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Public Aid to Private Education

Michael M. Sullivan

Stephen D. Willett

Public Aid to Private Education

The American education system is presently faced with an economic crisis. Since private schools cannot afford to continue operations, they are closing at an alarming rate.[1] In his Congressional Message on Education Reform President Nixon stated that "[i]n the past two years, close to a thousand non-public elementary and secondary schools closed and most of them displaced students enrolled in local public schools."[2] To absorb a large number of private school pupils government aid to construct new public schools will be necessary.[3] The only real alternative to closing private schools is public financing.[4] Although this approach is less expensive than building new public schools, it involves serious constitutional obstacles, *i.e.*, the establishment and free exercise clauses of the first amendment.[5] Three cases before the Supreme Court provide a unique opportunity to consider

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1. In 1965 there were 10,879 Catholic elementary schools in the United States with 4,492,107 pupils enrolled. In 1969 the number of elementary schools declined to 10,338 and the number of pupils to 3,902,487. NATIONAL CATHOLIC EDUCATION ASSOCIATION, CATHOLIC EDUCATION TODAY: AN OVERVIEW app. 1 (1969).

2. H.R. DOC. No. 91-267, 91st Cong., 2d Sess. 2 (1970).

3. The increase in money attributable to the enrollment in New York public schools of former Catholic school students is estimated at more than one hundred million dollars for the 1969-70 academic year. NATIONAL CATHOLIC EDUCATION ASSOCIATION, CATHOLIC EDUCATION TODAY: AN OVERVIEW app. 1 (1969).

4. This is not to say that aid is not currently given to all schools, public and private. Among the most important federal programs providing secular assistance at the elementary and secondary level are: National School Lunch Act, 42 U.S.C. §§ 1752, 1755, 1758, 1761 (Supp. V, 1970); National Defense Education Act of 1958, 20 U.S.C. §§ 403-602 (Supp. V, 1970); Manpower Development and Training Act of 1962, 42 U.S.C. §§ 2571-2626 (Supp. V, 1970); Economic Opportunity Act of 1964, 42 U.S.C. §§ 2701-2994 (Supp. V, 1970); and the Elementary and Secondary Education Act of 1965, 20 U.S.C. §§ 236-44(a) (Supp. V, 1970).

On the collegiate and university level Congress has enacted the following statutes under which both public and non-public institutions are eligible: National Science Foundation Act of 1950, 42 U.S.C. §§ 1861-82 (Supp. V, 1970); College Housing Amendments of 1955, 12 U.S.C. §§ 1749-49d, (Supp. V, 1970), *amending* 12 U.S.C. §§ 1749-49d (1964); Higher Education Facilities Act of 1963, 20 U.S.C. §§ 707-58 (Supp. V, 1970); National Foundation on the Arts and Humanities Act of 1967, 20 U.S.C. §§ 1091-1119c-4 (Supp. V, 1970); Library Services and Construction Amendments of 1966, 20 U.S.C. §§ 35-58 (Supp. V, 1970).

5. U.S. CONST. amend. I which states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

the constitutionality of public aid to private schools. In *DiCenso v. Robinson*[6] a three-judge district court declared Rhode Island's Salary Supplement Act[7] unconstitutional. In *Lemon v. Kurtzman*[8] a similar statutory court upheld the constitutionality of Pennsylvania's Nonpublic Elementary and Secondary Education Act.[9] Finally, in *Tilton v. Finch*[10] the district court upheld the constitutionality of the federal Higher Education Facilities Act of 1963.[11] This article will examine prior decisional law in order to define and apply a test to these three cases which could solve this economic crisis without rendering the first amendment hollow.

