Trends in Church/State Legislation

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TRENDS IN CHURCH/STATE LITIGATION

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The subject matter—"Trends in Church/State Litigation"—could readily be expanded to cover the entire two day agenda of this meeting. The scope of this topic could be very broad but time restrains and forces me to limit it to the field covered by some recent cases. I will basically discuss 9 recent cases.

By way of background there is a backlog of cases based on the first amendment dating all the way back to 1878. Some of those cases can be noted briefly in summary fashion as Selected Cases in Digested Form as follows:

SELECTED CASES DIGESTED

1. Reynolds v. United States, 98 U.S. 145 (1878), unanimously denunciating conduct allegedly religious, i.e., a federal statute making polygamy a crime was unanimously upheld, with Chief Justice Waite's opinion including a quotation from President Jefferson's letter to the Danbury Baptist Association that the first amendment's prohibitions resulted in "building a wall of separation between Church and State," used in the Everson case, below.

It may be noted that the first amendment's language contains no "wall of separation," "church," or "state" (this last is, technically, a quibble), but the concept now becomes a constitutional doctrine by judicial interpretation and application. This has provided the base for much opposition to the Court's decisions and opinions.

2. Bradfield v. Roberts, 175 U.S. 291 (1899), upholding a federal construction grant to a hospital operated by a religious order.

3. Pierce v. Society of the Sisters of the Holy Names, 268 U.S. 510 (1925), denouncing a state law requiring children between 8 and 16 to attend only public schools and not parochial or private ones.

4. Everson v. Board of Education, 330 U.S. 1 (1947), a 5-4 decision, all Justices agreeing that Jefferson's "wall of separation between Church and State" was intended by the first amendment's Establishment Clause (which applied to the states also), but the minority feeling that in this case such wall had been breached when tax money reimbursed parents for
transportation by public bus to and from parochial schools. All three opinions are of interest. Justice Black wrote, *inter alia*, that the 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."

In his concurrence in *Engel v. Vitale*, 370 U.S. 421 (1962), Justice Douglas stated: "The Everson case seems in retrospect to be out of line with the first amendment," *i.e.*, retroactively, *Everson* seems now to be a 5-4 opposite decision. Quaere: to what extent is its majority holding a viable one today? The answer seems to be that it remains valid regardless of Justice Douglas' disavowal.


6. *Zorach v. Clauson*, 343 U.S. 306 (1952), a 6-3 decision, in effect limiting *McCollum* to its facts and now, although all Justices still agreed on the wall-of-separation doctrine, upholding a released time program outside the school building, with pupils not so released remaining in school for their regular classes.

7. *Tudor v. Board of Education*, 14 N.J. 31, 100 A.2d 857 (1953), denouncing the free distribution in schools, after school hours, of Gideon Bibles to pupils who desired them to take home, even with parents' permission. This is the first decision in this area and the court also permitted evidence (expert testimony) concerning the harm thereby occasioned to the children.

8. *Engel v. Vitale*, 370 U.S. 421 (1962), a 6-1 decision rejecting as an Establishment violation a so-called non-denominational 22-word prayer required to be given in the public schools, even though nonobserving pupils might be excused. Justice Douglas' concurring opinion "cannot say that to authorize this prayer is to establish a religion in the strictly historic meaning of those words;" he also quoted in a footnote the "many 'aids' to religion in this country at all levels of government."

9. *Abington School District v. Schempp*, 374 U.S. 203 (1963), an 8-1 decision declaring two state statutes violated the Establishment Clause by requiring the reading, without comment, of the Lord's Prayer or Bible passages daily in public schools at opening exercises, even though parents, upon written request, could have their children excused (the dissenter feeling the appellate record was inadequate and desiring to remand for further hearings). The majority opinion quotes from an unpublished opinion of a century ago that "the ideal of our people as to religious freedom [is] one of absolute equality before the law of all religious opinions and sects . . . . The government is neutral, and, while protecting all, it prefers none, and it disparages none."

11. *Epperson v. Arkansas*, 393 U.S. 97 (1968), denouncing as an Establishment violation a state law making it unlawful for teachers in state-supported schools to teach "that mankind ascended or descended from a lower order of animals," *i.e.*, an anti-evolution statute (Justice Harlan concurred on the Establishment rationale but Justices Black and Stewart concurred because of the statute's vagueness, the former feeling the First amendment questions "troublesome").


13. *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (*Lemon I*), and 411 U.S. 192 (1973) (*Lemon II*), as well as *Sloan v. Lemon*, 413 U.S. 825 (1973). Lemon I held unconstitutional Pennsylvania's reimbursement to "nonpublic, sectarian schools for their expenditures on teachers' salaries, textbooks, and instructional materials used in specified 'secular' courses," and Rhode Island's direct supplement to all teachers qualifying therefor and on certain conditions of 15% of their annual salary; the reason was the required continuing supervision would foster excessive entanglement between the state and religion. *Lemon II* affirmed the denial of an injunction whereby the earlier successful challengers to the statute now sought to prevent the payment of funds to reimburse the aided schools for expenses incurred in reliance on the statute prior to its invalidation, *i.e.*, the challengers now lost.

After *Lemon I*, Pennsylvania enacted a statute reimbursing parents for part of tuition expenses when sending their children to nonpublic schools. *Sloan v. Lemon* now also denounced this (6-3, the dissenters being the Chief Justice and Justices White and Rehnquist). *See also Levitt v. Committee*, 413 U.S. 472 (1973), and *Committee v. Nyquist*, 413 U.S. 756 (1973).

