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Federal Aid to Church Affiliated Colleges and Universities: Breaching the Wall

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FEDERAL AID TO CHURCH AFFILIATED COLLEGES AND UNIVERSITIES: BREACHING THE "WALL"

The vast expansion in the field of public education has been complemented with an ever increasing growth of federal activity in this area. The impact of tremendous technological advancement and international competition has focused attention on the educational needs of this nation. Federal aid has been extended to assist in education by numerous measures in the last quarter century: The National School Lunch Act of 1946,[1] the National Defense Education Act of 1958,[2] the National Defense Loan Program of 1958,[3] the School Facilities Construction Act of 1958,[4] the Higher Education Facilities Act of 1963[5] and the Federal Aid to Elementary and Secondary Schools Act of 1965.[6] Of the approximately 2,000 institutions of higher education in this country,[7] over 800 are in some degree church related[8] and are allowed participation in federal funds.

The increasing use of public funds in the field of education has, however, raised an important controversy: Is such federal assistance to private sectarian educational institutions constitutional?

I

To date, the decisions of the Supreme Court regarding the scope of the no establishment clause of the first amendment[9] are relatively few, and there are none in point with the instant issue. Although this is presently an open question, there are, however, several propositions which are somewhat applicable to the constitutional power of the federal government to provide financial or other assistance, either direct or indirect, to secular

1. 60 Stat. 230 (1946), 42 U.S.C. § 1751-60 (1964).
2. 72 Stat. 1580 (1958), 20 U.S.C. § 401-589 (1964).
3. 72 Stat. 1583 (1958), 20 U.S.C. § 421-29 (1964).
4. 72 Stat. 548 (1958), 20 U.S.C. § 631-45 (1964).
5. 77 Stat. 363 (1963), 20 U.S.C. § 701-57 (1964).
6. 79 Stat. 27 (1965), 20 U.S.C.A. § 241 (a) (Supp. 1966).
7. See 109 CONG. REC. 18406 (daily ed. Oct. 11, 1963).
8. *Federal Programs Under Which Institutions With Religious Affiliations Receive Federal Funds Through Loans Or Grants,* a memorandum prepared by the legal staff of the Department of Health, Education, and Welfare, March 28, 1961. Nearly fifty such statutory programs are listed therein.
9. U.S. CONST., amend. I.

institutions, including schools of higher education maintained by or affiliated with religious bodies.

In this paper attention will be primarily centered on the National Defense Loan Program[10] and the Higher Education Facilities Act of 1964,[11] for they are most representative of the applicable federal legislation. The Higher Education Facilities Act was designed to meet the need for increased academic facilities in view of estimates that almost twice as many students would seek admission to colleges in 1970 as in 1960.[12] The Commissioner of Education is to allocate the funds to the states according to a statutory formula. The primary responsibility for allocating construction money is placed on the states which are to determine the priorities of the various institutions within their borders, although the Commission may disapprove any state plan. The funds are to be used only for "academic facilities" which are defined as structures "especially designed for instruction or research in the natural or physical sciences, mathematics, modern foreign languages, or engineering, or for use as a library."[13] "Academic facilities" are not to include any facility to be used for sectarian instruction or as a place for religious worship[14] during the twenty year period of federal interest.

The National Defense Loan Program[15] which provides funds for students in institutions of higher learning is somewhat less suspect due to the act's connection with national defense. Secondly, the provisions are directly of benefit to the individual rather than to any institution.

