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THE "PERMEATION" ISSUE IN FEDERAL AID TO EDUCATION

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MUST THE FEDERAL GOVERNMENT, which recognizes that the child citizen may subscribe to any religious creed, proscribe him from general educational benefits if his state-approved course of instruction is associated with religion? This is rapidly becoming the critical constitutional question in connection with Federal Aid legislation.

It is no secret that education in Catholic parochial and private schools adheres to an educational philosophy which requires that the curriculum be integrated with relevant religious concepts. This is not to say that the Catholic concept of education demands that extraneous religious concepts and examples be introduced into the teaching of the basic humanistic disciplines. It means rather that when the conclusions of a physical or social science course impinge on theological premises there must be a full explanation of the principle so that a harmonious and valid picture will be presented to the student. This concept of the integration of religious principles applies to the whole curriculum. It varies in its emphasis depending on the nature of the subject, the teacher or text book. There is nothing new or alien about this approach to education. In 1787 our Founding Fathers incorporated the following provision in the Northwest Ordinance:

> Article III: Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall be forever encouraged.

This same language was incorporated in the Southwest Ordinance which was adopted in 1789 by the same Congress that formulated the first amendment. The Catholic philosophy of education obviously has

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distinguished historical and constitutional associations. But now the argument is being advanced that this very philosophy of education precludes the federal government from extending financial assistance.

The "No Aid" Theory

In a recent research project supported by the National Council of Churches,[1] it was stated that the textbooks in parochial schools adhere to this philosophy and that even the physical science courses reflect it. On the basis of these findings it was asserted that the portion of the National Defense Education Act, which provides loans for private schools for the acquisition of textbooks in the physical sciences and foreign languages is unconstitutional; presumably on a guilt by association theory. Clothed in constitutional language, the argument is advanced that because of this association the receipt of public money constitutes aid to religion and therefore violates the no establishment clause of the first amendment. Strong reliance is placed on the "no aid to religion" doctrine of *Everson v. Board of Educ.* There the Court stated:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.[2]

The "no aid" theory, frequently read and applied in an uncritical manner since it was first enunciated by Mr. Justice Black, has led to many broad doctrinaire statements and positions inaccurately implying a prohibition of any form of economic assistance to an institution whose curriculum is integrated with religious percepts. This question was before the Court in *Everson.* For example, in oral argument, the attorney for appellant advanced the following proposition:

> So paying the transportation cost did more than aid the child in pursuing his secular education, it put him in the one place where religious instruction was made available....[3] Church school has two functions; the teaching of secular subjects and the teaching of religion.[4]

Later in the oral argument, the point came up most forcefully in a colloquy between Mr. Justice Black and the attorney for the appellee. Mr. Justice Black stated:

> I could understand it [your argument] if you based [it on] the situation, which it seems to me exists, that it does help religious schools but . . . it helps because of public education, and we shouldn't hold that it offends the broad purpose of the First Amendment.[5]

The decision of the Court upholding the transportation law reflects this colloquy. It held that the transportation legislation satisfied a public purpose, and then, after reciting the "no aid" language, declared that:

> [O]ther language of the First Amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude . . . Catholics, Lutherans . . . or the members of any other faith, *because of their faith or lack of it,* from receiving the benefits of public welfare legislation.[6]

It is obvious from this holding that the "no aid" doctrine may not be read in a

[1] LaNoue, *The National Defense Education Act and "Secular" Subjects,* 43 PHI DELTA KAPPAN 380 (June 1962).
[2] 330 U.S. 1, 15 (1946).
[3] Record, p. 16.
[4] *Id.* at 21.
[5] *Id.* at 50.
[6] Everson v. Board of Educ., *supra* note 2, at 16.

dogmatically literal manner and may not be applied without adverting to the fact that it is a legal term that calls for the application of the doctrine in the light of relevant judicial norms. What are these norms? First, *Everson* teaches us that the state must be neutral and that the "no aid" principle is conditioned by this judicial mandate of neutrality.[7] This doctrine was given positive emphasis in the case of *Zorach v. Clauson,* where the Supreme Court, in upholding a New York released time statute, declared:

> We are a religious people whose institutions presuppose a Supreme Being. . . . When the State encourages religious instruction or cooperates with religious authorities . . . it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs.[8]

The neutrality norm of *Everson* was thus freed of its negative characteristics and became a dynamic principle deviating sharply from the secularistic philosophy of *McCollum v. Board of Educ.*[9] It must now be interpreted in light of the accommodation mandate of *Zorach* and the juridical philosophy underlying it—a philosophy which is predicated on cooperation between Church and State.

