DePaul Law Review

Volume 21
Issue 3 *Spring 1972: Symposium on Federal-State Relations*

Article 8

# Constitutional Law - Aid to Parochial Schools - The First Pronouncement of Precise Standards for State Aid to Parochial Schools

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# CASE NOTES

## CONSTITUTIONAL LAW—AID TO PAROCHIAL SCHOOLS—THE FIRST PRONOUNCEMENT OF PRECISE STANDARDS FOR STATE AID TO PAROCHIAL SCHOOLS

The Rhode Island Salary Supplement Act[1] authorized the payment by the state of a fifteen percent salary supplement directly to teachers of secular subjects in nonpublic elementary schools. To qualify for the supplement, a teacher had to teach a course offered in public schools, to use textbooks approved for public school use, and to agree not to teach a course in religion. Furthermore, a teacher had to teach in a school where the per-pupil expenditure did not exceed the per-pupil expenditure in public schools. Nonpublic schools were required to submit data on enrollment and total expenditures. If this data indicated per-pupil expenditures were in excess of the per-pupil expenditures in public schools, state auditors examined the books in question to determine how much of its spending was attributable to secular education and how much to religious education.[2] Plaintiffs, citizens and taxpayers of Rhode Island, sought a declaratory judgment contending that the statute was violative of the federal constitution[3] and an injunction to prevent its continued operation. They contended that the goal of the parochial schools, the Act's primary beneficiaries, was the propagation of religion and, therefore, the supplement resulted in an establishment of religion. The three-judge federal district court[4] found that

1. R.I. GEN. LAWS ANN. §§ 16-51 to 9 (Supp. 1969).

2. The federal district court found only one instance in which this breakdown between religious and secular expenses was necessary. The school in question, was not affiliated with the Catholic church. DiCenso v. Robinson, 316 F. Supp. 112 (D.R.I. 1970).

3. U.S. CONST. amend. I.

4. The three judge federal court has original jurisdiction under 28 U.S.C. §§ 2281, 2284 ( ). Section 2281 reads: "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining . . . the enforcement or execution of such statute . . . shall not be granted by any district court judge thereof upon the ground of unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges. . . ."

the Act resulted in excessive government entanglement with religion, and violated the Establishment Clause of the United States Constitution.[5] On appeal to the Supreme Court the case was consolidated with *Lemon v. Kurtzman.*[6]

The Pennsylvania Nonpublic Elementary and Secondary Education Act[7] provided that the state shall pay public funds to applying nonpublic elementary and secondary schools in order to reimburse them for having rendered secular educational services through the teaching of certain subjects.[8] Reimbursement to a school was authorized only for the cost of teachers' salaries, textbooks and instructional materials to the extent that such cost had actually been incurred by the institution. Lemon, a citizen and taxpayer of Pennsylvania,[9] sought a declaratory judgment and injunction on the ground that the statute violated the Establishment and Free Exercise Clauses of the Constitution.[10] The federal district court[11] dismissed the complaint challenging the validity of the Act, holding that it failed to state a claim for relief.[12] Speaking for the Court and seven of its members,[13] Chief Justice Burger held that the statute violated the first amendment by fostering "excessive entanglement between government and religion."[14] *Lemon v. Kurtzman* and *Early v. DiCenso*, 403 U.S. 602 (1971).

This decision is significant because it represents the Supreme Court's most recent effort to formulate a judicial guideline concerning the constitutionality of state aid to parochial schools. In addition,

5. *Supra*, note 2, at 122.

6. 310 F. Supp. 35 (E.D. Pa. 1969).

7. PA. STAT. ANN. tit. 24, §§ 5601-09 (Supp. 1969).

8. Section 5604 of the Act limited all purchases to courses in mathematics, modern foreign languages, physical science and physical education.

9. For the fundamental aspects of standing as to the right of taxpayers to challenge state expenditures which infringe upon the Establishment Clause, *see, e.g.*, Flast v. Cohen, 392 U.S. 83 (1967); Doremus v. Board of Education, 342 U.S. 429 (1952); *see also*, Berger, *Standing to Sue in Public Actions: Is it a Constitutional Requirement?*, 78 YALE L.J. 816 (1969); *Arthur Garfield Hays Civil Liberties Conference: Public Aid to Parochial Schools and Standing to Bring Suit*, 12 BUFF. L. REV. 35 (1962); Jaffe, *Standing to Secure Judicial Review: Private Actions*, 74 HARV. L. REV. 1265 (1961).

10. "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.

11. *Supra*, note 4.

12. *Supra*, note 6, at 49.

13. The vote in the Pennsylvania case was 8-0 as Justice Marshall did not participate in the decision. The vote in the Rhode Island case was 8-1 as Justice White wrote a dissenting opinion.

14. 403 U.S. 602 (1971).

the decision places a substantial barrier in the path of proponents of parochial aid who had been encouraged by Supreme Court decisions over the past twenty-four years,[15] that sometimes suggested that the constitutional question was not "whether" government should help, but "how." The purpose of this casenote is to familiarize the reader with the decision, focusing upon the "entanglements test" as the primary constitutional standard in parochial aid questions. This note will further analyze the decision in light of relevant case law, discussing possible acceptable alternatives within the framework of the "entanglements test," and consider the decision's impact on future developments in this area of the law.

The first amendment contains a two-pronged prohibition on governmental power in the field of religion.[16] In recent cases the Supreme Court has differentiated between the two clauses and applied them independently. In probing the constitutional limits of aid to education, the Establishment Clause is the primary constitutional standard.[17] Thus, in *Everson v. Board of Education*,[18] the Establishment Clause was first held applicable to the states.[19] However, the Supreme Court's consideration of the constitutionality of private schools and earlier forms of aid started long before *Everson*. Although the starting point for the church-state doctrinal development by the Supreme Court is *Everson*, some mention of the pre-1947 cases is necessary in order

15. The constitutionality of aid to parochial schools at the Supreme Court level began with the Court's decision in 1947 of Everson v. Board of Educ., 330 U.S. 1 (1947); For a more extended review of these developments, *see*, Kauper, *The Warren Court: Religious Liberty and Church-State Relations*, 67 MICH. L. REV. 269 (1968).

16. *Supra* note 10.

