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CONSTITUTIONAL LAW-ESTABLISHMENT OF RELIGION, DUE PROCESS, AND EQUAL PROTECTION-PUBLIC AID TO PAROCHIAL SCHOOLS

P. F. Westbrook, Jr. S.Ed.
University of Michigan Law School

COMMENTS

CONSTITUTIONAL LAW—ESTABLISHMENT OF RELIGION, DUE PROCESS, AND EQUAL PROTECTION—PUBLIC AID TO PAROCHIAL SCHOOLS—That part of the First Amendment to the Constitution of the United States which concerns religion places two restraints upon the federal legislative power.[1] Congress is enjoined from making any law (1) "respecting an establishment of religion" or (2) "prohibiting the free exercise thereof." Jefferson, always in the vanguard of the movement for religious and civil liberty, characterized these twin restraints

[1] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U. S. Const., Amendments, Art. I.

as "building a wall of separation between Church and State."[2] That wall is reinforced under our federal system by restraints placed on the legislatures of the states by the vast majority of state constitutions.[3] More recently, the First Amendment having been made applicable to state action by virtue of the Fourteenth Amendment, the Supreme Court has stated broadly that the religious prohibitions of the First Amendment apply with the same force and effect to state statutes as to federal statutes.[4]

While the two restraints of the federal Constitution are woven together in the history of religious freedom in the American Colonies,[5] their history after their adoption as part of the Bill of Rights has diverged.[6] The protection of the guarantee of the free exercise of religion was sought unsuccessfully by the Mormons in an effort to obtain immunity for the practice of polygamy.[7] Later, it was decided that compulsory military training and service did not abridge the free exer-

[2] Reynolds v. United States, 98 U.S. 145 at 164 (1878).

[3] State constitutional provisions take two forms, both frequently appearing in the same constitution. The first is roughly similar to the federal religious clause. The second has specific reference to the use of public funds to support religious education. KINDRED, PUBLIC FUNDS FOR PRIVATE AND PAROCHIAL SCHOOLS: A LEGAL STUDY (Unpublished thesis in University of Michigan Library, 1938); 50 YALE L. J. 917 (1941). See, also, Part A, 2 of the text below for a further discussion of state constitutional provisions.

[4] Prior to the adoption of the Fourteenth Amendment, the religious clause of the First Amendment did not, of course, apply to state action. Permoli v. New Orleans, 3 How. (44 U.S.) 589 (1845). That the due process clause of the Fourteenth Amendment protected from state action some of the religious freedom guaranteed by the First Amendment was conceded in Hamilton v. Regents, 293 U.S. 245, 55 S. Ct. 197 (1934). And in Cantwell v. Connecticut, 310 U.S. 296 at 303, 60 S. Ct. 900 (1940), Justice Roberts, speaking for a unanimous court, stated, "The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws." Cf. Murdock v. Pennsylvania, 319 U.S. 105, 63 S. Ct. 870 (1943). See Part B, 2 of the text, infra.

[5] An excellent brief summary of the development of the concept of separation of church and state is found in Deutsch, "Freedom of Religion in American Constitutional Philosophy," 28 GEO. L. J. 487 (1940). See also note 62, infra.

[6] For present purposes, we may put aside two early cases involving church lands, Terrett v. Taylor, 9 Cranch (13 U.S.) 43 (1815) and Town of Pawlet v. Clark, 9 Cranch (13 U.S.) 292 (1815), for these decisions pointed to the First Amendment only as establishing complete separation between church and state and did not undertake further interpretation of the Constitutional language. See also, Watson v. Jones, 13 Wall. (80 U.S.) 679 (1871); Mormon Church v. United States, 136 U.S. 1, 10 S. Ct. 792 (1890); and Ponce v. Roman Catholic Apostolic Church, 210 U.S. 296, 28 S. Ct. 737 (1908), all three of which were concerned with the same general problem.

[7] Reynolds v. United States, 98 U.S. 145 (1878); Davis v. Beason, 133 U.S. 333, 10 S. Ct. 299 (1890).

cise of religion.[8] However, by far the most important cases have been those involving the Jehovah's Witnesses; in a series of decisions, beginning in 1938, the Supreme Court has accorded a large degree of protection to their evangelistic religious activity, frequently invoking freedom of speech, of assembly, and of the press as well as freedom of religion.[9] Although it cannot be said that the outer limits of the protection afforded the free exercise of religion are now completely defined, it is clear that the guarantee creates a substantial immunity of individual and group religious activity from both state and federal interference.

The "establishment of religion" clause of the First Amendment has received far less attention from the Supreme Court. Once in 1899 and again in 1908, the clause was before the Court for interpretation.[10] However, it was not discussed by the present Court until the case of *Everson v. Board of Education of the Township of Ewing* was decided in February, 1947.[11] This was substantially the same Court which has given broad meaning to the injunction against restraints on the free exercise of religion; yet the Court, in a five to four decision, sustained an ordinance which, in the words of the majority, "approached the verge of a state's constitutional power."[12] That decision is the immediate occasion for this comment, for with it the prohibition against an establishment of religion by law bids fair to become a new frontier of constitutional law.

The facts of the *Everson* case are these: A New Jersey statute authorized district boards of education to make contracts for the transportation to and from school of children living at a remote distance from any school, including children attending other than public schools except schools operated for profit in whole or in part. Pursuant to this

[8] Hamilton v. Regents, 293 U.S. 245, 55 S. Ct. 197 (1934); Selective Draft Law Cases, 245 U.S. 366, 38 S. Ct. 159 (1918).

[9] Lovell v. Griffin, 303 U.S. 444, 58 S. Ct. 666 (1938), and Schneider v. Irvington, 308 U.S. 147, 60 S. Ct. 146 (1939), the first two cases in the series, involved only freedom of speech, and of the press. The third, Cantwell v. Connecticut, 310 U.S. 296, 60 S. Ct. 900 (1940), was the first to base the decision on the ground of the free exercise of religion. Numerous Jehovah's Witnesses cases have followed; a recent summary may be found in Howertown, "Jehovah's Witnesses and the Federal Constitution," 17 Miss. L. J. 347 (1946). For a more critical analysis see Summers, "The Sources and Limits of Religious Freedom," 41 Ill. L. Rev. 53 (1946).

