

Make-up *A.*

FEDERAL AID TO EDUCATION

By

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The question of Federal aid to Catholic schools will be a permanent issue in American life and national politics for the foreseeable future. It will be more prominent than ever before in the 1962 Congressional elections and it will almost certainly arise in Washington in 1963 as an issue as explosive and as misunderstood as it was in 1961, the first year of President Kennedy's administration. If a bill granting Federal aid to public schools alone is enacted by the incoming 88th Congress in 1963 or 1964, the Catholics of America cannot be expected to withdraw from the struggle to obtain some part of future Federal subsidies for Catholic Schools.

The Catholics of America therefore are engaged in a venture entirely new for them and one which will probably not be resolved for at least a generation. Within the lifetime of every person here consequently, the issue of Federal aid to Catholic education will probably be the most difficult, complex and important public policy question confronting the Catholic Church in America.

The issue of Federal aid to education is at least as many-faceted as the proposal to insure medical care for the aged through social security. It is not surprising therefore to discover that with respect to Federal aid, as with medicare, even those deemed to be the best informed not infrequently overlook or misunderstand the fundamental principles at issue in the controversy.

The question of Federal aid to education is uniquely difficult for the Catholic clergy of America. Never before have priests in America been confronted with a national problem caused almost entirely by the Church's teaching and which because of a wide variety of circumstances, has become a political issue on many aspects of which there is no clear-cut moral answer. The Catholic clergy therefore

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must advance the teaching of the Church on education, must be vigilant for the rights of the Mystical Body of Christ while, at the same time, not interfering with the legal and political machinery by which the issue of Federal aid to education will be decided.

Perhaps the most important duty of every priest in connection with Federal aid is to be extremely well-informed. It does not suffice, however, to be familiar with the usual arguments centering on parental rights, distributive justice and the dangers of a state monopoly on education. However valid Catholic contentions in these matters may be, it seems clear that Catholic polemicists employing only these arguments have not been persuasive to non-Catholic opponents of Federal aid for Catholic education. Catholic elaborations on these arguments, moreover, have tended to alienate some non-Catholics, especially when Catholics assert these principles as so self-evident that only the bigoted or the ignorant can reject them.

There is a need for new points of insertion into contemporary legal and educational thought. Fresh viewpoints, new insights into American law and reflections on the horizons of religious freedom in a pluralistic society are needed in order to grapple with the powerful coalition made up of Protestants, the American Civil Liberties Union and the American Jewish Congress, an alliance which has been successfully erecting a wall against the Catholic claim for the financing of nonpublic schools.

An approach to Federal aid that is more aligned with and responsive to the rejection of all Catholic claims to a share in Federal funds can be obtained only from a thorough knowledge of the legal and non-legal arguments which dominate the entire discussion of Federal aid for parochial schools. Let us therefore explore the following areas:

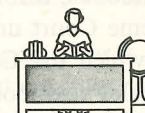
- I. The law and public money for private schools prior to the 1947 *Everson* decision of the United States Supreme Court.
- II. The meaning of the *Everson* opinion and subsequent Church-State rulings with respect to state and Federal

aid for nonpublic schools.

III. The Catholic "case" for public aid for parochial schools.

- a) The "case" from Catholic principles
- b) The "case" based on American legal, constitutional and educational principles.

IV. Conclusions and reflections.



I. PRIVATE SCHOOLS AND PUBLIC MONEY PRIOR TO THE 1947 EVERSON DECISION

If anything was certain in 1900 about education and the law in America it was that the tax-supported public school had been legally "consecrated" as *the* American school. Virtually every state had in the sternest measures written into its supreme law a prohibition of any grant of public funds to sectarian schools. This nineteenth century "solution" to the school problem is explainable and even understandable as a Protestant attempt to prevent the growth of Catholic schools and as an effort by a new nation to unify its future citizens by means of a common school.

Whatever Catholic protests were made in the last century against this "solution" of the school problem were totally ineffective. Even in the twentieth century, Ohio seems to be the only state where Catholics during the depression made an effective but unsuccessful attempt to secure public funds for non-public schools. In view of the general Catholic acquiescence during the 60 years of the twentieth century in the nineteenth century "solution" to the school prob-

lem it is understandable why so many millions of non-Catholics are amazed and astounded at the vigor and vehemence with which Catholics have demanded at least token recognition for Catholic schools if Federal aid to education is to become a reality.

Actually, the more amazing phenomenon is that Catholics in all American history have never really sought tax support for their schools. Catholics have accepted the state ban on such assistance and have not sought relief even to the extent of requesting secular textbooks, a form of state assistance which the United States Supreme Court unanimously approved in its 1930 *Cochran* decision in which the Court sustained a Louisiana law that provides free secular textbook to all the children in non-public schools in that state.

The lack of Catholic requests for the granting of free textbooks after the Supreme Court's unequivocal declaration in 1930 of the validity of such grants seems to indicate that, (1) Catholics in the 1930's were not anxious to have the state assist them financially with their schools or, (2) Catholics were fearful of state control that might come with state aid or (3) Catholics did not want to introduce a request into the public domain which might result in a bitter Church-State struggle.

Oddly enough, the Supreme Court of Mississippi is the *only* tribunal in the nation which has followed the *Cochran* precedent and, in sustaining a state grant of secular textbooks to children in private schools, wrote in 1941 this well-reasoned paragraph:

"If the pupil may fulfill its duty to the state by attending a parochial school it is difficult to see why the state may not fulfill its duty to the pupil by encouraging it 'by all suitable means.' The state is under the duty to *ignore* the child's creed but not its need. It cannot control what one child may think, but it can and must do all it can to teach the child how to think. The state which allows the pupil to subscribe to any religious creed should not because of his exercise of this right, proscribe him from benefits common to all. . . ."

The only assistance ever widely requested by Catholic parents in this century prior to 1947 was for tax-supported school bus transportation for their children. Although the reluctance of Catholics to petition for state aid for their schools derives from a variety of reasons it seems clear that the basic difficulty stemmed from the very ambiguous juridical status accorded to private schools in America, even after the much-praised but perhaps overemphasized 1925 *Pierce* decision where, as is well known, the Supreme Court of the United States declared void an Oregon law designed to outlaw private schools.

The *Pierce* decision, sometimes called the *Magna Charta* of parental rights in America, deserves the most careful consideration since it is this ruling which, while in itself admirable, left totally unresolved all the important questions about the status and role of the non-public school in America. *Pierce* simply said that the property of Church-related and private schools in Oregon could not be rendered useless because, the Court found, these institutions actually are involved in an "undertaking not inherently harmful." *Nothing* was said in *Pierce* about religious freedom, the First Amendment or Church and State. *Pierce* was decided a few days before the *Gitlow* case transferred to the states for the first time via the Fourteenth Amendment the rights guaranteed in the First Amendment. The *Pierce* decision, therefore, notwithstanding its impressive *dicta* that "the child is not the mere creature of the state" and that parents have a right "to direct the upbringing and education of children under their control," does *not* prove that the operation of parochial schools forms a part of the constitutionally guaranteed religious freedom of Catholic parents. Much less does *Pierce* say, as some Catholic publicists have implied, that it is a violation of religious freedom to deny financial aid to the parents who patronize Church-related schools.

It is understandable that Catholics seeks to extract from the famous Oregon case all that would support the thesis that Catholic schools have a right to public aid. But *Pierce* says nothing about

this matter and, in fact, expressly affirms that private schools are subject to "the power of the state reasonably to regulate all schools, to inspect, supervise, and examine them, their teachers and pupils. . . ." The famous 1925 decision consequently leaves open the crucial question: can the state deny to schools, totally regulated by government officials and acceptable to the state for the purposes of compulsory education laws, that minimum juridical status which would make the school entitled to some share of the common school fund?

The Supreme Court uttered a quiet and ambiguous "no" to that question five years after *Pierce* in the *Cochran* case, noted above. Here the Supreme Court permitted secular textbooks in a unanimous ruling although the Louisiana Supreme Court had sustained this benefit in a 3-2 split. The *Cochran* decision relied on the theory that the state may give identical benefits to all children and, even if such benefits aid the private school which some attend, this incidental aid to the school does not impair the validity of the grant given to *all* children. Once again, however, the *Cochran* decision has nothing to do with the First Amendment or religious freedom under the Constitution. But it is a precedent, never fully utilized by Catholics, which is still good law and which may yet be decisive in the question of aid to nonpublic schools.

Of the period prior to 1947, therefore, it can be said that, although the private school was granted a juridical status in the *Pierce* decision, this status has not risen above the position accorded by law to all non-profit corporations. In the *Cochran* ruling secular textbooks were permitted but not on the grounds of the First Amendment. In general then the nonpublic or Catholic school before 1947 was a private institution which had not requested nor been granted any state or Federal aid of any consequence beyond those privileges granted to any institution by reason of the fact that it has a building, which needs fire and police protection, or has a corporate legal existence which needs the benefit of state incorporation laws, or is a charitable unit entitled to tax-exemption.