17. In order to understand the present status of the doctrine of the Establishment Clause, it is necessary to understand the historical background of the doctrine. The historical background of the Establishment Clause, including a discussion of its pre-judicial history, may be found in Justice Waite's opinion in Reynolds v. United States, 98 U.S. 145 (1878); in Justice Black's opinion in Everson v. Board of Educ., *supra* note 15; in Justice Frankfurter's opinion in McCollum v. Board of Educ., 333 U.S. 203 (1948); in Justice Clark's opinion in Abington School District v. Schempp, 374 U.S. 203 (1963); in Justice Rutledge's dissent in Everson v. Board of Educ., *supra* note 15; *cf.*, Knowlton v. Moore, 178 U.S. 41 (1900); and in 2 COOLEY, CONSTITUTIONAL LIMITATIONS 960-85 (8th ed. 1927).

18. 330 U.S. 1 (1947).

19. The Free Exercise Clause was first held applicable to the states through the fourteenth amendment in Cantwell v. Connecticut, 310 U.S. 296 (1940); *accord, e.g.*, Jamison v. Texas, 318 U.S. 413 (1943); Largent v. Texas, 318 U.S. 418 (1943); Murdock v. Pennsylvania, 319 U.S. 105 (1942); West Virginia State Board of Educ. v. Barnette, 319 U.S. 624 (1943); Follett v. McCormick, 321 U.S. 573 (1944); Marsh v. Alabama, 326 U.S. 501 (1946); *cf.*, Bradfield v. Roberts, 175 U.S. 291 (1899).

to place future decisions in proper perspective. Although the first amendment was not at issue in these early cases, study of these decisions will aid one in understanding why present litigation has come so late in our constitutional history.

Closely related to the question of whether state aid may be given to sectarian schools is the question of whether parents have the constitutional right to send their children to church-related schools. The question involves the doctrine embodied in the Free Exercise Clause of the United States Constitution.[20] The initial case to face the question was *Meyer v. Nebraska.*[21] In *Meyer* a teacher was convicted for teaching a course in German in violation of a Nebraska statute prohibiting the teaching of foreign languages in public or private elementary schools. At issue was the question of whether the state had the constitutional right to prescribe the curricula of church-related schools. The United States Supreme Court reversed the decision holding:

> [T]hat the State may do much . . . in order to improve the quality of its citizens, physically, mentally and morally is clear, but the individual has certain fundamental rights which must be respected.[22]

The fundamental right to one's free exercise of religion as expressed in a religious education was recognized. The significant point of *Meyer* is that parents have the right to control the education of their children.

The legitimacy of a private school education was established in *Pierce v. Society of Sisters.*[23] *Pierce* involved an Oregon statute that required all parents who had children between the ages of eight and sixteen to send their children to public schools. The Supreme Court held that the statute was violative of the Due Process Clause of the Fourteenth Amendment as an unreasonable interference with the liberty of the parents to determine the education of their children. The Court, citing *Meyer*, reinforced the right of parents to control the education of their children when it held: "The child is not the mere

20. For development of this idea that religious freedom is the central concern of the first amendment and that the principle of church-state separation is defensible only as long as it promotes religious freedom, *see* KATZ, THE CASE OF RELIGIOUS LIBERTY, IN RELIGION IN AMERICA 95 (J. Cogley ed. 1958). *See also,* Griswold v. Connecticut, 381 U.S. 479, 482 (1965), where the Court held that "the right to educate one's children as one chooses is made applicable to the States by the force of the First and Fourteenth Amendments."

21. 262 U.S. 390 (1923).

22. *Id.* at 401.

23. 268 U.S. 510 (1925). The decision was not based on the first amendment's Religion Clauses, which had not at this time been held applicable to the states. The Court relied instead on the economic due process concepts finding that the statute constituted a deprivation of school property.

creature of the State; those who nurture him and direct his destiny have the right . . . to prepare him for additional obligations."[24] The importance to be derived from the decision is that although parents are compelled to send their children to school, *Pierce* holds that parents will have the freedom to exercise their constitutional right to send their children to private schools. The relevance of these early cases to the discussion of aid to parochial schools is: (1) *Pierce* is often used as the basic argument on which sectarians have traditionally founded their case for parochial schools and for public aid to private schools; (2) the *Meyer* and *Pierce* cases mean very little in constitutional terms because they were not first amendment cases; and (3) although *Pierce* upholds the legitimacy of parochial education, the subsequent decisions of the Court do not imply a constitutional duty on the part of the state to give financial aid in support of these schools.[25]

With the legitimacy of the pluralistic educational system established, the proponents for governmental support of sectarian institutions sought to justify aid by government. The first theory advanced was the "child benefit theory," the name given to the concept that the state may extend certain welfare aid to students attending church-related schools in situations where general aid to the parochial schools themselves would be unconstitutional.[26] This theory first was expressed in *Borden v. Board of Education*,[27] which involved the challenge of a Louisiana statute under which children attending both public and private schools were furnished textbooks free of charge by the state. The state supreme court approved the program on the theory that "school children and the state alone"[28] are the beneficiaries of the program and not the private schools that the children attended. It was carefully noted by the court that the parents formerly purchased the books, therefore, the benefits were to the parents and not the schools. Further, the books

24. *Id.* at 535.

25. *See* DiCenso v. Robinson, *supra*, note 2, at 123, wherein the court rejected the argument that parents may not constitutionally be denied the benefit of public tax funds to educate their children because they elected to exercise their constitutional right to send them to parochial schools. *See also*, Sherbert v. Verner, 374 U.S. 398 (1963) for the derivation of the argument. *See also*, Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1686-87 (1969) for a complete discussion of this argument.

26. *See*, LaNoue, *The Child Benefit Theory Revisited: Textbooks, Transportation and Medical Care*, 13 J. PUB. LAW 76 (1964); and LaNoue, *Religious Schools and Secular Subjects*, 32 HARV. EDUC. REV. 255-61 (1962).

27. 168 La. 1005, 123 So. 655 (1929).

28. *Id.* at 1020, 123 So. at 661.

were loaned to the children and the books thereby remained the property of the state.