Neutrality

Although attempts to define the boundaries of the establishment clause are exemplified by sundry theories,[12] the Supreme Court has never waivered

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6. 316 F. Supp. 112 (D.R.I.), *prob. juris. noted*, 399 U.S. 918 (1970).
7. R.I. GEN. LAWS ANN. §§ 16-51-1 to 16-51-9 (1956).
8. 310 F. Supp. 35 (E.D. Pa.), *prob. juris. noted*, 397 U.S. 1034 (1970).
9. 24 PA. STAT. §§ 5601-09 (Supp. 1969).
10. 312 F. Supp. 1191 (D. Conn.), *prob. juris. noted*, 399 U.S. 904 (1970). Pursuant to Fed. R. Civ. P. 25 Secretary of HEW Richardson has been substituted for former-Secretary Finch.
11. 20 U.S.C. §§ 701-57 (1964).
12. Some proponents of public aid to private schools cite the "child benefit" theory. That is, any financial aid must be used for those items which have a direct, primary benefit to the child. For a general discussion of this theory *see Survey, Church-State: A Legal Survey—1966-68*, 43 NOTRE DAME LAW. 684, 734 (1968). *See generally* Cushman, *Public Support of Religious Education in American Constitutional Law*, 45 ILL. L. REV. 333 (1950). Proponents of this theory believe any indirect benefit to the institution is irrelevant as long as the aid directly benefits the child. The source of this doctrine is Everson v. Board of Educ., 330 U.S. 1 (1947) which dealt with the constitutionality of a New Jersey statute authorizing funds to the parents of Catholic school students for the cost of sending the children to school on the public bus transportation system. The Court upheld the statute. However, it must be noted that *Everson* is not a direct-aid situation since the benefits flow to the parents and/or child instead of the religious institution.

The most serious flaw in the child benefit theory is that it could be used to circumvent the establishment clause. For example, a state might give a child a direct grant covering the cost of his private religious education. By claiming such grant to be valid under the child benefit theory, the state renders meaningless the constitutional prohibitions against public aid to religious institutions.

Closely aligned with the child benefit theory is the "voucher theory" or the "purchase of secular services theory." *See National Catholic Reporter*, Oct. 16, 1970, at 6, col. 1 (Fall Educ. Supp.). Under this plan the government gives money directly to the parents who then purchase their children's education wherever they wish. This doctrine falls into the same quagmire as the child benefit theory.

The "quasi-public" argument for public aid to private schools is based on Pierce v. Society of Sisters, 268 U.S. 510 (1925). The supporters of this doctrine say that since the private schools are "public" for the purpose of compulsory attendance laws, they should be designated as "public" for the purpose of receiving governmental aid. It is argued that the private schools have a right to this aid. Drinan, *The Constitutionality of Public Aid to Parochial Schools*, in THE WALL BETWEEN CHURCH AND STATE 56 (D. Oakes ed. 1963). This argument fails. Attendance is very different from the right to receive aid. If all religious schools had a right to receive aid there would be

from the theory of neutrality. The Court defined neutrality in *Everson v. Board of Education*:[13]

> That Amendment [First] requires the state to be a neutral in its relations with groups of religious believers and non-believers; 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.[14]

Since the neutrality theory has consistently been applied to all church-state relations, the question presented is whether governmental aid to private schools adheres to this theory.

Neutrality means that religion must neither be advanced nor inhibited. In *Abington School District v. Schempp*[15] the Supreme Court formulated its "purpose and primary effect" test—to determine neutrality, *i.e.*, whether the

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no first amendment problems. This theory begs the first amendment question. In *Pierce* the Court emphasized that the Constitution does not infringe on the rights of parents to send their children to private schools, but said nothing about forcing aid to these schools.

Horace Mann League v. Board of Pub. Works, 242 Md. 645, 220 A.2d 51 *cert. denied*, 385 U.S. 97 (1966) questioned state aid to private colleges. The Maryland state court devised several criteria for determining and evaluating the sectarian nature of the defendant colleges. The case does not have a statutory or decisional basis in American law. *See* Drinan, *Does State Aid to Church-Related Colleges Constitute an Establishment of Religion?—Reflections on the Maryland College Cases*, 1967 UTAH L. REV. 491. The most serious defect in this approach is its operational impracticality. The six general criteria plus their subheadings total an unwieldy twenty principles to determine the sectarian or secular nature of the college. In reality this is an attempt to assign weighted numbers to these criteria and with a magic combination arrive at the sectarian or secular determination. Such an evaluation must be done on an individual school by school basis and each school must be studied in depth. Thus, the *Horace Mann* approach presents a constitutional test which is wholly unmanageable.

