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Recommended Citation
John C. Hayes, The Constitutional Permissibility of the Participation of Church-Related Schools in the Administration's Proposed Program of Massive Federal Aid to Education, 11 DePaul L. Rev. 161 (1962)
Available at: https://via.library.depaul.edu/law-review/vol11/iss2/2
DE PAUL LAW REVIEW

Volume XI  SPRING-SUMMER 1962  Number 1

THE CONSTITUTIONAL PERMISSIBILITY OF THE PARTICIPATION OF CHURCH-RELATED SCHOOLS IN THE ADMINISTRATION'S PROPOSED PROGRAM OF MASSIVE FEDERAL AID TO EDUCATION

JOHN CORNELIUS HAYES

There is no official Catholic position for or against the Administration's proposed program of massive Federal aid to education. Independently of that proposed program, there is no official Catholic demand for the public financing of parochial schools. There is no unanimity of Catholic opinion as to the wisdom and prudence of such a program.

1 The writer welcomes the opportunity to present his views on this controversial subject. His views are not simply repetitious of those expressed by the Legal Department of the National Catholic Welfare Conference in their excellent study published in 50 GEO. L. J. 401-55 (1961). The reader is also apprised that, since the writer's term of office as President of the National Council of Catholic Men has expired, he no longer sustains the position he had when he testified on this matter in March of 1961 before the Congressional Subcommittees then considering it, namely, the position of representative of the Joint Councils' Executive Committee of the National Council of Catholic Men and the National Council of Catholic Women, organizations which together represent millions of Catholic parents throughout the United States.

2 The only statement which can purport to be an official statement of the Catholic position is the statement issued on March 2, 1961, by the Most Reverend Karl J. Alter, Archbishop of Cincinnati, in his capacity as the then Chairman of the Administrative Board of the National Catholic Welfare Conference. Informally announcing the results of the deliberations of the Board at its March, 1961, meeting, Archbishop Alter's statement, while not binding upon any individual American Bishop in respect of his own
of taking advantage of any public aid to parochial education which may be or become available.

In respect of the Administration's proposed program of massive Federal aid to education, the official Catholic position is simply this: Should the American people decide to initiate such a program at any level of education, then church-related schools at that level, either as such or through their students and the parents of their students, must in justice be equitably included. And this position is based on the further position that the participation of church-related schools in any such program, in any of the several forms in which such participation has been suggested and specifically in the form of long-term, compensatory-interest-rate loans, is constitutionally permissible under the Federal Constitution as presently construed.

Some Catholics also think that the failure to provide for such participation would itself be unconstitutional as a violation of Fifth Amendment due process, in that: (a) such a constitutionally unnecessary differentiating classification would be wholly arbitrary; and (b) such a constitutionally unnecessary omission would subvert the constitutionally protected right of a parent to direct and control the education of his child and the constitutionally protected right of every person to the free exercise of his religion, by making it economically impractical for great numbers of parents to exercise their rights and for church-related schools to continue to exist.

Why does anyone think that the participation of church-related schools in the Administration's proposed program is unconstitutional? The non-lawyer is likely to think so because of his uncritical acceptance, as a principle of constitutional law, of an absolute separation of Church and State. But not only is there no such principle expressed in the Federal Constitution itself, but the United States Supreme Court in the 1952 case of Zorach v. Clauson repudiated the concept as a position, represents the collective position of the American Bishops as a group. Paragraph One of the statement supports the text. The writer has been informed that the statement stands unchanged by any subsequent action of the Administrative Board or of the collective American Bishops.

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3 Paragraph Two of Archbishop Alter's statement.

4 Paragraph Three of Archbishop Alter's statement.

5 For example, Dr. Frank Brown, Professor of Economics at De Paul University, an articulate and able member of Citizens for Educational Freedom, has expressed this point of view to the writer.

principle of constitutional law. That case litigated the Federal constitutionality of the New York City plan of "released-time" religious education, as authorized by a New York statute and implemented by the local Board of Education. The Court held that the New York City plan, unlike the Champaign (Illinois) plan previously litigated in the *McCollum* case, did not violate the "establishment of religion" clause of the First Amendment of the Federal Constitution, as construed and applied to the several states through the "due process" clause of the Fourteenth Amendment in the previous *McCollum* decision. In the course of its opinion, the Court said:

The First Amendment ... does not say that in every and all respects there shall be a separation of Church and State. Rather it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise, the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly. 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. Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; "so help me God" in our courtroom oaths and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: "God save the United States and this Honorable Court."

On the contrary, the Court, after noting that "we are a religious people whose institutions presuppose a Supreme Being," further stated:

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 then it 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.

There is, therefore, no such constitutional principle as an *absolute* separation of Church and State.

