Constitutional Barriers to Public Assistance for Parochial Schools
CONSTITUTIONAL BARRIERS TO PUBLIC ASSISTANCE FOR PAROCHIAL SCHOOLS*

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .

Superficially, these words, which form an integral part of our Bill of Rights, appear unequivocal and thus a questionable source of controversy. Since its inception, however, this seemingly innocuous directive has repeatedly been the focal point for impassioned arguments relative to the separation of church and state.¹

Recently, there has been a proliferation of litigation applicable to one specific area of church-state relations. Three years ago, the Supreme Court upheld a New York statute requiring local public school authorities to lend textbooks free of charge to all students in grades 7 through 12, including students attending private parochial schools.² This year the Court held unconstitutional state programs which called for a purchase of services arrangement³ and teacher salary supplements⁴ to parochial schools. Concurrently, the Court also upheld a federal program which granted aid to church-related universities for the construction of buildings and facilities to be used for secular educational purposes.⁵

* This article is a student work prepared by Thomas Klein, a member of the ST. JOHN'S LAW REVIEW and St. Thomas More Institute for Legal Research.
1 The term "separation clause" is a misnomer, since it is not mentioned in the body of the Constitution. This expression merely refers to that portion of the first amendment which denies to the federal government establishment of any religion and further guarantees religious freedom.
5 Tilton v. Richardson, 403 U.S. 672 (1971). The court held however that the portion of the program wherein the United States retains a 20 year interest in any facility constructed with funds under the Act and if during this period, the recipient violates the statutory conditions, the government is entitled to recovery of funds is unconstitutional "as the unrestricted use of valuable property after 20 years is in effect a contributism to a religious body." Id. at 683, 684.
This new eruption of litigation concerning state aid to church-related schools has thus rejuvenated interest in the debate over the legality of such assistance. The present financial crisis in the parochial school system has also contributed immensely to this topic once again assuming a paramount position among contemporary problems. Presumably, these current cases merely foreshadow another sequence of cases in the incessant controversy concerning the extent to which the first amendment requires a separation of church and state.

State aid to parochial schools is a topic which by its nature elicits vehement opinions from all concerned. Since both proponents and opponents of "parochiaid" tend to expound their convictions overzealously, their arguments are impeded by a lack of one essential element—rationality. Professor Paul Kauper has very aptly stated in conjunction with this problem that "[b]asic predilections and prejudices enter into a person's consideration of these questions and help shape his conceptions of what is wise policy in their solution." In attempting to restore rationality to the discussion of state aid to parochial schools, this article will enunciate and evaluate the fundamental principles and policies upon which the Supreme Court has relied in adjudicating problems in this realm.

Historical Background of State Aid to Parochial Schools

Before considering the Supreme Court's disposition of state aid to parochial schools, it is imperative that a brief exploration be made into the evolution of education in America. This inquiry will put in perspective the previous relationship between state aid and the church.

Throughout the majority of states in the colonial and early national periods, education was the handmaiden of religion and the use of public funds to support religion was the conventional way of financing education. The secularization of public schools occurred in gradual stages over a period of years and resulted in tax funds being relegated to public schools only. This inevitably precipitated the decline of religious schools. Due to their religious tradition, most people still desired some form of religious instruction in the schools. However, the multitude of religious sects made it impractical to teach the common tenets of all the beliefs. Therefore, the public school curriculum was divorced from any religious content.

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6 Generally, the terms "parochial," "church-related," and "nonpublic" are used interchangeably throughout this paper in reference to Roman Catholic schools. This is based on the fact that the vast majority of nonpublic schools are affiliated with the Roman Catholic church. For example, in both Lemon and DiCenso, 95 percent of nonpublic schools involved were under Roman Catholic control.

7 See L. PFEFFER, CHURCH, STATE, FREEDOM 521-26 (1967), [hereinafter L. PFEFFER], listing various arguments for and against state aid to nonpublic schools.

Although a few different sects maintained private schools, Protestant religious education was confined mainly to the church. Catholics, however, found the compromise intolerable, on the ground that education without religion is incongruous. As a politically negligible minority in most states during the early 1800's, the Catholics were forced to continue their own schools.

The 1830's signaled the commencement of an enormous Catholic immigration which continued until the end of the century and resulted in the emergence of Catholics as a political force. In 1840, this newly developed power found its expression in the attempt to obtain public funds for Catholic education in New York.\footnote{There were appropriations of state funds to denominational schools in New York as late as 1871. See N.Y. Sess. Laws ch. 869 (1871).} The continuing Catholic demands for public aid were met with rigorous opposition which is best exemplified by the formation of such groups as the Know-Nothing party and the Native-American party.\footnote{A good study of the Native-American movement is found in R. A. Billington, The Protestant Crusade 1800-1860 (Quadrangle Books ed. 1964).} By enacting amendments to their constitutions which specifically prohibited aid to nonpublic schools, the vast majority of states mirrored this anti-Catholic sentiment.\footnote{See Note, Catholic Schools and Public Money, 50 Yale L.J. 917 (1941).} In many instances, these provisions expressed a more restrictive attitude toward aid to church-related schools than the federal Constitution itself.

