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AID TO PAROCHIAL SCHOOLS: THE TEST FLUNKS

Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.¹

In its 1968 decision in *Board of Education v. Allen*,² the Supreme Court recognized that parochial schools in our society perform two fundamental functions. They serve the interests of the state in the secular³ education of its children and they promote the religious mission of the sponsoring church. In upholding a New York program which extended to parochial school children the benefits of free loans of state-owned textbooks, the Court in *Allen* recognized the ability of the state to aid parochial schools in a manner which did not violate the constitutional prohibition against “laws respecting an establishment of religion.”⁴ State aid programs challenged in the future, the Court said, would be measured by a two-pronged constitutional test. The program must have a secular legislative purpose and a primary effect which neither advances nor inhibits religion.

Each case which has succeeded *Allen* has presented innovative programs which sought to satisfy the secular purpose and primary effect test. In each case, the Court has found some constitutional infirmity, either by adding new criteria to the test, or by drawing exceedingly fine factual or legal distinctions. To date, not a single program of state aid to parochial schools has survived scrutiny under the Court’s establishment clause test.⁵ These results suggest that the present test used by the Court is not a useful tool for distinguishing those forms of state aid to parochial schools

3. “Secular” is defined as “not spiritual; not ecclesiastical; relating to the affairs of the present world.” BLACK’S LAW DICTIONARY 1521 (rev. 4th ed. 1968). Throughout the opinions of the Court discussed herein, “secular” has been defined as “neutral, non-sectarian, and non-ideological.”
4. U.S. CONST. amend. I. The religion clauses of the first amendment were found to be embodied within the concept of “liberty” and thus made applicable to the states under the due process clause of the fourteenth amendment in Cantwell v. Connecticut, 310 U.S. 296 (1940). See also Schneider v. State, 308 U.S. 147 (1939).
5. The term “establishment clause test”, as used herein, refers to the test currently being used by the Supreme Court to determine whether or not a program of state aid to parochial schools violates the constitutional prohibition against laws “respecting an establishment of religion.” U.S. CONST. amend. I.
which are constitutional from those which are not. This article will assess that utility.

The analysis will begin with a discussion of the development of the establishment clause test in the narrow context of state aid to parochial schools and the manner in which the Court has applied it to the various programs it has considered. This part of the analysis will illustrate that the range of aid which is acceptable to the Court is considerably narrower in scope than that expressed by the test. The second part of the analysis will view the development of the test from a theoretical perspective, and will reveal a process of retreat from the broad position expressed in Allen that the state may aid secular educational functions to the current narrow view that the "potential for political divisiveness" posed by a state aid program may constitute a supportive ground for a finding of unconstitutionality. Finally, the article will point out two possible conclusions which may be drawn from this analysis: either the Court has failed in its attempt to develop a meaningful constitutional test for measuring state programs of aid to parochial schools against the establishment clause or the Court's decision in Allen was an aberration from the Court's true position on the issue—the stern no-aid view expressed in Everson v. Board of Education.6

THE TEST DEVELOPS

Everson: The Wall of Separation

The Supreme Court first addressed the constitutionality of state aid to parochial schools under the first amendment establishment clause in Everson v. Board of Education7 in 1947. The challenged program8 provided free transportation of students to all schools, public and parochial. The plaintiffs argued that by making it easier for students to get to parochial schools, the state was also making those schools more attractive to prospective students and their parents. In addition, by removing the burden of transportation costs, the state was making it possible for parents to donate additional funds to the parochial schools in support of religious activities.

Justice Black, in a lengthy opinion for the majority, reviewed the historical foundations of the establishment clause9 and concluded:

The "establishment of religion" clause of the first amendment means at least this: Neither a state nor the Federal Government

7. Id.
9. The majority opinion of Justice Black in Everson v. Board of Education, 330 U.S. 1 (1947) and the dissenting opinions of Justice Jackson and Justice Rutledge contain an extensive review of the historical origins of the religion clauses of the first amendment. In addition, Madison's Memorial and Remonstrance Against Religious Assessments is reprinted as an appendix to the opinion. 330 U.S. at 63.
can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No 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. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice-versa. In the words of Jefferson, the clause against the establishment of religion by law was intended to erect a "wall of separation between Church and State."\(^1\)

Despite the existence of this proverbial "wall of separation," Justice Black found that the free transportation of children to schools, public and parochial alike, did not offend the establishment clause. He viewed the program as an exercise of the state's power to protect the health and safety of school children. To be sure, he wrote, there was some benefit to the religious schools, but such benefit was only the incidental and indirect effect of a proper exercise of the state's police power. The primary benefit was to parents and children, not to church-sponsored schools. Justice Black qualified his decision by saying that although the program was constitutional, it was on the "verge"\(^11\) of unconstitutionality.\(^12\)

**Allen: Secular Educational Functions May Be Aided**

In 1968, the Court decided *Board of Education v. Allen*.\(^13\) In *Allen*, establishment clause objections were raised to a New York statute\(^14\) which provided for the free loan of secular textbooks to all school children in the state regardless of their choice of public or parochial schools. Books loaned under this program were to be those which were "designated for use in any public elementary or secondary schools of the state or . . . approved by any boards of education," and which were required course material.\(^15\)