There *is*, however, as the Court explained, a constitutional prin-

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9 *Id.* at 313.
10 *Id.* at 313-14.
principle of separation of Church and State in certain respects. This principle does not require the exclusion of religion from public life or the profession of agnosticism by public officials, but it does limit the State in its activities vis-a-vis religion. Under the First Amendment, neither the Federal government nor, now, any State may pass laws “respecting an establishment of religion, or prohibiting the free exercise thereof.” The philosophical basis for these constitutional limitations is an enlightened awareness of the total absence of any competence, any jurisdiction, on the part of the state in matters relating to the eternal welfare of its citizens. The competence and jurisdiction of the state is restricted to the protection and promotion of the common good in the temporal order within the principle of subsidiarity. Competence and jurisdiction in matters relating to the eternal order are vested in the Church. Since the individual man is simultaneously subject to both jurisdictions, they must be complementary in order to serve his total interest. Ultra vires acts by either damage their common subject, the individual member of both societies. His primary civil freedom, therefore, is the free exercise of religion, so firmly guaranteed by the First Amendment, not only generically but as well in terms of specifically prohibiting the commonest threat to that freedom which he had been experiencing in the Western Europe of the 17th and 18th centuries: an establishment of religion by civil law.

Lawyers know that this constitutional ban on laws “respecting an establishment of religion” has been recently construed for the first time by the United States Supreme Court and, as construed, applied to all state and local governments through the medium of the “due process” clause of the Fourteenth Amendment. If lawyers, therefore, think that the participation of church-related schools in any program of massive Federal aid to education is unconstitutional, it will be because they know that the United States Supreme Court has construed the constitutional ban on civil laws “respecting an establishment of religion” to mean “at least this: Neither a State nor the Federal Government . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another.”

The historian knows that this construction of the “no establishment

11 The absolute separatists agree. This proposition is the central theme of Mr. Leo Pfeffer’s CHURCH, STATE, AND FREEDOM (Beacon Press, Boston, 1953).


13 Id. at 210.
of religion" clause is in part historically inaccurate in that, as a matter of historical fact, the clause, when it became a part of the Federal Constitution in 1791, did not include the concept that the Federal Government (the only government to which it then applied) could not pass laws which "aid all religions" non-preferentially. In his concurring opinion in the *McCollum* case, Mr. Justice Frankfurter met this historical fact head-on by admitting it, only to find, however, that, in the course of the first century of our national development, the clause had come to include the new meaning.

Accepting this construction, in any event, as the currently authoritative principle of constitutional law, the real issue now becomes: what is governmental "aid" within the meaning of this constitutional prohibition? On this point, several decisions of the United States Supreme Court shed some light:

1. In *Bradfield v. Roberts*, a contractual business relationship between the Federal Government and a hospital corporation owned and managed by Catholic nuns was attacked as "an establishment of religion" contrary to the First Amendment. Within the District of Columbia at that time, there was no isolation hospital facility. By agreement, the nuns contributed a site for such a hospital on their grounds and undertook to staff and operate it when built. The Federal Government agreed in return to construct such a hospital on the site and to pay the nuns for the isolation care of such indigent patients as the District might send there. The Court held that the business arrangement was not "an establishment of religion." Rephrasing the holding in terms of "aid," the Court held that the business relationship did not constitute "aid" to one religion preferentially within the pristine meaning of the constitutional prohibition, because the corporation was a secular institution. The writer submits that an additional reason was that it did not constitute aid at all. The arms-length exchange of reasonable governmental payments for secular public services received is obviously not aid. In fact, the government employs ordained ministers of religion, not merely for secular governmental work, but even (non-preferentially) for furnishing religious services to governmental personnel (e.g., chaplains in the armed services).

14 See, for example, O'NEILL, RELIGION AND EDUCATION UNDER THE CONSTITUTION, (1949), reviewed by the writer in 35 A.B.A.J. 758 (1949).


16 175 U.S. 291 (1899).
2. In *Cochran v. Board of Education*, the State of Louisiana decided to furnish the free use of secular textbooks to all pupils in the State who were attending any state-approved school, including parochial schools. The inclusion, in this State tax-supported program, of pupils in the parochial schools was attacked as a use of public money for a private, religious, sectarian purpose, in violation of the Fourteenth Amendment. The Court held (as had the Louisiana Supreme Court for state purposes) that it was not. Re-phrasing the holding in terms of aid, the Court held that the furnishing at public expense of the free use of secular textbooks to all pupils at any approved school in the State served a public purpose and did not constitute aid to the private religious institution. The reason was that the public aid here involved was being furnished, not to the parochial schools which some of the children in the State attended, but to the children themselves and to their parents, and the aid related solely to secular, and not religious, instruction; such aid, therefore, served a legitimate public purpose of the State.