Currently, there is developing a trend toward the earlier mode of financing religious education through public funds. The American disposition is far more benign to the constitutionality of educational aid to parochial schools than in the waning years of the nineteenth century. In the last few decades the emotions which prompted the anti-aid amendments have been constantly dwindling. Various theories have been advanced for the more auspicious American attitude concerning aid to parochial schools. Among the important factors contributing to a relaxation of interreligious suspicion has been the imposition of federal statutory provisions regulating immigration. The widespread ecumenical movement initiated by the Vatican Councils of Pope John XXIII and Pope Paul VI has also alleviated to a great extent the mutual distrust of the various sects.\footnote{Sutherland, Establishment of Religion 1968, 19 Case W. Res. L. Rev. 469, 476 (1968).}

The modification of the stringent requirements of the various state constitutions has now reached the point where many states are giving assistance in the form of textbooks,\footnote{See, e.g., La. Rev. Stats. § 17:352 (1928); Miss. Code § 6656 (1940); N.Y. Educ. Law § 701 (McKinney 1965).} buses,\footnote{See, e.g., N.J. Stat. Ann. 18 A:39-1 (1968); N.Y. Educ. Law § 3635 (McKinney 1951).} shared time,\footnote{L. Pfeffer, supra note 7, 571-78.} and scholarships\footnote{See, e.g., N.Y. Educ. Law §§ 601, 601(a) (McKinney 1968).} to parochial school students. Funds are now also provided on the federal level for textbooks and other instructional materials for those attending parochial schools.\footnote{Elementary and Secondary Education Act of 1965, 20 U.S.C. § 201 (1965).} Higher education has received liberal benefits in the form of grants and...
loans for the construction of both public and private schools.\textsuperscript{20}

\textbf{Restrictions on Scope of Religion Clauses}

Another point which merits consideration concerns the degree to which the first amendment demands separation of church and state in the area of education. The language of the two religion clauses does not easily facilitate analysis on this point. However, in an attempt to clarify the meaning of the first amendment religious clauses, two extremes have been posited by the authorities. One extreme position contends that the first amendment requires aid to nonpublic schools.\textsuperscript{21} The other extreme would deny all aid to nonpublic schools on the theory that the establishment clause must be strictly construed as forbidding aid, either directly or indirectly, to religion.\textsuperscript{22} In this writer's opinion, both extremes are incorrect. There is a certain area wherein state aid to education is permitted, that area being aid for the secular aspects of education.

To illustrate that absolute principles in constitutional law are dangerous,\textsuperscript{23} an investigation of the strict constructionist viewpoint of aid will be undertaken. Advocates of the absolutist viewpoint of separation of church and state attribute their authoritativeness to two prime sources. The first is James Madison's \textit{Memorial and Remonstrance Against Religious Assessments of 1785}\textsuperscript{24} which has frequently been recognized by the Supreme Court as an important guide for ascertaining the impact of the first amendment.\textsuperscript{25} This work was written in opposition to a proposal which was pending in the Virginia Assembly to levy a tax for the benefit of "teachers of the Christian religion." As a synopsis of Madison's refutation of the proposition, the essence of the \textit{Remonstrance} is expressed in the following passage:

Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?\textsuperscript{26}

These words and indeed the entire \textit{Remonstrance} will not stand up to the broad interpretations that a complete separation of church and state is compulsory. On the contrary, these very words show that Madison's conception of an "establishment of religion" was a religion enjoying a preferred status. The \textit{Remonstrance} was a rebuttal to a law which directed tax receipts solely

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\item \textsuperscript{21} \textit{See, e.g.}, P. KURLAND, RELIGION AND THE LAW 112 (1962).
\item \textsuperscript{22} \textit{See} L. PFEFFER 535.
\item \textsuperscript{23} This danger is best illustrated in the following statement: "The taking of extreme positions leads too often to what can ill afford to endure when its task is too difficult at its best." Griswold, \textit{Absolute is in the Dark—a Discussion of the Approach of the Supreme Court to Constitutional Question}, 8 UTAH L. REV. 167, 181 (1963).
\item \textsuperscript{24} II \textsc{The Writings of James Madison} 183-191 (Hunt ed. 1901).
\item \textsuperscript{25} \textit{See, e.g.}, Everson v. Bd. of Educ., 330 U.S. 1, 37 (1946) (Rutledge, J. dissenting).
\item \textsuperscript{26} II \textsc{The Writings of James Madison} 186.
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to the support of a favored religion. Today this type of preferential law would also be struck down as being violative of the first amendment restrictions.

Furthermore, supporters of the absolutist persuasion emphasize the fact that Madison introduced in the House of Representatives the original proposal leading to the first amendment. It read:

The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.27

A controversy developed over whether the word “national” should be incorporated in the amendment. During this debate, the intentions of Madison were further revealed as this pertinent extract from the Annals of Congress indicates:

Mr. Madison said, he apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience.28

Although a number of Representatives understood Madison’s concept of the implications involved in the first amendment, they felt that others might misconstrue the words to the detriment of religion. Once again, Madison reiterated his opinion that the scope of the first amendment is limited to insuring that one sect did not obtain a pre-eminent position or combine with another to establish a religion to which they would compel others to conform. Madison subsequently withdrew his motion to insert the word “national” in the amendment and a Senate-House conference worked out the final version as it was ultimately approved by the states.

