal government to build income-producing facilities such as dormitories and cafeterias, in grants for the purpose of enabling schools and colleges to acquire certain facilities for the teaching of science, language and mathematics, and in the distribution of federal surplus property. That church colleges have benefited from all these programs is indisputable. But it is also indisputable that the assistance furnished these institutions has advanced the general welfare of the nation. Finally, I should mention that the separation principle has not been construed in practice to require denial of governmental benefits to persons in situations where reli-

gious bodies or institutions could be said to receive indirect aid from these benefits. I call your attention, for instance, to the granting of G. I. benefits to students, loans to college students and free lunches for school children. The fact that some students may attend church colleges and parochial schools does not disqualify them for these benefits.

I have reviewed at some length the various types of situations in which government has recognized the significance of religion in our national life, has accommodated its tax policy in recognition of the contribution made by religion to the community, and in the impartial distribution of financial benefits designed to serve the general welfare has made grants to all institutions serving the national purpose, including institutions operated under church auspices. Surely these practices make clear that it has not been the general understanding in the American interpretation of the separation principle that government must be indifferent to religion and its contribution to the national life, that it cannot in various ways give limited assistance on a nondiscriminatory basis to religious functions and activities, or that in the disbursement of public funds for social welfare functions, it must discriminate against religious bodies rendering services that government may properly support or subsidize. Certainly these practices do not point to a "wall of separation" between Church and State, to absolute and complete separation or to the conclusion that government can do nothing which in fact aids religion. In none of these cases is the government favoring one church over another, attempting to prescribe by compulsion a national creed forcing religion on unbelievers or attempt-

ing to operate or control a church or churches.

Constitutional Interpretation

The American tradition of separation of Church and State finds its legal expression in the provisions of the federal and state constitutions, and attention will now be directed to the question of constitutional interpretation. Both because of time limitations and because the current questions and controversies turn on the provisions of the federal constitution which explicitly limit Congress and which by judicial act have been made applicable to the states, I shall confine my discussion to the federal provisions. But before doing so, I should make clear that many state constitutions contain explicit provisions which on their face prescribe specific limitations on the expenditure of public funds which are more rigid than those stated in the federal constitution. Often these provisions limit expenditure to institutions under public control, and in many cases they prohibit the use of public funds to assist sectarian education or to assist schools which are controlled by religious bodies. It is clear that under these state constitutional provisions any aid to parochial schools or to church colleges in support of their educational programs would be unconstitutional.

We turn then to the federal constitution. The first amendment says that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." Here is the language on which discussion and controversy are centered. This is the language which in its twin phrases is interpreted to incorporate the principle of separation of Church and State into the federal constitution. What does it mean? I think we all have a good

idea of what is meant by the "free exercise" of religion. This embraces freedom of religion in its fullest dimensions—freedom of conscience, freedom of worship, freedom to organize and operate churches, to preach and teach, to evangelize and to seek to win converts—in short, all that is embraced within the concept of religious activity. But what is meant by a law respecting "an establishment of religion." Its meaning is not so clear and scholars are not agreed on the original significance of these words as used by the drafters. Did it mean that Congress could not set up a national church? Certainly this would be its minimum content. Did it mean that Congress could not favor one religion over another and that as between religions it must maintain neutrality? Certainly this is an interpretation that well fits the American religious scene and the diversity of religions found here. Does it mean something more than this?

At this point we look to Supreme Court decisions for illumination and to key statements found in important cases. The first occurred in the course of the majority opinion in the well-known and now famous case of *Everson v. Board of Educ.*, where the Court held constitutional a local school board's action in providing bus transportation at the expense of public tax funds for children attending parochial as well as public schools. This was the specific problem before the Court, and the majority found nothing unconstitutional about the school board's action. It is evident, therefore, that anything the Court said in that case about what either Congress or the states may not do to aid religion was dictum. The principal paragraph of Mr. Justice Black's much-quoted dictum in this case reads as follows:

The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and state. . . .'

It will be noted that the Court in this broad dictum, purporting to interpret the nonestablishment clause, included some ideas that clearly come under the free exercise of religion concept. Any attempt by government to force or influence a person to remain away from church or to profess a disbelief in any religion or to punish him for entertaining or professing religious beliefs or for church attendance would be a clear violation of religious freedom. What appears in this dictum as distinctively an interpretation of the non-establishment idea is that the government cannot set up a church, pass laws which aid one religion, aid all religions or prefer one religion over another, force or influence a person to go to church, force him to profess a belief in religion, punish him for disbelief or nonattendance at church, levy a tax to support any religious activities or institutions that teach or practice relig-

ion, or participate in the affairs of any religious organizations or groups. In short, nonestablishment means that the government can do nothing to sanction or aid religion. Translated in terms of the right of the individual, this means that a person enjoys a constitutional right to be free from any governmentally-sanctioned religion. Finally, it should be noted that Mr. Justice Black concludes this part of his opinion by referring to Jefferson's famous statement that the Constitution is intended to erect "a wall of separation between church and state."

