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SELF-DETERMINATION ELECTIONS AMONG PREVIOUSLY UNREPRESENTED EMPLOYEES IN FRINGE GROUPS: A REEXAMINATION

GEORGE H. COHEN*

Focusing attention on a recent NLRB decision which abandons, in part, an established Board doctrine favoring self-determination elections for employee fringe groups, the author traces the history of these elections in three basic types of situations, pointing up the inherent conflict between the Board's statutory task of determining the "unit appropriate" for collective bargaining and directing elections among previously unrepresented employees. Mr. Cohen finds the NLRB's new approach not only more consistent with its statutory duty, but also without prejudice to employee rights.

All too often a sound legal doctrine formulated to resolve a problem presented by a particular case falls victim to a gradual process commencing with judicial overuse and culminating with judicial misuse. The purpose of this article is to reexamine the self-determination election doctrine and to question whether it is one such victim. With the number of representation elections conducted by the National Labor Relations Board rising steadily year after year,¹ the principles related to the election process have become increasingly important to the practicing labor lawyer. Moreover, an evaluation of this nature is particularly timely in light of the recent pronouncements in D. V. Displays Corp.² wherein the Board reversed, in part, an established policy with regard to self-determination elections.

Section 9(b)³ of the Wagner Act entrusted the Board with what has

* Attorney-Advisor to Member Gerald A. Brown of the National Labor Relations Board; B.A., LL.B., Cornell University; LL.M., Georgetown University Law Center; Member of the Bars of the District of Columbia and the States of New York and Virginia.

The views expressed in this article are those of the author and do not necessarily reflect the position of the National Labor Relations Board or of any of its members.


² 134 N.L.R.B. No. 55 (Nov. 21, 1961).

proven to be the monumental task of determining in each case "the unit appropriate for the purposes of collective bargaining." The statute was generally silent as to the criteria which the Board should apply in making such determinations. More specifically, it made no mention of the self-determination election concept. While carrying out this task in *Globe Machine & Stamping Co.*\(^4\) in 1937, three petitions were placed before the Board for consideration—one seeking a production and maintenance unit and two seeking separate craft units of polishers and punch press operators. Recognizing that any or all said units were potentially appropriate, the Board effectively took refuge behind its now oft-quoted statement that "where the considerations are so evenly balanced, the determining factor is the desire of the men themselves."\(^5\) Separate elections were then directed in all these voting groups with Board "certification" awaiting the outcome thereof.\(^6\) Thus the concept of directing self-determination elections originated from what was essentially a craft vs. industrial unit problem. If this were the lone instance for its application, no problem would exist since it is difficult to find fault in a rule which entitles true craftsmen to choose between separate representation on a craft basis and representation in an over-all industrial unit.

However, as could be expected, a multitude of cases have been presented to the Board since *Globe*, albeit on facts far removed therefrom, which have also raised the self-determination election issue. In view of the myriad of ways in which the issue has reared its ugly head, a detailed case-by-case analysis shall be intentionally avoided in favor of a discussion limited to the most fundamental situations of concern to the Board from a policy-making standpoint.

I

Type (A). The petitioner, currently representing employees in unit \(X\), requests the inclusion of previously unrepresented employees \(Y\) in an over-all unit \(X + Y\).

\(^4\) N.L.R.B. 294 (1937).

\(^5\) Id. at 300.

\(^6\) By directing self-determination elections the Board permits the wishes of employees to play a controlling role in its appropriate unit determinations. Accordingly, the Board has been criticized in some instances for allegedly abdicating its responsibility delegated by the Congress and expressed in § 9(b)'s mandate that the Board shall decide "in each case" the "unit appropriate" for collective bargaining. In the few instances where the courts have considered this contention, it has been summarily rejected, and the validity of *Globe* elections has been recognized. See Pittsburgh Plate Glass Co. v. NLRB, 313 U.S. 146, 156 (1941); NLRB v. Weyerhauser Co., 276 F.2d 865 (7th Cir. 1960); NLRB v. Underwood Machine Co., 179 F.2d 118 (1st Cir. 1949).
This frequently recurring pattern can best be described by reference to certain of its basic elements. These include, inter alia, a petition by the incumbent union which raises a question concerning representation in its traditional unit, and also requests the inclusion in or addition to that unit of a group of previously unrepresented employees. Generally, these latter employees constitute either a so-called "fringe" or "residual" group. While the Board has not always done so, for our purposes the former term shall be accorded a word of art status, its applicability restricted herein to the "purer" fringe situations where the previously unrepresented employees are small in number in comparison with the size of the existing unit, and include a portion of the "leftovers" who properly belong in the historical unit.

Assuming the Board finds that such fringe employees properly belong in the existing unit, the question then arises whether it summarily places these employees in the over-all unit and directs one election or first ascertains their desires by directing a self-determination election. In essence, this was the very issue to which the Board addressed itself in the landmark Waterous Co. and Zia Co. cases. Perhaps better than any other pair of decisions, they vividly reflect the diametric positions which the Board has taken in the past with respect to directing self-determination elections among hitherto unrepresented fringe employees.

The Board capped its 1950 Waterous decision with this sweeping language:

[T]here is no cogent reason of statutory policy for balloting fringe employees separately in circumstances where, as here, the only union (or unions) seeking to represent the fringe employees on any basis is, at the same time, asking for

7 The Board has for a long time essentially resorted to a "legal fiction" in holding that previously unrepresented employees may constitute a separate appropriate unit if they comprise the entire unrepresented segment or residue of a basic appropriate unit. It has done so in the interests of insuring that these residual employees can reap the benefits of collective bargaining. Since the arguments relating to self-determination elections among previously unrepresented employees in fringe groups are generally applicable to residual groups, comments in this article shall be confined to the former groups. Parenthetically, it should be noted that if the unrepresented employees constitute a separate appropriate unit apart from their residual character (e.g., truckdrivers), then no logical reason exists for denying a self-determination election. Western Farmers Ass'n, 128 N.L.R.B. 338 (1960).


9 Ibid.

10 92 N.L.R.B. 76 (1950).

an election and certification in the basic appropriate unit in which the fringe group properly belongs. . . . [T]here is nothing in that sound and practical policy [of giving great weight to the form of bargaining unit which stood the test of time and experience] which ought to inhibit this Board from correcting a fringe defect in an historical bargaining unit.\(^{12}\)

*Waterous* thus became the vehicle by which the Board ushered in its new policy of refusing to direct self-determination elections among previously unrepresented fringe employees in the above-mentioned limited circumstances.\(^{13}\)

Board reliance on the *Waterous* doctrine, however, proved to be short-lived. After evaluating anew its relative merits in the *Zia* case of 1954, *Waterous* was summarily rejected. As has so often been the case in the entire problem area under consideration, this policy reversal was also accomplished with a minimum of explanatory comment. The Board simply stated in *Zia* that

> notwithstanding the fact that the employees sought to be added do not necessarily constitute a separate appropriate unit, we believe that they should be given an opportunity by a self-determination election to express their desires with respect to being included in the existing bargaining unit.\(^{14}\)

Prior to *D. V. Displays*, *Zia* was automatically cited as binding precedent with unfailing persistency wherever incumbent unions petitioned for over-all units, including previously unrepresented employee fringe groups.\(^{15}\) A brief inspection of Board law reveals that the rubber stamp citation—"*Zia Company*, 108 NLRB 1134"—left its imprint on cases involving fringe groups composed of, *inter alia*, plant clerical employees,\(^{16}\)

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12 92 N.L.R.B. at 77-78.

13 The *Waterous* decision overruled Petersen & Lytle, 60 N.L.R.B. 1070 (1945). The latter case involved an attempt by the incumbent union to preserve its existing contract unit in the face of a petition by another union requesting a broader unit. See discussion of Type (C) cases, pp. 199-204 infra. *Waterous*, on the other hand, involved a request by the incumbent to expand its existing unit. The *Waterous* doctrine was subsequently cited with approval. Courtland Mfg. Co., 95 N.L.R.B. 1292 (1951) (a two-union situation like Petersen & Lytle); Blue Ribbon Creamery, 94 N.L.R.B. 201 (a two-union situation), overruled on other grounds, Charles A. Krause Milling Co., 97 N.L.R.B. 536 (1951); Metz Baking Co., 92 N.L.R.B. 108 (1950) (a one-union situation like *Waterous*).

14 108 N.L.R.B. at 1137.


Moreover, the breadth of the *Zia* doctrine can only be fully appreciated if we recognize that its impact has extended far beyond Type (A) circumstances. Thus *Zia* has governed irrespective of whether the petitioner or intervenor requested an addition to its existing unit, irrespective of whether a question concerning representation was raised in the over-all unit or in the fringe group alone, and irrespective of whether, in a two union situation, there had been a bargaining history in one or both of the units. The direction of self-determination elections in each of these instances will be more fully discussed below.

For the moment, however, the discussion will be confined to the *Zia* problem as presented in Type (A) situations. *D. V. Displays* furnishes an excellent point of departure. There the joint petitioners raised a question concerning representation in the over-all unit composed of the existing multi-employer unit of production and maintenance employees and certain miscellaneous categories of previously unrepresented plant employees. This latter group, including photographic and maintenance employees (charwomen, regular part-time maintenance men and driver-maintenance men), had been historically excluded from the production and maintenance unit despite common duties, supervision, interests and terms and conditions of employment. The employer, a group of five firms, had bargained with one of the petitioners on a multi-employer basis for several years.

The wisdom of the practice of directing self-determination elections in such circumstances has long been open to grave doubt. Absent a bargaining history, this existing unit would be clearly inappropriate. Were the Board considering such a case de novo, the over-all unit, in-

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25 Purdy Co., 123 N.L.R.B. 1630 (1959). See also J. R. Reeves, 89 N.L.R.B. 54 (1950); Illinois Cities Water Co., 87 N.L.R.B. 109 (1949); Goldberg Bros. Mfg. Co., 81 N.L.R.B. 1037 (1949), which were decided prior to *Zia* but wherein self-determination elections were directed in like circumstances under the authority of *Petersen & Lytle*. 
cluding the plant employees in question, would constitute the appropriate unit for collective bargaining.\textsuperscript{26} If the exclusion of plant employees was a mere historical accident,\textsuperscript{27} not based on any real difference in function or status, why not remedy this unfortunate fringe defect by now placing them in the over-all unit where they properly belong? Even absent an historical accident, it can be argued that the Board's concern is not with \textit{how} or \textit{why} these employees failed to obtain representation in the past, but rather \textit{what} should be done with them in the future. Since the filing of a petition literally raises a question concerning future representation, might not one have difficulty perceiving any justification for a \textit{Zia} election where, as in \textit{D. V. Displays}, the over-all unit is the appropriate unit? Finally, why should the Board permit the plant employee group to perpetuate the existence of fringe defect by voting to maintain their unrepresented status?

Relying primarily on the fact that the answers to some of the questions posed above laid bare the glaring weaknesses of \textit{Zia}, a Board majority, Chairman McCulloch and Members Brown and Fanning, agreed in \textit{D. V. Displays} to revise that doctrine insofar as it applied to Type (A) cases.\textsuperscript{28} The dissenting opinion of Members Rodgers and Leedom indicated that \textit{Zia} merited continued Board endorsement because (1) it gave effect to bargaining history; (2) it did not preclude the establishment of appropriate units; (3) it acquired an immunity from Board scrutiny with the passage of time; and (4) it protected individual employee rights.\textsuperscript{29} These contentions will be treated seriatim.

There seems to be no reason for giving effect to a bargaining history where, as in \textit{D. V. Displays}, the incumbent union itself voluntarily chooses to disregard this history by filing a petition requesting an election in a unit more extensive than its existing unit.\textsuperscript{30}

Secondly, the dissenting members impliedly acknowledge that a reversal of \textit{Zia} would guarantee \textit{more appropriate} units. Contemporar-

\textsuperscript{26} D. V. Displays Corp., 134 N.L.R.B. No. 55 at 6 (Nov. 21, 1961) and cases cited therein. As a practical matter, \textit{Zia} problems frequently arise because an employer, without any Board certification, recognizes a union as the exclusive bargaining representative of its employees in a unit which, although agreed upon by the parties, would not otherwise satisfy the Board's "appropriate unit" standards.

\textsuperscript{27} See Lone Star Producing Co., 85 N.L.R.B. 1137, 1146 n.17 (1949) (Member Reynolds dissenting), clarified, 96 N.L.R.B. 1063 (1951).

\textsuperscript{28} 134 N.L.R.B. No. 55 at 5.

\textsuperscript{29} Id. at 8.

\textsuperscript{30} The importance of bargaining history where the incumbent union seeks to preserve its existing unit will be discussed in Type (C) situations, pp. 109-204 infra.
neously, however, they advocate continued adherence to Zia on the grounds that less appropriate but nevertheless appropriate units will result. At very best this amounts to an exceptionally weak endorsement of the doctrine in question. Thirdly, while the Board’s long term adherence to Zia is noteworthy, it need not be regarded as controlling. It makes very little sense for the judiciary to follow precedent solely for the sake of preserving stability in the law.

It [stare decisis] was intended, not to effect a “petrifying rigidity,” but to assure the justice that flows from certainty and stability. If, instead, adherence to precedent offers not justice but unfairness . . . it loses its right to survive, and no principle constrains us to follow it.32

It makes even less sense where quasi-judicial agencies such as the NLRB are involved.33 “Flexibility was not the least of the objectives sought by Congress in selecting administrative rather than judicial determinations . . . .”34 For the very reason behind their creation—the establishment of expert bodies able to keep abreast of the changing needs within their respective zones of authority (labor-management relations, for example)—implies the need for continually evolving new rules and reappraising existing doctrine.

Lastly, a discussion concerning the philosophical justification for directing self-determination elections among previously unrepresented employees in fringe groups brings into play two overlapping and sometimes conflicting concepts, namely, protecting individual employee rights and fostering collective bargaining.

It would seem reasonable to conclude from all the foregoing that the Zia doctrine certainly does not lend itself to the creation of optimum bargaining units. On the other hand, in principle, self-determination elections amount to nothing more than the exercise by individual employees of their “freedom of choice.” The utopian connotation which this phrase conveys to members of a democratic society helps to explain Zia’s natural appeal and hence its extended life span.

Absent self-determination elections, the petitioner-union has sole authority to decide which employee categories it seeks to represent, and the Board alone determines the “unit appropriate” for collective bargaining. In practice, individual factory workers have no real choice

31 134 N.L.R.B. No. 55 at 8-9.
33 2 Davis, Administrative Law Treatise § 17.07 (1958).
34 Shawmut Ass'n v. SEC, 146 F.2d 791, 796-97 (1st Cir. 1945) (Wyzanski, J.).
of bargaining unit mates since it is doubtful that a production employee, for example, would vote against a union merely because certain plant employees were excluded from the petitioner's unit request. Self-determination elections thus provide the one instance where individual employees can officially make themselves heard with respect to what constitutes an appropriate unit and with which of their fellow employees they will be associated for bargaining purposes.

It has been argued with much success that to deny these employees a self-determination election would be to encroach upon their rights by literally forcing them into the over-all unit without regard to their desires. Unfortunately, we have no statistics which would indicate whether the Board's actual experience supports this argument. Nevertheless, even assuming its validity, it is suggested here that this is the precise risk which confronts all minorities under our political system whereby representatives are elected by majority vote. Their rights are also invaded to the extent that they must abide by the choice of the majority. To paraphrase the poignant remark of a colleague, what is there so sacred in an employee's prior unrepresented status which entitles him to the special treatment afforded by Zia?

Turning our attention away from political theory and toward the statutes, we note that Congress' overriding concern was to promote, foster and encourage collective bargaining, the modus operandi selected to achieve industrial peace and stability. Given a conflict between this goal and individual employee interests concerning appropriate units, the former takes precedence. Thus the Seventy-Fourth Congress rejected a suggestion that a bargaining committee be established after any Board election in which more than one labor organization sought to represent the employees and that the committee have a membership pro rata to the number of employees each committee member represents. While such an arrangement would more closely reflect the desires of individual employees than has the "exclusive representative" concept enacted into law, it was emphatically rejected in the interests of achieving a workable collective bargaining procedure.

Both the Wagner Act and the Taft-Hartley Act themselves contain many built-in features which place restrictions on the aforementioned individual employee rights. The Wagner Act created two such inroads by permitting Board certification of labor organizations only in "appropriate units" rather than on any arbitrary basis requested by the union, and by

35 1 Legislative History of National Labor Relations Act 1335-36 (1935).
36 2 id. at 2490, 2928-29.
placing "appropriate unit" determinations in the hands of the Board\textsuperscript{37} rather than, as urged by many interested parties,\textsuperscript{38} in the employees. Taft-Hartley's subsequent prohibition against allowing "extent of organization" to control appropriate unit determinations constituted a further inroad.\textsuperscript{38}

All the foregoing factors indicate quite clearly that the legislature intended that individual employee interests would necessarily take a back seat where they did not go hand-in-hand with the attainment of effective collective bargaining. Consequently, it does not appear that the protection of free choice for the individual employee alone constitutes a satisfactory basis for directing self-determination elections.\textsuperscript{40}

The Board would be faced with some anomalous situations indeed were it to reach any other conclusion. How, for example, could it reconcile the protection of individual employee free choice in the following situations:

1. Cases where "accretions" occur in the employee complement and these new employees are placed in the existing unit without any opportunity to express their desires;\textsuperscript{41}

2. Cases where the Board, acting upon a motion to clarify an existing unit, summarily includes certain employee categories in the unit without ascertaining the desires of the individual employees affected thereby;\textsuperscript{42}

3. Cases where self-determination elections are denied to employees in fringe groups once they have been merged into the over-all contract unit by agreement between the parties.\textsuperscript{43}


\textsuperscript{38} 2 Legislative History of the National Labor Relations Act 1679, 2123, 2159 (1935).


\textsuperscript{40} Two other reasons for directing self-determination elections have been mentioned in past Board decisions: (1) No past bargaining history from which an inference might be drawn of acquiescence in the existing unit, Lone Star Producing Co., 85 N.L.R.B. 1137, 1144 (1949) (Member Reynolds dissenting), clarified, 96 N.L.R.B. 1063 (1951); (2) giving recognition to a unit shown to be practical through a history of actual bargaining, Waterous Co., 92 N.L.R.B. 76, 79 (1950) (Chairman Herzog dissenting).


Before terminating this discussion one final point merits mention. Even apart from the Board's ruling in *D. V. Displays*, there exists another ground for not directing self-determination elections, merely suggested earlier. From its inception the *Zia* doctrine was only intended to apply to true fringe group situations.

Adherence to this principle will . . . tend to insure that the wishes of small groups of employees no longer will be thwarted by the numerical superiority of employee-members of an existing historical unit from which the former have been excluded—a situation formerly brought about by the *small groups being absorbed into the bargaining unit* without first being afforded the opportunity to express their true desires.\(^{44}\)

Why then should *Zia* be controlling where the facts of a given case negate the presence of a fringe group? Cases wherein the unrepresented employees constitute a sizeable group, numerically comparable to or larger than the historical unit;\(^ {45}\) could be distinguished from *Zia* on the facts alone. Presumably, the dissenting Board members in *D. V. Displays* would not quarrel with this approach.

As a matter of conjecture the Board has probably shied away from this approach in the past, despite former Member Murdock's advocacy thereof,\(^ {46}\) because of the alleged danger it poses. It would compel the Board to establish arbitrary standards as to what constitutes a fringe group. While under certain circumstances this desire to eliminate needless "hair splitting" is understandable, it should carry little weight in those cases where, paradoxically, the size of the represented group more closely resembles a true fringe group than does that of the unrepresented group.\(^ {47}\)

II

Type (B). Petitioner, currently representing employees in the existing unit \(X\), now seeks to represent the previously unrepresented group of fringe employees \(Y\) without raising a question concerning representation in the over-all unit \(X + Y\).

\(^{44}\) 108 N.L.R.B. at 1136. (Emphasis added.)

\(^{45}\) See J. R. Simplot Co., 130 N.L.R.B. No. 136 at p. 3 (March 9, 1961), amending 130 N.L.R.B. No. 47 (Feb. 15, 1961); Mountain States Bean Co., 115 N.L.R.B. 1208 (1956); Reynolds Metals Co., 110 N.L.R.B. 812 (1954). These cases are cited only to illustrate situations where the previously unrepresented employees did not constitute a true fringe group. Cf. Bronx County News Corp., 89 N.L.R.B. 1567 (1950); Benner Tea Co., 88 N.L.R.B. 1409 (1950). In *Waterous* the Board attempted to justify these two latter decisions on the tenuous grounds that the previously unrepresented employees did not constitute a *distinct* fringe group and were therefore not entitled to self-determination elections.

\(^{46}\) Item Co., 113 N.L.R.B. 67, 69 n.5 (1954).

\(^{47}\) See cases cited note 45 supra.
The Board has maintained a consistent position when presented with problems of this nature. Since the Zia ruling in 1954, the same analytical approach has been pursued. First the Board ascertains whether the duties, interests and terms and conditions of employment of the unrepresented employees are such that these employees properly belong in the existing unit. If they do, a self-determination election is directed among the employees in this one voting group. Assuming that they cast their ballots for representation, they will be taken to have indicated a desire to be part of the existing unit, and the petitioner may henceforth bargain for them. Given a vote against representation, the existing unit remains intact.

Even during the period 1950-1954, when the Waterous "no self-determination election" concept reigned supreme, the Board nevertheless directed such elections if a petition only raised a question concerning representation among the previously unrepresented fringe employees. Thus well-established precedent furnishes a ready-made solution for those who would continue to direct self-determination elections in Type (B) situations. By expressly choosing in D. V. Displays to forego the convenient path of following Zia under the particular facts presented therein, the Board implicitly left other related problems open for future resolution. Among the first which comes to mind involves the question of what impact, if any, the D. V. Displays ruling will have on the resolution of Type (B) problems.

In analyzing this question it is arguable that a decision to eliminate self-determination elections in the latter-mentioned problems will not necessarily produce the same desirable results produced in D. V. Displays. Thus, in that case, the fringe employees were still afforded the opportunity to vote for or against representation, albeit in the so-called over-all appropriate unit. Theoretically, D. V. Displays might have an indirect adverse effect on fringe employees' opportunities for future representation. This is possible to the extent that the holding in D. V. Displays might deter incumbent unions, which do not enjoy a secure majority standing in their historical units and which are uncertain of the sentiments of the fringe employees, from filing petitions for over-all units. The realities of labor relations, however, dictate against this possibility since unions generally become more firmly en-

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trenched with each succeeding year of "exclusive bargaining representative" status. We can expect, under these circumstances, incumbent labor organizations will not hesitate to petition for broader units, and the heretofore unrepresented fringe employees will vote, as in D. V. Displays, in said over-all appropriate units.

On the other hand, by eliminating self-determination elections in Type (B) circumstances, the Board would, in effect, place a petitioning union in the position of either having to agree voluntarily to modify its original unit request and face an election in the over-all unit, or of having the petition dismissed. Any union reluctant to jeopardize its current majority status in the historical unit might prefer to withdraw its petition.

At first blush this result seems unduly harsh on both the petitioner and the fringe employees. But our concern for the petitioner is soon minimized, for it admitted the appropriateness of the over-all unit by filing the petition. In addition, since it presumably enjoys the benefits associated with a prior history as exclusive bargaining representative (to wit, increased support among employee bargaining-unit members), a petition withdrawal is unlikely. The possibility that fringe employees would lose the right to vote for representation therefore becomes remote.

Assuming the desirability of obviating even this remote possibility, how can such an end be attained? One could argue that Types (A) and (B) are distinguishable since in the latter instance no union has seen fit to place in issue its majority status in the existing unit, and that therefore it would be proper to direct a self-determination election among the fringe employees. Nor is this a novel contention. This is precisely the distinction which the Board first adopted to justify self-determination elections, Waterous notwithstanding, in the Great Lakes Pipe Lines and Boeing Airplane Co. cases. The consequences of endorsing their rationale today remain the same as before. The Board would not direct self-determination elections where a question concerning representation was raised in the over-all unit, but would do so when raised in the fringe group alone.

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51 92 N.L.R.B. 583 (1950).

52 92 N.L.R.B. 716 (1950).

53 The dissenting opinion in D. V. Displays points out the inconsistency of these two rules. 134 N.L.R.B. No. 55 at 9.
The major drawback inherent in such a dualistic approach was succinctly expressed in Member Reynolds’ observation that

if we are to adopt the distinction made . . . to wit, that the particular petitioner sought an election in the fringe group alone whereas here the election is sought in the broader unit, we are indicating that henceforth the Board will decide whether or not to permit an “Armour” Globe election based upon the position taken by the union . . . . I cannot concur with any such rule which substitutes the desires of one of the parties for the Board’s determination as to the type of election which should be held.54

Moreover, these dual standards could take the teeth out of D. V. Displays’ quest for appropriate bargaining units. Any incumbent union willing to forego certification in the over-all unit could file instead a Type (B) petition, and a “no union” vote by the previously unrepresented employees would thereby perpetuate the existing unit. The alternative solution to the dichotomy in the Waterous and Great Lakes Pipe Lines decisions is obvious. These petitions could be treated alike. Self-determination elections would then either be uniformly directed or denied in both instances.

Theoretically, this uniform treatment of petitions is warranted if the Board is motivated by the same desires in both Type (A) and Type (B) problems, namely, to foster collective bargaining by insuring that it takes place within the framework of appropriate units. This goal is accomplished in Type (A) problems by directing one election in the over-all appropriate unit. Similarly, in Type (B) cases the goal is achieved by dismissing the petition for the fringe employees, thus indicating that if the petitioner wishes to represent these employees, it must file a petition for the over-all appropriate unit. To do otherwise in either instance would be to grant these fringe employees the opportunity to maintain their unrepresented status and thereby perpetuate the existing, but otherwise inappropriate, unit.

In practice, however, the Board may feel that the price for reversing Zia in Type (B) problems—to wit, that fringe employees could be deprived of any immediate representation—exceeds the evil sought to be remedied. Further comments in this problem area must await future Board action.

III

Type (C). Petitioner, hitherto a stranger union, requests an over-all unit $X + Y$ including both those employees in the historical unit $X$.

represented by the incumbent (intervenor), and the previously unrepresented fringe employees \( V \).

The key element distinguishing this problem from those discussed above is that the request for an expanded unit originates with the petition of the stranger union rather than the incumbent. Under such circumstances, the incumbent-intervenor and/or the employer normally can be expected to allege that the petitioner's unit request is improper and that the only appropriate unit is the one evidenced by the prior bargaining history between the parties.

The Board focused attention on this general problem area in \textit{Petersen & Lytle} \(^{55}\) in 1945. It held there that the interests of preserving established contract units was a paramount significance. Consequently, an election was directed in the existing unit, and the previously unrepresented employees remained sans voting privileges. The Board concurrently gave its blessing to self-determination elections by pointing out that "our finding in this respect, however, shall not preclude a later determination based upon a new petition and a sufficient showing of representation, that these employees may be offered an opportunity to vote as to their inclusion in the larger unit herein found appropriate."\(^{56}\)

This language was subsequently cited with approval in a host of similar rulings that self-determination elections were proper but had to await the filing of a second petition.\(^{57}\) The Board eventually modified this position by eliminating the requirement that a petitioner go through the motions of filing a second petition,\(^{58}\) and to date, with but one notable exception in \textit{Reynolds Metals Co.},\(^{59}\) the Board has consistently extended 
\textit{Zia}'s scope to comprehend Type (C) situations.\(^{60}\)

\(^{55}\) 60 N.L.R.B. 1070 (1945).

\(^{56}\) Id. at 1073.

\(^{57}\) E.g., Allis-Chalmers Mfg. Co., 84 N.L.R.B. 30 (1949), overruled, Waterous Co., 92 N.L.R.B. 76 (1950); Inman Mills, 82 N.L.R.B. 735 (1949); Mississippi Barge Line Co., 69 N.L.R.B. 1443 (1940); cf. Blackstone Cotton Mill, 63 N.L.R.B. 751 (1945). However, if the previously unrepresented employees themselves constituted a separate appropriate unit, then a self-determination election was directed immediately. Craddock-Terry Shoe Corp., 64 N.L.R.B. 1176 (1945); Pittsburgh Equitable Meter Co., 61 N.L.R.B. 880 (1945).


\(^{59}\) 110 N.L.R.B. 812 (1954). In \textit{Reynolds} the Board distinguished the facts of that case from \textit{Zia} on the ground that a basic appropriate unit was present in \textit{Zia} even absent the fringe group, whereas in \textit{Reynolds} the existing production unit did not by itself constitute an appropriate unit. It is interesting to note that the \textit{Reynolds} rationale has not been relied upon in any subsequent case.

\(^{60}\) E.g., Cook Paint & Varnish Co., 127 N.L.R.B. 1098 (1960), overruled on other grounds,
In Type (A) cases a policy decision whether or not to follow Zia essentially boils down to a choice between two conflicting considerations. Either we protect the minority rights of previously unrepresented employees by directing self-determination elections, or we insure that collective bargaining proceeds on the basis of the most appropriate units by directing elections in over-all units. The preservation of established bargaining relationships is not a relevant consideration since the incumbent union itself seeks to expand the scope of the historical unit.

When analyzing Type (C) problems, however, we must reorient our thinking. For here, the preservation of established bargaining relationships becomes a vital consideration. By directing self-determination elections in Type (C) cases, the Board guarantees the incumbent's right to maintain its status as bargaining representative in the historical unit, whereas direction of an election in the over-all unit flies in the face of the incumbent-employer bargaining history.

Surprisingly little mention has been made of this consideration in Board decisions involving model Type (C) circumstances.61 The Board generally justifies its direction of self-determination elections therein as a means of giving the previously unrepresented employees an opportunity to express their desires62 rather than as a means of protecting the integrity of incumbent unions' existing units. To what degree the preservation of bargaining stability should control the Board's ultimate policy formulation poses a serious problem.

In support of Zia it may be argued that although the Board is disposed to find over-all units more preferable than smaller units, it can not be blinded to what apparently has been a satisfactory and workable relationship. This argument is very persuasive where there has been a bargaining history for all the employees in two (or more) existing units63 and the direction of an over-all election would have a disruptive effect on both bargaining units. However, its applicability to the instant situation is open to question. For here, the historical unit does not encompass the entire employee complement, and directing an over-all

61 But cf. Felix Half & Bros., supra note 60. Note also cases cited note 25 supra, involving established bargaining relationships in two or more contract units.

62 Cases cited note 60 supra.

63 See cases cited note 25 supra.
election would have a less disruptive effect, especially where no well-established pattern of bargaining was discernible.

At this juncture a note of caution is advisable. The profound respect which the Board has normally conferred upon "bargaining history," amply illustrated by the Board's omnipresent reluctance to disturb the contract unit(s) established as a result of collective bargaining,\(^64\) presents a force to be reckoned with. The exalted position which "bargaining relationships" have occupied throughout the Board's twenty-five year tenure is especially significant in that few principles have experienced the similar good fortune of long time survival in the dynamic labor law field. Accordingly, the prospect of disregarding the magical words "bargaining history" will undoubtedly be met with many cries of displeasure.

It is suggested that this displeasure may often be more emotional than rational. Thus in \textit{Mountain States Bean Co.},\(^65\) for example, the petitioner sought a plant-wide unit of fifty-eight employees and the incumbent union intervened to preserve the unit of twenty-one bean packaging employees it currently represented. Relying on this bargaining history the Board found that either unit might be appropriate and directed self-determination elections in two voting groups. This unwarranted dedication to the preservation of a historical unit was convincingly criticized in the dissenting opinion of Members Peterson and Murdock:

\begin{quote}
[I]t is extremely unrealistic to make the presence of that factor [bargaining history] alone completely conclusive where the result may well be to perpetuate in existence a unit consisting of an arbitrary group of employees such as the bean packaging employees involved herein. . . .

There can hardly be any question that if the unit placement of the bean packaging employees had been presented to the Board in the first instance, they would have been included in the overall production and maintenance unit. This is where they properly belong and this is where we would place them. Accordingly, we would direct an election only in the overall unit.\(^66\)
\end{quote}

Under such circumstances any impediment to the stability of the existing bargaining relationship between the employer and bean packaging em-

\(^{64}\) E.g., Hartford Elec. Light Co., 122 N.L.R.B. 1421 (1959); West Virginia Pulp & Paper Co., 120 N.L.R.B. 1281 (1958); Murray Co., 107 N.L.R.B. 1571 (1954); Ward Baking Co., 101 N.L.R.B. 419 (1952); H. A. Satin & Co., 97 N.L.R.B. 1001 (1952); see cases cited note 25 supra. However, the Board did not accord conclusive weight to a bargaining history which was clearly repugnant to its established policy. General Elec. Co., 107 N.L.R.B. 70, 72 (1953).

\(^{65}\) 115 N.L.R.B. 1208 (1956).

\(^{66}\) Id. at 1211-12.
ployees would seem of little consequence compared to the desirability of remedying this unit.\textsuperscript{67}

A policy decision to reverse \textit{Zia} in Type (C) cases would therefore enable the Board to comply more fully with Section 9(c)'s mandate that labor and management bargain collectively within appropriate units. The significance of this result should not be underestimated. Furthermore, the Board will be indirectly benefited to the extent that the knotty "pooling of votes"\textsuperscript{68} problem is avoided. Even a cursory examination of existing Board law re "pooling" reveals the inestimable value of avoiding the complexities and perplexities which characterize this entire doctrine.\textsuperscript{69}

A reversal of \textit{Zia} in Type (C) situations, on the other hand, will not automatically provide a panacea. Thus the possibility of "no representation" might be increased, a possibility which would neither enhance the cause of collective bargaining nor the stability of bargaining relationships. A "no representation" result is possible since the election would only be conducted in one voting group (three choices on each ballot—petitioner, intervenor or no union) with the outcome on an all

\textsuperscript{67} As suggested earlier in the article, the Board might well have refused to grant a self-determination election in \textit{D. V. Displays} on the grounds that the previously unrepresented employees did not constitute a true fringe group.

\textsuperscript{68} The pooling technique was first enunciated by Members Murdock and Peterson, dissenting in \textit{Pacific Intermountain Express Company}, 105 NLRB 480, 482-85. The Board later adopted this procedure in \textit{American Potash and Chemical Corporation}, 107 NLRB 1418, 1427, footnote 12. The Board's pooling procedure is explained by the following illustration: A union currently represents a bargaining unit of 100 employees. It seeks to add 20 additional employees to the present unit (or, for another example, a rival union could seek an over-all unit of 120 employees). In this situation, the Board would direct two elections—one for the employees currently represented, and one for the employees sought to be added to the unit. Assume that the represented employees voted 55-45 \textit{against} the union, but the 20 additional employees voted 20-0 \textit{for} the union. The Board would then reason that the 20 employees had voted to be included into the broader unit, and thus the appropriate unit would be expanded from 100 to 120 employees. As 65 (45+20), or a majority, of the employees concerned voted for the union and only 55 voted against the union, the union was therefore entitled to be certified as the collective bargaining agent for the entire unit of 120 employees.

However, if the voting results were reversed—that is, 55-45 \textit{in favor} of the union, and 20-0 \textit{against}, the Board would not pool the votes, but the union would continue to be the bargaining agent for the 100-employee unit, while the remaining 20 employees would remain unrepresented.

or nothing basis. Employees would either gain representation in the over-all unit or go unrepresented, whereas under Zia the employees get two additional bites at the "representation apple." The previously represented employees can perpetuate the existing unit by voting for the intervenor, and the fringe employees could then obtain representation by selecting the petitioner or, alternatively, the petitioner could also represent either the entire unit or the existing unit. Furthermore, if a large majority of employees in the fringe group vote for the petitioner, they could unseat the incumbent union even if a majority of the employees in the existing unit still favored representation by the incumbent. Whether this result is desirable is indeed open to question.

In assessing the above two possibilities it should be emphasized that we are dealing with hypotheticals. Accordingly, one tends to be led astray by a desire to conjure up every conceivable, though perhaps implausible, result. Theoretically, if Zia is reversed these results are possible, but the Board's actual experience might well be to the contrary.

Although the foregoing discussion has by no means exhausted all the ramifications of the self-determination election doctrine as applied to previously unrepresented fringe groups, it is hoped that it has provided the reader with a sampling of the diverse factors which the Board will be called upon to weigh in its future rulings on the Zia problem. D. V. Displays, by its very terms, constitutes a limited retreat from Zia. It may, however, set the stage for a comprehensive Board reevaluation of this entire area of representation case law.


71 One last potential problem worthwhile noting concerns stipulated units. In effect, by accepting stipulated units, which would otherwise fail to satisfy "appropriate unit" standards, the Board allows the parties to broaden the normal unit exclusions. Is it consistent for the Board to initially pursue a policy of accepting stipulated units and then at a later date refuse to permit the incumbent union to go to an election in its existing unit if a stranger union requests certification in the over-all unit?
ECONOMIC EVIDENCE IN RIGHT-OF-WAY LITIGATION

SIDNEY GOLDSTEIN*

Reviewing the law of compensation applicable to the partial taking of real estate and the current evidentiary practices for proving land value, the author proposes the courtroom use of severance damage studies of highway-severed parcels to achieve greater accuracy in the measure of compensation. Dr. Goldstein discusses the need for these studies as well as their reliability with a view toward overcoming any evidentiary obstacle posed by the hearsay rule.

INTRODUCTION

Because of the vast sums of public expenditures involved, acquiring the lands needed for highway right-of-way on an equitable and timely basis constitutes one of the major tasks facing highway builders today. For example, an estimated three-fourths of a million parcels will be required over the fifteen-year construction period of the National System of Interstate and Defense Highways alone. This system, designed to connect and serve all major urban centers of the United States, is probably the largest peacetime engineering project undertaken by man. The expenditures in men, materials, construction and land will approximate forty billion dollars by the time this 41,000-mile system has been completed, and of this total cost over six billion dollars will be spent for the approximately one and one-half million acres of land needed.1

Approximately twice this amount of property will be needed for the other federal-aid highway systems. In addition to the newer Interstate System, there exists the ABC program of federal aid which provides

* Chief, Economic Impact Research Branch, Highway and Land Administration Division, Office of Research, U.S. Bureau of Public Roads; Chairman, Committee on Indirect Effects of Highway Improvements, Highway Research Board; B.A., Brooklyn College; LL.B., Georgetown University Law Center; M.A., Ph.D., American University; Member of the Bars of the United States Supreme Court and the District of Columbia.

This article is based on a paper presented at the Forty-First Annual Meeting of the Highway Research Board, January 8-12, 1962. The author is particularly grateful to David R. Levin, Chief, Highway and Land Administration Division, U.S. Bureau of Public Roads, for his continued interest throughout the project and to William H. Stanhagen, formerly Chief, Highway Laws Project, Highway and Land Administration Division, for his help during the planning stage. Assistance in research by Joseph T. Sweeney, third year law student, Georgetown University Law Center, and Carrie L. Fair, third year law student, Howard University Law School, is also gratefully acknowledged.

for the improvement of highways and streets by states; it comprises a primary system of major routes and a secondary system of feeder roads together with their urban connections.²

Of the total cost of highway right-of-way acquisition, payments for severance damages to people whose property has been partially taken have been found to constitute a significant portion. For instance, ninety per cent of the mileage required for the Interstate System will be obtained from rural areas, and the acquisition of almost any rural parcel will involve a partial taking. Somewhat sketchy information from several states suggests that in some places such damage payments range up to as much as seventy per cent of right-of-way costs,³ although lower figures may be found in others. Such tremendous expenditures have made it incumbent upon individuals involved in land acquisition to seek the best means for determining what is proper compensation in these instances. This has led to the severance damage studies herein discussed.

A general need for economic evidence to assist in the calculation of "just compensation" permeates the entire eminent-domain field. The need is particularly pressing in the partial taking situation because such takings are so numerous and by their nature give rise to especially difficult valuation problems. Presently, valuation by appraisers and realtors is based primarily upon experience with entire parcels of land. When faced with the evaluation of a remainder, they must ascertain the damages caused by severance and, in some states, must segregate and determine the benefits to the property due to the highway.

Severance damage studies, instituted by several state highway departments in cooperation with the Bureau of Public Roads, are research projects based upon the premise that the subsequent history of similar remainder parcels provides a reliable norm upon which to base an estimate of the effects a proposed highway will have on the parcel currently being appraised. These studies rely upon a case history approach, collecting information on subsequent sales and developments upon the property taken in order to measure changes in the value and use of the remainder in the period after highway construction. The use of a uniform technique in compiling case histories permits a comparative analysis of cases as well as the development of meaningful relationships from their aggregation.

This article suggests the use of severance damage studies as direct evidence of value and as supporting data upon which an expert witness

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can rely. However, relevancy and hearsay objections may pose serious problems. A judicious choice of case histories to fit within a particular jurisdiction's comparable sales rules of evidence seems sufficient to meet the relevancy objection, for the comprehensive nature of each case history would insure an adequate showing of comparability. The hearsay difficulties are more serious. While some liberal courts have allowed condemnation value expert witnesses to rely upon hearsay in forming their opinions, survey studies, if hearsay, seem to be everywhere excluded in eminent-domain proceedings as independent evidence. Of course, the hearsay objection vanishes when the opinion witness has personally inspected the studied parcels and thereby made them part of his own experience.

In view of the need for severance damage studies and their inherent reliability, it is proposed that courts reexamine their position. These studies can fill in the gaps in evidentiary practice in litigation and can assist courts and juries in their decision-making roles. Both the public and the individual property owner will benefit from any reduction of guesswork that may be inherent in courtroom valuation.

I

CURRENT LAW AND EVIDENTIARY PRACTICES

In order to comprehend fully the need for severance damage studies in right-of-way litigation, it is necessary to appreciate the added valuation difficulties caused not only by the nature of the partial taking situation, but also by the complex legal situation within which the appraiser works. Hence, before treating the studies themselves and the evidentiary obstacles they must withstand, an examination of the present law of compensation and proof of land value will be helpful.

The requirement of the federal and the several state constitutions that "just compensation" be made to the owner of all private property taken by the exercise of eminent domain requires ascertaining in every such instance the value of the property taken. 4 In the great majority

4 U.S. Const. amend. V, which provides "nor shall private property be taken for public use, without just compensation," binds the federal government, while the due process clause of the U.S. Const. amend. XIV, § 1, as construed in Chicago, B. & Q.R.R. v. Chicago, 166 U.S. 226 (1897) imposes substantially the same requirements on the states. Several state constitutions include a similar provision for the taking of property, e.g., N.Y. Const. art. I, § 7; Ohio Const. art. I, § 19; Ore. Const. art. I, § 18; several other state constitutions also guarantee such compensation whenever property is merely damaged by eminent domain, e.g., Cal. Const. art. I, § 14; Ga. Const. art. I, § 3, para. 1; Mo. Const.
of cases where the condemned real property is of such a nature as to be readily saleable on the open market,\(^6\) its value for the purpose of compensation is measured by the market value criterion, namely, "the amount of money which a purchaser willing but not obliged to buy the property would pay to an owner willing but not obliged to sell it, taking into consideration all uses to which the land was adapted and might in reason be applied."\(^6\) Under that criterion all the elements of value which contribute to the saleable character of the land are relevant; these encompass all the facts which an owner would naturally and properly press upon a prospective buyer's attention and which would naturally influence an ordinarily prudent person desiring to purchase.\(^7\) Thus the owner of condemned land is entitled to have it evaluated in light of the highest and best use to which it can reasonably be adapted, irrespective of its current use or the owner's immediate plans for its use.\(^8\)

Computing "just compensation" when only part of a tract of land is condemned raises a new series of valuation problems. In all states the amount of severance damage to the part not taken must be computed to augment the award, and in most states benefits enhancing the property must be determined to be set off against the award. The complexity of the various state laws on this subject produces difficult problems for the land appraiser in segregating and specifying the elements properly attributable to damage and benefit.

The owner of a tract of real property, only part of which is condemned, is entitled to recover both for the value of the property taken\(^9\) and any

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\(^6\) Where land is not marketable for the exceptional use to which it has been adapted, the "market value" criterion is replaced by the "intrinsic value" criterion. Newton Girl Scout Council v. Massachusetts Turnpike Authority, 335 Mass. 189, 138 N.E.2d 769 (1956) (summer camp); Assembly of God Church v. Vallone, 150 A.2d 11 (R.I. 1959) (church).

\(^7\) Assembly of God Church v. Vallone, supra note 5, at 15; see Olson v. United States, 292 U.S. 246 (1934); Housing Authority v. Lustig, 139 Conn. 73, 90 A.2d 169 (1952); Hoy v. Kansas Turnpike Authority, 184 Kan. 70, 334 P.2d 315 (1959); State ex rel. Dep't of Highways v. Tolmas, 238 La. 1, 113 So. 2d 288 (1959); State Highway Comm'n v. Superbilt Mfg. Co., 204 Ore. 393, 281 P.2d 707 (1955).

\(^8\) Housing Authority v. Lustig, supra note 6; see Olson v. United States, supra note 6.


This value of the property taken includes any increased value which may inhere in it because it is part of a larger tract. People ex rel. Dep't of Pub. Works v. Loop, 127 Cal. App. 2d 786, 274 P.2d 885 (Dist. Ct. App. 1954); State Highway Bd. v. Bridges, 60 Ga. App. 240, 3 S.E.2d 907 (1939); Department of Pub. Works & Bldgs. v. Griffin, 305 Ill. 585, 137 N.E. 523 (1922).
severance damage to the remainder not taken.\textsuperscript{10} Severance damages include any increased value which may have inhered in the remainder as part of the larger tract;\textsuperscript{11} they encompass any present or prospective depreciation in the remainder’s market value which naturally and proximately results from the proposed use of the condemned part. Any aspect of the proposed use which may detrimentally influence a prospective purchaser of the remainder is properly considered in ascertaining these damages.\textsuperscript{12}

Prospective benefits enhancing the market value of land from which condemned land has been severed, and attributable to the particular public improvement for which the condemnation has been made, have been set off against the compensation to which the landowner would otherwise be entitled.\textsuperscript{13} Benefits have been classified as either special or general; the former accrue in a peculiar way to a particular tract because of its direct relation to the public improvement, while the latter accrue to the general community as well. In highway condemnation cases, courts have usually distinguished between these two types of benefits on the basis of whether they accrue only to lands abutting the highway or to nonabutting lands as well.\textsuperscript{14} Thus benefits accruing to nearby lands which do not abut the highway are regarded as general benefits,\textsuperscript{15} while benefits accruing to both abutting lands, no part of

\begin{itemize}
\item \textsuperscript{14} Louisiana Highway Comm'n v. Grey, 197 La. 942, 2 So. 2d 654 (1941); State ex rel. State Highway Comm'n v. Young, 324 Mo. 277, 23 S.W.2d 130 (1929); see Koelsch v. Arkansas State Highway Comm'n, 223 Ark. 529, 267 S.W.2d 4 (1954); State Highway Comm'n v. Bailey, 212 Ore. 261, 319 P.2d 906 (1957). See also McRea v. Marion County, 222 Ala. 511, 133 So. 278 (1931); Board of Comm'rs v. Gardner, 57 N.M. 478, 260 P.2d 682 (1953).
\item \textsuperscript{15} Louisiana Highway Comm'n v. Grey, supra note 14.
\end{itemize}
which has been taken for the highway, and those which have been partially condemned are regarded as special benefits.\(^{16}\)

Whenever part of a tract of land is taken by eminent domain, the landowner’s “just compensation” is further affected by whichever rule of benefit setoff prevails under local state law. Accordingly, either (1) general and special benefits may be set off against both the value of the land taken and the severance damages to the remainder;\(^{17}\) (2) general and special benefits may be set off only against the severance damages;\(^{18}\) (3) only special benefits may be set off against the value of the land taken and the severance damages;\(^{19}\) (4) only special benefits may be set off against the severance damages;\(^{20}\) or (5) no benefits of

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\(^{16}\) State v. Smith, 237 Ind. 72, 143 N.E.2d 666 (1957); State ex rel. State Highway Comm’n v. Young, 324 Mo. 277, 23 S.W.2d 130 (1929).


any kind may be set off.\textsuperscript{21} The cost of highway right-of-way acquisition, which necessarily involves much partial taking, is substantially affected by whichever setoff rule is followed.\textsuperscript{22}

The practice of setting off both general and special benefits has been constitutionally sanctioned as perfectly consistent with the property owner's right of full indemnification,\textsuperscript{23} but the setoff of general benefits


\textsuperscript{21} Iowa Const. art. 1, § 18; Okla. Const. art. 2, § 24.

\textsuperscript{22} To illustrate, suppose that the original value of a whole parcel is $200,000, the value of the land acquired is $80,000, the severance damage is $20,000, the special benefit is $40,000 and the general benefit is $50,000. Depending on the prevailing rule, the compensation due the owner is indicated in the following chart.

<table>
<thead>
<tr>
<th>Prevailing Rule</th>
<th>Compensation Due Owner</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Where the amount payable to a land-owner for land taken or damages to the remainder can be offset by any \textit{special} and \textit{general} benefits: $80,000 +$20,000 = $40,000 =$50,000.</td>
<td>$10,000</td>
</tr>
<tr>
<td>2. Where \textit{special} benefits may be used to offset damages to the remainder only: $80,000 +$0 ($20,000 =$40,000).</td>
<td>$80,000</td>
</tr>
<tr>
<td>3. Where \textit{special} benefits may be applied against the cost of land acquired and damages to the remainder: $80,000 +$20,000 =$40,000.</td>
<td>$60,000</td>
</tr>
<tr>
<td>4. Where both \textit{special} and \textit{general} benefits may be deducted but only from any damage to the remainder: $80,000 +$0 ($20,000 =$40,000 =$50,000).</td>
<td>$80,000</td>
</tr>
<tr>
<td>5. Where no offset of benefits is permitted: $80,000 +$20,000 =$.0.</td>
<td>$100,000</td>
</tr>
</tbody>
</table>

\textsuperscript{23} McCoy v. Union Elevated R.R., 247 U.S. 354, 365-66 (1918); Board of County
has been disallowed in some states as too speculative to be assessable and in others as an unjust exactment from the owner of partially condemned land for benefits equally enjoyed by his neighbor without charge. The setoff rules further vary as to the elements of compensation from which benefits may be deducted. Since benefits are one of the elements enhancing the property's market value, only the depreciation of which is compensable, all but two states allow benefits to be set off against severance damages. Furthermore, some states allow setoff against both the value of the land taken and severance damages primarily on the rationale that such setoff is the only just allocation of cost between the public treasury and the private property owner. However, the requirement of some state constitutions that "just compensation" be made in money has precluded setoff against the value of the land taken.

The several considerations incident to ascertaining the condemnee's "just compensation" in partial taking cases have resulted in two judicially-created formulas. Under the "before and after" formula, the condemnation tribunal always appraises the value of the entire tract of land before the partial taking. Then if no benefits are to be set off, it appraises the remainder without regard to any expected benefits. However, if any benefits can be considered, the remainder is appraised in light of those anticipated benefits which can properly be set off. As an alternative, the "value plus damages" formula provides a somewhat more complex method for arriving at the same result. Under this


24 State v. Hudson County Bd. of Chosen Freeholders, 55 N.J.L. 88, 25 Atl. 322 (Sup. Ct. 1892); Hempstead v. Salt Lake City, 32 Utah 261, 90 Pac. 397 (1907).

25 Louisiana Highway Comm'n v. Grey, 197 La. 942, 2 So. 2d 654 (1941); Petition of Reeder, 110 Ore. 484, 222 Pac. 724 (1924); Demers v. City of Montpelier, 120 Vt. 380, 141 A.2d 676 (1958).


27 See Bauman v. Ross, 167 U.S. 548, 574-84 (1897).


30 Hamer v. Iowa State Highway Comm'n, supra note 29.

The concepts of value relating to "just compensation" and the formulas integrating them can be utilized in court only insofar as the rules of evidence permit. Market value is not simply an inherent quality of the property but is largely a reflection of the state of mind of the public with respect to that property. There are two commonly acceptable means of proving this state of mind: (1) deduction from the prices paid in recent sales of the same or similar property which are admitted as evidence of market value; and (2) testimony by qualified witnesses as to the value they estimate the public would attach to the particular property taken or damaged by the exercise of eminent domain.

While prior sales of the condemned property proximate in time and voluntarily bargained for in good faith are admissible evidence of the property's market value, such sales are not likely to be available in most cases. Thus it is to evidence of the sales of "comparable" property that one must ordinarily look for an indication of value.

Although comparable sales evidence is universally admissible to cross-

35 See cases cited note 33 supra.
36 See cases cited notes 33 and 34 supra.
examine opinion testimony,39 a minority of four states deny it any probative force as evidence of market value.40 However, the law of the great majority seems to attest to the soundness of admitting such sales as direct evidence of market value. Thirty states expressly allow such sales as independent evidence of market value;41 those of the remaining states, whose courts have considered this kind of evidence, all tend to give it some affirmative probative value,42 and there has been a

39 State v. Peek, 1 Utah 2d 263, 273, 265 P.2d 630, 637 (1953); e.g., Templeton v. State Highway Comm'n, 254 N.C. 337, 118 S.E.2d 918 (1961); Pittsburgh Terminal Warehouse & Transfer Co. v. Pittsburgh, 330 Pa. 72, 198 Atl. 632 (1938).


42 District of Columbia Redevelopment Land Agency v. 61 Parcels of Land, 98 U.S. App. D.C. 367, 235 F.2d 864 (1956) (admissible to support appraiser's expert testimony but subject to the court's discretion); Mississippi State Highway Comm'n v. Rogers, 236 Miss. 800, 112 So. 2d 250 (1959) (admissible to support opinion testimony); Clark County School Dist. v. Mueller, 348 P.2d 74 (Nev. 1960) (dictum); In re Ohio Turnpike Comm'n,
noticeable changeover recently in which a number of states have adopted the majority rule.\textsuperscript{43}

Very cogent reasons support the admissibility of such sales either as independent evidence of market value or in support of opinion testimony. Market value, the criterion of "just compensation," is the price at which property sells in the open market. Such sales, when made under normal and fair conditions, are by their very nature a more valid indication of market value than the speculative opinions of witnesses.\textsuperscript{44} When offered in support of such testimony, sales evidence necessarily enhances the testimony, and when offered as independent evidence, provides a firm basis for any condemnation award.

The inherent drawback of evidence of recent sales of comparable property is the multitude of collateral issues which each sale raises. For each such sale proffered in evidence, the courts often decide as preliminary questions of fact the numerous issues of comparability, proximity and voluntariness hereinafter discussed. Furthermore, for each sale admitted in evidence, the jury must decide wherein and to what extent the recently sold parcel differs from the condemned parcel and make allowance for such difference in arriving at the latter's value.\textsuperscript{45} The multitude of these collateral issues, especially when multiplied by the number of comparable sales introduced, may substantially impede the valuation procedure by their digressive effect. For this reason the number of comparable sales admissible in any one case is regulated by the court.\textsuperscript{46}

\textsuperscript{43} E.g., County of Los Angeles v. Faus, 48 Cal. 2d 672, 312 P.2d 680 (1957); Redfield v. Iowa State Highway Comm'n, 251 Iowa 332, 99 N.W.2d 413 (1959); Village of Lawrence v. Greenwood, 300 N.Y. 231, 90 N.E.2d 53 (1949).

\textsuperscript{44} Stewart v. Commonwealth, 337 S.W.2d 880, 884 (Ky. 1960); State v. Peek, 1 Utah 2d 263, 272, 265 P.2d 630, 636 (1953).

\textsuperscript{45} Forest Preserve Dist. v. Kean, 298 Ill. 37, 131 N.E. 117 (1921).

\textsuperscript{46} Stewart v. Commonwealth, 337 S.W.2d 880, 883 (Ky. 1960); State v. Peek, 1 Utah 2d 263, 273, 265 P.2d 630, 637 (1953).
and in four states such sales are not admissible in direct evidence at all.\(^{47}\) It would seem that the greater the number of "comparables" that are admitted, the greater would be the reliability of the end product as a value indicator.

Certain requirements of similarity and proximity restrict the admission of all such sales of comparable property. The property sold must be sufficiently similar in character and geographically proximate to the condemned property to be useful in reflecting the latter's market value.\(^{48}\) The exact degree of each qualification required lies largely within the discretion of the trial court.\(^{49}\) Similarity in the topographical features and the size and shape of the two parcels may be considered.\(^{50}\) Where nearness to schools, churches, transportation and shopping centers substantially influences the value of property, only sales of property located a similar distance from these public facilities may be admissible as comparable.\(^{51}\) Where the highest and best use of a tract of land is for agricultural purposes, sales of more distant property with soil of a similar character may be deemed sufficiently similar to be admissible.\(^{52}\) Where the condemned property has been found adaptable for a special highest and best use such that sales of similarly adaptable property in the same community are not available, the requirement of geographical proximity has been largely abrogated.\(^{53}\) For the same reasons, the market value of severed lands with a special highest and best use due to their adjacency and access to a major highway ought to be provable by the sales price of a comparable remainder in another community.

Furthermore, sales of similar land, to be admissible, must be so proximate in time to the date when the condemned property was taken as to furnish an indication of value at the latter date.\(^{54}\) The permissible

\(^{47}\) Cases cited note 40 supra.


\(^{49}\) Cases cited note 48 supra.

\(^{50}\) Vann v. State Highway Dep't, 95 Ga. App. 243, 97 S.E.2d 550 (1957) (size); Stewart v. Commonwealth, 337 S.W.2d 880 (Ky. 1960).

\(^{51}\) See State ex rel Dep't of Highways v. Barber, 238 La. 587, 115 So. 2d 864 (1959).


\(^{53}\) See Knollman v. United States, 214 F.2d 106 (6th Cir. 1954) (suitable for industrial development).

interval depends partly on the stability of market conditions and the availability of more recent sales.\textsuperscript{55}

Finally, recent sales of the condemned property and recent sales of similar property, in order to be admissible, must have been voluntarily made and bargained for in good faith.\textsuperscript{56} Where the threat of condemnation or the need to sell out or purchase with undue haste has induced either party to consummate a sale, such a sale is not admissible in evidence,\textsuperscript{57} and a majority of the states exclude all sales to a condemnor or purchaser with the power of eminent domain.\textsuperscript{58}

When a sale of similar property has been ruled admissible, it is merely deemed sufficiently similar to be helpful in evaluating the condemned property. Both parties are then entitled to introduce evidence of the differences between the two properties to show wherein and to what extent the condemned property's value is greater or lesser.\textsuperscript{59}

When such sales are admitted as independent evidence of value, the sales price must be proved with as much formality as other material facts. Only those who were parties or brokers to such sales or who in some other manner knew of the price paid of their own knowledge are competent to testify.\textsuperscript{60} Accordingly, the mere recital of consideration in a deed and other hearsay sources of price information are not admissible.\textsuperscript{61} However, the federal revenue stamps affixed to real estate deeds have been admitted as evidence of the amount of consideration.\textsuperscript{62}

In addition to the determination of value from comparable sales, the second major means of ascertaining market value has been the testi-

\textsuperscript{55} Cases cited note 54 supra.


\textsuperscript{59} Forest Preserve Dist. v. Kean, 298 Ill. 37, 131 N.E. 117 (1921).

\textsuperscript{60} United States v. Katz, 213 F.2d 799 (1st Cir) cert. denied, 348 U.S. 857 (1954); City & County of Denver v. Quick, 108 Colo. 111, 113 P.2d 999 (1941).


mony of qualified witnesses, all of whom must possess firsthand knowledge of the land and the market conditions in the area.\(^63\)

Those who have bought and sold, valued or managed real estate in the community are deemed to have acquired therefrom such skill in appraisal and such knowledge of property values as to be real estate experts competent to give opinion testimony.\(^64\) They must base their testimony on characteristics and conditions they have actually observed rather than hypothetical conditions.\(^65\) Only in the absence of a market value are specialized experts competent to give opinion testimony regarding the property's intrinsic value.\(^66\) Real estate expert testimony has been regarded as the most practical medium of presenting to the jury the appraisal hypotheses on which either party seeks to have the condemnation award based.\(^67\)

In a majority of jurisdictions, neighboring residents and businessmen are deemed competent to give opinion testimony, based upon their familiarity with local real estate values rather than any special skill in the appraisal sciences.\(^68\) The speculative nature of such testimony is perhaps best illustrated by a recent Missouri highway condemnation case\(^69\) in which the only opinion witnesses on value were two neighboring farmers. An award of $400 was determined by commissioners. Both parties appealed for a jury trial. On the "before and after" basis, one farmer's testimony would have warranted a $4,725 award, and the other's testimony, a $2,500 award. Apparently influenced by these lay witnesses, the jury awarded $2,000. Where there are no available real estate experts

\(^63\) Shelby County v. Baker, 269 Ala. 111, 110 So. 2d 896 (1959); Lazenby v. Arkansas State Highway Comm'n, 231 Ark. 601, 331 S.W.2d 705 (1960); Forest Preserve Dist. v. Krol, 12 Ill. 2d 139, 145 N.E.2d 599 (1957); State ex rel. State Highway Comm'n v. Devenyns, 179 S.W.2d 740 (Mo. App. 1944).


