

December 2016

Federal Aid for Children and Teachers in all Schools

T. Raber Taylor

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



Part of the [Education Law Commons](#)

Recommended Citation

T. Raber Taylor (1966) "Federal Aid for Children and Teachers in all Schools," *The Catholic Lawyer*. Vol. 12 : No. 3 , Article 4.

Available at: <https://scholarship.law.stjohns.edu/tcl/vol12/iss3/4>

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.

FEDERAL AID FOR CHILDREN AND TEACHERS IN ALL SCHOOLS

T. RABER TAYLOR*

A NEW PATTERN FOR education in the United States was written on April 11, 1965,¹ when President Johnson signed into law the Elementary and Secondary Education Act of 1965. This is the federal education foundation act to strengthen and improve educational opportunities for children in the nation's elementary and secondary schools. It implements the equal protection of the laws principle as unanimously declared by the United States Supreme Court in *Brown v. Board of Educ.*,² wherein it was stated:

In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.³

School library resources, textbooks and other instructional materials are authorized by Title II of that Act to be supplied for the use of all children and teachers in public and private elementary and secondary schools. Title II is the clearest example of the formula used by the Johnson administration to win support for the principle of education "for the benefit of all children." This statute is an excellent example of federal educational aid for the child, with a minimum of federal interference in state control of educational facilities. Every federal department and employee is prohibited by the Act from exercising any direction, supervision or control over the curriculum of any educational institution or over the selection of library

* A.B. (1933), Regis College; LL.B. (1936), Harvard University.

¹ 79 Stat. 27, 34, 36 (1965), 20 U.S.C. §§ 236, 331, 821 (Supp. 1965).

² 347 U.S. 483 (1954).

³ *Id.* at 493.

resources, textbooks and other instructional materials.⁴

The Provisions of the Act

One hundred million dollars has been appropriated for distribution under Title II for fiscal year 1966.⁵ A head-count distribution of this appropriation would give a book benefit to each child of about \$1.75. Title II, however, demands that each state must submit a plan to the United States Office of Education for the expenditure of the state's allotment of federal funds for the acquisition of library resources, textbooks and instructional materials for the use of children and teachers.⁶

To avoid any financial aid to, or control in, any church, the Act is specific. It prohibits any payment "for religious worship or instruction."⁷ The regulations also provide that school library resources, textbooks or instructional materials may not be "used in such instruction or worship."⁸ State control of the library resources, textbooks and instructional materials is spelled out. The state plans shall provide that title to, and control and administration of, all of them shall vest only in a public agency.⁹ Also, the resources, books and materials "shall be limited to those which have been approved by an appropriate State or local educational authority or agency for use, or are

used, in a public elementary or secondary school of that State."¹⁰

These necessary political and practical limitations still leave open a large list of school library books, textbooks and other instructional materials for the use of all children. The question of paramount significance is how much money is available to provide these books for the children. The allotment of federal money to each state is in proportion to the state's total number of children enrolled.¹¹ In allocating the product of the federal money, namely the library resources, textbooks and instructional materials, the state plan must use two criteria: (1) the relative need of the children and teachers for them, and (2) equitable provisions for their use by children and teachers in non-public schools.¹²

Title II authorizes the Federal Commissioner of Education to make grants to states for a five-year period beginning July 1965. Although the authorization for the first year is one hundred million dollars, authorization for the succeeding four years will be decided upon by the Congress in future sessions.

It is hoped that Title II will be funded at a fairer and more realistic figure of ten to twenty dollars per child per year. Before then, and preferably as soon as possible, the "relative need" provision in the regulations must be re-examined in the light of the legislative history.

Title II, as originally introduced in both houses of Congress, provided grants for

⁴ 79 Stat. 57 (1965), 20 U.S.C. § 884 (Supp. 1965).

⁵ 79 Stat. 36 (1965), 20 U.S.C. § 821(b) (Supp. 1965).

⁶ 79 Stat. 37 (1965), 20 U.S.C. § 823 (Supp. 1965).

⁷ 79 Stat. 58 (1965), 20 U.S.C. § 885 (Supp. 1965).

⁸ 45 C.F.R. § 117.4(c) (Supp. 1966).

⁹ 79 Stat. 38 (1965), 20 U.S.C. § 825(a) (Supp. 1965); 45 C.F.R. § 117.4(b) (Supp. 1966).

¹⁰ 79 Stat. 30 (1965), 20 U.S.C. § 825(b) (Supp. 1965).