[10] Bradfield v. Roberts, 175 U.S. 291, 20 S.Ct. 121 (1899); Reuben Quick Bear v. Leupp, 210 U.S. 50, 28 S. Ct. 690 (1908). The case of Cochran v. Louisiana State Board of Education, 281 U.S. 370, 50 S. Ct. 335 (1930), which is sometimes cited as pertinent authority [e.g., 22 Notre Dame Lawyer 192 at 196 (1947)], was not relevant to this question. All three of these cases are discussed in detail in Part A, 1 of the text, infra.

[11] (U.S. 1947) 67 S. Ct. 504.

[12] Id. at 512.

authority, the Board of Education of the Township of Ewing passed a resolution providing for the reimbursement of parents for transportation of children attending designated public and Catholic parochial schools. Under the resolution, reimbursement was made for the transportation of twenty-one parochial school children, five of whom attended parochial elementary schools some distance from their homes although public elementary school facilities were available to them in the Township of Ewing. Everson, a taxpayer of the township, obtained review of the resolution in the Supreme Court of New Jersey under a writ of certiorari. The Supreme Court adjudged the resolution in violation of the state constitutional provision forbidding expenditures from the school fund except in support of public free schools.[13] Upon appeal, the New Jersey Court of Errors and Appeals reversed, holding that neither the statute nor the resolution were in violation of the state constitution or the federal Constitution.[14] Everson took an appeal to the United States Supreme Court, where the judgment of the Court of Errors and Appeals was affirmed and the statute and resolution sustained against the argument that they were in violation of the First and Fourteenth Amendments of the federal Constitution.[15]

On first impression, the decision of the Supreme Court in the *Everson* case is unlikely to arouse misgivings. Many may well echo Justice Jackson's comment in his dissenting opinion: "I have a sympathy, though it is not ideological, with Catholic citizens who are compelled by law to pay taxes for public schools, and also feel constrained by conscience and discipline to support other schools for their own children. Such relief to them as this case involves is not in itself a serious burden to taxpayers and I had assumed it to be as little serious in principle."[16] But as the division within the Court suggests, the decision should not be lightly dismissed.

Education has long ranked high as an instrument of organized religion. A purely secular education for Catholic children is contrary to the Canon Law of the Roman Catholic Church.[17] Accordingly, the Catholic Church has established elementary and secondary schools wherever possible.[18] Nor is the Catholic Church alone in this concern; other religious groups, notably the Lutherans and Episcopalians, have established parochial elementary and secondary school systems.[19] Vir-

[13] 132 N.J.L. 98, 39 A. (2d) 75 (1944).
[14] 133 N.J.L. 350, 44 A. (2d) 333 (1945).
[15] (U.S. 1947) 67 S. Ct. 504.
[16] Id. at 513.
[17] Id. at 514-15.
[18] The Catholic point of view is well stated by Johnson, "The Catholic Schools in America," 165 ATLANTIC MONTHLY 500 (1940).
[19] See 50 YALE L. J. 917 at note 10 (1941).

tually all denominations maintain educational institutions at the college and university level.[20]

These parochial schools and colleges occupy a status in the United States which differs markedly from that accorded them in most other nations. Other national policies range from outright support to suppression of parochial schools.[21] In the United States, diversification of religious belief and traditional regard for religious freedom have combined to make public education secular in character.[22] On the other hand, the Supreme Court has held that parochial education is protected from government interference and that parents are entitled to send their children to parochial rather than public schools if such schools meet secular educational requirements.[23] The resulting competition between public and parochial schools has brought forth an ever increasing demand for public assistance to the latter, particularly to Catholic schools.[24] Not only, as we shall see, have state legislatures responded to this pressure by various forms of subsidy, direct and indirect, but there are pending in Congress numerous proposals to utilize federal funds for aid to parochial as well as public education.[25]

Thus, the constitutional problem posed by the *Everson* case assumes significance. It is the purpose of this comment to examine the validity of conclusions reached on the facts of the *Everson* case. But what was said in the majority opinion and in the two dissenting opinions in the *Everson* case may also forecast developments in the future. Consequently, there will be occasion to comment upon the broader implications of the decision. First, however, it will be helpful to trace the

[20] Of a total of 1700 institutions of higher learning, 563 are under state or municipal control, 445 are privately owned, and 692 are denominational. Of the latter, 480 are under Protestant and 212 under Catholic control. EDUCATIONAL DIRECTORY, 1946-47, by U.S. Office of Education.

[21] One writer suggests four main types of relationship between sectarian and public education: (1) identification (Sweden, Newfoundland, Quebec); (2) affiliation (England); (3) toleration with competition (United States); and (4) suppression (Russia). Niebuhr, "Sectarian Education," 5 ENC. SOC. SCI. 421 (1935).

[22] The nature of this compromise is developed in Niebuhr, ibid.

[23] Pierce v. Society of Sisters, 268 U.S. 510, 45 S. Ct. 571 (1925).

[24] The vast majority of cases involving the question of public aid have concerned Catholic schools. See 5 A.L.R. 866 at 879 (1920), 141 A.L.R. 1144 at 1148 (1945); 50 YALE L. J. 917 (1941).

[25] Senate Bill 199, introduced by Senator Aiken, provides an outright grant of funds for reimbursement of nonpublic tax exempt schools for expense incurred in transportation, health services, and nonreligious books and supplies. Senate Bill 472, introduced by Senator Taft, provides for payment to nonpublic educational institutions where state funds are so used and in amounts proportionate to the state's expenditure. Counterparts of the latter bill in this respect are found in House Bills 1870, 2033, 2525, and 2683. On the other hand, House Bills 140, 156, 1722, 1762, 1803, and 2188 restrict aid to public schools. All bills mentioned were introduced in the 80th Congress, 1st session.

development of the case law dealing with state and federal constitutional provisions bearing on public aid to parochial schools.[26]

A. *Prior Interpretation of Constitutional Provisions*

1. *The "establishment of religion" clause of the federal Constitution.* The two previous decisions of the Supreme Court which have been directly concerned with the meaning of the phrase "an establishment of religion" went off on very narrow grounds. In the first, *Bradfield v. Roberts*,[27] decided by a unanimous court in 1899, a federal appropriations act had set aside a sum of money for the construction of certain buildings on the grounds of privately owned hospitals in the District of Columbia. Pursuant to the appropriation act, the Commissioners of the District of Columbia and the Surgeon General of the United States had entered into an agreement with Providence Hospital, which was especially incorporated under act of Congress for the purpose of establishing and operating a hospital in the city of Washington. Complainant, a taxpayer and citizen of the United States and a resident of the District of Columbia, sought an injunction against the performance of this agreement, alleging that the members of the hospital corporation were in fact all members of a Catholic sisterhood and that use of public moneys in aid of the corporation would violate the "establishment of religion" clause of the First Amendment. The Supreme Court held that the hospital corporation was not a religious establishment. Although the Catholic Church might exercise a controlling influence in the management of the corporation, it must nevertheless be managed in accordance with the incorporation act and the act did not permit management with religious ends in view.

