Buffalo Law Review

Volume 18 | Number 3 Article 7

4-1-1969

The New York and Federal Constitutional Standards in Relation to Governmental Aid to Private Education

Helen M. Kaney

COMMENTS

THE NEW YORK AND FEDERAL CONSTITUTIONAL STANDARDS IN RELATION TO GOVERNMENTAL AID TO PRIVATE EDUCATION

I. INTRODUCTION

American educational processes are under varied attack from many sectors. The recent disorders on numerous university campuses have shocked the national conscience. The teacher's strikes, the accusations of inferior education in predominantly Negro schools, the problem of *de facto* segregation in our schools have all etched a turbulent outline of American education in recent years. Amid all these grave problems indigenous to 20th century America, we are again facing squarely a recurring problem as exemplified in a recent New York Statute:[1] alleged public support of sectarian schools in which the tenets and doctrines of a particular religion are inculcated in students. What is right and proper within the realm of church-state relations concerning education is the basic problem to be analyzed here. All state constitutions include provisions designed to keep separate the functions of church and state.[2] These provisions may be thought of as a more precise expression of what is embodied within the first amendment of the Constitution of the United States.

We have in the United States two parallel systems of education: private and public. In New York alone, 21.5% of the total state enrollment attends nonpublic schools.[3] The numbers of nonpublic school students are significant and so are the problems of providing competitive, quality education for these students. Today, not only are local tax revenues, state, and federal moneys being used to defray the expense of public education, but recent legislation has extended aid within the sectarian school sphere.[4]

This involvement of the state and federal governments with private schools raises questions under the state[5] and federal constitutions[6] concerning separation of church and state. It is the purpose of this comment to analyze the New York

1. L. 1965, c. 320, § 1 *to be* § 701 of the Education Law, *effective* Sept. 1, 1966.
2. For various types of constitutional provisions *see* 50 Yale L.J. 917, 920-21 (1941), Note, *Public Funds For Sectarian Schools*, 60 Harv. L. Rev. 793, 794 (1947).
3. Board of Education v. Allen, 392 U.S. 236, 248 n.9.
4. N.Y. Education Law § 701 (1966). This is the New York Textbook Loan Law which furnishes books to all students in grades seven through twelve regardless of what school they attend. Title I and II of the Elementary and Secondary Education Act of 1965, 79 Stat. 27, 20 U.S.C. § 241 *et seq.* (Supp. 1966). Title I establishes a program of financial assistance to local educational agencies for the education of low income families. Title II involves federal grants for the acquisition of school library resources, textbooks and other printed and published instructional materials for the use of children and teachers in public and private schools.
5. N.Y. Const. art. XI, § 3.
6. U.S. Const. amend. I.

Constitution and the Federal Constitution to determine what constitutional standards are applied to legislation authorizing the expenditure of public funds for education including private education.

II. New York Constitution: Article XI, Sec. 3

The New York State Text-Book Loan Law[7] permits local school boards, upon individual request, to loan school books[8] to all children in grades seven through twelve regardless of what school they attend. This law has brought into sharp focus the whole controversy revolving around Article XI, section 3, of the New York State Constitution popularly known as the Blaine Amendment, which provides:

> Neither the state nor any subdivision thereof shall use its property or credit or any public money . . . directly or indirectly, in aid or maintenance . . . of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught. . . .[9]

Article XI, section 3 of the New York Constitution expressly prohibits the state from *directly*[10] or *indirectly*[11] aiding any sectarian school. This constitutional prohibtion was the culmination of an historic separation of government and religion. As early as 1805, the New York State Legislature provided for the establishment of free schools in New York City for poor children. It was specifically provided that these funds could not be used in educating children who were taught by any religious society.[12] In 1842, the Legislature specifically barred schools which taught religious or sectarian doctrines from receiving any public money.[13] In an effort to further clarify the status of denominational schools which taught doctrines and tenets of one sect, the legislature passed another law in 1844 which provided not only that schools which taught doctrines of one particular sect were not to receive any public moneys, but also schools which used books that favored one religion over another or contained materials prejudicial to any religion were barred from obtaining state moneys.[14] In 1853, a group of New

7. L. 1965, c. 320 *to be* § 701 of the Educational Law, *effective* Sept. 1, 1966.

8. *Id.* § 701(1)

"A text-book, for the purposes of this section shall mean a book which a pupil is required to use as a text for a semester or more in a particular class in the school he legally attends."

