Recent Developments Regarding the Establishment of Religion

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I

In two recent cases, the Supreme Court finally ruled on the controversial issue of government aid to parochial schools. Taking what may seem to some to be an absurdly simple approach to a complicated issue, the Court based the legality of the aid on the type of institution involved. Aid to parochial elementary and secondary schools was found to be within the forbidden area of the establishment of religion clause and therefore unconstitutional, while aid to parochial colleges was found to be outside this area and valid.

II

In *Lemon v. Kurtzman*, the Supreme Court squarely met the issue of whether a state subsidy to parochial elementary schools for teacher's salaries violated the establishment clause of the first amendment made applicable to the states by the due process clause of the fourteenth amendment. The Court held that the subsidies in question violated the establishment clause because of the excessive entanglement between government and religion.

The *Lemon* decision consolidated three actions challenging the constitutionality of subsidy statutes in two states. In number 89, the appellants were citizens and taxpayers of Pennsylvania attacking the Pennsylvania Nonpublic Elementary and Secondary Education Act of 1968 which authorized the Superintendent of Public Instruction to "purchase" certain "secular educational services" from nonpublic schools. The "services" purchased were teacher's salaries, textbooks, and materials. The funds were paid directly to the school for the cost of these services. As a condition to aid, the schools were required to use specified accounting methods in order to identify and separate the cost of these secular services from the cost of the religious services provided. Reimbursement was limited to teachers who taught, and textbooks and materials used in, certain secular subjects. Additionally, textbooks and materials used had to be approved by the Superintendent of Public Instruction and reimbursement for any religious course was prohibited. The action was brought in the United

2 403 U.S. 602 (1971).
3 The first amendment was first applied to the states by the fourteenth amendment in Stromberg v. California, 283 U.S. 359 (1931) (freedom of speech). The religion clauses were made applicable in Cantwell v. Connecticut, 310 U.S. 296 (1940) (free exercise clause); Everson v. Board of Education, 330 U.S. 1 (1947) (establishment clause).
6 403 U.S. 602, 610 (1971) ("mathematics, modern foreign languages, physical science, and physical education").
States District Court for the Eastern District of Pennsylvania which found that the Act did not violate either the establishment or the free exercise clauses.\(^7\)

Numbers 569 and 570\(^8\) involved challenges by citizens and taxpayers of Rhode Island to the Rhode Island Salary Supplement Act of 1969.\(^9\) This Act authorized payments of up to 15% of the salaries of teachers of secular subjects in nonpublic elementary schools. These state payments were supplementary to the teacher’s base salary and payments were made directly to the teacher. To be eligible, the instructor had to teach in a nonpublic school at which the average per-pupil expenditure on secular education was less than the average spent in public schools. The schools had to submit financial data to prove the eligibility of their teachers; that is, break down their expenditures as to religious and secular instruction. The teachers could only teach subjects also taught in public schools (“secular” subjects) and could use only books and materials used in public schools. They had to promise not to teach any course in religion while being subsidized. Suit was brought in the United States District Court for the District of Rhode Island which found that the parochial school system was an “integral part of the religious mission of the Catholic Church”\(^10\) and held that the Act violated the establishment clause.\(^11\)

The Supreme Court reversed and remanded number 89 and affirmed numbers 569 and 570.

The majority opinion was written by Chief Justice Burger, joined by Justices Black, Douglas, Harlan, Stewart, Marshall, and Blackmun. The Court noted immediately that the scope of the establishment clause\(^12\) is not limited to the ordaining of a state church or a state religion:

A given law might not establish a state religion but nevertheless be one “respecting” that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment.\(^13\)

The main evils the establishment clause guards against are “sponsorship, financial support, and active involvement of the sovereign in religious activity.”\(^14\)

Keeping in mind the evils the establishment clause was designed to prevent, the Court listed the three tests to be applied whenever an act is challenged as violative of the establishment clause:

