

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.¹⁴⁵ 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.

McColum v. Board of Education

A brief answer to the Memorandum's utilization of the *McColum* 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 *McColum* decision, which dealt with a very different problem, so much value as precedent. It is true that Justice Black, writing for the majority in *McColum*, 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 *McColum*).

As has been noted, the rationale of the *McColum* case is seriously qualified by the subsequent decision in the *Zorach* case. Some constitutional scholars consider that the *McColum* decision was in fact over-

¹⁴⁵ *Id.* at 377.