

1968

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# Establishment of Religion—1968

*Arthur E. Sutherland*

*Professor Sutherland examines the establishment clause of the first amendment from several perspectives — historical, pragmatic, and logical. He concludes that from each viewpoint, that clause of the Constitution does not forbid federal aid to education, regardless of church affiliations, and predicts Supreme Court approval in the near future of such federal assistance. The author asserts, and makes persuasive supporting arguments, that the Constitution only forbids the establishment of a State church, and in no way prohibits aid to education that may incidentally benefit religious organizations. Professor Sutherland also suggests that the Supreme Court may well decide aspects of this question in its current session.*

## FACTORS IN CONSTITUTIONAL EVOLUTION

**W**HAT AMERICANS have wanted in their Constitution, they have ultimately gotten. Sometimes popular outcry has been strong enough to activate the amending process. So came the Bill of Rights in 1791 in response to demands in five ratifying conventions.<sup>1</sup> The 11th amendment

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of 1798 responded to patriotic indignation at loyalists' suits in federal courts, brought against States to recover for confiscations during the Revolution.<sup>2</sup>

The post-Civil War amendments were evidence of the

emotional urge that had earlier sounded across the North in the "Battle Hymn of the Republic."<sup>3</sup> A burst of nationwide disgust brought repeal of the 18th amendment in 1933.<sup>4</sup>

Sometimes when the general will becomes urgent the Supreme Court is prompted to action and the amending process becomes unnecessary. State legislatures and the Congress, responding to popular demands for economic reforms, had set the pace for the Court in this manner when that tribunal changed its constitutional attitude toward the New Deal in 1937. Our State and national lawmakers had passed wage-and-hour laws, child labor laws, and economic

<sup>1</sup> See J. LANDON, *THE CONSTITUTIONAL HISTORY AND GOVERNMENT OF THE UNITED STATES* 111-24 (2d rev. ed. 1905).

<sup>2</sup> See *id.* at 302-04.

<sup>3</sup> See *id.* at 257-64.

<sup>4</sup> See C. BEARD, *AMERICAN GOVERNMENT AND POLITICS* 446-47 (7th ed. 1936).

regulation of many other varieties, in steadily increasing quantities during the latter part of the 19th and the first third of the 20th century. The Court's New Deal change of direction, forecast by *Nebbia v. New York*<sup>5</sup> in 1934 and obvious from *NLRB v. Jones & Laughlin Steel Corp.*<sup>6</sup> in 1937, simply aligned the Supreme Court with the political insistence of the American people.

The effect of our 1937 "constitutional revolution"<sup>7</sup> was, after all, not so startling. Some authors of academic literature, cherishing hyperbole, the prime American rhetorical device, have overstated the effect of Supreme Court disapproval, before 1937, on State and national economic regulation.<sup>8</sup> The Court has upheld over the years far more than it has struck down.<sup>9</sup> Legislatures have not been paralyzed by adjudications under the commerce clause and the two due process clauses. They had not, for generations before Franklin Roosevelt, felt any need for that President's 1935 admonition to resolve constitutional doubts in favor of enacting urgently needed and evidently beneficial legislation.<sup>10</sup> The annual statutes of the several States, and the successive volumes of the *United States Statutes at Large*, demonstrate the great and increasing amount of economic regulation during the decades prior to 1937.

When the Supreme Court validated the New Deal, the Justices fell in line with the constitutional views of the legislatures. Constitutional opinions of legislators deserve their due measure of respect. One may sometimes regard too lightly the inclusive terms of the third paragraph of article six of the Constitution of the United States, under which all public officers, State and national, bind themselves by oath to act constitutionally:

<sup>5</sup> 291 U.S. 502 (1934).

<sup>6</sup> 301 U.S. 1 (1937).

<sup>7</sup> The phrase is borrowed from E.S. CORWIN, *CONSTITUTIONAL REVOLUTION LTD.* (1941).

<sup>8</sup> See, e.g., Feldman, *Legal Aspects of Federal and State Price Control*, 16 BOST. U.L. REV. 570 (1936).

<sup>9</sup> See, e.g., *Boston Store v. American Graphophone Co.*, 246 U.S. 8 (1918).

<sup>10</sup> The President gave this advice in a letter to Congressman Hill in reference to pending legislation. He wrote:

Manifestly, no one is in a position to give assurance that the proposed act will withstand constitutional tests, for the simple fact that you can get not ten but a thousand differing legal opinions on the subject. But the situation is so urgent and the benefits of the legislation so evident that all doubts should be resolved in favor of the bill, leaving to the courts, in an orderly fashion, the ultimate question of constitutionality. . . . I hope your committee will not permit doubts as to constitutionality, however reasonable, to block the suggested legislation. 4 PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 297 (S. Rosenman Comp. 1938).

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution.

Legislators who vote for legislation, and the President or Governor who approves it, create a precedent of constitutionality, rebuttable in court, but properly persuasive.

Validation of the New Deal was easier than it might have been, due to the fact that the Court, by cautious wisdom and perhaps a little luck, had left itself routes for retreat when retreat became desirable. The "current of commerce" concept which Holmes had used in 1905 to uphold the constitutionality of applying the Sherman Act to collusive sales in stock yards;<sup>11</sup> the federal power to control those local episodes which affect interstate matters which Justice Hughes had recognized in the 1914 *Shreveport Rates Case*;<sup>12</sup> the attitude toward "economic due process" which in 1898 had brought the Court to uphold a Utah 8-hour day law in the mining and smelting industries;<sup>13</sup> these doctrines, selectively applied prior to 1937, were ready and waiting for use as constitutional infrastructures of the New Deal when the Court saw that the situation had become urgent and that the benefits of a mass of economic regulation had become evident to the great preponderance of national and State legislators and to the people who had elected them.

Today the country faces a situation somewhat similar to that of 1935 and 1936, but now the prospect of possible judicial negation concerns not economic regulation but a growing mass of federal and State legislation which gives aid for secular studies to students in church-connected schools equally with pupils in public schools. Whatever federal constitutional threat there is (and I can not think the menace very serious) arises from the first amendment's "establishment of religion" clause, and the latent presence of anti-establishment principles in the 14th amendment's guarantee of due process and equal protection. There are, to be sure, clauses in many State constitutions<sup>14</sup> which inhibit State support of sectarian institutions, but no State prohibition can veto any part of the growing mass of federal aids to education.<sup>15</sup> The need for better schooling

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<sup>11</sup> *Swift & Co. v. United States*, 196 U.S. 375 (1905).

<sup>12</sup> *Houston & Tex. Ry. v. United States*, 234 U.S. 342 (1914).

<sup>13</sup> *Holden v. Hardy*, 169 U.S. 366 (1898).

<sup>14</sup> See, e.g., ARIZ. CONST. art. 9, § 10; MINN. CONST. art. 8, § 3; N.Y. CONST. art. 11, § 4.

