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Parochiad and Prayer: A Perplexing Problem
William R. Fifner*

This paper is limited to a chronological examination of decisions of the United States Supreme Court involving aid to parochial education, an exploration of possible future aids, and inquiry into the question whether the extent of present aid and of possible future aid indicates that parochial schools and the general public are, or will be, on a collision course with respect to the free exercise of religion.

Although all types of parochial education are involved in the problem, the major portion involves Catholic schools, since these form the overwhelming majority of parochial schools. This article will, generally, be devoted to the Catholic parochial question, since it is around this question that the lines are being politically drawn. There is no question that, with mounting costs for maintaining schools, the financial burden of the parents of parochial school children is great. Nor can it be doubted that the financial burden of all taxpayers would increase if there were no parochial schools. The Catholic school system has been estimated to be a $9 billion load "off the government’s back".1 United States Senator Taft (R-Ohio) has estimated that the cost of shifting from private to public schools would involve $4.7 billion for operations, and up to $10 billion in construction.2

The problem is apparent. The solution is obscure.

The Political and Legislative History of "Establishment" and "Free Exercise"

The words "separation", "Church", and "State", are not found in the United States Constitution. Yet, these words are the essence of the problem. What is meant by the First Amendment language: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"?

Any observer of contemporary political expression recognizes that expressions, often out of context of time or place, are not necessarily conclusive of the views of the author. Yet such expressions of our Country's founders have been seized upon by those who support a broad no-aid interpretation and those who support a more narrow interpretation to support their particular points of view.

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Narrow constructionists rely upon the fact that the Amendments Committee of the Virginia ratifying convention of 1788 proposed only that an amendment should be added that "no particular religious sect or society ought to be favored or established by law, in preference to others." Many, including the Court, use the writings of Thomas Jefferson and James Madison to "prove" a broad interpretation. Some belittle the correspondence of Thomas Jefferson by pointing out that recommendations made by him while Rector of the University of Virginia do not support the correspondence, and this is disputed by an argument about the grammatical meaning of the recommendation. James Madison's essays are disputed by some who maintain that the only creditable evidence of his view is his statement in Congress on June 8, 1789 that he considered it proper to submit an amendment that no national religion shall be established. Statements made, for and against at state ratifying conventions, and the actions taken, have been used by both sides to support their position.

Many other historical conflicts were present and have been cited by both sides of the argument. Certainly this is due in large measure to the fact that the sixth, and final, draft of the Amendment is "at best opaque", and the two religion clauses are "not the most precisely drawn of the Constitution".

These historical conflicts, and the extreme interpretations given by both sides, indicate, as Professor Gianella suggests, that any thoroughgoing effort to interpret the First Amendment by resort to the original understanding of either the authors or ratifiers of the Constitution is apt to be a misguided, if not dangerous, effort.

Whatever the views of historians or religious and legal scholars the two clauses, (or parallel participial phrases), have such meaning as the Supreme Court from time to time places upon them, and it is to the Court that we turn. Broad interpretations and more narrow interpretations have been expressed in the cases by majority or dissent. Both sides in future aid cases will use these expressions and the justices who made them. Thus both positions and their advocates must be explored.

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5 Id. at 123.
6 Id. at 194.
10 D. OAKS, THE WALL BETWEEN CHURCH AND STATE, 3 [hereinafter cited as OAKS].
Establishment and the Court

The first case dealing with state aid arose before the establishment clause was made applicable to the States and involved a Fourteenth Amendment attack against a Louisiana statute authorizing the use of tax funds to furnish textbooks to private, as well as public, school children.11 Mr. Justice Hughes delivered the opinion for a unanimous Court. He pointed out that the books were furnished to the children, and only they, and the state, benefitted, and concluded that there is no violation of the fourteenth amendment where private school children are furnished "the same books that are furnished children attending public schools".12

Everson v. Board of Education13 involved a New Jersey statute which authorized reimbursement to parents of the cost of providing public bus transportation for their children to and from school. Some of the reimbursement was to Catholic parents. The opinion of the 5-to-4 majority, which sustained the constitutionality, was delivered by Mr. Justice Black, who furnished the Court's first interpretation of the meaning of the establishment clause:

The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another . . . 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 establishment of religion by law was intended to erect 'a wall of separation between Church and State.'14

Although the Court was sharply divided, there was no dispute among the nine Justices concerning the accuracy of the definition. The only dispute centered on the application of the definition to the constitutionality of the aid at issue. The cases which followed also accepted the definition, and, although it was originally thought to be obiter dicta, it can no longer be so construed.15

The due process argument that the state taxed some to help others carry out their private purpose was raised in Everson but was dismissed, citing Cochran, because, "It is much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose".16 New Jersey had

12 Id. at 375 (emphasis added).
14 Id. at 15, 16.
decided that this was a public purpose, and the Court accepted this conclusion.

To Mr. Justice Black the establishment clause means that a state cannot contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church. However, it cannot exclude (faiths or non-faiths) from receiving the benefits of public welfare legislation because to do so would hamper the free exercise of religion of its citizens. He discussed the dangers incident to walking, the safety of the children on a bus, the fact that some parents would be reluctant to send their children to school if they had to walk, and found constitutionality because:

The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools.\(^7\)

The *Everson* majority opinion concludes with the statement:

The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. *We could not approve the slightest breach.* New Jersey has not breached it here.\(^8\)

The *Everson* dissent was troubled. Mr. Justice Jackson, joined by Mr. Justice Frankfurter, did not reject the interpretation of the clause, but rejected the safety argument on the basis that children were no more safe on the bus whether paid by the state or parents; rejected the comparison with other benefits afforded such as police and fire protection, on the basis that these services are performed for persons or property as a part of society, and critically said:

\[T]\e undertones of the opinion, advocating complete and uncompromising separation of Church from State, seem utterly discordant with its conclusion yielding support to their commingling in educational matters.\(^9\)

Mr. Justice Rutledge, in dissent, joined by Mr. Justices Frankfurter, Jackson, and Burton also rejected the safety argument as one bearing no resemblance to a safety measure and found no comparison with police or fire protection. To him, the establishment clause, and the wall of separation, prohibit any type of state support, financial or otherwise, of religion in any guise, form, or degree. In his opinion,

Legislatures are free to make, and courts to sustain, appropriations only when it can be found in fact they do not aid, promote, encourage or sustain religious teachings or observances, be the amount large or small. No such finding has or could be made in this case.\(^{20}\)

\(^{17}\) Id. at 18.

\(^{18}\) Id. at 18.

\(^{19}\) Id. at 19.

\(^{20}\) Id. at 52-53.
He prophetically, and almost mournfully, noted that the wall was neither so high nor so impregnable following the majority's decision as it was before, and that this was the first breach, if not the second (viz., Cochran). He warned, "That a third, and a fourth, and still others will be attempted, we may be sure", and sadly observed: "For just as Cochran . . . has opened the way by oblique ruling for this decision, so will the two make wider the breach for a third. Thus with time the most solid freedom steadily gives way before continuing corrosive action".21

According to Pfeffer, the Catholics hailed Everson as a victory for religious liberty, and the Protestants criticized it as impairing separation.22 Whatever else may have been said, it is apparent that Everson broadly interpreted the establishment clause to prohibit any aid to religion but not as a prohibition against welfare legislation that can be considered as having a "child benefit", even though the aid may indirectly aid religion by releasing funds which can be used for religious purposes. From Everson have come hot lunches, textbooks, instructional materials, etc., in addition to bus transportation.