The first amendment provides only "that Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[16]

It is well settled that the language was to prohibit the federal government from establishing a national religion, or from affording any religion or religions a preferred status.[17] A large

10. 72 Stat. 1583 (1958), 20 U.S.C. § 421-29 (1964).
11. 77 Stat. 363 (1963), 20 U.S.C. § 701-57 (1964).
12. S. REP. No. 557, 88th Cong., 1st Sess. 2 (1963).
13. § 106(1), 77 Stat. 368 (1963) 20 U.S.C.A. § 176 (Supp. 1966).
14. § 401(a)(2)(c), 77 Stat. 374 (1963), 20 U.S.C. § 751 (a)(2)(c) (Supp. 1966).
15. 72 Stat. 1583 (1958), 20 U.S.C. § 421-29 (1964).
16. U.S. CONST. amend. I.
17. Corwin, *The Supreme Court As National School Board,* 14 LAW & CONTEMP. PROB. 3 (1949).

portion of the early settlers of this country came here from Europe to escape laws which compelled their membership in, and support of favored churches. The years preceding the colonization of America had been filled with civil strife and persecutions, generated in a large part by established sects determined to maintain their absolute political and religious supremacy. Strangely, however, these very practices of the old world were quickly replanted in the colonies.[18] Several states went so far as to provide for an official state church,[19] and in some cases repeated many of the old world practices and persecutions. This situation became so commonplace that it shocked the colonials into a feeling of abhorrence. "A resulting conviction appeared that individual religious liberty could be achieved best under a system whereby government was stripped of all powers to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individuals or groups."[20]

Perhaps the most celebrated statement concerning the first amendment is that of Justice Black in *Everson v. Board of Education*:[21]

> 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 nonattendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against

18. Everson v. Board of Educ., 330 U.S. 1, 11 (1946).

19. See, *e.g.*, "the charter of the colony of Carolina which gave the grantees the right of patronage and advowsons of all the churches and chapels . . . together with license and power to build chapels and oratories . . . and to cause them to be dedicated and consecrated, according to the ecclesiastical laws of the kingdom of England." POORE, CONSTITUTIONS 1390-91 (1878).

20. Corwin, *The Supreme Court As National School Board*, 14 LAW & CONTEMP. PROB. 3 (1949).

21. 330 U.S. 1 (1946).

establishment of religion by law was intended to erect 'a wall of separation between Church and State.'[22]

"The wall of separation" phrase is not one with true constitutional roots; it arose from Thomas Jefferson's letter to the Baptist Congregation of Danbury, Connecticut.[23] It has, however, been sufficiently annexed to the Constitution in almost every opinion dealing with "the establishment of religion" since *Reynolds v. United States*.[24] In practice the Court's "wall of separation" has been more of a vague generality rather than a contained area. For example, tax exemptions for religious institutions and property have been accepted in the United States from the time the Constitution was adopted.[25] There are a number of other manifestations: police and fire protection to churches, the presence of chaplains in Congress and in the Armed Forces, "In God We Trust" as the motto inscribed on coins, and the cry opening each session of federal court, "God Save the United States; and this Honorable Court."[26]

II

A. *Establishing the Foundation*

The seeds of the present issue were perhaps sown in *Pierce v. Society of Sisters*,[27] a case which involved an Oregon statute

22. *Id.* at 15-16. Presidents of the United States have on several occasions made known their thoughts. In 1875, for example, President Grant, addressing the Grand Army of Tennessee, said:

> Encourage free school and resolve that not one dollar appropriated for their support shall be appropriated for the support of any sectarian schools. Resolve that neither the state nor the nation, nor both combined, shall support institutions of learning other than those sufficient to afford every child growing up in the land the opportunity of a good common school education, unmixed with sectarian, pagan or atheistical dogmas. Leave the matter of religion to the family altar, the church, and the private school, supported entirely by private contributions. Keep the church and state forever separated. Quoted in McCollum v. Board of Educ., 333 U.S. 203, 218 (1948).

23. PADOVER, THE COMPLETE JEFFERSON 518-19 (1943).

24. 98 U.S. 145, 164 (1878).

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

26. McCollum v. Board of Educ., 333 U.S. 203, 255 (1947).

27. 268 U.S. 510 (1925).

requiring public school attendance of children between the ages of eight and sixteen. Society of Sisters, a parochial school, and Hill Military Academy, a private nonsectarian school, sought to enjoin the enforcement of the statute. The Supreme Court held that the law was invalid as an unreasonable interference with the right of parents to control the education of their children. The Court warned that a state cannot, consistently with the fourteenth amendment, "standardize its children by forcing them 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."[28] *Pierce* stands for the proposition that parents may, in satisfaction of compulsory education laws, send their children to private institutions, rather than to public schools, if they meet the educational standards of the state.