That nonestablishment should mean that the government may not sanction a particular religion or establishment or force religion on anyone is understandable. Such a construction promotes both the freedom of the believer and the freedom of the unbeliever, and both are entitled to constitutional protection. On this basis the Court, at its second last session, held invalid the provision of the Maryland Constitution requiring a declaration of belief in God as a condition of holding public office. Likewise, on the same basis, the Court this past term declared unconstitutional the nonsectarian prayer sanctioned by New York law and used in some of the public schools in that state. I shall say more about this decision later.

Returning to Mr. Justice Black's opinion in the *Everson* case, it is his statement that government cannot aid all religions that presents the real difficulty. Did this mean that government could, under no circumstances, do anything to recognize and encourage religious activities or that, in granting assistance for valid public purposes in areas where both government and the churches operate, it was required to discriminate against religious organizations

which, along with others, help discharge these functions? If this is what was meant, then was this intended by the language of the first amendment? As I have previously indicated, it is, indeed, highly doubtful that this was intended. Moreover, the various practices engaged in by government that I detailed above cast serious doubt on the authenticity of an interpretation of the first amendment which would require invalidation of any governmental practice that can be seen as an "aid to religion." Indeed, the *Everson* case itself rejects this notion since the actual holding was that a school board could use public funds to reimburse parents for the cost of transporting children to parochial as well as to public schools. In short, the Constitution does not require a state to discriminate against children attending parochial schools when disbursing funds for school transportation.

I should like here to stress the point in respect to discrimination. It seems quite clear that to discriminate in the enjoyment of legal privilege because of religion is in itself a violation of religious freedom. To permit parks to be used for all assemblies except religious assemblies, to levy a special tax on religious activities alone, to forbid owning of property by religious societies, to deny the benefit of police and fire protection to property solely because it is used for religious purposes, would all be instances of discrimination on the ground of religion. The point I am making here in regard to the "no aid" argument is that, if pressed to the extreme of denying to religion and religious activities, rights and privileges otherwise generally recognized under law, it becomes a means of defeating the free exercise of religion.

The decisions that immediately followed

Everson dealt with the released-time problem. In *Illinois ex rel. McCollum v. Board of Educ.*, the majority held invalid a released-time arrangement whereby public school property was used for the teaching of religion by teachers supplied by the primary religious groups, but at the expense of one hour per week of school time. Participation in the program was voluntary, and children whose parents objected to participation were assigned other school activities during this period. The majority of the Court considered the released-time program to be an unlawful involvement by the public school system in a program of religious education. As the majority saw it, the churches were using the schools as a means of recruiting students for religious education classes under circumstances that resulted in coercion of students to attend. But here again we have a dissenting view, this time by Mr. Justice Reed, who felt that the majority were running the separation argument into the ground, and in support of this, he pointed to many instances in American history where the State had taken a sympathetic view with respect to education for religious purposes.

Broadly interpreted, *McCollum* could have meant that the separation principle derived from the non-establishment limitation requires the State to be completely indifferent to religion and to the interest of parents in religious education. This is the only actual decision by the Supreme Court where the holding can be said to rest on a broad theory of separation of Church and State. Actually the case could easily be interpreted more narrowly to mean that the State may not make itself a party to any scheme whereby religious education is forced on children in the public schools. A broad interpretation of the case was repu-

diated by the later decision in *Zorach v. Clauson* where the Court sharply limited *McCollum* by its holding that a program of released time for religious education of children in the public schools was constitutional, provided that the classes were not conducted on the school premises. For all practical purposes, a majority of the Court had now swung around to the views expressed by Mr. Justice Reed in dissent in the *McCollum* case. This becomes evident when we look more closely at Mr. Justice Douglas' majority opinion and also at the opinions written for the four dissenting Justices who argued strenuously that the distinction between this case and the *McCollum* case was insubstantial and even trivial, and did not warrant a difference in result. The dissenters appear to be right in saying that there was no substantial distinction between the two cases. What is far more important was Mr. Justice Douglas' opinion in *Zorach*. Speaking for a majority of the Court, he sharply limited the language previously used in the *Everson* case. Indeed, in view of the fact that *Zorach* is a later case, it is surprising that in so much of the current discussion of Church-State problems in their constitutional aspects, the fashion is to quote the *Everson* opinion even though it was substantially weakened by what Mr. Justice Douglas said in *Zorach*. In the course of his opinion, Mr. Justice Douglas said:

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

Mr. Justice Douglas' opinion for the majority in the *Zorach* case is quoted at length since it reflects a basic difference in approach. To be sure, it overlaps in large part what was said in *Everson*. The government may not finance religious groups, must be neutral between sects, cannot undertake religious instruction or force religion, religious instruction or a religious observance on anyone. There are notable points of difference, however, and these points of difference become crucial and central in any discussion of the problem. First of all, the *Zorach* opinion recognizes that the first amendment itself says nothing

about the separation of Church and State. Separation is not in itself a starting point in constitutional thinking. It follows and is required only to the extent that it flows from the clauses relating to non-establishment and the free exercise of religion. The first amendment, then, according to *Zorach*, does not ordain a complete and absolute separation of Church and State in every respect. Implicitly, the Court in *Zorach* repudiates the notion that the first amendment establishes a "wall of separation" between Church and State, for the "wall" terminology and imagery is based upon a notion of absolute and complete separation. Moreover, in *Zorach*, the Court emphasized the idea that the legislative body of a state may take into account the religious interests of its citizens and adapt its legislative program to that end at least so far as accommodation of public facilities and services is concerned. Here, in other words, is a disclaimer of the idea that the state must be completely neutral as between religion and nonreligion. At least so far as the first amendment is concerned, the Court says that the legislature may take account of the religious interests of its people in its legislative programs so long as it does not act with coercive effect upon dissenters and nonbelievers, and no preference is given to any one religious group. In short, the government is not required to act as though religion and religious institutions did not exist. It may go further and find that they perform a useful and desirable function in the social community, even a public purpose, and that within the limits imposed by the Constitution, their activities may be encouraged and favored by the State. Finally, it is significant that the Court said in the *Zorach* case that the problem of separation of

Church and State, like many problems in constitutional law, is one of degree. Indeed, this may be the most significant statement in the whole case. The problems in this area cannot be solved by resort to doctrinaire absolutes, verbal formulae or metaphors. As in the case of all constitutional adjudications, the Court must look at these problems in terms of the competing interests at stake and, therefore, take a critical look both at what the State is trying to do and what are the fundamental purposes served by the constitutional restrictions.

Important Church-State problems came before the Court again in the *Sunday Closing Cases* decided in 1960. The argument was made that since the purpose of the Sunday closing laws was to promote observance of the Christian Sabbath, they were invalid as an attempt to establish the Christian religion. The Court's answer was that Sunday closing laws served a valid secular purpose in setting aside a day of rest. What is particularly important to observe was the Court's observation that legislation aimed at valid secular purposes is not rendered invalid because it may at the same time have the secondary effect of aiding religion. Noteworthy also was the point of emphasis in Mr. Justice Frankfurter's concurring opinion that the purpose of the first amendment was to keep the legislature from dealing with religion as such.

The Prayer Case

I conclude this survey of the case materials by returning to the Court's latest decision in the series, namely, the recent decision holding invalid the New York nonsectarian prayer as prescribed for use in public schools. In comment, let me say that, in my opinion, not much was lost by requiring the elimination of this prayer

situation. The mechanical and routine repetition of a prayer with so little substantive content as this nonsectarian prayer does not in my opinion do much to advance the cause of religion. Indeed, religion may suffer from such practices. On the constitutional question, I agree that it is not the State's business to engage in or prescribe religious practices in a situation like that in the public schools, where such practices are offensive to the conscience and beliefs of some parents and children and the practicalities of the situation operate as a coercive force to compel conformity. I suppose that, consistent with this case, a school may allow opportunity for silent prayer or even for voluntary prayers by children, since the Court's emphasis was upon the fact that the prayer objected to was an officially approved and sanctioned prayer. Moreover, the Court indicated that its decision did not affect patriotic exercises that mention a Deity or the singing of patriotic songs which acknowledge dependence upon God. My difficulties with the case arise from the Court's reliance upon the argument that such a prayer exercise was an establishment of religion, the failure to put the emphasis upon the rights of nonconformists to be free from religious practices prescribed by the State, and the further failure to indicate what interest must be shown to have been violated in order to give standing to a person to raise questions of this kind. It seems to me that a person should be required to show that the governmental practices of which he complains impair either his freedom of conscience or his interest as a taxpayer.

Mr. Justice Douglas' concurring opinion deserves special attention. Finding that the prayer was voluntary and did not result

in coercion of nonconformists, and admitting that this prayer exercise was not an establishment of religion in the historic sense of the word, he based his concurrence on the ground that the government was using financial resources, namely, the public school system, to promote religion and this use of public property and the educational system in specific support of a religious practice is unconstitutional. Of special interest was his intimation that the *Everson* case was incorrectly decided—a conclusion that may have substantial significance for the future. Apparently Mr. Justice Douglas now feels that any governmental practice which results in aid to religion and religious instruction is unconstitutional.

