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Erratum

On page 64, the line which read: "Mr. Jaffe: It is an interesting ideal and I can't get all around it. I would" should have been omitted.

THE ARTHUR GARFIELD HAYS CIVIL LIBERTIES CONFERENCE: PUBLIC AID TO PAROCHIAL SCHOOLS AND STANDING TO BRING SUIT

INTRODUCTION

NORMAN DORSEN*

THE thorny problems concerning the constitutionality and desirability of aiding religious institutions with public funds have vexed the nation since its inception. There has always been ample dispute over the proper spheres for church and state, on this question as on others, but the proposals to help finance parochial schools now before the people and their political representatives have raised the debate, in the words of Professor Philip Kurland, to an "unprecedented crescendo."[1]

In 1961 the voters of New York State were asked to authorize, through proposed Constitutional Amendment 6,[2] certain types of aid to all institutions of higher learning within the state, including religious institutions. The Arthur Garfield Hays Civil Liberties Program of the New York University School of Law decided to hold a conference of experts to consider the complex issues involved in a program of the kind contemplated by New York and, presumably, other states. Plans for the conference were well under way when on election day the voters handily rejected Amendment 6. Despite this result, a poll of the conferees disclosed the general conviction that the issues were of such importance that there was every reason to go ahead.

The conference was held on March 6, 1962, and was attended by many professors and practicing lawyers with special interest in problems of church and state. Two broad questions were considered: (1) the constitutionality of public assistance to church-related schools, and (2) the problem of obtaining legal standing, in either the federal or state courts, to assert a constitutional challenge to any program of public assistance.

In a brief introduction I shall not attempt to add to the ideas and contentions expressed by the parties to the conference. Instead, I shall first make a few general observations, and then comment on certain implications of the most

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1. Kurland, Religion and the Law 7 (1962).
2. Amendment 6 provides in relevant part:

> Notwithstanding of this or any other article of this constitution, the legislature may by law, which shall take effect without submission to the people, make or authorize making the state liable for the payment of and interest on bonds, or notes issued in anticipation of such bonds, of a public benefit corporation created to aid by loans or otherwise educational institutions, to provide dormitories and other buildings, improvements and facilities for the use of students or essential, necessary or useful for instruction in the academic program at any institution for higher education located in this state and authorized to confer degrees by law or by the board of regents.

recent authoritative decision bearing upon the constitutionality of public aid to church-related schools—*Engel v. Vitale*,[3] the school prayer case.

The debate about public aid to parochial schools is part of the broader and pressing question of federal aid in general. It is this possibility—that the central government will, for the first time, provide substantial amounts of financial assistance to local education untied to considerations of national security—that has focused attention sharply on whether such aid should or must be confined to public schools.

In resolving this issue, it is important, as we were often reminded during the conference, to try to distinguish between constitutional and political issues. The political issues are complex, involving not only traditional battle lines over the ideal relationship between church and state and the proper role of the federal government in an area traditionally within exclusive state jurisdiction, but also newer conflicts, notably over the potential effect of grants to non-public schools on the future of segregated education.

I am less confident than some that the constitutional debate can be conducted, by spokesmen for either side, free from a heavy influence of "political" views. I am even less confident that the public can participate in either legal or political debate without succumbing to the easy conclusion that those opposed to public assistance to parochial schools are anti-religious or, more specifically, anti-Catholic. This conclusion ignores much history as well as the complexities of what is involved, but nonetheless will probably persist to polarize debate along unfortunate lines. Strong statements from unassailably devout sources that public aid is unwise or unconstitutional may help to moderate feelings and words,[4] but the deeply-rooted interests at stake suggest that all will not be sweetness and light as decision days in Congress or the Supreme Court approach.

These pessimistic conclusions seem amply borne out by the response to *Engel v. Vitale*, in which the Supreme Court held that a non-denominational prayer[5] composed by the Board of Regents could not constitutionally be made part of the daily routine in New York public schools. In certain quarters the reaction was bitter. The Court and its supporters were treated with scorn, frequently by sources that had previously been critical of recent judicial rulings in favor of civil rights.[6] Perhaps the most dismaying consequence was the bald

3. 370 U.S. 421 (1962).

4. A recent example is a report of a special committee of the United Presbyterian Church in the United States, which recommended that:

> Grants from federal, state, or local taxes for nonpublic elementary and secondary schools, including payment for tuition or scholarships of children attending such schools, grants to their parents for this purpose, or tax credits, tax forgiveness or exemption from school taxes or other taxes for such parents be opposed.

See Current Magazine, September 1962, pp. 60, 61.

5. The prayer reads: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers, and our country."

6. In an editorial discussing Engel v. Vitale, the writer for one magazine that has been highly critical of the Court first said, "to try to bring [racial integration in schools] by a

assertion by some local officials that the decision would not be obeyed—not because of honest disagreement over the scope of the Court's ruling (for example, whether it outlaws the devotional reading of the Lord's Prayer), but as an act of outright defiance.[7]

A clue to the reasons for the fierce outcry over *Engel v. Vitale* may lie in its implications for the constitutionality of public aid to religious schools. Superficially, of course, the "wall of separation" between church and state that *McCollum v. Board of Education*[8] preserved (or erected, depending on one's point of view) has received some repair after the erosions of *Zorach v. Clauson*.[9] Yet those seeking federal funds for parochial schools may try to use *Engel v. Vitale*, at least in the political arena, to support their position. It could be argued that since the decision makes it unlawful to engage in religious practices in the public schools, the only fair alternative in a pluralistic and essentially religious society is to establish a private school system where parents could send their children to receive a religiously oriented education, and that the only way to achieve this is through public support.[10] If such contentions should prevail in the legislatures, the courts undoubtedly will be asked to rule on the constitutional question under the Establishment Clause.

Meetings, debates, symposia, round-tables, or what have you, are often hard to justify on strict grounds of intellectual contribution. They frequently turn out to be airy and vague, providing neither scholarly advance nor sharp focus on disputed questions. The edited transcript that follows is offered with the hope that the common fate escaped us and that the authorities who confronted one another directly—at fingerpoint, one might say—made a measurable contribution to clarifying and solving the difficult problems under discussion.

TRANSCRIPT OF CONFERENCE

CHAIRMAN DORSEN: As you all know, this conference was organized by the Arthur Garfield Hays Civil Liberties Program that has been established at the New York University School of Law. The idea developed at a time proposed Amendment 6 to the New York State Constitution was before the voters. The Amendment was defeated, but we decided to go ahead anyway in view of the general importance of the problem.

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sudden decree by nine men directly contradicting an understanding of 165 years' duration was, in reality, a revolutionary, not a constitutional act." The editorial then went on to discuss the Engel case in these terms: "[S]ince June 25, 1962, we have a new Constitution, which has annulled and suppressed the old," and "There is a petty, niggling, nasty quality about this school prayer decision." The National Review, July 17, 1962, pp. 10, 11.

7. This is not to condemn individual protests designed to alter the edict of a court (or any other law) which one cannot conscientiously obey. The point is that public officials, charged with responsibility for enforcing judicial rulings, are not free to interpose personal opinions about their correctness; the choice of officials is to comply or resign.

8. 333 U.S. 203 (1948).

9. 343 U.S. 306 (1952).

10. This line of argument could flow naturally from the respected views of Father John Courtney Murray, who is widely regarded as a spokesman on this issue for the official Roman Catholic position. See Murray, We Hold These Truths, especially chapter 6 (1960).

There are two questions. The first concerns the constitutionality of public aid to church-related schools under the First and Fourteenth Amendments to the Constitution, which prohibit any law "respecting an establishment of religion." The second question raises the problem of obtaining standing in the courts to challenge federal or state aid.

Let us begin with the substantive question of the constitutionality of public assistance to church-affiliated schools by calling on Leo Pfeffer, the author of two recent articles on the subject.[11]

MR. PFEFFER:[12] It is of course difficult to present in brief a substantive consideration of the constitutionality of federal aid to parochial schools. My feelings are pretty definite. I believe, as does President Kennedy, on the basis of the memorandum of law prepared by the Department of Health, Education and Welfare (H.E.W.), that government assistance in the form of funds to church-related schools is a violation of the First Amendment if done by the federal government and the Fourteenth Amendment if done by a state government.[13]

I do not think this was seriously controverted until rather recently. At least I had not seen until the past several years any serious effort to justify the constitutionality of the use of government funds for parochial schools. Recently, there have been several articles, including William Ball's paper for the National Catholic Welfare Conference,[14] Paul Kauper's article in the Michigan Law Review,[15] and Philip Kurland's article in the Chicago Law Review.[16] The recent constitutional debate is, I think, to a large extent a political rather than a legal controversy.

In the past, federal or state aid to parochial schools in the form of text books or bus transportation has been justified on the basis that no aid to the school was involved, but rather aid to the child which was only of indirect benefit to the school. It was always tacitly recognized that direct aid would be unconstitutional. If this is wrong, I don't understand what all the fighting and arguing in the *Everson* case[17] was about—the great debate whether the legislature had gone to the "very verge"[18] of constitutional power or beyond it; whether what was involved was really or only fictionally in aid to the child rather than aid to the school. All this was mere shadow boxing if with one

11. Pfeffer, Federal Funds for Parochial Schools? No, 37 Notre Dame Law. 309 (1961), reprinted as S. Doc. No. 29, 87th Cong., 1st Sess. 5, 24-26 (1961); Pfeffer, Some Current Issues in Church & State, 13 W. Res. L. Rev. 5 (1961).

