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CHURCH AND STATE: COOPERATIVE SEPARATISM†

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NOTHING is better calculated to stimulate argument, arouse controversy, excite the emotions and even produce intense visceral reactions than a discussion of church-state relations. Always a subject of lively interest, it has received added attention and emphasis in recent months. Perhaps at no time in at least the modern era of American history have the questions of the proper relationship between religion and government been more thoroughly publicized and explored, and the issues more widely debated, than during the period beginning with the presidential campaign of 1960.

The nomination by the Democratic Party of a Catholic, John F. Kennedy, for the Presidency sparked the new public discussion of church-state relations and, more particularly, the question whether an adherent of the Catholic faith could properly discharge the functions of the President of the United States. Opposition to election of a Catholic to the Presidency was based on the premise that the Catholic Church does not recognize the traditional American separation doctrine and that, therefore, a Catholic president could not be expected, out of loyalty to his faith and his church, to act in conformity with this doctrine. In response to these charges, Mr. Kennedy took a clear and unequivocal position in support of the separation of church and state.

Whether Mr. Kennedy's Catholic religion helped or hurt in the course of the campaign is one of those debatable matters on which judgment may be withheld. What is important for the purpose of this discussion is that Mr. Kennedy won the election and thereby became the first Catholic to win and occupy the nation's

† This article is based on a lecture delivered on June 27, 1961, as one of a series of lectures on "The Constitution of the United States—1961," given in connection with the Second Special Summer School for Lawyers held at The University of Michigan Law School, Ann Arbor. The entire series of lectures will be published in book form in the Spring of 1962 by The University of Michigan Press.—Ed.

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highest office. His election may be viewed as marking a decisive step in the history of religion in the United States. It effectively symbolized shifts in status of the nation's religious forces. It is fair to say that from the time of the early settlements until recent decades, Protestantism has been the dominant religious force in helping to shape the pattern of American life and the content of American culture. But the growth in size, power, and influence of the Catholic and Jewish minorities has pointed up a significant new pattern of American religious pluralism which marks the end of the so-called Protestant era in American history. This, in turn, has a vital bearing on all problems of church-state relations. The recognition that the Catholic and the Jewish groups, as the other two primary religious groups in this country, along with the Protestant groups all stand in an equal position, that none has a preferred position either in determining governmental policy or choice of officers, or in molding the religious mores of the country, has a significance that far transcends the election of a Catholic as President of the United States.

It became apparent some years ago that as the influence of the Catholic and Jewish constituencies increased, traditional Protestant assumptions would have to be discarded. Nowhere were these assumptions more clearly articulated and expressed than in the field of education. The public school system as it first developed and, indeed, as it has continued in some parts of the country to this day, was essentially a Protestant school system, and it is not surprising that despite the Protestant emphasis on separation of church and state, the reading of the King James version of the Bible as a devotional exercise was not uncommonly an accepted part of the public school program. On the other hand, the idea that no public funds should go to support competing schools, notably parochial or religious schools, is another distinctive aspect of Protestant thinking.

The current interest in church-state questions has been generated not only by the discussions of the religious issue in the course of the presidential campaign of 1960, but also by concrete legislative proposals that have a direct bearing on the problem. The President's proposal for federal aid to education, whereby federal funds will be used to subsidize either capital expenditures or operating expenses, or both, of public schools throughout the nation,¹

¹ President's Message to Congress, 107 CONG. REC. 2284 (daily ed. Feb. 20, 1961).

immediatedly provoked the question whether some federal aid should not be extended also to non-public schools including the parochial schools operated by church bodies. The Catholic hierarchy, supported by some other groups, including a national organization of Orthodox Jews, is pushing a proposal that the federal government at least make low-rate interest loans available to non-public schools to assist in the construction of badly needed facilities.² The President has ventured the opinion that any kind of assistance like this to church-operated schools would be unconstitutional.³ On the other hand, the President's aid-to-education program, while denying subsidies to non-public schools at the primary and secondary level, encompasses proposals for federal subsidies in the field of higher education, including loans or grants to church-related colleges for capital purposes, tuition grants to students attending these colleges and further payments to these colleges, which raise similar constitutional issues.

Decisions by the Supreme Court during the past term add further interest to discussion of these problems. A Maryland law requiring that a person seeking an appointment as notary public take an oath declaring his belief in God has been held unconstitutional.⁴ Much more significant, however, were the decisions dealing with the validity of Sunday closing laws.⁵ The opinions in the cases, which will be discussed at some length later, furnish much interesting reading on the separation issue.

Enough has been said to indicate that the problems of church-state relations are with us in a very real and intimate way. A number of groups and organizations are devoting new study to these questions in order to clarify their position. While to some it may seem that the term "separation of church and state" solves all these questions, it has become clear to the more thoughtful observer that the relationship between the political and the religious forces of the community, all operating within the same social structure, and often serving concurrent or overlapping purposes, and drawing upon the same basic human resources and personnel, is a matter too complex to be described by use of slogans or sym-

² See N.Y. Times, March 3, 1961, p. 1; *id.*, March 15, 1961, pp. 1, 26; *id.*, March 30, 1961, p. 16. [All references herein to the New York Times are to the City Edition.]

³ See N.Y. Times, Feb. 21, 1961, p. 22; *id.*, March 9, 1961, pp. 1, 16.

⁴ *Torcaso v. Watkins*, 367 U.S. 488 (1961).

⁵ *McGowan v. Maryland*, 366 U.S. 420 (1961); *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961); *Gallagher v. Crown Kasher Super Market, Inc.*, 366 U.S. 617 (1961); *Braunfeld v. Brown*, 366 U.S. 599 (1961).

bols, and that the problems attending this relationship are too difficult to be solved by doctrinaire propositions or absolutes.

I

"Separation of church and state" is the symbolic language so often used as a beginning point of discussion. Actually this precise language does not have much relevancy to the American scene. It is borrowed from European history and tradition where the problem could be identified in terms of a single church and of a single state, or in later years of a single state and two churches, namely, Catholic and Protestant. To speak of separation of church and state in the United States invites some difficulty in the use of terms, first, because we have a plurality of states including the federal government and the individual states and, second, because we have a plurality of church bodies. Perhaps it would be more illuminating to identify the subject in terms of the problems arising out of the interrelationship of religious and political forces in the community. This interrelationship creates the problem in which we are interested. Use of the term "state" denotes the politically-organized community with its monopoly of coercive power. The church, on the other hand, is a voluntary association which must depend on noncoercive religious motivation and persuasion in making its impact upon the individual and the community.

The problems we are concerned with have a substantial legal significance since both the Constitution of the United States and the constitutions of the several states include provisions that deal with the church-state problem. The first amendment to the Constitution provides that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. Many of our state constitutions have provisions more explicit than this and are designed, in many cases, to make clear that public property and public money shall not be used for religious or sectarian purposes or in aid of sectarian education.⁶ Moreover, the Supreme Court of the United States has said that the provisions of the first amendment are made applicable to the states through the fourteenth amendment's due process clause,⁷ so that as a matter of federal constitutional restriction, and in addition to or apart from the limitations imposed by its own constitution, each state must

⁶ *E.g.*, MICH. CONST. art. II, § 3.

⁷ See *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

observe the limitation that it can make no law respecting an establishment of religion or prohibiting the free exercise thereof.

The first amendment says nothing explicitly about separation of church and state. This term is not used in the federal constitution and, indeed, it is not used in American constitutions generally. This phrase is one of the verbal symbols that is useful as a shorthand term for conveying a set of related ideas, but it is useful to recognize that it is not a legal term, and certainly not a definitive constitutional term. What the first amendment does say is that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. Two different although related ideas are expressed in this opening clause of the first amendment. Congress shall make no law respecting an establishment of religion, and Congress shall make no law prohibiting the free exercise of religion. Ordinarily when people think of religious freedom they are thinking of the kind of freedom protected by this second part of the opening language of the first amendment, namely, that Congress shall make no law prohibiting the free exercise of religion. Freedom to exercise one's religion is, indeed, a fundamental right protected under the Constitution through the first amendment against Congress and under the due process clause against the states. It embraces freedom of worship, freedom in the organization of religious associations, freedom in the propagation of the faith, freedom in the distribution of religious literature, freedom in the enjoyment of public facilities dedicated to the dissemination and propagation of ideas, freedom from discrimination on religious grounds in the enjoyment of rights and privileges. This encompasses a wide field.⁸

It is not so clear, at least on first blush, that the non-establishment clause of the first amendment states a fundamental right in and of itself. The non-establishment idea, whatever it may mean in substance, becomes significant as a matter of fundamental right, only as the power of the states is used to force religion on a person, either by requiring his adherence to state-imposed religious beliefs or practices or by forcing him to submit to laws that have a religious purpose or to pay taxes in support of religious activities. The non-establishment idea acquires significance as a fundamental right only as a freedom from involuntary acceptance of or support of

⁸ See, *e.g.*, *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Kunz v. New York*, 340 U.S. 290 (1951); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

religion, but even in this situation, before a person can raise this issue in terms of the due process clause of the fourteenth amendment, he must show that any law or practice which he claims to be an invalid establishment of religion impinges in a substantial way upon either his personal freedom or his pocketbook.