The Court upheld the program under the *Everson* rationale,\(^16\) finding that the primary economic benefit was to parents and children, not to the parochial schools. It also found that since ownership of the textbooks

10. *Id.* at 15.
11. *Id.* at 17.
12. Black's decision was severely criticized in dissents by Justices Jackson and Rutledge. Both would have built the wall of separation high enough to exclude even free bus transportation of parochial school students. *Id.* at 18, 28.
16. It is interesting to note that Justice Black was among those dissenting in *Allen*. 392 U.S. at 250.
remained technically with the state, the textbooks were loaned not to parochial schools, but to parochial school students. 17

More importantly, Justice White, who wrote the majority opinion in Allen, indicated that establishment clause doctrine had advanced beyond the narrow “student benefit” concept of Everson. He preferred to express the rule in the broader language of the Court’s decision on school prayer, School District of Abington Township v. Schempp. 18 In Schempp, the Court stated that a statute comports with the establishment clause if it has a secular legislative purpose and a primary effect which neither advances nor inhibits religion. 19 This, Justice White wrote, was the essence of the establishment clause test of Everson and the standard by which future programs would be measured. 20

Allen was a landmark decision for a number of reasons. First, while it purported to be an extension of the “student benefit” rule of Everson, it also proposed that state aid programs be measured by the “purpose and effect” test. Second, Allen recognized that secular educational functions performed by parochial schools were separate and distinct from religious functions, and that the state could, in a proper exercise of its powers, aid the secular functions without violating the establishment clause. Finally, Allen carried the clear implication that the Court would uphold other forms of aid to parochial schools if they complied with the “purpose and effect” test.

The Third Test: Entanglements

Subsequent to Allen, the Court held, in Walz v. Tax Commission, 21 that in addition to examining the purpose and effect of a program under the establishment clause, it would also examine the relationship the program would create between church and state. If the program unduly entangled 22 the church or the state in the affairs of the other it was unconstitutional. Thus, a third factor was added to the establishment clause test, that of “excessive entanglements.”

Walz was an establishment clause case, but the issue was not presented in the context of aid to parochial schools. The factual context presented in Walz was unique in two ways. First, the practice challenged—the granting

17. Justice Douglas, in dissent, challenged the idea that the books were being loaned to students, and not to parochial schools. Id. at 254. Justice Brennan raised a similar argument based on a similar analysis to the Court’s textbook loan decision in Meek v. Pittinger, 421 U.S. 349, 379 (1975).
19. Justice Black wrote a vigorous dissent in Allen. 392 U.S. at 250. He reasoned that the Allen decision and the rationale used to sustain it were the first steps down the road to the establishment of state religion.
20. Id. at 242.
22. The Court has never defined “entanglements”. Instead, it has proceeded on a case by case basis.
of state tax exemptions to religious institutions—pre-dated the Constitution itself. Second, the substantial economic benefit conferred on those institutions by this practice was the result of state abstention from the exercise of its taxing powers, not the overt appropriation of state tax funds. In upholding this time-honored practice, the Court noted that one of the cornerstones of the establishment clause was the principle that the state, in its dealings with the churches, must maintain a "wholesome neutrality." Thus, the Court determined that it must examine the church-state relationship established by the tax exemptions and assess the entanglements created. It found that both taxation and tax exemption involved the state in the affairs of religion.

The entanglements arising out of taxation would include tax valuation of church property, tax liens, tax foreclosures and criminal liability. The only entanglement arising from tax exemption was that the state would have to inquire as to whether or not a particular institution was a "religious" one. The Court chose that course which caused the lesser number of entangling relationships—the continued allowance of tax exemptions.

Subsequently, in the context of positive aid to parochial schools, the Court adopted the excessive entanglements test in Lemon v. Kurtzman and its companion case, Early v. DiCenso. The Pennsylvania and Rhode Island aid programs challenged in these two cases complied with the Allen purpose and effect test. Both had a secular legislative purpose and both attempted to avoid advancing the religious mission of the schools by carefully limiting the aid to secular purposes.

The Rhode Island program challenged in DiCenso provided for a 15 percent salary supplement for teachers who taught only secular subjects in the parochial schools. The teachers were required to agree in writing not to teach courses in religion while receiving salary supplements from the state. The payments were apparently made directly to the teachers and were limited: a teacher receiving salary supplements could not earn more than a comparable teacher in a public school. To qualify for these salary supplements, the State Commissioner of Education required the parochial schools
to submit financial data evidencing a per-pupil average expenditure below
the average spent in the public schools.

The Pennsylvania program challenged in *Kurtzman* provided for the
"purchase" of specified secular educational services from the parochial
schools. Payments under the purchase "contracts" would be made directly to
the parochial schools, solely for their expenditures for teachers' salaries, text-
books, and instructional materials. The schools were required to maintain
prescribed accounting procedures which clearly segregated secular from non-
secular expenditures. These accounts were subject to state audit. The
payments were limited to reimbursement for courses taught in the public
schools, such as mathematics, modern foreign languages, physical science,
and physical education. Textbooks and instructional materials included in
the program had to be those approved by the state. The statute prohibited
payments for any course containing "any subject matter expressing religious
teaching, or the morals or forms of worship of any sect."