Conceding that charitable organizations such as this are not as important to the furtherance of the religious doctrines of its sponsors as are educational institutions, the reasoning employed is nevertheless highly artificial. Permitting the legal personality of a corporation to

[26] At this point, it should be noted that the problem of establishment of religion comes up in connection with education, not only in instances where public assistance is sought for parochial schools, but also when an effort is made to introduce religion into the public school curriculum. See JOHNSON, LEGAL STATUS OF CHURCH-STATE RELATIONSHIPS IN THE UNITED STATES (1934); THAYER, RELIGION IN PUBLIC EDUCATION (1947). This tendency drew adverse comment from the minority justices in the Everson case. See the opinion of Justice Rutledge, principal case at 534. In view of the conviction on the part of many modern educators that some sort of religious education, at least in the broad sense of instruction in moral and social values, is essential, it is to be expected that the Supreme Court will be called upon to pass on the "establishment of religion" question as it bears on the teaching of religion in public schools. See BOWER, CHURCH AND STATE IN EDUCATION (1944). However, this comment will be confined to the problem of public aid to parochial schools.

[27] 175 U.S. 291, 20 S. Ct. 121 (1899).

disguise the fact that it is but an instrument of its members may be accepted legal doctrine in the field of corporation law, but transplanted to the field of constitutional law it creates endless possibilities for rendering the "establishment of religion" clause a nullity. Incorporate a church and, if the charter is carefully drawn, it becomes something other than a religious establishment in legal contemplation. But in actuality it would remain a church, controlled by those who controlled it previously and teaching the same doctrines it taught before.

Reuben Quick Bear v. Leupp,[28] decided in 1908, again by a unanimous court, permitted no such easy evasion of the real issue. There the Commissioner of Indian Affairs had contracted with the Bureau of Catholic Indian Missions, a private corporation admittedly sectarian in character, for the education of certain members of the Sioux Tribe and had allocated certain funds in his control for payment to the bureau. These funds were of two kinds: (1) Trust Funds, which were moneys appropriated by Congress in one lump sum in 1899 in payment for certain land cessions and the income from which was used for Indian education, and (2) Treaty Funds, which were moneys appropriated annually by Congress in fulfillment of treaty obligations arising out of other land cessions. The complainant was a member of the Sioux Tribe and sought to enjoin the payment of the sums allocated from these two funds. The Supreme Court denied the injunction on the ground that these were not public moneys since they belonged to the Sioux as a matter of right. The commissioner was regarded as a kind of trustee of these funds. The Court was careful to differentiate the two funds from which the allocation had been made from money derived from gratuitous appropriations made for the education of the Indian Tribes, raising the inference that expenditure of such public moneys for sectarian education would have violated the constitutional prohibition.

Under the Court's view of the nature of the Trust Fund and Treaty Fund, there can be little quarrel with this decision. No one would argue that money remains public money when it is once removed from the public treasury in payment of a valid obligation of the government. However, care should be taken to limit the decision to its facts. Gratuitous payments from public funds were not sanctioned and the holding in the case could not possibly be regarded as precedent for the *Everson* decision.

Before leaving the federal cases which may be relevant to the *Everson* decision, mention should be made of *Cochran v. Louisiana State Board of Education*,[29] decided in 1930 by a unanimous court, for the very reason that it bears only indirectly on the problem of the

[28] 210 U.S. 50, 28 S. Ct. 690 (1908).

[29] 281 U.S. 370, 50 S. Ct. 335 (1930). Commented upon, 25 ILL. L. REV. 547 (1930).

Everson case. A Louisiana statute authorized and directed the State Board of Education to provide all school children of the state (except those attending colleges or universities) with school books free of charge. The petitioner, a taxpayer and citizen of Louisiana and a patron of the public school system sought to enjoin the board from expending any funds to buy books for parochial school children upon the ground, inter alia, that the statute was repugnant to the Fourteenth Amendment of the federal Constitution. The briefs presented by the complainant in the Supreme Court raised only the question whether the state's action involved the expenditure of public funds for a private purpose.[30] The Supreme Court's answer was succinctly negative: "We can not 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, comprehensive. Individual interests are aided only as the common interest is safeguarded."[31] The prohibition of an establishment of religion under the First Amendment of the federal Constitution was not raised or discussed.

Thus, the previous Supreme Court cases relating to the meaning and scope of the "establishment of religion" phase in the First Amendment yield little of value in approaching the *Everson* case. Perhaps partly because the philosophy of strict separation between church and state is so deeply ingrained in the nation's political structure, there is no prior body of federal case law which takes us by easy progression from obvious to more obscure applications of the language of the Constitution. In part, however, the dearth of judicial interpretation is attributable to the fact that the *Everson* case is the first to test a state statute under the "establishment of religion" clause of the federal Constitution. This does not mean that effort to obtain public aid for parochial schools is an entirely new development; the state courts have long been concerned with the problems that these efforts raise.

2. *State constitutional restrictions on the use of public funds.* State constitutions not infrequently contain provisions similar to the federal prohibition of establishment of religion by law.[32] However, the development of public education and the resulting demands of parochial schools upon the public treasury spurred all but two of the states (Maryland and Vermont) to adopt provisions specifically restricting

[30] See the dissenting opinion of Justice Rutledge in the Everson case, at 518, note 3.

[31] 281 U.S. 370 at 375, 50 S. Ct. 335 (1930).

[32] KINDRED, PUBLIC FUNDS FOR PRIVATE AND PAROCHIAL SCHOOLS: A LEGAL STUDY (Unpublished thesis in University of Michigan Library, 1938); GABEL, PUBLIC FUNDS FOR CHURCH AND PRIVATE SCHOOLS (1937).

the use of public funds for non-public educational institutions.[33] Litigation concerning state aid to parochial schools has naturally centered in the specific rather than the general constitutional provisions. Nevertheless, judicial treatment of the specific provisions has not differed greatly from the conflicting viewpoints expressed by the majority and minority justices in the *Everson* case and for that reason is worthy of attention.

