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In the next few years, the United States Supreme Court, unless it avoids the question by retrogression to earlier standards of what is an appropriate question for judicial resolution, must meet the question of whether government funds may constitutionally be allocated to church schools. Professor Kurland, generally regarded as the leading United States expert on legal matters pertaining to church and state, discusses this question from the legal, political and cultural standpoints.

POLITICS AND THE CONSTITUTION: FEDERAL AID TO PAROCHIAL SCHOOLS[†]

*Philip B. Kurland**

As history measures time, it was not too long ago that politics, sex and religion were subjects that could not be properly broached in polite society. Today, if these subjects were eliminated from social conversation, a deathly silence would fall upon the world. So, too, politics, sex and religion were once beyond the ken of Supreme Court jurisdiction. If cases involving these matters were to be removed from the Supreme Court's current docket, it would be shorn of about half of its business. It is, therefore, without apology that I offer this paper that deals with both politics and reli-

[†] This article derives from a speech delivered at the University of Wyoming on March 16, 1966, under the auspices of the University Public Exercises Committee.

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gion. As for sex, you'll have to find your titillations elsewhere.¹

Two church-state questions are looming on the Supreme Court's horizon that may make all of its earlier decisions on the subject pale into insignificance. The first is the question of the constitutionality of tax-exemption for church-owned property. This issue was recently placed on the Court's doorstep by the notorious *Madalyn Murray*,² obviously encouraged by her successful efforts to secure a constitutional ban on bible-reading and prayers in public schools.³ The Court may not open its doors to receive this bundle of joy, but sooner rather than later the question will be answered by it. Until now the Court has shrugged off the issue by ruling that it is not "a substantial federal question,"⁴ technical language for saying "don't bother us."

The second question, and the one I should talk about today, is whether government funds may properly be allocated to church schools. This issue was made imminent by the Education Act of 1965.⁵ Federal aid to parochial education had not heretofore been presented for Supreme Court adjudication. It is certainly not a question that can be designated as insubstantial. If the Court is to avoid this question, it will have to retrogress to earlier standards of what is an appropriate question for judicial resolution.⁶

The tax-exemption issue is one of major concern to all organized religions. The parochial school problem is, for the time being at least, of importance primarily to Catholics. "About 92 per cent of all children attending private schools in America today are enrolled in Catholic elementary and secondary schools."⁷

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1. When this was first written, I did not know that "tiltillating" sexual interests were federal crimes punishable by five years in jail. *Ginzburg v. United States*, 86 Sup. Ct. 969 (1966). I am, therefore, relieved that I so wisely abstained.
 2. *Murray v. Comptroller*, 216 A.2d 897 (Md. 1966).
 3. *Murray v. Curlett*, 228 Md. 239, 179 A.2d 698, *rev'd sub nom.* *Abington Township School Dist. v. Schempp*, 374 U.S. 203 (1963).
 4. See Kauper, *The Constitutionality of Tax Exemptions for Religious Activities*, in *THE WALL BETWEEN CHURCH AND STATE* 95 (Oaks ed. 1963) (hereinafter cited as OAKS).
 5. 79 Stat. 27 (1965), 20 U.S.C.A. § 821 (Supp. 1965).
 6. See Brown, *Quis Custodiet Ipsos Custodes? — The School—Prayer Cases*, 1963 SUP. CT. REV. 1.
 7. Drinan, *The Constitutionality of Public Aid to Parochial Schools*, in OAKS, *op. cit. supra* note 4, at 57.

There are two major aspects of the problem of governmental aid to religious education that I will treat here: the political and the constitutional. They may not, in fact, differ in substance but they are at least different in time. I should like first, therefore, to look backward to the legislative history before I look forward to the constitutional problem that the Supreme Court will be called upon to decide.

Although national government aid to education can be traced back at least as far as the Northwest Ordinance of 1787, antedating the Constitution itself, it is sufficient for our purposes to examine the history that begins but a generation ago. And in doing so, I shall limit myself to aid at the grammar school and high school level. The question of assistance to colleges and universities presents a different countenance.

In 1938, the Advisory Commission on Education reported to President Roosevelt—and in 1955 the White House Conference on Education reported to President Eisenhower—that the states were not providing adequate educational opportunities for their grammar and high school pupils. In some instances this was because the states were not willing to allocate sufficient resources to the purpose. In other cases, it was because the states lacked the resources to allocate to such an endeavour. As is so often the case in our time when the states prove unwilling or unable to meet their responsibilities, the answer proposed is federal financial aid.