Madison’s insistence on the federalist character of the first amendment and the sanctity of states’ rights in relation to the establishment clause should be sufficient to illustrate that his position was not the same as absolutists would have us believe. Professor Edwin Corwin, a constitutional expert, offers the most influential and succinct refutation of Madison’s alleged absolutist position.29 Corwin points out that the Remonstrance preceded the framing of the first amendment by four years and that Madison himself never put forth this work as an interpretation of the amendment. Likewise, the form of the amendment as proposed to the state legislatures for ratification was not the same as Madison had introduced and even if it had been, the Remonstrance indicates that “an establishment of religion” meant a religion enjoying a privileged legal position. Finally, Corwin comments that Madison himself advocated looking to the text of a statute in order to determine its meaning.

The absolutists also rely to a great extent on Thomas Jefferson as a champion of their cause. His “wall of separation” metaphor30 has been a rallying point for

27 I ANNALS OF CONG. 451 (Gaels ed. 1834).
28 Id. 758.
29 Corwin, The Supreme Court as National School Board, 14 LAW & CONTEMP. PROB. 3, 13 (1949).
30 Jefferson’s phrase was penned in a letter written in 1802 to a Baptist association. It was
those who feel that all vestiges of religion must be removed from governmental activity. However, Jefferson's own ensuing actions and writings tarnish the absolutist effect which some have sought to give these words.

Professor Robert M. Healey, a dispassionate observer of Jefferson, remarks that Jefferson admitted that religion was an essential part of government. Jefferson stated that "those areas of religion on which all sects agreed were certainly to be included within the framework of public education." Pertaining to the same concept is this excerpt from Jefferson's writings:

It was not however, to be understood that instruction in religious opinion and duties was meant to be precluded by the public authorities, as indifferent to the interests of society. On the contrary, the relations which exist between man and his maker, and the duties resulting from those relations, are the most interesting and important to every human being and most incumbent upon his study and investigation.

While addressing himself to the question of sectarian education at the University of Virginia, a state institution which he helped found, Jefferson stated that "It is supposed probable, that a building of somewhat more size in the middle of the grounds may be called for in time, in which may be rooms for religious worship ..." He also prepared the regulations which were ultimately adopted by the University and included the following stipulation:

[S]hould the religious sects of this State, or any of them, according to the invitation held out to them, establish within, or adjacent to, the precincts of the University, schools for instruction in the religion of their sect, the students of the University will be free, and expected to attend religious worship at the establishment of their respective sects ...

It is conceded that any diligent effort to interpret the religion clauses of the first amendment through history is a precarious process. However, even from this cursory discussion of Madison's and Jefferson's statements and actions, one does not have to be extremely perspicacious to discern that the two alleged stalwarts of absolutism were not extremists at all but rather advocates of a limited sphere of interaction between government and religion.

If the debate over the meaning of the religion clauses of the first amendment is

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adopted by the Court in Reynolds v. United States, 98 U.S. 145, 164 (1878), and declared to be an authoritative declaration of the meaning of the first amendment.

31 Healey, JEFFERSON ON RELIGION IN PUBLIC EDUCATION 208, 252 (1962).

32 S. Padover, THE COMPLETE JEFFERSON 957 (1943).

33 19 THE WRITINGS OF THOMAS JEFFERSON 449 (Mem. ed. 1904).

34 Id. 449.

35 The Founding Fathers were novices in the field of religious freedom, for they had come from a background of bigotry and lived in an era of intolerance ... it would be strange comment on the flexibility of our democratic government, if after 150 years of growth our concepts of freedom were limited to the narrow horizons of our forefathers. The First Amendment, if it is to keep step with the times, must give much wider protection than it did in 1789. Summers, The Sources and Limits of Religious Freedom, 41 ILL. L. REV. 53 (1946).
vociferous, so also is the controversy surrounding the applicability of the first amendment to the states.\textsuperscript{36} In some cases the Court has held that the fourteenth amendment incorporates only those provisions of the Bill of Rights which are “implicit in the concept of ordered liberty.”\textsuperscript{37} There are no stipulations in the fourteenth amendment which allow one to substitute the word “state” for “Congress” in the prohibitions enforced by the first amendment on laws “respecting an establishment of religion.”\textsuperscript{38} The limitations of the fourteenth amendment are primarily concerned with protecting religious liberty. Provided states guarantee this liberty, it is within their discretion to establish religion. The fourteenth amendment safeguards one basic right—liberty. Justice Story expressed a similar view in one of his commentaries on the Constitution:

Probably at the time of the adoption of the constitution, and of the first amendment to it . . . . the general, if not universal sentiment was, that Christianity ought to receive encouragement from the state, so far as it was not incompatible with the private rights of conscience, and the freedom of religious worship. An attempt to level all religious, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation.\textsuperscript{39}

All the foregoing facts lend credence to the idea of a limited scope of the first amendment, \textit{i.e.}, that “the whole power over the subject of religion is left exclusively to the state governments, to be acted upon according to their own sense of justice, and the state constitutions . . . ."\textsuperscript{40} One seriously questions the soundness of the Supreme Court’s rejection of the contention that the purpose of the first amendment was merely to prevent a governmental preference of one religion and that equality of treatment for all religions is forbidden.

