The Catholic Lawyer

Volume 17
Number 3 *Volume 17, Summer 1971, Number 3*

Article 3

March 2017

Nine Rulings: Three Wins, Three Losses, and Three Remands on Government Aid to Church-Related Institutions

T. Raber Taylor

NINE RULINGS: THREE WINS, THREE LOSSES, AND THREE REMANDS ON GOVERNMENT AID TO CHURCH-RELATED INSTITUTIONS

T. RABER TAYLOR*

ON JUNE 28th, 1971, the U.S. Supreme Court made nine (9) rulings on religion and government in relation to Church-related schools and colleges. There were three (3) wins, three (3) losses, and three (3) remands for further hearings.

Wins:

The Court's 5 to 4 ruling sustaining federal grants to Church-affiliated colleges and universities for laboratories, libraries and secular facilities is the most helpful and one of the encouraging rulings.[1]

The other encouraging rulings and their results are these:

(a) The Court left standing, by a vote of 8–1, a West Virginia Supreme Court ruling holding that if school buses are operated for public school pupils, students in parochial schools have a constitutional right for that transport.[2]

(b) The Court dismissed (7–2) constitutional challenges to free busing of parochial school students in publicly owned buses. This action left in effect a 1969 Minnesota law requiring free transportation.[3]

---

* A.B. (1933), Regis College; LL.B. (1936), Harvard University.

1 Tilton v. Richardson, 403 U.S. 672 (1971).

2 Kanawha Bd. of Ed. v. Hughes, *appeal dismissed, cert. denied,* — U.S. — (1971).

3 American United Inc. v. Independent School District, *appeal dismissed,* 403 U.S. 945 (1971).

Remands:

Encouragement can also be found in the Court's remand rulings in three (3) cases:

(a) In 1966 in Ohio, P.O.A.U. filed the first lawsuit attacking the federal law giving school library resources and textbooks to children in all schools. The attack was to put to death the "child benefit" doctrine used by the Congress in drafting the 1965 *Federal Elementary and Secondary Education Act* Titles I and II. In 1971 this case was on the U.S. Supreme Court calendar. The Court refused to rule on the merits of the case. Its ruling remands the case to a three-judge U.S. District Court in Ohio to determine if the loaning of library books and materials directly to parochial schools, rather than the issuing of textbooks directly to the school children, under the safeguards of Title II of the *Federal Elementary and Secondary Education Act,* is minimal involvement or excessive entanglement.[4]

The other two encouraging remand rulings were on the New Jersey and South Carolina Educational Facilities Authority Acts.[5] Both the New Jersey Supreme Court and the South Carolina Supreme Court held that a state authority could issue tax exempt municipal revenue bonds to finance buildings of Church-affiliated colleges for educational purposes. The Baptist College at Charleston, South Carolina, was the object of the $3\frac{1}{2}$ million of authority revenue bonds. Neither the Supreme Court of South Carolina nor the Supreme Court of New Jersey considered the First Amendment 1970 "excessive entanglement" doctrine constructed by the Court in *Walz v. Tax Commission.*[6] The rulings of the U.S. Supreme Court vacated the New Jersey and South Carolina judgments with remands for reconsideration in the light of the sixty (60) pages of written opinion.

Losses:

In 1968, Rhode Island won Court approval on her 1965 textbook law. In October 1967, before the U.S. Supreme Court, Pennsylvania won on her 1965 school bus law. Pennsylvania and Rhode Island each have unchallenged laws providing health services to nonpublic school students. Now 24 of the 50, but only 3 of the Western States (California, Idaho and New Mexico) send their children to parochial schools by public bus.

Teachers Salaries:

With more lay teachers and higher teachers salaries in nonpublic schools, and more children transferring from nonpublic to public schools, the financial squeeze threatened to send the tax bill for public schools skyrocketing even higher. Thus, Rhode Island in 1969 and Pennsylvania in 1968 passed laws to pay for a part of the salaries of teachers of secular subjects in nonpublic schools. Rhode Island's law paid a 15% salary supplement to teachers of secular subjects in grades one to eight. Payment was made directly to the teacher. Pennsylvania used a different route. It purchased instructional services from the pri-

[4] Donaley v. P.O.A.U., 435 F.2d 627 (6th Cir. 1970), *cert. denied,* 403 U.S. 958 (1971).