9. N.Y. Const. art. XI, § 3 permits examination or inspection of sectarian schools and authorizes the legislature to provide school transportation for children attending any school.

10. Judd v. Board of Education, 278 N.Y. 200, 212, 15 N.E.2d 576, 582 (1938). The Court of Appeals defined *directly* in the Blaine Amendment as aid:

> [f]urnished in a direct line, both literally and figuratively, to the school itself, unmistakably earmarked, and without circumlocution or ambiguity.

11. *Id.* at 211, 15 N.E.2d at 582. The Court defined indirect aid as follows:

> Aid furnished "indirectly" clearly embraces any contribution, to whomever so made, circuitously, collaterally, disguised, or otherwise not in a straight, open and direct course for the open and avowed aid of the school, that may be the benefit of the institution or promotional of its interests and purposes.

12. L. 1805, ch. 108.

13. L. 1842, ch. 150, § 14.

14. L. 1844, ch. 320, § 12.

York citizens belonging to a particular sect petitioned the legislature to authorize the use of money from the common school fund to establish schools in which religion was to be taught. The legislative committee to which the petition was addressed rejected it, reasoning that implementation of such a program would open the door to dangerous and vicious controversy among different religious groups as to who would get what shares of the public money.[15] This action demonstrates that as early as 1853 there was general agreement that the laws of the state prohibited public support of religiously oriented schools.

Judd v. Board of Education[16] dealt directly with the Blaine Amendment. Plaintiffs, as taxpayers, instituted a suit against the board of education of their school district challenging the board's action under section 206 of the Education Law. This provision authorized the use of public funds to defray the expense of transporting pupils to and from private or religiously controlled schools. Plaintiffs contended that the law violated Article IX, section 3. The Court of Appeals, three judges dissenting, held that the law permitting the transportation of children at public expense to a denominational school did violate the New York Constitution.[17] The court concluded that the furnishing of transportation to pupils of private and parochial schools was aid or support of the schools and was therefore forbidden by the state constitution.

> The purpose of the transportation is to promote the interests of the private school or religious or sectarian institution that controls and directs it. . . . Without pupils there could be no school. It is illogical to say that the furnishing of transportation is not an aid to the institution while the employment of teachers and furnishing of books, accommodations and other facilities are such an aid.[18]

An argument, invoked by the defendant, but completely rejected by the court, was the so-called "child benefit doctrine."[19] Defendant argued that the assistance given was primarily for the benefit of the child and that any benefit conferred

15. Judd v. Board of Education, 278 N.Y. 200, 208, 15 N.E.2d 576, 581 (1938).

16. 278 N.Y. 200, 15 N.E.2d 576 (1938).

17. The constitution was amended the following year to provide specifically for school bus transportation for all children regardless of the schools they attended.

18. Judd v. Board of Education, 278 N.Y. 200, 212, 15 N.E.2d 576, 582 (1938).

19. The Child Benefit Doctrine was first upheld in Borden v. Louisiana State Board of Education, 168 La. 1005, 1020, 123 So. 655, 660-61 (1929).

> The 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 that the appropriations were made. True, these children attend some school, public or private, the latter, sectarian or non-sectarian, and the books are to be furnished them for their use, free of cost, whichever they attend. The schools, however, are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation, because of them. The school children and the state alone are the beneficiaries.

This case was immediately followed by *Cochran v. Louisiana State Board of Education*, 281 U.S. 370 (1930), which also accepted the Child Benefit Theory. This case went up to the United States Supreme Court only on the issue of whether the act in question authorized the taking of private property for a private purpose and thus violated the 14th amendment. No first amendment, establishment of religion issue, was involved nor any issue involving the act's alleged violation of the Louisiana Constitution.

on the institution the child attended was secondary and therefore not proscribed by Article XI, section 3. The court rejected the "child benefit doctrine" summarily.