3. The impact of a similar type of public-purpose educational aid on the "establishment of religion" clause of the First Amendment was decided fifteen years later in the *Everson* case. In that case, New Jersey decided to furnish school bus transportation at public expense to all pupils in the State attending any state-approved elementary or secondary school, including parochial schools; and the highest court of New Jersey held that such a tax-supported program as applied to students in parochial schools did not violate the New Jersey State Constitution as a tax expenditure for a private purpose. On review by the United States Supreme Court, the inclusion in the program of pupils attending parochial schools was then attacked as "an establishment of religion" (an issue properly made and preserved below). The United States Supreme Court held that it was not. Re-phrasing the holding in terms of "aid," the Court held that the furnishing of school bus transportation at public expense to all pupils attending any state-approved elementary or secondary school in the State was not "aid" to one religion preferentially or to all religions non-preferentially within the meaning of the constitutional prohibition. The reason was that the public aid here involved was being furnished, not to the

17 281 U.S. 370 (1932).
parochial schools which some of the children in the State attended, but to the children themselves and to their parents, to assist them in their performance of their State-imposed duty under the State compulsory school attendance law, the purpose of which was to insure the degree of formal secular education necessary for the preservation of democratic government in New Jersey.

In *dictum*, moreover, the Court remarked that the governmental provision at public expense of police and fire protection and of water and sewage-disposal facilities to a parochial school was not “aid” within the meaning of the constitutional prohibition. This observation takes on added significance when one realizes that the parochial school is not a municipal taxpayer, and so does not itself contribute to the public funds used to provide these essential municipal services. The furnishing of such services to a parochial school is simply a recognition of its status as an institutional member of the local community. The services are not related to the religious character of the school, and are not extended to it in its capacity as a religious institution. Essential governmental services are extended to all members of the community for the common good, no matter what their religious nature or affiliation may be.

4. In the *Zorach* case, as already indicated, the Court held that state-authorized cooperation with all religions non-preferentially by excusing a child (whose parent so requested) from compulsory attendance at the last hour of public school classes on one day a week, to enable him to go elsewhere for sectarian religious instruction, was not state “aid” within the meaning of the constitutional prohibition. Thus, the New York City program of “released-time” religious instruction did not constitute “aid,” though the Champaign (Illinois) program, previously litigated in the *McCollum* case, had. The Champaign program differed from the New York City program in two important respects: (a) In Champaign, the religious instruction took place, not only during the regular public school class hours, but in the public school classrooms themselves, whereas in New York City it took place, though during regular public school class hours, on other premises; (b) In Champaign, the public school personnel took an active part in the operation of the program (distributing and collecting parental consent forms and checking attendance) and the


public school superintendent of education had a veto power over the selection of the religious instructing personnel. It could be said, therefore, that state officials had actually participated in the program and had thereby affirmatively used the power of the state to promote religious instruction, whereas, in New York City, there was no such active participation. The thrust of the *Zorach* decision, however, and the point here being made, is that the mere accommodation of the state's compulsory school attendance process and of the public school class schedule to the request of parent and child for sectarian religious instruction off the public school premises was not "aid" within the meaning of the constitutional prohibition.

These few cases demonstrate that, though the constitutional prohibition against laws respecting "an establishment of religion" means that neither a state nor the Federal Government may aid one religion preferentially or all religions non-preferentially, the concept of what constitutes such prohibited "aid" is obviously a sophisticated and not a simple literal concept. An arms-length business arrangement between the Federal Government and an order of Catholic nuns for the construction of an isolation hospital and for payment for isolation care for indigent patients for whose welfare the Federal Government was responsible, did not constitute such "aid." The State gift of the use of secular textbooks to all pupils in all elementary and secondary schools in Louisiana, including parochial schools, did not constitute such "aid."22 The state's provision of free bus transportation to all pupils in all elementary and secondary schools in New Jersey, including parochial schools, did not constitute such "aid." A municipality's provision of police and fire protection and of water and sewage-disposal facilities to parochial schools would not constitute such "aid." The state's accommodation of its compulsory school attendance process and of its public school class schedule to the request of parent and child for sectarian religious instruction off the premises during regular public school hours did not constitute such "aid." Even the state's enforcement of its "Sunday" laws, though incidentally benefiting some religions and their adherents and detrimentally affecting other religions and their adherents, did not constitute preferential "aid" within the meaning of the constitutional prohibition.23

In fact, in view of these cases, the real question would seem to be:

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22 By hindsight, in the light of the subsequent *Everson* decision.

what does constitute such “aid”? At the very least, it is obvious that not all aid is “aid.” How, then, does one distinguish the aid which is constitutional from the aid which is not?

