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Constitutional Law: State Aid to Parochial Schools--Excessive Entanglement Revisited

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The instant decision is little more than a return to the pre-*Schneider* philosophy of second-class citizenship.[55] With an appropriate congressional response, the visit may hopefully be short-lived.

MORGAN STEVENSON BRAGG

CONSTITUTIONAL LAW: STATE AID TO PAROCHIAL SCHOOLS — EXCESSIVE ENTANGLEMENT REVISITED

Lemon v. Kurtzman, 403 U.S. 602 (1971)

The Pennsylvania Nonpublic Elementary and Secondary Education Act[1] provided for the "purchase" of certain secular educational services from nonpublic schools. The statute authorized the Pennsylvania Superintendent of Public Instruction to reimburse eligible schools for teachers' salaries, textbooks, and instructional materials.[2] Reimbursement was prohibited for any course that contained subject matter expressing religious teaching or the morals or forms of worship of any sect.[3] Appellant brought suit challenging the constitutionality of the statute. A federal district court granted appellee state officials' motion to dismiss the complaint for failure to state a claim of relief.[4] On appeal the United States Supreme Court reversed and HELD, the Pennsylvania statute was in conflict with the excessive entanglement doctrine and, therefore, violated the first amendment.[5]

In a companion case the 1969 Rhode Island Salary Supplement Act[6] authorized state officials to pay a salary supplement directly to teachers of secular subjects in nonpublic elementary schools.[7] Appellees brought suit

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55. *See, e.g.*, Perez v. Brownell, 356 U.S. 44 (1958); Savorgnan v. United States, 338 U.S. 491 (1950); Mackenzie v. Hare, 239 U.S. 299 (1915).

1. PA. STAT. ANN. tit. 24, §§5601-09 (1968).

2. *Id.* §5604. An eligible school was required to keep a record of secular education costs, as opposed to religious instructional expenses, in its accounting procedures. The school's accounts were subject to state audit. *Id.* §5607. Also, payment for secular services was restricted to the following courses offered in the public school system: mathematics, modern foreign languages, physical science, and physical education. *Id.* §5604.

3. *Id.* §5603 (3).

4. 310 F. Supp. 35 (E.D. Pa. 1969).

5. 403 U.S. 602 (1971).

6. R.I. GEN. LAWS §§16-51-1 *et seq.* (Supp. 1970).

7. *Id.* The salary supplement could not exceed 15% of an eligible teacher's salary nor, as supplemented, could the recipient's salary be greater than the maximum salary of public school teachers. Eligible teachers were required to agree not to teach courses in religion and to teach only certain subjects offered in the public school system. The materials used must be those used in public schools. In addition, the eligible teacher must have been teaching in a nonpublic school where the average per pupil expenditure on secular instruction was less than the average state expenditure. The Act required eligible schools to submit financial data to the state Commissioner of Education in order to distinguish secular education costs from religious instruction expenditures.

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seeking declaratory and injunctive relief on the ground that the statute violated the establishment and free exercise clauses of the first amendment. A three-judge federal court ruled the Act violated the establishment clause.[8] The United States Supreme Court affirmed and HELD, the statute fostered excessive entanglement between government and religion and thus violated the first amendment.[9]

Historically, the establishment clause was envisioned by Thomas Jefferson as an impregnable "wall of separation between Church and State."[10] While the Supreme Court initially defined the scope of the establishment clause by alluding to Jefferson's wall,[11] it later retreated from this theory. In *Pierce v. Society of Sisters*[12] parochial schools were permitted to operate educational systems that competed with public schools. The principle issue in the Supreme Court's consideration of the establishment clause, the "child benefit" theory, was first implemented in *Cochran v. Board of Education*.[13] There, the Court upheld a statute authorizing the use of public funds to buy textbooks for public and nonpublic school pupils. The Court reasoned that the primary benefit accrued to the school children and their parents and not to the school; the law was therefore constitutional under the equal protection clause.[14] Subsequently, in *Everson v. Board of Education*[15] the Supreme Court was confronted with the question of whether state aid to parochial schools was in violation of the establishment clause.[16] New York tax revenue was provided to pay for bus fares of students, including those who attended nonpublic schools. The Court again implemented the child benefit theory in ruling the public welfare legislation constitutional. Since *Everson* there has been a trend toward a workable compromise between the extremes of a "wall of separation" and direct state aid to religion.[17] The underlying rationale of these decisions has been the child benefit theory, which allows

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8. DiCenso v. Robinson, 316 F. Supp. 112 (D.R.I. 1970).