12. Petergorsky Visiting Professor of Constitutional Law at Yeshiva University; General Counsel of the American Jewish Congress.

13. The Department's memorandum is printed in 50 Geo. L.J. 349 (1961).

14. The Constitutionality of Church-Related Schools in Federal Aid to Education; a study prepared for the Legal Department of the National Catholic Welfare Conference; reprinted in 50 Geo. L.J. 397 (1961).

15. Kauper, Church & State, Cooperative Separatism, 60 Mich. L. Rev. 1 (1961).

16. Kurland, Of Church & State & the Supreme Court, 29 U. Chi. L. Rev. 1 (1961), an earlier version of Kurland, Religion & the Law, supra note 1.

17. Everson v. Bd. of Educ., 330 U.S. 1 (1947).

18. Id. at 16.

sentence the Court could have said: "There is nothing in the Constitution which prohibits the State of New Jersey from giving this money directly to the school; what are we wasting our time about?" The *Everson* case makes no sense to me except on the assumption that the state could not have given the money directly to the parochial school.

Once it is settled, as it was in the *Everson* case and in the *McCollum* case,[19] with perhaps a little bit of doubt in the *Zorach* case,[20] but certainly cleared up in *Torcaso v. Watkins*,[21] that the First Amendment means the government may aid religion neither on a non-preferential basis nor a preferential basis, that it may not give money to all churches any more than it may give it to one church, then I have no real doubts about the parochial school question.

There is, however, one point which does have to be recognized. In *Everson*, the Supreme Court ruled that it is permissible to use public funds to transport children to parochial schools. This assumes that the rationale of the *Everson* decision was that the purpose of this expenditure was to protect the children from getting run over by automobiles. With respect to the argument concerning taxation for private purposes, there is language in the case which goes further than that, language which says that since this is an accredited school, it is in the public interest to transport children to it.[22] It is too late, the Court said, to argue that it is not in the public interest to transport children to any school, where they can satisfy the requirements of the compulsory school attendance law.[23]

And so, it could be said that if it is in the public interest to get children to school, for which public funds can be used, then it is also in the public interest to see that they get an accredited education in the schools. So it can be argued also, as William Ball does in his paper,[24] that the religious teachings can be separated from the secular teachings in the parochial school and that public funds can be used to finance the secular aspects of the school on a pro rata basis.

I think this is artificial and unreal and, notwithstanding one or two sentences, contrary to the whole tenor of *Everson*. And I think that neither the *McCollum* case nor *Zorach v. Clauson* permits this. I also suggest that the decisions of the state courts are uniformly opposed. *Almond v. Day* in Virginia,[25] the Alaska Bus case,[26] the Oregon Textbook case[27]—practically all state courts are agreed, I think, that public funds cannot be used for parochial schools. A few of them, a minority even after *Everson*, have allowed bus trans-

19. McCullom v. Bd. of Educ., supra note 8.
20. Zorach v. Clauson, supra note 9.
21. 367 U.S. 488 (1961).
22. 330 U.S. 1, at 6.
23. Id. at 7, citing Cochrane v. Louisiana State Bd. of Educ., 281 U.S. 370 (1930); Holmes, J., in Interstate Ry. v. Massachusetts, 207 U.S. 79, 87 (1907); Cooley, J., in Stuart v. School Dist. No. 1 of Kalamazoo, 30 Mich. 69 (1874).
24. Supra note 14.
25. Almond v. Day, 197 Va. 419, 89 S.E.2d 851 (1955).
26. Matthews v. Quinton, 362 P.2d 932 (Alaska, 1961).
27. Dickman v. School Dist. No. 62C, 223 Or. 347, 366 P.2d 533 (1961).

portation, but have gone no further. And no state statute permits direct aid to parochial schools.

The evidence against direct grants is overwhelming, and I believe that were it not for the fact that this was made a political issue, we might not have the present constitutional debate. I do not know how many of you know that before the Federal Aid Bill was presented, it was debated within the Catholic Church what position the Church should take. There was a long dispute between two wings in the Church. The position of the more liberal wing—liberal according to our views—led by the Jesuits and the law school faculties, was not to demand all-out aid to parochial schools, but at most fringe benefits, *i.e.*, those that could be justified under the child benefit theory.[28] The Bishops, who have the financial responsibility for parochial education in the United States at the elementary and secondary levels, argued for full participation by parochial schools in any program for federal aid to education. The Bishops ultimately prevailed. As a result, the position of the Catholic Church for the past two years is that the parochial schools are entitled to federal funds, not tangentially, not indirectly, but as a pattern in the educational system.[29] Once that decision was made, then, of course, the next job was to justify the position legally, and I think that is why the National Catholic Welfare Conference brief was written.

But for my part, I believe that the extent that definiteness in constitutional law is possible, it is definite, on the basis of the decisions of the Supreme Court and of the state courts, that direct grants of Government funds to parochial schools would violate the Constitution.

CHAIRMAN DORSEN: Thank you, Mr. Pfeffer, for your presentation, although I am not sure that everyone here agrees with your analysis.

MR. JAFFE:[30] I hold an opposite point of view; so I think it is appropriate that I make a statement along those lines.

First, I think what might be called the dialectical framework of Mr. Pfeffer's presentation, which is a good lawyer's one, is not acceptable across the board as what Herbert Wechsler would call a neutral principle. Even if the overtones of *Everson* are fairly clear, and I suppose they are fairly clear, they are, however, fairly recent. This is not a proposition that has been standing very long. It only occurred to somebody rather recently that the First Amendment, for example, was incorporated in the Fourteenth. A number of people still wonder how the Establishment Clause ever became part of the Fourteenth and how Mr. Justice Frankfurter, for example, convinced himself that it was.

But I am taking the larger point. I think, to mention an instance which

28. See Statement by Rev. Neil G. McCluskey, S.J., Editor of America, quoted in N.Y. Times, March 12, 1961, p. 9. See also Weclew, Church & State: How Much Separation?, 10 De Paul L. Rev. 1 (1960).

29. See, e.g., Henle, American Principles & Religious Schools, 3 St. Louis U.L.J. 237 (1955).

30. Byrne Professor of Administrative Law, Harvard Law School.

will occur to all of you, the desegregation decision[31] came as quite a shock to a lot of people in certain parts of the country who thought that the thing had been settled since 1896 in *Plessy v. Ferguson*.[32] They found that they were not right after all, and so we have some new law, namely, that segregation violates the Fourteenth Amendment. Now, that is brand new, and this is just as new in the other way.

So I do not think that the fact that everybody is taking it for granted, or some people have taken it for granted, and that the overtones of *Everson* are fairly clear is the end-all and be-all for scholars who are looking to see what the merits are.

McCollum was thought to settle something which then turned out in *Zorach* not to be so clearly settled. Now there are two ways in which people can approach *Zorach*. Mr. Pfeffer can say it is wrong, in which case he is admitting that these things change pretty quickly and they are not so settled, or he can say it is distinguishable. But I think he is apt to say, if I understand him, that it is wrong. So you are presented with a lot of wrong decisions and a few right ones.

It consequently seems to me that it is necessary to approach this question somewhat more broadly than precisely as it stands today.

By the way, I was reading Mr. Pfeffer's book[33] the other night, and I observed that in most places Mr. Pfeffer is remarkably precise and discriminating in the way he presents things, but when he got around to state aid to schools and federal aid to schools, he did not, as far as I could see, distinguish very much between cases that arise under a constitution which forbids aid to parochial schools, as some of the state constitutions seem to be, and cases which deal with aid to schools as being an establishment of the church.[34]

Those things are to me entirely different. I think he is absolutely right that, if you have a prohibition against state aid to schools, the kind of thing that is being suggested here is highly doubtful. There is no escape unless you can say you are aiding the child rather than the school. But if you are proceeding on the basis of the First Amendment as incorporated into the Fourteenth, then it seems to me you have an entirely different proposition. There is the proposition stated by Justice Black that you can't give aid of any sort to religion under the First Amendment and the one suggested by Justice Douglas, which is more in line with the actual way in which this whole situation has been interpreted over the years, that you can give some aid. It is unfortunately like about 99.44% of the propositions in the law—a matter of degree.

Now, among the things I read in Mr. Pfeffer's book was a statement flat, out and out, without any qualification, and I think he is right, too, that tax

31. Brown v. Bd. of Educ., 347 U.S. 483 (1954).
32. 163 U.S. 537 (1896).
33. Pfeffer, Church State & Freedom (1953).
34. Id. at 603.

benefits to a church are aid to religion.[35] Therefore, under the test that you cannot give any aid to religion, if that is the test, they are unconstitutional.

But it seems to me, that this example proves that it is not the test. After all, something that has been in existence for 150 years or more is just as much a part of the doctrine as what was done yesterday in *Everson*. It seems to me, indeed, that it is a more significant part; it is much more significant that you can give tax benefits to churches—and you have been giving them for 150 years—than some little refined decision this way or that.

Consequently, it seems to me that Justice Douglas is absolutely right in saying that you can give some kind of aid to religion, but it cannot be too much; nor can it be too direct. The question is therefore whether any aid to education which indirectly helps religious organizations in terms of their prestige or their other activities, in terms of a whole lot of things, is so extreme or so direct that it passes the boundary of what the courts will permit.