Government lawyers for the Department of Health, Education, and Welfare and for the Department of Justice addressed themselves to this very question in preparing the Administration’s legal memoranda in support of its proposed program of massive Federal aid to education. Theirs was the task of supporting the Administration’s position that Federal aid to all colleges without distinction (whether public, private, or church-related), in the Administration’s proposed college-aid Bill providing loans and matching grants for the construction of academic facilities, was not “aid” within the meaning of the constitutional prohibition; that Federal aid under the National Defense Education Act of 1958 to all elementary and secondary schools (in the form of grants to public schools and loans to parochial schools), for the purchase of equipment with which to teach mathematics, science, and foreign languages, was not “aid” within the meaning of the constitutional prohibition; tacitly, that a later proposed amendment to the extended National Defense Education Act providing inter alia Federal aid to private and parochial elementary and secondary schools (in the form of long-term, compensatory-interest-rate loans for the construction of academic facilities in which to teach mathematics, science, and foreign languages) was not “aid” within the meaning of the constitutional prohibition; that the long-term, compensatory-interest-rate loans made available to all colleges without distinction (whether public, private, or church-related) by the College Housing Act of 1950 (as amended in 1961) for the construction of student dormitories and centers, was not “aid” within the meaning of the constitutional prohibition; BUT that the inclusion of parochial schools (even to the mere extent of providing long-term, compensatory-interest-rate loans solely for the construction of academic facilities) in the Administration’s bill for massive Federal aid to public elementary and sec-


ondary schools only (in the form of grants for the construction of academic facilities or for the payment of teachers’ salaries or, under the Prouty amendment, for any operating expense whatever) would constitute "aid" within the meaning of the constitutional prohibition.

One need not agree with their conclusions, in support of these apparently contradictory Administration positions, to be impressed with the sincerity of their professional efforts and to pay careful attention to the bases for their conclusions. In their memorandum of March 28, 1961, they advised as follows:

(a) All grants to parochial elementary and secondary schools would constitute "aid" within the meaning of the constitutional prohibition.

(b) The long-term, compensatory-interest-rate construction loans then being sought for parochial elementary and secondary schools (by way of permitting such schools to participate in the Administration's bill for aid to public elementary and secondary schools only) would also constitute "aid" within the meaning of the constitutional prohibition, fundamentally because loans are in reality simply grants of credit.

(c) Nevertheless, in determining when aid is "aid," no single criterion is ever controlling; rather, one must balance out a whole complex of diverse factors, the enumeration of which may be inferred from the writer's summary of their advice as to the constitutionality of the equipment loans in the NDEA: since those equipment loans have a (1) limited and (2) non-religious purpose (3) which is vital to the national defense and (4) which is not otherwise timely achievable, the (5) minimal degree of aid (6) incidentally involved for the parochial schools would not constitute "aid" within the meaning of the constitutional prohibition.

On the same bases, in a supplementary memorandum of late June, 1961, they advised that the later-proposed "special purpose" construction loans to parochial elementary and secondary schools for academic facilities in which to teach mathematics, science, and foreign languages would not constitute "aid" within the meaning of the constitutional prohibition (though, in their opinion, grants for the same "special purpose" would).

It is submitted that the government lawyers recognize, therefore, as they must, that the First Amendment, despite its flat wording, was not intended to, and did not, establish absolute freedoms, and that, as presently construed in terms of "no governmental aid to one religion preferentially or to all religions non-preferentially," not all aid is "aid."
Rather, one must balance the type and degree of aid incidentally involved against the urgency of the national need and the practical necessity of the aid as a timely and effective means of fulfilling that need. The scales may be heavily weighted in favor of the First Amendment freedoms, but they are not absolutes, and the final decision must be made in the light of the over-all national common good.

This approach explains how the government lawyers reached contradictory conclusions about the constitutional validity of the same type and degree of incidental aid (namely, long-term, compensatory-interest-rate loans for the construction of academic facilities) in the two Administration proposals for massive Federal aid to education: (a) in the college bill, such loans are made available to all colleges without distinction (whether public, private, or church-related), and the government lawyers support the constitutionality of this provision; (b) in the elementary and secondary school bill, such loans were suggested as an amendment to the Administration bill and later proposed as a separate Senate bill sponsored by Senators Clark and Morse, and in both instances the government lawyers took the position that the proposal was unconstitutional. Since the type and degree of incidental aid are identical and since the urgency of the national need is identical, the only variable left is the practical necessity of the aid as a timely and effective means of fulfilling the urgent national need, and thus of subserving the national common good.

A careful reading of the March 28th memorandum furnished by the Department of Health, Education, and Welfare (with the assistance of the Department of Justice) will disclose that that was precisely the distinction taken by the government lawyers. Their distinction was probably based on the following facts: (a) At the college level, over one-half of the nation's colleges, enrolling more than 40% of the nation's college students, are private or church-related. It is obvious, therefore, that no college-aid program which excludes private and church-related colleges can hope to be effective, much less timely. Hence, they must be included, and their inclusion through loans is constitutional. (b) At the elementary and secondary school level, on the other hand, less than 15% of the nation's students are enrolled in private and parochial schools—a relatively insignificant percentage, which the public schools, moreover, are both willing and able to absorb, even though the number of such students exceeds 5,000,000.

