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WHOLESOME NEUTRALITY: LAW AND EDUCATION

JOSEPH F COSTANZO, S. J.*

In September, 1963, a suit was filed in Anne Arundel circuit court, Annapolis, Maryland, titled, *The Horace Mann League of the United States of America et al,* plaintiffs, v. *J Millard Tawes, Governor et al,* defendants, which set into motion the judicial process on a critical question of law whose ultimate determination will bear far-reaching consequences for education in America. After a year of pretrial depositions the court trial opened in November, 1964, with Judge O. Bowie Duckett presiding. At issue was the constitutionality of an appropriation by the Maryland legislature of $2.5 million for four Maryland church-related colleges—$750,000 to Notre Dame of Baltimore, $750,000 to St. Joseph's College of Emmitsburg for science buildings, $500,000 to Methodist-related Western Maryland College in Westminister for a science building and dining hall, and $500,000 to Hood College in Frederick, related to the United Church of Christ, for a dormitory.

The Maryland case represents a change in political and legal tactics for the opponents of public support for educational institutions under religious auspices. In the preceding years, they concentrated their instrumentalities of influence upon members of the national and state legislatures. But aid in one form or another and for a variety of specified purposes which were identified as a legislative concern of public interest were extended to educational facilities under church sponsorship. They were judged to be no less efficacious and competent than the nonreligious institutions of learning in realizing the educational objectives set down by the legislators. Besides, the nationwide debate on the constitutionality

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of these subventions in law journals, before congressional committees, and on televised forums, brought to the fore the fact that scholars, jurists, and men of high public repute were to be found no less on the side which upheld their constitutionality as there were in the opposite camp. Surveys and polls of public opinion showed a steady decline in the public persuasion and political influence of the opponents. With a shift of preponderance from one side to the other, the opponents hopefully concentrated on winning the legal battle in the courts. In the legal forum there is a change of tactic too. Whereas Mr Marbury, the chief counsel for the defendants in the Maryland case argued that several Supreme Court decisions established a precedent that public aid is constitutionally permissable if a church-related institution performs "a legitimate secular function that does not advance or prohibit religion," Mr. Pfeffer contended for the plaintiffs that Judge Duckett must apply a different constitutional test—that tax support cannot be given to institutions "which either teach or practice religion." The Maryland case was carefully chosen by Mr Edgar Fuller, an official of the Horace Mann League, and his associates. First, inasmuch as the grants involved are made directly from the state to the colleges the more appealing student-benefit argument may be avoided. Secondly, the four institutions represent two Protestant affiliations as well as two Catholic and in this wise the usual concentration of legal attack upon Catholics subtly suggestive of discriminatory bias is shunned.

On March 11, 1965, Judge O. Bowie Duckett handed down his ruling that the Statutes mentioned in the Bill of Complaint are valid and constitutional.[1] On June 2, 1966, the Court of Appeals of Maryland in a four to three decision[2] reversed for three of the colleges but upheld the constitutional permissiveness of the state grant to Hood College on the basis of tests which weighted the degree of relationship of the educational institution to church or religious regulation. The Supreme Court has declined to review the ruling of the Maryland Court of Appeals. In the expectation that eventually a similar issue will come before the high tribunal we here undertake to examine pertinent cases of the United States Supreme Court and try to ascertain what constitutional premises may be controlling on this great issue of governmental financial aid to church-related institutions of learning. For the moment, the refusal to review the Court of Appeals ruling leaves us with a presumption in favor of that ruling but it is a rebuttable presumption and in the hope that it may someday be contravened by the

1. The Horace Mann League of the United States of America, Inc. v. J. Millard Tawes, Governor et al. No. 15, 850 Equity, March 11, 1965, Judge O. Bowie Duckett.
2. Horace Mann League of the United States of America, Inc. v. Board of Public Works of Maryland, 242 Md. 645, 220 A.2d 51 (Ct. App. 1966).

Supreme Court of the United States we undertake to discuss this issue at length. It takes only a modicum of perception to see how epoch-making the Supreme Court decision on such an issue would be. The alternatives which the Supreme Court may have to consider are three: (1) whether the colleges in question are essentially educational institutions despite or together with their religious affiliation and therefore they may receive tax funds; (2) whether such tax support is violative of the nonestablishment prohibition of the First Amendment and therefore they may not be recipients of government subventions; (3) whether a line must be drawn, as the Court of Appeals of Maryland did, between church relationship and church control—admittedly, an extremely difficult canon of application.

A FREE STATE AND A FREE CHURCH

Some prefatory reflections must be stated in order to be alert to distracting or misleading considerations customarily made in a discussion of this problem.

The Constitution does not mention the word "church" nor "state" in the generic sense except in the Second Amendment, in which a "well regulated militia" is asserted to be "necessary to the security of a free state." The principle of separation of church and state and the "wall of separation" are nonlegal terms which better fit the European (and Middle East and Oriental) historic experience from which Americans have gradually disengaged themselves since colonial times. The resort to the historical past does not enlighten if it serves to evoke fears and premonitions out of tune with the times and popular sensibilities. Americans have a right to fashion their own constitutional history in church-state relations without being burdened by memories of religious wars and animosities of their distant forebears. Many of the foreboding nuances of the historic church-state relations might be avoided if we spoke more accurately of the relations between the temporal and spiritual lives of the American community to the extent that they come under the regulations of public law in America. We have religious pluralism and a multiplicity of churches with none of which any of our fifty-one state and federal governments have a concordat or legal establishment as state religion. But the term, "separation of church and state" is here to stay by popular usage. Strictly speaking, church-state relations are not in any positive way defined or formulated by the Constitution. The twin religious clauses of the federal First Amendment and similar provisions in state constitutions are stated in negative terms—what these governments may not do—between the confines of these prohibitions and the courts, both state and federal, have evolved the positive affirmations of

permissive and required relations between state and the religious conscience. The controversary which has been raging in recent times must be dated with the celebrated dictum of Justice Black in *Everson v Board of Education*:

> 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, nor can pass laws which aid one religion, aid all religions, or prefer one religion over another Neither can force or influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No persons 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 preach religion. Neither a state nor the federal government can, openly or secretly, participate in the affairs of any religious organization or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion was intended to erect 'a wall of separation between church and state.'[3]

Several summary observations may here be made. It is Justice Black's broad interdiction against any aid to religion which contrary to a great variety of governmental legislative provisions for religion, religious activities, and public services conducted by religious agencies and institutions and offers the greatest diffculty of constitutional construction unless its literal comprehensiveness becomes less than absolute when contracted by the constitutional permissiveness of the specific ruling. Secondly, some of the doctrinaire generalizations have inserted unresolved antinomy between members of the Court. In *Everson*,[4] *McCollum*,[5] and *Zorach*,[6] the Court with the exception of Justice Reed, subscribed to the formulation of nonestablishment by Justice Black but then split five to four in this specific ruling in *Everson* and in *Zorach* in the particular application. Thirdly, Justice Black's interpretation of the nonestablishment clause includes elements that properly are inherent to the free exercise of religion guarantee. This is not without significance for in succeeding cases the Court is alert to the fact that the nonestablishment prohibition is not to be so understood or applied as to infringe upon the equally inviolable constitutional guarantee of religious liberty This conduces the Court to a competing of interests calculation in particular instances and weighs its

3. Everson v. Board of Education, 330 U.S. 1, 15-6 (1947).
4. *Ibid.*
5. McCollum v. Board of Education, 333 U.S. 203 (1948).
6. Zorach v. Clauson, 343 U.S. 306 (1952).

favor to the religious liberty concept. Fourth, the sum total of the prohibitions does constitute *absolute* separation between the government and the spiritual life of the American community It denies to the government both competence and jurisdiction to operate a church, to define dogma, or to participate in the internal affairs of the church. And conversely, it denies by implication that it is the function of the churches to run the government. These negations are those constitutionally guaranteed conditions which serve the cause of freedom—freedom and independence of the state and its legitimate activities from dictation and imposition by the churches on political governance—freedom and independence of the churches from governmental interposition in church government, in the definition of creeds, and the right to proselytyze without coercive power—freedom of the individual to believe or not to believe, to attend or not to attend church services except as his conscience impels him to do so. It is not a separation that spells indifference. On the contrary, external conduct attributed to religious creeds are not outside the reach of the police powers of the state.

No government in modern history has affirmed so frequently in corporate and individual official pronouncements on the most memorable and solemn occasions belief in and dependence upon God as the author of its liberties and reliance upon divine providence for civic peace, order, and good government, as has the American government.

This moral nexus between religious and civic life enjoys preferment status in law Churches, seminaries, monasteries, convents, synagogues, and rabbinical schools are given tax preferment and tax deductible benefits by law, the clergy and students of the ministry are exempt from military service, both in peace and war, state and federal governments provide for chaplains to invoke God's blessings and guidance upon legislative deliberations. These preferment benefits are an acknowledgement by law that religious life is a necessary beneficient influence for the promotion of civic virtue and religious institutions are considered as tributory to civic peace, law, and order. The legal preferments through tax exemption and tax deductible benefits in favor of religious life are to clearly distinguished from similar benefits that educational and social welfare affiliates of the churches enjoy under a statutory law in common with other nonprofit organizations. Legislative chaplaincies and military exemptions for students of the ministry as well as for the ordained clergy bears no other parallel with secular institutions.

The plain fact is that the state and federal governments and the churches are mutually reliant upon one another in order to enjoy the freedom and independence that results from "separation." The churches are no less beneficiaries of the facilities of the ad-

ministration of justice than other associations, commercial, industrial, cultural, etc. Where church schools have not adequate recreational facilities, municipal authorities have roped off the streets for their students to play, deflecting the unrestrained flow of public traffic. Public proselytizing in parks, street corners, and distribution of religious literature in person even to the inconvenience of tenants has been upheld by the courts. In turn, the churches are called upon to testify before congressional committees to give their counsel on domestic and foreign affairs, and to assist in the moral enlightenment of their congregations on the inviolability of the rights of others against deeply rooted bias and prejudice. We may note here that it is misleading to refer to all litigations as church-state cases. The generality of cases are not between the juridical entities but between a government and an individual who in his moral character as the subject of natural rights invokes his rights of conscience under the religious liberty clause and between the government and a citizen, or corporation, as the subject of legal rights claiming he ought not to be excluded as a beneficiary from general welfare provisions because of his exercise of religious liberty in the fulfillment of a civic purpose defined by the government.

There is too, a concurrence of identical interests between government and religious agencies. Historically, the care of the poor, the infirm, and of dependents and other works of corporal mercy have been the principal burden of churches and religious organizations. Gradually, the state has assumed more and more of these temporal cares but not with the intent of preempting the field. Rather, it has subsidized on a *pro rata* basis, the care of the ages, the infirm, incurables, the blind, deaf, mutes, the orphaned, and the wayward under the care of religious agencies, and acknowledged the need of religious solace for the sorely afflicted. In 1894, the State of Louisiana invited Catholic Nuns, the Daughters of Charity, to help care for the afflicted at the leprosarium at Carville. When the federal government took over in 1921, the Sisters remained in this charitable employment. The federal Hill-Burton Act makes grants for the new construction and expansion of hospital facilities to all qualified hospitals, and of those under religious auspices constitute a major number of the total.

There is, too, a concurrence of functions between government and religious agencies because both jurisdictions fall upon one and the same subject in his dual capacity, the individual person, as believer and citizen. This occurs, for example, in the areas of marriage and divorce laws, education and birth control programs. This mutual involvement of civic and ecclesiastical jurisdictions is unavoidable because such matters touch upon personal conscience and the outward conduct correspondent to religious confession. It

is not difficult to see in what sense there is absolute separation of church and state—there is to be no jurisdictional, institutional, or functional fusion of the two authorities, civil and religious. This separation is to ensure freedom of conscience for the believer (and nonbeliever) and for the churches and their religious apostolate and activities. It is a freedom which makes possible a cooperation that is vigorous because independent of interference from the other Cooperation may and does take expression in a variety of forms. It may be an accommodation that is required because its denial would restrict the exercise of religious liberty (as in the *Jehovah Witnesses*[7] and *Sherbert v Verner*[8] *cases*), an accommodation that is prohibited because it is considered to be constructively an establishment of religion (as in *McCollum, Engels,*[9] and *Schempp*[10] cases), an accommodation which is permitted because it assists religious life without entailing the constitutionally forbidden establishment (*Everson, Zorach*) Where a public service is involved, the the government must not use a religious exclusionary norm (*Bradfield,*[11] *Cochran,*[12] *Everson, Torcaso*[13]) but must observe strict neutrality as between believer and nonbeliever Nor may a religious exclusionary norm be used if the secular, i.e., civic general welfare purpose is achieved in such a way that it unavoidably does entrail as an overflow a discernible benefit to the religious life (*Bradfield, Pierce,*[14] *Cochran, Everson,* the *Sunday Closing Laws* cases) One cannot deny that religious life does enjoy a variety of public privileges which may rightly be said to encourage religious life if not confer upon it a privileged status. And where a conflict between competing interests emerges between the interplay of the twin religious clauses, the Court has weighed the scales in favor of the free exercise of religion.