Proponents of federal aid have been quick to rely on the early cases of *Bradfield v. Roberts*[29] and *Cochran v. Louisiana Board of Education*.[30] In *Bradfield* the Court held that federal monies used for construction of a building on the grounds of a Roman Catholic hospital in the District of Columbia was not a violation of the first amendment, because the primary function of the aid was "for the cure of such sick and invalid persons as may place themselves under the treatment of the hospital."[31] In *Cochran* an appropriation of state tax funds to supply free textbooks for children in all schools, including sectarian schools, was held not to violate the fourteenth amendment. The Court, quoting from *Borden v. Louisiana State Board of Education*, said:

> The appropriations were made for the specific purpose of purchasing school books for the use of the school children of the state, free of cost to them. It was for their benefit and the resulting benefit to the state that the appropriations were made.[32]

In deciding *Everson v. Board of Education*[33] the Court perhaps reached the outer limits of federal aid. This case dealt

28. *Id.* at 535.
29. 175 U.S. 291 (1899).
30. 281 U.S. 370 (1930).
31. 175 U.S. 291, 299-300 (1899).
32. 281 U.S. 370, 374-75 (1930).
33. 330 U.S. 1 (1946).

with the use of tax funds for reimbursement of parents of Catholic school children for transportation to and from parochial schools. The Court by a five to four majority said that the statute approached the "verge" of constitutional limits but sustained it as public welfare legislation designed for the safety and benefit of school age children.

Based on *Cochran* and *Everson*, it may be said that appropriations passed for the benefit of the public as a whole do not violate the establishment clause even though a portion may go to groups of a sectarian nature, if such use has only incidental benefit to a particular religion. As Justice Black said in the *Everson* case, "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 beliefs."[34]

It should be recalled that *Everson* was the occasion for Justice Black's famed scope of the first amendment maxim "no tax in any amount . . . can be levied to support any religious activities or institutions."[35]

Everson is an unreliable precedent for sustaining the federal aid programs for several reasons. First, the result and the tenor of discussion seem somewhat inconsistent. As Justice Jackson pointed out in dissent, the Court could be likened to Byron's Julia who "whispering 'I will ne'er consent,' — consented."[36] And secondly, a major thorn in the side of sectarian aid is the fact that the individual and not the school received the aid, a factor significant to the majority. Thus, if the case renders possible validity to the National Defense Loans, it gives a kiss of death to the Higher Education Facilities Act.

B. *The "Release Time" Programs*

McCollum v. Board of Education[37] involved a release time program set up by a local Illinois school board. Under the program, public school pupils were premitted to attend classes in religious instruction during school hours and upon school premises which were conducted by teachers representing a number of

34. *Id.* at 16.
35. 330 U.S. 1, 15-16 (1946).
36. 330 U.S. 1, 19 (1946).
37. 333 U.S. 203 (1948).

religious faiths. Pupils who did not attend the religious instruction sessions were required to utilize the time in studying their regular subjects. The program was attacked on the grounds that it violated the first and fourteenth amendments. The Supreme Court held that the program breached the wall of separation, and was "a utilization of the tax established and tax supported public school system to aid religious groups to spread their faith."[38] The Court said that in addition to providing facilities for the dissemination of religious doctrines, the state afforded an "invaluable aid to provide pupils for the religious classes through the use of the state's compulsory public school machinery."[39]

Four years later, the Court upheld New York's release time program in *Zorach v. Clauson*.[40] The plan differed from the one in *McCollum* only in that the program took place off the school premises. The Court said, "the . . . program involves neither religious instruction in public school classrooms nor the expenditure of public funds. All costs, including the application blanks, are paid by the religious organization."[41]

In language upholding federal aid, the Court further stated:

> The First Amendment, however, does not say that in every and all respects, there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the *common* sense of the matter. Otherwise, the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly.[42]

And:

> [to hold otherwise] would be preferring those who believe in no religion over those who do believe. Government may not finance religious groups, nor undertake religious institutions, nor blend secular and sectarian education, nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which

38. *Id.* at 212.
39. *Ibid.*
40. 343 U.S. 306 (1952).
41. *Id.* at 309.
42. *Id.* at 312.
43. *Id.* at 314.