\(^68\) E.g., Shelby County v. Baker, 269 Ala. 111, 110 So. 2d 896 (1959); State v. McDonald, 88 Ariz. 1, 352 P.2d 343 (1960); Taney County v. Addington, 304 S.W.2d 842 (Mo. 1957); South Carolina State Highway Dep't v. Hines, 234 S.C. 254, 107 S.E.2d 643 (1959).

\(^69\) Taney County v. Addington, supra note 68.
familiar with the condemned property and values in its surrounding area, such lay witnesses may be the only available means of proving value.

Finally, most courts allow the owner of the condemned property to give his opinion of the property’s value by virtue of the knowledge he is presumed to have as owner.70 Although this type of testimony is competent as a matter of law, the condemnee’s natural bias has been said to derogate from the weight which a jury would otherwise accord it. For this reason it has been suggested that such testimony serves little more than to enable the owner to personally present his claim to the jury.71

All opinion testimony on the condemned property’s value must naturally be based on the substantive rules of valuation heretofore discussed.72 Thus in support of his opinion, the condemnation value witness on direct examination usually gives the facts on which it is based73 to indicate the extent of his familiarity with the condemned property and the state of the market. This familiarity naturally affects the weight which the jury will accord to the testimony, and such supporting evidence has been held indispensable to sustain the opinion.74 The reasons or general principles on which the opinion is based may also be given on direct examination,75 even though they are frequently left to be extracted on cross-examination.

The opinion witness, with few exceptions,76 can testify on direct examination only to such data as would be admissible as independent evidence;


72 E.g., Indianapolis & Cincinnati Traction Co. v. Wiles, 174 Ind. 236, 91 N.E. 161 (1910); see Mississippi State Highway Comm'n v. Hillman, 189 Miss. 850, 198 So. 565 (1940); City of Houston v. Fisher, 322 S.W.2d 297 (Tex. Civ. App. 1959).


74 State Highway Comm’n v. Byars, 221 Ark. 845, 256 S.W.2d 738 (1953).


76 It should be noted that in some jurisdictions comparable sales are admissible in support of opinion testimony on market value, even though not admissible as independent evidence. District of Columbia Redevelopment Land Agency v. 61 Parcels of Land, 98 U.S. App. D.C. 367, 235 F.2d 864 (1956); Mississippi State Highway Comm’n v. Rogers, 236 Miss. 800, 112 So. 2d 250 (1959); In re Ohio Turnpike Comm’n, 164 Ohio St. 377, 131 N.E.2d 397 (1955), cert. denied, 352 U.S. 806 (1957).
however, the hearsay rule has been somewhat relaxed in its application to the supporting data offered by expert opinion witnesses. The Oregon Supreme Court seems to have fashioned another exception to the hearsay rule. They have held that a real estate appraiser may properly introduce as supporting evidence for his expert opinion reports made by other investigators which he deems reliable. Other courts have indicated a similar inclination.

The foregoing discussion makes it readily apparent that the most important and accurate method of proving land value is the utilization of comparable sales, either as direct evidence or as a factor upon which the expert witness can base his opinion. It would seem that the reliability of any value judgment increases in direct proportion to the number of comparable sales allowed to be used. However, since the collateral issues raised by the present rules of evidence have often forced the courts to severely limit the number of comparables, there exists a need for some evidentiary tool so reliable as to overcome the rationale underlying the obstacles presently blocking their greater use. This is one purpose of the severance damage study.

SEVERANCE DAMAGE STUDIES

Estimates of highway effect made without careful reference to the experience of comparable situations have been found to result in serious discrepancies. For example, one study revealed that a highway parcel of land in Michigan which was expected to have a value of only 5% of its worth prior to the highway turned out in fact to have an "after" value of 115% of its "before" value. In Ohio researchers have noted that there has been no instance of an owner having to sell a remainder parcel for as little as 10% of its former value, although estimates of 90% damages for landlocked property are reported to have been fairly common.


78 State Highway Comm'n v. Arnold, supra note 77.


In light of such results, highway department personnel and appraisers alike have recognized the need for new factfinding techniques to aid the highway and public officials in improving the measure of "just compensation" for property acquisition. As a step in this direction, a nationwide program of right-of-way research has begun, aimed at achieving more accurate indicators of value for use in legal proceedings. Appraisers and right-of-way specialists have endorsed these land value studies. Messrs. Balfour and Hess of the California Division of Right of Way, Lindas of Oregon, Eichhorn of Ohio, Kramer of New Jersey, Arnold of Washington and many other state highway department officials have all indicated their support.

Severance damage studies are a part of this larger and continuous program instituted by several state highway departments in cooperation with various universities, the Bureau of Public Roads, appraiser groups and the Land Economics Committee of the Right of Way Association. At present there are forty-two states that have either undertaken a severance damage study or have it in the planning phase prior to the collection of data.

As stated at the outset, severance damage or partial taking studies are usually case studies of the sales experience of individual parcels of land that have been severed by a highway taking. Because it is no longer part of the original parcel, the value of the remaining parcel generally suffers a certain amount of damage over and above its market value as a piece of land independently considered. Likewise, benefits generally accrue to the remainder due to the new highway's effect. By recording and analyzing the subsequent histories of remainder parcels, the severance damage study seeks to determine whether these damages and benefits in fact occurred, and if so, to what extent.

The case histories are the raw materials, the basic data upon which the study depends. These case histories can, of course, be published individually. More often, the case histories of a particular area through

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83 For a discussion of how such studies are made and their importance, see Garbarino, The Effect of "High Lines" on the Market Value of Abutting Properties, April 1961 (unpublished paper presented to the Legal Committee, Edison Electric Institute, Boca Raton, Fla.).
which a highway has passed are gathered together and published in aggregate. When grouped in this manner, various deductions and inferences are drawn through statistical methods so that meaningful relationships can be developed. While the ideal program of partial taking analysis would include case histories of every severed parcel in an area, as a practical matter this is seldom possible. In this sense a study is a sampling, but particular care is taken that a representative and sufficiently complete selection is made, consistent with modern statistical methods.

A severance damage study is designed to measure benefits as well as damages. To segregate and determine benefits, control parcels or areas are often used in the studies. These are parcels of nonhighway-severed property which otherwise closely resemble the study parcel. They provide a standard or base of reference to which partial taking data can be related to show highway effects. The type of control parcel selected will depend upon whether both general and special benefits are being sought. If only special benefits are desired, a control parcel may be selected in the immediate area. It is important that control parcels be carefully selected for similarity to the study parcel in such characteristics as land use, improvements, size and terrain, and proximity to shopping facilities, employment centers, schools, churches and the like.

A severance damage study may be begun when the highway is constructed. But the important work is done after the highway's opening. Into each case history is added the subsequent sales and uses to which the property is applied. All the study's details will be used to establish comparability, but it is to the important resale figures and subsequent uses that an appraiser will look in using the studies to arrive at the "after" value estimate of the parcel under consideration.

The severance damage study is specifically designed to meet the appraiser's need for a reliable indicator of "after" values. The dearth of factual information about what happens to remainder properties is widely recognized. Without such information his estimate may be reduced to speculation, for the task is difficult. His appraisal of the "before" and "after" values is made contemporaneously, but the "after" value necessarily involves a projection into the future and an estimate of the prospective effects of the highway. The development and utilization of em-

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85 One account of a typical appraisal states that it contains "solid proof on the before value of the lands and improvements with full documentation" and then the frustrating words, "in my opinion the remainder is damaged 50% by reason of proximity." Arnold, The Economic Study—Its Uses, June 1960 (unpublished paper presented at the Right-of-Way Section Meeting, American Association of State Highway Officials, Portland, Ore.).
pirical data on the subsequent history of similarly situated remainder parcels is the logical means by which the appraiser can impart a degree of certainty to his estimate.

To provide a centralized means of disseminating the results of the various severance damage studies, the Bureau of Public Roads will maintain a depository or "bank" in Washington, D.C. Into this bank will flow the raw material of the studies, the case histories. Naturally, uniformity in the compilation of the data is required. To achieve this end a uniform severance damage form has been developed through the cooperative efforts of state highway personnel, the American Right of Way Association and officials of the Bureau of Public Roads.

The "bank," which is now under way and is expected to be fully operational within a year, will be the key instrument in disseminating comparable case studies. When information is desired concerning severed parcels like that in litigation, such "comparables" will be made available through the use of mechanical sorting devices.

While the contents of the "bank" will primarily be utilized initially by state appraisers, it is hoped that the case histories may eventually be available to other researchers and appraisers as well. It must be remembered, however, that in any particular case the condemnee who wishes to examine the cases selected often has available the usual discovery devices and the pretrial conference as well as cross-examination.

As a supplement to the central "bank," the results of severance damage studies are being published for public use by state highway departments. To date, analyses of over 500 parcels of highway severed property have been made available to the general public. Once the program has gained full momentum, the number of parcels studied will run into the tens of thousands. Naturally, it will be impossible for the states to publish the information on every single parcel. However, all the case histories will be available to the state highway appraisers through the central bank.

**Evidentiary Problems and Inroads**

The admission of severance damage studies raises many evidentiary problems. No attempt is made here at a comprehensive exposition or solution of the myriad difficulties, but the more important obstacles to their admissibility either as independent evidence or as supporting material for the expert opinion witness will be spelled out.

The use of severance damage studies in condemnation litigation must withstand the objection of relevancy. This objection, that the studies lack sufficient bearing upon the parcel in litigation, would exclude them on the
basis that they represent property that is different in nature, type or location. This may be a legitimate criticism of the use of any data but is less germane to severance damage cases than to many other situations. The very same objections can be leveled at the use of a single comparable parcel, and yet, as previously indicated, the law has widely recognized that the determination of land value must necessarily rely to some extent upon the sales of comparable property.

The real objection is that the study itself may be inadequate to establish sufficient comparability. But the study technique has been designed with this very point in mind. Each case history contains a complete and comprehensive collection of facts and characteristics concerning the land. These facts and characteristics include as much, if not more, relevant data than required by the current rules governing the admissibility of individual "comparable sales," e.g., the type of highway, its date of completion, the degree of access, area, frontage, measurements of the whole and severed parcels, the remainder's visibility from the highway and the amount of elevation.

The more substantial evidentiary objection to the courtroom use of severance damage studies is their hearsay nature. A document offered in evidence is objectionable as hearsay if offered to prove the truth of statements contained therein made by someone who is not before the court for cross-examination, and severance damage studies do contain facts not personally observed by the witness offering them into evidence. But no hearsay objection exists when the opinion witness has personally examined the studied parcels and thus is able to testify concerning them from his own experience.

Courts have traditionally recognized that hearsay evidence must, in some instances, be utilized if the jury is to fulfill adequately its factfinding function. Underlying the rationale of all the exceptions are the double factors of reliability and necessity. When circumstances indicate a great need for evidence which is inherently reliable in character, courts have been willing to disregard its hearsay character. Unfortunately, hearsay exceptions have developed within traditional categories, and courts have been hesitant to admit evidence which does not readily fit therein. Statistical studies, surveys and other economic data which fail to fall within the traditional exceptions have been accorded harsh treatment by the

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86 5 Wigmore, Evidence § 1420 (3d ed. 1940).
87 Id. § 1427; Minton, Changes in the Exceptions to the Hearsay Rule, 29 Ill. L. Rev. 422, 427 (1934).
In view of the progress made in research methods and the increasing need for such data, courts might well reexamine their reluctance to depart from the traditional norms.

In examining the particular hearsay objections encountered by the courtroom use of severance damage studies, it might be helpful to draw a distinction between that part of the studies which merely sets forth a compilation of case histories and that part which represents an analysis of these histories by the various research teams engaged in the studies. In the case of the former, the same objections must be met which presently exclude from evidence in many states testimony relating to individual comparable sales in which the witness himself was not a participant. In this area the majority of the courts have generally refused to admit testimony as to such sales on the grounds (1) that the original source of the information is not available for cross-examination by the opposing party, (2) that there is the inherent possibility of inaccuracies in the witness' report of what he has been told, and (3) that the mere recital of the sale price does not give the jury sufficient information to determine the proper weight to be accorded to the asserted fact (e.g., where the sale was not truly voluntary, the jury could be misled in attributing significance to a sale which was not in fact "comparable").

These objections are equally applicable to the evidentiary use of the compilation of case histories offered by the severance damage studies, for such histories assert as facts information obtained by study team personnel unavailable for observation, cross-examination or for further questioning as to the possibility of pertinent undisclosed information. However, the minority of the courts which have allowed value experts to base their conclusions upon reports and other secondary sources have advanced compelling reasons for creating an exception to the general rule in this area. These courts have justified this exception on the grounds that practical convenience and necessity require that the expert be allowed to rely upon some compilation of data in forming his opinion, and that, in fact, "an appraisal based upon such reports may be more accurate than if the experts were confined to facts duly proved." In addition, the

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reliability that can be attributed to any impartially conducted federal, state or university study and the comprehensive nature of these particular studies, as set forth in the preceding paragraphs, mitigates to a large extent the force of these objections when applied to the use of case histories. The comprehensive scope of the data contained in the studies insures the presentation of all pertinent information both to the opposing party and the jury.

It is true that the case histories must contain estimates. For instance, the appraisal value of the "before" value of the entire tract, the remainder and the severance damages are estimates. Likewise, the determination of benefits by the jury in the case under study is an estimate. But it cannot be too strongly stressed that these estimates, if used at all, are utilized as added factors in determining comparability. The crucial factors in making a value determination are contained in the "after" value history. These are facts recorded from the parcel's subsequent sale and experience. Those most crucial are the resale prices and the subsequent uses. Special care can be taken to develop a technique which insures the verification of these facts by reliable sources. For example, the study team may be required to verify the sales price by federal tax stamps as a minimal standard of procedure. Where these stamps are admitted as evidence of consideration, objections to the studies can be considerably minimized on this point.

However, as to the part of the studies devoted to an analysis of the compiled data, the objections appear more substantial. Here we are dealing not with simple assertions of fact, but with statistical inferences drawn from these facts. Nevertheless, as will be shown, there also exists ground for admitting into evidence even these analyses for the limited purpose of supporting expert testimony as to the "value" of benefits and damages resulting from partial taking. Moreover, it should also be realized that even were the courts to refuse to admit the analytical portion of the studies, their admission of the case histories alone would greatly increase the accuracy and reliability of the jury's appraisal of benefits, damages and "just compensation" in all such cases.

Despite the frequent exclusion of research evidence, judicial recognition and acceptance of certain types of statistical data has occurred in various areas of litigation for reasons which may be equally applicable in eminent domain cases. Statistical data, summarized in census reports92

92 State census reports are also judicially noticed in the states of their origin, but reference here will be made only to the United States census reports. E.g., People ex rel. Stoddard v. Williams, 64 Cal. 87, 27 Pac. 939 (1883); Coal Creek Drainage Levee Dist. v. Sanitary
and mortality and annuity tables are judicially noticed and have been admitted into evidence at times without a showing of the trustworthiness of the report or table. In addition, market reports and price lists are admitted as evidence in determining the value of personal property.

Of these types of statistical and survey data, only two are widely admitted as independent evidence for the truth of the matter asserted therein. These are the United States census reports, which are surveys based on samples and complete enumerations, and mortality tables, which are probability statements used by the courts in computing annuities, life insurance sums, dower and damages for loss of life. Courts have justified the admissibility of census reports by the confidence engendered from the disinterested character of their operation, the reliability of their methodology, and the impossibility of verifying the information contained therein because of its privileged character. Mortality tables have been admitted on the general principle that they are founded on “certain and constant” data and deal with “exact sciences.” An equally compelling reason is that the admission of this data is demanded by custom and


84 Keast v. Santa Ysabel Gold Mining Co., 136 Cal. 256, 259, 68 Pac. 771, 772 (1902) (“The court may or may not require such preliminary proof of standard acceptance according to its judgment of the need therefore.”); Hann v. Brooks, 331 Ill. App. 535, 549, 73 N.E.2d 624, 630 (1947) (“A showing that the tables are used by reputable life insurance companies is sufficient to establish their status as standard authorities.”) But see Banks v. Braman, 195 Mass. 97, 80 N.E. 799 (1907).


89 6 Wigmore, Evidence § 1698 (3d ed. 1940).
practical necessity\textsuperscript{100} since these facts are unascertainable by any other means and are relied upon by the general public interested in such data. Consequently, the judicial mind has relented to their use in the absence of a better yardstick for its problem-solving tasks.\textsuperscript{101}

Courtroom recognition as a hearsay exception has also been accorded to certain commercial and professional lists and reports, namely, market reports, price lists and quotations contained in certain newspapers and trade journals.\textsuperscript{102} Such data has been deemed competent evidence of the state of the market because they are based upon a general survey of the whole market and are constantly accepted and acted upon by persons who transact commercial operations on the faith of their reliability.\textsuperscript{103} However, unlike census reports and mortality tables, market reports and price lists have not enjoyed hearsay exception status without qualification.\textsuperscript{104} A few state legislatures\textsuperscript{105} have authorized the use of scientific works to evidence "facts of general notoriety and interest," a principle echoed by Rule 529 of the Model Code of Evidence.\textsuperscript{106}

A more limited exception also appears in the admission of sample and research opinion polls, although the rationale of the aforementioned exceptions to the hearsay rule would seem to support a more complete adoption of these research methods.\textsuperscript{107} Nevertheless, due to an alleged lack

\textsuperscript{100} Ibid.

\textsuperscript{101} See Brown v. Bronson, 35 Mich. 415, 421 (1877).


\textsuperscript{103} See, e.g., Sisson v. Cleveland & T.R.R., supra note 102.

\textsuperscript{104} E.g., Doherty v. Harris, 230 Mass. 341, 119 N.E. 863 (1918) (nonavailability of witnesses must be shown); Von Reitzenstein v. Tomlinson, 249 N.Y. 60, 162 N.E. 584 (1928) (accuracy of report and acceptability to the trade must be shown); Burns Mfg. Co. v. Clinchfield Prods. Corp., 189 App. Div. 569, 178 N.Y.S. 483 (1919) (goods not readily found in open market).


\textsuperscript{106} Model Code of Evidence rule 529 (1942).

\textsuperscript{107} See generally McCold, The Admission of Sample Data Into a Court of Law: Some Further Thoughts, 4 U.C.L.A. Rev. 233 (1957); Sprowls, The Admission of Sample Data Into a Court of Law: A Case History, 4 U.C.L.A. Rev. 222 (1957); Zeisel, op. cit. supra
of probative value, such samples and polls have been admitted for the limited purpose of proving the fact that the assertions were made rather than the truth of the matters asserted.\textsuperscript{108} Utilization of such data has also been limited to certain litigable areas, such as patent and trademark infringement, unfair competition and other related areas where consumer reaction is important.\textsuperscript{109}

Notwithstanding these exceptions, severance damage studies, for the reasons previously set out, face the distinct possibility of being excluded as direct evidence in condemnation proceedings. However, the rationale underlying the admission of the above data and the existence of certain similarities between such data and severance damage studies lend support to the inclusion of the latter within the scope of the recognized exceptions. For, like the census, the basic data in severance damage studies is obtained by field personnel from out-of-court sources. In both, the materials gathered are carefully selected by men trained in their field, and the method of compiling this data is set up and supervised by competent and unbiased authorities. In the case of mortality and annuity tables, the courts have allowed their exception in spite of the fact that they involve the necessary element of probability, a factor which is also seen to a limited extent in the studies. Furthermore, in common with market reports and price lists, the evidentiary use of the studies would be for the purpose of ascertaining "value" which is admittedly a matter of opinion and approximation.

In all of these an element of necessity compels the courts to deviate from a strict application of the hearsay rule. Accuracy and reliability justify the admissibility in all of these instances, though in the case of the studies, the necessity is a relative one and their reliability has not been tried and tested by time to the same extent as some of the excepted sources. Nevertheless, these differences alone should not prevent the

\textsuperscript{108} See United States v. 88 Cases, More or Less, 187 F.2d 967, 974 (3d Cir.), cert. denied, 342 U.S. 861 (1951).

\textsuperscript{109} Gulf Oil Corp. v. FTC, 150 F.2d 106 (5th Cir. 1945); Sorensen & Sorensen, Responding to Objections Against the Use of Opinion-Survey Findings in the Courts, 20 J. Marketing 133, 134 (1955). See generally Barksdale, Use of Survey Research Findings as Legal Evidence (1957); Caughey, The Use of Public Polls, Surveys and Sampling as Evidence in Litigation and Particularly Trademark and Unfair Competition Cases, 44 Calif. L. Rev. 539 (1956); Howes, The Role of Public Surveys in Unfair Competition Cases, 46 Trade-Mark 154 (1956); Note, 20 Geo. Wash. L. Rev. 211 (1951); Note, 66 Harv. L. Rev. 498 (1953); Annot., 76 A.L.R.2d 619 (1961).
courtroom use of the studies when they meet every other test of reliability and when their use is essential if we are to insure that the jury's award in condemnation cases will actually be "just compensation."

Severance damage studies, as direct evidence, will thus provide great help to the jury. But as a practical matter they will be of greater use to the expert witness. The expert can bring all his knowledge and experience to bear in evaluating and giving proper significance to the minor differences which of necessity must appear in the comparable case histories. Likewise, his expertise will enable him to examine and verify the inferences, conclusions and statistical methods of the study itself.

Fortunately judicial inroads have already been made in forging an exception which will allow the expert witness in condemnation cases to base his opinion as to value upon facts which he has obtained through hearsay. Both federal and state courts have already taken significant steps in this direction.

In California, as early as 1930, it was "well settled that testimony as to market values is not incompetent because derived from published reports or from information acquired from others."110 Similarly, in Massachusetts the courts have allowed an expert witness to tell the jury the sources upon which he has relied in forming his opinion as to value even where those sources were independently inadmissible as hearsay.111 In other states the expert witness has been allowed to base his opinion upon information obtained from secondary sources such as commercial laboratory reports and state highway department reports.112

In the federal courts, the Fourth Circuit has held that it is reversible error to exclude an expert's opinion as to comparable sales because he has based his knowledge of the sales prices upon sales records.113 Noting that the hearsay rule should not be applied in a way to prevent the expert from giving the jury the basis for his opinion, the court stated that it would unduly hamper the production of testimony and prolong the trial for the courts to require that facts concerning comparable sales be proved with the particularity required in suits to enforce the contracts for such sales.114 Applying this rationale to a case where the expert testimony as to value


113 United States v. 5139.5 Acres of Land, 200 F.2d 659 (4th Cir. 1952).

114 Ibid.
was based partly upon personal observation and partly upon company records and conversations with company employees, the Tenth Circuit has also declared that “the rule is well established that an expert may testify as to value, though his conclusions are based in part or even entirely upon hearsay evidence.”

In addition to this rationale, these courts have advanced other compelling reasons for allowing this exception. In reaching their decision they have realized that such reports themselves exert a strong influence upon market values, and thus appraisals based upon them may be more accurate than those confined to the traditionally admissable sources. This was recognized by the Kentucky Court of Appeals when it stated that the customary channels of trade are such that “it is quite often true that the most thorough, comprehensive and accurate professional appraisals are based almost entirely on ‘hearsay’ in the legal sense of the word.”

For this reason, the Superior Court of New Jersey declared that the real estate expert is not only entitled to but should base his value conclusions upon all those factors which exert a real influence upon the market price regardless of the fact that such sources may be hearsay in the ordinary sense of the word.

Finally, these courts have justified this exception on the grounds that the expert’s opinion, even where based upon sources not independently admissable, is entitled to consideration because of “the added sanction of his general experience.” Such an admission realistically recognizes that, even more than the court or the jury, the expert is the one best qualified to determine the reliability of reports and other secondary sources of information. Accordingly, where an expert is willing to rest his reputation on the reliability of certain reports and studies, his judgment should be accepted and the materials should not be declared inadmissable solely because they happen to fall within the scope of an artificial rule of evidence.

To exclude those “matters which men consider in their everyday affairs” from the consideration of the jury will hinder rather than help

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115 H. & H. Supply Co. v. United States, 194 F.2d 553, 556 (10th Cir. 1952).
116 Stewart v. Commonwealth, 337 S.W.2d 880, 885 (Ky. 1960).
120 United States v. 25406 Acres of Land, 172 F.2d 990, 995 (4th Cir. 1949).
them in arriving at a fair and accurate result. This is especially true in condemnation cases where “at best, evidence of value is largely a matter of opinion.”\textsuperscript{121} If proper weight is to be accorded to the expert’s testimony, it is important that both the court and jury “know how it was made and upon what information it was based.”\textsuperscript{122} Thus if the value expert in condemnation proceedings is going to rely upon economic studies in forming his opinion, it is essential that the court and the jury be appraised of this information. This necessity was clearly pointed out by Mr. Watson Bowes, former First Vice President of the American Appraisal Institute, when he stated:

Economic studies are not only advantageous in appraising highway right-of-ways but they are absolutely necessary. Every highway department appraiser employs such studies to some extent. Some appraisers relate economic studies to the subject properties by making only mental notes as they are developing their estimates of fair compensation. Such mental notes are difficult to transmit to juries and do not show on any appraisal report so they can be used as a negotiating tool by the negotiator.\textsuperscript{123}

Since these reports are thus brought into evidence, in spite of the hearsay rule, there is clearly little purpose in hiding this fact from the jury solely because of the hearsay objection.

\textbf{CONCLUSION}

The materials presented in this article on the economic orientation of condemnation cases and the suggestions for the utilization of various types of evidentiary materials in such cases indicate a belief that economic fact should serve the court in establishing legal fact. Existing legal practices with respect to the admission and use of research evidence in courts of law suggest that such results and techniques have made definite contributions to the judicial factfinding and decision-making processes. These admissions have almost invariably been confined to areas of commercial litigations, excepting, however, certain scientific tables and calculations said to be admissible and competent because of the demands of custom and practical convenience making them generally, if not universally, acceptable.

This study of the need for similar factual data in condemnation proceedings has suggested the admission and use of severance damage studies

\textsuperscript{121} Id. at 995, citing Montana Ry. Co. v. Warren, 137 U.S. 348, 353 (1890).

\textsuperscript{122} Stewart v. Commonwealth, 337 S.W.2d 880, 885 (Ky. 1960).

\textsuperscript{123} Address by Watson Bowes, Annual Convention of the American Association of State Highway Officials, Omaha, Nebraska, Oct. 26, 1951.
in land valuation cases. If followed, this would demand a reshaping of those rules of evidence which might prohibit their entrance in condemnation proceedings. Such change in evidentiary procedure in effect amounts to the next step in the evolutionary process set in motion by the admission of comparable sales of particular parcels. If evidence of sales of comparable parcels can be introduced in piecemeal form through the drawn out procedure of separately and individually establishing the collateral issue of comparability, followed by evidence of the sales prices, the factor of time, if nothing else, would call for better procedural methods of introducing evidence pertaining to land values. Severance damage studies can meet this need; but more importantly, it can overcome the shortage of land valuation data essential in determining "just compensation," the goal of every condemnation proceeding.

What is required of courts and of legal counsel is a desire to utilize economic data currently available within their states and obtained under systematic procedures. Through such use, what may be considered experimental only because of non-usage, may become traditional through usage.
COMMENTS

UNCONSTITUTIONAL CONDITIONS: AN ANALYSIS

John D. French*

Analyzing the rationale basic to the opposing views usually advanced to support or question the constitutionality of any given condition attached by the state to a benefit conferred, the author criticizes the reliance upon such concepts as privilege and the evasion of constitutional policy, without inquiry into their underlying principles. Rather than focusing exclusively on either the benefit or the burden, the author suggests that by examining both together and balancing the competing interests of the state and the individual, courts will be better able to solve the serious constitutional questions involved.

The cases and commentaries on the venerable doctrine of unconstitutional conditions are legion, and it would serve no useful purpose to reconsider them in detail here.1 Let it suffice to say that the principles underlying the doctrine have been utilized in efforts to answer serious constitutional questions in a great variety of contexts. But such is the first-blush forcefulness of the competing contentions that have coalesced to give rise to the doctrine that courts and commentators have seldom tested them either for depth of logic or for soundness of policy. It is the purpose of this article to undertake such an examination of the reasoning that bottoms the doctrine of unconstitutional conditions in order to determine its value as a tool of legal analysis.

I

The Traditional Analysis

The essential thinking of the cases may be briefly summarized. Attention is focused first on some "privilege" which, for one reason or another, is conceded to be wholly within the power of the state to grant or deny. A leading example is the power of a state to deny permission to a foreign corporation to enter to do local business.2 Next it is argued

* Legal Assistant to Federal Trade Commissioner Philip Elman; LL.B., Harvard University; Member of the Bar of the District of Columbia.

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1 For recent surveys of the authorities, see Note, 73 Harv. L. Rev. 1595 (1960); Note, 28 Ind. L.J. 520 (1953).

2 The genesis of the unconstitutional-conditions analysis in the troublesome foreign-corporations field is thoroughly discussed in the early leading works, Henderson, The Position of Foreign Corporations in American Constitutional Law (1918).
that this authority to withhold a benefit altogether is greater than, and necessarily includes, the right to proffer it only on condition. The interested party may acquire the benefit only in company with a burden the state has chosen to attach to it.

To revert to the example of the foreign corporation, this line of argument would permit a state to deny a corporation the right to do business within it unless the corporation were willing to forego its right to remove cases to the federal courts. The same analysis applies in any situation in which one can locate a “privilege” to use as a starting point. If public employment is nothing but a privilege, then a policeman may not complain that a municipal ordinance prohibiting public employees from soliciting aid for political parties abridges his constitutional right to express his political opinions. “The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.” Nor is there any difficulty in upholding the conviction of one who violates an ordinance prohibiting addresses in the public parks, “except in accordance with a permit from the mayor,” when state law confers upon the legislature the power to exclude the public from common property at will. “The right to absolutely exclude all right to use, necessarily includes the authority to determine under what circumstances such use may be availed of, as the greater power contains the lesser.”

At this point, however, the opponents of the condition in question call attention to the way in which the condition contravenes some policy of the Constitution of the United States. For instance, with reference to the exclusion of foreign corporations except on condition of non-removal of lawsuits to a federal court, it could be said,

Total prohibition may produce suffering, and may manifest a spirit of unfriendliness towards sister States; but prohibition, except upon conditions derogatory to the jurisdiction and sovereignty of the United States, is mischievous, and productive of hostility and disloyalty to the general government.

This challenge is analogous to the principle in contract law that contracts against public policy are void; significantly, it does not go to refute

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4 See, e.g., Doyle v. Continental Ins. Co., 94 U.S. 535 (1876), in which the unconstitutional-conditions debate was first explicitly formulated.
5 McAuliffe v. Mayor & Bd. of Aldermen, 155 Mass. 216, 220, 29 N.E. 517 (1892).
the formal logic of the position that the power to deny includes the power to condition.

The proponents of the condition have the next move. They usually argue either that the constitutional policy involved is not strong enough to justify overturning the bargain between the states and the individual (especially since the choice to accept or reject the condition resides with the latter), or, if they concede this point, that only the contract falls and the state's arbitrary power to deny the benefit remains unimpaired. 8 The rebuttal to this contention is that to permit the state to deny the benefit at this juncture would be to sanction the indirect achievement of a result which is impermissible if approached directly; that is, the unacceptable condition will simply become implicit and the party seeking the benefit will have to comply with it or go begging. But surely "it is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence." 9

At some stage in this debate enough judges are satisfied to make up a majority and the case is settled. Often the result seems to be anybody's guess, and upon reflection this is not particularly surprising. As it has traditionally been posed, the choice is one between logic and policy, and that choice, like the choice between an apple and an orange, all too often depends on the subjective and fluctuating mood of the chooser.

II

THE TRADITIONAL ANALYSIS ANALYZED

1. The Logical Argument From "Privilege"

Let us start from the beginning. The argument is that:

[The] doctrine of unconstitutional conditions . . . is difficult to support logically. If I have no ground for complaint at being denied a privilege absolutely, it is difficult to see how I acquire such a ground merely because the state, instead of denying me a privilege outright, offers me an alternative, however harsh. 10

In other words, the right to withhold encompasses the right to offer on any terms. But this conclusion is erroneous, and Professor T. R. Powell long ago demonstrated why with convincing clarity. Writing in reply to Mr. Justice Holmes' argument in dissent in Western Union Tel. Co. v.

8 See, e.g., Western Union Tel. Co. v. Kansas ex rel. Coleman, 216 U.S. 1, 52-56 (1910) (dissenting opinion).
Kansas ex rel. Coleman\textsuperscript{11} that the state's power to exclude foreign corporations completely included the power to impose whatever burdens it wished on their admission, he said:

The fallacy here will appear if the proposition is put in syllogistic form.

\textit{Major Premise.} There is a class of corporations "A" (foreign corporations doing intra-state commerce) over which the state has the \textit{power of absolute exclusion}.

\textit{Minor Premise.} The X corporation is an "A" corporation.

\textit{Conclusion.} Therefore the X corporation is one upon which the state has the \textit{power to impose any burden whatsoever}.

Plainly the only legitimate conclusion from these premises is that the X corporation is one over which the state has the \textit{power of absolute exclusion}. Mr. Justice Holmes is guilty here of the fallacy of four terms.\textsuperscript{12}

To cite another instance, the same fallacy inheres in the proposition that the right of the government to execute (for example, for treason) includes the right to torture instead.\textsuperscript{13} "A person without any right to claim his life from the government is still protected by constitutional guarantees against other deprivations."\textsuperscript{14}

The significance of this analysis is immediately apparent. In terms of logical categories, the power to deny a privilege is different from, rather than greater than, the power to impose conditions on its grant. The privilege analysis has rested on a fundamental error ever since the power of a state to exclude a foreign corporation, enunciated in \textit{Bank of Augusta v. Earle},\textsuperscript{15} was translated into a power to condition its entry in \textit{Paul v. Virginia}.\textsuperscript{16} This is true no matter what the field of substantive law. For example, a privilege analysis cannot be used to justify unreasonable discrimination in public employment because the right to deny government jobs to everyone does not permit the logical inference of a right to deny them to some but not all.\textsuperscript{17}

Now let us assume that a state has admitted a foreign corporation on a condition later found to be contrary to some constitutional policy. In light of the foregoing discussion, logic cannot save the condition; so supported by neither logic nor policy, it falls. At this point the privilege

\begin{thebibliography}{11}
\bibitem{11} 216 U.S. 1, 52 (1910).
\bibitem{12}  Powell, The Right To Work for the State, 16 Colum. L. Rev. 99, 110-11 (1916). (Footnote omitted.)
\bibitem{13}  Id. at 111 n.31.
\bibitem{14}  Id. at 108 n.22.
\bibitem{15}  38 U.S. (13 Pet.) 519 (1839).
\bibitem{16}  75 U.S. (8 Wall.) 168 (1868).
\bibitem{17}  Powell, supra note 12, at 111-12.
\end{thebibliography}
theorist would argue that logic compelled the conclusion that the state must be permitted to evict the corporation. His opponent would avoid the logic and rebut on some policy ground, e.g., that the condition was extorted under duress,18 or that, as suggested earlier, to permit eviction would be to countenance evasion of the prohibition against the condition. But he should never have conceded on the logic. An easy substitution of terms in Professor Powell's syllogism shows that the power to evict "A" corporation cannot be deduced from the power to exclude it in the first place.

This mode of analysis assumes only that the privilege theorist's premise and conclusion are not the same by definition. Of course, if that were true he would be proving nothing by argument but simply iterating a conclusion. And, as a practical matter, any effort to obtain identity by definition would face embarrassing obstacles. To recur to the foreign corporation example, expulsion, with its attendant forced abandonment of a going business, can be equated with initial exclusion only through the most myopic process of definition. And this analysis is equally applicable to other governmental gratuities. The power to dispense jobs, to permit the use of highways, and so on does not imply the arbitrary power to retake these benefits once conferred.

Further, by analogy to established principles of private law, one may construct a logical argument which leads to a conclusion diametrically opposed to the one derived from the traditional privilege analysis. It has long been settled that arrangements in the form of contracts or trusts are invalid and unenforceable if their enforcement would be against public policy. Beyond this, it is also settled that a party to such an arrangement cannot recover damages for its breach or even restitution for the performance he has already rendered.19 The principal reason given for this rule is that it tends to diminish the number of

18 See, e.g., Union Pac. R.R. v. Public Serv. Comm'n, 248 U.S. 67 (1918). The significance of a finding of duress lay in its negation of the proposition that the onerous condition could be avoided by choosing not to accept the benefit to which it was attached. Merrill, Unconstitutional Conditions, 77 U. Pa. L. Rev. 879, 888-89 (1920), and Oppenheim, Unconstitutional Conditions and State Power, 26 Mich. L. Rev. 176, 184-85 (1927), found the duress concept a useful one, but Hale, supra note 10, at 322-23, saw in it a dangerous indefiniteness.

19 E.g., Restatement, Contracts § 598 (1932); Restatement, Restitution §§ 62, 140 (1937). Similarly, in the case of a trust only the illegal condition subsequent is invalidated; the remainder of the trust is effectuated. Scott, The Law of Trusts §§ 62, 65 (2d ed. 1956); Restatement Second, Trusts § 65, comment e (1959).
agreements against public policy, \(^\text{20}\) *i.e.*, agreements which the law finds bad and wishes to prevent. Spelled out, the chain of inference is:

**Major Premise.** The law will prohibit those transactions which conduce to the production of results deemed to be against public policy.

**Minor Premise.** Recovery of damages or restitution for the breach of a contract unenforceable as against public policy conduces to such results.

**Conclusion.** The law will prohibit the recovery of damages or restitution for the breach of a contract unenforceable as against public policy.

It is not difficult to bring this chain of inference to bear on our problem. For the concept of "public policy" in contract law, we merely substitute the term "constitutional policy" to obtain a major premise applicable to the debate over unconstitutional conditions. The concept of "restitution" (that is, the restoration of performance or its value) seems an apt characterization for the return to the state of the benefit it has conferred subject to the unconstitutional condition. For example, in the case of the foreign corporation, restitution would imply the return of the corporation to its position outside the state, *i.e.*, its eviction. According to our syllogism the law will prohibit restitution, so the state's right to evict the foreign corporation not only finds no support in the logic of the law but seems to be forbidden by it. And the same argument applies to any attempt by the state to withdraw a benefit granted on condition after the condition has been declared invalid as against constitutional policy.

In terms of permissible inference, then, we are left with nothing more than that the power of general unconditional denial includes the power of general unconditional denial.

**2. The Utility of the Privilege Concept**

Even if we conclude that the supposed logic of the privilege analysis is unsound, there remains the question whether, so long as we are careful of the conclusions we draw, there might not be some merit to the concept of "privilege" as an approach to certain constitutional questions.\(^\text{21}\) This is an issue deserving of further consideration.

First, in any inquiry it is important to distinguish clearly between

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\(^{20}\) Restatement, Contracts, supra note 19, at § 598, comment (b); Restatement, Restitution, supra note 19, at § 62, comment (a), § 140, comment (b); Williston, Contracts § 1630 (4th ed. 1937).

\(^{21}\) See Merrill, supra note 18, at 889-91; Oppenheim, supra note 18, at 186-89. Contra, Beck, Nullification by Indirection, 23 Harv. L. Rev. 441, 450-51 (1910).
premises and conclusions. Unfortunately, the traditional technique employed in this area has seldom done so. In fact, it has frequently indulged in the use of the notion of privilege as a premise before proving it as a conclusion. Perhaps this results from the lamentable fact that the idea of a "privilege," standing alone and without qualification, is simply too broad to be descriptive of many practical relationships between private parties and agencies of authority. It is difficult to think of a privilege which, if fully thought out, is not merely a privilege under given circumstances. Even "the most absolute seeming rights are qualified, and in some circumstances become wrong."22 The error of the traditional view has too often been in carrying the conclusion that something is a privilege in one context forward into a new context as a premise, without realizing that the original setting has been left behind.

Usually the decision to call something a privilege can legitimately be made only at the end of a thought process rather than the beginning. Like a label, the word is pasted onto a finished product. It has been suggested, for example, that tax deductions should be allowed only when they are clearly authorized because their existence is purely a matter of "legislative grace."23 Whatever the validity of this "legislative grace" theory in some contexts,24 it is clear that it cannot be carried too far. In Speiser v. Randall25 the Supreme Court had before it a provision of the Constitution of California providing tax exemptions for veterans but requiring as a qualification that each applicant for exemption subscribe to an oath that he did not advocate the violent overthrow of the state or federal governments or the support of a foreign government against the United States in the event of hostilities. The Court held that the enforcement of this provision through procedures which placed the burden of proof on the taxpayer resulted in a denial of free speech without adequate procedural safeguards required by the due process clause of the fourteenth amendment to the Constitution of the United States. In the course of its argument the state contended that because a tax exemption is a "privilege" or "bounty," its denial could not constitute an infringement of the right of free speech. The Court flatly rejected this assertion and concluded instead that a condition imposed on the grant of a

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22 Fidelity & Deposit Co. v. Tafoya, 270 U.S. 426, 434 (1926).
24 This canon of interpretation is strongly criticized in Griswold, An Argument Against the Doctrine That Deductions Should Be Narrowly Construed as a Matter of Legislative Grace, 56 Harv. L. Rev. 1142 (1943).
privilege must be reasonable.26 Apparently the mileage one gets out of the concept of privilege depends on the use made of it.

Other cases verify this hypothesis and show how uninformative the privilege characterization can be. In Schware v. Board of Bar Examiners27 the Court rejected as irrelevant the question whether the practice of law, or the pursuit of any other occupation, is a "right" or a "privilege," stating "it is sufficient to say that a person cannot be prevented from practicing except for valid reasons."28 Yet only three years before, the same Court had seen fit to settle the question whether a state might temporarily suspend a physician's license (as a result of his conviction for failure to produce subpoenaed papers before a congressional committee) by reference to the principle that the practice of medicine is a privilege over which the state has "broad power."29

A serious defect in the privilege concept as a tool of analysis should be clear. The point of employing it in an investigation is to derive aid in determining whether or not a certain legislative imposition infringes some constitutional guarantee. But the privilege label seems to do nothing to further this inquiry. On the one hand, we are able to reach acceptable answers even if we discard the privilege notion as irrelevant. On the other, even if we take pains to label a certain state grant a privilege, we are able to conclude independently that the conduct may or may not be constitutionally permissible. In many instances then, the characterization of something as a "privilege" is itself a gratuity, and the constitutional decision rests on other considerations.

Of course, once we have reached the conclusion, as a by-product of weighing these other considerations, that some activity really is a privilege in a particular set of circumstances, we may safely conclude that henceforth there is no compulsion to extend it in those circumstances. Thus if a governor's power to pardon is deliberately placed within his exclusive discretion, he may withhold it regardless of the plight of the convict. The same thing is true in a more general sense with regard to the bounty of a legislature. A class of people may not compel a legislature (except, of course, through the political process) to pass social legislation for its benefit. This is to say no more than that "a donee ought not to be allowed to compel the government to make a gift."30

26 Id. at 518.
28 Id. at 239 n.5.
this point has been passed, however, the reasoning becomes suspect. The passer-by may owe no duty to assist the accident victim lying by the roadside, but when he volunteers his assistance his actions become governed by the whole regime of rules of tort law.\footnote{See, e.g., Prosser, Torts § 38c (2d ed. 1955).} Similarly, the governor’s power to withhold a pardon entirely gives him no warrant to enforce a condition that the convict, once pardoned, must assassinate his political opponent;\footnote{Cf. Doyle v. Continental Ins. Co., 94 U.S. 535, 543-44 (1876) (dissenting opinion).} nor is the legislature justified in enacting a dole on condition that the recipients convert to Christianity.\footnote{Cf. Davis, supra note 30, at 276.}

3. Doing Indirectly What Cannot Be Done Directly

Let us now shift our sights to the other side of the argument. There the shibboleth of privilege has its counterpart in the doctrine that the state cannot be allowed to do indirectly what it may not do directly. We may test this proposition by asking simply: Why? It is immediately apparent that this argument presents another logical gap in the traditional analysis. If we are given as premises only (1) that the state is prohibited from achieving a general class of result by \textit{direct action}, and (2) that result “X” falls within that general class, we are without inferential foundation for the conclusion that the state is prohibited from achieving result “X” by \textit{indirect action}. To justify such a deduction would require a considerably broader major premise—such a premise, for example, as: The state will never be permitted to achieve this general class of result \textit{by any means}.

As indicated earlier, the objection underlying the argument against indirect action is that unless the state is prevented from employing indirection to achieve its ends, it will be able to evade the prohibition against direct action. But this proposition assumes its conclusion. It affixes the label evasion to a course of indirect action without establishing that exactly the same effects will flow from that course as from direct action. As in the case of the argument from privilege, the argument from evasion runs the danger of speciously carrying a conclusion forward while leaving its context behind. It overlooks the fact that the imposition of a burden by the state, with nothing more, may have quite different consequences from the offer of a benefit-burden package. Without knowing further facts it is impossible to conclude that the latter is an evasion of the former.\footnote{Cf. Davis, supra note 30, at 276.}
The argument that the state can never go further indirectly than it can directly is thus too rigid a formula. It fails to take account of the multiform facts presented by the cases. As a principle which was enunciated because of concern over the results that might be produced by various schemes of governmental regulation, the argument against indirection fails precisely because it tends to misdirect attention away from the potential results of a state's action and toward an a priori mechanistic rule.

4. The "Blunt Instrument" Fallacy

A point implicit in much of what has been said seems worth making outright. This is that the traditional unconstitutional-conditions analysis tends often to lack the necessary sensitivity to deal with the problems to which it is applied. It is a "blunt instrument" doing a job better left to more delicate tools. The argument is likely to attach great weight to a very few matters—such as privilege and indirection—without ever really explaining why. Thus a factor which should perhaps be permitted to make some difference is readily accepted as making all the difference, and rules are applied without probing into whether the reasons that underlie them call for their application in the particular situation.

To illustrate, suppose two parties are before the court in separate cases complaining of the deprivation of property without due process of law. The first complainant shows that he has long held a license to serve as a bail bondsman and that his license has recently been withdrawn without any form of hearing. The court decides that such a license, once granted, becomes a "right" and therefore cannot be revoked except by procedures containing the elements of due process.34 The second complainant, a private club, asserts that its license to sell liquor has been wrongfully suspended, also without a hearing. The court decides that there is nothing remiss in suspension of the license without a hearing, reasoning that (1) the sale of liquor bears importantly on public morals; (2) this confers broad powers of regulation on the state; (3) a liquor license is thus a mere "privilege"; and (4) acceptance, therefore, of a license under a statute permitting summary suspension deprives the licensee of any right to demand a hearing.35

In all probability there are relevant distinctions between these situations. But the bald assertions that one involves a "right" and the

34 See In re Carter, 177 F.2d 75, cert. denied, 383 U.S. 900 (1949).
other a "privilege" are hardly satisfying. These are, or should be, conclusions—conglomerates derived from the composition of a number of underlying elements. Investigation would be better furthered by considering those elements individually to see if either conclusion is an apt one for the present case, rather than by treating each as a simple and indivisible element in itself, beyond which we need not inquire further.

To recur to our case of the bail bondsman, there are some questions left unasked by the court which might have had an effect on its decision if it had chosen to ask them. Had the licensee built up a substantial going business? Is the fixed capital investment in this business a large one, so that expulsion would work a severe hardship? Did he have fair warning, such as might be inferred from periodic licensing, that he might someday be excluded from this field? What is the significance of bail to the efficiency of the operation of the criminal courts? And so on. Similar questions could, of course, be asked in connection with the suspended liquor license.

The considerations enumerated above seem important, and any mode of analysis which probes no deeper than compound conclusions like "privilege" or "vested right" appears too superficial to be adequate.

5. The Critical Problem of Focus

We arrive finally at the aspect in which the traditional unconstitutional-conditions analysis seems most seriously deficient, that is, in the way in which its focus on the issues tends to produce distortions. The realization that focus has played a major role under this doctrine in the decisions of the cases is not new. More than one major case has found its significance in its emphasis on one, rather than another, of the conflicting considerations.36 This suggests a disturbing possibility, viz., that a number of the decisions in this area may have rested not so much on a weighing of even the superficial variables involved, as on which of them the court happened to get into its sights.

Let us consider for a moment the government security program and its application to specific individuals. Suppose that a government employee's all-important security clearance is withdrawn and discharge from a "sensitive" position inevitably follows, all without a hearing.

The court concludes that access to confidential documents is a privilege and that government employment is neither "property" nor "liberty" and, therefore, is not protected by the due process clause of the fifth amendment. Assuming arguendo that a person may not have a right of access to secret documents, to make this the point of exclusive focus shuts out of the picture the issues of deprivation of the individual's employment and damage to his reputation which deserve—even demand—consideration. And, in fact, when the job threatened by the security program has been one in private employment so that the court could proceed from the starting point that the employee had a "right" to hold it, these factors have indeed entered into the court's deliberations.

The difficulty is that one element of the problem is overemphasized to the neglect of others which also constitute part of the matrix of the case. Whereas the "blunt instrument" fallacy involves reliance on slogans without inquiry into the factors that led to their coining, the fallacy of narrow focus leads to the disposition of cases on the basis of one slogan without consideration even of the other possibly apposite slogans, much less their underlying bases.

The undesirability of this procedure becomes even more clearly apparent when one considers the case with which an argument can be phrased so as to take advantage of the tendency to focus on too narrow an issue. In Speiser v. Randall, discussed earlier, the state argued that because a tax exemption was a mere "bounty" or "privilege," its denial could not infringe constitutional guarantees. The dissent accepted this thesis as conclusive; the majority, on the other hand, saw the denial of the exemption as a supplemental sanction for the punishment of a type of speech or advocacy. This sort of either-or-but-not-both approach poses difficulties. It is not all that easy to distinguish between a tax and an exemption, between imposing a penalty and with-


38 Since Bailey v. Richardson, supra note 37, the distinction between dismissal without cause and dismissal for reasons which damage the employee's standing in the community has been accorded recognition by the Supreme Court. Vitarelli v. Seaton, 359 U.S. 535 (1959); see Note, 73 Harv. L. Rev. 84, 198-200 (1959).


40 357 U.S. at 538.

41 Id. at 518.
holding a privilege. For example, there would be an identity of effect whether the state imposed a uniform tax increase concurrent with an equivalent exemption for all persons signing loyalty oaths, or merely imposed a special tax on all non-signers.

One has the feeling that it would be more useful to ask what the total impact of legislation is, rather than whether one of its constituents is a "privilege" or a "penalty." It is in this seriatim focus upon separate facets of each problem that the traditional unconstitutional-conditions analysis does its greatest disservice to total comprehension of the significance of the issues in a given case. The argument proceeds by ricochet from privilege to condition to public policy and so on, without taking account of the relationships of these and other factors as a coherent composition. The grave practical consequence of this deficiency is that cases are as apt to be decided by what has been left out of the analysis as by what has been put in.

Consider, for example, Hamilton v. Regents\(^{42}\) in which it was held that since attendance at a state university is a privilege, conscientious objectors may not complain that one of the conditions of enrollment is compulsory attendance in a course in military science and tactics. One wonders what the result would have been if the Court had also considered whether, given the full scope of the program of higher education offered by the state and the relatively minor hindrance to the effectuation of the state's ends of permitting an exception, state deprivation of educational benefits from a principled religious minority seemed justifiable.\(^{43}\)

III

Some Conclusions and Suggestions

If these criticisms of the thought process which underlies the long debate over unconstitutional conditions may be summarized briefly without serious overgeneralization, they are that: (1) the argument uses unproved conclusions ("privilege," "evasion," and the like) as premises (2) to the exclusion of consideration of the principles which support them and (3) of other premises as well, and as a result (4) tends to decide cases on the basis of factual fragments without regard to the pattern of the whole mosaic. The best shorthand description of what is wrong with this practice is that it employs the method of deduc-

\(^{42}\) 293 U.S. 245 (1934).

tion for the solution of problems to which only induction is suited. This is bound to be so as long as the cases persist in juxtaposing conflicting claims of right and authority. When erstwhile absolutes are arrayed in opposition, there must be some sort of accommodation, and when accommodation begins to qualify premises, it is no longer safe to attempt to deduce all our conclusions from them. It is unclear why the characterization "privilege subject to a condition" has obscured this difficulty, but one can little doubt that it should not have. The necessity for a switch from deductive to inductive reasoning becomes imperative as soon as it is conceded that rights, privileges, power and authority exist not per se but only "in the circumstances."

Instead of looking first at an alleged benefit conferred and then at an alleged burden attached to it, we need to start by examining the entire legislative package. The statute or administrative action challenged will have some discernible purpose, e.g., highway safety, the preservation of public health, the protection of government security or the subsidization of education. The complaining party will be arguing that the operation of the state's action abridges one of his personal freedoms. In resolving the dispute the court may probe first the background and pattern of the state's program. What is the nature and extent of the need which called it forth? What is the scope and degree of the sovereign's interest in meeting the need? What, in detail, is the effect of the statute or administrative directive in furthering the state's interests?

Equally as complete an inventory of the individual's claims may be made. What interests does he allege to be deserving of constitutional protection? What are the direct and collateral effects of the state's action upon those interests? What bearing have the particular elements of the state's action which affect the complainant on the furtherance of the state's objective? It is at this point that the judge is called upon to perform his function of judgment by weighing the interests asserted and deciding which must accommodate to which others and to what degree. His opinion need not contain the terms "privilege" or "condition" or "evasion." Instead his conclusions may rest on judgments whether the state's action has been arbitrary and unreasonable or based upon an unjustifiably discriminatory classification.

There is nothing novel or uncertain about such an analytical technique. In fact, it is a standard method of determining whether governmental conduct transgresses the bounds of constitutional guarantees.44

44 E.g., Shelton v. Tucker, 364 U.S. 479 (1960); Dean Milk Co. v. City of Madison, 340
It is difficult to understand why a different approach should be taken in the traditional unconstitutional-conditions area. Governmental regulation of individual behavior is no less regulation because it involves a condition on a benefit rather than direct imposition of a burden.45 Moreover, avoidance of the unconstitutional-conditions reasoning pattern has the gratifying consequence of obviating the need for preliminary definition of privileges and conditions, a process laden with opportunities for error and distortion and best bypassed if possible.

U.S. 349 (1951); Kovacs v. Cooper, 336 U.S. 77 (1949); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

45 The fact, deemed vital by privilege theorists, that the individual retains the power of choice to avoid the onerous condition on the benefit-condition package by electing not to seek the benefit requires no alteration of these conclusions. It is still appropriate to ask whether, given the total impact of the state action in question, it is constitutional to require the individual to make such a choice.
THE LEGALITY OF FPC REGULATION OF INDEPENDENT GAS PRODUCERS BY AREA PRICE FIXING

INTRODUCTION

Last June marked the seventh anniversary of the Supreme Court's decision in *Phillips Petroleum Co. v. Wisconsin* and the Federal Power Commission's seventh year of effort, mandated by that decision, to regulate independent gas producers under the Natural Gas Act. Prior to that decision the FPC was of the view that Congress had not intended such regulation and held, as early as 1940, that the independent producers did not come within the ambit of the act. This view was shared by the industry which managed, after many unsuccessful attempts, to have two bills passed by Congress expressly exempting them from regulation. Both were subjected to Presidential veto, and subsequent attempts to enact similar legislation have been unsuccessful.

From the start the Commission applied the traditional public utility rate-base method of regulation which requires a determination of the justness and reasonableness of rates on a company-by-company basis, and during the first nine months after *Phillips*, the Commission was inundated with producer rate and certificate filings. The FPC was never able to wade through this initial avalanche, and the log jam continued to com-

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1 347 U.S. 672 (1954).
2 This term is defined as any person "who is engaged in the production or gathering of natural gas and who transports natural gas in interstate commerce . . . not primarily engaged in the operation of an interstate pipeline." 18 C.F.R. § 154.91(a) (1961).
7 H.R. Doc. No. 342, 84th Cong., 2d Sess. (1956) (Fulbright-Harris bill); H.R. Doc. No. 555, 81st Cong., 2d Sess. (1950) (Kerr-Thomas bill). President Eisenhower stated his agreement with the Fulbright-Harris bill itself but felt compelled to veto it because of irregular activities connected with certain unsolicited contributions to Senator Francis Case's campaign fund which he disclosed on the floor of the Senate in announcing, for that reason, his intention to vote against the bill. See *N.Y. Times*, Feb. 18, 1956, p. 1, col. 8.
9 Address by John C. Mason, FPC General Counsel, Before ABA Mineral and Natural Resources Law Section, in St. Louis, Aug. 8, 1961.
pound itself, the Commission estimating in September 1960 that it would not become current until the year 2043, even if its staff were tripled. In 1952 the Commission decided three cases under the Natural Gas Act; last February there were seventy active court cases. Despite all this the Commission was forced to attempt to operate with the same number of people it had when *Phillips* was issued until July 1, 1958, when additional appropriations were received to hire new personnel. Perhaps partially attributable to these factors but without question adding to the over-all chaotic situation was the fact that the Commission, during all this time, failed to prescribe with any degree of clarity the standard of proof required by the producers to sustain their cases. It has been speculated that had there been no foot-dragging in the very early years after *Phillips*, prompted by the springing hope of remedial legislation, an acceptable solution could have been reached by now.

Whether that may be, criticism of the Commission’s progress in this gargantuan task has ranged from the vituperative to the sympathetic.

On September 28, 1960, the Commission, in a bold and decisive move calculated to assist it out of the administrative morass into which it had fallen, issued its Statement of General Policy No. 61-1 in conjunction with its decision in *Phillips Petroleum Co. (Opinion No. 338)*.

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10 *Phillips Petroleum Co.*, 24 F.P.C. 537, 546 (1960) (Opinion No. 338), aff’d sub nom. Wisconsin v. FPC, No. 16175, D.C. Cir., Nov. 30, 1961. This is the same case as referred to above on remand from the Supreme Court after more than a decade of litigation.


13 Mason, supra note 9.

14 *Staff of Subcomm. on Administrative Practice and Procedure, Senate Comm. on the Judiciary, 86th Cong., 2d Sess., Report on Regulatory Agencies to the President-Elect (Comm. Print 1960)* [hereinafter cited as 1960 Landis Report]. Dean Landis stated:

> The Federal Power Commission without question represents the outstanding example in the federal government of the breakdown of the administrative process. The complexity of its problems is no answer to its more than patent failures. These failures relate primarily to the natural gas field, in the Commission’s handling of its responsibilities with respect to the transmission and the production of natural gas.

Id. at 54.


discarding the rate-base method of regulation and embarking upon a policy of price fixing on an area basis. In its wake follows a plethora of questions concerning its practicability and legal validity. It is to the latter that this note addresses itself.

I

BACKGROUND

1. Statutory Basis for Regulation

The growth of the natural gas industry has been and continues to be dramatic, having, in relatively few years, risen from a state of virtual obscurity to become one of the nation's major industries. Initially the pipelines, which created the market, dictated the prices to producers, but today it is a seller's market. Perhaps disproportionate with higher exploration and production costs and a greatly increased demand, field prices for natural gas have risen drastically.

There are three components of the natural gas industry: production and gathering, transmission and distribution. Production and gathering have been subject, for some time, to regulation by the states in which the reserves are located, and distribution, by the states in which the natural gas is consumed. A hiatus was created when the Supreme Court held that the states were unable to regulate the interstate commerce aspects of the natural gas business. The Natural Gas Act was passed to plug this gap in order to "protect consumers against exploitation at the hands of natural gas companies." Immediately the Com-

18 The American Gas Association made the prediction in 1959 that by 1970 the gas industry's $18 billion worth of gross plant will have grown to $50 billion, and instead of the 32 million customers now being served, there will be almost 44 million using more than twice the $4.6 billion of 1958. Fortune Magazine, Sept. 1959, p. 120. As recently as 1945, in the absence of a market, a fifth of the total gas produced was flared at the wellhead or blown in the air. FPC, No. G-580, Natural Gas Investigation 114 (Smith-Wimberly Rep.). Today, natural gas accounts for about one-third of the total energy of all kinds consumed in the United States. Address by Chairman Swidler, 41st Annual Meeting of the American Petroleum Institute, in Chicago, Nov. 15, 1961.