\(^8\) John R. Earley v. Joan Dicenso (no. 569); William P. Robinson, Commissioner of Education of the State of Rhode Island v. Joan Dicenso (no. 570), both at 403 U.S. 602 (1971).
\(^10\) 403 U.S. at 609.
\(^12\) “Congress shall make no law respecting an establishment of religion.”
First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, . . . finally, the statute must not foster "an excessive government entanglement with religion."15

Examination of both the Rhode Island and Pennsylvania statutes and their respective legislative histories portended that the motivating purpose behind both was to improve secular education in all schools in the state. No evidence was introduced to indicate that the legislative intent was to advance religion. The improvement of secular education is a valid public and legislative purpose.16

As to the advancement or inhibition of religion, the Court noted that both legislatures engrafted numerous restrictions upon the Act to ensure that state aid did not reach religious activities. In the abstract, at least, the religious and the secular are separable in parochial schools and aid given to one possibly may neither advance nor inhibit the other.17 The Court did not decide, however, whether the primary effect of these statutes was to aid or inhibit religion:

We need not decide whether these legislative precautions restrict the principal or primary effect of the programs to the point where they do not offend the Religion Clauses, for we conclude that the cumulative impact of the entire relationship arising under the statutes in each state involves excessive entanglement between government and religion.18

Thus, the majority effectively decided -the case on the third test—excessive entanglement between government and religion. Rather than laying down a hard rule in this area, the Court indicated that it will take a case by case approach and will "examine the character and purposes of the institutions which are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority."19

Examining the recipient schools in Rhode Island, the Court found the "substantial religious character of these church-related schools"20 made the arrangement fraught with the "grave potential for excessive entanglement."21

15 Id. at 612-13; the first two are from Board of Education v. Allen, 392 U.S. 236, 243 (1968); and the last is from Walz v. Tax Commission, 397 U.S. 664, 674 (1970).
17 Board of Education v. Allen, 392 U.S. 236, 248 (1968). "[U]nchallenged in the meager record before us in this case, we cannot agree with appellants either that all teaching in a sectarian school is religious or that the processes of secular and religious training are so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion." See also Everson v. Board of Education, 330 U.S. 1 (1947); Pierce v. Society of Sisters, 269 U.S. 510 (1925); contra, Board of Education v. Allen, 392 U.S. at 236, 252 (1968) 252 (Black, J., dissenting); Lemon v. Kurtzman, 403 U.S. 603, 641 (1971). (Douglas, J., concurring).
18 403 U.S. at 613-14.
19 Id. at 615.
20 Id. at 616.
21 Id. at 615.
which the first amendment was to guard against. Specifically, the Court saw that: (1) the schools were invariably located close to parish churches; (2) religious exercises were held regularly; (3) the buildings contained religious symbols in both classrooms and halls; (4) religiously oriented extracurricular activities were encouraged; and (5) the abundance of nuns as teachers created a predominately religious atmosphere in the schools. On the basis of this information, the majority held that:

[T]he parochial schools constituted an integral part of the religious mission of the Catholic Church. . . . This process of inculcating religious doctrine is, of course, enhanced by the impressionable age of the pupils, in primary schools particularly. In short, parochial schools involve substantial religious activity and purpose.

Proceeding to the form of aid given, the Court distinguished earlier decisions allowing the states to provide bus transportation, lunches, public health services, and secular textbooks to parochial students. Chief Justice Burger found these services to be religiously neutral—that is, their religious content was easily ascertainable—while ascertaining and policing the neutrality of teachers too closely involved the state with religion:

In terms of potential for involving some aspects of faith or morals in secular subjects, a textbook’s content is ascertainable, but a teacher’s handling of a subject is not.

Because of the pervasive religious atmosphere of these schools, the state could not, without violating the establishment clause, provide aid for teacher’s salaries on “a mere assumption that secular teachers under religious discipline can avoid conflicts” between their secular and religious duties.