> makes it necessary for government to be hostile to religion, and to throw its weight against efforts to widen the effective scope of religious influence. The government must be neutral when it comes to competition between sects.[43]

Zorach, its critics claim, was a contest of hair-splitting analysis, as was amply put by Justice Jackson in his dissent: "[T]he distinction attempted between [*McCollum*] . . . and this [case] is trivial, almost to the point of cynicism, magnifying its nonessential details . . . the *McCollum* case has passed like a storm in a teacup."[44]

Perhaps the only lesson learned from *McCollum* and *Zorach* is that fact situations in point turn on matters of degree, a principle not uncommon in constitutional law.

C. *Sunday Closing Laws*

The status of *McCollum* was a source of much discussion between those who interpreted *Zorach* to be a mere retreat and those who found *Zorach* to be a repudiation.[45] As if to reaffirm *McCollum*, or to rebuff *Zorach*, the Court shortly handed down two decisions, *McGowen v. Maryland*[46] and *Torcaso v. Watkins*,[47] reiterating the definitive paragraph interpreting the establishment clause as expressed in *Everson* and *McCollum*, and making notice of the fact that the Court's opinion in *Zorach* specifically stated: "We follow the *McCollum* case."[48]

At issue in the *McGowen* case was the constitutionality of state legislation which, broadly speaking, required the cessation of most commercial activities on Sunday.[49] The appellants argued that not only was the purpose of the statutes religious—the encouragement of church attendance—but their effect was discriminatory—preferring Sunday-worshipping Christians over other sects.

The Court, through Chief Justice Warren, conceded that the original purpose of Sunday closing laws was motivated by re-

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44. *Id.* at 325.

45. See, *e.g.*, Kouper, *Church, State and Freedom, A Review*, 52 MICH. L. REV. 829 (1954): "All students of this subject may well agree that *Zorach* for all practical purposes overruled *McCollum*."

46. 366 U.S. 420 (1961).

47. 376 U.S. 488 (1961).

48. Zorach v. Clauson, 343 U.S. 306, 315 (1952).

49. See also Gallagher v. Crown Kosher Market, 366 U.S. 617 (1961); Braunfeld v. Brown, 366 U.S. 599 (1961); Two Guys from Harrison—Allentown, Inc. v. McGinley, 366 U.S. 582 (1961).

ligious forces but felt that today their object is to set aside a day of rest for all citizens in an "atmosphere of recreation, cheerfulness, repose, and enjoyment. . . . The statutes present purpose and effect is not to aid religion. . . ."[50]

In a separate opinion,[51] Justice Frankfurter observed that the establishment clause makes the legislature incompetent to enact regulations, the purpose of which is to control man's religious beliefs. "But once it is determined that a challenged statute is supportable as implementing other substantial interests than the promotion of belief, the guarantee prohibiting religious 'establishment' is satisfied."[52] He further stated:

> If the primary end achieved by a form of regulation is the affirmation or promotion of religious doctrine—primary, in the sense that all secular ends which it purportedly serves are derivative from, not wholly independent of, the advancement of religion — the regulation is beyond the power of the state. This was the case in McCollum. Or if a statute furthers both secular and religious ends by means unnecessary to the effectuation of the secular ends alone—where the same secular ends could equally be attained by means which do not have consequences for promotion of religion—the statute cannot stand.[53]

The similarity between the "*Blue Law*" cases and the issue at hand is quite apparent. It is undisputed that education is a secular object and one of general public concern. From the language in *McGowen* it would seem that the incidental benefit to religious groups would be outweighed by ends independent of the advancement of religion.