[5] Kerrich v. Clayton, 56 N.J. 523, 267 A.2d 503, *vacated,* 403 U.S. 945 (1971); Hunt v. McNair, 255 S.C. 71, 177 S.E.2d 362, *vacated and remanded,* 403 U.S. 945 (1971).

[6] 397 U.S. 664 (1969).

vate school, then reimbursed the school for teachers salaries for instructional services in math, modern foreign languages, physical science, and physical education. To insure secularity, compliance with the state educational requirements and financial accountability, the act provided on-going supervision for determining what was secular and what was sacred and a post-audit procedure on the state reimbursements to the school. The 1968 Pennsylvania plan was the pattern for the law in Connecticut, Ohio, New Jersey and Louisiana. On June 30th, 1971, the U.S. Supreme Court affirmed the lower court ruling that the Connecticut law was unconstitutional.

In 1930, Louisiana won approval of state funds for all children in all schools. "The school children and the state alone are the beneficiaries" was the controlling reason for the U.S. Supreme Court's unanimous decision. Louisiana has for years had unchallenged laws supplying certain school supplies to all pupils and since 1950, school lunches for all pupils in all schools. In 1967, the U.S. Supreme Court affirmed a lower court decision striking down a Louisiana tuition grant limited to children enrolled in private "non-sectarian" schools.[7] This affirmed the ruling: "The free lunches and textbooks Louisiana provides for all its school children are the fruits of racially neutral benevolence. Tuition grants are not the product of such a policy. They are the fruits of the State's traditional racially biased policy of providing segregated schools for white pupils."

In 1970 Louisiana patterned a law on Pennsylvania's 1968 purchase of teacher services law. It was promptly held unconstitutional by the Louisiana Supreme Court.

Louisiana lost its appeal to the U.S. Supreme Court on June 28th, 1971.[8]

The headlined losses are the nullification of the Pennsylvania and Rhode Island programs for paying part of the teachers salaries. The importance of these decisions and their future guidelines are reflected in 67 pages of reasons. The Pennsylvania ruling was unanimous. The Rhode Island decision drew a lone dissent from Justice Byron R. White of Colorado.[9]

Both laws were ruled unconstitutional under the Religion Clauses of the First Amendment because the cumulative impact of the entire relationship under the statutes in each state involved excessive entanglement between government and religion. The rulings end the hope for state aid for part of teachers salaries when the teacher is hired, supervised and paid by a church-related school.

In 1970, the Supreme Court upheld state tax exemptions for land and buildings owned by religious organizations and used for religious worship. It created the "entanglement test" as a substitute for Jefferson's personal metaphor—"wall of separation of church and state." The Pennsylvania and Rhode Island rulings have shelved the 1947 metaphor of a "wall" or impassable barrier between church and state. Its replacement is said "to confine rather than enlarge the areas of permissible

[7] Louisiana Financial Assistance Comm. v. Poindexter, 389 U.S. 571 (1967).

[8] William v. Segers, 403 U.S. 955 (1971).

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

state involvement with religious institutions by calling for close scrutiny of the degree of entanglement involved in the relationship." In application, the 1970 entanglement doctrine means that federal and state governments under the Religion Clauses may aid religious institutions providing there is no "excessive entanglement." The Court admits that the entanglement doctrine is not clear: "Judicial caveats against entanglement must recognize that the line of separation, far from being a 'wall' is a blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship." The Court now examines: (1) the character and purposes of the institutions which are benefited; (2) the nature of the aid that the state provides; and (3) the resulting relationship between the government and the religious authority.

In application, the Court rules that there is not excessive entanglement when the Federal Government gives to Church-affiliated colleges, secular college buildings under a one-time single purpose construction grant. Excessive entanglement is found to exist when state funds are advanced for part payment of teacher salaries under payment or reimbursement programs which require continuing surveillance to determine what is secular and what is religious, together with continuing financial and religious audits.