Mr. Justice Rutledge did not have long to wait for the third breach to be attempted. In Illinois ex rel. McCollum v. Board of Education,23 public school parents were permitted to sign request cards, and their children were then permitted to attend religious instruction classes conducted during school hours in the public school building by outside teachers furnished by a religious council representing certain faiths, subject to the approval of the superintendent of schools. Attendance records at these classes were kept and reported, and non-attenders were required to continue their secular studies. With Mr. Justice Reed as the lone dissenter, Mr. Justice Black delivered the opinion of the Court, striking down this practice as a violation of the establishment clause. He rejected the argument that the Court's (i.e., his) views as set forth in Everson were dicta as to the meaning of the Establishment Clause and the argument that the First Amendment was historically intended to forbid only government preference of one religion over another, not an impartial governmental assistance of all religions.24 As far as he was concerned:

Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes. This is beyond all question, a use of the tax-established and tax-supported public school system to aid religious groups to spread the faith.25

Although we might wonder "when is aid, aid?", and "when is aid, not aid?", we can conclude from Everson and McCollum that where

21 Id. at 29.
22 Supra note 4 at 138.
24 Id. at 211.
25 Id. at 209-10.
the aid is indirect as in *Everson*, and does no more than provide a public welfare "pupil benefit", it is constitutional. Such aid is incidental to the compulsory school laws. However, where, as in *McCollum*, the aid is direct and related to the compulsory school law, it is unconstitutional. The non-preference theory (i.e., aid to religion is not prohibited so long as given to all religions) was advanced in the *McCollum* briefs but not accepted by the Court. Pfeffer notes that, in any event, the Court could scarcely have accepted the theory in *McCollum* since only the sects which worked through Interfaith Council were included (which excluded Lutherans and Jehovah's Witnesses), Catholics were taught in a basement room, and it would have been a fiction to say that the attendance was purely "voluntary".26

Just four years later in *Zorach v. Clauson*, in an opinion written, perhaps surprisingly, by Mr. Justice Douglas, a different form of "released time" was sustained.27 The facts, so far as relevant, differed from *McCollum* only in that the children whose parents made application were released during school hours to leave the school premises and attend their respective religious centers. Mr. Justice Rutledge's wall is under the fourth attack, and this one is successful. The broad, strict separation interpretation of the amendment, as expressed in *Everson* is surely tempered by a statement that:

The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter.28

Although, as he later regretted, Mr. Justice Douglas was with the *Everson* majority, this could not be called a "pupil benefit" case in the *Everson* sense. He had joined the *McCollum* majority, indeed affirmed that he was following *McCollum*, but finds a distinction, and no breach of the establishment clause, where public funds are not being used per se, nor are public school classrooms. He stated that:

We are a religious people whose institutions presuppose a Supreme Being . . . When the State encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions . . . Government may not finance religious groups nor undertake religious education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.29

26 *Supra* note 4 at 347.
28 *Id.* at 312.
29 *Id.* at 313-14.
Having reached the above position as respects the State vis-a-vis the Church, he concludes that although following McCollum, it cannot be expanded to cover the instant released time program since the first amendment does not require such hostility to religion that it would forbid public institutions from making adjustments of their schedules to meet the religious needs of the people.\(^{30}\)

Mr. Justice Black, in almost angry dissent, found no difference between the McCollum and Zorach systems "even worthy of mention".\(^{31}\) He was not impressed by the fact that the school buildings were not being used, because:

As we attempted to make categorically clear, the McCollum decision would have been the same if the religious classes had not been held in the school building.\(^{32}\)

Very possibly the real difference between McCollum and Zorach is that Justices Murphy and Rutledge died in between them and were replaced by Justices Clark and Minton. Surely Mr. Justice Rutledge, and possibly Mr. Justice Murphy, would have voted with Justices Black, Frankfurter, and Jackson in Zorach.

Mr. Justice Black was troubled by the fact that, to him, the State of New York was manipulating, coercively, its compulsory education system to help religious sects get pupils, resulting in a combination, rather than a separation, of Church and State.\(^{33}\) Mr. Justice Frankfurter, in dissent, believed that the "pith" of the case was that those who do not attend the religion classes were compelled to attend their regular school classes.\(^{34}\) Mr. Justice Jackson, in dissent, thought that the distinction between McCollum and Zorach was "trivial, almost to the point of cynicism":

A reading of the Court's opinion in this case will show such difference of overtones and undertones as to make clear that the McCollum case has passed like a storm in a teacup. The wall which the Court was professing to erect between Church and State has become even more warped and twisted than I expected.\(^{35}\)

By 1952, then, a theory has evolved that it is not unconstitutional for the state to "accommodate" religion. The Zorach majority pointed out certain areas of accommodation—prayers in the legislative halls, executive proclamations, courtroom oaths, public rituals—and the McCollum form of released time appears to be another acceptable accommodation.

Pfeffer noted that the Zorach Court did not repeat the McCollum interpretation of the amendment, specifically omitted the statement

\(^{30}\) Id. at 315.

\(^{31}\) Id. at 316.

\(^{32}\) Id. at 316.

\(^{33}\) Id. at 318.

\(^{34}\) Id. at 321.

\(^{35}\) Id. at 325.
about government neutrality as between religion and non-religion, and:

1. Adopted the argument, rejected in *McCollum* (but still as valid) that the permissibility of government aid to—or at least cooperation with—religion could be inferred from the fact that "we are a religious people".

2. Adopted the argument that practices determine, or at least evidence, constitutionality. These religious practices such as courtroom oaths, etc., were present, and rejected, in *McCollum* and the only things that had changed were the temper of the times and the personnel of the Court.

3. Adopted the argument (heretofore raised only by one Justice—Reed—in *McCollum* dissent) that the First Amendment does not require that in every and all respects there shall be separation of Church and State. 36

Professor Kurland believes it is clear that the 'purpose and primary effect' of the released time legislation approved in *Zorach* is "the advancement of religion". 37 However, the case has never been overruled.

The "primary purpose and effect" mentioned by Kurland becomes important in two cases involving Sunday closing laws rather than school aid. The validity of such a statute was sustained in *McGowan v. Maryland*. 38 The Court admits the purely religious origin of such laws but believes that in the course of history both federal and state governments have oriented their activities very largely toward the improvement of the health, safety, recreation, and general well-being of our citizens, and that such laws had evolved into a distinct secular purpose—a "day of rest"—having no present relationship to establishment of religion. The Court stated:

The "Establishment Clause" does not ban federal or state regulation of conduct whose reason or effect merely happen to coincide or harmonize with the intents of some or all religions. In many instances, the Congress or state legislatures conclude that the general welfare of society, wholly apart from any religious considerations, demands such regulations. 39

and it concluded:

The present purpose or effect of most [Sunday Closing Laws] is to provide a uniform day of rest for all citizens; . . . To say that the States cannot prescribe Sunday as a day of rest for these purposes solely because centuries ago such laws had their genesis in religion would give a constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and state. 40

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36 supra note 4 at 157-159.
39 Id. at 442 (emphasis added).
40 Id. at 445 (emphasis added).
On the same day, in *Gallagher v. Crown Kosher Super Market*, the Court sustained the Massachusetts Sunday closing statute, stating that "we do not find that the present statute's purpose or effect is religious".