Hence, there is no practical necessity for the inclusion of the private and parochial schools in the Administration's program, and their inclusion in any form would, therefore, be unconstitutional.

Note that there is no denial, nor could there be, that private and parochial elementary and secondary schools serve a legitimate public purpose. That they do so is crystal-clear from the fact that attendance at them constitutes a complete fulfillment of the public duty of compulsory school attendance imposed by the states for the accomplishment of the public purpose of guaranteeing the level of formal education essential to the preservation and development of a democratic society. That they do so is equally clear from the fact that the overwhelming percentage of the instruction offered in such schools is in the very same secular subjects which are being offered in the public schools and which constitute the legitimate focal point of the state's own interest in elementary and secondary education. And that they must be permitted to do so as a matter of constitutional law, as long as parents choose to send their children to them, is the clear holding of the Meyer and Pierce cases\(^{30}\) of the mid-1920s. The government lawyers, then, the writer repeats, do not make the mistake of attempting to deny the public-service function of private and parochial elementary and secondary schools. What they deny is the practical necessity of including such schools in the Administration's elementary and secondary Federal aid program in order to make that program effective and timely; and without that practical necessity, they maintain that such inclusion in any form would be unconstitutional.

It is no answer to the government lawyers' position, therefore, merely to continue to emphasize the public-service function of private and parochial elementary and secondary schools. They concede it. The issue is the practical necessity of including such schools in the Federal aid program at that level. The relevant answer must deny the government's position on that issue, and this the writer does. He submits:

(a) The nation cannot afford to ignore more than 5,000,000 elementary and secondary school students and still hope for the effective and timely achievement of the urgent national goal of adequate self-defense through elementary and secondary education.

(b) There are very many areas throughout the nation in which the local taxpayers are neither able nor willing to absorb the private and

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parochial students into the public school system. In the Chicago area, for example, there are over 330,000 such students in the Catholic parochial schools alone. Archdiocesan officials estimate that their absorption into the public school system would require an immediate capital outlay of at least $200,000,000, and an annual operating cost of over $100,000,000. To maintain that the local taxpayers in the Chicago area would be either willing or able to shoulder this additional expense (even with the aid proposed in the Administration’s bill) is to be absurd.

(c) In any event the end result of absorption (viz., a state monopoly of elementary and secondary education) would sacrifice traditional American educational values and disserve the national interest.

(d) There is, therefore, no practical, timely, and effective alternative available.

All this has been said on the basis of the government lawyers’ assumption that long-term, compensatory-interest-rate loans constitute a form of Federal aid. The writer has always denied, and still does, that this assumption is correct. It is his basic position that such loans constitute no aid at all, and that they are the same type of arms length business transactions as were involved in the Bradfield case and there held constitutional. There is no donative element whatever in such loans. Every dime of the principal amount must be repaid. The interest rate, recomputed annually, is the average rate which the lender (the Federal Government) itself is paying in the current year on all its outstanding borrowings, plus an additional one-quarter of one per cent to cover the administrative costs involved. In the year 1961, for example, that interest rate would have worked out at 3½%. The interest rate is, therefore, fully compensatory. To describe loans such as these as aid is to take the position that a bank or a savings and loan company is an eleemosynary corporation, or that a businessman who sells a customer on credit an article which the customer wants is doing the customer a favor. The government lawyers who equated such loans to grants of credit display a basic misconception; such loans are not grants of credit, but sales of credit. No businessman would pretend that to extend credit to a customer at compensatory interest rates is to make him a gift or to do him a favor; businessman and customer,

31 For a state case reaching this conclusion as to public loans to parochial schools on the same terms and conditions as for all other eligible borrowers, see Schade v. Allegheny County Institution Dist., 386 Pa. 507, 126 A.2d 911 (1956).
lender and borrower all know that the transaction is a straight business deal for their mutual benefit.

In supporting their view that such loans do constitute aid, the most telling point made by the government lawyers was this: Whenever a public agency provides such loans to church-related schools under terms and conditions under which such loans are not commercially available from private lending agencies, then the loan by the public agency constitutes aid (which, however, may or may not be "aid" within the meaning of the constitutional prohibition). By aid, they said, they meant economic benefit. In those terms, the writer thinks that aid properly means donative economic benefit. In every sale, each party believes that the transaction will be to his economic benefit, else the sale would not occur. Has each aided the other? Even if it were so, such aid is not "aid" under the Bradfield precedent. But the essential point remains: if government makes loans of a type not commercially available, is not that a donative economic benefit? Not if, in making the loan, government incurs no actual cost and achieves a public benefit which, in its judgment, is worth buying. Government values differ and government costs differ from those of the private commercial lender. The latter does not make the loan because, in his judgment, the economic benefit is not worth the economic cost. Government's judgment under government's circumstances may be that it is. But surely, it may be said, at least when government makes a loan at a lower interest rate than that being charged for similar loans by commercial lenders, the lower interest rate aids the borrower. Not necessarily. What is a compensatory interest rate for government differs from what is a compensatory interest rate for the private lender, because government need not show a profit on its loans. The differential would simply be the private profit margin. If the public interest justifies the governmental intrusion into areas normally served by private business, that public interest plus the government's own compensatory interest rate is what makes the sale of the use of the money a worthwhile bargain achieved without actual cost to the government.