Some opponents of aid to religious schools base their objections on the "permeation theory." They believe that any course taught in a sectarian institution will be permeated with religion. The inherant nature of the institution will cause this inescapable result and the nature of the institution will permeate the thoughts and philosophies of the teachers. This theory is unrealistic. Some subjects, *e.g.*, physical education, mathematics, and foreign language do not lend themselves to an infusion of religion and to assume they are inherently religious is unfair. This theory will be discussed more fully in the text.

The theory advocated by the most ardent opponents of public aid is "absolutism." For a discussion of absolutism *see* Gordon, *Aid to Parochial Schools—Unconstitutional*, in THE WALL BETWEEN CHURCH AND STATE 81, 83 (D. Oakes ed. 1963). The "absolutists" argue that any public act which advances religiously affiliated institutions no matter how incidental or indirect is prohibited by the establishment clause. But the very concept of neutrality necessarily recognizes that there will be some relationships between church and state. Neutrality only forbids those which advance or inhibit religion.

13. 330 U.S. 1 (1947).

14. *Id.* at 18.

15. 374 U.S. 203 (1963). The Court, speaking through Mr. Justice Clark, declared:

> The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the structures of the Estab-

statute's purpose and effect is secular. All agree that the general purpose of a statute may be determined by looking to the stated purpose found on its face. This is a valid procedure. But the statute must be examined in its entirety to determine whether a religious purpose has been disguised in secular words. In effect, the statute's legislative motivation must be analyzed to determine its specific purpose.

Many methods of determining effect have been advanced. One method is "permeation," *i.e.*, whether the publicly funded program is permeated with religion. If the program is permeated then the effect is sectarian and the public aid unconstitutional. On the surface this method appears plausible. However, the difficulty is that permeation can not be measured. One approach to permeation assumes its presence in private schools based on the nature of the institution. This imposes a burden upon the institution to prove the absence of permeation. But one who assumes that permeation is so vast that it advances religion is being neither neutral nor realistic since many school subjects defy such permeation despite the religious nature of the institution.[16]

Another approach assumes that no permeation is present. This approach is adhered to by proponents of aid to education. The burden of proving permeation is then switched to the opponents of public aid. But this approach is also unrealistic for concededly there are many instances when permeation is obviously present, though difficult to measure.

Another method to measure primary effect, termed "absolutism," is that any effect which aids religion violates the establishment clause. However, as the Supreme Court has stated, incidental benefits to religion are not unconstitutional per se.[17] This is not to say that all incidental benefits are

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lishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.

Id. at 222.

The language of the purpose and primary effect test was first used in McGowan v. Maryland, 366 U.S. 420 (1961) which dealt with the Maryland Sunday closing laws. The Court stated that even though religion might be advanced, the purpose and effect of the laws must be examined to determine their constitutionality.

The purpose and primary effect test culminated in *Schempp*. In Board of Educ. v. Allen, 392 U.S. 236 (1968) the Court dispelled any belief that this was not the proper constitutional test of neutrality. *Allen* was a challenge to the New York State textbook law. The Court measured the constitutionality of this law by asking what is its purpose and primary effect. The Court further stated that any incidental effects which aid religious institutions do not destroy the constitutionality of the statute. *Id.* at 244.

In Walz v. Tax Comm'n, 397 U.S. 664 (1970) the Court, employing similar language, again used the purpose and effect test and cited *Allen* with approval. *Id.* at 672.

16. Physical education, mathematics, and science would not be permeated with religion if taught in the manner prescribed by most state accreditation committees.

17. A tax exemption is a benefit and measurable. However, the Court stated in Walz v. Tax Comm'n, 397 U.S. 664 (1970) that this type of benefit is acceptable.

constitutional as opponents of the absolutist theory argue. If the benefit advances a religious activity, it is unconstitutional per se.