Payment of public funds directly to parochial institutions for educational purposes has been involved in several decisions rendered by state courts of last resort. With but two exceptions, such payment has been held unconstitutional.[34] In Indiana, the payment of public funds to a parochial school for the continuation of educational services which would otherwise have been discontinued to the immediate embarrassment of the public school system was approved by the dubious process of examining seriatim the various religious factors involved and finding that each was in itself insufficient to constitute the school a parochial institution under the new arrangement; religious instruction as such was confined to a voluntary period prior to the beginning of school each day.[35] In Illinois, a somewhat different arrangement involving the education of delinquent children was sustained by virtue of the fact that services were furnished by parochial institutions below actual cost and below potential cost to the public authorities; the court reasoned that an arrangement which involved loss to the parochial institution could not constitute 'aid.'[36]

State courts have been somewhat more reluctant to invalidate ar-

[33] 50 YALE L. J. 917 at 920 (1941). These provisions take a variety of forms capable of various classifications. However, for present purposes it is sufficient to note that those of some 37 states specifically exclude sectarian educational institutions; the remaining 9 states prohibit the use of public funds for other than public educational institutions. Ibid. And see authorities cited in note 32, supra.

[34] Knowlton v. Baumhover, 182 Iowa 691, 166 N.W. 202 (1918); Atchison, T. & S. F. Ry. v. Atchison, 47 Kan. 712, 28 P. 1000 (1892); Wright v. School District, 151 Kan. 485, 99 P. (2d) 737 (1940); Williams v. Stanton District, 173 Ky. 708, 191 S.W. 507 (1917); Harfst v. Hoegen, (Mo. 1941) 163 S.W. (2d) 609; Jenkins v. Andover, 103 Mass. 94 (1869); Opinion of the Justices, 214 Mass. 599, 102 N.E. 464 (1913); State ex rel. Public School District No. 6 v. Taylor, 122 Neb. 454, 240 N.W. 573 (1932); State ex rel. Nevada Orphan Asylum v. Hallock, 16 Nev. 373 (1882); Collins v. Kephart, 271 Pa. 428, 117 A. 440 (1921); Synod of Dakota v. State, 2 S.D. 366, 50 N.W. 632 (1891); Hlebanja v. Brewe, 58 S.D. 351, 236 N.W. 296 (1931). See also, Connell v. Gray, 33 Okla. 591, 127 P. 417 (1912). In Gerhardt v. Heid, 66 N.D. 444, 267 N.W. 127 (1936), a similar arrangement was sustained but the issue was limited to the wearing of religious garb by teachers employed by the public school authorities. See generally, 5 A.L.R. 866 at 879 (1920) and 141 A.L.R. 1144 at 1148 (1942).

[35] State ex rel. Johnson v. Boyd, 217 Ind. 348, 28 N.E. (2d) 256 (1940); see also, Sargent v. Board of Education, 177 N.Y. 317, 69 N.E. 722 (1904).

[36] Dunn v. Chicago Industrial School, 280 Ill. 613, 117 N.E. 735 (1917).

rangements involving the furnishing of services at public expense or the payment of funds to children (or their parents) in attendance at parochial schools. A substantial minority has emphasized the benefit to the children sought in furtherance of the state's legitimate interest in education generally or in the public safety.[37] Occasionally, public assistance to parochial school students is also found to be complementary to compulsory school attendance statutes.[38] Notwithstanding the appeal of these arguments, particularly when they are accompanied by strong political pressures, a majority of the state courts in considering public aid extended to parochial school children have regarded it as in fact aid to the schools and hence invalid under the state constitutional provisions.[39]

Adverse decisions by state courts have not abated the demand for public funds to aid parochial schools. Notwithstanding the prevalent judicial hostility, hundreds of parochial schools are supported in whole or in part by direct public subsidies.[40] In addition, aid in the form of free use of schoolbooks or free transportation to parochial school students is common.[41] Following an adverse judicial decision, the New York State Constitution was amended in 1938 to permit the use of

[37] Furnishing transportation or reimbursing expenditures therefor has been approved in the following cases: Bowker v. Baker, 73 Cal. App. (2d) 653, 167 P. (2d) 256 (1946); Board of Education v. Wheat, 174 Md. 314, 199 A. 628 (1938); Adams v. St. Mary's County, 180 Md. 550, 26 A. (2d) 377 (1942); Everson v. Board of Education of Ewing Township, 133 N.J.L. 350, 44 A. (2d) 333 (1945). Furnishing schoolbooks to parochial school children has been approved in the following cases: Borden v. Louisiana State Board of Education, 168 La. 1005, 123 S. 655 (1929); Cochran v. Louisiana State Board of Education, 168 La. 1030, 123 S. 664 (1929); Chance v. Mississippi State Textbook Board, 190 Miss. 453, 200 S. 706 (1941).

[38] See, for example, Everson v. Board of Education of Ewing Township, 133 N.J.L. 350, 44 A. (2d) 333 at 337 (1945).

[39] State ex rel. Traub v. Brown, 36 Del. 181, 172 A. 835 (1934), writ of error dismissed in 39 Del. 187, 197 A. 478 (1938); Smith v. Donahue, 202 App. Div. 656, 195 N.Y.S. 715 (1922); Judd v. Board of Education, 278 N.Y. 200, 15 N.E. (2d) 576 (1938); Gurney v. Ferguson, 190 Okla. 254, 122 P. (2d) 1002 (1941); Mitchell v. Consolidated School District, 17 Wash. (2d) 61, 135 P. (2d) 79 (1943); State ex rel. Van Straten v. Milquet, 180 Wis. 109, 192 N.W. 392 (1923). And see Hlebanja v. Brewe, 58 S.D. 351, 236 N.W. 296 (1931); REPORT OF ATTY. GEN. OF IDAHO, Opinion No. 217 (1934). In Sherrard v. Board of Education, 294 Ky. 469, 171 S.W. (2d) 963 (1942), Kentucky followed the view that transportation furnished to parochial students aids parochial schools; in Nichols v. Henry, 301 Ky. 434, 191 S.W. (2d) 930 (1946), a carefully drafted statute providing for transportation of children otherwise compelled to walk along unprotected highways was sustained. However, the court expressly disavowed any intention of over-ruling the Sherrard case.