In 1938, Senators Harrison of Mississippi and Thomas of Utah introduced a bill to provide such financing. That bill never got beyond the stage of extensive committee hearings. It took more than a quarter-century to bring the required legislation to fruition.

The period between 1938 and 1964 revealed the power of coalescing minorities to prevent the effectuation of legislation supported in principle at all times by a majority of the legislators. Throughout this period there were three issues around which controversy raged. The first was the question of federal assumption of state powers and responsibilities. Here, although conservatives like Everett Dirksen of Illinois, then in the House, and Robert Taft of Ohio, in

the Senate, led the fight for federal aid, there were always a group of stalwarts opposed to federal entry in the field of elementary and secondary education, including such Republican moderates as President Eisenhower and Vice-President Nixon.

The second flaming issue was that of school segregation, fanned in 1954 by the Supreme Court's decision in *Brown v. Board of Education*.⁸ On this question there were those typified by Adam Clayton Powell, with his great strength in the later stages in the House Committee on Labor and Education, who opposed any legislation that did not require desegregation as a condition for federal aid. On the other side were those like Congressman Howard W. Smith, chairman of the powerful Rules Committee, who would not tolerate legislation that did require such desegregation.

The third problem was euphemistically referred to as the question of aid to "private schools." On this issue there were legislators who opposed any aid that included benefits to parochial schools, balanced by those who would not support assistance to public schools unless some assistance was also forthcoming for church schools. This religious school question issue reached its first nadir, in 1949-50, when the Barden bill to aid elementary education excluded aid for parochial schools. Cardinal Spellman publicly attacked Congressman Barden and his "disciples of discrimination."⁹ And when Eleanor Roosevelt announced her opposition to federal aid to parochial education, the Cardinal attacked her too. Concluding an "open letter" to Mrs. Roosevelt, he wrote: "For whatever you may say in the future, your record of anti-Catholicism stands for all to see—a record which you yourself wrote on the pages of history which cannot be recalled—documents of discrimination unworthy of an American mother."¹⁰ The immediate cause of aid to parochial education was hardly helped by the Cardinal's choleric temperament, so frequently displayed on issues of church and state. But the possibility of aid to public schools was certainly severe-

8. 347 U.S. 483 (1954).

9. Lachman, *The Cardinal, the Congressmen, and the First Lady*, 8 J. OF CHURCH & STATE 35, 41 (1965).

10. *Id.* at 46.

ly damaged. I refer to this unfortunate controversy not to rake up old coals, but because it typifies the manner in which this issue was debated both on and off the floor of Congress.

Sometimes one and sometimes another of these three questions was centerstage. Each of them was always present. No single group was strong enough to prevent legislation for general aid to elementary education. It took a combination of at least two of them to frustrate the general objective. But that combination was always available.

In 1960, it was the House Rules committee that was responsible for killing the relevant bill, although it was clear that had it passed Congress it would have been vetoed by President Eisenhower, who was opposed to any direct financial aid to the states for this purpose. His attitude, concurred in as it was by Nixon, made an important issue in the presidential campaign of that year, for Senator Kennedy was deeply committed to the passage of a school-aid bill and pledged its accomplishment if he were elected.

It is rather ironical that America's first Catholic president should have what he labelled "probably the most important piece of domestic legislation" in his program defeated by his coreligionists. Kennedy's Boswells are in some disagreement about the prime responsibility for the defeat of the 1961 bill. Schlesinger conceded that it was the Catholic bloc of 88 members of the House of Representatives—in conjunction with Republicans—that was responsible.¹¹ Sorenson says that the President preferred to place the blame elsewhere.¹² Certainly the Catholic bloc could not have defeated the legislation by itself. It is clear, however, that the religious issue was the major one exposed. Kennedy had announced, both in the campaign and after his election, that federal aid to parochial schools was unconstitutional. It was certainly politically expedient for him to do so.¹³ After election, he received support for his position in a brief, not from his

11. SCHLESINGER, *A THOUSAND DAYS* 662 (1965).

12. SORENSON, *KENNEDY* 362 (1965).

13. In 1963, Theodore Sorenson, special counsel to President Kennedy, had publicly acknowledged: "While it should not be impossible to find an equitable constitutional framework to settle the church-school aid problem, it is difficult for the formula to be suggested by the nation's first Catholic President." Quoted in Lachman, *supra* note 9, at 35.