The companion case of *Cochran v. Board of Education*[29] was heard by the United States Supreme Court. The Supreme Court in approving the statute adopted the language of the state supreme court:

> [T]he appropriations were made for the specific purpose of purchasing school books for the use of the school children of the state, free of cost to them. It was for their benefit and the resulting benefit to the state . . . . The schools, however, are not the beneficiaries of these appropriations . . . . The school children and the state alone are the beneficiaries.[30]

The criteria established by the case in analyzing financial assistance statutes under "the child benefit theory" is a two-step process: (1) Determine the legislative intent; and (2) ask the question—who receives the aid—the church-related school or the parent and child?[31] This theory is important because it runs throughout the Supreme Court's consideration of the Establishment Clause.

It was against this background that the Supreme Court considered *Everson v. Board of Education*,[32] the Court's most serious consideration of the question of public funds for private schools. *Everson* concerned the challenge of the constitutionality of a New Jersey statute authorizing reimbursement to all parents for money they expended for the bus transportation of their children to schools on the public transportation system. In a five-four decision the Court held that the statute did not violate either the fourteenth amendment or the Establishment Clause.[33] In the absence of specifically enunciated prohibitions in the Establishment Clause, the Court stated what the clause proscribes:

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29. 281 U.S. 370 (1930). The suit was not based upon the Establishment or Free Exercise Clauses of the First Amendment. The suit was based on the theory that taxation for the purpose of school books constituted a taking of private property for a private purpose.

30. *Id.* at 374-75.

31. *See*, Cushman, *Public Support of Religious Education in American Constitutional Law*, 45 ILL. L. REV. 333 (1950); Fellman, *Separation of Church and State in the United States: A Summary View*, 1950 WIS. L. REV. 427 (1950).

32. *Supra* note 15.

33. Although the majority upheld the constitutionality of the statute, a critical analysis of the minority opinion establishes the basis of the Supreme Court's opinion in Lemon and DiCenso. In Everson the majority refused to consider the religious nature and primary function of parochial schools in relation to state aid. Mr. Justice Jackson in his dissent made extensive findings as to the character of these schools and related these findings to the constitutional criteria he characterized as: "[w]hether the taxpayer constitutionally can be made to contribute aid to parents of students because of their attendance at parochial schools depends upon the nature of those schools and their relation to the Church." *Supra*, note 15, at 21. This is substantially the same criteria used by the Supreme Court in

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. Neither can it force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*.[34]

Having defined the meaning of the Establishment Clause, the Court then described the relationship between church and state as: "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach."[35] The main concept of the clause that emerges from this *dicta* in *Everson* is described as the principle of "strict no-aid" or the doctrine of "strict separation."[36] The central tenet of the doctrine of "strict separation" is that government cannot by its programs, policies or laws do anything to aid or support religion or religious activities.[37] The importance of the doctrine is that it has been used as the primary argument for opponents of aid to parochial schools in later cases.

The majority, realizing that New Jersey could not give funds consistent with the Establishment Clause in aid of religion, seized upon the Free Exercise Clause and adopted the "neutrality principle" as justification for the approval of the program.[38] To the Court the Establishment Clause "requires the state to be neutral in its relations with groups of [religious] believers and non-believers; it does not require the state to be their adversary."[39] The form of aid to parents of parochial

Lemon and DiCenso. Furthermore, Mr. Justice Rutledge prophetically characterized the ultimate form of aid that would evolve if the majority opinion was followed, as: "Payment of transportation is no more, nor is it any less essential to education . . . than payment for tuitions, for teachers' salaries. . . ." *Supra*, note 15, at 48. It is ironic that the dissent to a decision that would form the basis of the evolution of aid to parochial schools should form the basis of the opinion that may well end such evolution.

34. *Supra*, note 15, at 15-16.

35. *Supra*, note 15, at 18.

36. In support of a doctrine of absolute separation, *see* the dissenting opinion of Mr. Justice Rutledge in Everson v. Board of Education, *supra*, note 15, at 28.

37. The doctrine derives from the literal interpretation of the first amendment phrase—"no law *respecting* the establishment of religion." *Supra*, note 15, at 19.

38. For a complete discussion of the "neutrality principle" *see*, Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development Part II: The Nonestablishment Principle*, 81 HARV. L. REV. 513 (1968); Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 CALIF. L. REV. 260 (1968).

39. *Supra*, note 15, at 18.

school children was characterized as public welfare legislation. As a further justification, the Court carefully pointed out that the benefits of the aid were directed toward the parents and children and not to the schools. Therefore, there was an effective affirmance of the "child benefit theory" as enunciated in *Cochran*. The third basis of the decision was that the aid was separable from religious instruction and that no aid was paid directly to the church-related schools.[40]

The majority, while holding that public funds could not be used for parochial schools, at the same time permitted some general welfare benefits to go to all school children. The decision set forth the dual responsibilities of the state in establishment matters as: (1) The state must insure that no public funds are paid directly to church-related schools; and (2) the state cannot exclude citizens from welfare programs because of their religion. The central question, then, became—if the prohibition is not absolute, where can a reasonable line be drawn short of total aid to the whole sectarian educational process? The test suggested in *Everson* to determine where the line falls is, where the benefit to the religious institution was indirect, it is constitutionally permissible.

As a result of *Everson* two schools of thought had developed as to the meaning of the doctrine of separation. The first was that of active co-operation, *i.e.*, the intent of the first amendment is that government cannot give preferential treatment to one religion over all other religions. The second theory was that of absolute separation, *i.e.*, the intent of the first amendment is to preclude any government aid to religious groups, direct or indirect.[41] The paradox of *Everson* is that