Mr. Justice Douglas, who had believed that we were "a religious people", and at least inferentially rejected the non-preference theory in *Zorach* nine years earlier, was the lone "establishment" dissenter in these Sunday closing cases.

It would appear that from a "strict separation" start, and the addition of "pupil benefit" and "government accommodation" we can add a "primary purpose and effect" theory of permissibility.

A simple prayer prescribed by a Board of Education in New York was at issue in *Engel v. Vitale*. The prayer was:

> Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country.

There were no compulsions on the students, who could stand or not stand, recite or not recite, or even leave the classroom while the teacher read the prayer. Mr. Justice Black, again entering the fray, delivered the opinion for five members of the Court. Mr. Justice Frankfurter and White took no part in the decision. Mr. Justice Douglas concurred, and Mr. Justice Stewart dissented. The Court struck down the prayer as violating the establishment clause, stating:

> The constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government.

It has been wryly pointed out: "Certainly there is something anomalous about a wall that will admit a school bus without 'the slightest breach' but is impervious to a prayer". To that might be added, that there is also something anomalous about a wall which will admit released time away from school, and will admit, as Mr. Justice Black so carefully pointed out by footnote as ceremonial and therefore distinguishable, schoolroom recitation of the Declaration of Independence with its reference to the Diety, singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, etc. Mr. Justice Douglas was by now not so sure about these so-called ceremonial functions and also took the occasion of this case to state:

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42 Id. at 630.
44 Id. at 422.
45 Id. at 425.
46 OAKS, supra note 10, at 2-3.
The Everson case seems in retrospect to be out of line with the First Amendment. Its result is appealing, as it allows aid to be given to needy children. Yet, by the same token, public funds could be used to satisfy other needs of children in parochial schools—lunches, books, and tuition being obvious examples.\footnote{Id. at 443.}

Kurland believes that the only thing left clear by Engel was that if the decisions of the past failed to produce a governing principle, no remedy of that defect is found in Engel, and the reader gets the impression of "the Justices of the majority walking on eggs, and of the . . . minority . . . stamping after them".\footnote{Kurland, supra note 37, at 153.}

Two companion cases, School District of Abington Township, Pa. v. Schempp and Murray v. Curlett,\footnote{374 U.S. 203 (1963).} involved school district requirements that classes be commenced each day with readings from the Bible and recitation by the students of the Lord's Prayer. Once again the wall was impervious to prayer. Mr. Justice Clark delivered the opinion for the Court. He observed that in eight cases over a score of years, and with only one Justice dissenting on the particular point, the Court:

[H]as consistently held that the clause withdrew all legislative power respecting religious belief or the expression thereof. The test may be stated as follows: what are the purposes 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.\footnote{Id. at 222 (emphasis added).}

The Court distinguishes the free exercise and establishment clauses on the basis that a violation of the former is predicated on coercion, while there need be none for the latter. Applying the principles to the two cases, the Court concludes that the religious "exercises" are unconstitutional, adding:

Further, it is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent . . . \footnote{Id. at 225.}

Mr. Justice Rutledge would surely agree.

As far as Kurland was concerned, the single certain conclusion to be drawn from Engel and Schempp is that the states may not prescribe the conduct of religious ceremonies in their public schools.\footnote{Kurland, supra note 37, at 178.}
Once *Engel* had been decided, "only a surrender to the political power of the churches similar to that made in *Zorach* could have caused the Court to decide the *Schempp* case otherwise".54

"Government neutrality" becomes a theory in *Schempp*, as a requirement of the establishment and free exercise clauses, and the test of neutrality is the "primary purposes and effect" test delineated. Kurland views the establishment clause as an absolute "neutrality" requirement. Government can do nothing, or refrain from doing something, that will confer a benefit, or impose a burden, upon religion. It cannot do anything which either aids or hampers religion.55 However, it would not appear that the test of *Schempp* is as far-reaching toward "neutrality" as Kurland would fashion.

Unlike *Cochran*, which was challenged on familiar due process grounds, *Board of Education v. Allen*,56 involved a First Amendment challenge to a New York statute requiring local public school authorities to lend textbooks free of charge to all students in grades 7 through 12, including private school children. Mr. Justice White, for the majority, noted that the books designated by the state or approved by the board of education were ones which a pupil was required to use for at least one semester in a class in the school he legally attends. The Court recognized that the line between state neutrality and state support was not easy to locate and likened this case to *Everson*. It found nothing in the law that was contrary to its stated purpose (educational aid is required by the public welfare and national defense) and found no abridgment of the first amendment—after assuming that only secular testbooks would be provided, and these would not be unsuitable for use in the public schools because of any religious content.57

Mr. Justice Harlan, concurring, made an extremely interesting restatement of the test:

I would hold that where the contested governmental activity is calculated to achieve non-religious purposes otherwise within the competence of the State, and where the activity does not involve the State so significantly and directly in the realm of the sectarian as to give rise to . . . divisive influences and inhibitions of religion . . . it is not forbidden by the religious clauses of the First Amendment.58

Mr. Justice Black was in dissent in *Allen*, and worse, found the majority using and, to him, misreading, his *Everson* opinion to sustain its position. He believed *Allen* to be a:

[F]lat, flagrant, open violation of the First and Fourteenth Amendments which together forbid Congress or state

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54 Id. at 172.
55 Id. at 160.
56 392 U.S. 236 (1968).
57 Id. at 245.
58 Id. at 249.
legislatures to enact any law "respecting an establishment of religion".59

As far as Mr. Justice Black was concerned, both Everson and McCollum plainly interpret the Constitution as protecting public taxpayers from being compelled to pay taxes to their government to support the agencies of private religious organizations the taxpayers oppose. He envisions sectarian religious propagandists continuing the struggle for complete domination and supremacy and worries that "it nearly always is by insidious approaches that the citadels of liberty are most successfully attacked".60 This is the same Justice who was not concerned in Everson that there may be some aid to parochial schools by the bus transportation?