Attorney General, but from the Department of Health, Education, and Welfare.¹⁴

In 1962, general aid-to-education legislation was moribund. In that year and the two that followed, emphasis shifted to aid to higher education, and important legislation was enacted to this end, at least some of which will also face First Amendment religion clauses tests in the not too distant future.¹⁵

In January 1965, President Johnson demanded of Congress legislation providing federal aid for state elementary and secondary education. Aware that prior legislation had foundered in controversies over proposed amendments sought by special interests, the Johnson forces summarily rejected all proposals for change or delay. Within three months, the administration bill was law. This accomplishment was made possible in part by the earlier dissipation of opposition bases. The segregation question had been disposed of by the Civil Rights Act of 1964, which prohibited 'discrimination on the basis of color in any program receiving federal assistance. Those opposed to federal intervention in the province of the states had suffered a disastrous defeat in the 1964 elections. The parochial school advocates, shorn of allies and offered the possibilities of some very substantial benefits, could not extract the higher price of direct aid. If they should prove able to sustain the 1965 legislation against constitutional attack, however, they will have secured extensive immediate benefits and even greater claims on future assistance. Of the three dissident groups, only this one succeeded in making the administration pay heavily for the elimination of its opposition.

Before leaving this phase of the story, I should report on the policy arguments offered by each side and on the content of the legislation secured by the Johnson administration. The substantive arguments are difficult to uncover. Of the hundreds of pages of rhetoric, very little can be distilled in the form of reasoned analysis.

14. U.S. DEPT. OF HEALTH, EDUCATION, AND WELFARE, *IMPACT OF THE FIRST AMENDMENT TO THE CONSTITUTION UPON FEDERAL AID TO EDUCATION* S. Doc. No. 29, 87th Cong., 1st Sess. (1961).

15. See 77 *HARV. L. REV.* 1353 (1964).

For the Catholic position, the following propositions can be gleaned or constructed. Catholics cannot continue to support an expansive parochial school system without substantial assistance from the state. A Catholic cannot get the education that his faith demands of him except in a parochial school. Freedom of education, which the Constitution allegedly guarantees, therefore, will become a myth rather than a reality, in the absence of the availability of federal funds. Moreover, the American cultural heritage is dependent upon a diversity that can be preserved only through the continuance of parochial schools. Since the so-called public schools are really religious schools permeated either by the Protestant ethic or the religion of "secular humanism,"¹⁶ that equality of treatment can only be secured by equality of aid. Probably the most frequently suggested argument was that Catholic tax-payers, who have their taxes used for an educational system that they cannot use, are subjected to double taxation because they also have to pay for the educational system that they do use.

The policy arguments on the other side were not so much against parochial schools as they were favorable to the public schools. The major premise was that the public school system was the essential unifying force in the pluralistic society in which we live. In Professor Alexander Bickel's words:¹⁷ "Culturally, no doubt the most significant nationalizing, egalitarian force, by which we have set immense store for a hundred years, has been the free public school system." It was argued "that the public school, as the ally of social tolerance, class fluidity, and the open mind, is so valuable that alternatives to it should not be encouraged and certainly should not receive public support."¹⁸ The private school was a divisive force. Aiding existing parochial schools would be a serious enough threat to the public school system, but worse, federal aid would encourage the proliferation of

16. Probably no greater damage has been done to the possibility of a rational interpretation of the religion clauses of the First Amendment than the Supreme Court's concession to the Catholic position that secular humanism is a religion. See, *e.g.*, *Torcaso v. Watkins*, 367 U.S. 488, 495 n. 11 (1961).

17. BICKEL, *POLITICS AND THE WARREN COURT* 202 (1965).

18. See CENTER FOR THE STUDY OF DEMOCRATIC INSTITUTIONS, *RELIGION AND AMERICAN SOCIETY*. 49 (1961).

such schools. For many on this side of the question, segregation of school children by religion was at least as bad as segregation by race. And, since there were not sufficient resources available, even through federal aid, to secure high enough standards for public education, the proposition was that none of these scarce resources ought to be dispersed among those who voluntarily rejected the common school room to set up a system of their own. There were those, of course, who also expatiated on the evils of the parochialism of a parochial school system. And argument was presented—frequently by non-religious sources—that government aid would mean government control destructive of the religious values that these schools now afford.