14. *Tilton v. Richardson*, 403 U.S. 672 (1971). The federal Higher Education Facilities Act of 1963 provided for federal grants for construction of buildings and "academic facilities" to be used for secular educational purposes and expressly excluded such facilities for sectarian instruction or as a place for religious worship. The United States retained a 20-year interest in all such facilities. If the grant recipient violated the conditions during such 20 years, the government would recover moneys under a formula. Five Justices upheld the "facilities" provision because it did not have the primary effect of aiding religious purposes of church-related institutions, even though they received some benefits; eight Justices denounced that portion of the statute providing for the 20-year limitation on the religious-use restrictions.
15. *Levitt v. Committee for Public Education and Religious Liberty*, 413 U.S. 472 (1973), denouncing New York's reimbursement to qualifying private schools for certain testing and record-keeping costs mandated by the state, and not permitting payments for religious worship or instruction, as the aid for the secular functions was not identified and separated from the aid to sectarian activities (referring to and relying on the *Nyquist* decision, below, for "some of the same constitutional flaws . . .") Justices Douglas, Brennan, and Marshall would apply the *Nyquist* holding without more; Justice White dissented.

See also *Sloan v. Lemon*, 413 U.S. 825 (1973). Quaere: Does this *Levitt* reasoning imply that if, to repeat, if there had been a sufficient (satisfactory) identification and separation, then the reimbursements would have been upheld?

16. *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973). A New York statute provided for: (1) direct state grants to qualifying nonpublic schools for maintenance and repair of facilities and equipment; (2) tuition reimbursement to parents of children attending elementary and secondary nonpublic schools; and (3) state income tax relief to such parents. Eight Justices denounced (1) as the payments were not restricted exclusively for secular purposes; six Justices invalidated (2) for these reasons; and (3) was rejected by six Justices because it was insufficiently so restricted. (The Chief Justice and Justice Rehnquist agreed with the six others in striking down the first, but, with Justice White now joining them, all three dissented as to the second and third holdings).

17. *Hunt v. McNair*, 413 U.S. 734 (1973), a 6-3 decision (dissenters are Justices Brennan, Douglas, and Marshall), upholding a bond issuance program, but not to be obligations of the state, by a state-created agency for the benefit of the Baptist College of Charleston, South Carolina. The bond proceeds would finance buildings, facilities, etc. but these were not to be used for sectarian instruction or worship, and the buildings and facilities would be conveyed to the agency which would lease these back to the College for ultimate reconveyance when the bonds were fully repaid.

18. *Meek v. Pittenger*, 421 U.S. 349 (1975), in which another Pennsylvania effort was made, this time partially successful. See *Lemon v. Kurtzman*, 411 U.S. 192 (1973); *Sloan v. Lemon*, 413 U.S. 825 (1973). Six Justices upheld the loan of textbooks without charge to children attending nonpublic elementary and secondary schools; Chief Justice Burger and Justices Stewart, White, Blackmun, Powell, and Rehnquist; six Justices denounced the loan of instructional material and equipment because loaned to the schools, and also denounced the furnishing of a professional staff to provide auxiliary school services because furnished on the premises of the church-related schools and only when requested by the school authorities; Justices Douglas, Brennan, Stewart, Marshall, Blackmun, and Powell; three Justices, who sided in approving the textbook loan, dissented as to the two other items and would uphold the entire statute; Chief Jus-

19. Roemer v. Board of Public Works of Maryland, 426 U.S. 736 (1976), a 5-4 decision. A statute provided for annual non-categorical grants to state-accredited and qualifying private colleges, including religiously affiliated ones, subject only to the limitations that the moneys not be used for sectarian purposes. A three-Justice plurality of the Chief Justice and Justices Blackmun and Powell would uphold the grants because they did not foster excessive governmental entanglement, while Justices White and Rehnquist rejected this third "test" and would uphold because the first two tests were not violated, i.e., five Justices upheld the grants. Three of the other four Justices wrote separate, short, dissenting opinions, with Justice Stewart also joining in the other two and Justice Stevens joining "substantially" in that of Justice Brennan.

20. Americans United v. Lang, 429 U.S. 1029 (1977), denying certiorari when the Missouri Supreme Court upheld a state law which provides for tuition grants to students attending various public and private colleges, including some colleges which have religious affiliations. Justice Brennan would grant certiorari. See Americans United v. Lang, 538 S.W.2d 711 (Mo. 1976), cert. denied, 429 U.S. 1029 (1977).

21. Wolman v. Essex, 429 U.S. 1037 (1977), probable jurisdiction noted concerning the constitutionality of an Ohio law which provides to private and parochial school children certain materials, equipment, and services which are available to children at public schools. The materials are, under the law, on "loan" to the pupils and their parents and not to the schools, and some services, e.g., guidance and counseling, are performed off the premises of the schools. In 1976, a lower federal court held the law to be facially constitutional. See also Meek v. Pittenger, 421 U.S. 349 (1975); Key v. Doyle, 434 U.S. 59 (1977).