CANONS OF CONSTITUTIONAL CONSTRUCTION

Bearing in mind that there are a number of concurring functions of interest between governments and religious agencies and unavoidably an interplay of the two religious clauses involving the individual both as a believer and as a subject of the government we ask what may we find in court decisions of the past to shed light on the constitutionality of federal aid to church schools. There is no court ruling on this precise issue. While *Bradfield v Roberts,*[15] *Cochran v Board of Education,*[16] and *Everson v Board of*

7. West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).
8. Sherbert v. Verner, 374 U.S. 398 (1963).
9. Engel v. Vitale, 370 U.S. 421 (1962).
10. School District of Abington Township, Pennsylvania v. Shempp, 374 U.S. 203 (1962).
11. Bradfield v. Roberts, 175 U.S. 291 (1899).
12. Cochran v. Board of Education, 281 U.S. 370 (1930).
13. Torcaso v. Watkins, 367 U.S. 982 (1963).
14. Pierce v. Society of Sisters, 268 U.S. 510 (1925).
15. *Supra* note 11.

Education,[17] are the only three decisions of the Supreme Court which bear more relevance to our discussion than do the others, we will review a number of other cases in order to ascertain if in any reasonable way our precise issue is at least broadly adumbrated in the reasonings of the opinions of the Justices.

Bradfield v Roberts

In 1899, the Supreme Court upheld in a unanimous decision the constitutionality of federal appropriations of funds for the construction of a building and public recompense for services rendered to a hospital owned and administered by Roman Catholic Sisters. Presumably the Hill-Burton Hospital Survey and Construction Act which has been repeatedly renewed since its enactment in 1946 rests squarely upon the ruling in *Bradfield* that such federal subventions are not in violation of the nonestablishment clause. One cannot argue conclusively from *Bradfield* that what is upheld in the non-educational area—hospital services and facilities—would necessarily apply to the area of education. But allowing for the obvious differences between educational and medical situations nevertheless appropriations for an officially recognized public service might be favorably constructed into an analogous constitutional principle for gauging the public interest of an officially accredited schooling. Nor has any constitutional embarrassment come from acknowledging that some benefit does accrue to the private religious corporation, and in certain instances the benefit is almost incalculable to the fortune of an affiliate educational institution of learning.[18] *Bradfield* supplied the constitutional rationale in an area of concurrent or overlapping functions. Federal and state governments in disbursing funds and property for specified objectives that come within their powers to provide and spend for the general welfare, have extended financial assistance impartially to all agencies and institutions, religious[19] or secular, who can fulfill the legislative intent and so

16. *Supra* note 12.
17. *Supra* note 3.
18. Yeshiva, Book 396, note 105. Notes 105-109 for a discussion of the contractual arrangement between the City of New York and Yeshiva University. *Cf.* COSTANZO, THIS NATION UNDER GOD, 257-260, 396 (1964).
19. The Court meticulously observed in what sense the Catholic Hospital must be understood to be a church-affiliated institution and what relevance that has on public service the federal government expected from it no less. The Court pointedly makes these observations (1). the hospital was owned by a corporation, chartered by the government and consequently, legally speaking, the corporation was subject solely to the control "of the government which created it." Under this aspect the corporation was secular and nonsectarian. (2). the fact that the hospital was conducted under the Auspices of the Catholic Church meant "That the church exercises great and perhaps controlling influences over the management of the Hospital." (3). the stockholders of the corporation were all nuns, Bradfield v. Roberts, 175 U.S. 291, 298 (1899). In the light of these admissions of fact the Supreme Court's ruling in Bradfield means that a direct appropriation of government funds for the performance of a public function conducted under the auspices "and perhaps controlling influence" of an institution with religious professions is not in contravention of the non-establishment clauses of the First Amendment. The Court too noted the error of confounding a "law respecting an establishment of religion" with "a law respecting a religious establishment.

service a public purpose. This rationale has been explained by subsequent state court decisions to counter the customary two objections of the religious character of an institution and the overflow of benefits to it.

In 1955 the highest court of New Hampshire upheld the constitutionality of a statue giving state aid to denominational hospitals for the education of nurses:

> The purpose of the grant is neither to aid any particular sect or denomination nor all denominations, but to further the teaching of the science of nursing. The aid is available to all hospitals offering training in nursing without regard to the auspices under which they are conducted or to the religious beliefs of their managements, so long as the aid is used for nurses' training 'and for no other instruction or purpose' If some denomination incidentally derives a benefit through the release of other funds for other uses, this result is immaterial. A hospital operated under the auspices of a religious denomination which receives funds under the provisions of this bill acts merely as a conduit for the expenditure of public funds for training which serves exclusively the public purpose of public health and is completely devoid of sectarian doctrine and purposes.
>
> The fundamental position that public moneys shall be used for a public purpose has not prevented the use of private institutions as a conduit to accomplish the public objectives.[20]

In Kentucky the Court of Appeals upheld the federal statute against the contention that the federal-state grant to church-affiliated hospitals violated both federal and state constitutions.

> (4) private agency may be utilized as the pipe-line through which a public expenditure is made, the test being not who receives the money but the character of the use for which it is expended. The fact that members of the governing board of these hospitals, which perform a recognized public service to all people regardless of faith or creed, are all of one religious faith does not signify that the money allotted the hospitals is to aid their particular denominations. courts will look to the use to which these funds are put rather than the conduits through which they run. If that use is a public one it will not be held in contravention of sec. 5 merely because the hospitals carry the name or are governed by members of a particular faith.[21]

The difference between religion and public health and religion and education is not so broad as to warrant, despite certain obvious dissimilarities, a contrary attitude toward those who approve

20. Opinion of the Justices, 99 N.H. 519, 113 A.2d 114, 116 (1955).
21. Kentucky Building Commission v. Effron, 220 S.W.2d 836 (Ky. 1949).

of government aid to church-affiliated schools. What the state court rulings of New Hampshire, Kentucky, Mississippi and others have stressed is that a public purpose can still be served through a private agency despite or together with its patent religious profession and environment and even allowing for incidental benefits to the religious institution itself.

Meyer v Nebraska[22]

The importance of *Meyer* is generally overshadowed by the momentous decision two years later of *Pierce* which in great part was prejudiced by the former. In both cases, the Supreme Court made similar observations touching upon the rights of parents to direct the education of their children, the contractual rights of schools and of the teaching profession as restrictions upon the state's provisions and requirements regulating state compulsory school attendance laws. Both cases deny state monopoly of the educational process either by an absolute control of school curriculum or by compulsory attendance at public elementary schools for all children. But scarcely any notice has been taken of the court's consideration of the multiple aspects of a language study which does cast light on the tangled issues of the secular subjects as taught in church-related schools. It quotes at length from the decision of the Supreme Court of Nebraska that underscored the indefectibility of the study of the German language even in the very employment of Biblical stories. The question of the constitutionality of the state statute proscribing the teaching of German in elementary schools remains without prejudice should any appeal be made to the freedom of religious beliefs. The high tribunal apparently agreed with the analysis of the case by the Nebraska Supreme Court—that two distinct and separate purposes remain intact—the teaching and learning of the state proscribed German language and the teaching and learning of Bible stories. The two concurrent objectives are recognized to be separable and separate, and accordingly, both the federal and state Supreme Courts see no constitutional right of religious liberty at issue before them. In a word, the German language is being taught even in the reading of Bible stories and it is on that precise issue that both court-rulings are made. Apparently the intermingling of religious matter in the teaching of a secular subject—a modern language—does not diminish nor impair the proficiency of teaching and learning the secular subject nor interfere with achieving its own distinctive secular aspect and function. Taking note of the laudable motive of promoting cultural assimilation in schools the Court however ex-

22. Meyer v. Nebraska, 262 U.S. 390 (1923).

pressed its aversion to the statute before it by reaching back to the Platonic and Spartan experiments by law of trying to mold the minds of the young by removing them entirely from parental care and submitting the youngsters to an educational process entirely controlled by the state. It is striking that the court in speaking of the higher importance of education among the American people should choose to quote the Ordinance of 1787 which conjoins knowledge with religion and morality for the benefit of government and society.

Pierce v Society of Sisters[23]

Though *Pierce* is generally cited for its celebrated pronouncement on the rights of parents, the issue before the Court was the proprietary right of private corporations, secular, military, and religious, to engage in schooling in fulfillment of state compulsory attendance laws. The Court's affirmation of the primacy of parental rights is more than a *dictum* because it is the necessary term correspondent to the inviolable exercise of the private corporations' right to engage in public education. Their rights, the Court noted, are dependent upon patronage, "the free choice of patrons, present and prospective." In ruling upon both cases together, the Court in effect denied that the religious affiliation of the parochial school distinguished it from the private school as an educational institution. The significance of *Pierce* is sharply defined when projected against the background of forces which brought about the enactment of the Oregon statute. Those who worked for its enactment argued that:

> The assimilation and education of our foreign-born citizens in the principles of our government, the hopes and aspirations of our people, are best secured by and through attendance of all children in our public schools.[24]

The Court rejected this underlying premise that state schools are better educational instrumentalities for inculcating civic virtues and patriotism. We might observe on this point that church-related

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23. *Supra* note 14.

24. The principal forces behind the Americanization campaign were led by the Imperial Council, A.A.O. Nobles Mystic Shrine. *Cf.* Oregon School cases· Complete Record 732 (1925). An interesting comment upon this motivation will be found in the brief amicus curiae filed in the case by Louis Marshall on behalf of the American Jewish Committee. "Recognizing in the main the great merits of our public schools system, it is nevertheless unthinkable that public schools alone shall, by legislative compulsion rather than by their own merits, be made the only medium of education in this country. Such a policy would speedily lead to their deterioration. The absence of the right of selection would at once lower the standards of education. If the children of the country are to be educated in accordance with an undeviating rule of uniformity and by a single method, then eventually our nation would consist of mechanical robots and standardization Babbitts. *Id.* at 615

The private and parochial schools which exist throughout the country are conducted on the same patriotic lines as are our public schools." *Id.* at 618. For a sharp rejection of the charges of divisiveness leveled at parochial schools, *Cf.* Marshall, *Id.*, at 621-22.

schools are, on the contrary characteristically more noted for their patriotism. *Pierce* affirms the *right* of *private* corporations, whether religious, military or secular, to operate schools for the same public intent as the state schools. They exist not by privilege nor sufferance of the political power The basic reason for the existence of the independent schools is that they are differentiated, by a principle of integration of curriculum and a system of discipline, from state-owned schools while sharing in common with them a proficiency in required subjects and in the inculcation of civic virtues. The effect of the *Pierce* ruling is to deny any priority or superiority before the law for the state to compel parents to choose the state schools.

> The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public schools only The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.[25]

It is true that the First Amendment was never argued or even mentioned in the *Pierce* ruling. But this is precisely what constitutes its unique merit. In ruling upon both cases together, the Court in effect denied that the religious affiliation of the parochial school distinguishes it from the private (military) school as an educational institution capable of fulfilling a public purpose as prescribed by state educational laws. Both are subsumed as private corporations with equally inviolable property rights *not merely in education but in public education.*

Private proprietary title and church affiliation do not derogate from nor diminish the ability to fulfill public law requirements of school curriculum, standards of teaching, and other educational facilities, nor render the educational process less competent, less truly public in purpose and achievement. By denying to the state a monopolizing role in education, it implicitly affirms that parents, church, and the state are all contributors to public education. Strictly speaking, it is not the religious and nonreligious conscience that is made to prevail but it is the parental right, (correspondent to rights of private corporations in public education), whether exercised out of religious motivation or not, that limits the state to a partnership, and denies it an exclusive role in public education. At the same time, while there is no explicit discussion of a principle of integration in the school curriculum, the court seems not unmindful of it when it notes that the reason that parents may choose an accredited education in an independent school is that in

25. Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925).

the judgment of the parents such schooling is ordained to assist the student for "his destiny" and "additional obligations" beyond those presumably provided for in the state-owned schools. The profound significance of the *Pierce* ruling is that the proprietary right of independent schools to operate is related to the prime moral obligation of the parents to regulate the moral educational process of their children, without denying the state a supervisory role and without removing from the independent schools their obligation to the public welfare. In a word, the court is not merely saying that a division of labor is legitimate, and so the state need not have an exclusive role in education nor that other agencies besides the state may not be equally competent to educate the young; rather the court affirms the proprietary right of independent schools and of its "patrons, present and prospective," to be co-participants with the state in the educational requirements of public welfare. We cannot too strongly emphasize the fact that of those private church-affiliated schools who do not ask for a share in governmental aids, none will permit critics to say they are not fulfilling the purposes of public education, none will admit that their schools are unAmerican, divisive, undemocratic, none will agree that their educational process is defective. The reason why they exist at all is precisely because they are firmly persuaded that the state schools are wanting in the fullness of intellectual and spiritual development. They make this criticism respectfully not to disparage the state schools but with full awareness of the complex problems which religious pluralism engenders in those circumstances. The religious neutrality in state schools is not the definition of an educational ideal but a compromise, an abstention which constitute the very reason why parents who can afford to do so send their children to church-affiliated schools.

Cochran v Board of Education[26]

Whereas in the *Pierce* ruling the principal stress was upon the correlation of real rights, parental rights and the proprietary rights of private corporations to participate in public education in the *Cochran* case the Court upheld the identifiable common purposes of a total view of pluralist public education as the legitimate objective of a general welfare benefaction. The appellant had brought suit to restrain the Louisiana state officials from expending any part of the severance tax fund in purchasing textbooks and in supplying them free of cost to parochial school children, contending that utilization of state funds for private uses controvened the mandate of the due process clause of the Fourteenth Amendment. In support of this federal judicial question they argued that:

26. 281 U.S. 370 (1930).

