



## Notre Dame Law Review

Volume 37 | Issue 3

Article 2

3-1-1962

# Wall of Separation--Judicial Gloss on the First Amendment

Paul M. Butler

Alfred L. Scanlan

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>

 Part of the [Law Commons](#)

### Recommended Citation

Paul M. Butler & Alfred L. Scanlan, *Wall of Separation--Judicial Gloss on the First Amendment*, 37 Notre Dame L. Rev. 288 (1962).  
Available at: <http://scholarship.law.nd.edu/ndlr/vol37/iss3/2>

This Article is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact [lawdr@nd.edu](mailto:lawdr@nd.edu).

# WALL OF SEPARATION — JUDICIAL GLOSS ON THE FIRST AMENDMENT

Paul M. Butler\* and Alfred L. Scanlan\*\*

## Introduction

As the Second Session of the 87th Congress convened, the question of both the propriety and the constitutionality of federal assistance to private, sectarian educational institutions remained as a controversial item for the Congress and the country to debate, if not to resolve.<sup>1</sup> Points of view are always plentiful and diverse on this emotion-laden subject; for the most part, compromise and dispassionate analysis are strangers to the argument. Some continue to maintain that any sort of government action which confers some benefit, however indirect, on sectarian educational institutions, cannot and should not pass muster under the first amendment.<sup>2</sup> Others contend that if the primary purpose of a congressional enactment is the public welfare, the fact that religious educational institutions also may be incidentally benefited does not render it constitutionally objectionable.<sup>3</sup> Bolder proponents of federal aid to religious schools even have advanced the argument that not to include church-related schools in any overall program of federal assistance to education is discriminatory, perhaps rising to the level of a violation of the due process clause of the fifth amendment,<sup>4</sup> as well as of the free exercise clause of the first amendment. At the other extreme are those who complain that even the singing of traditional Christmas carols on public school time transgresses the no establishment clause.<sup>5</sup> And recently a novel, but logically appealing, argument has been made that federal assistance which can be allocated to the secular activities of church-related schools is constitutional, while direct federal aid to religious instruction maintained in such schools is not.<sup>6</sup>

\* LL.B., University of Notre Dame Law School, 1927; formerly a member of the Indiana and District of Columbia bars and the bar of the Supreme Court of the United States; National Chairman of the Democratic Party, 1954-1960. Mr. Butler died on December 30, 1961 while this article was in a state of preparation, and did not live to see it in final draft. However, the views expressed in this article represent those which were held by Mr. Butler, as well as those now entertained by the co-author.

\*\* A.B., Columbia University, 1941; LL.B. and LL.M., George Washington University Law School, 1946 and 1947 respectively; member of the bars of the District of Columbia, Indiana, Maryland and the Supreme Court of the United States; partner in the firm of Shea & Gardner, Washington, D.C.

1 By his State of the Union message to the Congress, the President again indicated his determination to seek legislation to provide financial aid to public primary and secondary schools, but not to include assistance to private schools at this level. Washington Evening Star, January 10, 1962, pp. A-1,8. On several occasions prior to this time, the President has stated his opinion that the exclusion of federal aid for "church schools" was based on and in "accordance with the clear prohibition of the Constitution. . . ." The New York Times, February 21, 1961, p. 1.

2 Konvitz, *Separation of Church and State: The First Freedom*, 14 LAW & CONTEMP. PROB. 44, 59 (1949).

3 See, e.g., the remarks of Professor Sutherland, of the Harvard Law School, as reported in the Catholic Standard, March 10, 1961, p. 1.

4 Blus, *Religious Liberty and Bus Transportation*, 30 NOTRE DAME LAWYER 384, 437 (1955); see also the well-publicized statement of the Bishops composing the administrative board of the National Catholic Welfare Conference, as reported in The New York Times, March 2, 1961, pp. 1, 14.

5 Washington Evening Star, January 9, 1962, p. B-1.

6 *The Constitutionality of the Inclusion of Church Related Schools In Federal Aid to Education*, a memorandum prepared by the Legal Department of the National Catholic Welfare Conference, (December 14, 1961), p. 54.

In this article, we have eschewed, to the extent possible, all comment on the wisdom or justice of federal aid to religious educational institutions, and have attempted to confine discussion to the legal issue involved.

Even on this issue, the authors are not presumptuous enough to predict which point of view will prevail in the long run. And while they have their own firm convictions as to which of the varying opinions concerning federal aid to religious schools is not correct, they are not so bold as to pick those that may prove to be right. Rather, our purpose in this article is to review pertinent decisions of the Supreme Court of the United States, to demonstrate that, whatever the proposed form or forms of federal aid to church-related schools, the proponents of such aid must take into careful account the fact that the Court, at least as now constituted, has adopted an interpretation of the first amendment that makes its task more difficult than perhaps the founding fathers might have intended. In short, Jefferson's facile figure of speech, "a wall of separation between church and state" has now been grafted on the text of the first amendment. Henceforth, at least until the present composition of the Supreme Court is substantially altered, the amendment must be read as though that phrase were written into it, however at variance this may be with American constitutional history and with the origins and traditions of the nation. This purpose may strike the reader as limited enough in objective. Nevertheless, however true that may be, we believe that long-run progress may be served best in this instance by accurate understanding and acceptance of the present, or short-run, obstacles to its achievement.

### *The Argument from History*

The first amendment provides in pertinent part as follows:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .

As later pointed out, the Supreme Court has given the no establishment clause of the first amendment an interpretation under which, apparently, any federal aid, whether direct or indirect, to a sectarian school, will have a presumption of unconstitutionality running against it. Clearly, the Court, as it is now constituted, appears determined to read the first amendment as if it were set out in terms of Jefferson's now famous metaphor. As a consequence, the type of federal assistance to church-related schools that can survive the test of constitutionality may be severely restricted, provided, however, that there is anyone with standing to bring such a test.<sup>7</sup>

On this point, we align ourselves, presumptuously perhaps, with a distinguished scholar whose research, we believe, establishes that the Court's substitution of Jefferson's descriptive but isolated phrase for the text of the no establishment clause disregards American constitutional history and national traditions.<sup>8</sup> As Professor Corwin of Princeton has extensively documented, the clear purpose of the first amendment was to prohibit the federal government from establishing a national religion, or from affording any religion or reli-

<sup>7</sup> *Massachusetts v. Mellon*, 262 U.S. 447 (1923) discussed *infra*, p. 306.

<sup>8</sup> Corwin, *The Supreme Court as National School Board*, 14 *LAW & CONTEMP. PROB.* 1 (1949).

gions "a preferred status."<sup>9</sup> Despite Justice Rutledge's attempt to establish otherwise in his dissenting opinion in *Everson v. Board of Education*,<sup>10</sup> and Justice Black's subsequent adoption of Justice Rutledge's unpersuasive reading of American constitutional history in *McCollum v. Board of Education*,<sup>11</sup> Professor Corwin's study has not been discredited.