D. *School Prayers and Bible Reading*

In *Engel v. Vitale*[54] the Court, in another of Justice Black's decisions, held that New York's program of daily classroom invocation of God's blessings as prescribed in a prayer promulgated by its Board of Regents was a "religious activity" and use of a public school system to encourage recitation of such prayer

50. McGowen v. Maryland, 366 U.S. 420, 448-49 (1961).
51. Mr. Justice Harlan joined.
52. 366 U.S. 420, 466 (1961).
53. *Id.* at 466-67.
54. 370 U.S. 421 (1962).

was a practice wholly inconsistent with the establishment of religion clause.

Justice Douglas in a concurring opinion made note of Justice Rutledge's dissent in *Everson:*

> Now as when it was adopted the price of religious freedom is double. It is that the church and religion shall live both within and upon that freedom. There cannot be freedom of religion, safeguarded by the state, and intervention by the church or its agencies in the state's domain or depending on its largesse. The great condition of religious liberty is that it be maintained free from sustenance, as also from other interferences, by the state. *For when it comes to rest upon that secular foundation it vanishes with the resting. Public money devoted to payment of religious costs, educational or other, brings the quest for more. It brings too the struggle of sect against sect for the larger share or for any.* Here one by numbers alone will benefit most, there another. That is precisely the history of societies which have had an established religion and dissident groups.[55]

Although perhaps tempered somewhat by Douglas' prior references to neutrality, the above is nevertheless harrowing to the proponents of aid programs. Note especially the language of the Higher Education Facilities Act dealing with the administration of funds by state officials.[56]

The Bible Reading cases, *Abington School District v. Schempp*, and *Murray v. Curlett*,[57] involved a Pennsylvania statute and a Maryland regulation which required the reading of a portion of the Holy Bible without comment and the recitation of the Lord's Prayer at the opening of each day of public school. It was provided that any child could be excused from participation upon parent's request.

In declaring these practices to be violative of the establishment clause, the Court found that their primary effect was the advancement of religious beliefs. Writing for the majority, Justice Clark shed some light on the neutrality requirement of the first amendment,[58] rejecting "unequivocally the contention

55. *Id.* at 444.

56. § 106(1), 77 Stat. 374 (1963), 20 U.S.C.A. § 751(a)(2)(c) (Supp. 1966).

57. 374 U.S. 203 (1963) (companion cases).

58. See, *e.g.*, Konvitz, *Separation of Church and State; The First Freedom,* 14 LAW AND CONTEMP. PROB. 44 (1949); Corwin, *The Supreme Court as National School Board,* 14 LAW & CONTEMP. PROB. 3 (1949).

that the Establishment Clause forbids only governmental preference of one religion over another."[59]

The true meaning of the neutrality principle can be found in the interaction of the first amendment's twin religious clauses. Justice Clark explained it in terms of a specific test:

> The test may be stated as follows: What are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the structures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.[60]

There is at least one major factor which distinguishes the aid and assistance proscribed in *Zorach*, *McCollum*, *Engel* and *Schempp* from that to be rendered under the federal aid to education programs. The former involved state approval and support of religion over nonbelief while the federal legislation expresses neither approval nor disapproval. To be sure, direct financial aid does serve to encourage religious education, but it cannot be doubted that the primary scheme is neutral *between religion and nonbelief* since its benefits are available to state and nondenominational schools as well as sectarian institutions. Such neutrality is an important distinguishing factor in light of *Everson v. Board of Education*[61] and *Cohran v. Louisiana Board of Education.*[62]

Attention should also be given to Justice Douglas' concurring opinion in *Schempp-Murray*:

> The most effective way to establish any institution is to finance it, and this truth is reflected in the appeals by church groups for public funds to finance their religious schools. Financing a church either in its strictly religious activities or in its other activities is equally unconstitutional, as I understand the establishment clause. Budgets for one activity may be technically separable from budgets for others. But the institution is an inseparable whole, a living

59. 374 U.S. 203, 216 (1963).
60. *Id.* at 222.
61. 330 U.S. 1 (1946).
62. 281 U.S. 370 (1930).