<sup>15</sup> Federal welfare legislation normally functions through the cooperation of State

at all levels in America has been increasingly urgent for many years; there has long since become evident to the Congress and to many State legislatures the inevitability of aid in secular education to students in both public and church-connected institutions. An increasing aggregate of national and State educational programs of this character which in one way or another might raise a federal constitutional issue, and some State judicial challenges to such State educational subventions which have already occurred, suggest that before long a confrontation may occur in the Supreme Court of the United States.<sup>16</sup>

This paper explores the situation, and predicts validation under the Federal Constitution. The precedent of 1937 will repeat itself. A declaration of constitutional validity of such nondiscriminatory educational aids today should be much easier than the validation of New Deal federal economic regulation in *Jones & Laughlin* and the cases which followed. The existing legislative construction of the Constitution in educational statutes is at least as persuasive as the legislative precedent was in the economic regulation area before 1937; and, in the educational field, the Supreme Court has no line of precedents to overrule. The Court need undertake no difficult search for decisional escape routes. Governmental help for a parochial schoolchild to learn to read secular textbooks seems wholly unlike the "establishment" of a "national religion" which, on June 8, 1789, Madison in the House of Representatives undertook to forbid by constitutional amendment. A State statute furnishing the same free chemistry texts to all schoolchildren, in public and parochial schools alike, hardly seems to deprive anyone of due process or equal protection of the law.

#### THE CULTURAL-HISTORICAL CONTEXT OF THE ESTABLISHMENT CLAUSE

The American climate of opinion is far more favorable to the constitutionality of educational aids to parochial pupils than it was in the late 19th century. Decline in the suspicious and resentful rivalry between different religious groups, both in Europe and the United States, is a welcome development of our time. The extent

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officials; however, where local law prohibits this cooperation, the federal subvention may go directly — and presumptively constitutionally — to the beneficiaries via federal functionaries. See, e.g., National School Lunch Act of 1946, 42 U.S.C. § 1751 (1964), which for 20 years has provided school lunches for parochial and public school pupils alike.

<sup>16</sup> The confrontation may have started. See note 92 *infra* and accompanying text.

of this happy change becomes abundantly evident from a backward glance. The first permanent English colonies in America were founded in the early 17th century amid religious bitterness which arose from complicated causes now hard to understand. Undoubtedly, this rancor was connected with national adherence to one religion or another as a matter of official policy. In the 16th century open revolutionary warfare had raged between religious sects in various European nations; when one side felt weak, it would call on nearby countries of its own religious affiliation for aid in the internal struggle. The third volume of the *Cambridge Modern History*,<sup>17</sup> significantly entitled *The Wars of Religion*, fills its 900 pages with such sorry annals — accounts of campaigns between Huguenots and Catholics in France; of English intervention on the Huguenot side; of the war between Protestant England and Catholic Spain, and its climactic sea battle between the Armada and the English fleet. Puritans came to New England in the forefront of the 17th century because the Established Church persecuted them at home. Then, in 1660, the Puritans in turn hanged Mary Dyer and her Quaker brethren on Boston Common because the Friends stubbornly preached their religion, which seemed sedition to the Puritan theocrats.<sup>18</sup> One reason for the Glorious Revolution of 1688, which sent the Catholic James II into exile from Protestant England, was the prospect that at his death he would leave a Catholic heir to the English throne. The English Bill of Rights of 1689 denounced James on the ground that he “did endeavor to subvert and extirpate the Protestant religion and the laws and liberties of this kingdom,” and praised “his Highnesse the Prince of Orange (whome it hath pleased Almighty God to make the Glorious instrument of delivering this kingdome from Popery and arbitrary power).”<sup>19</sup>

In 1700, British colonists in New York and New England thought of Catholicism as French, and pictured Jesuit missionaries on the northern frontiers as hostile agents. On August 9, 1700, the New York Assembly passed “An Act Against Jesuits and Popish Preists,”

who by their wicked and Subtle Insinuations Industriously Labour to Debauch Seduce and wthdraw the Indians from their due obedience unto his most Sacred ma'ty and to Excite and Stir them up

<sup>17</sup> 3 CAMBRIDGE MODERN HISTORY, THE WARS OF RELIGION (1905).

<sup>18</sup> See T. WERTENBAKER, THE PURITAN OLIGOPOLY 229-37 (1947).

<sup>19</sup> This quote is taken from J. MACY, THE ENGLISH CONSTITUTION 508, 510 (1897).

to Sedition Rebellion and open Hostility against his ma'tys Govern'm't.

The Act ordered every Catholic clergyman to leave the province of New York on or before November 1, 1700; and any such clergyman

who shall Continue abide remaine or come into this province or any part thereof after ye first day of November aforesaid shall be deemed and Accounted an incendiary and disturber of the publick peace and Safety and an Enemy to the true Christian Religion and shal be adjudged to Suffer perpetuall Imprisonm't and if any person being so Sentenced and actually Imprisoned shall break prison and make his Escape and be Afterwards retaken he shall Suffer such paines of Death penalties and forfeitures as in Cases of felony.<sup>20</sup>

But the 18th century saw a steady decline in the intensity of religious rivalry in America. The new State constitutions adopted after Independence contain little trace of the prerevolutionary establishments of religion, and even these traces had almost entirely disappeared by the end of the 1830's. We had too much diversity among Protestant sects to tolerate any favoritism. The two decades before the Civil War saw a flareup of anti-Catholic, antiforeigner sentiment, probably acerbated by large immigration of impoverished Irish fleeing the potato famine in their native country. When these newcomers established themselves in the larger American cities and demonstrated considerable talent for coherent political organization, they not surprisingly urged that whatever taxes they paid to support schools should go to support those schools in which their devoutly held Catholic religion was taught. This in turn aroused a xenophobic reaction among certain groups proud to call themselves "native Americans," and gave rise to the short-lived "Know-Nothing" political party of the 1850's. Anti-Catholic sentiment lasted long enough for the House of Representatives to pass by a vote of 180 to 7 in 1876 the proposed Blaine amendment to the Federal Constitution, which would have forbidden the use of State funds for any religious sect.<sup>21</sup>

The Blaine amendment died because it failed to get the required

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<sup>20</sup> 1 COL. LAWS N.Y. 428-29 (1700). The Massachusetts General Court had enacted a similar measure on May 29, 1700. See 1 ACTS AND RESOLVES OF THE PROVINCE OF THE MASSACHUSETTS BAY 423 (1700).

<sup>21</sup> The proposed amendment took its name from its sponsor, James G. Blaine, a Congressman from Maine. See H. AMES, PROPOSED AMENDMENTS 277-78 (1897) (published as vol. 2 of the 1896 Annual Report of the American Historical Association). See also Meyer, *The Blaine Amendment and the Bill of Rights*, 64 HARV. L. REV. 939 (1951).

2/3 vote in the Senate; however, alarmed Protestant majorities wrote restrictions into most State constitutions prohibiting the appropriation of public money to schools controlled by religious organizations.<sup>22</sup> In 1894 a New York constitutional convention adopted, and the State's electorate approved, what is sometimes loosely called a "Blaine amendment."