I find it impossible to decide these issues by a completely doctrinaire method of absolutely exclusive categories. We are dealing with general phrases that do not have any precise meaning. Consequently, to apply them we must take into account why those things were and with what problems they were meant to deal.

Now, if you read Mr. Pfeffer's book, you will find that these guarantees grew out of all kinds of drastic and extreme church institutional devices, out of a great background of coercion of the conscience, of undue control of religion by the state, out of a situation in which religion had a destructive, distorted, and violent effect. This is the history against which, it seems to me, one must interpret these general phrases.

I suppose Mr. Pfeffer will deny this, but I think we are in a very different position today. In the first place, the influence of the churches qua religious organization is terribly diluted as compared to its influence in the days of establishment. Secondly, religion as a force has ceased to have the effect on us that it had. In this country, the religious institutions are as much social organizations as they are religious organizations. There are varying degrees of religious affiliation, but for the most part affiliation does not mean the same thing. Consequently, a penny here and a penny there—let alone the large benefit of tax exemption—is not world-shaking. Nor is the fact that it may help the churches a little bit to have the city shut down on Sunday. I am suggesting that this question throughout our entire history has been treated as a question of degree, and that there are institutions which obviously exist, which can't be explained away, which do add up to aid to religion.

It is easy, of course, to avoid the political question if you say that every proposal is unconstitutional. If you take my position, you must face up to the political question.

I haven't thought too much about it, but I have a kind of vague feeling

35. Pfeffer, op. cit. supra note 33, at 424-483.

that I am for aid to the Catholic colleges for various specialized activities, but against aid to the parochial schools, partly for a reason that really has nothing to do with parochial schools. I cannot get rid of the feeling that if we aid parochial and private schools, we sabotage the whole desegregation effort in the South because all the private schools will be eligible to get funds. That bothers me a great deal.

There are other things that bother me. I have never been able to work out to my own satisfaction whether all-out aid to the parochial schools would weaken or strengthen the public schools, whether it would release the public schools from certain kinds of tasks, make them stronger or weaker. I just do not know.

On the other hand, I am much less bothered about the college situation. It seems too that we are in a situation where we need all the strong colleges that we can get. The Catholic colleges are very respectable colleges. We get fine students from them in the law schools—very well trained and in no sense bigoted. We need all the good colleges we can get, and to be good, they need aid, at least in certain ways.

If Harvard College is going to get aid, I cannot see any reason on earth why Notre Dame should not. This particular device does not raise the same problems as does aid to the secondary schools. We already have the private colleges down South. I should add that I think Mr. Pfeffer is right, that the implication of *Everson* is that aid of this sort to parochial colleges would not be constitutional, but I don't know how solid *Everson* is.

So I come out with the conclusion that it is highly questionable whether a carefully tailored form of aid to the schools would be unconstitutional, and that it would be appropriate to give carefully tailored aid to the colleges, and not appropriate to give it to the secondary and primary schools.

MR. GREENAWALT:[36] Having written the briefs for the American Civil Liberties Union in *Everson, McCollum,* and *Doremus,*[37] and having argued the *Zorach* case, I am disturbed by several scholars whom I have heard talk on this subject in recent months. They are less apt to view these things in sharp outline and are always trying to rationalize and find something new and different about these decisions so that they can make their articles interesting. The thing that disturbs me in listening to this argument is that there is an effort now to change and modify principles and to find compromises, "policy" they call it, "public policy." I think it is about time that somebody spread the alarm that what we need today in this country are more Jeffersons and Madisons. It seems to me that the First Amendment was put into the Constitution as a matter of basic principle. The Preamble to the Constitution says that it is for the general welfare. This is a matter of "policy." This is a matter of primary public policy.

36. Member of the New York and United States Supreme Court Bars and Director of the National Council on Higher Education.

37. Doremus v. Bd. of Educ., 342 U.S. 429 (1952).

It would alarm me greatly if we should abandon the basic principles of the First Amendment and allow people who want public money used in aid of religious schools and who want religion taught in the public schools to break down the principles which were fought for so hard by Madison and Jefferson. Jefferson said it was the "severest contest" of his life that resulted in the First Amendment;[38] and when you read the early debates on the subject you understand why. After all, Patrick Henry was a formidable opponent, and he is the one that Madison had in the Virginia debates.

I was interested just the other day in reading again about the Mrs. Roosevelt-Cardinal Spellman controversy, and I was struck by the rather modest suggestions that Cardinal Spellman made back when the Barden Bill was pending. About all he sought then were "minor fringe benefits," maybe medical aid, maybe free lunches, possibly transportation. But where have these demands grown today? Today he wants "full equal treatment." Their parochial school children, he asserts, are entitled to the same treatment that every public school child is entitled to. Everything is said to be for the benefit of the child today; nothing is said to be for the benefit of the institution.

I think the rule that prohibits all public financial aid which, directly or indirectly, benefits a religious school or institution must be sustained. I think that people who are interested in the separation of church and state—and by that I include religious freedom, because the two in my mind are inextricably associated—had better hold that line tight.

I happen to be on a school board in Westchester County where the recently enacted Speno Bill[39] has caused all sorts of transportation problems. Under that bill transportation at public expense must be furnished for children attending parochial schools. In our own public school the school transportation budget has gone up about five times in the past year because we are being called upon to transport parochial school children to every part of the county.

Aside from the public expense, it seems to me that we have to try to draw the line, which we tried to draw in *Everson*, and hold that such transportation is an aid to the institution and not merely to the child. Likewise, books are benefits to the institution; tuition, libraries, all sorts of facilities are benefits to the institution. Without these things the institution could not function.

It is quite a different thing to request certain medical benefits for all school children. I wouldn't take that away from any child, of course. But these aids or benefits that go to the educational process itself—"public welfare" benefits and "benefits to the child and not the institution"—must be nipped in the bud. If you ever made a study of how the concept of "aid to the child" got started, you will see that it is growing and growing; and you will realize why it was important to try to stop that concept as soon as it got started, because it is still being used to justify all sorts of public aid to church institutions.

38. 19 Writings of Thomas Jefferson 414 (Memorial Ed. 1904).
39. See N.Y. Educ. Law § 3635 (as amended 1961).

While I do not know precisely where Leo Pfeffer and I stand today, I am sure we are not far apart on most of the basic principles relating to a real separation of church and state. I think it would be a tragic thing if people interested in the religious colleges and parochial schools were allowed to break down the basic principles which are stated in the *Everson* case and which have been reiterated by the United States Supreme Court in subsequent cases. I realize that in the *Zorach* case there was a slight suggestion that the rule of *Everson* might be modified. Yet in that case Justice Douglas said there could be no public support of religious institutions.

MR. GUNTHER:[40] I am glad to see that Mr. Greenawalt, who apparently sides with Mr. Pfeffer, does get a bit away from the conception that the Court has decided everything. I take it that Mr. Greenawalt supports Justice Black's opinion in *Everson* although he considers this result contrary to Justice Black's principle of no aid or no direct aid.

It seems to me that we cannot hope to discuss this problem very usefully by saying that the Court has decided it all, because surely no one reading the small handful of Supreme Court opinions can avoid noting the ambiguity in what the Court has done so far. Nor can our discussion be very useful if we do not try to separate the question of where the constitutional limitations properly belong from the question of where, as a matter of our views of desirable policy, the limits to aid to parochial schools properly belong.

The basis for the views about holding the line against the smallest amount of aid is one of policy, not constitutional interpretation. Certainly you cannot support the absolute barrier view from the Court's results; and I have difficulty finding support for it in starting afresh and looking at the Constitution and at what little I know about its history.

May I suggest this: Mr. Pfeffer, in saying that the discussion has been pretty well closed off by what had happened in the Court in the late forties and early fifties until some recent difficulties arose in the law journals and elsewhere, brushed aside what I thought was a fairly thorough, reasonable, non-axe grinding effort by Professor Kurland at Chicago to look at these cases again.

Professor Kurland, as a matter of constitutional interpretation, suggests that you must look not only at the establishment of religion provision, but also at the freedom of religion provision, that they are intertwined; that in carrying the logic of some of the establishment principles to the extreme you do run into some difficulties with the freedom problem and with the problem of discrimination on religious grounds.[41]

I am not buying all of what Kurland concludes, but I would be interested to hear from Mr. Pfeffer why this is so clearly untenable as not to warrant discussion. Kurland's conclusion is a very simple one—namely, that looking at the freedom and separation clauses together yields this single precept: that govern-

40. Professor of Law, Stanford University School of Law.
41. Kurland, supra note 16.

ment cannot use religion as a standard for action or inaction, because these clauses read together prohibit classification in terms of religion, whether to confer a benefit or to impose a burden.

Is it clear that this is contrary to what the Court has done so far? Is it clear that this is contrary to the defensible conclusions that may be drawn from the Constitution as it stands, assuming that both religion provisions of the First Amendment are to be given effect?

CHAIRMAN DORSEN: Any other comments?

MR. RABKIN:[42] Professor Jaffe has said that Justice Douglas in the *Zorach* case said that the state can give some aid to religious groups, and then raises the question where it can stop. There is nothing in Douglas' opinion which says this. All Douglas says is that it is perfectly all right for the state to adjust its schedule and the schedule of its schools to meet the need of some religious groups and the religious needs of some of the pupils. He never says anywhere that some aid can be given.