Public Purpose

Secondly, *Everson* indicates (though in a generalized manner), the essential relationship of the public purpose character of the legislation to the ultimate solution of the issue. With respect to this norm, the Court observed in *Everson* that:

> It is much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose.[10]

In so holding it cited the case of *Cochran v. Board of Educ.*,[11] where the Court had sustained the constitutionality of a statute which provided for the use of textbooks by all of the school children in the State of Louisiana. In this key case the Court declared:

> Viewing the statute as having the effect thus attributed to it, we can not doubt that the taxing power of the State is exerted for a public purpose. The legislation does not segregate private schools, or their pupils, as its beneficiaries or attempt to interfere with any matters of exclusively private concern. Its interest is education, broadly, its method, comprehensive. Individual interests are aided only as the common interest is safeguarded.[12]

Admittedly, the public purpose concept of *Cochran* and *Everson* has not been used adequately as a norm for interpreting the "no aid" doctrine, probably because the Court did not in the *Everson* decision attempt to spell out the relationship between this concept and "no establishment." The position that the religious instruction in a parochial school is a disqualifying factor is a perfect example of the confusion which has resulted from the "wall of separation" which has been erected between the public purpose principle of the fourteenth amendment and the "no establishment" clause of the first amendment. Little effort has been made to relate and harmonize the first and fourteenth amendments. Concededly, aid to education serves a public purpose under the fourteenth amendment.[13]

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[7] National Catholic Welfare Conference, *The Constitutionality of the Inclusion of Church Related Schools in Federal Aid to Education,* 50 GEO. L.J. 399 (1961).

[8] 343 U.S. 306, 313-14 (1952).

[9] 333 U.S. 203 (1948).

[10] Everson v. Board of Educ., *supra* note 2, at 7.

[11] 281 U.S. 370 (1930).

[12] *Id.* at 375.

[13] *Cf.* Everson v. Board of Educ., 330 U.S. 1 (1946).

Ordinarily this would conclude a controversy over the constitutionality of public aid. The question is now asked, "Even if a public purpose is served, is there aid to the sectarian institution?" If the question is answered in the affirmative, then the tendency is to conclude that there is a violation of the first amendment.

This compartmentalized approach to problems affected by the first and fourteenth amendments results from the disposition to regard the "no aid" concept of the first amendment as an absolute. A critical and informative analysis of the validity of this attitude may be found in the June 16, 1962 issue of *America*. In an article entitled, "Textbooks and the Constitution," Charles M. Whelan, S.J., makes the following comment:

> If the Supreme Court has made anything clear since the New Deal, it is that there are no absolutes in our constitutional law. This may be regrettable, but it is a fact. It is one of the principal reasons why we have so many split and prolix opinions. Actually, the doctrine is not as relativistic as it sounds. The point driven home in one decision after another is that the "no" language in the Bill of Rights means not "never", but "hardly ever". "The First Amendment", wrote Mr. Justice Douglas for the court in the Zorach decision (1952), "within the scope of its coverage permits no exception; the prohibition is absolute. The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State.[14]

The Relationship Between "No Aid" and Public Purpose

With this proposition in mind we may now proceed to examine the interrelationship between the first and fourteenth amendments. At the outset we are confronted with the fact that the very application of the principles of the first eight amendments to the state is through the medium of the fourteenth amendment. Moreover, the concept of liberty now frequently associated with the first amendment was first articulated in connection with the liberty clause of the fourteenth amendment.[15] In short, we do not have two basically different and unrelated principles. The public purpose concept has a definite relationship to the concept of aid. Mr. Justice Rutledge saw this quite clearly in his dissenting opinion in *Everson*. There, he stated:

> We have here then one substantial issue, not two. To say that New Jersey's appropriation and her use of the power of taxation for raising the funds appropriated are not for public purposes but are for private ends, is to say that they are for the support of religion and religious teaching. Conversely, to say that they are for public purposes is to say that they are not for religious ones. . . .
>
> Now it [the Court] declares in effect that the appropriation of funds to defray part of the cost of attending these schools is for a public purpose. If so, I do not understand why the state cannot go farther or why this case approaches the verge of its power.[16]

It is therefore submitted that if educational legislation satisfies a public purpose, then any "aid to religion" must be *substantial* and *directly* intended before it may be held

[14] America, June 16, 1962, p. 400.

[15] 262 U.S. 390 (1923). See also Hamilton v. Regents of the Univ. of Cal., 263 U.S. 245 (1934); Cantwell v. Connecticut, 310 U.S. 296 (1940). In the latter case the Supreme Court declared: "The fundamental concept of liberty involved in . . . [the Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment." *Id.* at 303.