The most logical method to determine effect is to examine the result of the government expenditures. If any religious activity is directly benefited, the effect is not secular but sectarian.[18] Religious activity is the keystone to this approach for the first amendment prohibits only the advancement of religious activity.[19] The secular activities of a church-related institution are—constitutionally speaking—irrelevant and can by advanced by public aid. Thus, the government may help finance private schools and still remain neutral. Through this method of determination the financial crisis in American education can be solved without violating the first amendment. In summary, the purpose and effect is determined by (1) an examination of the specific general purposes for which the aid is granted, and (2) an analysis of the resulting "benefit" to determine if the benefit goes to a religious activity. This test is hereafter referred to as the "purpose and religious benefit" test.

Although the purpose and primary effect test of *Schempp* applies to the establishment clause, the other "half" of the first amendment's religion clause should not be overlooked. To date the free exercise clause has been the "poor brother" of the two clauses receiving little attention from the Supreme Court.[20] In the public aid to private schools cases this clause generally receives summary dismissal. However, the *Walz* decision added a new dimension to "effect" in both the free exercise and establishment clauses.

See discussion of absolutism note 11 *supra*. Another theory closely akin to the absolute theory is the "nature of the institution." Proponents of this theory simply look to the nature of the institution and if religious, the aid is unconstitutional. *Cf.* Bradfield v. Roberts, 175 U.S. 291 (1899). This approach fails to recognize that the nature of an institution is less important than the advancement or inhibition of religion by public aid.

18. In his concurring opinion in Walz v. Tax Comm'n, 397 U.S. 664 (1970) Mr. Justice Brennan declares: "General subsidies of religious activities would, of course, constitute impermissible state involvement with religion." *Id.* at 690.

19. U.S. CONST. amend. I.

20. In Engel v. Vitale, 370 U.S. 421 (1962) the Court held that a free exercise claim rises and falls on a showing of direct governmental pressure. The governmental pressures which the free exercise clause prohibits are those which coerce a person to believe or disbelieve in a particular religion or in religion in general. *See* Torcaso v. Watkins, 367 U.S. 488, 495 (1961). Thus, in Abington School Dist. v. Schempp, 374 U.S. 203 (1963), the Court stated:

> [It] is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion. The distinction between the two clauses is apparent—a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended.

Id. at 223. In Board of Educ. v. Allen, 392 U.S. 236, 248-49 (1968) the Court reaffirmed this holding and quoted the *Schempp* case verbatim.

Walz *and Entanglement*

In *Walz v. Tax Commissioner*[21] the Supreme Court upheld that section of the New York Constitution granting tax exemption to property used exclusively for religious purposes.[22] The crux of the decision is that, even when government passes legislation applying to religious institutions, "[w]e must . . . be sure that the end result—the effect—is not an excessive government entanglement with religion."[23]

Opponents of public aid to private education contend that the "purpose and primary effect test" has been replaced by the "entanglement" test of *Walz*. They argue that the Court in *Walz* dropped primary effect and stated the second half of the test in terms of "entaglement." This is an erroneous interpretation of the *Walz* decision. The entanglement test serves a dual purpose. First, it does not replace the "effect" half of the *Schempp* test, but refines and carries it one step further. Secondly, it further determines when religion has been inhibited by government.

Prior to *Walz* the test for effect was: "Is it secular?" If secular, the public aid was constitutional. But this test only deals effectively with public monies given directly to private schools. This was not the case in *Walz*, since the aid given was a tax exemption. The "purpose and religious benefit" test cannot be used in a *Walz*-type situation due to the absence of affirmative public aid. In *Walz* the Court stated that the New York property tax exemption law[24] had its origins in a secular legislative purpose, and that the end "effect" of the statute must not be excessive government entanglement.[25] A majority of the Court was able to find that this excessive entanglement did not result from the New York statute.[26] The Court noted that taxation unavoidably hurts and tax exemption necesarily helps religion.[27] Previous Supreme Court cases disputing religious property clearly indicate that the *Walz* entanglement test would be forthcoming. In effect, the *Walz* decision combined two doctrines that the Court had enunciated in the past: (1)