The Court held that both programs created unconstitutional entangle-
ments between church and state. In so holding, the Court reasoned that
while the content of a textbook could be assessed and determined to be of a
secular nature, the handling of secular subjects by a teacher could not. Thus,
under the Rhode Island program, to ensure that teachers were not using their
state-subsidized classroom time to promote the religious mission of the
school, the state would have to conduct a continuous system of surveillance.
The Pennsylvania "purchase of service" concept was found entangling
because of the requirements that the parochial schools provide financial
data, keep accounts as prescribed by the state, and open their accounts to
state audit procedures.

The application of the entanglements criterion to the programs chal-
lenged in *Kurtzman* and *DiCenso* provides a vivid illustration of the fact that
the tripartite establishment clause test developed through the pronouncement
of overly-broad general rules from narrow factual contexts. As noted
previously, the entanglements test was born in the unique factual context
presented in *Walz*, where the Court had to decide upon the continued
existence of tax exemptions for religious institutions. In essence, the choice
was between allowing the exemptions to continue, thus advancing religion by
conferring upon it a substantial economic benefit, and discontinuing the ex-
emptions, which would have the effect of inhibiting religion because the
result would be to require the states to tax religious institutions, thus

30. Pennsylvania Nonpublic Elementary and Secondary Education Act, Law of
31. The word "contracts" is placed in quotation marks here, as it was in the Court's
opinion, because it was the belief of the Court that the term was used by the legislature
euphemistically, to disguise the true nature of the program, which was in effect a direct
grant.
32. 403 U.S. at 610.
placing a substantial economic burden upon them. Faced with this dilemma, the Court found the entanglements criterion useful in choosing between the lesser of two evils.

The choices faced in *Kurtzman* and *DiCenso*, however, did not pose the same dilemma. There was no time-honored practice being challenged. There was no possibility of an economic benefit to religion since both states had limited their aid to solely secular purposes, consonant with the *Allen* holding. Nor would a holding which struck down the programs result in state action which would have the effect of inhibiting religion. In short, there was no compelling need to apply the entanglements criterion to *Kurtzman* and *DiCenso*.

Application of the entanglements test to the facts of *Kurtzman* and *DiCenso* also proved to be awkward. The Court construed the financial controls placed on these programs by the respective legislatures not as an exercise of fiscal responsibility or governmental accountability, but as a recognition by the two legislatures that the teachers who would teach secular subjects in the environment of a religious school might find it difficult to remain religiously neutral. The controls necessary to ensure against this potential evil, the Court found, would create an excessively entangling relationship between church and state.

The Court also concluded that both programs possessed a “potential for political divisiveness” since they required an annual legislative appropriation of tax funds. Chief Justice Burger explained:

In a community where such a large number of pupils are served by church-related schools, it can be assumed that state assistance will entail considerable political activity. Partisans of parochial schools, understandably concerned with rising costs and sincerely dedicated to both the religious and secular educational missions of their schools, will inevitably champion this cause and promote political action to achieve their goals. Those who oppose state aid, whether for constitutional, religious, or fiscal reasons, will inevitably respond and employ all of the usual political campaign techniques to prevail. Candidates will be forced to declare and voters to choose. It would be unrealistic to ignore the fact that many people confronted with issues of this kind will find their votes aligned with their faith.

The Chief Justice pointed out that while such activities were normally healthy manifestations of democratic processes, when the religion clauses were at issue, the normal processes must take a back seat to the danger of potential political disorder.

33. Generally, these controls consisted of required accounting procedures, submission of financial data, and state audit of parochial school accounts.
34. The Court suggested, as a possible control, a continuous system of surveillance of the teachers in the parochial schools. 403 U.S. at 619.
35. *Id.* at 622.
The Kurtzman decision did not make clear, however, just what place the potential political divisiveness factor would take within the Court's test. There is expressed in the opinion a definite view that it is a form of entangling relationship. But the question of whether or not political divisiveness is sufficient in and of itself to render a program unconstitutional is not answered. The question is important because if answered in the affirmative any program of state aid to parochial schools funded by annual legislative appropriations would be unconstitutional. The Court's decision in Committee for Public Education and Religious Liberty v. Nyquist, the case which followed Kurtzman, dealt with this aspect of the problem.

Nyquist: Indirect Aid Approach

Stating that "the right to select among alternative educational systems should be available in a pluralistic society, and that any sharp decline in non-public school pupils would massively increase public school enrollments and costs, seriously jeopardizing quality education for all children," the New York legislature adopted three programs of aid to parochial schools. These programs were the subject of establishment clause challenges in Committee for Public Education and Religious Liberty v. Nyquist.

The first program provided for direct money grants to non-public schools for maintenance and repair of facilities and equipment to ensure the students' health, welfare and safety. The Court found this program unconstitutional as having the primary effect of advancing religion, since the religious schools would be required to maintain their facilities in a safe condition whether or not the funds came from the state, and because the effect of the state grant would be to allow them discretion to use funds which normally would have been spent for maintenance and repair for religious purposes.