9. 403 U.S. 602 (1971).

10. *See* Reynolds v. United States, 98 U.S. 145, 164 (1879). A historical review of parochial school systems is found in Justice Douglas' concurring opinion in the instant decision, 403 U.S. at 625. The historical development of the establishment clause is discussed in Engel v. Vitale, 370 U.S. 421 (1962), in Justice Frankfurter's opinion in McCollum v. Board of Educ., 333 U.S. 203, 212 (1948), and in Justice Black's opinion in Everson v. Board of Educ., 330 U.S. 1 (1947). For a separatist interpretation of the first amendment *compare* L. PFEFFER, CHURCH, STATE, AND FREEDOM (rev. ed. 1967), *with* McCloskey, *Principles, Powers and Values: The Establishment Clause and the Supreme Court*, in RELIGION AND THE PUBLIC ORDER (1964). *See also* Comment, *First Amendment Religion Clause: Historical Metamorphosis*, 61 NW. U.L. REV. 760 (1966).

11. Reynolds v. United States, 98 U.S. 145 (1879).

12. 268 U.S. 510 (1925).

13. 281 U.S. 370 (1930). The child benefit theory actually originated in a Louisiana supreme court decision in Borden v. Board of Educ., 168 La. 1005, 123 So. 655 (1928).

14. Cochran v. Board of Educ., 281 U.S. at 375.

15. 330 U.S. 1 (1947).

16. The first amendment was made applicable to the states in Murdock v. Pennsylvania, 319 U.S. 105 (1943).

17. Note, *Constitutional Law — Aid to Parochial Schools and the Establishment Clause — Everson to Allen: From Buses to Books and Beyond*, 18 DE PAUL L. REV. 785, 791-92 (1969).

a state to subsidize religious institutions as long as the primary benefit goes to the student and not to the school.[18]

First amendment constitutionality is dependent upon satisfaction of certain criteria set forth in the instant decision.[19] First, a statute must have a secular legislative purpose;[20] second, its principal or primary effect must be one that neither advances nor inhibits religion;[21] and finally, the statute must not foster an excessive government entanglement with religion.[22]

The first two criteria are a restatement of the "primary purpose and effect" test devised in *Abington School District v. Schempp*[23] and reapplied in *Board of Education v. Allen*.[24] In *Schempp* a Pennsylvania statute required Bible readings in public schools at the opening of each day. Any child could be excused from the readings upon written request of his parents. The Court ruled the statute unconstitutional, concluding that the strictures of the establishment clause require legislative neutrality toward religion.[25] In *Allen* the Court considered a New York law requiring school boards to lend textbooks to nonpublic school students attending schools that complied with compulsory attendance laws.[26] Although the collateral benefits would accrue to parochial schools, the statute was held constitutional because the primary benefit went to the student.[27] The Court recognized that parochial schools have a dual purpose, religious instruction and secular education.[28] Thus, the child benefit theory was used to establish a permissible primary effect; that is, one that maintains constitutionally required neutrality toward religion.

The statutes in the instant decision were carefully drafted in light of *Allen* and its predecessors to ensure aid only to secular education.[29] Both legislatures were concerned with satisfying the "primary purpose and effect" test. The Rhode Island statute required that teachers applying for a salary

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18. *Id.* at 791-98.

19. 403 U.S. at 612.

20. Board of Educ. v. Allen, 392 U.S. 236, 243 (1968); Abington School Dist. v. Schempp, 374 U.S. 203, 222 (1963).

21. Board of Educ. v. Allen, 392 U.S. 236, 243 (1968); Abington School Dist. v. Schempp, 374 U.S. 203, 222 (1963).

22. Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970).

23. 374 U.S. 203 (1963). "The test may be stated as follows: what are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." *Id.* at 222. The same underlying rationale was also used in two earlier cases. *See* McCollum v. Board of Educ., 333 U.S. 203 (1948) *and* Everson v. Board of Educ., 330 U.S. 1 (1947).