\textbf{State Aid and the Court}

Although there has been a proliferation of literature devoted to the religion clauses, there is a paucity of Supreme Court precedent concerning them. Basically, this scarcity can be attributed to the fact that it was only in 1940 that the Court read the fourteenth amendment as embodying the pertinent provisions of the first amendment.\textsuperscript{41} Another contributing factor was that judicial review of expenditures for federal educational programs at the instance of a federal taxpayer was unavailable from 1923\textsuperscript{42} until very recently.\textsuperscript{43}

For an interpretation of the establishment clause as it pertained to state aid to

\textsuperscript{36} See Snee, \textit{Religious Disestablishment and the Fourteenth Amendment}, 1954 Wash. U.L.Q. 371, where it is suggested that the framers of the amendment meant it to apply only to Congress.
\textsuperscript{37} Adamson v. California, 332 U.S. 46 (1947); see also Fauman, \textit{Does the Fourteenth Amendment Incorporate the Bill of Rights?}, 2 Stan. L. Rev. 5 (1949).
\textsuperscript{38} See Meyer, \textit{The Blaine Amendment and the Bill of Rights}, 64 Harv. L. Rev. 939 (1951), where it states that the fourteenth amendment was not understood as incorporating the “establishment of religions” clause.

\textsuperscript{39} J. Story, \textit{Commentaries on the Constitution of the United States} § 1874 (1833).
\textsuperscript{40} Id. § 1879.
\textsuperscript{41} See Cantwell v. Connecticut, 310 U.S. 296 (1940).
\textsuperscript{42} Frothingham v. Mellon, 262 U.S. 447 (1923).
\textsuperscript{43} Flast v. Cohen, 392 U.S. 83 (1968).
parochial schools, one has to look back only as far as 1947, to Everson v. Board of Education. Before examining Everson, however, one should examine those cases which preceded it in order to obtain an insight into what the judges used as authority for their reasoning in that landmark decision.

An investigation of pre-Everson cases must begin with Pierce v. Society of Sisters. This was a suit by the Roman Catholic Society of Sisters for an injunction against the enforcement of an Oregon statute requiring that children aged eight to sixteen years attend public schools. The main issue was whether the state has a monopoly over education. On a fourteenth amendment property theory, the Court held the Oregon compulsory school law was unconstitutional as interfering with the prerogative of parents to direct the education of their children. The Court did not dispute Oregon's power to compel school attendance or demand that the attendance be at an institution adhering to state imposed requirements as to the quality of education. Pierce held that the state's interest in education would be adequately provided for by the secular teaching that accompanied the religious training. By establishing that parents have a right to send their children to parochial schools, Pierce gave to the private and sectarian schools a juridical existence and the force of the truancy laws of the nation, greatly enhancing the status of Catholic and religious schools.

Another important case was Meyer v. Nebraska, which concerned the question of whether the state has absolute power to prescribe the curriculum of schools. The Court held that a teacher in a Lutheran parochial school who had taught the subject of reading in German could not constitutionally be prosecuted under a Nebraska statute forbidding the subject matter to be taught in any language other than English. The Court stated that the right to teach was included among the "liberties" guaranteed by the fourteenth amendment against state interference. Attacking the doctrine that all educational rights are within the province of the state, the Court also said "the right of parents to engage him [the teacher] so to instruct their children" was also one of the "liberties" protected by the fourteenth amendment.

Although both Meyer and Pierce involved church-related schools, one must realize that the results would have been identical had private nonsectarian institutions been the issue. Both decisions represent constitutional obstructions against the imposition by the state of an exclusive educational pattern. The state was created to protect the rights of its citizens, not to subvert them. Certainly to coerce the

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45 268 U.S. 510 (1925).
46 The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.
Id. at 535.
47 262 U.S. 390 (1923).
48 Id. at 400.
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American public into accepting one educational system would be an infringement of these rights.

In Cochran v. Louisiana State Board of Education, 49 a unanimous Court upheld a Louisiana statute furnishing free textbooks to all pupils, in parochial and public schools alike. Avoiding the issue of the separation of church and state, the only argument offered by the plaintiff was a plea that the fourteenth amendment protected against the taking of public property for private use. The Supreme Court found that there is a “public” purpose in education whether given in a public or parochial school. In order to establish the public purpose of the textbook legislation, Chief Justice Hughes quoted at length from the sections of the Louisiana majority opinion where the distinction between aid to the child and aid to the school were explained. The pertinent excerpt stated:

The schools, however, are not the beneficiaries of these appropriations. ... The school children and the state alone are beneficiaries. It is also true that the sectarian schools, which some of the children attend, instruct their pupils in religion, and books are used for that purpose, but one may search diligently the acts, though without result, in an effort to find anything to the effect that it is the purpose of the state to furnish religious books for the use of such children. 50

This was interpreted as the birth of the “child benefit” theory. 51 Cochran clearly establishes that the teaching of secular subjects in a parochial school is the performance of a public function and that such program may be aided by government.

In light of this background, the Court handed down its decision in Everson and initially applied the establishment clause of the first amendment to the states. The Court upheld state reimbursement of bus fares for school children irrespective of the schools they attended. Writing for the majority, Mr. Justice Black concluded that the New Jersey legislature did “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” 52 and thus thereby was only extending its general public benefits to all its citizens. The Court recognized that this aid helped children to get to church schools and that some might not even attend if parents were compelled to pay for bus fares out of their own pockets when transportation to a public school would have been paid by the state. Despite the unanimous agreement of the justices that the establishment clause prohibited government aid to religion, the overwhelming public welfare aspect of the program prevailed.