The question may be raised whether the free exercise of religion is dependent on the non-establishment of religion and the separation of church and state. If, for instance, there is an established church, as in England, is this incompatible with the free exercise of religion? Some would say not and point to England as an example. The Anglican Church is the established Church of England. But is there not complete freedom of religion in England? All nonconformist and dissenting religious groups are free to pursue their own ways and no one's faith is coerced. But, this is not quite the case. The clergy and members of the Church of England are really not free to exercise their own religion since control of the Church is technically in the hands of Parliament. No established church subject to governmental control or dependent upon governmental support is really completely free. Moreover, members of independent churches are not as completely free to propagandize their beliefs in the market-place of ideas if they are competing with a religion enjoying a preferred status established and supported by law. Non-establishment as a rule requiring neutrality as between religions is then an important facet of the central concept of religious freedom. On the other hand, if non-establishment means that government must be completely indifferent to religion and that it can do nothing which aids religion in any way, even though not preferential or discriminatory, the relationship of non-establishment as thus defined to the free exercise of religion becomes a more complicated matter. If the government without dictating or coercing belief on any one's part recognizes the place of religion in the life of the community, and, without preferring one or more religious groups, accommodates its program and the use of its facilities to religious needs and supports activities in which the government and the churches have a concurrent interest and common concern, religious freedom is not placed in jeopardy. On the contrary, it may be argued that the government is thereby contributing to religious freedom and making it more meaningful. Some situations may arise when a choice must even be made between the non-establishment principle as broadly conceived and the principle that the government may not discriminate on religious grounds.

As previously noted, the Constitution does not employ the term "separation of church and state," much less the terms "wall of separation" or "complete and permanent separation of church and state." These are all phrases that have been coined outside the constitutional language. The Supreme Court has said that the twin phrases of the first amendment, proscribing laws respecting an establishment of religion or prohibiting the free exercise thereof, combine to require a separation of church and state.⁹

It is evident, then, that the critical problems in respect to the separation of church and state turn on the interpretation given to the first phrase of the opening clause of the first amendment, namely, that Congress and, as interpreted, the states, shall make no law respecting an establishment of religion.

II

We turn, then, to the interpretation given this language by the Supreme Court in recent years, and for this purpose we shall take account of key statements found in important cases. The first occurred in the course of the majority opinion in the well-known and now famous case of *Everson v. Board of Education*¹⁰ where the Court held constitutional a local school board's action in providing bus transportation at the expense of public tax funds for children attending parochial as well as public schools. This was the specific problem before the Court, and the majority found nothing unconstitutional about the school board's action. It is evident, therefore, that anything the Court said in that case about what either Congress or the states may not do to aid religion was dictum. The principal paragraph of Mr. Justice Black's much-quoted dictum in this case reads as follows:

"The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in

⁹ See *Everson v. Board of Educ.*, 330 U.S. 1 (1947); *Zorach v. Clauson*, 343 U.S. 306, 312 (1952).

¹⁰ 330 U.S. 1 (1947).

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 establishment of religion by law was intended to erect 'a wall of separation between church and State. . . .'¹¹

It will be noted that the Court in this broad dictum, purporting to interpret the non-establishment clause, included some ideas that clearly come under the free exercise of religion concept. Any attempt by government to force or influence a person to remain away from church or to profess a disbelief in any religion or to punish him for entertaining or professing religious beliefs or for church attendance would be a clear violation of religious freedom. What appears in this dictum as distinctively an interpretation of the non-establishment idea is that the government cannot set up a church, pass laws which aid one religion, aid all religions or prefer one religion over another, force or influence a person to go to church, force him to profess a belief in religion, punish him for disbelief or non-attendance at church, levy a tax to support any religious activities or institutions that teach or practice religion, or participate in the affairs of any religious organizations or groups. In short non-establishment means that the government can do nothing to sanction or aid religion. Translated in terms of the right of the individual, this means that a person enjoys a constitutional right to be free from any governmentally-sanctioned religion and free from any imposition by way of taxes to support religion. Finally, it should be noted that Mr. Justice Black concludes this part of his opinion by referring to Jefferson's famous statement that the Constitution is intended to erect "a wall of separation between church and state."

That non-establishment should mean that the government may not sanction a particular religion or establishment or force religion on anyone is understandable. Such a construction promotes both the freedom of the believer and the freedom of the unbeliever, and both are entitled to constitutional protection. On this basis the Court this past term held invalid the provision of the Maryland Constitution requiring a declaration of belief in God as a condi-

¹¹ *Id.* at 15-16.

tion of holding public office.¹² It is clear also that the conscience of individuals should not be coerced by forcing them to pay taxes in support of a religious establishment or religious activities. But the statement in Mr. Justice Black's dictum in *Everson* that government cannot aid all religions presents more difficulty. Did this mean that the government could under no circumstances do anything to recognize and encourage the worth of religious activities? If this is what was meant, then was this intended by the language used in the first amendment? Scholars disagree on this.¹³ Moreover, practices long sanctioned in American history cast doubt on the validity of this interpretation: tax exemptions for property used for religious purposes, commissioning of chaplains for the armed services, religious services in the nation's military schools, use of public property such as sidewalks and parks for religious purposes, exemptions of conscientious objectors from military service, tax deductibility of contributions for religious purposes, and the preferred treatment under the income tax laws for housing allowances for ministers. Surely there is aid to religion in one way or another in all these practices. Moreover, as Mr. Justice Black recognized in his *Everson* dictum, no one questions the validity of giving churches the benefit of the usual governmental services such as police and fire protection and water service.

It is clear, then, that either the Court was painting with too broad a brush in condemning all aid to religion or was using the term in a special way that needed further clarification. In the end did Mr. Justice Black say anything more than that the Constitution forbids the kind of aid which amounts to an establishment of religion? The difficulty in the "aid to religion" concept is manifest in the dissenting opinion in the *Everson* case. The four dissenting Justices apparently accepted everything that Mr. Justice Black said about the meaning of non-establishment but felt that the majority had made a wrongful application of the idea since, in their opinion, the use of public monies to send children to parochial as well as to public schools was an aid to the teaching of religion which according to the majority thesis was forbidden by the Constitution. This, of course, illustrates at once the problem of interpretation and suggests also that a proposal to use federal funds to grant some

¹² *Torcaso v. Watkins*, 367 U.S. 488 (1961).

¹³ See I STOKES, *CHURCH AND STATE IN THE UNITED STATES* 537-39 (1950); Pfeffer, *Church and State: Something Less Than Separation*, 19 U. CHI. L. REV. 1 (1951); Katz, *Freedom of Religion and State Neutrality*, 20 U. CHI. L. REV. 426 (1953).

kind of assistance to parochial schools cannot be summarily disposed of by saying that it is constitutionally forbidden in view of the dictum in the *Everson* case. Indeed, if the actual holding in *Everson* means anything, it points in the opposite direction.

The decisions that immediately followed *Everson* dealt with the released-time problem. In *Illinois ex rel. McCollum v. Board of Education*¹⁴ the majority held invalid a released-time arrangement whereby public school property was used for the teaching of religion by teachers supplied by the primary religious groups, but at the expense of one hour per week of school time. Participation in the program was voluntary, and children whose parents objected to participation were assigned other school activities during this period. The majority of the Court considered the released-time program to be an unlawful involvement by the public school system in a program of religious education. As the majority saw it, the churches were using the schools as a means of recruiting students for religious education classes under circumstances that resulted in coercion of students to attend. But here again we have a dissenting view, this time by Mr. Justice Reed, who felt that the majority were running the separation argument into the ground, and in support of this he pointed to many instances in American history where the state had taken a sympathetic view with respect to education for religious purposes.

Broadly interpreted, *McCollum* could have meant that the separation principle derived from the non-establishment limitation requires the state to be completely indifferent to religion and to the interest of parents in religious education. This is the only actual decision by the Supreme Court where the holding can be said to rest on a broad theory of separation of church and state. Actually the case could easily be interpreted more narrowly to mean that the state may not make itself a party to any scheme whereby religious education is forced on children in the public schools. A broad interpretation of the case was repudiated by the later decision in *Zorach v. Clauson*¹⁵ where the Court sharply limited *McCollum* by its holding that a program of released time for religious education of children in the public schools was constitutional provided that the classes were not conducted on the school premises. For all practical purposes a majority of the Court had now swung

¹⁴ 333 U.S. 203 (1948).

