

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:

¹³¹ 330 U.S. 1 (1947).

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.