It is trite to point out that principle is not the fundamental guide to legislative action. Politics, it has been said, is the “systematic pursuit of expediency.” And no better evidence is available than this history of the general aid-to-education law. Expediency dictated the inclusion in the legislation of aid to parochial education. Expediency also explains why so much of the problem was not resolved by the statute but was rather turned over to the executive branch of government for resolution. The larger the constituency, the smaller the power of any given pressure group. Every legislative constituency is necessarily smaller than that of the national executive. And the national executive in turn was given the opportunity to pass on some of the hard problems to local communities with homogeneous interests to be satisfied rather than pluralistic conflicts to be exacerbated.

Under title I of the Act, which provides for an expenditure of over one billion dollars, the benefits to private schools could take any or all of several forms. Probably the most important is the possibility of financing “shared-time” or “dual enrollment” programs, by which parochial school students will receive some of their education, most likely science, mathematics and language instruction, in public schools established sufficiently close to parochial schools so that the students can take their humanities and social science instructions under church auspices. That such programs can provide substantial succor for a financially pressed paro-

chial system is patent. The only potentially restrictive factor is one that Congress did not write into the law but expressed in a committee report, where it said: "[I]t is the committee's expectation that the arrangements will be administered in such a manner as to avoid classes which are separated by religious affiliation."¹⁹

Under this same title, other substantial benefits can be made available: public school teachers may be provided for parochial schools to meet "special educational needs of educationally deprived children." And there will be available to church-school students, "broadened health services, school breakfasts . . . , guidance and counseling services, as well as special educational programs."

Under title II of the Act, with a budget of \$100,000,000, "library resources, textbooks . . . [and] other instructional materials" will be afforded parochial school students, but "only those materials which have been approved for use in public schools may be made available." Parochial schools will also participate in the direction of and benefits from the supplemental educational centers and services provided by title III's \$100,000,000. In the committee's language: "[I]t is intended that local public educational agency . . . will have wide latitude in fashioning programs of direct benefit and advantage to elementary and secondary school pupils *regardless of whether they are enrolled in public schools.*" (Emphasis added.)

The Department of Health, Education, and Welfare, which had so conveniently supplied President Kennedy with an opinion in support of his conclusion of unconstitutionality of aid to parochial schools, proved equally ready to indorse the Johnson bill as within the limits of the First Amendment. This fact demonstrates either the very thin line between constitutionality and unconstitutionality or the capacity of a department's legal office to accommodate the law of the constitution to the will of the chief executive. Or, it may mean that in one opinion or the other, the Department was just plain wrong.

19. This and the quotations immediately following were taken from S. REP. NO. 146, 89th Cong., 1st Sess. (1965).

This brings me to the state of constitutional development against which the act will be tested. Remember that the role of the Court purports to be different from that of the legislature. The issue in the courts is not supposed to be whether the statute's provisions are desirable or undesirable but rather the legislature has clearly exceeded the limits of its authority fixed by the Constitution. Moreover, the issue will not be presented in the abstract fashion of legislative debate, but rather in terms of the grant or denial of funds or the method of their use in specific cases. Since these facts cannot be fully anticipated in advance of the litigation that will arrive at the Court, final judgment must await the presentation of such a case of controversy on a hard record.

The fact is, however, that if the issues deriving from the statute were to arrive at the Supreme Court tomorrow, there would be neither precedent nor principle available to resolve them. The Court's judgments in the area of church and state are even more eclectic than its decisions in other areas of constitutional law. In the specific field of education, there are but half a dozen decisions that are relevant and none is close to being decisive.

Probably the earliest decision of the Court meriting consideration in this context is the case of *Pierce v. Society of Sisters*,²⁰ but not for the reasons usually offered. The case raised no church-state issues; the Court decided no church-state issues. Indeed, no reference to the First Amendment is made anywhere in the Court's opinion.