¹⁵ 343 U.S. 306 (1952).

around to the views expressed by Mr. Justice Reed in dissent in the *McCullum* case. This becomes evident when we look more closely at Mr. Justice Douglas's majority opinion and also at the opinions written for the four dissenting Justices who argued strenuously that the distinction between this case and the *McCullum* case was insubstantial and even trivial and did not warrant a difference in result. The dissenters appear to be right in saying that there was no substantial distinction between the two cases. What is far more important was Mr. Justice Douglas's opinion in *Zorach*. Speaking for a majority of the Court he sharply limited the language previously used in the *Everson* case. Indeed, in view of the fact that *Zorach* is a later case, it is surprising that in so much of the current discussion of church-state problems in their constitutional aspects, the fashion is to quote the *Everson* opinion even though it was substantially weakened by what Mr. Justice Douglas said in *Zorach*. In the course of his opinion Mr. Justice Douglas said:

"... There is much talk of separation of Church and State in the history of the Bill of Rights and in the decisions clustering around the First Amendment . . . [here citing the *Everson* and *McCullum* cases]. There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. And so far as interference with the 'free exercise' of religion and 'establishment' of religion are concerned, the separation must be complete and unequivocal. The First Amendment within the scope of its coverage permits no exception; the prohibition is absolute. The First Amendment, however, does not say that in every and in all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly. Churches could not be required to pay even property taxes. Municipalities would not be permitted to render police or fire protection to religious groups. Policemen who helped parishioners into their places of worship would violate the Constitution. . . .

"We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedoms to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no

partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence. The government must be neutral when it comes to competition between sects. It may not thrust any sect on any person. It may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction. But it can close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction. No more than that is undertaken here.

"This program may be unwise and improvident from an educational or a community viewpoint. That appeal is made to us on the theory, previously advanced, that each case must be decided on the basis of 'our own prepossessions.' . . . Our individual preferences, however, are not the constitutional standard. The constitutional standard is the separation of Church and State. The problem, like many problems in constitutional law, is one of degree. . . ."¹⁶

Mr. Justice Douglas's opinion for the majority in the *Zorach* case is quoted at length since it reflects a basic difference in approach. To be sure, it overlaps in large part what was said in *Everson*. The government may not finance religious groups, must be neutral between sects, cannot undertake religious instruction or force religion, religious instruction or a religious observance on anyone. There are notable points of difference, however, and these points of difference become crucial and central in any dis-

¹⁶ *Id.* at 312-14.

cussion of the problem. First of all the *Zorach* opinion recognizes that the first amendment itself says nothing about the separation of church and state. Separation is not in itself a starting point in constitutional thinking. It follows and is required only to the extent that it flows from the clauses relating to non-establishment and the free exercise of religion. The first amendment, then, according to *Zorach*, does not ordain a complete and absolute separation of church and state in every respect. Implicitly the Court in *Zorach* repudiates the notion that the first amendment establishes a wall of separation between church and state, for the wall terminology and imagery is based upon a notion of absolute and complete separation. Moreover, in *Zorach* the Court emphasized the idea that the legislative body of a state may take into account the religious interests of its citizens and adapt its legislative program to that end at least so far as accommodation of public facilities and services is concerned. Here, in other words, is a disclaimer of the idea that the state must be completely neutral as between religion and non-religion. At least so far as the first amendment is concerned the Court says that the legislature may take account of the religious interests of its people in its legislative program so long as it does not act with coercive effect upon dissenters and non-believers, and no preference is given to any one religious group. In short, the government is not required to act as though religion and religious institutions did not exist. It may go farther and find that they perform a useful and desirable function in the social community, even a public purpose, and that within the limits imposed by the Constitution their activities may be encouraged and favored by the state. Finally, it is significant that the Court said in the *Zorach* case that the problem of separation of church and state, like many problems in constitutional law, is one of degree. Indeed, this may be the most significant statement in the whole case. The problems in this area cannot be solved by resort to doctrinaire absolutes, verbal formulae or metaphors. As in the case of all constitutional adjudication, the Court must look at these problems in terms of the competing interests at stake and, therefore, take a critical look both at what the state is trying to do and what are the fundamental purposes served by the constitutional restrictions.

The most recent extended expressions of opinion in this important area are found in the Court's four decisions handed down at the last term dealing with the validity of Sunday closing laws, and any discussion of the problems in this area must take these

decisions and the several opinions into account. Indeed, the whole area of church-state relations and the basic meaning of the first amendment are subjected to intensive review.

The basic constitutional problems presented in the four cases consolidated for hearing before the Court can be simply stated:

(1) Is a state or local law, which states a general rule prohibiting work or business on Sundays, unconstitutional because it, in effect, is an attempt pro tanto to establish the Christian religion as the religion of the community?

(2) Even if such a law is not generally invalid on an establishment theory, must it as a constitutional matter exempt from its prohibition of Sunday work persons who because of religious convictions observe a day other than Sunday as a day of rest?

The majority of the Court found these Sunday closing statutes to be constitutional, both in their general application and in their application to persons who for religious reasons observe another day of the week as a day of rest, as in the case of orthodox Jews who abstain from business activities on the Sabbath.¹⁷ The chief opinions were written by Mr. Chief Justice Warren and were concurred in by Justices Black, Clark and Whittaker. A long concurring opinion was written by Mr. Justice Frankfurter joined by Mr. Justice Harlan.¹⁸ Justices Brennan and Stewart concurred in the view that Sunday closing laws are not generally invalid as an attempt to establish the Christian religion, but dissented from the majority's holding on the second question, since in their opinion it is a violation of religious liberty to force a Sunday closing on a person who already for religious reasons observes a different closing day.¹⁹ Mr. Justice Douglas dissented both on the ground that Sunday closing laws are unconstitutional generally as an attempt to establish the Christian religion and on the further ground that they violate the religious freedom of persons who observe a different day of rest.²⁰

As already noted, these cases raised issues under both the non-establishment and the free exercise clauses. The argument in respect to establishment is easily seen, namely, that Sunday closing laws rest on the Christian conception of Sunday as a day of worship and rest, and that, therefore, these laws sanction the Christian

¹⁷ *McGowan v. Maryland*, 366 U.S. 420 (1961); *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 366 U.S. 582 (1961); *Gallagher v. Crown Kasher Super Market, Inc.*, 366 U.S. 617 (1961); *Braunfeld v. Brown*, 366 U.S. 599 (1961).

¹⁸ *McGowan v. Maryland*, 366 U.S. 459 (1961) (separate opinion).

¹⁹ *Braunfeld v. Brown*, 366 U.S. 599, 609-10 (1961).

²⁰ *McGowan v. Maryland*, 366 U.S. 561 (1961) (dissent).

religion as the official religion of the community. Admittedly, Sunday closing laws have their genesis in religious considerations. Eight members of the Court, however, are satisfied that the Sunday closing laws at issue in the cases before them, whatever the motivation behind their original enactment, are now justified on secular grounds as an exercise of the state's police power to promote the public health and welfare by establishing one day of the week as a day of rest, repose, relaxation, and family visiting. In short, the state has established a secular holiday for reasons appropriate to the state's police power, and the validity of its action is not impaired by the consideration that the day of the week chosen corresponds with the day observed for religious reasons by a majority group in the community. Once it is conceded that the Sunday closing laws rest on adequate non-religious grounds, then, according to the majority, it is no violation of religious freedom to compel observance of the law by those persons who, because of their religion, feel compelled to observe a different day of the week as a day of rest and thereby must make a choice between their religion and the economic disadvantage of having to observe two days of rest each week. On this point the majority relied upon the well-established doctrine, supported by the cases, that the practice of religion is subject to the reasonable exercise of the police power. Polygamy may be prohibited even though sanctioned by religion;²¹ public health measures take precedence over religious scruples against medical treatment;²² and the public interest may require that a person serve in the country's armed forces even though he is a conscientious objector.²³ Citing the practical enforcement problems that would otherwise arise and the difficulties involved in use of a religious test, the Court concluded that the legislature was not acting unreasonably in denying exemptions from the Sunday closing law to persons whose religion required observance of a different day of rest.

Although on the surface of the matter and by reference to the history of Sunday closing laws, one is tempted to support Mr. Justice Douglas's view in dissent that no amount of rationalization can serve to disguise the religious motivation behind these laws, the lengthy opinions by Mr. Chief Justice Warren and Mr. Justice Frankfurter, together with the extended documentation, do lend

²¹ *Reynolds v. United States*, 98 U.S. 145 (1878).

²² See *State ex rel. Holcomb v. Armstrong*, 39 Wash. 2d 860, 239 P.2d 545 (1952).

²³ See *United States v. Macintosh*, 283 U.S. 605 (1931).

impressive support to the idea of evolution and change in the motivation underlying Sunday laws and to the thesis that for many Americans Sunday is a thoroughly enjoyable day of rest and relaxation quite unrelated to the matter of religious observance. The transformation of Sunday from a religious into a civil holiday is an interesting symbol of the secularization of American society. Religious forms are appropriated for secular purposes.

What contribution do the Sunday closing law cases make to the interpretation of the non-establishment idea? The cases do not really turn on any new interpretation of establishment, since it was recognized by all nine Justices that Sunday closing laws would have to be condemned as an attempt to establish religion if they could be justified only by religious considerations. If the holding in these cases can be reduced to some capsule propositional form, it is that governmental action serving a valid public purpose by reference to civil and secular considerations does not become invalid because it operates simultaneously to promote religious interests, either generally or of a particular group. So stated, the holding is parallel to that of the *Everson* case—spending public money to send children by bus to parochial schools serves a valid secular purpose even though it also advances and helps a program of religious education.