Although virtually no one in 1925 and very few today would want the *Pierce* result reversed, no one seems to see a contradiction in allowing a nonpublic school to be fully accredited for the purposes of the compulsory education laws but fully disqualified for the tax benefits going to public schools, which, of course, are also designed to implement the state's compulsory education laws. But if the juridical status of parochial schools was anomalous even after the endorsements of the *Pierce* and the *Cochran* decisions it became even more curious after the Supreme Court in 1947 construed, for the first time in American history, the establishment clause of the First Amendment. It is to this great divide in the history of Church and State in America to which we now turn our attention.

II. THE MEANING OF THE EVERSON DECISION AND SUBSEQUENT CHURCH-STATE OPINIONS

In 1944 New Jersey was one of the dozen states which allowed public bus transportation for private school pupils. A 1941 New Jersey law permitted the reimbursement of *all* parents if their children were required to journey to a neighboring city to attend school. Pursuant to this authorization, a township in New Jersey appropriated a sum of a few hundred dollars to reimburse parents for the transportation costs of their children to attend a Catholic high school in a nearby city. All other parents in the township were similarly reimbursed since their children also travelled daily to the next city to attend its public high school, to which the home city of the pupils paid tuition.

A lawsuit brought by taxpayer, Arch Everson, and financed in

part by the American Civil Liberties Union and the American Jewish Congress, challenged the constitutionality of the reimbursement of the parents of children attending Catholic secondary schools. The trial court of three judges divided 2 to 1 in ruling against the practice; the Supreme Court of New Jersey reversed this result in a 6 to 3 split, and the United States Supreme Court, in a 5 to 4 decision, sustained the constitutionality of publicly financed bus rides for parochial school children. It is still unbelievable how much emotional energy and public controversy have been poured forth on the seemingly insignificant question of whether Catholic parents in an obscure New Jersey suburb should periodically receive a trifling sum of money to pay for their children's bus rides to school.

Somehow, however, the *Everson* case became and remains the symbol of the Catholic claim to some share of the common school fund. *Everson* is for many the "camel's nose under the tent," or the "crack in the wall of separation of Church and State." Dissenting Justice Rutledge typified the apprehension and alarm over the *Everson* result when he wrote in his dissent that "this is not just another little case about bus rides."

But what exactly does *Everson* mean? Unfortunately neither the actual ruling in the majority opinion nor the many state judicial decisions that have applied *Everson* make it exactly clear what the Supreme Court said. The nine justices could have decided that bus rides in New Jersey are like textbooks in Louisiana and therefore permissible. In one sense that is all the Supreme Court *did* say in *Everson* but, in a more important sense, the Court, all nine members concurring, ruled that the Federal Constitution by reason of the establishment clause of its First Amendment forbids state aid "to all religions," even if such aid is granted on a nondiscriminatory basis.

Such a conclusion was, of course, an unprecedented and startling reading of the 16 words of the First Amendment: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise therefore." Justice Black, nonetheless, construing

the words "an establishment of religion," really for the first time in American history, stated in a now famous paragraph:

"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. . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. . . . 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.'" (emphasis supplied)

Advancing to the application of this theory Justice Black asserted that "New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church." On the other hand, Justice Black found that the latter part of the First Amendment which prohibits state interference with the "free exercise" of religion "commands that New Jersey cannot exclude individual Catholics . . . or members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation." (emphasis supplied)

This concept of "the benefits of public welfare legislation," which is the key to Justice Black's validation of the New Jersey statute, would be a useful formula except that it is not defined in the *Everson* opinion nor has it been found to be self-defining. In fact, the critical question in the entire matter of bus rides which is left open by *Everson* is this: If a state enacts a law clearly designed to provide school bus transportation for all children, can such a law be anything but "public welfare legislation"?

Despite all its ambiguities, however, *Everson* stands for at least the following three principles:

1. There is no establishment of religion if a state law permits transportation of pupils to private schools;

2. The state, however, may constitutionally enact a law which would "provide transportation only to children attending public schools";
3. But the "benefits of public welfare legislation" may not be denied to individual citizens "because of their faith or the lack of it."

The majority opinion in the *Everson* decision apparently did not make it clear that laws supplying bus rides for *all* school children were "public welfare legislation," the benefits of which may *not* be denied to children because of their religious faith. At least the Supreme Courts of New Mexico, Missouri, Washington, Alaska and Wisconsin have not thought so because these tribunals have, since 1947, declared unconstitutional bus laws in their states which were clearly meant to furnish transportation to *all* children attending *any* school within these states. Only Connecticut and Maine have followed *Everson* and permitted private school pupils to have tax-supported school transportation.

The *Everson* decision did, however, even if in an ambiguous way, reaffirm the validity of the child-benefit theory and the constitutionality of grants of auxiliary welfare services to children in non-public schools. But the revolutionary impact of *Everson* came in its spuriously historical assertions about the First Amendment among which were the following *dicta*, or views not necessary to resolve the precise question at issue:

1. The "establishment" clause is transferred and binding on the states so that the States as well as Federal Government are constitutionally forbidden to "aid all religious."
2. "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach."
3. The provisions of the First Amendment "had the same objective and were intended to provide the same protection against government intrusion on religious liberty" as the Virginia Bill for Religious Liberty,— "in the draft-

ing and adoption of which Madison and Jefferson played such leading roles. . . ."

With these three and other allegations the *Everson* opinion has entered into the stream of constitutional law and American thought. Its impact has been beyond calculation. Even the dissents in the case by Justice Rutledge and Justice Jackson had and continue to have an influence that is almost unprecedented in American constitutional history.

The *Everson* decision seems to have struck some sections of the Protestant community almost as a blow to their pride. POAU was formed directly as a result of the *Everson* decision handed down by the Supreme Court in February 1947. The anti-Catholic feeling in the late 1940's is to some extent traceable to the pronouncement in *Everson* that parochial school children cannot be denied "the benefits of public welfare legislation."

Catholic reaction to the *Everson* opinion was also one filled with apprehension. While applauding the actual result, the sustaining of bus ride legislation, Catholics expressed the gravest criticism of the "wall of separation" theory and the doctrine of no aid "to *all* religions."

Since 1947 the Supreme Court has not retreated from its affirmation in the *Everson* opinions that the state may not "aid *all* religions." Thirteen months after *Everson* the Supreme Court, using its own newly issued interdict on aid to all religions, ruled in the famous *McCorm* case that released-time religious instruction must be removed from the tax-supported property of public schools.

Due undoubtedly in part to the severe criticism of the *McCorm* ruling the Supreme Court held four years later, in its April 1952 *Zorach* opinion, that released-time religious instruction was permissible so long as it was conducted off the school premises. Despite language in *Zorach* affirming that "we are a religious people whose institutions presuppose a Supreme Being," the 6 to 3 majority opinion expressly stated that it affirmed and followed *McCorm*. The tone and spirit of *Zorach*, however, represent a defi-

nite retreat from the rigid no-aid-to-religion dogma which *McCollum* enunciated in a manner needlessly broad and sweeping for the disposition of the case before the Court.

For reasons on which one can only speculate the Supreme Court declined review in all Church-State cases from 1952 to 1961. But in the Sunday closing cases decided in May 1961 the Supreme Court again expressly affirmed its faith in the *Everson-McCollum* thesis of the unconstitutionality of aid "to all religions." The same month the Supreme Court, in a unanimous ruling invalidating a law requiring an oath of faith in God as a prerequisite for office holders in Maryland, went out of its way to reassert its conviction that *Zorach* did not modify the Church-State separation theory as set forth in *Everson* and *McCollum*.

In its public school prayer decision of June 25, 1962 the Supreme Court made no specific mention of any of its previous rulings on Church and State. But the opinion of Justice Black, for a 6 to 1 majority, clearly re-endorsed the principles of *Everson* and subsequent cases.

Despite all these reaffirmations of the "no-aid-to-religion" doctrine, it is important to recall that Justice Black, the Court's principal architect of the "wall of separation" thesis, is also the author of the majority opinion in *Everson* where the rule is set down that the "benefits of public welfare legislation" may, and sometimes must, be granted to children in nonpublic schools. It is impossible to say therefore that the Supreme Court's ban on aid "to all religions" would necessarily cause it to declare unconstitutional a grant of public money to a sectarian school for secular educational purposes if such grants are, in the language of Justice Black in *Everson*, "... separate and ... indisputably marked off from the religious function" of the school.