Neither the state nor any subdivision thereof shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught . . . .<sup>23</sup>

Perhaps the high point of this variety of legislation was the Oregon statute of November 7, 1922, adopted by the voters of that State under the initiative provisions of its constitution. The statute required all children to attend public school from the age of 8 to the age of 15, in effect preventing attendance at church-connected institutions for most of the primary and part of the high school years.<sup>24</sup> The Supreme Court in 1925 held the statute unconstitutional under the 14th amendment.<sup>25</sup>

In the last four decades the sentiments which induced these enactments have been steadily declining in the United States. Such changes in popular opinion concerning fundamentals of policy do occur, but the time of the general change and its causes are hard to identify. Probably many causes converge. W. E. H. Lecky, in the introduction to his *History of the Rise and Influence of the Spirit of Rationalism in Europe*, describes

the fierce theological controversies that accompanied and followed the Reformation, while a judicial spirit was as yet unknown, while each party imagined itself the representative of absolute and necessary truth in opposition to absolute and fatal error. . . . Each theologian imagined that the existence of the opinions he denounced was fully accounted for by the exertions of certain evil-minded men, who had triumphed by means of sophistical arguments, aided by a judicial blindness that had been cast upon the deluded. . . .

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<sup>22</sup> Note, *Catholic Schools and Public Money*, 50 YALE L.J. 917 (1941), wherein is compiled a list of such enactments. A number of States construe these provisions to allow public benefits to parochial pupils. In 1961, however, the General Counsel to the Department of Health, Education and Welfare reported that officials in more than half the States were thus inhibited. CONSTITUTIONALITY OF FEDERAL AID TO EDUCATION IN ITS VARIOUS ASPECTS, S. DOC. NO. 29, 87th Cong., 1st Sess. 46 (1961).

<sup>23</sup> N.Y. CONST. art. 11, § 4.

<sup>24</sup> Compulsory Education Act, Ore. Laws § 5259 (1922).

<sup>25</sup> *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).



But when towards the close of the eighteenth century the decline of theological passions enabled men to discuss these matters in a calmer spirit and when increased knowledge produced more comprehensive views, the historical standing-point was materially altered. It was observed that every great change of belief had been preceded by a great change in the intellectual condition of Europe, that the success of any opinion depended much less upon the force of its arguments, or upon the ability of its advocates, than upon the predisposition of society to receive it, and that that predisposition resulted from the intellectual type of the age.<sup>26</sup>

A complication in estimating sources of "the intellectual type of the age" in the middle of the 20th century is the fact that means of rapid communication and swift movement of persons have made development of ideas to a certain extent worldwide. To sort out that which is parochial from that which occurs in many countries entails difficult speculations. One factor in today's relaxation of interreligious suspicion and rivalry within the United States may well have been the slowing of immigration brought about by World War I, and which, as a result of federal statutory provisions,<sup>27</sup> has continued ever since. We have not for 50 years seen ships arriving at our ports crowded with newcomers, many of them having deep cultural differences from longer established Americans. The descendants of the Irish immigrants of the 1840's, no longer concentrated in urban masses, have ceased to be strangers; the Italian newcomers who followed them to New York and Boston have evolved in a similar manner.

Since World War II the widespread ecumenical movement, evident in the Vatican Councils of Pope John and Pope Paul, has had conspicuous effect in America. On September 15, 1967, the *New York Times* carried an announcement by Bishop Fulton Sheen of the Roman Catholic Diocese of Rochester, New York, that two Protestant clergymen had joined the faculty of the diocesan St. Bernard's Seminary.<sup>28</sup> A Roman Catholic scholar-priest has become Guest Professor of Roman Catholic Studies at the Harvard Divinity School. A New York State constitutional convention, sitting in the summer and autumn of 1967, by a large majority vote submitted to that State's electors a new State constitution not containing the "Blaine amendment" of 1894, substituting in its place the religion

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<sup>26</sup> W. LECKY, *Introduction* to HISTORY OF THE RISE AND INFLUENCE OF THE SPIRIT OF RATIONALISM IN EUROPE at v (1886).

<sup>27</sup> See generally F.L. AUERBACH, IMMIGRATION LAWS OF THE UNITED STATES 75-85 (2d ed. 1961), wherein text and tables regarding these laws are found.

<sup>28</sup> N.Y. Times, Sept. 15, 1967, § 1, at 1, cols. 7-8.

clause of the federal first amendment. One might have hoped that this action by the convention indicated a general relaxation of emotional religious rivalries in New York. That State's highest court had already upheld a statute providing for free loans of secular textbooks to parochial pupils,<sup>29</sup> thus by the "pupil benefit theory" taking most of the practical effect out of the State's Blaine clause. But the symbolism of the proposed deletion awakened dormant feelings, and on November 7, 1967, a majority voted against the new constitution. Undoubtedly the elimination of the Blaine clause was a strong factor in its defeat.<sup>30</sup> Emotional religious rivalries have not disappeared. Nevertheless Catholicism is no longer the symbol of strangeness that it was in the mainly Protestant America of a few generations ago. Battle cries are less shrill than they were. All America mourned when our first Roman Catholic President died.

#### THE ESTABLISHMENT CLAUSE AND THE CONGRESS

From the earliest days of the first amendment, the Congress has demonstrated its opinion that not every federal statute from which some religion might gain support was for that reason invalid under the establishment clause. The first amendment became effective on December 5, 1791, when Virginia's ratification provided the requisite three-fourths of the then 14 States. Less than 2 months later, in January and February 1792, the House of Representatives was debating a measure to increase the Army. A number of the members in 1792 had been Congressmen when the House debated the first amendment in 1789 — including in that number James Madison who proposed its first draft. On February 1, 1792, the House by a vote of 29 to 19 passed the bill in question.<sup>31</sup> Among many other provisions the bill set the pay of an Army chaplain at \$50

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<sup>29</sup> Board of Educ. v. Allen, 20 N.Y.2d 109, 228 N.E.2d 791, 281 N.Y.S.2d 799 (1967), *prob. juris. noted*, 36 U.S.L.W. 3286 (U.S. Jan. 16, 1968) (No. 660). Review cannot, of course, affect the State court's interpretation of the New York constitution.

<sup>30</sup> The proposal had strong opposition. The *New York Times* was editorially against it. N.Y. Times, Sept. 15, 1967, § 1, at 46, cols. 1-2. Support for the amendment was strongest in Manhattan and rural areas. Hacker, *The Blaine Amendment — Yes or No?*, N.Y. Times, Oct. 1, 1967, § 6 (Magazine), at 27. For an analysis of the symbolic effect of the omission, see Zion, *Aid to Church Schools*, N.Y. Times, Nov. 6, 1967, § 2, at 56, cols. 3-4.