The other programs presented novel approaches to the financial plight of parochial schools. One provided for reimbursement by the state of parochial school tuition paid by low-income families. The amount of the reimbursement was limited to $50 per grade school child, and $100 per high school student, and could not exceed 50 percent of the actual tuition paid. The other program provided for tax relief for those families ineligible for the

37. Id. at 763.
41. There was some debate among the parties to this case over the particular label given this arrangement. The Court felt that the precise label was unimportant. Rather, it looked to the overall effect of the program. 413 U.S. at 789.
42. Id. at 780, 794.
tuition reimbursements. A statutory formula provided for "tax credits" which would be nearly identical in amount to the sum refunded under the reimbursement plan.

The Court found that these programs also had the unconstitutional primary effect of advancing religion in spite of the fact that the aid was given to the families of parochial students and not directly to the parochial schools. Stating that the identity of the aid recipient was only one factor to be considered in a determination of the total effect of a particular program, the Court found the total effect of these programs indistinguishable from a direct grant scheme, with one additional infirmity. The direct grants proposed in the "purchase of service" concept challenged in Kurtzman and in the maintenance and repair segments of the act challenged in Nyquist were limited solely to secular uses, whereas the indirect aid under these programs was not so limited. These monies could be used for any purpose without any restrictions on the recipients. Thus, they might be used to advance the religious mission of the schools.

Even though these programs were found unconstitutional under the advancement of religion test, the Court felt compelled to make the observation that "apart from any specific entanglement of the state in particular religious programs, assistance of the sort here involved carries grave potential for entanglement in the broader sense of continuing political strife over aid to religion." Noting that this concept applied with peculiar force to the New York statute in question, the Court found the challenged programs politically divisive in two ways. With respect to the direct grants authorized by the maintenance and repair sections of the act, a possibility of divisiveness existed because of the need for an annual legislative appropriation. In regard to the indirect aid authorized through the tax credit and tuition reimbursement plans, which required no appropriations, the possibility existed as a result of the constant pressures which would be created by increasing costs and by proponents of such programs to expand the benefits under these programs. Justice Powell expressed this view as follows:

[We] know from long experience with both Federal and State governments that aid programs of any kind tend to become entrenched, to escalate in cost, and to generate their own aggressive constituencies. And the larger the class of recipients, the greater the pressure for accelerated increases. Moreover, the State itself, concededly anxious to avoid assuming the burden of educating children now in private and parochial schools, has a strong motivation for increasing this aid as public school costs rise and population increases. In this situation, where the underlying issue is the deeply

44. Id.
45. 413 U.S. at 780, 794.
46. Id. at 781.
47. Id. at 794.
48. Id. at 796.
emotional one of Church-State relationships, the potential for seriously divisive political consequences needs no elaboration. Justice Powell further noted that this potential for political divisiveness is not to be accorded equal weight with entangling church-state relationships as a separate and distinct ground of unconstitutionality. Potential political divisiveness is, according to Justice Powell, merely a "warning signal" not to be ignored.

**Meek v. Pittinger: Selective Application of the Tripartite Test**

The Supreme Court recently completed a review of four Pennsylvania aid to parochial school programs in *Meek v. Pittinger*. The four programs provided for the loan of textbooks, instructional materials, instructional equipment, and for auxiliary services to children attending qualified non-public schools, that is, schools which met the state's compulsory attendance requirement.

These programs were accompanied by legislative findings that the welfare of the school children and the state required that all school children be provided with free textbooks, instructional materials and equipment, and auxiliary services. It was noted that approximately 25 percent of the state's children attended non-public schools. The express intent of the legislature was to extend the benefits of equal educational materials and services to non-public school children.

Instructional materials were defined to include books, periodicals, documents, pamphlets, photographs, reproductions, pictorial or graphic works, musical scores, maps and globes. Instructional equipment was defined to include projection equipment, recording equipment, and laboratory equipment. Auxiliary services included guidance, counseling and testing services, psychological services, services for exceptional children, remedial and therapeutic services, speech and hearing services, and services for the improvement of the educationally disadvantaged.

49. *Id.* at 797.
50. *Id.* at 798.
54. *Id.*
56. 421 U.S. at 352, n.2. Throughout this text, the author has used the term "parochial", whereas the legislative enactments under discussion usually used the term "non-public", which includes the term "parochial". The author chose the term "parochial" because the vast bulk of "non-public" school children attend "parochial" schools, and because establishment clause issues are not presented in the case of aid to "non-public, non-parochial" private schools. "Parochial", as used herein, is defined as a private or non-public school run or supported by a religious organization or church.
These programs, like similar programs which preceded them, were seeming-
ly designed to meet the objections raised by the Court in Kurtzman and
Nyquist. All aid was limited to the non-sectarian, neutral and non-ideological
functions performed by the parochial schools. The textbook loan program was
virtually identical to that upheld in Allen. In one sense, the textbook program
was even stricter than New York's program since the textbooks which could be
loaned under this program had to be those which were approved for use by
the local school board. In Allen, it was possible for the parochial school offi-
cials to request and receive a textbook of their own choosing. This could not
occur in the Pennsylvania scheme challenged in Meek.\(^{60}\)

The instructional equipment and materials programs were designed to
meet the Court's objections to direct grants of aid in Kurtzman and Nyquist,
by providing for a loan, rather than an outright grant, of these forms of aid.
The relationship of the school to the state was akin to that of a bailee of
such materials and equipment. The parochial school would merely have pos-
session of neutral, non-sectarian, non-ideological state property for the use
and benefit of the school children. The school would receive no direct eco-
nomic benefit from the programs.

