Science and the News

The Constitution and Religion: How High the Wall of Separation?

During the school aid debate last year the Health, Education, and Welfare Department, at Senator Morse's invitation, prepared a legal memorandum on the constitutional problems of aid to church schools; to no one's very great surprise, it found that everything the Administration was proposing seemed to be constitutionally acceptable, but that what the Administration was opposing was, unfortunately, unconstitutional. Specifically, the Department's memorandum suggested that aid for clearly nonsectarian purposes, such as for laboratory equipment, would be all right for religious elementary and secondary schools; that almost any kind of aid *not* specifically for religious purposes would be all right for universities; but that the general-purpose loans that Catholics were asking for parochial-schools would be out of bounds.

Now the Catholic position has been formally stated in a countermemorandum released last week by the National Catholic Welfare Board, and this, equally unsurprisingly, finds that the Welfare Department is mistaken, and that almost any kind of assistance to parochial schools would be constitutional so long as the proportion of aid did not exceed the portion of the school budget fairly chargeable to secular education. Two other major positions have been argued for: one is that any aid to church-related schools, at any level of education, and for any purpose, would be unconstitutional; the other is that federal aid to education in general is unconstitutional. The first of these commands a good deal of popular support, but virtually no support among the leaders of either party; the second is supported only by conservatives of the Goldwater school, but is not taken seriously in other quarters. Neither one, though, stands the remotest chance of ever being accepted by the Supreme Court, even though, in one of the paradoxes with which the law abounds, the first is actually the position that is closest in accord with a straightforward interpretation of the Supreme Court's opinions. Goldwater's position is that Congress has no power to spend money on anything that is not specifically mentioned in the Constitution, a view which was finally and firmly turned down by the Supreme Court in 1936, and which, if taken seriously, would make half of what the government is doing, such as sending a man to the moon, unconstitutional. The no-aid-to-any-church-school view, however, can point for support to the Everson case, the leading decision on aid to church schools: "No tax in any amount, large or small, can be levied," said the Court, "to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." This is pretty strong language, and might seem to put in doubt almost every program on the books giving support to higher education, since under all of them money goes to church-connected colleges. No one is much concerned, though, for if the Court were to take *that* position, nearly everyone would regard it as a disastrous thing to do, which is a nearly absolute guarantee that the court will never do it.

As for the two major positions, the Administration's and the Church's, both took a similar line of reasoning to get around the Court's apparent position: this was generally that a church school could be thought of as having two components, a religious component, for which all aid is prohibited, and a secular component, to which any aid is permitted. The awkward point for the Catholics was that this, pretty clearly, was not what the court had in mind when it wrote its decision; in the case, the court had actually upheld, by a 5 to 4 vote, the constitutionality of a New Jersey law providing free bus transportation for private as well as public school children, but on the grounds that it was only incidentally aid to the schools involved, and mainly a program to get children "regardless of their religion, safely and expeditiously to and from accredited schools." This might be stretched, as the Administration did in its argument, to allow room for quite a bit of aid under a series of narrowly defined specific programs, each of which would be justified on the grounds that it was merely a benefit for all school children, regardless of religious considerations, and not to be ruled unconstitutional merely because it incidentally benefited a religious school. But it was stretching it pretty near the breaking point to argue that it allowed room for across-the-board help, where it became awkward to argue that the help would only incidentally benefit the school.

The awkward point for the Administration was that, having taken the politically necessary position of regarding across-the-board grants or loans as unconstitutional for schools, it had to explain why similar grants or loans would be all right for colleges. What the Administration did was abandon the Everson case and argue that the nation's private institutions of higher education are just too important to deny support to merely because some of them are church-connected. But once this argument is adopted the question becomes one clearly over public policy rather than over what is constitutional. It becomes perfectly legitimate to argue that as a matter of public policy, again, private schools should be given at least the minimum amount of support necessary to permit them to survive, on the grounds that some diversity is good for the country. Once the question comes down to what is wise public policy, the matter is one for Congress rather than the Supreme Court to decide.

In practice, it is at least very likely, that this is the view that will prevail, and that any laws which go through Congress in the coming years relating to support for private education will be accepted by the Supreme Court. But so far as general aid to schools is concerned, the problem at the moment is entirely academic, since no one has yet seriously suggested a strategy that could get such a plan through the coming Congress anyway.—H.M.