> organism, which is strengthened in proselytizing when it is strengthened in any department by contributions from other than its own members.[63]

Such language would certainly preclude all forms of general grants and assistance to church affiliated schools and would probably find the Higher Education Facilities Act equally offensive. For example, grants for construction of a science or engineering building, certainly secular, would allow sectarian funds to be freed from that purpose and possibly be used for a chapel, clearly a religious end.[64]

E. *Sherbert v. Verner*

The appellant in *Sherbert v. Verner*,[65] a Seventh-day Adventist, had been discharged from her employment because she would not work on Saturday, the Sabbath day of her faith. She was subsequently declared ineligible for unemployment compensation, because she refused to accept employment involving work on Saturday.[66]

In holding the unemployment compensation act unconstitutional as applied to the appellant, the Court found that the appellant's disqualification for unemployment compensation imposed an indirect burden on the free exercise of her religion. She was forced to choose between following the precepts of her religion and forfeiting the unemployment benefits and abandoning one of her religious principles in order to qualify.

In dissenting, Justices Harlan and White pointed out that the majority implied that if a statute of general application imposes an indirect financial burden upon a person or group solely because of religiously motivated conduct, the government is compelled by the free exercise clause to create an exception, unless compelling state interests require otherwise.

Accepting this, is it not at least arguable that to deny individuals desiring to attend religious affiliated schools the benefits of federal aid that their contemporaries in private schools enjoy would penalize them because of their religious beliefs?

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63. 374 U.S. 203, 229 (1963).

64. Construction at places of worship are prohibited by the Higher Education Facilities Act, § 401(a)(2)(c), 77 Stat. 374 (1963), 20 U.S.C. § 751 (a)(2)(c) (1964).

65. 374 U.S. 398 (1963).

66. Unemployment Compensation Act, S.C. CODE ANN. § 68-114 (1952) declared ineligible for its benefits a claimant "who has failed, without good cause . . . to accept suitable work when offered him. . . ."

F. *Horace Mann League and Maryland Education Cases*

The only case decided subsequent to *Engel* and *Schempp* involving the establishment clause is *Horace Mann League of the United States v. Board of Public Works*.[67] The Maryland Court of Appeals used federal constitutional principles[68] to determine whether *state* aid to sectarian schools was violative of the first amendment. It laid down several factors as significant in determining whether an educational institution is religious or secular:

(1) The stated purposes of the college.

(2) The college personnel, which includes the governing board, the administrative officers, the faculty, and the student body. With considerable stress being laid on the substantiality of religious control over the governing board as criterion of whether a college is sectarian.

(3) The college's relationship with religious organizations and groups, which relationship includes the extent of ownership, financial assistance, the college's memberships and affiliations, religious purposes, and miscellaneous relationship with its sponsoring church.

(4) The place of religion in the college's program, which includes the extent of religious manifestation in the physical surroundings, the character and extent of religious observance sponsored or encouraged by the college, the required participation for any or all students, the extent to which the college sponsors or encourages religious activity of sects different from that of the college's own church, and the place of religion in the curriculum and in extracurricular programs.

(5) Result or "outcome" of the college program, such as accreditation, and the nature and character of the activities of the alumni.

(6) The work and image of the college in the community.[69]

67. 242 Md. 645, 220 A.2d 51, *cert. denied*, 87 S. Ct. 317 (1966).

68. First amendment freedoms, made applicable to the states in Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

69. 242 Md. 645, ___, 220 A.2d 51, 65-66 (1966).

By way of summary of past guidelines the Maryland Court said:

> 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 religions .... Although a state cannot contribute tax-received funds to the support of an institution which teaches the tenets and faith of any church, it cannot exclude individuals, because of their faith or lack of it, from receiving the benefits of valid public welfare legislation.[70]

Of the four schools involved—Hood College, Western Maryland, Notre Dame, and St. Joseph—only Hood College was found to be so removed from church connection that aid would not constitute an establishment of religion.