<sup>31</sup> Of the 29 members of the Second Congress who voted for the bill in 1792, at least 14 had been members of the First Congress which had proposed the first amendment. See 1 ANNALS OF CONG. 95-121 (1789) [1789-1791]; 3 *id.* 355 (1792) [1791-1793].

per month. Madison voted for the measure. Ultimately the Senate and House agreed on some amendments; in March 1792, President Washington approved the bill with its provision for the chaplain, and it thus became law.<sup>32</sup> Washington took his constitutional limitations seriously; in February 1791 he had hesitated to sign the bill creating the Bank of the United States, doubting that the Constitution gave the Congress power to charter a bank. He finally signed the bank measure, evidently on Hamilton's urging.<sup>33</sup> The vote for the Army bill by Madison and his majority colleagues in the House; the vote of the Senate majority; the approval by a scrupulous President — all are convincing demonstrations that the Fathers did not believe that by providing for an Army chaplain they were making a "law respecting an establishment of religion" in defiance of the first amendment.<sup>34</sup> In the 18th century "an establishment of religion" was an institution well known to ordinary men. The American Bill of Rights, proposed by Congress in 1789, had many overtones of the English Bill of Rights adopted just a century earlier. To a Congressman of 1789, the Glorious Revolution of 1688, which got rid of Catholic James and established William and Mary and their militant Protestantism, was an event as recent as Appomattox and the 13th amendment are to men of our day. In Cambridge, Massachusetts in 1789 stood the spacious house built only 29 years earlier for the Reverend Mr. East Apthorp of Boston, a clergyman of the Church of England. He had sailed for England in 1764 amid somewhat ill-tempered rumors that he aspired to royal appointment as an American bishop, and he never came back.<sup>35</sup> In 1789, when drafting the first amendment, Americans remembered

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<sup>32</sup> Act of March 5, 1792, ch. 9, § 7, 1 Stat. 242.

<sup>33</sup> See B. HAMMOND, *BANKS AND POLITICS IN AMERICA* 117-18 (1957).

<sup>34</sup> The Supreme Court of the United States has never decided the chaplaincy question. In 1928 the Supreme Court of the District of Columbia dismissed a bill filed against the Treasurer of the United States to enjoin the payment of military and congressional chaplains. The Court of Appeals of the District of Columbia affirmed, *Elliot v. White*, 23 F.2d 997 (D.C. Ct. App. 1928), *citing to* *Frothingham v. Mellon*, 262 U.S. 447 (1923), holding that petitioner, whether as a citizen or a taxpayer, lacked standing. In *Engel v. Vitale*, 370 U.S. 421, 437 (1962), Mr. Justice Douglas wrote a concurring opinion agreeing in the unconstitutionality of prayers in a New York public school. He spoke of governmental financing of religious exercises as "an unconstitutional undertaking whatever form it takes." He mentions chaplains without further comment. *Id.* at 438-39 n.2. Apparently his sweeping dictum applies to them.

<sup>35</sup> The historian of Apthorp House, Wendell Garrett, thought that East Apthorp's departure inspired a cartoon in the *London Political Register* for September 1769. In this picture a bishop is scrambling up the riggs of a departing ship, which a mob is pushing away from a quai. One of the spectators is shouting "No Lords Spiritual or Temporal in New England." See W.D. GARRETT, *APTHORP HOUSE 1760-1960* (1967). The House is now the Master's Residence of Adams House, Harvard.

that in England (with which a treaty of peace had ended the War of Independence only 6 years before) bishops sat in the House of Lords. In those days an establishment of religion meant a church supported by the government, and, regardless of such tax support as Massachusetts and Connecticut might give to the salary of congregational ministers, the newly independent Americans were not going to tolerate a national church, established and preferred by Congress over all other varieties of religion, as Parliament had preferred the Church of England. But these remembered resentments did not inhibit the Congress of 1792 from providing an infantry major's pay for an Army chaplain.

The Congress has never in recent times been seriously inhibited in educational matters by the first amendment's establishment clause. In 1961, the General Counsel of the United States Department of Health, Education and Welfare produced a memorandum entitled *Constitutionality of Federal Aid to Education in its Various Aspects*.<sup>36</sup> On 12 pages of this document appears a compilation entitled *Federal Programs Under Which Institutions with Religious Affiliation Receive Federal Funds Through Grants or Loans*.<sup>37</sup> Some of these programs had lapsed by 1961, but most were then still functioning. All were demonstrations that the Congress, and the President also (unless there may have been instances of passage over a veto), saw no constitutional objection to aiding students to gain secular instruction at church-connected institutions. The National Defense Education Act<sup>38</sup> includes nine such programs; the Public Health Service administers ten; the Office of Vocational Rehabilitation, two; Social Security Administration, two; and, the Surplus Property Utilization Program, one. The Atomic Energy Commission offers five programs in aid of scientific education; the Veterans Administration, three; the National Science Foundation, five; and the State Department offers several, of which the U.S. information and educational exchange programs, and the programs of technical cooperation with foreign countries are two examples. The Department of Defense supports a number of programs at institutions of learning — the most familiar are the programs at many colleges for the training of reserve officers in the Army, Navy and Air Force. A program for business management research had gone forward under the Small Business Administration; on the books are

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<sup>36</sup> S. DOC. NO. 29, 87th Cong., 1st Sess. (1961).

<sup>37</sup> *Id.* at 37-48.

<sup>38</sup> 20 U.S.C. §§ 401-592 (1964).

four programs under the Department of Agriculture; and, there is one program for university research under the National Aeronautics and Space Administration. The Housing and Home Finance Agency ran a College Housing Loan Program under the Housing Act of 1950.<sup>39</sup>

Since 1961, the Congress has instituted additional important new programs which aid students in church-connected as well as public educational institutions. It has carried forward by subsequent appropriations most of the older activities listed in the 1961 memorandum. All these programs have common features, of which the most conspicuous is secular motivation, though church-connected colleges may participate in all. The Reserve Officers Training Corps (ROTC) at Notre Dame is intended to produce officers, not to produce Catholics. To be sure, the program makes an education at Notre Dame a little easier for ROTC students. Notre Dame thus derives collateral benefits; and as that University is oriented to Catholicism, some of the federal funds appropriated for the Notre Dame ROTC do, at a couple of removes, give some indirect support to the Catholic Church. Perhaps the Atomic Energy Act of 1946, as amended,<sup>40</sup> which authorizes the Atomic Energy Commission (AEC) to make grants to institutions for nuclear laboratory equipment, research reactors, and physics teaching aids, offers an example even more striking. If, for example, St. Swithins College, an imaginary but highly Episcopal institution conducted by the Diocese of Ames, develops a reputation in science, the AEC may equip its laboratory. St. Swithins, as a result, becomes much more attractive to talented young men. But the AEC is trying to make physicists, not Episcopalians; and the Congress and President Truman must be credited with the belief that they were acting constitutionally when they respectively passed and approved the bill.

The Elementary and Secondary Education Act of 1965<sup>41</sup> has seven subdivisions called "Titles." Title I is 17 years old; it made and continues to make provision for federal assistance for local educational agencies in areas affected by federal activity. It provides no aid for parochial pupils, and so does not raise any question of public support for a church. Title V, entitled *Grants to Strengthen State Departments of Education*, provides no funds to any but public agencies. No provision of it can be construed to give any aid

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<sup>39</sup> 12 U.S.C. § 1749 (1964).

<sup>40</sup> 42 U.S.C. §§ 2051-111 (1964).