> The courses of study and the school books prescribed by the private, religious, and other schools aforesaid *not embraced* in the public educational system of the State of Louisiana, are different from those prescribed and used in the free public schools of this State, and the Louisiana State Board of Education has no right or authority to prescribe the course of study or the school books to be used by the children attending schools *constituting no part* of the public educational system of the State of Louisiana, and petitioners show that there is a large number of such private and sectarian or denominational schools in the State of Louisiana where religious instruction is included in the course of study, and many of the school books selected, used and required in such schools, are designed and employed to aid and promote religious beliefs, and to foster and encourage the principles of faith, and to teach the tenets of the creed, mode of worship, and ecclesiastical policy of the respective churches under whose respective control the said schools are conducted.[27] (Italics supplied.)

Further, the petitioners asserted that Section 4 of Article I and Section 8 of Article IV of the Constitution of Louisiana forbade "the taking of money from the public treasury for the purpose of teaching religion, and in aid of churches, sects, or denominations of religion." The respondents acknowledged all the alleged facts but contended to the contrary:

> That it is not their intention nor purpose to furnish free, or otherwise, any sectarian or denominational textbooks to the *school children of the State of Louisiana* and that respondents only propose to furnish such books to the *educable school children of the State attending schools, curricula of which have been approved by the State Board of Education of Louisiana.*[28] (Italics supplied.)

The state further expanded upon the comprehensive conception of all publicly accredited schooling by asserting:

> That the private schools of the State of Louisiana thus become and are *agencies of the state,* aiding in the education of its children and making it possible to educate many thousands who would otherwise be deprived of educational advantages. That the primary policy of the aforesaid acts of the legislature is providing free textbooks for the *educable school children* of the State, *without discrimination* as to race, sex, religion or creed, and respondents aver that if any children of the State are denied the privilege of obtaining free school books from the State of Louisiana because of the fact that such children are attending private or sectarian schools, such discrimination would be arbitrary,

27. Record, p. 4, Cochran v. Board of Education, *supra* note 26.
28. *Id.* at 13.

> unjust and illegal, as well as unconstitutional, and incapable of legal enforcement.[29] (Italics supplied.)

It was the Supreme Court of Louisiana, however, which enlarged upon the child-benefit concept and related it to state-care for all educable school children.

> One can scan the acts in vain to ascertain where any money is appropriated for the purchase of school books for the use of any church, private, sectarian, or even public school. The appropriations were made for the specific purpose of purchasing school books for the *use of the school children of the state,* free of cost to them. *It was for their benefit and the resulting benefit to the state* that the appropriations were made. True, these children attend some school, public or private, the latter, sectarian or non-sectarian, and that the books are to be *furnished to them for their use, free of cost, whichever they attend.* The schools, *however, are not the beneficiaries of these appropriations.* They obtain nothing from them, nor are they relieved of a single obligation, because of them. *The school children and the state alone are the beneficiaries.* It is also true that the sectarian schools, which some of the children attend, instruct their pupils in religion, and books are used for that purpose, but one may search diligently the acts, though without result, in an effort to find anything to the effect that it is the purpose of the state to furnish religious books for use of such children. In fact, in view of the prohibitions in the Constitution against the state's doing anything of that description, it would be legally impossible to interpret the statute as calling for any such action on the part of the state. . . .[30] (Italics supplied.)

The United States Supreme Court, in an opinion by Mr. Chief Justice Hughes, took cognizance of the nondiscriminatory language of the state statute which authorized without any religious exclusionary clause "supplying school books to the school children of the state" and the directive to the Board of Education to provide "school books for school children free of cost to such children." After quoting the language of the majority set out above, it concluded:

> Viewing the statute as having the effect thus attributed to it, we cannot doubt that the taxing power of the state is exerted for a public purpose. 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, com-

29. *Id.* at 16.

30. Borden v. Louisiana State Board of Education, 168 La. 1005, 1020, 123 So. 655, 660 (1929).

> prehensive. Individual interests are aided only as the common interest is safeguarded.[31]

The ruling of the Louisiana state courts stresses the *patria potestas* of the state for all its educable children without distinguishing in the reach of its care between the children who attend state and privately operated schools. They reject the contention of the plaintiffs that the non-governmental schools are "not embraced in the public educational system of the State of Louisiana," that these schools "constitute no part of the public educational system of the State of Louisiana." On the contrary, they agree with the state "that the private schools of the State of Louisiana thus become and are, agencies of the State, aiding in the education of its children." The reach of the state concernment is for all educable school children without discrimination as to race, sex, religion or creed. The intent and reach of the legislative benefaction, as the Supreme Court of Louisiana, stresses, is the benefit of the educable child and its consequent benefit to the State. "It was for their benefit and the resulting benefit to the State that the appropriations were made." The United States took cognizance of the nondiscriminatory language of the state statute which authorized without any religious exclusionary norm "supplying school books to the school children of the state" and the directive to the Board of Education to provide "school books for school children free of cost to such children." It is the firm persuasion of this writer that any federal aid program for the betterment of national education ought to confront the question squarely and affirm or deny whether or not education in private, religious schools is or is not achieving those objectives of schooling that are in the interest of general welfare. This fact is in practice acknowledged by the schools themselves both on the intracollegiate, collegiate, and university levels. Students may transfer from one school to another in midterm or after graduation with due acknowledgement of the academic record. Ought not the law admit what the academy itself has never denied? Obviously, governmental aid to church-related schools would be directed and proportionate to the public function of these schools, (namely, the mastery of the secular and natural sciences) and a formal explicit acknowledgement of the secular goals and achievements of the church-related schools so long acted upon in a multiplicity and diversity of federal aid programs is long overdue.

Everson v. Board of Education[32]

Whereas in *Pierce*, the Court affirmed the legal right of private corporations, whether religious, secular, or military, to participate

31. Cochran v. Board of Education, *supra* note 26.
32. 330 U.S. 1 (1947).

in public schooling together with state schools as a necessary correspondent to the inviolable moral right of parents to direct the education of minors, and in *Cochran* the Court denied that the religious profession of parochial schools constituted an exclusionary norm to forbid state provision of secular education facilities to all educable school children, in *Everson* the Court through the majority opinion of Mr Justice Black, declared in italicized words—as if to emphasize the firmness of its conviction—that no religious exclusionary rule may be applied to recipients of state welfare benefits. The *Everson* ruling is a study of symmetry of dialectic with inbuilt antinomies that can be explained only by subordinating an absolute premise to a particular determination rather than by relating the specific ruling to the general premise. A taxpayer of the township of Ewing brought suit against the reimbursement to parents for the cost of transportation of children to Catholic schools which were being made pursuant to a resolution of the school board of Ewing in accordance with a state statute authorizing such provisions. It is not without significance that Mr Justice Black, speaking for the majority of five, disposed of the argument that the payments were illegal because they required the taking of some persons' property for the private use of others, by rejecting the contention that the religious affiliation of the parochial schools withdrew them from the area of public education. This he did both at the beginning of his opinion and at its conclusion.

> It is much too late to argue that legislation intended to facilitate the opportunity of children to get a *secular* education serves no public purpose. The same thing is no less true of legislation to reimburse needy parents, or all parents, for the payment of fares of their children so that they can ride in public busses to and from schools rather than run the risk of traffic and other hazards incident to walking or 'hitchhiking' [33] (Italics supplied.)

And

> Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from *accredited* schools.[34] (Italics supplied.)

Everson, reaffirms *Cochran* in holding to the public function and character of the educational process and facilities of private, religious-affiliated schools. It is the core of the ruling composed of two solemn declarations, one succeeding the other, that has stirred an almost endless controversy on the permissible and impermissible tax benefits that are constructively in accord with or in contraven-

33. *Id.* at 7.
34. *Id.* at 18.

tion of the non-establishment clause of the First Amendment and the complete proscription of any religious esclusionary in the application of governmental benefits. In a word, there is an apparent contrariety between two absolutes which is resolved differently by two opposing schools of interpretation. The advocates of absolutely no aid subordinate the second absolute to the first; the advocates of aid in support of a legislatively defined secular goal, qualify the first absolute by the second.

> We must consider the New Jersey statute in accordance with the foregoing limitations imposed by the First Amendment. But we must not strike that state statute down if it is within the state's constitutional power even though it approaches the verge of that power New Jersey cannot consistently with the "establishment of religion" clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church. On the other hand, the other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith or lack of it,* from receiving the benefits of public welfare. While we do not mean to intimate that a state could not provide transportation only to children attending public schools, we must be careful, in protecting the citizens of New Jersey against state-established churches. To be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all citizens without regard to their religious beliefs.[35]

The italics in the above passage are the Court's (an unusual occurrence in the Court's opinions) and clearly reject an exclusionary religious test in the definition of general welfare benefits. And then as if to link together *Pierce* and *Cochran* with *Everson,* Justice Black adds:

> The Court has said that parents may in the discharge of their duty under state compulsory education laws, send their children to a religious rather than a public school, if the *school meets the secular education requirements which the state has power to impose.*[36] (Italics supplied)

The Court does not deny that some undoubted benefits do accrue to the parochial schools by the extension of transportation facilities set by the state, but this does not constitutionally interdict that neutrality on religious matters which permits the state to direct

35. *Id.* at 16.
36. *Id.* at 18.

its assistance to a secular purpose that is being realized under the state's own supervisory educational regulations by religious institutions.

> Of course cutting off church schools from these services, so separate and indisputably marked off from the religious function, would make it far more difficult for the schools to operate. But such is obviously not the purpose of the First Amendment. That Amendment requires the state to be neutral in its relations with groups of religious believers and nonbelievers. It does not require the state to be their adversary State power is no more to be used so as to handicap religions than it is to favor them.[87]

Everson like *Cochran* affirms the principle that government may assist public service aspects of an educational process which fulfills the secular educational requirements which the state has power to impose. Indeed, their accreditation depends upon this compliance. In at least three different instances does the Court acknowledge the secular education that obtains in religious schools and finds it almost tiresome to doubt it. "It is much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose."

We maintain in this study that an exclusionary rule for government benefactions based on religious profession ought to raise substantive constitutional questions about the legal consequences attendant upon the exercise of religious liberty in education. We cannot too often repeat that the only practical way of interpreting and executing legislative statutes reaching to a public interest and service without prejudice to religious liberty is the empirical test of ascertaining whether the secular aspects and functions of nontheological studies, in the promotion of which the government has a direct interest, are in fact proficiently and competently realized to the public benefit. Such an empirical device or measurement can meet the impartial requirement of Justice Black's statement, "because of faith, or lack of it."

Unfortunately the passage which precedes the one we have been analyzing is more often quoted because it provides another "absolute" held in the particular ruling. The Court took cognizance of the appellant's contention that the provision of transportation at public expense for children who attend church-affiliated schools constituted an aid to religion in violation of the no establishment clause of the First Amendment. Said Mr Justice Black:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal

87. *Id.* at 16.

> Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another Neither can force nor influence a person to go to or 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 nonattendance. 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 or *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."[38]

A careful weighing of these propositions discloses that nonestablishment is simply not a disengagement from religious life of the American community but directed to ensuring the exercise of religious liberty without any coercive interference touching upon the individual choice to believe or not believe, to attend religious services or not. Other propositions must be historically viewed as against those incidences of state-establishment of church or religion, which by legislative preference for a creed visited civil disabilities and punitive consequences upon dissidents and nonconformists and imposed taxes upon them for the support of a faith or church not of their choice or confession. What has provided the occasion of much controversy is the implication of the literal statements which seem to proscribe *any* aid to religion, even on a nondiscriminatory basis, "in *any* amount, large or small, to support any religious activities or institutions." While the language admittedly lends itself to a formula of absolutely no aid at all to religion a reading of it in context saddles such an interpretation with many difficulties. The demarcation of a secular education in church-related schools to which both *Cochran* and *Everson* admit, is held to be constitutionally eligible for government support proportionate to the fulfillment of the purpose. In such a context, then, an educational process that is so defined and supportable by tax funds is not constructively aid for any religious *activities* or *institutions* that teach or practice religion, even if as a consequence there is an overflow of some benefit to the religious agency itself. One cannot control the consequence of multiple effects in this matter no more than in any other human enterprise. And the legislative record of state and federal tax support, large and small, in a variety of forms, with no prejudice to religious affiliation is a constant witness to this official conviction. Grants and contracts for research projects,

38. *Id.* at 15, 16.

scholarships, fellowships, tuition grants, and loans for educational facilities and building constructions, fiscal provision for remedial and special pedagogy for the mentally retarded, for disadvantaged children, funds for language institutes and training programs and numerous other programs by a variety of government agencies constitute one of the most gratifying etceterations of government use of all educational instrumentalities for the sake of general welfare without any religious exclusionary rule. Where an identity of the secular goals of education and a compatibility of interest has existed, national and state legislatures have made appropriations in support of those achievements. This is not to say that the same identical provisions in kind and degree are extended in every form of governmental aid in support of the secular goals of education in state and nonstatal schools. Some, such as scholarships and tuition grants, fellowships, matching grants, research grants and contracts, student loans at low interest are generally extended on equal basis. Government funds for educational equipment and building construction of science buildings, campus centers, and dormitories, generally take the form of long-term loans at low interest when extended to church-affiliated schools.