Hood College differed in that the college's relation with the United Church of Christ and its "stated purposes in relation to religion are not of fervent, intense, or passionate nature, but seem to be based largely upon its historical background."[71] Emphasis was placed on findings that financial assistance given by the church amounted to only 2.2%, and that religion did not occupy a dominant place in the Hood program.

On examination of Notre Dame and St. Joseph the Court found that the entire "atmosphere of the College was permeated, motivated, enlarged, and integrated by the Catholic way of life."[72]

At Western Maryland College, while only 3% of the budget was provided by the Methodist Church, considerable importance seemed to be placed on the fact that participation in Protestant religious services was required of all students. Further examination showed that of the Hood College student body of 675 only 89 were members of the United Church of Christ. Western Maryland had a 40% Methodist student body, and Notre Dame and St. Jospeh had a student body of 97% Catholic.

The above case is significant for several reasons. First, as previously noted, the Maryland case somewhat defines the scope of *Engel* and *Schempp*. Second, the instant case introduces a possible alternative argument for supporters of federal aid, that

70. *Id.* at 64-65.
71. *Id.* at 67.
72. *Id.* at 70.

being, no "sufficient connection with a sponsoring sect to violate the no establishment clause."

G. *Constitutional Source*

The structure of the legislation in question illuminates several possible grounds to support its constitutionality.[73] It is generally accepted, as evident in the Loan Programs and in the committee records of the Higher Education Facilities Act,[74] that national defense is of sufficient justification for the assistance. But national defense is not the only source of justification for the exercise of federal power. One may also find its source in the national welfare, in the war powers, in the commerce power, or the power to tax. Any of these powers, with or without the broad scope of the "necessary and proper" clause, would possibly be sufficient. But because these powers are given in rather broad language, a possible resulting conflict with the first amendment arises. Faced with this situation, the Court may say that the establishment clause is one of "preferred nature."[75] Thus, the establishment clause would be a limitation applicable to any or all of these powers. In other words, the federal government cannot exercise any power in a way which is inconsistent with the first amendment.[76] On the other hand, the Supreme Court has on several occasions permitted certain interest, such as national security, to outweigh other first amendment rights, as exemplified in *Dennis v. United States*.[77] This "balance approach" may be quite relevant in light of *Sherbert v. Verner*[78] where the court applied a balancing approach with respect to the "free exercise clause" in the first amendment.

Assuming that the legislation at issue is primarily secular in nature and of incidental benefit to particular religious bodies, survival might well depend on the Court's employing a balancing test between the prohibitions of the establishment clause and the public benefit to be gained from a better educated population.

73. Manning, *Aid to Education—Federal Fashion*, 29 FORDHAM L. REV. 495 (1961).
74. 109 CONG. REC. 18255 (daily ed. Oct. 10, 1963).
75. Kovacs v. Cooper, 336 U.S. 77 (1949).
76. Manning, *Aid to Education—Federal Fashion*, 29 FORDHAM L. REV. 495 (1961).
77. Dennis v. United States, 341 U.S. 494 (1951).
78. 374 U.S. 398, 406 (1963).

H. *Standing*

An added problem to be considered is that of standing—regarding what parties could successfully challenge the constitutionality of such federal statutes. In *Frothingham v. Mellon*[79] the Court declared that an individual taxpayer, without more, does not have standing to bring a suit to restrain the enforcement of an act of Congress authorizing appropriations of public money upon the ground that the act is unconstitutional. A suit challenging appropriations from the federal treasury is not a "judicial controversy" within the meaning of Article III of the Constitution.[80]

Theoretical justification for this refusal to entertain federal taxpayer suits is that the judicial branch is not competent to adjudicate alleged wrongs which do not impinge directly on the individual but which he suffers merely in an indefinite way and in common with the people in general.[81] It may be noted that numerous taxpayer suits have been brought in state courts to test the constitutionality of state aid to religious schools.[82] However, it appears that *Frothingham* would preclude any constitutional attack by an individual.