The *Everson* decision, therefore, and the five Supreme Court rulings on Church and State since *Everson*, have not specifically foreclosed the Catholic claim to a share in the public money which is spent in making available to school children those aids which can

be classified as a part of the public welfare benefits which the state should give to its future citizens. But whether or not a secular education in which a sectarian atmosphere is intermingled can be one of these "public welfare benefits" is not settled, though the Supreme Court has warned in the most solemn manner that *no* breach of the wall of separation will be tolerated.

So much then for a very brief review of the law on public money for private schools, both before and after the dramatic development in Church-State jurisprudence that came about with the momentous *Everson* decision in February 1947. It is encouraging to note that Catholic schools have been victorious each of the three times in which their legal rights have been litigated in the United States Supreme Court; they won the right to existence in 1925, the right to secular textbooks in 1930 and a qualified right to bus transportation in 1947. It would be heartening to be able to think that the child-benefit theory, according to which the Supreme Court granted textbooks and bus rides, would be extended to the other completely secular benefits which are required by children whether they are students in public or parochial schools.

There is, however, no discernible trend towards the adoption of the child-benefit theory. In fact, several state courts have questioned its validity as, for example, the Supreme Court of Oregon which, in 1961, declared unconstitutional an Oregon statute that permitted the granting of secular textbooks to children in nonpublic schools. Some 22 states nonetheless authorize bus transportation to private schools and, in virtually all states, the medical benefits dispensed to children on the premises of public school buildings are available to children in nonpublic schools. In some cases, however, as recently in Pennsylvania, the children in private schools will not receive these benefits unless the state law regulating such matters is broadened to make specific mention of nonpublic school pupils.

Although at the state level the nineteenth century "solution" to the school problem has continued to deny every form of assistance

besides bus transportation and medical benefits to nonpublic schools two interesting and promising developments on the Federal level are noteworthy:

1. The National School Lunch Act, adopted in 1946, resulted in the expenditure of \$93.6 million in the fiscal year 1961. This program is administered by the states, but the Act specifically provides that in the 28 states where public education officials are legally barred from disbursing Federal-state funds to private schools, these schools may apply directly to the U. S. Agriculture Department for their proportionate share of the funds allocated to provide free or reduced cost lunches to the nation's school children. Actual surplus foods are also distributed directly to private schools as are funds to help pay for the cost of recess-time milk programs at nonpublic schools.

It is significant to note that the Federal government has in this instance bypassed the public policy of more than half the states, inevitably raising the question whether this could be done in another area where the Federal government intended to give a benefit to all children and desired that this benefit be conferred while the children are in school. The benefit conferred by the School Lunch Act is not in itself directly related to education and for that reason there has been virtually no objection to the Federal government's deliberate rejection of the settled policy of so many states. But would or should the result be different if the Federal government decided, for example, that *every* child in elementary school should have a dictionary or that *every* student in high school should have a slide rule?

2. The National Defense Education Act, passed in 1958 amid post-Sputnik panic, set aside 12% of \$47.5 million, authorized each year for *grants* to public schools for the purchase of mathematics, science or foreign language equipment, for *loans* for the same purposes by nonpublic schools. This provision for loans for private schools was added to the original act on the floor of Con-

gress with little debate or discussion. In the first three years of the NDEA program, however, private schools borrowed only \$1.8 million out of the \$20.4 available to them.

Under the same NDEA program eligible students in *all* colleges may borrow substantial sums. Half of such loans are cancelled for those borrowers who teach five years in a public (but not in a non-public) school.

The loan provisions of the NDEA constitute, at least symbolically, an unprecedented recognition in Federal legislation of the importance and contribution of nonpublic primary and secondary schools. Once again the Federal government refused to follow the rigid proscription of any financial assistance to nonpublic schools which is the fundamental policy and basic law of almost every state in the union. The NDEA represents, therefore, a rejection of the policy of exalting the public school to the point of refusing every sign of encouragement to the private school. NDEA said in effect that if the cold war is to be won, the mind of every eighth American child, who goes to a nonpublic school, must not be neglected.

While the *actual* assistance given by the NDEA to nonpublic schools is undoubtedly very small in relation to their total commitment, it is most significant that the NDEA was the first Federal or state law in this century to give private schools of less than collegiate rank even a semblance of parity with public schools of comparable rank. The token-like assistance available to private schools under the NDEA, however, points up the enormous struggle which confronts Catholics and others who seek to persuade the nation's leaders that the traditional policy of aiding *only* public schools must now yield to a different and more realistic approach to the existence and growth of private schools.

III. THE CATHOLIC "CASE" FOR PUBLIC AID FOR PAROCHIAL SCHOOLS

If Holmes' statement, that the life of the law is not logic but experience, is true of any area of the law, it is more true of the law of Church and State than of any other topic within the ambit of American law. Reinhold Niebuhr warned us that law and even justice might not be the ultimate forces in Church-State law when he wrote:

"The Catholics ought to realize that no abstract standards of justice can overcome the historic prestige of an established institution, such as the public school. The Protestants must learn that no principle, such as the separation of Church and state, is not subject to amendment in the light of new developments." (*Applied Christianity*, Meridian Books, 1959, p. 255)

If "abstract standards of justice" and the "separation of church and state" supply no fixed points in the debate over state and Federal aid to Catholic schools then it is difficult to know where to begin the discussion. What is needed most in the dialogue over Federal aid for private schools has been stated in the following words by a distinguished Protestant educator, F. Ernest Johnson:

"It seems to me that our most urgent needs are a greater measure of agreement as to the *true nature of the issues* and a much clearer understanding by the contending parties of what their opponents *are trying to say*." (emphasis supplied) ("Religion and the Schools," Fund for the Republic, 1959, p. 64)

What then is the "true nature of the issues" and what are Catholics "trying to say"? Let us first rule out those issues which are not actually in controversy since they are not at the present time the subject of any proposed legislation or litigation:

1. There is no movement at the state level to give Catholic schools public financing or to make them an integral part of the

states' tax-subsidized school system. In only two states of the union are Catholics actually seeking anything more than bus transportation; in Oregon, Catholics are seeking a rehearing of the recent ban on secular textbooks for private schools and in Rhode Island Catholic authorities have made a request to state officials to supply to parochial school children a limited number of secular textbooks as well as certain diagnostic testing materials.

2. No request is being made at the state or Federal level that tax money be given to pay teachers' salaries.

3. No request has been made nor contemplated to ask for funds to carry on any specifically Catholic instructional program; the Catholic petition for some recognition of Catholic schools if Federal aid is to be enacted is based completely on the supposition that if any public money were given to sectarian schools it would be to aid the secular and *not* the sacred functions fulfilled by that school.

The Catholic claim, therefore, to some part of Federal aid does *not* mean that Catholics are now seeking, nor necessarily will in the future seek, total public financing for their schools. Under the Administration's 1961 proposal for Federal aid the sum to be given for each child in the public schools of America averaged \$24.22; for the state of Illinois it was only \$15.00 per child. Hence even if a parochial school received benefits identical with the public school across the street, a Catholic school in Illinois with 500 pupils would receive only \$7,500 per year, a sum which clearly would be a very small part of the entire budget of that school.

What then is the "true nature of the issues" at stake in the Federal aid controversy? Three of the fundamental issues which the Congress must confront are these:

1. Can Congress begin a program of substantial, even massive, aid to education and allow the states to deprive the children in private schools of that share of public welfare benefits which they would receive if this Federal money had originated and were spent according to the current patterns of the states' educational financing? Or, placing the emphasis on the taxpayer, is it justice to take

taxes from Catholic citizens in every state of the nation and then appropriate money, partially taken from Catholics, in such a way that there is no guarantee that these Catholic citizens will receive for their children a greater proportionate share in those health and welfare benefits which they would receive if the new taxes for education they are required to pay were collected at the state or local level?

One way to provide against this inequity is to stipulate by Federal law, as has been proposed in Federal aid bills from 1947 to 1962, that 10 percent, or some other appropriate figure, of the total amount allocated to a state be expended on public welfare services. If such expenditure for private schools is contrary to the state's policy the appropriate amount could be allotted directly by the Federal government to private schools according to the successfully employed formula under the National School Lunch Act.

2. A second basic issue which Congress must resolve before enacting Federal aid is the *ultimate* purpose of Federal intervention into the financing of local schools. Is the purpose simply one of assisting local units to pay higher teachers' salaries and build more classrooms? If this is the prosaic and routine role which Federal authorities should have in education, then, once Federal aid is enacted, the national government will be sharing in the financing of schools on a permanent and ever increasing basis just as it now acts in connection with hospital construction, highway development, medical research and school aid to Federally impacted areas.