Public School Teachers Teaching Non-Ideological Courses to Children in Non-public Schools:

Under Title I of the 1965 *Federal Elementary and Secondary Education Act,* federal funds are granted to public school districts to meet the special educational needs of children in schools in poverty areas. The school districts' plan must offer special educational services and arrangements in which children in the nonpublic schools in the poverty area can participate. In Colorado, public school teachers are hired, supervised and paid by the public school district to provide remedial reading, and arithmetic to children in nonpublic schools. This application of child benefit was attacked in New York in the celebrated standing-to-sue case decided by the U.S. Supreme Court in June 1968.[10] The case has not yet been tried on its facts and merits. Government hiring, supervising and paying teachers to instruct health impaired, homebound, or hospital bound and economically or socially handicapped children, seems to invite U.S. Supreme Court approval. Chief Justice Burger points out that the Pennsylvania plan of state financial aid directly to the Church-related school is distinguishable from bus rides and textbooks which state aid is "provided to the student and his parents—not to the church-related school."

Further, in the *Federal Higher Education Facilities Act* decision, he ruled:

> The entanglement between church and state is also lessened here by the nonideological character of the aid which the government provides. Our cases from *Everson* to *Allen* have permitted church-related schools to receive government aid in the form of secular, neutral, or nonideological services, facilities, or materials that are supplied to all students regardless of the affiliation of the school which they attend.

---

[10] Flast v. Cohen, 392 U.S. 83 (1969).
[11] Lemon v. Kurtzman, 403 U.S. 602 (1971).

Tuition Grants to Students:

Justices William Douglas and Hugo Black are against any direct aid to any Church-related institution, college or school. However, they distinguish and do not pass upon "grants to students." They give a footnote warning that grants to students have been stricken down where they have been tools of forbidden racial discrimination.[11] Colorado's 1971 *Student Aid for Secular Education Act* specifically restricts the cash grants to students enrolled in schools complying with Title VI of the 1964 *Federal Civil Rights Act.* This Act prohibits racial discrimination.

Some legal and constitutional experts have already studied the entire decisions and related decisions. They have concluded that the Pennsylvania and Rhode Island rulings do not outlaw educational tuition grants for students, or grants to parents of, or for children in Church-related schools, such as the *Illinois Parent Grant Act* for up to $60.00 per pupil in grades K to eight and up to $90.00 per pupil in grades 9 to 12. The 1971 Maryland law grants scholarships to students of $75.00 to $100.00 per pupil.

The Colorado Student Aid Act expressly implements Federal and State constitutional provisions to benefit the child. The U.S. Supreme Court 1968 (6–3) decision supports it. Payments are made only to the parent for the child. The law provides only the minimal absolute control of the state required by *Colorado's Compulsory School Attendance Law.* It "creates only a minimal and remote involvement" between the nonpublic school and the state. The state's absolute control is exercised but once annually when the State Board awards the cash grant for tuition to the student. To insure this minimal and remote involvement, the Act implements and promotes the First Amendment rights of the parents to educate a child in the school of the parent's choice and First Amendment academic freedom rights of assembly, of association, of conscience, and freedom of speech.

State Income Tax Credits:

State income tax credits for school tuition and fees paid by parents are not banned and are invited by Chief Justice Burger's decision granting tax exemption for church real estate used for worship. Tax exemption is distinguished from grants of tax money. The former does not involve a transfer of state revenue to churches. The state simply abstains from demanding that the church support the state. Tax exemption creates only a minimal and remote involvement between church and state. On a parity of reasoning, it appears that a state income tax credit to parents for school fees, tuition, and supplies would aid the child—not the state—and a possible once a year income tax audit of the parent's income tax return, would create "only a minimal and remote involvement between church and state", more remote and more minimal than the real estate tax assessor's annual review of tax exemption for land used for worship. In 1971, Minnesota provided a state income tax credit up to $100.00 per pupil for parents of nonpublic school students. Parents may claim the credit, estimated to be $75.00 to $85.00, regardless of whether or not they pay Minnesota state taxes. This has similarity to the Colorado Food Sales Tax Credit. The $7.00 credit is allowed each Colorado

resident and one for each resident dependent. The credit is applied to Colorado income tax liability, if any. If none, the Food Sales Tax Credit is refunded to the taxpayer.

The present Federal and Colorado income tax deduction for contributions to charities and churches are not conditioned on the churches' using the money for secular activities. The church can pay clergymen, or buy missals, vestments and Communion breads with the funds.

A 1969 proposed Colorado income tax credit of $25.00 for all pupils in all public and non public schools failed for legislative sponsorship.