The result of the *Zorach* case is, of course, a limitation of the *McCollum* case with respect to the propriety of "released time."

MR. JAFFE: It does give some aid, doesn't it?

MR. RABKIN: No, it does not.

MR. JAFFE: No? The "released time" does help religion somewhat, doesn't it?

MR. RABKIN: This is one of the things you can argue about.

MR. JAFFE: You do not think that it does give any?

MR. RABKIN: What Justice Douglas was saying is that when you release a child to a religious class during school hours and adjust the schedule so he can go without disrupting the school, this is not aid. This is really what he was saying. I read the opinion very carefully, and nowhere does he say that aid is proper. So to base your attack on what was said is, I think, thoroughly wrong.

MR. JAFFE: How do you deal with tax aid?

MR. RABKIN: One more point on *Zorach.* Although Justice Douglas did write the majority opinion, he did say, "We affirm what we said in *McCollum.*" He was referring to the classic language of what the constitutional provision of freedom of religion means.

The other point that Professor Jaffe made was that *Everson* is fairly new; therefore it is unsettled and can always be overturned. Unfortunately for his argument, the Court, practically every time it had an opportunity to do so, has taken the language of *Everson,* the language of Justice Black, and has reaffirmed it. It quoted it in the *Torcaso* case,[43] after quoting it again in *McCollum.*[44] So it seems to me that it is clear that currently the Court believes what was said by Justice Black in the majority opinion in the *Everson* case and has gone out of its way to reaffirm the precise language.

42. Counsel, Anti-Defamation League of B'nai B'rith.
43. 367 U.S. 488, at 492.
44. 333 U.S. 203, at 210.

So let us not say, "Well, this is just temporary." Of course it can be changed, but in trying to figure out what the Court is likely to do with this issue, we should not do so in terms of "We are historians and since this is fairly new, it therefore can never become old." We should do it in terms of what the Court has said currently about the earlier language.

MR. JAFFE: Should not we do it in terms of our own ideas as to a proper and consistent construction?

MR. RABKIN: Yes, but we ought, in making our arguments, to try to stick to the facts, to try to talk in terms of what the decision really says instead of extrapolating it beyond what it says.

MR. GUNTHER: What about what the decision did?

MR. RABKIN: Even what the decision did had nothing to do with aid to religious groups or religious schools.

MR. GUNTHER: *Everson* did not involve aid?

MR. RABKIN: That was what Justice Douglas said, and that is what he based his decision on; and for us to say that we do not care what the majority said, let alone the dissenters, is wrong.

Justice Douglas has gone out of his way recently to pick up one phrase which has been repeatedly used, the one in which he said, "Ours is a religious nation whose institutions presuppose a Supreme Being."[45] This phrase, although widely reiterated, was merely dictum. In *McGowan,* Justice Douglas in effect said, "Look what everybody is doing with this phrase. They shouldn't do it because I didn't intend it this way."[46] This is how far he had to go in order to make it clear that he was not doing what Professors Gunther and Jaffe say he did.

CHAIRMAN DORSEN: I don't want anyone to feel the discussion of the First Amendment point is being unduly curtailed, but I think that we should spend the remaining time on the question of standing to raise the constitutional question.

MR. PRESENT:[47] Before we move on, may I make a short point? It is in line with what Mr. Greenawalt said about attempting to hold the line.

As I see it, the defense of the people who have wanted to hold the line has been to say, "Well, this is unconstitutional, and, therefore, we cannot go into this." I think there is a twofold question. One is the question of constitutionality, and the other is the correct public policy. So when the President says, "We can't do this because it is unconstitutional," it assumes that if it were constitutional it would be desirable. The policy aspect is overlooked. I think we should not limit ourselves to challenging things in the Court, but should think in terms of engaging in the other kind of battle, which I think is going by default.

45. Justice Douglas originally used this phrase in the majority opinion in Zorach v. Clauson, supra note 9, at 313.

46. See McGowan v. Maryland, 366 U.S. 420, 461 (1961).

47. Member of the New York and United States Supreme Court Bars and counsel for petitioners in Lincoln Center case.

CHAIRMAN DORSEN: Thank you. I would now like to move to our second question—the problem of standing to challenge public aid in the courts. Mr. Pfeffer has provided us with a careful summary of all the pertinent New York cases; Professor Redlich has a brief statement that is derived from his recent article in the New York University Law Review;[48] and Mr. Butler, a director of the New York Civil Liberties Union, has prepared a paper entitled "Judicial Standing and Civil Rights." I shall ask Mr. Butler to make the opening statement.

MR. BUTLER:[49] The issue arose when Amendment 6 to the New York State Constitution was proposed. Amendment 6, you probably recall, provided for the formation of a Public Service Corporation which would float bonds, the proceeds of which would be used to aid sectarian institutions.[50]

Several of us who are working on these cases were concerned that our standing to sue to test the legality of this constitutional provision was foreclosed by existing law in the State of New York. We were also concerned that federal aid to education could take the same form, that public service corporations would be devised on a federal level, that the credit of the federal government would be used to float bonds, the proceeds of which would be used to aid sectarian institutions. Since we felt that there was no jurisdiction available to the taxpayer in the initial instance, we thought that in order for the taxpayer to sue it might be necessary for the bonds to go by default, and then when the moneys of the government are used to back up the bonds, then a taxpayer might possibly have standing to sue in the federal court.

Be that as it may, we wrote this paper in the light of present New York law. In New York the test of the constitutionality of laws or administrative actions took three different forms. One was the mandamus proceeding; another was a proceeding for injunction; and the third was a proceeding for declaratory relief.

The law is well settled by *Bull v. Stichman* that any of these procedures are available only to one whose civil or property rights have been specifically and technically affected.[51] This in effect forecloses the right of organizations to bring suit. The main reason for these decisions and the reluctance on the part of the courts to entertain suits where one is not personally affected stems from the longstanding role of the judiciary to take jurisdiction only in adversary proceedings.

But perhaps the role of the judiciary is more than that. Perhaps the role of the judiciary is to act as a kind of guardian of the constitutional rights of the individual citizen. Perhaps we should compel the courts to take jurisdiction

48. Redlich, Constitutional Law, Ann. Survey of N.Y. Law, 36 N.Y.U.L.Rev. 1417 (1961).

49. Member of the New York and United States Supreme Court Bars and co-counsel for petitioner in Engel v. Vitale.

50. Supra note 2.

51. 273 App. Div. 311, 78 N.Y.S.2d 279 (3d Dep't 1948).

over government actions which certain individuals or groups of individuals claim are unconstitutional or illegal.

We thought that one of the ways to provide for such a proceeding was by an amendment to the Declaratory Judgment Act, Section 473 of our Civil Practice Act. This amendment would give an individual or a group of individuals or an organization the right to determine the legality or constitutionality of any statute, regulation, executive order, or official act involving direct appropriations of public funds of the state or involving the use of the credit of the state in any form, provided a taxpayer citizen or association asserts a bona fide claim, or that said action by the state is alleged to be antagonistic to the plaintiff and likely to lead to imminent and inevitable litigation, or that such action by the state involves a matter of unusual public interest and the court is satisfied that by its decree it can bring an end to the controversy or uncertainty giving rise to the proceeding.

Our proposed legislation provides that the court has power to impose costs and to carry out its sanctions under its general powers. Someone might ask how this relates to mandamus or injunction. The effect would be the same—once a law or an official act of any kind is declared unconstitutional by way of a declaratory judgment, then the official of the state would cease carrying on such act.

CHAIRMAN DORSEN: Does anyone have any comment?

MR. PFEFFER: *Bull v. Stichman* involved a grant of public funds to Canisius College for a dormitory. I submitted a brief in that case in which I suggested that, on the basis of the decisions of the New York courts, it is too broad to say that a taxpayer may never sue to challenge a state expenditure of funds; that there are enough decisions permitting such action to justify this type of test.

A taxpayer's suit should be allowed where, first, there is an issue of general public importance, like the election cases or civil service cases; second, where there is an actual bona fide controversy, *i.e.*, it is not a feigned case; third, where the issues are adequately argued by both sides so that the court would not be going off half-cocked; and, fourth, where there is no other remedy available. In those cases the courts should have discretion to assume jurisdiction and pass on it. I think support for this approach can be found even in the New York cases.

I also think that it is an overstatement to say, Professor Jaffe, that a taxpayer does not have standing in the federal court to challenge an unconstitutional act in the absence of a special injury to himself. This is said, and, of course, *Doremus* repeated it, but the Court did take jurisdiction in *Bradfield v. Roberts*[52] and *Heim v. McCall*,[53] both taxpayer's suits.

The language of *Heim v. McCall* is quite significant because it raises

52. 175 U.S. 291 (1899).
53. 239 U.S. 175 (1915).

another question—whether this is an act of self-restraint on the part of the courts or is a constitutional issue. In that case there was a challenge to one of the laws prohibiting employers from using aliens. The Supreme Court said:

> There seems to have been no question raised as to the right of Heim to maintain the suit, although he is not one of the contractors nor a laborer of the excluded nationality or citizenship.[54]

The Appellate Division[55] had held that there might be objection to his right under the holding of the *Schieffelin* case.[56] The Court of Appeals, however, made no comment, and we must—certainly may—assume that Heim had a right of suit.