19 Prices have more than doubled in the last five years. 1960 Landis Report 55.


22 FPC v. Hope Natural Gas Co., 320 U.S. 591, 610 (1944). The FPC graphically outlined abuses of the monopolistically situated pipelines in charging local distribution companies unreasonably high rates that were being absorbed by consumers in its report to the Senate. S. Doc. No. 92, 70th Cong., 1st Sess., pt. 84-A, chs. XII, XIII (1928).
mission included the production and gathering facilities of the pipeline companies in its regulation of them.\(^{23}\)

The FPC's position is one of arbiater between numerous and very often divergent and conflicting interests, and the history of regulation in this industry is replete with regulatory intrigue. The primary purpose of the act, as indicated above, is to protect the consumer's interest against excessive prices. Both industrial and domestic users have converted to gas facilities at an enormous expense, which would be compounded if high prices forced them to reconvert to competing fuels. Curiously enough, the consumer interests, to a large extent, have been represented by the state utility commissions and local east coast distributing companies, which have found themselves ranged against the FPC.\(^{24}\) At the same time, the public has a vital stake in the financial health and stability of the gas companies which insist that present prices cannot be compared with the distress prices of the early years.\(^{25}\) Enough revenue must be provided to supply investor interests with the incentive to make the huge outlays required to explore for and develop future gas reserves to meet the projected demand.\(^{26}\) In addition to the consumer and investor interests, a broader public interest is seen in the prevention of unjust enrichment of the owner in collecting royalties and of unjust impoverishment of future generations by wasting this natural resource, about which there have always been rather ominous predictions.\(^{27}\)

It is the Commission's duty under both section 4\(^{28}\) and section 5\(^{29}\) of the act to determine "just and reasonable rates." A "just and reasonable

\(^{23}\) Hope Natural Gas Co., 3 F.P.C. 150, 153 (1942).


\(^{26}\) It has been estimated that a producer outlay of $92 billion will be required to meet the estimated demand during the next 10 years and, even with this expenditure, it is believed that the present 21 years' supply of natural gas will drop to the reserve figure of 15 years by 1970. Searls, Decision of Federal Power Commission in Phillips Petroleum Company Case and Effect on Producers of Commission's Statement of General Policy 61-1, as Amended, 12 Annual Institute on Oil & Gas Law & Taxation 1, 21-22 (1961). The investment of transmission companies is similarly astronomical. The cost of mainline construction of 30-inch or 36-inch pipe may exceed $100,000 per mile. Miller, supra note 20, at 226-27.

\(^{27}\) Lichtblau, Is the Tank Running Low?, Reporter, June 1957, pp. 15-17.


rate” is not defined nor is there any method or formula prescribed for its determination.\(^{30}\) Any proposed change in rates must be filed with the Commission, and the Commission has the power, in the case of proposed increases, of suspending the change for a period not to exceed five months, after which time the rate may be put into effect, subject to a bond to refund any part of the new rate found to be unjustified in a subsequent hearing.\(^{31}\) The Commission may, on its own motion or on complaint, investigate rates, and if they are found to be excessive, fix new rates to become effective prospectively.\(^{32}\) The burden is on the producer in the section 4(e) proceeding to prove that his newly filed rate is just and reasonable, but in the section 5(a) proceeding, the burden is on the Commission.

In the case of new sales the producer must secure a certificate of public convenience and necessity from the Commission,\(^ {33}\) but the initial contract price is set by the seller and is not subject to suspension.\(^ {34}\) The rate filed and accepted can only be changed after a section 5(a) hearing which has no refund feature. Proceedings under this section have proven to be “nigh interminable.”\(^ {35}\) Although unable to suspend initial rates and subsequently to superimpose bonding requirements when rates go into effect, as is done with proposed rate increases, the Commission has been able to have its say on the prices to be charged for initial sales by attaching conditions for lower rates to orders issuing certificates of public convenience and necessity.\(^ {36}\)

2. Rate Making vis-à-vis Price Fixing

Rate making, a legislative function, is a species of price fixing, but the theoretical basis of the two approaches to regulation are quite distinct:

\(^{30}\) When the bill was first before Congress it contained the following: “In determining just and reasonable rates the Commission shall fix such rates as will allow a fair return upon the actual legitimate prudent cost of the property used and useful for the service in question.” H.R. 5423, 74th Cong., 1st Sess., § 312(c) (1935). Congress rejected this in favor of the broad statutory language used.


price fixing attempts to eliminate profits that are considered to be abnormal for the industry as a whole, the result supposedly achieved by competition, whereas traditional public utility rate making seeks to control the profits of the individual company.\footnote{Comment, Federal Price Control of Natural Gas Sold to Interstate Pipelines, 59 Yale L.J. 1468, 1503 (1950).}

At a very early date the power of the states to control prices by rate making was vindicated by the historic decision in \emph{Munn v. Illinois}.\footnote{94 U.S. 113 (1876).}

Basically, the regulating body sought to permit utility earnings sufficient to cover operating expenses plus a fair return on the utility’s property, and the actual dollar amount or rate base on which this return was to be made, in order to meet the due process requirements of the fourteenth amendment, was declared by the Supreme Court in \emph{Smyth v. Ames}\footnote{169 U.S. 466 (1898). In reviewing railroad rates set by Nebraska, the Court made no attempt to establish a formula for determining “fair value” but suggested that:

\begin{quote}
[T]he basis of all calculations . . . of rates . . . must be the fair value of the property being used by it for the convenience of the public. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration . . . . What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience.
\end{quote}

Id. at 546-47.}

to be the “fair value of the property.” The concept of valuing a rate base for the purpose of affixing a value to the goods or services produced in order to establish rates first came into vogue in the regulation of transportation service\footnote{Smyth v. Ames, 169 U.S. 466 (1898).} and was used later in other similarly situated industries.\footnote{E.g., Willcox v. Consolidated Gas Co., 212 U.S. 19 (1909) (gas distribution rate); San Diego Land & Town Co. v. National City, 174 U.S. 739 (1899) (water rates); Covington & Lexington Turnpike Road Co. v. Sandford, 164 U.S. 578 (1896) (road tolls).}

The public, while not receiving any of the property, did make use of it, and the difficulty of appraising an intangible service was thought to be simplified by relating it to physical property which was visible and did have definite value.\footnote{FPC v. Hope Natural Gas Co., 320 U.S. 591, 648 (1944) (Jackson, J., dissenting).} Since the utility was often monopolistically situated, there were no open market criteria as to reasonableness, and the value or cost of what was put to use in the service was not a remote or irrelevant consideration in making rates.\footnote{Ibid.}
and the early battle concerned itself with what formula was to be used in order to value the regulated company’s property or establish its rate base. The original cost of acquiring the property and reproduction cost are methods that have been used. The FPC departed from the “fair value” rule soon after it undertook its task of regulating gas companies and arrived at a rate base by determining what the property should have originally cost had the money been prudently invested, less depreciation and depletion. This was sustained in FPC v. Hope Natural Gas Co. when the Supreme Court held that the fifth amendment does not require adherence to any specific rate-making formula. Thus the “fair value” rule of Smyth v. Ames was substantially modified. However, the FPC’s adoption of the rate-making approach did not pass without spirited and articulate objection by Mr. Justice Jackson in his dissent in Hope.

West Virginia, appearing as amicus curiae in Hope, advanced the argument that the Commission was not empowered to include the production and gathering facilities of the Hope Company, which produced as well as transported gas interstate, in the determination of its rate base because of the exemption provisions of section 1(b) of the act. It submitted that the correct procedure would have been for the Commission to include in the operating expenses of the company, whose rates it was empowered to fix, the “fair field price” or “fair market value, as a commodity, of the gas.” The Court rejected this argument and supported the Commission’s action.

Mr. Justice Jackson felt that application of the conventional utility rate-base (cost-of-service) approach as applied to production properties was economically fallacious and recommended that the Commission fix the price of gas in the field as one would fix maximum prices of oil, milk or coal, or any other commodity. He viewed the transmission part of

44 E.g., Hope Natural Gas Co., 3 F.P.C. 150 (1942), rev’d, Hope Natural Gas Co. v. FPC, 134 F.2d 287 (4th Cir. 1943), rev’d, 320 U.S. 591 (1944); Columbian Fuel Corp., 2 F.P.C. 200 (1940).
45 320 U.S. 591 (1944).
46 Id. at 628.
48 320 U.S. at 607-15.
49 Id. at 647-52. Some of the most notable cases, arising under both the fifth and fourteenth amendments, in which the price fixing power was upheld, are: Olsen v. Nebraska, 313 U.S. 236 (1941) (state statute fixing maximum compensation to be collected by private employment agencies); United States v. Darby, 312 U.S. 100 (1941) (federal statute fixing minimum wages); Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381 (1940) (federal
the business as lending itself reasonably well to the rate-base approach but declared that production, in the broad sense of finding and reducing gas to possession, is inherently more erratic, irregular and unpredictable in relation to investment than any phase of any other utility business. He insisted that the value of the rate base is more elusive than that of the gas since it consists of intangibles—leaseholds and freeholds—whose value lies almost wholly in predictions of discovery and of the price of gas when captured, and bears little relation to the cost of tools, supplies and labor used to develop it. He therefore suggested that since the components of a rate base cannot be valued reasonably or accurately, the gas should be valued directly and prices fixed. Needless to say, today much attention has been refocused on Mr. Justice Jackson's views.

3. Regulation Prior to Statement of General Policy No. 61-1

An appreciation of the Commission's move, enunciated in its Statement of General Policy No. 61-1, and its attendant legal questions can only be had if viewed within the context of the prior seven years of regulation. Because of space limitations this will hardly be an exhaustive recounting, but an effort will be made at least to point up its highlights.

A. Rates

About six weeks before the Supreme Court's holding in Phillips, the Commission decided to follow Mr. Justice Jackson's suggestion. In

statute authorizing National Bituminous Coal Commission to fix maximum and minimum prices for bituminous coal; United States v. Rock Royal Co-op., 307 U.S. 533 (1939) (federal statute authorizing Secretary of Agriculture to fix minimum prices to be paid producers for milk sold to dealers); Mulford v. Smith, 307 U.S. 38 (1939) (federal statute imposing penalties on tobacco auction warehousemen for marketing tobacco in excess of prescribed quota); Nebbia v. New York, 291 U.S. 502 (1934) (state statute authorizing a milk control board to fix minimum and maximum retail prices for milk).

50 320 U.S. at 647.

51 Id. at 648, 652. While showing the tenuous relationship between costs and gas produced in attacking the reasonableness of the application of the rate-base method to this segment of the industry, Mr. Justice Jackson, however, made it implicitly clear that in any scheme of price fixing to be applied in this industry, costs were not to be ignored. Costs have always been a major item of consideration in determining what prices to fix. See generally Comment, supra note 37, at 1503 n.222.

52 Mr. Justice Jackson reiterated his position in Colorado Interstate Gas Co. v. FPC, 324 U.S. 581, 610 (1945) (concurring opinion).

53 For a more detailed analysis see generally McGee, Independent Producers—After Six Years of FPC, 1960 ABA Section of Mineral & Natural Resources Law 219.
determining whether to allow the Panhandle Eastern Pipe Line Co. an increase in its rate, the Commission decided not to evaluate the company’s production property or include it in the rate base; instead, it priced the gas directly by the use of a “fair field price” formula. The “field price” for Panhandle’s gas was computed on the basis of the “weighted average arm’s-length prices” established by unregulated bargaining for similar gas in the same fields. It then multiplied the volume of the company’s production by the “field price” obtained and included the result in Panhandle’s operating expenses as an amount to be recovered through the rates established, while at the same time excluding from the rate base the cost of the production properties and the cost of production from recoverable operating expenses.

The United States Court of Appeals for the District of Columbia Circuit reversed the Commission in City of Detroit v. FPC. Although the court said that it did not hold the rate-base method to be the only one available under the statute, it said that “unless it is continued to be used at least as a point of departure, the whole experience under the Act is discarded and no anchor, as it were, is available by which to hold the terms ‘just and reasonable’ to some recognizable meaning.” The Solicitor General refused to sign the petition for certiorari, and the Supreme Court refused to grant it. Meanwhile Phillips had come down, and many of the independent producers who were filing with the Commission were relying strictly on “field price” evidence in support of their prices. In Union Oil Co., the first major decision involving an independent producer, the Commission expressly followed City of Detroit and declared this type of evidence to be inadequate.

Before Union Oil could be heard on review, the Commission created an exception to it in Pan American Petroleum Corp., allowing a rate

57 Id. at 268-69, 230 F.2d at 818-19.
58 352 U.S. 829 (1956).
59 16 F.P.C. 100 (1956), amended, 17 F.P.C. 89, amended, 17 F.P.C. 256 (1957). It is significant to note that, even at this early date, the Commission was talking about “the financial requirements of the industry”: “It is impossible to meet the requirements of either the act or the Constitution unless we can determine the revenue requirements of the industry we must regulate and the effect of the rate in question on its earning capacity.” 16 F.P.C. at 111. (Emphasis added.)
60 19 F.P.C. 463 (1958). The case involved sales from the West Edmond field which was
increase solely on the basis of field-price evidence where it was utterly impossible to use the rate-base approach. The Fifth Circuit affirmed the Commission’s action in the Union Oil case, styled Bel Oil Corp. v. FPC on review, but did not discuss the Commission’s application of the City of Detroit doctrine to independent producers. The court, however, did note the exception created in Pan American to its Union Oil holding. Gulf Oil Corp. v. FPC, a companion to the Bel Oil case, considered the producer’s plaint that the rate-base method was completely unworkable and their reliance on Pan American in support of field price evidence. While stating that the Commission had “much latitude” in the selection of applicable criteria and that it must first decide what factors are necessary for a case to come within the ambit of the Pan American exception, the court chose not to extend Pan American; instead, it reversed the Commission’s holding and afforded the producers the opportunity to submit such evidence as the Commission would advise.

In the meantime, the Commission had upheld the examiner’s decision in Forest Oil Corp. that the producers had not sustained their burden of proof in relying on evidence tending to show that the contract was executed at arm’s length within a competitive market, and that the increased price was below prices then currently being paid in that area. The appeal to the Fifth Circuit gave that court an opportunity to clarify its opinion in Bel Oil in the following extremely significant language:

We do not think that either the Commission or the petitioner should be baffled or handicapped in this new field of regulation by any formulas by whatever name they are known. Specifically, if there is an accounting or rate-making formula known to the public utilities, [sic] industry as a “conventional rate base method of rate-making” which the Commission in its order of dismissal in this case said must be used at least as a basis of comparison or point of departure, we say the Commission need not require it unless such method is the only way by which the

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62 255 F.2d 556 (5th Cir. 1958).
63 What other factors the Commission should take with consideration [beyond the financial data above referred to], such, for instance, as the fact that different producers from the same field and even from the same well, may, under traditional cost of service rate making standards, be entitled to different prices as reasonable, is for the Commission to decide in the first instance.
Id. at 557.
64 17 F.P.C. 617 (1957).
Commission can make its required determination. This is what we undertook to say in the *Bel Oil* opinion, and it is clear that the Commission recognizes that it is free to act thus by such of its opinions as 310, supra [*Pan American*].

Despite this language the Commission did not thereafter extend the exception that it had created in *Pan American* but continued to adhere to its demand that producers back up their cases with the conventional cost-of-service evidence until the Commission's about-face in September 1960, despite the producers' insistence on the futility of the rate-base method.

### B. CERTIFICATES

Section 7(e) requires that proposed initial sales be scrutinized by the Commission, and if the transaction is found to be required by "the present or future public convenience and necessity," a certificate will issue. The act does not require a determination of just and reasonable rates in a section 7 proceeding, but the question immediately arose as to the extent to which the proposed price ought to be scrutinized by the Commission, especially when such price, if certified, would pierce the prevailing prices in the area. Battle lines were drawn from the outset. The intervenors requested that conditions be attached to the certificates to lower the contract price or that various types of price redetermination provisions be removed; the producers, on the other hand, insisted that the onus on them ought to amount to no more than a showing that the contract price had been arrived at through arm's-length negotiations and that any greater burden would be tantamount to the requirements of a section 4 or section 5 rate proceeding.

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65 Forest Oil Corp. v. FPC, 263 F.2d 522, 526 (5th Cir. 1959).
66 In Continental Oil Co., 19 F.P.C. 519 (1958), the Commission did not apply the *Pan American* exception even though Commissioners Digby and Kline dissented, stating that they were unable to distinguish between the two cases. On review the Commissioner's dismissal for failure to present cost of service evidence was affirmed without mention of *Pan American*. Episcopal Theological Seminary v. FPC, 106 U.S. App. D.C. 37, 269 F.2d 228, cert. denied sub nom. Pan American Petroleum Corp. v. FPC, 361 U.S. 895 (1959).
67 E.g., Pan American Petroleum Corp., 19 F.P.C. 463 (1958); Delhi-Taylor Oil Corp., 18 F.P.C. 375 (1957); H. F. Sears, 18 F.P.C. 244 (1957). After the Fifth Circuit's *Bel Oil* decision, one of the producers petitioned for a declaratory order from the Commission for a statement of the type of evidence that the Commission wished in a producer case; the Commission refused to issue the declaratory order but rather suggested that they proceed on "whatever basis it deems best in light of its own knowledge of its business and its operation and costs." Associated Oil & Gas Co., 20 F.P.C. 788 (1958).
The Commission decided Tamborello\textsuperscript{70} which seemed to illuminate the Commission's basic attitude on this question. The certificate was issued without a condition over the objections of the intervenors who had boomed for a proof approaching a showing that the proposed sale was at a just and reasonable price. The Commission supported its action in the following words:

However, because the economic and other conditions presented in certificate applications filed by independent producers are substantially different from those presented in certificate applications filed by interstate pipeline companies, the Commission has not deemed it prudent to expend the time required to resolve rate issues at this stage, nor has it found it practical to inquire into the reasonableness of producer rates in all producer certificate proceedings.\textsuperscript{71}

Shortly thereafter, however, the Commission exercised its power to condition the price of a permanent certificate for the first time in Cities Service Gas Co. \textit{(Signal Oil)}.\textsuperscript{72} This decision was based on evidence introduced by the Commission's staff that the proposed initial price was higher than the prevailing area price and, if allowed, would operate to trigger "favored-nations" clauses.\textsuperscript{73}

Consumer hopes, inspired by \textit{Signal Oil}, were dashed in short order by subsequent actions of the Commission.\textsuperscript{74} Representative is Seaboard Oil Co.,\textsuperscript{75} in which the Commission expressly limited \textit{Signal Oil} to substantially similar fact patterns, stating that some standard of reasonableness had to be formulated before price conditions would be workable. Thus a truly enigmatic situation existed in which the Commission was permitting the initial filing prices to be fixed by the producers merely on a showing, so far as price justification was concerned, that they had been bargained for at arm's length or that they were no higher than other prices then being paid in the area—the same basis upon which the Commission was contemporarily leveling criticism at the producers in section 4 rate proceedings.\textsuperscript{76} Newly contracting parties were thus

\textsuperscript{70} 14 F.P.C. 123 (1955).
\textsuperscript{71} Id. at 126.
\textsuperscript{72} 14 F.P.C. 134 (1955).
\textsuperscript{73} Essentially, these provide that if the purchasing pipeline contracted with another producer for a higher price during the span of the contract, the price paid to the contracting producer would pro tanto be increased. Hooley, Financing the Natural Gas Industry: The Role of Life Insurance Investment Policies 15 (1961).
\textsuperscript{75} 19 F.P.C. 416 (1958).
\textsuperscript{76} United Gas Improvement Co. v. FPC, 290 F.2d 133, 135 (5th Cir. 1961).
being permitted, in some instances, to charge prices thirty to fifty per cent higher than earlier prices which were, at the same time, being suspended by the Commission, pending hearings under section 4 procedures.\textsuperscript{77} It is interesting to note, particularly in the light of subsequent developments, that Commissioner Connole, in his dissent, advocated a system for initial sales whereby no extensive showing would be required if the price were at or beneath the going rate.\textsuperscript{78} Although criticized as being unworkable, in principle it was a herald of coming events.

The Commission was brought up short by the Supreme Court in \textit{Atlantic Ref. Co. v. Public Serv. Comm'n (CATCO)}.\textsuperscript{79} Reaffirming its decision in \textit{United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.},\textsuperscript{80} which held that the sales price is initially determined by contract, the Court recognized that the act does not require the Commission to determine a just and reasonable rate in a certificate proceeding.\textsuperscript{81} Nevertheless, the Court held that since initial certificated rates are reviewable only in a section 5 proceeding, which proceeding has been earmarked by a "nigh interminable" delay, during which time the public is not protected by refund provisions, the Commission has a duty to protect the public interest.

Where the proposed price is not in keeping with the public interest because it is out of line or because its approval might result in a triggering of general price rises or an increase in the applicant's existing rates by reason of "favored nation" clause or otherwise, the Commission in the exercise of its discretion might attach such conditions as it believes necessary.\textsuperscript{82}

Shortly thereafter, the Supreme Court summarily reversed the Third Circuit and remanded a case to the Commission which involved proposed sales from twenty-six producers from the same area as \textit{CATCO} at prices as high as or higher than those struck down in that case.\textsuperscript{83} The Commission had refused to condition the proposed sale,\textsuperscript{84} and the Third

\textsuperscript{77} Id. at 136.
\textsuperscript{78} 19 F.P.C. at 426 (1958).
\textsuperscript{79} 360 U.S. 378 (1959).
\textsuperscript{80} 350 U.S. 332 (1956).
\textsuperscript{81} 360 U.S. at 389.
\textsuperscript{82} Id. at 391. FPC Examiner Simpson, after remand, filed his decision on August 14, 1961, subject to review by the Commission, allowing the \textit{CATCO} group an initial price of 19.92 cents per thousand cubic feet as compared to the 21.4 cent price struck down by the Supreme Court. FPC News Release No. 11601, Aug. 14, 1961.
\textsuperscript{83} Public Serv. Comm'n v. FPC, 361 U.S. 195 (1959).
\textsuperscript{84} Seaboard Oil Corp., 20 F.P.C. 330, 332 (1958).
Circuit had affirmed the Commission’s action in the face of the CATCO decision.\textsuperscript{85} The courts and the Commission have since been holding the line.\textsuperscript{86} While matters were in this posture, the Commission issued its Statement of General Policy No. 61-1.

II

\textbf{STATEMENT OF GENERAL POLICY NO. 61-1}

The Commission issued its policy statement\textsuperscript{87} concurrently with \textit{Phillips Petroleum Co. (Opinion No. 338)}\textsuperscript{88} in which it presumably used the rate-base method for one of the last times in independent producer cases. It rejected this method in unequivocal terms:

Experience of the Commission in this case, as well as in many other producer rate cases during the last five years, has shown, beyond any doubt, that the traditional original cost, prudent investment rate base method of regulating utilities is not a sensible, or even a workable method of fixing the rates of independent producers of natural gas.\textsuperscript{89}

The short, perhaps necessarily vague, policy statement announced levels for initial sales and rate increases which would “aid in effectively applying the provisions of the Act to independent producers on a simple, clear and administratively feasible basis, and in a manner fair to all whose interests are affected by Commission regulation.”\textsuperscript{90}

In setting up dual prices for each of nine geographical areas, each in turn divided into districts, the Commission emphasized that these standards would serve as a guide in determining whether proposed initial rates should be certificated without a price condition and whether proposed changes should be accepted or suspended. The prices set forth were based on considerations including cost information from all decided and pending cases, existing and historical price structures, volumes of production, trends in production, price trends in the various areas over

\begin{itemize}
\item \textsuperscript{85} United Gas Improvement Co. v. FPC, 269 F.2d 865 (3d Cir. 1959).
\item \textsuperscript{86} Texaco, Inc. v. FPC, 290 F.2d 149 (5th Cir. 1961); United Gas Improvement Co. v. FPC, 290 F.2d 133 (5th Cir. 1961); FPC v. United Gas Improvement Co., 287 F.2d 159 (10th Cir. 1960); Public Serv. Comm’n v. FPC, 109 U.S. App. D.C. 289, 287 F.2d 143 (1960). On Nov. 17, 1959, the Commission issued certificates without conditions in seven producer cases in Transcontinental Gas Pipeline Corp., 22 F.P.C. 836, but on Jan. 15, 1960, granted rehearing in five of those cases for the purpose of reconsidering whether price conditions ought to attach. No. G-16603, FPC.
\item \textsuperscript{87} Statement of General Policy No. 61-1, 24 F.P.C. 818 (1960).
\item \textsuperscript{88} 24 F.P.C. 537 (1960), aff’d sub nom. Wisconsin v. FPC, No. 16175, D.C. Cir., Nov. 30, 1961.
\item \textsuperscript{89} Id. at 542.
\item \textsuperscript{90} 24 F.P.C. at 819.
\end{itemize}
a number of years, trends in exploration and development, trends in demands, and the available markets for the gas. The Commission stressed that the various price levels applied to "pipeline quality gas," that the geographical areas set up were not sacrosanct but subject to change, and that the dual price system, dictated by economic factors for the short run, were to be eventually eliminated. In addition, it was emphasized that these prices did not represent an adjudication of the ultimate justness and reasonableness of any rate level.

In essence, the policy statement amounted to a "price freeze" since the prices set forth approximated then current maximum prices. It was suggested that anyone having a quarrel with the area maximum price should join together with other interested persons and submit evidence, of the type outlined above, in any attempt to revise the area price or the geographical area itself. It was said that the determination would be "in the nature of setting a price for the gas itself from any source questioned and not necessarily a price applicable solely to the party proposing some other price." These proceedings would then culminate in new determinations representing just rates for the areas involved. The amendments to the policy statement set up additional prices for areas not covered initially and made some changes in others.

Immediately thereafter, the Commission terminated eighty-three producer proceedings in which proposed rate increases, previously suspended, fell within the permissible levels promulgated in the policy statement. The Commission moved cautiously, and the announcement was greeted in all quarters with a reserved hope, punctuated with numerous questions.

91 1960 Landis Report 55.
92 24 F.P.C. at 820.
95 One of the most poignant questions concerned itself with how persistent the Commission would be in pursuing the policy because of the transition that the Commission was undergoing in its composition. Only three Commissioners participated in the policy statement and former Commissioner Kline half-heartedly joined in solely "because it represents action rather than inaction." 24 F.P.C. at 580 (separate opinion). With the exception of ex-Chairman Kuykendall, none of the membership of the Commission at the time of issuance of the policy statement remains in office, two having died while in office and the terms of two others having expired. President Kennedy accepted the resignation of Commissioner Kuykendall, the last of the Republican appointees, on October 14, to become effective on January 1, 1962, despite the fact that his term expires on June 22, 1962. Washington Post, Oct. 15, 1961, § A, p. 2, col. 5. The new Chairman, Swidler, did not fully officially endorse this policy until September 19, 1961, in a speech delivered
that perhaps this was a way out of the perplexing difficulties confronting the industry.\footnote{96}

The Commission instituted area-rate proceedings for the Permian Basin area, including parts of New Mexico and Texas, on December 23, 1960,\footnote{97} and for the Southern Louisiana area on May 10, 1961,\footnote{98} for the purpose of determining just and reasonable rates in these respective areas.\footnote{99} Consolidated therein were numerous cases then before the Commission. Because of the sheer magnitude of a proceeding of this type, in terms of the enormous number of parties and interested groups and the complexity of the issues and evidence involved, prehearing conferences were set up to facilitate consolidation of evidentiary showings and to consider the type of evidence to be adduced, the number of witnesses to be heard and the simplification and delineation of issues. Space does not permit an extensive discussion of the developments to date; however, of particular significance in the Permian Basin prehearing conference was a motion certified to the Commission requesting that the type of cost evidence to be introduced be set forth with some degree of particularity and that the Commission grant a "savings clause" allowing the individual producers the opportunity to demonstrate the reasonableness of individually filed rates, after the issuance of a final order determining area rates. The Commission ruled that it would not permit rate-base, cost-of-service studies in the proceedings, regardless of whether such studies relate to the operations of an individual producer or to any group of producers, and suggested somewhat more specifically the pertinent type of cost evidence to be introduced, which was along the same lines as that suggested in the policy statement.\footnote{100} Regarding the "savings clause" request, the Commission deferred consideration until

\footnote{96} E.g., Oil & Gas Journal, Oct. 3, 1960, p. 56.
\footnote{97} Order Instituting Area Rate Hearing, Consolidated Proceedings and Prescribing Preliminary Procedure, 24 F.P.C. 1121 (1960) (No. AR61-1).
\footnote{98} Order Instituting Rate Proceedings for the Southern Louisiana Area, No. AR61-2, FPC, May 10, 1961.
\footnote{99} The Commission originally intended that the Southern Louisiana hearing be held in two phases, the first of which was to concern itself with the price of initial sales, but because of general producer criticism based mainly on the fact that the evidence to be presented for either determination would be the same, the Commission abandoned the two-phase idea. Order Upon Presiding Examiner's Report Prescribing Procedure and Denying Motion, No. AR61-2, FPC, Nov. 9, 1961.
\footnote{100} Order Ruling Upon Motion Relating to Evidence to be Considered in Area Rate Proceeding, No. AR61-1, FPC, April 5, 1961, at 4.
a later date but stated that even if granted, no rate-base evidence of an individual producer would be permitted.\textsuperscript{101} The Permian Basin hearing commenced on October 11, 1961.

On August 23, 1961, Examiner Edward B. Marsh filed his report to the Commission on the results of the Southern Louisiana prehearing conference.\textsuperscript{102} He reported that in addition to reserving the right individually to amend, amplify and restrict the categories of evidence agreed upon (which consisted of every type of economic evidence imaginable), each producer reserved the right to individually justify each and every one of the contract prices which were the subject of certificate proceedings consolidated in the area-price proceeding.\textsuperscript{103} Most of them, he said, reserved the right to reject an area rate not equal to or higher than any of their highest contract prices in the area, questioning the legal validity of the area-rate policy.\textsuperscript{104}

The report discloses that variant positions had begun to crystallize somewhat as evidenced by the statements of position filed: some among all the groups represented, including state commissions, distributors and producers, continue to insist that just and reasonable rates for producers must be determined by the cost-of-service formula; few have declared themselves as favoring area-wide price fixing, and those that have are found only among the producers; and the other participants, while indicating a desire to cooperate with the Commission, show no disposition or intention unconditionally to abide by an area-rate determination regardless of the nature or amount of evidence adduced, a number of them strenuously opposing the use of this procedure and more of them its \textit{unlimited} use.\textsuperscript{105} Some of the distribution companies show less animosity to the concept than the price lines drawn. Examiner Marsh's proposed report on the prehearing conference contained the recommendation that the Commission drop the area-wide rate method of procedure; this was deleted after a group of producers told him they would cooperate fully in an attempt to give area pricing a fair trial and urged that the effort be continued.\textsuperscript{106} It was hoped that the hearing would get underway around December 15, 1961, but it now looks as though there will be a considerable delay.

\textsuperscript{101} Id. at 5.
\textsuperscript{102} Report to the Commission of Prehearing Conference, No. AR61-2, FPC, Aug. 23, 1961 [hereinafter cited as Prehearing Report].
\textsuperscript{103} Id. at 5.
\textsuperscript{104} Id. at 5-6.
\textsuperscript{105} Id. at 6.
\textsuperscript{106} Id. at 12; Tulsa World, Aug. 19, 1961, p. 20, col. 1.
III
LEGAL VALIDITY

While the participants are attempting to cope with the immense mechanical problems involved in attempting to implement the area-rate concept, omnipresent in the background is the pervading question of whether or not the courts will sustain it on review. The State of Wisconsin and the Public Service Commission of Wisconsin attempted to attack the Policy Statement directly, but the United States Court of Appeals for the District of Columbia Circuit granted the FPC's motion to dismiss on the basis that, not being a final order, the Policy Statement was not reviewable.\textsuperscript{107} Oblique references have been made showing some sympathy for the idea,\textsuperscript{108} and the Third Circuit very recently decided \textit{J. M. Huber Corp. v. FPC}\textsuperscript{109} based on an acceptance of its validity, but the case did not arise in such a posture as to permit the court an opportunity for a square holding to that effect. On November 30, 1961, the United States Court of Appeals for the District of Columbia Circuit once again handed down a decision in the \textit{Phillips case},\textsuperscript{110} to be discussed at length \textit{infra}, which upheld the validity of the switch to area price fixing. At this writing, the time for petitioning for certiorari has not yet elapsed.

The questions relating to the legality of this approach, in some instances, do not fit into neat conceptualistic categories, but three basic ones seem to be discernible: firstly, whether the Natural Gas Act permits the Commission to discard the conventional public utility rate-base method of regulation in favor of a price-fixing scheme; secondly, if the price-fixing approach is within the Commission's authority, whether substantive due process requires that any uniform maximum price set be compensatory to all producers, and if not, whether producers claiming a higher cost are entitled to make an individual showing in order to pierce the area price set; and thirdly, whether the area-hearing technique leading to a determination of just and reasonable rates conforms to the act and with the requirements of procedural due process.

\textsuperscript{107} Wisconsin v. FPC, 292 F.2d 753 (D.C. Cir. 1961). Of sundry lines of attack, perhaps the most interesting is the contention that the area levels set forth would immediately become the floor; all producers with lower rates would immediately raise them to these levels to the detriment of the consumer.

\textsuperscript{108} United Gas Improvement Co. v. FPC, 290 F.2d 133 (5th Cir. 1961).

\textsuperscript{109} 294 F.2d 568 (3d Cir. 1961). The Commission's action was affirmed, at least partially on the basis that the proposed prices were higher than those set forth in the Policy Statement.

\textsuperscript{110} Wisconsin v. FPC, No. 16175, D.C. Cir., Nov. 30, 1961.
1. Validity of the Price Fixing Approach

It has been asserted that the Natural Gas Act does not permit the Commission to establish area rates applicable to all independent producers operating in the same geographic area, nor does the act permit the Commission to establish rates for a single producer (whether area rates or otherwise) on the basis of costs or cost of service applicable to the industry.\(^{111}\) As pointed out above, the act is silent on the method to be employed by the Commission in its determination of just and reasonable rates. It becomes necessary then to look to the cases in order to attempt to ascertain the breadth of the Commission's authority under the act.

In *FPC v. Natural Gas Pipeline Co.*, the first case to reach the Supreme Court under the act, it was declared that the Constitution does not bind rate-making bodies to the service of any single formula or combinations of formulae, and that agencies to whom this legislative power has been delegated are free, within the ambit of their statutory authority, to make the pragmatic adjustments which may be called for by particular circumstances.\(^{112}\) Three members of the Court made it clear, in their concurring opinions, that they considered price fixing, including the rate-making type, as being essentially a legislative function and that the due process clause does not give an "unlimited grant to courts to approve or reject policies selected by legislatures in accordance with the judge's notion of reasonableness."\(^{113}\) They favored indicating more explicitly the wide breadth of freedom which the Commission had under the new act. Mr. Justice Frankfurter, who also wrote a concurring opinion, observed that the historic controversy over the constitutional limitations upon the powers of courts in rate cases was not presented in that case and that it would be "an usurpation of the Commission's function to tell it how it should discharge this task and how it should protect the various interests that are deemed to be in its, and not in our, keeping."\(^{114}\)

The Court in *FPC v. Hope Natural Gas Co.* repeated the language of *Natural Gas* and further added that under the act it is "the result reached not the method employed which is controlling . . . . It is not theory but the impact of the rate order which counts. If the total effect


\(^{112}\) 315 U.S. 575, 586 (1942).

\(^{113}\) Id. at 601 (Black, Douglas, Murphy, JJ., concurring).

\(^{114}\) Id. at 610.
of the rate order cannot be said to be unjust and unreasonable, judicial inquiry under the Act is at an end.

In essaying the applicability of this broad language to the current question, however, it must be considered in the light of the factual contexts presented in those two cases—both involved the efficaciousness of the Commission's use of variations on the traditional rate-base approach.

Further, the Court in Hope, in rejecting Mr. Justice Jackson's views, noted that the Committees, in reporting the bill that became the Natural Gas Act, said that it provided "'for regulation along recognized and more or less standardized lines' and that there was 'nothing novel in its provisions.'" Mr. Justice Jackson replied that the majority had sustained a rate calculated on a novel variation of rate-base theory which had been recognized, at time of the enactment, only in dissenting opinions. As a practical matter it is very unlikely that Congress, when passing the legislation, ever intended the act to apply to independent producers.

To be balanced somehow against this, however, is the Court's language in Colorado Interstate Co. v. FPC in which the Court was confronted with essentially the same problem presented in Hope. It again acknowledged that the rate-base method was customary but carefully pointed up specifically that "'we do not say that the Commission lacks the authority to depart from the rate-base method. We only hold that the Commission is not precluded from using it.'" Beyond this, the Court pointed out to the petitioning pipeline company, which was insisting that it be allowed the "fair field price" of the gas which it produced rather than including the production property in its rate base, that "'the Act does not say that the Commission would have to value it at the fair field price if the Commission abandoned the rate-base method of regulation.'" It should be noted again, for whatever probative value it may have, that subsequently the Court refused to grant certiorari in City of Detroit which held that rate-base evidence was required. Any implication thus drawn should be qualified for the same reason that the holding in City of Detroit should be qualified in considering its applicability to independent producers, viz., that the case

118 Id. at 601.
119 Id. at 603. (Emphasis added.)
concerned itself with the production facilities of a pipeline company and not an independent producer.

Perhaps the strongest dictum to the effect that Congress intended that rates be determined on a company-by-company basis is to be found in *Bowles v. Willingham* in which Mr. Justice Douglas said, in distinguishing the statute there under consideration, "under other price-fixing statutes such as the Natural Gas Act of 1938 Congress has provided for the fixing of rates which are just and reasonable in their application to particular persons or companies." The Court cited its decision in *Hope* in support of this dictum. Some difficulty has been envisioned with the Supreme Court's holding in *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.* that the initial sales prices were to be set by contract and not by the Commission. But conditioning a certificate at a maximum uniform sales price, while being more of a formality in such a case, could be viewed as very much akin to setting up a line and holding that line by conditioning as urged in *CATCO*.

There exists one case, the Fifth Circuit's opinion in *Forest Oil Corp. v. FPC*, quoted earlier, which clearly holds that the Commission is not bound by and is free to discard the rate-base method in its regulation of independent producers, although the case certainly can not be construed as endorsing area price fixing as an alternative. The most recent *Phillips* decision is the only definitive holding thus far supporting the validity of this approach. The United States Court of Appeals for the District of Columbia Circuit noted that the Commission had dealt with the consolidated cases before it in three parts: the earlier rates previously suspended; the current rates and those to be in effect during the interim period between the implementation of the rates contained in the policy statement and the effective date of the newly proposed area-rate system; and the future rates to be implemented after completion of the hearings. In discussing the third and final stage of the area-rate policy, the court had this to say:

> The Congress has confided the regulation of the natural gas industry to the Commission, not to the courts. The Supreme Court has said several times that the Commission is not bound to any one method or to known methods. . . . It would be foolish for the courts to hold that the Commission is bound to apply to these new conditions the methods and measurements designed and used for other and different regulatory purposes. We think it is clear that the Commission had ample

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120 321 U.S. 503, 517 (1944). (Citation omitted.)
121 350 U.S. 332 (1956).
123 263 F.2d 622 (5th Cir. 1959).
authority to embark upon an effort to design suitable new standards for use in the regulation of producers when it found that the tools at hand were not suited to this purpose.\textsuperscript{124}

Conspicuous in its absence was mention of this court's prior holding in \textit{City of Detroit}.

After such an unequivocal endorsement of the Commission's ultimate area-rate policy goal, it was inevitable that the court would endorse the second stage:

Has the Commission power under the Natural Gas Act to do what it did? Can it adopt upon the basis of its own expertise and its files, without a record made in the open in respect to the specific subject matter in issue, and without hearing, a set of guidelines by which it will be controlled in its regulatory functions during an interim period while it is attempting to perfect a suitable system for permanent regulation? We think it can.\textsuperscript{125}

There can be no doubt that this case supports the transition to price fixing and that the \textit{City of Detroit} holding has been limited to the facts giving rise to it. It is submitted that, at the very least, it can be said that if the Supreme Court decides to go along with area price fixing, it will not be required to overturn any of its decisions.

2. \textit{Substantive Due Process}

There has been general confusion prevailing among the producers as to the real function of the intermediate stage area rates set forth in the September 28, 1960, policy statement. One of the big immediate questions is whether they are considered to be merely "guidelines" for the Commission in its determinations, perhaps entailing a presumption of justness or reasonableness,\textsuperscript{126} or a "price freeze" definitely holding the line where it is until the Commission is able to secure the necessary cost and other economic data from the area hearings upon which it will base its determination of the revenue requirements of the industry, and thence its determination of just and reasonable prices. Conceivably these prices could be lower than those set in the policy statement. But the most burning question concerns the status of the area rates to be determined on the basis of the hearings. It is the question which was embodied in the motion certified to the Commission from the Permian Basin prehearing conference and upon which the Commission deferred decision: whether, after a just and reasonable area price has been established on the basis


\textsuperscript{125} Id. at p. 15.

\textsuperscript{126} See Prehearing Report 10.
of a collective sampling of evidence, the uniform rates will be valid if not compensatory to all producers, and if valid, whether an individual producer may make a showing that its costs are such that a just and reasonable price as to them ought to be higher than the area price.\textsuperscript{127} At the time of this writing, the Commission had not yet ruled on this motion.

In a recent speech Chairman Swidler left little doubt as to the direction of the Commission's thinking on this question.\textsuperscript{128} Urging that the area-pricing concept be pushed forward with all dispatch and vigor, he warned that area prices must serve as ceilings and not as floors for natural gas rates, for if companies insist on a right to use these rates as a basis for anything more they can get in an individual determination, then the utility type cost-of-service, rate-base approach may as well be used from the outset. He stated that if area proceedings are merely to determine rates which each individual company would be free to take or leave, it would be a giant step backwards. Moreover, Chairman Swidler observed that fixing area prices based on area-wide costs and conditions would allow the more efficient company to reap the benefits of its efficiency; to allow the less efficient company to have higher rates would permit producers "both to have their cake and eat it." Conceivably then, high cost marginal operators could be driven out.

A practical dilemma is posed: if substantive due process requires that

\textsuperscript{127} Order Ruling Upon Motion Relating to Evidence To Be Considered in Area Rate Proceeding, No. AR61-1, FPC, April 5, 1961. The "savings clause" requested by the producers, supposedly comparable to the provisions in the railroad industry, stipulated that the producers would have the opportunity to demonstrate the reasonableness of an individual rate and further that, prior to the individual determination, the uniform rate would have no application to these producers. Either the producers misconstrued the operation of the provision used in the railroad industry, or their request was for one calculated to have greater effect than those used in that industry. It would appear that area rate making has been used for some time in this industry and individual companies may either show the reasonableness of their specific rates at the group hearing or may later petition for an individual hearing, but until such time as an individual determination is made, the group rate applies. Interview With Irving L. Koch, Assistant Director of the Bureau of Rates & Practices of the ICC, in Washington, D.C., Nov. 21, 1961. See King v. United States, 344 U.S. 254, 275-76 (1952); see also North Carolina v. United States, 325 U.S. 507, 518 (1945); United States v. Louisiana, 290 U.S. 70, 76 (1933). Although not denominated a "savings clause" in this industry, an example of this type of provision can be found in Eastern Texas R.R. v. Railroad Comm'n, 242 Fed. 300, 304 (W.D. Tex. 1917).

a uniform price be set at a level where every firm could make a profit, then the only valid uniform rate would have to be predicated on the experience of the firm having the highest cost and perhaps the least efficiency, and this patently would not be protecting the consumer. On the other hand, if prices were fixed at a level only high enough to offer the incentive to bring forth the required supply of gas and it developed that constitutional requirements were such that each producer was entitled to meet costs, albeit relatively high (and consequently entitled to show these costs demanded a higher return on a single-company basis), the price fixed could hardly be said to be uniform. The practical effect, as Chairman Swidler pointed out, might be to vitiate the efficaciousness of the price-fixing approach, and a company-by-company approach might as well be used from the very beginning. In essence, the constitutional question presented, and never before squarely ruled upon without the war power, is whether substantive due process requires that prices be fixed at a level that permits all firms in the industry, severally, to make a profit, or conversely, whether maximum prices set at a point where some producers may not make a profit deprives them of their property without due process of law.

At the outset it will be well to contrast this problem with the constitutional problem that might be presented if producers who were not making a profit or meeting costs were forced to remain in business and maintain service. In Bowles v. Willingham, 129 a case to be discussed more fully later, the Supreme Court had occasion to distinguish this problem from the one with which it was then confronted, pointing out that it was dealing with a situation that did not involve a "taking" of property since the relevant act setting forth maximum rents expressly stated that "nothing in this Act shall be construed to require any person to sell any commodity or to offer any accommodations for rent." 130 There is, of course, nothing in the Natural Gas Act that requires producers to sell into interstate commerce, but once their gas is committed in this fashion, section 7(b) 131 of the act provides that they may not abandon service without Commission approval.

It is obvious, though, that if the Commission succeeds in setting area prices at a level just calculated to bring forth the necessary quantities of gas to satisfy demand, its determination of what price to set will have to involve consideration of how many producers capable of pro-

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129 321 U.S. 503 (1944).
ducing the desired quantity will be able to meet the competition at that price, and thus the Commission should have no interest in forcing a company which cannot meet the competition to continue. If its gas-producing potential were needed, the price would theoretically be raised to a point where it could become healthy again. For fear of theoretical oversimplification, it must be pointed out that this is an inexact science at best which will involve some experimentation and no doubt some subsequent adjustment, during which time this problem, which certainly offends visceral notions of fair play, might rear its head.\textsuperscript{132} It must be remembered too that even if non-compensatory, many producers would want to remain in business to recoup as much as they could from their investment. Particularly would this be true if abandonment meant drainage by neighboring wells. However, without delving into this complex problem, it should be noted that the question of abandonment entails a weighing of all of the elements of public convenience and necessity,\textsuperscript{133} and it may be that a producer, to make out a case of confiscation, would have to show that upon all his jurisdictional sales he would not be making a return rather than simply showing that his cost exceeded the sales price on a particular sale.\textsuperscript{134}

Returning now to the question under consideration, it is clear that Mr. Justice Jackson never foresaw a valid constitutional objection being leveled at a scheme which fixed maximum prices at levels making it unprofitable for some firms to continue when they could voluntarily withdraw:

It is probable that price reductions would reach economically unwise and self-defeating limits before they would reach constitutional ones. Any constitutional

\textsuperscript{132} If the company is granted permission to discontinue service and elects to do so, there remains the question of civil liability on contracts with pipelines, which usually run for twenty years. Miller, Competition in Regulated Industries: Interstate Natural Gas Pipelines, 47 Georgetown L.J. 224, 229 (1958). Another disruptive side effect of abandonment that the Commission must consider is its possible effect on the sinking fund of the pipeline company involved. The capital structure of pipeline companies usually has a high portion of debt, sometimes as high as 75\%, id. at 227, and the sinking fund provisions are normally correlated to gas reserves. Abandonment of a contract by a producer with the consequent loss of reserves to the pipeline may well operate to drastically accelerate the sinking fund requirements.


problems growing out of price fixing are quite different than those that have heretofore been considered to inhere in rate making. A producer would have difficulty showing the invalidity of such a fixed price so long as he voluntarily continued to sell his product in interstate commerce. Should he withdraw and other authority be invoked to compel him to part with his property, a different problem would be presented.

Even under the fair value-fair return doctrine of *Smyth v. Ames*, it was considered that the allowance of a fair return was dependent upon a company's ability to earn a fair return if unregulated; the public was not underwriting the investment. In the case of a regulated company operating a turnpike, it has been said that even though the company, if unregulated, could earn a profit by charging the captive user whatever the traffic would bear, that the alleged fact that tolls were fixed too low to pay dividends or even maintain the road properly was "a misfortune for it and them which the Constitution does not require to be remedied by imposing unjust burdens upon the public."

The District of Columbia Circuit, in its most recent *Phillips* decision, emphasized that it did not have before it the question of whether any guide rate set by the Commission was reasonably computed or confiscatory and that consideration of that question would have to wait until a particular rate in a particular area came under fire. However, the court did use some unmistakably suggestive language when it pointed out that the question of what is a fair price for a commodity bought and sold by a merchandiser may involve different considerations from what may be a just price for a public utility, rendering service by use of fixed equipment, since almost the whole of economics of merchandizing differs from the economics of public utility service.

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136 169 U.S. 466 (1898).
137 FPC v. Natural Gas Pipeline Co., 315 U.S. 575, 590 (1942); see San Diego Land & Town Co. v. Jasper, 189 U.S. 439, 446-47 (1903). Mr. Justice Holmes, speaking for the Court in *Jasper*, when it was contended that maximum water rates fixed by a board under a California statute were so low as to amount to a taking of the companies' property, said:

In a case like this we do not feel bound to reexamine and weigh all the evidence, although we have done so, or to proceed according to our independent opinion as to what were proper rates. It is enough if we cannot say that it was impossible for a fair-minded board to come to the result which was reached.

Id. at 441-42.
138 Covington & Lexington Turnpike Road Co. v. Sandford, 164 U.S. 578, 597 (1896). This language was quoted with approval in the concurring opinion of Justices Black, Douglas and Murphy in *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 608 (1942).
Are the just and reasonable prices of such a merchandiser limited to fair returns on his own investment and prices paid by him (and, if so, what investment and what prices), or are those prices reasonably measured by the fair prices for the product as measured by the open competitive market for the product, evaluated by Commission expertise and data on the whole of the market operation? Either criterion is a method of regulation. It seems to us that the choice must lie with the Commission.139

Prior to this the most recent case to grapple with this question, arising in a slightly different context, was Jordan v. American Eagle Fire Ins. Co.140 The same court, Judge Prettyman writing the opinion, was confronted with the claim that uniform maximum rates fixed by the District of Columbia for fire insurance coverage were confiscatory because they denied certain companies a fair profit. The court never reached the constitutional issue inasmuch as the question did not arise properly on appeal, and it was remanded for more specific findings by the district court, where the case apparently was settled. However, the court did take the opportunity to phrase the constitutional issue involved and to review in some detail the cases cited.

The court pointed to the Supreme Court’s opinion in Hope as having redefined the essentials necessary to the investor's interest in rates—that there be enough revenue for operating expenses, capital costs, and a sufficient return to the equity owner to assure financial integrity of the enterprise, so as to maintain its credit and attract capital.141 The court then conceived the constitutional issue presented to be whether the minimum was applicable to the companies separately or whether it was applicable to the several classes of risks and thus to the companies as a group.141 Thus an interesting and perhaps meritorious conceptual bridge was created by applying language, expressed as a guide to the end result to be achieved by the proper determination of a rate base of a utility company, to the question of constitutional limitations on price fixing in an industry having very few, if any, utility characteristics. If the answer to the constitutional issue is that it applies to the companies as a group, it will be observed that it closely parallels Mr. Justice Jackson’s ideas on where the price fixing limits are located.

The district court in Jordan had indicated in its opinion that confiscation could be shown by individual companies and that if shown individually, while the general order fixing uniform rates would not be

141 Id. at 200 n.28, 169 F.2d at 289 n.28.
invalid, it would be invalid as applied to those companies.\footnote{142} It relied heavily in support of its opinion on \textit{Aetna Ins. Co. v. Hyde},\footnote{143} a Supreme Court case on all fours with the situation in \textit{Jordan}. There an order of a Missouri superintendent of insurance decreasing rates across the board by ten per cent was dismissed because the dealers had not shown that they operated their businesses efficiently and because, while attempting to show that the new rates would not allow a fair return for the group as a whole, they had not made a showing that the rates would be confiscatory as to any one particular dealer.\footnote{144} The Court said that "rates sufficient to yield adequate returns to some may be confiscatory when applied to the business of others."\footnote{145} Thus the clear implication, by way of dictum, was that the individual company could show that the uniform rate was invalid as to them because it denied them just compensation. But the Court went on in language that can only be interpreted to mean that a uniform rate itself will not be held invalid simply because all affected by it do not make a profit under it:

The Fourteenth Amendment does not protect against competition. Moreover, "aggregate collections" sufficient to yield a reasonable profit for all do not necessarily give to each just compensation for the contracts of insurance written by it. It has never been and cannot reasonably be held that state-made rates violate the Fourteenth Amendment merely because the aggregate collections are not sufficient to yield a reasonable profit or just compensation to all companies that happen to be engaged in the affected business.\footnote{146}

The court of appeals in \textit{Jordan} also discussed \textit{Aetna} but felt compelled to recommend to the district court that another rule might better apply because the rates involved were not directed at a specific company or companies, as in the usual utility rate proceeding, but rather were aimed directly at the risk, and because no monopoly was involved,\footnote{147} a situation comparable to that of independent producers.

The Emergency Price Control Act of 1942,\footnote{148} fixing maximum rents, was attacked on constitutional grounds in \textit{Bowles v. Willingham}.\footnote{149} The statute provided that the Administrator was to fix rates which, in his judgment, would be "generally fair and equitable." After remarking

\footnotesize{\begin{itemize}
    \item Id. at 204, 169 F.2d at 293.
    \item 275 U.S. 440 (1928).
    \item Id. at 448.
    \item Id. at 447.
    \item Ibid.
    \item 83 U.S. App. D.C. at 203, 169 F.2d at 292.
    \item Ch. 26, 56 Stat. 23.
    \item 321 U.S. 503 (1944).
\end{itemize}}
that implicit in landmark price-fixing cases such as *Nebbia v. New York*\(^{150}\) and *Sunshine Anthracite Coal Co. v. Adkins*\(^{151}\) was the fact that high cost operators may be more seriously affected by price control than others, the Supreme Court said that it had never been thought that price fixing, otherwise valid, was improper because it was on a class rather than on an individual basis.\(^{152}\) So saying, the Court did not need to determine what constitutional limits there are to price-fixing legislation and decided the case on the basis of the war power.\(^{153}\) Ten years earlier, in *Hegeman Arms Corp. v. Baldwin*,\(^{154}\) the Court had rejected the constitutional complaint of a milk dealer caught between minimum prices established for his buying of milk and the competitively fixed market price. The Court made much ado over the fact that dealer's complaint stemmed from the fact that he was unable to meet the competition of the market place at prices set by other dealers laboring under the same fixed cost, but Mr. Justice Cardozo did so in such a way as to create the impression that matters would have been on an entirely different footing had the complaint been on the basis of losses suffered under maximum prices.\(^{155}\) It would seem that this distinction made between prices fixed so as to take from the seller the chance to get all that the traffic would bear and prices fixed to take from the buyer some of the advantage that market conditions would give him, with the possibility of loss inherent in both, is a highly tenuous one and has been criticized on this score.\(^{156}\)

There is one case, *Tagg Bros. & Moorhead v. United States*,\(^{157}\) that would support, at least on its facts, the validity of maximum rates set at a level compensatory to most of the operators in an industry but not to some. There the question of whether suffering dealers were entitled to an individual showing in an effort to pierce the uniform

\(^{150}\) 291 U.S. 502 (1934).

\(^{151}\) 310 U.S. 381 (1940).

\(^{152}\) 321 U.S. at 518.

\(^{153}\) Id. at 519. In another case decided under the war power in which World War I maximum coal prices were involved, the Court expressly stated that it did not have to decide the question of whether Congress, when enacting the statute, could constitutionally have fixed prices at which persons then owning coal might sell it, without providing compensation for losses. Matthew Addy Co. v. United States, 264 U.S. 239 (1924).

\(^{154}\) 293 U.S. 163 (1934).

\(^{155}\) Id. at 171.

\(^{156}\) Comment, Federal Price Control of Natural Gas Sold to Interstate Pipelines, 59 Yale L.J. 1468, 1504 n.224 (1950).

\(^{157}\) 280 U.S. 420 (1930).
rates was not presented. A group of dealers combined to attack the order prescribing rates chargeable for the purchase and sale of livestock, and it was accepted by the lower court that some of the dealers would be squeezed out.158 The value of this case as a precedent is somewhat mitigated, however, by the cursory treatment given to the confiscation question by the Supreme Court on review: "The lower court held the additional evidence admissible, and after considering it, reached the conclusion that the charges prescribed are not unreasonably low or confiscatory. This conclusion of the lower court conforms, in our opinion, to the evidence . . . ."159

It is submitted that while the cases certainly leave room for the contrary view, dicta and analogy can be persuasively argued for the proposition that if the area rate policy is approved, the prices set need not be set at a level compensatory for all. Economic analysis may show that if such a limitation were tacked on to the approval of area rates, pursuance of the policy on this basis could well frustrate the prime purpose of regulation of this industry. The further question of whether individuals ought to be allowed to pierce any uniform rate set, with the various ramifications discussed, would seem to be a much more open question.

3. Procedural Due Process

The method of conducting group hearings on an area basis has been subjected to much criticism on the grounds that it is not authorized by the act and, aside from this, that procedural due process is contravened. There seems to be little question that section 15(a),160 relating to the conduct of hearings, is sufficiently broad to encompass hearings held on this basis inasmuch as it gives the Commission complete discretion, generally, as to the size of the hearings to be held under the act in terms of the number of parties and other interested persons who may be permitted to participate. However, it is said that the Commission has no authority under the act to conduct group hearings and that the act contemplates individual hearings.161

In a comparable situation in the railroad industry, the Supreme Court impliedly approved the use of group hearings leading to a determination of rates on the basis of evidence deemed typical by the

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159 280 U.S. at 445.
Interstate Commerce Commission,\textsuperscript{162} even after an act was passed in 1910 putting the burden of proof on the carrier to show the justness and reasonableness of its rates.\textsuperscript{163} The provisions of this act appear to be substantially similar, in this regard, to those of the Natural Gas Act. The Court pointed out that not until the passage of the Transportation Act of 1920\textsuperscript{164} did Congress formally provide for a group system of rate making\textsuperscript{165} but stressed that the practice did not have its origins in the 1920 act but earlier, in the actual necessities of procedure and administration which had led to the adoption of the group method.\textsuperscript{166}

Questions relating to procedural due process quite obviously will depend on the disposition of the other questions of validity discussed. If the transition to price fixing is approved under the act and extant court decisions, it would seem that the attack on this basis will be most vehement if the Commission does not permit an individual presentation to show the justness and reasonableness of a rate above the uniform price fixed. Presumably, if the constitutional right to make this individual showing were upheld, the hearing would conform to the Commission's past individual hearings and would be above reproach on this ground. This is not to say that an attack on this basis against the uniform price fixed would be precluded even if the right to a further individual showing were upheld; there is every evidence from the various statements of position filed with the Commission that everything about the area hearing approach will be attacked on procedural due process grounds.\textsuperscript{167}

The comment may be made that many of the allegations of due process contravention leveled thus far, relating generally to the conduct of the area hearings and more specifically to the restriction of evidence and limitation of witnesses,\textsuperscript{168} seem somewhat premature. The Commission has not so far made a clear delimitation on these matters, although urging for the sake of expeditiousness that agreement be reached to some extent limiting the type of evidence to be considered as well as the number of witnesses to be put on.\textsuperscript{169}

\textsuperscript{163} Commerce Court Act, ch. 309, § 12, 36 Stat. 551 (1910).
\textsuperscript{165} 261 U.S. at 198.
\textsuperscript{166} Ibid.
\textsuperscript{167} See generally Prehearing Report 6-8.
\textsuperscript{168} E.g., id. at 7.
\textsuperscript{169} Order Instituting Area Rate Hearing, Consolidated Proceedings and Prescribing
Prescinding from questions concerning the claimed constitutional requisites of a quasi-judicial hearing, it is well established that the fifth amendment does not require that Congress provide for a hearing in order to pass a valid statute fixing maximum rents when Congress has provided for judicial review of the Administrator’s action—review satisfies the requirements of due process.\textsuperscript{170} In \textit{Bi-Metallic Investment Co. v. State Board},\textsuperscript{171} in which a suit was brought by a taxpayer to enjoin the enforcement of an order of a Colorado board increasing the valuation of all taxable property in Denver by forty per cent, Mr. Justice Holmes said that “where a rule of conduct applies to more than a few people it is impracticable that everyone should have a direct voice in its adoption,” that the Constitution “does not require all public acts to be done in town meeting or an assembly of the whole,” and that the rights of the citizenry are protected by their power over those who make the rule.\textsuperscript{172} In \textit{Jordan} the statute was attacked because it failed to provide that a hearing be had prior to issuance of an order under it. The court said that while due process does not require a hearing before issuance of an order, property could not be taken under the law until a full hearing was had.\textsuperscript{173} In that case the hearing had in the district court reviewing the order was held to comport with procedural due process requirements.\textsuperscript{174} However, in contrast to the Natural Gas Act, the controlling statute in \textit{Jordan} did not provide for a hearing prior to issuance of the rate order but merely an investigation.\textsuperscript{175}

It is difficult to speak broadly in terms of the requirements of “a hearing,” and it would seem that when questioning the constitutional validity of a particular hearing, it must be viewed in the light of its particular circumstances. However, because of the number of parallels that exist in the hearing problems presently confronting the Commission and allegations of due process contravention\textsuperscript{176} reviewed in the \textit{Tagg} case, that opinion is instructive.