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21. 397 U.S. 664 (1970).
22. N.Y. CONST. art. XVI, § 1 (1939) provides:
Exemptions from taxation may be granted only by general laws. Exemptions may be altered or repealed except those exempting real or personal property used exclusively for religious, educational or charitable purposes as defined by law and owned by any corporation or association organized or conducted exclusively for one or more of such purposes and not operating for profits.
23. 397 U.S. at 674.
24. Art. XVI, § 1, of the New York State Constitution is implemented by N.Y. REAL PROP. TAX § 420(1) (McKinney Supp., 1970).
25. 397 U.S. at 674.
26. *Id.* at 673-74.
27. *Id.* at 676.

the secular purpose and primary effect test of *Schempp*, and (2) the "no excessive involvement" guideline.[28]

While *Walz* used the purpose and primary effect analysis of *Schempp*, it redefined "effect" to read not "purpose and religious benefit" but rather "entanglement." This does not mean that the purpose and religious benefit test should be discarded. The entanglement test cannot replace the purpose and religious benefit test when dealing with affirmative public aid.[29]

The contribution of *Walz* to affirmative public aid is the placing of restrictions on the purpose for which public money is spent. No longer is it possible to look only to purpose and effect; now there is the additional concern for excessive governmenal entanglement with religion. In measuring effect prior to *Walz* the concern was only with religious activity. If such an activity was directly benefited by the public aid that aid was unconstitutional. After *Walz* the test consists of a three-step process: (1) the statute must be investigated to determine its purpose, and if secular the initial requirement is satisfied, (2) a determination must be made of the effect of the aid as measured by the religious benefit test, and (3) the statute must be examined for excessive government entanglement. If all three conditions are met, the statute will not violate the establishment clause.

Opponents of public aid to private education cite language in *Walz* to support their contention that any governmental involvement in private schools is excessive and therefore unconstitutional.

> Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards, but that is not this case.[30]

Opponents correctly state that any governmental entanglement with a religious activity is unconstitutional. This is what the Supreme Court is saying

28. In Presbyterian Church v. Hull Church, 393 U.S. 440 (1969) the Court held that in order to be consistent with first amendment principles civil courts cannot determine ecclesiastical questions in resolving property disputes. *See also* Maryland & Virginia Eldership of Churches of God v. Church of God, 396 U.S. 367 (1970) (Brennan, J., concurring).

29. If it did supplant the purposes and religious test entirely, the following anomalous situation would appear; the government could make a direct money grant to a private religious school for purposes of "education" and stipulate that the inspection procedures be those used for other types of money grants to non-governmental institutions, *e.g.*, private anti-drug programs. The private religious school could, consistent with the entanglement test, then use the money for both secular and religious education. Clearly, the entanglement test requirements would be met but a degree of "establishing" religion would then be present. Plainly, the entanglement test by itself cannot be effectively used in this fact situation. The Court must have intended the purpose and religious benefit test to survive *Walz*.

30. 397 U.S. at 675.

in the above quote.[31] However, governmental entanglement with a secular activity is not unconstitutional per se. It is unconstitutional only when excessive. Government restrictions on the aid could be so excessive as to "inhibit" religion or so lax that religion is "established." Thus, *Walz* is not a departure from previous holdings, but rather preserves the fundamental distinction between affirmative aid to secular and religious activities.[32]

Walz also dealt with the application of the free exercise clause to the public aid question. *Engel v. Vitale*[33] held that a free exercise claim requires a showing of direct governmental pressure. This clause prohibits governmental pressure which coerces a person to believe or disbelieve in a particular religion or religion in general.[34] Nowhere in *Walz* does the Court specifically apply the entanglement test solely to the free exercise clause. Nor does the Court discuss the free exercise clause apart from the establishment clause.[35] Thus, the entanglement test should be applied to both the establishment and free exercise clauses.[36]

In *Walz* the Court was concerned that excessive governmental entanglement would inhibit the practice of religion. Such excessive entanglement could lead to that type of pressure which causes people to "disbelieve" in religion. Public aid to private schools could result in so much government entanglement through frequent inspections, unreasonable restrictions, and performing a substantial portion of critical administrative de-

31. The quotation is from a paragraph in the decision where the Court discusses tax exemptions vis-à-vis direct aid to religious activities.