Although Mr. Chief Justice Warren's opinion²⁴ discusses the general theory and interpretation of the first amendment at some length, in the end it relies chiefly on *Everson* as an exposition of the non-establishment language. Mr. Justice Frankfurter's separate opinion is more instructive in this respect. He makes the principal point that the non-establishment idea forbids governmental action which is directed toward the primary end of affirming or promoting religious doctrine. His opinion at this point is of sufficient interest to warrant the following extensive quotation:

"Of course, the immediate object of the First Amendment's prohibition was the established church as it had been known in England and in most of the Colonies. But with foresight those who drafted and adopted the words: 'Congress shall make no law respecting an establishment of religion,' did not limit the constitutional proscription to any particular, dated form of state-supported theological venture. The Establishment Clause withdrew from the sphere of legitimate legislative concern and competence a specific, but comprehensive, area of human conduct: man's belief or disbelief in the verity

²⁴ *McGowan v. Maryland*, 366 U.S. 422 (1961).

of some transcendental idea and man's expression in action of that belief or disbelief. Congress may not make these matters, as such, the subject of legislation, nor, now, may any legislature in this country. Neither the National Government nor, under Due Process Clause of the Fourteenth Amendment, a State, may, by any device, support belief or the expression of belief for its own sake, whether from conviction of the truth of that belief, or from conviction that by the propagation of that belief the civil welfare of the state is served, or because a majority of its citizens, holding that belief, are offended when all do not hold it. . . .

"To ask what interest, what objective, legislation serves, of course, is not to psychoanalyze its legislators, but to examine the necessary effects of what they have enacted. If the primary end achieved by a form of regulation is the affirmation or promotion of religious doctrine—primary, in the sense that all secular ends which it purportedly serves are derivative from, not wholly independent of, the advancement of religion—the regulation is beyond the power of the state. This was the case in *McCullum*. 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. A State may not endow a church although that church might inculcate in its parishioners moral concepts deemed to make them better citizens, because the very *raison d'être* of a church, as opposed to any other school of civilly serviceable morals, is the predication of religious doctrine. However, inasmuch as individuals are free, if they will, to build their own churches and worship in them, the State may guard its people's safety by extending fire and police protection to the churches so built. It was on the reasoning that parents are also at liberty to send their children to parochial schools which meet the reasonable educational standards of the State, *Pierce v. Society of Sisters*, 268 U.S. 510, that this Court held in the *Everson* case that expenditure of public funds to assure that children attending every kind of school enjoy the relative security of buses, rather than being left to walk or hitchhike, is not an unconstitutional 'establishment,' even though such an expenditure may cause some children to go to parochial schools who would not otherwise have gone. The close division of the Court in *Everson* serves to show what nice questions are involved in applying to particular governmental action the proposition, undeniable in

the abstract, that not every regulation some of whose practical effects may facilitate the observance of a religion by its adherents affronts the requirement of church-state separation."²⁵

Although Mr. Justice Frankfurter's opinion serves a useful purpose in its analysis of the problem and with its emphasis on the "primary end" served by a regulation, the test proposed still requires a large measure of judicial weighing and judgment. Moreover, his statement does not purport to explain or harmonize all the earlier cases. The *McCullum* case may very properly be cited to support the proposition that the state may not enact a form of regulation which has as its primary end the promotion of religious doctrine. But Mr. Justice Frankfurter says nothing about *Zorach*, and the question may indeed be raised whether *Zorach* can be fitted into his analysis.

The weakness, if not futility, of attempts to state general propositions as controlling tests for these cases is further illustrated by Mr. Justice Douglas's dissenting opinion. The point of emphasis in his long and interesting opinion is captured in the following sentence: "There is an 'establishment' of religion in the constitutional sense if any practice of any religious group has the sanction of law behind it."²⁶

On the surface this sounds like a sensible and viable test. But, again, it may be questioned whether it states an accurate proposition. What if a law prohibiting polygamy exempts those who practice plural marriage as a matter of religious conviction? Or if a law regulating the slaughtering and inspection of meat exempts from its requirements meat slaughtered and inspected in accordance with religious practices? Similarly, what if a public health measure exempts persons who are opposed to medical treatment on religious grounds? Indeed, what if a Sunday closing law grants an exemption to persons who observe a different rest day on religious grounds? Can it not be said in each of these instances that the state is placing the sanction of law behind the practice of a religious group? Yet no one seriously supposes that any one of these exemptions would be held unconstitutional. On the contrary they would be appropriately regarded as a legislative recognition and implementation of religious freedom.

²⁵ 366 U.S. 459, 465-67 (1961) (separate opinion).

²⁶ 366 U.S. 561, 576 (1961) (dissent).

III

In the light of these expressions of opinion and the holdings by the Court, what can be said about the meaning of non-establishment and what is its relevancy to today's most urgent problems in this area?

In any critical examination of this general problem of church-state relations and more particularly of the non-establishment limitation, it is useful to start with the elementary idea that the state and the church serve basically different functions and objectives. It is the state's business to operate the politically-organized society and serve the community's civil needs. The business of the church is to minister to man's spiritual needs and to carry on activities appropriate to a sense of religious concern. Some may prefer not to put it in this way, but rather to say that the state is concerned with the secular functions of our society and the churches with its spiritual functions. This, too, may be a gross oversimplification, but it does, at least, point up a central consideration, namely, that church and state serve different primary functions. It is not the business of the state to operate a church or to engage in the propagation of religious ideas. On the other hand, it is not the function of the churches to exercise the coercive authority of the politically-organized community. This separation of function has its roots not simply in some theoretical conception of a convenient division of labor but is grounded more profoundly on the theory that the cause of human freedom is best served when religion and its institutions are grounded in voluntarism and not dependent upon political force.

The really important questions we face today, however, do not arise from any threat of formal confusion of functions or any attempt at formal institutional blending of the separate functions of the church and state. Rather they have to do with the practical problems of interrelationship involving questions of the recognition of each other's function and of the contribution that each makes to the total scheme of things.

Even though a separateness of function is recognized in regard to the primary purposes of politically-organized society, on the one hand, and religious institutions, on the other, it is clear that this is an abstract idea which must be given practical meaning in the context of a social community where both the secular and religious societies draw upon the same human resources. This is what introduces the perplexing aspects of our problem. We may speak of a

duality of citizenship—an allegiance to both the secular and the spiritual realms. Or to put it in terms of the language used by Luther in describing this situation we have the two kingdoms: the kingdom of the sword and the kingdom of the spirit. Yet they must necessarily operate within the same community. From this it follows that each must respect the other and, indeed, each is dependent upon the other.

The state has a complete monopoly of coercive power with the result that the church is necessarily dependent upon the state for the maintenance of the elementary conditions of peace and order essential to the enjoyment of religious freedom and to the discharge of the church's functions, whether it be the maintenance of a house of worship, propagation of the faith, teaching the young, or ministering to the sick and needy. It is an idea well accepted in Christian theology and doctrine that the state itself occupies an important role in God's created order and that its primary function in punishing the wrongdoer and preserving the peace of the community is to make possible the conditions that will advance the kingdom of the spirit. The church as the community of believers, therefore, respects the state and looks to the state for protection of the peace of the community, for protection of its property, and for enjoyment of the public services rendered by the state. Already at this point it becomes evident that there is an interdependence which is not accurately portrayed by the wall-of-separation metaphor. The church is dependent upon the state in a very real way in order to maintain its functions. For this reason the church deems it appropriate that its members support the state, pay taxes, vote, and serve as magistrates and civil servants despite the radical views of a small group within the Christian communion who, in order to carry separation to a maximum, have divorced themselves from the political life of the community. It is appropriately the function of the state to provide police and fire protection and to give churches the benefit of the same services provided to other organizations and to individuals, whether it is in the furnishing of utility service or whatever service the politically-organized community renders. Obviously, the state in giving the religious community the benefit of these services is extending aid to religion in a very real sense. To suggest that this is distinguishable because this is not aid to religion as such is simply to use words to avoid the critical problem. When government makes its facilities available to protect the organized religious groups and to make possible the

system in which religion can flourish, it is giving the most important aid that a state can give to any group with respect to the performance of its functions. It is aid to religion but not the kind of aid forbidden by the Constitution. It is a benefit shared by the church with all the community, and the state in extending this benefit is not thereby using its power to promote or sanction religious belief.