At the time of the adoption of the first amendment, a number of States had established or quasi-established religions. Some persisted for many years after the ratification of the first amendment. When the amendment was proposed, several of the original states had just eliminated, or were in the process of eliminating, established religions. There was a strong popular desire on both sides of the fight to keep the new (and suspected) national government out of the struggle and to insure that it did not interfere.<sup>12</sup> Perhaps as authoritative a statement as any is Justice Story's summary of the situation which existed at the time of the adoption of the first amendment, as he stated it in 1833:

The situation . . . of the different states equally proclaimed the policy, as well as the necessity of such an exclusion. In some of the states, Episcopalians constituted the predominant sect; in others, Presbyterians; in others, Congregationalists; in others, Quakers; and in others again, there was a close numerical rivalry among contending sects. It was impossible, that there should not arise perpetual strife and perpetual jealousy on the subject of ecclesiastical ascendancy, if the national government were left free to create a religious establishment. The only security was in extirpating the power. But this alone would have been an imperfect security, if it had not been followed up by a declaration of the right of the free exercise of religion, and a prohibition (as we have seen) of all religious tests. Thus, the whole power over the subject of religion is left exclusively to the state governments, to be acted upon according to their own sense of justice, and the state constitutions; and the Catholic and the Protestant, the Calvinist and the Arminian, the Jew and the Infidel, may sit down at the common table of the national councils, without any inquisition into their faith, or mode of worship.<sup>13</sup>

Even Jefferson, whose figure of speech seems now to have been slipped into the first amendment, might have been surprised to learn that his words have been substituted for penetrating and persuasive legislative history of the amendment. For example, Jefferson has written that religion was "a supplement of law in the government of man," and "the alpha and omega of the moral law."<sup>14</sup> Moreover, Jefferson gave his express approval to the establishment of a divinity school at the University of Virginia, a public institution.<sup>15</sup>

At least one scholar has gone slightly beyond Professor Corwin in arguing that the Supreme Court has ignored compelling evidence from constitutional history in adopting the construction which it has given the no establishment clause of the first amendment. Professor and Father Kenealy, S.J., former dean

9 *Id.* at 10.

10 330 U.S. 1 (1947).

11 333 U.S. 203 (1948).

12 Corwin, *supra* note 8, at 11-12.

13 STORY, COMMENTARIES ON THE CONSTITUTION, ¶ 1879 (1833); see also, COOLEY, CONSTITUTIONAL LIMITATIONS 469 (1871).

14 THE WRITINGS OF JEFFERSON 33 (H.A. Washington, ed. 1896).

15 PADOVER, THE COMPLETE JEFFERSON 518-519 (1943).

of the Boston College Law School, has stated that the first amendment was "an express declaration of a principle of Federalism which guaranteed, as against federal interference, *exclusive state power* over religion. . . ." <sup>16</sup>

In any event, we believe that whatever compelling justification may exist in favor of a strict construction of the no establishment clause, and the restrictions it places on governmental action which benefits sectarian schools, it cannot be found in American constitutional history which establishes that the no establishment clause was intended only to prohibit the federal government from setting up an official religion, from preferring a religion or religions, and from taxing its citizens to achieve either one or the other of those two prohibited purposes.

The argument from history seems confirmed by that drawn from national tradition and practice. For example, tax exemptions for religious institutions and property have been accepted in the United States from the time the Constitution was adopted.<sup>17</sup> Indeed, in 1875, President Grant suggested a constitutional amendment to provide "that all church property shall bear its own proportion of taxation."<sup>18</sup> Down to 1929, amendments of the type suggested by President Grant had been introduced and re-introduced in the Congress some 20 times.<sup>19</sup> None of these proposals ever passed. If tax exemptions for religious schools were thought to be a violation of the Constitution, these oft-renewed but never successful proposed constitutional amendments were an exercise in the unnecessary.

The state courts almost universally have sustained the constitutionality under state constitutions of tax exemptions for religious institutions.<sup>20</sup> The Supreme Court has never passed on the precise issue. Nevertheless, it seems to have accepted, at least *sub silentio*, the proposition that whatever federal or state aid may be prohibited by the "wall of separation of church and State," the granting of tax exemptions to religious groups generally is not barred.<sup>21</sup>

We will take only passing note of the many manifestations of the federal government's cooperation with, and, to be candid, assistance to, religion and religious institutions, including church-related schools. The presence of chaplains in the Congress of the United States and in the armed forces comes immediately to mind. "In God We Trust," at least when we last looked, was still the motto inscribed on the coins being turned out at the Mint in Washington.

More compelling instances abound of Congressionally-authorized assistance to secular institutions, including religious schools. The authors note here only some of the more prominent illustrations of such federal aid, direct or indirect. Representative examples include: financial grants to sectarian hospitals under the Hospital Construction Act;<sup>22</sup> tuition payments to denominational colleges,

16 Kenealy, *Tax Aid to Education* 7 (1961) (unpublished memorandum).

17 Paulsen, *Preferment of Religious Institutions in Tax & Labor Legislation*, 14 *LAW & CONTEMP. PROB.* 144 (1949).

18 AMES, *PROPOSED AMENDMENTS TO THE CONSTITUTION* 277 (1897).

19 MUSMANNO, *PROPOSED AMENDMENTS TO THE CONSTITUTION* 182 (1929).

20 Paulsen, *supra* note 17.

21 Lundberg v. Alameda County, 46 Cal.2d 644, 298 P.2d 1, *app. dismissed*, 352 U.S. 921 (1956).

22 60 Stat. 1041 (1946), 42 U.S.C. 291b, 291i(g) (1957).

including divinity schools, under the Servicemen's Readjustment Act;<sup>23</sup> disbursements to "non-profit, private schools" under the federal school lunch program, in which children attending parochial schools share;<sup>24</sup> and payments of tuition directly to private or parochial schools attended by the pages of the Supreme Court, as well as by those of the Congress.<sup>25</sup> Finally, we refer to the far more inclusive list of federal programs under which religious institutions have been the beneficiaries of federal assistance, which has been compiled by the Department of Health, Education and Welfare.<sup>26</sup>

So far as research reveals, no attack grounded on the first amendment has been made on the constitutionality of the federal assistance furnished under the statutes referred to above, as well as under others contained in the recent memorandum prepared by the Department of Health, Education and Welfare. Lack of challenge, much less successful challenge, obviously does not mean that the issue has been decided in all these instances. Nevertheless, it is credible evidence that Congress, in enacting programs under which religious institutions were substantially benefited, was acting in accordance with a well-established national tradition, and was not, in any sense, impairing or ignoring the basic constitutional guarantees of religious freedom, including the no establishment clause, as these are written into the first amendment.

#### *The Earlier Cases and the Emergence of the Child or Public Benefit Concept*

To this day, the decisions of the Supreme Court which stake out the scope of the no establishment clause of the first amendment (including the extent that the liberties protected by it are now embraced within the due process clause of the fourteenth amendment) are quite few. Still, we think that the Court has said enough on these isolated occasions to have provided several accepted propositions regarding the constitutional power possessed by the federal government and the states to provide financial or other assistance which may confer some benefit, either direct or indirect, on secular institutions, including schools maintained by or affiliated with such institutions.

Until recently, at least, we believe that the principles which justifiably could be gleaned from the decisions were as follows: First, it is incontestable that government in this country is not hostile to religion or toward religious institutions. As the Court stated in *Holy Trinity Church v. United States*,<sup>27</sup> we are, indeed, "a religious people." Our "laws . . . customs and society" constitute a "recognition of [that] truth." *Holy Trinity*, of course, is the landmark case supporting the canon of statutory construction that holds a word or term may fall within the letter of a statute, yet not be embraced within its spirit or within the intention of the framers of the enactment. On the point under discussion here, however, its importance lies in the detailed statement which the Court

23 58 Stat. 284, 290 (1944), 38 U.S.C. 739 (1946).