40. Direct aid is also prohibited to parochial schools by state constitutions. *See* ALA. CONST. art. XIV, § 263; ALAS. CONST. art. VII, § 1; ARIZ. CONST. art. II, § 12, art. XI, § 7, art. XI, § 8, A.R.S.; ARK. CONST. art. XIV, § 2; CAL. CONST. art. IX, § 8; COLO. CONST. art. IX, § 7; CONN. CONST. art. VIII, § 4; DEL. CONST. art. X, § 3; FLA. CONST. DECL. OF RIGHTS art. I, § 3; GA. CONST. art. VIII, XII, par. 2 (1966); HAWAII CONST. art. IX, § 1; IDAHO CONST. art. VIII, § 3; ILL. CONST. art. VIII, § 3; IND. CONST. art. 8, § 3; KAN. CONST. art. 6, § 6(c); KY. CONST. art. 189; LA. CONST. art. XLVI, § 2; MICH. CONST. art. I, § 4; MINN. CONST. art. VIII, § 2; MISS. CONST. art. VIII, § 208; MO. CONST. art. IX, § 8; MONT. CONST. art. XI, § 8; NEB. CONST. art. VII, § 11; NEV. CONST. art. II, § 10; N.H. CONST. Pt. II, art. 83; N.J. CONST. art. VIII, § 4, par. 2; N.M. CONST. art. VII, § 3; N.Y. CONST. art. XI, § 3; N.C. CONST. art. IX, §§ 4, 12 (1868); N.D. CONST. art. VIII, § 152; OHIO CONST. art. VI, § 2; OKLA. CONST. art. II, § 5; ORE. CONST. art. VIII, § 2; PA. CONST. art. 3, § 15; R.I. art. 12, § 4; S.C. art. XI, § 9; S.D. CONST. art. VIII, § 16; TENN. CONST. art. XI, § 12; TEX. CONST. art. VII, § 5; UTAH CONST. art. 10, § 13; VA. CONST. art. X, § 141; WASH. CONST. art. IX, § 4; W. VA. CONST. art. XII, § 4; WIS. CONST. art. I, § 18, art. X, § 2; WYO. CONST. art. VII, § 8.

41. 30 Albany L. Rev. 58 (1966).

although it was the first case to hold that the Establishment Clause was applicable to the states, it resolved the issue without applying the establishment doctrine.[42]

*McCollum v. Board of Education*[43] was the first case in which the Supreme Court struck down a statute for giving aid to religious groups and was the first case considered by the Court after *Everson.* The factual pattern in *McCollum* involved an Illinois program of released time whereby religious teachers of various faiths were permitted to come into public school buildings weekly, and substitute religious training for secular training. The Court was asked to renounce the applicability of the Establishment Clause to the states through the fourteenth amendment. The Court rejected the argument[44] and relied upon the definition of the Establishment Clause in *Everson* as the basis of its holding. The Supreme Court held that the state provisions for instruction of religious subjects in public school buildings was "beyond all question a utilization of the tax established and tax supported public school system to aid religious groups to spread their faith."[45]

*McCollum* is significant because it further develops the doctrine of separation of church and state. It is also a rigorous affirmance of the no-aid principle for parochial schools. *McCollum* stands as a judicial rejection of the doctrine of active co-operation. If aid was given to religion in *McCollum,* the active co-operationist would reason, it was permissible aid, as it did not give preferential treatment to any one religion over another. Since all religious groups could give instructions within the schools, none were preferred. However, the Court found that this was aid to all religious groups prohibited by the language of the Establishment Clause.[46] The fact that distinguished the Illinois program from the payment of transportation costs, is the Supreme Court's analysis of the resulting church-state relationship not present in the New York enactment. The fact that there was close co-operation between

42. The majority opinion is often regarded as highly paradoxical for its non-application of the principles it set down in relation to the establishment clause. Mr. Justice Jackson in his dissent characterizes the majority opinion as: "The case that irresistably comes to mind as the most fitting precedent is that of Julia who, according to Byron's reports, 'whispering 'I will ne'er consent,'—consented.' "

43. 333 U.S. 203 (1948).

44. *Id.* at 211-12.

45. *Id.* at 210.

46. Quoting Everson v. Board of Education, *supra* note 15, the Court relied upon the definition of the Establishment Clause and the specific phraseology: "[N]either can pass laws which aid one religion, aid *all religions,* or prefer one religion over another." [emphasis added] *Supra,* note 15, at 15.

school officials and religious leaders, the use of tax supported property and the compulsory nature of attendance created an impermissible involvement between church and state.

Four years later in *Zorach v. Clauson*,[47] the Supreme Court approved a New York "released time" program. Under the statute, public school children were allowed to leave school during the day to receive religious instructions in nonpublic school buildings. Although the factual circumstances are similar to the program in Illinois, they differ in critical areas. In *Zorach* there was no use of the public school buildings; students left school premises to attend classes in religious schools. Further, there was no expenditure of public funds. All costs were paid by the religious organizations. Finally, there was no compulsory attendance requirements as in the Illinois plan. These critical differences between the two programs were the basis that allowed Justice Douglas, writing for the Court, to find that the statute in New York was constitutional.[48] The decision represents a major shift in attitude by the Court from hostility toward religion to one of accommodation and co-operation. Justice Douglas noted that our history as a nation has been one of a religious people. State encouragement of religious instruction and co-operation with religious authorities to that end was held constitutionally acceptable as long as state accommodation did not require the use of public buildings and funds.[49] The released time program in New York respected "the religious nature of our people and accommodates the public service to their spiritual needs."[50] This co-operation between state and church to encourage the religious need of the nation has been termed the "accommodation theory."[51] In essence the theory, as propounded in *Zorach*, is that the government may in some instances grant preferred treatment to religious liberty. The theory later was extended to require government to grant preferred treatment to religious liberty.[52]

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47. 343 U.S. 306 (1952).

48. The differences expressed are perhaps the only basis upon which the decisions can be distinguished, because the Court openly admitted that both programs provided aid to the church-related schools.

49. *Supra*, note 47, at 315.

50. *Supra*, note 47, at 314.

51. *See* KAUPER, SCHEMPP AND SHERBERT, STUDIES IN NEUTRALITY AND ACCOMMODATION, 1963 Religion and the Public Order 3, 10-23 (1963).

52. In Sherbert v. Verner, 374 U.S. 398 (1963), a Seventh Day Adventist was refused by the state of South Carolina unemployment compensation benefits because she refused to accept a job that required her to work on Saturdays as it was against her religious beliefs. The Supreme Court held that South Carolina had

*Zorach* is significant in the doctrinal development of the Establishment Clause because it rejects the strict no-aid *dicta* in *Everson.* To accomplish this, Justice Douglas adopted the theory of co-operative separation as an alternative to the extremes of active co-operation and absolute separation. In formulating the theory the Court clearly states that the theory of co-operative separation recognizes the principle of separation of church and state. "[T]he separation [of church and state] must be complete and unequivocal. The First Amendment within the scope of its coverage permits no exception; the prohibition is absolute."[53] However, Justice Douglas rejected the view that an application thereof necessarily prohibits all intercourse between church and state: "The First Amendment, however, does not say that in every and all respects there shall be a separation between Church and State."[54] The Court summarized the theory in stating: "The constitutional standard is the separation of Church and State. The problem, like many problems in constitutional law, is one of degree."[55]

The effect of the *Zorach* decision was threefold. First, the decision reflects the philosophy of co-operative separation. Second, the decision adopts the accommodation theory as a constitutional standard that more nearly approximates the yet undefined meaning of neutrality alluded to in *Everson.* Benefits of state action would no longer have to be classified, as in *Everson,* as public welfare legislation in order to win constitutional approval. Rather, the Court had declared that it was appropriate for government to accommodate the religious interests of the people.[56] Third, the Court does not identify what is prohibited by the Establishment Clause due primarily to the lack of a "test" that could be applied to future cases.[57]

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violated the free exercise clause and that the petitioner was entitled to receive unemployment benefits. This is an illustration of constitutionally *required* accommodation.