24. 392 U.S. 236 (1968).

25. 374 U.S. 203, 225 (1963).

26. 392 U.S. 236 (1968).

27. *Id.* at 244.

28. *Id.* at 245.

29. The Court noted that the legislatures of Rhode Island and Pennsylvania intended to advance only a secular purpose. "There is no reason to believe the legislatures meant anything else." 403 U.S. at 613.

supplement teach only courses offered in public schools, agree not to teach courses in religion, and use only materials used in public schools.[30] The Pennsylvania statute limited reimbursement to courses offered in public school curricula.[31] Additionally, both statutes subjected parochial school accounts to state audit in order to distinguish secular education costs from religious instructional expenses.[32]

Because the statutes in the instant case clearly stated an intention to enhance secular education, appropriate deference was given the lawmakers and the secular legislative purpose test was ruled satisfied.[33] However, the issue of permissible primary effect was never determined because the statutes did not fulfill the third requirement, the excessive entanglement test.[34]

The excessive entanglement doctrine originated in *Walz v. Tax Commission*,[35] which upheld state tax exemptions for real property owned by religious organizations and used for religious worship. The Court found that granting tax exemptions to churches created involvements between church and state; but the test was held to be one of degree.[36] It concluded that there was not an unconstitutional degree of involvement in assessing such exemptions,[37] although an attempt to tax churches *would* create a high degree of entanglement between church and state.[38]

A determination of excessive government entanglement with religion requires an examination of the character and purposes of the institutions that are benefited, the nature of the aid that the state provides, and the resulting relationship between the government and religious authority.[39] The instant Court concluded that the purpose of the parochial school is to proselytize future generations to the Catholic faith,[40] making the schools substantially religious in character.[41] The nature of salary supplements for

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30. R.I. GEN. LAWS §§16-51-1 *et seq.* (Supp. 1970).
31. PA. STAT. ANN. tit. 24, §5603-4 (1968).
32. PA. STAT. ANN. tit. 24, §5607 (1968); R.I. GEN. LAWS §§16-51-1 *et seq.* (Supp. 1970).
33. 403 U.S. at 613.
34. *Id.* at 613-14.
35. 397 U.S. 664 (1970).
36. *Id.* at 674.
37. *Id.* at 675.
38. *Id.*
39. 403 U.S. at 615.
40. *Id.* at 609. The three-judge federal court found that approximately 25% of Rhode Island's elementary students were enrolled in nonpublic schools, 95% of which were sponsored by the Roman Catholic Church. *Id.* at 608. In Pennsylvania more that 20% of the state's school children attended nonpublic schools, most of them Catholic. *Id.* at 610. *See also* U.S. NEWS AND WORLD REP., July 12, 1971, at 27; Wall Street J., June 29, 1971, at 1, col. 6.
41. 403 U.S. at 616. "In the parochial schools Roman Catholic indoctrination is included in every subject. History, literature, geography, civics, and science are given a Roman Catholic slant. The whole education of the child is filled with propaganda. That, of course, is the very purpose of such schools, the very reason for going to all of the work and expense of maintaining a dual school system. Their purpose is not so much to educate, but to indoctrinate and train, not to teach Scripture truths and Americanism, but to make loyal Roman Catholics. The children are regimented, and are told what to wear, what to

teachers was distinguished by the Court from subsidies found constitutional in previous decisions.[42] A conflict of functions was said to exist between the subjective religious convictions of a parochial school teacher and the purely secular aspects of the teaching process.[43] In analyzing the Rhode Island statute, the Court noted that a parochial school teacher is employed by a religious organization, subject to the direction and discipline of religious authorities, and labors in a system dedicated to rearing children in a particular faith.[44]

It is the potential for impermissible fostering of religion and not actual religious inculcation that invalidated the principal statutes.[45] This factor is enhanced by the impressionable age of the students, especially those in elementary schools.[46] In order to counteract this potential, both Rhode Island and Pennsylvania drafted statutes requiring a comprehensive, discriminating, and continuing state surveillance of eligible schools.[47] Such a relationship, however, is the epitome of the forbidden entanglement of government with religion.[48] Ironically, the legislative concern for fulfilling the permissible primary effect test resulted in the failure to comply with the excessive entanglement requirement.[49]

The potential political involvement inherent in the Rhode Island and

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do, and what to think." *Id.* at 635 n.20.