<sup>41</sup> 79 Stat. 27, as amended (codified in scattered sections of 20 U.S.C.).

to a church-connected school. Title VI contains definitions and administrative provisions which do not affect the church-state question. The last section of that title is significant, however: "Nothing contained in this Act shall be construed to authorize the making of any payment under this Act, or under any Act amended by this Act, for religious worship or instruction."<sup>42</sup>

Title II of the 1965 Education Act, the next title which is also (and confusingly) numbered II, title III, and title IV are those which are important when we begin to consider "an establishment of religion." The first title II is entitled *Financial Assistance to Local Educational Agencies for the Education of Children of Low-Income Families*.<sup>43</sup> The Act defines a "local educational agency" as a public board of education or other public agency legally constituted to serve public elementary or secondary schools.<sup>44</sup> Title II directs the United States Commissioner of Education to pay such State agencies grants "to expand and improve their educational programs by various means (including preschool programs) which contribute particularly to meeting the special educational needs of educationally deprived children."<sup>45</sup> This title further directs the Commissioner to calculate the amount of a grant to a local agency by determining the number of children in the agency's district, aged 5 to 17 inclusive, whose families have a "low income" (initially defined as \$2,000 annually). Sums which the family receives under a State "aid to dependent children" plan are not counted in this total. The total federal grant to a school district is to be calculated as a percentage (initially 50 percent) of the average per pupil expenditure of the State, multiplied by the number of children of the prescribed age of low income families within the school district in question. The Commissioner may increase the amount in such districts by an additional "basic incentive grant."<sup>46</sup>

Thus far the first title II contains no church-state complication. But the federal grant is not calculated on the total of exclusively public school children of low income families in the district; the amount is predicated on the total number of children of such families in the district, no matter what schools they attend, private or parochial. And the Commissioner must determine, as a condition of any grant

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<sup>42</sup> § 605, 79 Stat. 58, 20 U.S.C. § 885 (Supp. II, Vol. I 1967).

<sup>43</sup> 79 Stat. 27, 20 U.S.C. §§ 241a-m (Supp. II, Vol. I 1967).

<sup>44</sup> Tit. VI, § 601(f), 79 Stat. 56, 20 U.S.C. § 881(f) (Supp. II, Vol. I 1967).

<sup>45</sup> § 201, 79 Stat. 30, 20 U.S.C. § 241(a) (Supp. II, Vol. I 1967).

<sup>46</sup> § § 204-05, 79 Stat. 30, 20 U.S.C. § 241(c)(a)(2) (Supp. II, Vol. I 1967).

(1) that payments under this title will be used for programs and projects (including the acquisition of equipment and where necessary the construction of school facilities) (A) which are designed to meet the special educational needs of educationally deprived children in school attendance areas having high concentrations of children from low-income families and (B) which are of sufficient size, scope, and quality to give reasonable promise of substantial progress toward meeting those needs, and nothing herein shall be deemed to preclude two or more local educational agencies from entering into agreements, at their option, for carrying out jointly operated programs and projects under this title; (2) that, to the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency has made provision for including special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment) in which such children can participate.<sup>47</sup>

There are other conditions of inspectoral and administrative character. But whatever question might arise under the first amendment's establishment clause derives from the language quoted above authorizing participation by children attending "private elementary and secondary schools" in special educational services and arrangements (such as dual enrollment, educational radio and television, and mobile educational services and equipment). The language is broad enough, intentionally so, to include pupils of parochial schools. About 20 percent of New York's school children attend such schools. Is participation by such children in federal aid which the statute also grants to all the rest of the eligible school population an "establishment of religion" which the first amendment prohibits?

The second title II in the 1965 Act is headed *School Library Resources, Textbooks, and Other Instructional Materials*. This title directs the Commissioner to make grants to State agencies to carry out State plans for acquiring books, periodicals, documents, audio-visual materials, textbooks, and other printed and published instructional materials. These materials are to be provided not only for teachers and pupils in the public schools but also for those in "private elementary and secondary schools in the State which comply with the compulsory attendance laws of the State or are otherwise recognized by it through some procedure customarily used in the State." Instructional materials are to be only those approved for public schools of the State;<sup>48</sup> title to them remains in the State;<sup>49</sup> the Com-

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<sup>47</sup> § 205 (a), 79 Stat. 30, 20 U.S.C. § 241 (e) (a) (Supp. II, Vol. I 1967).

<sup>48</sup> § 205 (b), 79 Stat. 38, 20 U.S.C. § 825 (b) (Supp. II, Vol. I 1967).

missioner is to assure the use of federal funds only to augment local funds, not to supplant them.<sup>50</sup>

Title III provides for *Supplementary Educational Centers and Services*,<sup>51</sup> from which students in church-connected as well as public schools may benefit. The Commissioner is to make grants to public educational agencies for guidance, remedial instruction, dual enrollment, specialized instruction in sciences, foreign languages, and other subjects not taught in local schools or which can be provided more effectively on a centralized basis, and is to make modern equipment and specially qualified personnel, including artists and musicians, temporarily available to public and other nonprofit schools, organizations, and institutions.<sup>52</sup>

Title IV<sup>53</sup> authorizes the Commissioner to make grants to public and private nonprofit universities and colleges for training and research in the field of education. "Research and related purposes" is defined to include "demonstrations in the field of education" and "experimental schools, except that such term does not include research, research training, surveys, or demonstrations in the field of sectarian instruction or the dissemination of information derived therefrom."<sup>54</sup> Under this provision a Catholic university could obtain a federal grant to conduct an educational demonstration or an experimental school — provided that the school or the demonstration were entirely secular.

Legislation which similarly benefits public and parochial pupils is appearing in several States.<sup>55</sup> New York in 1965 adopted a textbook-loan law, benefitting alike children in public and private (generally parochial) schools.<sup>56</sup> Rhode Island in 1956 had adopted a law in substance the same.<sup>57</sup> National and many State legislators

<sup>49</sup> § 205(a), 79 Stat. 38, 20 U.S.C. § 825(a) (Supp. II, Vol. I 1967).

<sup>50</sup> § 203(a)(5), 79 Stat. 38, 20 U.S.C. § 825 (Supp. II, Vol. I 1967).

<sup>51</sup> 79 Stat. 39, 20 U.S.C. §§ 841-48 (Supp. II, Vol. I 1967).

<sup>52</sup> § 303(b), 79 Stat. 41, 20 U.S.C. § 843 (Supp. II, Vol. I 1967).

<sup>53</sup> 79 Stat. 44, 20 U.S.C. §§ 331-32 (Supp. II, Vol. I 1967).

<sup>54</sup> § 4(e), 79 Stat. 47, 20 U.S.C. § 332(b) (Supp. II, Vol. I 1967).

<sup>55</sup> Of course, schoolbus laws to permit such inclusive benefits are widely adopted. In 1938 New York relaxed its constitutional restriction to permit such service. The Connecticut Supreme Court has upheld that State's similar law. *Snyder v. Town of Newtown*, 147 Conn. 374, 161 A.2d 770 (1960), *appeal dismissed*, 365 U.S. 299 (1961) (for want of a substantial federal question).