If, on the other hand, the Federal government can be imaginative and creative in a program of Federal aid to education it can instill in education in America a new ambition for the attainment of greater heights of academic excellence. The NDEA is an example of what inventiveness, coupled with Federal resources, can achieve.

Implicit in this second issue is the question whether the Federal government should follow the nineteenth century "solution" to the school question or whether it should experiment by encouraging initiative and resourcefulness in nonpublic schools as is the practice

of the great foundations, such as Ford and Carnegie, which are dedicated to the advancement of excellence in education.

3. A third and crucial issue which the Congress must resolve is the direct and specific request made by Catholic officials for a basic share in the Federal funds to be allotted to improve the nation's secular educational facilities.

A deliberate rejection of this claim will affront a substantial number of citizens whose sense of injustice would be understandably deepened. Such a rejection furthermore endorses the policy behind the states' grant in the last century of a monopoly on educational funds to the public schools, a philosophy of education which, however wise for previous generations, is now challenged by a substantial minority of American citizens.

Are there any effective arguments which Catholics can make which might be persuasive in supporting their "case" for a share of Federal funds? Catholics, to be sure, are not short of arguments. But which are the more cogent? It must appear to many apologists for the Catholic claim that, in connection with the plea for aid for private schools, Franz Werfel's words in his story of Lourdes have particular relevance, "To those with faith no explanation is necessary; to those without faith no explanation is possible."

We must, however, never give up our innate confidence in the power of reason and its eventual rule in the affairs of men. It is then fitting that we proceed to a catalogue of the arguments which have been made, sometimes badly and too often emotionally, to support the Catholic claim for parity if the Federal government enters the field of financing the education of the nation's youth.

Two comments, however, are pertinent before we attempt a critical evaluation of the arguments which Catholics are making to support their claim for recognition if Federal aid is enacted.

1. It is regrettable but true that both sides in the struggle over Federal aid to education tend more and more to operate from positions of fear. Protestants and secularists fear that some yielding to the Catholic claim may eventually be necessary if Federal aid is to

be enacted; they fear consequently that their efforts over a long period to improve public education by means of Federal funds will inadvertently lead to that weakening of the public school which, in their minds, would be the inevitable result of any Federal grants to parochial schools.

Catholics, on the other hand, fear that on the issue of Federal aid they face a crisis possibly unprecedented in the history of the Catholic Church in America. If the Federal government makes a basic policy decision to aid *public* schools rather than *all* educational institutions, the prestige and power added to the public school by this Federal endorsement may be a most serious threat if not the death-knell to nonpublic schools. While this fear among Catholics may be exaggerated it cannot be denied that the adverse impact on private schools of massive Federal aid given exclusively to public schools would be enormous.

One could predict that if such a policy decision were chosen by the Federal government it would have the same lasting effect as the Morrill Land Act of 1863. Under this Act massive tracts of land were given by the Federal government to the states with the proviso that the money from the sale of these lands would be used to establish and maintain state universities. The Morrill Act brought about a great change in higher education in America and has in fact been described as the development "which shifted the center of gravity in American higher education from Christian and humane purposes to secular and pragmatic goals,"—to use the words of Professor Franklin A. Littell in his recent volume "From State Church to Pluralism" (Doubleday, 1962).

Catholics and their opponents, therefore, realize that the Federal government cannot for the first time begin to give financial assistance to elementary and secondary schools without at the same time adopting a philosophy of education. It is this central, unavoidable dilemma which leads to our second preliminary comment.

2. Both sides in the controversy over Federal aid for private schools have not restricted their arguments to the relatively narrow

issue involved in the specific bills before the Congress. They have not even restricted themselves to the question whether children in private schools should receive under a Federal aid bill the same amount allotted for each student in a public school.

The proponents and opponents of Federal aid for Catholic schools conduct their debate as if the question to be settled were the total subsidization of parochial schools. Lawyers and good debaters on both sides try to delimit the discussion to the issue of the very small Federal subvention that is directly in controversy. But it appears almost impossible to confine the discussion to this specific point. Those who oppose the granting of any part of Federal aid for parochial schools demand that those who advocate the inclusion of parochial schools give reasons to justify not *this* specific inclusion but rather reasons that would justify the total subsidization of the parochial school system.

The proponents of Federal aid for parochial schools have, for better or for worse, accepted the broad challenges of their opponents and have filled the atmosphere with arguments which would justify not the relatively insignificant sums in issue in the Federal aid controversy but rather massive state aid to Catholic schools. Catholics thus unwittingly but perhaps unavoidably support the allegation that the token recognition they seek in the first Federal aid bill is a "wedge" for additional and eventually total subsidization of their schools.

These two preliminary comments lead us to the crucial question: what are Catholics trying to say to the nation about Federal aid and Catholic schools?

A. THE "CASE" FROM CATHOLIC PRINCIPLES

Catholics seem to argue on behalf of Federal aid on two intermingled but distinguishable levels. From Catholic theology and philosophy there proceeds directly or indirectly a line of reasoning which asserts that in distributive justice the state, which is not per se a teaching agency, must recognize the rights of parents to

control the education of their children. Such reasoning, with its conclusions and corollaries, seems almost self-evident for Catholics. But, however obvious and undeniable such truths may appear to Catholics, it should be clear that specifically Catholic and natural-law doctrine are indispensable in arriving at these conclusions. The usual Catholic argument involving the three elements of distributive justice, parental rights and the limited role of the state in matters of education, does not proceed from American statutory or decisional law. It is arguable that its conclusions are not inconsistent with the Federal Constitution but this traditional Catholic argument is *not* derivable from any legal or moral norms widely accepted in modern American law or contemporary society. This does not mean, of course, that the customary line of reasoning employed by Catholics is not entitled to the most careful consideration. But it should not be assumed or asserted that this Catholic justification for its claim to a share of Federal aid to education is merely an articulation of basic American legal and constitutional principles.

Catholics will and should continue to assert their convictions about the right of their church to teach, the right of Catholic parents to have an education for their children consistent with their faith and the duty of the state to be a neutral agency with respect to a philosophy of education. Such convictions are expressed spontaneously by those to whom the Catholic tradition is a way of life. The articulation of these truths is in a way an act of faith and, if it fails to convince non-Catholics, it nonetheless teaches other Catholics about the profound consequences of Catholicism with respect to the proper education of youth.

But has anyone heard any responsive reply by any non-Catholic to the indisputably powerful, logical and indeed overwhelming case which Catholics continuously make out for a share in Federal funds for Catholic schools by employing the argument in which the ideas of distributive justice, parental rights and the nonteaching state are interlinked? It seems to this observer that most non-Catholics

do not or cannot understand, much less answer, the Catholic sorties from which there flows the judgment which, in the words of Pius XI in his 1930 encyclical on education, concludes:

"Let no one say that in a nation where there are different religious beliefs, it is impossible to provide for public instruction otherwise than by neutral or mixed schools. In such a case it becomes the duty of the State, indeed it is *the easier and more reasonable method of procedure*, to leave free scope to the initiative of the Church and the family, while giving them such assistance as justice demands." (emphasis supplied)

Why is it that virtually no non-Catholics in America agree with the statement that it would be "easier and more reasonable" for the state to "leave free scope to the initiative" of private groups to build and maintain schools? Is not one of the reasons the fact that Catholics tend to assert principles and conclusions which, assuming the truth of the Catholic tradition, are almost self-evident but which, in contemporary American context, are largely irrelevant?

Are there then arguments for the Catholic "case" which do not unconsciously or inadvertently "smuggle" in truths of the Catholic tradition while labelling them as parts of the American consensus? Is there, in other words, a form of reasoning which would support the Catholic "case" without utilizing the Catholic philosophical or theological legacy and which would be convincing to the reasonable nonbelieving American?

B. THE "CASE" FROM AMERICAN LEGAL, CONSTITUTIONAL AND EDUCATIONAL PRINCIPLES

Let us attempt to construct a line of reasoning, *not* dependent on Catholic postulates, but on those legal, constitutional and educational facts and theories on which there is some consensus among most Americans. It is not possible to separate the various arguments on this second level of the Catholic "case," just as it is un-

realistic to try to isolate in separate categories the philosophical and theological principles which, taken together, form the argument from distributive justice, parental rights and the proper role of the state in education.

A legal-constitutional-educational line of reasoning calculated to support the Catholic claim to some part of Federal aid to education would follow this series of propositions, which we will first enumerate and then discuss:

1. The public school in America is forbidden by law to fuse the sectarian (and therefore the sacred) with the secular education which it imparts to its students.

2. Catholics consequently find the secular school inconsistent with certain dictates of their conscience and, as a result, the source of a restriction and even a violation of their constitutionally guaranteed religious freedom.

3. Under any theory of jurisprudence accepted by any significant group in America it is unjust to inflict a financial penalty on citizens because of the exercise of their religion when the state could, with no added expense and no harm to the common good, relieve them of such financial penalty.