32. In *Walz* Mr. Justice Harlan highlighted the dichotomy between religious and secular activities:

> To the extent that religious institutions sponsor the *secular activities* that this legislation is designed to promote, it is consistent with neutrality to grant them an exemption just as other organizations devoting resources to these projects received exemptions.

397 U.S. at 697 (emphasis added).

The Supreme Court has used this dichotomy to determine whether other legislation was constitutional. In Everson v. Board of Educ., 330 U.S. 1 (1947) the Court upheld the constitutionality of school busing for private school pupils, a secular activity. In McCollum v. Board of Educ., 333 U.S. 203 (1948) the Court struck down the Champaign County, Illinois, program which permitted religious groups to enter public schools and instruct public school pupils in religion. This is a religious activity. In the *Schempp* case the Court held violative of the first amendment the practice of beginning the school day with recitation of Bible verses—again, religious activity. In *Allen* the Court upheld New York's program of loaning textbooks for secular subjects to private school pupils—a secular activity.

33. 370 U.S. 421 (1962).

34. Torcaso v. Watkins, 367 U.S. 488, 495 (1961).

35. The Court in *Walz* continually refers to both clauses and makes them seem as one. *See* 397 U.S. at 667-69, 671. As the Court said in *Schempp* "the two clauses may overlap." 374 U.S. at 222.

36. This conclusion has been reached in two district court decisions. Johnson v. Sanders, 319 F. Supp. 421 (D. Conn. 1970); DiCenso v. Robinson, 316 F. Supp. 112 (D.R.I.), *prob. juris. noted*, 399 U.S. 918 (1970).

cisions, that the private schools would be seriously inhibited in practicing their religion. There could also be such a degree of entanglement that "the school becomes 'public' for more purposes than the Church could wish"[37] thus, establishing religion. *Walz* questioned "whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement."[38] The Court said "[t]he test is inescapably one of degree."[39] Although *Walz* provides no guidelines to measure this degree, the Court did state that "the very existence of the Religion Clauses is an involvement of sorts. . . ."[40]

The Court has stated that "if the State must satisfy its interest in secular education through the instrument of private schools, it has a proper interest in the manner in which those schools perform their secular educational function."[41] The Court has "confirmed the power of the States to insist that attendance at private schools, if it is to satisfy state compulsory-attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction."[42] In addition, states have required private schools in order to qualify for certification or approval to provide certain courses of instruction in citizenship and assure that buildings conform to laws governing safety and sanitation. The state has a legitimate interest in all of these categories. To prohibit the government from legislating in a reasonable manner in these categories would be an infringement on its duty to provide all children a quality education.

The Supreme Court is indeed aware of the crisis in American education.

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37. 319 F. Supp. 421 (D. Conn. 1970). In Johnson v. Sanders, a three-judge federal court held the Connecticut Non-Public School Secular Education Act, CONN. GEN. STAT. ANN. §§ 10-281a to 10-281v (Supp. 1970) unconstitutional. The court stated that the Connecticut law created government entanglement through its enforcement procedures which, if rigidly enforced, would inhibit religion to a degree violative of the free exercise clause; and if enforced in a cursory manner, misuse could result in the establishment of religion. In addition, the court stated that too much state control of private schools would result in the private schools becoming public in nature.

The court spoke hypothetically of what could happen in extreme instances. But we are not dealing with a hypothetical. The Connecticut statute provides money for state-approved textbooks, which was allowed in *Allen*. In addition, the statute provides for supplementing the salaries of teachers of secular subjects. The court reads into the statute restrictions, controls, and fears which are not found in any literal reading of it. The court talks of the change in relationship between the state and private schools. However, the only new requirements of this law are: (1) to ensure no religion enters into those secular subjects for which textbooks are provided, and (2) to ensure money supplements do not aid religious instructors. These are reasonable requirements which do not lead to excessive entanglement.

38. 397 U.S. at 675.

39. *Id.* at 674.

40. *Id.* at 670.