<sup>56</sup> N.Y. EDUC. LAW § 701(3) (McKinney Supp. 1967). The constitutionality of the statute has been upheld under the Federal and State Constitutions. *Board of Educ. v. Allen*, 20 N.Y.2d 109, 228 N.E.2d 791, 281 N.Y.S.2d 799 (1967), *prob. juris. noted*, 36 U.S.L.W. 3286 (U.S. Jan. 16, 1968) (No. 660).

<sup>57</sup> R.I. GEN. LAWS ANN. § 16-23-2 (Supp. 1966). A Rhode Island superior



are coming to feel that public aid in nonclerical education, even when extended to a child in a church-connected institution, has no resemblance to the "establishment of religion" which the draftsmen of the first amendment intended to forbid. The American people now face the question whether, within the bounds of their Constitution, they can have what their national legislature, and some of their State legislatures, want them to have.

#### THE ESTABLISHMENT CLAUSE AND THE COURT

Literature, judicial and other, concerning the first amendment's establishment clause is almost endless. I would serve no good purpose by here attempting *da capo* a new discussion of the decisional material and the abundant commentary upon it.<sup>58</sup> The first amendment pointed out in plain words that the founding fathers saw a difference between establishment of religion and its free exercise. The Supreme Court has scrupulously guarded religious freedom. It has held invalid State legislation which, even in a trifling way, could have interfered with some individual's "free exercise" of his faith;<sup>59</sup> it has inhibited State interference with evangelization even when the public proclamation of doctrines was distasteful to hearers.<sup>60</sup> Nowhere in the United States is there room for a Bedford gaol to lock up latter-day John Bunyans.<sup>61</sup> The Supreme Court has been tender — rightly so — of the religious sensitivities of children obliged to attend public schools under the threat of truancy laws.<sup>62</sup> The Supreme Court will forbid even the most trifling pray-

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court, in *Bowerman v. O'Conner* (unreported 1967), held this statute unconstitutional under the fourteenth amendment and the State constitution. An appeal is probable. Oregon has also held such a statute unconstitutional. *Dickman v. School Dist.*, 232 Ore. 238, 366 P.2d 533 (1964).

<sup>58</sup> See generally S. COBB, *THE RISE OF RELIGIOUS LIBERTY IN AMERICA* (1902); L. PFEFFER, *CHURCH, STATE, AND FREEDOM* (1953); A. STOKES, *CHURCH AND STATE IN THE UNITED STATES* (2d ed. 1964). My late colleague Mark DeWolfe Howe published his charming *WEIL LECTURES* as *THE GARDEN AND THE WILDERNESS* (1965). See also Sutherland, *Due Process and Disestablishment*, 62 HARV. L. REV. 1306 (1949) (regarding incidental religious benefits); Sutherland, *Establishment According to Engel*, 76 HARV. L. REV. 25 (1962) (regarding liturgical public school activity). Decisional material is collected in P. FREUND, A. SUTHERLAND, M. HOWE & E. BROWN, *CONSTITUTIONAL LAW* 2069-154 (3d ed. 1967). Historical surveys may be found in A. SUTHERLAND, *THE CHURCH SHALL BE FREE* (1965), and A. SUTHERLAND, *CONSTITUTIONALISM IN AMERICA* ch. 11 (1965).

<sup>59</sup> See, e.g., *Engel v. Vitale*, 370 U.S. 421 (1962); *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948).

<sup>60</sup> *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

<sup>61</sup> See *id.*; *Kunz v. New York*, 340 U.S. 290 (1951); *Saia v. New York*, 334 U.S. 558 (1948).

<sup>62</sup> See *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). In mak-

erful exercise in the schools we all support by our tax contributions, even though on request the pupils can be excused from attendance.<sup>63</sup> No child in our widespread polity will suffer any governmental harassment, no matter how trifling, because of his religious commitment. I doubt that anyone ever will. The intellectual type of the age is dead set against it.

Neither the Federal Education Act of 1965,<sup>64</sup> nor the New York and Rhode Island textbook laws, nor the manifold State laws which provide schoolbus service for parochial as well as public school pupils, put any constraint on the individual. The free arithmetic text for the pupil at St. Patrick's parochial school imposes no hardship on the pupil at Public School No. 6 who gets the same book equally free. The schoolbus which stops at St. Patrick's and at Public School No. 6 on its morning round imposes no religious exercise on anyone. *West Virginia State Board of Education v. Barnette*<sup>65</sup> and *Everson v. Board of Education*<sup>66</sup> are poles apart. In *Barnette* the public authorities punished the schoolchild whose religion forbade him to join in the classroom salute of the national flag; they threatened his parents with prosecution as well. Everson's only grievance was an addition to his taxes, ascribable to the expense of transporting parochial pupils. The Supreme Court struck down West Virginia's flag-salute law, but sustained the New Jersey bus law litigated in *Everson*.

A curious feature of commentary on judicial opinions is its tendency to prefer dicta over statements directly relevant to the question decided. The fame of Justice Black's *Everson* opinion rests largely on his eloquent, much-quoted explanation of what he was not deciding, his statement about the establishment clause, beginning "[n]either a state nor the Federal Government can set up a church," and ending "[i]n the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of

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ing this statement I am not forgetting that States permit compliance with laws prescribing compulsory schooling by attendance at sectarian schools, which fact might offer a child or his parents a means of withdrawal from unwelcome public school exercises. Indeed, the Supreme Court has forbidden a State to legislate parochial schools out of existence. *Pierce v. Society of Sisters*, 268 U.S. 707 (1925).

<sup>63</sup> Cases cited note 59 *supra*; *Zorach v. Clauson*, 343 U.S. 306 (1952).

<sup>64</sup> 79 Stat. 27, *as amended* (codified in scattered sections of 20 U.S.C.).

<sup>65</sup> 319 U.S. 624 (1943).

<sup>66</sup> 330 U.S. 1 (1947). The authority of *Everson* was reenforced by *Snyder v. Town of Newtown*, 147 Conn. 374, 161 A.2d 770 (1960), *appeal dismissed*, 365 U.S. 299 (1961) (for want of a substantial federal question). See also *Rhoades v. Abington Township School Dist.*, 424 Pa. 202, 226 A.2d 53, *appeal dismissed*, 36 U.S.L.W. 3141 (U.S. Oct. 10, 1967).

separation between church and state.'"<sup>67</sup> Much less frequently quoted is Black's statement, in the succeeding two pages of his opinion, about the secular public purpose of schoolbus transportation — which after all was the question at issue in the case. He wrote.

It is undoubtedly true that children are helped to get to church schools. There is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the State. The same possibility exists where the state requires a local transit company to provide reduced fares to school children including those attending parochial schools,<sup>68</sup> or where a municipally owned transportation system undertakes to carry all school children free of charge. Moreover, state-paid policemen, detailed to protect children going to and from church schools from the very real hazards of traffic, would serve much the same purpose and accomplish much the same result as state provisions intended to guarantee free transportation of a kind which the state deems to be best for the school children's welfare. And parents might refuse to expose their children to the serious danger of traffic accidents while going to and from parochial schools, the approaches to which were not protected by policemen. Similarly, parents might be reluctant to permit their children to attend schools which the state had cut off from such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks. Of course, cutting off church schools from these services, so separate and so indisputably marked off from the religious function, would make it far more difficult for the schools to operate. But such is obviously not the purpose of the First Amendment. That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them.