Similarly, the auxiliary services program was designed to meet previous
court objections. The services under this program were to be provided by
employees of the public school system. As the district court characterized it,
the program was one which provided for travelling therapists, rather than travelling students.\(^{61}\)

The district court upheld the textbook loan program, the auxiliary serv-
ces program, and the instructional materials program. Its approval of the
instructional equipment loan program was limited. Only equipment of a
"self-policing" nature, that is, equipment such as science laboratory fixtures
and supplies which were not readily adaptable to religious uses, could be
loaned.\(^{62}\) Equipment not of a self-policing nature, such as audio-visual
devices, were found to be an unconstitutional advancement of religion,
since they could easily be used for religious purposes. Such use would
confer an economic benefit on the parochial school by making available
free-of-charge equipment which would otherwise have to be rented or pur-
chased.\(^{63}\)

In upholding the textbook and instructional material loans, the district
court cited Allen as authority and refused to draw any constitutional
distinction between secular, neutral, non-ideological textbooks, on the one
hand, and secular, neutral, non-ideological "books, periodicals, documents,

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60. 421 U.S. at 361, n.11.
62. Id. at 661.
63. Id.
pamphlets, photographs, reproductions," on the other. These materials, the court found, were of a self-policing nature and could not be readily converted to religious purposes. As with the textbook program, ownership of these materials remained technically in the state.

The district court also upheld the auxiliary services program, finding that it was based on a secular legislative purpose, that it did not have a primary effect of advancing religion, and that it possessed no excessive entangling church-state relationships. The primary effect requirement was satisfied by the neutral, non-sectarian, non-ideological nature of these services, as well as by the fact that no direct monetary benefit accrued to the parochial school. The entanglement issue, the district court felt, was covered by the secular nature of the services, but more importantly by the fact that the services were to be provided by employees of the public school system, subject to the supervision and control of the state.

On appeal, the Supreme Court upheld the loan of textbooks. Justice Stewart, speaking for the Court, reviewed the program in some detail and found it to be identical in every material respect to the one considered in *Allen*. The other programs, however, were found to contain some constitutional infirmity.

The loan of instructional materials and equipment, the Court found, had the primary effect of advancing religion, regardless of the fact that by keeping ownership of the equipment and materials in the state the religious schools received no direct economic benefit. The majority expressed the view that "[e]ven though earmarked for secular purposes, 'when [aid] flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission,' state aid has the primary effect of advancing religion." In so stating, the Court appeared to be rejecting the position it had adopted in *Allen*—that the secular and

64. *Id.* at 659.
65. *Id.*
66. *Id.* at 657.
68. Justice Stewart was joined in this portion of the opinion by Justice Blackmun and Justice Powell. A majority on this program was concluded by Justice Rehnquist who, joined by Justice White, 421 U.S. at 387, found simply that the program was "constitutionally indistinguishable" from that upheld in *Allen*, but did not elaborate to the same degree as Justice Stewart. Just what difference of opinion exists on this issue between Justice Stewart and Justice Rehnquist is not clear from their respective opinions. Apparently, it indicates a less than whole-hearted acceptance by Rehnquist and White of the *Allen* rationale. Justices Brennan, Douglas, and Marshall dissented from the textbook holding. The Chief Justice also wrote a separate opinion concurring with the textbook holding and dissenting from the auxiliary services portion of the decision.
69. Having found loans of instructional equipment and materials unconstitutional under the primary effect test, the Court did not find it necessary to discuss any possible entanglements.
70. 421 U.S. at 366.
non-secular functions of the parochial schools are separate and distinct and the state could aid the secular activities without aiding the religious functions.\textsuperscript{71}

The Court also rejected the auxiliary services program,\textsuperscript{72} on the basis that the district court had erred in relying on the good faith and professionalism of the secular teachers and counsellors functioning in church-related schools to insure that a strictly non-ideological posture would be maintained.\textsuperscript{73} To insure a non-ideological posture, the Court held, the state would have to engage in a continuous system of surveillance of teachers, and such "prophylactic contacts . . . necessarily give rise to a constitutionally intolerable degree of entanglement between church and state."\textsuperscript{74}

The entanglement argument used by the Court appears to be of doubtful validity. Since the teachers who would be performing the auxiliary services were employees of the public school system, they would not have been subject to the control or discipline of any religious authority. There appears to be no reason why the state could not, under this program, conduct a system of surveillance of its own employees without any interference with religion. The Court's response to this argument was:

\begin{quote}
[The teachers] are performing important educational services in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained. . . . The potential for impermissible fostering of religion under these circumstances, although somewhat reduced, is nonetheless present. To be certain that auxiliary teachers remain religiously neutral, as the Constitution demands, the State would have to impose limitations on the activities of auxiliary personnel and then engage in some form of continuing surveillance to ensure that those restrictions were being followed.\textsuperscript{75}
\end{quote}