42. 403 U.S. at 616-17. Bus transportation, school lunches, health services, and textbook lending had been ruled constitutional under the establishment clause. The Court, especially concerned about the dissenting opinions in *Allen*, noted that the ideological character of a teacher is substantially different from that of books. "In terms of potential for involving some aspect of faith or morals in secular subjects, a textbook's content is ascertainable, but a teacher's handling of the subject is not." *Id.* at 617. This distinction allays the fears expressed by Justice Black dissenting in *Allen* where he hypothesizes that the *Allen* rationale could be used to uphold laws providing state or federal funds to pay the salaries of religious school teachers. Board of Educ. v. Allen, 392 U.S. 236, 253 (1968).

43. 403 U.S. at 618-19.

44. *Id.* at 618.

45. *Id.* at 619.

46. *Id.* at 617. The Court has distinguished the religious aspects of church related elementary and secondary schools from religion-sponsored institutions of higher learning on the grounds that "college students are less impressionable and less susceptible to religious indoctrination." Tilton v. Richardson, 403 U.S. 672, 682 (1971). This distinction appeared to be a major factor in the Court's ruling that federal construction grants for college and university nonreligious facilities were constitutionally valid under the establishment clause.

47. "[T]he very restrictions and surveillance necessary to ensure that teachers play a strictly nonideological role give rise to entanglements between church and state." 403 U.S. at 620-21. The Court has contrasted the direct and continuing surveillance required to ensure teacher neutrality in the instant case to one-time, single-purpose construction grants. *See* Tilton v. Richardson, 403 U.S. 672, 688 (1971).

48. 403 U.S. at 620-21.

49. Justice White expressed concern that the Court had created an insoluble paradox for the state and parochial school by its decision in the instant case. "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 and on this record able to give — and enforces it, it is then entangled in the 'no entanglement' aspect of the Court's Establishment Clause jurisprudence." 403 U.S. at 668 (concurring opinion).

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Pennsylvania laws was viewed as an additional church-state entanglement.[50] Lobbying by religious groups for legislation aimed at bolstering the financial resources of parochial schools fosters political divisiveness.[51] This detrimental factor is emphasized when annual appropriations may be required for the benefit of relatively few religious groups.[52]

The long and controversial history of the establishment and free exercise clauses suggests that the issue of state aid to parochial schools is far from resolved. It is questionable whether the three tests enunciated by the Supreme Court offer a more explicit statement of first amendment requirements than previously existed.[53] There are two basic reasons: first, the cumulative criteria are hardly innovative; second, these tests may have created a paradoxical constitutional requirement.[54] Statutes attempting to provide a primarily secular effect may at the same time create excessive government entanglement with the church. Conversely, laws drafted to avoid an unconstitutional degree of state involvement with religion may effectuate a primary religious purpose.

Perhaps this paradoxical situation was created by the type of aid provided in the Rhode Island and Pennsylvania statutes. Teacher salary supplements connote "direct" aid to religion in the historical direct-indirect dichotomy.[55] The Court persuasively rationalized that the nature of the teacher's position and the government control necessary to ensure neutrality resulted in an unconstitutional degree of church-state involvement. The instant decision obviously jeopardizes any kind of state aid involving subsidies to parochial school teachers. However, any aid requiring less government surveillance — construction grants and student tuition subsidies, for instance — may be constitutionally distinguishable from salary supplements.[56]

Statutes that use public funds to supplement nonpublic school teachers' salaries have been passed in four states,[57] and laws substantially similar to

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50. *Id.* at 622.

51. *Id.* at 623-24.

52. *Id.* at 623.

53. *See* text accompanying notes 19-22 *supra*. However, the adoption of an absolutist position, which holds that all government contact with religion is forbidden by the first amendment, is an unrealistic one. *See* Griswold, *Absolute Is in the Dark — A Discussion of the Approach of the Supreme Court to Constitutional Questions*, 8 UTAH L. REV. 167 (1963). "Judicial extremism in the pursuit of a workable constitutional principal is no virtue where it causes grave societal disorder, unless a more essential overriding interest is upheld." Note, *Constitutional Law — First Amendment — State Aid to Sectarian Education — Child Benefit Theory* — Board of Education v. Allen, 17 CATH. U.L. REV. 242, 246 (1967).