4. The granting of tax money to finance a *small* part of the *secular* program of a Church-related school could not (a) undermine the public school, (b) weaken national unity or (c) cause a proliferation of sectarian schools.

1. The Public School Is a Secular School

When American law in the last century decreed that the common school must not teach anything "sectarian" there was no intention of ruling out the teaching of the sacred or the religious. Only those doctrines unique to a particular "sect" were proscribed. Actually the legal ban on "sectarian" teachings probably did not substantially affect the curriculum of the public school until recent years. Within the last generation, however, the term "sectarian" has come to include all that is sacred and religious. The public school today,

therefore, is restricted to a curriculum that is essentially and almost exclusively secular.

There is to be found everywhere, even among many Catholics, the greatest reluctance to accept the idea that the public school is the "secular" school. Most Protestants and even secularists will argue that the public school can and must communicate moral and spiritual values which transcend the secular. But even the most ardent defenders of the public schools as something more than "secular" are not certain that the public school has the right to transmit theistic values.

It is difficult to escape the conclusion that the United States Supreme Court itself, even in its irenic *Zorach* decision, ruled that the public school must be secular. Justice Douglas wrote in that opinion that "government may not . . . *blend secular and sectarian education.*" Justice Rutledge, dissenting in the *Everson* case, stated that some "children are not sent to public schools . . . for the reason that their atmosphere is *wholly secular.*" (emphasis supplied)

It is impossible to suggest any legal or constitutional theory by which a public school teacher could transmit other than a secular education. While a teacher may inspire by personal example and by inculcating respect for sacred truths it is hard to see how even the collective conduct of several such teachers can remove from a public school the label of "secular."

Catholic reluctance to push the concept of the "secular" school to the limit of its logic derives from the fact that more than one half of all Catholic children attend the public schools of the nation. Quite understandably Catholics do not wish to add to the conceded secularization of these schools by placing new inhibitions upon their administrators and teachers concerning the teaching of theistic or sacred truths and values. But can Catholics have it both ways, urging the secularization of the public schools when arguing for tax support for parochial schools and encouraging the communication of religious and theistic values when dealing with the mission of the public school?

1/2 of the population "of religion" - secularism

The public schools in various parts of America vary greatly in their ideological atmosphere; a good deal depends on the personnel, the socio-ethnic background of the school and its pupils and the other countless ideological forces which form the pattern of the values taught in any particular school.

If the public school is by law and in fact a secular school does it follow that secularism is "established" in the nation's schools? Catholics once again have been hesitant in pressing this accusation. But if Catholics are to obtain financial support for their own religiously-oriented schools they must first persuade the American people that for Catholic children the public school is a clear and present danger because it is so secular as to be, in effect, "anti-religious."

If this standard of opposition to the public school is thought to be too rigorous then how opposed must Catholics be to the secular public school before they can claim that their conscience refuses to allow them to permit their children to participate in the school offered by the state?

A most remarkable admission of the validity of the Catholic position that the public school is a secular school has come about during the past year in the emergence of the concept of "shared time." While this idea is too new to permit much generalization, the endorsement of this plan by some Protestants indicates their conviction that the Catholics are correct when they insist that some academic courses,—such as the social sciences—are inherently value-laden. Under the "shared time" scheme Catholic children would attend public schools for those subjects, such as chemistry, in which spiritual values are not intrinsic but attend Catholic schools for those courses where moral attitudes and values are of great importance.

One cannot read the 30 page symposium on "shared time" in the January-February 1962 issue of the journal *Religious Education* without sensing that the sheer secularism which has overtaken the public school is producing the most serious reconsiderations on the

make secular schools more sectarian

part of many religionists. Although once again the newness of the "shared time" idea makes one cautious, it may not be too bold to say that the endorsement by some Protestants of this plan admits either the validity or the inevitability of the Catholic claim for a share of the common school fund.

If then the public school has become, by law and in fact, a secular school, how conscientiously opposed to such a school must a citizen be before he can legitimately assert that the state cannot compel him to send his children to school but supply him with no institution of learning except the secular school? This question leads us to the second point in our line of reasoning—the rights of conscience and religious liberty in confrontation with the school which, to repeat Justice Rutledge's phrase, is "wholly secular."

2. Conscience, Religious Freedom and the Secular School

a. Conscience and Obedience to Law

It is uncertain what American law would hold if tomorrow the nation's Catholics came to the conclusion that they could no longer in good conscience allow their children to attend any public school. There exists practically no actual American case law concerning persons who claim that they cannot attend a public school because it is too secular. The Amish and a few comparable sects have resisted attendance in ultra-modern school buildings but otherwise America has no legal experience with any group which asserts that the tax-supported state school violates their conscience because it divorces the sacred and the secular and teaches only the latter.

It will be noted, therefore, that when Catholics state that they cannot "in conscience" send their children to non-Catholic or public schools they are not necessarily speaking in a way which would bring them within the legal category of conscientious objectors to a particular state-sponsored compulsory program. How much objection in conscience then to the secular school would Catholics have to possess before the state would under the Constitution be re-

but what happens when the Church, saying we state and become so high that Catholics can't attend

quired to excuse them from attendance and yet not penalize them financially because of their religious scruples?

To find a specific legal requirement to be contrary to one's conscience does not, of course, automatically grant release from obedience, even if by obedience one's conscience is violated. The Mormons felt required under pain of everlasting damnation to enter into plural marriages, but the Supreme Court of the United States held firmly that unity is one of the essential qualities of the marriage contract and that even the voice of conscience cannot give an exemption for those whose failure to take more than one wife would, according to their conscience, cause them the loss of their eternal soul.

Similarly the Supreme Court in 1961 ruled that people who, for reasons of conscience, observe a day of worship and total rest on Saturday, may not transact business on Sunday. A law is not unjust or coercive of conscience, Chief Justice Warren wrote, if it does not compel an act forbidden by conscience but only renders "the practice of . . . religious beliefs more expensive."

The flag salute cases, however, offer some encouragement to the Catholic assertion that being coerced to send his children to the secular school, because of an economic boycott on the secular-sectarian school, violates his conscience. As is well known, the U.S. Supreme Court reversed itself with respect to laws requiring children, who were Jehovah's Witnesses, to salute the flag; in 1943 the Supreme Court, vacating previous rulings to the contrary, held that it is unconstitutional to require a pupil to salute the flag when he has conscientious objections to such a practice.

If children with religious scruples over the performance of certain secular practices within the public school have a constitutional right to be excused from such activities, does it follow that the Catholic, opposed in conscience to the secular approach to life and learning dominant in the public school, can also be said to have a constitutional right not to be coerced into participating, contrary to his conscience, in such a program?

An affirmative answer to that question could not at present be inferred, but the reflections of Justice Frankfurter, dissenting against the majority opinion which granted an exemption from the flag salute to children conscientiously opposed to the practice, is most significant. Justice Frankfurter sees the consequences of the Court's bowing to the religious scruples of a minority and raises this question:

"Parents who are dissatisfied with the public schools . . . carry a double educational burden. Children who go to public school enjoy in many states derivative advantages. . . . What of the claims of equality of treatment of those parents who, because of *religious scruples*, cannot send their children to public schools? What of the claim that if the right to send children to privately maintained schools is partly *an exercise of religious conviction*, to render effective this right it should be accompanied by equality of treatment by the state. . . ." (emphasis supplied)

If the Catholic claim to partial tax support for Catholic schools is to be grounded on the argument from conscience it would appear that at least the following must be shown to be facts:

1. The public school is so secular that, in Justice Frankfurter's words, Catholic parents "cannot . . . because of religious scruples" allow their children to attend.
2. The secular school demands an expression of belief or state of mind which is inconsistent with the fundamental attitudes and beliefs of a person committed to a supernatural view of life.
3. Irreparable harm will be done to a Catholic child attending a secular public school because he will learn non-sacred truths in such a manner that his faith will be impaired.

If one hesitates or refuses to agree that these three assertions can be verified, as understandably one might, then the argument from conscience should be reconsidered. In other words, is it actually true for Catholics to assert that their conscience is violated when they are coerced by economic means into sending their children to

a public school? If such a practice does violate the conscience of a parent, then there is no excuse for continuing it.

It seems clear therefore that the Catholic "case" for some share of Federal aid cannot rely on a clear-cut case of the Catholic conscience being violated by enforced attendance at a secular public school. Catholics cannot, moreover, identify their case with that of the person who, conscientiously opposed to war, cannot participate in any direct preparation for war. The Catholic, in other words, has not said and perhaps cannot say that he is a "conscientious objector" to the secular school. If the Catholic did or could, his case might be radically different.

b. Religious Freedom and the Secular School

Although Catholics apparently cannot claim in the strict sense that participation in the secular school violates their conscience, they do claim that the denial of state funds which leads to the enforced attendance of their children at secular schools infringes, impairs or restricts their religious freedom. Here again, however, it appears that Catholics have not drawn up a careful bill of particulars concerning their feeling that their religious liberty is, under present conditions, being curtailed.