[40] 50 YALE L. J. 917 at 923 (1940).

[41] Id. at 923. See also, 22 NOTRE DAME LAWYER 192 (1946).

public funds for transportation of parochial school students.[42] More commonly such arrangements are tolerated because of difficulty in finding a proper party plaintiff or an appropriate remedy.[43] The result is confusion, and interested persons, including those writers who seem to sympathize with the position of the parochial school feel keenly the need for clarification.[44] In this situation, it was to be hoped that the United States Supreme Court would speak clearly and emphatically on the problem, providing a workable guide for future legislative action.

B. *The Principal Case*

The divergent viewpoint expressed by the Supreme Court in the decision of the *Everson* case can be marked out very briefly. Justice Black, writing for the five-justice majority, summarily dismissed any possibility of an equal protection argument, disposed rather more elaborately than necessary of the conventional due process question, and then proceeded to cut the "establishment of religion" aspects out of the case by viewing the New Jersey statute and the board's resolution as general welfare legislation incidentally benefiting a religious institution. Justice Rutledge, speaking for himself and Justices Frankfurter, Jackson, and Burton, dissented primarily upon the broad ground that the Constitution requires complete separation of church and state and that the Court's decision approved an abridgment of that separation. Justice Jackson, with whom Justice Frankfurter concurred, also wrote a separate dissent taking specific issue with the Court's interpretation of the facts of the case and emphasizing the important role of parochial education in the Catholic Church. In examining the interplay of ideas involved in these opinions, it is proposed to look first to the conventional arguments based on the Fourteenth Amendment and then to the arguments relating directly to the First Amendment as incorporated in the Fourteenth Amendment.

1. *The conventional Fourteenth Amendment arguments.* Both the due process clause and the equal protection clause entered into the case independently of the First Amendment prohibition of an establishment of religion by law. The familiar due process argument raised against the New Jersey statute and the school board's resolution was simply that the expenditure furthered a private purpose for which public funds could not be used. While the Supreme Court

[42] Constitution of New York, Article XI, section 4. This amendment obviated the Judd decision cited supra, note 39.

[43] See 50 YALE L. J. 917 at 923, 924 (1941). And see the administrative avoidance of a state constitutional restriction exemplified in Schlitz v. Picton, 66 S.D. 301, 282 N.W. 519 (1938).

[44] 22 NOTRE DAME LAWYER 192 (1946).

has, in rare instances, invalidated state action upon this ground,[45] such an attack upon legislation designed to promote the state's interest in education would seem to be foreclosed by *Cochran v. Louisiana State Board of Education.*[46] The Court so held and the minority justices properly conceded the point.[47] However, Justice Black went on to assimilate the New Jersey statute and resolution to public safety legislation.[48] As both Justice Jackson and Justice Rutledge pointed out, this construction is not consistent with the actual operation of the transportation arrangement since transportation as such was not furnished by the public authorities and the same facilities were used as would have been relied upon in the absence of a plan of reimbursement.[49]

Clearly, there was no substantial due process argument, absent any considerations raised by the religious aspect of the case. One can not but feel that the emphasis placed on this fact by the majority was unfortunate. As observed by Justice Rutledge, "The public function argument, by casting the issue in terms of promoting the general cause of education and the welfare of the individual, ignores the religious factor and its essential connection with the transportation, thereby leaving out the only vital element in the case."[50] The Court's holding on the conventional due process point colored its subsequent treatment of the establishment of religion question.

The situation was reversed with regard to the equal protection phase of the case; the majority brushed it aside while the minority insisted that it had a significant and, under the majority's view of the establishment of religion question, controlling influence on the case. It will be recalled that the New Jersey statute authorized reimbursement for the transportation of school children to and from public and private schools, except private schools operated in whole or in part for profit. Furthermore, the resolution passed by the school board authorized reimbursement only for the transportation of children attending public schools and certain Catholic schools. Thus, the minority argued, the statute discriminated against children attending private, profit-

[45] Citizens' Savings and Loan Association v. Topeka, 20 Wall. (87 U.S.) 655 (1874); Parkersburg v. Brown, 106 U.S. 487, 1 S. Ct. 442 (1883); Thompson v. Consolidated Gas Utilities Corporation, 300 U.S. 55, 57 S. Ct. 364 (1937). Cf. Green v. Frazier, 253 U.S. 233, 40 S. Ct. 449 (1920).

[46] 281 U.S. 370, 50 S. Ct. 335 (1930).

[47] See principal case at 507, 528. And see generally on the due process question involved in the use of public funds for school transportation, 63 A.L.R. 413 (1929); 118 A.L.R. 806 (1939), and for schoolbooks, 17 A.L.R. 299 (1922); 67 A.L.R. 1196 (1930).

[48] Principal case at 507.

[49] Id. at 513, 533.

[50] Id. at 528.

making schools and the resolution added discrimination against children attending non-Catholic parochial schools.[51]

Justice Black dismissed this exclusionary language with the observation that the equal protection clause had not been invoked by the complainant. "Striking down a state law is not a matter of such light moment that it should be done by a federal court ex mero motu on a postulate neither charged nor proved, but which rests on nothing but a possibility."[52] Moreover, as he viewed the case, it did not appear that the New Jersey court of last resort would have sustained the statute or the resolution against a proper challenge on this point.[53] The Court's casual dismissal of the exclusionary language of the statute and the resolution was as significant in its bearing on the "establishment of religion" question as was its emphasis on the general welfare and public safety arguments it had advanced in sustaining the arrangement against the due process argument.[54]

As we shall see, the minority felt that the exclusionary language of the statute and the resolution were important to the establishment of religion question. However, they went farther. Justice Rutledge pointed out that discrimination cast in terms of religious belief or lack of it certainly is not within the limits of reasonable classification under the equal protection clause.[55] That being so, the New Jersey court's holding that the resolution was within the authority conferred by the statute was a construction inconsistent with the equal protection clause.[56] The Court, led by the late Chief Justice Stone, had established the proposition that the usual presumption of constitutionality will not work to save legislative enactment impinging in the slightest degree on the fundamental freedoms of the First Amendment.[57] Thus, the burden was on the supporters of the arrangement to show that the apparent discrimination was not discrimination in fact; it was immaterial that

[51] Id. at 514, 534.

[52] Id. at 506, note 3.