24 60 Stat. 230, 233 (1946), 42 U.S.C. 1753, 1759 (1957).

25 60 Stat. 839 (1946), 2 U.S.C. 88a(c) (1961).

26 *Federal Programs Under Which Institutions With Religious Affiliations Receive Federal Funds Through Loans or Grants*, a memorandum prepared by the legal staff of the Department of Health, Education and Welfare, March 28, 1961. Nearly 50 such statutory programs are listed therein.

27 143 U.S. 457, 462-72 (1892).

made in that case summarizing the religious tradition of the states and of the Union "which the whole history and life of the country affirm. . . ." We assume that this remains true, and as the Court has more recently noted, that nothing written into the first amendment or implied from its historical purpose requires that "the state and religion . . . be aliens to each other, hostile, suspicious, and even unfriendly."<sup>28</sup>

A more recent example of the special place and unique standing which religion holds with the Congress and the Court is provided by the exemption from military service permitted ministers of religion and the members of certain religious sects.<sup>29</sup> Mention might also be made here of *Reynolds v. United States*.<sup>30</sup> In that case, the Supreme Court held that there was nothing in the first amendment rendering unconstitutional a statute of the United States outlawing polygamy in its Territories. The decision is especially interesting, since it seems to be the first instance in which the Supreme Court referred to Jefferson's well-known letter to the Danbury Baptists, using the phrase "a wall of separation between church and State."<sup>31</sup> Moreover, in the *Reynolds* case, the Court read the first amendment exclusively in the terms of a protection of rights of conscience and religious freedom, rather than from the point of view of the no establishment clause, going on to hold that, nevertheless, such freedoms are not violated when the sovereign acts to punish violations of social duties or to outlaw actions which are subversive of good order.

Next, we take it, perhaps too sanguinely, that even the bitterest opponents of federal aid to church-related schools would not dispute the propositions of constitutional law which were established in *Pierce v. Society of Sisters*,<sup>32</sup> and *Myer v. Nebraska*.<sup>33</sup> In the *Pierce* case, the Court struck down an Oregon statute which required every parent or guardian of children between 8 and 16 years of age to send such children to the public schools of the State. The principles drawn from *Pierce* are several. Clearly, the decision holds that there is no power in the state to monopolize education and also reaffirms the axiomatic truth, at least as it prevails in the Anglo-Saxon cultures, that the "child is not the mere creature of the State."<sup>34</sup> Equally important, and perhaps more pertinent to the instant discussion, *Pierce* stands for the proposition that parents may, in discharging their obligations under state compulsory education laws, send their children to private schools, including church-related schools, if the latter meet the minimum secular educational requirements which the state has the constitutional authority to impose. The parents' right to do this is just that, and a right which is part of the liberty which the due process clause of the fourteenth amendment guards and which the fifth amendment also protects in the federal sphere.

*Myer v. Nebraska*,<sup>35</sup> endorsed a principle of perhaps lesser but, nevertheless, relevant importance. The Supreme Court in that case struck down a

28 *Zorach v. Clauson*, 343 U.S. 306, 312 (1952).

29 *The Selective Service Cases*, 245 U.S. 366, 390 (1918).

30 98 U.S. 145, 164-166 (1878).

31 *Id.* at 164.

32 268 U.S. 510 (1925).

33 262 U.S. 390 (1923).

34 268 U.S. 510, 534 (1925).

35 262 U.S. 390 (1923).

Nebraska statute which made it a crime for any teacher to teach any subject in any elementary school in any language other than English. The Court refused to sustain Nebraska's attempt to interfere "with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their young."<sup>36</sup>

Turning now to the earlier cases which deal more precisely with the issue under examination in this article, we find the Supreme Court in *Bradfield v. Roberts*,<sup>37</sup> holding that an Act of Congress appropriating money for the construction of a building on the grounds of a Roman Catholic hospital in the District of Columbia was not in conflict with the no establishment clause of the first amendment. There was no argument, in the mind of the Court, concerning the congressional power to "appropriate money for the purpose expressed in the appropriation," or the power of the district commissioners to enter into the contract with the Catholic hospital. The Court regarded the fact that the hospital was conducted under the auspices of the Roman Catholic church as "wholly immaterial," since its primary function was "for the care of such sick and invalid persons as may place themselves under the treatment" of the hospital.<sup>38</sup>

Thirty-one years after the *Bradfield* decision, but prior to the time when the Supreme Court had conclusively determined that the "fundamental liberties" protected under the first amendment were incorporated in the due process clause of the fourteenth amendment,<sup>39</sup> the Court was called upon to decide in *Cochran v. Louisiana State Board of Education*,<sup>40</sup> whether an appropriation by a State of tax-raised money to supply free textbooks for children in private schools, including sectarian schools, as well as for pupils attending public schools, violated the due process clause of the fourteenth amendment. The first amendment point was not directly involved in the case, the plaintiffs contending only that they were being taxed to support a private purpose and not expressly relying on any claim of impairment of religious freedom or departure from no establishment. In sustaining the statute in question and the appropriation of public funds to provide textbooks to private schools, including church-related schools, the Court stated:

The legislation does not segregate private schools or their pupils as its beneficiaries, or attempt to interfere with any matters of exclusively private concern. Its interest is education broadly; its method comprehensive. Individual interests are aided only as the common interest is safeguarded.<sup>41</sup>

36 *Id.* at 401.

37 175 U.S. 291 (1899).

38 *Id.* at 299-300. The case of *Quickbear v. Leupp*, 210 U.S. 50 (1908), decided subsequent to *Bradfield v. Roberts*, but prior to the *Cochran* case, also merits mention. In *Quickbear*, the Supreme Court sustained a contract made at the request of Indians that public monies due them under a treaty with the United States be paid by the Commissioner of Indian Affairs for the support of Indian Catholic mission schools. Although the case is distinguishable on the grounds that the monies appropriated were out of sums held in trust for the Indians, it is significant that the Court rejected an argument that the spirit of the first amendment required that "the Government shall make no appropriation whatever for education for any secular schools." 210 U.S. 50, 72 (1908).

39 *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

40 281 U.S. 370 (1930).

41 *Id.* at 375.



Finally, the Supreme Court in *Everson v. Board of Education*,<sup>42</sup> a decision discussed in more detail below, sustained the right of a New Jersey township to pay for the transportation of parochial school children on public buses against the contention that the challenged practice violated the first amendment as incorporated in the fourteenth. The New Jersey statute involved in *Everson* had been implemented by a resolution of the township which authorized disbursement of the taxpayers' money for transportation of school children to and from school, but limited those benefits to children attending public schools and Catholic schools. Recently in a Connecticut decision,<sup>43</sup> the Court was given an opportunity to reopen the issues decided in *Everson*. However, it declined to do so.