Jehovah's Witnesses have contributed new horizons to religious freedom in the score of cases which they have carried to the U. S. Supreme Court within the last generation. In briefest summary the rights extended to the Witnesses guaranteed their immunity from arrest while preaching in public streets or parks. The language of the Supreme Court, however, in broadening the right to make the public park a pulpit is often so sweeping that one can conclude that *any* restriction on religious preaching or practice must have a justification of a most substantial nature.

Catholics in this matter face a serious dilemma. If they assert that having and maintaining their children in a Catholic school is an exercise of their religious freedom, then their request for tax support for such activity runs squarely into the prohibitions of the

establishment clause. If, on the other hand, Catholics ground their claim to public support of their schools strictly on the *secular* contribution which these schools make to the state by educating its future citizens, then Catholics may not logically urge that their religious freedom is restricted if the state, for reasons of expediency or economy, decides to finance only the public school.

The argument from religious freedom cuts both ways because it is not yet certain what relation the second part of the First Amendment, the free exercise clause, has or should have to the first part, the establishment clause. Many noted scholars have argued that the extension of religious freedom is the *main* purpose of the First Amendment and that therefore the establishment clause is merely instrumental to broadening horizons of religious liberty. The Supreme Court, however, has not adopted this theory and, in fact, in several instances (including the prayer decision in June 1962) has reaffirmed its conviction that the establishment clause stands independently of the free exercise clause and by itself creates rights which can be infringed even in the absence of an infringement of the free exercise clause.

Under this construction of the First Amendment it is difficult to see how a Catholic can claim that the denial of state support for Church-related schools is a violation of his free exercise of religion. At least, if it is a violation, then the financing of these schools would also violate a right in the non-Catholic to have the establishment or no-aid-to religion clause observed. If the no-aid-to religion doctrine is an absolute, then it is not possible to have state money finance, even in part, the exercise of anyone's religion.

But can a Catholic utilize the new interpretation of the establishment clause and assert that the Catholic's right to be free of the establishment of *any* religion, including that of secularism, is being infringed by a dominance of secular values and ideals in the public school which amounts to an establishment of religion in the strict, constitutional sense? It might be difficult for Catholics to gain acceptance of this idea but certainly its potentialities, under present

law which views the establishment clause as conferring rights independently of an infringement of religious freedom, seem to be very great.

If then it is not possible, in the present state of the law, to prove that the Catholic whose child because of economic coercion attends the secular school or that the Catholic who pays "double taxation" for his child's education in a Catholic school are the victims of an infringement of their religious freedom, is it nonetheless arguable that *some* specific constitutional rights of these Catholic parents are being infringed? This, of course, is the crucial question, and the answer, as of now, appears to be "No."

There may be involved, however, a denial of equal protection for the parent whose children in the parochial schools are denied, because of their faith, the "benefits of public welfare legislation," as the *Everson* decision put it. One may say also that such a denial would offend the "free exercise" clause, but neither the *Everson* opinion itself nor the state decisions which followed it are very clear or very encouraging as to the extent of the coverage of "public welfare benefits." Nowhere does the Supreme Court say or hint that such benefits do or could extend to even the most limited form of instruction in secular subjects.

One cannot help but feel, nonetheless, that there is a breadth and scope in the "free exercise" clause which is capable of expanding to include that religious motivation which causes a Catholic parent to send his child to a Church-related school. But such expansion is the work of the future. It is clear that contemporary collective Catholic thought and conscience feel that the parochial school is an inherent part of the exercise of their religion. What is needed is to translate this conviction into juridical language and constitutional law. Such a task cannot be achieved in one generation because the school problem, which took at least four generations to become a national dilemma, may require that same amount of time to unravel itself into an equitable solution for a pluralistic society.

If arguments from the imperatives of conscience, the desirability

of having an unfettered religious freedom and the right to be free from the establishment of secularism are potential rather than actual legal and constitutional doctrine at this time, the claims of conscience and religious liberty are nonetheless the very essence of the Catholic complaint and petition. If, however, it is not now possible to bring these arguments to full flower, it is feasible to develop and expand a corollary of these arguments, viz., the idea that the state cannot penalize citizens for exercising their religion in a matter in which the state imposes a compulsory law as it does in education. This leads to our third point in the legal-constitutional-educational "case" for the Catholic position.

3. Under Any Theory of American Jurisprudence It Is Unjust To Inflict a Financial Penalty On Citizens Because of the Exercise of Their Religion When the State Could, With No Added Expense and No Harm To the Common Good, Relieve Them of Such Financial Penalty

Both sides to the debate over Federal aid for Catholic schools invoke the fact of compulsory education laws. Catholics urge that it is unfair to compel them by law to educate their children and yet deny financial assistance to the only type of school suitable to their conscience. Opponents of aid for sectarian schools insist that since the children who attend parochial schools are legally required to do so, the state, if it added a subvention to its laws on attendance, would be aiding a religion.

But is the fact of compulsory attendance laws really relevant to the debate? If tomorrow it were deemed unnecessary to have such laws, as well it might be, attendance at public and parochial schools would probably not vary in the least. And would the repeal of laws requiring attendance at school change the nature of the debate over the advisability of Federal aid going to Catholic schools?

As a concrete example, let us assume that a particular state made a rule that no one need attend school after the ninth grade. Youths

in the three years of high school in this state would attend school voluntarily and not because it is their legal duty. The state would encourage such attendance by making good educational facilities available. Would the absence of legal compulsion permit the state to extend the G.I. tuition-scholarship plan down to the secondary school?

Actually many seniors in high school today, being over 16 years of age, are no longer required to attend school. Could a bill be enacted to provide some type of special secular training for *all* high school seniors who attend *any* high school but who are no longer legally required to do so?

It seems clear that little thought has been given to these questions because both parties to the Federal aid debate have been anxious to exploit whatever relevance there is for their side of the struggle from the existence of laws requiring school attendance.

When education became compulsory about a century ago the foreseeable inconvenience to some was mitigated by a great emphasis on the idea that the required education would be free. The free public school and the free public library emerged together in American life as symbols of democracy. No one seems to have raised the point that the idea of a "free" education was basically compromised by providing only one type of school and that concededly contrary to the conscience and religious faith of a substantial minority.

Today, however, the twin concepts of a compulsory but free education, revolutionary ideas a century ago, have long since been accepted as beyond dispute. But can the American state retreat from its historic commitment of giving a "free" education to the children of *every* citizen when some citizens insist that the free state school violates their deepest beliefs and those of their children?

As we have seen, the arguments from conscience and religious freedom have not yet reached the clarity and status of an undeniable constitutional right, but by what theory of law or of society

can a state refuse the right to a "free" education to those for whom the one secular type of schooling is not acceptable for reasons of conscience?

The state is not being asked by those who seek aid for nonpublic schools to spend any money which it has not already committed itself to spend. If anything is clear from the nature and history of the laws requiring attendance at school it is the fact that the state has promised to give a free education to all of its future citizens.

If the state were scrupulously devoted to its pledge of giving to *all* children whom it requires to go to school a *free* education it could, with no violation of the separation of Church and State, set aside for each child who, for reasons of conscience withdraws from the public school, a sum of money equal to the sum expended on every child who attends the free school. Is it not the fair and just thing to place in a trust fund, so to speak, the cost of a free education which is each child's right as a future American citizen? If that child, acting through its parents, decides that he will follow the state-prescribed curriculum of secular learning in the atmosphere of a sectarian school it seems to be totally arbitrary and unjustifiable to cut off the child's right to a free education because he and his guardians believe, as a part of their religious faith, that the secular and the sacred are inextricably intermingled.

None of the philosophies of law which are current in America, Holmes' positivism, Kelsen's realism or Pound's harmonization of interests theory can justify the exclusion of an ever growing body of children from the financial benefits to which they are entitled and to the expenditure of which the state has committed itself. Such a financial penalty on parents and children because they have by their conscience a different philosophy of education than the majority is surely such a shocking injustice that law and society will remedy it within the foreseeable future. The least that the state should be doing is to seek ways by which it can carry out its pledges to every child that it will have a free education.

The one reason which could justify the boycott of non-secular

✓ schools would be a finding that such schools do harm to the common good. Some few commentators on the matter imply darkly that such is the fact though they, somewhat illogically, do not feel that any further discouragement of non-secular schools is necessary. The issue of private schools and the common good leads to our fourth point in a "case" for aid to Catholic schools built on a legal-constitutional-educational foundation.