The legislatures of the nation have established a long standing consensus on the competence and effectiveness of the educational process in nongovernmental schools without prejudice to religious affiliation. As for the interdiction of any aid to religion impartially extended, such as tax exemptions and tax deductible benefits to churches and religious institutions and agencies, the support of military and legislative chaplains, the income tax laws which permit housing allowances for ministers, exemptions from military service of conscientious objectors, of students of divinity, and of clergy in peace and war, whatever the underlying rationale justifying or challenging these preferment benefits of public law, the secular goals and achievements of these institutions of learning which are accredited and comply with state educational requirements should not be equally subsumed under the same general discussion. If the *Everson* decision indicates any direction of application it points favorably in the direction of the educational concernment of governments.

If the two classic passages on non-aid—at all—and the religious exlusionary rule mean anything it is that the two absolutes must be jointly considered and related to one another Undoubtedly the first absolute would deny tax support of sectarian teaching and practices. The second absolute should deny the exclusion of religious sectarian agencies and institutions from government aid in the achievement of secular goals in which the government has a substantive interest to promote. The Court has upheld this federal

involvement in *Bradfield* in the area of hospital care in the educational field, the provision of textbooks by the state to all educable children by the *Cochran* ruling.

McCollum v Board of Education,[39]

The *McCollum* ruling of 1948 struck down the Champaign, Illinois, religious instruction program which was conducted on the school premises by outside teachers representing the various faiths to students whose parents had requested these religious classes. The Court through the majority opinion of Mr Justice Black, found the arrangement to be a utilization of tax-supported public school system and its compulsory attendance machinery for the dissemination of sectarian religious doctrine that is proscribed by the nonestablishment clause of the First Amendment.

This specific ruling has no bearing on the issue before us. In fact a comparison of the two considerations would be as a matter of factual situation and the controlling legal principles would be more notable for its sharp contrasts than for similarities.

Zorach v Clauson,[40]

The impartiality of the *Everson* ruling which refused to allow the religious affiliation to be made the basis of an exclusionary rule seemed to some constitutional jurists to have been reduced to a questionable neutrality of total abstention in *McCollum*, was restored in *Zorach* with such affirmations as to lead some scholars to hold that *McCollum* was to a considerable extent checked by a more positive construction of government neutrality *Zorach* permitted tax-salaried public school officials to cooperate with the religious released time program conducted off school property. If it is a cause for some reflection why the absolute separatism passage in *Everson* is cited more often without the accompanying absolute interdiction of a religious exclusionary rule of the succeeding paragraph, it is even more surprising why it is quoted more frequently than the more positive formula of *Zorach*, which was a later ruling, as if the earlier formula were the only one to control church-state relations in education. *Zorach* like *McCollum* does not concern itself with government funds in support of education in church-related schools. It does, however, affirm broadly certain propositions on relations between the government and the religious life of the American community Mr Justice Douglas, speaking for the majority, distinguished *Zorach* from *McCollum* on two grounds — there was no utilization of tax-supported property premises and there

39. 333 U.S. 203 (1948).
40. 343 U.S. 306 (1952).

was no evidence of any coercion being exercised upon the children by state officials. It does make statements which are intended to make more clear the absolute prohibition of the non-establishment clause.

> 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 place of worship would violate the Constitution. Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamation making Thanksgiving Day a holiday; "so help me God" in our courtroom oaths — 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."[41]

And then there follows that memorable passage in which neutrality of total abstention is disowned for a benevolent impartiality that finds expression in reasonable accommodations. It is not without profound significance that this passage is introduced with the statement: "We are a religious people whose institutions presuppose a Supreme Being." Here in the solemnity of the highest judicial review on the constitutionality of official actions and law, the high tribunal was not simply observing that as a broad, undeniable historical fact the American people have been traditionally religious, God-fearing and God-loving men. Rather, it said with calculated particularity that the public institutions of the American Republic rested on religious belief in God.

> We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom of worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best

41. *Id.* at 312-3.

> of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to wide the effective scope of religious influence. The government must be neutral when it comes to competition between sects. It may not thrust any sect on any person. It may not make a religious observance compulsory It may not coerce anyone to attend church, to observe religious holiday, or to take religious instruction. But it can close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction. More than that is undertaken here.
>
> This program may be unwise and improvident from an educational or a community viewpoint. That appeal is made to use on a theory previously advanced, that each case must be decided on the basis of "our own prepossessions." Our individual preferences, however, are not the constitutional standard. The problem, like many problems in constitutional law, is one of degree. [42]

The *Zorach* ruling like that of *McCollum* was not concerned with the issue of government funds for secular goals in religious education. *Zorach* is nonetheless significant in its stress upon a principle of benevolent impartiality as within the permissible governmental relations with religion that are not forbidden by the nonestablishment clause. Against a neutrality of total abstention the Court sets a formula of a cooperative and reasonable accommodation that gives scope to the religious life of the American community without placing constraints upon anyone, believer or nonbeliever. There is implied in the specific settlement of the case a point which is explicitly stressed by Mr Justice Frankfurter's dissenting opinion and which carries with it a meaning not openly stated in the majority ruling. Justice Frankfurter would have no constitutional qualms if there were a general dismissed time program whereby the public school once a week dismissed all students an hour earlier than the general hour of the end of the school day In such an arrangement the students may then spend that hour as they choose, to sectarian instruction, to ethical instruction, to the study of music, etc. But the provision of the New York Legislature for released time within

42. *Id.* at 313-4.

the regular school day would seem to imply that a nexus be affirmed between the educational process and religious and spiritual values in an arrangement that does no violence to the diversities of religious conscience.

There is an undoubted difference of attitude and approach between *Zorach* and *McCollum*. It seems to overleap *McCollum* while adhering to that specific ruling, — to *Everson* and repeat in different language some of its proscriptions of government activity that fall under the ban of the nonestablishment clause. Government may not finance religious groups, must be neutral between sects, cannot undertake religious instruction or force religion, religious instruction, or religious observance on anyone. These proscriptions leave untouched the support by government of carefully defined secular goals of education by whomsoever they are realized. The support of educational programs which are not religious subjects but are identifiable as citizen education are objectives which can be fulfilled by competent and official educational agents and facilities. To preclude some of them because of their religious confession or affiliation is to do violence to the absolute proscription of an exclusionary rule affirmed so categorically *in italics* in *Everson*. At the same time the absolute proscriptions of the nonestablishment clause does not preclude a reasonable measure of accommodation for specifically religious practices and teachings. To what extent public law accommodations for religious teachings and practices are permissible — such as the New York released time program and the sectarian religious holidays during school years — and when they are forbidden will depend on the degree of governmental involvement that the Court decides in each instance to be within the complementary boundaries of the two religious clauses of the First Amendment.

Zorach made no mention of the Jeffersonian metaphor, "wall of separation," which other members of the Court cited in their several opinions in the earlier *Everson* and *McCollum* cases. Rather, the Court strove sedulously to contrive a formula of separation of church and state without resorting to the mataphor on masonry and its connotation of complete and permanent separation.[43] As Mr Justice Frankfurter was to observe later, the separation is one of friendly fences between neighbros that allows and encourages cordial and cooperative relations.

43. Justice Frankfurter, in his concurring opinion in the *Sunday Law* cases, states. "But the several opinions in *Everson* and *McCollum*, and in Zorach v. Clauson, 343 U.S. 306, makes sufficiently clear that 'separation' is not a self-defining concept." McGowan v. Maryland, 336 U.S. 420, 461 (1961).

SUNDAY CLOSING LAWS CASES

McGowan v Maryland[44]

All of the court opinions in this and other Blue Laws cases admitted the religious origin of the Sunday day of rest. The majority Court opinion, while aware that some state Blue Laws still literally refer to the Lord's day, held to the valid secular purpose which was said to emerge from and to prevail apart from its religious origins even if it still operated in such a manner as to favor the dominican and to the disadvantage of the sabbatarian religious confessions. "The proponents of Sunday closing legislation are no longer exclusively representatives of religious interest." There is no denial of the obvious fact, on the part of the court, that there is an intermingling of interests, of secular objectives and of religious advantage partial to Christians. But the court opinion refuses to allow that such concurrence of benefits, secular and religious, nullifies the valid secular purpose which government has a right and duty to secure:

> However, it is equally true that the "Establishment Clause" does not bar federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions. In many instances, the Congress or state legislatures conclude that the general welfare of society, wholly apart from any religious considerations, demands such regulations.[45]
>
> Sunday Closing Laws, like those before us, have become part and parcel of this great governmental concern wholly apart from their original purposes or connotations. The present purpose and effect of most of them is to provide a uniform day of rest for all citizens; the fact that the day is Sunday, a day of particular significance for the cominant Christian sects, does not bar the state from achieving its secular goals. To say that the states cannot prescribe Sunday as a day of rest for these purposes solely because centuries ago such laws had their genesis in religion would give constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and state.[46]

With what force of logic and reason one may reflect in similar terms upon an analogous situation, the intermingling of secular functions and religious aspects of church-school education, will depend for the most part on the recognition of a secular goal of education in the curriculum in which the state has a substantive interest and which can be ascertained empirically by the state educational authorities. The precise holding of Chief Justice Warren's

44. 386 U.S. 420 (1961).
45. *Id.* at 422.
46. *Id.* at 444-45.

opinion is that governmental action directed to a valid public purpose does not become invalid because it operates simultaneously to other effects — the promotion of religious interests, either generally or of a particular group. The court opinion holds to its exposition of nonestablishment by referral to *Everson* which had upheld the expenditure of public funds to transport children to parochial schools as a legitimate service for a valid secular purpose. This secular purpose was not solely the safe transportaion of the school children but, as Justice Black noted, a *safety means* to the secular educational goals which the state requires and accredits in religious schools. The fulfillment of these secular purposes are not annulled or vitiated because it also advances and helps a program of religious education. Mr Justice Frankfurter's concurring opinion adds to the Chief Justice's rationale:

> To ask what interest, what objective legislation serves, of course, is not to psychoanalyze its legislators, but to examine the necessary effects of what they have enacted. If the primary end achieved by a form of regulation is the affirmation or promotion of religious doctrine-primary in the sense that all secular ends which it purportedly serves are derivative from, not wholly independent of, the advancement of religion — the regulation is beyond the power of the state. This was the case in *McCollum*. Or if a statute furthers both secular and religious ends by means unnecessary to the effectuation of the secular ends alone — where the same secular ends could equally be attained by means which do not have consequence for promotion of religion — the statute cannot stand. A state may not endow a church although that church might inculcate in its parishioners moral precepts deemed to make them better citizens, because the very raison *d'etre* of a church, as opposed to any other school of civilly serviceable morals, is the predication of religious doctrine. However, inasmuch as individuals are free, if they will, to build their own churches and worship in them, the State may guard its people's safety by extending fire and police protection to the churches so built. It was on the reasoning that parents are also at liberty to send their children to parochial schools which meet the reasonable educational standards of the State, *Pierce v Society of Sisters*, 258 U.S. 510, that this Court held in the *Everson* case that expenditure of public funds to assure that children attending every kind of school enjoy the relative security of busses, rather than being left to walk or hitchhike, is not an unconstitutional 'establishment,' even though such an expenditure may cause some children to go to parochial schools who would not otherwise have gone. The close decision of the Court in *Everson* serves to show what nice questions are involved in applying to particular governmental action the proposition, undeniable in the abstract, that not every regulation, some of whose practical effects may facilitate the

> observance of a religion by its adherents, affronts the requirement of church-state separation.[47]

Mr Justice Frankfurter after repeatedly stressing that in some activities public and religious interests "overlap," "interplay," and that the history of Blue Laws has made them "the vehicle of mixed and complicated aspirations," inquired as to when a benefit to religion may be allowable if there is an intermingling of religious and civic objectives. Only, he concluded, when there is no other alternative for realizing the secular goals:

> Or if the statute furthers both secular and religious ends to the effectuation of the secular ends alone — where the same secular end could equally be attained by means which do not have consequences for promotion of religion — the statute cannot stand.

This passage precedes Justice Frankfurter's concatenation of *Pierce, Everson,* with the ruling in *McGowan* and therefore invites a legitimate argument by analogy with the mixed objectives in education. It is a misconstruction to frame the problem simply as — the government cannot financially take over the entire educational facilities of the country and therefore the only alternative is for the government to assist to some extent the education of its children that attend church-sponsored schools. The simple answer to that would be — that such an alternative is possible. The problem is correctly formulated in terms of the right of the student (and of his parents) to attend a schooling of the lower and higher levels in accordance with the dictates of his conscience. There can be no feasible alternative to these church-related schools to this compounded right other than for the government to allow the teaching of religious dogma and philosophy in an all-comprehensive government system of education by tax paid teachers, not excluding the clergy This supposition would not be seriously contemplated either as a matter of American policy or of constitutional law

But the economic argument does come into play when related to the corporate proprietary rights of the church-related schools. Proponents of federal aid to education on the lower levels have argued that the exclusion of the parochial schools from sharing in government aid would place them in such a disadvantageous position in the face of enormous resources of the federal government that the educational facilities of the parochial schools might in comparison be reduced to a level of inferiority which could prove harmful in these schools. Has the government no alternate means of avoiding this alleged damage to private schools? One might push the question

47. *Id.* at 465-67.

further and ask if it is in the national interest to bring about, however indirectly, this imbalance? The root question to which we must always return is to ask of the government what precisely is the status of parochial schools (apart from their constitutional right to educate in fulfillment of state educational requirements) in the comprehensive national educational program: to ask whether in fact they can and do contribute to the national education of the country and whether government may rely upon them as well as upon state-owned schools for its educational programs.