¹¹ 79 Stat. 36 (1965), 20 U.S.C. § 822 (Supp. 1965); 45 C.F.R. § 117.11 (Supp. 1966).

¹² 79 Stat. 37 (1965), 20 U.S.C. § 823(a)(3) (A), (b) (Supp. 1965).

the acquisition of textbooks and instructional materials to "be furnished to schools" for the use of children and teachers in "public and non-profit, private elementary and secondary schools." The early drafts of the predecessor of section 823(a)(4)(A) of Title 20 required that the state criteria would "take into consideration the relative needs of the schools of the State."¹³ Amendments of the General Subcommittee and Full Committee on Education of the House "adopted clarifying language which makes clear that library resources, textbooks and other printed and published materials are not being made available to schools but to children and teachers."¹⁴ Thus, the "relative need" criterion now found in section 203(a)(3)(A) is "the relative need of the children and teachers of the State for such library resources, textbooks, or other instructional materials. . . ." Title II, states the Senate Committee Report, was amended to assure that it is "not being made available to schools but to children and teachers."¹⁵

Although the Act provides for grants "for the acquisition of school library resources, textbooks, and other printed and published instructional materials,"¹⁶ as of June 1966, school libraries are the dominant beneficiaries of Title II.

Nearly 47 per cent of public and more than 50 per cent of non-public elementary school students have no school library. About one-third of all public and non-

public elementary and secondary school students in the United States attend schools without libraries. It seems accurate, at this time, to conclude that federal aid for textbooks and other instructional materials for the use of most children must wait for more realistic appropriations.

The priority for school library resources sharpens the factual basis for the constitutional challenge of Title II. A textbook loaned to a child for his use is patently of direct benefit to him. Are "school library resources" available to him an indirect benefit to his church-related school and a violation of the first amendment's establishment clause? This issue was sharply presented by Leo Pfeffer to the House Subcommittee on Education.¹⁷ It seems that the change in the "relative need" test from that "of the schools of the State" to the "relative need of the children and teachers of the State" for such books and materials may have been made to blunt his objections. As stated above, the Senate Committee Report makes it abundantly clear that the amendments were designed to benefit children and not schools, including children attending "a private, vocational, trade, or other school which meets State standards but is operated for profit."¹⁸ The regulations on "relative need" indicate a disregard of this legislative history when they fail to make clear that the relative need is to be the relative need of the child and not the relative need of the school. The regula-

¹³ 111 CONG. REC. 5563 (daily ed. March 24, 1965).

¹⁴ *Ibid.*

¹⁵ S. REP. NO. 146, 89th Cong., 1st Sess. 25 (1965).

¹⁶ 79 Stat. 36 (1965), 20 U.S.C. § 821(a) (Supp. 1965).

¹⁷ *Hearings on H.R. 2361 and H.R. 2362 Before the General Subcommittee on Education of the House Committee on Education and Labor, 89th Cong., 1st Sess. 1606-40 (1965).*

¹⁸ *Supra* note 13.

tion on relative need seems to be contrary to the legislative history when it focuses attention on factors which relate to the economic need of the school district or the school as opposed to the needs of the child. The regulation states that

such criteria shall include priorities for the provision of such materials on the basis of factors such as degree of economic need . . . and degree of previous and current financial efforts for providing such materials in relation to financial ability. The distribution of such resources, textbooks, and materials for children and teachers solely on a per capita basis would not satisfy this provision.¹⁹

The federal allotment to the states is on a per capita basis.²⁰ Federal funds not required by a state for any year may be reallocated to other states. Since the federal allotment to the state is on a per capita basis, the state's allocation of books and instructional materials might presumably also be on a per capita basis. This raises the question as to whether or not the criteria of relative need of the children for such books and materials should be used to give some children a \$1.20 book benefit and other children a \$2.20 book benefit. There is good reason for the argument that a per capita basis distribution of the books and materials will in some cases better satisfy the objectives of Title II.