Mr. Justice Douglas, having previously questioned the correctness of Everson, is also in Allen dissent. To him, seemingly totally secular subjects can be treated, by text-book, with extremely religious overtones. He envisions a sectarian-secular battle for control of the school board, with the political lines drawn, and is convinced:

Now that "secular" textbooks will pour into religious schools, we can rest assured that a contest will be on to provide those books for religious schools which the dominant religious group concludes best reflects the theocentric or other philosophy of the particular church.61

Mr. Justice Fortas, also in Allen dissent, distinguishes from Everson, where the same service or facility was extended to children attending parochial schools as to public school children.62

The Allen decision was critically examined by Professor Freund. The opinion was guarded, in that, because of the lack of evidence as to the exact nature of the books, there were favorable assumptions accorded to the defense. It was narrow also, with its stress upon the fact that the books were only loaned, and the requests were made by and on behalf of the students, not the school. The majority's analogy to Everson is questionable. Bus rides are not ideological, but can the same be said of textbooks chosen by a parochial school for compulsory use, interpreted by teachers selected by that school, and employed in a deliberately religious atmosphere? Anticipating the next advancement from Allen—i.e., to textbooks not on loan, or not in form requested by pupils, books of a character or for use in schools different from the circumstantial presumptions of Allen, unconditional grants for specified areas of learning, and lump sum grants—Freund believes that there are three constitutional choices: (1) aid mandatory; (2) aid permissible; (3) aid impermissible. The first is not acceptable, the second would ordinarily be best (were the issue not religious) as it would permit the state's political process to function

59 Id. at 250.
60 Id. at 252.
61 Id. at 265.
62 Id. at 271.
in constitutional grey areas, but, he would choose the latter and have no further expansion of Allen beyond its narrow grounds because political divisions along religious lines is one of the principal evils that the first amendment sought to forestall.63

Both establishment and free exercise were considered involved in Epperson v. Arkansas,64 although financial school aid was not in issue. An Arkansas statute made it a misdemeanor for a teacher in any state-supported school to teach the theory or doctrine of evolution, or use any textbooks which supported this theory. Mr. Justice Fortas delivered the opinion for the Court, holding, with no dissent, that the statute was violative of both clauses of the first amendment, and stating:

Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. The First Amendment mandates governmental neutrality between religion and religion, and between religion and non-religion.65

There is, and can be no doubt that the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma.66

The State may not adopt programs or practices in its public schools which "aid or oppose" any religion. This prohibition is absolute. It forbids alike the preference of a religious doctrine or the prohibition of theory which is deemed agnostic to a particular dogma.67

The neutrality concept of Epperson appears more akin than Schempp to Kurland's view. The inter-relationship that the Court extends to the Establishment and Free Exercise clauses was again demonstrated in Walz v. Tax Commission.68 After an early colonial history of tax exemption for religious institutions extending before, during, and after the Constitutional debates, and continuing to the present day, the Court met, for the first time, a challenge to the constitutionality of property tax exemptions to religious organizations for religious properties used solely for religious purposes. Mr. Justice Burger, for the Court, comes to the view that there is no constitutional absolute straight line, no constant rigidity, and reaches a general first amendment principle that:

[W]e will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neu-

64 393 U.S. 97 (1968).
65 Id. at 103-04.
66 Id. at 106.
67 Id. at 106-07.
trality which will permit religious exercise to exist without sponsorship and without interference. 69

He noted the apparent concessions of Everson, Zorach, and Allen, and stated:

With all the risks inherent in programs that bring about administrative relationships between public education bodies and church-sponsored schools, we have been able to chart a course that preserved the autonomy and freedom of religious bodies while avoiding any semblance of established religion. This is a "tight rope" and one we have successfully traversed. 70

The Court discounts, and rejects, the social welfare theory. It does not read the tax exemption statute as an attempt to establish a religion but reads it as simply sparing the free exercise of religion from the burden of property taxation levied on private profit institutions. The Court does wonder if such legislation might entail an "excessive" governmental "entanglement" with religion. It concludes, perhaps rationalizes, that, "The grant of tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state". 71 Anyway, "The exemption creates only a minimal and remote involvement between church and state and far less than taxation of churches". 72 To "neutrality" can be added "benevolent neutrality" as constitutionality permissible. It would appear that in a period of just two years, the Court has gone from an opinion of neutrality closely akin to Kurland's, to one poles apart.

Mr. Justice Douglas was in solitary dissent in Walz. Admitting to being one of the 5-to-4 majority in Everson, he questions its correctness, stating that he "has since had grave doubts about it, because I have become convinced that grants to institutions teaching a sectarian creed violate the Establishment Clause". 73

Tilton v. Richardson 74 and the companion cases of Lemon v. Kurtzman and Earley v. DiCenso 75 were decided on the same day. The Tilton Court sustained that part of the Federal Higher Education Facilities Act of 1963 76 which provided for federal construction grants for colleges and universities, including parochial, but excluding any facility to be used for sectarian purposes. The Lemon Court struck down a Pennsylvania statute that aided non-public elementary schools by way of direct reimbursement for teachers' salaries, and textbooks and instructional materials in specified secular subjects (mathematics, modern foreign languages, physical science, and physical education).

69 Id. at 669.
70 Id. at 672.
71 Id. at 675.
72 Id. at 676.
73 Id. at 703.
74 403 U.S. 672 (1971).
75 403 U.S. 602 (1971).
All materials were to be approved by the state, with no reimbursement for any course expressing religious teaching or the morals of any sect. A Rhode Island statute was also struck down. It paid directly to non-public elementary teachers a supplement of 15% of their annual salary if they taught only courses offered in the public schools, used only teaching materials offered in the public schools, and taught no religion courses while receiving the supplement.

Since this article is primarily concerned with state aid to parochial education below the college level, the *Tilton* decision is not particularly germane, because the *Tilton* Court specifically distinguished that case from *Lemon* on the basis of three factors which substantially diminish the extent and potential danger of aid in *Tilton*. The three factors are that: (1) there are significant differences between the church-related institutions of higher learning and schools below that level—the affirmative, if not dominant, policy of the latter being to assure future adherents by educational control at an early age, and the latter, even though admittedly religious schools, have a primary purpose of providing their students with secular education; (2) the aid given is non-ideological—i.e., the construction of buildings for secular purposes, and the cases have upheld the right of churches to receive government aid in the form of secular, neutral, or non-ideological services, facilities, or materials that are supplied to all students regardless of the affiliation of the school which they attend, and; (3) these grants, unlike ones involving direct and continuing payments with all the incidents of regulation and surveillance, are one-time, single-purpose, construction grants.\(^7\)

*Tilton* is of importance, however. For one reason, Mr. Chief Justice Burger, who announced the decision and wrote the opinion, was able to get just three Justices to join the opinion in spite of the higher education aspect—Justices Harlan, Stewart, and Blackmun. Mr. Justice White concurred in the result. Mr. Justice Brennan dissented as to the constitutionality of the Act as it applied to federal aid to sectarian institutions. Mr. Justice Douglas, joined by Mr. Justice Black and Marshall, also dissented and said:

I dissent not because of any lack of respect for parochial schools but out of a feeling of despair that the respect which through history has been accorded the First Amendment is this day lost.\(^8\)

It is important, also, because of four questions fashioned by the Court in order to reach an understanding of the constitutionality:

1. Does the Act reflect a secular legislative purpose?
2. Is the primary purpose of the Act to advance or inhibit religion?
3. Does the administration of the Act (i.e., the effect foster an extensive government entanglement with religion?)

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\(^7\) *Tilton* v. Richardson, 403 U.S. 672, 685-86 (1971).

\(^8\) *Id.* at 696-97.
4. Does the implementation of the Act inhibit the Free Exercise of religion? 79

The Court was able to answer "Yes" to the first question, and "No" to the next three.

Mr. Chief Justice Burger also delivered the opinion in *Lemon*. The first three questions above—the Establishment questions—were restated. The Court was particularly unable to answer "No" to the third question. It took note of the full language of the establishment clause, observing:

A given law might not establish a 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. 80

The Chief Justice's dictum did not consider that the prior holdings of the Court called for total separation between church and state, believing that this was not possible in an absolute sense.