In summary, then, it is the writer's position that long-term, compensatory-interest-rate construction loans to church-related schools are not aid at all; that even the government lawyers who think they are have concluded, on the basis of their own analysis of existing judicial precedent, that they are not "aid" within the meaning of the constitutional prohibition at the college level, and would not be even at
the elementary and secondary school level for the limited purposes of the National Defense Education Act; and that the same lawyers on the same bases have reached a contradictory conclusion as to the proposed inclusion of such loans in the Administration’s general elementary and secondary school bill only because they have miscalculated the practical necessity of such loans for the timely and effective achievement of the urgent national requirements for self-defense through elementary and secondary education.

One loose end remains. The writer has remarked that the government lawyers do not deny that the secular education afforded as the overwhelming percentage of instruction in parochial elementary and secondary schools makes it clear that these schools serve a public purpose. Others, however, do. The writer has encountered this objection most often from political scientists and lawyers. In most instances, the objection arose from a misunderstanding of the thrust of the argument in the Pierce case for the necessity of parochial elementary schools. The Pierce case, decided in 1925, litigated the Federal constitutionality of an Oregon statute which capped the climax of the nation-wide drive for state compulsory school attendance laws by compelling the attendance of normal children at public elementary schools only. To the argument that the “liberty” protected against state action by the Fourteenth Amendment encompassed the recognition of the primary parental right to direct and control the education of children and more especially their religious education, Oregon responded by suggesting that the formal religious education of the children could be accomplished in part-time supplementary schools of religion. The reply was that such schools did not provide parents with a reasonable alternative because the achievement of the parental objective required that instruction in the secular subjects be permeated with religion, an objective which could be accomplished only in parochial schools which offered a full curriculum, both secular and religious. This “permeation” argument has led some persons to the conclusion that the whole curriculum of the parochial elementary school is primarily religious in nature and therefore private as opposed to public, and that there is, therefore, a “Catholic” geometry, a “Catholic” English grammar, and

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83 A conclusion which is contradicted by the simple reality that all parochial elementary schools are in fact subject to public control by state regulations designed to insure the fulfillment of the state’s interest in the education of its future constituents.
"Catholic" spelling. Were such the case, then, of course parochial elementary education would be serving primarily a religious and private purpose rather than a public purpose, and would be for that reason alone ineligible for any tax-supported aid, since tax money must be spent for public purposes only.

But there is, of course, no such thing as, for example, "Catholic" spelling in a parochial school. There is simply spelling, the same spelling as that taught in the public school. And the same thing is true of all the other secular subjects in the parochial school curriculum. The difference between spelling or any other secular subject in the parochial school curriculum and the same subject in the public school curriculum lies, not in the secular subject itself or in the method of its instruction, but in a distinctive plus contributed to it in the parochial school, namely, in its orientation to and correlation with the ultimate eternal destiny of the student. It is in this sense only that all the secular subjects in the parochial school curriculum are "permeated" with religion—by being related to the total truth about man. The secular subject still fulfills the same public purpose as when it is taught in the public school; but it also fulfills the further purpose of assisting man to reach Infinite Truth and Infinite Good. The parochial school curriculum, therefore, is not a matter of alternatives: the subserving of either a public purpose or of a private, religious purpose. Rather, it subserves both purposes simultaneously, thanks to the distinctive plus of relating its secular subjects to total truth. The conclusion is that the parochial school, in instructing its students in the same secular subjects as does the public school, serves a public purpose in no lesser degree than does the public school.

And now, what about grants? On the same analysis of constitutional precedent as that on which the government lawyers have concluded that the somewhat restricted long-term, compensatory-interest-rate construction loans to all colleges without distinction (whether public, private, or church-related), and the more restricted NDEA equipment loans and proposed construction loans to private and parochial elementary and secondary schools, are not "aid" within the meaning of the constitutional prohibition, might not grants for the same purposes and with the same restrictions be equally constitutional? It is

34 The reference is to the fact that such loans may not be used for the construction of any facility for religious worship or for religious instruction or primarily for any part of the educational program of a school or department of divinity. See, for example, Sec. 122 (a) (2) B and C of H.R. 8900, 87th Congress, Second Session (1962).
submitted that the answer is yes. True, there is now no question of the aid factor; grants, unlike loans, are clearly donative in nature. And the aid is not minimal in degree. Yet such grants would clearly serve a public purpose, and the limitations make clear both that the public purpose is nonreligious and that any aid involved for all religions non-preferentially is merely a necessary incident to the primarily-sought public purpose. Once again, then, the decisive issues will be: how vital and urgent is the national interest to be served by these grants, and how practically necessary is it to make such grants to church-related schools in order timely and effectively to achieve that urgent national interest.