The present textbook loan law is not the first attempt in this state to supply books to all school children regardless of the school they attend. The legislature enacted a law in 1917, which had a purpose similar to that of the present law.[20] The earlier statute included school supplies as well as textbooks and was therefore broader than the present law. The statute was attacked in the case of *Smith v. Donahue*.[21] The appellate division held that the statute violated the Blaine Amendment. It reasoned that if the aid was not direct it was certainly indirect aid to parochial schools.[22] The court also stated that such indirect aid to sectarian schools "if not in actual violation of the words, it is a violation of the true intent and meaning of the Constitution and in consequence equally unconstitutional."[23]

The constitutionality of the present textbook loan law was recently tested in the New York courts. In a 4 to 3 decision, the Court of Appeals[24] held that the law did not violate section 3 of Article XI of the New York State Constitution. The majority reasoned that the New York Constitution prohibits the expenditure of public funds to aid religiously affiliated schools but that this was not the situation presented by the Textbook Loan Law. In the Court's opinion, the law did provide for some *incidental* benefit to parochial schools but such benefit could not be designated as direct or indirect aid because the legislature in enacting this statute had no intention of assisting parochial schools. The legislature sought only to benefit all school children regardless of the kind of school they attended.

What the Court really seems to be saying is that the State's interest in uplifting education is so great that it overrides constitutional obstacles in certain instances. Since many children in New York attend parochial schools, their educational opportunities in certain areas are a proper object of state aid. The Court did try to limit the aid by designating it as *incidental* aid and also by stating that "certain types of aid can be made available to *all* children."[25] But where the Court in the future will draw the line between *incidental* aid and direct or indirect aid is unknown.

Judge Van Voorhis, speaking for the three judge minority in *Allen* cited the *Judd*[26] and *Smith*[27] cases as being decisive of the issues before the Court. In

20. Laws of 1917, ch. 786.
To provide textbooks or other supplies to all the children attending the schools of such cities in which free textbooks or other supplies are lawfully provided . . . . (formerly N.Y. Education Law § 868(4).

21. 202 App. Div. 656, 195 N.Y.S. 715 (3d Dep't 1922).

22. *Id.* at 661, 195 N.Y.S. at 719.

23. *Id.* at 664, 195 N.Y.S. at 722.

24. Board of Education v. Allen, 20 N.Y.2d 109, 228 N.E.2d 791, 281 N.Y.S.2d 799 (1967).

25. *Id.* at 117, 281 NY.S.2d at 804, 228 N.E.2d at 794 (1967).

26. Judd v. Board of Education, 278 N.Y. 200, 15 N.E.2d 576 (1938). The Court of Appeals in the *Allen* case specifically overruled *Judd*.

27. Smith v. Donahue, 202 App. Div. 656, 195 N.Y.S. 715 (3d Dep't 1922).

those cases, the Court of Appeals had refused to accept the contention that transportation and textbooks may be supplied to private school children by the state and not violate Article XI, section 3 of the New York Constitution. These "aids" contravened the language and intent of the constitutional prohibition concerning public money being used directly or indirectly to aid or maintain any parochial school. The minority in *Allen*[28] found no basic change in the factors considered in *Judd* and *Smith* since these cases were decided and therefore was of the opinion that the present textbook loan law was unconstitutional.