This sort of entanglement is based on an assumption that the public school employees who would have performed the auxiliary services would have shared the same religious faith as that promoted by the parochial school to which they were assigned. There was no requirement in the challenged legislation that auxiliary services personnel meet any religious requirements of the parochial school. It was conceivable that under this program a Jewish or agnostic teacher might be assigned to a Roman Catholic school. Such personnel would hardly be likely to intentionally or inadvertently promote the Catholic religion. Indeed, there is as great a danger that religious neutrality might be violated within the public schools. No doubt, if a public school teacher were to promote the tenets of one particular religious faith in

\textsuperscript{71} 392 U.S. at 245.
\textsuperscript{72} Id. at 372.
\textsuperscript{73} Id. at 369.
\textsuperscript{74} Id. at 370.
\textsuperscript{75} Id. at 371.
a public school classroom, effective measures could be taken to insure religious neutrality. There appears to be no reason why the same response would not have been possible or appropriate under Pennsylvania's auxiliary services program.

In addition to disallowing the auxiliary services program on the basis of excessive entanglements, the Court found that the program involved a potential for political divisiveness by virtue of the fact that it would require an annual appropriation by the legislature.76 This potential for political divisiveness plus the entangling aspects found to exist in the auxiliary services program combined, in the opinion of the Court, to render the program an unconstitutional establishment of religion.77

**Establishment Clause Theory as Applied**

Up to this point, the development of the three part establishment clause test and the manner in which it has been applied by the Court have been discussed. The discussion has illustrated the limited utility of the current test in distinguishing constitutional from unconstitutional forms of aid to parochial schools. A discussion of the theoretical bases for the establishment clause which have found expression in the opinions of the Court will now be presented in the belief that when these theoretical positions are compared with the Court's decisions, the true position of the Court towards aid to parochial education will be illuminated.

Few issues have spawned as much legal literature as the meaning and interpretation of the religion clauses of the first amendment. There are at least six theoretical positions posed by eminent legal scholars which attempt to interpret the establishment clause in the context of aid to parochial schools.78 These positions range in scope from the view that the establish-

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76. Id. at 372.
77. Shortly after the Court's decision in Meek, the Illinois General Assembly amended the Illinois School Code to allow parochial school children the benefits of loans of state-owned textbooks. The amendment to ILL. REV. STAT. ch. 122, § 18-17 (1975) reads as follows:

   The Illinois Office of Education shall provide the following free of charge to any student in this State who is enrolled in grades kindergarten through 12 at a public school or at a school other than a public school which is in compliance with the compulsory attendance laws of this State and Title VI of the Civil Rights Act of 1964 the loan of secular textbooks listed for use by the Office of Education. The foregoing service shall be provided directly to the students at their request or at the request of their parents or guardians. The Office of Education shall adopt appropriate regulations to administer this section and to facilitate the equitable participation of all students eligible for benefits hereunder.

78. See generally Note, Aid to Parochial Schools: A Re-examination, 14 WM. & MARY L. REV. 128 (1972). This article categorized the various theories posed by various legal scholars on whether or not aid to parochial schools is permissible under the establishment clause. In the first category are the "absolute" theories, which range from the absolute position that the establishment clause requires aid, to the absolute position that the establishment clause prohibits aid. The second category, the "middle ground"
ment clause absolutely forbids any form of such aid, to the view that such aid is required by the Constitution. Since it would be unduly repetitive and unnecessary to review here the various constitutional theories, the discussion will be limited to those theories which have found expression in the Court's decisions.

The Wall of Separation

In *Everson v. Board of Education*, Justice Black looked to the source of the first amendment for a guide to the meaning of the establishment clause. His conclusion that the clause against the establishment of religion requires a "wall of separation" between church and state was based on his own examination of the historical background of the religion clauses, which showed that the real debate over freedom of religion took place in 1785, during the Virginia Assembly's consideration of a bill which would have re-established a tax-supported church. Jefferson and Madison led the fight against passage of the measure. Madison's "Memorial and Remonstrance" is credited with turning the tide against such tax assessments. There, Madison made the following argument:

Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish, with the same ease any particular sect of Christians, in exclusion of all other Sects? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?

Justice Black believed that Madison and Jefferson were opposed not merely to the establishment of tax-supported churches, but to any taxes levied in support of one religion, or all religions. Thus religion and government were to be separated, forever and unequivocally.

Justice Black upheld, however, the New Jersey plan of free bus transportation for school children in *Everson*. His rationale was that such a

theories, include the Everson "student benefit" doctrine and two positions of "neutrality", which again range from the view that neutrality prohibits aid to the view that neutrality requires aid. The third category is the "no-imposition" theory of Professor Schwartz, that as long as government aid does not impose religion or religious beliefs upon its citizens, aid is constitutional. The fourth category contains the "balancing" theories, which require a case by case approach and a balancing of the benefit of aid to religion against the public interest. The fifth category represents the "quid pro quo" approach of Professor Choper, that as long as such aid does not exceed the value of the secular educational services performed, direct cash grants, for any purpose, may be given to parochial schools. The sixth category represents the "excessive entanglements" approach of *Walz* and *Kurtzman*, that if such aid will create excessive entangling relationships between church and state, it is unconstitutional.