The suit there arose against an order issued by the Secretary of

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\textsuperscript{171} 239 U.S. 441 (1915).
\textsuperscript{172} Id. at 445.
\textsuperscript{173} 83 U.S. App. D.C. at 199, 169 F.2d at 288.
\textsuperscript{174} Id. at 198, 169 F.2d at 287.
\textsuperscript{175} Id. at 197, 169 F.2d at 286.
\textsuperscript{176} See generally Prehearing Report.
Agriculture under the Packers and Stockyards Act of 1921\textsuperscript{177} fixing the maximum commission rates chargeable for the purchase and sale of livestock by market agencies. When a new price schedule introducing higher rates was filed, it was suspended and notice was given to the numerous parties and other interested persons of public hearings to be held before an examiner to inquire into the reasonableness of the new schedule.\textsuperscript{178} The petitioners attacked the order on the grounds, \textit{inter alia}, that extensive audits showed that the rates fixed did not reflect the average costs of the cost information submitted by the dealers at the hearings. The district court noticed that no one nor an average of all the great many different extremes and variants of cost figures could be accepted as a reasonable standard, but the court said that merely to show that the examiner did not adopt or apply a mathematical mean between two extremes in no way tends to show that he was wrong:

He refused to be bound by either the lowest cost he found, or by the highest, or by any mathematical average. He found the cost which he deemed normal and reasonable, well below the highest and well above the lowest. As to each item there is proof that some agencies are getting the thing done in actual operation well within the the maximum fixed. In each instance, there are some agencies that are not keeping within the maximum.\textsuperscript{179}

Moreover, the court noted that it was hardly to be imagined that every possible cost of every one of the fifty-nine different concerns examined by the Secretary would be specifically referred to and covered in such an order as made.\textsuperscript{180}

The objection has been raised that the failure of the Commission to indicate precisely the use to which it proposes to put the findings and determinations made in the proceedings is violative of due process. From the general tenor of producer comments one gets the impression that it is felt that sales already certificated and rates already determined to be just and reasonable are to be held inviolate and that the Commission is prohibited from a redetermination.\textsuperscript{181} The contention was made in \textit{Tagg} that the notice of the hearings before the examiner and the Secretary did not apprise the dealers of the Secretary's intention to fix a new schedule, but led them to believe that the hearings would be confined to the inquiry of whether the new schedule was excessive,

\textsuperscript{178} 280 U.S. at 432.
\textsuperscript{179} 29 F.2d at 755.
\textsuperscript{180} Id. at 756.
\textsuperscript{181} See Prehearing Report 8.
and that if so found, the previously approved schedule would be left in force. The new schedule approved by the Secretary carried rates lower than the originally approved schedule. 182 The Supreme Court held that this contention was without merit since a section of the pertinent statute there, akin to section 5 of the Natural Gas Act, expressly empowered the Secretary in any such proceeding to fix the justness and reasonableness of the rate to be charged in the future, without limiting him to a determination of the lawfulness of the proposed rate in a proceeding initiated the same as a proceeding under section 4 of the Natural Gas Act. 183

It is acknowledged that the Commission will have an extremely difficult time in conducting the area hearings because of their magnitude, particularly in attempting to protect the small producers, on whom the onerousness of the burden will invariably be greater, from becoming lost in the shuffle. But it is submitted that, in the final analysis, if the switch to area price fixing is upheld, the question will be whether the Commission did everything in its power, under all the circumstances, to accord to all the parties in interest the fullest possible chance to be heard.

CONCLUSION

Whether or not the area price-fixing policy is declared legal, it raises questions that go to the very fiber of the nation’s regulatory philosophy. The Commission has asked Congress to endorse this concept, and the possibility exists that Congress will speak first. 184 The above discussion has assumed and concerned itself with the questions resulting from the Commission’s eventual adoption of a single-price system, admittedly its goal, discarding its current dual-price approach. If the Commission’s full use of this approach in this industry which seems to have so few utility characteristics is vindicated, many of the consequent questions will hinge on the price determinations that are actually made, based on the wealth of economic data collected from the hearings. Because the standard that initial sales prices be in the “public interest” is less rigorous than the “just and reasonable” standard of rate determinations, it must be remembered that it is conceivable that the Commission’s use of the area price in holding the line and preventing disruption with respect to initial prices might be approved, whereas it might not be approved in its ap-

182 280 U.S. at 439-40.
183 Id. at 440.
lication to section 4 and section 5 rate determinations.

If the traditional utility insulation is removed, the complexion of regulation will have been inherently changed, providing for a broader and more intense base of competition, and it would seem that prices set, generally to be determined at a level that will provide the incentive to bring forth the necessary supply, ought to reflect and be commensurate with the greater risk. If the price is set at a point where the revenue requirements of the industry are met and it is not compensatory for some producers, the question will be whether they are entitled to be carried by the public at rates sufficient to meet their costs.

Even if it develops that economies of scale are such that some small producers, although efficient, are unable to meet the competition of the larger producers under the maximum rate, the question will have to be asked whether the small producer should be protected at the expense of the small consumer. Perhaps some of the rationale behind provision for "savings clauses" in the railroad industry may have application here. If not, the further question, then, is whether the over-all public convenience and necessity dictates that producers finding themselves in these circumstances ought to be allowed to abandon their service. Questions of economic and administrative expediency would seem to be at least germane to the solution of the constitutional questions posed.

Although much objective criticism can be laid at the doorstep of the Commission for failing for so long to come to grips with the jurisdiction that, admittedly, was rather abruptly thrust upon it, it must now be commended on its new spirit of determination and resolution to wholeheartedly embrace this extremely demanding task.

JOHN P. HIGGINS

THE SOVEREIGN’S IMMUNITY AND PRIVATE PROPERTY:
A DUE PROCESS PROBLEM

INTRODUCTION

Narrowly escaping the invading forces of Nazi Germany, Otto Augstein and his son Hans fled from their home in Czechoslovakia in 1939, leaving behind a considerable amount of money in the Zivnostenska Banka of Czechoslovakia. After the Communist putsch in 1948, the bank simply ignored the Augsteins’ inquiries about their deposits. Upon learning that the Zivnostenska Banka and the newly formed state bank (Statni Banka), then in the process of assuming control over all
private Czech banks, had assets in several New York banks, the Augsteins filed a complaint in the Supreme Court of New York requesting that a receiver be appointed to take over these assets pursuant to section 977-b of the New York Practice Act.\(^1\) Section 977-b was held applicable, and an order was issued freezing deposits and securities of the Zivnostenska and Statni Banks in New York financial institutions.\(^2\) This decree was affirmed by the Appellate Division\(^3\) and the New York Court of Appeals.\(^4\) The United States Supreme Court, when asked to pass on this determination, dismissed the appeal for lack of a substantial federal question.\(^5\) At this point title to the assets on deposit, under New York law, was vested in the receiver subject to true ownership. An application for an order modifying the restraining order was made by Zivnostenska based upon a suggestion of sovereign immunity given by the State Department. This application was opposed not only by the receiver but also by third party claimants to specific securities.

On August 18, 1961, Captain Navarro Custin with the aid of ten crew members hijacked the Cuban freighter *Bahia de Nipe* bound for the Soviet Union with a cargo of sugar. After the barratrous crew had anchored the vessel in Chesapeake Bay, United Fruit Sugar Company, along with creditors of the Cuban Revolutionary Government, attached the vessel and its cargo. United Fruit filed a complaint in the United States District Court for the Eastern District of Virginia claiming title to the sugar aboard the vessel. Here too the State Department entered a suggestion of sovereign immunity.

These two analogous yet unrelated happenings, giving rise to separate litigation, have projected a dichotomy of judicial attitude into the doctrine of sovereign immunity which presents an opportunity for a fresh appraisal of the proper application of that pervasive doctrine. In *Stephen v. Zivnostenska Banka, Nat’l Corp.*,\(^6\) Justice Lupiano of the New

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1 Section 977-b, so far as here pertinent, reads: “An action may be instituted in the Supreme Court for the appointment of a receiver of the assets in this state of a foreign corporation, whenever such foreign corporation has assets or property of any kind whatsoever, tangible or intangible, within the State of New York and (a) it has heretofore been or is hereafter . . . nationalized . . . .”


5 356 U.S. 22 (1958) (per curiam).

6 The relevant prior history of this case establishing title in the receiver has been noted in the factual development and accompanying footnotes. We are now concerned with the
York Supreme Court, realizing the seriousness of the State Department’s action and his own duty to give judicial recognition to a suggestion of immunity, nevertheless held that in a case where ownership in property before the court is in question, “further serious and important duty devolves upon the court; that is, to explore the area of true ownership, which if not done, would defeat such ownership.” In his opinion the failure to exercise this duty would have been a “transgression of the basic and fundamental rights preserved under our federal and state constitutions.”

Instead of accepting the suggestion and dismissing the action, the court gave the sovereign an opportunity to prove its title in the attached deposits.

On the other hand, Judge Hoffman in Rich v. Naviera Vacuba, S.A. considered the suggestion by the State Department binding and conclusive on all disputed questions of law and fact. He stated that “while the certification by the State Department leaves much to be desired, and adopts qualified language with respect to ownership of the vessel and cargo, the acceptance of these facts as true is conclusive upon the court and shifts the responsibility to the Department of State and Attorney General.” Judge Hoffman dismissed the action.

The diverse attitudes of these two judges brings into sharp focus the question of the applicability of the doctrine of sovereign immunity in cases where the ownership of the property attached is in question. If the court accepts as conclusive the executive determination of title to property, serious constitutional questions are raised.

I

Inception and Development of the Suggestion of Sovereign Immunity

The doctrine establishing a foreign sovereign’s immunity is a principle of substantive law which in the United States has evolved solely from Supreme Court adjudication, as opposed to a state’s immunity under the


7 Id. at 857, 199 N.Y.S.2d at 802.
8 Ibid.
10 Id. at 726.
11 Ex parte Republic of Peru, 318 U.S. 578, 588 (1943).
eleventh amendment. It has evolved as a principle of international law which has been adopted as part of the municipal law of nations. The courts of one country, recognizing that their inherent sovereignty would give them jurisdiction over all persons and property within the jurisdiction of the court, will refuse to exercise this jurisdiction when the party sought to be sued is a foreign sovereign. The rationale for the recognition of sovereign immunity usually begins with the proposition that to hale a foreign sovereign into a municipal court is an affront to its dignity and incompatible with its status as a sovereign. Too, such an assertion of jurisdiction is regarded as vexatious of foreign affairs.

Until recent years the courts in the United States have applied what has been termed the doctrine of absolute sovereign immunity. In every instance where the foreign government satisfied the court, either by appearing through its emissary or by the intercession of the State Department, that the suit was against the sovereign or its property, the action was dismissed.

However, with the entrance of the sovereign into the commercial arena, at one time monopolized by private enterprise, it was inevitable that countries so engaged would frequently hide behind the shield of absolute immunity when sued on obligations growing out of their commercial activities. Many countries, recognizing that absolute immunity

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14 Ex parte Republic of Peru, 318 U.S. 578, 588 (1943); Knocklong Corp. v. Kingdom of Afghanistan, 6 Misc. 2d 700, 167 N.Y.S.2d 285 (Nassau County Ct. 1957).
16 See Berizzi Bros. v. Steamship Pesaro, 271 U.S. 562 (1926); II Hackworth, Dig. of Int’l L. 393 (1941).
17 See, e.g., Ex parte Republic of Peru, 318 U.S. 578 (1943); The Schooner Exchange v. M’Faddén, 11 U.S. (7 Cranch) 116 (1812); Ervin v. Quintanilla, 99 F.2d 935 (5th Cir. 1938); The Miliakos, 41 F. Supp. 697 (S.D.N.Y. 1941).
had never been a principle of international law, began in the early 1900's to depart from that anachronistic concept in favor of a more realistic restrictive immunity. But it was not until 1952 that the State Department put its imprimatur on the restrictive doctrine with the now famous Tate Letter. Mr. Tate described the scope of the restrictive doctrine as follows: "according to the newer or restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts (jure imperii) of a state, but not with respect to private acts (jure gestionis)." The approval of the commentators was unanimous.

Under both the absolute and restrictive doctrines, two procedures have always existed for bringing the plea of sovereign immunity before the courts: either the foreign sovereign can intervene in the action as a party through one of its emissaries, or it can request the State Department to file a suggestion of immunity with the court. The purpose of either method is to satisfy the court that the suit is being brought against the sovereign or its property. When title is not in question and property is attached to gain jurisdiction over the sovereign, the doctrine fulfills its purpose of saving the sovereign from vexatious suits. However, where title to the attached property is in question, another problem presents itself. If the foreign emissary makes his plea directly, the court has an opportunity to inquire into title before granting immunity. However, when the State Department suggests immunity and the court accepts the suggestion as conclusive, as in the Rich case, in effect the Department is determining title. It is submitted that the latter is an improper application of the doctrine, be it absolute or restrictive immunity.


20 26 Dep't State Bull. 984 (1952).


23 Ex parte Republic of Peru, 318 U.S. 578, 588 (1943); see The Pesaro, 255 U.S. 216 (1921); Ex parte Muir, 254 U.S. 522 (1921).
The judicial deference to a suggestion of immunity by the State Department has its genesis in several Supreme Court decisions. The first pronouncement dealing with such a suggestion was Chief Justice Marshall’s opinion in *The Schooner Exchange v. M’Faddon.* More over, it is the only case decided by the Court in which the State Department suggested immunity where title in property constituted the issue between the plaintiff and a foreign government. The *Exchange,* a French warship, was riding out foul weather in New York harbor when plaintiff M’Faddon, thinking that he recognized the vessel as his, which had never returned from a European voyage, brought a libel action for the recovery of his property. A United States Attorney appeared in behalf of the French government and filed a State Department suggestion of immunity. The Chief Justice, in holding the vessel immune, premised his decision on an implied consent of the courts in this country to waive jurisdiction over the warships of foreign sovereigns. The significant aspect of the case is that nowhere in the opinion did Chief Justice Marshall state that the suggestion of the State Department precluded the courts from further inquiry into title of the property. Rather, he stated that “it is the duty of the court to inquire whether this title has been extinguished by an act, the validity of which is recognized by national or municipal law.” The extinguishing act was not the suggestion of immunity but the commissioning of the *Exchange* as a ship of war; it was this fact, permeating the entire opinion, which foreclosed the rights of the plaintiff—not by precluding inquiry into title, but rather by acknowledging an overriding attribute to which history accords absolute immunity.27

In an earlier case involving the immunity of a state as sovereign, Chief Justice Marshall had observed: “it certainly can never be alleged that a mere suggestion of title in a state to property, in possession of an individual, must arrest the proceedings of the court, and prevent their looking into the suggestion, and examining the validity of the title.”28 It could be questioned whether the Chief Justice would have given the suggestion of the State Department any greater effect on the jurisdiction of the court than that given to a suggestion by a state.

24 *11 U.S. (7 Cranch) 116 (1812).*
28 *United States v. Peters, 9 U.S. (5 Cranch) 115, 139-40 (1809).*
A process of rewriting the opinion in *The Schooner Exchange* was begun when Mr. Justice Van Devanter held the decision in that case applicable to a merchant ship owned and used by a foreign government in state trading, even though the State Department declined to suggest immunity.\(^{29}\) The revision was completed in *Compania Espanola De Navegacion v. Navemar*\(^{30}\) when Mr. Justice Stone stated that the suggestion of immunity by the State Department was conclusive on the courts. That Mr. Justice Stone's statement was dictum is evident from the fact that the Department had refused to suggest immunity, and the only question on appeal was whether the suggestion of immunity filed by the Spanish Ambassador was conclusive on the Court.\(^{31}\)

*Ex parte Republic of Peru*\(^{32}\) squarely presented the question as to what effect a court should give to a suggestion of immunity from the State Department. In an action by a Mexican corporation against the owner of the steamship *Ucayali* for breach of contract, the State Department, following the libel of the *Ucayali*, filed a suggestion certifying that the Republic of Peru, the owner of the vessel, was entitled to sovereign immunity. Chief Justice Stone, again writing for the majority and relying on his own dictum in *Navemar* as authority, stated that "the certification and the request that the vessel be declared immune must be accepted by the courts as a conclusive determination by the political arm of the Government that the continued retention of the vessel interferes with the proper conduct of our foreign relations."\(^{33}\) However, since the subject vessel in *Ex parte Peru* was libeled not to litigate disputed ownership but to give the court jurisdiction to try an alleged breach of contract, the suggestion of the State Department did not attempt to determine the legal question of title in the ship, but rather the political question whether Peru was a sovereign and therefore entitled to immunity. This case is authority for the proposition that the action of the Department is conclusive only, as the Chief Justice noted, "when taken within its appropriate sphere."\(^{34}\)

A converse illustration of judicial deference in this situation is *Republic of Mexico v. Hoffman*\(^{35}\) in which the Court held that the recog-

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\(^{30}\) 303 U.S. 68, 74 (1938).
\(^{31}\) Id. at 71.
\(^{32}\) 318 U.S. 578 (1943).
\(^{33}\) Id. at 589.
\(^{34}\) Id. at 587.
\(^{35}\) 324 U.S. 30 (1945).
nition of sovereign immunity by the courts when the State Department has refused to suggest it may be equally embarrassing to the conduct of foreign affairs, thus accepting as binding on the courts the refusal by the State Department to suggest sovereign immunity.  

While the Supreme Court has not modified its holding in *Ex parte Peru* that the suggestion by the State Department is conclusive on the courts, it is still not clear whether Justice Stone meant conclusive on all contravened issues of law and fact or conclusive only on "political" issues. Judge Hoffman in the *Rich* case was of the opinion that the suggestion by Secretary of State Rusk, requesting sovereign immunity for the *Bahia de Nipe* and her cargo, was an acceptance by the Department of Cuba's assertion of title and constituted an absolute bar to further judicial inquiry. This immediately brings into question whether it is within the appropriate sphere of the executive branch of the government to decide who has legal title in a particular res before the court. Even assuming that an affirmative answer to the above question would do no violence to the separation of powers required by the federal constitution, the State Department is, for practical reasons, a poor forum in which to determine the traditionally legal question of title to property, lacking, as it does, the necessary machinery for conducting an adversary proceeding. There is nothing to indicate that a plaintiff's request to participate in proceedings initiated by a foreign government's request for a suggestion of immunity would be refused. However, the practice has been for the Department to conduct *ex parte* hearings. The plaintiff usually first learns of the Department's action when he is faced with a *fait accompli* in the form of a suggestion of sovereign immunity.

Full appreciation of the truncating effect on judicial proceedings of the State Department suggestion is gained when the cases just discussed are contrasted with those in which assertion of sovereign immunity is made in court by a representative of a foreign government. In *Lamont*

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36 Id. at 35-36.
37 The majority of the Court distinguished *Berizzi Bros. v. The Pesaro* on the basis of possession of the vessels by the sovereign. Id. at 35 n.1. Mr. Justice Frankfurter, concurring, thought possession too tenuous a distinction, and called for a clear overruling of *Berizzi Bros*. Id. at 39-42.
38 197 F. Supp. at 724.
39 See Bishop, supra note 22.
v. Travelers Ins. Co.\textsuperscript{41} the Mexican government intervened as a party, asserted ownership of the monetary fund in question, and then attempted to curtail the investigation of its claim by a plea of sovereign immunity. The New York Court of Appeals blocked this maneuver, stating: "The mere assertion by a foreign government, without proof, that property which is the subject of controversy between parties here belongs to the government, does not constrain the court to refuse jurisdiction of that property."\textsuperscript{42} The United States Court of Appeals for the Fifth Circuit in Erwin v. Quintanilla,\textsuperscript{48} also involving conflicting claims of ownership in property, approved the proposition that a foreign sovereign asserting an interest in the property claimed by the plaintiff can not rest on its bald assertion of immunity but should give evidence along with the other claimants.\textsuperscript{44}

Thus in an action where a foreign government appears as a party defendant and pleads immunity, the plaintiff at least has the satisfaction of judicial inquiry into the merits of his claim. Can the plaintiff be equally satisfied that the merits of the sovereign immunity defense have been subjected to an impartial inquiry when the foreign government makes application to the State Department? The problem with a suggestion of immunity by the State Department is that it, in effect, adjudicates the merits; yet it is generally acknowledged that the State Department, acting within its proper constitutional sphere, is more interested in broad policy considerations than the substantive legal merits.\textsuperscript{45}

\section*{II}

\textbf{“Political” vs. “Judicial” Questions}

Recognizing that the Constitution places exclusive control over foreign affairs with the Executive and Congress, the courts, when faced with a suggestion of immunity, tend to treat the entire problem as a

\textsuperscript{41} 281 N.Y. 362, 24 N.E.2d 81 (1939).
\textsuperscript{42} Id. at 372, 24 N.E.2d at 86.
\textsuperscript{43} 99 F.2d 935 (1938).
\textsuperscript{44} Id. at 940. The courts of England are in agreement that the mere assertion by a foreign government is insufficient to divest the court of jurisdiction. The foreign sovereign, however, need only "produce evidence to satisfy the court that its claim is not merely illusory, nor founded on a title manifestly defective." Juan Ysmael & Co. v. Government of the Republic of Indonesia, [1955] A.C. 72, 89-90 (P.C.), [1954] 3 All E.R. 236, 240; see United States v. Dollfus Mieg Et Co., [1952] A.C. 582, 616-17, [1952] 1 All E.R. 572, 588. But see Rahimtoo v. Nizam of Hyderabad, [1957] 3 All E.R. 441 (Q.B.).
\textsuperscript{45} See Timberg, supra, note 19. A recent and notable example is the "trade" of the hijacked Eastern Airlines Electra for the Cuban gunboat. See Funk, Mr. Harris’s War with Castro, The Washington Sunday Star, This Week Magazine, Oct. 15, 1961, p. 7.
political one and bow to the dictates of the executive branch; this itself is a recognition by the courts that the State Department determination is not on the merits of the legal question.

When a court properly labels an issue "political," it is not abdicating a judicial function but is merely stating the limitations of its constitutional powers. However, there is the lack of a definitive area of responsibility between the courts and the executive branch of the government in the application of the doctrine of sovereign immunity which may well result in judicial abdication.\(^{46}\) In certain areas there is a clear delineation of responsibility. "It has been specifically decided that 'who is the sovereign, de jure or de facto of a territory is not a judicial, but is a political question . . . .'\(^{47}\) Whether Texas was an independent state,\(^{48}\) whether the Falkland Islands were part of Buenos Aires,\(^{49}\) the location of the territorial boundaries of Alaska,\(^{50}\) the degree of "friendliness" of Hungary,\(^{51}\) the existence of Soviet control over Estonia,\(^{52}\) the status of a foreign government,\(^{53}\) these are typically political questions, and their determination by the executive branch will be binding on the courts.\(^{54}\)

In many instances a suggestion of immunity from the State Department will be determinative solely of political questions. An example is the Ex parte Peru case\(^ {55} \) where the suggestion did not purport to adjudicate contravened contentions, but certified that the property which was admittedly owned by a foreign government was immune from suit or attachment. It is only when the suggestion leaps the boundaries of executive authority that the court should exercise its power and decide

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\(^{48}\) Kennett v. Chambers, 55 U.S. (14 How.) 38, 50-51 (1852).


\(^{50}\) In re Cooper, 143 U.S. 472, 502 (1892).


\(^{52}\) The Maret, 145 F.2d 431, 438-39 (3d Cir. 1944).


\(^{55}\) 318 U.S. 578 (1943).
the controverted issues. The proposition is not without support in the law. In *Banco de Espana v. Federal Reserve Bank,* the United States had purchased large quantities of silver from Spain. The Spanish bank alleged title to the silver. It was contended in defense of the action that determination by the executive branch of the government that "title of the Spanish government . . . was good, and the transaction valid, was binding upon, and not subject to review by, the courts." Judge Clark rejected this contention by stating: 

The courts will leave for the Executive the determination of all "political" issues; in the international field this means such matters as the recognition of new governments or the making of treaties, not the direct determination of questions of property. . . . A broader interpretation of "political" question is unnecessary to the effective conduct of diplomatic relations with other countries and is undesirable as subjecting issues of private property to the changing circumstances of international policies beyond what is inevitable in any event.

The precise issue was before the same court in *Sullivan v. State of Sao Paulo.* There the plaintiff sued to recover on certain bonds issued by a Brazilian state. Brazil asserted an interest in the bonds and pleaded sovereign immunity. The State Department accepted as true the representations of Brazil that it had an interest in the bonds and issued a suggestion. Again Judge Clark, speaking for the court, succinctly delineated the area of responsibility for the executive and the judiciary.

Courts will undoubtedly accept as conclusive Executive pronouncements on whatever might be considered a "political," as opposed to a "judicial," question . . . .

The adjudication of present rights to property within a court's jurisdiction is, however, a purely judicial function, which no Executive department of the government is constitutionally or practically equipped to discharge.

Every court has the inherent power to pass on its own jurisdiction and cannot be deprived of that power by executive action. When property

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57 114 F.2d 438 (2d Cir. 1940).
58 Id. at 442.
59 Ibid.
60 122 F.2d 355 (2d Cir. 1941).
61 Id. at 357-58.
62 Id. at 358.
is within the jurisdiction of the court and the court is asked to decide the conflicting interests therein, a judicial question is presented regardless of the identity of the claimants.

The drafting committee of the American Law Institute has indorsed the view that the suggestion of the State Department "will be considered as conclusive only with respect to such statements as are within the exclusive responsibility of the Executive Branch of the Government."63 The State Department’s treatment of requests for suggestions of immunity in earlier cases indicates that at that time the Department recognized limitations on its sphere of activity such as later received approval in the tentative draft of the Law Institute’s Restatement.

The Spanish Ambassador in Naßemar requested the Secretary of State to inform the court that the vessel was the property of Spain and was being used for a public purpose. The Secretary replied that it was the practice in such cases "to refrain from taking any action which might constitute an interference by the executive authorities of this Government with regard to the merits of the controversy."64 In a second letter to the Spanish Ambassador, the Secretary reiterated the Department’s position and pointed out that in previous cases where the suggestion of immunity had been made because of the public character of the attached ship, "there was no dispute concerning the facts embodied in the statements of the Ambassador . . . concerning the ownership, possession, character, use, et cetera, of a particular vessel . . . . Here important facts having a direct bearing on the status of the vessels are in dispute."65

During the case of Ervin v. Quintanilla,66 the Mexican government requested the Secretary of State to intercede and suggest Mexico's ownership and right to possession of the attached vessel. The Secretary declined, stating:

In those cases in which this Government is satisfied that a vessel, an object of litigation, is that of a foreign government, the Department is, of course, glad to bring the facts to the attention of the appropriate court. However, in those cases where title to the vessel is in question, the Department has properly taken the position that the matter is one for the determination by the judiciary rather than the executive branch of the government.67

A consistent application of the announced policy in these letters would

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64 II Hackworth, Dig. of Int’l L. 449-50 (1941).
65 Id. at 450.
66 99 F.2d 935 (5th Cir. 1938).
67 II Hackworth, supra note 64, at 456.
satisfy most of the Department's detractors. Unfortunately, the Department has inexplicably departed from the policy of exercising the suggestion of immunity only on political questions. In the Rich case the telegram from Secretary of State Rusk stated: "I understand that the Cuban vessel Bahia de Nipe now at Norfolk is owned by the Government of Cuba and is employed in the carriage for the Government of Cuba of a cargo of sugar which is the property of the Government of Cuba." The court accepted this as a conclusive determination of the controverted issues and dismissed the case. It is quite possible that had the court retained jurisdiction Cuba would have proved ownership by an "act of state." Nevertheless, the fact that Cuba might have prevailed on the issue of title to the sugar on the basis of evidence before the court should not justify the action of the State Department in determining this judicial question.

In a series of letters in the Zivnostenska case, the State Department advanced, in inconsistent fashion, first that the assets of the Statni Banka were immune from attachment. Then in a letter to the attorney for one of the subsequent claimants, the Department stated:

The suggestion of immunity . . . was not intended to be a determination by the Department of any controversy between his client . . . and Czechoslovakia

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68 197 F. Supp. at 714. (Emphasis added.)
69 The doctrine emanates from Chief Justice Fuller's oft-quoted statement that "every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory." Underhill v. Hernandez, 168 U.S. 250, 252 (1897). Although Underhill was a personal tort action, it has been held that the courts are bound by the same legal principle in an action involving title to personal property. Ricaud v. American Metal Co., 246 U.S. 304 (1918); Oetjen v. Central Leather Co., 246 U.S. 297 (1918). In Oetjen it was indicated that the rationale of the doctrine is grounded upon "the highest considerations of international comity and expediency." In explanation the Court stated that "to permit the validity of the acts of one sovereign state to be re-examined and perhaps condemned by the courts of another would very certainly 'imperil the amicable relations between governments and vex the peace of nations.'" Id. at 303-04. Acts of another state have been granted recognition although directly opposed to the public policy of the forum and international law. Holzer v. Deutsche Reichsbahn-Gesellschaft, 277 N.Y. 474, 14 N.E.2d 798 (1938). Perhaps a more enlightened approach, as indicated in Banco Nacional de Cuba v. Sabbatino, 193 F. Supp 375 (S.D.N.Y. 1961), would be to have the forum court determine whether the act comports with international law before granting it efficacy. At least for the present the sovereign's claim of title as often as not will be founded upon a nationalization decree. The likelihood of such decree being recognized by the forum court is very good indeed, and the plaintiff's day in court is apt to be abbreviated.
as to the ownership of any securities involved in the case or to deprive his client of the opportunity of establishing ownership of any securities. . . . The Department had no intention of suggesting that any property not owned by . . . Czechoslovakia was immune from execution or from proper disposition by the Court.\textsuperscript{71}

This position would have been entirely compatible with the determination of political and judicial questions by the appropriate branch of the government, but the Department filed another letter which thoroughly confused the issue. Referring to the opinion of the court in which Justice Lupiano held that the court would determine the conflicting claims of ownership, the Department wrote that the court had misunderstood the Department’s position on immunity as to the disputed property. The Department stated that if any claimant “could prove to the court that specific property . . . was his as a matter of Czech law, then sovereign immunity did not extend to such property,” and the Department’s letter to a claimant’s attorney “did not mean that the Czechoslovak government could be required to prove to the court its ownership of property to which its claim had already been recognized and allowed . . . .”\textsuperscript{72}

Thus the final position of the Department was that immunity would be absolute against the receiver appointed at the instance of the Augsteins, but individual claimants to specific securities could prove ownership under Czech law. This position ignores the fact that under New York law no extra-territorial effect can be given to a foreign decree purporting to nationalize property located in New York.\textsuperscript{73} Under New York law the claimants could not have been required to prove their title by Czech law. As Justice Lupiano stated, the Department’s specification of the manner of proof of ownership—“under Czech law”—was clearly “an intrusion on the judicial function.”\textsuperscript{74}

The tendency of most United States courts to accept the suggestion of immunity by the executive as conclusive on all issues is in sharp con-

\textsuperscript{71} Id. at 400.
\textsuperscript{72} Id. at 401.
\textsuperscript{73} This law raises problems which were heard before the Supreme Court in the Litvinov Assignment cases. In answer to the question of whether New York could disregard the extra-territorial effect of Russian confiscation decrees which had been sanctioned by an international compact, the Court held it could not. United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 325 (1937). However, in dismissing the Zivnostenska case for lack of a substantial federal question, the Court appears to uphold the validity of the New York law when an international compact is not involved. Stephen v. Zivnostenska Banka, Nat’l Corp., 356 U.S. 22 (1958) (per curiam).
trast with the English practice. Though the English courts continue to recognize the doctrine of absolute immunity, they accept the Foreign Office certification of immunity as conclusive only on the question whether the particular government is a sovereign entitled to immunity and not on questions of law.

It is not difficult to sympathize with the position of the State Department when presented with a request for a suggestion of immunity. Consistent with its arduous task of maintaining friendly relations with foreign governments, it is not easy for the Department to refuse to "accept as true" the representations of a foreign government that property before a court is owned by that government. However, history does not support the proposition that to withhold a suggestion of immunity until the foreign government establishes its title in court would be vexatious to foreign affairs.

III
DUE PROCESS AND CLOTURE OF THE COURTS

History does support, on the other hand, the certainty of vexing problems in the application of a doctrine of sovereign immunity which forecloses judicial determination of issues properly before the court. Derivation of property without due process of law is the result of such practice. In entertaining a plea of sovereign immunity purporting to determine title, the courts deprive the individual of a forum by acceding to executive declaration as a rule of decision. In United States v. Klein Congress attempted to do as much by declaring a rule of decision binding upon the courts in cases involving attempts by pardoned adherents of the Confederacy to recover property seized by the Union during the Civil War. The Supreme Court referred to the Constitution's separation of powers in protecting the individual's property interest and held that such dictation by the legislature of judicial decision exceeded the constitutional limit on legislative power. There are no cases of a like character involv-

75 Compania Naviera Vascongado v. Steamship "Cristina," [1938] A.C. 485, 490, [1938] 1 All E.R. 719, 721. But Lord Macmillan said: "I should hesitate to lay down that it is part of the law of England that an ordinary foreign trading vessel is immune from civil process within this realm by reason merely of the fact that it is owned by a foreign state ..." Id. at 498, [1938] 1 All E.R. at 725.
78 80 U.S. (13 Wall.) 128 (1872).
ing executive deprivation of property. There is, however, no reason to believe the Court would reach a different result in a like case involving the executive branch. In the Klein case the Court prevented a deprivation of due process by the legislature. In yielding to the executive act in the suggestion of immunity, a court permits such a deprivation, excusing itself by reference to the doctrine of "political questions." The doctrine of "political questions" is possible only under a government of separated powers. Failure to appreciate the historical thrust of that arrangement is a prime source of constitutional confusion.

The theory of separation of powers is said to inhere in those forms of government establishing political liberty.79 It is a matter of practicality, bottomed on avarice;80 it is a shrewdness in seeing "that the private interest of every individual may be a sentinel over the public rights."81 The precept of separation of powers written into the Constitution is intended to guard against a concentration of power by placing personal motive in the way.82 There is nothing in the theory itself which would promote efficiency, expediency, effectiveness; nothing which would inculcate reverence in one department for another.83 It is not a technical rule of law but a practical guide to the grand object of government, political liberty.84 The doctrine is one of full affirmative exercise of one's faculty, not restraint.

The Constitution gives the judiciary which it creates a certain faculty—"the judicial Power"85 extending to "Controversies . . . between a State, or the Citizens thereof, and foreign States . . . ."86 The constitutional courts are not free to decline this jurisdiction—they must exercise it affirmatively and fully as a duty.87 This is not required only by the language of article III; it is an attribute of the concept of separation of powers.

The judiciary, traditionally the weakest branch of the three branches of government, was historically the most subject to external encroach-

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80 See I Montesquieu, op. cit. supra note 79, ch. 6, at 225.
81 The Federalist No. 51, at 324 (Lodge ed. 1888) (Hamilton or Madison).
82 Id. at 323.
83 See The Federalist No. 51, op. cit. supra note 81, at 301-03.
85 U.S. Const. art. III, § 1.
86 U.S. Const. art. III, § 2.
87 In re Cooper, 143 U.S. 472, 503 (1892); see Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).
Whatever its relative strength at present, it is, under the theory and in actual practice, subjected to legislative and executive encroachment. This is not necessarily a vice. As Madison points out, the compartments are not watertight.

[It] may clearly be inferred that, in saying "There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates," or, "if the power of judging be not separated from the legislative and executive powers," he [Montesquieu] did not mean that these departments ought to have no partial agency in, or no control over, the acts of each other. His meaning, as his own words import, . . . can amount to no more than this, that where the whole power of one department is exercised by the same hands which possess the whole power of another department, the fundamental principles of a free constitution are subverted.

The vice, in a constitutional sense, is found in judicial self-restraint in the name of separation of powers. The judiciary, in abdicating any part of its function, gives over its whole power within Madison's meaning. There may or may not be a constitutional question of departmental integrity or due process of law when one branch of the government actively seeks to assume another's functions. Whether we have tension or unconstitutional encroachment is a matter of ill defined degree. But in abdicating their judicial function, the courts act precisely contrary to this constitutional separation. In principle, political liberty is without protection at this point; in practice, the litigant's right to due process fails because of the assumption by the executive of the judicial function. The judiciary itself serves as a political instrument.

Historically and theoretically there seems a case that judicial abdication results in an unconstitutional loss of the integrity of that branch of the government. In no decision do we find the Supreme Court ruling

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88 I Montesquieu, op. cit. supra note 79, ch. 6, at 228; The Federalist No. 78, at 484 (Lodge ed. 1888) (Hamilton).
89 See Vanderbilt, op. cit. supra note 84, at 97-143.
90 The Federalist No. 51, op. cit. supra note 81, at 301-02.
92 The possibilities are suggested by Funk, Mr. Harris's War With Castro, The Washington Sunday Star, This Week Magazine, Oct. 15, 1961, p. 9, where the author mentions that attachment of a Cuban gunboat on execution of a judgment was released at the State Department's request, the request being prompted by Cuba's offer of a trade touching State Department interests; see also Timberg, Sovereign Immunity, State Trading, Socialism and Self-Deception, 56 Nw. U.L. Rev. 109, 123-24 (1961), suggesting adamant Justice Department interests in this area.
93 Douglas, We The Judges 64 (1956).
94 The commentators suggest the possibility of a constitutional problem in the judicial abdication inherent in the present practice of entertaining the plea of sovereign immunity.
on the question. Nevertheless, the reports abound with protest, dicta and apposite language which supports the view. Chief Justice Marshall tells us:

This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments.

The government of the United States is one of the latter description. . . . To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?95

Under the theory of separation of powers where each body constitutionally restrains the other, does not Marshall suggest a breach of constitutional duty if one relinquishes a limiting function? Justice Story observed:

The judicial power must, therefore, be vested in some court, by Congress; and to suppose that it was not an obligation binding on them, but might, at their pleasure, be omitted or declined, is to suppose that, under the sanction of the constitution, they might defeat the constitution itself.96

This raises the question whether the courts are free, in effect, to vest the judicial power in another branch of the government by default any more than Congress is free to vest it anywhere but in the judiciary.

The same Justice, speaking of congressional legislation in a subsequent case, stated:

[T]he judicial department has imposed upon it by the constitution, the solemn duty to interpret the laws, in the last resort; and however disagreeable that duty may be, in cases where its own judgment shall differ from that of other high functionaries, it is not at liberty to surrender, or to waive it.97

If this is true with reference to interpretation of congressional legislation,


95 Marbury v. Madison, 5 U.S. (1 Cranch) 137, 176 (1803).
it should be equally true that courts cannot waive any judicial duty when "other high functionaries" differ with them.

Relating the courts' dicta more closely to the problem of sovereign immunity, Justice Fuller in In re Cooper wrote:

We are not to be understood, however, as underrating the weight of the argument that in a case involving private rights, the court may be obliged, if those rights are dependent upon the construction of acts of Congress or of a treaty, and the case turns upon a question, public in its nature, which has not been determined by the political departments in the form of a law specifically settling it, or authorizing the executive to do so, to render judgment, "since we have no more right to decline the jurisdiction which is given than to usurp that which is not given."98

The Court clearly indicated it felt itself bound by the language of the Constitution. Should it not also be bound by the plain inference of that Constitution, in setting up three separate branches of government, that it is not free to decline jurisdiction by deferring to the executive; that such deference is as much a violation of the constitutional system of separate powers as it is a violation of the mandatory language of article III?

To be sure, there is only dicta. But if we accept the premise that the public welfare, under the theory of separation of powers, requires the courts to maintain their function, relinquishment is unconstitutional and, as to the individual in a given case, a denial of due process.

In the context of due process of law, the constitutional implications of the theory of separation of powers have been obscured by the courts' use of the label "political questions." Such verbalisms form the rationale of Ex parte Peru99 and the dicta of Navemar.100 The use of such labels obviates the necessity of inquiry into the meaning and purpose of a tripartite government, while at the same time invoking the theory of such an arrangement as authority for what is done through labels. Upon examination of the theory of separation, however, it is found that it does not support the proposition that when the political arm moves the courts are to duck. At least it does not support the proposition simply because to duck is instinctive. The theory of separation of powers was in fact

98 143 U.S. 472, 503 (1892); see also Vermilya-Brown Co. v. Connell, 335 U.S. 377 (1948).
99 318 U.S. at 588-89.
100 303 U.S. at 74; cf. Sullivan v. State of Sao Paulo, 122 F.2d 355, 357 (2d Cir. 1941), invoking the labels "political" and "judicial" to dismiss the State Department nicety that in recognizing a claim of immunity, it does not do so "'as a conclusion of law.'" The Department's attempt at distinction-drawing obviously had its origin in the kind of thinking in which Justice Stone was to engage in Ex parte Peru.
posited in reliance on anything but a withdrawal mechanism. The courts should not act as if there were no legal guide for distinguishing what they must act upon.\textsuperscript{101} There is the Constitution.

In saying that they face a “political question” rather than a “judicial question” in a suggestion of sovereign immunity, the courts perhaps face the fact that the State Department, in “accepting as true” the allegations of a state seeking immunity, makes no legal determination of title where that issue is present. The State Department in suggesting immunity tells the court that considerations of foreign policy dictate that the court, in the public interest, cannot protect this individual’s property rights, and the court, of course, is not free to view those foreign policy considerations. The courts then agree and allow immunity because there is a “political question.” Under that label the judiciary hides the “conflict between the executive’s claim for unfettered discretion in the handling of . . . foreign affairs and the individual’s claim of a constitutional right to be protected against arbitrary action which may deprive one of life, liberty or property.”\textsuperscript{102} Here again, the due process problem is exposed. In terms of expediency the former interest seems absolute; in terms of political liberty the latter has that character. The question raised is whether the competing interests of the executive and the individual should be weighed in determining which is protected.

In the area of first amendment freedoms, the courts traditionally have weighed the competing interests by a “clear and present danger” test.\textsuperscript{103} That these “fundamental freedoms” have drawn much protection from the courts is understandable because of their preferred position. But those interests protected by the fifth amendment due process clause have their own standard of security—“reasonableness.” The test achieved its clearest formulation in a case involving deprivation of property by state legislation and arising under the fourteenth amendment.\textsuperscript{104} The State Department, with an acquiescent judiciary, would preclude the application of the test to acts of the federal executive.


\textsuperscript{102} Nathanson, The Supreme Court as a Unit of the National Government: Herein of Separation of Powers and Political Questions, 6 J. Pub. L. 331, 360-61 (1957).


That the test of due process is the same under the fifth amendment as under the fourteenth amendment is not open to question.\(^\text{105}\) Does the fact that the competing interest comes from the executive branch make out a case for balancing the interests differently to present a different standard of due process? Again the question does not seem open.\(^\text{106}\) Whether due process has been met is a question only of whether the power was reasonably exercised in view of all the facts.\(^\text{107}\)

*Sterling v. Constantin*\(^\text{108}\) teaches that executive discretion at the state level is not free from the precepts of due process. In *Constantin*, the Governor of Texas had declared martial law and had proceeded to regulate the production of oil in that state. The Texas legislature had passed a conservation act prior to the Governor's action, and it was this act he sought to enforce through military orders, in the face of an interlocutory injunction restraining such regulation. The court below made findings of fact which precluded declaration of martial law. The government contended that courts may not review the sufficiency of facts upon which martial law is declared. Addressing itself to the executive's duty and discretion in faithfully executing the laws, the Supreme Court said:

> It does not follow from the fact that the Executive has this range of discretion, deemed to be a necessary incident of his power to suppress disorder, that every sort of action the Governor may take, no matter how unjustified by the exigency or subversive of private right and the jurisdiction of the courts, otherwise available, is conclusively supported by mere executive fiat.\(^\text{109}\)

The Court denied that such action is conclusive proof of its own necessity and must be accepted as due process; the executive's act is open to inquiry. The government contention that "to argue that the Courts have the power so to inquire is to argue out of the State constitution the provision separating the powers of government into departments"\(^\text{110}\) is a perversion of what actually happened—in effect, the closing of the courts by the executive. A unanimous court for the Fourth Circuit in *Rich* would accept the perversion as the constitutional mandate of the doctrine of separation of powers: "We think that the doctrine of the separation powers under our Constitution requires us to assume that all perti-


\(^{108}\) 287 U.S. 378 (1932).

\(^{109}\) Id. at 400.

\(^{110}\) Id. at 382.
nent considerations have been taken into account by the Secretary of State in reaching his conclusion.\textsuperscript{111}

It would seem to follow that the foregoing principles applied to executive acts in the conduct of foreign relations require a judicial examination of the exercise of executive discretion. However, the doctrine of "political questions" heretofore has ruptured that logic. The suggestion of sovereign immunity has continued to foreclose judicial examination of the circumstances surrounding the suggestion.

A series of cases in the past ten years has indicated, however, that the courts are not precluded from examining executive acts in the area of foreign affairs, suggesting pointedly the impossibility of continuing the doctrine as drawn in \textit{Ex parte Peru}. These are the District of Columbia's "passport cases."

In 1951 a naturalized American citizen was traveling in France under a valid American passport. Without notice or hearing the State Department revoked the passport and would revalidate it only for her return to the United States. It was then unlawful to travel in Europe without a valid passport.\textsuperscript{112} The only reason given for the revocation was that in the opinion of the Department the activities of that person were "contrary to the best interests of the United States." In an action against the Secretary of State for a declaratory judgment and an injunction against denial of plaintiff's right to a passport,\textsuperscript{113} the court recognized the existence of a right to travel abroad protected by fifth amendment due process. It then dealt with the defendant's contention that a passport is in the realm of foreign affairs and the issuance or denial of it is therefore a political matter entirely in the discretion of the Secretary of State and not subject to judicial review. Admitting the plenary power of the executive in the area of foreign relations, the court pointed out that there is a limitation on the power of the political departments in that their acts must not be in conflict with any provision of the Constitution.\textsuperscript{114} There was a right to travel, subject, like other rights, to \textit{reasonable} control; the arbitrariness of revocation without notice or hearing violated the due process test of reasonableness.\textsuperscript{115} The court in \textit{Bauer v. Acheson},

\begin{itemize}
  \item \textsuperscript{111} 295 F.2d 24, 26 (1961).
  \item \textsuperscript{112} Act of May 22, 1918, ch. 81, §§ 1, 2, 40 Stat. 559. The provisions of that act were repealed, Act of June 27, 1952, ch. 477, § 403(a) 15, 66 Stat. 279, but wartime restrictions and passport requirements have been continued in effect. 66 Stat. 190 (1952), 8 U.S.C. § 1185 (1958).
  \item \textsuperscript{114} Id. at 449, citing United States v. Curtiss-Wright Corp., 299 U.S. 304, 319-20 (1936).
  \item \textsuperscript{115} Id. at 452.
\end{itemize}
son later pointed out the standard of procedural due process with which the executive must comport in this "political" area.

The United States Court of Appeals for the District of Columbia Circuit extended the protection of substantive due process to the new liberty. Writing in Schachtman v. Dulles, Judge Fahy added reasonableness in content to fairness in method, and consideration of factual circumstances was of course necessary to a determination of the substantive reasonableness of any act.

The whole problem of the "political question" was clarified by Judge Fahy's after-thought remark in Schachtman:

We must not confuse the problem of appellant's application for a passport with the conduct of foreign affairs in the political sense, which is entirely removed from judicial competence. For even though his application might be said to come within the scope of foreign affairs in a broad sense, it is also within the scope of the due process clause, which is concerned with the liberty of the individual free of arbitrary administrative restraint. There must be some reconciliation of these interests where only the right of a particular individual to travel is involved and not a question of foreign affairs on a political level.

Whatever the degrees of "political" may be, that type of question is always subject to the demands of due process. It may be that as a question becomes more "political," that is, as it affects the public interest more acutely, it becomes less and less reasonable to protect the individual's right. But this is not to say that the right is not under the protection of fifth amendment due process, substantive and procedural.

Whatever the case-by-case outcome, the "passport cases" have continued to apply the test of "reasonableness" and require findings of fact upon which interference with the right to travel is predicated. The Supreme Court, without reaching the constitutional issue, has tacitly approved the District of Columbia courts in their treatment of the competing interests in the passport area.

118 But see id. at 292 n.9, 225 F.2d at 943 n.9, pointing out that examination of matters affecting national security is not necessarily suggested by the concern with factual circumstances.
119 Id. at 293, 225 F.2d at 944.
121 Kent v. Dulles, supra note 120, at 129.
The litigant that seeks for his property the protection that has been afforded the right to travel faces two problems. The first is slight, *i.e.*, whether the property interest will be afforded the same constitutional protection as the travel interest. This is hardly open to question; the individual's interest in property is brought within the pale of due process protection specifically.\(^{122}\) The second hurdle is whether the doctrine of sovereign immunity involves an area so "political" that the individual right will be "suggested" out of protection, and whether it will be automatically reasonable to sacrifice any individual property interest in this area. The language of *Worthy v. Herter*\(^ {123}\) assures us that whatever the decision in a given case, the degree of involvement in foreign relations will not foreclose application of the test of reasonableness. Like the "passport cases," the sovereign immunity cases involve more than conduct of foreign relations; they involve a property interest, and "the nub of the problem . . . revolves about a fact not a suppositional theorem."\(^ {124}\) *Worthy* is an illustration of the Constitution's appreciation of fact in a society of relative rights.\(^ {125}\)

It is not within the scope of this discussion to make a determination of what will amount to reasonableness in the type of sovereign immunity case dealt with in this note. But it is pertinent to point out that there is no longer an area of foreign affairs distinct from domestic affairs.\(^ {126}\) The magic of the term "sovereign immunity" no longer should remove us from the areas of familiar constitutional limitation by its mere utterance, sweeping us into "foreign affairs" per se.\(^ {127}\) Also pertinent is a suggestion, made in a slightly different context, that only where the State Department effectuates by its suggestion of immunity an "established international legal contention advanced by the United States with reasonable consistency" can we know whether the suggestion involves a matter affecting

\(^{122}\) U.S. Const. amends. V, XIV.
\(^{124}\) Id. at 159, 270 F.2d at 911.
\(^{125}\) See id. at 157-58, 270 F.2d at 909-10.
\(^{126}\) Department of State, Our Foreign Policy, No. 3972 (Gen. Foreign Policy Series 26), p. 4 (1950).
\(^{127}\) Judge Bazelon suggests the charismatic effect of crying "foreign affairs" when he cites the example of an American mayor embarrassing the State Department by saying that a foreign chief of state is unwelcome in his town. On this, the domestic level, none would question his right to say so even though the international embarrassment is great. The question of censure would be an open one, however, if uttered in the area marked "foreign affairs." Briehl v. Dulles, 101 U.S. App. D.C. 239, 265, 248 F.2d 561, 587 (1957) (dissenting opinion), rev'd on other grounds sub nom. Kent v. Dulles, 357 U.S. 116 (1958).
the national interest.128 Most pertinent, however, is that which might be obscured by academic consideration of constitutional questions, i.e., that under no circumstances does "reasonableness" encompass preclusion of a determination of title in property before the court.

Well may it be reasonable for the State Department to suggest that it is in the national interest to foreclose a plaintiff's right in that property, whatever the language it uses to do so; but never may it determine those rights by declamation. Justice Lupiano said no more and no less than this in Zivnostenska when he referred to the State Department suggestion as devitalized as a suggestion of a political nature because resting on matters judicial.129 Its conclusiveness was lost at that assumption of power basically unconstitutional. Judge Hoffman in Rich, on the other hand, failed to make the distinction which was so clear to the New York Justice. Secretary of State Rusk's view in Rich as to where title lay was immaterial. The federal court in Virginia had made no determination of title and thus had no interests to weigh against one another; it could not be said of that court that it saw the State Department's representations as evidence of policy considerations to be weighed against a proven property right. In Rich the position was never reached where consideration could be given to what effect the Secretary's letter should have—because it had been given an effect it could not have consonant with due process of law. The court in Zivnostenska is ready only now, having made a determination of title, to weigh whatever interests the executive may put before it. The distinction is not new in Justice Lupiano. It was drawn in The Schooner Exchange by Chief Justice Marshall.130

Conclusion

Effective executive action in the sphere of foreign affairs dictates the continued vitality of the doctrine of sovereign immunity. Properly applied, it is a constitutional prerogative of the executive. However, the authors do exhort greater attention to the boundaries of the respective areas delineated by the Constitution for the judicial and executive branches of the Government. Assuming that ownership in the property proceeded against is contested, a judicial question of title arises, and until determined, no suggestion of immunity should issue; if issued, a court should feel no compulsion to respect it. We would be less than truthful to sug-

128 Franck, supra note 94, at 118.
gest that adherence to our reasoning would assure plaintiffs of a high degree of success in establishing their title. Once in court, another principle, the “act of state” doctrine, the detailed treatment of which is beyond the scope of this note, very frequently and very conclusively establishes title in the sovereign.

It is submitted, however, that when the litigant asserts a claim of ownership to property before the court, and the court recognizes its constitutional duty, effect will be given to the State Department suggestion of immunity only insofar as the sovereign establishes its title to the property. To do otherwise, that is, to accept a suggestion as conclusive without a prior determination that the foreign sovereign is the titleholder to contested property, is to deprive the plaintiff of any forum in which a right to assert a claim exists, and this, it is submitted, is a deprivation of substantive due process.

DAVID F. FITZGERALD
PATRICK W. LEE
JAY E. RICKS

131 For a brief discussion of the “act of state” doctrine, see note 69 supra.
DECISIONS


The safety valve allegedly responsible for the plaintiff’s injuries was manufactured by an Ohio corporation and later incorporated by a Pennsylvania firm into a hot water heater which was sold in the course of commerce to an Illinois consumer. The complaint charged that the Ohio corporation negligently manufactured the safety valve and that the injuries were suffered as a proximate result thereof when the water heater exploded. In personam jurisdiction was acquired by means of constructive service under an Illinois statute made applicable to a nonresident who, either in person or through an agent, is charged with “the commission of a tortious act within the state.” The Ohio corporation appeared specially, filing a motion to quash service on the ground that it had not committed the tortious act in Illinois and alleging by affidavit that it does no business in Illinois, has no agent or employees in Illinois, and sells its completed valves to the heater manufacturer outside Illinois. Defendant’s motion was granted, but on appeal the Illinois Supreme Court reversed and remanded. Held, injury within a state resulting from a negligent act without the state is sufficient basis under state statute for in personam jurisdiction over foreign corporations.

In the landmark case of Pennoyer v. Neff it was established that under the due process clause of the fourteenth amendment, jurisdiction necessary to render an in personam judgment against a nonresident individual cannot be secured solely by serving process upon the defendant outside the forum state, either actually or by publication. While Pennoyer has been held to apply to corporations as well as individuals, peculiar problems attended dealings with the corporate defendant, for at common law, in the absence of statute or voluntary submission to a court, in personam jurisdiction could not be secured over a corporation outside of its domiciliary state. However, as the commercial facts of life in an increasingly mobile and volatile nation dictated that inroads be made in the Pennoyer doctrine, the Supreme Court accepted and then abandoned

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1 Ill. Rev. Stat. ch. 110, §§ 16-17 (1955). Section 16(1) of the Illinois Civil Practice Act provides that personal service of a summons may be made upon any party outside the state and that such service has the force and effect of personal service in Illinois as to non-residents who have submitted to the jurisdiction of the Illinois courts. A nonresident submits to jurisdiction as provided in § 17(b) when he, in person or through an agent, commits a tortious act in Illinois.


3 95 U.S. 714 (1877).

the fictions of "implied consent,"\(^5\) "presence,"\(^6\) and "doing business,"\(^7\) as tests of a forum's power to subject foreign corporations to its jurisdiction. The present standard was laid down in International Shoe Co. v. Washington;\(^8\) a foreign corporation must have certain "minimum contacts" with the territory of the forum such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."\(^9\) These due process demands are met by such contacts as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit brought there. The measurement of "minimum" is not to be "simply mechanical or quantitative" but must depend rather "upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to insure."\(^10\)

Closely linked to the ever expanding jurisdiction over foreign corporations are statutes conferring jurisdiction on the basis of the commission of a single tortious act within the state. In Smyth v. Twin State Improvement Corp.\(^11\) a Vermont statute,\(^12\) similar to the Illinois statute, was sustained against a New Hampshire builder who was negligent in roofing the plaintiff's residence in Vermont. No contacts within the jurisdiction other than the tortious conduct were shown. However, both the negligent act and its consequent injury occurred within Vermont. In Nelson v. Miller\(^13\) the Illinois statute before the instant court was upheld in its application against a Wisconsin appliance dealer whose agent negligently injured the plaintiff while making a delivery in Illinois. The single tort was held to be sufficient contact.

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\(^5\) Jurisdiction over foreign corporations was supported by resort to the legal fiction that it has given consent to service and suits, consent being implied from its presence in the state through the acts of its authorized agents. Old Wayne Mut. Life Ass'n v. McDonough, 204 U.S. 8, 21 (1907); Connecticut Mut. Life Ins. Co. v. Sprathy, 172 U.S. 602, 614 (1899); St. Clair v. Cox, supra note 4, at 356.

\(^6\) That the corporation was present within the territory of the forum was manifested by the activities carried on in its behalf by those authorized to act for it. Louisville & N.R.R. v. Chatters, 279 U.S. 320 (1929); Cannon Mfg. Co. v. Cudahy Packing Co., 267 U.S. 333 (1925); Green v. Chicago, B. & Q.R.R., 205 U.S. 320 (1907).

\(^7\) The "doing business" test was determined by whether the corporation maintains a regular and continuous course of business activities within the jurisdiction. Bank of America v. Whitney Cent. Nat'l Bank, 261 U.S. 171 (1923); Rosenberg Bros. & Co. v. Curtis Brown Co., 260 U.S. 516 (1923); see 37 Cornell L.Q. 458, 460 (1952).

\(^8\) 326 U.S. 310 (1945).

\(^9\) Id. at 320.

\(^10\) Id. at 319.


\(^12\) Vt. Stat. Ann. tit. 12 § 855 (1959). "[I]f a foreign corporation commits a tort in whole or in part in Vermont against a resident of Vermont such act shall be deemed to be doing business in Vermont by such foreign corporation . . . ."

\(^13\) 11 Ill. 2d 378, 143 N.E.2d 673 (1957).
These statutes, so construed, appear in some aspects as little more than another facet of the rationale underlying the nonresident motorist statutes sustained in Hess v. Pavloski,14 and there is every reason to believe that these statutes, as applied by the Smyth and Nelson cases to the factual patterns there presented, would be sustained by the Supreme Court as comporting with the minimal requirements of due process. The Court may have obliquely approved of the Smyth holding in McGee v. International Life Ins. Co.15 where the issuance of a single policy of insurance within the jurisdiction was deemed sufficient to meet the “minimum contacts” required by International Shoe. In support of its statement that “it is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that state,” the McGee Court cited Smyth.16

An entirely different question, however, is presented by the instant case, holding, as it did, that jurisdiction can be asserted over a foreign corporation solely on the basis of an injury occurring within the state, without other contacts. By virtue of this construction of the controlling statute, this court has extended the scope of in personam jurisdiction over a foreign corporation far beyond the cases upon which it relied and to a point that is, constitutionally speaking, highly suspect.

In ruling against the defendant’s contention that there had been no “commission of a tortious act within the state,” the court adopted the conflict of laws theory that “the place of wrong is where the last event takes place which is necessary to render the actor liable.”17 With a syllogism scarcely reflecting reality, the court arrived at the conclusion that the defendant, who if negligent at all was negligent in Ohio, had “acted” in Illinois within the meaning of the statute. The court seems to have confused the choice of law rule and the question of jurisdiction. To say that if the “place of wrong” for purposes of conflict of laws is Illinois, the “place of the commission of the tortious act” is also Illinois for purposes of interpreting a statute conferring jurisdiction over nonresidents is to engage in “lump-concept” thinking.18 These are two separate and distinct problems; the one is concerned with the law to be applied in deciding the issues, while the other deals with the problem of who has such power over the litigants as to determine their rights. No facile juxtaposition of terms can obviate the clear import of the statute. Prior to the instant decision the United States District Court for the Northern District of Illinois, in interpreting the same statute without benefit of a state court decision, held that the

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14 274 U.S. 352 (1927).
16 Id. at 223.
17 176 N.E.2d at 762-63; Restatement, Conflict of Laws § 377 (1934).
statute was not meant to extend jurisdiction to a nonresident manufacturer whose negligence outside the state caused an injury within the state.\textsuperscript{19}

With this rather tortuous construction of the statute, the determination that there were sufficient "minimum contacts" between Illinois and the Ohio corporation is somewhat dubious. The drastic extension of the doctrine of International Shoe effected by this decision becomes readily apparent when the contacts supporting this assertion of jurisdiction are compared with those supporting the cases upon which the instant court relied. In International Shoe there was a continuous and systematic solicitation of business by agents present within the state, and the cause of action arose from activities therein; in Perkins v. Benguet Consol. Mining Co.,\textsuperscript{20} although the cause did not arise in Ohio, sufficient contacts existed when the nonresident corporation performed a substantial amount of business there; in McGee the insurance contract was delivered in and the premiums were mailed from California, the residence of the insured; and in the Smyth and Nelson cases, the defendants sent employees into the forum state. But in the instant case there was no indication of any continuous and systematic operation in Illinois, no substantial amount of business to be performed within the state, and no agent or employee performing corporate activities there. The only contact was that the defendant's product was incorporated into a larger instrumentality sold in Illinois.