54. *See* note 49 *supra*.

55. The traditional test of constitutionality for state aid to nonpublic schools has been whether the aid is direct or indirect. *See* Comment, *The First Amendment and Financial Aid to Religions: Limits on the Government's Conduct*, 61 NW. U.L. REV. 777, 778 (1966). In the instant case the Pennsylvania statute had the further defect of providing the financial aid directly to the nonpublic school. 403 U.S. at 621.

56. *See* note 47 *supra*.

57. CONN. GEN. STAT. ANN. §§10-281a to -281v (1969); LA. REV. STAT. ANN. §§17:1321-35 (1970); N.J. STAT. ANN. §§18A:58-38 to -58 (1971); OHIO REV. CODE ANN. §3317.06 (1970).

the Pennsylvania "purchase of services" statute are under active consideration in the legislatures of seven others.[58] Other states have adopted laws involving a parental grant plan.[59] The validity of such statutes is in question as a result of the instant decision.

The invalidation of parochial aid statutes may result in a serious social and economic impact on nonpublic schools. In recent years parochial schools have faced a severe financial crisis.[60] Several states have passed public welfare legislation to funnel tax revenue to religious educational systems.[61] The instant decision may reduce the flow of these funds, forcing many parochial schools to close their doors. Others will certainly raise tuition. This may result in an influx of students in the public school system and, consequently, an increase in state taxes to cope with the cost of expanded programs.[62]

The Supreme Court has continually recognized the difficulty of perceiving exactly where the "verge" of the precipice of unconstitutionality lies. Thus, a basic theme has emerged from adjudication of establishment clause issues: the Court is dedicated to the proposition that such issues will be resolved on a case-by-case basis. Jefferson's wall has been battered and torn in the past but in the present decision it was reconstructed, if only for a while.

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58. Indiana, Kansas, Maine, Massachusetts, Missouri, Washington, and West Virginia. Wall Street J., June 29, 1971, at 22, col. 4. *See also* CHURCH AND STATE, June 1971, at 13.

59. *See* Wall Street J., June 29, 1971, at 22, cols. 3-4. This plan involves a "voucher" system whereby parents of pupils who attend both public and nonpublic schools are given a tuition grant to be applied to costs at whichever school a child attends. Its advocates believe such a plan will pass constitutional muster because the primary benefit goes to the child and it involves little government involvement with religion. *Id.*

60. *See* U.S. NEWS AND WORLD REP., July 12, 1971, at 27. In 1967 there were 12,627 Catholic elementary and high schools in the United States. These schools comprised 85% of the total number of nonpublic schools. By 1970 this number had decreased to 11,352 as a result of increased costs, which have driven tuition up beyond the means of many parents. *Id. See also* Wall Street J., June 29, 1971, at 1, col. 6.

61. *See* note 58 *supra*. Connecticut originally appropriated $6 million to parochial schools. CONN. GEN. STAT. ANN. §10-281v (1969). A recently passed New York law will provide $33 million to nonpublic schools for secular educational services and an Illinois statute makes available to students of private schools a $48 to $60 a year grant for elementary school pupils and $60 to $90 for high school students. Wall Street J., June 29, 1971, at 22, col. 3. Although there has been a concerted effort by some members of the Florida Legislature to introduce such legislation, it has thus far failed to pass. *See* Fla. S. 391, Fla. H.R. 3585 (1970); Fla. S. 470, Fla. H.R. 836 (Spec. Sess. 1971). Only 8% of all school children in Florida attend nonpublic schools. There is, however, a strong Catholic lobby group. Interview with Mr. Kern Alexander, Associate Director, National Educational Finance Project, in Gainesville, Fla., July 14, 1971.

62. *See generally* TIME, July 10, 1971, at 19; U.S. NEWS AND WORLD REP., July 12, 1971, at 27; Wall Street J., June 29, 1971, at 22, col. 3. One authority has stated that the American public could smoothly absorb the fiscal impact caused by a large exodus of parochial students to the public school system. This could be achieved by enactment of impact laws similar to present federal statutes that provide subsidies to ease the strain on communities affected by such large government projects. Interview, *supra* note 61.