As we note below, the *Everson* case may have been a pyrrhic victory for the proponents of federal and state assistance to church-related schools performing the public function of educating the young. Yet, with that decision, a certain outline of the permissible scope of federal or state aid to church-related schools seemed to have been established. As we discern it, it would be made up of the following premises:

Neither the federal nor the state governments are hostile to religion; "the child is not a creature of the State," and a parent has the right to educate his child in a non-public, church-related or religious school, provided that the latter meets the minimum secular standards constitutionally imposed by the state;<sup>44</sup> appropriation of public funds undertaken for a valid public purpose, such as increasing facilities for the care of the sick, or the education of the young, are not laws "respecting an establishment of religion," even if sectarian schools and their pupils may also be benefited thereby.<sup>45</sup>

If the above-stated propositions of constitutional law, especially the child benefit concept, still prevail, the proponents of federal or state aid to parochial schools, or the pupils of such schools, may rest easily. Surely, the public service functions performed by non-public schools, including those operated under secular auspices, are manifest. An impartial observer of their works has aptly stated:

Parochial schools are, in fact, public institutions, though they are not governmentally sponsored and operated. They perform a public function, supplying large numbers of children with an education that is everywhere taken as the equivalent of the education given in the public schools. They have full public recognition as educational agencies. Their credits, diplomas and certificates have exactly the same validity as those issued by Governmental establishments.<sup>46</sup>

42 330 U.S. 1 (1947).

43 *Snyder v. Newton*, 147 Conn. 374, 161 A.2d 770 (1960), *app. dismissed for want of a substantial federal question*, 365 U.S. 299 (1961). Justices Frankfurter and Douglas would have noted probable jurisdiction in the *Snyder* case.

44 The regulation by a state of private school curricula has been upheld over the objection that such action violated the religious beliefs of pupils and their parents. In *The Matter of Weberman*, 198 Misc. 1055, 100 N.Y.S.2d 60 (1951). Would the State's support of the same curricula in the same religious school or schools constitute the "establishment of religion"? Up to *Everson*, we would believe the answer clearly would have to have been in the negative.

45 *Cf., Carmichael v. Southwestern Coal Co.*, 301 U.S. 495, 518 (1937).

46 HERBERG, JUSTICE FOR RELIGIOUS SCHOOLS: A NON-CATHOLIC VIEW, 7-8 (1958); see also Meiklejohn, *Educational Cooperation Between Church and State*, 14 LAW & CONTEMP. PROB. 61 (1949).

*Later Cases: Does Strict Separation Displace  
No Establishment as the Constitutional Standard?*

It is true that at least the result reached in *Everson v. Board of Education*,<sup>47</sup> supports the position that legislation or appropriations passed for the benefit of the public as a whole, or an identifiable segment of the public, selected without discrimination, do not violate the no establishment clause of the first amendment, as this provision has been assimilated by judicial decision under the due process clause of the fourteenth amendment. Still, as close students of the Court were immediately aware,<sup>48</sup> the proponents of federal or state aid to parochial schools were entitled, after analysis of the *Everson* decision, to repeat the words of the ancient King Pyrrhus who, surveying the dreadful carnage inflicted on his troops in a costly victory over the Roman legions, is alleged to have said, "One more such victory and I am undone."

Nevertheless, as stated above, comfort could be drawn from the actual decision arrived at, as well as from the opinion of the majority, wherein the Court stated that in guarding the ramparts of the first and fourteenth amendments:

[W]e must be careful, in protecting the citizens of New Jersey against state established churches to be sure that *we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious beliefs.* (Emphasis supplied.)<sup>49</sup>

Unfortunately, such approval of the public benefit concept as can be found in Justice Black's majority opinion seems obfuscated by other aspects of the decision. In the first place, *Everson* squarely holds that whatever prohibitions the no establishment clause of the first amendment may place upon the federal government, similar limitations now are laid upon the states through incorporation of the first amendment into the due process concept embraced within the fourteenth.<sup>50</sup> While such a holding may appear logical and serve symmetry of interpretation of the first amendment, wherein both free exercise and no establishment bind both the nation and the states, still it is not a proposition with solid support in American constitutional history. For instance, Professor Crosskey (whose recent, revolutionary and landmark study of the original meaning of the Constitution and the first ten amendments strangely has been ignored by the Court, as well as by many scholars on this and other issues of Constitutional interpretation) has this to say:

The history of their framing [*i.e.*, the clauses comprising the first amendment] shows, in the plainest way, that the first amendment was deliberately drawn to create a field not only of *exclusive* but of *inviolable* state power "respecting" religious establishments; . . . (Emphasis supplied.)<sup>51</sup>

We pass the point, however. Whatever the original congressional intention regarding the scope and extent of the power of the states respecting the estab-

47 330 U.S. 1 (1947).

48 Blum, *supra* note 4, at 412.

49 *Everson v. Board of Education*, 330 U.S. 1, 16 (1947).

50 330 U.S. 1, 8 (1947); see also, *Murdock v. Pennsylvania*, 319 U.S. 105 (1943).

51 2 CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 1057 (1953).

lishment of religion, we believe that it is too late in the day to argue that the states are now barred from legislative action which affects the free exercise of religion, but are not now prohibited from establishing, preferring, or directly supporting or assisting religious sects, including institutions maintained by those sects.<sup>52</sup>

Even more disturbing to those who entertain the view that federal aid to church-related schools is constitutional should have been the following language of Justice Black's *Everson* opinion:

The "establishment of religion" clause of the first amendment means at least this: Neither a state nor the federal government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the federal government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."<sup>53</sup>

For a while, proponents of federal aid to church-related schools may have tried to reassure themselves that the stark, strict principle which Justice Black appeared to have enunciated in the paragraph quoted above could be taken as no more than dictum, and unnecessary to the decision actually handed down by the Court. As we shall discuss immediately below, those who may have read his language in this fashion were quite mistaken. Justice Black meant what he said. More importantly, it now appears that a substantial majority of the Supreme Court of the United States agrees with him.

Four Justices dissented in *Everson*. All four joined in a long opinion by the late Justice Rutledge,<sup>54</sup> in which he attempted to prove from constitutional history that the prohibitions of the no establishment clause "broadly forbid[s] state support, financial or other, of religion in any guise, form, or degree. It outlaws all use of public funds for religious purposes." In the main, Justice Rutledge went about establishing his thesis by relying on certain actions and statements of James Madison, undertaken by the latter not only in connection with the composition and introduction of the proposal that became the first amendment, but also as part of his activities in the fight which he led in Virginia against the Assessment Bill. This proposal, finally defeated, was a tax measure for the support of religion, but under which each taxpayer would have the privilege of designating which church should receive his share of the tax, and if he designated none, the legislature could apply it to pious uses.<sup>55</sup>

52 Scanlan, Book Review, 19 GEO. WASH. L. REV. 114, 117 (1950).

53 330 U.S. 1, 15-16 (1947).

54 *Id.* at 28-74.

55 *Id.* at 36.