In 1922, the State of Oregon, under the initiative provision of its constitution, adopted a statute that, for all relevant purposes, made attendance at public schools within the state compulsory. The statute was challenged, even before it was to become effective, by the Society of Sisters, an Oregon corporation that conducted a parochial school, and by Hill Military Academy. The primary reliance of the schools was on decisions such as the *Child Labor Tax Case*²¹ and *Coppage v. Kansas*.²² In short, the arguments put forth were in terms of the "substantive due process" cases that have

20. 268 U.S. 510 (1925).

21. *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922).

22. 236 U.S. 1 (1915).

long since been interred along with the notion that the principles of Spencer's *Social Statics* were incorporated in the Constitution.²³ At that time, however, the Court was still enthralled and the opinion by Mr. Justice McReynolds reads accordingly.

The other major emphasis of the Court was based on *Meyer v. Nebraska*²⁴ which had held unconstitutional a state statute making it illegal to teach any modern language other than English. The *Meyer* case established for the Court the proposition that there could be no interference with the liberty of parents by "forcing [their children] to accept instruction from public teachers 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 The decision was as applicable to the military academy as to the parochial school. In no way did it rest on any concept of "freedom of religion."

Nor is the second relevant decision valid for the position for which it is usually cited. *Cochran v. Board of Education*²⁶ sustained the constitutionality of a state expenditure for textbooks for private schools. But again the issue was not arising under the religion clauses of the First Amendment. As of the time of decisions in *Pierce* and *Cochran*, the Supreme Court had not yet discovered that the First Amendment's religion clauses, the language of which is addressed solely to Congress, were applicable to the states.²⁷ For this reason both decisions are peripheral to the federal aid to education laws. Both opinions, however, contain dicta or reasons that do, indeed, bear on the judgments to be rendered on the subject of our immediate interest.

When *Everson v. Board of Education*²⁸ came before the Court in 1947, it was able to write on a comparatively clean

23. See McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, in *THE SUPREME COURT AND THE CONSTITUTION* 158 (Kurland ed. 1965).

24. 262 U.S. 390 (1923).

25. Note 20 *supra* at 535.

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

27. See Howe, *The Constitutional Question*, in *FUND FOR THE REPUBLIC, RELIGION AND THE FREE SOCIETY* 49 (1958).

28. 330 U.S. 1 (1947).

slate, at least insofar as the Court's judgments rather than its dicta were concerned. This litigation arose out of payments made by the township of Ewing, New Jersey to parents of parochial school children in reimbursement for the costs of transportation of those children to their school. A taxpayer of the township took exception to the payments and brought suit to effectuate his objections.

Mr. Justice Black's opinion, for a five-man majority, first disposes of the argument that the payments were illegal because they required the taking of some persons' property for the private use of others. This, it will be recalled, was the major emphasis of the appellants in the *Cochran* case and the argument was quickly disposed of on that authority.

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 payment of the fares of their children so that they can ride in public buses to and from schools rather than run the risk of traffic and other hazards incident to walking or "hitchhiking."²⁹

With reference to the First Amendment problem, Black's conclusion from history and the scanty precedents was set out in language that has become the classic base for all arguments relevant to the establishment clause:

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 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

29. *Id.* at 7.

can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."³⁰

The additional language that Black used has also been offered by both sides in the school-aid controversy and reads like this:

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, 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 legislation. 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 its citizens without regard to their religious belief.³¹

This clearly says that a legislative classification in terms of public and non-public schools would be valid. A classification in terms of religion, however, would be invalid. This proposition is again emphasized in the Court's opinion at a later point. In sustaining the validity of the New Jersey action in question, the opinion said: "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."³²

In a dissenting opinion, Mr. Justice Jackson suggested that any payment to parochial schools would fall under the constitutional ban, whether the contribution was going to all

30. *Id.* at 15-16.

31. *Id.* at 16. (Emphasis not added.)