The minority stated that Article XI, Section 3 of the New York Constitution and the First Amendment of the Federal Constitution have the same purpose:

> . . . to keep religion from being dominated by government and to prevent government from being dominated by pressure groups seeking to control it for the promotion of religion.[29]

While this is perhaps not an all encompassing statement of the purpose of the two constitutional provisions, it is at least a partial formalization. Having framed this statement of purpose, Judge Van Voorhis then examined the law under consideration and focused on the requirement that the books supplied must be secular as opposed to religious. The minority declared that there was no reliable standard under which secular and religious texts may be differentiated and therefore if this law was implemented, religious schools would apply pressure on the state to supply books which were in accord with their views of such secular subjects as the Spanish Inquisition, evolution, and economics. The minority also envisioned the state as responding to such pressure and ultimately dominating the churches.[30] To support this position, the minority relied heavily on Mr. Justice Jackson's concurring opinion in *McCollum v. Board of Education*,[31] which elucidated the problem of separating out all religious influence from subjects taught in school. Judge Van Voorhis stated that one of the important reasons for the existence of parochial schools was the desire of the members of a church to have their children indoctrinated with the church's point of view on a variety of subjects.

In essence, the minority is saying that religious schools exist to implant certain views and textbooks are the central means of effectuating this purpose. If the state loans textbooks to parochial school children, it will set up a conflict between the state and the religion which operates the school. The prevention of such a conflict is what the respective provisions in the state and federal constitutions were designed to effect.

---

28. Board of Education v. Allen, 20 N.Y.2d 109, 228 N.E.2d 791, 281 N.Y.S.2d 799 (1967).

29. *Id.* at 121, 228 N.E.2d at 797, 281 N.Y.S.2d at 808.

30. *Id.* at 123, 228 N.E.2d at 798, 281 N.Y.2d at 810.

31. 333 U.S. 203 (1948).

III. Federal Constitution: First Amendment

The New York law also directly raises basic problems under the first amendment of the United States Constitution which provides:

> Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . .

The first amendment contains a two-pronged prohibition on governmental[32] power in the field of religion. In recent cases, the Supreme Court has differentiated between the two clauses and applied them independently.[33] In probing the constitutional limits of aid to education, the establishment clause is the primary constitutional standard.[34]

The meaning of the establishment clause in the area of education was recently interpreted in *Everson v. Board of Education*.[35] This case concerned a New Jersey statute which authorized the expenditure of public funds for bus transportation of children attending public and private, nonprofit, schools. The statute was challenged in so far as it authorized reimbursement of parents of children attending sectarian schools for the expense of bus transportation. The Supreme Court in a 5 to 4 decision held that the statute did not violate the first amendment nor did it violate the due process clause of the fourteenth amendment.[36] Mr. Justice Black writing for the majority stated:

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

32. The first amendment was originally applied only to the federal government, but more recently it has been made applicable to the states through the fourteenth amendment. *See, e.g.*, Cantwell v. Conn., 310 U.S. 296, 303 (1940); Everson v. Board of Education, 330 U.S. 1, 8 (1947); Zorach v. Clauson, 343 U.S. 306, 309 (1952); Engel v. Vitale, 370 U.S. 421, 423, 430 (1962).

33. The older cases were in terms of religious rights being safeguarded by the first amendment. *See, e.g.*, Davis v. Beason, 133 U.S. 333 (1890); Reynolds v. United States, 98 U.S. 145 (1878). The court now analyzes each clause separately. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398 (1963); Abington School District v. Schempp, 374 U.S. 203 (1963).

34. Engel v. Vitale, 370 U.S. 421, 430 (1962).

> [While the two clauses of the first amendment] may in certain instances overlap, they forbid two quite different kinds of governmental encroachment upon religious freedom. The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental *compulsion* and is violated by enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not. (Emphasis added.)

35. 330 U.S. 1 (1947).

36. Petitioners contended that tax-raised funds were being used for a private purpose and therefore the fourteenth amendment was violated.

> participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."[37]