Judicial caveats against entanglement must recognize that the line of separation, far from being a "wall", is a blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship. 81

Mr. Justice Douglas, joined by Mr. Justice Black, concurred but he was obliged to point out the dangers of subsidy, in any form, Mr. Justice White dissented, being unable to "understand how the Court can accept the considered judgment of Congress that its program is constitutional and yet reject the equally considered decisions of the Rhode Island and Pennsylvania legislatures that their programs represent a constitutionally acceptable accommodation between church and state. 82

Such is the status of the Supreme Court today. We have seen a "wall of separation between church and state" articulated as one that will not "admit the slightest breach". Yet it has admitted bus transportation reimbursement to parents, released time away from public school premises during school hours, loaned textbooks, construction grants to colleges, and real estate tax exemption for churches. It has refused to admit shared time in public school buildings during school hours, state prescribed prayers in public schools, reimbursement of salaries of secular teachers and salary supplements. We have seen cases "followed" which seemed incapable to "lead". We have seen no case overruled.

The sharply divided Court in many of the decisions, the sometimes seemingly inconsistent conclusions, the changes that seem to have, or actually did, take place in the minds of some of the Justices as to what constituted a breach of the interpretation, and, what

79 Id. at 677.
81 Id. at 614.
82 Id. at 671.
seems to be an amendment to the interpretation, without calling it thus—all combine to leave one, approaching the next part of the inquiry, believing that he is much like Alice and the King at her trial:

"What do you know about this business?", the King said to Alice.
"Nothing", said Alice.
"Nothing 'whatever'? persisted the King.
"Nothing 'whatever'", said Alice.
"That's very important", the King said, turning to the jury."\(^8\)

The Arguments For and Against Additional Aid

Whatever hope there may have been for an accommodation between the public and parochial school systems has been weakened, if not destroyed, by the secularization of the public schools, coupled with the compulsory education laws. To the Catholics, or at least to many of them, the philosophy of secular education is not merely neutrality with regard to religion and creed but is a positive, religious philosophy which contradicts Catholic principles of education. This being the case, the state, having adopted compulsory education laws, is under an affirmative duty to provide schools that accord with the dictates of the parents' conscience.\(^8\)

This basically moral concept is not easily refuted, nor should it be casually dismissed. Powerful religio-philosophical arguments can be advanced that secular education is indeed a religious education. In United States v. Seeger,\(^8\) a unanimous Court construed the test of the words "in relation to a Supreme Being," as used for conscientious objector exemption under The Military Training and Service Act,\(^8\) to be "whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that fulfilled by the orthodox belief in God of one who clearly qualifies for the exemption".\(^8\) Obviously, such a view of man's ethical values, and an even more removed approach in the public school system, is unacceptable to those who believe that "education is not complete unless the pupil is presented with the whole of life, which includes an awareness of his obligation to God".\(^8\)

But morality alone will not solve the Catholics' dilemma, nor are they without constitutional arguments. If Catholic parents are required to send their children to school and have a constitutionally

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\(^{83}\) L. Carroll, Alice's Adventures in Wonderland, (1875), (The Heritage Press ed.) 161 (1941).
\(^{84}\) Note, Catholic Schools and Public Money, 50 Yale L. J. 917, 923 (1941).
\(^{85}\) 380 U.S. 163 (1964).
\(^{86}\) 50 U.S.C.A. 456 (j).
\(^{88}\) W. Parson, S.J., The First Freedom, 5-6 (1948).
guaranteed right to direct the education of their children in accordance with religious conviction, is it not an infringement of their religious liberty to tax them for the financial support of a public school system which is being conducted in a manner which conflicts with their religious convictions? If this guaranteed liberty can be exercised only at the price of a penalty, does not this penalty on "the exercise of a freedom...limit it in fact, if not in theory?" \(^89\)

Professor Drinan fortifies the moral arguments of the Catholic by the conclusion that the neutrality principle established by the Court is constitutionally wrong because "the silent assumption by the public schools that religion in any meaningful sense is irrelevant to the educational process amounts to an official establishment of secular values". \(^90\) He believes that the Sunday Closing cases make it clear that the separation requirement does not mean the state, in carrying out a legitimate secular purpose, must do so in a way that gives no aid to religion. The line of cases from Everson to Engel make it equally clear that public money cannot logically be withheld from the private school if it is publicly accredited as an institution where children may fulfill their legal duty to attend school. \(^91\) To him, a correct Constitutional interpretation of the meaning of the establishment clause as expressed in Everson, proscribes funds to teach or practice religion, but does not proscribe funds for secular education even though under religious auspices. Nor is there any prohibition to funds to a church related institution for accomplishing a secular purpose merely because such a grant might liberate other funds of the institution for use in pursuit of a religious purpose. \(^92\) In fact, it is constitutionally wrong for a state to finance instruction permeated with a secularistic outlook, if it cannot provide funds for instruction in secular subjects where religious values are commingled in the instruction. \(^93\)

Some of those who oppose the use of public funds for the aid of parochial schools, or parochial parents, are the same persons who opposed prayers, Bible reading, or other religious practices in the public schools. However, such persons are in the extreme minority. The great majority of the opponents are those parents who are at least morally opposed to the "exercises" decisions stemming from Engel.

To many citizens, the free, public school system is one of great attributes, and bulwarks, of our society. Aid to private schools threatens this system because it will lead additional religious and

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90 Drinan, The Constitutionality of Public Aid to Parochial Schools, 69, 70 in OAKS, supra note 10.
91 Id. at 60.
92 Id. at 66.
93 Id. at 64.
other groups to undertake educational instruction programs in reliance on tax support. These inroads and "further fragmentation would destroy or at least weaken public schools so gravely that they could not meet the educational needs of all the children of our society". 94 To these opponents, all parents are free to send their children to public schools, and if, for any reason, they elect a private school, they must bear the expense of this choice. 95

Running through the views of many of the opponents is the sincere, non-bigoted, belief that parochial aid can only lead to divisiveness, and seriously threaten the country's intersectarian compromise. It has been expressed that Catholic aid "entails a willingness, if not a necessity, to support with public funds the separate schools of any legitimate religious, social, or even political group and this is not an inviting prospect to a society already harassed by growing religious segregation and social and ideological stratification". 96 In the same tenor, another writer believes that any merger of the voluntary element of religion and the compulsory element of government "will compromise individual freedom and disrupt public order" and "will make the state the determiner of what is and what is not religious". 97 Another believes that "substitution of endless diversity of sectarian private schools for the common public school as a principal means of elementary and secondary education will promote not pluralism but a dangerous divisiveness" and "politics and religion will become inseparably intertwined". 98

Such are the pros and cons. It is obvious that there are heavy undertones of morality intermingled with all Constitutional arguments, but "fairness" and "justice" arguments will not decide the problem. "It may be neither to tax parochial parents and have them pay for public schools, but it is also neither to tax the public to support schools which it does not want". 99

Two Polar Positions

Two positions, poles apart, have been expressed about the wisdom of increased aid, one being from an unexpected source.