The underlying import of the economic aspect of the Sunday Law cases is that the state would be obligated to hold in check the free play of open market competition (even on the claim of religious conscience) if in effect it would obstruct or frustrate a valid *secular* goal. Whether or not the federal government may be economically unconcerned about the educational facilities of approximately six million parochial school children and the status of eight hundred church colleges is a question that ought not to be settled out of hand without first determining their place in the scheme of the national interest.

In coming to a decision, the Congress ought first to make this frank confrontation of the crucial issue. But apart from the vast economic consideration is the evaluation of the educational process itself. Permeation means intermingled objectives — value judgments, and motives, and religious and secular aspects of the science studies. May the national legislature any more than the courts choose one mode of value-inculcation against the others? Or, may it allow any value integration which is not offensive to the communal welfare, perhaps even tributary as a spiritual force, and which preserved intact the secular aspects and functions of the educational process that the public interest requires? If the indefectibility of the secular studies is assured — and this, we must repeat may be ascertained empirically — then government aid ought not to be interdicted because of a religious consequential. The exercise of religious liberty should be no less inviolable in education and no less free of government prejudices and civil disabilities than in any other public endeavors or enterprises.

Torcaso v Watkins[48]

In *Torcaso* the right of a citizen to become a notary public without being required by law to make a public declaration of belief in God was upheld. It would have been more felicitous had the court not subsumed in a footnote, by an exercise of logical positivism, nontheistic beliefs into the meaning of religion in the First Amend-

48. 367 U.S. 982 (1963).

ment. To have preserved even in legal interpretation the traditional meaning of religion as the relation of man to a transcendental being, God, would not have precluded the right of a non-theistic (nonreligious) conscience from the protective mantle of the First Amendment religious clauses. *Torcaso* could have adequately rested its ruling on the Anglo-American tradition of law that the right to belief is a right to an internal area of absolute inviolability into which inner sanctum neither the law may inquire nor the coercive power of government force its disclosures. However, what does emerge from *Torcaso* for the purpose of our discussion is that regardless of *the faith or lack of faith* (*Everson*) what matters is that the public service of a public office (whether correspondent to the official's conscience or not) be in accord with the requirements of the duties of that office. If the conscience, religious or not, be tributary to, or at least conform with the civic virtues of public office, the law will not inquire further to ask on what theological grounds such conduct is based. The particulars of *Torcaso* mark it off by some distance from questions of federal aid to religiously integrated education. But it does suggest further reflections on the public benefit that the government expects and empirically ascertains in an educational process permeated by ultimates whether theistically grounded or not, whether Christian or not, etc. It also raises the correlative consideration whether equality of religious liberty whether theistic or nontheistic should not ensue into an equality of treatment when confronted by government benefactions. The Maryland state court in upholding the constitutional requirement had relied on the common law attitude towards atheists as a reasonable basis for excluding the appellant from the office of notary public. The state court determined that the distinction between believers and nonbelievers as a security for good conduct in office had not become so devoid of meaning that to adopt it would be arbitrary The common law statute equated the ungodly with the unworthy It was supposed, as Professor Wigmore had suggested, that the sanction of divine retribution for false swearing might add stimulus to truthfulness wherever that was possible. While it may be cynical to suggest that many good men are not deterred from perjury because of moral dictates, it seems equally unreasonable to restrict an inducement to veracity to the believer. The equation of honesty with belief must in our day give way to the more conclusive evidence of the actual performance of civic duties.

A line of reasoning on the permeation issue might be constructed from *Torcaso* in this fashion. Whether the agent of a public requirement is motivated by theistic or nontheistic belief, whether he invests his work with moral or theological virtue, *the service rendered must be judged on its own merits and by the canons properly*

applicable to that specific performance. Similarly, one may reason, whatever the spiritual permeation of an educational process — secular humanism, ethical culture, military discipline, theism, Christianity — *the educational objectives in which the state has a public interest must be measured and evaluated by tests proper to the various intellectual disciplines.* Has a student learned to spell, read multiply? Does he learn in biology and history what the state educational authorities require of every schooling? In this wise the religious permeation of an accredited schooling would not disqualify from participation in governmental programs for the improvement of education.

When the Court said in *Watson v Jones*[49] "The law knows no heresy, is committed to the establishment of no religion, the support of no dogma," it did not mean to say the public law is indifferent to heresy or dogma. The First Amendment embraces two concepts, "freedom to believe and freedom to act." (*Cantwell v Connecticut*)[50] ". In every case the power to regulate must be so exercised as not in attaining a permissible end, unduly to infringe the protected liberty" Since from the very nature of things not every public service and benefit is impervious to spiritual and religious values, public law must direct itself to the realization of its own interest whether its objectives and motives are intertwined with the objectives and motives of private interest, whether a private agency is religiously inspired or not. The public good is definable in itself and its efficacy for the public interest is not impaired — perhaps, on the contrary, enhanced — for being invested with religious insights. On this basis, a good start can be made for the substantive construction of a principle of neutrality, with prejudice to the rights of conscience of no one. Public law has indeed very much interest in the outward behavior of religious beliefs. It does not disdain to call upon the religious faiths for support of its own secular programs in time of peace and war. It has an interest in the ulterior motivation that religious life can provide for the conduct that is conducive to the harmonious peace and tranquil order of the commonwealth. In the crucial hour for the advancement of civil rights, public law looks to religious authorities and creeds to enlighten their faithful and help draw them out of those hardened and blind social prejudices which obstruct the free exercise of civil liberties and bring discord and violence to fellow citizens. If public law may turn to religious life for support of its own civic programs and for a resolution of many of its complex problems, then it ought not look askance upon an educational process which the state has accredited because it fuses the spiritual life of the students with his learning.

49. Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871).
50. Cantwell v. Connecticut, 310 U.S. 296 (1940).

We cannot departmentalize man by requirements of law and then ask him to conjoin — supposedly — his dual, concurrent lives as citizen and believer when the national benefit requires it. In a word, the law and government are not neutral and indifferent to the ethical values and religious motivations provided in an accredited schooling.

Admittedly, there are substantial points of disparity between *Torcaso* and the constitutional question of government aid to education. In the disbursement of public benefactions a sound public policy may justifiably restrict its subsidies to a limited reach. Because privately owned services in industry and commerce — such as agriculture, airlines and railroad — may require government subsidies to sustain the public service it does not follow that every other privately owned and operated public service must be equally a recipient of government subventions. The controlling consideration is the substantive national interest. And so we return to the original question which keeps recurring — whether or not religious institutions of learning are not truly educational facilities and as such are part of national education; whether these schools should share in federal programs for the advancement and improvement of their educational process because they are part of the national interest. Only in this wise will the twin clauses of the First Amendment operate to promote the freedom of the believer and the freedom of the unbeliever in the performance of a public service. To the absolutist school of interpretation, we suggest that adherence to the supposed principle that Government cannot aid religion may well discriminate against religion and impair its free exercise.

School District of Abington Township, Pennsylvania v Schempp[51]

In the light of the court ruling in *Engel v Vitale*[52] holding unconstitutional a school board's action in prescribing the daily recitation of the New York Regents' non-sectarian prayer, the findings of the Court in Schempp, concerning the laws and regulations requiring Bible reading without comment and the recitation of the Lord's Prayer at the beginning of the public school day, were almost a certainty to predict.

If a nondenominational prayer could be struck down as a violation of the nonestablishment clause, the use of the Lord's prayer, as taught by the Founder of Christianity, would be more vulnerable to the charge of unconstitutionality Bible reading posed a new question. While the court followed the finding of the trial court of a Bible reading without comment at the beginning of the school day was a religious exercise in itself and in fact was so intended

51. 374 U.S. 203 (1963).
52. 370 U.S. 421 (1962).

by the state, it admitted that the Bible could be a legitimate study and a legitimate object of study for its literary and historic qualities appropriate to the secular and civic purposes of public schools. Just as many have considered *Zorach* a judicial reaction to the absolutists strictures of *McCollum* in response to the public furor that the latter aroused, so too many have felt that both the tone and attitude of *Schempp*, while negative in its specific settlement, showed great concern for the adverse public criticism that followed upon the *Engel* decision. Mr Justice Clark's majority opinion repeats Mr Justice Douglas' proposition in *Zorach* that "we are a religious people whose institutions presuppose a Supreme Being." He underscores gratefully the profound significance of religious life in the American community and in evidence details a number of public religious exercises. The seventy-nine page concurring opinion of Mr Justice Brennan discourses about the related meanings of the religious clauses of the First Amendment, the caution in the use of historical referrals, the contemporary problematics of religious pluralism, the particularities of public schooling, the constitutional principles in appraising the historic practices of Bible reading and prayer, and, significantly, six different categories of permissible cooperation or accommodation between government and religion. The tone of *Schempp* is not characterized by the peremptoriness of *Engel*. Both the majority opinion and the concurring opinion of Mr Justice Brennan are sensitive to the public concern on the interrelationship between government and religion by reassuring that some of the traditional government practices in favor of religion are not being imperiled by the instant decision.

But *Schempp* differs from *Engel* in a more significant way than in its tone of concern and reassurance. The Court could have settled the issue in *Schempp* on a narrow meaning of the establishment clause in that the Lord's prayer favored Christians and Bible reading favored believing Jews and Christians. Instead it struck down these sectarian religious practices on the broad interpretation first defined in *Everson*, and then applied in *McCollum*, and relied on in *Engels*. Government support of any sort of religious activity in public schools is constructively an establishment of religion.

The element of coercion which was stressed in some of the opinions in *McCollum* and was apparently abandoned as a controlling factor in *Engel*, has now been succeeded by a consideration of the degree of governmental involvement even in an arrangement that rests upon voluntary participation. Mr Justice Douglas noted in *Zorach* that the "problem, like many problems in constitutional law, is one of degree," a consideration which underlay the permissibility of indirect aid to a religious school in *Everson*. In *McCollum* and *Engel*, the governmental involvement was found to be equal to

establishment of religion. What emerges from *Schempp* is a resolution to the problem of weighing the neutrality principle that has been repeatedly reaffirmed since *Everson* by the degree of government involvement and this solution is made to derive from a newly formulated principle that distinguishes between primary and secondary purposes and effects of legislative enactment. The rationale upon which *McGowan* was based is now explicitly translated to the area of education in *Schempp*.

The neutrality principle as formulated in these more precise terms is set forth by Mr Justice Clark as follows:

> The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.[53]

Mr Justice Clark prefaces this passage with the notice that in order to avert a collusion of government and religious functions or a dependency of one upon the other, it is necessary to apply "the wholesome neutrality" of preceding cases.

The neutrality which was expressed in absolutist terms — no aid in any amount or form — which was related to *Everson* to a rejection of a religious exclusionary norm — and reaffirmed in *Zorach* in terms of impartiality between believer and nonbeliever and benevolent accommodations, is now spoken of as a "wholesome neutrality" Further, the Court's opinion begins with a recital of governmental practices that undoubtedly favor religious life whose constitutionality the Court does not call into question but which at the same time seems literally to be at variance with the proposition that the legislative provision neither advances nor inhibits religion. How then may this apparent ambivalence be resolved if we are to spare the court opinion from the charge of inconsistency The Court speaks of "*the* primary effect" and of "*a* primary effect." It is one thing to say that the primary effect of a legislative enactment is secular and therefore constitutionally correct even if there are incidents of benefit to religion and another to speak of "*a* primary effect" that is secular but which does not preclude a concomitant primary effect which advances or inhibits religion. In view of the specific ruling of Schempp the second interpretation seems unwarranted. The appellants had contended that while Bible reading and the recitation of the Lord's prayer were religious in purpose and

53. *Supra* note 51, at 222.

effect a no less principal purpose and effect was the promotion of moral values designed to serve appropriate secular purposes. The Court rejected this contention and besides it was vulnerable for other reasons, namely, both religious exercises were patently sectarian in nature. It is more correct to say that the secular primary purpose must be effectuated by a secular means. The legislation's validity cannot be impugned even if there follows from its provisions an incidental consequence which either advances or inhibits religion. At its core this rationale seems to be the identical one upon which both *McGowan* and *Schempp* are based. But following upon this secular primary purpose and effect — secular means formula, Mr Justice Clark takes cognizance of practices which are undoubtedly religious and both as means employed and effect intended obviously advance religion. If the *wholesomeness* of neutrality being fashioned by the Court covers under its constitutional mantle all these instances with no evident sense of embarrassment and inconsistence, tt would be better counsel to speak of the principle of neutrality in terms of specific determination rather than in an all comprehensive doctrinaire construct to be imposed *a priori* on conflicting claims. It may be, however, that there is really less incongruity in the position of the Court than appears at first and far more basic consistency The key to the solution of these apparent ambivalences may be found in *Zorach* where Mr Justice Douglas observed that the problem is one of degree. A circumstantial fact which seems to have favored the absolutist interpretation has been that in recent years these problems have been raised under the establishment clause of the First Amendment which provided the occasion for firm and absolute affirmations against any governmental action that at least constructively added up to establishment. The earlier cases, on the contrary, were based on claims of religious liberty and in these the Court manifested no less zeal in affirming — a great latitude of freedom against a competing interest. If then we conjoin the Court's specific rulings and general propositions in favor of religious liberty of the earlier cases with those against the establishment cases, in the later cases, there does emerge a viable formula that guards with equal zeal and firm conviction the twin religion clauses of the First Amendment. What at first appeared as inconsistencies in the rationale and specific determinations of the Court were actually a diversity of positions concentrating on the protection of rights and against the dangers of establishment. The Court has upheld exemption from military service on religious and nontheistic claims of conscience in the Selective Draft and *Seeger* cases. In the *Jehovah's Witnesses* cases, the Court upheld a latitude in religious proselytizing that protected

it against the requirements of permits (*Marsh v Alabama*,[54] 1946; *Kunz v New York*,[55] 1951), against the claims of privacy and convenience of house owners (*Martin v Struthers*,[56] 1943), prohibited the imposition of a tax on the distribution of religious literature (*Murdock v Pennsylvania*,[57] 1943), and upheld proselytizing on public streets against claims based on common law and state statutory safeguards for the peace (*Cantwell v Connecticut*,[58] 1940), and has repeatedly declined to review lower court approval of the constitutionality of tax exemptions for religion.