Much attention has focused on Mr. Justice Black’s famous no-aid dictum:

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 incidental benefit to religious education does not make the law unconstitutional.

49 281 U.S. 370 (1930).
50 Id. at 375.
51 This is the theory that legislation primarily provides some secular benefit for the child, an
52 330 U.S. at 18.
laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.\textsuperscript{51}

Any analysis of these words must take into consideration that they were meant to construe only the establishment clause. As the Court apprehended, the demands of the free exercise clause acted as a qualifying factor to this strict interpretation of the establishment clause. The free exercise clause commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation.\textsuperscript{54}

The limited scope of Black's statement is best illustrated by the fact that he upheld the statute. Had Black followed his strict definition of what the establishment clause means, he would have reached a different result, because it seems to preclude any type of aid to private and parochial schools.

In the Court's view, bus transportation was sufficiently removed from the educational process to warrant its constitutionality. Although noting that the decision approached the "verge of . . . power,"\textsuperscript{55} the Court reasserted the "child benefit" theory of Cochran. The "verge of . . . power" phrase raised many questions as to whether more direct aid to education would be prohibited. The Court's decision in \textit{Everson} did not seem to provide an adequate insight into the establishment clause.\textsuperscript{56} Rather the opinion tended to obscure the standards a statute had to follow in order to be constitutional.

After \textit{Everson}, the Court in a preponderance of cases adopted a strict view of what is legally permissible in public schools in regards to the restriction of religious clauses.\textsuperscript{57} During this period, the Court

\textsuperscript{51} \textit{Id.}

\textsuperscript{54} \textit{Id.} at 16.

\textsuperscript{55} \textit{Id.}

\textsuperscript{56} It is conceivable that if the Court decided the \textit{Everson} case today it might have a different result. Consider this statement of Justice Douglas: My problem today would be uncomplicated but for \textit{Everson v. Board of Education} . . . the \textit{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. Mr. Justice Rutledge stated in dissent what I think is durable First Amendment philosophy. . . .

\textsuperscript{57} See, e.g., \textit{McCollum v. Bd. of Educ.}, 333 U.S. 203 (1948) (a "released time" program in which public school classrooms were used for religious instruction was held unconstitutional on the ground that it used the tax supported system to aid religious groups in spreading their faith); \textit{Engel v. Vitale}, 370 U.S. 421 (1962), (state directive requiring an official prayer to be said aloud in public school classes is contrary to the
used a variety of tests in evaluating the validity of state legislation under the establishment clause. With the emphasis on the encroachment of religion in the schools, the cases in this period were not directly concerned with the question of state aid to parochial schools.

Twenty years elapsed after Everson before the Court once again confronted the issue of state aid to parochial schools. Board of Education v. Allen held that a New York statute providing for a loan of secular textbooks to parochial school students did not violate the establishment clause in that the law had "a secular legislative purpose and primary effect that neither advances nor inhibits religion." The Court stated that the statute merely made available to all children the benefits of a general program to lend schoolbooks free of charge. Being a general welfare program, the New York statute was analogous to the one upheld in Everson.

The statute provided that books were to be furnished at the request of the pupil, but ownership would remain, at least technically, in the state. No funds or books could be furnished to parochial schools, therefore the financial benefit would run to the parents and children, not to the schools. Furthermore, only secular books could receive approval for loans. The majority recognized the difference between the books involved here and the buses in Everson but believed that sufficient safeguards were taken to prevent the loan of religious textbooks. Allen can be seen as an extension of the Everson case, because it provided aid for activities directly connected to the educational process.

From the few facts available, the Court conceded that the secular could be distinguished from the religious in the educational systems of nonpublic schools. However, if the Court had discovered that the secular classes in a parochial school were permeated by religious teaching, the statute undoubtedly would have been found in conflict with the first amendment.

As to the test employed by this Court—that of "secular purpose and primary effect"—the statute was found in accordance. The purpose of the statute as expressed by the New York legislature was the furtherance of the educational opportunities available to all youth. This was sufficient to meet the "secular purpose" requirement of the test. However, more

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58 See cases cited in note 57.
60 The secular purpose and primary effect test was first clarified by the Court in a decision which struck down the practice of bible reading in public schools as violative of the establishment clause of the first amendment. Abington School Dist. v. Schempp, 374 U.S. 203 (1963).

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61 The broad application that can be given to the "secular purpose" test is its outstanding deficiency. "It is doubtful that there is a legislature in the land so tongue-tied that it could not find a multitude of secular purposes to cover any religious interest it wished to accommodate." La Noue, The Child Benefit Theory Revisited: Textbooks, Transportation and Medical Care 13 J. Pub. L. 76, 77-78 (1964).
difficulty was involved in evaluating the "primary effect" of the statute. While the statute financially aided parents and children, the Court conceded that it indirectly aided parochial schools because free books might make attendance at these schools more conducive to some students. As in Everson, the Court decided that these indirect benefits to the schools were not enough to find the statute unconstitutional.

The recent case of Lemon v. Kurtzman,62 decided along with Robinson v. DiCenso,63 represents the initial excursion of the Burger Court into the realm of state aid to parochial schools. The question in both Lemon and Robinson concerned the constitutionality of state statutes providing state aid to church related elementary and secondary schools, and to teachers therein, with regard to instruction in secular matters.