[53] Id. at 506, note 3. The New Jersey Court of Errors and Appeals had stated: ". . . we hold that the legislature may appropriate general state funds or authorize the use of local funds for the transportation of pupils to *any* school. . . ." 133 N.J.L. 350 at 354, 44 A. (2d) 333. Justice Black viewed this language as indicating that if the point were raised, the state court would invalidate the clause excluding children attending private schools operated for profit and sustain the statute as authorizing reimbursement for the transportation of all school children. Principal case at 506, note 3. Neither Justice Jackson nor Justice Rutledge were willing to accept this view of the state court's holding. Id. at 514, 534.

[54] The majority did not again advert to the exclusionary language of the statute or the resolution.

[55] Principal case at 534.

[56] Id., note 59.

[57] United States v. Carolene Products Co., 304 U.S. 144, 58 S. Ct. 778 (1938). See Wechsler, "Stone and the Constitution," 46 COL. L. REV. 764 at 795 (1946).

the record was devoid of proof that there were children excluded from the transportation scheme by reason of their attendance at private, profit-making schools or at non-Catholic parochial schools.[58]

The merits of these conflicting views on the equal protection question need not detain us here, for we may be assured that, when next the question arises, the record will be clear. The present significance of the majority and minority comments on the equal protection question is twofold. First, the argument of the majority did not foreclose future attack along equal protection lines; indeed it might even be said that the majority indicated a willingness to consider the equal protection question when and if it is presented to its satisfaction upon the record. Secondly, four of the Supreme Court justices stand committed to the proposition that such aid as is in fact extended to parochial schools must also be extended to other private institutions, whether or not they are operated for profit. In a proper case, these four might well muster sufficient strength from among the majority in the *Everson* case to establish their view as to the requisite for legislative action.

2. *Arguments involving the First Amendment as incorporated in the Fourteenth Amendment.* In considering the bearing of the First Amendment on the problem of the *Everson* case, the Court was unanimous on three points: (1) that the specific language of the First Amendment was made applicable to the states by the Fourteenth Amendment, (2) that the history of the movement toward separation of church and state which culminated in the religious clauses of the First Amendment indicates the necessity of a broad interpretation of the establishment of religion prohibition, and (3) that support of a parochial school would be an establishment of religion within the meaning of the First Amendment. Thereafter, the Court broke sharply. The majority, carrying over the general welfare-public safety argument adduced in connection with the conventional due process question and disregarding the troublesome discrimination seemingly apparent in the statute and resolution, proceeded easily to the conclusion that the New Jersey legislation, as applied, did not support the parochial schools but merely provided "a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools."[59] Not so the minority; for them, matters pertaining to religion could never be made a public purpose; the parochial schools were an integral part of a religious structure and the transportation was an important element in making the parochial schools effective for their primary purpose, which is the teaching of religion.

[58] Principal case at 534, note 61.

[59] Id. at 513.

Prior decisions of the Supreme Court had paved the way for the proposition that the specific language of the First Amendment regarding establishment of religion is applicable to state action but occasion had not arisen for a clear holding on this question. Freedom of speech, of the press, and of assembly are secured by the First Amendment almost in those terms; there is no more general way of expressing the concepts involved. So also with the guarantee of the free exercise of religion. Consequently, the general statement that the fundamental rights protected by the First Amendment were encompassed within the liberty protected by the due process clause of the Fourteenth Amendment would suffice for all cases involving these concepts.[60] However, the problem of the *Everson* case does not lend itself to analysis in general terms. To be sure, the prohibition against an establishment of religion by law could be worked out of the guarantee of the free exercise of religion. But the specific phrasing of the First Amendment offers a more direct route. The Court did not hesitate nor even consider it necessary to make the transition in its reasoning explicit; it proceeded directly to consider whether the statute and resolution violated the First Amendment.[61]

Both Justice Black's majority opinion and Justice Rutledge's dissenting opinion emphasize the historical developments which led to the adoption of the religious clause of the First Amendment.[62] Justice Black made the following broad summation:

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain

[60] Thus in Palko v. Connecticut, 302 U.S. 319, 58 S. Ct. 149 (1937), Justice Cardozo described the relationship of the Fourteenth Amendment and the fundamental rights secured by the First Amendment in this fashion: "In these and other situations immunities that are valid as against the federal government by force of particular amendments have been found to be *implicit in the concept of ordered liberty*, and thus, through the Fourteenth Amendment, become valid as against the states." (Italics supplied). The transition from this viewpoint to the literal adoption of the First Amendment as part of the Fourteenth is revealed in the decisions cited in note 4, supra.

[61] Principal case at 508, 518.

[62] Id. at 508-510, 520-524. Justice Black laid particular stress on Jefferson's "Virginia Bill for Religious Liberty," whereas Justice Rutledge drew extensively on Madison's "Memorial and Remonstrance." Both regarded the struggle in Virginia as exemplifying that of all the colonies. Both treatments are well documented with numerous references to primary and secondary sources. Further recapitulation here would serve little purpose in view of the agreement between the two as to the significance of the history they recounted.

away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. *No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.* Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa."[63]

In this, the minority justices would certainly concur.[64]

The Constitution, of course, says nothing about education but it would seem abundantly clear that an institution existing for the primary purpose of teaching religion falls within the prohibition of the First Amendment.[65] Justice Rutledge pointed to the protection afforded parochial education by the guarantee of the free exercise of religion and noted that the meaning of the word "religion" was necessarily the same in the "establishment" context.[66] Justice Jackson emphasized the vital importance of parochial schools to the Roman Catholic Church, basing his argument on excerpts from the Canon Law.[67] The majority did not give specific consideration to the point; however, Justice Black conceded in passing that "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."[68]

Here the agreement between the majority and minority ended. Justice Black reiterated the view that this was public welfare legisla-

[63] Id. at 511. (Italics supplied.)

[64] Justice Jackson summarized the minority view of the Court's decision thus: "In fact, the undertones of the opinion, advocating complete and uncompromising separation of Church from State, seem utterly discordant with its conclusion yielding support to their commingling in educational matters. The case which irresistibly comes to mind as the most fitting precedent is that of Julia, who, according to Byron's reports, 'whispering "I will ne'er consent,"—consented.'" Id. at 513.

[65] President Grant felt it desirable to propose an amendment which would have prohibited the use of public funds for sectarian education. 4 CONG. REC. 175, 181 (1875). A bill which would have referred the amendment to the states for ratification passed the House but failed by two votes to obtain the necessary two-thirds vote in the Senate. 4 CONG. REC. 5190, 5580, 5595 (1876). However, the proposal was aimed at state action, coming after the Thirteenth, Fourteenth, and Fifteenth Amendments.