One view, expressed by Deedy, the managing editor of *The Commonweal* is that the Catholic Church may win the battle over aid, and lose the war. To his thinking, it is the parish, not the school, which must be the center of the faith, but the trend has been to direct all energy away from the parish and toward the school, which has caused dissension between those Catholics who support emphasis

94 Gordon, *The Unconstitutionality of Public Aid to Parochial Schools*, 73, 74-75 in OAKS supra note 10.
96 Supra note 84 at 926.
97 Fey, supra note 15 at 38.
98 Supra note 94 at 77-78.
99 OAKS, supra note 10 at 6-7.
on the schools and those who support emphasis on the parish. This polarization is destructive. The parochial schools have served their exalted purpose and are now a hindrance to Catholicism.¹⁰⁰

The other view, expressed by Robert Hutchins, discounts as "misplaced piety" the attachment given to statements by men, such as Thomas Jefferson, who did not participate in the adoption of the first amendment. The future of the western world is as the world's schoolmaster, and the future of democracy rests in becoming a community learning together to govern itself and achieving the common good, not being obstructed by a figure of speech. His principal wish is for more federal aid to education, which he considers inevitable, and is based upon the over-riding public purpose, and benefit, of education. It is self-defeating to try to act as though schools under religious auspices did not exist. Any aid which might accrue to religion is incidental to the over-riding benefit, which will not be achieved unless parochial schools are included.¹⁰¹

Hutchins' views were expressed before the Federal Education Acts of 1963 or 1965, and at least part of his goal was obtained, since his wish for aid included parochial schools at all educational levels. However, and whatever may be the merits of the respective positions, it seems highly unlikely that either will come to pass. On the one hand, it borders upon the impossible to believe that there will be, anytime in the foreseeable future, sufficient lay strength within the Catholic Church to cause it to abandon its school system and join the ever more secularized public system. On the other hand, while it may be true that there has been an "advent of actual religious tolerance in wide areas of the United States" which has "created a receptive audience for Catholic petitions to share the public fund to which Catholics as taxpayers must contribute,"¹⁰² it is improbable, although perhaps not impossible, to expect that aid to the extent desired by Hutchins will either forthcoming from our legislatures or approved by the Court.

**The Extent of Permissible Future Aid**

It is most surely a truism to state that the chaotic condition of legal theory on our question reflects the confused social and political issues which underlie it.¹⁰³ It is true, as McLaughlin points out, that our western allies, most notably Holland, are more accommodating financially to parochial education than our country.¹⁰⁴ Is it true that financial aid will grow with the question being "how much" and "how far" not "if", "when", or "why", because the trend is in motion

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¹⁰² *Supra* note 84 at 926.
¹⁰³ *Supra* note 84 at 927.
¹⁰⁴ *Supra* note 89 at 419.
and, "it would take a High Court of Douglasses to reverse the trend . . . this is a time of Burgers and Blackmuns and Nixonian preferences and white middle-class ascendency and these inter-relate and parochial schools will be the beneficiary." Our Court today is composed of Chief Justice Burger and Justices Blackmun, Brennan, Douglas, Marshall, Powell, Rehnquist, Stewart, and White. The present Court has not decided a parochial aid case. Justices Black and Harlan have died since the last aid case and have been succeeded by Justices Powell and Rehnquist.

The importance of the membership of the Court should not be overlooked. We have noted a change between McColllum and Zorach. Another, and even better illustration, is a comparison between Jones v. Opelika106 and Murdock v. Pennsylvania.107 Each case involved exacting of a nominal license fee for selling or distributing books, and each was contested by members of the Jehovah’s Witnesses faith. The constitutionality of the license fee was upheld in Jones and stricken in Murdock. Both were 5-to-4 decisions. What happened in two years, other than the fact that Mr. Justice Byrnes, who voted with the Jones majority, resigned from the Court, and was succeeded by Mr. Justice Rutledge (the establishment foe), who voted with the Murdock majority?

This writer does not subscribe to Mr. Dooley’s views that “no matter whether th’ constitution follows th’ flag or not, th’ supreme court follows th’ illiction returns”.108 However, it could be correct to believe that the appointers do, in fact, follow “th’ illiction returns”, and it could be suggested that the “natural law” theory is present in the minds of the Justices, and some of them, without conceding an adoption of the theory, do, in fact, presume a power of the Court “to periodically expand or contract Constitutional standards to conform to the Court’s conception of what at a particular time constitutes ‘civilized decency’ and ‘fundamental liberty and justice’ ”.109

Gianella I has suggested that with the passage of time, the role of the state must transcend traditional boundaries. The vernacular meaning of “separation” must be revised to conform with new realities if the original purposes and expectations are to be realized, and as the “social, political, and economic milieu evolves, so must the content given the first amendment”.110 Is this concept anything more, or less, than “natural law”?

105 Deedy, supra note 1 at 15.
106 316 U.S. 584 (1941).
107 319 U.S. 105 (1943).
108 Mr. Dooley on the Court, 1901, B. Schwartz, A Basic History of the U.S. Supreme Court, 152, 135 (1968).
110 Supra note 9 at 1383-84.
What, then, is the Court likely to decide about such questions as:

**Direct State Subsidies**

Although Professor Gianella, in a different context, appears to suggest that certain dicta of prior decisions may be incorporated into a test of constitutionality,\(^{111}\) and even though today's dictum often becomes tomorrow's rule of law, there is nothing in the decisions, or dicta, of the majority, or dissenting, opinions of the Court from *Cochran* through *Lemon* to sustain any belief that this Court would consider such aid constitutionally permissible. The Court in *Cochran*, *Everson*, and *Allen*, was careful to point out that the aid was to the pupil and not to the school. We may well be in an era of Nixonian middle-class-preferences, but such preferences may also include strict construction, and it is most unlikely that the Court would make such a departure from the precedent.

**Parental Grants**

An Ohio statute authorizing direct grants to parents of non-public school children was involved in *Wolman v. Essex*.\(^{112}\) A three judge court has held that such grants are an unconstitutional violation of the establishment clause. The district court applied the three tests prescribed by *Lemon* to the statute. The first test—a valid secular purpose—was satisfied. The second test—principal or primary effect—was considered as nothing more than the neutrality test of *Schepp* and was not fully satisfied. The court judged the question of neutrality on the size of the class, noting that the Ohio aid went to the parents of only 13% of the total number of school children, and distinguished *Everson*, *Allen*, and *Walz*, where the aid went to all parents, the books went to all students, and the tax exemptions ran to many non-profit institutions other than schools. The small size, and sectarian nature of the class affected prompted the court to turn to the third test—excessive governmental entanglement—and on this final ground rested a conclusion that the establishment clause was violated.\(^{113}\)

There is little chance that the Court will find any significant difference in ultimate effect between this type of aid and the impermissible aid in *Lemon*. Whether to the school, or to the parent, subsidy—even though only $90.00 per year per pupil—will not survive the present tests and it is not likely that a majority of the Court will fashion any new test which could accommodate such aid.

**State Tax Exemption of Parents**

This form of aid will have a better chance of survival, but will it survive? Can *Walz* justify such aid? Is there, really, any significant difference between such aid and the permissible aid in *Walz*?


\(^{112}\) Civil Action No. 71, 396 (S. D. Ohio 1972).