The case involves a so-called "Mortmain Statute" which reads as follows:

A devise or bequest of real or personal property to a minister, priest, rabbi, public teacher, or preacher of the gospel, as such, or to a religious sect, order or denomination, or to or for the support or use, or benefit thereof, or in trust therefor, is not valid unless it is made at least 30 days before the death of the testator. D.C. Code § 18-302 (1973).

The trial court in Estate of French v. Doyle, 365 A.2d 621 (D.C. App. 1976), appeal dismissed, 98 S. Ct. 280 (1977) held:

For the reasons hereafter set forth, this Court hold(s) (sic) that in addition to being an invalid infringement of the free exercise of religion provisions of the First Amendment, 18 D.C. Code 302 is also unconstitutional and thus invalid as a denial of due process guaranteed by the Fifth Amendment. (Citation omitted).

The appellate court affirmed that "the statute is invalid under the equal protection and due process principles of the Fifth Amendment and there-
fore did not address the First Amendment issues.” 365 A.2d at 623.

The fifth amendment rationale was based upon a discriminatory class distinction created by the statute. The trial court as affirmed held: “Section 18-302, by its terms, declares void only bequests and devises for the benefit of religious institutions or the clergy. Testamentary gifts to non-religious charitable or educational organizations are not included.” 365 A.2d at 622.

The equal protection guarantee “requires, at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose.” . . . “A classification ‘must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike’.” . . . The statute in question creates two classes of beneficiaries: one class composed of clergymen and religious institutions and a second class encompassing all other beneficiaries. The issue, therefore, is whether this classification bears any rational relationship to the purpose of the statute. . . . [T]he District of Columbia statute, as interpreted by the courts, voids only religious devises or bequests and distinguishes further between gifts to religious institutions and gifts to charitable organizations owned and operated by religious institutions, making only the latter valid. There is no rational basis for presuming that a testator troubled by religious considerations is likely to make a bequest directly to a church, rather than to a charity run by the church. Thus, the statute arbitrarily provides different treatment for similarly situated legatees. Consequently, we conclude that the classification established by § 18-302 has no rational relationship to the purpose of the legislation and hence denies religious legatees equal protection of the law.

Id. at 623-24 (citations omitted).

In a special concurring opinion the Chief Judge of the appellate court felt compelled to observe that the opinion should also be upheld as a violation of the free exercise clause of the first amendment. He stated:

Its real vulnerability is that it singles out bequests for religious uses in contrast to bequests for charitable, educational, artistic, or humane institutions. According to appellees, the statute’s main purpose is to prevent advocates of traditional religious, particularly the clergy, from influencing the dying by holding out hopes of salvation or avoidance of damnation in return for generous gifts to further the practice of religion. But such an objective is precisely what the ‘free exercise’ of religion clause of the First Amendment forbids, for it is premised upon the assumption that such representations are false and hence Congress can enact safeguards against their effect.

Thus, even though it could be proved (much less presumed) that agents of the two churches secured these benefits by representations made to the testatrix as death was imminent, the text of the First Amendment and judicial decisions construing it show that they had a constitutional right to make them. See, e.g., Jones v. Opelika, 319 U.S. 103 (1943) . . .; Murdock v. Pennsylvania, 319 U.S. 105 (1943) . . .; Cantwell v. Connecticut, 310 U.S. 296 (1940) . . .; and Sherbert v. Verner, 374 U.S. 398 (1963) . . . According to the statute infringes on rights which the legatees had standing to assert and therefore cannot stand under the First Amendment.
This case deals with the issue whether the civil courts will assume jurisdiction of ecclesiastical disputes. Plaintiff is a Catholic priest who had been suspended by the Defendant as Bishop of the Diocese. The priest invoked the jurisdiction of the civil courts seeking monetary damages and declaratory judgment that the Bishop not prevail unless and until a canonical tribunal was convened to hear the priest's complaint. In affirming the lower court's refusal of the case—as an ecclesiastical dispute which should not be resolved in civil courts, the Alabama Supreme Court reviewed three governing cases on this question as rendered by the U.S. Supreme Court, ranging from 1871 to 1976:

1. *Watson v. Jones*, 80 U.S. (13 Wall.) 679 (1871). The Court said that "... we think the rule of action which should govern the civil courts, founded in a broad and sound view of the relations of church and state under our system of laws, and supported by a preponderating weight of judicial authority is, that, whenever the questions of discipline, or of faith, or ecclesiastical rule, custom, or law have been decided by the highest of these churches judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their applications to the case before them." 80 U.S. at 727.

2. In *Gonzales v. Archbishop*, 280 U.S. 1, 16 (1929), the U.S. Supreme Court issued a ruling that raised a possibility of "marginal court review" as an exception to the *Watson* Rule. The court said: "In the absence of fraud, collusion or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are excepted in litigation before secular as conclusive, because the parties in interest made them so by contract or otherwise. ..." The implication was that the courts might review for fraud, collusion or arbitrariness or for purity of ecclesiality.

3. *Serbian Eastern Orthodox Diocese for United States of America and Canada v. Milivojevich*, 426 U.S. 696 (1976). In this case the U.S. Supreme Court reversed an Illinois case based *inter alia* on the marginal review concept. The Supreme Court of Illinois held that: (1) the church's suspension, removal, and defrockment of the bishop must be set aside as arbitrary because the church proceedings against him had not been conducted in accordance with the court's interpretation of the church's constitution, penal code, and internal regulations, and (2) the church's reorganization of the diocese was beyond the scope of the church's authority to effectuate such changes without approval of the diocese. 60 Ill. 2d 477, 328 N.E.2d 268.