This is what the court absolutely refused to do in *Doremus*. In *Doremus* the Supreme Court of New Jersey said, "Yes, you have standing. Go ahead with the suit"; and in *Doremus* they did. But the United States Supreme Court refused to accept jurisdiction.

I think what the Supreme Court does one year does not guarantee it will do the same thing the following year. There is nothing to prevent the Supreme Court from returning to *Heim v. McCall* and to *Bradfield v. Roberts*, and indeed to *Zorach v. Clauson*. There is language in *Doremus* which the Court could have used as a basis for not taking jurisdiction in *Zorach v. Clauson*.

I think to a large extent—this is, of course, a political rather than a judicial observation—the Court will take jurisdiction when it wants to pass on the merits, and that it can make a reasonable case for accepting jurisdiction even in cases which ordinarily would seem to be barred by *Doremus*.

In short, if we are to have legislation—although I am not sure that legislation is desirable—I suggest that it provide for jurisdiction where the matter is of public importance, where there is an actual bona fide controversy, adequately argued by both sides, and where there is no other practicable available remedy. Where these conditions are met, I would say the Court should have the discretion to accept jurisdiction.

MR. GUNTHER: Can we get to some specific questions on this issue of standing? Taking it first on the federal level, assuming that today it is reasonably clear that the Supreme Court will not entertain a federal taxpayer's action to enjoin federal spending in the light of the *Frothingham* case,[57] we have before us several proposals to avoid the effect of that decision. There is, for example, the proposal of the Morse-Clark Bill to grant standing to taxpayers, among others, as part of an aid to the education bill.[58]

In contrast, the Department of Health, Education and Welfare in its memo—which the President relied on as to the substantive point—said on the

54. Id at 186.
55. Heim v. McCall, 165 App. Div. 449, 150 N.Y. Supp. 933 (1st Dep't 1914).
56. Schieffelin v. Komfort, 212 N.Y. 520, 106 N.E. 675 (1914).
57. Massachusetts v. Mellon, 262 U.S. 447 (1923).
58. S. Res. 1482, 86th Cong., 1st Sess. (1960). A bill to authorize loans to private non-profit schools for the construction of elementary and secondary school facilities.

judicial review point, as I read it, that a legislative act granting standing to a mere taxpayer would not be constitutional, in other words, that *Frothingham* rested on Article III grounds. My own view would be that an awfully good argument can be made on the basis of *Frothingham* that it is not a constitutional question, that the issue of standing does go to remedy, and that a grant of a remedy by Congress would be constitutional in the manner proposed by the Morse-Clark Bill, contrary to the suggestion of the H.E.W. memorandum.

MR. JAFFE: I agree. Anybody who happened to read my two articles,[59] one written sometime after the other, would quickly see that the author wavered about the authority of the *Frothingham* case, not only with respect to the questions just raised, but also with respect to whether it could be distinguished even without legislation. In looking back over the case, having been prodded by my colleague Albert Sacks to reconsider it, I concluded that the opinion is full of outs.

There is a great deal of talk in the opinion to the effect that a vague political question is involved that is not an appropriate question for the Court to undertake. It was the question, generally speaking, whether the legislation interfered with states' rights. The Court did not think that a very close issue was framed. I suggested tentatively in my article—and without any great assurance—that if a very precise question of constitutional right, the kind of question that is up today, the type of question which the *Everson* case showed to be adjudicable, that is to say, the kind of issue that the Court will take as distinguished from a so-called political issue, then it might be possible to distinguish *Frothingham v. Mellon* even without legislation.

As to legislation, the Supreme Court tells us that it cannot be made to do non-judicial business. But for the life of me I cannot see why, if *Everson* is judicial business to the Supreme Court of the United States, it would not equally be judicial business if a federal taxpayer were permitted to bring suit.

There may be some good reasons why, as a matter of its own jurisprudence, the Supreme Court will take a state taxpayer case, yet not, on its own, take a federal one, but that seems to me to be a reason of policy. If there were really a fundamental defect, if there weren't any case, the Court could no more take it from the states than it could take it in any other way. Consequently, I would think that there is nothing absolutely clear in the way of authority against such legislation.

In connection with Mr. Butler's suggestion of a statute—I think some statute might be a useful thing—is it the purpose of your statute to tie jurisdiction to an expenditure of funds? Is it simply to fill in the one gap that you think now exists because you don't have the state taxpayer suit?

MR. BUTLER: That would be a secondary reason for the statute. The primary reason is as Leo Pfeffer quite correctly pointed out. Courts, both on the

59. Jaffe, Standing to Secure Judicial Review: Public Actions, 74 Harv. L. Rev. 1265 (1961); Standing to Secure Judicial Review: Private Actions, 75 Harv. L. Rev. 255 (1961).

federal level and the state level, have chosen to take certain cases and ignore the standing question and also have used the standing issue to refuse to take cases. I want to foreclose the Court from what I consider a cowardly refusal to entertain suits to enforce constitutional rights. I want to place upon the Court by legislation, if I can, the duty and the obligation to determine constitutional rights under proper procedures. That is the main reason for the statute.

The secondary reason is to plug the loophole that exists in the law as to public service corporations and the credit of the state (as distinguished from the funds of the state) and to broaden the right of that statute to individual taxpayers and to associations.

MR. JAFFE: I agree with that.

MR. PFEFFER: One thing I noticed, that you do not use the word "property." You use funds and credit. But many cases, such as the *Ossining* case,[60] did not involve either funds or credit. It involved the setting aside of public property for religious purposes. That would apparently not be covered by this statute.

MR. BUTLER: The statute would say "Involving any other act under the state authority, statutory or otherwise."

MR. PFEFFER: Then you have the question of *ejusdem generis*. I would include "property."

CHAIRMAN DORSEN: At this point perhaps Professor Redlich would discuss his memorandum on a possible federal question involved in a taxpayer's standing to challenge state expenditures.

MR. REDLICH:[61] It has occurred to me, in studying the *Doremus* case and the comments that have been made about it, that no one seems to have explored in any depth the question whether the taxpayer's standing to challenge a state expenditure on the grounds that it violates his rights under the Constitution of the United States is itself a federal question. Standing has always been assumed to be a question left to the states. The possibility that this might possibly not be a matter merely for state determination but itself a federal question seems to me worthy of exploration.

With that in mind, if you look at the *Doremus* case, you see that the Supreme Court held, as a matter of appellate jurisdiction, that there was no standing to sue. The appeal was dismissed, the result being that the state court decision in New Jersey was left intact. This has been criticized, quite properly in my view, on the theory that if the taxpayer did not have any standing for purposes of the appellate jurisdiction of the Supreme Court, then he should not have had any standing in the first place, and there was no reason to leave intact the decision of the New Jersey Supreme Court. Among others, Paul Freund made this point in Edmond Cahn's book.[62] My suggestion is,

60. Baer v. Kolmorgen, 14 Misc. 2d 1015, 181 N.Y.S.2d 230 (Sup. Ct. 1958).
61. Professor of Law, New York University School of Law.
62. Supreme Court & Supreme Law 35 (Cahn ed. 1954).

that if as a matter of federal law this taxpayer did *not* have standing to sue, perhaps we might expand this concept and find a principle which would tell us, as a matter of federal law, when a taxpayer does have standing to sue.

As you all know, the Supreme Court accepted jurisdiction in the *Everson* case and decided it on the merits. In *Doremus* the Court distinguished *Everson* on the ground that in *Everson* there was a good faith pocketbook action because the activity alleged to be unconstitutional required the spending of money. In *Doremus* this situation did not exist because Bible reading apparently did not involve any expenditure of the taxpayer's funds.

If you take the standard of *Everson*, that there is standing to sue if there is a good faith pocketbook issue, we might then explore the question whether standing might itself be a federal question. I submit for purposes of discussion that where a state activity requires the expenditure of funds, and a taxpayer brings an action in a state which holds that a taxpayer does not have standing to challenge this expenditure, the question is raised whether the issue of standing is itself a federal question. In so doing, the taxpayer would argue that the criteria of *Everson*, as emphasized in the *Doremus* case, should sustain the taxpayer's standing to sue as a matter of federal law.

MR. PFEFFER: May I comment on that? In *Bull v. Stichman*, decided after the *Everson* case, I made the claim, which went the way of all my other contentions in that case, that denial of a state remedy, where there is a clear violation of the Federal Constitution, should be held to constitute a denial of procedural due process; that if there is a constitutionally guaranteed right, the refusal of the state court to grant a remedy to vindicate that right constitutes a denial of due process, and that that was itself a federal issue. We never got any further than that. The question of whether the federal question could have been raised at that point, or whether it would be necessary to bring an independent action in the federal courts, was not brought up. My basic point is that I think there is merit to Paul Freund's suggestion, expanded here by Norman Redlich. I want to comment on another point. I do not know that I am in favor of William Butler's proposed bill or even my own brief in *Bull v. Stichman*. I am by no means certain that it is desirable to restrict the Court by compelling it to take jurisdiction. I think there is a good deal to be said to allowing the Court a way out, if it does not want to pass on the merits, as it apparently did not want to in *Doremus* and did not want to do in *Schempp*,[63] and did not want to do in the birth control cases.[64]

I think you should consider carefully whether it is desirable to close avenues of escape and say to the Court, "You have to pass on it." I am convinced that if the Court had been compelled to pass on the *Doremus* case in 1952, if it didn't have an escape, it would have decided it as it did *Zorach*. In

63. Schempp v. School Dist. of Abington, 177 F. Supp. 398 (E.D. Pa. 1959), reversed and remanded, 364 U.S. 298 (1960), on remand, 201 F. Supp. 815 (1962).
64. Poe v. Ullman, 367 U.S. 497 (1961).