In some instances, good reason exists for stating that there is greater relative need of children for books and instructional materials in non-public schools than in the public schools where the chil-

dren have less relative need for books. Their need for books and instructional materials has been satisfied tax free. To be faithful to the legislative history, should not the factor of the "degree of economic need" of the child or teacher be considered? Federal funds are to be used to supplement and not to supplant state, local and private school funds. Previous and current financial contributions of the state to its schools are to be considered in the allocation of these federal funds.²¹ But when the states themselves allocate school library resources by a formula based on an adjusted assessed real estate valuation, even when approved by the United States Office of Education, it would appear that they are disregarding the amendment changing the criteria for relative need from that "of the schools of the State" to that "of the children and teachers of the State for such library resources, textbooks, or other instructional materials."²²

The Act provides for federal grants for the "acquisition of school library resources, textbooks, and other printed and published instructional materials."²³ The regulations define this phrase in expansive terms, and while furniture or similar equipment is unprovided for, those printed and published materials which are suitable for and are to be used by children and teachers in elementary and secondary schools and which with reasonable care and use may be expected to last more than one year, are covered. This includes,

²¹ 45 C.F.R. § 117.24 (Supp. 1966); see 79 Stat. 37 (1965), 20 U.S.C. § 823 (Supp. 1965).

²² See 79 Stat. 37 (1965), 20 U.S.C. § 823(a)(3)(A) (Supp. 1965).

²³ 79 Stat. 36 (1965), 20 U.S.C. § 821(a) (Supp. 1965).

¹⁹ 45 C.F.R. § 117.3(b) (Supp. 1966). *But see* 45 C.F.R. § 117.5(a) (Supp. 1966).

²⁰ 79 Stat. 36 (1965), 20 U.S.C. § 822(a) (Supp. 1965).

among others, such items as books, periodicals, documents, pamphlets, photographs, reproductions, pictorial or graphic works, musical scores, maps, charts and globes.

In school districts where textbooks are provided to students in all grades by local tax money, there is very little interest in federal funds for textbooks. But generally there is a critical need for funds for new textbooks. The prepared statement of the Federal Commissioner of Education, Francis Keppel, tells us:

When we turn to survey the needs of our schools for modern textbooks, we find that all too often our children must use textbooks which are out of date and grossly inadequate for this era of expanding educational horizons. It is a sad fact that 'modern history' books often have nothing to teach our children about events after World War I and that physics texts frequently deal with the state of our knowledge in the forties and fifties—ignoring, for example, the Atomic Revolution.

For many families the purchase of a child's textbooks is a luxury they can ill afford. A 1964 survey shows that one-fourth of the school systems in one hundred twenty-eight of our larger cities do not provide free textbooks at the high school level. Non-public schools rarely provide textbooks. A poor family with children in high school may be required to spend fifteen to twenty dollars or more per child for up-to-date textbooks—a prohibitive sum when money doesn't exist for many of the barest necessities of life. . . . Children in families unable to support this extra burden are often turned from the halls of the school to the alleys of the slums. We cannot afford this loss.²⁴

²⁴ *Hearings on S. 370 Before the Subcommittee on Education of the Senate Committee on Labor and Public Welfare, 89th Cong., 1st Sess. 850 (1965).*

How do the child and teacher in the elementary and secondary school know what school library resources, textbooks and instructional materials are available? Under neither the Act nor the regulations is the state plan required to supply a catalog of all of the books and materials approved "for use, or used, in" a school in that state. A helpful amendment to the regulations would be a requirement that the state agency maintain and distribute a current and complete list of all library resources, textbooks and other instructional materials approved for use, or used in each of the elementary and secondary schools of the state. If the regulation did not require this, it could, as a minimum, require that such a list be maintained for inspection and copying.

Some states have laws that may help accomplish this. Where the curriculum, library materials, textbooks or other instructional materials are under the control of the local school district, a state statute may require the secretary of the district to supply a current and complete list to the state educational agency. Another helpful statute, found in Ohio, provides that any schoolbook publisher offering books in the state must file a price list with a central state agency.²⁵ Either by federal regulation, state plan or by state law, a complete list should be maintained and be readily available.

If and when Congress provides more funds for textbooks, the need for a current and complete list will become more apparent.

The methods and terms of availability of the books and materials are not spelled

²⁵ 4 OHIO REV. CODE § 3329.01 (1964).

out in the Act, except that they are to be "for the use of children and teachers."²⁶ The regulations provide that "such materials are made available on a loan basis only."²⁷ Different methods of making the materials available to the children in the non-public schools have been adopted in the various state plans. The regulations provide for administrative control of the public agency and inventory methods.²⁸