Education Vouchers:

Education vouchers are to be state issued to every family with children of school age and can be spent at any school, public or non public, which the student wishes to attend.

Losses of Pennsylvania, Rhode Island, Louisiana and Connecticut raise the Horace Greeley cry: "Go West, young man, go West." California—an educational leader—is the place for the education voucher experiment. One is already going on at San Jose, California, supported by the Nixon administration and federal funds. California's Governor Ronald Reagan and California's superintendent of public instruction have spoken publicly in favor of the educational voucher system. It is to be supported by state, local and federal funds. Ford Foundation has awarded $40,700.00 to examine the economical, fiscal and educational effects of the voucher plan. The University of California at Berkeley is offering a course on "The Voucher System in Education."

At the Center for the Study of Public Policy at Harvard University, work has been going on for several years on the voucher plan. The Center is the "Think Tank" which has already spent more than $500,000.00 to design the federal voucher plan.[12]

The *Harvard Civil Rights–Civil Liberties Law Review,* May 1971, "Education Vouchers" [pp. 466-504] examined the Pennsylvania and Connecticut purchase of services programs and how the pitfalls of excessive entanglement of the state in church affairs are to be avoided.

U.S. Representative Roman C. Pucinski (Dem. Ill.), will try to include a voucher plan in an education aid bill on which he is working. He is Chairman of the House General Committee on Education. U.S. Representative James J. Delaney (Dem.-N.Y.), of the 1961 Rules Committee, was in great measure responsible for the defeat of John F. Kennedy's Public School Assistance Act, because it authorized aid for public school teachers salaries and public school building construction and provided no benefit for a child in a non-public school.[13] U.S. Representative Delaney in 1965 was in large measure responsible for the passage of Title I and Title II of the Federal *Elementary and Secondary Education Act.* In the 1971 Congress, he is sponsor of the *School Childrens Assistance Act*

---

[12] Note, *Education Vouchers,* HARV. CIV. RIGHTS–CIV. LIB. L. REV. 466-504 (1971).
[13] T. SORENSON, KENNEDY 361 (1965).

—a tuition voucher proposal authorizing an annual financial grant to each child attending public or non-public schools. In April 1971, there were hearings before the Chairman of the U.S. House, Education and Labor Committee, Carl D. Perkins. Much opposition was mustered to the OEO voucher plan. However, the Committee was inclined to go along with the plan.

Mandated Services:

The 1970 New York law apportions 15¢ per grade school pupil per day and 25¢ per high school pupil per day to non-public schools for their services in keeping compulsory school attendance records and administering and grading tests and examinations compelled by state law. For 180 school days, this means $27.00 per grade school pupil and $45.00 per high school pupil. Colorado Representative Jean Bain introduced House Bill 1502 concerning the registration of non-public schools. This act could be redrafted to provide a school children census act as a supplement to the Compulsory School Attendance Law and provide payment to the non-public schools for taking the daily pupil census.

Colorado's Options:

Colorado, like all of the Western states, except California, Idaho and New Mexico, has no state aid for the education of children in non-public schools. California, Idaho and New Mexico give limited school bus transportation. New Mexico gives some textbook aid. Thus, Colorado, like Arizona, Hawaii, Montana, Nevada, Oklahoma, Oregon, and Texas, has nothing to lose as a result of the Pennsylvania and Rhode Island decisions. The non-public school pupils in these states stand to gain if their state legislators will enact laws providing some or all of these secular, neutral, or nonideological services, facilities or materials described in the U.S. Supreme Court opinion:

(a) Bus transportation;
(b) School lunches;
(c) Public health services; and
(d) Secular textbooks.

In addition to these Court described options for all students, Colorado has these additional options:

(1) School childrens' tuition aid;

(2) State income tax credits;

(3) Teachers hired, supervised and paid by the state for teaching nonideological courses to pupils in nonpublic schools;

(4) Instructional supplies and equipment for all children in all public and non-public schools;

(5) Public auxiliary services to be extended to all non-public school children. These include: Health and nursing services, speech correction services, visiting teacher services, diagnostic and counsellor services for handicapped or health impaired, and remedial reading and arithmetic services;

(6) Education vouchers; and

(7) State funded aptitude and ability tests for pupils in non-public schools.