The authors believe that a more comprehensive and objective analysis of the legislative history of the first amendment, including documented research concerning the exact role that Madison played in its introduction and passage, justify Professor Corwin's conclusion "that Justice Rutledge sold his brethren a bill of goods when he persuaded them that the 'establishment of religion' clause of the first amendment was intended to rule out all governmental 'aid to all religions'."<sup>56</sup> Moreover, since Professor Corwin first stated his persuasive case against the conclusions reached by Justice Rutledge concerning the historical origins of the first amendment in *Everson*, Professor Crosskey's illuminating work has been printed. If doubt remained whether it is Justice Rutledge or Professor Corwin who has more accurately discerned the purpose or purposes of the first amendment, Crosskey's research would seem to have dispelled it, despite the silence or indifference which, for the most part, seems to have been afforded his scholarly and detailed treatment of the subject.<sup>57</sup> Crosskey's conclusions, it could be argued, should be entitled to special credibility, since the whole burden and thrust of the novel thesis set forth in his two-volume work on the Constitution is that the enumerated powers set forth in article 1, section 8 of the Federal Constitution were not intended as a total enumeration of powers bestowed on the Congress, but only to make it clear what the legislative branch had authority to do, as opposed to the executive branch of the new government. In no sense can Crosskey be counted as a supporter of the "states' rights" theory of constitutional interpretation. Accordingly, his carefully documented opinion that the no establishment clause of the first amendment, as finally enacted, was intended exclusively to keep the new federal government from meddling with establishment or disestablishment in the states should be entitled to great weight.

Be that as it may, Justice Rutledge's view of the constitutional history of the first amendment obviously was accepted by most of the majority and all of the minority Justices in the *Everson* case. And as we show below, this opinion apparently continues to prevail in the thinking of the present members of the Supreme Court of the United States. That this was fact was soon established by the decision in *McCullum v. Board of Education*.<sup>58</sup> The case involved the released time religious education program imposed by a local Illinois school board. Under the program, public school pupils were permitted to attend classes in religious instruction conducted during school hours and upon school premises, by teachers representing a number of religious faiths. The pupils who did not attend these religious instruction sessions were required to utilize the time in studying their regular subjects. The program was attacked on the grounds that it violated the first and fourteenth amendments. The Supreme Court held

<sup>56</sup> Corwin, *The Supreme Court As National School Board*, 14 LAW & CONTEMP. PROB. 1, 16 (1949). See also, Murray, *Law or Prepossessions?*, 14 LAW & CONTEMP. PROB. 23, 41-43 (1949). Together, the historical materials cited by Corwin and Father Murray almost irrefutably demonstrate that Madison understood the purposes of the no establishment clause as limited to preventing the new federal government from establishing, or according preference in law to, a national religion, or from compelling men to worship in manner contrary to their consciences.

<sup>57</sup> Crosskey, *op. cit. supra*, note 51 at pp. 1057, 1058, 1060-1061, 1068 (especially) 1072 & 1077.

<sup>58</sup> 333 U.S. 203 (1948).

the program unconstitutional and "a utilization of the tax established and tax supported public school system to aid religious groups to spread their faith."<sup>59</sup> Not only were public school buildings used for the dissemination of religious doctrine, but the State also [afforded] secular groups an "invaluable aid [in helping] to provide pupils for the religious classes through the use of the State's compulsory public school machinery."<sup>60</sup>

The result in *McCollum* perhaps might be justified, even by the proponents of federal aid to church-related schools without too much concern that the child or public benefit theory had been impaired. After all, as the Court found, the State's compulsory education system in that case was directly integrated with the program of religious education carried on by [some, but not all] separate religious sects. The power of the State, very directly, and apparently quite indispensably if the program were to succeed, was utilized to teach sectarian doctrines. It is difficult to resist the force of the argument that the legislative, or more properly administrative, action involved in *McCollum* was action "respecting the establishment of religion," even more precisely, establishing the dogma of some religious sects.

However, it is not the result in *McCollum* which should most have distressed the proponents of federal or state aid to church-related schools. Rather, it was the fact that the Court in that case specifically rejected the more persuasive historical analysis represented by Professor Corwin's view concerning the congressional intention behind the adoption of the first amendment and also expressly turned aside a challenge made by the attorneys for the respondent Board of Education who maintained that the gratuitous strictures of Justice Black in the *Everson* case, as previously referred to, were merely dicta. Said the Court: "We are unable to accept either of these contentions."<sup>61</sup> Beyond this, the majority opinion written by Justice Black three times employed the phrase "wall of separation between church and state." With *McCollum*, has the doctrine of absolute separation displaced the more flexible concept seemingly reflected in, and apparently intended by, the no establishment clause?

The Court's drift in the direction of absolute separation seems to have been arrested, temporarily at least, in *Zorach v. Clauson*.<sup>62</sup> Again, a released

59 *Id.* at 210.

60 *Id.* at 212.

61 *Id.* at 211. It is interesting to note, however, that the four dissenters of the *Everson* case joined in a concurring opinion in *McCollum*, delivered by Justice Frankfurter. In it, speaking through the latter, the concurring Justices reaffirmed their view that the first and fourteenth amendments "have a secular reach far more penetrating in the conduct of Government than merely to forbid an 'established church'." *Id.* at 213. Thereafter, Justice Frankfurter goes on to recite what he believes to be the relevant history of religious education and the secularization of public schools in the United States. His remarks are a well-documented statement on the subject. However, the opinion does not throw any additional light on the meaning of the no establishment clause. Perhaps Justice Frankfurter's elaborate presentation of the story of the conceded secularization of the public schools of America was thought necessary on his part in order to buttress the weakness in the argument based on history as Justice Rutledge had made it in *Everson*, and which the Court, even including Justice Frankfurter, seemed to have accepted in the *McCollum* case. The authors agree that "due process," and maybe even "no establishment" are not static, but dynamic and flexible constitutional concepts. If so, it may be that the rigidity of the "absolute wall of separation" approach will some day give way to the point of view that maintains that some forms of governmental assistance to church-related schools violate neither the first nor the fourteenth amendments.

62 343 U.S. 306 (1952).

time program was involved, as in *McCollum*. However, in *Zorach*, the program took place off the premises of the schools. Nevertheless, as in the *McCollum* case, the student who did not participate was required to remain in his classroom, and the administrative machinery of the public school system was employed in conducting the program. Even on close, hair-splitting analysis, it is difficult to discern any substantial difference in the fact situation presented in *Zorach*, as opposed to that involved in *McCollum*. Four Justices dissented, holding fast to *McCollum*, and as Justice Jackson said in his separate dissenting opinion in the case, "The distinction attempted between [*McCollum*] . . . and this [case] is trivial, almost to the point of cynicism, magnifying its nonessential details. . . . The *McCollum* case has passed like a tempest in a teacup."<sup>63</sup> The very fact that Justice Jackson may have been right and that any distinctions between the two cases were those without differences should have encouraged the critics of the Court's decision in the *McCollum* case. Sophistry sometimes is the only way to justify a change of mind or course of judicial decisions. In any event, the proponents of federal or state aid to religious schools certainly were entitled to take comfort, not only in what was done in *Zorach v. Clauston*, but in what the Court, through Justice Douglas, one of the staunchest defenders of civil liberties, had to say in his majority opinion:

The first amendment . . . does not say that in every and all respects there shall be a separation of church and state. Rather it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise, the state and religion would be aliens to each other — hostile, suspicious, and even unfriendly. Churches could not be required to pay even property taxes. Municipalities would not be permitted to render police or fire protection to religious groups. Policemen who helped parishioners into their places of worship would violate the Constitution. Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; "so help me God" in our courtroom oath — these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies, would be flouting the first amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: "God save the United States and this Honorable Court."<sup>64</sup>

This was comforting enough, but Justice Douglas further went on to say, in language that would be appropriate for a statement or brochure issued by the proponents of federal or state aid to church-related schools, that:

We are a religious people whose institutions presuppose a Supreme Being. . . . When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For then it respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the Government show a callous indifference to religious groups.

