

"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).