[66] Principal case at 519-520, citing Pierce v. Society of Sisters, 268 U.S. 510, 45 S. Ct. 571 (1925). See also principal case at 526-527.

[67] Id. at 514-515.

[68] Id. at 512. Furthermore, the entire argument that the benefit conferred by the state was designed to accrue to the children and the public generally assumes that aid to parochial schools would violate the "establishment of religion" clause.

tion designed to facilitate the opportunity for education and to provide a safe means of transportation to and from school. He likened the incidental benefit accruing to the parochial schools to that inherent in police and fire protection, which could not be denied religious institutions without violating the First Amendment guarantee of the free exercise of religion.[69] This was not a repetition in terms of the "child benefit" theory adopted by the minority of state courts [70] but the underlying reasoning is the same in both instances.

The minority justices took issue both broadly and specifically with this treatment of the problem. The fundamental objection was that the public welfare concept was completely inappropriate to a determination of the "establishment of religion" question. Justice Rutledge stated the proposition in this way:

> "Our constitutional policy . . . does not deny the value or necessity for religious training, teaching or observance. Rather it secures their free exercise. But to that end it does deny that the state can undertake or sustain them in any form or degree. For this reason the sphere of religious activity, as distinguished from the secular intellectual liberties, has been given the twofold protection and, as the state cannot forbid, neither can it perform or aid in performing the religious function. The dual prohibition makes that function altogether private. It cannot be made a public one by legislative act. This was the very heart of Madison's Remonstrance, as it is of the Amendment itself." [71]

Thus, whenever legislation in fact aids or promotes religious teaching or observances, it falls within the area forbidden by the "establishment of religion" clause, notwithstanding that it might be sustained under the Fourteenth Amendment if the religious element were absent.

The specific issues drawn by the minority justices substantiate their basic critique. Transportation is an essential cost of modern education; once the public welfare analysis is permitted, the way is opened for additional assistance, tendered perhaps to the individual, but in fact aiding the school. "Payment of transportation is no more, nor is it any the less essential to education, whether religious or secular, than payment for tuitions, for teachers' salaries, for buildings, equipment and necessary materials. Nor is it any less directly related, in a school giving religious instruction, to the primary religious objective all those essential items of cost are intended to achieve." [72]

[69] Id. at 513.
[70] See text at note 37, supra.
[71] Principal case at 529. And see Justice Jackson's support of this reasoning at 517.
[72] Justice Rutledge, id. at 527.

Neither does the public safety argument of the majority stand up under the scrutiny of the minority. As has already been observed, the statute and resolution lack the essential elements of safety legislation, since they did not alter the pre-existing mode of transportation.[73] Moreover, as Justice Jackson pointed out, the Court's analogy to police and fire protection is invalidated by the religious test which determined whether reimbursement for transportation was to be made.[74]

The suggestion of the majority that failure to include parochial schools in the transportation plan would amount to discrimination against them was met by the argument that such discrimination is in fact required by the First Amendment as the price of religious freedom.[75] Indeed an arrangement which provided for the transportation of all school children and thus satisfied the equal protection argument discussed earlier herein would still be invalid to the extent that it authorized aid to parochial schools.[76] "For then the adherent of one creed still would pay for the support of another, the childless taxpayer with others more fortunate. Then too there would seem to be no bar to making appropriations for transportation and other expenses of children attending public or other secular schools, after hours in separate places and classes for their exclusively religious instruction. The person who embraces no creed also would be forced to pay for teaching what he does not believe. Again, it was the furnishing of 'contributions of money for the propagation of opinions which he disbelieves' that the fathers outlawed."[77]

Summing up the division between the majority and minority on the "establishment of religion" question, it seems to the writer that substantial and persuasive arguments support the minority position. No argument advanced by the majority meets the fundamental objection that legislation which in fact aids religion or religious institutions, directly or indirectly, is an establishment of religion. The public wel-

[73] See text at note 49, supra.

[74] Principal case at 516.

[75] Justice Jackson, id. at 517.

[76] Justice Rutledge, id. at 532-533. The argument here was concentrated on the point that non-discrimination between sects would not cure the constitutional defects of the statute and resolution. However, the reasoning is equally applicable to legislation which encompasses all school children; aid to those attending parochial schools would still be forbidden. The minority would not have sustained Cochran v. Louisiana State Board of Education, 281 U.S. 370, 50 S. Ct. 335 (1930), which involved an all inclusive statute, against attack under the First Amendment "establishment of religion" clause.

[77] Principal case at 533. A further criticism of a statute providing for assistance for all school children was found in the "Virginia Statute for Religious Freedom." "Each thus pays taxes also to support the teaching of his own religion, an exaction equally forbidden since it denies 'the comfortable liberty' of giving one's contribution to the particular agency of instruction he approves." Id. at 526.

fare argument, introduced in connection with the non-religious due process question, served but to obscure the underlying issues so clearly pointed out by Justice Rutledge. Further, discrimination against religious institutions in the gratuitous distribution of public funds is commanded by the Constitution. And, solidly supporting the minority's insistence on a broad interpretation of the "establishment of religion" clause, is the proposition that in cases involving the fundamental freedoms of the First Amendment the usual presumption of constitutionality is unavailing to save even the least infringement upon them.[78]

C. *Conclusion*

Whatever may be said on the merits of the various arguments advanced in the *Everson* case, the decision is certain to strengthen demands for public aid to parochial schools and thus aggravate and spread bitter controversies which have already been aroused.[79] From this point of view alone, the insistence of the minority justices on a sweeping application of the "establishment of religion" clause is justified. Justice Rutledge has stated that position as follows:

> "Neither so high nor so impregnable today as yesterday is the wall raised by Virginia's great statute of religious freedom and the First Amendment, now made applicable to the states by the Fourteenth. New Jersey's statute sustained is the first, if indeed it is not the second breach to be made by this Court's action. That a third, and a fourth, and still others will be attempted, we may be sure. For just as *Cochran v. Louisiana State Board of Education* . . . has opened the way by oblique ruling for this decision, so will the two make wider the breach for the third. Thus with time the most solid freedom steadily gives way before continuing corrosive decision." [80]

The stage is already set for further litigation. In the state field, variations on the *Everson* transportation plan and other forms of subsidy wait to be tested.[81] Moreover, tax exemptions extended to

[78] See note 57, supra.