Dr. Edgar Fuller, Executive Secretary of the American Council of Chief State School Officials, told the House and Senate Education Committees that "a majority of state educational agencies are legally disqualified to administer these federal funds for non-public schools."²⁹ This objection was made to the bill as first presented to the Subcommittee on Education of the House. A bypass provision, however, was included in the Act. In any state in which "no State agency is authorized by law to provide library resources, textbooks, or other printed and published instructional materials for the use of children and teachers in any one or more elementary or secondary schools in such state," the Federal Commissioner of Education shall arrange for the provision on an equitable basis for such use and pay the cost out of the state allotment.³⁰ It has been reported that there were thirty-eight states that prohibited the use of public funds to

aid sectarian schools, or for the benefit of any sect or religious society.³¹ Title II, however, refers throughout to "federal funds." The fund accounting procedures are to be designed to assure proper disbursement of, and accounting for, *federal* funds paid to the state under Title II. This requires earmarking as to purpose, if not trust-fund accounting.³²

The question thus arises as to whether the state constitutions and statutes prohibiting the use of state funds to aid sectarian schools apply to the expenditure of federal funds to aid children in private schools. Title II requires no matching of federal funds with state or local funds. It is a one-hundred per cent federal grant program.

To meet this question, the regulations require that each state plan for administering Title II programs must include certification from the state attorney general or other appropriate state legal officer that all provisions of the state plan are consistent with state law. An interesting comparison may be made with National Defense Education Act testing. Under Title V-A, National Defense Education Act, testing that is provided for non-public school students is comparable to that provided for public school students. Such testing is provided by the state when permitted by state law.³³ Otherwise, the Commissioner of Education arranges for the testing of such students and pays for

²⁶ 79 Stat. 36 (1965), 20 U.S.C. § 821(a) (Supp. 1965).

²⁷ 45 C.F.R. § 117.5(a)(2) (Supp. 1966).

²⁸ 45 C.F.R. § 117.5(b)(d) (Supp. 1966).

²⁹ *Supra* note 17, at 1119; *supra* note 24, at 2709.

³⁰ 79 Stat. 38 (1965), 20 U.S.C. § 824(b) (Supp. 1965).

³¹ U.S. DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, OFFICE OF EDUCATION, THE STATE AND NON-PUBLIC SCHOOLS 15 (Misc. No. 28 1958).

³² See 3 DECISIONS OF THE COMPTROLLER GEN. 956 (1924); 2 DECISIONS OF THE COMPTROLLER GEN. 684 (1923).

³³ Sec 45 C.F.R. § 117.30(b) (Supp. 1966).

one-half of the cost out of the state's allotment. The other one-half of the cost must come from the student or other sources.

What are the prospects of litigation involving Title II? The Senate Committee Report details the care taken "to assure that funds provided under this title will not inure to the enrichment or benefit of any private institution. . . ." ³⁴ The committee knew that nineteen states specifically provide for the transportation of private school students at public expense, and that four states specifically call for the distribution of textbooks to children in private schools. On the other hand, it also observed that some states have considered such laws invalid within the meaning of state law and state constitutions. ³⁵

Senator Wayne Morse, Chairman of the Senate Subcommittee on Education, declared:

I know of no part of the bill that is in conflict with any article or section of the Constitution I base it also on the first amendment. I do not think it violates, in any regard whatsoever, the doctrine of separation of church and state. ³⁶

He considered the Act a student-centered program, not a school-centered program, to provide school books *to the student* and therefore constitutional since it is based on United States Supreme Court precedent. ³⁷

The debate in the Senate produced a

³⁴ 1 U.S. CODE CONG. & AD. NEWS 1468 (1965).

³⁵ *Id.* at 1468-69.

³⁶ 111 CONG. REC. 7052 (daily ed. April 7, 1965).

³⁷ *Id.* at 7053. The case he referred to was *Cochran v. Board of Educ.*, 281 U.S. 370 (1930).

detailed and extensive brief from Senator Ervin of North Carolina. ³⁸ He argued:

We are confronted by a serious constitutional question. The three state decisions interpreting the provisions of state constitutions similar to the provisions of the first amendment put in serious doubt the question whether the provisions of the bill authorizing the use of Federal tax money to procure textbooks for the use of pupils in sectarian schools are valid under the first amendment. ³⁹

The thrust and purpose of his presentation was the espousal of a judicial review amendment since he believed it to be doubtful that any plaintiff could establish *standing* to challenge the Act. After consideration of all facets of the problem, the Senate Committee on Labor and Public Welfare concluded that the probability that the Act would be reviewed did not warrant such an amendment.