The instant court agreed that the validity of an assertion of jurisdiction over a nonresident must be determined by viewing the facts of each particular case\textsuperscript{21} and that the fairness and reasonableness of the assertion is the prime consideration. In finding the assertion as fair and reasonable, the court determined that suit in Illinois would be convenient due to accessibility of witnesses and evidence. It did not consider the fact that much of the evidence supporting the charge of negligence would have to be found in the place of manufacture. The court also put substantial weight on its conclusion that the defendant had benefit of the Illinois laws, one of the bases of the Nelson decision. But in the light of the facts of this case—the lack of any direct contact with Illinois—the conclusion seems without merit. The court appeared to be grasping when it inferred that a good many of the water heaters incorporating defendant's valves were sold in Illinois and noted that the defendant had "undoubtedly benefited, to a degree, from the protection which our law has given to the marketing of hot water heaters containing the valves."\textsuperscript{22}

Another court, when asked to extend the minimum contacts rule, posed the following hypothetical:

[C]onsider the hesitancy a California dealer might feel if asked to sell a set

\textsuperscript{19} Hellriegel v. Sears Roebuck & Co., 157 F. Supp. 718 (N.D. Ill. 1957). Because of the court's interpretation of the statute, the due process question was not decided.

\textsuperscript{20} 342 U.S. 437 (1952).

\textsuperscript{21} 176 N.E.2d at 767.

\textsuperscript{22} Id. at 766.
of tires to a tourist with Pennsylvania license plates, knowing that he might be required to defend in the courts of Pennsylvania a suit for refund of the purchase price or for heavy damages in case of accident attributed to a defect in the tires.  

Although that court was considering the effect that such an extension would have upon interstate commerce, the hypothetical illustrates equally well the danger inherent in the Illinois decision. Given the enactment of similar statutes across the country, manufacturer or vendor, individual or corporate, large or small, would be subject to in personam jurisdiction wherever his product or goods could be found. Exposure to suit of this scale makes it difficult to agree that maintenance of such suits does not offend "traditional notions of fair play and substantial justice."  

MARIO ESCUDERO


Plaintiffs, students at the Alabama State College for Negroes, joined in "sit-in" and other demonstrations protesting racial segregation. The president of the college warned the student body generally and three of the plaintiffs personally to cease these activities. When the plaintiffs thereafter took part in still another demonstration, investigations of their conduct were made by the president, the Alabama Director of Public Safety, and the staff of the Alabama Attorney General. The State Board of Education, considering the results of these investigations and the admitted inability of the college president to control future demonstrations, voted to expel the plaintiffs, who were then notified by mail. No formal charges were placed against them and no hearing was accorded them prior to their expulsion. Plaintiffs brought an action in a federal district court in Alabama to enjoin the Board from interfering with their right to attend the college. The court denied the injunction on the grounds that it would not interfere with the college's right, under its regulations, to dismiss students for the general welfare of the college, so long as such dismissal was not arbitrary, and that the expulsion in the manner described did not deprive the plaintiffs of any constitutional rights.  

Upon appeal the United States Court of Appeals for the Fifth Circuit reversed, one judge dissenting. Held, students expelled


for misconduct from a public college without notice and hearing are denied due process of law under the fourteenth amendment.  

It is well established that notice and hearing are not required when private colleges dismiss students for misconduct; the same is true for public elementary and secondary schools. But the cases dealing with expulsion from public colleges or universities have concerned themselves with whether the hearing actually given the student was adequate, not whether such hearing was required by the federal constitution. The sufficiency of the hearings invariably has been upheld, the courts either assuming the right to notice and hearing or ignoring the question because it was not before them.

The standards of adequacy and fairness applied by these courts have been far less rigorous than those demanded by procedural due process. Adequate notice and hearing have been found where a student was called to a meeting of university authorities, informed of the charges against her, and invited to make any statement she wished in her defense; where a student, accompanied by her attorney, appeared before school officials, was informed of the charges, and denied them, there being no other evidence heard; and where a dean of women informed a student of the charges against her and invited her to explain her alleged misconduct. The procedure has been held sufficient even though written charges were not preferred, the witnesses were not put under oath, the student was not permitted to cross-examine witnesses, and evidence of the charges was not heard at the hearing. In general, courts will not interfere with the discretion of school officials in disciplining students unless there has been a clear abuse of this discretion or the action of the officials has been arbitrary and unlawful.

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7 People ex rel. Bluett v. Board of Trustees, 10 Ill. App. 2d 207, 134 N.E.2d 635 (1956).
9 People ex rel. Bluett v. Board of Trustees, 10 Ill. App. 2d 207, 134 N.E.2d 635 (1956); State ex rel. Ingersoll v. Clapp, 81 Mont. 200, 263 Pac. 433 (1928).
11 State ex rel. Ingersoll v. Clapp, 81 Mont. 200, 263 Pac. 433 (1928).
12 People ex rel. Bluett v. Board of Trustees, 10 Ill. App. 2d 207, 134 N.E.2d 635 (1956).
13 State ex rel. Ingersoll v. Clapp, 81 Mont. 200, 216, 263 Pac. 433, 437 (1928); State ex rel. Sherman v. Hyman, 180 Tenn. 99, 113, 171 S.W.2d 822, 827-28 (1942). One case
Only two cases have expressly considered the question whether the due process clause of the fourteenth amendment required a notice and hearing prior to expulsion. In *State ex rel. Sherman v. Hyman*\(^{14}\) the court recognized a property right to study in a state university and held that the student was entitled to notice and a hearing before being expelled for misconduct. However, it expressly rejected due process as the basis for this right: "The due process clause of the Constitution . . . can have no application where the governing board of a school is rightfully exercising its inherent authority to discipline students."\(^{15}\) And in *Steier v. New York State Educ. Comm'r*\(^{16}\) the court upheld a summary judgment dismissing a complaint alleging that the plaintiff had been maliciously expelled from a public college and arbitrarily denied a fair hearing. Although the main opinion asserted that no federal question was presented,\(^{17}\) one judge intimated that the federal courts had jurisdiction under the due process clause of the fourteenth amendment.\(^{18}\) The remaining judge, while agreeing that the complaint was rightly dismissed because the fourteenth amendment did not guarantee *judicial* due process in administrative hearings,\(^{19}\) failed to consider the further question of whether due process under the fourteenth amendment was itself the basis for the student's right to such a hearing.

The importance of the *Dixon* holding, then, lies in its express grounding of the student's right to notice and a hearing before expulsion on the due process clause of the fourteenth amendment. The basic rationale upon which this determination was predicated was that procedural due process attaches to protect an individual injured by an act of a governmental body.\(^{20}\) The court chided the lower court for disposing of the case on the ground that the right to attend a public college or university is not in itself a constitutional right. In pointing out that the private interest involved deserved consideration, the court quoted from *Cafeteria Workers v. McElroy*: "One may not have a constitutional right to go to Baghdad, but the Government may not prohibit one from going there unless by means consonant with due process of law."\(^{21}\) More precisely, the court viewed the nature of the private interest here as the right to remain at a public institution of higher learning in which the plaintiffs

held the student to be entitled to a hearing which would encompass the rudimentary aspects of a judicial proceeding, including the right to confront witnesses, but it did not base the right on the fourteenth amendment. *Commonwealth ex rel. Hill v. McCauley*, 3 Pa. County Ct. 77 (1887).

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14 180 Tenn. 99, 111, 171 S.W.2d 822, 826 (1942), cert. denied, 319 U.S. 748 (1943).
15 Id. at 111, 171 S.W.2d at 827.
17 Id. at 18.
18 Id. at 23 (dissenting opinion).
19 Id. at 21 (concurring opinion).
20 294 F.2d at 155.
21 Id. at 156, quoting 367 U.S. 886, 894 (1961).
were students in good standing. This interest was not to be injured unless the requirements of due process were met.22

However, the minimum procedural requirements necessary to satisfy due process depend upon the circumstances and the interests of the parties involved.23 Where the governmental power exerted is almost absolute and the private interest involved is relatively slight, it may be that no hearing is required.24 In the instant case, however, it was clear to the court that the private interest—continued attendance at a state college—was substantial; expulsion would disrupt and possibly terminate the students' formal education. On the other hand, the court found the governmental power exerted to be far from absolute; there was no imminent danger to public safety, no serious threat to public order, nothing that would justify the Board in acting in such haste as to be unable to give the students notice and a hearing.

The minority's view of a "sane" approach to the problem is that of the court in Steier: "Education is a field of life reserved to the individual states. The only restriction the Federal Government imposes is that in their educational program no state may discriminate against an individual because of race, color or creed."25 This statement is far too sweeping. When a teacher or professor in a state institution is dismissed from his position, the federal courts will take jurisdiction to determine whether his constitutional rights have been violated.26 There would seem to be no constitutional basis for distinguishing between a professor's interest in continued employment at a state institution and a student's interest in continued attendance at that institution, insofar as the availability of federal protection of the right is concerned—other than the relative weight of the two interests.

The minority also relied on the fact that the college, by its regulations, reserved the right to dismiss students at any time without assigning any reason other than the general welfare of the college.27 It was thought that the plaintiffs, by accepting admission to the college and agreeing to adhere to its regulations, waived any right they might have had to notice and a hearing before expulsion. As the majority pointed out, however, this reasoning is valid only as to private colleges.28 There the relationship between the student and the college is *contractual*, and the courts will uphold a regulation, as was involved in the instant case, on the theory that it is a waiver under the principles of contract law.29 If, however, the student's right to notice and a hearing

22 Id. at 157.
23 Id. at 155.
24 Id. at 156.
25 271 F.2d at 18.
27 294 F.2d at 164.
28 Id. at 157-58.
while attending a public college is a *constitutional* right, it would seem that the state cannot condition the granting of even its privileges upon the waiver of a right derived from the federal constitution.\(^{30}\)

Before a student could be expelled from a public college for misconduct, the *Dixon* court would insist he be given a notice containing a statement of the specific charges against him and a hearing which embodied the minimal requirements of an adversary proceeding, including a statement of the facts to which each of the witnesses against him testified and the right to produce oral testimony or affidavits from witnesses in his behalf.\(^{31}\) This would, of course, be a great advance over the procedural requirements of many of the cases mentioned earlier, which applied standards so minimal as to afford almost no protection to the rights and interests of the student. The attitude of the courts has been one of extreme deference to the judgment of the school authorities; but the *Dixon* court shows an unwillingness to rely upon the discretion of these authorities and indicates that it will look to the hearing itself to determine if it embodies certain specified rudiments of procedural due process. Thus the student appealing from dismissal from a public college for misconduct can establish the inadequacy of his hearing by showing that it did not conform to certain *objectively* determinable standards, as opposed to a showing of malice or arbitrariness—concepts which contain a large element of subjectivity not readily susceptible of proof.

By virtue of its application of the fourteenth amendment, it is possible that *Dixon* sounds the death-knell for the rule that courts will not interfere with the disciplining of students, absent malice or arbitrary action. Courts may now begin scrutinizing more closely the procedures by which the state attempts to deprive the student of a college education. In the narrow context in which this case arose, this would prove a valuable protection against harassment for the many Negro students who are in the forefront of the battle for equal rights.

JOHN J. KENNY

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**EVIDENCE—State Officers Invited To Witness an Illegal Detention by Federal Officials May Be Enjoined by Federal Courts From Testifying in State Proceedings With Respect to Statements Made by the Accused.** *Bolger v. Cleary*, 293 F.2d 368 (2d Cir. 1961).

Plaintiff Bolger, a longshoreman and hiring agent licensed by the Waterfront Commission of New York Harbor, was arrested by federal customs officials for the possession of liquor illegally obtained from ships' stores. In the course of the ensuing investigation, federal officers conducted an illegal search


\(^{31}\) 294 F.2d at 158-59.
of the plaintiff’s house and later obtained incriminating admissions from him during a detention and interrogation which violated Rule 5(a) of the Federal Rules of Criminal Procedure. These admissions were witnessed by the defendant Cleary, an investigator for the Waterfront Commission, who attended the interrogation at the invitation of the customs officials. As a result of those admissions, state criminal proceedings for petit larceny and Waterfront Commission proceedings for revocation of license were instituted against Bolger. Bolger petitioned the federal district court for an order enjoining the customs officials and Cleary from testifying in either proceeding with respect to the statements made during the illegal detention. The court granted the injunction on the authority of its supervisory powers over federal agents and extended it to include the defendant Cleary in his capacity as a witness to the acts of the federal officers. The United States Court of Appeals for the Second Circuit affirmed. Held, state officers invited to witness an illegal detention by federal officials may be enjoined by federal courts from testifying in state proceedings with respect to statements made by the accused.

The so-called McNabb-Mallory rule, as originally laid down by the Supreme Court, was limited to excluding from admission into evidence in federal criminal prosecutions all statements obtained during an illegal detention of the defendant by federal officials. Since the McNabb-Mallory decisions were not decided upon constitutional grounds but were based, instead, upon the Court’s supervisory power over the administration of justice in federal courts, the Supreme Court made it clear that neither the McNabb-Mallory rule nor the Federal Rules of Criminal Procedure were to be imposed as a limitation upon state courts or state law enforcement agents. On the same day that McNabb was decided, the Court further held that this supervisory power was not limited to those instances where the illegal detention was by federal officers themselves, but that it was equally binding upon federal officers where the defendant was illegally detained by state agents acting under a “working agreement” with federal officials. The Supreme Court later expanded their exercise of this

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1 Rule 5. Proceedings Before The Commissioner. (a) Appearance Before The Commissioner. An officer making an arrest under a warrant issued upon complaint or any person making an arrest without a warrant shall take the arrested person without unnecessary delay before the nearest available commissioner or before any other nearby officer empowered to commit persons charged with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith.


3 Bolger v. Cleary, 293 F.2d 368 (2d Cir. 1961).


supervisory power in *Rea v. United States* by including within its scope the participation of federal law enforcement agents in state criminal prosecutions. The Court there concluded that to appropriately enforce the Federal Rules against those owing obedience to them, the federal courts can enjoin federal agents from producing the fruits of their illegal search and seizure in state criminal prosecutions.

In the instant case the Second Circuit claimed to carry *Rea* to its logical conclusion by enjoining federal officers from doing indirectly, through the instrumentality of state agents, what *Rea* held that they could not do directly. Further, it declared that the injunction applied to state administrative proceedings for revocation of license as well as state criminal prosecutions. In so holding, however, the court pointed out that the necessity for any injunction, and thus the court's equitable jurisdiction in such cases, would prevail only so long as the Supreme Court's recent ruling in *Mapp v. Ohio* remained unclear in its "application to federal statutory or rule, as well as constitutional, prohibitions or to state administrative proceedings such as those of the Waterfront Commission."

By extending the ambit of its injunction beyond the acts of federal agents and the proceedings in federal courts, *Bödger's* application of *Rea* necessarily raises two fundamental problems. Foremost of these concerns the power of a federal court to enjoin the acts of state officers in state proceedings. Here the principal difficulty arises from section 2283 of the Judicial Code which, in substance, prohibits a federal court from issuing an injunction affecting state court proceedings unless it can show either that its action does not operate to enjoin such proceedings or that it falls within the scope of certain specified exceptions. These exceptions occur where the injunction is specifically authorized by an act of Congress or where the injunction is necessary to aid the court's jurisdiction or to protect or effectuate its judgments. In *Rea* the Court justified its action as nonintervention in a state proceeding although, conceivably, it might have been classified as an exception to section 2283 in view of the fact that the evidence in dispute was seized under a federal warrant, the defendant was indicted in a federal court, and the use of the evidence was suppressed under a federal court order. Nevertheless, the *Rea* Court chose to hold section 2283 inapplicable since it was "not asked to enjoin state officials nor in any way to interfere with state agencies in enforcement of state law."

In the instant case, due to the nonexistence of even a prior federal warrant, the court is afforded neither the luxury of a possible alternative nor the safety

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7 350 U.S. 214 (1956).  
9 293 F.2d at 370.  
11 350 U.S. at 216.
of having to enjoin only federal officers. In order to bring its action within the realm of precedent and to avoid the difficulties of proving that it falls within the exceptions to section 2283, the instant court is forced to reason that, for the purposes of the interrogation, the defendant Cleary was no more than "a human recorder" and that, accordingly, he was being enjoined not in his capacity as an agent of the state, but in his sole capacity as a witness to the acts of the federal officers.

This distinction appears, of necessity, to be founded on the unrealistic assumption that Cleary witnessed the interrogation of the accused not as an investigator for a state regulatory commission, but solely as an agent and instrumentality of the federal customs officials pursuant to a "working agreement" between the two. Such an assumption ignores both the legitimate interests of the Waterfront Commission in the illegal activities of one of its licensees and the duty of Cleary, as an investigator for that Commission, to serve those interests by learning of such activities in order to bring them to its attention.

Only a few months prior to Bolger, the Supreme Court affirmed a previous en banc decision by this same court which upheld a federal court conviction based upon a confession obtained by federal and state agents during an illegal detention by state police. The court of appeals there determined that there was no "working arrangement" as long as the state officers, while working in cooperation with federal agents, were pursuing legitimate state interests with an eye towards state prosecution for a state offense. That the offense in the instant case was a matter of appropriate concern for the Waterfront Commission was acknowledged even by the accused, and that it ultimately led to Commission proceedings is a matter of record. Thus there seems to be little doubt but that in attending the interrogation Cleary was acting not as an agent of the customs officials, but rather as an investigator for a state commission performing his proper duties in an official capacity.

In the light of this realization, it would appear that Bolger has gone substantially beyond the holding of Rea by extending its injunctive relief to encompass state as well as federal officials. Moreover, the court's attempt to rely upon Rea for support of its action would still be questionable at best in view of the language of the Supreme Court in the recently decided Wilson v. Schmetter. Although in that case the injunction to enjoin the production of evidence seized in an arrest was ultimately denied on other grounds, the Court, nevertheless, intimated that the presence of a prior federal warrant, indictment

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12 This particular expression was used by Judge Anderson in his dissenting opinion. 293 F.2d at 372.
14 189 F. Supp. at 244.
and suppression order would be considered an important factor in determining the federal court's injunctive power in such cases.16

The apparent conclusion is that the instant court can find in Rea little support for its injunction against Cleary. Its decision must stand on its own in holding that an order enjoining a state agent from testifying in a state prosecution is in no way an injunction against the proceedings themselves, and thus not barred by section 2283 of the Judicial Code. And though the Bolger court might find support for this view in the dissents of some of the present members of the Supreme Court,17 it can find little in precedent, which indeed offers more resistance than succor to this line of reasoning.18

Even if the court's action were not barred by section 2283, that fact alone would by no means justify a federal court in exercising its discretionary power of injunction. Bolger must still be examined in the light of the second problem raised by its holding, namely, its apparent conflict with the established policy against equitable interference in state criminal proceedings. This policy was first clearly enunciated by the Supreme Court in Stefanelli v. Minard19 when it ruled that a federal court should refuse to intervene in such prosecutions to enjoin the use of illegally obtained evidence. Speaking through Mr. Justice Frankfurter, the Court stated: "The maxim that equity will not enjoin a criminal prosecution summarizes centuries of weighty experience in Anglo-American law. It is impressively reinforced when not merely the relations between coordinate courts but between coordinate political authorities are in issue."20 Accordingly, the Court found that the disruptive effect such interference would have on the administration of state justice far outweighed what benefits might be derived from the granting of the injunction.

In Rea the Court seemingly created an exception to this principle, thus giving rise to the impression that the policy was valid in theory only, while in practice it was receiving mere lip service from the Court's majority.21 However, in its decision the Court expressly distinguished the facts in that case from those in Stefanelli on the obvious grounds that in the former no injunction was sought against a state official. Subsequent to Rea the policy laid down in Stefanelli was reaffirmed by the Court in Pugach v. Dollinger;22 and again in Wilson v. Schnettler.23 Furthermore, insofar as it concerns the instant

16 Id. at 386 (dictum).
19 342 U.S. 117 (1951).
20 Id. at 120.
21 350 U.S. at 219-20 (Harlan, J., dissenting).
case, this policy has been left wholly unimpaired by the recent *Mapp* decision which directed itself only to evidence seized in violation of the Constitution.\(^{24}\)

An evaluation of *Stefanelli* in the light of later decisions clearly demonstrates that the soundness of its doctrine has never been rejected and that, at best, this doctrine is difficult to reconcile with the holding of the instant case. For, as intimated previously, to say that the injunction against Cleary does not constitute a substantial interference with state proceedings is to ignore the realities of the situation. As the Supreme Court has pointed out, the term "state court proceedings" is a comprehensive one including "all steps taken or which may be taken in the state court or by its officers from the institution to the close of the final process"\(^{25}\) and governing "a privy to the state court proceeding . . . as well as the parties of record."\(^{26}\) Surely a realistic application of this definition would include within its scope the testimony of a state law enforcement officer in a state criminal prosecution where such testimony is essential to support a conviction.

It is submitted, therefore, in view of the policy enunciated in *Stefanelli, Pugach*, and *Wilson*, in addition to the prohibitions of section 2283, that the grounds for the decision in *Bolger* are questionable not only as to their validity, but also as to their wisdom. The injunction against Cleary is in substance and effect a direct interference with the state's administration of justice, and its end result will not only disrupt the state's criminal proceedings, but also discourage the commendable cooperation between state and federal agents. Thus it is submitted that as long as this interference is based solely upon the federal courts' supervisory power over federal agents, it will constitute "an unwarranted invasion of the rights and powers of the states."\(^{27}\)

Moreover, the only justification offered by the court for the result in the present decision is "that the federal courts will make an exception to this principle of noninterference in order to insure that federal officers comply with the requirements of fair criminal law administration as set forth in the Federal Rules of Criminal Procedure."\(^{28}\) However, to say that the desirability of enforcing obedience to the Federal Rules is the proper justification for such interference is to ignore the more basic reason behind Rule 5(a) itself, *i.e.*, the desire to protect the individual's right to freedom from undue police pressure without hampering effective and intelligent law enforcement.\(^{29}\) Under the rationale of 5(a), true justification for any interference in state proceedings could be found only in an acknowledgement that the individual's


\(^{26}\) Ibid.

\(^{27}\) 293 F.2d at 372 (dissenting opinion).

\(^{28}\) 293 F.2d at 369.

\(^{29}\) McNabb v. United States, 318 U.S. 332, 343-44 (1943).
right to be free from such pressure is sufficiently important and sufficiently delicate to warrant and necessitate his freedom from all unreasonable detentions by federal or state officials. And if such an acknowledgment should ever be made, this right surely must be shielded by a constitutional guarantee which would not only afford it the protection not available under the Federal Rules and the supervisory authority of the federal courts, but also which would obviate the present undesirable tendency towards piecemeal intervention by the federal courts in the states’ administration of justice.

JAMES V. DOLAN

LABOR RELATIONS—EMPLOYER TWENTY-YEAR SUPERSENIORITY PLAN CONSTITUTES AN UNFAIR LABOR PRACTICE WITHOUT A SHOWING OF INTENT TO DISCRIMINATE. Erie Resistor Corp., 132 N.L.R.B. No. 51 (July 31, 1961).

Failure of the Erie Resistor Corporation, respondent, and Local 613 of the International Union of Electrical Workers, charging party, to negotiate a new contract led to a strike called by the union. During the strike the respondent proposed a plan whereby those hired as replacements and strikers who returned to work would receive twenty years superseniority, to apply only in the event of future layoffs. This plan blocked negotiations for settlement of the strike and a new contract. Under the settlement agreement which terminated the strike, the parties proposed to submit the respondent’s superseniority plan to the National Labor Relations Board and the federal courts for final disposition. The plan continued in effect, and as a result approximately 132 strikers who had not been replaced and who were recalled lost their jobs in subsequent layoffs. It was contended that respondent’s insistence on and institution of the plan violated sections 8(a)(1), (3) and (5) of the Labor Management Relations Act of 1947. The trial examiner, relying on past Board decisions on superseniority, considered intent to discriminate as controlling and in the absence of a showing of such intent found no violation of the act. The union filed exceptions to the trial examiner’s intermediate report, and the Board heard oral argument. Held, superseniority plan of respondent consti-

1 Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

.......

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.......

.......

(5) to refuse to bargain collectively with the representatives of his employees . . . .

tuted an unfair labor practice under the act although intent to discriminate was not shown.2

An impasse at the bargaining table will on occasion lead to a rupture in labor-management relations and culminate in an economic strike, a strike characterized by goals of increased wages or improved fringe benefits. This form of walkout can be contrasted with an unfair labor-practice strike or a walkout in protest over certain actions taken by the employer which are proscribed by Congress. In the latter case, the employment status of the strikers is stabilized since upon termination of the strike, they are unconditionally entitled to reinstatement.3 The economic striker, however, gambles when participating in a walkout. Although he retains his “employee” status4 and his employment relationship may not be severed or impaired merely because of his strike activity,5 he may be permanently replaced during the strike to allow the employer to continue his business.6 Notwithstanding the threat of replacement, the retention of “employee” status confers upon the economic striker a number of advantages, not the least of which is his retention of seniority. Length of service is, of course, an extremely valuable asset as it determines job security. An employee with a comparatively few number of years will be the first to feel the effects of production cutbacks, shutdowns and technological changes.

Emphasizing the fact that an economic striker retains his employee status and is entitled to reinstatement if not replaced, the Board has found an unfair labor practice in an employer’s tolling of a striker’s seniority during a strike, while nonstrikers accrued seniority for the corresponding period.7 Once adopting this position the Board twelve years ago embarked upon a consistent line of decisions by holding in Potlatch Forests, Inc.8 that a grant of additional seniority to replacements and ex-strikers who abandoned the strike was a form of discrimination which violated the act. In Potlatch the Board viewed the superseniority plan as an impairment of the employment relationship of those who had exercised their statutory right to strike and to engage in concerted activities.9

In three decisions since Potlatch involving the superseniority issue, the Board has found employer unfair labor practices. In each, however, the Board was

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2 Erie Resistor Corp., 132 N.L.R.B. No. 51 (July 31, 1961); accord, Swan Rubber Co., 133 N.L.R.B. No. 31 (Sept. 26, 1961).
3 NLRB v. Remington Rand Inc., 130 F.2d 919 (2d Cir. 1942).
6 Id. at 345-46.
8 87 N.L.R.B. 1193 (1949), enforcement denied, NLRB v. Potlatch Forests, Inc., 189 F.2d 82 (9th Cir. 1951).
able to uncover independent evidence of discriminatory intent.\textsuperscript{10} Not until the instant case, \textit{Erie Resistor}, did the Board clearly state its rationale as to the superseniority question by finding superseniority in itself, absent any discriminatory intent, in "direct conflict with the express provisions of the Act prohibiting discrimination."\textsuperscript{11}

The symmetry of Board law, however, is not paralleled by the decisions of some courts of appeals on the superseniority question. The Board's decision in \textit{Potlatch} was denied enforcement by the Ninth Circuit\textsuperscript{12} on the ground that an 8(a)(3) violation in this type of case required employer intent to discriminate. Although conceding that the grant of superseniority during a strike was in effect a form of discrimination tending to discourage union activities, the court reasoned that the employer had this prerogative as a corollary to the aforementioned right to secure replacements during an economic strike,\textsuperscript{13} so granted by the Supreme Court in \textit{NLRB v. Mackay Radio & Tel. Co.}\textsuperscript{14} The Seventh Circuit in \textit{NLRB v. Levin-Mather Co.}\textsuperscript{15} has also indicated that employer use of superseniority during an economic strike would escape the sanctions of the act\textsuperscript{16} and inferentially decided, contrary to the decision of the instant case, that superseniority was a legitimate subject of collective bargaining. In addition, the decision of the Fourth Circuit in \textit{Olin Mathieson Chem. Corp. v. NLRB,}\textsuperscript{17} though enforcing a Board order on independent evidence of discriminatory intent, appeared to be inclined toward the view that superseniority might be proper upon a showing of economic necessity on the part of the employer.

The \textit{Erie Resistor} decision squarely met the problem posed by \textit{Potlatch} by refusing to follow the Ninth Circuit's extension of the \textit{Mackay} case. Pointing out that even though \textit{Mackay} allowed replacement of economic strikers during the strike, the Board argued that the decision itself required nondiscriminatory

\textsuperscript{10} Ballas Egg Prods., Inc., 125 N.L.R.B. 342 (1959), enforced, Ballas Egg Prods., Inc. v. NLRB, 283 F.2d 871 (6th Cir. 1960) (antiunion motive rather than economic interests); California Date Growers Ass'n, 118 N.L.R.B. 246 (1957), enforced, NLRB v. California Date Growers Ass'n, 259 F.2d 587 (9th Cir. 1958) (intent to punish strikers); Olin Mathieson Chem. Corp., 114 N.L.R.B. 486 (1955), enforced, Olin Mathieson Chem. Corp. v. NLRB, 232 F.2d 158 (4th Cir. 1955), aff'd per curiam, 352 U.S. 1020 (1957) (plan initiated after termination of strike).

\textsuperscript{11} 132 N.L.R.B. No. 51, at 7.

\textsuperscript{12} NLRB v. Potlatch Forests, Inc., 189 F.2d 82 (1951).

\textsuperscript{13} Id. at 86. For critical comment of the \textit{Potlatch} rationale see Comment, 27 U. Chi. L. Rev. 368 (1960); 6 Duke L.J. 143 (1957); 6 Rutgers L. Rev. 470 (1952); 4 Stan. L. Rev. 151 (1951); 30 Texas L. Rev. 776 (1952); 42 Va. L. Rev. 836 (1956).

\textsuperscript{14} 304 U.S. 333 (1937).

\textsuperscript{15} 285 F.2d 329 (1960).

\textsuperscript{16} Id. at 333.

\textsuperscript{17} 232 F.2d 158 (1956).
and complete reinstatement of all strikers not affected by replacement.\textsuperscript{18} This condition would be rendered impossible if the employer, in exercising his right to seek permanent replacements, were allowed to use superseniority. The Board undoubtedly felt that discharge as a result of superseniority is discharge nonetheless and can be traced directly to the employee's strike participation. Moreover, the Board asserted that though the threat of replacement may solidify strikers in collective efforts, undoubtedly because of the feeling that there is equal risk, superseniority is divisive in that younger employees will grab the once-in-a-lifetime opportunity to pass their elders in seniority. The elders at the same time are compelled to protect their standing. Consequently, it was felt that superseniority represented both a promise and a threat to strikers, effectively pressuring them to abandon strike activity.\textsuperscript{19}

In rejecting the \textit{Potlatch} approach the Board anchored its holding on the language of the Supreme Court in \textit{Radio Officers' Union v. NLRB}.\textsuperscript{20} There the Court was faced with the problem of disparate wage treatment of employees on the basis of union membership and decided that a situation of this type was “‘inherently conducive to increased union activity.’”\textsuperscript{21} In reaching its decision the Court stated that “in some situations specific evidence of intent to encourage or discourage is not an indispensible element of proof of violation of § 8(a)(3).”\textsuperscript{22} The Board here concluded that a superseniority plan fell within that range of situations since it discriminates “on its face” against those who continue to participate in the strike.

It is clear that in this problem area the Board was confronted with the difficulty of drawing the boundaries of permissible discrimination. It faced the dilemma of either allowing a union to continue to apply its already weakened method of economic pressure or permitting the employer to utilize an attractive inducement to replacements—an inducement which would necessarily have, as a side effect, an almost complete obliteration of the incentive to strike.

Certainly the most potent counterattack upon the Board’s position is the contention that the employer must have a means of protecting his business, and without some offer of inducement he will have difficulty in effectuating the right of replacement guaranteed in \textit{Mackay}.\textsuperscript{23} In \textit{Erie Resistor} the Board answered this defense of “necessity” in an abbreviated fashion by merely reiterating the stand taken in its original \textit{Potlatch} decision; that is, that the right to strike and engage in protected, concerted activities guaranteed by the act would be destroyed.\textsuperscript{24} It is submitted, however, that this reply, although

\textsuperscript{18} 132 N.L.R.B. No. 51, at 8.
\textsuperscript{19} Id. at 10.
\textsuperscript{20} 347 U.S. 17 (1954).
\textsuperscript{21} Id. at 46, quoting NLRB v. Gaynor News Co., 197 F.2d 719, 722 (2d Cir. 1952).
\textsuperscript{22} Id. at 44.
\textsuperscript{23} Comment, 27 U. Chi. L. Rev. 368, 376 (1960); 100 U. Pa. L. Rev. 287, 289 (1951).
\textsuperscript{24} 132 N.L.R.B. No. 51, at 14.
not complete, is not inadequate. Even absent an employer intent to discriminate, superseniority does seriously offend the employees’ right to strike. With the threat of superseniority present, in any form or for any number of years, a penalty would attach each time the right was exercised. For an employee to strike in order to obtain immediate economic benefits or improved working conditions and to abandon long term security would indeed be shortsighted. Though it may be conceded that the replacement is in a strong bargaining position and may seek a guarantee assuring his permanence, it is equally evident that an offer of superseniority to replacements, applicable in the event of future layoffs, transcends the normal inducement of financial gain and benefit and provides an effective and unique insulator against a problem common to all working men, the problem of economic recession. It is an insulation unobtainable, absent the fortuitous event of a strike.

The Board’s rationale in explaining its position in *Erie Resistor* appears consistent with the letter and spirit of the act. It has evolved a per se doctrine, and although its per se doctrines have not met with favor in other problem areas,25 the decision as to superseniority has merit. The grant of this added benefit to replacements and returning strikers would have a devastating effect upon union activity. Even an express disclaimer of intent to strike at hardcore union members is unavailing when one considers the effects of superseniority. The most fervent union sympathizers will undoubtedly be the last to abandon the strike but will systematically be the first laid off in the event of future curtailment of operations. In addition, union prestige and bargaining power would suffer a death-dealing blow. The instant case offers ample evidence of that fact. Upon termination of the strike the union received 190 withdrawal cards from former members and 132 strikers were laid off as a result of the plan. As the Board correctly pointed out, “it is hard to conceive of continued collective bargaining under these conditions.”26

The instant decision, if enforced, would render less likely the possibility that an employer might gamble with superseniority, hoping to sustain a showing of economic cause. The Board has made its position crystal clear. The employer’s rights have been clearly defined regarding replacement; so likewise have those of the employee. The economic striker would still be faced with the prospect of replacement but could be secure in the knowledge that his

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26 132 N.L.R.B. No. 51, at 12.
job security would remain intact if that circumstance should not arise. However, the inconsistency between Board law and the decisions of courts of appeals continues to permeate this area. It would appear that only a decision of the Supreme Court of the United States can remove this uncertainty.

JOSEPH E. O'BRIEN, JR.


Defendant Kaplan, a surgeon, had the plaintiff admitted to a hospital for surgery as his private patient and ordered a general anesthesia. Out of his presence a general anesthetic was administered by personnel of the anesthesiology department pursuant to orders of the department head. Injection of the anesthetic was negligent and resulted in loss of the plaintiff's arm. Plaintiff sued Kaplan and the head anesthesiologist, Stone. On the issue of respondeat superior, the trial court instructed the jury that the person administering the anesthetic was defendant Kaplan's servant. The Supreme Court of Pennsylvania affirmed on appeal. Held, a surgeon absent during pre-operative treatment of patient is liable for negligence of hospital anesthesiologist.1

It has been suggested that of the two factors necessary for application of the doctrine of respondeat superior, i.e., a "servant" acting within the "scope of employment," the problem of whether the tortfeasor was a servant, and if so, of whom, presently involves the greatest amount of litigation.2

The test for determining whether there is a master-servant relationship revolves about control or the right of control.3 The physician's right of control traditionally has been defined in terms of the walls of the operating room. Where a plaintiff in a physician-patient case seeks to impose liability on the basis of the negligence of a servant borrowed from the hospital, right of control such as will permit application of respondeat superior is found only as to those acts taking place in the operating room.4 The test secures protection of

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2 Mechem, Outlines of Agency 279 (1952).
the hospital during the operation as well as the physician before and after the operation. Where the physician's actual control continues, he has been found to be in a master-servant relationship outside the operating room. But in that case, liability based on the surgeon's own fault, not respondeat superior, seems the correct basis of liability. Moreover, where the surgeon delegates his whole function in the operation and is not himself present to exercise authority, he has been held liable on the theory of respondeat superior.

The usual determination of who has right of control is a question of fact. In this respect the physician-patient cases are sui generis in the law of master-servant insofar as they apply a test which draws the line on the relationship at the door of the operating room. The leading case in this area, McConnell v. Williams, also a Pennsylvania decision, indicates that the line is an arbitrary one of policy. McConnell equated the physician's control in the operating room with "supreme control" such as is exercised by the "captain of a ship." This was an obvious effort to differentiate the operating surgeon's right of control during operation from the quite as real right of control before and after operation. None would question that, in fact, the physician has a right of control over those handling his patient in or out of the operating room.

The Pennsylvania Supreme Court later lost sight of the reason for its strong


6 E.g., Davis v. Potter, 51 Idaho 81, 2 P.2d 318 (1931).
7 The theory of the case, in or out of the operating room, where actual control is exercised sounds in direct liability. See Davis v. Potter, supra note 6; Saint Paul-Mercury Indem. Co. v. Saint Joseph's Hosp., 212 Minn. 558, 4 N.W.2d 637 (1942); Powell v. Risser, 375 Pa. 60, 69, 99 A.2d 454, 458 (1953) (Musmanno, J., dissenting).
9 Restatement (Second), Agency § 220(1), comment c, § 227, comment a (1958).
11 Id. at 362, 65 A.2d at 246.
language and seemed to equate the McConnell view of respondeat superior with a requisite of actual participation by the surgeon in the negligent act. The Pennsylvania court obviously felt McConnell had reference to the state of facts in the case when it spoke of "supreme control."

Both the majority opinion and the dissent in Rockwell cite the McConnell decision as support for their opposite views on the issue of respondeat superior, but both failed to apply properly the rationale of that case. The majority cites McConnell to support its position that because Kaplan could have stopped the operation, including the administration of anesthesia, he had a right of control. Kaplan had in fact a right of control which was not disputed. The dissenters employ McConnell to object to liability in the instant case but on the erroneous ground that McConnell required actual control.

None of these uses of McConnell sees the thrust of that case, eminently sound in its appreciation of the doctrine of respondeat superior. Vicarious liability, as expressed in the rule respondeat superior, is an exception to the law of negligence. It is exceptional in that it shifts the loss of the person harmed to one not participating in the harm. Its nature as an exception has elicited elaborate study and fundamental disagreement as to the source and rationale of the rule. The suggested bases range from identification of master and servant to the deep-pocket theory of responsibility to "public policy." Whatever the proposed rationale, describing liability in terms of right to control is inconsistent with the liability-without-fault nature of respondeat superior. Right of control is not a test of the applicability of liability without fault in the sense that right of control is why the doctrine of respondeat superior is applied. The control test, rather, is merely a judicial tool used to determine when the master-servant relationship exists. As such, it is flexible enough to support any policy a court wishes to pursue.

In the physician-patient cases, characterized by the instant decision, the test has been used by the courts as an instrument of policy to lessen the rigor of liability without fault by refusing to extend the physician's right of control beyond the operating room. The courts refuse to acknowledge the reality of the physician's pervading right of control in matters concerning his patient, thus creating a fiction. The reason for the fiction is fairly obvious—

14 Id. at 582, 173 A.2d at 58.
17 Ibid.
the time-consuming nature of pre-operative and post-operative treatment would hamstring the physician charged by the fear of liability with a constant vigil over the conduct of others in routine matters. This is the thrust of McConnell—liability founded upon a classic test but ameliorated on grounds of public policy by application of the same test to a fact created by a legal fiction.

To be sure, the type of litigation exemplified by the Rockwell case gives rise to other tests of occasional application. A distinction is sometimes drawn between "medical" and "nursing" procedures in determining whether right of control exists.19 The "expertise" test is another.20 Such tests applied in the pre-operative-post-operative care situation are subject to the criticism that they are attempts to determine on a factual basis whether there is a right of control when right of control as it is used with respect to the physician in this area is only an arbitrary line drawn by the courts as a matter of policy. Amelioration is lost. There is in fact right of control, and this cannot be evaded save by reference to an arbitrary line. Application of either the attempted distinction between "nursing" procedures or the "expertise" test in Rockwell would have resulted in liability under respondeat superior. Administration of anesthesia is no nursing matter, nor is it a matter of such exclusive expertise as to preclude Kaplan from interfering.21 Both tests would admit to the fact of right of control, and neither serves a policy with respect to the practice of medicine. McConnell, on the other hand, is not concerned with right of control in fact; it demonstrates only a pragmatic concern with the effect on the practice of medicine of imposing liability on the surgeon at an arbitrary point, regardless of the traditional tests of master-servant.

The Rockwell case thus exposes the basic error of assuming that the physician's right of control is a matter to be determined on the facts. In Pennsylvania the physician, in order to reduce his exposure to liability, now must concern himself with actual supervision of pre-operative and post-operative measures taken as a matter of course. This either flies in the face of the policy underlying decisions like McConnell or that policy has been abandoned.


21 See discussion 404 Pa. at 578, 173 A.2d at 56.
As was pointed out above the historical basis of respondeat superior is a point of contention. Its most articulate defenders, however, point out the present necessity of the doctrine in the increasing impersonality of the potential tortfeasor.\textsuperscript{22} In the face of that development the doctrine is a societal control imposing care on the otherwise impersonal. The courts, perhaps unconsciously, have prevented the full play of the doctrine in the physician-patient area. They have seen what is basic in the doctrine of respondeat superior—that the rectitude of its principles is second in importance to the degree of its application.\textsuperscript{23} The courts’ unspoken major premise in so acting has been that the practice of medicine is not impersonal; their control over the doctrine has been their fiction of no right of control outside the operating room. The court in Rockwell, in removing that limitation and putting right of control on a factual basis, has given full play to the doctrine of respondeat superior at the expense of a salutary public policy.

EDWIN M. LARKIN

\textsuperscript{22} Laski, supra note 16, at 124; Seavey, supra note 18, at 451.

\textsuperscript{23} For a discussion of this view see Laski, supra note 16, at 114.
BOOK REVIEWS

As the author says in his "Foreword," the thesis of this book is that liberty is being imperiled today for the sake of order; that in our effort to control crime we tend to become more and more impatient with the restraints of the fourth, fifth and sixth amendments and are thus in a fair way to lose these important protections. The author says: "It is altogether doubtful, indeed, if the Fourth, Fifth, and Sixth Amendments could win adoption by the requisite three-fourths of the states at the present time." 1

Citing Justice Frankfurter's remark that "the history of liberty has been largely the history of observance of procedural safeguards," 2 the author gives many instances of police disregard of procedural constitutional rights. Examples are arrests for investigation, coerced confessions, violations of the right of privacy, the use or misuse of evidence obtained by illegal means, eavesdropping, wiretapping and deprivation of the right of counsel. The author reviews the recent decisions bearing on these topics and approves those condemning violation of citizens' rights in these areas. The book is simply and lucidly written and is free from jargon. If it be said that as a whole it is rather elementary and contains nothing new for the average lawyer or law student, still such books have a useful function. In an age fixated on the immediate with the cry "there ought to be a law" dinning in our ears, the advocates of the quick and easy and usually drastic solution need to be reminded that there can be no constitutional short-cuts. 3 On the credit side there is therefore a valid objective—"lest we forget"—and a reminder that the fight for liberty is a continuous one, and that at no one moment in human history can it be said that the fight has been won.

On the debit side the book shows a number of annoying epithets and generalizations. The author has assimilated most of the superficial doctrines of the day, and it is interesting to note how they have crept

1 Barth, The Price of Liberty xi (1961).
2 Id. at 26, quoting McNabb v. United States, 318 U.S. 332, 347 (1943).
3 Cf. Mr. Justice Holmes' remark: "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).
into his thinking. Thus he refers to the recent "neurotic anxiety about protection of the community against Communist subversion." Our fight against Communism is more than a neurosis; it is a little disappo-inting to find a liberal so illiberal in his statements. He refers, too, to the Star Chamber and states that its inquests, "patterned on those of the Spanish Inquisition, were commonly conducted on the basis of mere suspicion." Catholics become a little weary of cliché references to the Spanish Inquisition, particularly from people who, it is almost certain, do not have the remotest notion of what it actually was. The author also adopts the party line on loyalty, referring to the Washington law firms who "guide hapless Government employees through the labyrinths of the Federal loyalty-security program" which embodies "arbitrary proceedings." The loyalty program is likely to survive these popgun broadsides.

The author is a great believer in the public defender system but would carry it one step further. The rich, he says, can purchase the best legal talent, and the poor can have it furnished to them without cost, "but all those in between must take their chances on such counsel as they may be able to find, and finance, in the legal marketplace." He adds: "It is worth considering whether the government which prosecutes should not also furnish the assistance of counsel to any accused person who wants it." It is suggested here, gently, that it is not worth considering. There is no reason why the decent people should be taxed to pay the lawyer of a prosperous defendant who is held on probable cause to meet a charge of crime. The idea has the iron logic of lunacy.

The chapter on "Crime and Correction" is a ragbag of all the fashionable and superficial viewpoints of the modern do-gooder. The cause of crime is society's failure; there is no sense in sending juvenile delinquents to jail, which merely turns them into adult criminals; the emphasis today is altogether on punishment, "as though punishment were of some good or had some utility in itself"; "surely delinquency is not willful on the part of the young"; J. Edgar Hoover's realistic doctrines of protecting society are all wrong; jails should be turned into

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4 Barth, supra note 1, at ix.
5 Id. at 27.
6 The debunking of these clichés has been the task of modern historians. See Walsh, Isabella of Spain 167-81, 194-229 (1930).
7 Barth, supra note 1, at 166.
8 Id. at 170.
9 Ibid.
10 Id. at 173-93.
hospitals; it is “unfair” to punish people for private homosexuality; the public is guilty of “moralistic fervor tinged with sadism”; the solution of the narcotic’s problem is for the state itself to supply addicts with narcotics—free of charge—which would put the big time peddlers out of business “by depriving them of helpless victims from whom to extort inflated prices”; education is the great reformer; more money should be spent on recreation centers for young people; attention to the causes of crime offers more hope than punishment as a deterrent.

These ideas read like a doctoral dissertation by Agnes Meyer, the dowager duchess of the Washington Post, or a collection of columns from “My Day” by Mrs. Eleanor Roosevelt. They have, however, one ominous thing in common: everybody and everything is responsible for crime except the free will of the criminal. It must never be admitted that man is a responsible individual; the parents are guilty, society is guilty, God is guilty, but the defendant is never guilty. It is a measure of the shoddy softness of the day that such viewpoints, by dint of repetition, no longer even cause irritation. It is likewise a tribute to our good sense that they carry no conviction. They are normal results of the little red schoolhouse, the big-city newspaper, and television—the “idiot box” which in the end will do us more harm than the atomic bomb.

The book is a good case study of the modern mind. It is scientific in the sense that it accumulates facts. It is likewise scientific in that having found the facts, the scientist does not know what to do with them, as the last chapter shows. The author is a typical citizen of the welfare state—benevolent, sentimental and pathetically confident that the state and laws and more laws, using other people’s money, can solve all problems. The best that can be said is that his heart is in the right place but that others must find the solution to the deep human problems which this book documents.

WILLIAM J. HUGHES, JR.*


A professor of political science (Kaplan) and a professor of law (Katzenbach) of the University of Chicago have collaborated to produce a book which seeks to explain the “interlocking patterns of international politics and law.” The method used is contrapuntal. Thus

* Professor of Law, Georgetown University Law Center.
the first part of a chapter on "recognition" discusses the subject in
the framework of international politics as it has emerged over the years,
while the second part sets out the changing legal concepts and effects
attendant upon such political developments. In addition to the chap-
ter on "recognition" are parallel chapters on "sovereignty," "jurisdic-
tion," "resort to force," "supranational organizations" and related
material corresponding to the usual format of a conventional book on
public international law.

The legal essays, presumably largely the work of Mr. Katzenbach, are
accurate and thoughtful short analyses of doctrinal development in
these major traditional fields of international law. While not "docu-
mented" with footnote supports, all could easily be so supported. As
such, they are valuable ancillary reading for students of international
law and for nonlawyers interested in the field who wish to acquire gen-
eral and realistic insights which make good sense and have in recent years
become part of the conventional wisdom on the subject.

The "political" essays, on the other hand, suffer from the fixed
"systematic" point of reference of the authors, presumably in this
instance Mr. Kaplan. According to the authors, international politi-
cal relationships are of one type in a world dominated by the "balance
of power" system, while they become quite different in what the authors
term a "loose bipolar system," dominated by power blocs headed by the
United States and Russia. Not only are differences in degree reflected,
but the nature of international relations changes according to whether
one or the other "system" prevails. The legal essays also reflect this
view but only to a limited extent, being largely self-contained and quite
separable from this so-called "systems analysis."

The difficulty with this approach is that, at least since the Middle
Ages, there has not been, and there is not now, an exclusive international
political "system," whether "balance of power" or "loose bipolar" or any
other. That is to say, we have always had, and have now, strong balance
of power elements at work in both "stable" and "unstable" periods of
international relations, and we have also witnessed for several recent
centuries, and for many centuries in earlier times, "loose bipolar" or
closely similar elements. Britain and Spain in the late sixteenth
century, Britain and France in the eighteenth century, Napoleon and
Alexander-Castlereagh-Metternich in the early nineteenth century fit
the category quite as well as the United States-Russia in the immediate
post-World War II era. The diffusion of power which we are now
witnessing—the emergence of a fledgling European Community, of
Communist China, of the large number of newly independent states in Africa and Asia—indicates that now, as in the past, "loose bipolarity" and "balance of power" are only two ever-changing yet ever-present elements in a world which continues to record fantastic technological development.

Indeed, even more important to the development of international relations, and hence of international law, has been the burgeoning of democratic ideas in the late eighteenth century, of nationalism in the nineteenth century, and of the desire for independence and rapid improvement in the conditions of life among the impoverished people of Asia, Africa and Latin America in the twentieth century. It is neither helpful nor accurate to overlook or appreciate inadequately the fact that foreign relations begin at home, and for many countries with very serious developmental and other problems, it practically ends there.

In addition to the book's didactic approach to international politics, there is an almost complete omission of what may be termed the "economic foundations" of both international politics and international law, which is a most important but, again, not an exclusive "explanation" of current and past international political and legal development.

The book, then, represents a commendable but only partially successful effort to weave together law and politics as they operate in international relations. That this effort does not quite come off does not mean that the book is not worth reading. It merely means that it has failed to provide a "key" to unlock the secrets of international legal or political development which the authors apparently thought they had discovered.

STANLEY D. METZGER*


The warp and woof of life insurance company investment practices in the natural gas industry has for many years been hidden from public view. This book provides a valuable addition to the very meager literature on this subject. The author, an economist with some years of practical experience as an employee of two large insurance companies, has written a down-to-earth description of typical loan agree-

* Professor of Law, Georgetown University Law Center.
ments and bond indentures between life companies and natural gas pipelines as they have evolved over the past twenty-five years, with special treatment given to the initial financing and subsequent growth through 1958 of two pipelines organized subsequent to World War II, Texas Eastern Transmission Corporation and Transcontinental Gas Pipe Line Corporation. Brief mention is also made in summary fashion of life insurance company loans to natural gas producers and to natural gas distributors.

The description of the terms of the lending agreements, the summaries of relevant statistics on the rise in the wellhead price of natural gas and on the exceedingly rapid growth in the total investment by the life companies in the natural gas pipeline industry, and the capsule statement of the provisions of the New York Insurance Law which governs the investment policies of the "big five" life companies (the major insurance lenders in the natural gas pipeline field) are well done. Appropriate mention is made of the concern of the life insurance lender with the assurance of an adequate "cash flow" to meet interest and sinking fund requirements. Note is taken of the "acceleration clause" which empowers the bond trustee to accelerate the schedule of sinking fund payments in the event that the annual gas supply report reveals to him that the original estimates of recoverable gas supply were too high. The author also recognizes the stabilizing effect of long-term contracts between pipelines and distributors.

The discussion of regulatory problems handled by the Federal Power Commission in connection with the issues raised by United Gas Pipe Line Co. v. Memphis Light, Gas & Water Div.1 and Atlantic Ref. Co. v. Public Serv. Comm'n2 is inaccurate. The aforesaid deficiencies are pardonable in view of the author's lack of legal training. However, Dr. Hooley does represent himself as an economist skilled in the techniques of security analysis. Yet his analysis of the "cash flow" available to natural gas pipelines is anachronistic. His discussion of "cash flow" is limited to dividend restrictions on equity, minimum take-or-pay provisions in long-term sales agreements with distributors, and the three to three and one-half per cent ordinary rate of depreciation usually allowed by the Federal Power Commission. No mention whatsoever is made of the enormous flow of funds generated by the use of accelerated

2 Id. at 19-20.
amortization,\textsuperscript{3} liberalized depreciation\textsuperscript{4} and amortization of intangible drilling expense.\textsuperscript{5} Depletion allowances are noted early in the book and are thereafter disregarded in subsequent discussions of "cash flow."

In the concluding chapter the tocsin is sounded, and the writer accuses gas industry leaders, investors and regulatory bodies (especially the Federal Power Commission) with reckless complacency in allowing disproportionately high percentages of fixed-income securities and overly thin equity. There he states:

A large part of the reason for the present situation is the failure of the Federal Power Commission to take a firm stand on the matter of financial structure, in spite of the fact that the courts have repeatedly maintained that these matters fall within the area of Commission jurisdiction.\textsuperscript{6}

Dr. Hooley offers no citation to judicial opinions or to the Natural Gas Act to support the aforesaid statement. Indeed, there is none to cite. Congress has not given the Federal Power Commission plenary power over natural gas companies' financial structure\textsuperscript{7} comparable to that which the Public Utility Act of 1935 gives it over security issuance\textsuperscript{8} or which it gives the Securities and Exchange Commission to regulate the issuance of securities by public utility holding companies.\textsuperscript{9}

To date the Federal Power Commission has exercised to the fullest the jurisdiction delegated to it by Congress by conditioning the grant of certificates of convenience and necessity authorizing pipeline construction so as to require at least fifteen per cent equity and not more than seventy-five per cent long-term debt.\textsuperscript{10}

\textsuperscript{5} United Fuel Gas Co., 23 F.P.C. 127, 133 (1960).
\textsuperscript{6} Hooley, op. cit. supra note 1, at 164.
\textsuperscript{10} Transwestern Pipeline Co., 22 F.P.C. 407, 418 (1959); Midwestern Gas Transmission
While broad statements are occasionally made without any credible citation of authority, consumers, investors, and students of finance, economics and public utilities all owe the Columbia University Press a debt of gratitude for publishing this book.

Daniel Goldstein*

GUIDE TO LEGISLATION ON RESTRICTIVE BUSINESS PRACTICES. The European Productivity Agency of the Organisation for European Economic Co-operation, Paris, 1960. Three volumes. Pp. 304; 408; 267. $6.00 each. (Vol. IV in preparation; supplements at $1.25 per 100 pages.)

The Organisation for European Economic Co-operation is an international organization which came into being to administer United States economic assistance to Europe after the war. However, it quickly became the forum for European cooperation in a multiplicity of economic tasks, not the least of which was the reduction of trade barriers. Almost all European countries outside the Iron Curtain have been members of the organization. The United States and Canada have participated as associate members, Yugoslavia to a limited extent and as an observer. The large number of European countries, the great variety of their new laws concerning restrictive business practices, the occasional difficulty in obtaining the full and up-to-date text of such statutes, and in several cases the language barriers combined to induce the OEEC to make the present compilation one of its projects.

The basic idea of the Guide is to offer the official text of and other information regarding statutes directed against restrictive practices, plus relevant excerpts from the European "community" treaties. Usually the full text is given, but portions, presumably of no interest to the users of this set, are sometimes omitted. This compilation, published in French and English, is limited to European and North American


* Attorney, Federal Power Commission. The views expressed herein are those of the author and do not necessarily reflect those of the Commission.

1 The OEEC is being succeeded by the Organization for Economic Cooperation and Development. The United States joined the OECD as a full member on December 14, 1960. The Senate advised ratification of the Convention on March 16, 1961, and the President ratified on March 23, 1961. 44 Dep't State Bull. 537 (1961).
countries. In general, the legislation of each country is prefaced by an introduction with background and historical information and followed by comments, selected decisions and bibliographies. Additionally, the third volume contains a selected international bibliography.

The countries and “communities” participating in this project have designated expert representatives—most of them highly placed public officers dealing with the subject of restrictive practices—for work on the Guide. The resultant quality of the materials is reflected in the “explanatory notes” wherein is contained, for example, a reliable condensed statement of the basic tenets of United States antitrust laws. However, due to the newness of most of the statutes included in the Guide, there is a marked scarcity of judicial and administrative decisions in many countries.

Though it contains the complete text of many pertinent statutes, the Guide does not purport to be an exhaustive treatment of each national law. Nor is it a treatise on comparative antitrust law. Rather, it is a handbook from which information pertinent to foreign laws may be quickly obtained. By its nature, however, it poses particular problems: translations, bibliographies, indices, and keeping up-to-date are the more significant ones.

The translation of statutes is a difficult task. Not infrequently the concept underlying a legal term is not a part of the legal terminology of the language into which that term is translated. Literalness may be deceptive, for the same word may exist in both languages and yet may not have the same meaning; the same may be true with regard to derivatives of the same etymological root. Thus far, countries representing nine languages have contributed to the Guide, with non-English and non-French speaking countries being responsible for the correctness of either an English or French translation of the contributions submitted by them. Though the translations are acceptable and convey the general meaning of the original text, details may not always be fully accurate.

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2 However, omitted are the legislation of Finland, Law for the Control of Restraints of Competition in Trade, Jan. 18, 1957 (No. 47) and the Law on Cartel Regulation, Feb. 7, 1958 (No. 50), and that of Yugoslavia, Constitution of the Federal People's Republic of Yugoslavia, Jan. 31, 1946, Art. 18(4).

3 This may be illustrated by reference to the German Law Against Restraints of Competition. Its first (and most important) sentence declares that certain restrictive agreements are “unwirksam.” Law of July 26, 1957, [1957] I Bundesgesetzblatt 1081. The literal and, in this instance, the most apt translation is the word “ineffective” (or “ineffectual”). That the word was carefully chosen is indicated by the distinctive use of the terms “unwirksam” and “nichtig” (“void”) in the statute. The earlier Guide translated “unwirksam” in § 1(1)
All basic material should be included in the various bibliographies, but detailed completeness is to be avoided in a manual of this kind. An enormous number of publications exists in the United States (particularly law review articles), but this is not true in other participating countries. In general, the choice made by the Guide has been excellent, both as to the international bibliography and the bibliographies of the individual countries. It may be noted that the international bibliography, while referring to Professor Brewster's book Anti-Trust and American Business Abroad, does not list the equally pertinent and valuable book by Wilbur Fugate, Foreign Commerce and the Antitrust Laws. Nor does the international bibliography include the Antitrust Bulletin, which contains much information on everyday antitrust subjects, though it is listed in the United States bibliography. The decision to exclude United States law review articles was reasonable, for many of these would not be readily available to users of the Guide in foreign countries. For the same reason several articles and periodicals listed in the bibliographies could have been omitted since they are rarely available anywhere else than in their own countries and at a few universities.

While the Guide prefaces some, but not all, statutes with a rather rudimentary table of contents, the set contains no index whatever. Though the great variety of enactments in the different countries necessarily discourages the considerable work which an over-all index would entail, it would be useful and comparatively simple to add individual indices both to the statutes and in some instances to the comments of participating countries.

We live in a period of great interest in the fight against restrictive

by "invalid." This is not exact since the word "invalid" might be used as synonymous with "void" but not with "ineffective." The September 1960 supplement to the first volume illustrates the thoroughness of the editors in that the objectionable translation of the word "unwirksam" was corrected to read "ineffective." The French edition of the Guide uses more accurately the translation "inefficace[s]." Antitrust Legislation, of the World, "West Germany: Law Against Restraint of Competition" 280 (1960), a paperback collection of numerous unannotated antitrust statutes compiled by the Staff Office of the Japanese Fair Trade Commission, goes to the unacceptable extreme of translating "unwirksam" by "null and void." Another example is the translation of the word "rechtskräftig" in § 3(1) of the Austrian Cartel Law by the words "in a legally valid form." Law of July 4, 1951, [1951] Bundesgesetzblatt No. 173. Though this might be a literal translation in other instances, in the particular context "rechtskräftig" is used as a technical term meaning "no longer subject to review."