This Court has said that parents may, in the discharge of their duty under state compulsory education laws, send their children to a religious rather than a public school if the school meets the secular educational requirements which the state has power to impose. See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). It appears that these parochial schools meet New Jersey's requirements. The State contributes no money to the schools. It does not support them. 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.<sup>69</sup>

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<sup>67</sup> 330 U.S. at 15-16.

<sup>68</sup> "New Jersey long ago permitted public utilities to charge school children reduced rates. See *Public S.R. Co. v. Public Utility Comm'rs*, 81 N.J.L. 363, 80 A. 27 (1911); see also *Interstate Ry. v. Massachusetts* [207 U.S. 79 (1908)]." *Id.* at 17 n.24.

<sup>69</sup> *Id.* at 17-18.

Black's 1947 *Everson* opinion is a vigorous statement of the "child benefit theory" — the doctrine that where legislation primarily provides some secular benefit for the child, an incidental benefit to religious education does not make the law unconstitutional. Particularly relevant to this doctrine is another passage in *Everson* where Justice Black cites and relies on the Supreme Court's 1930 decision in *Cochran v. Louisiana State Board of Education*.<sup>70</sup> In *Cochran* the unanimous Court, in an opinion by Chief Justice Hughes, upheld a Louisiana statute furnishing free textbooks to all pupils, in parochial and public schools alike. Cochran, a taxpayer, had sought an injunction against spending public funds for this purpose, basing his complaint on various clauses in the Louisiana State constitution, on the 14th amendment, and on article 4, section 4 of the United States Constitution, the "republican form of government" clause. Despite this battery of constitutional objections, Louisiana courts and the United States Supreme Court upheld the Louisiana textbook law. The Supreme Court had to meet Cochran's contention that parochial education served only a "private" purpose and that taxation for a private end deprived the taxpayer of property without due process of law. Hughes writing for the unanimous Supreme Court upheld the "public" purpose of education when given either in a public or a parochial school. And Black in 1947 wrote in the majority opinion of the Court in the New Jersey schoolbus case that "[i]t is much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose. *Cochran v. Louisiana State Board of Education*, 281 U.S. 370 . . . ."<sup>71</sup>

Recently some comment has attempted to disparage the authority of *Cochran*, on the theory that in 1930, when that decision was rendered, the 14th amendment had not yet "incorporated" the entire first amendment. This denigration of *Cochran* rests on the theory that the "incorporation" of the literal terms of the first amendment into the 14th amendment did not occur until 1940, when the Court decided *Cantwell v. Connecticut*<sup>72</sup> in which Justice Roberts wrote: "The fundamental concept of liberty embodied in that [14th] Amendment embraces the liberties guaranteed by the First Amendment . . . ." He concluded that "the states [are] as incompetent as Congress to enact . . . laws . . . respecting an establishment

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<sup>70</sup> 281 U.S. 370 (1930).

<sup>71</sup> 330 U.S. at 7.

<sup>72</sup> 310 U.S. 296 (1940).

of religion or prohibiting the free exercise thereof";<sup>73</sup> that in 1930 the Supreme Court did not know what it was doing; that in 1940 its successors on that bench set it right; that after 1940 a statute helping a student, aged 12, 16, or 20, to engage in secular studies, such as arithmetic or physics, in a church-connected educational institution, would be void as unconstitutional under the first amendment's establishment clause.

I think that those who express this view err. I think that they depart from what Lecky called "the intellectual type of the age"; that in 1968 the social and governmental structure of the United States serves our people by an intricate and astonishingly effective complex of human organizations, some of which we habitually call "public," some "private"; that the underlying constitutional question is the preservation of all of us from any sort of tyranny, secular or religious, however difficult of definition the term "tyranny" may be; that the services to children in parochial schools promised by the Federal Education Act of 1965 presage no tyranny, no injustice, and no unconstitutional "establishment of religion."

When Black cited *Cochran* to demonstrate the "public" character of the secular subjects of education taught in parochial schools, he was stating a profound insight into the operation of our constitutional system. A man's religious beliefs and his devotional exercises or abstention therefrom, are deeply "private" matters into which government, national or State, is constitutionally forbidden to intrude, no matter how slightly. When the Supreme Court forbade religious exercises in public schools,<sup>74</sup> it demonstrated the strictness of its adherence to this principle. But where government places no religious constraint on anyone, where the student is entirely free to go to a parochial or a public school, then I find difficulty in understanding how anyone is deprived of life, liberty or property without due process of law, or is denied the equal protection of the laws, by a parochial student receiving free textbooks or other secular aid granted by the State. When the public purpose of educating the child in secular subjects is advanced by furnishing him the benefits of the Federal Elementary and Secondary Education Act of 1965 or analogous legislation, I see no violation of the

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<sup>73</sup> *Id.* at 303. Five years before *Cochran* Justice Sanford wrote "freedom of speech and of the press . . . are among the fundamental personal rights . . . protected by the due process clause of the Fourteenth Amendment . . ." *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

<sup>74</sup> *School Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

first amendment; I see no resemblance, in such a law, to the "establishment of religion" which obtained in England in 1789, and which the men who drafted the first amendment in that year must have had in their minds.

This construction of the first and 14th amendments accords with the great mass of federal legislation giving aids to secular educational programs in church-connected as well as public educational institutions, and with such State court decisions as that upholding the New York free textbook statute.<sup>75</sup> If the Federal Elementary and Secondary Act of 1965 comes before the Supreme Court, the "pupil benefit" construction of the first amendment would tend to uphold the statute.<sup>76</sup>

No Supreme Court decision conflicts with that first amendment doctrine. Whatever Supreme Court precedent exists favors that construction of the 14th amendment. One aspect of *Horace Mann League v. Board of Public Works*<sup>77</sup> has escaped much notice. Four colleges were defendants in that litigation; as to one of these, Hood College, the Maryland Court of Appeals found constitutional under the 14th amendment a State grant of \$500,000 to help erect a dormitory and classroom building.<sup>78</sup> Hood College, the majority opinion tells, "is church related through its affiliation with the United Church of Christ [U.C.C.] but welcomes students of all religious faiths." It is listed in a tabulation of the Danforth Foundation of Institutions Associated with Religious Bodies as "reflecting religious orientation."<sup>79</sup> The court of appeals wrote that the "College's stated purposes in relation to religion are not of a fervent, intense or passionate nature . . . . Students are not required to attend and participate in many religious observances."<sup>80</sup> The United Church of Christ contributes financially to the college, but not a great deal. Hood College is, that is to say, somewhat church connected, somewhat religious in character, but not very much so.

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<sup>75</sup> *Board of Educ. v. Allen*, 20 N.Y.2d 109, 228 N.E.2d 791, 281 N.Y.S.2d 799, *prob. juris. noted*, 36 U.S.L.W. 3286 (U.S. Jan. 16, 1968) (No. 660).

<sup>76</sup> The Supreme Court may soon face this issue. For a discussion, see text accompanying note 92 *infra*.