The Constitutional Attacks on the Act

With this legislative background it was certain that litigation aimed toward the United States Supreme Court would start in state and federal courts. In a state court, a suit could be brought under the first amendment to test the constitutionality of any government textbook law for all pupils. Free textbooks for all children are made available by state statute in Louisiana, Mississippi, Rhode Island, New Mexico and Kansas. ⁴⁰ The Rhode Island textbook law ⁴¹ authorizes the school committee of every community to lend textbooks and supplies used in courses in mathematics, science and modern foreign languages to all elementary and secondary

³⁸ 111 CONG. REC. 7312-27 (daily ed. April 8, 1965).

³⁹ *Id.* at 7327.

⁴⁰ *Supra* note 24, at 187.

⁴¹ R.I. GEN. LAWS § 16-23-2 (Supp. 1965).

school pupils. With the support of the American Civil Liberties Union, a taxpayer's action was brought on February 16, 1966, alleging that this state law was passed for the specific purpose of aiding parochial schools in violation of the United States and the State Constitutions. The plaintiffs sought a declaratory judgment and an injunction against the defendants, members of the City of Cranston School Committee. A Rhode Island Supreme Court decision, solely on the first amendment ground, might reach the United States Supreme Court and, by analogy, settle the constitutionality of the federal act's provision for school materials for children in private schools.

In addition, to put to death the "child benefit" doctrine, to kill Title II school books and materials for public school as well as private school children, and to establish a new route for judicial review for federal constitutional challenges to all federal aid to education, Protestants and Other Americans United For Separation of Church and State and twenty-two individuals sued in the three-judge district court, Dayton, Ohio, to declare the Act unconstitutional.

The Ohio Title II plan provides grants for funds for libraries. The complaint alleged that the grants were made to all the Dayton public schools (\$86,407.75) and to twenty-two parochial schools (\$14,606.02) for the purchase of books and materials. Plaintiffs claimed that the entire \$100,000,000 federal appropriation for Title II deprived them of property without due process of law in violation of the fifth and fourteenth amendments. They prayed the three-judge court to declare the Elementary and Secondary Edu-

cation Act and Title II unconstitutional and to enjoin the defendants from further spending, after returning Dayton's \$101,013.77 back to the United States Treasury. This claim also questions the power of Congress under the "general welfare" clause⁴² "to strengthen and improve educational quality and educational opportunities in the nation's elementary and secondary schools," the declared legislative purpose of the Act.⁴³ The United States Supreme Court has not as yet ruled on this precise question.⁴⁴

The notice required,⁴⁵ when the constitutionality of an act such as this one is drawn into question, has been given to Attorney General Katzenbach. The United States may now intervene for presentation of evidence and for argument on the question of constitutionality. The children and teachers, the intended beneficiaries of the school books and materials, may be permitted to intervene under rule 24.

If the plaintiffs can defeat motions to dismiss,⁴⁶ this case might eventually arrive in the Supreme Court. If the complaint is dismissed for lack of standing

⁴² U.S. CONST. art. I, § 8.

⁴³ 111 CONG. REC. 5563 (daily ed. March 24, 1965).

⁴⁴ See *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937); *Helvering v. Davis*, 301 U.S. 619 (1937).

⁴⁵ 28 U.S.C. § 2403 (1964); FED. R. CIV. P. 24(c).

⁴⁶ Plaintiffs brought several collateral causes of action including the following:

(1) Under 42 U.S.C. § 1983 (1964) and the grant of jurisdiction from 28 U.S.C. § 1343 (1964) plaintiffs invoked their civil rights and claimed damages for deprivation, under color of federal law and state regulation, of their rights of citizenship secured by the first and fourteenth amendments. *Monroe v. Pape*, 365 U.S. 167 (1961), breathed life into those Re-

or on another ground, with a denial of the prayer for injunction, the plaintiffs will assert that they are entitled to a direct and mandatory appeal to the Supreme Court because of the special three-judge district court provision.⁴⁷ The Supreme Court may thus be forced to decide the Act's constitutionality.

Future litigation may be brought under federal civil rights law by children and teachers on the complaint that they are deprived of equitable, or equal, participation under a state Title II plan. If a state agency, under color of any state law, statute, ordinance, regulation, custom or usage, deprives any child or teacher of any equitable provision for the use in private schools of the library resources, textbooks and other instructional materials, it would appear that the United States District Court would have jurisdiction under the Civil Rights Section of the United States Judicial Code.⁴⁸

construction Period civil rights statutes. "The officers may be made to respond in damages not only for violations of rights conferred by federal equal civil rights laws, but for violations of other federal constitutional and statutory rights as well." *Greenwood v. Peacock*, 34 U.S.L. WEEK 4572, 4578 (U.S. June 20, 1966). (2) Under the Federal Tort Claims Act provisions, 28 U.S.C. §§ 1402, 1346(b) (1964), plaintiffs claimed money damages from the United States seemingly for alleged injury caused by wrongful act of any employee of the United States government. They then invoked the jurisdiction of the United States Court of Claims to review any tort claim judgment. See 28 U.S.C. §§ 1504, 2110 (1964). This is a novel approach.