After cutting off the state subsidies on this ground, the Court then forged the other edge onto its sword. Immediately after deciding that a state cannot merely give aid absent restrictions to parochial teachers without violating the establishment clause, the majority then held that if the state does provide for policing provisions and controls to ensure that the teachers are not teaching religion, excessive involvement between state and religion results even then and again the first amendment is violated! The provision for government evaluation of school expenditures and inspection of school records contained in the Rhode Island statute made “the relationship pregnant with dangers of excessive government direction of church schools and hence of churches.”

The character of the Pennsylvania schools and the restraints imposed by the statute were found to be almost identical to Rhode Island’s:

22 Id.
23 Id. at 616.
25 403 U.S. at 617.
26 Id. at 619.
27 Id. at 620.
As we noted earlier, the very restrictions and surveillance necessary to ensure that teachers play a strictly nonideological role give rise to entanglements between church and state.\(^{28}\)

Additionally, Pennsylvania required the schools to use prescribed accounting methods to facilitate state inspection.

Another defect in the Pennsylvania statute was that the aid was given directly to the schools (in Rhode Island, the money was paid to the teachers directly). The Court felt that this type of subsidy was even more of a threat to the separation that the first amendment requires. At least three earlier cases warned of direct subsidies to religious institutions,\(^{29}\) and the Court noted that varying methods of control and surveillance usually followed such direct grants. An almost unanimous feeling among the Justices was that direct subsidies violate the establishment clause.\(^{30}\)

Almost as a postscript, the Court found another even broader base of entanglement present in these cases. In communities served by church-related elementary schools, the subject of state aid is sure to be a controversial issue. Proponents and opponents of aid will each present and argue their views. Candidates will take sides, and votes will be cast in line with the voter’s faith. The Court felt that political division along religious lines would prevent meaningful discussion on more important governmental issues.

\([P]\)olitical division along religious lines was one of the principal evils against which the First Amendment was intended to protect . . . . The political divisiveness of such conflict is a threat to the normal political process.\(^{31}\)

The fact that these programs involved continuing annual appropriations of continually larger amounts contributed to the potential divisiveness inherent in such aid.

While joining in the majority opinion, Justice Douglas also wrote a concurring opinion, joined by Justice Black, in which he reiterated the limitations of \textit{Everson v. Board of Education}:

No tax in any amount, large or small, can be levied to support any

\(^{28}\) \textit{Id.}.

\(^{29}\) The Court cited \textit{Everson v. Board of Education}, 330 U.S. 1, 18 (1947); \textit{Board of Education v. Allen}, 392 U.S. 236, 243-44 (1968) and quoted from \textit{Walz v. Tax Commission}, 397 U.S. 664, 675 (1970). “Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards.”


religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.\textsuperscript{32}

Justice Douglas subscribed to the view that no tax money whatsoever is to be paid to churches or church-related institutions.\textsuperscript{33} He indicated that aid to the parochial schools for secular purposes would inevitably aid their religious purposes also and thus would always result in a violation of the establishment clause:

Yet... there are those who have the courage to announce that a state may nonetheless finance the secular part of a sectarian school’s educational program. That, however, makes a grave constitutional decision turn merely on cost accounting and bookkeeping entries... What the taxpayers give for salaries of those who teach only the humanities or science without any trace of proselytizing enables the school to use all of its own funds for religious training.\textsuperscript{34}

Justice Marshall took no part in the decision of number 89 and concurred in Justice Douglas’ opinion as to numbers 569 and 570.

Justice Brennan agreed with the decision in numbers 569 and 570, but thought that number 89 should have been reversed outright instead of being remanded.\textsuperscript{35} For Justice Brennan, the main defect was the government supervision needed to ensure compliance with the establishment clause. Again, the double-edged sword flashed: aid could not be given without restrictions because of the pervasive religious nature of the schools and the type of aid given, while at the same time restrictions and controls themselves entailed excessive involvement between state and religion. He expressly rejected the argument that some state aid should be given to parochial schools because they relieve the state of a burden which it would otherwise have to bear.\textsuperscript{36} This argument was deemed immaterial when compared with the consequences of a violation of the establishment clause. Finally, Justice Brennan intimated that for him all direct subsidies to religious institutions would “constitute impermissible state involvement with religion.”\textsuperscript{37}


\textsuperscript{35} Justice Brennan’s opinion also applied to Tilton v. Richardson (no. 153), 403 U.S. 672 (1971) in which he dissented.