In reversing, the U.S. Supreme Court in a 7-2 decision held:

Consistently with the First and Fourteenth Amendments 'civil courts do not inquire whether the relevant (hierarchical) church governing body has power under religious law ... (to decide such disputes) ... Such a determination ... frequently necessitates the interpretation of ambiguous religious law
and usage. To permit civil courts to probe deeply enough into the allocation of power within a (hierarchical) church so as to decide . . . religious law . . . (governing church policy) . . . would violate the First Amendment in much the same manner as civil determination of religious doctrine.’ Maryland and Va. Churches v. Sharpsburgh Church, 396 U.S. 367, 369 (1970) (concurring opinion). For where resolution of the disputes cannot be made with extensive inquiry by civil courts into religious law and polity, the First and Fourteenth Amendments mandate that civil courts shall not disturb the decisions of the highest ecclesiastical tribunal within a church of hierarchical polity, but must accept such decisions as binding on them, in their application to the religious issues of doctrine or polity before them.

The First Amendment severely circumscribes the role that civil courts may play in resolving church property disputes, since there is substantial danger that the state will become entangled in essentially religious controversies or intervene on behalf of groups espousing particular doctrinal beliefs.

(Headnote 3, 49 L.Ed. 2d 154).

Whether or not there is room for ‘marginal civil court review’ of church disputes under the narrow rubrics of ‘fraud’ or ‘collusion’ when church tribunals act in bad faith for secular purposes, an ‘arbitrariness’ exception . . . in the sense of an inquiry whether the decision of the highest ecclesiastical tribunal of a hierarchical church complied with church laws and regulations—is not consistent with the constitutional mandate that civil courts are bound to accept the decisions of the highest judicatories of a religious organization of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom or law; for civil courts to analyze whether the ecclesiastical actions of a church judicatory are ‘arbitrary’ inherently entails inquiry into the procedures that canon or ecclesiastical law supposedly require the church adjudicatory to follow, or else into the substantive criteria by which they are supposedly to decide the ecclesiastical question and such inquiry is the type that the First Amendment prohibits.

(Headnote 5, 49 L.Ed. 2d 154).

Though it did not rely on the ‘fraud, collusion, or arbitrariness’ exception to the rule requiring recognition by civil courts of decisions by hierarchical tribunals, but rather on purported ‘neutral principles’ for resolving property disputes in reaching its conclusion that the Mother Church’s reorganization of the American-Canadian Diocese into three Dioceses was invalid, that conclusion also contravened the First and Fourteenth Amendments. The reorganization of the Diocese involves solely a matter of internal church government, an issue at the core of ecclesiastical affairs. Religious freedom encompasses the ‘power’ (of religious bodies) to decide for themselves, free of state interference, matters of church government as well as those of faith and doctrine. Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952).

The Serbian case has a very interesting dissent by Rehnquist and Stevens to the effect that the first amendment does not mandate the Serbian case ruling. This case is well analyzed and discussed in the Fordham Law Review article made available to all of us at this meeting. See Note, 46 FORDHAM L. REV. 992 (1977).

Plaintiffs are the Queen of Angels Hospital, a California corporation ("Queen"), and the Franciscan Sisters of the Sacred Heart ("Motherhouse"). They filed a declaratory relief action against the Attorney General to determine the validity of a lease agreement, as well as the legality of an agreement for retirement pay. Plaintiff, Queen, is a non-profit corporation. Plaintiff, Motherhouse, is a religious order. The hospital was established in 1927. In 1932, Queen added a ten-floor wing to its main building. A clinic moved into the new wing. In 1948, Motherhouse took over operation of the clinic, which remained a separate corporation until 1958.

In April 1971, Queen's board of directors approved a lease to be effective May 1, 1971, between Queen as lessor and W.D.C. Services, Inc., hospital entrepreneurs, as lessee. Queen leased the hospital excepting the outpatient clinic and a convent house, to W.D.C. for 25 years with two options for ten additional years each. Queen intends to use a substantial portion of the lease proceeds to establish and operate additional medical clinics in East and South Central Los Angeles. It is not disputed that an outpatient clinic is not functionally equivalent to a hospital.

In June 1971, the Motherhouse submitted a claim for 16 million dollars for the value of the Sisters' past services to Queen's board of directors. The board unanimously acknowledged the validity of the claim. In July 1971, an agreement was executed between Queen and the Motherhouse, effective May 1971, settling and compromising the claim for the Sisters' past services by agreeing that Queen should pay to the Motherhouse $200 per month for each Sister in the Order over the age of 70 years, plus $200 per month for each lay employee who had worked for the congregation for over 20 years, not to exceed ten lay employees at any one time. The pensions are payable to all elderly Sisters in the order, whether or not the particular Sister performed services at Queen of Angels Hospital.

The Attorney General contends that under its articles of incorporation, Queen held its assets in trust primarily for the purpose of operating a hospital, and the use of those assets exclusively for outpatient clinics would constitute an abandonment of Queen's primary charitable purpose and a diversion of charitable trust assets.