In Lemon, the Pennsylvania statute64 in issue provided for state reimbursement of nonpublic elementary and secondary schools. The reimbursement was for the cost of teachers' salaries, textbooks, and instructional materials in specified secular subjects which did not contain any subject matter expressing a religious teaching or the morals or forms of worship of any sect. The participating schools were required to maintain, subject to state audit, prescribed accounting procedures to identify the cost of the secular educational service. Further specifications of the statute provided that the textbooks and instructional materials were subject to approval by the state and that reimbursement was limited to courses presented in the public schools.

In the Robinson case, a statute65 providing for payment of up to 15 percent annual salary supplements to teachers of secular subjects in nonpublic elementary schools was challenged. Under the statute, the teacher was required to be employed in a nonpublic school at which the average per-pupil expenditure on secular education was less than the public school average. If any questions arose as to the amount of expenditure, the school's financial records were subject to audit by the state. The teachers were required to teach only those subjects offered in the public schools, employing teaching materials used in public schools. Another prerequisite for the salary supplement required the teachers to agree in writing not to teach a course in religion while receiving salary supplements. Only teachers in parochial schools had applied for benefits under the statute.

Chief Justice Burger held that the statutes in both Lemon and Robinson were unconstitutional under the religion clauses of the first amendment because "the cumulative impact of the entire relationship arising under the statutes in each State involves excessive entanglement between Government and religion."66 Admitting the difficulty of adjudicating state aid cases, the Court stated that "[c]andor compels acknowledgment . . . that we can only perceive the lines of demarcation in this

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63 Id.
66 403 U.S. at 614.
extraordinary sensitive area of constitutional law."\(^6\)

The Court enumerated three tests in determining whether a statute fulfilled the constitutional mandate as being "no law respecting an establishment of religion." The first two standards were the "secular purpose and primary effect" previously mentioned in respect to the *Allen* case. Relying solely on the third test, excessive entanglement, the Court disregarded the other tests.

To see exactly what comprises "entanglement" as established by the Court, a number of ingredients have to be examined in each case. The character and purposes of the institutions which are benefitted must be inspected as well as the nature of the aid that the state provides. Finally, the resulting relationships between the government and the religious authorities is extremely important.

Besides looking at the religious purpose and operation of the Church-related elementary and secondary schools involved, the Court also took into consideration the enhancement of religious indoctrination resulting from the impressionable age of the pupils, particularly in elementary schools. The Court also considered the necessity of state surveillance to insure that the teachers observed the restrictions as to purely secular instruction. Also influencing the Court in determining this "entanglement" was the states' right to examine the parochial schools' financial records to determine which expenditures were religious and which were secular. Lastly, the probable intensification of political divisiveness along religious lines resulting from the annual appropriations required under the statutes was also a key factor cited by the Court.

In a concurring opinion, Justice Douglas expressed a few additional views. He found that the secular instruction in parochial schools was an integral part of the religious instruction. Furthermore, Douglas stressed the idea that what the taxpayers gave for secular purposes under the state statutes would enable the parochial schools to use all of their own funds for religious training.

Justice Brennan, also concurring, saw a real danger of secularization of a creed through the states' regulation and policing of the instruction and teachers of the sectarian schools. Positing that the objectionable features of the statutes as to surveillance were removed, Brennan indicated that the aid would still be unconstitutional, even though relegated solely to secular education.

It can be argued that the *Lemon* decision is deficient in various areas. The Court presented a somewhat obsolete picture of the Catholic educational system. Here the Court engaged in conjectures concerning the stereotyped characterizations of church-related schools, which it had refused to do in *Allen*. As Mr. Roman Pucinski, chairman of the House Subcommittee on General Education, stated:

> . . . if the Supreme Court Justices had any knowledge at all about the operations of this [n]ation's parochial schools, they would know that the religious administrators of those schools frequently carefully instruct
lay teachers to refrain from religious teaching, because the spiritual leaders of these schools believe this is their responsibility and do not want lay teachers teaching religion. This is a subject they quite properly reserve primarily for themselves, since they have been specially trained to teach religion.68

The inference that secular teaching in today's parochial schools is permeated with religious ideals or that teachers cannot separate the two is perhaps unrealistic.69

The Court also refused to admit that there was any variation between Catholic schools. Although the decision in Lemon was limited only to the specified defendant schools,70 the Court placed all schools under the same sweeping constitutional ban, without affording them the opportunity to demonstrate that their relationship and operations in connection with the Pennsylvania statute do not involve the unconstitutional relationships described by the Court's decision.

It is suggested that the Court should have relied on the revealed facts rather than stressing the "potential" for abuse inherent in the appropriate statute. Chief Justice Burger stated that "what has been recounted suggests the potential if not actual hazards of this form of state aid"71 and "the potential for impermissible fostering of religion is present."72 The Court rejected "the District Court's express findings that on the evidence before it none of the teacher[s] here involved mixed religious and secular instruction."73 The district court had determined that:

this concern for religious values does not necessarily affect the content of secular subjects in diocesan schools. On the contrary, several teachers testified at trial that they did not inject religion into their secular classes, and one teacher deposed that he taught exactly as he had while employed in a public school.74