\textsuperscript{36} 406 U.S. at 654 (Brennan, J., concurring).

\textsuperscript{37} Id. at 643-44, 652 (Brennan, J., concurring).
Justice White concurred in part and dissented in part. He agreed with the disposition of number 89, but would have held the Pennsylvania statute involved therein valid on its face pending findings as to the character of the schools upon remand. As to numbers 569 and 570, he would have held the Rhode Island statute valid as not violating the establishment clause. He noted that the secular purposes of both statutes were in line with constitutional requirements and that the primary effect of each was not found to be to aid religion. As to entanglement, Justice White felt that the controls used did not result in excessive entanglement of the state with religion. He noted that the evidence showed only one incident in Rhode Island where the state had to examine records and segregate secular and religious expenditures.

As a result of this decision, a state clearly may not subsidize the salaries of parochial school teachers at all:

The Court thus creates an insoluble paradox for the State and the parochial schools. The State cannot finance secular instruction if it permits religion to be taught in the same classroom; but if it exacts a promise that religion not be so taught—a promise the school and its teachers are quite willing to give—and enforces it, it is then entangled in the “no entanglement” aspect of the Court’s Establishment Clause jurisprudence.

This result follows whether the money goes directly to the teachers themselves or is paid to the school. The pervasive religious atmosphere precludes government aid. The only solution for parochial schools to secure aid would be for them to give up religious instruction entirely, something which the elementary parochial schools of this country are not about to do.

Hinted at, but not discussed in any of the opinions was the classic statement of Mr. Justice Jackson dissenting in *Everson v. Board of Education*:

If the state may aid these religious schools, it may therefore regulate them. Many groups have sought aid from tax funds only to find that it carried political controls with it. Indeed this Court has declared that ‘it is hardly lack of due process for the Government to regulate that which it subsidizes.”

The Court felt that to allow aid here might well be the first step down the establishment path and clearly would be a violation of the first amendment.

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38 Justice White’s opinion also applied to Tilton v. Richardson (no. 153), 403 U.S. 672 (1971) in which he concurred.
39 403 U.S. at 668 (White, J., concurring in part, dissenting in part).
41 403 U.S. at 624. Taking the first step in this area has been the fear of more than a few Justices. See e.g., *Everson v. Board of Education*, 330 U.S. 1, 16 (1947). (Black, J., felt providing bus transportation was carrying to the “verge” of forbidden territory); 330 U.S. at 29 (Rutledge, J., dissenting, felt that the bus transportation was the first step into the forbidden territory); *Abington v. Schempp*, 374 U.S. 203, 225 (1963) majority opinion by Clark, J.); *Walz v. Tax Commission*, 397 U.S. 664, 716 (1970). (Douglas, J., dissenting,
In *Tilton v. Richardson*, the Supreme Court answered the question whether a federal construction grant to church-related colleges violated the establishment clause of the first amendment. In a five to four decision, the Court held the establishment clause not to be violated by such grants.

The case involved a challenge to the constitutionality of the Higher Education Facilities Act of 1963 by citizens and taxpayers of the United States, residents of Connecticut. The Act provided construction grants to institutions of higher learning for physical plant expansion. Religious schools were found to be eligible because of the language of the Act providing that the buildings and facilities constructed were to be used exclusively for secular purposes and expressly excluding any building to be used for worship, sectarian instruction, or as part of a divinity school. The Act was administered by the United States Commissioner of Education who was required to ensure that the provisions of the Act were not violated. The Act provided that the United States had a twenty-year interest in the buildings constructed with such funds and that if the buildings were used for any of the forbidden purposes within that time, the government was to be reimbursed to the extent of its contribution. During this period, the Office of Education would make on-site inspections to enforce the restrictions.