If this conclusion strikes the reader as extreme, let him reflect that the Federal Government has long made grants to construct, not merely classrooms for primary use as places of secular education, but places for Divine Worship Itself, according to the various sectarian rites: churches and chapels for the accommodation of our men and women in the armed services and—with apologies to my fellow-servicemen in World War II for the unhappy association—in the Federal penitentiaries. Hence, there not only may be, but there has long been, such an urgent national need and such a practical necessity as has warranted grants to all religions non-preferentially of the use of tax-constructed facilities for Divine Worship Itself.

The writer has always been impressed with an explanation offered by Professor Wilber G. Katz for the constitutionality of such grants.\(^3\) Professor Katz says that such tax-supported religious services do not constitute a prohibited establishment of religion whenever not to provide them would necessarily violate an individual's primarily guaranteed right to the free exercise of his religion. Professor Katz understands how incongruous it would be to use, as the instrument for violating an individual's right to the free exercise of his religion, the precise specific prohibition which had been initially included in the First Amendment for the very purpose of further insuring it.

Are there still other forms of constitutionally permissible participation by church-related schools in any program of massive Federal aid to education? There are. So far we have been discussing what may be called institutional forms of participation: loans and grants to the church-related schools themselves. There are also what may be called

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individual forms of participation: those under which the church-related schools participate through the participation of their individual patrons, the students and the parents of the students. The commonest suggested forms of individual participation are: (a) scholarship grants and loans to the students, which the students may then use at any school of their choice, including church-related schools; and (b) federal tax deductions and tax credits to the parents of students in any school, including church-related schools.

Such scholarship loans are already available to college students under the existing provisions of the National Defense Education Act. Such scholarship grants have already been made available to students who were veterans of World War II and of the Korean police action. Representative Roman Pucinski of Illinois has requested that the Internal Revenue Service amend its Regulations to permit tuition payments to any school, including church-related schools, to qualify as charitable deductions from taxable gross income; it is unlikely, of course, that this suggestion can be entertained, because tuition payments are not donative in nature. Representative Church of Illinois has already introduced legislation to provide federal tax deductions and tax credits to parents of students attending any school, including church-related schools. Parents of students attending any college would be permitted to deduct from taxable gross income any amount up to $2,000 per student which they could prove had been spent during the taxable year for costs directly related to the college education of the student. Parents of students attending any elementary or secondary school would be permitted to deduct from their federal income tax any amount up to $100 per year which they could prove they had paid in local property taxes during the taxable year for the support of the local public schools in their school district. Neither suggestion was pushed during 1961 and the bills died in Committee.

All these individual forms of participation seem so clearly within the judicial precedent of the Cochran-Everson cases that the writer sees no need to develop the point. A caveat, however, is in order: Care must be taken to establish the public purpose of these individual forms of participation, as well as the practical necessity of resorting to them in order timely and effectively to achieve that public purpose.

A word should be said here about a currently pending bill for Federal aid to elementary and secondary schools which has the attraction

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of permitting members of the legislative and executive branches of the Federal Government to by-pass the awkward issue of the constitutionality of the participation of church-related schools in a program of Federal aid to education. The so-called Bailey proposal is to allot to each State a flat 2% of an annual grant for elementary and secondary school construction and operating costs, to be used by the State within the purposes of the bill in whatever way the State may use its own funds for the same purposes. Thus, the matter of the permissible participation of parochial schools in the Federal funds allocated to each State would be decided by the law of each State in that regard. This proposal, however attractive to Federal officials as a "buck-passing" device, has the transparent flaw of abdicating the national interest to the conflicting interests of the several states (as the proponents of racial desegregation in the public schools immediately pointed out). A Congress dedicated to the national interest has known how to deal with reluctant states in the Federal "Hot Lunch" program and, most recently, in the proposed Federal program for public fall-out shelters. There is no excuse for Congressional display of any lesser concern for the vital national interest in education.

It is, then, the writer's position that there are a number of constitutionally permissible forms of participation by church-related schools in any program of massive Federal aid to education. The question remains as to whether any of them ought to be utilized. As the writer indicated in his opening paragraphs, some Catholics think that they must be, on pain else of rendering any such program itself unconstitutional. While appreciative of the thrust of this position, the writer prefers for the present the less contentious position that one or more or all of those constitutionally permissible forms of participation ought to be utilized in the interests of the national welfare and of a policy of constitutional consistency.