The concept of neutrality must then comprehend within itself not only the strictures against establishment but also the affirmations in vindication of the right of religious liberty While in some instances these judicial determinations are made independently under one or other of the two religion clauses at other times they overlap and still at others they have competed with one another In these latter instances, the Court has more often than not deferred in favor of free exercise. In conjoining then the judicial determinations on claims of conscience, religious proselytizing, and tax preferment benefits under the free exercise clause to the rulings under the establishment prohibition, the neutrality which the Court has fashioned is more nearly benevolent and accommodating than one of total and absolute abstention.

But the principle of accommodation like that of neutrality is also one of degree. The Court has distinguished between three sorts of accommodation: the required, the permissive and the prohibitive. We have detailed instances of each sort. Even when the Court is engaged in weighing competing interest under the religious clauses the subordination of the establishment interdicts to the free exercises of religion is also a matter of degree beyond which the prohibition falls absolutely The accommodation of public services to the spiritual needs of a community is an exercise of legislative discretionary judgement which then in turn is regulated by a pragmatic decision of the Court in each instance. To fix upon the concept of neutrality divorced from specific Court rulings as a self-operating concept is to ignore the fact that members of the court have agreed to the same literal formula of neutrality and differed five to four in the same case or in succeeding cases. Mr Justice Brennan senses this division within the Court when in *Schempp* he lists practices of necessary and allowable accommodations by the government for religion in the very act of ruling against the state law requirement of Bible reading and the Lord's prayer in public

54. Marsh v. Alabama, 326 U.S. 501 (1946).
55. King v. New York, 340 U.S. 290 (1951).
56. Martin v. Struthers, 319 U.S. 141 (1943).
57. Murdock v. Pennsylvania, 319 U.S. 105 (1943).
58. *Supra* note 50.

schools.[59] The degree of accommodation under the free exercise clause must stop short of the strictures of establishment and the prohibitions of the establishment clause must not in effect become hostile to the rights of religious liberty

The accommodation theory is a slide rule which is guided by a pragmatic calculation of the degree of government involvement. In *Zorach* the professed neutrality is sensitive to a sort of neutrality which may border on hostility to religion. This sensibility reappears in *Schempp* in the court opinion of Mr Justice Clark and in the concurring opinion of Mr Justice Brennan. These advisory cautions on the neutrality concept are more sharply edged in Mr Justice Stewart's dissenting opinion when he states that true neutrality between believer and nonbeliever should rather find its expression in the freedom of choice to participate in religious exercises or not. Their complete exclusion by state authority would amount to "establishment of a religion of secularism, or at least, as government support of the beliefs of those who think that religious exercises should be conducted entirely in private."[60] The judicial insistence on the secular objects of a public schooling however is not to operate to the promotion of secularism. Mr Justice Stewart's dissenting opinion is all the more meaningful when projected against *Torcaso* which adumbrated nontheistic convictions together with theistic beliefs and morally grounded values and according brought both not only under the protective mantle of the free exercise of religion but also submitted each equally to the strictures of nonestablishment.

Even *Schempp* reveals that a strongly influential determinant of the decision was the degree of official involvement in the religious exercises. The specifics of the state arrangements were considered to exceed accommodation.[61] *Schempp* is more nearly in line with *McCollum* which seemed to involve the government in religious teaching to a greater degree than was ruled permissible in *Zorach*. If neutrality is hedged in by considerations of accommodation, ac-

59. These are as follows: (1) cases of conflicts between establishment and free exercise, including provision for churches and chaplains at military establishments for those in armed services and chaplains in penal institutions, (2) prayers in legislative chambers and appointment of legislative chaplains; (3) non-devotional use of the Bible in public schools, (4) uniform tax exemptions incidentally available to religious institutions (5) religious consideration in public welfare programs; (6) activities, like Sunday closing laws, which, though religious in origin, have ceased to have religious meaning. 374 U.S. 203, 294-304 (1963).

60. *Id.* at 246. So also Mr. Justice Goldberg who wrote that "untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake of a brooding and pervasive devotion to the secular as a passive or even active, hostility to the religious." *Id.* at 306. Such results "are not only not compelled by the constitution, but, it seems to me, are prohibited by it." *Id.* at 306.

61. Mr. Justice Goldberg, observed that the "pervasive religiosity and direct governmental involvement entering in the prescription of prayer and Bible-reading in the public schools, during and as part of the curricular day, involving young impressionable children whose school attendance is statutorily compelled and utilizing the prestige, power and influence of school administration, staff and authority, cannot realistically be termed simply accommodation. " 374 U.S. 203, 307 (1963).

commodation in turn is hedged in by a permissible and nonpermissible degree of governmental involvement. So considered, neutrality serves as a balancing instrument between the two religious clauses of the First Amendment which in the concrete means a weighing of competing interests toward a reasonable pragmatic determination. The absolute formula of no aid actually works to undermine strict neutrality Aid may be given provided it does not involve the government itself to a questionable degree in religious teaching and practices. *Schempp* provides a formula that is relevant to governmental relations to religious education on two grounds. The legislative power may not be exercised either to advance or inhibit religion. If this be neutrality it is better designated as a benevolent neutrality rather than a neutrality of abstention. If the government has defined certain specific educational goals whose primary purpose and effect are secular, then a "wholesome neutrality" precludes it from ruling out of its reach these same objectives as they are to be found in accredited religious schooling. The question then of the degree of governmental involvement in religious teaching and practices should not logically rise at all in the state's promotion and advancement of secular goals of education which are pursued in church-related schools. Indeed, even the concept of accommodation does not strictly enter into this primary consideration. Government may spend public money for public purposes whether in the area of social welfare, health, or education as these purposes are fulfilled by the severalty of instrumentalities, without excluding any of them on religious grounds, or because of their religious affiliation. To do so is to contravene that neutrality and impartiality repeatedly reaffirmed by the Court.

Sherbert v Werner[62]

Sherbert v Werner which was decided on the same day as *Schempp* gives strength of confirmation to our reflections.

Adell Sherbert, an adherent of the Seventh-day Adventist Church, was denied unemployment compensation under the terms of a South Carolina statute because she would not work on Saturday, the Sabbath day of her faith. The South Carolina Unemployment Compensation Act denied unemployment benefits to persons who would not accept employment that required work on Saturdays unless it be for a good cause. The statute did not specify adjectivally what would be considered a good cause. On its face, the statute did not require work on Saturday The claim of religious conscientious objection on the part of the Sabbatarian was considered by the Employment Security Commission as an insufficient personal reason

62. Sherbert v. Werner, 374 U.S. 398 (1963).

without any referral to the religious category While in intent and formulation the statute was strictly neutral in its construction, it operated in practice to favor those who were opposed to work on Sunday on religious grounds. The United States Supreme Court reversed the rulings of the South Carolina courts and held that the religious convictions of the appellant respecting a day of worship must be considered by the state in deciding whether unemployment compensation benefits should not be granted to the applicant. The opinion of the court and of concurring justices reinforces the suggestion that the neutrality of *Schempp* was greatly influenced by the degree of actual governmental involvement in religious exercises. In *Sherbert*, the deference to the free exercise of religion clause did not entail such intimate involvement and posed no real danger of establishment. While *Sherbert* calls to mind the preferred position given to religious conscience and activities in the Jehovah's Witness cases, and in the Selective Draft Law cases, *Sherbert* implies a greater latitude than these other cases. In the holding for exemptions from regulatory and tax laws, the Court was relieving religious proselytizing in those cases from a direct burden in the public conduct of the religious apostolate. In *Sherbert*, the state statute, wholly neutral and nondiscriminatory in its terms, was at most operating an indirect burden on the individual Sabbatarian and the Court ruled nonetheless that the state defer to her precisely on religious grounds. We cannot too strongly underscore the significance of *Sherbert*. The Court ruled that in the application of an authentic neutral statute, the state must in its application take into consideration the religious claim of the appellant and give it a preferred position as against the indirect burden that the statute placed on religious liberty Mr Justice Stewart who wrote a concurring opinion, and Mr Justice Harlan and Mr Justice White who dissented, thought that *Sherbert* was not distinguishable from *Braunfield* and in effect overruled it. But the Court opinion and the concurring opinions were convinced that the Sunday Closing Laws which *Braunfield* upheld operated a much less direct burden on the free exercise of religion rights and, besides, the greater dimensions of public welfare together with the complex difficulties of granting exemptions to a uniform day of rest posed problems of application not consequent to the exemption here granted to the Sabbatarian.

When we consider *Sherbert's* insistence upon the religious factor in the application of a state unemployment compensation act together with the various acknowledgements of the practical interrelationships between government and religion and its admonitions against a neutrality that may be hostile to the freedom of religious life in *Schempp* decided on the same day, it does not offend reason to say that the Court is far from committed to a strict neu-

trality concept as some of opponents of government aid to religion have argued. Mr Justice Brennan's court opinion would not allow that special preference or exemption on religious grounds was constitutive of establishment.

> plainly we are not fostering the "establishment" of the Seventh-day Adventist religion in South Carolina, for the extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall. Nor does the recognition of the appellant's right to unemployment benefits under the state statute serve to abridge any other person's religious liberties.[63]

Mr. Justice Stewart, who had dissented in *Schempp*, could not resist admonishing his brethren on the Bench against the "mechanistic concept of the Establishment Clause" which he declares to be offensive both to history and to law and warns of its dangers to the harmony of the twin religious clauses.

> For so long as the resounding but fallacious fundamentalist rhetoric of some of our Establishment Clause opinions remains on our books, to be disregarded at will as in the present case, or to be undiscriminatingly invoked as in the *Schempp* case ., so long will the possibility of consistent and perceptive decision in this most difficult and delicate area of constitutional law be impeded and impaired.[64]

The neutrality principle on which *Engel* and *Schempp* were based is to be related to the appropriate degree of abstention which should keep governmental relations with religion from being too intimately involved, so that it becomes itself, as it were, an agency of religious practice and teaching. *Sherbert* raises for our consideration the question whether or not government may deny on the basis of religious exclusionary rule financial aid proportionate to secular goals of education which are no less the objectives of church-affiliated schools as they are of other private and governmental schools. *Sherbert* may offer prospects of encouragement for an affirmative answer since it *required* the state to consider the religious factor even though in its application the statute operated no more than an indirect burden on the free exercise right as

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63. *Id.* at 409.

64. *Id.* at 416-417. Even Mr. Justice Harlan, who dissented would see no constitutional objection under the establishment clause if the state statute had provided for accommodations to religious claims. The constitutional concept of neutrality would not have suffered thereby.

contrasted with the preferred position for religious activities vindicated for the Jehovah's Witnesses who suffered a direct burden by state regulatory and taxing requirements.

On March 11, 1965, Judge O. Bowie Duckett, Associate Judge of the Fifth Judicial Circuit, gave his decision in *The Horace Mann League of the United States of America, Inc., et al v J Millard Tawes, Governor et al.* upholding the validity and constitutionality of the Maryland grants to be matched by four church-connected colleges.[65] The crux in the Court opinion was the extent of the church relationship, whether one or more of these four institutions is legally sectarian as contrasted to secular In ascertaining the measure of the extent of this relationship the opinion briefly summed up the relevant data.

Hood College is controlled by a Board of 30 Trustees of whom seven are selected by the United Church of Christ with which the college is affiliated. With the exception of the chaplain there is no requirement that any of its administrative officers or faculty members be of the same religious confession. In an enrollment of 676, the students are widely distributed among a variety of faiths. No courses are required as training for the ministry Two semester courses are mandatory in biblical studies. Hood "makes some attempt to require its students to attend approximately 14 Wednesday evening services in the Chapel and seven Sunday evening services also in the Chapel per semester" Hood receives approximately $45,000 annually from the United Church of Christ for operational services and a number of government grants from the National Science Foundation, the Atomic Energy Commission and other public agencies.