53. *Supra,* note 47, at 312.

54. *Supra,* note 47, at 312.

55. *Supra,* note 47, at 314.

56. Justice Douglas, writing the opinion of the Court, stated: "Whether . . . [it is done] occasionally for a few students or regularly for one; or pursuant to a systematized program designed to further the religious needs of all the students does not alter the character of the act." *Supra,* note 47, at 313.

57. The intervening cases after Zorach v. Clauson, *supra* note 47, did little to add to the development of the Establishment Clause doctrine. All the cases relied on past cases and were a simple reiteration of the doctrine that had been developed earlier. The only exception that could be ascertained was the Court's decision in McGowan v. Maryland, 366 U.S. 420 (1961). The test absent in *Zorach* was first conceptualized in McGowan, a Sunday Closing Law case. The test would later be refined and firmly established in Abington School District v.

In *Abington School District v. Schempp*,[58] the Supreme Court for the first time proposed a positive test. In *Schempp*, children in public schools were required to read passages from the Holy Bible at the beginning of each school day. The Supreme Court held that the Pennsylvania statute was violative of the Establishment Clause.[59] Justice Clark, writing for the Court, stressed the principle of neutrality in regard to governmental relationships with religion as the constitutional standard.[60] The Court recognized that complete neutrality between church and state is logically impossible.[61] Further, to Justice Clark neutrality meant that government must be neutral in its educational programs as in all its programs. Since public schools were neutral, any religious ceremony such as Bible reading violated that neutrality.[62] The concept of neutrality that had evolved from the past cases was termed "wholesome 'neutrality' " by Clark.[63] However, there was also a stern warning that the breach of this neutrality would not be tolerated.[64]

The test propounded by Mr. Justice Clark as to neutrality was suggested as:

> What are the purpose and 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 strictures of the Establishment Clause there must be a secular purpose and a primary effect that neither advances nor inhibits religion.[65]

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Schempp, 374 U.S. 203 (1963). As to other Sunday Closing Law cases, *see, e.g.*, Braunfeld v. Brown, 366 U.S. 599 (1961); Two Guys v. McGinley, 366 U.S. 582 (1961). The other major Establishment Clause cases after Zorach *see, e.g.*, Engel v. Vitale, 370 U.S. 421 (1962); Torcaso v. Watkins, 367 U.S. 488 (1961).

58. 374 U.S. 203 (1963).

59. *See also*, Murray v. Curlett, 374 U.S. 203 (1963) (companion case to Schempp).

60. By a process of selective quotation, Mr. Justice Clark manages to find that "wholesome 'neutrality' " has been the Court's guiding light in past cases as well. *Supra*, note 58, at 217-22.

61. *Supra*, note 58, at 220.

62. Note, however, the position of the Court that is taken in regards to the Bible's use in the educational process: "[O]ne's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. . . . [T]he Bible is worthy of study for its literary and historic qualities." *Supra*, note 58, at 225.

63. *Supra*, note 58, at 222.

64. Justice Douglas' concurrence contained a strong and explicit warning against the use of public funds to promote religious exercises: "*The most effective way to establish any institution is to finance it; and this truth is reflected in the appeals by church groups for public funds to finance their religious schools.*" *Supra*, note 58, at 229.

65. *Supra*, note 58, at 222.

The Court, in applying the test in *Schempp*, found that the legislation was motivated by non-secular purposes.[66]

Under this test each statute is considered in two ways: (1) The purpose of the enactment; and (2) the primary effect of the enactment. The first area is a reiteration of the test first employed in *McGowan v. Maryland*,[67] a Sunday Closing Law case.[68] The second aspect of the test revolves around the concept of the term "primary." The term "primary," standing by itself, was interpreted to mean that any statute is not self-defining. In the Wisconsin case of *Reynolds v. Nusbaum*[69] the term was interpreted to mean that any legislation aiding the category of private schools had the effect of primarily advancing religion.[70] The test has been widely criticized for the use of the term, often described as ambiguous[71] and limited in scope.

Although *Schempp* represented a significant development in the first amendment doctrine, neither the concept of neutrality nor Clark's test appeared very decisive when applied to the issue of aid to parochial schools.[72]

The test fashioned in *Schempp* was first applied by the Supreme Court to a program of aid to nonpublic education in *Board of Education v. Allen*.[73] *Allen* involved a New York statute requiring local school boards to purchase textbooks and to lend them free of charge to all children in private or public schools. The Court upheld the statute as neutral with respect to religion.[74] The decision relies heavily upon *Everson* and accompanying theories within that decision. The reliance upon *Everson* is evident in three aspects. First, the Court

66. *Supra*, note 58, at 223.

67. McGowan v. Maryland, *supra* note 57, concerned the indictment of various merchants for the sale of goods specifically prohibited by Sunday Closing Laws. The Supreme Court characterized the laws as "public welfare legislation." The Court decided to uphold the legislation even though it provided incidental benefits to religion. The basis of the Court's decision would later be refined in Schempp as the "secular purpose doctrine." The Court held in McGowan that the present purpose of the legislation was secular because it was enacted to provide a uniform day of rest and recreation.

68. *Supra* note 57.

69. 17 Wis. 2d 148, 115 N.W.2d 761 (1962).

70. *Id.* at 157, 115 N.W.2d at 765.

71. *See*, Valente, *Aid to Church Related Education—New Direction without Dogma*, 55 VA. L. REV. 579, 595 (1969).

72. *See* DiCenso v. Robinson, *supra*, note 2, at 118-20, where the district court found the Schempp test unworkable.