In *Massachusetts v. Mellon*,[83] the companion case to *Frothingham*, the state sought to attack the constitutionality of the Maternity Act,[84] which provided appropriation to the several states to assist in the reduction of maternal and infant mortality which its citizens had been unable to do. In denying the state standing to attack, it was pointed out that the statute imposes no obligation but simply extends an option which the state is free to accept or reject.[85] It was further stated that it is not the duty of the state to protect its citizens who are also citizens of the United States from the operation of a statute of the United States, since with respect to their relations with the federal

79. 262 U.S. 447 (1923).

80. U.S. CONST. art. III, § 2.

81. 262 U.S. 447, 486 (1923).

82. Horace Mann League v. Board of Public Works, 242 Md. 645, 220 A.2d 51, *cert. denied*, 87 S. Ct. 317 (1966); Abernathy v. City of Irvine, 335 S.W.2d 159 (Ky. 1961); Dickmon v. School Dist. No. 62C, 232 Ore. 238, 366 P.2d 533 (1961); Swat v. South Burlington Town School Dist., 122 Vt. 177, 167 A.2d 514, *cert. denied*, 366 U.S. 925 (1963).

83. 262 U.S. 447 (1923).

84. 42 Stat. 224 (1921).

85. 262 U.S. 447, 480 (1923).

government, it is the latter's function to serve as *parens patriae*.[86]

It is therefore suggested that an attack by private or state supported schools with or without the assistance of their respective state, while skipping around *Frothingham*, would collide with the principle of *Massachusetts v. Mellon*.

III

The only conclusion that can be drawn from this examination is that the constitutionality of federal aid to religious affiliated colleges and universities remains an open question, there being sufficient justification to reject or uphold the constitutionality of such legislation. There being no true precedent, the interpretation of the establishment clause depends on one's view of the first amendment. If the establishment clause demands an absolute separation of the activities of government and the interests of religious denominations, then, to be sure, federal assistance to sectarian schools could not exist. Such an approach is neither realistic or possible for it assumes that state and religion co-exist in mutually exclusive and self-contained spheres. As previously pointed out, there are presently any number of examples of church-state cooperations which preclude the existence of this approach.

It cannot be doubted that education is a traditional and legitimate governmental interest and evidences a secular purpose which should be sufficient to meet constitutional objections. If there is a conflict with the objectives of the first amendment, it would be only from some incidental benefit.

The Court has made quite clear that in its relations with religious bodies, the concept of the first amendment requires neutrality. The scheme of the legislation at issue seemingly satisfies this requirement. There is no requirement of governmental approval and support of a particular religion, or religions over nonbelief because aid is equally provided to all institutions of higher education *regardless* of religious affiliation. As in George Orwell's aphorism "All animals are equal, but some animals are more equal than others,"[87] to deny assistance to institutions because of affiliation would be to make the

86. 262 U.S. 447 (1923).

87. ORWELL, ANIMAL FARM (1945). Analogy suggested in *Aid to Education —Federal Fashion*, 29 FORDHAM L. REV. 495 (1961).

unreligious animal more equal than the religious animal. Certainly there can be no constitutional requirement for the above.

Even assuming that federal assistance in this area violates the establishment clause, it is quite doubtful in light of the *Mellon* case that one could ever successfully challenge the constitutionality of such enactments. Such an argument takes on added persuasiveness by looking at the cases involving the Tennessee Valley Authority.[88] While they in no way relate to the issue involved here, nevertheless, they involved a great national need as opposed to private property rights and a resulting lack of standing.

To deny federal assistance to all sectarian schools, whose affiliation with a religious body is in many cases no more than lip service, while allowing increasing amounts of aid to private and state institutions, would be to place the former out of the competitive market by prohibitive cost to students. Such is highly unlikely at a time when increased enrollments have resulted in already overcrowded conditions.

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88. Tennessee Electric Power Co. v. TVA, 306 U.S. 118 (1939); Alabama Power Co. v. Ickes, 302 U.S. 464 (1938); Ashwander v. TVA, 297 U.S. 288 (1936).