41. Board of Educ. v. Allen, 392 U.S. 236, 247 (1968).

42. *Id.* at 245-46.

In *Walz* the Court has already provided some assistance to the legal profession to guide it down that "tightrope" between the establishment and free exercise clauses.[43] By considering three cases which span the entire public aid question, the Court can provide further direction which will be of assistance in dealing with the American educational crisis.

Applying the Test

In *Tilton v. Richardson*[44] the petitioners challenged the constitutionality of Title I of the Higher Education Facilities Act of 1963.[45] In their complaint the petitioners state that the statute results in an unconstitutional award of federal grants to four Connecticut church-related colleges.[46] Nevertheless, the three judge district court declared the statute constitutional.

In *DiCenso v. Robinson*[47] the issue was the constitutionality of Rhode Island's Salary Supplement Act[48] which appropriates state funds for a 15 percent salary supplement for eligible teachers in non-public elementary schools. Only those teaching state-approved subjects are eligible. Moreover, the teachers had to use public school materials and could not teach religious courses. *DiCenso* differs from *Tilton* in two respects: (1) the subject was elementary and secondary schools, which tend to be more religious than universities, and (2) the aid was indirect, *i.e.,* given through the teachers. The Rhode Island District Court declared this statute unconstitutional.

The third case, *Lemon v. Kurtzman*,[49] considered the constitutionality of the Pennsylvania Nonpublic Elementary and Secondary Education Act.[50] This Act empowers the State Superintendent of Public Instruction to contract with private schools for the purchase of secular educational services—all teacher's salaries, secular state-approved textbooks, and classroom materials. The revenue for this Act is raised by a state tax on admission fees to horse races.[51] The lower court upheld the constitutionality of this Act.

The initial step in the first amendment test is secular purpose. In all three

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43. With all the risks inherent in programs that bring about administrative relationships between public education bodies and church-sponsored schools, we have been able to chart a course that preserved the autonomy and freedom of religious bodies while avoiding any semblance of established religion. This is a 'tight rope' and one we have successfully traversed.
397 U.S. at 672.

44. 312 F. Supp. 1191 (D. Conn.), *prob. juris. noted*, 399 U.S. 904 (1970).

45. 20 U.S.C. §§ 701-21, 751-58 (Supp. V, 1970).

46. Fairfield University, Sacred Heart University, Albertus Magnus College, and Annhurst College.

47. 316 F. Supp. 112, *prob. juris. noted*, 399 U.S. 918 (1970).

48. R.I. GEN. LAWS ANN. § 16-51-3 (Supp. 1969).

49. 310 F. Supp. 35 (E.D. Pa.), *prob. juris. noted*, 397 U.S. 1034 (1970).

50. 24 PA. STAT. §§ 5601-09 (Supp. 1969).

51. *Id.* § 5606.

cases the lower courts looked to the face of the challenged statutes to determine general purpose and in all three found the purpose secular.

The second step is measuring effect. In *Tilton* and *Lemon* the courts found the effects secular. In *DiCenso* the court found the Rhode Island statute had two effects: (1) aiding the quality of secular education in the state's private schools, and (2) giving significant aid to a religious enterprise.[52] In *Tilton,* the federal money was spent to construct non-religiously oriented buildings. No religious exercises could be held therein. The benefit was to a secular activity, not religious, and the second step in the test was satisfied. In *Lemon* the court found that the state money was spent solely for secular subjects. Since only non-religous subjects received the aid, no religious activity was directly benefited.[53] The *DiCenso* court found the Rhode Island statute had the effect of aiding a religious enterprise. However, the general purpose of the statute was to raise the quality of teachers in private schools and the specific purpose was to boost their salaries to put them on a parity with public schools. No religious activity was directly benefited and the statute's effect was secular.[54]

The final step of the test is excessive governmental entanglement. Speaking in terms of affirmative public aid governmental entanglement in a religious activity is per se excessive. The same entanglement in a secular activity is not unconstitutional per se, but must be measured. To be considered "excessive" it must substantially exceed that degree of entanglement which the state normally has in this area. This is the proper entanglement test for the the first amendment.