4. The Granting of Tax Money To Finance a SMALL Part of the SECULAR Program of Church-Related Schools Could Not

- a. Undermine the Public School
- b. Weaken National Unity
- c. Cause a Proliferation of Sectarian Schools

It should be noted that here, once again, emphasis is placed on the fact that the only real issue presently in controversy in America is a *small* subvention for the *secular* aspects of Church-related schools. It would appear that those who hold, with Justice Frankfurter, that the public school developed "as a symbol of our secular unity" and that it is now the principal promoter of unity in the nation look on any development which might possibly be adverse to the public school as a serious threat.

a. Could Private Schools Undermine Public Education?

An example of the almost mystical qualities attributed to the public school can be seen in the following testimony given to Congress in March 1961 by Methodist Bishop John Wesley Lord on behalf of Federal aid to public schools:

"As Protestants we recognize the legitimacy of church-related parochial . . . schools, and that they possess certain values in spite of certain disadvantages. It cannot be argued, however, that a system of private and parochial schools could meet the basic requirements of democracy. . . . Such schools are designed primarily to serve denom-

inational interests and to foster institutional control of the educational process. Certainly the values of democratic citizenship can be more fully realized by public education."

No line of reasoning, however logical, can be expected to effect any rapid change in the attitudes revealed by Bishop Lord, whose views reflect an outlook on the public school not at all uncommon in America.

The most intractable subject in the entire discussion of Federal aid for Catholic schools centers on the implied criticism of public education which the very existence of Catholic schools signifies. As a result of this implied criticism the request of these schools for some financial assistance is not judged on its merits but rather on what effect the granting of such a request would have on the prestige of the public school. As Reinhold Niebuhr put it:

"Protestants are inclined to be unyielding on problems of the public school because they suspect the hierarchy, at least, of being inimical to the whole idea of the public school system, which Protestants, as well as our secular democrats, regard as one of the foundation stones of our democracy." (Applied Christianity, p. 223)

It is frequently asserted by opponents of Federal aid for Catholic schools that an allotment of funds to private schools will mean that less money will be available to already under-financed public schools. Aside from the fact that this objection does not confront the hard question of the validity of the claim of the nonpublic school for state aid, the objection, moreover, carries with it the assumption that encouraging private education will inevitably diminish the prestigious position now held by public education.

Could not this objection to aid for private schools be met by the adoption of a provision in the enabling legislation that public schools will receive a fixed sum graduated upwards each year by means of an appropriate formula? If a guarantee of such increment for the public schools for a ten-year period were agreed upon, it is

difficult to see how the granting of some assistance to private schools would cause the budget of the public school to be lessened.

The public school was "undermined" in a certain sense when the Supreme Court in its 1925 *Pierce* decision ruled that no state had "any general power to standardize its children by forcing them to accept instruction from public teachers only." If it is true that the public financing of nonpublic schools would encourage these institutions in such a way as to cause the weakening or even the undermining of the public school, then should not the state prevent the further growth of private schools, even if such growth is achieved *without* the state's financial assistance?

Virtually no opponent of Federal aid to private schools has asserted that these schools, whose number and student population have about doubled since World War II, constitute a threat to the public school. Is it not a fair question to ask, however, whether at some point privately-financed schools will be so numerous as to represent an undesirable challenge to the prestige, function and mission of the public school? This question leads us to the second anxiety which troubles opponents of state aid for private schools: would such aid weaken national unity?

b. Private Schools and National Unity

In the midst of the 1961 controversy over Federal aid to education Reinhold Niebuhr wrote:

"A religiously pluralistic and semi-secular society cannot afford to imperil the unity of a people through a pluralistic school system."

The theory that the public schools have, as a part of their mission, the unifying of their students never makes it clear whether the pupils become unified by merely mingling together or whether the mystique or the instruction of the public school produces the unifying effect, an effect which somehow is different from the universally deprecated "conformity" which is said to afflict American youth.

Assuming, in the words of Niebuhr, that a "pluralistic school system" would in fact "imperil the unity" of the nation, does it not follow that the nation's leaders should seek to prevent such a threat not merely by denying public assistance to private schools but by such appropriate measures as would guarantee that there would not emerge a "pluralistic school system." No such measures now exist. It could well happen that the enormous growth of Catholic schools will continue, that non-Catholic schools will have a comparable growth and that enterprising educators may very soon establish highly competent private secondary schools for literally thousands of college-bound students whose parents would be happy to pay even a most substantial tuition if their children were given a training which would give them assurance of admission to a high-quality college.

If, in other words, the public school is so indispensable to the moral unity and cultural future of America, then *every* precaution should be taken against a decline in its student population or public prestige. The assertion that the public school is the vehicle by which ideals of democratic living and the traditions of America are communicated proves too much; it proves in fact that the Oregon school case was wrongly decided. Or at least it proves that some appropriate and effective measures should be taken so that, notwithstanding a continued denial of tax support to private schools, the number of these schools and their student population not increase substantially beyond their present proportion *vis a vis* the total public school enrollment.

If, furthermore, the opponents of public aid for Catholic schools base their opposition on the presumed need of the public schools for the purposes of creating national unity, is it not logical to ask when or whether national unity will have become so secure that more young Americans can attend nonpublic schools with no resulting serious threat to the maintenance of national unity? Will America be ready in another generation or in two generations to absorb the existence of more private schools? Or will national unity

always have as its indispensable partner the public school?

Confronted with this type of formless and therefore formidable objection to the petition for some public support for the Catholic school, the advocate of such support can only ask some fundamental questions:

1. Is there any evidence beyond mere conjecture that the public school promotes national unity more than the nonpublic school?
2. How is it assumed that the Church-related school, which can teach more freely about the religious foundations of American democracy than the public school can, is thought to be less capable of promoting national unity than the public secular school?
3. How can the promotion of national unity be a part of the task of the public high school teacher when the imposition of such a task on a public university professor would be deemed an intolerable infringement on academic freedom?

If the allegation that the preservation of national unity depends on the preservation of the public school seems to wither away upon analysis, the often expressed fear that aid for private education would cause a proliferation of sectarian schools is even more evanescent.

c. Public Aid and a Proliferation of Sectarian Schools

Dean John C. Bennett, one of the most balanced of all Protestant students of Church-State matters, expresses his fear of the consequences of granting public aid to Church-related schools in these words:

"I believe that even more important is the consideration that decisive encouragement of parochial schools through public financial aid would have a destructive effect on the public school and on education generally. . . . I am told by those who have studied the matter most closely that

we could not expect to have fewer than five or six systems of parochial schools competing for the resources of the community in the large or middle sized cities. This would also mean that every system would be educationally weak. . . . Such a development would drain off from the public school the teachers of strongest religious commitment and so public education would be more secularized than it is now." (Christians and the State, p. 246-47)

The assumptions and conclusions contained in this series of predictions are significant. Is there not contained in this prophecy the assumption that many Protestants are experiencing a profound dissatisfaction with the public school, and that even the small amount of aid which the state might offer to private schools would be sufficient to induce these Protestants to create their own schools? There is also the supposition here that competition among school systems would not improve the quality of these schools. Such an assumption is not verifiable on the college level where a healthy rivalry has brought diversity and added distinction to American higher education.

Only some eight religious sects have ever operated Church-related schools in America within the last century. If there is reason to believe that a partial subsidy from the government would elicit enough enthusiasm from many religious groups so as to cause a "proliferation" of sectarian schools (as is so often alleged), then the parents, who presumably need only a little financial encouragement to embark on the burdensome task of opening and maintaining their own schools, must feel deeply that, under present conditions, their ideas and hopes about education are being drastically repudiated by public educational officials.

Such, in briefest review, are some of the major points which must be included and expanded upon in the great "Brandeis brief" which needs to be written to support the "case" of the Catholic claim to a share of the public school fund. The original "Brandeis brief" hardly touched upon the legalistic aspects of the challenged

Oregon law regulating the conditions under which women could be gainfully employed in that state. Brandeis elaborated upon the economic, medical and sociological reasons for the Oregon statute designed to protect the health of women employees against the danger of excessively harsh working conditions. Brandeis won the case; the law was sustained because circumstances had changed.

The school question will be solved in a similar manner, not sheerly by law or the Constitution but by facts, circumstances and the needs of the American nation.

Perhaps some reflections and conclusions are appropriate after this journey through what is for Catholic and non-Catholic alike a maze of ambiguities, inconsistencies and sheer riddles.