1952 I don't think it would have dared to declare Bible reading unconstitutional.

MR. REDLICH: I don't think my proposal compels the Supreme Court to decide cases that it does not want to decide. There are other means that the Court can use to refuse to decide cases. My proposal simply would give the Court the opportunity to decide those cases which it wants to decide without being met with the problem of standing, which now operates as a total barrier to the plaintiff.

MR. GUNTHER: I think Mr. Pfeffer's point about the escape route raises an interesting question as to the source of the argument in Professor Redlich's proposal.

If, as I understand Mr. Pfeffer's point, *Doremus* was an escape route kind of case on policy grounds, then I take it, it was not very clear what constitutional or statutory authority the Court had for denying the case. I take it Mr. Redlich's point is that it was not a political escape route case at all, but one based on constitutional grounds. What is the constitutional provision? If the Court, as it said, was relying on Article III for refusing to entertain the case and there was no case or controversy, then that certainly is no basis for saying that the state courts are bound by it. Article III applies only to the federal courts. The only way in which Professor Redlich's application of federal rules of standing to state court actions would be justifiable, as I see it, is to argue that a federal law of standing is based on a federal substantive guaranty, namely, the Fourteenth Amendment; that the Fourteenth Amendment implies a right of action in state courts. That is, of course, not what the Court is talking about in *Doremus*. It is quite a jump from *Doremus* to that position.

Now, if that is the justification for Mr. Redlich's argument, that the Fourteenth Amendment implies a right of action in state courts as a matter of federal law, you then have the additional problem of making the state court take a case where the federal court has said there is a federally implied remedy in the Fourteenth Amendment. Suppose the state court does not have this kind of remedy; is there a federal obligation to give a kind of remedy which the state court is not accustomed to giving? This would all be a hypothetical question if the state courts gave some type of remedy in these situations. But I at least know of no situation where the Supreme Court has required a state court to grant a remedy where the state court was not granting a similar remedy in the same kind of case.

I don't know whether I make this at all clear, but it seems to me it is important to clarify whether *Doremus* rests on an Article III ground or rests on a Fourteenth Amendment ground. The consequences for the obligations of the state courts—and, generally, for Mr. Redlich's proposal of a federal law of standing—are quite different.

MR. GREENAWALT: I think you overlook one thing: that the state court in *Doremus* did not pass on the jurisdictional question.[65] That was mentioned,

65. 5 N.J. 435, 75 A.2d 880 (1950).

but the state court did not go into it.

MR. REDLICH: The New Jersey Supreme Court decided the case on its merits.

MR. GREENAWALT: But the state court just overlooked the jurisdictional question and assumed jurisdiction.

MR. REDLICH: Yes. The Supreme Court in *Doremus* simply held, as a matter of the appellate jurisdiction of the Supreme Court, that there was no case or controversy and narrowed its holding to the question of the appellate jurisdiction of the Supreme Court.

The link to *Doremus* in my argument is in the standard that the Court used to determine what was a good faith pocketbook action. They clearly said that *Everson* was and *Doremus* was not a case or controversy. The reason for that difference was that in *Everson* the activity required money and in *Doremus* the activity did not. If we apply that standard to the issue of what might be a case or controversy as a federal question, then I think that the *Everson* type of situation would clearly be a case or controversy.

I would like to add this thought. Where does *Frothingham v. Mellon* stand at this point? I, for one, am hard pressed to draw a distinction between my proposal and the continuing validity of *Frothingham v. Mellon.*

MR. CAHN:[66] It seems to me the argument can be made that *Everson* is the appropriate precedent here and not *Frothingham.* If we extend the preferred position doctrine much the way it was extended in a case like *Speiser v. Randall*[67] and say that while *Frothingham* involved ordinary social and economic legislation, *Everson* went to a preferred right, shouldn't the latter be our precedent?

MR. MAYERS:[68] Do you mean that *Frothingham* did not bear on any specific prohibition contained in the Bill of Rights, whereas *Everson* and *Doremus* did?

MR. REDLICH: Yes.

MR. RABKIN: I think *Doremus* talks about a pocketbook action, which would tend to bring it right back into *Frothingham.*

MR. CAHN: *Doremus* is not an expenditure case, and we are talking about expenditures only, as I understand it.

MR. REDLICH: That is correct. I think Professor Cahn's point is a good one, and it is necessary, in my view, to attempt to distinguish the *Frothingham* situation from the *Everson* situation, or else you have an untenable position. I think that this is a valid suggestion.

MR. JAFFE: It seems to me that it might be a mistake to narrow one's attack here too much. *Everson* was not even considered in terms of a tax payment. Then you have *Doremus,* where there was no argument at all on the

66. Professor of Law, New York University School of Law.
67. 357 U.S. 513 (1958).
68. Formerly Professor of Law at the City College of New York.

point. The Court simply ignored many, many cases in which it had taken jurisdiction without any question of an interest. This does not in any way change your point, but to focus the whole attention on *Everson* and the taxpayer action, I think, is a very narrow strategy, and to my mind is not a sound doctrine. The Court in a number of cases dealing with elections and not simply voter's rights—but generally—took jurisdiction.

Perhaps it has been assumed that it was quite sufficient that the state courts had taken jurisdiction. But you can't say that these cases were considered. Nothing has been considered. There simply has been either failure to consider anything or one absolutely ill-considered case, the *Doremus* case. The *Everson* case was not a considered case. If one is trying to evolve a sound doctrine, why base yourself on a fiction that everybody knows to be a fiction?

MR. PFEFFER: What is the fiction?

MR. JAFFE: The fiction that if the Bible is supplied, you are affected as a taxpayer and for that reason have a protectable interest. But if you can't find a penny or so on which to hang your question, then there is no jurisdiction.

MR. PFEFFER: My answer to that, Professor Jaffe, is that in a non-taxpayer type of case, in non-expenditure cases, there isn't a real problem. There was no real problem in *Doremus*. If they had been careful in *Doremus* and had hurried the proceeding, the Court would have decided *Doremus*. The only thing that happened in *Doremus* was that it was delayed so long that the plaintiff's child graduated. Had that plaintiff's child not graduated, then the Court would not have had this escape route.

MR. JAFFE: You mean the problem where you simply allow bonds to be . . . .

MR. PFEFFER: The problem which brought this up, Amendment 6, where you can't point out that some person's rights have been specifically injured. In the public school case, children or their parents have been specifically injured. That is not a pocketbook case. We are concerned with cases like *Bull v. Stichman*. There, a state grant of funds to Canisius College was challenged. No person was injured. There was no way of getting jurisdiction except if a taxpayer suit was allowed. That is the answer to your question why we have to work out this fiction. I don't care about the fiction, but this is one area where there is no remedy without it.

MR. JAFFE: I thought Mr. Butler had a case where there were no bonds issued and no loan, and he was afraid that the taxpayer could not show the funds of the state were involved. How would working on the basis of the taxpayer suit help you to get jurisdiction in that case?

MR. BUTLER: It does not.

MR. JAFFE: But I understand Mr. Pfeffer to say that the taxpayer suit is all you need; that the rest of the cases can be handled because some particular individual is involved.

MR. PFEFFER: That is right.

MR. JAFFE: But it is not. No individual is involved in your bond case, and no taxpayer interests are involved. I say you should be able to test that case just the way you test every case. But if you hang yourself up on this fiction of a taxpayer . . . .

MR. BUTLER: Let's take the issue of the contraceptive cases in Connecticut.[69] You actually have to sustain an injury before you can sue to test the legality of the contraceptive statute. The only way I see around this is state legislation.

MR. JAFFE: I think we may be talking at cross-purposes. As I understand it, where money is loaned through bonds, that is a proper case for the Court to consider. Do we agree on that?

MR. BUTLER: Yes.

MR. JAFFE: Then I think they should be able to treat it in declaratory judgment.

MR. PFEFFER: By whom? Somebody has to start it.

MR. JAFFE: Anybody; a citizen.

MR. PFEFFER: That is what we are talking about. We call him a taxpayer.

MR. BUTLER: There is a line of cases in which the courts declined jurisdiction on that ground.

MR. JAFFE: I am suggesting a head-on attack and not making it a fictitious taxpayer's suit.

MR. GORDON:[70] I think that what Professor Jaffe says relates to a distinction which is made, in the New York cases at least, but which I don't find too carefully discussed. There is one line of cases in New York dealing with the right of a taxpayer to sue that is limited to actions against municipal officers where there can be a showing of an expenditure of municipal moneys. Too frequently, I think, when we talk about taxpayer suits in New York, we don't realize that that line of cases is confined under the present legislation and under the cases to instances of the expenditure of money by a municipal government or municipal officers.

There is another line of cases, however, which has not been adequately developed independently, with a few exceptions, notably *Personal Finance Co. v. Lyon.*[71] This second line of cases deals with the right of a citizen, as distinct from a taxpayer, to bring an action where the nature of the controversy involves a matter in which a citizen has no special interest, but a common interest, with every other citizen in the community.

MR. JAFFE: I discussed this in great detail in the articles in the Harvard Law Review.[72] That is their whole point.