73. 392 U.S. 236 (1968).

74. *Id.* at 236.

categorized the legislation in *Allen* within the realm of public welfare legislation. Once the statute was thereby characterized, the Court rationalized that "the Establishment Clause does not prevent a State from extending the benefits of state laws to all its citizens without regard to their religious affiliation. . . ."[75] Secondly, the Court adopted the "child benefit" theory to the substantive aspects of the case. The benefits of the legislation were seen as flowing to the child and parent and not to the schools.[76] Mindful that *Everson* had expressly warned that any form of direct aid to church-related schools would be prohibited, the Court noted that under the program " . . . no funds or books are furnished to parochial schools. . . . "[77] The Court in *Allen* as a further justification under *Everson* placed textbook lending within the sphere of incidental aid to secular schools and, therefore, permissible.

The third aspect of *Everson* found in *Allen* is the most significant. At this point the Court could have stopped and relied solely upon *Everson* as precedent for upholding the legislation. However, the Court chose to adopt the test enunciated in *Schempp* as the test of constitutionality. In candid recognition of the limitations of the "secular purpose" doctrine, the Court admitted that the test was hard to apply.[78] As ground work to applying the test to present enactment, the Court initially applied *Everson*,[79] thereby showing the caution with which it approached the doctrine. The Court, applying the test to the present statute, found the express purpose of the statute to be secular in nature. Further, it held that there was no evidence to indicate the "principal or primary effect of the statute would be to advance or inhibit religion."[80] The effect of the adoption of the secular purpose doctrine in *Allen* was to effectively replace *Everson* as the principal case in this area of constitutional law.

The *Allen* decision is in no sense clear authority, however, for a broad program of aid to nonpublic education. The Court repeatedly stressed the lack of evidence that religious books had been loaned.[81]

75. *Id.* at 242.

76. *Id.* at 242.

77. *Id.* at 243-44.

78. Mr. Justice White writing the opinion of the Court said of the test: "[T]his test is not easy to apply, but the citation of *Everson* by the *Schempp* Court to support its general standard made clear how the *Schempp* rule would be applied to the facts of *Everson*." *Id.* at 243.

79. *Id.* at 243.

80. *Id.* at 245.

81. "Absent evidence, we cannot assume that school authorities, who con-

The case came to the Supreme Court on an appeal reversing an order for summary judgment. This limited record is particularly significant in relation to the cases of *Lemon* and *DiCenso*.[82] One scholar of constitutional law has indicated that the decision in *Allen* would have been different had there been evidence within the record of the religious character of the church-related schools.[83] The effect of this evidentiary shortcoming was to leave in doubt the decision for opponents to show that books loaned were taught from a religious frame of reference or that the religious character and purposes of the schools permeated the entire educational process.

Neutrality, accommodation and secular purposes were the three main constitutional principles facing the Court when it considered the case of *Walz v. Tax Commission*.[84] *Walz*, in retrospect, is, perhaps, the most constructive decision in the judicial development of first amendment doctrine. The Court was confronted for the first time with the precise question whether a property tax exemption for religiously owned and used property was constitutionally valid. The decision is constructed into two separate and distinct parts. Chief Justice Burger utilized the first portion of the decision as a compilation and summarization of first amendment doctrine that had evolved since *Everson*. *Walz* did not contain an historical analysis as in previous decisions. Rather, the Chief Justice noted that to the men who had written the Religion Clauses, "establishment of a religion connoted sponsorship, financial support and active involvement of the sovereign in religious activity."[85] The general principle deducible since *Everson* regarding the Establishment Clause was stated as: "[W]e will not tolerate either governmentally established or governmental interference with religion."[86] Bur-

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stantly face the same problem in selecting textbooks for use in the public schools, are unable to distinguish between secular and religious books. . . ." *Id.* at 245.

82. In Lemon v. Kurtzman, 403 U.S. 602 (1971), the Pennsylvania case came to the Supreme Court on an appeal for granted motion for summary judgment as did the Allen case. However, the Allen court refused to make any assumptions upon either the character of the parochial schools, as primary beneficiaries of the statute, or the possible religious nature of the books. However, the Court in Lemon did make the assumption that the Catholic schools were primarily religious in nature. These assumptions proved crucial to the ultimate decision. Justice Douglas, in his dissent in Allen, admonished the majority for not making an investigation of the religious purposes of the parochial schools. *Id.* at 254-67.

83. *See* Professor Freund's argument in *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680 (1969).

84. 397 U.S. 664 (1970).

85. *Id.* at 668.

86. *Id.* at 669.

ger felt that this was accomplished through a judicial policy of "benevolent" neutrality and accommodation of religion. Therefore, the theories of neutrality and accommodation were given judicial approval under the "new" Burger Court. Likewise, the decisions in *Everson* and *Allen* were also upheld.[87]

The second part of the *Walz* decision involved the determination of the issues at hand. The Court chose to adopt the secular purpose and primary effect test advanced in *Allen*. The Court found that the New York statute neither advanced nor inhibited religion.[88] Having determined the statute's purpose to be constitutionally permissible, the Court turned to the more difficult determination of the statute's primary effect. The *Walz* Court chose to alter the determination as established in *Allen* by formulating a new standard: "We must . . . be sure that the end result—the effect—is not an excessive government entanglement with religion. The test is inescapably one of degree."[89] Applying the new standard of entanglements to the facts of the case, government taxation of religious property would increase only the degree of involvment.[90]

The "entanglement test," thus, was placed in two spheres. The first was whether the involvement would be excessive and second whether the involvement would require continuing surveillance by the state or the church. The re-evaluation of the Court's approach to the Establishment Clause problems was highly significant. The shift in the Court's thinking is subtle but important. Viewing the Court's posture on the meaning of the Religion Clauses, the inference to be drawn is that the thinking of the Court has shifted to a more restrictive view of the Religion Clauses. However, there was considerable thought that the Court's approval of the principles of neutrality and accommodation would lead to a judicial approval of governmental aid to religion.

If any real controversy existed as to the effect of the entanglements doctrine on future decisions, it was settled abruptly when the Court in *Lemon* and *DiCenso* said of *Walz*: "[T]hat holding . . . tended to confine rather than enlarge the area of permissible state involvement

87. *Id.* at 671-72.

