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Editorial Comment

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Editorial Comment

The tabling of the Kennedy Administration's controversial school aid bill by the House Rules Committee this past July has left the subject of federal aid to education still unresolved. Debate on the proposed legislation continues to rage unchecked. Many of those who oppose the bill claim that it constitutes "discrimination" against private non-profit schools because it would authorize grants for public education only. On the other hand, some proponents of the bill take the position that certain forms of federal aid to education would be unconstitutional for the reason that they would be violative of the first amendment.

This comment, in the main, is offered as a brief and imperfect restatement of some of the basic legal considerations in this first amendment area of constitutional law. It is intended as a helpful preliminary to the two excellent articles on private non-profit school aid which are featured in this issue on the immediately following pages.

The first amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." The meaning of this amendment when it was written may be expressed in the words of Justice Story in his *Commentaries on the Constitution*:

Probably at the time of the adoption of the Constitution, and the amendments to it, now under consideration, the general, if not the universal sentiment in America was, that christianity ought to receive encouragement from the state, so far as was not incompatible with the private rights of conscience, and the freedom of religious worship. An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation if not universal indignation.¹

However, attitudes have changed since Mr. Story's time, and it has

¹ 2 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1874 (2d ed. 1851).

been said by the United States Supreme Court in *Everson v. Board of Educ.* that:

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.²

Although this strong language, that neither the state nor the federal government can aid one or all religions, was reaffirmed in *McCollum v. Board of Educ.* and in *Torcaso v. Watkins*,³ it must be properly interpreted. The holding in *Everson* was that it was constitutional for states to provide free school bus service for children attending private non-profit schools. No other question was before the Court. The thrust of the decision was that the purpose of the service was to aid the children and their parents, and not religious institutions which were only incidentally benefitted.

The *McCollum* case, which is often cited as establishing a high and impenetrable barrier between church and state, is hardly in point. In that case the released time program of Champaign County, Illinois was declared unconstitutional since it provided voluntary religious instruction on public school grounds, during school hours. However, in *Zorach v. Clauson*, the Supreme Court upheld a New York State released time program where the religious instruction, though given during school hours, was not conducted on the public school grounds. The chief distinction appears to be that in the *McCollum* case the Illinois system allowed the instruction to take place in a public school building. However, the dissenting opinions in the *Zorach* case took the position that the distinction was trivial and that the real vice in both situations was that a released time program amounted to a certain degree of coercion.

The real distinction probably is that in *McCollum* the religious instruction was more an integral part of the regular course of instruction than in *Zorach*. The teachers of religion were subject to approval by the superintendent of schools; they taught in classrooms just as other teachers did. To all intents these religious teachers were teachers of the public school the same as teachers of mathematics or history. If it appears that public school teachers are teaching religion then it appears that the public school has taken up the business of teaching religion, and this may be what the Court forbade. On the other hand, in *Zorach*, the two organs of instruction retained their identity. Even the dullest child was able to discern that it was the church not the public school that was teaching about religion. To quote from the *Zorach* case:

² *Everson v. Board of Educ.*, 330 U.S. 1, 15 (1947).

³ 6 L.Ed. 2d 982 (1961).

In the *McCollum* case the classrooms were used for religious instruction and the force of the public school was used to promote that instruction period. Here, as we have said, the public schools do no more than accommodate their schedules to a program of religious instruction.⁴

Understood in that light the two cases stand, not for a separation of church and state in the sense of an abandonment of all the traditional means of mutual assistance, but for separation in the sense that neither of these independent societies will be allowed to perform certain of the essential functions of the other.

It is also interesting to observe that the noted constitutional law authority, Professor Paul G. Kauper of the University of Michigan Law School has taken essentially the same position on these points. Speaking in a series of five lectures given in the Second Annual session for practitioners at Ann Arbor this summer, Professor Kauper sharply criticized those who maintain there is a "high wall" of separation between church and state. "Historically," he contended, "such a sharp barrier simply does not exist."

"We cannot find answers to any of the questions in the field of Church-State relations by employing absolutes 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."

Professor Kauper explained further that in a wide variety of rulings — most recently in the Sunday store closing cases — the Supreme Court has held that government action serving a valid public purpose, based on civil and secular considerations, shall not be struck down simply because it operates simultaneously to promote religious interests, either in general or for a particular group.

"There is, of course, an end point reached in the use of legislative powers to promote views, programs or practices that have a religious significance," he added.

In effect, 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.

An analysis of the restrictions on the federal government's dealings with private non-profit schools under this present interpretation of the establishment clause can follow one basic approach. It can involve essentially a consideration of the rights of religious people to the educational benefits government has to offer to the extent that the schools they choose fulfill a public purpose.

⁴ *Zorach v. Clauson*, 343 U.S. 306, 315 (1952).

A basic premise that must be appreciated in this approach is that a parent has the right to educate his children as he sees fit, provided that he chooses a school which complies with the reasonable standards laid down by the state. The Supreme Court first applied this principle in *Meyers v. Nebraska* in striking down a state statute forbidding instruction below the eighth grade in any language other than English. Two years later in *Pierce v. Society of Sisters*, an Oregon statute making attendance at a public school compulsory was likewise declared invalid. In that case, the Court in a unanimous opinion asserted that "the fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only." On the other hand, the state in a legitimate exercise of the police power can prescribe a minimum course of study and proscribe certain activities for children. Indeed, the state's authority over children is greater than over adults.

The relevant principle illustrated by the above cases is that it is not by sufferance of the state that private non-profit schools exist, but by virtue of a natural right expressed in the Constitution.

The argument to be drawn from this fundamental principle of constitutional law may be stated as follows: the state may decide to grant certain welfare benefits to its citizens, but if it does, then it may not grant them in a way necessarily calculated to prevent full exercise of a constitutional right. Consequently, if a state elects to grant educational benefits to its minor citizens it may not grant them in a way necessarily calculated to prevent full exercise of the parent's right to control the education of his children.

It follows from the above that to fully understand the constitutional issues involving federal aid to private non-profit schools, a fundamental premise that must be appreciated is that the federal and state governments have the power, indeed, the obligation, to promote the general welfare. While it may be argued that the establishment clause of the first amendment as presently interpreted has a restraining effect so that the federal government may not give aid to *any religion* under the guise of public welfare, *if the primary purpose of legislation is truly to promote, for example, education, health or rehabilitation, and the secondary or incidental effect is to aid religion, there should be no constitutional issue.*

A handwritten signature in black ink, appearing to read "Edward Tagan". The signature is fluid and cursive, with a long horizontal stroke at the end.

EDITOR