The articles of incorporation, as amended in 1971,¹ provides in relevant part as follows:

¹ In 1946 the articles were again amended to provide for succession in the event of liquidation, dissolution or abandonment. The named successors were, in order, a Santa Barbara hospital, a San Francisco hospital, a Los Angeles hospital, and the Roman Catholic Archbishop of Los Angeles.
First: That the name of said corporation is

QUEEN OF ANGELS HOSPITAL

Second: That the purposes for which said corporation is formed are:

(1) To establish, own, maintain, and operate a hospital in the City of Los Angeles, to furnish hospital care, and medical and surgical treatment of every kind and character, and to receive, treat and care for patients, invalids, the aged and infirm, and generally to conduct and carry on, and to do all things necessary or advisable in conducting and carrying on a hospital;

(2) To perform and to foster and support acts of Christian charity particularly among the sick and ailing; to practice, foster and encourage religious beliefs and activities, particularly those of the Holy Roman Catholic Church; to house and care for unprotected and indigent sick, aged and infirm persons regardless of race, creed, sex or age;

(3) To educate nurses and medical students, and to provide facilities for the same;

(4) That it is a corporation which is not formed for pecuniary gain and any revenue received from the operation and carrying on of said hospital shall be used in improving the same or shall be used in enlarging and improving said hospital and in enlarging the field and scope of its charitable, religious and educational activities;

(5) To lease or purchase any real estate which may be necessary, proper or useful in carrying out the purposes or for the benefit of the hospital, or as may be deemed to be conducive to the welfare of this corporation;

(6) To receive and hold such property as may be necessary, useful or advantageous in the carrying out of the general purposes or for the benefit of the hospital or as may be deemed to be conducive to the welfare of this corporation.

The opinion of the appellate court stated, inter alia:

First, what is most apparent in the articles of incorporation is that the name of the corporation, Queen of Angels Hospital, describes a 'hospital.' Second, although—as plaintiffs point out—the articles refer to a plural 'purposes,' the framework of those multiple purposes is the operation of a hospital. Clinics are not even mentioned. Thus, subclause 1 begins and ends with the operation of a hospital. Subclause 2, which begins with the performance of 'acts of Christian charity particularly among the sick and ailing,' concludes with the conjunctive purpose, 'to house and care' for persons, suggesting a hospital facility. Subclause 3, which refers to the education of nurses and medical students, intimates a reference back to the hospital. Most important, subclause 4 provides that 'any revenue received from the operation and carrying on of said hospital' shall be used either to improve the hospital or in other charitable religious and educational activities, indicating that the 'hospital' would continue, although other activities might be added or expanded.

The articles of incorporation alone—without resort to additional evi-
dence—compel the inference that although Queen is entitled to do many things besides operating a hospital, essential to all those other activities is the continued operation of a hospital.

In brief, whatever else Queen of Angels Hospital Corporation may do under its articles of incorporation, it was intended to and did operate a hospital and cannot, consistent with the trust imposed upon it, abandon the operation of the hospital business in favor of clinics. . . The question is not whether Queen can use some of its assets or the proceeds from the operation of the hospital for purposes other than running a hospital; it certainly can and has. The question is whether it can cease to perform the primary purpose for which it was organized. That, we believe, it cannot do. . . . This corporation is, however, bound by its articles of incorporation. Queen may maintain a hospital and retain control over its assets or it may abandon the operation of a hospital and lose those assets to the successor distributees (supra, fn. 1), but it cannot do both. . . . The issue is not whether the new and different purpose is equal to or better than the original purpose, but whether that purpose is authorized by the articles.

There is no merit to Queen's alternative contention that the statutes (citation omitted) authorizing the Attorney General to supervise such non-profit corporations are unconstitutional.

The rule, as most recently stated in In re Metropolitan Baptist Church of Richmond, Inc., 48 Cal. App. 3d 850, 121 Cal. Rptr. 899 (1975), is one of neutrality: "Where civil or property rights are involved the courts of this state have always, evenhandedly, accepted jurisdiction over property disputes, even where ecclesiastical questions may have been indirectly involved." Id. at 859, 121 Cal. Rptr. at 904 (emphasis in original). Where, as here, the dispute does not require the resolution by civil courts of controversies over religious doctrine and practice, no infringement on the parties' first amendment rights results. We deal here with a hospital, not a church, and it is well-established that a religious group may not claim the protection of the first amendment with respect to its purely secular activities.

Concerning the retirement plan, the trial court made the following relevant findings:

Plaintiff Franciscan Sisters of the Sacred Heart ("Motherhouse") is an unincorporated association and a religious order of the Roman Catholic Church. The property of Queen does not belong to either Motherhouse or the Roman Catholic Church. From the inception of the hospital through 1971, services were provided Queen by the Motherhouse and performed by the Sisters of the Motherhouse. When services were performed, all amounts requested by the Motherhouse for those services were paid by Queen, and except for such compensation, the services were considered donated to Queen by both parties. Neither the Motherhouse nor the Sisters expected any further or future compensation for those services.

Although the claim for compensation for past services was made in good faith and was not a dishonest claim, 'there was no basis for such claim and
neither the Motherhouse nor Queen had a reasonable basis for believing in the validity of the claim. The compromise of the claim—e.g., the retirement plan—was not a proper exercise of sound business judgment or of the fiduciary duties of Queen's Board.

The trial court concluded that Queen had no lawful obligation to repay the Motherhouse, that the compromise agreement was invalid, that the retirement plan was invalid and that, if implemented, it would constitute a diversion of charitable assets.