Some Relevant Deductions

What conclusions, then, can be drawn from the Supreme Court's decision on the interpretation of the first amendment?

1) While the Court has construed this amendment to state a principle of separation of Church and State, has acted rigorously under it to protect religious freedom and has invalidated some state practices found to constitute an establishment of religion, the Court as yet has failed to agree on general principles of interpretation that furnish some safe guide in determining the application of the amendment to situations we face today. In particular, the Court needs to refine the interpretation of the non-establishment language and what is meant by "aid to religion." Any prediction, for instance, that the Court will or will not uphold the constitutionality of federal spending in support of parochial as well as other schools is hazardous. At most, one can suggest arguments and conclusions based on prior decisions and opinions that do not go directly to this question.

2) Although the Court has said that the first amendment prohibits aid to religion, it is evident from results reached that this language cannot be literally construed. The decisions in the bus transportation case and the *Sunday Closing Cases*, both sustaining legislation directed to secular ends but having the effect also of aiding religion, make clear, it seems to me, that these questions cannot be resolved by the "aid" test. Long sanctioned historical practices, such as tax exemptions, support this conclusion as well as the further conclusion that we add nothing to the solution of these problems by talking about a "wall of separation" between Church and State or about absolute and complete separation. Absolute separation or an absolute application of the "no aid" principle is impossible when we consider the inevitable and inherent interrelationship between the civil and religious communities, the areas of overlapping and concurrent functions, and the consideration that a literal application of the "no aid" idea, so as to discriminate in the enjoyment of right and privilege solely on the ground of religion, would itself raise the serious question whether such discrimination was an unconstitutional restriction on religious freedom.

3) Not only has the Supreme Court not ruled that federal aid for parochial schools would be unconstitutional, but, on the contrary, substantial arguments can be made that such legislation would be constitutional if part of a program for federal assistance to schools generally. Since spending for education is for the general welfare, since parochial schools meet the educational standards prescribed by state law, since sending children to these schools discharges the obligation of parents, imposed by law, to send children to a school that

meets the state's standards, and since parents in sending children to a parochial school are exercising a constitutional freedom of choice, a case may be made out to support the conclusion that federal aid to these schools, as part of a general school assistance program, would not be condemned as an establishment of religion, or as forbidden aid to religion, but rather upheld as legislation in support of the public purposes served by these schools as part of the total educational system, particularly if the aid were limited to grants for the construction of facilities and acquisition of equipment and excluded any support such as salaries paid to teachers.

Others would go further. Professor Kurland of Chicago has advanced the thesis which finds some support in the opinions that what the first amendment forbids is legislation that uses religion as a basis for classification so as to either burden or benefit religious activities. In short, religion as such cannot be the basis for imposing burdens or conferring privileges. Quite clearly, under this test, federal aid to parochial schools as part of a general program of aid to schools would be constitutional, since religion or religious teaching is not the basis for determining eligibility. Others, such as Professor Katz, have advanced the same principle. On the other hand, it is equally clear to me that Congress, if it chooses, may limit expenditure of funds for educational purposes to institutions under public control. I would not regard this an unlawful discrimination, since the distinction between institutions under public control and those under private control is well supported in law as a basis for classification. This would not be discrimination on religious grounds. But if Congress deliberately excluded only parochial

schools from the benefits of federal aid legislation, a question of religious discrimination would be raised.

Others may approach the problem in different ways to achieve the same result. One path of thinking draws a line between direct and indirect benefits to religion and to religious activity, and interprets the Supreme Court's decisions to permit expenditure of federal funds in aid of valid public objectives, including bus transportation to parochial schools and distribution of free secular textbooks to parochial school children, on the theory that this is not direct aid to religious education. The same might be said for aid to assist in the construction of school buildings. Somewhat related is the "child benefit" theory, namely, that public funds may appropriately be spent in aid for purposes that contribute to the welfare of students regardless of the schools and colleges they attend, such as bus transportation, free lunches, health care and benefits, G. I. benefits, tuition and scholarship grants, so long as there is no direct subsidy of religious schools and religious education.

Conclusion

As a final word, I would say that what the Supreme Court will do with this and other problems, if ever they reach the Court, is an open question. The difficulty of prediction is compounded by the fact that we now have two new Justices on the bench and by Mr. Justice Douglas' recent intimation that the *Everson* case was incorrectly decided. If the Court adheres to past decisions, the way continues open for a construction of the first amendment, along the lines of several different theories, that would point to the validity of the use

(Continued on page 70)