\(^{113}\) Id. at 19-29.
Professor Kauper has commented on tax exemptions generally, and two arguments raised in their support: (1) A "quid-pro-quo" theory that such exemptions relieve non-profit property from burdens the state would be obliged to assume, or are given to encourage religion's promotion of morality, good citizenship, law, and order, and (2) exempting churches from taxation relieves them of all government functions and thus, then, achieves the full and complete separation required by the first amendment, and implements the church's freedom of worship. However, Kauper disputes such concepts on the basis that the amount of aid bears no logical relationship to the moral good or community welfare that churches might promote, nor is there logic to the argument that churches should not pay their share of police and fire protection. Any thinking person should admit that tax exemption imposes a heavier burden, because of it, upon non-members, and a heavier burden upon smaller denominations than upon large. Of course, whatever the merit of Kauper's point of view, it is inapplicable since Walz.

Pfeffer was able to find at least historical, and implied constitutional intent, merit to tax exemption on the basis that exemptions are as old as taxes, dating back to Biblical days and the Pharaohs, and were also universally accepted in colonial days. He also finds a conflict between the two religion clauses, because taxation might unconstitutionally abridge religious liberty, whereas exemption would appear to involve establishment. It was, of course, the "charting of a course" of reconciliation between this conflict that led to the decision in Walz.

Prior to Walz, Gianella II explored the constitutionality of general exemptions for churches from income and ad valorem taxes. He pointed out that the power of the state to apportion the tax burden among its citizens as it sees fit is almost as broad as the taxing power itself. While legislators may not fashion fiscal policy with a net effect of positive religious aid, it need not subject it to the burdens brought by the fiscal policy of socialization. Thus, for establishment purposes, the issue is whether the overall purposes, incidence, and structure of the tax, and its exemptions, require subjection to it by religious interests lest they gain a positive governmental aid.

Alleged tax inequality was unsuccessfully raised in Carmichael v. Southern Coal & Coke Company, in which the Court stated:

115 Id. at 98.
116 Supra note 4 at 183.
117 Id. at 98.
118 Supra note 108 at 545-54.
119 Id. at 545-46.
120 301 U.S. 495 (1937).
It is inherent in the exercise of the power to tax that a state be free to select the subjects of taxation and to grant exemptions... This Court has repeatedly held that inequalities which result from a singling out of one particular class for taxation or exemption infringe no constitutional limitation... Like considerations govern exemptions from the operation of a tax imposed on the members of a class. A legislature is not bound to tax every member of a class or none. It may make distinctions of degree having a rational basis.\footnote{Id. at 509.}

The fact that parents of public school children do not receive an exemption will not be constitutionally dispositive. The answer is a first amendment test.

Tax exemption (whether from ad valorem, property, income, sales, or other tax) for parochial parents complies with the rationale of \textit{Walz} that it is not a subsidy, but it merely spares the taxpayer the burden of supporting the state to this extent. It is even one step removed from \textit{Walz} in that the exemption does not run directly to the church. There are differences, also. One difference is the total lack of any historical background upon which the Court can rely to justify an extension of \textit{Walz}, with the limited, and not particularly comparable, exception of federal income tax exemption for charitable contributions. The lack of historical reference will necessarily make the legislation suspect. Another difference could be the narrowness of the class to which the exemption applies which also, as in \textit{Wolman}, will make it suspect—although this may be at least partially corrected by broadening the class to include payments to other charitable, nonprofit institutions.

The \textit{Wolman} court concluded that the proposed direct parental grants satisfied a secular purpose. It is at least open to question whether the Court, in either a parental grant or parental tax exemption case, will agree. There is no specific precedent, or language, to fully support such a conclusion where the aid obviously is in a form of reimbursement for tuition paid to institutions which foster both secretarian and secular teaching, and there is no qualification to the state support. However, it is reasonable to conclude that the present Court will find sufficient support from \textit{Lemon} to conclude that there is a secular legislative purpose.

The primary purpose and effect test is not so easily satisfied, even if the class is broadened, and even though the extent of the aid is relatively small. Neither the \textit{Walz} nor \textit{Lemon} decisions afford any real basis for a conclusion. Whatever else may be said, both decisions effectively ignored the question. Whether satisfied or not, it is probably that the third test—excessive government entanglement—will decide the issue.

Can this third test be extended as another “tight rope” to successfully span the two clauses? \textit{Walz} had history on its side, it had
property tax exemptions for all non-profit, charitable institutions, and it did not have the specific question—aid for parochial schools, albeit indirect. This writer discounts the probability that the present Court will find a corollary with Walz. It is more probable that this Court will not find any “pupil benefit” theory in such aid, and that it has the two defects of Lemon. The first—there is, and can be, no effective surveillance of the parochial school programs under such aid. The second, the divisive political potential of such exemptions. At whatever level exemption commences, there will, perforce, be increased political activity for increases. Partisans will seek even larger exemptions. Opponents will use all practical means to defeat such proposals. To accept such exemptions as constitutional would ignore the Lemon warning that 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.”\(^1\) A Court, indeed, would have to “follow th’ illiction returns”. Another factor, which must be in the mind of the Court, even if neither at issue or discussed, is the fact that such exemptions will run, to escape possible constitutional objection, to all private school parents. The Court must consider the possible future efforts of parents who might seek, in any given area, to avoid the effects of the desegregation decisions of the past. If tax-exemption for private and parochial school parents is constitutional, the possibilities of yet another attempt to evade are enormous.

In conclusion, and for whatever expressed reason, it can be surmised that the present Court will find such exemptions to be an impermissible governmental entanglement with religion, and proscribed by the first amendment.

**State Aid to All**

It has been reported that Rep. Richard F. Celeste (D-49, Cleveland) has submitted legislation to the Ohio General Assembly which would authorize payment of $100.00 per year to each student in the state, regardless of the school attended.\(^2\) This solution would very possibly solve all constitutional objections, but it is not likely to survive the pragmatic fiscal problems faced by state legislatures. From all sides, the states are besieged with monetary problems. Tax levies for schools are being defeated in many areas. According to the information submitted to the court in Wolman, there were 2,758,241 pupils attending school in Ohio the 1970-1971 school year.\(^3\) This would be an outlay of $275,824,100.00 per year.

It does not seem possible that the Ohio legislature, faced with the tax squeeze on the one hand, and religious opposition on the other, would pass such legislation. A better solution might include a com-

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123 The Sun Herald, May 18, 1972 at 1, col. 4.
124 Supra note 109 at 5.
plete restructuring of the public school system through the state with taxes paid directly to the state and elimination of at least the financial aspects of the various boards of education. This, also, would raise outcries from all sides and any such legislation, although perhaps the better ultimate solution to the education problem, is apt to be a long time coming.

**Federal Aid**

Article I, Section VIII of the Constitution authorizes Congress to tax for the general welfare, and on this section hangs a host of legislation. We can grant that education is not mentioned in the Constitution, but Congress has already entered the field, as has been seen. Should it dominate? If it is correct to say that

Today, education is perhaps the most important function of state and local governments. . . It is the very foundation of good citizenship.\(^{125}\)

such statement must equally apply to the federal government, and on this basis of general welfare can be found constitutional authority for additional government aid, which can be reconciled with both of the first amendment clauses, and ultimately lead to a pre-emption by the federal government of the entire field of education.