80. *Id.* at 15.
82. *Id.*
program was within the police power of the state and that it must not be struck down even if it bordered on an establishment of religion. The Court must be aware, he wrote, that in striking down a program of this type under the establishment clause, it might encroach upon those rights protected by the free exercise clause. Thus, Justice Black believed that while the establishment clause required a "wall of separation", the free exercise clause required that a valid exercise of the state's police powers not be struck down—even if it bordered on establishment—solely on the basis of a religious classification.

The net effect of the Everson decision, derived from the conflict between Justice Black's reasoning that the establishment clause requires a wall of separation and his holding which sanctioned a limited form of indirect state aid, was that the establishment clause erected something less than a "wall" of separation. A more accurate analogy would be that the clause created a "neutral zone" between those activities of the state which promote religion and those which inhibit religion. Between those two extremes, both church and state have mutual interests in very limited forms of interaction. The problem then was to determine the nature of permissible interaction within that neutral zone. The Court proceeded to do so with great difficulty.

In Zorach v. Clauson, the Court found that programs whereby public school students were released early from school, in order to allow them to travel to parochial schools for religious instruction, was within the neutral zone of permissible interaction. Similarly, in the "Sunday-closing law cases" the Court found that the state's interest in a day of rest and recreation for its citizens was within that zone, even though the day universally chosen for such a day of rest was Sunday, the sabbath of the Christian religions.

Conversely, in School District of Abington Township v. Schempp the Court ruled that compulsory bible reading and prayer in the public schools were not within the neutral zone. Such activities, it found, were prohibited religious exercises, even though they favored no religious denomination to the exclusion of any others. Further, the Schempp court proposed a test to define the bounds of the neutral zone. Permissible state action must be within the state's legislative power, and it must neither establish nor inhibit religion.

83. Id. at 16.
84. 343 U.S. 306 (1952).
85. Justice Douglas wrote the majority opinion in Zorach. In the opinion, he stated that Americans are a deeply religious people and that such a program of "released time" was within the best traditions of our people. Id. at 313.
NOTES

Purpose and Effect in the State Aid Context

The Schempp test and the rationale supporting it provided the framework for the Court's decision in Allen. Justice White also observed, based upon the Court's decision in Pierce v. Society of Sisters, that parochial schools perform both religious and secular functions, and that it was possible, consonant with the establishment clause, for the state to aid the secular functions without aiding the religious functions.

Allen, then, appeared to represent a departure from the Everson position. It apparently was an indication that the establishment clause would permit a somewhat broader range of aid to parochial schools, as long as such assistance aided only secular functions in which the state had an interest. The Court implied that subsequent programs would be measured by the Schempp purpose and effect test. Allen is the only case, however, which makes such sweeping generalizations about the constitutionality of aid to parochial schools.

Kurtzman: The Narrowing Process Begins

The cases which have followed Allen have all narrowed, to a large degree, the range of secular aid which may be extended to parochial education. The decision in Walz v. Tax Commission, which was a challenge to the constitutionality of time-honored property tax exemption laws for religious institutions, added the excessive entanglements test. In Walz, the Court was faced with the peculiar factual situation that a substantial economic benefit accrued to religious institutions, not because of monies appropriated by the legislature, but because of the almost universal practice of granting such institutions exemptions from the local and state tax laws. Thus, the Court faced a dilemma. To uphold the practice would sanction a direct and substantial economic benefit. To strike down the practice would require the states to tax religious institutions, and to employ all of the procedures authorized by the tax laws to ensure their collection. The Court recognized long ago in McCulloch v. Maryland, that the power

88. 268 U.S. 510 (1925). One chronic issue is whether or not church-sponsored schools and the secular courses taught in them are “permeated” with the religious doctrines of the sponsoring church. In Pierce v. Society of Sisters, the argument was used affirmatively by proponents of religious schools to prevent their being legislated out of existence. Today, those who favor state aid to parochial schools use the negative approach—that secular courses taught in parochial schools are not permeated with religious doctrines. See also Drinan, Implications of the Allen Textbook Decision, 14 Cath. Lawyer 285 (1968); Freund, Comment, Public Aid to Parochial Schools, 82 Harv. L. Rev. 1680 (1969); Valente, Aid to Church-related Education—New Directions Without Dogma, 55 Va. L. Rev. 579 (1969).


90. These include: tax valuation of church property, tax liens, tax foreclosures, and criminal liability. See note 21 supra.

to tax is the power to destroy. Faced with these alternatives, the Court chose to determine which alternative allowed the state to best maintain its neutrality. It chose that relationship it found least entangling, and upheld the tax exemption laws.

Thus, the excessive entanglements test was born, not from the dictates or commands of the establishment clause, but from a unique factual situation, in which either course of action posed grave constitutional consequences. No such dilemma faced the Court in *Lemon v. Kurtzman*, where the alternatives were to either allow or disallow affirmative state aid to church-supported schools. The failure of the state to aid would not, as in *Walz*, confer an economic benefit on church-related schools. Rather, it would result in increasing economic hardship for those schools. Still, the Court chose to apply the narrow holding of *Walz* to limit the wide-ranging implications of *Allen*.