<sup>77</sup> 242 Md. 645, 220 A.2d 51 (1965), *appeal dismissed*, 385 U.S. 97 (1966). I was one of the counsel for the colleges in the case, and so am open to suspicion of bias. But my bias in favor of the "pupil benefit" theory has a long history. As a member of the 1938 New York constitutional convention, I voted to permit schoolbuses to carry parochial students, a measure later approved by the voters.

<sup>78</sup> *Id.* at 676, 220 A.2d at 68.

<sup>79</sup> *Id.* at 672-73, 220 A.2d at 66.

<sup>80</sup> *Id.* at 675, 220 A.2d at 67.

The plaintiffs appealed to the Supreme Court of the United States which dismissed the appeal in a brief memorandum.<sup>81</sup> Dismissal of an appeal, where as here there is no procedural defect, is an adjudication on the merits, an authoritative precedent.<sup>82</sup> The Court's memorandum did not state that the ground of dismissal was for want of a substantial federal question, but no other ground for dismissal appears, and two Justices (Harlan and Stewart) stated that they would have noted probable jurisdiction.<sup>83</sup> The Hood College part of the *Horace Mann* case is Supreme Court precedent at least for the proposition that direct State financial support of a church-connected college is constitutional under the 14th amendment if the contribution is for secular purposes and the church connection is slight in degree.

Supreme Court precedent is scanty on federal grants to students in church-connected institutions, or federal grants to the institutions themselves for secular ends. *Bradfield v. Roberts*<sup>84</sup> in 1899 upheld a congressional grant to an incorporated hospital. Writing for the Court, Mr. Justice Peckham held that the Roman Catholic ecclesiastical character of the persons in charge did not alter the secular quality of the corporation. The unsuccessful plaintiff was a citizen and taxpayer of the United States; the Court slid easily over the question of his standing to sue. In 1908 the Court upheld a contract made by the United States Commissioner of Indian Affairs with the Bureau of Catholic Indian Missions, which agreed to maintain a number of Sioux Indian pupils in a Catholic school on an Indian reservation. The Court found that the payment of these funds was unobjectionable, on the ground that the funds were held by the United States as trust funds allotted to the Sioux tribe in exchange for lands.<sup>85</sup> The standing of plaintiffs, Sioux Indians, was not made clear. Whatever the value of these cases, they contain no suggestion of invalidity of the Education Act of 1965.

The scantiness of authority on federal legislation may derive from the fact that educational grants oppress no one and deprive no one of religious freedom — unless a federal taxpayer could be considered as wronged when some fraction of his contribution to the federal treasury is paid out for a purpose which may in some way

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<sup>81</sup> 385 U.S. 97 (1966).

<sup>82</sup> *Ohio ex rel. Eaton v. Price*, 360 U.S. 246, 247 (1959) (dictum).

<sup>83</sup> 385 U.S. at 97.

<sup>84</sup> 175 U.S. 291 (1899).

<sup>85</sup> *Quick Bear v. Leupp*, 210 U.S. 50 (1910).

lend help to a religion. *Frothingham v. Mellon*<sup>86</sup> denied to a federal taxpayer standing to sue to enjoin a payment of federal money for an allegedly unconstitutional purpose. But perhaps Congress may legislatively overrule *Frothingham* (assuming that such an overruling statute is within the constitutional powers of the Congress). A recent Senate bill<sup>87</sup> proposed to grant any federal income taxpayer a right to sue to enjoin a federal officer from paying out any sums under a group of specified acts, including the Elementary and Secondary Education Act of 1965, which the plaintiff might challenge on first amendment grounds.<sup>88</sup> An amendment to this bill proposed to permit any citizen, even if he paid no federal taxes, to bring such an action. The legislation provided for jurisdiction in the District Court of the District of Columbia. This bill was, of course, an effort to avoid the holding in *Frothingham*. The measure passed in the Senate on July 29, 1966, but the House took no action before Congress adjourned. On January 11, 1967, Senator Ervin of North Carolina introduced an identical measure.<sup>89</sup> Representative Rosenthal of New York introduced in the House a comparable bill.<sup>90</sup> On December 1, 1967, the Senate bill passed unanimously; but, as before, the Conference Committee removed it. The House Judiciary Committee will hold hearings on the bill early in the second session of the 90th Congress.<sup>91</sup>

But Supreme Court adjudication of the constitutionality of the Federal Education Act of 1965, and of the numerous other federal statutes of similar import, may not have to await a statutory overruling of *Frothingham*. On October 16, 1967, the Supreme Court noted probable jurisdiction of an appeal from a three-judge federal court in the Southern District of New York which could conceivably open the whole question.<sup>92</sup> In that action Florence Flast and others sued Secretary John W. Gardner, of the United States Department

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<sup>86</sup> 262 U.S. 447 (1923).

<sup>87</sup> S. 2097, 89th Cong., 1st Sess. (1965).

<sup>88</sup> For a discussion of standing in cases involving federal grants, see 77 HARV. L. REV. 1353 (1964).

<sup>89</sup> S.3, 90th Cong., 1st Sess. (1967).

<sup>90</sup> H.R. 1198, 90th Cong., 1st Sess. (1967). REPORT OF THE STANDING SUBCOMM. ON CONSTITUTIONAL RIGHTS OF THE SENATE COMM. ON THE JUDICIARY, S. REP. NO. 473, 90th Cong., 1st Sess. 9-15 (1967) discusses the measure.

<sup>91</sup> STAFF OF SENATE SUBCOMM. ON CONSTITUTIONAL RIGHTS OF THE SENATE COMM. ON THE JUDICIARY, 90TH CONG., 2D SESS., MONTHLY STAFF REPORT (Jan. 9, 1968).

<sup>92</sup> *Flast v. Gardner*, 271 F. Supp. 1 (S.D.N.Y. 1967), *prob. juris. noted*, 36 U.S.L.W. 3157 (U.S. Oct. 17, 1967). For a discussion of the case see N.Y. Times, Oct. 17, 1967, at 1, col. 2 (city ed.).



of Health, Education and Welfare, and Harold Howe, United States Commissioner of Education, to enjoin use of federal funds under the Elementary and Secondary Education Act of 1965 to finance guidance services and instruction in reading, arithmetic, and other subjects, in religiously operated schools, and to prevent the expenditure of federal funds for the purchase of textbooks and other instructional materials for use in such schools. Two members of the three-judge court voted to dismiss the complaint for lack of jurisdiction of the subject matter on the authority of *Frothingham*. District Judge Frankel dissented. The plaintiffs then filed the appeal of which probable jurisdiction has been noted. An overruling of *Frothingham*, and if it is overruled, a Supreme Court adjudication of unconstitutionality, remain speculative as these words are written.

Prediction of the outcome of constitutional adjudication in pending litigation is rash, and perhaps in questionable taste. The mass of federal aids which go alike to students in lay and church-connected educational institutions ranging from school lunches to the ROTC, going back over many years, certainly creates extensive legislative precedent. For it all to be struck down as "an unconstitutional establishment of religion" is a prospect which gives the observer pause.