As the church is dependent on the state and depends for its effective functioning and even survival on valuable services furnished by the state, so, in turn, the politically-organized community expects to be served by the religious community. The tradition developed in English legal history that the Chancellor was the keeper of the King's conscience. This term epitomized the idea that the King counted upon conceptions of equity developed by the Chancellor who was an ecclesiastical officer to liberalize the Common Law and to infuse it with moral conceptions that had a basic religious orientation. This, in turn, is simply another manifestation of the idea that the churches in the discharge of their separate functions in cultivating the spiritual lives of their parishioners and in developing moral and ethical ideas founded on religious insight and motivation make an important contribution to the politically-organized community. The state in formulating policy and in fashioning the law must depend upon the moral sense and values of the community. It makes little difference whether we recognize the church's contribution to the legal order and to the conception of public policy in terms of a body of moral or natural law which serves as a guide or norm for the framing of positive law or, whether apart from any conception of natural law, we identify this contribution to the civic order both through the impact of religiously-motivated citizens and public officers and the discharge by the church of a prophetic function in speaking to matters of public concern. In regard to such matters as disarmament, the use of nuclear weapons as war weapons, birth control, distribution of surplus food to needy peoples, immigration policy, aid to education, aid for the aged, the churches do have a real, vital interest. These are matters of both religious and civic concern.

There are some who would suggest that separation of church and state means that religion and politics must be kept separate. If by this is meant that the church, in deference to the separation idea, may minister only to the spiritual needs of its members and

not exercise a prophetic function in speaking to the problems of our day, then we have a gross misconception of the separation principle. Indeed, a higher principle arises here in terms of religious freedom on the part of any person or group to express ideas that have religious significance and which are relevant also to current social, economic and political problems. Criticism is often made of the Roman Catholic Church that it attempts to influence legislative policy in such matters, for instance, as birth control, sterilization, euthanasia, and obscenity in literature and the movies. On this matter it should be clear first of all that, in so far as this is a separation problem, it is not a constitutional problem since it is part of the freedom of churches to propagandize and to use their efforts to influence legislative policy. The Constitution does prohibit giving to any church a formal place in the legislative process. But it does not prohibit the churches or their members from giving their opinions on matters of political concern or speaking in support of legislative proposals. This, indeed, is part of their function as religious bodies. The idea that a man's religion is irrelevant to his conduct as a citizen or as a public officer states a low view of religion and a sterile concept of the place of religion in influencing a man's conduct, attitudes and motivations.

We may take as an illustrative case the problem of birth control. According to the doctrine of the Catholic Church, the use of means of artificial birth control presents a moral problem. Is it appropriate, then, for the church to advocate legislation designed to reflect the church's views on the subject, and, in turn, is legislation on this subject invalid as an establishment of religion? Legislation in regard to moral matters has been common throughout our history. Indeed, religious and moral grounds may be cited to support a large body of our criminal laws. For many, murder is a crime because it violates religious commandments. We mention this simply to indicate that legislation to advance and protect public morals has traditionally been regarded as one of the appropriate spheres of the police power. And if a substantial segment of a community, indeed, a dominant segment, wishes to translate a moral idea into a law, this is nothing new, nor does it violate any concept of separation of church and state in the constitutional sense. A dominant religious group may be ill-advised to do this and thereby impose its will upon others who do not accept, although this is usually true of the exercise of the police power. In the end, these questions must be discussed and answered in the

course of the usual political and legislative processes. Although the Catholic Church has been singled out for the purpose of illustrating the question involved when a church presses for laws that reflect the church's views on moral questions, this situation is by no means peculiar to this church. President Grant reportedly said that there were three political parties in this country—the Republicans, the Democrats and the Methodists.²⁷ At present many church groups are identified with efforts to secure civil rights legislation. Obviously, the separation idea does not preclude this. On the contrary, any sensible, mature, and sophisticated understanding of the relationship between the church and the state must take account of these common areas of concern and recognize that ideas and values of religious significance may appropriately be translated into or identified with conceptions of public policy and interest within the proper reach of governmental power.

There is, of course, an end point reached in the use of the legislative power to promote views, programs or practices that have a religious significance. A distinction must be made between legislation which finds support in considerations of public interest, even though also identifiable with religious views and practices and legislation designed to force a religious view or practice upon the community. The latter must be condemned as an unconstitutional establishment of religion. Obviously a statute requiring every person to attend church on Sunday or to make a contribution in support of churches would be invalid. This is the use of the state's power to promote a strictly religious objective, and no secular or civil considerations can justify such legislation. On the other hand, the Supreme Court, in the recent cases discussed earlier, has held that Sunday closing laws are a valid exercise of the state's police power since they rest on adequate secular or civil considerations even though they may also serve the concurrent purpose of promoting observance of the Christian religion.

Let us return for a moment to birth control laws. The Supreme Court at its last term handed down its decision dealing with the validity of the Connecticut statute prohibiting the use and sale of artificial birth control devices and the giving of medical advice with respect to their use. Although it is commonly supposed that the Catholic Church is responsible for this legislation, a study of its history indicates that its original enactment reflected Protestant

²⁷ See HESSELTINE, ULYSSES S. GRANT 305 (1935).

morality of the Anthony Comstock era. The validity of this legislation was argued before the Supreme Court wholly in terms of whether this was a valid exercise of the police power. Unfortunately the outcome of the case was not decisive of the problem. A majority held that there was not a real case or controversy, since the statute was not being enforced, hence the constitutional issue was avoided.²⁸ Two Justices believing that there was a case for the exercise of the judicial power found the statute invalid as an arbitrary restriction on individual liberty.²⁹ The avoidance by the majority of the constitutional issue suggests that they did recognize a substantial constitutional question presented by this kind of legislation. Two dissenters made clear that in their opinion there were no adequate considerations of public interest or policy to warrant this restriction on personal liberty. The notable dissent written by Mr. Justice Harlan stressed the argument that the statute in prohibiting use of contraceptives sanctioned a drastic invasion of the privacy of the home and of the marital relationship. Here, then, is the key to the general problem under consideration. Legislation identifiable with religious views and practices is constitutional if it can be supported by adequate considerations of a secular or civil nature relevant to the exercise of governmental power. Otherwise it fails either as an attempt to establish religion or simply as an arbitrary exercise of power unrelated to appropriate public objectives.

In the situation just discussed, the problem is whether government through the exercise of its police power is attempting to establish a religion, that is, whether by means of regulation of behavior compelling people to abstain from certain conduct it is sanctioning the views of a particular religion. The impact on personal liberty is evident in this case and the standing of a person affected by this to raise the question whether this is an attempt to establish religion is clear also. The more frequently arising question in respect to the establishment of religion concerns the spending by a state of money or the use of public property for purposes

²⁸ *Poe v. Ullman*, 367 U.S. 497 (1961). The chief opinion was written by Mr. Justice Frankfurter and joined by the Chief Justice and by Justices Clark and Whittaker. Mr. Justice Brennan wrote a separate opinion in which he concurred in the determination that these cases presented no real and substantial controversy. Justices Douglas and Harlan dissented in separate opinions. Finding justiciable issues in the cases before them, and passing to the merits of the question, they concluded that the statute was unconstitutional. Justices Black and Stewart dissented on the dismissal of the case but did not express conclusions on the meritorious question.

²⁹ Justices Douglas and Harlan, *id.* at 509 and 522.

which are said to aid religion or to favor a religion and thereby to violate the establishment idea. These are probably the most pressing questions we face at the present time. Thus the question arises with respect to use of government funds for the purpose of aiding parochial schools in one way or another.

It should be noted that as soon as we get into questions with respect to the use of public funds, property or facilities in aid of religion, we also get into an important remedial and standing question. The remedial and standing question is, in turn, related to the meritorious question of underlying constitutional right, particularly when we are talking about the application of the fourteenth amendment. No person can claim that he is being deprived of life, liberty or property without due process of law by reference to allegedly unconstitutional use of state funds in support of or by way of establishment of religion unless he can demonstrate some substantial injury to life, liberty or property. If a special tax is levied in order to support a church establishment, this clearly gives the taxpayer standing by virtue of the financial imposition made upon him. Or if in connection with the use of funds to support religious education, where it is not clear that there is a substantial use of these funds or any out-of-pocket charges against the government, the attempt is made to force this program on some unwilling person, it is clear here, too, that because of this invasion of his own freedom of conscience, he has standing to raise the question. But unless a person can demonstrate that alleged governmental participation or involvement in or support of some program alleged to aid religion is a substantial diversion of tax funds and thereby burdens him as a taxpayer or otherwise infringes upon his own freedom, it is not clear that he has standing to raise these questions.³⁰ This point is particularly worth noting in respect to attempts to question the validity of spending by the federal government. In the well-known case of *Frothingham v. Mellon*³¹ the Supreme Court held that a federal taxpayer as such does not have standing to raise questions in respect to the validity of federal spending. This case was decided on the theory that a taxpayer has such a small and remote interest in funds in the federal treasury that he cannot claim any personal damage because funds derived from tax sources are being used in an unconstitutional way. We need not emphasize the importance of this idea in respect to ques-

³⁰ See *Doremus v. Board of Educ.*, 342 U.S. 429 (1952).

³¹ *Sub nom.* *Massachusetts v. Mellon*, 262 U.S. 447 (1923).

tions that may be raised with respect to the validity of federal spending for parochial schools, for instance. Even if we had a clear case of appropriation of funds by the federal government to aid religion or to aid religious education as religious education, it is not clear at this point just who could raise the question. If *Frothingham v. Mellon* were followed in this situation, taxpayers would not have standing. It may be that because of the importance of the first amendment restriction the Court will permit taxpayers to question any spending of money which is alleged to result in an establishment of religion. This remains to be seen. At this point it is enough to note that the standing problem presents substantial difficulties.