The appellate opinion states:

Although plaintiffs make much of the relationship between Queen and the Motherhouse and attempt to present this relationship in terms of Roman Catholic Canon Law, the trial court properly rejected this approach. Plaintiffs' assertion that such evidence is material reflects an attempt to bootstrap a First Amendment argument by citing possibly undisputable evidence concerning the moral and ecclesiastic duties of Queen and the Motherhouse, and then arguing that whether the retirement plan accords with church doctrine is an internal ecclesiastical matter. Throughout, plaintiffs have sought the benefits of and conformed to the general requirements of civil law; they cannot now decline to be ruled by the principles which Queen has itself invited. (De La Salle Institute v. United States, supra, 195 F. Supp. 891, 901).

It is important to remember that this case originated in the Superior Court of California and was appealed to the state court of appeals. The first few times I read this case I completely missed the last paragraph of the appellate case which, it turns out, is the only part of the body of the appellate decision appearing on the last page of the opinion (page 26 as published by the Court). This paragraph is critical to understand and analyze this case. It reads: "The Judgment is Reversed." I am told by counsel from California that this automatically includes by law a remand and retrial of unsettled law and fact issues as per the appellate opinion. Accordingly the case is remanded for trial in accord with the opinion of the appellate court.

In summary, the original Queen's case presented four basic issues inter alia:

1. Does the United States Constitution First Amendment preclude the civil courts from assuming jurisdiction of this case as an ecclesiastical dispute for internal resolution?

   The trial court said "No!" and assumed jurisdiction. The appellate court affirmed in the body of the opinion.

2. Was the lease of the hospital to W.D.C. legal?

   The trial court held the lease to be legal while at the same time declaring it to be an abandonment of the purpose for which the state charitable franchise was granted, i.e., to run a hospital. Thus, the funds from the lease were deemed impressed with a trust and bound to be distributed to the successor distributees indicated in the dissolution clause of Queen's articles as amended in 1946.
The appellate court affirmed in the body of the opinion.

3. Is the compromise settlement of the claim for back wages—i.e., the pension plan, legal and enforceable under law as extant in 1971 when the plan was executed?

The trial court held "No!" The appellate court affirmed in the body of the opinion.

4. Is the pension plan legal and sustainable under a 1974 law enacted by the California legislature during the pending of this litigation?

The trial court held "No!" The appellate court said: "We cannot make the necessary determinations on this record."


This case is now well known as the constitutional challenge to part of ESEA (Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, as amended by Act of 1974, Pub. L. No. 93-380, 20 U.S.C. §§ 241a-241n (1976), Title I, providing for services on the premises of nonpublic schools. The case is still in the developing stages. Motions to intervene were finally granted after some initial resistance by plaintiffs. The case is now at the state of discovery proceedings. It is anticipated that a comprehensive record will be compiled rather than—or in addition to—stipulations. An educated guess would indicate that it be 2 years before this case would be handled by the U.S. Supreme Court if it goes that far. Indications are that the parties involved are grooming this case for the U.S. Supreme Court.

It is interesting to note that the U.S. Solicitor General has filed an amicus brief with the U.S. Supreme Court in the Wolman v. Essex case. The intended thrust of the brief is to protect the record for the Califano case in New York. The brief says in part:

We submit that Title I is fundamentally different from all state and local programs that offer aid to sectarian schools. The federal government has extended aid to individual children, without regard to the schools children attend. Although a state may fulfill its duty of neutrality by opening the doors of its public schools to all children, the United States does not maintain a system of public schools that is neutral with respect to religion, the United States must make its benefits available to students in public and private schools alike . . . . Because the task of deciding when the Establishment Clause is implicated in the context of parochial school aid has proved to be a delicate one, usually requiring a careful evaluation of the facts of the particular case (Wheeler v. Barrera, supra, 417 U.S. at 426), the United States believes that the court's decision in this case will not necessarily affect the constitutionality of Title I.

Brief for Appellant at 6-7, Wolman v. Essex, 430 U.S. 914 (1977) (mem.).

Wamble v. Pierce, U.S. District Court for the Western District of Missouri, filed April 4, 1976. The plaintiff is one of the plaintiffs in the Pearl v.
CHURCH/STATE LITIGATION

Califano case pending in N.Y. Federal Courts of the Southern District of New York.

In the original Wheeler v. Barrera case, 417 U.S. 402 (1974), the U.S. Supreme court ruled:

1. "Title I evinces a clear intention that state constitutional spending prescrip- tions not be pre-empted as a condition of accepting federal funds;" and
2. that the questions of: 1. whether Title I funds are public funds within the meaning of state constitutions, and 2. whether state law permits the use of public funds to send teachers onto parochial school premises is to be resolved under state (not federal) law.

In Mallory v. Barrera, 544 S.W.2d 556 (Mo. 1976) (en banc), the Missouri Supreme Court ruled that Title I funds are subject to the Missouri Constitution and violated the state's laws and constitution. Thereafter Congress enacted the so called by-pass provision of Title I, Pub. L. No. 93-380, 20 U.S.C. § 241e-1(b)(1)-(3) (1976).

Defendants in the Wamble case are Federal and State Education officials and persons involved in 3 direct contracts with the federal agencies to affect the by-pass for three programs in three Local Education Agencies (LEA's).