The majority assumed the New Jersey statute to be a public welfare measure whose benefits could not be denied to some citizens on account of their faith. The Court stated that under the establishment clause New Jersey cannot "contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church."[38] However, the Court mentions the free exercise clause as prohibiting penalizing a citizen because of his religion by excluding him from the benefits of public welfare legislation. This use of the free exercise clause rationale seems to avoid entirely the issue of whether this statute constitutes an establishment of religion. The Court did not actually designate which clause of the first amendment it relied on in deciding the case.[39] Yet, the first part of the opinion was devoted to the historical basis of the establishment clause[40] which was the clause under which petitioners challenged the statute. The majority recognized that there might have been incidental benefit to the parochial schools from this legislation[41] but the Court analogized this benefit to that received under general governmental services: police and fire protection, sewage disposal, and public highways and sidewalks. The Court in *Everson* may be saying that in fact there is an incidental aid to religion but that the state's interest in protecting school children on their way to and from school justifies it.[42] Mr. Justice Black employed the child benefit doctrine under which legislation achieving a public purpose such as furthering education is constitutional even though it incidentally aids religion.[43] The two dissenting judges in *Everson* relied on the absolute approach to the first amendment and therefore found a violation of the establishment clause.[44]

---

37. Everson v. Board of Education, 330 U.S. 1, 15-16 (1947).

38. *Id.* at 16.

39. *Id.* at 17.

> [W]e cannot say that the First Amendment prohibits New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools.

40. *Id.* at 8-16.

41. *Id.* at 17. The Court realizes that this statute helps children to attend church schools and may in some cases make it possible for some children to go to sectarian schools who would not otherwise do so if their parents had to incur the expense of their transportation.

42. Black's own definition of what the establishment clause means [*supra* note 37] is in opposition to the result in this case. He could not have applied his absolute test and arrived at the conclusion that there was no establishment. *See generally* Note, *The Free Exercise and Establishment Clause: Conflict or Coordination*, 48 Minn. L. Rev. 929 (1964).

43. *See also*, Cochran v Louisiana State Board of Education, 281 U.S. 370 (1930). The Court upheld the furnishing of secular textbooks to children in private and parochial schools with state tax funds. No first amendment issues were raised however.

44. Everson v. Board of Education, 330 U.S. 1, 24 (1947). Mr. Justice Jackson dismisses the child benefit theory summarily. He outlines the primary role of Catholic education for the continuance of the Church and concludes:

> The prohibition against establishment of religion cannot be circumvented by a

The clear cut secular interest in education in *Everson* is not present in other establishment cases. Three recent Supreme Court cases[45] dealing with laws or regulations providing for religious instruction or exercises during the public school day did not survive attacks based on the establishment clause. The Court concluded in each of these cases that aid to religion was involved plus an effort to utilize the machinery of government in influencing religious adherence. In these cases, the state could not show a sufficient secular reason for enacting laws which aided religion in some form.[46] In *Abington v. Schempp*,[47] Mr. Justice Clark elucidates a test for deciding whether a law runs afoul of the establishment clause.

> [W]hat 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 strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.[48]

Various state courts have ruled on the constitutionality of state laws which have provided for the furnishing of textbooks to children attending private schools.[49] The Supreme Court[50] has recently squarely faced the question of

---

subsidy, bonus, or reimbursement of expense to individuals for receiving religious instruction and indoctrination. (330 U.S. at 33).

In Mr. Justice Rutledge's view the establishment clause effects a total prohibition on any aid to religion.

The prohibition broadly forbids state support, financial or other, of religion in any guise, form or degree. It outlaws all use of public funds for religious purposes.

45. McCollum v. Board of Education, 333 U.S. 203 (1947). Public school children whose parents so requested were released from their normal classes once a week to attend religion classes conducted in the public schools by reprsentatives of various religious denomination. Non-attending pupils were kept in school. Engel v. Vitale, 370 U.S. 421 (1962). State officials composed a denominationally neutral prayer and required it to be recited at the beginning of each school day. Pupils could remain silent or be excused from the classroom during the recitation of the prayer. Abington v. Schempp, 374 U.S. 203 (1963). The State required the schools to begin each day with a reading from the Bible. Pupils again could absent themselves from the classroom during this time on written request from their parents.

46. Zorach v. Clauson, 343 U.S. 306 (1952). The Supreme Court held constitutional a New York released time statute which provided for religious instruction outside the public school building. This case is contrary to the above cited cases *supra* note 45. No secular purpose was demonstrated by the state. Even though no tax funds were directly used to support the program, *McCollum* strongly suggests that any released time program utilizing the machinery of compulsory public school attendance is objectionable from a first amendment view. Furthermore, the element of compulsion may be present since a child who does not participate in the religion classes is retained in public school.