The *Tilton* case concerned federal aid to colleges for secular activities. Entanglement created by enforcement procedures can violate the establishment clause by being so pervasive that the private school becomes de facto public. Entanglement can also be so pervasive that it inhibits the practice of religion in violation of the free exercise clause. In addition, the administrative controls and procedures enforcing a public aid to private education statute can be so minimal as to amount to no control at all. This lack of control could result in the use of public funds for either secular or religious activities. This is plainly "establishing" religion. The enforcement procedures of the Higher Education Act are neither excessive nor minimal. Section 751 (a) (2) of the Act provides, *inter alia,* that no sectarian instruction, religious worship, or program of a divinity school may be carried on in a

52. DiCenso v. Robinson, 316 F. Supp. 112 (D.R.I. 1970).
53. *See* discussion *supra* note 52.
54. As the Court held in *Allen,* an effect which has a possible incidental benefit to religion is constitutionally irrelevant. 392 U.S. at 244-45.

building constructed under the Act. This section is enforced by a state agency created under Title I of the Act.[55] An Act providing public money for the construction of educational buildings and necessarily requiring that no religion be practiced therein is constitutional. The Act, by prohibiting religion in the university buildings, would inhibit religion were other non-publicly funded buildings not available on campus for the instruction and practice of religion. The same statute applied to private elementary and secondary schools would unconstitutionally inhibit the practice of religion. No religion could be taught or practiced therein and no other buildings would be immediately available.

In *DiCenso* the public funds of Rhode Island were granted only to those teaching secular subjects. This is not aid to a religious activity hence, the governmental entanglement is not unconstitutional per se. The quesion then is the degree of entanglement. The requirements of the statute are neither too pervasive nor too stringent to result in a de facto public school or the inhibition of religion. However, the controls are plentiful enough to prevent the Rhode Island funds from being used for religious activities. The Act regulates an area of legitimate state interest—teacher qualification.[56] These requirements are reasonable in every respect. Consequently, this Rhode Island statute cannot be said to establish or inhibit religion.

Lemon regulates a legitimate state of interest—secular education. The controls built into the Pennsylvania statute apply to secular education and do not inhibit the free exercise of religion.[57] The statute only aids secular education. Is the entanglement so great that what remains is a public school within the shell of a private school? The amount of aid given to private schools by this Pennsylvania statute is as great as a government can constitutionally provide. Any further aid would support the argument that the private school is essentially public. The grants and controls reasonably regulate a legitimate interest—teacher's salaries and textbooks and classroom materials—while ensuring quality education to their pupils.

Conclusion

According to the Supreme Court the Constitution requires that the govern-

55. 20 U.S.C. § 715(a) (Supp. V, 1970).

56. The Act provides that before a teacher is eligible for salary supplements the state commissioner of education shall be satisfied that the teacher: (1) teaches in grade one to eight and only those subjects reuired to be taught by state law, (2) has a state teaching certificate, (3) meets the minimum salary standards for public schools, (4) is using public school teaching materials, and (5) does not teach religion and signs a statement in which he promises not to teach a course in religion while receiving a salary supplement. *See* R.I. GEN. LAWS ANN. § 16-51-3 (Supp. 1969).

57. *See* discussion *supra* note 52.

ment maintain a posture of neutrality with respect to religion. For the determination of governmental neutrality, the Court employs the purpose and primary effect test. Measuring purpose is best accomplished by looking to the face of the statute. The problem lies in the measurement of the effect, and the religious benefit test can best accomplish this measurement. The *Walz* decision contributes the concept of excessive governmental entanglement to the religious benefit test, *i.e.*, if controls are so persvasive that religion is inhibited, or so lax as to constitute establishment of religion, then the statute will violate the first amendment. But when a statute meets the three-step test, it does not violate the religion clauses of the first amendment.

Tilon, DiCenso, and *Lemon* span the entire spectrum of constitutionally permissible public aid. The Supreme Court's consideration of these cases should provide individual states with the necessary guidance to decide whether public aid is to be given and what form it should take.

Michael M. Sullivan
Stephen D. Willett