One questions the Court's utilization of the "entanglement" test as an independent standard of adjudication, divorced from the concepts of secular legislative purpose and primary effects of advancing or inhibiting religion. In Walz v. Tax Commission,75 the Court spoke of "involvement" and "entanglement" by way of dictum. The Court's whole discussion of "entanglement" in Walz centers upon whether the actions involved have a primary effect of advancing or inhibiting religion and upon nothing else. Otherwise, as an independent test it would constitutionalize a state providing aid without any restrictions to schools of only one denomination; this

69 Appellants voluntarily abandoned their class action below and the Court below excluded the class action allegations from the case. See Petition of Appellees for Rehearing and Supplemental Opinion, 403 U.S. 602 (1971).
70 Plaintiffs failed to provide any facts which would disprove the legislative acceptance of secular educational programs in church-related schools as fulfilling the compulsory education laws. Thus the Court should have refused to accept the "permeation" doctrine on its face as they refused to do in Allen. 392 U.S. at 247-48.
71 403 U.S. at 618.
72 Id. at 619.
73 Id. at 666 (White, J., dissenting).
would clearly violate the fundamental prohibition of the establishment clause.

The "broader base of entanglement" that the Court envisioned by "the divisive political potential of these state programs" is susceptible to constructive criticism. It appears that the Court is suggesting that a statute which benefits the education of parochial school students is unconstitutional due to the public outcries it might elicit from opponents of the aid. Although the Court does not explicitly forbid churches to express their views on issues of public concern, it seems to be limiting the perquisite of their members to speak out politically on issues which directly affect their personal interests. Following this line of reasoning, the disturbing situation may develop where any attempt by religious groups to obtain legislation which might parallel their religious beliefs could be declared void, e.g., abortion and birth control. The question arises as to whether political activity would continue to be permissible in areas common to all, or most, religious groups, such as tax exemption or health, but be impermissible where tenets of a single denomination were concerned. It has been suggested that "[i]f they [the Court] mean what they say [in Lemon and DiCenso] they are engaged in the greatest attempt to gag the churches in the history of American law." Churches have always been in the center of American politics and have enjoyed freedom of expression on critical public issues such as the future of American education.

The Court has now placed the state legislatures in a very difficult position. While the Court repudiates any direct aid to sectarian schools, it equally denounces all statutory and administrative attempts to prevent such abuses as impermissible "entanglement," thus creating an impossible dilemma for the legislator. As Justice White commented:

The State cannot finance secular instructions 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.

Thus, even though the legislative purpose of the Pennsylvania and Rhode Island statutes was intended solely to enhance the quality of secular education in all schools covered by compulsory attendance laws, they were found unconstitutional.

The Court recognized the role of church-related schools in American education and observed that "[t]heir contribution has been and is enormous. Nor do we ignore their economic plight in a period of rising costs and expanding need." Yet "perhaps the biggest disappointment in the court's reasoning was the failure of all the justices save one (White) to recognize the critical role that nonpublic schools play in American education." The Court seems to indicate that these schools are significant only.

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76 Whelan, Lessons from the School Aid Decisions, America, July 24, 1971, at 32 [hereinafter Whelan].

77 403 U.S. at 668 (White, J., dissenting).

78 Id. at 625.

79 See Whelan, supra note 76.
to the churches that sponsor, finance, and operate them. Given the present fiscal and social crises in American education, it is obvious that these schools render a public service and their continuance is important to the country. If the Court had acknowledged that these schools are simply conduits which the state employs for the general welfare of all its citizens, the result might have been different. Public schools receive their allocations for public functions; thus the public functions of church-related schools would seem to justify partial government support.

Constitutionality of State Aid

As previously stated, the extremist positions concerning state aid to parochial schools are totally erroneous. Aid to parochial schools is constitutional, as long as the aid is not used for a religious function. Examination of supporting criteria for this statement is therefore appropriate.

The religion clauses of the first amendment have to be thoroughly examined when considering state aid to parochial schools. The question arises as to whether the two clauses express a dichotomy of ideas or state as the primary limitations of the first amendment a unitary principle of separation of church and state. The more plausible explanation seems to be that separation is required only to the extent that it is necessary to prevent establishment and assure free exercise of religion. In emphasizing that the government must remain neutral in respect to religious matters, Professor Wilber Katz advances the similar argument that this neutrality is designed to guarantee religious liberty. Justice Douglas also subscribed to this view in his Zorach opinion. The strict separation of church and state called for by the establishment clause is alleviated by the free exercise clause, the result being that legislation normally precluded by strict church-state separation is permissible to avoid hampering the free exercise clause.

In many situations complete separation of church and state would operate to restrain religious freedom. Limits of the separation doctrine are to be found by reference to the constitutional principle of religious liberty. For example, in the armed forces or in federal prison, absolute separation of church and state would invalidate regulations facilitating religious worship. Dissenting in McCollum v. Board of Education, Justice Reed cited a convincing number of instances in which our political and educational activities are permeated with religious practices. It appears that the free exercise clause must predominate over the establishment clause when the two come in direct and irreconcilable conflict. The Supreme Court has always prudently guarded the religious freedom even in trivial cases.