[79] Illustrative of the strife and dissension which can result is the tragic struggle taking place over control of the educational system in a Cincinnati, Ohio suburb. Beginning in 1940 with the outright subsidization of a parochial school, dissident religious and political groups have been at war continuously for the last seven years. Recently the controversy flared up into actual violence and the effects of the conflict are felt throughout the town's government. Fey, "Preview of a Divided America," 64 CHRISTIAN CENTURY 682 (May 28, 1947).

[80] Principal case at 518.

[81] Statutes relating to transportation of parochial school students assume a great variety of forms, presenting infinite possibilities for fine distinctions of the sort invoked by the majority in the Everson case. See cases cited in notes 37 and 39, supra.

parochial schools in all states but one will almost certainly be tested under the *Everson* decision before long.[82] Reference has already been made to numerous proposals for federal legislation to extend federal aid to parochial schools by direct subsidy.[83] Federal laws already on the statute books offer additional sources of controversy.[84] Veteran's educational benefits, involving the payment of tuition to parochial schools and colleges, may involve the "establishment of religion" question.[85] And the National School Lunch Act of 1946 may be still another source of controversy.[86]

With these and other potentialities in the way of litigation clearly evident, it is particularly appropriate to attempt a summary of the effect of the *Everson* decision. It is possible to state three general conclusions derived from the interplay of ideas in the various opinions.

(1) Legislation involving public aid to parochial schools, even of the sort exemplified by the *Everson* arrangement, may be vulnerable

Moreover, the schoolbook statutes have yet to be tested against the "establishment of religion" clause and it may be significant that there is no possibility of a public safety argument here. The same is true of payments made directly to parochial schools for educational purposes. See notes 35 and 36, supra.

[82] Constitutional and statutory tax exemptions are collected in GABEL, PUBLIC FUNDS FOR CHURCH AND PRIVATE SCHOOLS (1937). California is the only state not providing tax exemption for elementary and secondary parochial schools; even there sectarian colleges are tax exempt. The tax exemption question does not, of course, involve the expenditure of public funds but, to the extent that parochial schools are excused from taxes, other taxpayers must take up the burden.

[83] See note 25, supra. The various proposals are criticized in Lewis, "The Threat in School Aid Bills," 64 CHRISTIAN CENTURY 652 (May 21, 1947).

[84] While state courts have been quite willing on the whole to permit taxpayers to raise constitutional questions as to public disbursements, the United States Supreme Court has denied that taxpayers have standing to challenge federal expenditures. Massachusetts v. Mellon, 262 U.S. 447, 43 S. Ct. 597 (1923). Thus, there is a barrier to litigation raising the "establishment of religion" question as to federal spending. However, it would seem that the Court will sooner or later have to rule the Mellon case inappropriate to controversies involving the fundamental rights of the First Amendment.

[85] Servicemen's Readjustment Act of 1944, § 5, Public Law 346, 78th Cong., 58 Stat. L. 284 at 288, 38 U.S.C. (1940 and Supp. V, 1940-1946) § 701. Obviously, any attack on the constitutionality of this legislation is likely to prove extremely unpopular. Nevertheless a substantial question appears to be present. State courts have tended to avoid the constitutional question wherever possible. See, for example, State ex rel. Atwood v. Johnson, 170 Wis. 251, 176 N.W. 224 (1920).

[86] Public Law 396, 60 Stat. L. 230 (1946), 42 U.S.C.A. (Supp. 1946) § 1751. This statute provides for the gratuitous furnishing of food and payment of money to public and non-profit private schools for the purpose of providing school lunches for under-nourished children. While it is arguable that this is indeed public welfare legislation aimed at raising the nutritive level of the child's diet and merely utilizing the parochial school as an agent, the exclusion of needy children who out of necessity may attend profit-making private schools is inconsistent with such a construction.

to attack, independently of the First Amendment, under the equal protection clause of the Fourteenth Amendment.[87]

(2) State legislation, as well as federal legislation, will henceforth be subject to review under the "establishment of religion" clause of the First Amendment.[88]

(3) State and federal legislation will be invalidated under the "establishment of religion" clause of the First Amendment when it is apparent that its primary purpose is aid to parochial schools.[89]

Beyond these general conclusions it must be recognized that the holding on the facts of the *Everson* case is inconclusive. Just how far the public welfare argument, which prevailed under the majority ruling, will be extended (or whether indeed it will be restricted) is problematical. Perhaps the Court will find occasion for such an about face as occurred in the compulsory flag salute cases.[90] Or perhaps the *Everson* decision will indeed prove a "corrosive precedent,"[91] wearing ever deeper into the "establishment of religion" clause, with the result of a gradual disintegration of one of the twin supports of the nation's traditional religious freedom.[92]

P. F. Westbrook, Jr., S.Ed.

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[87] See Part B, 1, of the text, supra. This possibility could be eliminated by making public aid available to all school children. It should be noted that the Court has required that an attack on a statute denying equal protection of the laws must be made by a member of the class discriminated against. Jeffrey Manufacturing Co. v. Blagg, 235 U.S. 571, 35 S. Ct. 167 (1915).

[88] See Part B, 2, of the text, supra.

[89] See Part B, 2, of the text, supra. Since the majority in the Everson case did not deny an incidental benefit to the school and yet conceded that aid to parochial schools as such would violate the "establishment of religion" clause, the only inference which can be drawn is that, for the present, the test applied by the Court will turn on its view of the *primary* purpose of contested legislation.

[90] See Minersville School District v. Gobitis, 310 U.S. 586, 60 S. Ct. 1010 (1940); Murdock v. Pennsylvania, 319 U.S. 105, 63 S. Ct. 891 (1943); West Virginia State Board of Education v. Barnette, 319 U.S. 624, 63 S. Ct. 1178 (1943). Justices Black, Douglas and Murphy changed their view on the question; interestingly, these three are among the majority in the Everson case.

[91] Justice Rutledge, principal case at 535.

[92] See the comments of Justice Rutledge, id. at 529-530, 531-532. Moreover, the very religious groups which seek or accept public aid may find that it carries political controls with it. "It is hardly lack of due process for the Government to regulate that which it subsidizes." Wickard v. Filburn, 317 U.S. 111, 63 S. Ct. 82 (1942). See the opinion of Justice Jackson, principal case at 517.