The complaint alleges that:

1. The three described contracts are unconstitutional for entanglement reasons proscribed under the first amendment.
2. That 20 U.S.C. § 241e-1 and the appropriate regulations authorizing the by-pass of the State Constitution are unconstitutional because they:
   a. Violated the tenth amendment of the U.S. Constitution construed as reserving education to the state respectively or to the people.
   b. Violates the No Establishment Clause of the first amendment in its function of preventing "Government's sponsorship of religion, Government's financing of religion, or Government's active involvement with religious institutions and activities"—excessive entanglement.

This case (Wamble v. Pierce) can be viewed as a potential hazard to the pending Pearl v. Califano case. After reading the complaint there is reason to speculate that this new litigation is designed to pre-empt Pearl v. Califano.

What is the status of Barrera litigation in Missouri—before and after the Title I Congressional by-pass provisions?

The Missouri State Board of Education prepared a state plan which was approved by the United States district court. That approval was appealed to the Eighth Circuit which reversed and ordered a new plan, Barrera v. Wheeler, 475 F.2d 1338, 1348 (8th Cir. 1973). Meanwhile the U.S. Supreme Court ruled that the Title I funds were subject to state law. Barrera v. Wheeler, 417 U.S. 402 (1974). Thereafter the Missouri Supreme Court issued its decision that Title I violated the state Constitution. Mallory v. Barrera, 544 S.W.2d 556 (Mo. 1976). At this point the Congressional by-pass provision was invoked to bring forth the three plans under attack in the Wamble case. In addition a subsequent state by-pass plan
has been proposed and submitted to the court for approval, apparently under the continuing jurisdiction of *Barrera v. Wheeler* in the U.S. District Court, Western Division, District of Missouri (Civil Action 182 48-2). The proposal appears to be a mockery and is being contested. The *Wamble* case, of course, comes after all of this and challenges the plans as well as the Title I by-pass authorization.


This case presents questions concerning, among other things, the provision of educational services and materials to students of nonpublic schools. The law in question was tried to a federal district court three judge panel and that court held it to be constitutional. On appeal the U.S. Supreme Court has accepted the case. It was argued before the U.S. Supreme Court on April 16, 1977. The interest of nonpublic school students and their parents was pursued by intervention. Mr. David Young of Columbus, Ohio, is counsel for the intervenors.


In 1974, this court declared unconstitutional the Tennessee Tuition Grant Program, *Tenn. Code Ann.* §§ 49-4601—a program which, although intended to be one of student financial assistance, provided tuition payments directly to colleges and universities. *Americans United v. Dunn*, 384 F. Supp. 714 (M.D. Tenn. 1974). This court’s judgment was subsequently vacated by the Supreme Court, and the case was remanded for reconsideration in light of an amendment to the program. 421 U.S. 958 (1975). Before this court had an opportunity to reconsider its prior judgment, the Tennessee Tuition Grant Program was repealed “in its entirety.” Preamble, Acts of 1976, Pub. ch. 415. In its place, the Tennessee General Assembly enacted “an entirely new financial assistance program,” the Tennessee Student Assistance Program, which provides for the payment of awards directly to needy students.

This case presents a constitutional challenge to the new Tennessee Student Assistance Program. Plaintiffs claim that the Program violates both the Establishment and Free Exercise Clauses of the first amendment, as applied to the states through the fourteenth amendment. They seek a declaration to that effect and an injunction against the administration of the Program “insofar as (it) provides for state funds being used for the benefit of church colleges operated for religious purposes and with religious requirements for students and faculty.”

Both the intervenors and the defendants contend that a program such as the one at issue, which makes direct financial assistance generally available to all college students in public and accredited private colleges, is religiously neutral and offends no constitutional principle.
QUESTIONS PRESENTED

Whether the Tennessee Student Assistance Program violates the Establishment Clause because benefits under the Program are available to all qualified college students, without regard to whether they attend a public or private, or a sectarian or non-sectarian, college.

STATEMENT OF THE CASE

This case requires the court to consider whether a program of student aid is constitutionally different from a program of institutional aid under the establishment clause of the first amendment. There is no real dispute on the basic factual characteristics of the aid program at issue in this case. The crucial question is simply this: What is the proper constitutional analysis for a program of student aid?

The court's answer to this question will have far-reaching effects. It will, of course, determine the fate of the Tennessee Student Assistance Program, presently funded at $1.5 million. But the court's answer will also necessarily affect the future of such federal student aid programs as the Basic Educational Opportunity Grant Program (BEOG), the Supplemental Educational Opportunity Grant Program (SEOG), the National Direct Student Loan Program (NDSL), and the College Work-Study Program—programs that are funded for the current academic year at more than $2 billion.

This case will probably be governed by the cases of Tilton, Hunt, Roemer & Poau v. Rogers as applied to its special facts. The facts here are differentiable in that the aid here flows to needy students rather than the institutions. Could this be interpreted as a Voucher system? The case has been submitted and as far as I know is awaiting disposition at the hands of the court.


During the late 60's and early 70's there was a movement in some areas of the state to change the Catholic school system from a parochial school system to a regional system. A regional system was one which would serve only the students in a carefully defined geographical region. In some instances, a regional school system operated only one school in one building. In other instances, a regional school system would operate many schools in many buildings. The earmark of all regional schools was that the area served by each school crossed town and city lines.