32. *Id.* at 18.

schools or not. For Jackson, aid to a "Church school is indistinguishable . . . from rendering the same aid to the Church itself."³³ He reached this conclusion because of his characterization of Catholic schools as "a vital, if not the most vital, part of the Roman Catholic Church."³⁴ And, he went on, "It is of no importance in this situation whether the beneficiary of this expenditure of tax-raised funds is primarily the parochial school and incidentally the pupil or whether the aid is directly bestowed on the pupil with indirect benefits to the school."³⁵

Mr. Justice Rutledge read the Constitution to outlaw all use of public funds for religious purposes.³⁶ For him: "Legislatures are free to make, and courts to sustain, appropriations only when it can be found that in fact they do not aid, promote, encourage or sustain religious teaching or observances, be the amount large or small."³⁷

The next relevant decisions concern the problem of segregating school children within their schools, for part of the time, by religious classifications. This was a classification not so ancient as the South's color segregation, but it was far more widespread in the United States. The system of released-time was first challenged in the Supreme Court in *McCollum v. Board of Education*.³⁸ In Champaign, Illinois, students were released from their public school classes for a period of thirty or forty-five minutes each week so that they might take religious instruction. This instruction was given on the school premises by teachers approved but not employed by the public school. It was given in the regular classrooms to those students whose parents indicated that they desired their children to take such instruction. Students who did not take religious instruction were required to leave their classrooms to continue their secular studies elsewhere in the building. Student attendance at the religious classes was reported to the school authorities. Mr. Justice Black,

33. *Id.* at 24.

34. *Ibid.*

35. *Ibid.*

36. *Id.* at 58.

37. *Id.* at 52-53.

38. 333 U.S. 203 (1948).

writing for the Court, had little difficulty in disposing of the case.

Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes. This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith. And it falls squarely under the ban of the First Amendment (made applicable to the States by the Fourteenth) as we interpreted it in *Everson*. . . .³⁹

The ban did not last very long. When the issue was again presented to the Court a few years later, in *Zorach v. Clauson*,⁴⁰ it found the New York City released-time program valid. Factually, the only difference between the Champaign and New York City programs was that the students released to take religious education in New York left the school premises in order to do so. Mr. Justice Douglas' opinion for the majority almost conceded this to be the only distinction, but regarded it as a distinction that made a difference.

The author of the *McCullum* opinion, Mr. Justice Black, was unable to recognize the difference. Mr. Justice Black's dissent pointed out: "As we attempted to make categorically clear, the *McCullum* decision would have been the same if the religious classes had not been held in the school buildings."⁴¹ "*McCullum* . . . held that Illinois could not constitutionally manipulate the compelled classroom hours of its compulsory school machinery so as to channel children into sectarian classes."⁴² The compulsion exerted in *Zorach* was neither less nor different from that held invalid in *McCullum*. He concluded:

State help to religion injects political and party prejudices into a holy field. It too often substitutes force for prayer, hate for love, and persecution for persuasion. Government should not be allowed, under the cover of the soft euphemism of "co-operation," to steal into the sacred area or religious choice.⁴⁸

39. *Id.* at 209-10.

40. 343 U.S. 306 (1952).

41. *Id.* at 316.

42. *Id.* at 317.

48. *Id.* at 320.

It can readily be seen that the decisions through both released-time cases hardly provide an answer to the question of government aid to parochial schools. The only other cases directly related to the subject matter are no more enlightening. Despite the furor that followed them, the recent decisions holding school prayers and bible reading illegal, which need no restatement here, are of very limited consequence.⁴⁴ This, and only this, can be derived in certainty from these cases: neither the state nor federal government is allowed by the Constitution to prescribe the conduct of religious ceremonies in the public schools.

If the Supreme Court's judgments provide little basis for decision of the issues presented by the aid-to-education bill, neither do the recent decisions of the state high courts. For example, the Connecticut and Maine courts have recently upheld the validity of state payments for bus transportation for parochial school pupils,⁴⁵ but the high courts of Wisconsin and Alaska have even more recently held to the contrary.⁴⁶ This in the face of the decision in *Everson* sustaining such payments. Oregon, despite the *Cochran* case, has held that supplying text books to church school pupils is unconstitutional.⁴⁷ And in Vermont, where school districts pay tuition for students from the district who attend school in another district, it was held invalid to pay such tuition to a parochial school, despite the *Pierce* case.⁴⁸ These samples reveal closely divided state courts trying to divine the meaning of the Supreme Court's rulings.

The essential problem is the absence of principle on which judgment might be based. The Supreme Court opinions have been wordy but not weighty. Certainly it is true, as Professor Paul Freund, the dean of American constitutional law professors, has said: "A course of decisions may be principled

44. See Kurland, *The School Prayer Cases*, in OAKS, *op. cit. supra* note 4, at 142.

45. *Snyder v. Town of Newton*, 147 Conn. 374, 161 A.2d 770 (1960), *appeal dismissed* 365 U.S. 299 (1961); *Squires v. City of Augusta*, 155 Me. 151, 153 A.2d 80 (1959) (dictum).