For a review of both books see Metzger, Book Review, 47 Georgetown L.J. 611 (1959).
business practices throughout the world. Enactment of pertinent laws has multiplied since World War II. Efforts to reach international agreements have intensified, and the pertinent provisions in the “community” treaties may be only a beginning. The resultant necessity to familiarize oneself with the legislation of the different countries makes this *Guide* indispensable to those dealing with foreign antitrust and related laws. The continuing usefulness of the *Guide* will be guaranteed by the publication of loose-leaf supplements.

MAX FREEMAN*

* Attorney, Antitrust Division, Department of Justice; member of the Bars of the District of Columbia and the State of New Mexico and formerly of the Bar of Austria. The views expressed herein are those of the author and do not necessarily reflect those of the Department of Justice.
BOOKS RECEIVED


SUPPLEMENT

THE FIRST AMENDMENT AND FEDERAL AID TO CHURCH-RELATED SCHOOLS
Editors' Comment

Because the current debate over federal aid to private and parochial education involves a constitutional question fundamental to every segment of society, the GEORGETOWN LAW JOURNAL is departing from its usual format in publishing the studies made by the Department of Health, Education, and Welfare and by the National Catholic Welfare Conference. Both HEW and NCWC are of the opinion that the publication of these studies, in the order in which they publicly appeared, is a fair presentation of their respective positions.
MEMORANDUM ON THE IMPACT OF THE FIRST AMENDMENT TO THE CONSTITUTION UPON FEDERAL AID TO EDUCATION

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
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SUMMARY OF CONCLUSIONS
WITH RESPECT TO ELEMENTARY AND SECONDARY SCHOOLS

This summary sets out briefly the conclusions reached in the attached memorandum with respect to the application of the first amendment to Federal aid to elementary and secondary schools with religious affiliations. The field of higher education, which presents different factual, historical, and constitutional considerations, is discussed in the body of the memorandum. The memorandum also discusses the problem of obtaining judicial review.

I

The Supreme Court has ruled that the first amendment to the Constitution forbids the use of public funds to "support religious institutions" or "finance religious groups." Legislation which renders support to church schools is unconstitutional in some circumstances. But laws designed to further the education and welfare of youth may not be unconstitutional if they afford only incidental benefits to church schools. For example, public funds may unquestionably be used to provide fire and police protection to church schools.

The line between direct support and incidental benefits is not always easy to determine. Decisions of the Supreme Court and relevant State cases cited and discussed in the accompanying memorandum make it clear that it is easier to determine what the first amendment forbids than what it allows.

II

A. Several unconstitutional proposals can be readily identified

1. Across-the-board grants to church schools may not be made. The Supreme Court has declared:

   No tax in any amount, large or small, can be levied to support religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion (Everson v. Board of Education, 330 U.S. 1).

Plainly an across-the-board grant is the type of support which the Court has ruled is prohibited. Since no effort is made to earmark the funds for specific purposes, such a broad grant would inevitably facilitate the performance of the religious function of the school. This the first amendment forbids.

2. Across-the-board loans to church schools are equally invalid. A loan represents a grant of credit. When made at a rate of interest below
what is normally available to the borrower, it also constitutes a grant of
the interest payments which are saved. These benefits plainly have the
purpose of providing financial advantage or convenience to the recipient.
And like the broad grant, the across-the-board loan would inevitably
facilitate religious instruction.

The Supreme Court has ruled that the first amendment forbids
the lending of a public classroom for religious instruction during released
time (McCollum v. Board of Education, 333 U.S. 203). The lending
of public property and the lending of public credit are constitutionally
equivalent forms of government assistance. In Zorach v. Clauson (342
U.S. 306), the Supreme Court stated, "Government may not finance
religious groups."

3. Tuition payments for all church school pupils are invalid since
they accomplish by indirection what grants do directly. The form of
governmental assistance is not controlling. Since tuition payments,
whether made to the school or to the parent or student, would constitute
support of church schools, they are prohibited by the first amendment.
State courts have followed the statements of the Everson case to in-
validate tuition proposals, since such a practice "compels taxpayers to
contribute money for the propagation of religious opinions which they
may not believe" (Almond v. Day, 197 Va. 419, 89 S.E.2d 851; Swart

B. Areas of uncertain constitutionality

The permissible area of legislation which renders incidental benefits
to church schools is not clear. The Everson case illustrates the close-
ness of the question. In upholding bus transportation, a form of assis-
tance in no way connected with the religious function of a church school,
the Court divided by 5 to 4. The majority opinion suggested that the
statute in question "approaches the verge" of impermissible action under
the first amendment (330 U.S. at 16). Nonetheless, bus transportation
has been ruled valid, and other collateral benefits like provision of milk
and lunches appear equally constitutional, since the benefit is plainly to
the health of the child and not to the school itself.

It is also likely that where funds are made available to a church
school on a loan basis for special purposes not closely related to re-
ligious instruction, constitutional objections may be avoided. An ex-
ample is title III of the National Defense Education Act which enables
church schools to borrow funds for equipment to assist in teaching
science, mathematics, and languages. Such programs advance specific national purposes, and their relationship to the religious function of a church school is remote. Moreover, the requirement that such funds be repaid makes it unlikely that a church school will be enabled to free its own funds for religious purposes.

In what other directions this principle of special purpose loans may be extended is difficult to ascertain. Typically secular and sectarian education is so interwoven in church schools as to thwart most possibilities.
Introduction

The extent to which Government, whether Federal, State, or local, may, consistently with the United States Constitution, aid religious schools is a problem which, surprisingly enough, is a relatively new one. Prior to 1947 Federal judicial concern with this field was limited. The only case presented to the Supreme Court involving the expenditure of federally controlled funds to religious schools was Quick Bear v. Leupp (210 U.S. 50 (1908)), which held merely that provisions in certain Indian appropriation acts prohibiting the use of public funds for the education of Indians in sectarian schools did not prevent trust funds belonging to the Indians and administered by the Federal Government from being used for such schools at their request and such action did not involve the prohibitions of the first amendment.

It was only recently that State action in this field was held subject to first amendment limitations.\(^1\) The first amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." (Emphasis added.) By itself this language is not a limitation on State action, though similar provisions exist in many State constitutions. In 1934, however, freedom of religion as guaranteed by the first amendment was construed to be among the liberties protected by the due process clause of the 14th amendment limiting State action (Hamilton v. Regents of the University of California (293 U.S. 245 (1934))). Later, in 1947, the now leading case of Everson v. Board of Education (330 U.S. 1), made it clear that the due process clause forbade State action which would effectuate "an establishment of religion" prohibited by the first amendment. The impact of that case is that State and Federal action affecting religion must now satisfy the standards of the amendment. Under those standards, what is forbidden to a State is also forbidden to the Federal Government, and what is forbidden to the Federal Government is also forbidden to a State. It is possible, however, that what the Federal Government and the States may properly do without offending the first

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\(^1\) For this reason the limited number of earlier cases touching upon State action affecting religious schools came up in the context of the question whether property rights were impaired without due process of law in violation of the 14th amendment. See Pierce v. Society of Sisters, 268 U.S. 510 (1925), upholding as a constitutional right the maintenance of private, including parochial, schools; Cochrane v. Board of Education, 281 U.S. 370 (1930), holding that the use of State moneys to provide textbooks for school children, including those attending private schools, whether sectarian or nonsectarian, is not a taking of property for private purposes.
amendment may nevertheless be prohibited to a particular State because of its own constitutional prohibitions.

In Everson, the Supreme Court in a 5 to 4 decision, held that where a local school district, as authorized by State law, reimbursed parents for the bus fare paid by them for public transportation of their children to parochial as well as public schools, such aid did not violate the establishment of religion clause of the first amendment. It was followed in 1948 by McCollum v. Board of Education (333 U.S. 203). With only Mr. Justice Reed dissenting, the Court there held that the first amendment (as made applicable by the 14th amendment to the State) forbade a public school program of "released time" under which religious teachers provided by various denominations were permitted by the Board of Education to hold classes in public school buildings for students who had volunteered for religious instruction. The children not desiring such instruction continued their regular studies in other rooms. In 1952, Zorach v. Clauson (343 U.S. 306), was decided. By a 6 to 3 vote, a voluntary "released time" program, basically differing from that involved in the McCollum case only in that the religious instruction was provided off the school premises, was held constitutional. These three cases constitute the most important judicial precedents in the field. The paucity of Supreme Court precedent is due to two factors: First, it was only in 1934 that the Court read the 14th amendment as embodying the pertinent provisions of the first amendment; second, despite the existence of a number of Federal educational programs in recent years, judicial review in Federal courts at the instance of a taxpayer of the lawfulness of Federal expenditures has not been available since Massachusetts v. Mellon (262 U.S. 447), decided in 1923. It should therefore be emphasized that the questions discussed in this memorandum are probably not open for judicial determination, unless adequate special statutory provisions are enacted to authorize judicial review.

The difficulties of obtaining a court test of legislation in this area impose a solemn responsibility upon both Congress and the Executive to be especially conscientious in studying the Constitution and relevant Supreme Court decisions so that any enactment will scrupulously observe constitutional limitations.

2 In Doremus v. Board of Education, 342 U.S. 429 (1952), the Supreme Court dismissed an appeal for want of jurisdiction in a suit filed by a State and local taxpayer who had not, on the facts alleged, shown a requisite financial interest.
I

THE CONSTITUTIONAL PRINCIPLES

At the outset it is evident that resolution of the constitutional problems of present concern requires us to deal with the interrelation of three constitutional limitations. Two are contained in the provisions of the first amendment: neither Congress nor the States may pass any law "respecting an establishment of religion"; neither may they pass any law "prohibiting the free exercise thereof." The third constitutional limitation is found with respect to the Federal Government in the due process clause of the fifth amendment and, for the States, in the due process and equal protection clauses of the 14th amendment. These limitations prohibit the Federal Government or a State from unreasonable discrimination in governmental programs (See Bolling v. Sharpe, 347 U.S. 497 (1954); Brown v. Board of Education, 347 U.S. 483 (1954)).

In many instances these three constitutional limitations overlap in one regard or another to prohibit Federal or State action. For example, a government program of compulsory education exclusively at State-operated schools which taught religion would violate all three. In other factual circumstances, however, a program which satisfied one or more of the limitations might violate another. For example, a program of educational grants to returning war veterans for their readjustment into civilian life perhaps could not have constitutionally excluded from its benefits applicants who wished to attend sectarian institutions. This would probably be regarded as a classification so unrelated to the expressed public purpose as to offend due process requirements.

There is agreement that education serves a fundamental public purpose (See Brown v. Board of Education, supra at 493) and accordingly that the Federal Government or a State may use public funds for that purpose. In addition, to that end States with respect to education under their control may also compel children, within reasonable limits of age and maturity, to attend schools. Moreover, they may set reasonable standards for education. At the same time, there seems little doubt that Government may not use its authority in the field of education in order to instruct children in religion generally or in any specific religion. This would violate the establishment-of-religion clause of the first amendment. Nor may government, without interfering with the religious freedom guaranteed by the first amendment and the due process clause, reserve educational functions to public schools and forbid education
by private institutions meeting the standards prescribed by law for the public school. (See Pierce v. Society of Sisters, supra.) And in any educational program in which public funds are expended there must be equal treatment for all children; that is, a State may not classify children on the basis of their religion, race, or similar irrelevant considerations without violating equal protection and due process requirements.

It is also evident that these constitutional limitations must be interpreted in the light of specific factual situations. It is the difficulty of attempting to interpret and apply them under contemporary conditions that brings about a potential conflict among them. The most significant of these conditions is that to a substantial extent education at the lower levels, which a State requires and compels, is being carried out by schools which teach according to particular religious tenets, although at the same time satisfying secular educational standards established by the State. This is a form of education which the State cannot constitutionally prohibit. It is settled that individuals have a constitutional right to a religious education. At the same time, sectarian schools are ones which the State cannot constitutionally require a student to attend. There is a constitutional right to freedom of religion or no religion.

The difficult problem is posed by the dual constitutional mandate: that the State must recognize these schools as part of its educational system for purposes of compulsory attendance laws, but that it cannot support them in ways that would constitute an "establishment of religion."

The problem is accentuated by the fact that American society is one in which religion touches much of everyday life, both in the home and in the school. It is a society in which customs, practices, morals, and ceremonies have been importantly influenced by religion. Fundamental as are the principles contained in the first amendment, it is clear that they cannot always be absolutes. The problem is to draw a line between what is permitted and what is prohibited in accordance with applicable constitutional principles. Since this must be done in the society in which we actually live—a society in which aspects of religion are inextricably entwined with knowledge and culture—history and experience may be sounder guides to locating Jefferson's "wall of separation between church and state" than abstract logic.

Even the general agreement that the State cannot constitutionally permit teaching of religion in public schools illustrates some of the difficulties. Examples of efforts to draw the line between constitutionally
permissible and impermissible State action have extended to such matters as reading from the Bible, prayers, and celebrations of religious holidays. Pushing the separation doctrine to its logical extreme would make education virtually impossible. History is replete with religious ideas, principles, and experience. Furthermore, it is readily apparent that what one person would classify as simply secular knowledge another would regard as religious instruction. The content of religious belief is largely the prerogative of religious groups to define, though they differ among themselves as to what is included. The content of education is for public authorities to define. Where definitions overlap difficulties arise.

It would be fruitless to deny that drawing the line between the permissible and impermissible is a hard task. In the Everson case itself, although the Court was unanimously of the view that the establishment of religion clause forbade a State from using public funds for sectarian education, it nevertheless divided by the closest margin (5-4) on whether State reimbursement of parents for fares paid for public transportation to a sectarian school constituted a prohibited use. But, however, difficult it may be to find the line in marginal situations, this difficulty cannot properly be used to avoid constitutional proscriptions. There are clear cases as well as difficult ones.

To summarize, the broad principles are clear enough in the light of recent decisions. The first amendment does not require government to be hostile to religion, nor does it permit governmental discrimination against religious activities. The objective is neutrality, however difficult it may be to be neutral or to determine what neutrality requires in relation to particular factual situations. Zorach reaffirms that the State may not actively support a religious organization. On the other hand, it may, and perhaps under some circumstances must, temper its secular requirements if religious observances conflict with them.3 There is the consistent emphasis in the cases that public funds may not be used to finance religion and that public property may not be used to assist it. Yet, the decisions warn that a person may not be denied general public benefits on religious grounds without violating the first amendment and the due process and equal protection clauses of the fifth and 14th.

3 See, for example, the flag salute case, Board of Education v. Barnette, 319 U.S. 624 (1943).
II

THE JUDICIAL PRECEDENTS

As earlier noted, prior to the decision in Everson, the Supreme Court had little occasion to consider the problem of governmental aid to religious schools. The right to attend such schools was clearly established in the 1920's (See Pierce v. Society of Sisters, supra; see also Meyer v. Nebraska, 262 U.S. 390 (1923); Farrington v. Tokushige, 273 U.S. 284 (1927)). The Quick Bear case, supra, had dealt with the unique problem of the use of Indian trust funds. The Cochran case, supra, had been decided before it had been determined that the establishment of religion clause of the first amendment operated upon the States by virtue of the due process clause of the 14th amendment.4

As indicated above, the controversy in the Everson case concerned a local schoolboard resolution adopted pursuant to a New Jersey statute. This resolution authorized reimbursement to parents of expenditures for transportation of their children to public and Catholic schools on regular buses operated by the public transportation system. A taxpayer filed suit challenging this action of the school board. The Court unanimously agreed that the due process clause of the 14th amendment embodied the "establishment of religion" prohibition contained in the first amendment. Five Justices found that the statute involved did not constitute a "law respecting an establishment of religion." It should be emphasized, however, that all nine Justices agreed that the clause prohibited governmental aid to religion; the disagreement turned, rather, upon whether the benefit was conferred upon the children or upon the parochial schools.

The most extensive discussion appears in the dissenting opinion of Mr. Justice Rutledge. On the basis of his evaluation of the historical materials and his view of the objectives of Madison and Jefferson, leading proponents of the amendment, he stated that—

The Amendment's purpose was not to strike merely at the official establishment of a single sect, creed or religion, outlawing only a formal relation such as had prevailed in England and some of the colonies. Necessarily it was to uproot all such relationships. But the object was broader than separating church and state in this narrow sense. It was to create a complete and permanent

4 For this reason the Cochran case is dubious authority for the proposition that textbooks may be provided by a State to parochial school students. The crucial question of whether the establishment clause of the first amendment prohibits the expenditure of public funds for textbooks to be used by church school pupils was not presented to the Court in this case, and the Court therefore had no occasion to rule upon the question.
separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion. In proof the amendment's wording and history unite with this Court's consistent utterances whenever attention has been fixed directly upon the question (330 U.S. at 31-32).

He concluded, therefore, that the taxing power may not be used to give support to religious training or belief and that "transportation, where it is needed, is as essential to education as any other element"; and that it "is impossible to select so indispensable an item from the composite of the total costs, and characterize it as not aiding, contributing to, promoting or sustaining the propagation of beliefs which it is the very end of all to bring about" (330 U.S. at 47, 48).

Justice Black, writing for the majority, adopted a similar view of the purpose of the first amendment. He stated:

The establishment-of-religion clause of the first amendment means at least this: Neither a State nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance. No tax in any amount, large or small, can be levied to support any religious activities or institution, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government, can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State" (330 U.S. at 15-16).

He concluded, however, that the State cannot deny any of its citizens the benefits of public welfare legislation because of their religion. He emphasized that much of such legislation (for example, that providing fire and police protection, etc.) incidentally benefits religious institutions, and that such benefits do not constitute proscribed support of the institutions. In this light he viewed the New Jersey statute merely as providing a program to get children, "regardless of their religion, safely and expeditiously to and from accredited schools." He therefore interpreted the purpose of the statute as a general, nondiscriminating one, designed to protect the health and safety of all school children. On this basis he was led to the conclusion that, while the New Jersey statute "approaches the verge" of impermissible action under the first amendment, it did not actually breach the "wall of separation between Church and State."

The specific holding in the Everson case permitted the use of public
funds to confer a limited benefit upon children attending religious schools. Nevertheless, the language and reasoning of both the majority and minority gives scant comfort to those who feel that, as a matter of fairness, State support ought to be provided to those schools. Proponents of this view point out that religious schools meet the educational standards imposed by the States and relieve the States of the burden of educating large numbers of children. The parents of children attending religious schools are taxed to support the public schools, yet receive no reciprocal benefits from the States.

The majority opinion states that—

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. (Emphasis supplied.)

If one assumes that a principal reason for the existence of a religious school is to provide religious teaching and the practice of religion (not available in public schools), and that religious considerations are intertwined in the entire fabric of sectarian education, moneys raised by taxation cannot be used to support such education. Obviously then, direct grants to sectarian schools are prohibited. The only question remaining open is whether the use of funds for general welfare purposes in a manner which benefits religious schools also constitutes prohibited support.

Because the clear import of the Everson opinion was that neither the Federal Government nor the States can directly support religious schools, a concentrated attack was made upon its rationale. The focus of this attack was on the Court's reading of history; that, in fact, the purpose of the first amendment was merely to strike at the official establishment of a single sect, creed, or a religion, as exists in England, and that the amendment was not intended to prohibit nonpreferential aid to all religions. This view has been vigorously argued by some scholars. For

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5 Earlier this year the Supreme Court dismissed an appeal for want of a substantial Federal question in Snyder v. Town of Newton, 365 U.S. 299 (1961), a case in which the Connecticut Supreme Court of Errors, on the authority of Everson, upheld the constitutionality of providing bus transportation to parochial school students. Justice Douglas, who had voted with the majority in Everson, and Justice Frankfurter, who had voted with the minority, both specially noted their votes to have the Supreme Court review the Connecticut decision.

present purposes it is sufficient to note that it was presented to and considered by the Supreme Court in *McCollum v. Board of Education*, *supra*. While it might be argued that Justice Reed adopted this view in his dissent, it is plain that the eight other members of the Court rejected it. The question is not open today.

The *McCollum* case involved the constitutionality of the system of "released time" adopted in Champaign, Illinois. Under an arrangement made with various religious faiths, representatives of those faiths were permitted to offer classes in religious instruction in the public schools. The classes were held once a week for 30 minutes in the lower grades and 45 in the higher grades. The teachers were not paid by the public school authorities, and the classes were attended only by students whose parents had requested it. Students who did not choose the program continued their secular studies in other classrooms. Justice Black, writing the opinion of the Court, stated that the arrangement was clearly prohibited by the holding in *Everson*:

The foregoing facts, without reference to others that appear in the record, show the use of tax-supported property for religious instruction and the close cooperation between the school authorities and the religious council in promoting religious education. The operation of the State's compulsory education system thus assists and is integrated with the program of religious instruction carried on by separate religious sects. Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes. This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith. And it falls squarely under the ban of the first amendment (made applicable to the States by the 14th) as we interpreted it in *Everson v. Board of Education*, . . . (333 U.S. at 209-210).

He went on to state:

Recognizing that the Illinois program is barred by the 1st and 14th amendments if we adhere to the views expressed both by the majority and the minority in the *Everson* case, counsel for the respondents challenge those views as dicta and urge that we reconsider and repudiate them. They argue that historically the first amendment was intended to forbid only government preference of one religion over another, not an impartial governmental assistance of all religions. In addition they ask that we distinguish or overrule our holding in the *Everson* case that the 14th amendment made the "establishment of religion" clause of the 1st amendment applicable as a prohibition against the States. After giving full consideration to the arguments presented we are unable to accept either of these contentions (id. at 211).7

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7 In his concurring opinion, Justice Frankfurter also made it clear that "the 1st and 14th amendments have a secular reach far more penetrating in the conduct of govern-
Zorach v. Clauson, supra, is the last case in which the Supreme Court has considered the “establishment of religion” prohibition. It also involved “released time.” There the plan permitted students actually to be released from the public schools at their parents’ request in order to obtain religious instruction elsewhere. The churches participating reported to the schools the names of children released from school who did not appear for religious instruction. In a 6 to 3 decision, the Court concluded that there was no element of coercion in the plan and that the only issue involved was whether public schools may excuse those who wish to worship or obtain religious instruction. The principles of the earlier cases were, however, carefully preserved. The Court stated:

Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence. The government must be neutral when it comes to competition between sects. It may not thrust any sect on any person. It may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction. But it can close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction. No more than that is undertaken here (343 U. S. at 314).

In separate dissents, Justices Black, Frankfurter, and Jackson said that since in effect the machinery of the State was being used to provide pupils to religious groups, the plan was constitutionally indistinguishable from that held invalid in McCollum.

The majority opinion, while emphasizing that ours is a religious nation, with profound religious traditions affecting and intermingling with secular activities (id. at 313-314), does not abandon the basic view of the first amendment adopted in Everson and McCollum. The most that can be said is that the opinion evidenced a somewhat more flexible attitude toward problems of separation.

The State court cases which have been decided since Everson have interpreted that case and McCollum and Zorach as precluding use of public funds to pay tuition at sectarian schools. Almond v. Day, 197 Va. 419, 89 S.E.2d 851 (1955), held that State payments to sectarian

ment than merely to forbid an ‘established church’” (id. at 213). Justice Jackson who, in a separate concurrence expressed doubts as to the standing of the complainant and the scope of the relief granted, concurred in this opinion.
elementary and secondary schools for the education of war orphans violated the first amendment because such payments utilize—

... public funds to support religious institutions contrary to the principles laid down in Everson ... It affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the state's compulsory public school machinery ... It compels taxpayers to contribute money for the propagation of religious opinions which they may not believe (89 S.E.2d at 858).

Swart v. South Burlington Town School District (167 A.2d 514 (Vt., (1961)), involved a school district which did not maintain a high school. Pursuant to statute the parents were permitted to choose schools, and the district paid the tuition. Under this plan it made tuition payments to Catholic high schools. The court read the Everson, McCollum, and Zorach cases as raising the following question, which it answered affirmatively:

Does the payment of tuition to a religious denominational school by a public entity finance religious instruction, to work a fusion of secular and sectarian education? (167 A.2d at 520).

The court, although noting that the district did not maintain a public high school, that the Catholic schools involved had been approved by the State board of education, and that non-Catholic students were not required to attend religious instruction, concluded, nevertheless, that the first amendment had been violated.

The foregoing two cases are the only State court decisions since Everson that have dealt with the payment of tuition to sectarian schools. Both hold such payments unconstitutional on the basis of that authority. Other State cases, however, have sustained payments to other types of sectarian institutions in specialized circumstances. Thus, payments for the support and maintenance of neglected and dependent children in denominational homes and institutions were upheld because they were considered as reimbursement rather than a use of appropriated funds prohibited by the State constitution (Schade v. Allegheny County Institution District, 386 Pa. 507, 126 A.2d 911 (1956)). Payments to sectarian institutions have also been justified where the funds were used exclusively for public purposes and the institution merely operated as a conduit for those purposes. In Opinion of the Justices (99 N.H. 519, 113 A.2d 114 (1955)), there was involved a proposed New Hampshire law which would have provided annual grants-in-aid to hospitals in the State offering nurses' training. This aid would have gone only to charitable hospitals, including sectarian ones which did not discrim-
inate on the basis of the religion of either students or patients. Holding that the grant program would not violate either the first amendment or its New Hampshire equivalent, the court stated:

The purpose of the grant . . . is neither to aid any particular sect or denomination nor all denominations, but to further the teaching of the science of nursing. . . . The aid is available to all hospitals offering training in nursing without regard to the auspices under which they are conducted or to the religious beliefs of their managements, so long as the aid is used for nurses’ training “and for no other instruction or purpose” . . . . If some denomination incidentally derives a benefit through the release of other funds for other uses, this result is immaterial . . . . A hospital operated under the auspices of a religious denomination which receives funds under the provisions of this bill acts merely as a conduit for the expenditure of public funds for training which serves exclusively the public purpose of public health and is completely devoid of sectarian doctrine and purposes.

The fundamental proposition that public moneys shall be used for a public purpose only has not prevented the use of private institutions as a conduit to accomplish the public objectives (113 A.2d at 116).^8

The Everson, McCollum, and Zorach cases have also inspired a large body of scholarly comment. Appendix A is a representative bibliography of such comment. In Appendix B we shall briefly describe some of the representative views contained in such comment.

III

The Relevant Criteria

The foregoing review suggests the relevancy of several considerations in determining the constitutional reach of the first amendment. The Supreme Court has made it absolutely clear that public funds and public property may not be used for the purpose of assisting any or all religions. In the Everson and McCollum cases, it has unequivocally rejected the historical argument, whatever its merits, that the establishment clause merely forbids State favoritism among religions.

The initial inquiry, therefore, must be whether a given legislative proposal is honestly designed to serve an otherwise legitimate public purpose and is not a mere subterfuge for religious support. Application of the test is not always easy. In the Everson case the majority charac-

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^8 A similar early holding by the Supreme Court is Bradfield v. Roberts, 175 U.S. 291 (1899). There the Court held that the first amendment did not preclude the Commissioners of the District of Columbia from entering into a contract with an eleemosynary corporation organized by Catholic sisters for the construction of buildings to be operated as part of the hospital.
terized the New Jersey law as related to the health and safety of children—a legitimate public concern. It was likened to police and fire protection services, concededly legitimate "benefits" to religious institutions, "incidental" to the larger public interest (330 U.S. at 16-18). The dissenters viewed the statute differently. They pointed out that, contrary to the Court's interpretation, it discriminated against other private schools. And all four dissenting Justices characterized the statute as having the purpose of getting the child to school—an indispensable part of his education—rather than protecting his health and safety. Indeed, the characterization largely decided the case for both majority and minority. Justice Black for the majority suggested that once the characterization is made in his fashion, it might well be a violation of the 14th amendment and the free exercise clause of the first to discriminate on religious grounds.

This analysis is confirmed by McCollum where the Court forbade the use of public school facilities for religious instruction during "released time." Here there could be no possible public purpose except to assist and support religious education—a purpose the Court found proscribed by the first amendment.9

The existence of a bona fide legislative purpose does not, however, validate a measure irrespective of any collateral benefit that might be rendered to a religious institution. Assume a legitimate public purpose not explicitly or implicitly related to religious support, as in the concededly constitutional examples cited in Everson—police, fire, sewerage, and (on Everson's assumptions) transportation. Could it properly be contended, for example, that since improving educational standards generally is a legitimate public purpose, any program which has that for an objective is constitutional irrespective of the establishment clause of the first amendment? If the objective is legitimate, are the benefits bestowed on religious schools always and necessarily "incidental?" We think not. The end cannot always justify the means. And where the means employed result in fact in support of religious institutions, the constitutional judgment cannot be avoided.

The problem area, then, is with regard to legislation which has a constitutionally legitimate public purpose but which at the same time

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9 In the McCollum case, the Court stated: "Here not only are the State's tax-supported public school buildings used for the dissemination of religious doctrines. The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the State's compulsory public school machinery. This is not separation of church and state" (333 U.S. at 212).
has the additional side effect of benefiting a religious institution. This was the problem raised by Everson, and the difficulty of its resolution is evidenced both by the 5-4 division of the Court itself and the widespread comment it engendered. How is the line to be drawn between what is proscribed and what is permissible? Once a benefit to a religious institution is conceded, what are the relevant criteria for determining that it is merely "incidental"? What factors are to be taken into account and evaluated?

As Justice Douglas acknowledged in Zorach, we live in a culture and society in which religion has played and continues to play a vital role. It is not possible to separate religion completely from other aspects of life, and the Constitution does not require the impossible. There may be no wholly logical distinction between tax exemption of religious property and governmental grants to construct religious edifices. Yet the whole history of church and state and the constitutional policy embodied in the first amendment put tax exemption and grants at opposite poles. Neither the majority nor dissenters in Everson could suggest an easy, workable rule of thumb against which to measure all governmental aid. But history, the language of the Constitution, the judicial decisions, and past practices do furnish an understanding of the criteria that are relevant to a judgment.

1. How closely is the benefit related to the religious aspects of the institution aided?

We are here concerned, as previously, with the underlying problem of distinguishing aid to the public generally, or general classes thereof, from aid to religion in particular. As the fire, police, and sewage examples indicate, churches and other religious institutions may receive benefits in their capacities as members of the general public and as property owners. The Constitution does not require that they be discriminated against or be excluded from a general class conceptually and factually unconnected with religion, i.e., property owners. So, too, a church or church school may receive tax exemption when classified with others as nonprofit organizations. Again it meets the group criteria, and there is no constitutional obligation to exclude it from benefits

11 The same could be said of according the benefits of State incorporation laws to churches.
common to the class. Similarly, it may be said validly that children, as such, constitute a class which is a proper object of general welfare legislation. The State has a legitimate concern with their health, their safety, and, indeed, their education. It may extend financial assistance in various ways to achieve these ends. But where this assistance is also assistance to a religious institution, the means become crucial. One horn of the constitutional dilemma is that the State may aid a child to achieve a sound body and a sound mind; the other is that the State may not aid the religious instruction of a child.

To adopt without qualification the theory that whatever benefits the child is *ipso facto* constitutional is to ignore the obverse prohibition. It either proves too much or proves nothing at all. The crucial question then becomes separating the permissible from the prohibited, the educational function from the religious one.

The clearest case is across-the-board aid, which necessarily includes items of aid that are closely related to the religious function. No separation is even attempted, and therefore general State grants to sectarian education would seem to be plainly prohibited. Public schools have already been constitutionally prohibited from providing classrooms for religious instruction during released time at no measurable cost to the public purse. A fortiori the Government is prohibited from granting funds to sectarian schools which would, directly or indirectly, serve the same prohibited use.

Milk, school lunch, medical inspection and services, and such like do not raise substantial problems because they do not closely tie in with the religious function served.\(^\text{12}\) The Supreme Court has put transportation in the same category. True, all such programs make the sectarian school more attractive educationally than it would otherwise be. But the Constitution does not require the State to handicap religious institutions or force parents to prejudice their children’s health in exercising their constitutionally protected right to a sectarian education.

The same principle may, perhaps, be extended to textbooks for the use of individual students where the books in question are common to the secular and sectarian educational systems.\(^\text{13}\) It might also be extended to some equipment, or possibly to facilities, designed for special purposes totally unconnected with the religious function of the schools.

How far this type of assistance, unquestionably of benefit to the sectarian school, can go cannot be conclusively stated. Unavoidably we

\(^{12}\) See Pfeffer, Church, State and Freedom (1953), at 474-475.

\(^{13}\) See footnote 4, supra.
are dealing here with matters of degree. State court cases indicate that it may be possible to make a tenable distinction between aid to sectarian hospitals and aid to sectarian schools. The Supreme Court put transportation at the outer limits of the constitutionally permissible. Those who see no distinction between transportation and any other form of assistance whatsoever should keep in mind that, apparently, the Court did.

2. \textit{Of what economic significance is the benefit?}

The spectrum of monetary benefits begins with an outright grant and moves through various loan arrangements to the most limited form of assistance, the contract for specified services.

The benefits of a grant are clear. Significant support is provided to the recipient. Moreover, the absence of any required repayment enables the recipient to free its own funds for any purposes, including those which directly support religious aspects of the institution.

A loan confers economic benefit of less degree but not of a different quality than a grant. A loan represents a grant of credit. When made at a rate of interest below what is normally available to the borrower, it also constitutes a grant of the interest payments which are saved. Whatever the interest rate, the lending of credit can be analogized to the lending of a classroom proscribed in the \textit{McCollum} case. While the \textit{Everson} case did talk about the expenditure of tax moneys as constituting the proscribed conduct, \textit{McCollum} did not involve any expenditure, and, therefore, is closer to the loan situation. The lending of public property and the lending of public credit seem indistinguishable as forms of governmental assistance. And in the \textit{Zorach} case, Justice Douglas, speaking for the majority, expressly stated: “Government may not finance religious groups . . . .” (343 U.S. at 314). It is our view that the statement, admittedly dictum, was not confined to grant assistance.

It is also important to recognize that the measurement of economic value is not necessarily the same from the standpoint of the governmental donor and the private recipient. While a loan at slightly above the prevailing rate of government borrowing might involve no economic loss from the standpoint of taxpayers, it might, nonetheless, be of measurable economic assistance to a private institution unable to secure reasonable credit from non-governmental sources.

\footnote{14 See, for example, Opinion of the Justices, supra; cf. Schade \textit{v.} Allegheny County Institution District, supra.}
Also relevant is whether the assistance provided enables a private institution to free its own funds for unrestricted purposes. To the extent that this occurs, the economic benefit becomes the type of across-the-board assistance which inevitably assists religious purposes. Unless a grant is earmarked for a specific purpose which would not otherwise be undertaken by the recipient, a grant program is more likely than a loan program to have the effect of releasing funds for constitutionally impermissible purposes.

When the Government makes contracts for initiation of particular studies or grants for undertaking particular research, any benefit to a religious institution seems too remote to be constitutionally proscribed. Unlike an across-the-board grant for education or an unrestricted grant for classroom construction and teacher salaries, such programs are primarily to serve a special governmental interest, and the size of the fee or grant is closely related to the cost of the program. In such cases the religious benefits seem remote and incidental. Alternatives would require a preference to secular institutions which in many instances might be less well-equipped to carry out the required research.

3. To what extent is the selection of the institutions receiving benefits determined by Government?

There is an important difference between governmental programs that aid institutions as such (including sectarian institutions) or aid them on behalf of all their students and, on the other hand, programs that aid a small number of selected students whose choice of institution alone results in benefit to a sectarian school. In the former case the aid to sectarian institutions is an automatic consequence of Government action; in the latter, it is a matter of chance so far as Government is concerned.

Under the original GI bill, each individual selected the institution he wished to attend, although the Government made the tuition payment directly to the institution. If the Government had selected the institution, however, it would obviously have presented a very different situation, and the mode of selection would have been more relevant than the identity of the payee of the Government check.

A program of financial aid to qualified students attending institutions of their choice to carry out a public policy of assisting unusually able students to develop their full potentialities, or to encourage study in subjects where there is a shortage of adequately trained persons to serve national needs, does not seem to raise a serious question. The sup-
port which a particular religious institution might receive would depend upon the student’s choice and would seem, therefore, both indirect and incidental. From the governmental viewpoint it would depend upon chance, not governmental decision. There would seem to be no constitutional significance to the fact that, like other problems of probability, some statistical prediction might be possible of how much aid particular religious institutions might receive. Only if selective standards of eligibility of recipients were to be virtually abandoned so that all college students were eligible would the program appear a disguised method of assisting all colleges, including sectarian ones. Under such a system there would be no functional difference between the award of scholarships and direct payments to colleges on a per capita basis. A program so equivalent to direct subsidy would transcend, we believe, the constitutional prohibition.

*Everson* put some emphasis on who received the assistance, student or institution. From this it has been argued that while assistance to the institution itself is prohibited, assistance to the student is more likely permissible, even though, functionally viewed, a similar purpose is served. This view overstates the significance of form alone. We believe that who receives the benefit is important only where form serves a substantive end. The examples above illustrate that it is not simply the identity of the payee which is the determinant of constitutionality.

4. *What alternative means are available to accomplish the legislative objective without resulting in the religious benefits ordinarily proscribed? Could these benefits be avoided or minimized without defeating the legislative purpose or without running afoul of other constitutional objections?*

Within this category, where the constitutional significance of incidental religious assistance is discounted in part by necessity, one could include many of the traditional benefits received by church organizations; for example, police protection, fire protection, and sewage disposal, although these could also be justified by other criteria suggested above. The point is that protection of health and safety within the community cannot reasonably be accomplished without including religious institutions within the class of beneficiaries. Furthermore, to exclude religious institutions from the class benefited would probably be violative of the first amendment as tending to prohibit freedom of worship and of the due process clause as an unreasonable classification.

Another illustration of the criterion here applied lies in the employ-
ment of chaplains and the construction of churches and places of worship by the Armed Forces. The purpose of employing chaplains is related to the morale and discipline of the forces, and it is difficult to see how an army could effectively perform its military functions without making provision for the moral welfare of the troops. In the context of military operations, this purpose can be effectuated only by active assistance on the part of the Government.

Conversely, to refuse to facilitate religious activities would be to throw the power of the Government against religion, not to maintain neutrality. To make it legally or factually impossible for a soldier to worship freely and to fail to adjust military necessity to religious freedom, within reasonable limitations, would itself be unconstitutional. Here, it seems, history and constitutional theory require cooperation of church and state not to breach, but rather to preserve, the "wall of separation." Soldiers may not be coerced into church attendance, but making church attendance possible cannot, under the facts of military organization, be constitutionally proscribed. And the difference between using public facilities within the armed services and permitting the use of public facilities in the released time school cases is found in the different demands of military life and the life of school children in a typical American community.

The Everson case itself provides an example, for once it has been determined that the legislative purpose relates to the safety and health of children, it is difficult to see how it could be accomplished without including all children.

One final example where the practicalities are relevant is the GI bill. The purpose of the bill was readjustment of veterans to civilian life by making it possible for them to continue their education. To have conditioned their benefits on attendance at a secular institution would have been impractical in view of the number of veterans and the limited educational resources available. In view of the short-range duration and urgency of the program, the construction of adequate additional facilities would have been impractical if not impossible.15 Thus, the legitimate legislative purpose could not have been achieved by other reasonable means.

One cannot blink the difficulties of applying this criterion, nor do we suggest it is by any means conclusive. In some instances the support

15 To have excluded from its benefits those veterans who, by conscience or preference, wished to attend sectarian institutions might conceivably have violated due process.
of religious institutions incident to a legitimate public policy may well be so direct and substantial that the policy itself may be legislatively unattainable despite the absence of practical alternatives.

One final argument made by proponents of governmental aid to nonprofit private schools should be mentioned. It has been suggested that the only criterion is whether or not the religious institution benefits qua religious institution or as a member of a more general class. This argument seems to be directly contrary to *Everson* and meets none of the criteria which we believe are determinative of constitutionality. This argument seeks to avoid the Constitution rather than to apply its terms as judicially interpreted. Benefits of some kinds may be conferred upon general classes, as earlier suggested—property owners, corporations, and nonprofit organizations—but we do not believe that the prohibition of tax-raised support of religious institutions can be circumvented merely by giving like support to other institutions, however numerous.

**IV**

**Legislative Programs and Proposals**

Against the authority and criteria already discussed, this section considers legislative proposals which have been introduced or which may possibly be seriously urged. These are (a) general education grants to private nonprofit elementary and secondary schools; (b) general educational loans to private nonprofit elementary and secondary schools; (c) special purpose programs.

(a) *General educational grants to private nonprofit elementary and secondary schools*

Federal grants to sectarian schools for general educational purposes would run squarely into the prohibitions of the first amendment as interpreted in the *Everson*, *McCollum*, and *Zorach* cases. Grants for assistance in the construction of general school facilities and for increasing teachers' salaries, to be administered by governmental agencies and made available directly to sectarian schools, are the clear case of what is proscribed by the Constitution. They meet none of the criteria suggested in the foregoing section. Indeed, if such grants would not violate the establishment provision of the first amendment as judicially interpreted, it is difficult to think of a form of government aid which would. Aid by way of grants to sectarian schools could only be justified by a reversal of the Supreme Court's interpretation of the establishment clause and
a new interpretation which would regard it as merely prohibiting discrimination among religions. Whatever its historical justification, this latter interpretation of the clause has been urged upon the Court in the cases cited and rejected by nine Justices in Everson and by eight in McCollum. While the tone of the Zorach opinion may imply a slight modification of the rigid separation doctrine espoused in McCollum, it is clear that it did not modify the Court’s earlier interpretation of the establishment provision in any substantial way. Rather, the opinion reiterates the principle that Government may not finance religious institutions.

Since the Supreme Court has spoken, the only serious argument put forward against this conclusion rests more on considerations of fairness than of law. The argument is that, because sectarian schools meet all prescribed standards of education and because they contribute significantly to the education of American children, they should be entitled to governmental assistance. This argument is bolstered by stating that, in effect, the refusal to grant assistance to children attending such schools constitutes a discrimination against them incompatible with the spirit of the fifth amendment, and, viewed realistically, violates the mandate of the first amendment against prohibiting the free exercise of religion.

The difficulty with this viewpoint, apart from the fact that it has been consistently rejected by the courts,16 lies in the fact that students attending such schools do so as a matter of free choice. If the choice is not free it is because of the religious beliefs of the individuals making the choice, not because of governmental edict. Since the public schools are open to all children without exception, it cannot be argued that constitutionally proscribed discrimination exists.

The prohibition embodied in the free exercise provision of the first

16 In Swart v. South Burlington Town School District, 167 A.2d 514, supra, the Supreme Court of Vermont forbade the payment of tuition by the school district for students attending a parochial school. In meeting the argument stated above, the court said (at pages 520-21): "Considerations of equity and fairness have exerted a strong appeal to temper the severity of this mandate. The price it demands frequently imposes heavy burdens on the faithful parent. He shares the expense of maintaining the public school system, yet in loyalty to his child and his belief seeks religious training for the child elsewhere. But the same fundamental law which protects the liberty of a parent to reject the public system in the interests of his child's spiritual welfare, enjoins the state from participating in the religious education he has selected. See Pierce v. Society of the Sisters, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070, 39 A.L.R. 468.

"Equitable considerations, however compelling, cannot override existing constitutional barriers. Legislatures and courts alike cannot deviate from the fundamental law."
amendment is only a prohibition against Government action which interferes with religious freedom. The Constitution does not require the Government to create conditions which make the free exercise of religion less burdensome financially.

(b) General educational loans to private nonprofit elementary and secondary schools

It has been suggested that even if grants to sectarian elementary and secondary schools are unconstitutional, long-term low-interest loans would not be. While we believe that loans constitute a less substantial assistance to religion than outright grants, we are persuaded by the decisions of the Supreme Court that this proposal is no less a form of support than grants and is equally prohibited by the Constitution. Loans are prohibited by the rationale of the Everson decision, and this conclusion is reinforced by McCollum, where the Supreme Court declared unconstitutional the provision of classrooms in a public school for religious instruction during “released time.” No measurable cost to the Government was involved in the use of such facilities, yet the Court held that the use nonetheless constituted assistance to religion by a governmental entity in violation of the establishment provision.

Low-interest across-the-board construction loans do provide measurable economic benefit to religious institutions. Moreover, there is a total failure in this proposal to distinguish between those aspects of a school which are involved with religious teaching and those which may not be. This combination of factors when applied to elementary and secondary schools places the proposal beyond the limits of permissible assistance.

(c) Special purpose programs

The Federal Government at present engages in a wide variety of statutory programs that have some impact on sectarian educational institutions. It is significant that the great bulk of Government-supported programs is in fields of higher education. Examples are aids for specialized training; or research connected with national defense, public health, or improving educational methods; or loans for college housing facilities or to permit needy students to attend college. In all such programs no direct connection with religion is present, and the funds in each case

17 Although use of the pressures of the compulsory attendance laws was a factor in the decision, Zorach indicates that use of the school facilities tipped the balance.

18 One seeming exception, more apparent than real, has been the aid given over a 5-year
appear adequately separated from any religious function to stay within constitutional bounds.

Existing Federal programs at the elementary and secondary level are less extensive in number and size. Typically, such programs either bear a clear-cut relationship to children’s health or promote a special purpose with a clear national defense implication. These programs are devoid of any substantial aid to the religious function, and such aid as might possibly occur is both remote and unavoidable.

To what extent a special purpose provides constitutional legitimacy to assistance to elementary or secondary schools depends on the extent to which the specific objectives being advanced are unrelated to the religious aspects of sectarian education. The problem is complicated because assistance for one purpose may free funds which would otherwise be devoted to it for use to support the religious function and thus, in effect, indirectly yet substantially support religion in violation of the establishment clause. At the present time, the National Defense Education Act permits the U.S. Commissioner of Education to make loans to private schools to acquire science, mathematics, or foreign language equipment. We believe such loans are constitutional because the connection between loans for such purposes and the religious functions of a sectarian school seems to be nonexistent or minimal. Furthermore, the money is loaned at one-fourth of 1 percent above the current average yield on all outstanding marketable obligations of the United States, thus avoiding characterization as more than a grant of credit.

There may be some other special purposes for which loans would be equally defensible, but any specific proposal would have to be evaluated against the criteria discussed above.

period by the National Institute of Mental Health under 42 U.S.C. § 242a to three divinity schools to develop curricula for training clergymen in the recognition and understanding of mental illness. For the purpose of such aid, clergymen along with teachers and lawyers are looked upon as groups which frequently deal with individuals in personal difficulty. The development of training for such groups presents an opportunity to advance the practical utilization of psychiatric knowledge. Such aid would seem to fall, therefore, within the special purpose doctrine.

A more difficult case is the program for the disposal of surplus Government property which includes sectarian institutions. Certainly, measured by the criteria set out in this memorandum, this program has in some instances approached and, it can be argued, has even transgressed constitutional boundaries. In most such cases, however, the property disposed of did not directly benefit the religious programs and training in sectarian schools. In any event the general language, the long history in similar preceding programs, and the legislative acquiescence in such disposal make quite clear the intention of Congress that sectarian institutions not be excluded altogether from the benefits of the program.
In considering whether an existing governmental program or a given proposal for new governmental action exceeds constitutional limits of assistance to a religious institution, no single criterion is necessarily decisive. And none of the criteria we have discussed affords precise units of measurement susceptible of easy application. Nevertheless, each criterion is an aid to judgment. What is least likely to be constitutional can readily be distinguished from what is most likely to be constitutional. In forming a judgment as to legislative proposals in the middle ground, all relevant criteria must be accorded due consideration. Ultimately a judgment is required—not a doctrinaire conclusion as to what should be done or should not be done, but a reasoned consideration of how an imprecise statement of fundamental constitutional principles is likely to be applied to each particular factual situation.

V

Higher Education

This memorandum has discussed first amendment principles, relevant judicial decisions, and criteria for determining the constitutionality of specific legislative proposals all in the context of elementary and secondary education. Since proposals are currently being advanced in the field of higher education, it is appropriate to give consideration to the significantly different context in which any constitutional problem concerning these proposals might arise.

The constitutional principles involved are obviously the same whether the subject is elementary and secondary school education or higher education, but the factual circumstances surrounding the application of the principles are dramatically different. The reasons are largely historical.

The history of education in the United States at the grammar and high school level is largely one of free public schools. While private institutions exist and cannot be constitutionally prohibited, the fact of the matter is that some 85 percent of children in the United States are educated in public schools. The reason for this historically lies both in the public policy perceived in educating children and in the implementation of that policy by making education at the lower levels compulsory. In order to compel the education of children, States were obliged to provide a system of education which was open to all. In addition, it was prohibited to the States to teach religion or to give a religious education in such schools. Whatever other courses might have, in theory or even in fact, been possible, the States chose to implement their policy by a system of free public schools.
The history of college and university education is almost precisely the opposite. While from a relatively early date the Federal and some State governments subsidized State universities and colleges, the bulk of advanced education has until recently been carried on by private institutions, the majority of which have a religious origin.

Primary schooling has long been accepted as essential for every American child, and secondary education is rapidly becoming recognized as almost equally a necessity. Attendance at a university or college, on the other hand, has always been a matter of individual decision, dictated or influenced by the circumstances and preferences of the individual child and his family. Even today fewer than half of the high school graduates enter college on a full-time basis, and of these 41 percent are students in nonpublic institutions.  

Reflecting these differences in history and practice, State laws everywhere require school attendance of all children for a substantial period of years, whereas, needless to say, there is no corresponding requirement at the college level. Those children whose parents so elect may satisfy the compulsory attendance laws by attendance at private schools, but they are still subject to compulsion once that election has been made. The election can be reversed if the parents wish to do so—if not immediately, then at the start of the next school term or year—but while the election stands, the child is not absolved from enforced attendance at classes, secular or sectarian as the case may be.

The position of the college student is very different. His attendance is wholly voluntary, not merely a choice between alternative commands of the State. He is mature enough, moreover, to have made the decision to attend college and to select the institution best suited to his career objectives, or at least to have participated intelligently in those decisions. Furthermore, he can better understand the significance of sectarian as compared to secular teaching. At some sectarian institutions he is not required to study religion, but if he chooses to do so, or chooses an institution where religious instruction is mandatory, he is merely asserting his constitutional right to the "free exercise thereof."

There are thus important differences between school and college, not only in terms of history and tradition but also in terms of the compulsory

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19 The U.S. Department of Health, Education, and Welfare, Office of Education, estimates that of those who graduate from high school 43 percent enter college on a full-time basis and 10 percent on a part-time basis. Of those who do enter, approximately 60 percent eventually graduate.
nature of attendance. There are differences, too, from the standpoint of the national interest involved. At the college and graduate levels the public institutions alone could not begin to cope with the number of young men and women already in pursuit of higher education, and expansion of these institutions or the creation of new ones sufficient to meet the expected increase of enrollment is out of the question. The effort which it is agreed must now be made in the field of higher education would, if confined to public institutions, force an ever more intensive selection of students and ever more concentrated effort to guide them into fields of study deemed important to the national defense and welfare. It would likely induce these institutions to overemphasize particular fields of study to the detriment of a balanced curriculum. Such warping of our educational policies is not to be contemplated lightly, and, to the extent that Congress finds it appropriate to encourage expansion of our university and college facilities, Congress must be free to build upon what we have, the private as well as the public institutions.

All these considerations indicate that aid to higher education is less likely to encounter constitutional difficulty than aid to primary and secondary schools. The same considerations apply even more forcefully to graduate and specialized education.

The administration bill to assist higher education authorizes loans to institutions, without distinguishing between public and private ones or between those under secular and sectarian sponsorship. It also provides for college scholarships awarded on a competitive basis. These scholarships may be used at any accredited college which the recipient selects. In addition, the bill provides for the payment to the college of a "cost of education" allowance to supplement the scholarship.

Governmental assistance directly to colleges for the construction and expansion of academic facilities perhaps raises, in the case of sectarian institutions, a closer constitutional question than scholarships. Fundamentally the distinction between assistance to sectarian colleges and assistance to sectarian elementary and high schools rests upon differences between the educational system which exists in the United States at the college and graduate school level and the predominantly free public educational system at the elementary and secondary school level. These differences create importantly different factual circumstances against which the criteria previously discussed must be considered to determine the constitutional question.

We are not, at the college level, dealing with a system of universal, free, compulsory education available to all students. The process is more
selective, the education more specialized, and the role of private institutions vastly more important. There are obvious limitations upon what the Government can hope to accomplish by way of expanding public or other secular educational facilities. If the public purpose is to be achieved at all, it can only be achieved by a general expansion of private as well as public colleges, of sectarian as well as secular ones.

Loans for construction of facilities may be less constitutionally vulnerable than grants for the same purposes. But this distinction is not here the only one or perhaps even the crucial one. More important are the distinctive factors present in American higher education: the fact that the connection between religion and education is less apparent and that religious indoctrination is less pervasive in a sectarian college curriculum; the fact that free public education is not available to all qualified college students; the desirability of maintaining the widest possible choice of colleges in terms of the student’s educational needs in a situation no longer limited by the necessity of attending schools located close to home; the extent to which particular skills can be imparted only by a relatively few institutions; the disastrous national consequences in terms of improving educational standards which could result from exclusion of, or discrimination against, certain private institutions on grounds of religious connection; and the fact that, unlike schools, the collegiate enrollment does not have the power of State compulsion supporting it.

All of the foregoing factors related to higher education are, of course, relevant to the scholarship grants. In addition, the decision as to which college is attended is entirely controlled by the student.

The additional cost-of-education grant paid to the institution is also, in effect, closer to a scholarship than a grant to support the institution chosen. Tuitions vary among colleges owing both to cost differentials and the size of endowment and annual private or public subsidy, but invariably the cost of education exceeds the tuition charged. It is to take account of this fact that the scholarship grant is supplemented by a cost-of-education allowance. In essence, it too is subject to the student’s, not the Government’s, educational choice.

The payment to the institution is in reality merely a supplement to the scholarship, no less valid constitutionally than the scholarship itself. To regard such payments as unconstitutional would make the question of who receives the payment the one decisive criterion and sacrifice substance to form.
Weighing all these factors, we conclude that the administration's proposals for higher education are within constitutional limits.20

VI

JUDICIAL REVIEW

The constitutionality of existing Federal legislation which confers some incidental benefits upon sectarian educational institutions has never been tested in the courts. Federal spending legislation ordinarily carries no provisions for judicial review. In the absence of such provisions, the only challenges to spending legislation usually come in the form of suits by individual taxpayers. These litigants lack standing sufficient to sue in a court of the United States, and, where a party to a lawsuit lacks sufficient standing, there is no "case or controversy" which the Federal courts may decide. This requirement of a "case or controversy" is imposed upon the Federal courts by article III of the Constitution, and there appears to be no way in which legislation can dilute this requirement.

The Federal rule with regard to standing to sue on the part of a taxpayer was established in 1923 in the case of Massachusetts v. Mellon (262 U.S. 447), and is significantly different from the position of a taxpayer in a municipality. In that case, Mr. Justice Sutherland distinguished the two positions as follows:

But the relation of a taxpayer of the United States to the Federal Government is very different. His interest in the moneys of the Treasury—partly realized from taxation and partly from other sources—is shared with millions of others; is comparatively minute and indeterminable; and the effect upon future taxation, of any payment out of the funds, so remote, fluctuating and uncertain, that no basis is afforded for an appeal to the preventive powers of a court of equity (262 U.S. at 487).

The Federal courts are similarly barred from considering an appeal from a State court where a taxpayer's interest is not substantial (Dore-mus v. Board of Education, 342 U.S. 429 (1952)).

Because of the rule in Massachusetts v. Mellon, existing Federal aids to education have presumably been immune to attack in the courts on

20 It should be pointed out that decisions of the Supreme Court discussing other problems in the field of education have emphasized that different considerations apply to higher education as against elementary and secondary education. Contrast Hamilton v. Regents, 293 U.S. 245 (1934) (higher education) with Bolling v. Sharpe, 347 U.S. 297 (1954); Brown v. Board of Education, 347 U.S. 483 (1954); Board of Education v. Barnette, 319 U.S. 624 (1943) (elementary and secondary education).
the ground that they violate the Constitution. There is, therefore, no significance to be attributed to the fact that the existing programs have not been litigated. We can regard them as precedents only for what the Congress and the President, not the Supreme Court, regard as within the first amendment.

If Congress wishes to make possible a constitutional test of Federal aid to sectarian schools, it might authorize judicial review in the context of an actual case or controversy between the Federal Government and an institution seeking some form of assistance.

For example, Congress could direct the Commissioner of Education to make some benefit available to private schools with a requirement that such benefit shall not contribute to an establishment of religion or prohibit the free exercise thereof. The same legislation would also provide for a hearing on a written record of any application rejected and a statement of findings by the Commissioner. The Commissioner’s decision rejecting any application for a benefit would be made subject to judicial review. If the Commissioner were to reject the application of a sectarian school on the ground that extending the benefit would violate the statutory provision embodying the prohibition of the first amendment, the applicant could then in effect litigate the constitutional question in court.

In the absence of some such statutory provisions, there appears to be no realistic likelihood that Federal legislation raising the constitutional issues discussed in this memorandum will be resolved by judicial decision.

/s/ ALANSON W. WILLCOX
General Counsel
Department of
Health, Education, and Welfare
Hon. Wayne Morse,
Chairman, Subcommittee on Education,
Committee on Labor and Public Welfare,
U.S. Senate, Washington, D.C.

Dear Senator Morse:

On the opening day of the hearings on S. 1021 you requested of me memorandums discussing the constitutionality of loans to private schools including sectarian institutions, a consideration of governmental actions which might validly provide some incidental benefit to private schools, and a summary of existing Federal legislation which results in the provision of some benefit to sectarian institutions.

I am enclosing herewith memorandums in response to this request. Except for the summary of existing legislation, which was prepared entirely in this Department, these documents have been prepared by our legal staff in consultation with attorneys of the Department of Justice.

Because of the interrelationship of the factors bearing on the constitutionality of loans and the constitutionality of various forms of indirect aid, we have combined our discussion of these two questions in a single document. We believe that our replies will be more helpful to the committee in this form.

Sincerely,

Abraham Ribicoff, Secretary
APPENDIX A

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APPENDIX B

DESCRIPTION OF SOME REPRESENTATIVE COMMENTS ON THE EVERSON, MCCOLLUM, AND ZORACH CASES

The views of the scholars who have commented on the Everson, McCollum, and Zorach cases fall roughly into three categories: (1) The view that an inflexible doctrine of separation has the effect of restraining religious freedom in violation of the first amendment and that the holding in Everson was correct as far as it went and logically should be extended to permit governmental aid to children attending sectarian schools; (2) the view that the separation must be absolute and that Everson was therefore incorrectly decided; and (3) the view that there is room for cooperation between church and state so that governmental aid for education is not invalid because sectarian schools receive incidental benefits, provided that the aid is aimed at achieving a broad public purpose.

1. The view that extensive Federal aid is constitutionally permissible.

—At present there are about 6,752,000 elementary and secondary school pupils in nonpublic schools.¹ Of these more than 80 per cent are in Roman Catholic schools.² Confronted by rising costs in the economy generally and in education specifically, Catholic parents contend that in effect they are subject to double taxation. Although some Catholic spokesmen disclaim any attempts to obtain general public school support of religious schools because they believe it may endanger religious liberty and hence would be satisfied with long-term, low-interest loans,³ there are others who would like to see far more pervasive Federal aid to sectarian schools and the “child-benefit” theory extended to include aid either to the sectarian institution itself or to the parent.

For example, Professor Weclew is of the opinion that as from the standpoint of public welfare no distinction can be drawn in Federal aid

¹ U.S. Department of Health, Education, and Welfare, Office of Education: “Projected Enrollments in Full-Time Public and Nonpublic Elementary and Secondary Day Schools.” The figure for nonpublic schools is 15.2 percent of the estimated total of school children, kindergarten through grade 12, there being approximately 37,551,000 children in public schools. The total estimated enrollment, public and nonpublic, is 44,303,000.

² Based on data from “Summary of Catholic Education 1959,” National Catholic Conference, Department of Education, Washington, D. C., which states that the October 1959 enrollment in Catholic elementary and secondary schools was 5,087,197. When projected this indicates 1960-61 enrollments in the neighborhood of 5,240,000.

to education between the university and elementary school levels. He says:  

Health, emotional stability, and literacy come more and more to be recognized as community assets in which government has a vital concern. These assets should be developed and not simply ignored as far as private schools are concerned because parents exercise their constitutional right to send their children to religious schools. Programs promoting these matters of vital concern when set up in religious schools leave the state and children as beneficiaries, and the religious schools only benefit incidentally.