88. For a detailed discussion of the establishment cases before Walz, *see* Note, *The Establishment Dilemma: Exemption of Religiously Used Property*, 4 SUFFOLK U.L. REV. 533 (1970).

89. *Supra*, note 84, at 674.

90. *Supra*, note 84, at 674. "Elimination of exemption would tend to expand the involvement of government by giving rise to tax valuation of church property. . . ."

with religious institutions."[91] The Court then expanded the entanglements concept by setting forth three specific areas of inquiry to be used as a general framework to determine the constitutionality of any program rendering aid to private schools:

> In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions which are benefited, the nature of the aid that the State provides and the resulting relationship between the government and the religious authority.[92]

With the statutes set against this framework as the constitutional standard, the Court concluded "that the cumulative impact of the entire relationship arising under the statutes in each State involves excessive entanglement between government and religion."[93]

To this new criteria the Court added the two part secular purpose doctrine. The cumulative criteria by which the constitutionality of a statute is to be tested centers on four questions when the entanglements and secular purpose doctrine are combined: (1) Does the statute reflect a secular legislative purpose?; (2) is the primary effect to advance or inhibit religion?; (3) does its administration foster an excessive government entanglement with religion?; (4) does its implementation inhibit the free exercise of religion?

The legislative purpose of both statutes was intended to enhance the quality of education in all schools. This legitimate concern for educational standards was seen by the Court to be secular in intent. However, unlike *Allen* where the religious character of the church-related schools was not an issue, here the Court gave specific recognition of the sectarian purpose.[94] The preoccupation with the religious aspect compelled the Court to put aside the consideration of the primary effect of the statute and to move instead into the consideration of the entanglements aspect. Relying upon the extensive findings of the district court on the religious character and purposes of parochial schools in Rhode Island,[95] the Court found that the aid was religious in nature. The Court declared it could not ignore "the danger that a teacher under religious control and discipline poses to the separation of the religious from the . . . secular aspects. . . ."[96] of education.

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91. 403 U.S. 602, 614.

92. *Id.* at 615.

93. *Id.* at 614.

94. The sectarian purpose of religious institutions, including schools was first given judicial recognition in Walz v. Tax Commission, *supra,* note 84, at 677-78.

95. DiCenso v. Robinson, 316 F. Supp. 112, 123 (D.R.I. 1970).

96. *Supra,* note at 617.

Although both states set forth restrictions to ensure the nonideological role of teachers, the Court regarded the restrictions as an attempt to separate the inseparable. The very restrictions on which the states relied to guarantee the secularity of the programs proved to be their undoing. The only assurance of separation could come from "continuing state surveillance," thereby resulting in entanglements. Also, the resulting relationship was further entangled by the provisions in both statutes for the state audit of the school records. Reiterating the warning in *Walz* of the potential for governmental interference in religion when government supports churches, the entanglements test was extended to include the "potential" of state involvement in the inhibition of the free exercise of religion.

The second plateau of entanglement is found in the traditional basis and historical foundation of the Religion Clauses. The Court cited as a broad base of entanglement the divisive political potential of these state programs. The Court seemed fearful of the often bitter political conflict that usually erupts when state legislatures consider assistance to parochial schools. Fear of political controversy was a controlling factor in the adoption of the Religion Clauses by the framers of the Constitution,[97] and this fear has been a constant issue in prior Court decisions. The effect of this second analysis of entanglement would seemingly be to forbid state statutes from granting aid to parochial schools that would require periodic appropriations to made by a state legislature.

While the decision at first glance seems restrictive in nature, there is no attempt by the Court to reverse its prior holdings in *Everson* and *Allen*. However, the Court does distinguish the two cases from the cases at hand by stating that the payments there were made to the students and not the schools.[98] By this distinction the Court has given viability to the "child benefit theory" in this area of the law. Books under *Allen* are also nonideological in nature, while teachers are not. Significantly, the Court recognized in open approval of *Zorach* that the "prior holdings do not call for total separation. . . . Some relationship between government and religious organizations is inevitable."[99] However, in light of the decision, the inevitability of these contacts does not mean that the state is free to engage in relationships

97. For discussion of the warnings of James Madison of the potential for political controversy over religious appropriations *see* Justice Rutledge's dissent in Everson v. Board of Educ., *supra* note 15.

98. *Supra,* note 91, at 602.

99. *Supra,* note 91, at 614.

that will extend government involvement to the ultimate direction of church schools. The Court distinguishes *Walz* on the issue of entanglements by stating that these innovative programs in *Lemon* and *DiCenso* are self-perpetuating and self-expanding and are decidedly different from the state-church involvement of over 200 years that resulted in no entanglements.[100]

Justices Douglas and Black in their concurring opinion stand in stark opposition to the Court's holding. Although they concur with the establishment doctrine, their attitude is entirely hostile toward religion. Those who patronize parochial schools in exercise of their constitutional right are viewed as dissenters not in the mainstream of American life. They would reject all forms of aid—direct or indirect. A frequent argument made by proponents of parochial aid is that these schools save the taxpayer money. Justice Douglas said precisely of this argument:

> And the argument is made that the private parochial school system takes about $9 billion a year off the back of government—as if that were enough to justify violating the Establishment Clause.[101]

Mr. Justice Brennan, concurring, charted the course followed by American judicial history to emphasize that public subsidy of sectarian schools is unconstitutional.[102] The lone dissent is made by Justice White who criticized the Court for creating an insoluble paradox:

> The State cannot finance secular instruction if it permits religion to be taught in the same classroom; but if it exacts a promise that religion not be so taught . . . and enforces it, it is then entangled in the 'no entanglement' aspect of the Court's Establishment Clause jurisprudence.[103]

Mr. Justice White says that he would sustain the Pennsylvania and Rhode Island legislation on the basis that the states are financing a "separable secular function of overriding importance."[104] The substantial benefits that flow from the programs to religion and other private interests do not convert the laws into establishments of religion.

The decision on *Lemon* and *DiCenso* are important to the development of the establishment doctrine. The decision represents the first explicit test in this area of constitutional law. The effect of the test is

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100. *Supra*, note 91, at 624-25.

101. *Supra*, note 91, at 630; *see also* Dunn v. Addison Manual Training Schools for Boys, 281 Ill. 352, 117 N.E. 993 (1917), where this argument was specifically rejected.