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69. Poe v. Ullman, supra note 64.

70. Member of the New York and United States Supreme Court Bars and member of the Executive Committee of the Commission of Law and Social Action of the American Jewish Congress.

71. 203 Misc. 710, 121 N.Y.S.2d 72 (Sup. Ct. 1953).

72. Jaffe, supra note 59.

MR. GORDON: That distinction is to be found in the New York cases.

MR. PFEFFER: No. The *Dorsey*[73] case knocked it out right off the bat. In the *Dorsey* case there was no public expenditure. It was a question whether the Metropolitan Life Insurance Company was discriminating against Negroes.

MR. GORDON: I don't think, Leo, with all due deference to how it was briefed, that the *Dorsey* case reached the point discussed in *Personal Finance Co. v. Lyon*, because that case pointed to decisions that have never been overruled to my knowledge: the civil service cases,[74] the election cases,[75] the public parks and streets cases.[76]

I think there is a common denominator in those cases where a citizen has standing as a citizen to bring an action. The common denominator is that the nature of the right involved is truly an indivisible one and can't be the subject of any personal property right or the like. This is true with respect to the civil service cases, and they haven't been overruled. Why can any citizen go in and challenge the propriety of actions affecting the civil service? I take it that the rationale behind it is that every citizen, in common with every other citizen, has an indivisible and indistinguishable right arising out of the administration of our civil service law.

MR. PFEFFER: Some of the courts have based it on the fact that it is a mandamus proceeding.

MR. GORDON: But we no longer have mandamus proceedings in New York.

MR. PFEFFER: This is after we no longer had mandamus.

MR. GORDON: No. You can't make the distinction in terms of the remedy.

MR. PFEFFER: I am telling you what the courts did.

MR. GORDON: The remedies have been merged, and you find many Article 78 proceedings asking for the same declaratory relief that you would have in a proceeding brought under Section 473 of the Civil Practice Act. But even that does not get us away, for example, from the election cases and the public street cases.

I would be very doubtful, Mr. Butler, about the possibility of legislation shooting as broadly as yours being adopted in the State of New York. It covers far more than what we are talking about here tonight, and I am afraid it would probably encounter difficulties far beyond the issue with which we are interested.

I would suggest one of two things. First, the possibility of legislatively extending the concept of the taxpayer suit in New York from an action involving a municipal officer or body to a state officer or body. This would be a simple and direct way.

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73. Dorsey v. Stuyvesant Town, 299 N.Y. 512, 87 N.E.2d 541 (1949).

74. E.g., Cash v. Bates, 301 N.Y. 258, 93 N.E.2d 835 (1950); Andresen v. Rice, 277 N.Y. 271, 14 N.E.2d 65 (1938).

75. E.g., McCabe v. Voorhis, 243 N.Y. 401, 153 N.E. 849 (1926); Daly v. Rice, 128 N.Y. 449 (1891).

76. E.g., Pumpyansky v. Keating, 168 N.Y. 390, 61 N.E. 637 (1901); Huff v. City of New York, 202 App. Div. 425, 195 N.Y. Supp. 257 (2d Dep't 1922).

Second, I would like to see a more imaginative extension of the cases dealing with the so-called common and indivisible rights of citizens in these citizen actions. I think it would lend itself to extension to the case where the nature of the interest involved is religious freedom or opposition to the establishment by the state. There, it seems to me, we are once again talking about the nature of an interest which all citizens have in common or, at least, it could be argued this way. I should think that there is common and indivisible interest on the part of each citizen in religious freedom to the same extent as in civil service or public streets or the election process.

It is for this reason that I am not at all sure that the argument was developed this way in the *Dorsey* case, especially since, as I recall, it was decided before the *Personal Finance* case, and the *Valente* case.[77] I am not at all sure that we have exhausted the possibilities under First Amendment preferred position cases of finding areas of standing, at least in the New York courts.

I would also suggest that, assuming that we can move in this direction in New York, I do not have serious doubts about the appellate jurisdiction of the Supreme Court of the United States in cases coming from the New York courts (assuming justiciability and standing to be predicated on the theories which I have discussed). I have little doubt that this type of case would be reviewable by the Supreme Court as long as a state court has indicated that there is a remedy, that it is justiciable, and is something which is plausible and does not lend itself to collusive suits or the kind of political issue which the Supreme Court would not review.

I believe this would be the case even though there might be some doubts under the case and controversy doctrine as a matter of original jurisdiction in the federal courts. For example, I think that the federal courts might have considerable trouble giving to a federal district court the power to issue an order *ex parte* in a wiretap case, as they do in the state courts. Yet, I would have little doubt that a determination by a state court on such an issue, if it properly became the subject of litigation, would come within the United States Supreme Court's appellate jurisdiction.

MR. REDLICH: I have two comments. One, I can't conceive of the New York Legislature, as I now know it to be composed, to pass any law which is going to enable taxpayers to challenge the constitutionality of either state or federal aid to church supported institutions in the state courts of New York. I just don't think that is a political reality.

Two, however imaginatively we might ask the Court of Appeals to reconsider its position with regard to taxpayer suits in New York State, I would be very much surprised if the present Court of Appeals would depart from the precedents which exist and embark upon a more imaginative approach which might compel it to decide these cases. Therefore, I feel that judicially the

77. 308 N.Y. 71, 123 N.E.2d 777 (1954).

ultimate hope lies in what the United States Supreme Court might do on the standing question.

MR. PRESENT: I want to ask Mr. Gordon this question: With regard to *Bull v. Stichman*, I can see how the proposed taxpayer's law would enable that case to have been decided in our state courts. But how could that situation have been challenged by way of appellate review in the United States Supreme Court?

MR. GORDON: I don't see how there could be serious doubt. There was an expenditure of moneys involved; how would there be any doubt about that one?

MR. PRESENT: You mean given the taxpayer's law?

MR. GORDON: I don't think the problem in *Bull v. Stichman* was federal jurisdiction. It was state standing, and I think if there had been the kind of legislation we are talking about, I don't have any serious doubt that if the state courts had assumed jurisdiction that there would have been jurisdiction in the Supreme Court.

MR. PRESENT: In other words, through the taxpayer's law, you assume that the state court would take jurisdiction, and then because of that the Supreme Court would assume jurisdiction? Is that your answer to the problem?

MR. GORDON: Yes. Why do you think there is a question about that?

MR. PRESENT: You had divided this up into two suggestions. One was the taxpayer suggestion, and the other was using the religious freedom idea.

MR. GORDON: That is correct.

MR. PRESENT: This, of course, wouldn't have fitted into the category of religious freedom.

MR. GORDON: Yes, I think it could.

MR. PRESENT: How?

MR. GORDON: Because the argument would have been made, both in terms of freedom and in terms of establishment, that if the citizenry has a common and indivisible interest in our public streets, in our election processes, and in the administration of civil service in this state, then it has a comparable interest in religious freedom, and the question of establishment.

MR. PRESENT: The point I am getting to is that we don't need the taxpayer's law because this theory would encompass every citizen; is that not right?

MR. GORDON: I would certainly argue that if the latter proposition could be established, yes.

MR. LESKES:[78] In considering this question, there may be a distinction in the standing of a litigant who presses the free exercise clause and one who presses the establishment clause of the First Amendment. This is supported by the Sunday Closing cases, where people who were operating a store on a seven day basis were permitted to challenge the constitutionality of the legislation under the establishment clause but not the free exercise clause.

78. Director, Legal Division, American Jewish Committee.

MR. CAHN: Since Professor Jaffe has given a great deal of thought to this subject, I would like to know whether he has any comment on the question whether we can have a federal *parens patriae* suit. In other words, I am trying to distinguish the *Mellon* case,[79] which says that in respect to a federal matter the state can't represent its citizens.

MR. JAFFE: I don't quite understand. You mean a suit by the United States?

MR. CAHN: Yes. Why can't a suit be brought, let's say by the Attorney General—after all, we have precedents for having arms of the Federal Government on both sides of a case. Why can't the Attorney General sue the Controller or whoever the responsible official is to prevent an unconstitutional bond issue?

MR. JAFFE: For one thing, there are some incidental problems. There is a question—at least a number of courts have raised this question—whether the Attorney General would be permitted to bring an action in which he attacks the constitutionality of the legislation of what is called his legislature. It is a mysterious idea.

MR. PFEFFER: You mean the federal Attorney General attacking state legislation?

MR. CAHN: No; attacking federal legislation.

MR. JAFFE: That might cause some trouble if the Attorney General were instructed by the President—

MR. CAHN: No; by the Congress.

MR. JAFFE: To bring a suit?

MR. CAHN: To challenge an act which appropriated the money; in other words, you have both the Congress and the executive branch purporting to act as *parens patriae.*

MR. JAFFE: It is an interesting idea, and I can't get all around it. I would be a little afraid that the Supreme Court would treat it as practically an application for an advisory opinion as to whether their legislation was constitutional.

MR. FRANK:[80] I would like to put that question very concretely. Supposing the State of New York had no bar against helping religious institutions; supposing it has a bar, as it now has, against suing a state officer; and supposing the legislature provided $500,000 directly for the construction of a church—don't get mixed up with schools—but for a church directly. The New York courts would presumably say, "we have no jurisdiction; we can't possibly decide this case on its merits." Would anybody, whether a United States citizen or a New York citizen, be able to bring that into the United States courts? That is really the question.