After enumerating various programs under different acts of Congress which have provided assistance both to sectarian institutions and to the individuals utilizing sectarian institutions, Weclew concludes:  

We can only conclude that the wall of separation is permeable, lacks definite boundaries, and is of uncertain height. Time, place, circumstances, and subject matter determine what degree of separation there shall be. There are areas where none will deny that the maximum degree of separation is best for all. There are areas where separation is unnecessary, undesirable, or impossible.

The opinion frequently expressed by the supporters of all-out aid to parochial schools is that the existing restrictive system actually operates to abridge the first amendment’s guarantee of freedom of religion. They say that where the Catholic parent has no real choice under existing laws but to violate his conscience because compelled by economic pressures to send his children to a public school, then the law has fallen short of protecting religious liberty for all—poor and rich alike.

This view, vigorously espoused by Professor Henle, is as follows:

We cannot, as Americans, simply say that this religious scruple is their own affair; that they may come to the public schools if they want aid, but, if they choose not to do so, that’s their own affair. This religious conscience is one of the factors in the case and must be taken into account by the government. Religious liberty and the prohibition of religious qualifications are meaningless unless they relate to the precise peculiarities of each type of conscience. Hence, our courts have shown a punctilious and precise concern to protect the consciences even of minorities commonly regarded as extremists (p. 245).

* * *

It might be said that the economic pressure is no concern of the State. Yet, it is our concern as Americans not to render lip service to an abstract religious liberty, but to work it out and safeguard it in the concrete. As a matter of fact, in the area of labor law, the Courts have recognized “economic pressure”

4 Weclew, Church and State: How Much Separation, 10 De Paul L.J. 1, 19-21 (1960).
5 Id. at 21.
6 Id. at 26.
as destroying any real choice when it is actually present. If, in the factual situation, there is no real choice, under the law, except to violate one’s conscience, then the law is not safeguarding religious liberty. And this is the worst form of religious discrimination, because it allows true religious liberty only to those who can afford it. American ideals demand an arrangement which will allow religious liberty for each man’s conscience, for Catholic, Protestant, Jew and unbeliever, for rich and poor alike (p. 248).

Under Henle’s views, a precedent is the program of veterans’ education whose children go to sectarian schools in the same way as it is to those parents whose children go to public schools.

He says:

We are thus faced with this practical situation: American ideals and principles demand that the educational aid, intended to be made available to all through the public school, should actually be made available to all American children whether they attend a public school or, for reasons of conscience, a religious school. The Lutheran parent or child, the Catholic parent or child, the Seventh Day Adventist parent or child, and so forth, who need and want this aid, are entitled to an equivalent share of public aid from the funds to which they also contribute under the law (p. 248).

Under Henle’s views, a precedent is the program of veterans’ educational benefits, except that he would permit the choice of school to be made by the parent rather than by the student:

In a similar manner we could work out a plan envisioning the child or parent as the beneficiary of all funds collected for educational purposes; if the parent selected the public school the funds can be made available through the public school; if, for conscience reasons, the parent selected a religious school, the fees (to a fair amount) could be paid in the name of the child or parent and in view of the education, not of the religious functions of the institution (p. 251).

Cast in somewhat different language, the argument for “proportionate aid” to sectarian schools is that the general welfare clause of the Constitution (art. 1, sec. 8), which is the basis for Federal aid to education, should not be construed as requiring religious considerations as a standard for inclusion or exclusion of beneficiaries. In this connection, Professor Costanzo says:

Federal aid to education which excludes religious schools from its beneficiaries precisely because of their religious profession and affiliation may place Congress in the incongruous role of promulgating a law prejudicial to the “free exercise thereof” clause; of establishing a preferential status for a secularized education as more worthy of its benefits than religious education, and find itself in the unenviable position of constructively setting a religious test as a norm for inclusion amongst the beneficiaries in the exercise of its general welfare powers; and, lastly,

8 Costanzo, Federal Aid to Education and Religious Liberty, 36 U. Det. L.J. 1, 42 (1958).
allow, if not actually intend, that exercise of religious liberty in education become a liability before the law in the disbursement of the benefits of the law. This would convert the "no establishment" clause into an affirmative official action in favor of nonreligious education.

2. The view that absolute separation is constitutionally required.—
A leading exponent of the absolute separation doctrine is Leo Pfeffer whose book, "Church, State and Freedom" (1953), is widely known and cited. Pfeffer draws heavily on the dissents of Justices Jackson and Rutledge in the Everson case in challenging the conclusion reached by the majority of the Court that by furnishing bus transportation to pupils attending sectarian schools, the State is doing no more than it does when it provides police protection for children crossing the street or when it supplies fire protection:

It is submitted that both these assumptions rest on fictions. As both dissenting opinions, by Justices Jackson and Rutledge, point out, the New Jersey statute and the Ewing resolution do not provide transportation for children on the streets; they provide transportation only for children going to school, either to a public school or to a Catholic parochial school. A child going to visit a neighbor or to a motion picture theatre is just as much subject to the hazards of the road as a child going to school. Yet New Jersey did not make any provision for the transportation of children going to any destination other than school—public or parochial. If New Jersey had so provided, none would dispute that the purpose of the legislation was to provide welfare benefits—indisputably within the State's police power. Since it was restricted to school transportation, it would seem clear that the purpose of the legislation was to provide an educational service.

It would therefore seem fallacious to equate—as Justice Black did—bus transportation and police or fire protection. The purpose of supplying traffic police is to protect children from accidents; all children are protected, Catholics and Protestants, believers and non-believers. The purpose of supplying fire protection is to preserve society's economic assets, whether in the form of church buildings or burlesque theatres. But the purpose of supplying bus transportation is to get children to school, not (at least, primarily) to protect them from traffic hazards.9

So, too, Pfeffer finds strong support in Justice Jackson's dissent in Everson in his (Pfeffer's) opposition to the argument that Catholic parochial schools provide the secular education which the State is empowered to provide. In the same vein, Pfeffer says:10

These authoritative church writings leave little doubt that the education received in Catholic parochial schools is not the secular education which a State may constitutionally provide or pay for.

9 Id. at 474-475.
10 Id. at 475.
In Pfeffer’s view, if reimbursement for bus transportation may be justified under the State’s police power to provide for the welfare of children, so may other expenditures of a similar character: fireproofing sectarian schools; repair of unsafe walls and ceilings, their replacement, and the like.\(^{11}\)

Despite his strong views respecting various aspects of parochial education, Pfeffer, as well as others in the “absolute separation” school, is able to distinguish the assistance discussed above from the aid rendered by a State in providing free medical and dental services or free hot lunches to children in parochial schools:

These are not educational services but true welfare benefits. A child needs medical and dental care and hot lunches, whether he goes to a public school, to a parochial school, or to no school at all. But he does not need transportation to a school unless he receives instruction at that school; and only in that case is his safety and health protected if the school building is fireproof and the rooms warm and ventilated.\(^{12}\)

Professor Konvitz of Cornell University may be considered as another advocate of absolute separation. He has tried to answer the arguments of Father Wilfred Parsons\(^{13}\) that parochial schools, insofar as they satisfy government standards for the teaching of secular subjects, should receive financial support to pay the costs of those teaching these subjects. The thrust of Konvitz’s argument is that under official Catholic doctrine all the teaching and the whole organization of the school, including teachers and books, are under the supervision of the Church; that religion is the foundation of the student’s training not only in the elementary school but in the intermediate and higher institutions of learning as well.\(^{14}\) It is from education in the parochial school that there springs Catholic growth, cohesion, discipline and loyalty. Konvitz says:

When this official philosophy of Catholic education is considered, it becomes clear why any form of public aid to parochial schools is a violation of the Constitution, a breakdown of the separation of church and state.\(^{15}\)

Konvitz concedes, as Father Parsons suggests, that Americans may not be logical when they refuse public aid to parochial schools yet recognize

\(^{11}\) Id. at 476.
\(^{12}\) Id. at 477.
\(^{13}\) Parsons, The First Freedom: Considerations on Church and State in the United States (1948).
\(^{15}\) Id. at 39.
them as fulfilling the requirements of compulsory education. But Konvitz asserts—

the departure from a narrow logic has been in the interests of a broad liberty. . . .

Just as “complete separation between the state and religion is best for the state and best for religion,” so, too, the liberty of religious groups to maintain their own schools is “best for the state and best for religion.”

In accord with some of the views advocating “absolute separation” are various articles prepared by the editorial staffs of the law reviews. One in the University of Pennsylvania Law Review says:

The strictest limitation upon governmental aid to religious institutions is required by the language, the historical content and the present validity of American constitutional provisions. The principle is clear and undisputed that formal interrelation of church and state institutions is prohibited by the letter and spirit of these provisions. Once established, the principle should be preserved intact against indirect as well as direct abridgement. To support the doctrine of separation is not to advocate irreligion but to maintain institutionally a separation of functions the fusion of which has invariably destroyed the usefulness of both institutions according to democratic standards.

The Everson case indicates that a court appraising auxiliary services like transportation to sectarian schools in terms of a present danger of substantial intercontrol of church and state may circumvent the restriction. Logically, however, if such services are public functions justifying state support, then the public welfare feature of sectarian education itself provides an even stronger claim to state support; but there is no judicial dissent from the view that such direct support is proscribed by both Federal and State constitutions.

The use of governmental authority, financial or persuasive, to aid or hinder religious institutions directly or indirectly should be prohibited under the establishment clause of the first amendment.

Another article emphasizes that it is not easy to seal the wall between church and state once it has been pierced in the name of the public welfare:

Teaching of non-religious courses in religious schools, and the standard of such instruction, is certainly for the public interest—can not the State then pay to that extent the salaries of religious teachers? . . . Physical fitness of American youth is a matter of public concern—can the State not, under the Everson case, build gymnasiums and furnish nurses to parochial schools? . . . The majority opinion in the Everson case suggests no line which would be drawn. It serves but one purpose—to enunciate a doctrine which amounts to a tool for the circumvention of the absolute prohibition against establishment of religion in the first amendment.

16 Id. at 59. This is similar to Justice Jackson’s view in Everson. See 330 U.S. at 27.
18 Comment, 21 So. Cal. L. Rev. 61, 75 (1947).
3. The “intermediate” position.—In contrast to the two positions discussed above, there is considerable sentiment among legal scholars for a more moderate position which it is claimed would strike a fair balance between competing interests.

Professor Katz of the University of Chicago Law School originally suggested that, in order to protect the freedom of parents in their choice of schools, a tax deduction of some kind for tuition paid to such schools would be permissible but that affirmative aid to religion should be avoided.\(^{19}\) He would now go further in the use of tax funds for religious schools upon the theory that the use thereof is not really aid to religion but rather chiefly aid to education, so long as the State’s standards for education are satisfied by the religious schools. He says:

If one assumes that the religious schools meet the State’s standards for education in secular subjects, it is not aid to religion to apply tax funds toward the cost of such education in public and private schools without discrimination. Like the dissenters in the bus fare case, I am not now able to distinguish between the minor payments there involved and payments for educational costs. I believe, therefore, that none of such nondiscriminatory uses of tax funds are forbidden by the first amendment.

He admits, however, that his position would be a most unpopular one generally and be subject to attack upon various grounds:\(^ {20}\)

The widespread rejection of the position just defended may be explained in a number of ways. It may reflect a general bias in favor of Government operation for any activity which is to be supported with tax funds. It may reflect a specific bias in favor of public education with only grudging concession of freedom for private schools. It may reflect skepticism as to the quality of education in religious schools and as to the feasibility of enforcing standards. It may reflect distrust of the position of the Roman church as to religious liberty. It may reflect a conviction that the problem is too explosive to be left to ordinary political processes and that the usual principle of state neutrality must, at this point, yield to a principle of absolute and hostile separation.

Professor Robert F. Cushman believes that since the Everson decision the problem of aid to sectarian schools is cast in a different light:\(^ {21}\)

It becomes clear that the crucial issue is not aid to the child versus aid to the school; it is not even the question of whether religion is being aided; the real question is, as it has always been, how do you distinguish aid to the public in general from aid to religion in particular. Religion does and should, as part of


\(^{20}\) Id. at 440.

the public, share in the benefits extended to the public in general. To hold otherwise is to adopt a position which would permit the state to make of religion an outlaw having no rights which the law is bound to protect. The question, then, is under what circumstances and in what way do religious institutions become part of the public in general.

The difference between providing police protection and providing teachers does not lie in the identity of the beneficiary but in the way in which the aid is extended. Aid is not normally extended to individuals or institutions by name, but rather to groups or classes of individuals or institutions. Any individual or institution falling under the restrictions of the law, or falling heir to its benefits, does so only as a member of such a group. An individual may be a pupil, a pedestrian, a property owner and a parent. A church is at once a corporation, a piece of property, a building, a meeting place, a religious institution and a nonprofit institution. Furthermore, a church may receive police protection when classed as property, tax exemption when classed as a nonprofit institution, sewage connections when classed as a building, and yet be denied financial aid when classed as a religious institution, since such a class may not validly be given public aid. Since the aid goes to groups rather than the individual components of any one group, the eligibility of an institution to receive public aid would seem to depend on which group it is classed in, rather than on its individual characteristics (p. 348).

The Constitution, according to the Court, does not forbid all aid to religious institutions. They may receive fire and police protection. What the Constitution forbids is aid to the religious function, and the Court in the Everson case divided over the question whether this function was in fact being aided. This being the case, if a state wished sincerely to protect the safety of its children, it could set up children's busses on which any child could ride, whether going to a parochial school or to the movies. To insure the health of its children it could provide free lunches, dental and medical care for all children. To improve their minds and morals it could provide free books, museums and libraries. These aids would be available to all children regardless of the school they attended, or whether or not they attended school. The aid would truly be to children (a group which the state may validly aid) irrespective of the religious activity of the individual concerned (pp. 348-349).

Under Professor Cushman's view, constitutional questions would be avoided through legislation which would provide aid for all children of the State, without earmarking it as assistance to children enrolled in schools, both public and religious:

When, however, the State undertakes to aid just pupils and schools it is no longer aiding all children and all buildings. It is aiding only those identified with the function of institutionalized education, since pupils and schools are groups set up for the sole purpose of identifying certain children and institutions with the functions of education. Aid to these groups, then, becomes aid directly to the function for which they are set up. Where school busses are extended to schools, or pupils, they are in aid to the function of education. Where this in-
cludes parochial schools and pupils this becomes aid to the function of religious education (p. 349).

As the majority in the Everson case pointed out, a State cannot aid religion, but it can not be denied the right to aid all its children even though some of them attend religious schools. A State statute so drawn as to provide aid to all children as a group, regardless of what that aid might be, would be exceedingly difficult to attack on constitutional grounds as an aid to religion. Thus a State which provided medical service and books to all the children in the State would be virtually assured of the validity of its action. Where, however, a State limits its aid to children enrolled in schools, and this includes both public and religious schools, it lays itself open to the charge that it is aiding two kinds of education, secular and religious, and religious education is something which the States are forbidden to aid (p. 349).

Still another approach has been advanced by Judge Fahy. After citing various precedents, both judicial and legislative, he said: 22

Consistent with these views on the place of religion in our national life is the established rule that public funds may be used to pay for services rendered, notwithstanding the fact that the payment is to a religious organization. It is immaterial that tax-raised funds are paid to these individuals or organizations by way of reimbursement for money spent by them in furtherance of a public program. Illustrations of existing or possible arrangements of this type include payments by local governments to denominational hospitals, conducted by religious orders or otherwise, for medical services rendered to those entitled to receive such service at public expense; and expenditures by the Federal Government toward the construction of or additions to denominational hospitals, under the Hospital Construction Act.

The same concept has been applied in the field of education. Federal Government payments to a denominational college for teaching or training draftees or veterans, even including training for the clergy, is authorized by the GI Bill of Rights.

A student note in the Yale Law Journal suggests other standards for achieving a fair and valid result in borderline cases. It was said: 23

One method of qualifying the Everson absolute throughout would be to balance the public benefit in each instance against the aid to religion. Inculcation of moral principles, for instance, may well be found to outweigh the sectarian nature of New York “released time” or religious exercises, even though insufficient to qualify as a full-fledged “public purpose” of the Everson variety.

Based upon the dissent of Justice Reed in McCollum v. Board of Education, supra, at 248-249, that the Everson decision did not intend to

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22 Fahy, Religion, Education and the Supreme Court, 14 Law and Contemp. Prob. 72, 82 (1949).

preclude religious bodies from receiving incidental advantages which other groups similarly situated obtain as a byproduct of organized society, the Yale Law Review Note continues: 24

Even more far reaching is the method suggested in Mr. Justice Reed's dissent, which would remove the need for any propitiating justification where the "aid" was merely a "by-product of organized society" and not "purposeful assistance directly to the church itself or to some religious group . . . performing ecclesiastical functions." Such a modification would transcend piecemeal exceptions by shifting the entire wall to a position where practices involving no direct expense to the State, such as "released time" and the use of public buildings for sectarian meetings, could easily be sustained. And direct expenditures, which theoretically are barred by the precept that no tax whatever can be constitutionally "levied to support religious activities," could be validated by a parallel definition of the word "support." While this approach was not specifically negated by the majority or concurring opinions, the 8-1 decision over Mr. Justice Reed's dissent indicates that the Court would be reluctant to relax its Everson prohibition to such an extent. The essence of this concept, however, might well be accepted in diluted form by construing state "neutrality" towards religion, which technically seems to save only those benefits in which all share, broadly enough to uphold desirable types of insignificant aid which could not be logically sustained on less drastic grounds.

24 Id. at 1121.
THE CONSTITUTIONALITY OF THE INCLUSION OF CHURCH-RELATED SCHOOLS IN FEDERAL AID TO EDUCATION

LEGAL DEPARTMENT
NATIONAL CATHOLIC WELFARE CONFERENCE
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Preface

This study is one which the Legal Department (NCWC) has long planned to bring forth. The need for a comprehensive constitutional statement on the church-state issue in education and its relevance to long-standing NCWC policies was made vividly clear by the statements and confusion on these issues in this year's debate on federal aid to education.

On March 28, 1961, the Department of Health, Education, and Welfare publicly issued its now widely read "Memorandum on the Impact of the First Amendment to the Constitution upon Federal Aid to Education." The Legal Department (NCWC) thereupon asked a number of constitutional scholars and lawyers for their independent critical analysis of the merits of that memorandum. The comments received in response to that request affirmed the necessity of presenting to the public a far more adequate analysis of the constitutional issues involved. Accordingly, as Director of the Legal Department, I requested William B. Ball, Esquire, of Harrisburg, to prepare such an analysis in cooperation with members of our staff. I wish to express my great gratitude to Mr. Ball for the selfless dedication and splendid competence which he has devoted to this task. I also wish to express special appreciation to George E. Reed, Esquire, of the Legal Department (NCWC), and to Charles M. Whelan, S.J., of the Georgetown University Law Center, who worked constantly upon this study and contributed to it in all phases of its preparation.

In presenting this study to the public, it is, of course, our hope that it will serve to clarify constitutional issues and to cause a more widespread recognition of the massive contribution of church-related and other private schools to the common welfare. However, should there not be presently achieved a just resolution to the problems with which this study deals, then it is our hope that we will at least have provided a basis for a continuing public dialogue respecting these problems. It is especially hoped that the presentation here made may stimulate in the educational and legal communities further intellectual interest.

This hope has received solid encouragement from the readiness with which many outstanding constitutional lawyers responded to our request for their advice and criticism when the preliminary draft of this study had been completed. Although a complete list of the authorities consulted would be too lengthy, we have a special debt of gratitude to
Professor Wilber G. Katz of the University of Chicago Law School, Dean Paul R. Dean and Professor Chester J. Antieau of the Georgetown University Law Center, Professor Paul G. Kauper of the University of Michigan Law School, and Professors Arthur E. Sutherland and Mark DeWolfe Howe of the Harvard Law School, for their valued comments. It is understood, of course, that none of the authorities consulted has committed himself by his cooperation to an endorsement of the positions and policies advocated in this study.

It has been the American experience in the past—and we are confident that it will be so in the future—that rational discussion of common problems by men of good will must in the end yield beneficent results to all.

William R. Consedine
Director
Legal Department
National Catholic Welfare Conference
INTRODUCTION

May the federal government, as part of a comprehensive program to promote educational excellence in the nation, provide secular educational benefits to the public in private nonprofit schools, church-related as well as nondenominational? This is the general constitutional question to which this study is addressed. Three related questions are not treated: the basic constitutionality of federal aid to education; the constitutionality of federal aid to education exclusively in public schools; and the constitutionality of federal aid to religious instruction.¹

The providing of secular education is unquestionably a public service and may be financed with public monies. It is equally unquestionable that secular education is provided in private nonprofit schools, church-related as well as nondenominational. Accordingly, the public may provide transportation for school children to private nonprofit schools.²

Whether the public may also help provide the secular education itself in private nonprofit schools, both church-related and nondenominational, is the precise question left open by the Supreme Court by its denial of certiorari in the Vermont school tuition case.³

Two contentions deserve summary disposition at the outset. One is that whatever helps religion is unconstitutional. The other is that religious benefit or detriment is irrelevant to the constitutionality of non-religious governmental programs. Both contentions have been flatly rejected once again by the Supreme Court in the Sunday Law Cases.⁴

The question actually is not whether religion is helped or hurt by the providing of secular educational benefits in all private nonprofit as well as public schools, but whether the help or hurt that results from such a nonreligious educational program is the kind of benefit or detriment forbidden by the first amendment. This study does not deal with the constitutionality of legislation which has financial benefit to church-

¹ It should be noted that this study makes no attempt to explore the further practical question of whether there in fact exists a need for large-scale federal aid to education. While, as is stated infra, there is no doubt that the nation now faces an educational crisis, there are, notoriously, radical differences in views as to the means necessary to resolve that crisis. These involve economic, educational, and political factors which it is not a purpose of the study to evaluate.


related schools as its primary purpose or effect. It deals with the constitutionality of legislation which aims at the promotion and improvement of the education necessary for the general welfare—our culture, prosperity, and defense—and which for these purposes seeks to improve educational opportunities in both public and private nonprofit schools.

I

THE EDUCATION CRISIS AND NATIONAL SURVIVAL

1. The Nature of the Crisis

Our intellectual and creative resources, then, are our first assets. And the more we invest in them, the greater the returns in every aspect of our lives. Human capital has taken priority over material capital both as a public and private investment.

Thus did the Regents of the University of the State of New York underscore the stellar importance which is being ever more generally ascribed to education in the United States today. At least since the appearance of Sputnik similar declarations have been made by leaders in all sections of the land. President Kennedy, in his message to the Congress on February 20, 1961, stated that the nation's twin educational goals must be "a new standard of excellence in education—and the availability of such excellence to all who are willing and able to pursue it." He further stated that there is now required "the maximum development of every young American's capacity."

Spurring the nationally felt need for more and better education has been, first of all, the genuine fear that the free world, of which the United States is the leader, may be destroyed through conquest, or may so far decline in position relative to Soviet power that it will inevitably become the subject of communism. Additionally, however, are other dynamic factors related to a fresh emphasis upon education. It is recognized that—communism aside—Americans have important missions to perform both abroad and at home. The conquering of disease and of poverty, the improvement of cities, the advance of industry, the increase of useful invention, the realization of greater achievement in the arts—indeed also the entire complex of the problems of a vastly more populous civilization in a far more closely knit earth in a suddenly opened universe of space and planet: all these supply additional imperatives to America's new effort to educate its young.

6 Id. at 1.
It should here be noted that the unvarying stress in all of the leading recent public pronouncements upon education is upon education as a national need and therefore as something to be rendered to all. It is never suggested in these statements that any racial or religious or economic or ethnic or income group, if educable, should be excluded.

It would be unthinkable, moreover, that an expanded American educational program would destroy certain values and traditions in American society without which that society would be no longer American. And all American educational and political leaders who have been proclaiming the new frontiers for our educational effort, have laid heavy and specific stress upon the need to maintain those values and traditions, indeed to revitalize them. Among the chief of these are the moral values of the Judaeo-Christian tradition. Requiring equal stress, because of its close relationship to freedom is that tradition of harmony-in-diversity which we call intellectual and cultural pluralism. The general increase of scientific endeavor and knowledge would in the end have been achieved in vain if the price paid for it were the acceptance of a moral order whose sole standard was the will of the state and of a pervasive conformity to a state-imposed single culture.

While, as has been noted, no position is here taken respecting the need for federal aid to education, it is apparent that two principles should ideally govern an American educational program for the future:

1. It is in the national interest that every child have the opportunity for an education of excellence.
2. It is in the national interest that our moral heritage be preserved, along with our freedom to acquire education in diverse, non-state institutions.

In simple terms this means that every American child should have equal opportunity, according to his talents, to acquire the best education possible but to acquire it in such school as he or his parents, in the exercise of their judgment, deem most desirable, provided such school meets reasonable state requirements of intellectual and physical competency. To achieve this objective, government need not be restricted to a single technique in selecting programs of aid to education—such as to extend aid through the institution only, or solely through parent or solely through pupil. Any such technique may be reasonable and the choice thereof should be determined by government's informed view as to how education will best be advanced.
But if aid through institutions is the selected means, then if governmental aid is to be given through some institutions (even if a majority) which are deemed competent to carry on the task of educating citizens, then it should be given through all institutions similarly competent—unless constitutional requirements plainly dictate to the contrary.

This is necessary to emphasize, since it is being strongly intimated in some quarters that nonstate schools somehow do not perform a public service; that especially the church-related schools are in some way alien to America; and that all which is nonstate inherently has no standing to receive state support. This view, far more than clear constitutional objection, lies at the heart of much of the controversy over aid to education in church-related schools.

But to expose this view by plainly stating it is at once to scotch it, since it is immediately apparent not only that it attacks the great American tradition of popular, church-related schooling, but that it also points the way to a totalitarian society. The campaign which it would inspire would begin with the forcing out of church-related education but its end could be a totally sovietized state.

It is an irony of the present debate that this view should have made headway, because while it talks constitutionalism, it weakens constitutionalism and the related concept of a diverse and free society. What the debate now needs is fresh recollection of American traditions of cultural differentiation and private initiative, along with a far more exacting scrutiny of the American constitution—an organic document which over the generations has proved hospitable to enlarged concepts of social needs, while preserving individual freedom.

Considering in a particular way both our public schools and our church-related schools, it would be a very great mistake to assume that the former need be any the less devoted to the expression of our traditional moral values than are the latter. Indeed our great public school system—built by men of all faiths—should receive the particular interest (as it does the financial support) of those who are dedicated to the church-related schools, since no citizen should shirk his duty to work for the common good in all areas of society.

On the other hand, the church-related and other private schools should be far better appreciated by that large part of the public which has not had direct association with them.

2. Church-Related Schools and the Public Welfare

The church-related school, teaching largely the same curriculum as the public school for the general education of the citizen, is not an intruding latecomer on the American educational scene. It represents, rather, our original source of popular education and, far from being a distractive force deviating from the American educational tradition, it stands instead at the core of that tradition and as a force which emphasizes certain moral and spiritual values with which that tradition is identified.

The elementary schools in all the colonies had the teaching of religion as their chief aim and as their main component. And Massachusetts, in 1647, enacted what has been described as "the first system of public education in the colonies." Known as the "Old Deluder" Act, it provided:

It being one chiefe proiect of ye ould deluder, Satan, to keepe men from the knowledge of ye Scriptures . . . . It is therefore ordred, yt evry towneship in this jurisdiction, aftr ye Lord hath increased ye number to 50 housholders, shall then forthwth appoint one wth in their towne to teach all such children . . . .

New York, a nontheocratic colony, adopted a similar law. Education in New Jersey, Pennsylvania and throughout the South, was emphatically religious. One of the earliest tasks to which French and Spanish missionaries in America devoted themselves was the founding of schools. They were among the first in the land, and, while they offered training in secular subjects, they were religious in nature generally.

The end of the colonial era and the coming of the Republic witnessed no change with respect to the strongly religious character of the American people, and it is not therefore surprising that hospitality to the religious upbringing of their children should have marked public attitudes toward education. The third article of the Northwest Ordinance of 1787 directly linked religion with good government and the well-being of society, and thus stated a major purpose of education: "Religion, morality and knowledge, being necessary to good government

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8 The Laws and Liberties of Massachusetts (1648) at 47 (1929).
and the happiness of mankind, schools and the means of education shall forever be encouraged.” The document has been described as “second only in importance to the Bill of Rights of the Constitution as a guarantee of religious freedom.” The Northwest Ordinance was re-enacted August 7, 1789 by the first session of the First Congress,¹.¹ the same Congress to which a few weeks later, on September 26, 1789, the Conference Committee report proposed the final draft of the first amendment. It was later praised in the highest terms by Webster¹² and by Lincoln.¹² The Southwest Ordinance, passed by the First Congress in 1790, applying to Tennessee and eventually to the entire Mississippi Territory, contained the same provision.

Nor did the new education movement launched by Horace Mann in the 1830’s seek the abolition of religion in the schools. To the contrary, it was definitely intended that the new schools should provide knowledge of religion along with traditional moral training. While Mann desired sectarianism kept out of the public school curriculum—what he called “special and peculiar instructions respecting theology”—he defined education to include moral and religious upbringing. He concluded his lecture in 1838 on “The Necessity of Education in a Republican Government” by stating:

And, finally, by the term education I mean such a culture of our moral affections and religious sensibilities, as in the course of nature and Providence shall lead to a subjection and conformity of all our appetites, propensities, and sentiments to the Will of Heaven.¹³

Similar expressions from American educational leaders are to be found in abundance over the remaining decades of the nineteenth century and, indeed, down to the present.

There is no purpose here to suggest criticism of the reasons why public school education in America became to a considerable extent secular rather than religious, nor is it suggested that it is inevitably true that certain trends toward sterilizing the public schools of any minimal efforts to acquaint children with God or the Commandments or prayer will continue.¹⁴ It is, on the other hand, merely pointed out that it can-

¹⁰ 1 Stat. 549.
¹¹ Quoted in 1 Am. Hist. Ass’n Rep. 56 (1896).
¹³ 2 Life and Works of Horace Mann 144 (1891).
¹⁴ See Resnick v. Dade County Bd. of Pub. Instruction, No. 59C 4928 and No. 59C 8873, Cir. Ct. of 11th Judicial Cir., Fla., May, 1961; Murray v. Curlett, No. 64708, Balti-
not with any accuracy be said that the American tradition of education is somehow a tradition of irreligion. On the contrary, it is a stubborn fact of our history that that tradition is one of hospitality to religious values and to a religiously based moral training.

Today, church-related schools of the United States are making a vast and patent contribution to the public welfare. Considering the largest of the groups of these—the schools under the auspices of the Roman Catholic Church—the extensiveness of citizen education which it supplies is remarkable. The phrase of the preceding sentence—"citizen education which it supplies"—bears repeating, since, as will later be stressed herein, these schools supply not some form of special or eccentric training, of which society can take no notice, but education recognized by the state as meeting essential citizen needs.

In 1960 there were enrolled in Catholic elementary schools 4,401,824 pupils.\(^\text{15}\) In the same year Catholic secondary schools had an enrollment of 885,406 students. It is estimated that in 1961 Catholic elementary schools are providing education to approximately four-and-a-half million children and Catholic secondary schools to approximately one million children. In 1960 Catholic elementary and secondary schools were educating 12.6% of the total school population, and for 1961 the percentage is believed to be slightly higher. In a number of states and the District of Columbia Catholic schools are educating considerably higher percentages of the children in school—in Rhode Island 25.8%, Wisconsin 23.3%, Pennsylvania 21.9%, Massachusetts 21.9%, Illinois 21.3%, New Hampshire 21%, New Jersey 21%, New York 20.8%, Delaware 18%, Minnesota 16.9%, Vermont 15.6%, Ohio 15.4%, Maryland 15%, Missouri 14.8%, Connecticut 14.7%, Michigan 14.4%, Louisiana 14.3%, Nebraska 14.1%, District of Columbia 13.8%, Iowa 12.9%.

Thus in nineteen states (and the District of Columbia) having a total school population of 21,868,683, and whose school population represents 51.9% of the total national school population, Catholic parochial schools are performing the public service of educating 18.6% of all children in elementary and secondary schools.

While one child out of every ten American children in Hawaii receives in a Catholic school the complete education deemed adequate by the

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\(^{15}\) The statistics for which no other reference is given in the following paragraphs are contained in, or computed from, the figures given in the General Summary of The Official
state, approximately one out of five does so in Massachusetts, New York, New Jersey, Pennsylvania, Illinois and New Hampshire, while approximately one out of four does so in Wisconsin and Rhode Island.

Catholic elementary schools are conducted in all of the fifty states, with a total, in 1960, of 10,662 schools throughout the nation. The number of such schools per state varies from eight in Alaska to 1,136 in the state of New York. In the Archdiocese of Chicago alone are 426 Catholic elementary schools.\textsuperscript{16} In the city of Pittsburgh, Catholic elementary schools educate 44% of the entire elementary school population.\textsuperscript{17} There were in 1960 2,426 Catholic secondary schools in the United States.

In 1960 there were 152,948 teachers staffing the Catholic secondary and elementary schools, the number being composed of 113,527 religious teachers and 39,421 lay teachers, the percentage of lay teachers now increasing rapidly in the Catholic schools (from, for example, 5.2% out of the total in 1948 to 25.8% of the total in 1960).

Here it should be noted that the religious aspect in church-related schooling is an addition to, and that it is not a subtraction from, basic citizen-education requirements. The pupil in the church-related school learns essentially the same arithmetic, spelling, English, history, civics, foreign languages, geography, and science which it is required that the pupil in the public school learn. He learns religion in addition, and the religious dimensions of secular knowledge. But let it be again stressed: this is in addition, not in subtraction.

Recalling that this study is at this point discussing simply the public welfare function of the church-related schools rather than the question of constitutionality of aid to such schools, it may be further noted that Catholic educational efforts—like many nonpublic educational efforts—have evolved over the years numerous schools of special achievement and schools for exceptional groups, such as the gifted and the mentally or physically handicapped, and have pioneered many valuable new teaching methods.\textsuperscript{18}


\textsuperscript{17} Statistics on file in the Catholic Schools Office of the Diocese of Pittsburgh.

\textsuperscript{18} See Directory of Catholic Facilities for Exceptional Children in the United States (1958), listing facilities under Catholic auspices throughout the nation which are accommodating a total of more than one million exceptional children. The 1958 edition of this Directory is currently being revised.
The Catholic school, moreover, has always stressed patriotism and other civic virtues. It is an important force for social democracy in the nation. Historically, Catholic education proved a beneficent bridge by which immigrant passed to the status of American. Typically, the Catholic school has been a meeting place for children of different ethnic and economic backgrounds. Although the schools are primarily for the education of Catholic children, non-Catholic children are admitted as a matter of universal policy where there is room. The record of Catholic schools generally with respect to Negro and other nonwhite children has been distinctly creditable. These schools have for the most part not been located according to de facto zoning which divides neighborhoods racially or economically. Thus the Catholic school has been an invaluable training ground to prepare citizens for full participation in a pluralist society. It has been stated:

If, as seems reasonable, the preservation and perpetuation of private and parochial schools are indispensable to the preservation of a pluralistic society, then those committed to a pluralistic America owe a great debt to the Catholic Church, just as those committed to a secular public school system owe it a great debt.

No fact can be more obvious than the fact that the graduates of the Catholic schools are found in all classes, occupations and activities of American life, contributing commonly with all other citizens, publicly and privately, to the sustenance and development of the American society. From these schools have come men and women who have been faithful public servants, fruitful scientists, creative artists. Upon the coming of the wars in which the nation has been involved, the man of Catholic school training has never been classified as alien in loyalty or divisive in inclination; and as in peacetime he is agreeably known in all neighborhoods and all occupations, so in times of national peril he has been found in all theatres of war and upon every beachhead and place of struggle. It is assuredly a late day for argument respecting the value of the training which Catholic and other church-related schools have conferred upon the country through their graduates.

20 Pfeffer, Creeds in Competition 82 (1958).
21 This is noted by the Rossis: "We could find no evidence that parochial schools tend to alienate individual Catholics from their communities. Parochial school Catholics are as involved in community affairs as anyone else of comparable educational position." Peter and Alice Rossi, Some Effects of Parochial School Education in America, Daedalus 323 (Spring 1961). See also Fichter, Parochial School: A Sociological Study 109-31, 427-53 (1958).
The public welfare contribution of the Catholic schools must, however, be seen in one further aspect. In the school years 1957 and 1958 the average current expenditure per public school pupil in average daily attendance in the United States was $341.14. This means that the Catholics who supported the 5.3 million students in the Catholic elementary and secondary schools in 1960 absorbed what would otherwise have been an expense for all taxpayers in the order of magnitude of $1.8 billion. Even this figure gives a wholly inadequate picture of the estimated savings to the country by virtue of the existence of all private schools, from the grade school level through college and the university. The total current expenditures, capital outlay, and interest of all private educational institutions in 1958 was $4 billion. For the period 1950-59, the same expenditures of all private elementary and secondary schools are estimated at $13.9 billion.

This in turn throws into bold relief another aspect of the public welfare contribution of the Catholic school system: this immense financial value—attributable to, it must be borne in mind, the providing of essential citizen education—is a value accruing to the nation not only out of the pay checks and savings accounts of millions of Catholic citizens but out of the very lives of a legion of other Catholic citizens—priests, nuns and brothers—who have dedicated themselves without recompense to teaching generation upon generation of young Americans.

Up to this point, this study has not discussed the constitutionality of federal aid to church-related education. What appears beyond contradiction, however, is the immense contribution to the public welfare made by church-related schools through their providing essential citizen education.

The demands of the education crisis relate directly to this, since it is the clear imperative of the times that all of our means of education must be utilized to their fullest extent, consonant with constitutional requirements. It is equally imperative that the pluralist structure and the basic freedoms of the nation be not lost while the education crisis is sought to be resolved.

This study is not a brief on behalf of the principle of federal aid to education. But it would appear undeniable that, so far as the question

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24 See id. for figures on which this estimate is based.
is one of policy and not of constitutional law, if the federal government offers aid to education in public schools, aid should similarly be offered to education in church-related schools.

The question of policy considered, the problem of constitutionality may now be explored.

II

THE CONSTITUTION AND CHURCH-RELATED EDUCATION

The question presented, in its broadest terms, is whether the federal government may aid education in church-related schools. However, no proposal has been made that government undertake to pay the full cost of the education provided in a church-related school. Such a proposal might involve constitutional problems not presented by proposals for limited support of such education and might moreover foreshadow total governmental control of such education. The forms of limited aid being chiefly discussed are:

a. Matching grants to church-related educational institutions for secular instruction therein.

b. Long-term loans to church-related educational institutions for secular instruction therein.

c. Grants or loans of tuition to students, which may be used in church-related educational institutions.

d. Tax benefits to parents as part or total reimbursement for tuition expended by them in church-related (or other) educational institutions.

It is the conclusion of this study that (1) the church-related schools perform a public function which, by its nature is supportable by government; (2) that such support may be only in a degree proportionate to the value of the public function performed; (3) that such support may take the form of grants to institutions or of loans to institutions or the form of grants of tuition or tax benefits; (4) that the federal government may constitutionally provide support in any of the aforementioned forms.

In order to ascertain whether the foregoing conclusions with respect to constitutionality are correct, it is needful, first of all, to examine those judicial decisions and other materials which provide the constitutional background.
1. The “Religion” Clauses of the First Amendment

The first amendment provides that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .” The clause respecting “establishment” is the clause chiefly relied upon by the March 28, 1961 Memorandum of the Department of Health, Education, and Welfare as blocking most kinds of grants, loans, or tuition payments for education in church-related schools. Therefore, preliminary to an examination of the relevant judicial decisions, it is desirable to ascertain the historic meaning of that clause.

The No Establishment Clause was not the product of an anti-religious revolution. Unlike the French Revolution, the American Revolution was made by men of strong religious conviction. It is not conceivable that they would have written into their Constitution a clause the purpose of which would be to sterilize all public institutions of religious content. Virtually every document relating to the formation of the United States attests to this. The Declaration of the Causes and Necessity of Taking Up Arms, July 6, 1775, abounds with such phrases as “the divine Author of our existence,” “reverence for our great Creator.” In the Preamble and Resolution of the Virginia Convention, May 15, 1776, appeal is made to God as “the Searcher of hearts” respecting the sincerity of the colonists’ declarations. The Declaration of Independence acknowledged God as the source of all human rights and stated that it is in order to secure these God-given rights that governments exist. The Articles of Confederation concluded by invoking “the Great Governor of the World.” The Northwest and Southwest Ordinances, as has been noted, specifically related religion to education and good government.

Story, writing in 1833, stated:

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

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25 Specific analysis of the Memorandum is contained in Annex B infra.
26 1 Journal of Congress I, 134-39 (1800 ed.).
27 Quoted in Documents Illustrative of the Formation of the Union of the American States 19 (Tansill ed. 1927).
28 Id. at 35.
29 Story, Commentaries on the Constitution of the United States § 1868 (1833).
The prime purpose of the clause as then universally understood, was to prohibit the Congress from creating a national church or from giving any sect a preferred status. This is clear from the language of the original draft of the first amendment submitted by Madison to the House of Representatives:

The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.

Professor Corwin comments:

That is, Congress shall not prescribe a national faith, a possibility which those states with establishments of their own . . . probably regarded with fully as much concern as those which had gotten rid of their establishments.

The clause contains, of course, no such wording as "separation of church and state" or "wall of separation of church and state." Used according to its historical intendment, "separation of church and state" is a concept familiar to all from the time of the adoption of the first amendment. The term "wall of separation of church and state" finds its way into the opinions of the Supreme Court almost a century later in the case of Reynolds v. United States. There the phrase was quoted from the well-known letter of Thomas Jefferson to the Danbury Baptists, the phrase plainly being employed in Reynolds in the same sense in which it was employed by Jefferson, namely, to show that the No Establishment Clause deprived Congress of power to prescribe religious practices. That Jefferson did not consider the clause to erect a wall which would prevent all relationship between government and religion is plain from his report to the President and Directors of the Literacy Fund of the state-supported University of Virginia in 1822:

It was not however, to be understood that instruction in religious opinion and duties was meant to be precluded by the public authorities, as indifferent to the interests of society. On the contrary, the relations which exist between man and

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30 Although there is some evidence that some considered the clause also as a protection of the right of the several states to maintain official church establishments.
31 1 Annals of Congress 434 (1789-91). (Emphasis added.)
32 Corwin, The Supreme Court as National School Board, 14 Law and Contemp. Prob. 11, 12 (1949).
34 98 U.S. 145 (1878).
his Maker, and the duties resulting from those relations, are the most interesting and important to every human being and most incumbent upon his study and investigation.\textsuperscript{35}

Jefferson then went so far as to suggest that the various sects establish religious schools on the confines of the university.

It would not have made sense in 1791, any more than it does today, to say that the No Establishment Clause prevents relationships—even cooperative relationships—between state and church. It is instead clear that an essential purpose of the clause was to prevent governmental transgressions upon religious liberty. It was fear of this and not fear of religion which prompted the drafting of the first version of the clause. Madison’s first draft reveals this, the context plainly being one of respecting rights of conscience. Jefferson’s “Bill for Establishing Religious Freedom,” exposing the meaning of the clause, stressed that religious liberty required that no man should be compelled to support “any religious worship, place, or ministry whatsoever.”\textsuperscript{36}

Far, therefore, from being a mechanical formula, prescribing automatically a void between religion and the state, it was the original common understanding of the No Establishment Clause, that it existed, in the main, for the protection of religious liberty. Indeed, it was therefore properly seen as a pro-religion clause and not as an anti-religion clause. Such protection, it is plain, existed to preclude (a) the setting up of an official church; (b) approaching the equivalent thereof by giving any sect such a degree of preference that government would have provided a powerful inducement to the people to belong to such preferred sect. The clause was never intended to exclude religion from the democratic processes and the political forum, nor to prevent the sects from taking advantage of these in peaceful competition for lawful benefits. The No Establishment Clause attacked preference by law. Certainly it was never understood to mean that religious institutions which perform public services are disqualified to receive compensation for them through the governmental organs of the society which has benefited by the services.

Throughout the nineteenth century this was the accepted view of the matter. Story’s views have been noted. Cooley, in his treatise, Constitu-

\textsuperscript{35} 19 Writings of Thomas Jefferson 414 (Memorial ed. 1904).

\textsuperscript{36} 12 Hening, Statutes at Large 84, 86 (1785). The original draft of the bill, with indications of the deletions made by the Virginia Assembly, is given in 1 Stokes, Church and State in the United States 392-94 (1950).
tional Limitations, makes it clear that the principal function of the No Establishment concept is to insure religious liberty.\textsuperscript{37} He states that certain things are not lawful under any of the American constitutions, among these:

Any law respecting an establishment of religion. The legislatures have not been left at liberty to effect a union of Church and State, or to establish preferences by law in favor of any one religious persuasion or mode of worship. \textit{There is not complete religious liberty where any one sect is favored} by the State and given an advantage by law over other sects.\textsuperscript{38}

2. The Relevant Supreme Court Decisions

A. THE BRADFIED, COCHRAN, AND EVerson DECISIONS

\textit{Bradfield v. Roberts, Cochran v. Board of Educ.,} and \textit{Everson v. Board of Educ.} are the three decisions of the Supreme Court—and the only three—which directly concern \textit{aid-providing} by government in the sense presented by the instant problem of federal aid to education in church-related schools.

\textit{Bradfield v. Roberts}\textsuperscript{39} lends support to the argument that federal aid to secular education in church-related schools, of the kind described herein on page 411 \textit{supra}, would be constitutional. The Court there held that the appropriation by Congress of money to a Catholic hospital, as compensation for the treatment and cure of poor patients under a contract, did not constitute an appropriation to a religious society in violation of the No Establishment Clause. The Court noted that the hospital was owned by a corporation and that, legally speaking, the corporation was secular and nonsectarian and subject solely to the control “of the government which created it.” However, the Court also noted that the hospital was conducted under the auspices of the Roman Catholic Church. “The meaning of that allegation,” said the Court, “is that the church

\textsuperscript{37} The Court in a recent case, in the context of discussing standing to sue, stated that “the writings of Madison, who was the First Amendment’s architect, demonstrate that the establishment of a religion was equally feared because of its tendencies to political tyranny and subversion of civil authority.” McGowan v. Maryland, 366 U.S. 420, 430 (1961). Later in the same case the Court quoted Madison’s comment on his original draft of the first amendment (which was not adopted by the Congress): “Mr. Madison ‘said, he apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience. . . .’” Id. at 441.

\textsuperscript{38} Cooley, Constitutional Limitations 469 (2d ed. 1871).

\textsuperscript{39} 175 U.S. 291 (1899).
exercises great and perhaps controlling influence over the management of the hospital." The Court also noted that the stockholders of the corporation were all nuns. Thus the Court (1) did not rule that a direct appropriation to a sectarian institution would be unconstitutional; (2) did hold that a direct appropriation might be made, for the performance of a public function, to an institution conducted under the auspices of a church which exercised "perhaps controlling influence" over it. Most significant in the Bradfield decision is the Court's direct disavowal of the point of view which had been advanced by those who brought the suit, that religious institutions performing public functions cannot, on account of the No Establishment Clause, be aided by government. The Court stated that the plaintiffs had said that Congress has no power to make "a law respecting a religious establishment," and then pointedly noted that "a law respecting a religious establishment" was "not synonymous with that [language] used in the Constitution," namely, "a law respecting an establishment of religion." 

Cochran v. Board of Educ. established that the use of government funds to provide secular textbooks for parochial school students is constitutionally justifiable as an expenditure for a public purpose. Under Louisiana statutes, boards of education were directed to provide "school books for school children free of cost to such children," and appropriations were made accordingly. The plaintiffs contended that they were being taxed to support a private purpose, contrary to the provisions of the fourteenth amendment. They stated the purpose of the acts to be "to aid private, religious, sectarian and other schools not embraced in the public educational system of the state by furnishing textbooks free to the children attending such private schools." The Supreme Court held the appropriations and the program of providing textbooks constitutional, in spite of the fact that children receiving textbooks under the program were enrolled in sectarian schools, noting that the textbooks involved were not religious books but books relating to secular subjects.

Again, in Cochran, the Court refused to hold that, because an institution was under religious auspices, its educational program could not receive governmental aid proportioned to the public function which such program involved. The Court was able clearly to distinguish the

40 Id. at 298.
41 Id. at 297.
42 281 U.S. 370 (1930).
43 Id. at 374.
public aspect of parochial school education from its private (religious) aspect and held, in effect, that whatever benefit might accrue to the institution from the aid given, such was incidental to the public benefit conferred upon the citizen-pupil and therefore constitutionally without significance. Per Hughes, C.J., the Court stated:

The schools, however, are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation because of them. The school children and the state alone are beneficiaries . . . . The legislation does not segregate private schools or their pupils, as its beneficiaries, or attempt to interfere with any matters of exclusively private concern. Its interest is education, broadly; its methods comprehensive. Individual interests are aided only as the common interest is safeguarded.\(^{44}\)

It is true that at the time of the *Cochran* decision the Supreme Court had not specifically held the first amendment applicable to the states through the fourteenth amendment.\(^{45}\) But the great point of the *Cochran* opinion is this: it establishes flatly that the teaching of secular subjects in a parochial school is the performance of a public function and that such program may therefore be governmentally aided. It was not until the *Everson* case, discussed *infra*, that the Court considered the impact of the first amendment on legislation which met the public purpose requirements of the fourteenth amendment.

In *Everson v. Board of Educ.* \(^{46}\) the Supreme Court held constitutional a New Jersey statute which provided that reimbursement to parents might be made out of public funds for transportation of their children to (*inter alia*) Catholic parochial schools on buses regularly used in the public transportation system. The decision was made in the face of first amendment objections to the New Jersey program which had been directly raised. As can be seen, this holding is directly relevant to the issues stated on pages 401 and 411 of this study. The underlying principle of the case is plain: government aid may be rendered to a citizen in furtherance of his obtaining education in a church-related school. Justice Black, for the majority, stated:

It is undoubtedly true that by the New Jersey program children are helped to get to church schools. There is even the possibility that some of the children

\(^{44}\) Id. at 375.

\(^{45}\) Eighty-five years previously the Court, in a case involving a claim of a denial by Louisiana of rights under the free exercise clause of the federal constitution, had held that "the Constitution makes no provision for protecting the citizens of the respective States in their religious liberties." *Permoli v. Municipality No. 1 of the City of New Orleans*, 3 How. (44 U.S.) 589, 609 (1845).

\(^{46}\) 330 U.S. 1 (1947).
might not be sent to the church schools if the parents were compelled to pay their children’s bus fares out of their own pockets when transportation to a public school would have been paid for by the State.\textsuperscript{47}

It is true that Justice Black, in the course of his opinion, then stated:

The “establishment of religion” clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from Church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect “a wall of separation between Church and State.”\textsuperscript{48}

For making this oft-quoted statement, Justice Black has been criticized as having gone well beyond the necessities of decision in essaying upon the supposed application of the No Establishment Clause to a number of cases not then before the Court. The statement, however, must be regarded as more than dictum.\textsuperscript{49} It is, in fact, part of the rationale of the decision, and must be read in the light of the actual result of the case: school bus benefits at government expense to citizens, to enable them to acquire education in church-related schools. That is to say: conformably with even so stringent an interpretation of the No Establishment Clause, secular education in church-related schools (and that was precisely and solely what was there involved) is supportable by government.

Unfortunately, the next succeeding paragraph of the Black opinion is often omitted from the discussion of disestablishment problems, but it forms the inseparable complement to his foregoing statement, necessarily resolving the tension between the two concepts of No Establishment and free exercise, which concepts would otherwise become unworkable absolutes. Justice Black stated:

We must consider the New Jersey statute in accordance with the foregoing

\textsuperscript{47} Id. at 17.
\textsuperscript{48} Id. at 15-16.
\textsuperscript{49} Justice Black, speaking for the Court this year in Torcaso v. Watkins, denies that the statement was dictum. 367 U.S. 488, 493-94 (1961).
limitations imposed by the First Amendment. But we must not strike that state statute down if it is within the state's constitutional power even though it approaches the verge of that power. 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, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith or lack of it, from receiving the benefits of public welfare legislation. While we do not mean to intimate that a state could not provide transportation only to children attending public schools, we must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief.50

Everson thus teaches that aid rendered to a citizen in order to obtain state-prescribed education in a church-related school is not, in the constitutional sense, "aid to religion," or a "financing of religious groups," or "support of the religious function" (to borrow terms used by various objectants to aid to education in church-related schools). It is recognition of the principle that government may assist all public service aspects of an educational enterprise.51 The decision, therefore, conclusively establishes a logical and enlightened "social benefits" doctrine, weighing (in the best traditions of the Supreme Court) the social benefit52 conferred by government action, relatively to prohibited government action.

To what subjects may these benefits extend? Justice Black, writing for the majority, said that they included also police and fire protection, connections for sewage disposal, public highways and sidewalks. He

50 Id. at 16.
51 Justice Frankfurter, a dissenting justice in Everson, commented upon its holding in his separate opinion in the Sunday Law Cases as follows:

[T]his Court held in the Everson case that expenditure of public funds to assure that children attending every kind of school enjoy the relative security of buses, rather than being left to walk or hitchhike, is not an unconstitutional "establishment," even though such an expenditure may cause some children to go to parochial schools who would not otherwise have gone. The close division of the Court in Everson serves to show what nice questions are involved in applying to particular governmental action the proposition, undeniable in the abstract, that not every regulation some of whose practical effects may facilitate the observance of a religion by its adherents affronts the requirement of church-state separation. 336 U.S. at 467 (separate opinion).
52 See discussion at p. 433-34 infra of the many "social benefits" relating to education in church-related schools which already have the sanction of legislative constitutional precedent.
said that cutting off these services would make it far more difficult for the school to operate and that it was no purpose of the first amendment to bring about such a result. 53 He noted that such services were "indisputably marked off from the religious function," but he did not clarify this point or what he meant by "the religious function." 54 However, at an earlier point in his opinion he explicitly recognized the full force of the *Cochran* case, discussed *supra*, saying: "It is much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose. *Cochran v. Louisiana State Board of Education.*" 55 It would therefore appear clear that Justice Black did not include the education in secular subjects given in church-related schools within the term "religious function" which he employed. The careful avoidance by the majority of any rule which would preclude aid to church-related education so far as the secular subject training in such education is concerned is to be noted in the following oft-quoted section of the opinion: "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." 56 The foregoing language excludes aid in support of (a) the teaching or practicing of religion ("religious activities,"

53 330 U.S. at 18.
54 Similarly indistinct is the expression of the Vermont Supreme Court in *Swart v. South Burlington Town School Dist.*, 122 Vt. 177, 167 A.2d 514 (1961), cert. denied sub nom. Anderson *v. Swart*, 366 U.S. 925 (1961). That court held violative of the first amendment the practice of school districts of making tuition payments to certain state-approved Catholic parochial high schools where the districts in question did not have public high schools. This practice was authorized by state statutes, which did not, however, state whether the tuition should be paid to the parent or to the child or to the school. The plaintiff taxpayer sought an injunction to restrain the continuance of payments to the schools. The court cited the *Bradfield, Cochran, and Everson* decisions. In the *Swart* case, although the court stressed that the high schools in question were an "integral part" of the Catholic Church, this was also true in *Cochran*, which case the court professed to follow. Undoubtedly the real reason for the decision in *Swart* lay in the fact that the tuition payments, which were made directly to the schools, were not in some manner apportioned to support of the nonreligious instruction given. This view finds support in the particularity with which the court noted that in *Cochran* none of the books furnished by the state was "expected to be adapted to religious instruction." Even so, *Swart* does not hold that tuition payments made to pupils or parents for use in obtaining in church-related schools a state-approved education would be unconstitutional. The court's extensive citation of the "citizen-benefit" cases points to the contrary.

55 330 U.S. at 7.
56 Id. at 16. (Emphasis added.)
"teach or practice religion"); (b) religious institutions as religious institutions. As noted infra, the aid given in Everson did actually to an extent support religious institutions, but the majority appeared to be saying that such aid is constitutionally unobjectionable where arising as an incident to the conferring of a definite social benefit upon a citizen.

Moreover, the allusion to "the religious function" found in the majority opinion is extremely indefinite. This merely said that cutting off police, fire and sewerage services—these being "so separate and so indisputably marked off from the religious function"—"would make it far more difficult for the schools to operate."\(^57\) This is plainly not a statement that fire, police, sewer (and transportation) services are the only aids to education (a) which are not part of "the religious function"; (b) which government may constitutionally supply in the case of education in church-related schools.

It cannot readily be denied that the New Jersey program aided "the religious function," that is, helped the teaching of religion in Catholic schools to continue. Justice Rutledge, dissenting in Everson, was not able to distinguish between so-called "direct" and "indirect" benefits. He thought that what the majority had sanctioned was "aid" to religious institutions—modified by whatever adjective. This, in his view, (which is the view which lost in Everson) was unconstitutional. As Professor Paul G. Kauper has noted:

But to distinguish on principle from this type of benefit ["fringe" or "auxiliary"] and the more substantial benefits that would accrue from subsidies to pay teachers' salaries or to provide educational facilities presents difficulties, particularly when it is noted that in the Everson case the Court emphasized that the state imposed a duty on all parents to send their children to some school and that the parochial school in question met the secular educational standards fixed by the state. By hypothesis the school building and the instruction in secular courses also meet the state's requirements. When we add to this that education is appropriately a function of both government and religion, the question may well be raised whether the same considerations that govern the problems of bus transportation costs and text books, as well as the question of public grants to hospitals under religious auspices, do not point to the conclusion, whatever different conclusions may be reached under state constitutions, that the First Amendment, in conjunction with the Fourteenth, does not stand in the way of governmental assistance for parochial schools.\(^58\)

Professor Kauper might also have noted the existence of such benefits to church-related education as tax exemptions.

\(^57\) Id. at 18.

\(^58\) Kauper, Frontiers of Constitutional Liberty 136 (1956).
The rule of *Everson v. Board of Educ.* is plainly this: (1) Government may support the education of citizens in various ways. (2) "Education of citizens" may take place in church-related schools. (3) Government may not support a religion or church, as such, but so long as its program confers directly and substantially a benefit to citizen education, that program is constitutionally unobjectionable, although benefit is at the same time incidentally conferred upon a religion or a church.

*Bradfield, Cochran,* and *Everson* are therefore decisions which not only do not constitute precedent against aid, as discussed herein; they—and especially *Everson*—are clear precedent for aid, as discussed herein. And they are the only decisions of the Supreme Court of the United States which pronounce upon the financial aid-providing function of government in the sense raised by the questions herein presented.59

B. THE MCCOLLUM AND ZORACH DECISIONS

The *McCollum* and *Zorach* decisions form the next grouping of cases here of interest. Perhaps the first thing to be noted about the two cases is that they did not involve any programs of financial aid-providing by government—no grants, no loans of money or property, no rebates, credits or reimbursements. That is to say, they are not in point with respect to any such programs save insofar as they may have involved the concept of "aid" in some far less tangible or nonmaterial sense or save insofar as they contained pronouncements upon the meaning of the first amendment relevant to the problems involved instanter.

*McCollum v. Board of Educ.*60 involved an education program imposed by a local board of education in Illinois whereby pupils in the public schools were permitted to attend classes in religious instruction conducted during regular school hours upon the school premises by outside teachers representing the various faiths. Pupils not attending these classes were required to utilize the periods involved in pursuing their regular nonreligious studies. The petitioner charged that the program violated the first and fourteenth amendments. The Court held the program unconstitutional, as "a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their

59 Quick Bear v. Leupp, 210 U.S. 50 (1908), is not in point, because it dealt with tribal funds, not public funds.
60 333 U.S. 203 (1948).
The Court stressed that the fact that the program was upon a nonpreferential basis did not relieve it from the force of first amendment objections; the state's tax-supported public schools could not constitutionally be used for the dissemination of religious doctrine. The state could not, without violating the first amendment, use its compulsory attendance machinery to provide religious classes for sectarian groups. This was the opinion of the Court. Justice Frankfurter concurred, offering various grounds for objection to the school program which were not stated in that opinion. He was joined by Justices Jackson, Burton and Rutledge. Justice Reed wrote a lengthy dissent.

The case, of course, is not in point with respect to programs of grants, loans, tax rebates, etc. What precedent value it may be considered to have with respect to the instant problem lies in analogy, but the factual analogy is at best remote. The case does present a re-emphasis of the statements of Justice Black in Everson respecting the scope of the No Establishment Clause, and supplies this as its ratio decidendi. This, coupled with Justice Black's three times employing the phrase "wall of separation between church and state," led many commentators to conclude that the Court had now stated a doctrine of absolute separation of church and state and that the ground had now been judicially prepared for the liquidation of fruitful relationships between government and religion which had been the American experience of one hundred sixty years. These commentators were proved incorrect by the decision of the Supreme Court in 1951 in Zorach v. Clauson.