Prior to 1971, state law required and authorized town and city school committees to transport public and private school pupils between their homes and schools provided the transportation was entirely within the limits of the town. In 1971, the General Assembly authorized and directed towns to provide transportation to students attending non-profit regional schools, regardless of whether the schools were private or public, and thus required the busing of students across town lines. The Rhode Island Su-
The Supreme Court in 1976 ruled the 1971 statute to be in violation of the state constitution.

In 1976 the General Assembly enacted a new statute, R. I. Gen. Laws § 16-21-2 (Supp. 1977). It required the same transportation as did its predecessor as long as the distance to be traveled did not exceed fifteen miles.

The court found that the Rhode Island law places on school committees—on taxpayers—the requirement that they provide an additional option to children attending out-of-district nonpublic (i.e., sectarian) schools. This option is not provided to public school children. Section 16-21-2 is therefore not a law, like the statute upheld in Everson, which provides equal benefits to all school children.

The court cites Everson with approval. It also cites the district court case from Iowa, Poau v. Benton, 413 F. Supp. 955 (S.D. Iowa 1975), and held further: Here, as in Benton, the benefits provided by the challenged statute fail to meet the requirement announced in Everson and every succeeding Establishment Clause case in the Supreme Court—that benefits be provided in common, substantially equally, without distinctions between children attending sectarian and public schools. The infirmity of the law is therefore not that any transportation of pupils to religious schools inevitably "aids" those schools. Section 16-21-2 is infirm because in fact it affords greater options—greater benefits—to children attending the quickly increasing number of regionalized religious schools than to children attending public schools. It has the effect in fact of transferring a major cost of regionalization from parents seeking to provide their children a religious education, and from the religious bodies themselves, to the taxpayers of the state. This the legislature may not do.

The court held that plaintiffs have succeeded under the third part of the Lemon test by demonstrating the entanglement of church and state brought about by the law. The challenged statute will entangle church and state in two ways. First, because the law clearly permits a single town to be included in the region served by a number of regionalized schools, the law will necessitate a great increase in the amount of coordination between school districts, the state, and sectarian school authorities to determine the amount of money available for transportation, the number of buses required, routes, holidays, and so forth. Second, and of greater importance, the law will inevitably provide successive opportunities for political fragmentation and division along religious lines, one of the principal evils against which the establishment clause was intended to protect. Meek v. Pittenger, 421 U.S. at 372. See also Lemon v. Kurtzman, 403 U.S. at 622-23.

By way of summary it is apparent that some of these same issues and others in varied or nuanced form are in the offing. They can be seen formulating in the fields of Unemployment Compensation, Civil Rights, Tax law, and Labor Relations. Questions such as employer identity, application of Church principle and dogma in the employer-employee relation-
ship will or have arisen. Questions of exemption from certain laws will or have arisen based on this dispute as to whether it applies to the Church as an institution or to the Church because of its role or function. The possible result may well be that Church as an institution will be denied heretofore established rights. Only Church functions as determined by government (courts or administrative agencies) will be exempt. Currently there is an ambivalence abroad on this issue. I predict it will come to an important decision in the next five years.

The real questions are: What is a Church? What do (can) Churches do—or not do? Who decides these questions—Church or State? Are the questions decided on the basis of institution or function?

Before closing I would like to indulge in some speculation concerning the future court decisions touching on the question of education or school aids to nonpublic school students. In the field of religion (as in others) the Supreme Court is so confusing and unpredictable that it has become impossible to suggest, much less predict, the vote or reasoning of any Justice. The Justices may believe in the same legal tests but their respective interpretations and applications have been known to vary widely in response to many dynamics and personal opinions or feelings.

Does the first amendment bar some or all aid for education as Congress and the states may enact? Does the judiciary really possess a veto over such legislation because of the power to interpret and apply the religions clause? Assuming *arguendo* that the answer to both questions is yes, is it possible to inject or utilize other arguments or logic to overcome the current refusal of the courts to allow more meaningful educational aids?

The U.S. Supreme Court has recently set more rigid standards for establishing the unconstitutionality of racial discrimination. Early statutes which allowed different treatments for different races were so blatantly discriminatory that their "facial invalidity" was obvious, *i.e.*, the intent to discriminate was clear and unambiguous on the face of the law and it was unconstitutional without application. It followed that statutes honestly intended and designed to treat all equitably were nevertheless found unconstitutional if they ultimately and factually resulted in discrimination in their application. The impact or result was the test which controlled where intent was not purely obvious or otherwise provable. Result was deemed to be the intent regardless of contrary expression.

This logic of the Court is now subject to possible different rationale. On June 7, 1976, the U.S. Supreme Court ruled in a case involving an examination for D.C. police applicants, that the statute in question was not illegal because it placed a "substantially disproportionate" burden on one race; to prove an equal protection violation under the constitution, there also had to be shown a "racially discriminatory purpose." *Washington v. Davis*, 426 U.S. 229 (1976). On January 11, 1977, this "intent" requirement was applied to the exclusionary suburban zoning. It was ruled not inherently unconstitutional for a white suburb to change zoning rules with the practical effect of blocking construction of racially
integrated housing if such an intent is not facially obvious. *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).

If intent can become the guidepost for racial discrimination, why can't intent control (or at least influence more than it does not) the constitutional question of education aids? Such an application could leave much more room in the joints of the current three-part test from *Schemp, Walz* and related cases. Conversely, it could even be used to tighten up the joints.

In closing, I would like to especially thank George Reed and the staff of USCC General Counsel for their assistance.