In adopting the test of excessive entanglements, and in finding that potential political divisiveness is a form of such entanglement, the Court cited the views of Professor Paul A. Freund, expressed in a 1969 article, *Comment, Public Aid to Parochial Schools*. Freund expressed the belief that the establishment clause absolutely prohibits aid to parochial schools, and that the *Allen* decision, although narrowly written, was in error. Fearful that *Allen* would generate a new wave of state aid cases, Freund wrote that the Court would face three alternatives in the cases which would inevitably follow: To hold that state aid was mandated by the first amendment; to hold that such aid was permitted by the first amendment; or to reverse itself and hold that the first amendment prohibited aid. In light of his view that the establishment clause prohibits aid, Freund discounted the position that the Court should find state aid mandatory. The real choice, he believed, was between permission and prohibition. To permit state aid would allow the issues to be ultimately settled by the operation of the political and judicial processes in each state or locality, while to prohibit state aid would serve to "defuse the political issue."

Based upon the belief that political division along religious lines was "one of the principal evils that the First Amendment sought to forestall," Freund failed to substantiate his assertion that where the religious clauses of the first amendment were at issue, the normal democratic processes were not to be relied upon in arriving at a correct constitutional resolution. See generally Ellington, *Principle of Non-divisiveness and the Constitutionality of Public Aid to Parochial Schools*, 5 GA. L. REV. 429 (1971), for another discussion of the potential political divisiveness factor. The discussion begins with Freund's assertion that political divisiveness was one of the principal evils against which the first amendment was intended to protect. Ellington then discusses history and precedent to find support for the assertion.
Freund advocated that the Court attempt to defuse the political issues by overruling the state aid programs it would subsequently consider. In order to do so, the Court would be required to reverse its holding in Board of Education v. Allen, since Allen had already recognized that at least some aid was permissible under the establishment clause, that is, aid which assisted secular educational functions.

THE COURT'S POSITION TODAY

In Meek v. Pittinger, the most recent aid to parochial schools decision, the Court, in upholding the loan of textbooks, has reaffirmed its decision in Allen. However, it also, consistent with Kurtzman and Nyquist, and with the views of Professor Freund, overruled three other programs of state aid to parochial schools. Thus, the Court has, on one hand, adopted the view that some aid is constitutional. On the other hand, it has adopted the view that the establishment clause prohibits such aid. This phenomenon suggests two possible conclusions as to the current position of the Court.

The first is that the "no-aid" dicta of Justice Black in Everson v. Board of Education is in fact the current rule on the issue of aid to parochial schools. Under this view, the Court's decision in Board of Education v. Allen was widely misinterpreted. Since it is possible to view Allen as no more than an extension of the student benefit rule of Everson, Allen may be viewed as merely having moved the "verge" of unconstitutionality from one point to another. The adoption of the purpose and effect test in Allen was simply an attempt to provide a means for distinguishing those strictly limited forms of aid allowed by Everson. The main defect of the test is its overly broad wording and imprecise definition. The decisions which followed Allen—Kurtzman, Nyquist, and Meek—were based on a legislative misinterpretation of the Allen case. All of the programs considered in these cases were much too broad in scope to survive the very narrow Allen test.

The second possibility is that Allen did in fact represent a retreat from the stern "no-aid" position of Everson. Under this view, the conclusion to be reached is that the development of the tripartite establishment clause test has, to date, failed. This failure consists of the inability of the Court to express its test in terms which express meaningful distinctions. This, in turn, resulted from the promulgation of broad general rules from narrow factual situations. The general rules were applicable to the narrow factual situation under consideration, but were inappropriate when applied to subsequent factual situations. The end result is that no new plans of aid to parochial

He concludes that avoidance of political division was an "aspirational norm" embodied within the establishment clause.

schools have passed the test, and many difficult, narrow legal distinctions have been drawn.

The conclusion offered here is that the former view is more likely to represent the current position of the Court. The very existence of an establishment clause test implies that there are programs which will pass the test. As illustrated in the first part of the analysis, no new programs of state aid to parochial schools enacted since *Allen* have passed the Court's test. This observation, combined with the adoption by the Court of the views of Professor Freund, leads to the conclusion that the *Everson* decision has been re-vitalized, that the Court has changed its position on the ability of the states to aid secular educational functions in parochial schools, and that the "wall of separation" between church and state allows only a very limited amount of aid to parochial schools.

**CONCLUSION**

It has not been the intention of the author to present the arguments in favor of or against aid to parochial schools. The sole purpose of this article has been to assess the utility of the Supreme Court's tripartite establishment clause test in distinguishing those programs of aid which are constitutional, from those which are not.

The discussion of the cases from *Allen* through *Meek* has revealed that the Court has stated its test in broad terms, but applied it in an exceedingly narrow manner. The discussion of the theories which underlie the test, and the adoption of the views of Professor Freund, has revealed that perhaps the Court is attempting to steer a middle course between the opposing forces on the issue of aid to parochial schools. To those who favor such aid, the Court offers a constitutional test and thus implies that a program may yet be conceived which will provide the substantial aid needed to avert the financial ruin of parochial schools. To those who oppose such aid, the Court offers a narrow application of its test, and its apparent adherence to the views of Professor Freund which virtually assures that no additional aid programs will be upheld. Thus it may be said that the tripartite establishment clause test is not a useful tool in making constitutional distinctions among programs of state aid to parochial schools, at least not in the hands of a Court which does not appear to favor such aid.

**RICHARD J. RETTBERG**