63 *Id.* at 325.

64 *Id.* at 312-13.

That would be preferring those who believe in no religion over those who do believe.<sup>65</sup>

However, as we indicate in the next section of this article, despite the reassuring dicta quoted above, it seems that it is *Zorach* which may be the aberrational decision and not *McCullum*, so far as concerns the constitutional issue of federal aid to religious schools.

*Tuition Payments, Blue Laws and Test Oaths:  
First, Silence and Then, Secularism*

The 1960-61 term of the Supreme Court provided three cases of pertinent interest to the subject under discussion. None, however, furnished any substantial support for those maintaining the constitutionality of federal aid to church-related schools. The first case arose in Vermont.<sup>66</sup> Under a statute of that State, enacted in 1915, each Vermont town district which did not maintain or furnish secondary instruction for its pupils was authorized to pay the tuition of such pupils who attended high schools in other school districts. A limit was placed on the tuition that could be paid and the statute required that the school selected by pupils who had to receive their secondary instruction elsewhere be one recognized by the State. Although the statute was silent on the point, the administrative practice was that tuition payments could be either to the schools attended by the pupils, or to the parents or guardians upon bills submitted.<sup>67</sup>

Some of the South Burlington pupils attended schools operated by the Roman Catholic Diocese of Burlington or by a religious order of the Diocese of Burlington. An action was brought in the Chancery Court to prevent the school officials from disbursing out of tax monies payments for the tuition of resident pupils attending Catholic high schools in other school districts. The complaint charged that these payments violated the Vermont Constitution and the first amendment of the Constitution of the United States. In the trial court, the parties agreed on, and the Chancellor apparently adopted, the theory that the first amendment of the Constitution of the United States and article 3, chapter 1 of the Vermont Constitution were similar, and that a violation of the one would constitute a violation of the other. However, in reaching his decision that the challenged payments were illegal, the Chancellor relied exclusively on the interpretation of the first amendment, finding that the payment of tuition by the school district for pupils in sectarian schools selected by their parents and guardians was prohibited by the first and fourteenth amendments.<sup>68</sup>

<sup>65</sup> *Id.* at 313-14.

<sup>66</sup> *Swart v. South Burlington Town School District*, 122 Vt. 177, 167 A.2d 514, *cert. denied*, 366 U.S. 925 (1961).

<sup>67</sup> The Vermont statute is representative of a widespread practice which has existed in the United States for a long time, under which a school district which does not provide school facilities is required by statute to arrange for some of its resident children to attend a school not operated by the school district. In such instances, "tuition is paid for them out of public funds of the resident district." REMMLEIN, *SCHOOL LAW* 220 (1950). Statutory provisions for the payment by the resident district of tuition in such circumstances generally have been upheld in the state courts. *Boggs v. School Township of Cass*, 28 Ia. 15, 102 N.W. 796 (1905); and see the cases collected and discussed in Edwards, *Courts and the Public Schools* 276 (1955). It is interesting that out of a total of 42,429 public school systems of the United States, 21,646 of them did not provide any secondary education during 1960. *Public School Systems in 1960*, Bureau of the Census, 5-6 (November 9, 1960).

<sup>68</sup> *Anderson v. Swart* (No. 856, October Term, 1960) Supplement to Pet. for Writ of Cert., March 29, 1961, pp. 2-6.

On appeal, the Vermont Supreme Court put aside discussion or decision with respect to the possible relevant limits of the Vermont Constitution. It was of the view that "in the domain of religious liberty, the resolute history of the first amendment seems the more demanding." The Vermont Supreme Court then went on to consider the question of the constitutionality of the tuition payments under challenge solely "from the federal aspect."<sup>69</sup> The Vermont Court, placing heavy reliance on Justice Black's remarks in the *Everson* case, as previously quoted herein, and the Supreme Court's decision in *McCollum*, then decided that the defendant school board members "while acting within the literal provisions of the [Vermont] statute, have exceeded the limits of the United States Constitution."<sup>70</sup>

A petition for certiorari was filed with the Supreme Court of the United States on March 29, 1961. As presented, the question raised by the petition was whether "the payment of tuition to sectarian high schools selected by the parents or guardians" violated the first and fourteenth amendments to the Constitution. However, the petition took note that under the statute, payments could be made either to the schools or to the parents and guardians upon bills submitted.<sup>71</sup> The petition for certiorari was filed at a time when discussion and debate in the Congress and in the press concerning both the wisdom and the constitutionality of federal aid to sectarian schools was reaching its acrimonious height.<sup>72</sup> Legislation embracing the President's proposals for federal aid to public elementary and secondary schools, and excluding such aid to church-related schools in these categories, had been introduced in the Congress just a month before the petition for certiorari in the *Anderson v. Swart* case reached the Supreme Court.<sup>73</sup> After the petition had been filed, several editorials referred to the pendency of the case, indicating their view that it furnished the Court an opportunity to clarify the question of the constitutionality of federal aid to sectarian education.<sup>74</sup>

Despite the controversy which raged outside its august chambers, the Supreme Court of the United States was not moved to speak on the burning subject, so far as it might have done so within the framework of the constitutional issues involved in the *Swart* case; it denied certiorari on May 15, 1961.<sup>75</sup>

As is usually the case, it is futile to speculate what the Court's denial of certiorari meant. For those so inclined, several alternatives suggest themselves. There is always the possibility that the Court believed that the Vermont Supreme Court had correctly decided the first amendment issue, at least so far

69 *Swart v. South Burlington Town School District*, 122 Vt. 177, 167 A.2d 514, 518 (1961).

70 *Id.* at 521.

71 *Anderson v. Swart*, *supra*, note 68, Pet. for Cert., p. 2.

72 See, e.g., *The Washington Evening Star*, March 1, 1961, p. A-15; *The Washington Post and Times-Herald*, March 9, 1961, p.A-17; *The New York Times*, March 8, 1961, p. 18; *The Catholic Standard*, April 21, 1961, p. 6.

73 H.R. 4970, 87th Cong., 1st Sess., introduced on February 29, 1961; S. 1021, 87th Cong., 1st Sess., introduced on February 20, 1961.

74 See, e.g., the editorial of *The Washington Post and Times-Herald*, April 3, 1961, at p. A-10, observing that if the Court decided to review the Vermont case "any guidance that its opinion may give to national policy [regarding federal aid to sectarian schools] will be in the nature of a fortuitous by-product."