82 333 U.S. 203 (1948).
83 Id. at 253-55.
84 See, e.g., Sherbert v. Verner, 374 U.S. 398 (1963) (state may not deny unemployment compensation benefits to a Seventh Day Adventist who, for religious reasons, could not satisfy the statutory requirements that she be able and willing to work on Saturday, her sabbath); Torcaso v. Watkins, 367 U.S. 488 (1961) ("religious test for public office" violates applicant's freedom of belief and religion).
State aid to parochial schools is necessary to guard people's free exercise of religion. To refuse aid to church-related schools, given their current financial problems, would be akin to enacting a law that all children must attend public schools, and this has already been declared constitutionally impermissible by the Supreme Court. The government should not be permitted to issue directives to parents concerning the schools in which their children should be educated. It is inherently discriminatory to give financial aid to one group of parents for the education of their children in public schools and deny it to another group whose children attend church-related schools. The argument for the constitutionality of aid for the non-religious functions of church-related schools is augmented by the Court's decision in Allen. While lucidly denying aid to religion, the Court also tenaciously held that the enormous power of the government may not discourage or "inhibit" religion.

The functions of the schools must also be considered when determining the permissibility of aid. The basic premise on which aid to public schools is founded is the public service it provides through secular education. Proponents of aid allude to the fact that religious schools adhere to the education standards exacted by the states and also alleviate the state's burden of educating large numbers of children. When the state refuses to pay for the secular education of parochial school children, it is apparently withholding its help merely on the basis of religion. Since Catholic schools stress the student's role as a citizen, religious aspects in church-related schooling are a supplement to secular education. Parochial schools are in a position where they either perform the same functions as public schools in training children or they do not. If they do, they deserve public support as compensation for the contribution they bestow upon the state.

It has already been illustrated in discussing the Lemon case that there is a constitutional presumption that all education in church-related schools amounts to sectarian education. This hypothesis has been rejected by numerous state legislatures and by Congress. If the secular aspects of church-related education were totally infiltrated with religion as some have advised, the Constitution should exempt it from all state regulatory burdens, for the government cannot regulate the internal affairs of churches.

The theory of neutrality requires government impartiality between religious sects and between believers and non-believers.  

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85 One wonders what adverse effect it has on the proponents to be described as follows: The same powerful sectarian religion propagandists who have succeeded in securing passage of the present law to help religious schools carry on their sectarian religious purposes can and doubtless will continue their propaganda, looking toward complete domination and supremacy of their particular brand of religion. Bd. of Educ. v. Allen, 392 U.S. 236, 251 (Black, J., dissenting).

86 See notes 15-20 supra.

87 That [First] Amendment requires the state to be a neutral in its relations with groups of religious believers and nonbelievers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them. Everson v. Bd. of Educ., 330 U.S. at 18; accord, Torcaso v. Watkins, 367 U.S. 488, 495 (1961).
This neutrality would appear to be violated by the continuous exclusion of any reference to religion in public schools. Maintaining the secular character of public schools without establishing secularism is a grave problem. Contemporary public schools emphasize only the secular aspects of life and exclude the spiritual and religious aspects of our culture, thereby presenting a total distortion of the reality of life. This trend is definitely an abandonment of the neutrality principle and in fact leads to establishment of a religion of secularism. In the Allen case, Mr. Justice Douglas advances this concept by portraying the public school not as a neutral or impartial institution but rather the epitome of secularism.

Another point to be stressed is that all education cannot be kept truly religion-free, because "[t]he task of separating the secular from the religious in education is one of magnitude, intricacy and delicacy." As was cogently expressed in McCollum this separation is impractical:

But it would not seem practical to teach either practice or appreciation of the arts if we are to forbid exposure of youth to any religious influences. Music without sacred music, architecture minus the cathedral, or painting without the scriptural themes would be eccentric and incomplete, even from a secular point of view. . . . The fact is that, for good or for ill, nearly everything in our culture worth transmitting, everything which gives meaning to life, is saturated with religious influences, derived from paganism, Judaism, Christianity—both Catholic and Protestant—and other faiths accepted by a large part of the world's peoples.

It would seem reasonable that if public education in state-run schools can minimize to a tolerable constitutional level the religious aspect of its secular instruction, then it would also be feasible for public education in church-related schools to maintain the same level in respect to secular courses.

Conclusion

It has been illustrated that state aid to parochial schools is indeed constitutional when limited to nonreligious functions. In several aspects, the Lemon case appears to be at variance with historical precedents and rationales. Government involvement with church-affiliated schools, health facilities, and welfare institutions has always been greater than that present in aid to education statutes. Governmental regulation of the secular aspects of education in nonpublic schools under compulsory education laws has never been challenged as involving "entanglement." The term "excessive entanglement" will undoubtedly be tested in numerous cases in the years ahead.

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88 392 U.S. at 254 (Douglas, J., dissenting).
90 Id. at 235-36 (Jackson, J., concurring).
91 Another plausible argument for aid is that it is necessary to keep the nonpublic schools open in order to foster competition between school systems thus increasing the quality of American education. See, e.g., O'Neill, Giving Americans a Choice—Alternatives to Public Education, America, Jan. 24, 1970, at 66.
in order to clarify its relationship to primary purpose and secular effect.

Delineating permissible from impermissible in the sphere of aid to parochial schools is extremely difficult. Perhaps a better solution would be to leave the problems in this area to the legislator rather than the jurist. Indeed, state aid to parochial schools may be a question which is better left to nonjudicial determination. Today, most of the crucial questions in constitutional law possess social as well as legal ramifications.

Rather than a realistic assessment of the situation in today's society, the separation of church and state is more of an ideal.