The Secretary of Health, Education, and Welfare was named as a defendant, along with four church-related colleges in Connecticut which had received federal funds to build facilities under the Act. The District Court found the Act constitutional as having neither the purpose nor the effect of advancing religion.

Chief Justice Burger wrote the opinion of the Court joined by Justices Harlan, Stewart and Blackmun. They acknowledged that no hard and fast rules exist in the area of the establishment clause:

> [C]andor compels the acknowledgement that we can only dimly perceive the boundaries of permissible government activity in this sensitive area of constitutional adjudication.

Because of this, each case must be examined to find:

>\[T\]he present involvement of government in religion may seem *de minimus*. But it is, I fear, a long step down the Establishment path\).
First, does the Act reflect a secular legislative purpose? Second, is the primary effect of the Act to advance or inhibit religion? Third, does the administration of the Act foster an excessive entanglement with religion?\(^{49}\)

The purpose of the Act was to enable colleges to increase their capacity so as to better satisfy the increasing demand for higher education. The preamble of the Act stated that this expansion was needed to ensure the welfare and security of the United States. Advancing the cause of education is a valid public purpose and increasing the capacity of the nation's colleges is a valid secular legislative purpose.

As to whether the Act had a primary effect of advancing or inhibiting religion, the Court rejected the 'composite profile' of a church-related school which it had impliedly accepted in *Lemon v. Kurtzman*,\(^{50}\) decided the same day. Each college was investigated and found to be "indistinguishable from a typical state university."\(^{51}\) Although some incidental benefits had accrued to the religious function of the colleges, the enforcement policies of the commissioner had ensured that the advancement of religion was not the primary effect of the Act.

The Court accepted the rationale in *Board of Education v. Allen*\(^{52}\) that the religious and secular can be separated in a sectarian school to the extent that aid to one is not necessarily aid to the other. This holding almost involved an outright rejection of *Everson v. Board of Education*,\(^{53}\) long considered a leading decision in this area, where the court stated that the establishment clause meant at least that:

\[
\text{[N]o tax in any amount, large or small, can be levied to support any religious activities or institutions whatever they may be called, or whatever form they may adopt to teach or practice religion.}\]

Thus, the Court followed the limitations set down in *Lemon* that every case will be examined to discover if the primary effect of the legislation was to advance religion.

The Court next explored the record to find if the administration of the Act resulted in that excessive entanglement between government and religion which was found to inhere in the administration of state subsidies to parochial school teachers in *Lemon*.\(^{55}\) Parochial elementary schools were found to be an

\(^{49}\) *Id.*
\(^{50}\) 403 U.S. 602 (1971) (involving the validity at state salary subsidies to parochial school teachers).
\(^{51}\) 403 U.S. at 680.
\(^{52}\) 392 U.S. 236, 248 (1968).
\(^{53}\) 330 U.S. 1 (1947).
\(^{54}\) *Id.* at 15-16.
\(^{55}\) This independent test of constitutionality was first announced in *Walz v. Tax Commission*, 397 U.S. 664, 674-76 (1970).
integral part of the religious mission of the Catholic Church. Those schools were replete with religious symbols, and religious services were held as a matter of course. The tender age of the students made this indoctrination even more effective. The statutes in controversy in *Lemon* provided for government inspection—even auditing—of the school records as part of the policing provisions.

In church-related colleges, however, a marked absence of these religious 'affiliations' existed: (1) no attempt was made to indoctrinate students; (2) religious symbols were conspicuous by their absence; (3) religious services were not required; (4) college students were not as impressionable as those in elementary schools; and as a whole, (5) the colleges were "characterized by a high degree of academic freedom."\(^5^6\)

Since religious indoctrination was not found to be a significant purpose of these colleges, the control and surveillance fatal to the Acts in *Lemon* were not necessary here. This fact greatly lessened the potential for excessive entanglement.