In taking a closer look at the questions raised in regard to use of public funds, facilities, or property as a means of aiding religion and thereby constituting an unlawful establishment, several general considerations may be noted at the outset.

In the first place, notwithstanding what has been said by the Supreme Court, particularly in its dictum in the *Everson* case, the truth and the historical fact is that government funds have been spent distinctively in support of religious purposes. Although Mr. Justice Frankfurter said in his concurring opinion in the Sunday-closing-law cases that government can never do anything that will support or endorse any religious view or views, history does not support so sweeping an assertion. The clearest case in refutation of this is the use of federal funds to pay salaries to officers in the armed forces who are military chaplains and who are commissioned as officers because they are religious officers and whose whole function is to perform a religious ministry to men in the armed services. Now we know that some special reasons are given for this situation, namely, that men in the armed forces are away from their usual homes and environment where they have the opportunity to attend church and so the government is meeting this need by supplying a chaplain service and this, in turn, is related to the government's interest in maintaining the morale and well-being of its soldiers. In other words, the government does have a proper and valid interest here that warrants the expenditure of funds for this kind of religious ministry. Whatever the special reasons given, at least this demonstrates an important consideration, namely, that any absolutes in respect to nonuse of public funds to aid religion simply do not fit the case. The problems in this area cannot be solved by painting with a broad brush that condemns all recognition of reli-

gious purposes or assistance for religious purposes as being unconstitutional. At present there is a movement in force in many of the states to supply chaplains at state institutions such as penitentiaries, hospitals and the like. Again, no one seems seriously to question the validity of spending for this purpose even though it is distinctively in aid of a religious purpose.

Similarly, no one can doubt that the granting of tax exemptions for property used for purposes of religion or religious education amounts to substantial financial assistance by the state to religious institutions. Again, rationalizations are provided to justify this situation, namely, that since exemption for church property is usually part of a statutory pattern whereby exemption is allowed for various types of properties used for nonprofit purposes, therefore, it is appropriate to permit this exemption for property used for religious purposes, for otherwise there would be a discrimination against one class of property owned and operated by nonprofit institutions. This seems to be a tenable theory, but acquiescence in this theory should not obscure the fact that tax exemptions are generally recognized to be valid because the underlying institutions serve a proper public purpose and in many instances they perform functions which otherwise the state would have to perform. This is not to suggest that the justification for tax exemptions for churches is that they are performing a function which the state otherwise would perform, but rather that an exemption here is a recognition of the fact that religious institutions do serve a sufficiently public purpose to warrant this kind of treatment.

A second consideration is that under some circumstances a state may have to make a choice between the principle that it cannot aid religion on the one hand and the competing principle that it cannot discriminate against religion. Perhaps this is already illustrated in the tax exemption case mentioned above, where it may be said that if tax exemptions are granted to all nonprofit institutions, it would be an unwarranted discrimination to deny the exemption to one particular class of nonprofit institutions, namely, churches and church-operated schools. Perhaps an even better illustration is found in the cases involving the use of public properties for purposes of religious meetings. The numerous cases involving Jehovah's Witnesses furnish an excellent illustration of this period. According to the Supreme Court's decisions there is a right to use public ways, including streets and sidewalks and public parks for purposes of religious meetings and demonstrations

as well as for other public meeting purposes. This is based on the theory in these cases of the free exercise of religion.³² It cannot be doubted that in these cases the state by making its facilities available—and it is told that it is under a constitutional duty to do so—is aiding religion and is aiding the free exercise of religion. Yet not only is this permissible as a form of aid to religion, but it is even constitutionally required.

Finally, I revert to an idea previously mentioned in connection with the police power cases, namely, that a concurrence of function may be found in some cases so far as the separate functions of both church and state are concerned. In the police power cases such as the Sunday closing laws, although it can be said the Christian church has a special interest in observance of Sunday, the state has a concurrent interest in having all people observe a day of rest and it may appropriately choose Sunday as the designated day for this purpose. Here we have a concurrence of religious and secular interest converging upon the same result. There may also be a concurrence of interest with respect to the performance of certain functions, where the question is properly raised whether, because of such concurrence of interest, a state may appropriately recognize and support certain undertakings carried on by the churches. It is useful to note in this connection that a notable aspect of the secularization of American life is the gradual taking over by the state of many functions at one time performed by the churches. We do recognize that it is appropriately a religious function to engage in activities other than having church services on Sunday. It is appropriately a church function to operate hospitals, to operate schools and colleges, and to take care of the needy and helpless. Yet we know also that in these areas the state has been moving in more and more, and that with the progressive acceptance of the conception of the welfare state or the social service state, we are looking to government to perform functions which at one time were performed wholly or primarily by the churches. The fact that the state is now performing these functions in no way impairs the validity of the churches' performance of these same functions.

The question then arises whether, because of concurrence of interests and objectives, the state may to some extent support these functions when carried on by the church. At this point we may choose, simply for illustrative purposes, the operation of hospitals.

³² *Kunz v. New York*, 340 U.S. 290 (1951); *Niemotko v. Maryland*, 340 U.S. 268 (1951).

Clearly the operation of hospitals is a public function warranting the use of public funds. On the other hand, churches have traditionally operated hospitals as means of ministering to the sick and of expressing the concern and compassion of the church. Is it appropriate for government in any way to subsidize the operations of privately-owned and operated hospitals including hospitals owned and operated by the churches? The question is probably academic, because we know this has been done under the federal Hill-Burton Act³³ whereby benefit of these funds to assist in the construction of new and additional hospital facilities has been extended to hospitals owned and operated by church groups. The theory here is that the government is supporting these hospitals obviously not because they are religious institutions but because they are performing a function which the state itself can perform.³⁴

IV

We turn our attention now to the questions raised in respect to the relationship between the government and education and, more particularly, questions raised in respect to government and religious education. In general, it can be said that two underlying questions are presented by current developments and both of them have to do with the problem of establishment of religion by the state. The first is the question whether or not the state may in any way support any kind of program of religion in the public schools. The second is the question whether the state may give any form of assistance to the operation of what I have chosen to describe as parochial schools, which may be described by others as religious schools, or even by some as public-religious schools.

The problem in respect to religious education or religious exercise in state-supported educational institutions presents distinctive aspects depending upon the level of education involved. Dealing with this problem first of all at the public school level, that is, the level of primary and secondary schools, is it appropriate, for instance, to include as part of a public school program the reading of the Bible and even the recitation in unison of the Lord's Prayer? It can hardly be doubted that the introduction of a Bible reading and prayer exercise at the beginning of the school day is intended

³³ 62 Stat. 1040 (1946), as amended, 42 U.S.C. §§ 291 (a) - (n) (1958).

³⁴ See *Bradfield v. Roberts*, 175 U.S. 291 (1899), where the Court upheld an appropriation of money by Congress to a hospital in the District of Columbia, even though the hospital was owned and operated by an incorporated sisterhood of the Roman Catholic Church.

to have a religious significance, and it is difficult to avoid the conclusion that this does favor a particular religion, notably the Christian religion, and more particularly the Protestant religion, depending upon the version of the Bible that is used. As was mentioned at the beginning of this article, the public schools for many years in this country reflected a primary Protestant orientation and the practice of opening sessions with Bible readings and even recitation of the Lord's Prayer reflects this Protestant influence. It is perhaps noteworthy that these practices frequently come under attack not from anti-religionists but from religionists such as Catholics and Jews who contend that this is an attempt to use the public schools for purposes of inculcating Protestantism in the students. Historically the Bible-reading practice has been widespread, and if history is any index to the meaning of the fourteenth amendment, it would be difficult to deny the validity of this practice. I am inclined to think, however, that in view of the pronouncements by the Supreme Court in recent years on the meaning of the first amendment which is also read into the fourteenth amendment, it would be very difficult to support the validity of such practices at present. The circumstances under which these exercises are conducted by a public school teacher, on school premises and as part of the regular school day, all point to the conclusion that the state through the use of its facilities, personnel and regular program is engaging directly in instruction and exercises that have a primary religious motivation and significance and which tend to favor one religious group.³⁵ It must be kept in mind that a person who objects must have a substantial basis of standing to do so either by showing that he is a taxpayer and that tax funds are being used in an unlawful way—a very difficult thing to maintain here because of difficulty of showing out-of-pocket expenditure funds—or that his own liberty or that of his children is being infringed upon and in that case some actual coercive effect must be demonstrated.³⁶ The point should be observed also that the reading and study of

³⁵ In *Schempp v. School Dist.*, 177 F. Supp. 398 (E.D. Pa. 1959), vacated and remanded for consideration of newly-enacted statute, 364 U.S. 298 (1960), the three-judge district court held unconstitutional daily Bible reading in the public school as required by a Pennsylvania statute as well as the practice of saying the Lord's Prayer in unison.

The New York Court of Appeals has recently held constitutional the practice of opening the public school day with the non-sectarian prayer recommended by the Board of Regents. *Engel v. Vitale*, 10 N.Y.2d 174, 176 N.E.2d 579 (1961).