46. *Reynolds v. Nusbaum*, 17 Wis.2d 148, 115 N.W.2d 761 (1962); *Matthews v. Quinton*, 362 P.2d 932 (Alaska 1961), *appeal dismissed and cert. denied*, 368 U.S. 517 (1962).

47. *Dickman v. School Dist.*, 232 Ore. 238, 366 P.2d 533 (1961), *cert. denied*, 371 U.S. 823 (1962).

48. *Swart v. South Burlington Town School Dist.*, 122 Vt. 177, 167 A.2d 514 (1961), *cert. denied*, 366 U.S. 925 (1961).

without being doctrinaire."⁴⁹ But not even he has shown what the principles might be that underlie the decisions in this area. After examining the judicial literature one is tempted to agree that Mr. Justice Jackson might have spoken the truth in the first released-time case when he stated: "It is idle to pretend that this task is one for which we can find in the Constitution one word to help us as judges to decide Nor can we find guidance in any other legal source. It is a matter on which we can find no law but our own prepossessions."⁵⁰ In short, in Jackson's view, the judicial approach has been the same as the legislature's.

What then will be the basis for argument before the high tribunal when the issues arrive there? If the results are not predictable, the arguments are, in large measure because they have been so frequently mooted in periodical literature and books devoted to the subject.

The strongest argument to sustain not only this statute but even more general aid to parochial schools derives from the *Pierce* case, despite the fact that that decision was not based on the religion clause of the First Amendment. This argument is that "public money . . . cannot logically be withheld from the private school if it is publicly accredited as an institution where children may fulfill their legal duty to attend school."⁵¹ And, because of *Pierce*, the state must make it possible for a parochial school to be accredited in this fashion. According to this argument, parochial schools are in a different category from any other function of a church because of the fact that the church has been allocated a public duty to perform in the area of primary education. Certainly, *Pierce* could be overruled, especially since it rests largely on a philosophy of economic substantive due process long since rejected by the Court. But this is not likely. Nor is it likely, however, that the Court will make the direct confrontation that *Pierce* would enforce on it.

Before I turn to the issue that the Court will probably regard as the one that it can best handle in accordance with

49. FREUND & ULICH, *RELIGION AND THE PUBLIC SCHOOLS* 12 (1965).

50. Note 38 *supra* at 237-38.

51. Drinan, *op. cit. supra* note 7, at 60.

its *ad hoc* methods, let me state what I regard as the weakest of the arguments for support of parochial schools, but one that is most frequently asserted. It is, in effect, that failure to provide aid to parochial schools constitutes an infringement of religious liberty and that the function of the establishment clause is to serve only as an adjunct of the freedom clause. Therefore, as William Gorman puts it:

To be sure, governmental action taken to avoid abridgement of religious liberty would *indirectly* entail "aid to religion." And, to be sure, the distinction between direct aid to religion and indirect aid resulting from concern for religious liberty might, in the first instance, be something too subtle for the understanding of "ordinary people." But surely it is precisely the function of the legal art, as exercised by judges and by jurists in the schools of law, to make and then effectively teach whatever subtle distinctions the doing of justice requires.⁵²

The quick and simple answer is that Gorman's major premise is in error. As Professor Freund has said:

The nonestablishment clause is not merely a means to assure free exercise. The free-exercise guarantee is not absolute; it must yield when it invades a paramount concern of public order. The nonestablishment guarantee is directed at public aid to the religious activities of religious groups; but since these are commonly intertwined with other activities, philanthropic and educational, some incidental aid is valid, as in the case of school bus fares or public aid to church-related hospitals.⁵³

It is to this question of incidental or indirect aid that the Court is most likely to address itself in seeking a solution to the problems that will come before it as a result of the 1965 statute. For the statute itself avoids any issue of direct aid. And both the "liberals" and the Catholics are prepared to rest their case on the propriety of indirect aid. But this is largely a shift in rhetoric rather than substance.

For some Catholics, as we have seen, even direct subsidies for parochial schools may be labeled indirect assistance. For

52. Gorman, *Problems of Church and State in the United States: A Catholic View* in OAKS, *op. cit. supra* note 4, at 49.