[16] Everson v. Board of Educ., 330 U.S. 1, 51 (1946).

to be constitutionally suspect. A corollary of this proposition is that legislation which satisfied a public purpose under the fourteenth amendment creates a prima facie case of "no aid" under the first amendment. This principal would give the legislative function the dignity to which it is entitled. The legislature would then have reasonable assurance that when it passes a law which satisfies a public purpose, it will not be struck down on the basis of a doctrinaire thesis deriving from an absolute interpretation of the "no aid" principle of the first amendment. Moreover, the fourteenth amendment would be restored to its rightful place in the judicial process. This prime facie case would be materially strengthened if the public purpose coincided with the implementation of rights guaranteed under the free exercise clause of the first amendment. Thus, in addition to the neutrality norm of *Everson* and *Zorach,* we have the presumption of "no aid" deriving from legislation which satisfies a public purpose —a presumption which is strengthened when the law implements the constitutional guarantee of religious liberty.

The Supreme Court has moved forward in this direction in the Sunday Law cases.[17] In upholding the legislation it acknowledged that there would be some collateral and unavoidable benefits to religion but not aid in an unconstitutional sense, for a public purpose was being satisfied[18] — a purpose contemplated by the legislature— namely the setting aside of a day for rest or leisure. A secular end was intended and achieved. Thus the argument of aid to religion, amounting to establishment, was rejected. Here is an excellent example of the necessity for giving full consideration to the public purpose of the statute in determining whether there is unconstitutional aid. These cases build an important constitutional bridge between the first and fourteenth amendments. They are an extension and refinement of the *Everson* case.

The Public School Prayer Case

The latest decision of the Supreme Court involving the establishment clause is that of *Engel v. Vitale.*[19] In this case the Court declared that the following prayer, formulated by the New York Board of Regents violated the first amendment:

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

This prayer was recited in some of the public schools of New York on the recommendation of the State Board of Regents. The various school boards were free to adopt or reject it. If adopted, no child was required to recite the prayer or remain in the room where it was recited. In holding that the prayer violated the establishment of religion clause of the first amendment, the Court declared: "[I]t is no part of the business of government to compose official

[17] McGowan v. Maryland, 366 U.S. 420 (1961); Two Guys From Harrison-Allentown, Inc. v. McGinley, 366 U.S. 582 (1961); Braunfeld v. Brown, 366 U.S. 599 (1961); Gallagher v. Crown Kosher Super Mkt., Inc., 366 U.S. 617 (1961).

[18] "However, it is equally true that the 'Establishment' Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions. In many instances, the Congress or state legislatures conclude that the general welfare of society, wholly apart from any religious considerations, demands such regulation." McGowan v. Maryland, 366 U.S. 420, 422 (1961).

[19] N.Y. Times, June 26, 1962, p. 16, col. 1.

prayers for any group of the American people to recite as a part of a religious program carried on by government."

An interesting aspect of this case is that no mention was made of any of the other church-state cases decided by the Court. Nor was any reliance placed upon the "no aid" theory. This is especially significant in light of the concuring opinion of Mr. Justice Douglas who asserted: "The point for decision is whether the Government can constitutionally finance a religious exercise."[20] In support of this plea for a broad ruling, he asserted that: "Our system at the Federal and state levels is presently honeycombed with such financing."[21]

He cited the following of "aids to religion": the G.I. Bill of 1944, the Hospital Survey and Construction Act of 1946, bible reading in public schools, tax exemption of religious organizations, and the Pledge of Allegiance. He indicated that the problem today would be uncomplicated but for the *Everson* case and then asserted that this case is "out of line with the First Amendment." Significantly no other member of the Court adopted his view. He stands alone in this extreme application of the "no aid" theory. On the contrary, the Court stated:

> There is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State of New York has sponsored in this instance.[22]

Here is the suggestion that the satisfaction of a public purpose, "the expression of love for one's country" is the determining factor which operates to uphold a practice involving a profession of faith in a Supreme Being. No such argument was present in the *Engel* case and admittedly it would have been difficult to introduce. However, it is obvious that Court is demonstrating a real interest in the element of a public purpose.

Just as the preoccupation with the establishment clause of the first amendment leads many to ignore the implications of the finding of a public purpose under the fourteenth amendment so it also induces advocates of absolute separation to ignore the relevance of the free exercise clause of the first amendment. The first amendment must be given a unitary construction with the viewpoint of securing religious liberty.[23] In summary, the "no aid to religion" doctrine must be applied within the limitations of the neutrality mandate, must not ignore the fourteenth amendment implication of the finding of a public purpose, and must respect the relevance of the free exercise clause.