75 366 U.S. 925 (1961).



as pertained to the payment of tuition directly to the sectarian schools. On the other hand, the comprehensive and careful study prepared by the legal department of the National Catholic Welfare Conference leans to the view that "the real reason for the decision in *Swart* lay in the fact that the tuition payments, which were made directly to the schools, were not in some manner apportioned to the support of the nonreligious instruction given."<sup>76</sup> The authors of the petition for certiorari in *Swart* and of this article are not so sure. More likely, the Court was of the opinion that a sufficient non-federal ground existed on which the Vermont Supreme Court decision could rest. If that were true, of course, the federal question regarding the scope of the first and fourteenth amendments would not have been necessary to review.<sup>77</sup> While we believed at the time we made it, and are still of the opinion, that the stronger argument is that the Vermont Supreme Court explicitly based its decision on the determination that the first amendment prohibited the tuition payments involved, nevertheless, the record below was sufficiently ambiguous as to permit the opposite conclusion.<sup>78</sup> In any event, if the Court were looking for an opportunity to avoid getting into issues which were then receiving the excitable attention of the Congress, the press, the clergy and the public, a denial of certiorari was an easy way out. Indeed, advocates on both sides of the issue of federal aid to sectarian education may have breathed easier after the Court declined to take jurisdiction. Some of those favoring such aid, as the authors know, were concerned lest the Court grant certiorari and then go on to affirm the decision of the Vermont Supreme Court on the merits. Likewise, some of the opponents of federal aid to sectarian education may have felt relieved that the Court did not use the case as an opportunity to make clear that the "absolute separation" concept which had come into being in *McCollum* but which had been considerably restricted in *Zorach*, was to be further relaxed in favor of the public benefit principle as presented in *Swart*.

In the *Swart* case the Court may have deliberately avoided decision of the first amendment issues presented. In the Sunday closing law cases, decided on May 29, 1961, the Court, obliquely but firmly touched upon such questions.<sup>79</sup> These cases involved the constitutionality of Sunday closing laws in effect in the States of Maryland, Pennsylvania and Massachusetts. While there are some significant differences in the facts the basic pattern of the cases and issues presented are substantially the same. Briefly, the Court was called upon to determine whether various Sunday closing laws of the States referred to, prohibiting the sale of certain merchandise as well as certain activities on Sunday, violated the equal protection or due process laws of the fourteenth amendment or constituted a law respecting an establishing of religion within the meaning of the first amendment, now made applicable to the states by the fourteenth amendment.

<sup>76</sup> *The Constitutionality of the Inclusion of Church Related Schools In Federal Aid to Education*, a memorandum prepared by the Legal Department of the National Catholic Welfare Conference (December 14, 1961), p. 29.

<sup>77</sup> *Lynch v. New York ex rel. Pierson*, 293 U.S. 52, 54-55 (1934).

<sup>78</sup> STERN & GRESSMAN SUPREME COURT PRACTICE 98 (2d ed. 1954).

<sup>79</sup> *McGowan v. Maryland*, 366 U.S. 420 (1961); *Two Guys v. McGinley*, 366 U.S. 582 (1961); *Braunfeld v. Brown*, 366 U.S. 599 (1961); and *Gallagher v. Crown Kosher Market*, 366 U.S. 617 (1961).

The Court had no difficulty in finding that the classifications with respect to the sales of merchandise or activities prohibited on Sunday did violate equal protection. The majority opinion, written by Chief Justice Warren, then moved on to find that, in the light of their evolution, the Sunday closing laws are of a secular rather than of a religious character and as now constituted bear no relationship to the establishment of religion, as those words are used in the first amendment.<sup>80</sup> With the results reached by the Court in the various *Sunday Closing Law Cases*, there should be little quarrel. A state-created or enforced "day of rest" serves secular ends beyond any benefit that may thereby be conferred on those churches whose members observe the Sabbath on Sunday. More disturbing to the proponents of federal aid to religious institutions may be the fact of the Court's extended reaffirmance of their view that the legislative history of the first amendment as first spelled out by Justice Rutledge in the *Everson* case remains an accurate statement of what the framers of the first amendment intended and what the Congress which passed it had in mind when it did so.<sup>81</sup> Again it was the Court's view that the first amendment must be given a "broad interpretation . . . in the light of its history and the evils it was designed forever to suppress. . . ."<sup>82</sup> The Chief Justice then capped his summary of the Court's understanding of the legislative history of the first amendment by repeating the words of Justice Black in *Everson* which set out the absolute separation concept in all its stern and stark scope.

The proponents of federal aid to sectarian education might take some faint hope of better days or decisions ahead from the concurring opinion of Justice Frankfurter, with whom Justice Harlan joined, in *McGowan v. Maryland*,<sup>83</sup> one of the four Sunday closing law cases. True, Justice Frankfurter indicated that he too still adhered to the view that the legislative history of the first amendment required that the no establishment clause be interpreted to carry out "the fundamental separationist concept which it expresses. . . ."<sup>84</sup> Nevertheless, he went on to state reassuringly that "once it is determined that a challenged statute is *supportable as implementing other substantial interests than the promotion of belief*, the guarantee prohibiting religious 'establishment' is satisfied."<sup>85</sup> Justice Douglas, the author of the majority opinion in *Zorach*, dissented in the *Sunday Closing Law Cases*, being of the view that both free exercise and the no establishment clauses of the first amendment were transgressed by the Sunday laws under attack.<sup>86</sup>

Some commentators draw comfort from the *Sunday Closing Law Cases*, at least from the Chief Justice's opinion in *McGowan v. Maryland*, finding the decision as one which along with *Zorach* must be taken as a squelching of the absolute concept of the separation principle which otherwise is derived from

80 *McGowan v. Maryland*, 366 U.S. 420, 431-44 (1961).

81 *Id.* at 437-43.

82 *Id.* at 442.

83 366 U.S. 420 (1961).

84 *Id.* at 466.

85 *Ibid.* (Emphasis supplied).

86 *Id.* at 561, 581.

the dicta in *Everson* and from the decision and dicta in *McCollum*.<sup>87</sup> We are not so encouraged. The Court had to strain the history, tradition and evolution of Sunday laws in order to preserve the reasonable power of the States to prescribe a certain day of rest for its citizens from an attack based on the no establishment clause. Even more disheartening news to the proponents of federal aid to religious schools than the Court's secularizing of the Sabbath surely must lie in its continuing determination to stick to an understanding of the legislative history of the first amendment that is not historically supportable, as well as again manifesting an apparent concern that any act of the federal government or of the states which is intended to confer any benefit, however indirectly, on any or all organized religions may be a violation of the first amendment. So long as the Court persists in that analysis, to invoke the public benefit concept to preserve the constitutionality of federal or state aid to religious institutions may be to lean on a very slim reed.

Finally, in the closing days of the 1960-61 term, the Supreme Court handed down its decision in *Torcaso v. Watkins*.<sup>88</sup> Here, the Court held that a provision of the Maryland Constitution which required State office holders, including the appellant who sought a commission as a notary public, to declare their belief in God, violated freedoms of belief and religion guaranteed by the first amendment and protected by the fourteenth amendment from infringement by the states. Article VI of the Federal Constitution, of course, outlaws a religious test for qualification to any office of the United States. As a result of *Torcaso*, it is now established that the fourteenth amendment, which incorporates the principles of religious freedom protected by the first amendment, bars religious test oaths as a requirement for state offices. Once more, there appears to be little quarrel with the correctness of the decision reached by the Court. The prescribed Maryland test oath was a direct infringement of the religious freedom of those who do not accept the belief in a personal Deity, and its imposition upon such persons as a condition of holding public office seems a clear violation of the free exercise clause of the first amendment, now made applicable to the states through the fourteenth. Again, however, what is upsetting is not so much what the Court did but what it said. For example, Justice Black, who wrote the opinion of the Court, used it as an occasion to make it clear that his statements concerning "absolute separation," first made in *Everson*, and so frequently referred to throughout this article, were not dicta but apparently represent the entire Court's firm interpretation "of the scope of the first amendment's coverage." Moreover, in *Torcaso* Justice Black put to rest any lingering hopes that the Court's opinion in *Zorach v. Clauson*,<sup>89</sup> "had in part repudiated the statement in the *Everson* opinion quoted above and previously reaffirmed in *McCollum*."<sup>90</sup>

---

<sup>87</sup> *The Constitutionality of the Inclusion of Church Related Schools In Federal Aid to Education*, a memorandum prepared by the Legal Department of the National Catholic Welfare Conference (December 14, 1961), p. 37.