102. *Supra*, note 91, at 642-61.

103. *Supra*, note 91, at 668.

104. *Supra*, note 91, at 664.

to restrict the number of possible forms of aid that are acceptable within the constraints of the Establishment Clause. Legislation in this area must not only meet the requirements of secular purpose and primary effect, it must also not incorporate into the programs the secular-religious distinctions and policing that proved fatal to the Pennsylvania and Rhode Island statutes. However, the elimination of these restrictions may place these statutes in the face of another dilemma—direct aid to parochial schools.[105] The decision further affirms the theories of neutrality, accommodation and child benefit, implying that all forms of aid must still conform to these constitutional standards as well. It is significant that the Court did not say that aid to education in parochial schools is unconstitutional. The implication is that there are acceptable alternatives to the programs that were found unconstitutional in these decisions.

In attempting to weigh which forms of assistance might be acceptable to the Court, a valuable starting point is provided by the following statement of the Chief Justice in *Lemon* and *DiCenso*:

> Our decisions from *Everson* to *Allen* have permitted the States to provide church-related schools with secular, neutral or nonideological services, facilities or materials. Bus transportation, school lunches, public health services and secular textbooks supplied in common to all students were not thought to offend the Establishment Clause.[106]

This passage when read in conjunction with the dictates of the entanglements test suggests that the Court may accept the types of aid that meet the following criteria: (1) All school children, public and private, participate in the program; (2) the aid provided is in the form of secular services and materials; (3) the assistance does not require daily distinctions between what is secular and what is religious education; and (4) the program does not require the church-related school to sacrifice its independence in religious matters.

As acceptable alternatives the states may seek to expand the aid to parochial school children in the form of the earlier programs of transportation[107] and textbooks.[108] However, any aid aimed at the pay-

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105. *Supra*, note 91, at 616.

106. *Supra*, note 91, at 616, 617.

107. For state cases *see e.g.*, Spears v. Honda, 51 Hawaii 1, 449 P.2d 130 (1968); Board of Educ. v. Antone, 384 P.2d 911 (Okla. 1963); Reynolds v. Nusbaum, 17 Wis. 2d 148, 115 N.W.2d 761 (1962); Matthews v. Quinton, 362 P.2d 932 (Alas. 1961); Snyder v. Town of Newton, 147 Conn. 374, 161 A.2d 770 (1960); McVey v. Hawkins, 364 Mo. 44, 258 S.W.2d 927 (1953); Zellers v. Huff, 55 N.M. 501, 236 P.2d 949 (1951); Visser v. Nookscack Valley School Dist., 33 Wash. 2d 699, 207 P.2d 198 (1949); Silver Lake School Dist. v. Parker, 238 Iowa

ment for operating expenses[109] will undoubtedly be rejected. There is a relatively new form of aid originating within the state legislatures providing for the payment of tuition of parochial school children. A typical statute being proposed is a bill in the Illinois legislature.[110] The plan provides in relative parts that parents of children in nonpublic elementary and secondary schools will be issued a tuition voucher form when their children enroll in parochial schools. Upon completion of the school year, the schools will then submit the vouchers to the State Superintendent of Public Instruction. Upon the Superintendent's approval, the Auditor of Public Accounts will be directed to issue payment to the schools for the vouchers. The schools must account to the Superintendent as to how the money is spent. The proposed legislation falls far short of complying with the constitutional restrictions enunciated by the Supreme Court. First, the bill calls for the payment of the money directly to the schools. Such direct funding has been prohibited since the Court's decision in *Everson* and it is further prohibited by the Illinois Constitution.[111] Further, the bill does not include all the children within the state but merely parochial school children. The reporting by the schools to the state of the use of the money is ominously similar to the statutes found unconstitutional in *Lemon* and *DiCenso*. In relation to the entanglements test, the character and purpose of the schools benefited is religious in nature. The ultimate conclusion to be drawn upon these facts is that the legislation as proposed has little chance of securing judicial approval. It is submitted that the bill would

984, 29 N.W.2d 214 (1947); *compare*, Opinion of the Justices, 109 N.H. 578, 258 A.2d 343 (1969); Alexander v. Bartlett, 14 Mich. App. 177, 165 N.W.2d 445 (1968); Rhoades v. Abengton, 424 Pa. 202, 226 A.2d 53 (1967); Squires v. City of Augusta, 153 A.2d 80 (Me. 1959).

108. For state cases *see e.g.*, Dickman v. School Dist., 232 Ore. 238, 366 P.2d 533 (1961); Judd v. Board of Educ., 278 N.Y. 200, 15 N.E.2d 576 (1938); Haas v. Independent School Dist., 69 S.D. 303, 9 N.W.2d 707 (1943); *compare*, Chance v. Mississippi State Rating and Purchasing Bd., 190 Miss. 453, 200 So. 706 (1941).

109. Recent cases are—Opinion of the Justices, 356 Mass. 814, 258 N.E.2d 779 (1970); State *ex rel.* Chambers v. School Dist., 155 Mont. 422, 472 P.2d 1013 (1970); Almond v. Day, 197 Va. 419, 89 S.E.2d 851 (1955).

110. 77th Ill. G.A. S.B. 853.

111. ILL. CONST. art. VIII, 3 (1870) also applicable to 1970 constitution. ILL. CONST. art. X, § 3 (1970) states: "Neither the General Assembly nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation or pay from any public fund whatever, anything in aid of any church or sectarian purpose, or to help support or sustain any school, academy, seminary, college, university, or other literary or scientific institution, controlled by any church or sectarian denomination whatever; nor shall any grant or donation of land, money or other personal property ever be made by the State or any such public corporation, to any church, or for any sectarian purpose."

have a substantially better chance of winning approval if the tuition payment were made to the parent instead of to the schools. Initially this would remove the prohibitions of direct payments to the schools, the schools would not have to report any use of the funds and the character of the schools would not necessarily be at issue since they would only incidentally be benefited.

The Supreme Court is uncertain as to the proper course it should set with respect to religious pluralism at the institutional level in America. Although religious pluralism at the individual level has been accepted by the Court, the Court is uncertain as to what to do about the increasing entanglements between churches and state and federal governments, especially in the areas of education, health services and welfare activities. Although some form of collaboration may be accepted, the prospects of the Court's approval of church-state collaboration are uncertain at best.

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