Let us apply these legal norms to the proposition that the religious content of parochial school textbooks and curriculum precludes participation in the National Defense Education Act.

Initially the proponent of this view must concede that the parochial school provides a curriculum that complies with the state requirements. This is a fact and a fact with real legal significance. It thus satisfies

[20] *Id.* at col. 3.
[21] *Ibid.*
[22] *Id.* at col. 3.
[23] McGowan v. Maryland, *supra* note 18.

a public purpose and imposes a burden on the opponent to demonstrate that any collateral benefit to religion amounts to establishment. The only way that this could be accomplished would be to prove that the legislature had enacted a law for the purpose of substantially benefitting religion. Certainly this was not true of the N.D.E.A. legislation. Congress, concerned by Sputnik, legislated for the purpose of developing more scientists in the schools of the nation. Its interests was a national one and this interest could not be properly served by taking a position that the scientific potential of the children in church-related schools should be ignored because their scientific studies were part of a curriculum which had some religions overtones. To have done so would have impaired the full achievement of the public purpose of the legislation and would have involved an action of hostility toward religion. The Government would have ignored its need because of the children's creed.[24] The Constitution does not ask this much.

It is fortunate that the LaNoue study challenges the N.D.E.A. legislation for it brings into focus the national implications of a constitutional position which ignores the basic norms of interpreting the "no establishment" clause of the first amendment. If Congress had not taken a neutral attitude, if it had not recognized the constitutional implications of the public purpose character of the legislation, the nation would have been deprived of the potential of fifteen per cent of the nation's students. Such a result would be limited not merely to N.D.E.A. but to the whole realm of federal aid to education if all qualified schools were not included, including church-related schools.

[24] *Cf.* Chance v. Mississippi, 190 Miss. 435, 200 So. 706 (1941).

Current Influence of the Blaine Amendment

Reference is made specifically to federal legislation because we are confronted with a constitutional problem that derives from federal law. This point cannot be emphasized too strongly for there is a growing tendency to interpret the first amendment on the basis of attitudes deriving from state constitutions. This is confusing to say the least, for the provisions of state constitutions concerning the relationship between Church and State have a different judicial and historical background than the first amendment. Most of the state constitutions are directly or indirectly related to the so-called Blaine Amendment which came close to adoption in 1876[25] at a time when there was open anti-Catholic sentiment. This proposed amendment which narrowly failed to secure a two-thirds majority, read as follows:

> No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no religious test shall ever be required as a qualification to any office or public trust under any State. No public property, and no public revenue of, nor any loan of credit by or under the authority of, the United States, or any State, Territory, District or municipal corporation, shall be appropriated to, or made or used for, the support of any school, education or other institution, under the control of any religious or antireligious sect, organization, or denomination, or wherein the particular creed or tenets of any religious or antireligious sect, organization, or denomination shall be taught; and no such appropriation or loan of credit shall be

[25] A similar amendment has been rejected on twenty occasions subsequent to 1876. H.R. Doc. No. 551, 70th Cong., 2d Sess. ——— (1928).

made to any religious or antireligious sect, organization or denomination, or to promote its interests or tenets. This article shall not be construed to prohibit the reading of the Bible in any school or institution; and it shall not have the effect to impair rights of property already vested. Congress shall have power, by appropriate legislation, to provide for the prevention and punishment of violations of this article.[26]

Though defeated, its basic tenets and philosophy were incorporated into many state constitutions. In these jurisdictions problems arising of a church-state nature are solved by an application of the precise terms of the law deriving from the Blaine proposal.[27] No reference is made to the public purpose of the legislation. A casual examination of the Blaine Amendment indicates quite clearly that it makes no room for this basic concept. The first amendment, on the other hand does not preclude the application of the public purpose principle. For example, the Supreme Court held in *Bradfield v. Roberts,* [28] that a direct appropriation might be made, for the performance of a public function, to an institution conducted under the auspices of a church which exercised "perhaps controlling influence" over it. Moreover, the Court directly disavowed the argument that religious institutions performing a public function cannot, because of the first amendment, be assisted by government. Actually, one of the most fundamental propositions in federal law is that the coincidence of private interest with national welfare does not defeat the legislation. This point was emphasized strongly in *Everson*:

Nor does it follow that a law has a private rather than a public purpose because it provides that tax-raised funds will be paid to reimburse individuals on account of money spent by them in a way which furthers a public program. . . . Subsidies and loans to individuals such as farmers and homeowners, and to privately owned transportation systems, as well as many other kinds of businesses, have been commonplace practices in our state and national history.[29]

Likewise, Judge Cooley in his work on Taxation wrote:

To justify the court in declaring the tax void, the absence of all possible public interest in the purpose for which the funds are raised must be clear and palpable—so clear and palpable as to be perceivable by every mind at first blush.[30]

This is a rational principle necessary to the proper function of the legislative process and at the very heart of progressive social legislation.