Professor Reutter believes that various interpretations of the Court in related areas give credence to the belief that Congress does have the power to provide federal aid to education, and it would be presently difficult to argue that public education is not connected with the general welfare.\(^ {126}\)

Until *Flast v. Cohen*\(^ {127}\) an action against Acts of Congress could not be brought by individuals who could assert only payment of taxes as giving standing to bring suit. With the right to bring suit now vested in a federal taxpayer, suits have been brought and more will follow. The United States Court of Appeals has already decided that direct federal grants for loaning library books and instructional materials directly to parochial schools\(^ {128}\) rather than directly to the students presents constitutional questions not resolved by *Allen* requiring a decision by a three judge court.\(^ {129}\)

If we accept these premises—(1) education is indeed the most important problem facing our country today, (2) the first amendment proscriptions will not tolerate additional state aid, (3) the Congress has the power, under the welfare clause, to aid education, (4) the Court has, in general, been willing for thirty years to accept the constitutionality of welfare legislation, (5) this Court might be favorably


\(^ {127}\) 392 U.S. 83 (1968).


disposed to consider such legislation signed by a President who has publicly stated favor for parochial aid—we can come to the conclusion that this, and this alone, will be the legislation that can "walk the tightrope" and provide additional aid, in whatever form, and to whatever extent, the Congress may choose, so long as the aid is to all education, public and private. The Court, in such event, could conclude that the important public welfare purpose override any minimal aid that may accrue to religion.

We predict that the Court will sustain the constitutionality of the 1965 Act and that other extensions of the aid will follow with each in turn being sustained.

The Collision Course

Parochial aid is with us and, perhaps, as Deedy suggests, more will surely come. But will this serve either the Catholic or public good, and should the Catholics be, perhaps, the last persons to answer "Yes"?130

Pfeffer, who finds no constitutional authority for the forms of aid already approved, would surely question not only the permissibility, but the wisdom, of additional aid. To him, the separation of church and state and religious freedom has enabled religion in this country to achieve "a high estate unequalled anywhere else in the world. History has justified the great experiment and has proved the proposition on which it was based—that complete separation of church and state is best for church and best for state, and secures freedom of both".131

It is possible to predict that increased aid might, in the final analysis, bring governmental intervention to a point where to paraphrase Pfeffer, "religion, having looked to and found princes for salvation, lost it there".132 What will be the answer when an enrolled atheist challenges the non-objective teaching of religion, prayer, religious symbols, selection of text material, etc., in parochial schools? When an admitted atheist is denied admission to a parochial school? No such case has yet reached our Court, but it will as surely as night follows day. Or what reaction when a legislature or state board of education prescribes the method and manner of instruction in the entire curriculum?

Some of the "free exercise" decisions are illuminating, but more for what was not decided than for what actually was. As Pfeffer points out, Pierce v. Society of the Sisters of the Holy Names133 was a fourteenth amendment case, decided at a time when the Court was clearly and diligently protecting business and property interests

130 Deedy, supra, note 1 at 16.
131 Supra note 4 at 605.
132 Id. at 289-90.
133 268 U.S. 510 (1925).
against undue state influence. There was no suit brought by parents of parochial children. The religious issue was not stressed, the major issue being the large financial investment and financially profitable character of operating parochial schools. Additionally, the private military academy was also party to the suit. The Court did uphold the right of parents to satisfy the state's educational requirements by sending their children to non-public schools, but it did not say that the state could not regulate such schools. Such question was not in issue, and the Court so noted.

Meyer v. Nebraska reversed a conviction for teaching German to parochial school children below the eighth grade, contrary to a Nebraska statute. The Court decided only that a guise of protecting the public interest could not be used for legislative action which is arbitrary or without some reasonable relation to some purpose within the competency of the state to effect.

It is true that certain dictum in Farrington v. Tokushige criticized the fact that the Act passed by the Hawaii legislature gave affirmative direction concerning the intimate and essential details of private schools, entrusted their control to public officers, and denied both owners and patrons reasonable choice and discretion in respect of teachers, curriculum, and textbooks. However, this statute was directed primarily at private Japanese foreign language schools and almost all the children attending these schools also attended public or equivalent private schools. The important difference between Pierce, Meyer, Farrington and our situation is that none of these schools received any form of state aid.

Even without state or federal aid, Reutter believes that government has almost complete power over what must be taught and what must not be taught, checked only by the individual liberties protected by a state or federal Constitution, with power to prescribe all textbooks, control over qualifications and working conditions of teachers, and control over the method and manner of subject presentation.

J. Elson noted the trend developing toward more rigid control and regulation of non-public schools, with the effect these will become more and more like public schools and thereby reduce or eliminate their usefulness. However, "neither rights of religion nor rights of parenthood are beyond limitation... Its [the state's] authority is not nullified merely because the parent grounds his

134 Supra note 4 at 429.
136 262 U.S. 390 (1923).
137 Id. at 399-400.
139 Id. at 298.
140 Supra note 123 at 29-53.
claim to control the child's course of conduct on religious conscience. Although parochial parents and educators may look to the courts to check extension of public controls, it is not likely to find help there.

Can parochial education have it both ways? If the state may aid, may it therefore regulate? Once these [parochial] schools become federally funded they become bound by federal standards . . . and accordingly adherence to Engel would require an end to required religious exercises.

It is open to serious question whether the Court could sustain attacks upon the religious "exercises" present today in parochial schools under the present level of state and federal aid. However, the Court could, at this level, conclude from its prior decisions that the minimal secular aid given cannot operate to destroy the religious liberty guarantee of the first amendment. By the same token, if the aid is permitted to grow, and goes beyond pupil benefit and strictly secular aid, it is difficult to conceive that the Court, without revising prior cases, could strike down legislation aimed at almost full control by the state which standardizes and secularizes parochial education, or strike down a suit by a parent who challenges either the admission policies of, or religious "exercises" in, the parochial schools.

Conclusions

In conclusion, a fair reading of the aid and exercise cases to date, coupled with the fact of the membership of the Court, and the further fact that the Allen opinion did not muster a majority, leaves one with the impression that no further state aid will be found acceptable unless it is specifically and affirmatively tied, and earmarked, to obviously secular purposes under state control. The only exception to further aid might come in the form of federal aid which the Court, without reversing its prior first amendment decisions, may sustain under the provisions of Article I, Section VIII by adopting natural law and concluding that the overriding public welfare need requires such aid in spite of the "minimal" aid that may accrue to religion as a result.

If, and when, the above happens, and when the concentrated attacks begin against the conduct of religious "exercises", the churches may well wonder if it would not have been better "in the interest of fully preserving their status as free and independent institutions

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143 Supra note at 119-20.
. . . to shed the cloak of governmental favoritism and stand before the community on the strength of their own messages and missions, unfettered by state restrictions and unembarrassed by state aid."\textsuperscript{146} Additional aid, the political battle lines, and divisiveness presents the very serious risk that parochial education may, in final result, find that it has, indeed, won a battle and lost the war.

\begin{footnote}
\textsuperscript{146} \textit{Supra} note 111 at 98.
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