53. FREUND & ULICH, *op. cit. supra* note 49, at 11.

many proponents of the statute, so long as the major objective is not aid to religious institutions but education of children, the assistance may be sustained as indirect or incidental. The anti-aid group made up, according to Professor Katz,⁵⁴ of most non-Catholic lawyers has a different theory. For them aid is indirect only if it is administered and controlled by secular or governmental agencies. For those in the middle, the issue is whether the particular program being supported has a significant religious content. If, as in the case of science training, the religious content is deemed minimal, federal aid is proper. If, on the other hand, the training is in social sciences, where the religious content is substantial, aid would be improper. And, indeed, it is on this last thesis that Congress would seem to have rested its legislation.

Most of the uncommitted legal scholars, that is those not governed by either the Catholic or the separationist ideology, would seem to support the distinction between direct and indirect aid. For example, Professor Mark de Wolfe Howe of Harvard told the Senate committee: "I am satisfied that a valid line can be drawn between government support of activities that are predominantly of civil concern and those which are predominantly of religious significance."⁵⁵ (Parenthetically, it should be pointed out that the entire Catholic case for maintaining a separate school system is that such a line is impossible to draw.) It is interesting to note that Professor Howe was also of the view that as a matter of legislative policy, aid to parochial schools was undesirable.⁵⁶ Professor Wilber G. Katz and Professor Arthur Sutherland are in agreement with Professor Howe on the constitutional question.⁵⁷ And Professor Paul G. Kauper has reached the conclusion that direct aid would be invalid but indirect aid of the kind promoted by the 1965 statute will be held valid.⁵⁸

For myself, I find the distinction offered between direct and indirect aid of little merit, whether it is justified on the ground that the indirect aid supports only secular activities or on the ground that the aid is to the students rather than

54. KATZ, *RELIGION AND AMERICAN CONSTITUTIONS* 73 (1964).

55. *Ibid.*

56. *Id.* at 76.

57. *Id.* at 74.

58. KAUPER, *RELIGION AND THE CONSTITUTION* 112-13 (1964).

to the institution. In effect the assistance offered does not differ from direct aid. "[T]he sectarian institution will be strengthened in its religious activities both because its own funds will be freed for religious use and because it will be able to subject more students to religious training."⁵⁹ If direct aid is invalid, then I see little way to avoid the conclusion that indirect aid is also invalid. I do not agree, however, that direct aid is invalid.

As a matter of legislative policy I regret and should have voted against provision for federal aid to private elementary and secondary schools. I find the potential values to our society from unsegregated public school education so great as to require the concentration of public funds for their support. The problem of constitutionality I find more difficult. Given the *Pierce* case which tells us that the Constitution requires that the public function of educating our children for American citizenship must be delegated to private schools at the parents' behest, I find it difficult to conclude that direct, nondiscriminatory aid cannot be afforded those schools performing that public function. My position may appear somewhat anomalous, however, for if it would sustain direct aid for parochial schools it would reject as unconstitutional aid by way of shared-time, which is the major form of relief afforded parochial schools by the 1965 legislation. For as I see it, there is no rationale for dividing pupils between public and private schools in the manner that most shared-time programs would do except to relieve the financial burden of the parochial schools. Programs that have no rationale except benefit for church schools, I find clearly violative of the establishment clause of the First Amendment.⁶⁰ But wiser men than I have asserted that shared-time is both a desirable and a constitutional concept.⁶¹

In conclusion, I would offer a quotation from my favorite author, made in the heat of the controversy over the Kennedy bill, when he wrote: "Anyone suggesting that the answer, as a matter of constitutional law, is clear one way or the other

59. Note 15 *supra*, at 1354.

60. See KURLAND, *RELIGION AND THE LAW* (1962).

61. See Katz, *Note on the Constitutionality of Shared Time*, 1964 *RELIGION AND THE PUBLIC ORDER* 85.

is either deluded or 'deluding.'"⁶² On the other hand Mr. Justice Douglas has announced that even indirect aid to parochial schools is unconstitutional.⁶³ And he is closer to the seat of judgment than I am.

62. KURLAND, *op. cit. supra* note 60, at 111.

63. *Abington School Dist. v. Schempp*, *supra* note 3, at 229 (concurring).