IV. SUMMARY AND CONCLUSIONS

It is clear that a thousand forces have produced the crisis which confronts the Catholic school of today and tomorrow. Three great phases in the life history of that school are clearly identifiable,—its status prior to the 1947 *Everson* decision, its added dimension in Church-State law after *Everson* and its contemporary “trial” before Congress and public opinion with regard to its request for some tax support if Federal aid to education becomes a reality. This third phase, the “trial” of the Catholic school, may well be with us for the foreseeable future.

The Catholics of America will therefore of necessity be developing and articulating for the foreseeable future their petition for public assistance for their schools. Their task will continue to be a painful undertaking, filled with misunderstandings, calumny and fearful dilemmas. The “case” for Catholic education has two strong

lines of reasoning to support it; each of them is forceful and valid in itself and, when both are taken together, they constitute a truly formidable, closely interwoven and logically irresistible argument demonstrating the injustice of a denial of state funds to Catholic schools.

The two lines of reasoning, in briefest summary, proceed as follows:

1. Arguing from a background of Catholic and natural law principles, one can show that the basic truths regarding parental rights, distributive justice and the minimal role of the state in the area of education lead to the conclusion that society has no right to compel all parents to send their children to school and then to furnish only the one secular school which, of its very nature, is unacceptable in conscience to many religious parents.

2. Arguing from an American legal-constitutional-educational viewpoint, the secular school, legally forbidden to teach the sectarian and the sacred, offends against the conscience and religious freedom of Catholic parents. Since the children of these parents, in common with all future citizens, have a right to a free education, the state cannot retract this right simply because these children insist on a secular education into which the sacred elements of life and learning are blended.

The partial financing of the non-secular school cannot bring about a lessening of the prestige of the public school, or any diminution in future national unity or a proliferation of sectarian schools. Such allegations are not provable and, moreover, if the eventualities they mention as threats are truly dangerous, then, logically, other means must be taken to prevent the rise of private schools which, if too numerous, would in themselves, with or without state aid, threaten the public school and the common good.

There are other arguments, all of which deserve elaboration:

1. the pattern of financing of sectarian schools in other pluralistic democracies such as Holland, England and elsewhere;

2. the rights of the Church in America as a juridically recognized and legally incorporated entity;
3. the need to mitigate the deep sense of injustice felt by a substantial segment of Catholic citizens;
4. the unrealism of the law recognizing the pluralism of religion in all aspects of American life except in the schools;
5. the testimony on behalf of the constitutionality of limited state aid for Catholic schools by such non-Catholic experts on constitutional law as Professors Arthur Sutherland, Paul Kauper, Mark De Wolfe Howe, Harry Jones, Philip Kurland and Wilber Katz. The basic contention which these scholars of the constitution make is that the state may grant public money for a public purpose and, if religion is thereby incidentally benefited, such assistance does not render unconstitutional the aiding of a public purpose. Such reasoning was an important element in the Supreme Court's validation of Sunday laws. The court there ruled that a common day of rest may be decreed and is valid unless the primary purpose of such a decree was to aid religion.

Who can say which of the themes or arguments in the Catholic "case" will be more persuasive than any other? Just as the Catholic approach to life is all-embracing, so too the Catholic outlook on education touches on theology, history, law and political philosophy and in so doing challenges some of the fundamental unspoken major premises of Americans of every faith and no faith.

There is reason to feel that Catholics are gradually understanding and expressing their viewpoint with more clarity and that an increasing number of non-Catholics are sympathetic.

If the road ahead for Catholics appears to be one filled with misunderstanding and calumniations, Catholics can be consoled and strengthened by the knowledge that injustice causes the Bride of Christ not to wither but to flourish. In the sure knowledge, therefore, that Christ and His Church will not be confounded, Catholics

can move forward in peace and tranquility, not unduly alarmed at whatever may be the immediate outcome of the Federal aid controversy, but with a quiet assurance that the norms of reason and the ideals of religious freedom will certainly be victorious in the manner and at the time which an all-wise Providence shall determine.

APPENDIX A

ANNOTATED BASIC BIBLIOGRAPHY

The following titles are probably the best contemporary book-length treatments of the Church-State problem in America.

1. *The Supreme Court on Church and State*, edited by Joseph Tussman, Oxford Univ. Press, 1962, 305 pp., \$1.95 (paperback)

This collection of the texts of the 29 major decisions on Church and State of the United States Supreme Court is an excellent and indispensable handbook. It is ideal for study groups, reading assignments for senior high school or college classes and for intercredal clergy dialogue. This volume, however, does not contain the Sunday law decisions of May 29, 1961, nor the prayer decision of June 25, 1962.

2. *Christians and the State*, by John C. Bennett, Scribner's Sons, 1958, 302 pp., \$4.50

Dean Bennett of Union Theological Seminary has written in this volume one of the most balanced and sympathetic Protestant books on Church-State problems in America. This study rejects the theory of an *absolute* separation of Church and State, endorses health and welfare benefits for parochial schools but rejects direct state aid for these institutions.

3. *Church, State and Freedom*, by Leo Pfeffer, Beacon Press, 1953, 675 pp.

Written by the general counsel of the American Jewish Congress and the articulate advocate of an "impregnable wall of separation" between Church and State this volume is a complete, well-ordered analysis of America's statutory and decisional law on Church and State. The author's thesis is that *absolute* separation between Church and State will bring about the most complete religious freedom for all. This volume should be read in connection with Mr. Pfeffer's more popular study, "Creeds in Competition" (Harper and Brothers, 1958, 178 pp.)

4. *Of Church and State and the Supreme Court*, by Philip B. Kurland, University of Chicago Press, \$1.50

This reprint of an article published by Professor Kurland in the Autumn, 1961, issue of the *University of Chicago Law Review* is a most valuable review and evaluation of all the principal decisions of the U. S. Supreme Court on Church and State. Professor Kurland's thesis is that the First Amendment means that government "cannot utilize religion as a standard for action or inaction . . . either to confer a benefit or to impose a burden." He finds his thesis supported by some but not all Supreme Court decisions but urges that the application of his thesis would bring justice to all parties. This study is remarkably well done and merits the most careful consideration.

5. *Philosophy of the State as Educator*, by Father Thomas Dubay, S.M., Bruce, 1959, 237 pp., \$5.95

This study of the rights and duties with regard to education of the church, the state and Catholic parents is noteworthy.

6. *Catholic Viewpoint on Church and State*, by Jerome G. Kerwin, Hanover House (Doubleday) 1960, 192 pp., \$3.50

This readable study by an outstanding Catholic political scientist has the limitations inherent in its broad coverage but the excellence of being an over-all treatment of contemporary Church-State problems.

7. *Catholic Viewpoint on Education*, by Father Neil G. McCluskey, S.J., Hanover House, 1959, 192 pp., \$3.50

By far the best current summary of the controversy over public aid for parochial schools this volume (now in paperback) is ideal for discussion groups or for courses in education in high school or college. Father McCluskey's eight chapters cover every major educational issue in the Church-State field. The volume can be read in connection with the author's study, *Public Schools and Moral Education* (The influence of Horace Mann, William Torrey Harris and John Dewey), Columbia Univ. Press, 1958, 315 pp.

8. *Religion in America*, edited by John Cogley, Meridian Books, 1958, 288 pp., \$1.45

A valuable volume containing essays on many aspects of Church and State by Reinhold Niebuhr, John Courtney Murray, S.J., Leo Pfeffer, Wilbur G. Katz, Will Herberg, James Hastings Nichols, Walter J. Ong, S.J., Stringfellow Barr, Gustave Weigel, S.J., Abraham Heschel and Paul Tillich. A broad spectrum of opinion is here obtainable, with particularly outstanding material on the issue of state aid for nonpublic schools.

9. *Hearings on Federal Aid to Schools*, March, 1961. Before the Subcommittee on Education of the Committee on Education and Labor, House of Representatives, 87th Congress, 1st Session, on H.R. 4970—2 Vols., 1052 pages.

These two volumes are literally a treasury of excellent material on every aspect of Federal aid to education. Full texts of statements by Monsignor Hochwalt, Secretary Ribicoff (as well as the brief of the Department of Health, Education and Welfare), all Protestant statements and those of the American Jewish Congress and the American Civil Liberties Union. A good bibliography of Church-State literature is contained on pp. 938-939 of Part 2. These volumes may be available through one's Congressman or from the U. S. Government Printing Office.

10. *The Constitutionality of the Inclusion of Church-Related Schools in Federal Aid to Education*, 50 Georgetown Law Journal, pp. 399-455, Winter, 1961.

This article is a brief prepared by the legal department of the National Catholic Welfare Conference in reply to a brief issued by the Department of Health, Education and Welfare to support the Administration's position that "across-the-board" grants and loans to parochial schools would be unconstitutional. The NCWC brief is a thorough, well-reasoned presentation of all the major legal and constitutional issues involved in Federal aid to Catholic schools. A very valuable document.