³⁶ See *Doremus v. Board of Educ.*, 342 U.S. 429 (1952), holding that a taxpayer as such did not have standing to challenge the validity of a statute requiring the reading of the Bible at the beginning of each school day.

the Bible as literature, or the study of religion, or instruction in moral values and ethics is not in itself objectionable so long as not identified with exercises and activities aimed at the cultivation of religious faith or motivation. Moreover, the Supreme Court has held that school boards may permit released time for religious instruction by teachers supplied by religious groups, provided this does not take place on the school premises.³⁷

By contrast we may point to the situation existing in many state universities where courses in religion are included as a part of the curriculum, either as courses included in particular departments or in a separate school of religion as at the State University of Iowa.³⁸ Here very clearly is the use of public funds in a way to support an interest in religion and to support teaching in the field of religion. No one seems seriously to question the validity of this practice even though it does show that any sweeping assertions about the invalidity and use of money to support religious education must be examined with a good deal of care and skepticism. The real reasons for distinguishing this situation from that of the public schools is that attendance at state universities is voluntary, that participation in these particular courses dealing with religion is voluntary, and that the greater maturity of the student precludes any notion that this is an attempt to indoctrinate or to compel students to accept a particular religious belief.³⁹ This distinction between the two situations again points up a very important conclusion, namely, that the broad assertion made in the interpretation of the first amendment that no public funds can be used to aid religion in any way, or that it is even inappropriate for the state to show any kind of affirmative interest in the matter of religion or religious instruction is not supported by history or by present practice.

The problems get more difficult when we get into the questions relating to the use of public funds in support of educational institutions owned and operated by churches, whether parochial schools operated at the primary and secondary level or colleges owned and operated by churches. In those cases the religious environment and religious objectives assume an integral significance in the total educational process.

³⁷ *Zorach v. Clauson*, 343 U.S. 306 (1952).

³⁸ See McLEAN & KIMBER, *THE TEACHING OF RELIGION IN STATE UNIVERSITIES* (1960).

³⁹ See Kauper, *Law and Public Opinion*, in *RELIGION AND THE STATE UNIVERSITY* 69-86 (Walter ed. 1958).

Turning to the problem that is generating the greatest amount of current controversy, the question is raised whether in the event of federal aid to education it would be appropriate to assist private as well as public schools, including, in the private category, schools operated by churches and commonly known as parochial schools. It should be emphasized at this point that in the course of this whole discussion we are concerned wholly with limitations derived from the first amendment. Specific provisions of some state constitutions limiting the use of public funds have a more restrictive effect on the power of state legislatures in spending money in aid of parochial schools than general limitations derived from the first amendment.

The problem grows immediately out of the proposal that the federal government assist the states in the operation of the public school system by making grants to be administered through the states for the purpose of aiding the schools either in construction of new facilities or in meeting annual operating expenses.⁴⁰ Essentially the idea is that the federal government will tap its own financial resources in order to return to the states some of the money collected from federal taxpayers in order to help the states in operating their schools. The question that arises is whether or not the federal government should, as part of this program, give some financial assistance also to parochial schools. This is the immediate question. Interesting questions are raised also by the part of the President's program relating to colleges, including church-related colleges.

The position of the administration as stated by President Kennedy has been that constitutionally the federal government can give assistance only to public schools operated by the states, and that to aid parochial schools by any kind of federal financial assistance would violate the first amendment as interpreted in the *Everson* case.⁴¹ In opposition to this view has been the position asserted chiefly by the Catholic hierarchy, that while it may be constitutionally objectionable to use federal funds to support parochial schools in the same measure as public schools, it would not be unconstitutional for the federal government to make loans at relatively low interest rates in order to assist parochial schools to meet their cap-

⁴⁰ For the essential features and objectives of President Kennedy's program for use of federal funds in aid of education, see his Message to Congress, 107 CONG. REC. 2284 (daily ed. Feb. 20, 1961).

⁴¹ See N.Y. Times, Feb. 21, 1961, p. 22; *id.* March 9, 1961, pp. 1, 16.

ital needs either by way of building new schools or extending or improving present facilities.⁴²

It should be evident from what has already been said that the constitutional question respecting federal aid for parochial schools does not admit of the easy or ready answer given by some who are opposed to such aid.

Education is not a matter falling within the primary and direct jurisdiction of the federal government. At most, general education, as distinguished from education for certain specific purposes,⁴³ comes within the reach of the federal government's authority by virtue of its power to spend for the general welfare.⁴⁴ The theory in support of congressional spending for general education is that Congress may determine that this contribution to the more effective functioning of the nation's educational system by aiding the construction of more and better physical facilities and the payment of higher salaries to teachers will promote the nation's general welfare.

If "general welfare" is the only consideration, no substantial difficulty is raised about the use of federal funds to aid parochial as well as public education, since attendance at these schools satisfies the compulsory school attendance laws of the several states and thereby serves the public purpose and objectives underlying these laws.⁴⁵ The constitutional issue that is raised is not whether this is spending for the general welfare but rather whether it is prohibited by the first amendment's non-establishment clause. Quite clearly, if either the federal government or the states were to provide money to aid Sunday School education or to provide transportation for children attending Sunday School, this would be the kind of support of religion prohibited by the non-establishment clause. The problem is quite different, however, when we talk about schools which are operated by churches but which parallel the public school system. Two important considerations must be emphasized. First, compulsory school laws place a duty on parents to send

⁴² See N.Y. Times, March 3, 1961, p. 1; *id.*, March 15, 1961, pp. 1, 26; *id.*, March 30, 1961, p. 16.

⁴³ Federal expenditures to aid training in science and mathematics find a specific justification in the power to promote the national defense.

⁴⁴ It is now recognized that Congress has an independent, substantive power to spend federal funds in order to promote "the general welfare." *United States v. Butler*, 297 U.S. 1 (1936); *Steward Machine Co. v. Davis*, 301 U.S. 548 (1937).

⁴⁵ See *Everson v. Board of Educ.*, 330 U.S. 1 (1947), holding that use of state tax funds to reimburse parents for the cost of sending children to parochial as well as public schools was for a proper "public purpose."

their children to a school that meets the state's educational standards and requirements. The public interest in having all children receive minimum education—an objective that is vital and indispensable to a democratic society—furnishes the justification for these compulsory education laws. Any schools, including parochial schools, that satisfy the state's requirements thereby serve the public purpose underlying the compulsory education laws. Since a parent cannot receive credit for discharging his statutory obligation unless the school to which he sends his child meets the state's requirements by reference to secular courses that are taught, minimum number of school days, health and safety standards, and qualification of teachers, it is evident that private schools by meeting these requirements are already integrated in a substantial way into the total educational system within a state.

Secondly, these schools outside the public school system but serving the same purpose under the compulsory school laws as the state-owned and operated schools, do not exist by sufferance or tolerance of the state. This is an important consideration. In the famous case of *Pierce v. Society of Sisters*⁴⁶ the Supreme Court held that it is a constitutional right of parents to send children to the school of their choice, so long as the school meets requirements and standards that the state may properly impose, and that a state statute compelling parents to send their children to public schools is unconstitutional. By virtue of this decision churches have a right to operate schools and parents have a right to send their children to parochial schools. The Court in sustaining these fundamental rights placed a constitutional barrier in the path of state monopoly of the educational process and of a state-directed program of forcing all students into the mold of a uniform secular educational process. If parents wish to send their children to a school where religion assumes significance as a unifying element in the total educational program, this is their right. The public school is a cherished symbol of our democracy, but it may also be suggested that parochial and the non-parochial private schools, having their own important constitutional status and representing a basic freedom of choice on the part of parents, are an equally important and impressive symbol of our democratic and pluralistic culture. This is worth noting since it seems to the writer that so much of the opposition to aid for parochial schools stems from a

⁴⁶ 268 U.S. 510 (1925).

feeling against these schools as though there were something almost un-American about them.

The discussion here is not focused on the merits of the public schools versus parochial schools or on the policy considerations, pro and con, respecting use of public funds to aid parochial schools. We are concerned here with the constitutional aspects of any program of federal aid to education that includes assistance for parochial as well as public and non-parochial private schools. If the federal government were to make loans to churches to assist in the construction of new or additional school facilities, would this be the kind of "aid to religion" or support of religious education which according to the dictum of the *Everson* case is unconstitutional as an attempt to establish religion?