Western Maryland College is associated with the Methodist Church. There is no religious test for the admission of any student, teacher or officials. One more than one-third of 40 Trustees are required to be Methodist ministers. No courses are given specifically for training in the ministry Studies in biblical literature are mandatory and a certain percentage of chapel services must be attended. The Methodist Church annually contributes $40,000 toward the operational costs of the college. All its Presidents have been Methodists. In a faculty of 76, 64 are Protestant, five Catholic, one Jewish, one Mohammed and five unaffiliated. In a student enrollment of 755, there is a distribution of religious con-

65. Chap. 546, Acts of 1963 granted $500,000 to West Maryland College toward the construction of a science wing and dining hall. Chap. 545, Acts of 1963 granted to St. Joseph's College $750,000 toward the construction of a science building. Chap. 88, Acts of 1962 granted $500,000 to Hood College toward the construction of a dormitory and classroom building. Chap. 66, Acts of 1962 granted $750,000 to the College of Notre Dame of Maryland toward the construction of a science building. Each act provided that the recipient would privately obtain elsewhere an equal and matching sum for the aforesaid buildings.

fession. Children of Methodist Ministers receive a 50 per cent reduction in tuition. Students must attend at least five of 10 required chapel services and studies in biblical literature is mandatory

The College of Notre Dame of Maryland was originally organized by the School Sisters of Notre Dame, a religious community of the Roman Catholic Church. Of the seven on the Board of Directors, five are required to be Sisters of Notre Dame. No religious affiliation is required for the admission of students but approximately 98 per cent of them are Roman Catholic. Of a faculty of 85, 44 are members of religious orders and of the 41 lay teachers eight are Non-Catholic. They are required courses in philosophy and theology

St. Joseph's College was founded by Mother Seton in 1809. In 1902 the College was empowered by the State of Maryland to confer degrees for liberal arts and sciences and nursing. While the Board of Trustees may include two laymen, it is customarily composed of the Sisters. Of the 13 administrative officers all are Catholic, 10 of them religious and three lay Thirty-seven of the 72 teachers belong to religious orders and of the 35 lay teachers eight are non-Catholic. Over 98 per cent of the students are Catholic. Non-Catholics are not required to attend religious courses nor religious services.

Mr Justice Bowie ruled that the Horace-Mann League has no standing to sue because as a non-profit corporation it pays no taxes and does not suffer any other injured interest.[66] However, he found that individual taxpayers who have brought suit not only in their own name but also on behalf of all other taxpayers of the State do have sufficient standing to sue. The Plaintiffs in question are real and personal property taxpayers and therefore have a special interest in the appropriations, different from that of the general public and even from other classes of taxpayers. To this must be added the acknowledgement that the question at issue is of such importance and urgency that it is ripe for decision.

On the "subordinate question" does the Maryland Constitution forbid grants of public money to church connected institutions, Justice Bowie relied on the repeated decisions of the Court of Appeals, Maryland's highest court, that little or no distinction intervenes between a sectarian or secular institution receiving an appropriation, provided the money is used to perform a public service as, for example, health, education, and general welfare of the citizens of the state.[67]

66. Besides, Justice Bowie felt bound to abide by the ruling of Sun Cab Co. v. Cloud, 162 Md. 419, 159 A. 132 (1932), which the Maryland Court of Appeals, its highest court, had only the year before cited with acceptance. Citizens Committee v. County Comm., 233 Md. 398 (1964).

67. Article 36 of the Maryland Declaration of Rights provides, in part. " nor ought any person be compelled to maintain, or contribute to maintain any place

Addressing himself to the main question, does the First Amendment to the United States Constitution prohibit these grants to church connected colleges, Justice Bowie applies Mr Justice Clark's test in *Schempp*—a secular legislative purpose and a primary effect that neither advances nor inhibits religion. As to the legislative purpose, he observes that the Maryland legislature[68] was in no way concerned with religion in making the appropriation because the language of the Acts themselves show that the grants were intended for science buildings, dormitories, dining halls, and classroom buildings, all of a secular nature. To the more difficult question, is the primary effect of one or more of the enactments to advance religion, he notes that the appropriations are for the construction of secular college buildings in no way connected with religion, that there is no training for the ministry at any of these four colleges, that there is no religious test for faculty members nor for the admission of students. Noting that there are some requirements for the study of religion and attendance at religious services for students of the same religious confession as the college and a greater distribution of religious professions at Hood and Western Maryland than at the two Catholic colleges, he said that if an adult chooses an institution where religious instruction is mandatory, he is merely asserting his constitutional right to the freedom of religion.

Justice Bowie takes cognizance of five factors[69] advanced by the complainants and admits that they do take the measure of the extent of the relationship of the institutions of learning with religion. But this, he points out is a foregone conclusion since, to begin with, the litigation is about church connected colleges. The "real issue" he emphasizes, is whether the primary effect of providing the means for the construction of secular buildings at these institutions advances religion. He concludes that the stated purpose

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of worship, of any ministry · " Justice Bowie quotes the Court of Appeals in St. Mary's Industrial School v. Brown, 45 Md. 310, 336 "The fact that the institution may be under denominational or religious control, can in no manner affect their qualification for assuming such relation to the City, or for the full and faithful discharge of the duties that they may contract to perform. Charity, to say the least of the matter, is quite as likely to be fully and faithfully administered under such auspices as it could be under any other. It could, therefore, be no objection that the institutions are or may be under the control and influence of those belonging to any particular church or denomination." *Cf* Finan v. M. & O.O. of Cumberland, 154 Md. 563, 141 A. 269 (1928), in which the Court of Appeals upheld the validity of a municipal appropriation in aid of the construction of a hospital operated by a group of Roman Catholic Nuns. See also, Board of Education v Wheat, 174 Md. 314, 199 A. 628 (1934).

68. Justice Bowie also noted that the Maryland legislature for the past 175 years has made similar grants to private colleges and universities including many denominational institutions. In holding fast to the concept of neutrality first formulated in *Everson*, Justice Bowie notes by citing a long litany of federal governmental programs that this neutrality has not been an absolute neutrality but one which has been as sensitive against taking a hostile stance against religion as it has against indifference to the establishment clause.

69. (1) stated purpose of the college, (2) college personnel (3) college's relation to religious organization, (4) place of religion in the college program (5) the result and outcome of the college program.

and formal pronouncements in the college catalogues, especially of the two Catholic colleges, which declare the centrality of theology and philosophy in their educational process does not annul the actual achievements of these institutions in the secular studies for non-Catholic as well as for Catholic students.

> The buildings sought to be constructed are for secular purposes and the testimony in this case clearly establishes that the secular courses, such as science, English and mathematics, taught in these Institutions are practically identical with the courses at non-religious colleges.
>
> non-Catholic students and faculty are freely admitted to both institutions, and no attempt is made to convert non-Catholic students and faculty or to interfere with the free exercise of their religion. *If we distinguish between church related colleges on the basis of the degree of their relationship to a particular denomination, we would discriminate between different religions which is likewise prohibited by the First Amendment.* (Italics supplied)

Justice Bowie concluded by identifying the providential motive behind the secular legislative purpose and primary effect of the enactment.

> Most of us know that the Government maintains Military, Naval and Air Academies, but that it lacks a science academy All of our scientists, therefore, must come from the public and private institutions of higher learning. According to the testimony of this case there are a total of approximately 1189 private institutions of higher learning in the United States and of this total, 817 are church related. Our source for obtaining scientists would be very limited if confined to the small number of non-religious institutions. It would therefore seem to me that the scientific education of college students is most vital to our public safety and welfare, perhaps more so than training juveniles at St. Mary's Industrial School even though it did produce Babe Ruth.[70]

Justice Bowie upheld the state of Maryland's appropriations as valid and constitutional.

There are a number of reflections I wish to note on Justice Bowie's ruling. In determining the constitutionality of financial assistance to church-affiliated schools we must identify the "real issue." The direct purpose to which these appropriations are applied must be such as are within the rights and duties of the legislative power to provide for—security of state, general welfare, etc. The fulfillment of these purposes are not vitiated, deflected, or renderd

70. The Plaintiffs conceded that public grants to religious institutions, such as hospitals, orphan asylums and other non-educational institutions are valid when affecting health, safety and welfare of our citizens.

less acceptable to state authority because they are realized through agencies that are motivated by religious convictions. Nor are they less competently taught nor less efficient in the end result because of the philosophy of education which correlates all the various disciplines of learning to a religious source. The actual achievement can be empirically ascertained. The degree then of involvement of religious persons in the governance of the educational institution is not relevant to the constitutional determination no more than its avowed philosophy of education. The real issue is whether the legislative secular purpose and primary effect is fulfilled. The primary effect of providing the means for the construction of secular buildings at these institutions is not to advance religion. Unquestionably, such an assistance for secular goals in a church-related college is an advantage to the educational institution but only because its students are obtaining at these institutions these secular studies that they would otherwise have to seek elsewhere. Whoever raises the question that such aid "advances religion" as a legitimate consideration must also raise the correlative question whether its denial because of the institution's religious affiliation does not constitute an inhibition of religion. In all court rulings the phrase "neither advances" is always coupled with "nor inhibits religion." Only in such wise can we strive for that "wholesome neutrality" that Justice Clark wrote of in *Schempp* and for the impartiality—"because of faith or lack of faith"—which Justice Black set down in *Everson*.

It is high time that there be openly admitted on all sides that the educational process is preeminently a spiritual process and that the law does not prescribe what that spiritual integration be—theistic, non-theistic, Catholic, Christian, Hebraic, Ethical-Culture, etc. The real issue is whether the philosophy of education professed in any way diminishes the content and methodology of the secular subjects taught at these church-connected institutions. We have already pointed to a very broad and highly significant fact that the academy itself does not discriminate between the state, private, and religious schools in their mutual acceptance of students and graduates. If law be concerned with the realities of national education, how then may the law not admit the same evidences of academic achievement?

Church-related colleges are essentially educational institutions, not religious enterprises, and they can contribute to the state's interest in educational accomplishment. The religious piety which these religious colleges may actively foster by their environment, courses in theology, and attendance at chapel services is never considered by them as a substitute for competence in learning. Those who fail their examinations are not the less pious and those

who do pass are not necessarily numbered among the saints. The avowed aims that appear in their college catalogues to integrate the collection of the various disciplines of learning into an integrated whole is ostensibly to invest the whole educational process with moral values and religious motivations for the benefit of the student and of the community in which he will live. This religious investiture is intended to keep science and its achievements preeminently *human*, that is, subject to moral judgment and evaluation, to couple freedom with responsibility, and to ordain through human effort the stark realism of arbitrary human conduct to the ideals that elevate by faith, hope and charity It is surely not an unwarranted usurpation much less a legal prohibition that educators teach the meaning of life and the destiny of man as a salutary accompaniment to immediate secular pursuits. It is the answer to Tertullian's question "What has Athens to do with Jerusalem?"

The church affiliated schools enjoy the singular advantage of providing instruction on the relations between man and God, the want of which constituted for Jefferson a "chasm in a general institution of the useful sciences." It is for this reason that Jefferson in his education plans for the state of Virginia entrusted this responsibility "to each society of instruction in its own doctrine" and extended facilities to them on the grounds of the state university or adjacent to it.[71] It is facile but misleading construction to translate the constitutional neutrality between believer and nonbeliever into a neutral educational process. The first is a legal act; the second is a myth. If the educational process is to be adumbrated within constitutional neutrality, then the correct formula is that the constitution is neutral on value judgments that invest all educational processes with the reasonable and necessary reservation that the general welfare is not harmed thereby Indeed, it will be found that there are a diversity of value-judgment systems that are contributory to the commonwealth.

The plaintiffs appealed the ruling of the lower court and the Court of Appeals of Maryland[72] by a 4 to 3 vote reversed in part by upholding the constitutionality of the matching grants for Hood but denying them to the other three colleges. The ruling of the court revolved on the contention of the appellants that while some degree of relationship to church or religion may exist in an educational institution without rendering it "sectarian," a relationship which is "substantial" renders the institution sectarian and thereby constitutionally ineligible to receive public funds. The appellees, on the contrary, held that the degree of relationship to religion, how-

71. COSTANZO, THIS NATION UNDER GOD 170-76 (1964).

72. Horace Mann League of the United States of America, Inc. v. Board of Public Works of Maryland, 242 Md. 645, 220 A.2d 51 (Ct. App. 1966).

ever substantial, does not render that educational institution legally ineligible to receive grants for educational purposes. For the lower and higher court there seems to have been two different "real issues." The Court of Appeals did not consider whether the buildings to be constructed were for secular purposes and whether secular courses "such as science, English and mathematics, taught at these institutions are practically identical with the courses at nonreligious colleges." It chose rather to apply the five standards that the plaintiffs had proposed in ascertaining the degree of connection of the college with religion and by this calculation determining whether each college was truly an educational institution or a sectarian institution and *as such* disqualified under the nonestablishment clause of receiving governmental assistance in its educational programs identical with the interest of the state. By inserting this dichotomous leverage between the "objective" nature of the subject studies and services and the religious affiliation and government of the school, it disengaged the educational instrumentality and facility from its educational achievements.