Conclusion

Since the community has such an important interest in these areas a solution must be found to the church-state issue. Progress will be made if we resort to basic legal principles unaffected by irrelevant criteria such as the application of the Blaine tenets to the interpretation of the federal constitution. Of equal importance is the

[26] 4 CONG. REC. 5595 (1876).

[27] An example of this approach may be found in a recent decision of the Wisconsin Supreme Court holding that a law providing transportation to all school children from points on regular school routes to the nearest public school was unconstitutional. The decision was based on a provision of the constitution which embodied the Blaine approach. The court declared that its constitution was broader in its reach than the first amendment and that it prevented any aid to parochial schools, even transportaion to the nearest public school. *Everson,* following the public purpose norm, reached the opposite conclusion.

[28] 175 U.S. 291 (1899).

[29] Everson v. Board of Educ., 330 U.S. 1, 7 (1946).

[30] As quoted with approval in Scott v. Frazier, 258 Fed. 669 (D.C.N.D. 1919), *rev'd on other grounds,* 253 U.S. 243 (1920).

necessity for harmonizing the empowering aspect of the public purpose principle with the limiting aspect of the first amendment.

The nature of the legislation can ease the solution of this problem. For example, most of the federal aid programs do not provide for the full cost of the project. Loans must be repaid with interest and grants are generally on a fifty-fifty matching basis. Therefore, it is fair to assume that the public money does no more than pay for the secular aspect of the instruction. The neutrality norm would preclude the application of an argument based on the disqualifying factor of religion.

Another legislative approach that minimizes the church-state problem is legislation which gives the same things to all schools for educational purposes. An excellent example of this type of legislation is embodied in the Surplus Property Act which makes real the personal property available to all qualified institutions on a donation basis. Similarly, the N.D.E.A. makes the same equipment available to private schools as to public schools for the same purpose but on a different financial basis. St. John's parochial school could only secure a government loan for the purchase of a microscope, whereas, the public school could secure a fifty per cent grant for the procurement of the same item. Legislation was given serious consideration during the first session of the Congress which would have placed all schools in substantially the same position insofar as the N.D.E.A. is concerned.[31]

These legislative techniques together with the principles set forth above will work to the benefit of the national community if they are applied as federal norms of construction divorced from the irrelevant philosophy of the various state constitutions. The tendency of congressmen to reflect the constitutional philosophy of their state in their approach to legislation is understandable but it only confuses and obscures the federal constitutional issue. For example, most state constitutions specifically prohibit grants or donations to religious institutions. It is therefore frequently assumed that grants and donations are per se, bad. There is no such doctrine under the federal constitution, if the grant is made to achieve a public purpose.[32] It would be otherwise if the grant were made to assist religion but we are not addressing these remarks to such legislation.

Progress may not be expected, unless the problem is approached in a scholarly manner with a view toward furthering the national interest. Frankly, I find it difficult to believe that this national issue will be resolved by studies which are predicated on the proposition that the slightest benefit to religion is a disqualifying factor for such a principle is at war with generating and sustaining principles of this country.

[31] For a more complete discussion of legislative approaches, see National Catholic Welfare Conference, *The Constitutionality of the Inclusion of Church Related Schools in Federal Aid to Education*, 50 GEO. L.J. 399, 435-36 (1961).

[32] Congressional action discloses a series of grants and donations to religious bodies. Among them are the following: National Defense Education Act, 72 Stat. 1583, 20 U.S.C. § 421 (1958); National School Lunch Act, 60 Stat. 230 (1946), 42 U.S.C. § 1751 (1958); College Housing Amendments of 1955, 69 Stat. 644 (1955), 12 U.S.C. § 1749 (1958); and the following provisions of the Public Health Service Act: Construction of Hospitals and Other Medical Facilities, 60 Stat. 1041 (1946), as amended, 42 U.S.C. § 291 (1958); Construction of Health Research Facilities, 70 Stat. 717 (1956), 42 U.S.C. § 292 (1958); Training of Nurses or Supervisors, 70 Stat. 924 (1956), as amended, 42 U.S.C. § 242e (Supp. III 1959-61).