MR. CAHN: I think you are quite right.

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79. Massachusetts v. Mellon, supra note 57.

80. Member of the New York Bar and Member of the Board of Directors of the American Civil Liberties Union.

MR. BUTLER: I want to point out that Bob Burns and I thought long and heavy about the idea of inserting into our proposed statute the idea that the Attorney General may be the one to bring an action to declare an act of the state unconstitutional. It wasn't a new idea. As a matter of fact, I believe it is employed in the State of Washington, where the citizens first must go to the Attorney General, and if the Attorney General is satisfied that there is a bona fide case, he can bring an action.

But on reflection we were suspect of federal and state officials, and we weren't willing to entrust in any Attorney General the power to bring an action to enforce the constitutional right. It was as simple as that. We just wouldn't trust him. We though that this was better left to the judiciary than to the executive branch.

MR. ENNIS:[81] I was going to say, as a practical answer to Professor Cahn's suggestion, that no such provision would be put in any act of Congress because Congress insists that the Attorney General's job is to defend its statutes against constitutional attack. The Congress would never pass a statute putting the Attorney General on the other side in attacking legislation.

MR. GELLER:[82] I think that the distinction the *McGowan* case made between raising a question under the establishment clause and under the freedom clause has put a great dent in the theory that Murray Gordon advanced to give standing to anyone who did not have standing as a taxpayer. The majority in *McGowan* said that the plaintiffs who had pleaded no religion at all, and were simply the owners and employees of supermarkets in Maryland, were without standing under the freedom clause. These people were not allowed to raise what has been suggested is an issue common to all. They could not argue what the plaintiffs in the *Crown Kosher* case[83] could argue, simply because those other plaintiffs were Jewish. Apparently under the *McGowan* case, even if the plaintiffs were Christians and observed Sunday, they could not have raised the issue that their Jewish brothers raised in the *Crown Kosher* case. Yet, you would think that a Sunday Closing Law is a common issue to all.

MR. GORDON: It was not argued that way. The point was raised, in the context that I am raising it now, in terms of standing.

MR. FRANK: I am strongly in favor of Mr. Pfeffer's approach, which is to educate the courts, as against legislation. I have had some experience with the New York Legislature for many years. I doubt whether you would get any bill through the New York Legislature doing what Bill Butler is proposing to do. I doubt whether you would get anything through Congress doing what was proposed before to give the Attorney General power to raise the constitutional issue. I think you have to find some means to get the courts to do it.

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81. Member of the New York and United States Supreme Court Bars and General Counsel of the American Civil Liberties Union.

82. Member of the New York and United States Supreme Court Bars and co-counsel for petitioner in Engel v. Vitale.

83. Gallagher v. Crown Kosher Super Market, Inc., 366 U.S. 617 (1961).

MR. ENNIS: I disagree with Walter Frank. It is very likely that in a federal bill, as a compromise, they might put in such a review provision just to get it passed. They might say: "If it is unconstitutional, let the courts decide it."

One of the things we are talking about is in the language in the federal bill, and I think Professor Jaffe's suggestion that we do our best to get away from this taxpayer idea to a broad citizen idea can be tested very well by looking at how much more difficult the case and controversy question would be, if you changed the language from "any citizen who has paid a tax" to "any citizen may bring a civil action against the commissioner to restrain or enjoin him from taking an action claimed to be in violation of the First Amendment." You will make the case and controversy question much more difficult.

MR. GUNTHER: I take it the whole point that Professor Jaffe is making is that it ought not to be more difficult if you take away the taxpayer. The question of whether the plaintiff has paid a ten dollar or a thousand or a twenty thousand dollar tax bill surely isn't the real test of whether there is opposition; whether there is adequate adversariness; whether there is a concrete situation; or whatever criteria of case and controversy you wish to use.

MR. ENNIS: It is a question of whether you want to get a judicial decision on an act of Congress to lend money to public schools. It seems to me the narrow provision would be more likely to get substantive review.

MR. BURNS:[84] In my research, one thing that singularly impressed me was the repeated comments by various courts that there must be an adversary proceeding before they will take cognizance of any constitutional question, which is quite in contrast with the European attitude where they do have advisory opinions. This leads me to believe that it would be very difficult to get many courts today to accept the idea that they are the guardians of the civil liberties or people's rights in common.

MR. JAFFE: But there are many cases in which the court says, "We will pass on a constitutional issue if it is of sufficient and public importance even though the plaintiff is just a public citizen."

MR. BURNS: Even though they can't find a controversy between two adversaries?

MR. JAFFE: There are many. I could probably cite you about twenty.

MR. BURNS: There are cases in New York which go as far the other way as to say that it is no concern of the judiciary whether there is maladministration in the executive unless there is an adversary situation.[85]

84. Assistant Professor of Law, Loyola (Chicago) School of Law; formerly, Arthur Garfield Hays Civil Liberties Fellow, New York University School of Law.

85. E.g., Dorsey v. Stuyvesant Town, 299 N.Y. 512, 87 N.E.2d 541 (1949); McCabe v. Voorhis, 243 N.Y. 401, 153 N.E. 849 (1926); Baird v. Bd. of Supervisors, 138 N.Y. 95, 33 N.E. 827 (1893).

MR. JAFFE: Then there are many cases the other way. There are cases all over the states—dozens.

MR. PFEFFER: I want to make an observation which relates to what I said before. I am far from convinced that we should either legislatively or judicially change the existing situation. I am troubled about opening the door to suits which are ill prepared and could lead to bad precedents.

One further point, there is a danger in our approach of putting all our eggs in the judicial basket. We are more and more getting to the idea, apparently implicitly, that the only forum, the only governmental unit to protect civil liberties, is the court; that the President has no responsibility; that the legislature has no resposibility. Just find a way to get into court, and all our problems are solved.

I think that the Constitution of the United States is not merely a mandate to the courts. It is a mandate to the executive and to the legislature, and we have to make the constitutional fight in the legislature as well as in the courts. It is the easiest thing in the world for Congress to say, "Pass the law; don't worry about the constitutionality. Let the Supreme Court pass upon the constitutionality." We should fight within the Congress on constitutional issues and not give it an easy out by saying, "Let the Supreme Court protect us and give it all the responsibility."

MR. GREENAWALT: I don't agree with that. I think there ought to be a way by which citizens can test the constitutionality of any law—especially within the Bill of Rights—which has been passed by legislatures, and to get around the "actual controversy" requirement of the Supreme Court as presently interpreted. It isn't phrased in terms of "adversary proceedings" in the Constitution, and it seems to me that an "actual controversy" could be interpreted to include a citizens suit. I don't believe that there ought to be bars to having an adjudication by our highest court of these fundamental constitutional questions. If they aren't adjudicated, the provisions of the Constitution do not mean a thing in many instances since local legislatures are often swayed by all sorts of considerations which have nothing to do with the constitutional question.

MR. REDLICH: Would it be permissible to throw out a suggestion in order to get the reaction of the people here?

MR. JAFFE: It is an interesting idea and I can't get all around it. I would

What about an *Ashwander* type of action?[86] Supposing Congress were to adopt a program of public grants or loans to church-related schools and a church-related institution which happened to believe in the separation of church and state were to apply for such a grant or loan. A member of the board of trustees might bring an action to enjoin the institution from accepting the money or applying for the grant on the ground that the program under which it was operating violated the First Amendment. We have had such a suit in *Carter v.*

86. Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936).

Carter Coal[87] and in *Ashwander*. It is open to the objection, of course, that it is collusive.

MR. PFEFFER: I had hoped we had gotten away from that.

MR. JAFFE: You mean the Supreme Court is just waiting to have the wool pulled over its eyes; that it would not take the thing on an honest basis, but it would if you can figure up a dishonest way? If I were a judge and I didn't believe that a suit like this should be brought, I wouldn't decide the case you put.

MR. REDLICH: I recognize your position, but I am only saying that cases like this have been decided. I don't think it is an answer to my suggestion to say that, if you were on the Supreme Court, you would regard this as a collusive action.

MR. PFEFFER: I think that this removes one of the important things which I think should be in any taxpayer's suit, the assumption of why we have a determination of rights by litigation—a bona fide fight by two people who are on opposite sides. This is the assumption upon which our judicial system is based; that the best way to get the truth is to let both sides beat each other's brains out; but if they both believe the same thing, then you have shadow boxing.

MR. REDLICH: If Mr. Jaffe could cite 20 cases where the courts have entertained suits by general citizens to protect their constitutional rights, I think it is possible to cite an equal number, if not more, which by your definition would not constitute a good faith knockdown, drag-out battle. I think that my suggestion has to be viewed not only in terms of whether we regard such a thing as within the theory of a case or controversy, but whether the Supreme Court would regard such a suit as a case or controversy.

MR. PFEFFER: If Professor Redlich's point is valid, the Attorney General would intervene and fight.

MR. CAHN: That's the whole objection to this procedure, it seems to me. It forces the Department of Justice into the case in defense of the appropriation.

MR. RABKIN: I would be willing to have it. I don't care about the opposition.

MR. CAHN: You don't care about getting the Department of Justice in opposition?

MR. RABKIN: It may be the best possible opposition.

CHAIRMAN DORSEN: I believe that we have covered our subject. I want to thank all of you for coming, especially those who have journeyed from other cities. The meeting is adjourned.

87. Carter v. Carter Coal Co., 298 U.S. 238 (1936).