(3) They then claimed \$5,000,000 in damages for invasions by Congress of their vested right of privacy. In this class suit, they also appeared as federal and state taxpayers.

⁴⁷ 28 U.S.C. § 1253 (1964).

⁴⁸ 28 U.S.C. § 1343(3) (1964).

*Everson v. Board of Educ.*⁴⁹ is the font of help and hurt for all legislation "intended to facilitate the opportunity of children to get a secular education"⁵⁰ in a non-public school because (a) the holding supported the New Jersey reimbursement of bus fares for children to and from church schools, but (b) the dictum of Mr. Justice Black, who wrote for the majority, on the establishment of religion clause of the first amendment⁵¹ has been used to construct a wall separating the flow of equal educational opportunity from children at non-public schools. Mr. Justice Jackson, dissenting, argued that the New Jersey statute made "the character of the school, not the needs of the children, determine the eligibility of parents to reimbursement" for public bus fare for their children to ride to and from school.⁵² He found the New Jersey law did not authorize "transportation of *all* pupils to *all* schools. . . ." Children "are to be aided if they attend the public schools or private Catholic schools, and they are not allowed to be aided if they attend private secular schools or private religious schools of other faiths."⁵³ His basic ground for dissent was the majority's fallacy . . . ignoring the essentially religious test by which beneficiaries of this expenditure are selected. . . . [B]efore these school authorities draw a check to reimburse for a student's fare they must ask just that question, and if the school is a Catholic one they may render aid because it is such, while if it is of any

⁴⁹ 330 U.S. 1 (1947).

⁵⁰ *Id.* at 7.

⁵¹ *Id.* at 15. See generally Taylor, *Equal Protection of Religion: Today's Public School Problem*, 38 A.B.A.J. 277 (1952).

⁵² *Everson v. Board of Educ.*, 330 U.S. 1, 20 (1947).

⁵³ *Id.* at 21.

other faith or is run for profit, the help must be withheld.⁵⁴

Mr. Justice Rutledge, in his dissenting opinion, stated: "The New Jersey statute might be held invalid on its face for the exclusion of children who attend private, profit-making schools."⁵⁵

The first amendment establishment clause, said Mr. Justice Black for the majority, "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. State power is no more to be used so as to handicap religions than it is to favor them."⁵⁶

This neutrality test was spelled out and applied in the 1963 *Abington School Dist. v. Schempp*⁵⁷ decision, banning Bible reading and the "Our Father" in public schools:

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 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. . . . The Free Exercise Clause, likewise considered many times here, withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion.⁵⁸

By broad and clear classifications to benefit all children in *all* public and private elementary and secondary schools of the state, the Rhode Island school book law,

like Title II, has avoided the constitutional problems highlighted in the *Everson* dissents. As originally introduced, Title II authorized grants only for the use of teachers and children in "public and non-profit private elementary and secondary schools." The House deleted the word "non-profit" thereby extending the benefits of Title II to *all* children in private schools. "The purpose of this amendment was to assure that under Title II, which is designed to *benefit children and not schools*, certain children would not be discriminated against merely because they attend a private vocational, trade, or other school which meets State standards but is operated for profit."⁵⁹

Conclusion

In summary, a token amount of money has been appropriated by Congress to strengthen and improve educational quality and educational opportunities in the nation's elementary and secondary schools. The legislative adoption of the "child benefit" judicial theory by the Congress is a novel and far-reaching precedent. At present, the amount of money appropriated is not adequate to meet the needs for school books and materials. The legal approval of all but two state attorneys general of state administration of state plans, including private school children and teachers, is a good foundation on which Congress can justify substantial additional appropriations. It appears probable that the constitutional and civil rights issues under Title II will be presented to state and federal courts. It is likely that by some route the issues will be presented to the United States Supreme Court.

⁵⁴ *Id.* at 25.

⁵⁵ *Id.* at 61-62.

⁵⁶ *Id.* at 18; See also *id.* at 24.

⁵⁷ 374 U.S. 203 (1963).

⁵⁸ *Id.* at 222-23.

⁵⁹ 1 U.S. CODE CONG. & AD. NEWS 1469 (1965).