The necessity of including church-related schools in any Federal aid program, in the several forms in which it is constitutionally permissible to do so, in order effectively and timely to achieve the vital national interests sought by such a program, has already been sketched. The constitutional policy to which the writer refers, consistency with which requires their inclusion, is the policy set by the Meyer and

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Pierce cases (and by Bartels v. Iowa\textsuperscript{39} and Farrington v. Tokushige\textsuperscript{40}). The Meyer-Pierce cases identified the basic rights involved in the continued existence of private and parochial elementary and secondary schools as being those of the child to an education and those of the parents to direct and control that child's education.\textsuperscript{41} The point being made is this: the same Federal Government which has vindicated these basic constitutional rights of parents and children to choose to be educated in private and church-related schools ought not thereafter to initiate a program which, by excluding such schools without constitutional necessity, substantially imperils their healthy existence and development. On the contrary, to be consistent with the policy of the constitutional law, comparable aid ought to be afforded to those schools by including them in the Federal program in forms which are permissible under the Constitution as presently construed.

Why would the initiation of a program of massive Federal aid to public schools only imperil the healthy existence and development of the church-related schools thereby excluded without constitutional necessity? Because, so long as parents and children choose to exercise their constitutional rights to attend church-related schools, those schools, in justice both to their patrons and to the governments whose public purposes they subserve, must keep pace with the educational facilities, practices, and standards of the public schools. They must do so, not only to comply with the minimal requirements of governmental supervisory agencies and private accrediting agencies, but also to continue to a competitively excellent secular education together with the religious and moral education which is the distinctive plus value, to provide which those schools exist—the value which the public schools are legally unable to provide. If and when, therefore, new massive Federal aid is extended to public schools, church-related schools will have to keep up with whatever improvements and developments the Federal money will enable the public schools to undertake and public and private accrediting agencies thereafter to exact—and this in addition to meeting the sharp growth demands to which they, like the public schools, are currently being subjected. The money to sustain

\textsuperscript{39} 262 U.S. 404 (1923).

\textsuperscript{40} 273 U.S. 284 (1927).

\textsuperscript{41} That these were the basic rights involved, underlying the property rights immediately at issue, see the writer's analysis of these cases in "Law and the Parochial School," 3 The Catholic Lawyer 99, 102–4 (1957).
these new burdens of meeting growth requirements and improved public school standards must come, either as tuition payments or as contributions, from the patrons of the church-related schools, who are also simultaneously sustaining as taxpayers their fair share of the costs of the growth requirements of the public schools plus the costs of the new massive Federal aid to the public schools. As an example, if the State of Mississippi used half of its share of the proposed Federal aid to public elementary and secondary schools to increase teachers salaries, the estimate is that the annual salary of each such teacher would be raised $480. In addition to paying their share of the cost of this Federal aid, the patrons of the church-related schools in Mississippi would have to match that salary raise for the increasing number of lay teachers in those schools or be content with second-rate lay teaching personnel and suffer the inevitable consequences.

This is the prospect which has caused His Eminence, Cardinal Spellman to say that any new program of massive Federal aid which excludes church-related schools is the beginning of the end for those schools. And the writer's point is that the destruction or substantial impairment of church-related schools without constitutional necessity is inconsistent with the policy of constitutional protection of the rights of children to an education in church-related schools and the rights of their parents to direct and control the education of their children by choosing to send them to church-related schools.

In a concurring opinion in *Kingsley Int'l Pictures Corp. v. Regents of the Univ. of the State of New York*, Mr. Justice Frankfurter, discussing the constitutional problem involved in the prior licensing of the public exhibition of motion pictures, said:

The real problem is the formulation of constitutionally allowable safeguards which society may take against evil without impinging on the necessary dependence of a free society on the fullest scope of free expression.

That same problem exists here. To paraphrase it, the real problem is the formulation of constitutionally permissible forms of participation by church-related schools in any new program of massive Federal aid to education without impinging on the necessary mutual independence of Church and State in a free society. Judicial precedent indicates that there are such forms of participation, and the "balancing" formula of the government's own lawyers indicates their agreement that not all

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43 *Id.* at 694.
aid is “aid” within the meaning of the constitutional prohibition. Under that formula, long-term, compensatory-interest-rate loans to church-related schools, grants restricted to secular education in church-related schools, loans and scholarships to students in church-related schools, tax deductions and tax credits to parents of students in church-related schools—all are constitutionally permissible forms of participation by which the urgent national interest may be effectively and timely achieved in a manner consistent with the established policy of constitutional protection of the rights of children and parents to an education in the church-related schools of their choice.
# ILLINOIS JUDICIAL ARTICLE

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