Zorach, like McCollum, involved a "released time" program, the program considered in Zorach, however, being one which took place off the school premises. As in McCollum, however, the student not participating in the program was to remain in the classroom. As in McCollum, the administrative machinery of the public school system was employed in the running of the program. Here, as in McCollum, the program was attacked upon the basis of first-fourteenth amendment objections. The Supreme Court held the program constitutionally unobjectionable.

So far as the problems presented for consideration by this study are concerned, there are two points especially to be noted with respect to the Zorach decision: (1) the case is not, upon its facts, in point with

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61 Id. at 210.
62 Id. at 211.
63 Id. at 212.
64 343 U.S. 306 (1952).
respect to loans, grants, tax rebates, etc.; (2) the majority opinion, through its lengthy statement upon the first amendment, makes it clear beyond all question that the first amendment is not to be taken as a weapon for the liquidation of the salutary American tradition of government-religion relationships. It moreover makes clear that the phrase, "separation of church and state," is not to be taken in any absolute sense:

The First Amendment . . . does not say that in every and all respects there shall be a separation of Church and State. Rather it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise, the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly. Churches could not be required to pay even property taxes. Municipalities would not be permitted to render police or fire protection to religious groups. Policemen who helped parishioners into their places of worship would violate the Constitution. Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; "so help me God" in our courtroom oath—these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: "God save the United States and this Honorable Court."66

Far from holding to absolutist concepts respecting a "wall of separation," the Court further stated:

We are a religious people whose institutions presuppose a Supreme Being. . . . When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For then it respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.68

The Court also suggested limits beyond which government might not go in cooperating with religion, stating that government may not (1) "finance religious groups," (2) "undertake religious instruction," (3) "blend secular and sectarian education," or (4) "use secular institutions to force one or some religion on any person."67 These points had already been stated in Everson, and here again it is plain that they cannot be

65 Id. at 312-13.
66 Id. at 313-14.
67 Id. at 314.
asserted as constitutional blocks to such financial aid to education in church-related schools as is here under consideration. These do not involve the financing of religious groups but instead the financing of citizen education.\textsuperscript{68} By providing support for such citizen education, government is in no sense undertaking religious instruction nor a blending of that with secular education. Nor is it, of course, in any way utilizing secular institutions to force religion on anyone.

In view of the decision in \textit{Zorach v. Clauson}, there has been much speculation as to whether the Court there virtually overruled the \textit{McCollum} decision. The dissenting justices in \textit{Zorach} believed this to have been the case, Justice Black saying that he saw "no significant difference between the invalid Illinois system and that of New York here [in \textit{Zorach}] sustained."\textsuperscript{69} Justice Frankfurter stated that the principles accepted by the court in \textit{McCollum} "are disregarded in reaching the result in this case,"\textsuperscript{70} while Justice Jackson said "the McCollum case has passed like a storm in a teacup."\textsuperscript{71} Constitutional scholars have made similar observations. Professor Kauper states: "One may well agree with the dissenters in \textit{Zorach} that the majority decision in the \textit{Zorach} case . . . amounted to an overruling of the \textit{McCollum} case."\textsuperscript{72} Undoubtedly the correct view to be taken today of the \textit{McCollum} decision is that which is plainly suggested by Chief Justice Warren speaking for the majority of the Court in \textit{McGowan v. Maryland}.\textsuperscript{73} In that case the Chief Justice, in disposing of the "establishment" contentions there raised, referred to the \textit{McCollum} case, stating its holding:

Thus, in \textit{McCollum v. Board of Education}, 333 U.S. 203, the Court held that the action of a board of education, permitting religious instruction during school hours in public school buildings and requiring those children who chose not to attend to remain in their classrooms, to be contrary to the "Establishment" Clause.\textsuperscript{74}

\textsuperscript{68} See discussion of \textit{Everson} at pp. 417-22 supra.

\textsuperscript{69} 343 U.S. at 316 (dissenting opinion). Subsequently Justice Black in \textit{Torcaso v. Watkins}, 367 U.S. 488, 494 (1961), noted that the Court in \textit{Zorach} had stated: "We follow the McCollum case." Undoubtedly this does not represent a change in Justice Black's views since in \textit{Torcaso} he was addressing himself to the narrow question of the validity of a test oath. This was the context of his notation, which was immediately followed by his stating that nothing decided or written in \textit{Zorach} would justify sustaining a test oath.

\textsuperscript{70} 343 U.S. at 322-23.

\textsuperscript{71} Id. at 325.

\textsuperscript{72} Kauper, Frontiers of Constitutional Liberty 122 (1956).

\textsuperscript{73} 366 U.S. 420 (1961).

\textsuperscript{74} Id. at 442.
It is, of course, this precise holding of *McCollum* which today survives as the law of that case. Sweeping dicta in the case which justifiably gave rise to fears that the No Establishment Clause should be interpreted to create cleavage, if not hostility, between government and religion were given strongly moderating limitation by the Court in *Zorach*.

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It may be concluded from the *McCollum* and *Zorach* decisions that (1) they do not constitute precedent against the kinds of possible aid to church-related education here under discussion; (2) the Court has specifically rejected the view that the Constitution requires an absolute separation of church and state and instead makes it clear that government and religion may in various ways cooperate. So far as an absolutist concept of the "separation" principle may be derived from the *McCollum* case, that concept is today constitutionally dead.

By its broad and eminently practical view of the No Establishment Clause—a view which expressly recognizes governmental accommodations to the religious interests of the people—the *Zorach* case goes some distance to argue in favor of, rather than against, such governmental aid to education in church-related schools as is herein discussed.

C. THE MEYER AND PIERCE DECISIONS

*Meyer v. Nebraska* and *Pierce v. Society of Sisters* form the third relevant group of cases. They relate, in differing ways, to rights of free choice in selecting educational institutions. In a more profound sense they stand as constitutional barriers against the imposition by the state of an exclusive educational pattern aimed at creating an official *Kultur*.

*Meyer v. Nebraska*75 involved a state statute which made it a crime for any teacher to teach any subject in any elementary school in any language other than English. Meyer, a teacher in a parochial school maintained by the Zion Evangelical Lutheran Congregation, was convicted under the statute of teaching the reading in the German language of Bible stories to a child. The statute was enacted just after the close of World War I, and it recited the existence of an emergency. The Supreme Court of Nebraska in upholding the conviction, considered that to have children become acquainted with any foreign language was

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75 262 U.S. 390 (1923).
"inimical to our own safety." The requirements of the statute the court therefore upheld as a reasonable exercise of the police power. The Supreme Court of the United States reversed, holding that the statute as applied violated the rights of the teacher guaranteed by the due process clause of the fourteenth amendment.

In arriving at its conclusion the Court stressed the importance of education in America, adverting, in relation thereto, to the Ordinance of 1787. It found, however, no harm in mere knowledge of the German language. It then went on to describe three groups of rights which it declared the Constitution protected against unreasonable intrusions by the state: the right of the teacher, the right of the parent, the right of the child. Of the statute the Court then said:

Evidently the legislature has attempted materially to interfere with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their young.76

Thus the Court struck at a doctrine which is everywhere identified with modern totalitarian regimes and which unhappily is on the ascendancy in the United States: the view that all educational rights are the possession of the state.77 The Court here forcefully pointed out the existence of rights in other groups. While conceding that "the state may do much, go very far, indeed in order to improve the quality of its citizens, physically, mentally, and morally," yet, it insisted "the individual has certain fundamental rights which must be respected." The Court stated moreover: "The desire of the legislature to foster a homogeneous people with American ideals . . . is easy to appreciate . . . ."78 But it warned that the means adopted could not be means violative of the liberty guaranteed by the Constitution.

*Meyer* has great significance with respect to the questions to which this study addresses itself. It is more and more insistently argued that only one form of education is really entitled to exist in the United States;

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76 Id. at 401. (Emphasis added.)

77 Indeed the Court with great accuracy detailed the relationship between complete state absorption of education and the marking of the totalitarian society, referring to the proposals of Plato that the state take the young for their upbringing, totally isolating them from their parents. The Court remarked: "In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. . . . [I]t will hardly be affirmed that any legislature could impose such restrictions upon the people of a state without doing great violence to both letter and spirit of the Constitution."77 Id. at 402.

78 Id. at 401-02.
that, apart from constitutional considerations, education in church-related schools has no claim to governmental support because—though it teaches what the state requires—it also teaches religion. It thus lacks the all-important character of complete “officialness” and is a force contributing to cultural heterogeneity, diversity, pluralism.

So far as it is part of the argument against aid to education in church-related schools that we should have but a single, state-run, uniformitarian system of education in the United States, the Supreme Court in *Meyer v. Nebraska* warned that homogeneity is not to be attained at the sacrifice of basic teacher, parental and child rights. It also gave warning—highly significant in view of cries for uniformity based upon Russian achievements—that the invocation of “emergencies” does not command the ouster of such basic rights.

The landmark decision in *Pierce v. Society of Sisters*79 involved an expanded recognition of parental and child rights in education.80 It involved an even more positive rejection of statism in education than had been made by the Supreme Court in the *Meyer* case. As in *Meyer*, there was involved a statute aimed at creating a uniformitarian scheme of education, but whereas *Meyer* concerned the question of whether the state has absolute power to prescribe curriculum, *Pierce* concerned the question of whether the state has a monopoly over education itself. The teaching of the *Pierce* case is of central importance with respect to issues presented for discussion in this study.

A statute of the state of Oregon required every parent or other person having custody of a child between eight and sixteen years of age to send such child to a public school. Failure to comply was made a misdemeanor. The statute was the result of a campaign to “Americanize” education in Oregon launched in 1920 by the Imperial Council, A.A.O. Nobles Mystic Shrine and certain related groups. Their purpose was stated on the official ballot when the compulsory education bill was before the electorate. The sentences are instructive at the present hour:

> Our nation supports the public school for the sole purpose of preservation.

> The assimilation and education of our foreign-born citizens in the principles of our government, the hopes and inspiration of our people, are best secured by and through attendance of all children in our public schools.

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79 268 U.S. 510 (1925).

80 The right is in the parent until the child is emancipated; the right is otherwise in the child. The *Pierce* decision, in defining parental rights, stressed protection of the child, and by necessary implication, his right to be educated in nonstate institutions. Id. at 535.
We must now halt those coming to our country from forming groups, establishing schools, and thereby bringing up their children in an environment often antagonistic to the principles of our government.

Mix the children of the foreign-born with the native-born, and the rich with the poor. Mix those with prejudices in the public school melting pot for a few years while their minds are plastic, and finally bring out the finished product—a true American.81

The “Americanization” campaign swept the state and the measure became law. The Hill Military Academy and the Society of Sisters sought injunctions restraining enforcement of the statute, alleging its unconstitutionality. Ranged on the side of the Society of Sisters and Hill Military Academy were the Domestic and Foreign Missionary Society of the Protestant Episcopal Church in the United States of America, the North Pacific Union Conference of Seventh-Day Adventists, the Evangelical Lutheran Synod of Missouri and Ohio, twenty-five ministers of the Presbyterian Church, the Catholic Civil Rights Association of Oregon, and the American Jewish Committee.

The Protestant Episcopal brief amicus curiae saw the state monopoly over education created by the statute as “threatening the whole structure of religious education and morality.” The Seventh-Day Adventist brief amicus curiae saw the statute as breaching “the common law, or natural right” of the parent “to direct the education of the child” and:

The natural rights of the parent for which we contend in this case preceded the state, and the government, formed to “secure these” certainly ought not to take any action which would subvert the very purpose of its creation.82

The most extensive and learned brief amicus curiae to be filed in the case was that written by Louis Marshall on behalf of the American Jewish Committee. He expressed his fears as to what the practical results might be of state absorption of all education:

Recognizing in the main the great merit of our public schools system, it is nevertheless unthinkable that public schools alone shall, by legislative compulsion rather than by their own merits, be made the only medium of education in this country. Such a policy would speedily lead to their deterioration. The absence of the right of selection would at once lower the standards of education. If the children of the country are to be educated in accordance with an undeviating rule of uniformity and by a single method, then eventually our nation would consist of mechanical Robots and standardized Babbitts.83

81 Oregon School Cases: Complete Record 732 (1925).
82 Id. at 594.
83 Id. at 615.
Against the slander—similar to that heard today—that parochial and private schools are somehow "un-American," the American Jewish Committee brief stated:

There is no foundation in truth for this statement. The private and parochial schools which exist throughout the country are conducted on the same patriotic lines as are our public schools.84

Moreover:

Among the advantages of private and parochial schools is the fact that there prejudices are apt to be mitigated. At all events they are not stimulated in a truly religious atmosphere or in a genuine cultural environment.88

Marshall inveighed against the exponents of uniformitarian education:

All of these statements combined lead to the conclusion in the minds of those responsible for this species of argumentation, that by the education of the youth of the nation in our public schools "all shall stand upon one common level." By that doubtless is meant the dead level of uniformity. God forbid that that shall be the case!86

But the most trenchant criticism of the statute and of the philosophy of those who defended it Marshall reserved for the conclusion of his brief. The point is most pertinent in view of charges made today that church-related schools are "divisive." Backers of the statute had stated: "Our children must not under any pretext, be it based upon money, creed or social status, be divided into antagonistic groups, cliques or cults there to absorb the narrow views of life as they are taught."87

This view Marshall castigated:

Here those who send their children to private and parochial schools because of their creed are charged with constituting antagonistic groups and as absorbing 'narrow views of life.' In other words, parents who are anxious for the future welfare and happiness of their children, and who seek to dedicate them to moral, ethical and religious principles, are denounced for sending their children to private and parochial schools, because, forsooth, the views of life which they there absorb are characterized as 'narrow'.

What does that mean but an attempt on the part of the protagonists for this law to sit in judgment upon their fellow-citizens whose ideals differ from theirs? How does such a mental attitude differ from that which prevailed when governments sought to enforce uniformity of religious beliefs and punished nonconformists as criminals?88

84 Id. at 618.
85 Id. at 619.
86 Id. at 620.
87 Id. at 621. (Emphasis added.)
88 Id. at 621-22.
The Supreme Court of the United States affirmed the decrees of the lower court enjoining enforcement of the statute. Its basis for affirmance was that the statute deprived plaintiffs of liberty and property contrary to the guarantees of the fourteenth amendment. The Court noted that the District Court of the United States for the District of Oregon had ruled that the statute interfered with the schools’ “free choice of patrons” and that “parents and guardians, as part of their liberty, might direct the education of children by selecting reputable teachers and places.”89 The Supreme Court further stated (with respect to schools operated by the Catholic Church): “The Compulsory Education Act of 1922 has already caused the withdrawal from its schools of children who would otherwise continue, and their income has steadily declined.”90

Acknowledging the power of the state reasonably to regulate all schools, the Court noted that the district court had declared that private schools in question “were not unfit or harmful to the public.”91

The Supreme Court concluded that, under the doctrine of Meyer v. Nebraska it was “entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control.”92 The Court then stated, in effect, that it is not within the competency of the legislature to vest in the state a monopoly of education: “As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state.”93 The Court was, of course, stating that the Compulsory Education Act of 1922, creating the state educational monopoly, did not bear reasonable relationship to a purpose which was within the state’s competency.

Again stressing the parental rights and sharply attacking that concept of governmental power which would result in subjecting all to a single educational mold, the Court stated:

The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny

89 268 U.S. at 533-34.
90 Id. at 534.
91 Ibid.
92 Ibid.
93 Id. at 535. (Emphasis added.)
have the right, coupled with the high duty, to recognize and prepare him for additional obligations.94

The teachings of *Pierce* are of importance with respect to the issues here presented. First, *Pierce* holds that there is no power in the state to monopolize education. Secondly, *Pierce* states that the child is not a mere creature of the state. Thirdly, *Pierce* holds that parents may, in the discharge of their duty under state compulsory education laws, send their children to church-related schools rather than to public schools if the church-related schools meet the secular educational requirements which the state has constitutional power to impose.95 This is described by the Court as a *right*—not a privilege but a part of that "liberty" protected under the due process clause of the fourteenth amendment (and also undeniably of the fifth amendment).96 This becomes a consideration to be weighed where a program of governmental spending upon education in public schools may reach such proportions as to require the cessation of all other kinds of education in the land and *de facto* to remove all possibility of the exercise of the parental right of choice.

The *Pierce* decision has received subsequent recognition by members of the Supreme Court as having established protection to parents and to children under the free exercise clause of the first amendment. Justice Rutledge so recognized it in his dissenting opinion in the *Everson* case,97 and Justice Frankfurter in his concurring opinion in the Sunday Law Cases, in which Justice Harlan joined.98

Certain essential theses of the *Pierce* decision find subsequent expression in the racial desegregation cases.99 Here, an "official" plan of free education for Negro children was prescribed by the state. These children felt themselves, however, constitutionally entitled to receive their schooling in institutions which were "unofficial" as to them. The Supreme Court, by the fact of its decision in *Brown*, inferentially denied any supposedly supreme power in the states to require attendance at "official" schools. Moreover, there appears in the *Brown* opinion (by a

94 Id. at 534. (Emphasis added.)
95 Specific recognition of this was given in the opinion of the Court in *Everson* v. Board of Educ., 330 U.S. 1, 18 (1947). And see similar recognition by the Court in *Prince* v. Massachusetts, 321 U.S. 158, 166 (1943).
97 330 U.S. at 32-33.
unanimous Court) strong emphasis upon certain human and personal values—an emphasis which is the antithesis of statism. It spoke of education as "awakening the child to cultural values"; it spoke of the personal success of the child in life.\(^{100}\) Above all, it rejected the notion that adequate state-provided plant, teachers' salaries and curriculum went to make a real education where human personality—the "hearts and minds" of which the Court spoke—would be adversely affected.\(^{101}\) In its opinion the Court even went to the length of citing materials from the field of psychology in order to buttress its position that values of personality and related rights of conscience take precedence over "official" government programs of education, however competent these may be.\(^{102}\)

The *Meyer* and *Pierce* cases underscore the protection with which the American Constitution jealously surrounds individual rights in education. They both stress child-parental rights; by clear implication they attack the concept of a statist culture which would result from the permitting of government monopoly of education. Each gives strong basis for argument that governmental programs which result in denials to parents and children of choice in education according to the reasonable demands of conscience may be unconstitutional.

3. *Legislation as Constitutional Precedent*

While constitutional doctrines of judicial review vest in the judiciary the power ultimately to determine validity, the duty upon the legislative and executive branches to assess and to pass upon constitutionality is by no means on that account removed. Indeed, the doctrine of the presumed constitutionality of legislation rests upon the presumed scrupulous pursuit of that duty by the legislature.

No stronger answer is to be found to the argument that no aid may be afforded education in church-related schools than the fact that the Congress has in numerous ways over the years deliberately provided such aid. A list of forty-one such programs—all, by the way, consisting of grants and loans to church-related *institutions* (including educational institutions)—was issued on March 28, 1961, by the Department of Health, Education, and Welfare.\(^{103}\) One of these programs, the Surplus

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\(^{100}\) Id. at 493.

\(^{101}\) Id. at 493-94.

\(^{102}\) Id. at 494 n.11.

Property Act of 1944, has resulted in 488 grants of land and buildings to religious-affiliated schools belonging to thirty-five different denominations.\textsuperscript{104}

4. Some Permissible Forms of Aid

The wide variety of legislative precedents reveals that Congress has used many forms of aid to education in order to promote national excellence. Grants, loans, scholarships, tuition payments, and tax benefits have been among the forms used. Frequently, church-related institutions have been included on the same footing as other accredited schools and colleges. Familiar examples are the College Housing Act,\textsuperscript{105} the Surplus Property Act,\textsuperscript{106} and the G.I. Bill of Rights.\textsuperscript{107} Only very recently has it been suggested that the only permissible form of participation by church-related organizations should be through the medium of loans—with, indeed, a further limitation, now urged in some quarters, that these loans be limited to a few purposes connected, in the main, with the national defense.\textsuperscript{108}

The form of aid is important only insofar as it embodies a concrete limitation of governmental support to the public aspects of education in private nonprofit schools. As previously indicated, this study is not concerned with the constitutionality of government programs whose primary purpose and effect would be the support of the religious aspects of education in church-related schools. How, then, can a meaningful financial division be made between those costs properly attributable to the secular aspects of education and those properly attributable to the religious aspects?

Such a division is properly the task of the art of accounting, as informed by the basic legal and educational principles applicable in this area. Some of the costs in the construction and operation of a church-related school are obviously the same as costs in providing public schools; some are obviously different; and still others are similar but not identical. The basic principle which must govern here is that if government support is to be limited to the secular aspects of education in church-related schools, then government support must be directed

\textsuperscript{106} 58 Stat. 765 (1944), as amended, 40 U.S.C. § 484(j) and (k) (1958).
towards the neutral items of expense: those expenses which are substantially the same in public and nonpublic schools. A corollary of this principle is that government should not bear the complete cost of constructing and operating nonpublic schools. Keeping the government's contribution to a limited basis means that some allocation of costs will certainly have been made. So long as the government's share is directed towards the neutral expenditures, government will not be involved in the purposeful support of religion. As already indicated in the discussion of the major Supreme Court decisions, the indirect benefit or detriment which may accrue to church-related institutions from such a governmental program is not forbidden by the first amendment because important national interests in education are at stake. 109

Fundamental to the entire discussion of the allocation of costs is the principle that when both governmental and nongovernmental institutions contribute to the cost of a program, the government has no right to insist on more than the achievement of the national purposes which the government intends to promote by making the expenditures. If those purposes are achieved, the nonpublic institution is constitutionally free and financially entitled to use its own funds for its own purposes. Consequently, if the government makes a grant of funds or equipment for national purposes to a church-related school, and this grant represents only a fraction of the cost of the operation of that school, all that government is entitled to insist upon is that the purposes for which the grant was made be in fact accomplished. It has no right to require the school to abstain from the accomplishment of other and compatible purposes through the use of the school's own funds.

If this principle of allocation is extended to particular items, there is still less justification for excluding the accomplishment of compatible private purposes. For example, if the government contributes only part of a classroom, it is manifestly not entitled to the entire use of the classroom. The mutuality of financial interest and the compatibility of the public and private purposes precludes any exclusivity of the government's interest.

109 The point is stressed by Justice Frankfurter in his separate opinion in the Sunday Law Cases. Commenting upon the meaning of the No Establishment Clause, he stated the limitation of its reach: "Neither the National Government nor, under the Due Process Clause of the Fourteenth Amendment, a state, may, by any device, support belief or the expression of belief for its own sake . . . ."—the words, "for its own sake," being evidently employed to describe a primary benefit to religion. McGowan v. Maryland, 366 U.S. 420, 466 (1961).
In the case of loans, where the borrower bears the entire cost of the facility, it is particularly clear that government is without authority to require the banishment of the religious aspects of education. The national purpose is satisfied when the students learn what the government reasonably requires them to learn. It is not frustrated when they also learn their religious heritage.

Scholarships, based on merit and need, have been a frequent instrument for promoting educational excellence by the national and state governments. They exist on both the college and the high school level. Significantly, scholarship programs have carefully respected the student's and parents' freedom to choose any accredited educational institution and to study any subjects offered in that institution. No better example of the extravagant extremes to which some factions wish to push the separation of church and state can be found than in the attempts during the last Congress to limit the freedom of choice of scholarship winners both as to the institutions attended and the subjects studied. Religion, it would seem, is no longer a part of human culture.

Tuition grants differ from scholarships in being based not on merit but on some obligation of the government to provide education. At the state level, some state constitutions have limited tuition payments to public and nonsectarian schools. At the federal level, the situation is quite different. Page boys in Congress and the Supreme Court receive tuition grants from the federal government which may be applied either to a public or any private school. If Congress may give this freedom of choice to federal employees, it is difficult to see why Congress may not extend it to federal taxpayers. It would be a paradox, indeed, were the separation of church and state to mean that scholarship winners or federal employees may attend church-related schools, but that no one else may.


Tax benefits are in the unique position of having been almost universally accorded since the foundation of the country by both the state and the federal governments to all nonprofit educational institutions, church-related as well as nondenominational and public. If history means anything, such a tradition cannot be unconstitutional.112

Long-term loans, matching grants, scholarships, tuition payments, and tax benefits are only some of the possible forms of aid to education. Others will doubtless be conceived. What is important here is not a complete catalog, but the conclusion that the major forms of aid in current discussion are constitutional as applied to education in church-related schools. The form is important only as it safeguards the national purpose.

CONCLUSIONS

From the foregoing certain conclusions may be clearly drawn:
1. Education in church-related schools is a public function which, by its nature, is deserving of governmental support.
2. There exists no constitutional bar to aid to education in church-related schools in a degree proportionate to the value of the public function it performs. Such aid to the secular function may take the form of matching grants or long-term loans to institutions, or of scholarships, tuition payments or tax benefits.
3. The parent and child have a constitutional right to choose a church-related educational institution meeting reasonable state requirements as the institution in which the child’s education shall be acquired.
4. Government in the United States is without power to impose upon the people a single educational system in which all must participate.

The foregoing conclusions, drawn from the relevant Supreme Court decisions, represent only a part of the justification for aid to education in church-related schools. What must further be considered are results which would flow from a denial of such aid in the face of long-term programs of massive support exclusively to the public schools.

Some of these results would raise serious constitutional problems, while others would render meaningless certain constitutional protections presently enjoyed. These results should be carefully pondered when any program of major federal aid to education is being considered, because they would plainly entail a transformation of a free and pluralist Ameri-

can society into a society in which uniformitarianism would be certain and freedom therefore doubtful. It is indeed true that governmental spending may effect transformations of society; and in no instance is this potential in government spending programs to be more carefully examined than where such programs are directed—as in the case of subsidies for education—toward the formation of the minds of citizens.

Massive spending solely for public schools would in time result in a critical weakening of church-related schools, presaging the ultimate closing of many of them. This, taken in conjunction with the compulsory attendance laws, would mean that most children would be forced to acquire their education in the public schools. De facto, parents would no longer enjoy the freedom to send their children to church-related schools. Practically speaking, therefore, the freedom of parent and child protected by the Pierce decision would have been rendered meaningless.113

Further difficulties appear. The Supreme Court observed in West Virginia State Bd. of Educ. v. Barnette: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion . . . ."114 Yet an "orthodoxy" is expressed—inescapably so—even in a curriculum from which religious "orthodoxies" are absent. Removal, through government spending programs, of practical alternatives115 to public school education would mean that those

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113 Although economic coercion through governmental action is not to be classified, constitutionally speaking, with statutory coercion such as was considered in the Pierce case, the observation made in 1955 by Alanson W. Willcox, presently General Counsel of the Department of Health, Education, and Welfare, should be borne carefully in mind: "Whenever a state imposes a choice between . . . receiving a public benefit, on the one hand, and exercising one's constitutional freedoms, on the other, the state burdens each course to the extent that abandonment of the other is unpalatable. The deterrent to exercise of first amendment freedoms when public benefits are at stake is a real one . . . . Infringement of constitutional rights is nonetheless infringement because accomplished through a conditioning of a privilege." 41 Cornell L.Q. 12, 43-44 (1955).

114 319 U.S. 624, 642 (1943).

115 The Supreme Court has made note of the absence of alternatives as a standard for judging the coercive effect of given governmental action. The Court pointed out that in the McCollum case "the only alternative available to the nonattending students was to remain in their classrooms"; while with respect to the Maryland Sunday laws (which the Court upheld) "the alternatives open to nonlaboring persons . . . . are far more diverse." McGowan v. Maryland, 366 U.S. 420, 452 (1961). The absence (in the case of closing of church-related schools, caused by a program of massive governmental support of public schools) of any alternative opportunity to receive a form of education to which
who, in conscience, desired education in a church-related school would be forced to participate in an education in unacceptable orthodoxies. Here, as a matter of practicality, would be the social result discountenanced by the Court in *McCollum*: coercion upon the child to participate in schooling, the orientation of which was counter to his beliefs—a *de facto* denial of free exercise of religion.116

Not only "free exercise" problems would be encountered by such spending programs; "no establishment" problems would become manifest. This is because there is little guarantee that the public schools can, in actuality, maintain a completely non-"value"-inculcating program. Since life itself, humanity, history, and the social sciences are all involved in the daily life of any educational institution, "values" of one sort or another inevitably creep in. In this connection, it must be asked: If the No Establishment Clause operates to exclude the incultation of religion in the public schools, what, by constitutional definition, is "religion"?

Leo Pfeffer, of the American Jewish Congress, considers nontheistic beliefs to be "religious":

In this study I shall regard humanism as a religion along with the three major faiths: Protestantism, Catholicism, and Judaism. This, I submit, is not an unreasonable inclusion. Ethical Culture is exclusively humanist but is generally considered a religion.117

Lanier Hunt, of the National Council of Churches, is somewhat uncertain of the definition of religion, but is willing to accord it a very broad definition:

By another definition, religion is simply loyalty to ultimate values. . . . In schools, youths look for answers to questions about the origin, destiny, and meaning of life. These are religious questions. In the United States we say that every individual has a right to an education. And this is an expression of a religious conviction about the nature of the universe and man's place in it. Within the wider definition of religion, public education is perhaps the greatest religious force in American life today.118

millions of citizens would consider themselves conscientiously entitled, would highlight the coercive effect of such a program.

116 The Court continues to underscore its warnings against such uses of governmental power as will tend to coerce beliefs. Torcaso v. Watkins, 367 U.S. 488 (1961).


Justice Black’s notation in *Torcaso v. Watkins* is to the same effect:

Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Buddhism, Taoism, Ethical Culture, Secular Humanism, and others.\textsuperscript{119}

That public schools inculcate values is undeniable. Indeed, it has been said, respecting public school education:

The development of moral and spiritual values is basic to all other educational objectives. Education uninspired by moral and spiritual values is directionless.

That educational purposes rest on moral and spiritual values has been generally recognized in the public school system. The Educational Policies Commission has previously declared: "Every statement of educational purposes, including this one, depends upon the judgment of some person or group as to what is good and what is bad, what is true and what is false, what is ugly and what is beautiful, what is valuable and what is worthless, in the conduct of human affairs."\textsuperscript{120}

The foregoing statement by the Educational Policies Commission of the National Education Association of the United States and the American Association of School Administrators is qualified, it is true, by the statement contained in the same report that public schools must be nondenominational: "As public institutions, the public schools of this nation must be non-denominational. They can have no part in securing acceptance of any one of the numerous systems of belief regarding a supernatural power and the relation of mankind thereto."\textsuperscript{121} However, several of the denominations to which Justice Black made reference do not acknowledge a supernatural power. The value-objectives of one of these, the Ethical Culture Movement, are described in the following statement:

A national movement of Ethical (Culture) Societies—religious and educational fellowships based on ethics, believing in the worth, dignity and fine potentialities of the individual, encouraging freedom of thought, committed to the democratic ideal and method, issuing in social action.\textsuperscript{122}

Certainly the Court, through Justice Black, cannot have meant to say that the teaching of certain religious value-systems to child citizens is publicly supportable, whereas the teaching of certain others is not. To make a distinction based upon whether the religious value-system em-

\textsuperscript{119} 367 U.S. 488, 495 n.11 (1961).
\textsuperscript{120} NEA & AASA, Moral and Spiritual Values in the Public Schools 7 (1951).
\textsuperscript{121} Id. at 4.
braced the supernatural would be meaningless and invidious. The Court, in Torcaso, held the provision of the Maryland Constitution there involved unconstitutional because it favored "one particular sort of believers" ("believers," as the Court had noted, including also those who profess nontheistic religions).123

Obviously, under an absolutist interpretation of the first amendment, such value-inculcation must pose serious problems. Again, however, rationality should point to the solution. Value-teaching should not, in principle, be regarded as an evil, to be shouldered out of community life by some deemed necessities of the first amendment. But if such teaching may, without first amendment objection, be offered in the public schools which are supported completely by government, then it cannot be said that some compulsive mandate of the first amendment decrees that no government aid whatever can be granted to education in church-related schools because the church-related schools, too, offer a program which inculcates values.

Again, it should be apparent that there is no need for a dilemma seemingly caused by opposed claims of the free exercise clause, on the one hand, and the No Establishment Clause on the other. It is apparent that the free exercise clause as well as the No Establishment Clause must be recognized as creating limitations upon the spending power of the federal government. If all governmental spending for education in church-related schools is to be considered ruled out on account of requirements of the No Establishment Clause, governmental spending for education in public schools must also be considered ruled out due to requirements of the free exercise clause. Ours, however, is a Constitution of rationality, not one of absolutes which paralyze social action. And plainly the solution becomes one in which government should be free to make such rational adjustment as best comports with the very real social needs involved.

Apart from the question of precise holdings in cases, constitutional precedent of another sort is available in aid of a solution to the problem here presented: the view often expressed in the more recent Supreme Court decisions respecting freedom of contract, the commerce clause, due process in criminal proceedings, and equal protection, that the Constitution is not static but must be from time to time reinterpreted in view of changed social conditions.124 These decisions show a hospitality

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123 367 U.S. at 490.
124 Emspak v. United States, 349 U.S. 190 (1955); Brown v. Board of Educ., 347
to change, an awareness of widely felt social needs, an admirable balancing of competing interests, and a recognition that the demands of justice are not necessarily met by such slogans as "freedom of contract," or "separate but equal"—or "separation of church and state" (where that phrase is meant to denote absolute separation). Such pat phrases may command constitutional results while ousting rational discussion of the real and complex social problems involved.

In the present situation, where it is said that an educational crisis is upon us and that government aid to education is an imperative, it is apparent that the constitutional wisdom of the past is the necessity of the present. There is need to recognize the public contribution of education in church-related schools and to continue to utilize its beneficent contribution to the national weal. The problems involved are predominantly practical: no constitutional bar exists to the aid herein described to education in church-related schools. Practicalities, not slogans, should govern the determinations to be made—determinations which give clear recognition to the rights of parents, the rights of children, the enlargement of freedom, and the preservation of the nation.

**ANNEX A**

**STATISTICS ON ELEMENTARY AND SECONDARY SCHOOL ENROLLMENT IN THE UNITED STATES (1960)**

Column 1: Total students enrolled in all elementary and secondary schools, public and nonpublic.  
125

Column 2: Total students enrolled in Catholic elementary and secondary schools.  
126

Column 3: Catholic school enrollment as per cent of total enrollment (Column 2 divided by Column 1).

<table>
<thead>
<tr>
<th>STATE</th>
<th>Column 1 TOTAL</th>
<th>Column 2 CATHOLIC</th>
<th>Column 3 CATHOLIC/TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>816,117</td>
<td>24,530</td>
<td>3.01%</td>
</tr>
<tr>
<td>Alaska</td>
<td>45,558</td>
<td>2,252</td>
<td>4.93%</td>
</tr>
<tr>
<td>Arizona</td>
<td>333,887</td>
<td>22,746</td>
<td>6.81%</td>
</tr>
<tr>
<td>Arkansas</td>
<td>433,325</td>
<td>10,150</td>
<td>2.34%</td>
</tr>
<tr>
<td>California</td>
<td>3,698,762</td>
<td>313,784</td>
<td>8.48%</td>
</tr>
<tr>
<td>Colorado</td>
<td>430,023</td>
<td>34,369</td>
<td>7.99%</td>
</tr>
<tr>
<td>Connecticut</td>
<td>573,331</td>
<td>84,416</td>
<td>14.72%</td>
</tr>
<tr>
<td>Delaware</td>
<td>102,604</td>
<td>18,544</td>
<td>18.04%</td>
</tr>
<tr>
<td>District of Columbia</td>
<td>143,214</td>
<td>19,787</td>
<td>13.82%</td>
</tr>
<tr>
<td>Florida</td>
<td>1,038,381</td>
<td>53,833</td>
<td>5.18%</td>
</tr>
<tr>
<td>Georgia</td>
<td>949,864</td>
<td>16,659</td>
<td>1.75%</td>
</tr>
<tr>
<td>Hawaii</td>
<td>161,841</td>
<td>15,590</td>
<td>9.63%</td>
</tr>
<tr>
<td>Idaho</td>
<td>166,440</td>
<td>6,838</td>
<td>4.11%</td>
</tr>
<tr>
<td>Illinois</td>
<td>2,274,666</td>
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<td>Indiana</td>
<td>1,125,367</td>
<td>128,942</td>
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<tr>
<td>Iowa</td>
<td>672,855</td>
<td>86,473</td>
<td>12.85%</td>
</tr>
<tr>
<td>Kansas</td>
<td>516,083</td>
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</tr>
<tr>
<td>Kentucky</td>
<td>707,746</td>
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<td>11.50%</td>
</tr>
<tr>
<td>Louisiana</td>
<td>847,164</td>
<td>121,058</td>
<td>14.29%</td>
</tr>
</tbody>
</table>

125 Column 1 is an estimate derived from the addition of three figures: (1) public school enrollment as given in Office of Education Circular No. 634, Fall 1960 Statistics on Enrollment, Teachers, and Schoolhousing in Full Time Public Elementary and Secondary Day Schools, Table 3 (August 4, 1961); (2) Catholic elementary and secondary school enrollment as given in the General Summary of The Official Catholic Directory (1961); and (3) 10% of the Catholic enrollment as an estimate of the non-Catholic private elementary and secondary school enrollment. This 10% factor is based on the estimate in Biennial Survey of Education in the United States—1954-56: Statistics of State School Systems 1955-56, at 25-26 (1959).

126 The totals given in Column 2 have been derived by adding the enrollments in four categories of the General Summary of The Official Catholic Directory (1961): High Schools, Diocesan and Parochial; High Schools, Private; Elementary Schools, Parochial and Institutional; Elementary Schools, Private.

443
<table>
<thead>
<tr>
<th>State</th>
<th>Column 1 TOTAL</th>
<th>Column 2 CATHOLIC</th>
<th>Column 3 CATHOLIC/TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>Maine</td>
<td>234,597</td>
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<tr>
<td>Maryland</td>
<td>727,489</td>
<td>109,205</td>
<td>15.01%</td>
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<td>Massachusetts</td>
<td>1,072,240</td>
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<tr>
<td>Michigan</td>
<td>1,997,376</td>
<td>287,851</td>
<td>14.41%</td>
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<tr>
<td>Minnesota</td>
<td>850,684</td>
<td>143,953</td>
<td>16.92%</td>
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<tr>
<td>Mississippi</td>
<td>590,599</td>
<td>14,181</td>
<td>2.40%</td>
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<tr>
<td>Missouri</td>
<td>984,156</td>
<td>145,237</td>
<td>14.76%</td>
</tr>
<tr>
<td>Montana</td>
<td>166,480</td>
<td>18,332</td>
<td>11.01%</td>
</tr>
<tr>
<td>Nebraska</td>
<td>334,763</td>
<td>47,060</td>
<td>14.06%</td>
</tr>
<tr>
<td>Nevada</td>
<td>68,080</td>
<td>3,365</td>
<td>4.94%</td>
</tr>
<tr>
<td>New Hampshire</td>
<td>137,758</td>
<td>28,899</td>
<td>20.98%</td>
</tr>
<tr>
<td>New Jersey</td>
<td>1,370,894</td>
<td>287,717</td>
<td>20.99%</td>
</tr>
<tr>
<td>New Mexico</td>
<td>248,217</td>
<td>22,967</td>
<td>9.25%</td>
</tr>
<tr>
<td>New York</td>
<td>3,606,894</td>
<td>751,722</td>
<td>20.84%</td>
</tr>
<tr>
<td>North Carolina</td>
<td>1,114,458</td>
<td>11,302</td>
<td>1.01%</td>
</tr>
<tr>
<td>North Dakota</td>
<td>158,497</td>
<td>18,485</td>
<td>11.66%</td>
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<tr>
<td>Ohio</td>
<td>2,349,326</td>
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<tr>
<td>Oklahoma</td>
<td>558,457</td>
<td>17,688</td>
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</tr>
<tr>
<td>Oregon</td>
<td>420,672</td>
<td>29,165</td>
<td>6.93%</td>
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<tr>
<td>Pennsylvania</td>
<td>2,559,738</td>
<td>562,861</td>
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<tr>
<td>Rhode Island</td>
<td>187,674</td>
<td>48,328</td>
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<tr>
<td>South Carolina</td>
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<td>9,390</td>
<td>1.59%</td>
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<td>165,433</td>
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<td>816,229</td>
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<tr>
<td>Texas</td>
<td>2,314,718</td>
<td>148,620</td>
<td>6.42%</td>
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<td>Utah</td>
<td>242,313</td>
<td>4,116</td>
<td>1.70%</td>
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<tr>
<td>Vermont</td>
<td>90,402</td>
<td>14,101</td>
<td>15.60%</td>
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<td>Virginia</td>
<td>888,909</td>
<td>37,892</td>
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<tr>
<td>Washington</td>
<td>690,880</td>
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<tr>
<td>West Virginia</td>
<td>454,617</td>
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<td>Wisconsin</td>
<td>975,455</td>
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<td>Wyoming</td>
<td>83,094</td>
<td>3,784</td>
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</tr>
<tr>
<td>Totals</td>
<td>42,099,576</td>
<td>5,287,230</td>
<td>12.56%</td>
</tr>
</tbody>
</table>
Annex B


The conclusions of this Memorandum may be summarized as follows: (1) "across-the-board" grants and loans to church-related schools are unconstitutional; (2) tuition payments for all pupils in church-related schools are equally invalid; (3) the providing of milk, lunches, and bus transportation to pupils in church-related schools appears to be constitutional; (4) loans for special purposes not closely related to religious instruction, such as the loans in Title III of the National Defense Education Act, are probably constitutional; (5) how far the principle of special purpose loans may be extended is difficult to ascertain.

These conclusions apply only to elementary and secondary church-related schools. The inclusion of church-related colleges and universities in federal aid to higher education is fully supported by the Department in the body of the Memorandum.

In a subsequent memorandum, dated June 27, 1961, the Department of Health, Education, and Welfare explicitly sustained the constitutionality of certain proposed amendments to Title III of the National Defense Education Act insofar as they would authorize loans to private non-profit elementary and secondary schools, including church-related institutions, for the purposes of providing "special educational facilities" and "physical development facilities." Since this second memorandum is only an application of the constitutional position developed in the first, it needs no special treatment here.

Owing to the wide publicity given to the first HEW Memorandum, it has been judged advisable to present here a somewhat detailed analysis. Necessarily, this results in some repetition of the discussion of the principal cases, already treated in the body of this study. The Memorandum states that there is a "paucity of Supreme Court precedent" with respect to government aid to education in church-related schools.

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127 The Memorandum has been printed in Senate Doc. No. 29, 87th Cong. 1st Sess. 7 (1961). All page references to the Memorandum [hereinafter cited as HEW Memorandum] are to the edition in this issue of the Georgetown Law Journal.

128 HEW Memorandum 351-53.

129 Id. at 377-81.

130 Id. at 355.
Nevertheless, the Memorandum proceeds to derive a large body of supposedly controlling principles from such admittedly meager materials. This process was greatly assisted by the Memorandum's reliance, not upon the holdings of the cases, but upon sweeping generalizations in some of the majority and many of the dissenting opinions. Such generalizations, it is true, may not be readily discounted. But neither may the holdings of the cases. They are the precise decisional results deriving from particular critical facts; and it is these, not the broadly stated rationales given in their support, which are recognized as "controlling" when the precedent value of cases is assessed.

_Everson v. Board of Education_

The most important case having possible precedent value respecting the instant problem is _Everson v. Board of Educ._131 The _Everson_ case upheld, over first amendment-fourteenth amendment objections, reimbursement to parents for transportation of their children to (inter alia) Catholic schools on regular buses used in the public transportation system. This decision is not changed by characterizing it, as does the Memorandum, as a decision "by the closest margin (5-4)."132 If today the _Everson_ decision is to be adhered to, then its underlying principle must be accepted: that at least some forms of government aid may be rendered to a citizen in furtherance of his obtaining education in a church-related school. If today the _Everson_ decision is to be reconsidered, then simultaneously there must be a reconsideration of the excursive essay of Justice Black therein, relating to the historical meaning of the No Establishment Clause. Of course, under discussion of neither of the alternatives have the dissenting opinions of Justices Rutledge and Jackson significance from the point of view of precedence or _ratio decidendi_.

Taking the first of the foregoing alternatives, it is apparent that the Department Memorandum misses the significance of the _Everson_ decision:

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132 HEW Memorandum 358. Moreover, this comment in the Memorandum ignores the significance of the Feb. 20, 1961, dismissal by the Supreme Court of the appeal in Snyder v. Town of Newtown, 365 U.S. 299 (1961). Compare the subsequent footnote on this case in HEW Memorandum 361 n.5. As the Memorandum notes, the issue in Snyder was the same as that in _Everson_. The Supreme Court dismissed, 7-2, for want of a substantial federal question.
1. The Memorandum states that the Court has ruled in Everson that across-the-board grants are prohibited.\textsuperscript{139} First, it must be considered that the broad speculative generalizations respecting the scope of the No Establishment Clause appearing in Justice Black’s opinion—("The ‘establishment of religion’ clause of the First Amendment means at least this . . .")\textsuperscript{134}—must be considered as limited by the opinion of the Court in Zorach v. Clauson.\textsuperscript{135} This was recognized by Justice Black himself in his dissenting opinion in the Zorach case. It is no answer to assert, as does the Memorandum, that the Court in Zorach stated that "Government may not finance religious groups,"\textsuperscript{136} since the principal effect of government aid to parochial schools, when seen from the point of view of the public interest, would not be to aid “religious groups” but to further the public interest in education of the citizenry. The opinion of the Court in Zorach markedly departs from the opinion of the Court in Everson insofar as the scope of disestablishment is concerned, and makes it clear that state and church, though separate, may commonly participate in matters related to the public interest. Indeed in Zorach it was said:

When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs.\textsuperscript{137}

Secondly, Everson conclusively establishes the “social benefits” doctrine. We are then left, apparently, to ascertain some point at which the “social benefit” is inconsiderable and the “religious function” is predominant.\textsuperscript{138} The Court in Everson did not have before it a question of “across-the-board”\textsuperscript{139} aid, but it may logically be argued that, so far as the teaching of Everson goes, its essential “social benefits” doctrine applied today would encompass even “across-the-board” aid. The dissenting opinion of Justice Rutledge in Everson was not able to distinguish between degrees of aid, or differences

\textsuperscript{133} HEW Memorandum 351.  
\textsuperscript{134} 330 U.S. at 15-16.  
\textsuperscript{135} 343 U.S. 306 (1952).  
\textsuperscript{136} HEW Memorandum 352.  
\textsuperscript{137} 343 U.S. at 313-14.  
\textsuperscript{138} 330 U.S. at 18.  
\textsuperscript{139} Although it must be noted that the Memorandum never defines the term, “across-the-board,” which it employs.
between "direct" and "indirect" benefits or "direct" and "fringe" benefits. To Justice Rutledge, what was sanctioned by the majority was direct aid to the religious institution. In this connection Professor Paul G. Kauper has stated:

But to distinguish on principle from this type of benefit ["fringe" or "auxiliary"] and the more substantial benefits that would accrue from subsidies to pay teachers' salaries or to provide educational facilities presents difficulties, particularly when it is noted that in the Everson case the Court emphasized that the state imposed a duty on all parents to send their children to some school and that the parochial school in question met the secular education standards fixed by the state. By hypothesis the school building and the instruction in secular courses also meet the state's requirements. When we add to this that education is appropriately a function of both government and religion, the question may well be raised whether the same considerations that govern the problems of bus transportation costs and textbooks, as well as the question of public grants to hospitals under religious auspices, do not point to the conclusion, whatever different conclusions may be reached under state constitutions, that the First Amendment, in conjunction with the Fourteenth, does not stand in the way of governmental assistance for parochial schools.140

Thirdly, the reasoning of the Department Memorandum founders upon difficulties presented by the existence of such benefits to religious institutions as tax exemptions. It is at once apparent that constitutional sanction of tax exemptions (which exemptions are, practically speaking, equivalent to bounties) further weakens arguments that "direct" grants to parochial schools would be impermissible because such aid would support the "religious function" thereof.

Fourthly, an important qualification upon the "no aid" language of the Everson majority is expressly given in their opinion. It being clear that the government may not set up an official church, the No Establishment Clause appears to have its principal mandate as auxiliary to the free exercise clause. The majority opinion in Everson makes this clear. There could be no other explanation for the Court's holding that the No Establishment Clause is made applicable to the states by the fourteenth amendment. Moreover, the opinion of the Court at numerous points expressly stresses that "religious liberty" (free exercise) is the determinant with respect to all government legislation respecting religion which goes beyond "establishing" (in the British sense) a church. The opinion states: "The people . . . reached the conviction that individual religious liberty could be achieved best under a govern-

140 Kauper, Frontiers of Constitutional Liberty 136 (1956).
The Court quoted Jefferson's "Bill for Establishing Religious Freedom" in its exposition of the meaning of the No Establishment Clause, which stressed that religious liberty required no man should be compelled to support "any religious worship, place, or ministry whatsoever." Assuredly, then, the clause does not bar aid to church-related schools where the predominant benefit of such aid is not to the institution but to the citizen-student.

Fifthly, the Memorandum itself fully demonstrates that extensive government aid is presently furnished to church-related educational institutions. Or to assert, as does the Department, that such aid is not actually aid to institutions as institutions, is to do no more than really establish that across-the-board grants may be made to such institutions. As is explained in more detail infra, the "criteria" for aid which the Department (and not the Court) has constructed do not withstand analysis.

2. The Memorandum implies that the Court has ruled in Everson that loans to church-related schools are invalid. For the reasons stated supra with respect to across-the-board grants, it is clear that such loans would not be invalid. The Memorandum goes to remarkable lengths in attempting to justify its position. It cites McCollum v. Board of Educ. as authority for the proposition that loans would be unconstitutional, resting here upon its own employment of the word "lend." The opinion of the Court in McCollum nowhere employs the word "lend" or "loan," and the utilization of the classrooms in McCollum was not at all a "lending" in the sense the term is used in financial loans. Again, the Memorandum cites the Zorach case as authority, quoting therefrom the statement "Government may not finance religious groups." This begs the question, the Memorandum failing to establish that the making of loans to parochial schools would in fact be to "finance religious groups."

3. The Memorandum states that tuition payments for all church school pupils are invalid under the rule of the Everson case "since they accomplish by indirection what grants do directly." It is in large

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141 330 U.S. at 11.
142 Id. at 12, 13.
143 HEW Memorandum 352.
144 Ibid.
part true that such payments would accomplish what grants would accomplish, namely, to educate the citizen-student. As has been seen, this would violate no constitutional precedent. It is also true, however, that the Memorandum itself asserts that tuition may be constitutionally paid by the government to students in institutions of higher education. For reasons more fully explored at a later part of this analysis, it would seem clear that the fact that the student would be in an institution of elementary or secondary education would be without constitutional significance. Indeed, the Department’s principal argument in justification of rejection of aid (whether by tuition grants or otherwise) for elementary or secondary education in church-related schools, while qualifiedly upholding it in the case of higher education, would seem to work in reverse. That argument is, that education at the lower levels is general and compulsory. Since it is compulsory that all children obtain elementary education, and since the education which the state requires may be obtained in church-related schools, and since these are the sole schools which certain children may as a matter of conscience attend, and, finally, since these schools presently are educating millions of American children, therefore it would seem that the institutions performing this public task (or the children who therein fulfil their public obligation) should have a clearer claim for public funds than would institutions or students in higher education.

_McCollum v. Board of Education_

A brief answer to the Memorandum’s utilization of the _McCollum_ case would be to say simply that it is not in point. It is remarkable that the Memorandum, which finds the closely relevant _Everson_ decision to have no precedent value whatever with respect to the problem of grants and loans, discovers in the _McCollum_ decision, which dealt with a very different problem, so much value as precedent. It is true that Justice Black, writing for the majority in _McCollum_, restated his views respecting the scope of the No Establishment Clause. (It may be noted incidentally that while the Memorandum quotes extensively from the dissenting opinions of Justice Rutledge in the _Everson_ case, it all but totally ignores the lengthy dissent of Justice Reed in _McCollum_).

As has been noted, the rationale of the _McCollum_ case is seriously qualified by the subsequent decision in the _Zorach_ case. Some constitutional scholars consider that the _McCollum_ decision was in fact over-

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145 Id. at 377.
ruled by Zorach. As professor Kauper has stated: "One may well agree with the dissenters [in Zorach] that the majority decision in the Zorach case . . . amounted in substance to an overruling of the McCollum case."146

The "on-the-premises," "off-the-premises" distinction between the two cases seems not significant in view of the principal point made by the majority in McCollum, that the released time program there was unlawful because it encouraged recruitment into religion classes. This coercive element was equally present in the dismissed time program considered in Zorach, and the dissenting justices in Zorach indeed deemed McCollum to be overruled. It is interesting to note that the Department apparently agrees.147

Zorach v. Clauson

In view of what has hitherto been stated herein with respect to the Zorach decision, only the following brief comments remain to be directed to the Department's appraisal thereof.

It must be stated that the Department Memorandum largely misconceives the teaching of the Zorach case. The Memorandum states: "The most that can be said [of Zorach] is that the opinion evidenced a more flexible attitude toward problems of separation."148 Whatever legal meaning can be derived from this description is most uncertain. The dissenting opinions in Zorach were more definite. Justice Black saw in the majority opinion therein a new interpretation of the first amendment.149 So did Justices Jackson and Frankfurter.150

In attempting to establish its thesis, the Department encounters formidable difficulty in attempting to reconcile Zorach and again resorts to vague expression in appraising that case: "Zorach reaffirms that the state may not actively support a religious organization. On the other hand, it may, and perhaps under some circumstances must, temper its secular requirements if religious observances conflict with them."151 Notably, the Court in Zorach made it clear that the Constitution does not require in all respects a separation of church and state and that

146 Kauper, Frontiers of Constitutional Liberty 122 (1956).
147 HEW Memorandum 363.
148 Ibid.
149 343 U.S. at 315-20.
150 Id. at 320-25.
151 HEW Memorandum 358.
the state may in numerous ways accommodate its programs to the religious interests of its citizens and institutions.

This distinction between "aid to religion" and "accommodation of religion" is the basic proposition of Zorach. The distinction obviously makes "aid to religion" a highly technical concept, since religion was unquestionably "aided" as well as "accommodated" by the released-time program. The Department Memorandum, however, constantly applies the "no aid" principle in dogmatically literal manner without adverting to the fact that Zorach has interpreted and limited the principle in terms of a constitutional philosophy that is open to the accommodation of public services to religious interests.

Rule by semantics should never take the place of the rule of law. It can only result in complete confusion. A good example of this confusion is the Department Memorandum's assertion that loans are unconstitutional even if there is "no economic loss from the standpoint of the taxpayers."152 HEW explains that such a loan "might, nonetheless, be of measurable economic assistance to private institutions unable to secure reasonable credit from non-Government sources."153 Another example of the same confusion lies in HEW's frequent recurrence to the "liberation of funds" argument.154 Any form of joint financing by the government and religious institutions of secular activities, HEW argues, is constitutionally vulnerable, because it results at least in freeing funds for religious purposes which the religious institutions would otherwise have spent on secular welfare activities. This liberation of funds is "aid to religion" and therefore unconstitutional. Such an argument condemns itself.

It treats the "no aid" principle as if it were merely a phrase in the English dictionary. It cannot be reconciled with Zorach or the unbroken American tradition of the joint financing by religious and governmental organizations of social welfare activities.

Cochran v. Board of Education

The Memorandum dismisses the Cochran case as one of "dubious authority for the proposition that textbooks may be provided by a State to parochial school students."155 While it is true that first amendment

152 Id. at 369.
153 Ibid.
154 Id. at 370.
155 Id. at 359 n.4.
considerations were not involved in *Cochran*, it is also true that that case established that the use of government funds to provide secular textbooks for church-related school students was justifiable as being an expenditure for a public purpose. Importantly, the Court per Justice Hughes, stated:

The schools, however, are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation because of them. The school children and the state alone are beneficiaries . . . . The legislation does not segregate private schools or their pupils, as its beneficiaries, or attempt to interfere with any matters of exclusively private concern. Its interest is education, broadly; its method comprehensive. Individual interests are aided only as the common interest is safeguarded.\(^{156}\)

The *Cochran* opinion therefore recognizes that the teaching of secular subjects in a church-related school is the performance of a public function and that such program may therefore be governmentally aided.

Here, obviously, the Department might have discovered a contradiction to its repeated assertion that grants, loans, and tuition payments may not be made to church-related schools upon the supposition that these aid in the carrying out of the school’s “religious function.” The Department states that “religious considerations are intertwined in the entire fabric of sectarian education” and therefore “moneys raised by taxation cannot be used to support such education.”\(^{157}\) The Supreme Court, however, was able to distinguish the public aspect of education in church-related schools from its private (religious) aspect and held, in effect, that whatever benefit might accrue to the institution from the aid given, such was incidental to the public benefit conferred upon the citizen-student and therefore constitutionally without significance.

**Pierce v. Society of Sisters**

The Memorandum pays little heed to the Supreme Court decision in the *Pierce* case. It is true that *Pierce* was decided before it was clear that the first amendment is made applicable to the states by the fourteenth amendment. It is also true, as Professor Howe and others have noted, that decided in a single opinion with *Pierce* was the companion case of *Pierce v. Hill Military Academy*, which involved the application of the same Oregon Compulsory Education Act to a nonreligious school. However, the case plainly involved freedom of religion. The issue was specifically raised in the Society’s complaint and in its brief before the

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\(^{156}\) 281 U.S. 370, 375 (1930).

\(^{157}\) HEW Memorandum 361.
United States Supreme Court. The issue occupies a considerable part of the transcript of the oral arguments before the Court. Justice Rutledge, in his dissenting opinion in *Everson* gave recognition to the specific religious element in the *Pierce* decision.158

The true significance of *Pierce* was never stated in the Department Memorandum. *Pierce* not only upholds the liberty of parent and child freely to choose for the education of the latter a church-related school; it also denies a power in the state to monopolize education:

The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.159

It is not, of course, intended here to suggest that the economic compulsion which would be visited upon the Catholic parent and child by massive expenditures for public schools only would be legally comparable to a compulsory public education scheme such as was employed in Oregon. It is important to point out, however, that the same standardization of which the Court warned would be the probable eventual result of such a one-sided spending program. The great question of policy, upon which the Court in *Pierce* puts its finger, is whether the public interest lies in the creating of a unitary *Kultur*.

*Irrelevant Criteria*

The "criteria" for "aid" given in the Memorandum are, of course, nowhere to be found in the cases. They represent, rather, the Department's attempt to make the cases fit its thesis. The Department is able to create a thinly plausible reconciliation of the cases and the constitutional principles involved principally by refusing to define "religious function" and by refusing to state the specifics of how some sort of "aid" does in fact result in aiding "religion" or the carrying out of "religious functions." At this point in its Memorandum, of course, the Department assumes that it has conclusively established that nothing in the way of what it dubiously calls "across-the-board" aid can be made to religion.

The Memorandum thus justifies (as it must) *Everson* in that the aid there given was for a "legitimate public concern." But if aid is

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158 330 U.S. at 51.
to be justified upon this basis, then aid to any form of state-approved schooling should be upheld.

The Memorandum lays great stress upon the views of the dissenters in *Everson*, who “characterized the statute as having the purpose of getting the child to school—an indispensable part of his education.”160 But if the dissenters were right in this, and the majority upheld the statute, then *Everson* plainly holds that that which is indispensably necessary to the educating of a child in a church-related school is constitutional. This consideration is not reflected in the Memorandum.

The Memorandum, as has been indicated, is totally unable to support its distinction between such aids as police, fire and sewerage on the one hand, and tuition, books, grants or loans on the other. The problem is not solved by semantics. Calling one form of aid “incidental” and the other “direct” changes no fact. Sewerage, to which the Department refers, is a *sine qua non* to the teaching of religion to groups of children. The providing of a school bus trip to the child who cannot otherwise attend a church-related school is actually as much an aid to his getting a religious education as there being a classroom in which he may be instructed at the trip’s end. The Department’s talk about “side effects of benefiting a religious institution” is meaningless unless (1) we are supplied with specific facts showing *how*—not a religious institution, but a church or sect—comes to be benefited, and (2) whether that benefit must not be ignored when seen in relation to the benefits to the citizen-student.

Although the Department furnishes many examples of aids which it says are not aids to religion, it is at a loss to show how financial aid is any the more essential to the church-related school than the aids which the Department would sanction.

The sections of the Memorandum respecting “criteria,” it must be said in brief, are so shot through with categorical generalizations that little is served by attempting detailed analysis thereof. The controlling premises are found in such unsupported statements as “the State may not aid the religious instruction of a child”161 a “legislative proposal ... [must not be] a mere subterfuge for religious support”;162 the “means employed [must not] result ... in support of religious institutions.”163

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160 HEW Memorandum 366.
161 Id. at 368.
162 Id. at 365.
163 Id. at 366.