The Supreme Court has already sustained the use of public tax funds to transport children to parochial as well as public schools and this on the theory that this is not really aid to religious education but social welfare legislation.⁴⁷ It is apparent that the solution to some of these problems depends on placing the right label on the legislative program, and that if we can label a particular program as social or child welfare rather than aid to religious education, we thereby determine the constitutional result. And even before the *Everson* case, the Court had held that the distribution of secular textbooks to children in parochial schools did not violate any constitutional limitations.⁴⁸ This was even more direct aid to education conducted under the auspices of a church. But the distribution of these books served a valid secular purpose. Other instances of assistance that have not reached the courts may be cited, perhaps the most notable is the Free Lunch Program under the sponsorship of the federal government.⁴⁹ Children are not denied the benefits of this because they are attending a parochial as distinguished from a public school. Here the theory is that this is a child-benefit program and that this is not direct assistance to religious education. The test propounded by some is whether the assistance is a direct subsidy to church bodies to aid them in the operation of their schools or whether it is a so-called fringe benefit that does not reach the heart of the educational process. Attention should also be called to the provisions of the National Defense Education Act of 1958⁵⁰ pursuant to which funds have been made

⁴⁷ *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

⁴⁸ *Cochran v. Louisiana State Bd. of Educ.*, 281 U.S. 370 (1930).

⁴⁹ National School Lunch Act, 60 Stat. 230 (1946) 42 U.S.C. §§ 1751-60 (1958).

⁵⁰ 72 Stat. 1580 (1958), 20 U.S.C. §§ 441-45 (1958).

available by the federal government to colleges and high schools to assist in the acquisition of new equipment needed for the study of science, mathematics and foreign languages. Under the authority of this statute, federal funds have been loaned to parochial high schools.⁵¹ It is said, however, that neither bus transportation, distribution of secular textbooks, the free lunch program, or use of funds for laboratory equipment involve the state in support of a program of coerced religious instruction—a matter beyond the competence of the state to direct or support. The difficulty with this interpretation is that it leaves the critical question unanswered. At what point can it be said that financial assistance to parochial schools can be identified with religious instruction as to make it an unconstitutional establishment? There can be no precise answer to this. If the relevant cases—those dealing with bus transportation and textbooks—furnish any answer at all, it is that the state can afford some support for parochial schools in so far as they discharge the same secular functions as the public schools even though they have the plus element of religion. In other words the concurrence of function principle is applicable here. The parochial schools do serve a recognized public purpose so far as the state's total interest in the educational process is concerned.

By emphasizing the secular aspects of parochial school education, substantial financial assistance can be given without running into the obstacle that it amounts to an establishment of religion. If any distinguishing limitation is to be observed, it is that overall subsidies to parochial schools, which include support for operating expenses, are invalid because they further the teaching of religion, whereas assistance for specific purposes not directly and immediately identified with religious instruction is valid and proper.⁵² In line with this theory a case may be made out to support the validity of a program of federal loans to assist in the construction of new parochial school facilities. Buildings, like buses and laboratory equipment, are neutral or can even be labeled secular.⁵³ At

⁵¹ The statute expressly authorizes low-interest loans to nonprofit private schools for these purposes. 72 Stat. 1588 (1958), 20 U.S.C. § 445 (1958).

⁵² The Vermont Supreme Court in a recent decision held that it was a violation of the first amendment's non-establishment clause for a school board to pay tuition charges for a student attending a Catholic high school outside the school district. The school district did not operate a high school, and its practice was to pay the tuition cost of its resident students who attended a high school in another district. *Swart v. Smith Burlington Town School Dist.*, 167 A.2d 514 (Vt.), *cert. denied*, 366 U.S. 925 (1961), 59 MICH. L. REV. 1254 (1961).

⁵³ Particularly if federal grants were limited to the purpose of constructing facilities

least it appears to me that there is no controlling precedent that would require a conclusion that such use of federal funds would be unconstitutional.

The opposition in some quarters to any assistance from federal funds for parochial school education is all the more striking in view of the apparent acquiescence in proposals for assistance to higher education that raise parallel questions. Thus, President Kennedy's proposed aid-to-education program calls not only for a continuation of loans to colleges, including church colleges, for self-liquidating projects such as dormitories, but also for a new program of outright grants to colleges, including church colleges, for academic buildings. It likewise calls for tuition scholarships for students going to private colleges and an additional grant of \$300.00 to the institution itself on the theory that the cost of tuition is not commensurate with the total cost of educating the student.⁵⁴ A program of loans to colleges on a long-term basis at cheap interest rates to help build dormitories, cafeterias and other buildings has been in effect now for several years⁵⁵ but it has not excited any major constitutional arguments. Yet can it be questioned that the use of this government money at low interest rates is a financial aid to these colleges many of which are under the control of church bodies? Payment of the low interest rate as compared with borrowing from other sources, frees operating expenses that may go into other phases of the college program, and if the President's further proposal is carried out, what about the validity of outright grants to colleges by the federal government for the purpose of constructing educational buildings? A similar problem is raised with respect to grants to church-related colleges to supplement tuition scholarships given to students who attend those colleges. Here are grants made directly to institutions to aid in their educational programs. Yet in many church-related colleges, religion is just as central a part of the educational program and objectives as it is in parochial schools.

As previously noted, a distinction is observed in practice between religion in the public schools, on the one hand, and in state universities, on the other, and the position is taken that a parallel

for such secular purposes as physical education, science, mathematics and foreign languages.

⁵⁴ See President's Message to the Congress, 107 CONG. REC. 2284 (daily ed. Feb. 21, 1961).

⁵⁵ Under authority of Title IV of the Housing Act of 1950, 64 Stat. 77, as amended, 12 U.S.C. § 1749 (1958).

distinction can and should be made on the issue of spending federal funds to support church-related colleges as opposed to parochial schools, and that consistent with the non-establishment restriction the federal government may aid private colleges, including church-related colleges, either by direct grants or loans or by benefit grants to students in a way not permitted with respect to parochial schools. In support of this position it is argued that private institutions play a much larger role in the total scheme of higher education as contrasted to the place of parochial schools in the overall system of primary and secondary education, that the state colleges and universities cannot take care of all the students who want a college education, that there is no compulsion to attend college, that the states do not provide tuition-free education at the higher level, that religion is a less conspicuous feature of church-related colleges as contrasted to parochial schools, and that the college student's greater maturity limits the opportunity for sectarian indoctrination.⁵⁶ Whether or not these arguments are adequately supported and whether or not they furnish a satisfactory and persuasive basis for distinction in respect to the constitutional issues raised respecting federal aid to parochial schools and to church-related colleges, respectively, at least it is clear that these distinctions rest wholly on practical, pragmatic and functional considerations as a guide to interpretation of the first amendment limitation.

In any event, it is clear that the government may give some support to parochial school education, either by way of so-called fringe benefits or by subsidizing particular phases of this education identifiable as secular in character. A principal reason to justify these expenditures is that parochial schools do serve a secular as well as religious purpose. To put the matter in another way, the church and state are engaged in concurrent functions. But we may also stress another reason, and this is that the state in giving some assistance to parochial schools is thereby making a meaningful contribution in support of the right of parents to send children to the school of their choice. It may at a point become an empty gesture to talk about this right or about the correlative privilege of churches and other bodies or groups to operate schools, along with the public school system, if the cost to parents of maintaining

⁵⁶ See General Counsel's Memorandum, Dept. of Health, Education & Welfare, *Impact of the First Amendment to the Constitution Upon Federal Aid to Education*, S. Doc. No. 29, 87th Cong., 1st Sess. 5, 24-26 (1961).

these private schools, in addition to the burden of supporting the public schools, is so great that as a practical matter it can no longer be borne. This is not to suggest that the government is under a constitutional duty to support private schools in whole or in part. This writer does not believe there is any such duty. But the constitutional right of parents to send children to a school of their own choice, particularly when this choice is dictated by religious considerations, is a substantial factor to be considered in any discussion of the problem. There are situations where choices must be made between the policy underlying the free exercise of religion and the policy of non-establishment of religion. For Congress to decide that it will encourage the free exercise of religion by limited capital grants or loans to parochial schools at the expense of some aid to religion would not be an arbitrary choice, where in making this choice Congress also advances the general welfare served by the nation's total educational program and the secular objectives of the state's compulsory education laws.

This writer is not advocating federal aid for parochial schools. But it is his opinion that consistent with the non-establishment principle of the first amendment and the separation limitation derived from it, and in view of the interpretations given to this language and the practices that have been sanctioned, Congress may grant some assistance to these schools as part of a program of spending for the general welfare, so long as the funds are so limited and their expenditure so directed as not to be a direct subsidy for religious teaching.

It is clear that we cannot find answers to any of the questions in the field of church-state relations by employing broad and sweeping postulates based on a theory of complete separation or on a theory that the state can do nothing which in fact aids religion. These problems will have to be answered on a pragmatic basis that takes account of competing and conflicting interests and of the underlying purposes served by the separation principle. But it should also be stressed that the issue of constitutional power should not be confused with the question whether it is desirable or wise as a matter of policy for the government to give support to parochial schools. Certainly any proposal for such support does invoke very important policy considerations. On the one hand, the effect of such assistance in promoting parochial schools and the resulting impact and effect on the public school system must be considered and weighed. And, in turn, those interested in the parochial

schools must seriously and carefully weigh the question whether and to what extent they should receive and accept assistance from the government at the expense of submission to controls that properly accompany grants of public funds. But these are questions of policy to be debated and argued in the public forum and in the legislative halls. Debate on these issues should not be foreclosed or obscured by indiscriminate invocation of the separation principle derived from the first amendment.