Prefatory to these considerations, the Court of Appeals has an "extended" lengthy disquisition on the "historical background of the First Amendment" beginning with Pliny's letter to the Roman Emperor Trajan in 112 A.D., no less! One would have hoped by this time that the American gradual disengagement from ancient animosities and historical complexities would warrant that the American community can now fashion its own history of state-religion relationships as a unique experiment in "wholesome neutrality," of accommodation and impartiality, ever sensitive to encroachments upon religious liberty and prejudicial establishments whether on theistic or nontheistic grounds. The usefulness of historical reference should not be marred by an implied sense of historical determinism and a Hegelian logism that works out inevitably to foreordained consequences. Governmental grants to specific educational goals defined in terms of the public interest in no way diminishes the mutual independence of the state or of the religious institution nor confer upon the public authority religious functions nor upon the religious institution any political power The Court is completely silent about the mutual exchange of students by state, private, and church-connected schools on all levels during a school term or upon graduation. Nor is there any awareness of the eligibility, without discrimination, of students for scholarships and fellowships from public and private sources. The "real issue" is deflected in the application of the five factors plus one which measure the degree of school-church connection. (1) the stated purposes of the college; (2) the college personnel, which includes the governing board, the administrative officers, the faculty, and the student body; (3) the

college's relationship with religious organizations and groups; (4) the place of religion in the college program; (5) the result or "outcome" of the college program; such as accreditation and the nature and character of the activities of the alumni; and (6) the work or image of the college in the community After applying these criteria to each of the colleges, the Court concluded that three of the colleges may not constitutionally receive the state grants. Hood College was adjudged not to be "sectarian in a legal sense under the First Amendment, or to a degree that renders the grant invalid thereunder " Further, the Court did admit that the Maryland state statute making available public funds to a private institution for a public purpose was not violative of any of the controlling articles of the Maryland state constitution, namely, Articles 23, 15 and 36.

In corroboration, the Court then quotes at length from the dissenting opinion of Judge Parke in *Board of Education v Wheat*[73] which in its literal expression would seem to uphold the constitutionality of such state grants to all four the colleges. This is in fact what the dissenting opinion of the three justices pointed out, in repeating the very same quotation:

> Neither the payment of money by the State to a private person, whether corporate or otherwise, not the nature and occupation of that person, is determinative of the purpose of the payment. Thus the appropriations by the General Assembly of public funds are customarily made and paid to various bodies and institutions through the state, which are privately owned and managed, and which are, in many instances, of sectarian origin and character It will be found, upon examination, that this employment of public moneys has been sanctioned by the decision of this court. If an incidental or direct benefit result to the recipient, this resultant advantage becomes immaterial and negligible because of the paramount public and essential nature of the service rendered and out of the further factor that the State has either not undertaken or not fully assumed the performance of the public service or function involved. (citation) *The validity of such grants, when so limited, is not affected by any sectarian circumstance.* (citation) Thus, *grants to educational institutions* which supply instruction and training in learning and mechanical, industrial, agricultural and other arts, of which the State does not offer or undertake to afford universal service, are freely made without reference to whether the recipient be denominational or otherwise. (citation of Maryland cases and legislative grants) Similarly, the grants in aid of the hospitalization of patients for care and treatment in sickness, injury and disease (citation) for chronic alcoholism, (citation) for homes for the aged and infirm, for orphans, for children, for the blind, for crippled children, for reformatories and for other purposes

73. Board of Education v. Wheat, 174 Md. 314, 199 Atl. 628 (1934).

> which are within the functions of the State as conducive to the welfare of its inhabitants, and pursuant to the mandate of the Declaration of Rights: "That the Legislature ought to encourage the diffusion of knowledge and virtue, the extension of a judicious system of general education, the promotion of literature, the arts, sciences, agriculture, commerce and manufactures, and, the general amelioration of the condition of the people." Article 43.
>
> In these grants the State advisedly *makes no distinction between denominational and non-denominational institutions*, nor has it limited its appropriations to race or color The grants so made for special public purposes find at once their justification and vindication in the promotion of the general welfare in those matters of public concern in respect of which the government had not theretofore undertaken completely to perform. In short although paid to a private person, the money is appropriated and expended for a public use.[74] (Emphasis added.)

Both the majority and the minority opinion quote Justice Parke but what makes the majority's use of this passage so intriguing is that the italicized words and lines are supplied by the majority and not by the minority And the italicized sections are the very portions of the passage that would have warranted on the part of the majority a contrary decision, an affirmative one for all of the four colleges.

The dissentiong opinion of Justice Hammond, in which Justice Horney and Justice Marbury concurred, pointed to the historical record of the state of Maryland which has for over a hundred and eighty years followed a general, systematic and non-discriminatory pattern of financial assistance to private institutions furnishing a higher secular education. These grants, the minority opinion stressed, were under both Maryland law and federal constitutional standards for a public use and purpose. It quoted, as we have already indicated, the same passage from Justice Parke which literally would warrant rather than interdict them as constitutionally permissible provisions. It turned to *Everson* for its major premise: "It is much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose." While the provision for free bus transportation to a parochial school is in itself a safety welfare measure properly within the exercises of state police power, the Court had linked that secular means of travel to an educational process which is religiously orientated and called it a means to a secular education on the implied grounds that the parochial schooling was effectively fulfilling the secular requirements. Translating this valid in-

74. *Id.* at 637.

terpretation to the case at hand, the minority opinion made its application with convincing evidence:

> the four donee colleges here involved all furnish a secular liberal arts education comparable to that furnished by other first rank liberal arts colleges in the United States and are accredited by standard accrediting agencies. The courses taught in the four donee colleges are taught in substantially the same manner as at other similar colleges, for example, Johns Hopkins or Goucher, adn are not used as vehicles for religious indoctrination; the text books are chosen by individual teachers for their merit in supplying knowledge of the course and are not chosen for their religious orientation or because of the religion of the author and, in most instances, are the same texts that are used at other public and private colleges. No doctrine, dogma or other teaching of any church enters into or interferes with the teaching of the secular subjects that are taught. Graduates of the four doneee colleges go on to take graduate studies and obtain the degrees on an individual basis with graduates of other public and private colleges at universities offering the best post graduate courses, such as Johns Hopkins and Columiba. There are no religious requirements, oral or written, for admission of students to the donee colleges and, finally, the buildings to be erected with the funds granted will be places which will furnish the secular training offered by the colleges and not used for religious ceremonies or instruction.[75]

If law should be attendant to the meaning of facts, should it disregard the universal experience among all colleges and universities of America whose students may transfer from one to another public, private, and church-connected college,—before the completion of an educational process after graduation? The minority opinion then describes the vast national need that private colleges have helped to fulfill and what a large percentage of these the church-connected colleges constitute. And in testimony of this broad fact, more than two billion dollars from the federal government is currently going to private colleges for research contracts, loans, and outright grants without prejudice to their religious affiliation.

Justice Hammond reviewed the preceding Supreme Court decision and finds in Justice Clark's test enunciated in *Schempp* a summary focus of the guidlines by which we are to evaluate what aids are not constitutive of establishment—a secular means to a public purpose which is primary in intent and effect of the legislative provision.

There is, lastly, the argument on alternate means from *McGowan*

75. Horace Mann League of the United States of America, Inc. v. Board of Public Works of Maryland, *supra* note 72, at 78.

The minority opinion quotes from a Note in the *Harvard Law Review*:[76]

> To exclude these 800 institutions of higher learning from federal aid would seriously hamper the effort to increase enrollment capacity to the point where colleges will be able to handle the expected demand of 1970 and distort the present educational allocation of students between denominational and nondenominational school s. Such pragmatic considerations would be irrelevant if the command of the Constitution were clear; the remedy would then be a constitutional amendment. However, the lack of an effective alternative should be highly relevant when a plausible constitutional defense can be made and where, in an area of church-state overlap, criteria can be formulated which minimize governmental intrusion into religious concerns without paralyzing governmental attempts to cope with urgent national problems.

On the question of constitutionality, the author, at pp. 1356-57 says:

> On the other hand, the opinions of Justice Clark and Brennan in *Schempp* indicate that federal aid to education would be considered constitutional. For example, Justice Clark enunciated the test of constitutionality to be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. Similarly Justice Brennan would draw the line at legislation employing the organs of government for essentially religious purposes or using essentially religious means to serve governmental ends where secular means would suffice. Under either test, the act would appear to be free from constitutional flaws.[77]

PROSPECTUS

On November 14, 1966 the United States Supreme Court declined to review[78] the Court of Appeals decision and that in effect left the court's rule controlling in the State of Maryland. Opponents of federal grants to church colleges have been unable to obtain a court test because of the Supreme Court's rule announced in 1923 in the case of *Massachusetts v Mellon*.[79] This ruling held that federal taxpayers lacked standing to challenge, in court, expenditures

76. *Constitutionality of Federal Aid to Church Related Colleges*, 77 HARV. L. REV. 1353, 1358 (1964).

77. Horace Mann League of the United States of America, Inc. v. Board of Public Works of Maryland, *supra* note 72, at 81.

78. Horace Mann League of the United States of America, Inc. v. Board of Public Works of Maryland, 242 Md. 314, 220 A.2d 51 (Ct. App. 1966), *cert. denied*, 385 U.S. 97 (1966). The Court also refused to review the decision informing Hood College of the request of the Horace Mann League.

79. Massachusetts v. Mellon, 262 U.S. 447 (1923).

of United States funds. In the Maryland courts, however, state taxpayers were allowed to contest state grants. The Higher Education Facilities Act has authorized federal grants for construction of certain types of buildings at church-related colleges. One can only speculate why the United States Supreme Court refused to hear the Maryland case. It may be because it involved only Maryland law The federal government was not a party to the litigation in any way According to the federal program of assistance to higher and lower levels of education, grants may be made to private and church-related colleges to help finance institutes under the National Defense Education Act and to such schools under the developing college program. It is a fair conjecture that the federal programs involved in these assistances and financial subventions add up to $1.6 billion dollars to private colleges and a $1 billion dollar plan for aid to elementary and secondary education. In the expectation that someday the United States Supreme Court will agree to review this momentous question on governmental aid to church-connected schools, whether of the higher or lower level, we here submit certain criteria derived from preceding court decisions in the light of which we may conjecture the ultimate determination of this controversial issue.

First, both government and religious communities have concurrent interests and functions in many areas of general welfare, including education. Second, the identity of goals, the competence and efficiency of the religious educational instrumentalities may be tested and ascertained empirically Third, the public law should take cognizance of the broad and long-standing experience of the academy itself which gives witness to the identity of secular goals realized in the diversity of publicly accredited schools by the mutual exchange of students during a school term and after graduation. To this too must be added the government confirmed belief in the competence of state, private and church-connected schools to fulfill its goals by granting to the diversity of the schools without any discrimination on basis of religion those grants and research contracts. Fourth, an unreal objection often arises to distract from concentrating on the real issue, the secular services and studies of the church-connected schools. It is said that such aids benefit the institution itself. Undoubtedly! Negatively considered, deny all governmental assistance to these church colleges and universities and extend them only to state and private secular institutions and the series of consequences to their disadvantage may be easily conjectured. Positively considered, extend these benefactions to these religious institutions in the government's own interest and that of its citizens, and the consequent benefit to the enrollment, to students, and the faculty can scarcely be denied. The objection is unreal because it blinds itself to the nature and operation of

almost all human acts and conduct, whether private or public. Fifth, there is more often than not multiple effects rather than singleness of outcome. Nor can one constrain all efficiency to a predetermined end. There is generally an overflow of consequences. Good and evil, private or governmental, are diffusive of themselves. If the legislative secular purpose and primary effect is realized through an agency that admits to a religious confession then one would suppose all the better for it. To insert a religious exclusionary rule because of an overflow of benefits offends civility no less than common sense. Sixth, *Everson* denied that such a religious exclusionary rule may interject between the recipients of a governmental assistance directed to secular education in church-schools. Whoever than invokes the phrase "neither advances religion" must give in its complementary entirety the Supreme Court's own proposition, "that neither advances nor inhibits religion." Only in this wise will it be possible to achieve the delicate balance of preserving on the one hand religious liberty in education and on the other forbid what constitutes establishment. Seventh, the neutrality between believers, on the one hand, and between believers and non-believers on the other, affirmed in *Torcaso,* will be absolute, showing favoritism neither to one nor the other by weighting government power, influence, and prestige on the side of one educational process. The "wholesome neutrality" of which Mr Justice Clark spoke of in *Schempp,* will be regulated by identifying the governmental interest whereseoever it is done with no prejudice to the exercise of religious liberty in education. Eighth, in the use of historical precedents on the union of church and state, of Altar and Throne, of state church establishments with all their incidents of civil disabilities and oppression to dictates of conscience, we counsel caution against an implied sense of historical determinism and a species of Hegelian *a priori* ergotisms. The American community and its political and legal institutions have gradually disengaged themselves from the social-political-religious inheritance of their European forebears. They have a right as well as the awesome responsibility of fashioning their own church-state relations without evoking ancient fears and animosities. There is discernible an "American way" of doing things and it is this unique pragmatic American approach and not the dead heavy hand of the past that should guide our decisions. In conclusion, we suggest that in order to dispel the incubus of the logic of past events and to affirm our own freedom of force and action, the time has come for the United States Congress to make a full and complete evaluation of the church schools and ascertain to its own satisfaction whether or not they may participate as authentic educational facilities in the goals of national education and whether they are beneficial to our democratic institutions.

We are convinced that properly defined relationships of mutual cooperation where there is an identity of goals, a concurrence of functions and of interests, is a proper implementation of the unique American experiment in the separation of church and state. And we are firmly convinced that by these arrangements both church and state will remain free and unhampered by each other in the performance of their divinely-ordained and constitutional functions.