Additionally, the type of aid—grants for building construction—was more "neutral" than the aid to teachers given in *Lemon* and more in line with the "sterile" types of aid sanctioned in *Everson* (bus transportation)\(^5^7\) and *Allen* (textbooks).\(^5^8\)

Since teachers are not necessarily religiously neutral, greater governmental surveillance would be required to guarantee that state salary aid would not in fact subsidize religious instruction. There [*Lemon*] we found the resulting entanglement excessive. Here, on the other hand, the government provides facilities that are themselves religiously neutral. The risks of government aid to religion and the corresponding need for surveillance are therefore reduced.\(^5^9\)

Finally, the Court saw that the aid given here was a "one-time, single-purpose construction grant."\(^6^0\) Thus, no continuing financial relationships, audits, or inspections were required. The infrequent on-site inspections by the Office of Education were considered to be *de minimus*.

Taken together these considerations lessened that potential for excessive involvement between government and religion which is the purpose of the establishment clause. Furthermore, because of the more cosmopolitan nature of colleges and universities the potential for political division along religious lines is not nearly as great as found in the community-centered elementary schools in *Lemon*.

While upholding the Act, the Court did strike down the twenty-year

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\(^5^6\) 403 U.S. at 686.  
\(^5^7\) 330 U.S. 1 (1947).  
\(^5^8\) 392 U.S. 236 (1968).  
\(^5^9\) 403 U.S. at 687-88.  
\(^6^0\) *Id.* at 688.
limitation on federal interest in the buildings. Finding no rational basis for
that period of time the majority felt that allowing the school to convert the
building into a chapel, for example, after twenty years would certainly be an
advancement of religion.

Justice White cast what turned out to be the deciding vote in this decision.\textsuperscript{61} Although concurring in the result, he found that reasoning of the majority
to be anomalous to the majority opinion in \textit{Lemon}, decided the same day and
also authored by the Chief Justice. He accepted the reasoning in the \textit{Allen} case
that the religious and secular are not so intertwined as to make aid to one result
in aid to the other. He found, in both \textit{Lemon} and \textit{Tilton}, that neither the purpose
nor the primary effect of the statutes was to aid religion. Moreover, he found no
excessive entanglement present in either case and would have upheld the aid
in both.

Justice Brennan dissented\textsuperscript{62} with the observation that all subsidies to
sectarian schools were outlawed by the establishment clause.\textsuperscript{63} He was also of
the opinion, contrary to the majority, that even the on-site inspections created
an excessive entanglement between government and religion.\textsuperscript{64}

Justice Douglas also dissented and was joined by Justices Black and
Marshall. The main thrust of his argument was to refute the position in \textit{Allen}
that the religious and secular are separable in sectarian schools:

A parochial school operates on one budget. Money not spent for one
purpose becomes available for other purposes. Thus, the fact that there
are no religious observances in federally financed facilities is not
controlling because required religious observances will take place in
other buildings.\textsuperscript{65}

He reasoned, and with much force, that through the influx of federal money, the
parochial school system will remain viable and continue to pursue its main goal
—religious indoctrination. Douglas rejected the conclusion of the Court that
these colleges were indistinguishable from state universities. No matter how hard
they may try to disguise it, and they may in order to receive aid, the main