<sup>88</sup> 367 U.S. 488 (1961).

<sup>89</sup> 343 U.S. 306 (1952).

<sup>90</sup> *Torcaso v. Watkins*, 367 U.S. 488, 494 (1961).

### *Some Concluding Observations*

Early in the October, 1961 term, the Court granted certiorari in *Engel v. Vitale*.<sup>91</sup> In the proceedings below, the Court of Appeals of New York, speaking in a split decision, had upheld the non-compulsory recitation in public schools of a non-denominational "Regents Prayer" against the claim that this was a violation of the first amendment's prohibition against an establishment of religion or prohibiting the free exercise of religion. The prayer was worded as follows: "Almighty God, we acknowledge our dependence upon Thee and we beg Thy blessings upon us, our parents, our teachers and our Country."

In an earlier case, *Doremus v. Board of Education*,<sup>92</sup> the Court had avoided review of a State court decision sustaining the constitutionality of Bible reading in the New Jersey public schools on the grounds that the petitioners, whose children were no longer in the school at the time the case was appealed to the Supreme Court, lacked the necessary standing to challenge the practice. Actually, it could be fairly argued that in *Doremus*, the Court for the first time applied to a controversy arising in a state court the federal doctrine enunciated in *Massachusetts v. Mellon*,<sup>93</sup> that a taxpayer, without more, lacks the standing to challenge the constitutionality of a statute.

If the Court reverses the Court of Appeals of New York and outlaws the non-denominational "Regents Prayer," on first amendment grounds, a heavy blow will have been struck in the name of the absolute separation concept. Should that occur, the proponents of federal aid to sectarian schools who rely upon the public benefit concept to sustain their position, so far as constitutionality is concerned, will not have necessarily surrendered the field, but their position will have been materially weakened. More importantly, if the Court adds to its denial of certiorari in the Vermont school case, and some of its remarks in the *Sunday Closing Law Cases* and again in *Torcaso*, by reversing the lower courts in *Engel v. Vitale*<sup>94</sup> those who are of the view, as President Kennedy seems to be, that the first amendment of the Constitution forbids any federal aid to sectarian schools (below the college and graduate school levels) will have been provided with additional authority for their position. After all, as Justice, then Attorney General, Jackson once remarked, the Supreme Court "may not be final because it is infallible, but it is infallible because it is final."

There is the opinion, and the authors share it, that if the Congress were to pass school aid legislation which provided assistance, directly or indirectly, to church-related schools, no one could ever successfully challenge the constitutionality of such a statute. It was authoritatively decided in *Massachusetts v. Mellon*,<sup>95</sup> that an individual taxpayer, without more, does not have standing to bring a suit to restrain the enforcement of an act of Congress

91 368 U.S. 924 (1961). The case was reported below in 10 N.Y.2d 579 (1961).

92 342 U.S. 429 (1952).

93 262 U.S. 447 (1923).

94 368 U.S. 924 (1961).

95 262 U.S. 447, 488 (1923).

authorizing appropriations of public money upon the ground that the act is unconstitutional. As we read the case, *Massachusetts v. Mellon* was decided on constitutional grounds. It quite clearly held that a taxpayer's suit challenging appropriations from the federal treasury was not a "judicial controversy" within the meaning of article III of the Constitution.<sup>96</sup> But even if this is the accurate view and *Massachusetts v. Mellon* remains good law and a decision which cannot be changed merely by an act of Congress, the fact is of little persuasion in trying to convince the Congress to permit federal aid to sectarian education in the face of consistent language and decisions on the part of the Supreme Court which strongly suggest that such a statute would violate the no establishment clause. In short, while President Kennedy and the administration's spokesmen in the Congress may have oversimplified or perhaps even are mistaken concerning what is constitutionally permissible in the form of federal aid to sectarian institutions, nevertheless, a search of recent Supreme Court decisions for precedents to the contrary, with the possible exception of *Zorach v. Clauson*,<sup>97</sup> is a non-rewarding endeavor.

This is not to say that we believe that the Court has accepted an understanding of the first amendment which is firmly supportable in the history of the amendment or the traditions of the nation. Still the prospects are unlikely that the Court will jettison the interpretation of the intention of the no establishment clause which it first adopted in *Everson* and to which it has consistently adhered. Yet, there may be some hope in the slightly different approach which Justice Frankfurter has taken of how the first amendment should be construed. As he put it in *McGowan v. Maryland*,<sup>98</sup> both the first and fourteenth amendments must be looked at as "illuminated . . . by our national experience." Justice Frankfurter, of course, shares the opinion that "national experience" under the no establishment clause has been in the direction of the complete secularization of public schools and, in his view, this is good and the way things should be. On the other hand, "national experience" is not a static concept — it may ebb and flow. "Separate but equal" was an accepted part of "national experience" for many years until it finally gave way to the accumulating force of our national conscience in the *School Segregation Cases*. So also may there come a time when the already gross, but still not clearly grasped, inequity of refusing to recognize (in the form of federal aid) the public service functions performed by church-related schools will cause "national experience" to have a turn of direction, undertaken with the approval of the Supreme Court of some subsequent day. Should that occur, as Professors Corwin and Crosskey have established, it will have much sound support in history and in our national traditions. For the foreseeable future, however, secularism dominates the field, both in the Court and in the Congress, and those who analyze the decisions of the Supreme Court with any care must confess it to be so, however deeply they wish it were not.

---

96 *Id.* at 489.

97 343 U.S. 306 (1952).

98 366 U.S. 420, 463 (1961).

As stated at the outset of this article, the authors are resolved to avoid expressing herein their own firm convictions regarding the wisdom or advisability of federal aid to church-related schools. Now, at the finish, we depart from this resolution in one particular. We believe, as we said, that in the long run, "national experience," speaking through the majority of American citizens, may recognize the need for and justice of a program of federal assistance, whether by loans, tuition grants or otherwise, to non-public, non-profit schools, including church-related schools. However, progress toward that end will not be achieved by florid and angry rhetoric emanating from clerical spokesmen in high places, or through the threats of collective Catholic opposition to proposals for federal assistance to the public schools alone, or through the indifference of Catholics to the severe plight of the public school systems in many of the poorer school districts of the nation. Rather, we believe, the achievement of federal assistance to sectarian schools, including its ultimate validation in the Courts, will be realized only because the case for it is sound and because it has been carefully and effectively presented, without rancor or recrimination even toward that vocal minority which opposes aid for parochial schools because it opposes the ancient faith which maintains such schools.