\textsuperscript{61} Justice White's opinion also applied to \textit{Lemon v. Kurtzman}, 403 U.S. 602 (1971).
\textsuperscript{62} Justice Brennan's opinion also applied to \textit{Lemon v. Kurtzman}, 403 U.S. 602 (1971).
\textsuperscript{63} 403 U.S. at 643-44, 652 (Brennan, J., dissenting in \textit{Tilton}). This view has been
expressed in more than a few cases and by a number of Justices: see Everson v. Board of
Education, 330 U.S. 1, 20-21, (1947) (Jackson, J., dissenting) ; 330 U.S. at 28, 41 (Rutledge,
by Burger, C.J.) ; 397 U.S. at 690 (Brennan, J., concurring) ; \textit{Lemon} v. \textit{Kurtzman}, 403
U.S. 602, 640-41 (1971) (Douglas, J., concurring); see also, Board of Education v. \textit{Allen},
(1963) (Stewart, J., concurring) ; \textit{Zorach} v. \textit{Clauson}, 343 U.S. 306, 314 (1951) ; \textit{McGowan}
\textsuperscript{64} 403 U.S. at 650-51 (Brennan, J., dissenting in \textit{Tilton}).
\textsuperscript{65} \textit{Id.} at 693 (Douglas, J., dissenting).
reason parochial schools are in existence is to advance religion and indoctrinate young people in the faith.\textsuperscript{66}

Douglas seized on a point passed over by all the other Justices. "Once these schools become federally funded, they become bound by federal standards."\textsuperscript{67} In effect, they become public schools. In \textit{Engel v. Vitale},\textsuperscript{68} the Court outlawed prayer in public schools. Accordingly, \textit{Engel} would effectively prevent the conducting of religious services anywhere on a funded college campus! This result would not be a violation of the free exercise clause because of \textit{Wickard v. Filburn}\textsuperscript{69} which held that "... it is hardly lack of due process for the Government to regulate that which it subsidizes."\textsuperscript{69a}

Finally, Douglas concurred with Brennan that the surveillance entailed in this case—the on-site inspections—created a potential for an excessive entanglement of government with religion which would be violative of the establishment clause.\textsuperscript{70}

Reconciling this decision with \textit{Lemon} decided the same day and also written by the Chief Justice is difficult. Surely Justice Douglas has a valid point when he argues that such aid to sectarian schools will indirectly advance religion in these schools. The money saved by the receipt of these grants can be used for a chapel, a divinity school, or a myriad of other religious purposes. As Douglas put it so succinctly in \textit{Abington v. Schempp},\textsuperscript{71} "What may not be done directly, may not be done indirectly lest the Establishment Clause becomes a mockery."\textsuperscript{72}

Although the classification of these schools as being indistinguishable from state-supported colleges seems correct at first blush, the description fails upon closer examination. Universities such as Notre Dame, Marquette, Sacred Heart, and Wake Forest are thought of first as \textit{sectarian} and secondly as great universities. Providing funds for expansion of religious colleges will certainly have the effect of advancing their religious mission if just by exposing more students to their teachings.

The entanglement involved in \textit{Tilton}, while undoubtedly less than the audits provided for in \textit{Lemon}, still entails government supervision of these schools where none existed before.

In \textit{Allen} the Court suggested, though obliquely, that government aid had reached the "verge" of the permissible limits of the establishment clause when

\textsuperscript{66} Id. at 692 (Douglas, J., dissenting); accord, Board of Education v. Allen, 392 U.S. 236, 262 (1968) (Douglas, J., dissenting). \\
\textsuperscript{67} Id. at 693-94 (Douglas, J., dissenting). \\
\textsuperscript{68} 370 U.S. 421 (1962). \\
\textsuperscript{69} 317 U.S. 111 (1942). \\
\textsuperscript{69a} Id. at 131. \\
\textsuperscript{70} 403 U.S. at 694 (Douglas, J., dissenting). \\
\textsuperscript{71} 374 U.S. 203 (1963). \\
\textsuperscript{72} Id. at 230 (Douglas, J., concurring).
textbooks were provided to parochial students. Certainly, the *Tilton* decision may be said to be the first step toward the establishment of religion long feared by the Court. Surely, in view of Justice Douglas' reasoning concerning the application of *Engel* some

Church fathers who seek public financing for their schools soon may find themselves repeating the observation of Pyrrhus: 'With one more victory like this, the war will be lost.'

Another decision like this one and sectarian education may be lost.

Jerry Webb

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