47. 374 U.S. 203, 216 (1963). The Supreme Court has unequivocally rejected the idea that the establishment clause merely prohibits governmental preference of one religion over another.

48. *Id.* at 222.

49. The provision of free textbooks to children attending sectarian schools was upheld on the theory that the aid was to the child and not to the school. *See* Chance v. Mississippi State Textbook Rating and Purchasing Bd., 190 Miss. 453, 200 So. 706 (1941); Borden v. Louisiana State Board of Education, 168 La. 1005, 123 So. 655 (1929). Other courts have held that such statutes were an unconstitutional aid to religious schools. *See* Dickman v. School District No. 62 C, 232 Ore. 238, 366 P.2d 533 (1961), *cert. denied* 371 U.S. 823

whether a New York statute providing for the furnishing of textbooks to all children in grades seven through twelve is a law *respecting* an establishment of religion or prohibiting the free exercise thereof. The highest New York court, as discussed in the preceding section of this comment, found no violation of either the state or federal constitutions.[51] The Supreme Court, three judges dissenting held that the New York law was not a law respecting an establishment of religion nor did it prohibit anyone from exercising his religion.[52] The majority recognized that between state neutrality and state support of religion, the line is hazy, wrapped in the shrouds of history and the predeterminations of man. The constitutional standard in regard to establishment: separation of Church and State,[53] is succinct and none too illuminating. Mr. Justice White, speaking for the majority in *Allen*, applied the Schempp test[54] which distinguishes between those contacts with religion which are permissible under the establishment clause and those which violate the constitutional mandate of the first amendment. The legislative purpose of the statute is to enhance the educational opportunities of the children of the state.[55] That education is a valid area of interest for the state under public welfare ideas is not to be denied.[56] The primary effect of the law is to put free[57] secular textbooks[58] into the hands of all the children in the state who are in the prescribed grades. The textbooks loaned must either be ones chosen for use in any public, elementary or secondary school in the state or approved by any board

(1962); Zellers v. Huff, 55 N.M. 501, 236 P.2d 949 (1951); Smith v. Donahue, 202 App. Div. 656, 195 N.Y.S. 715 (3d Dep't 1922).

50. Board of Education v. Allen, 392 U.S. 236.

51. Board of Education v. Allen, 20 N.Y.2d 109, 228 N.E.2d 791, 281 N.Y.S.2d 799 (1967). The court in a 4 to 3 decision held that the statute did not give aid to parochial schools and therefore no establishment of religion problem was involved. The court characterized the law as a public welfare measure aimed at improving the quality of education of all children in the state. Board of Education v. Allen, 27 A.D.2d 69, 276 N.Y.S.2d 234 (3d Dep't 1966); the Appellate Division reversed the trial court solely on the issue of plaintiff's standing to sue Board of Education v. Allen, 51 Misc. 297, 273 N.Y.S.2d 239 (1966), the trial court held that the plaintiffs had standing to bring the case and that the statute violated Art. XI, § 3 of the N.Y. Constitution. In *dicta*, the court also stated that the statute violates both the establishment and free exercise clauses of the first amendment.

52. Board of Education v. Allen, 392 U.S. 236 (1968). The Court dismissed appellants free exercise contention in two sentences since no claim was made that individuals were coerced in the practice of their religion.

53. Zorach v. Clauson, 343 U.S. 306, 314 (1952).

54. L. 1965 c. 320 *to be* § 701 of the Education Law, *effective* Sept. 1, 1966.

55. New York Sess. Laws 1965, c. 320, § 1.

56. Board of Education v. Allen, 392 U.S. 236, (1968).

> The security and welfare of the nation require the fullest development of the mental resources and skills of its youth. . . . It is hereby declared to be public policy of the state that the *public welfare and safety require* that the state and local communities give assistance to educational programs which are important to our national defense and the general welfare of the state.

57. New York Education Laws § 701(3).

The books are loaned to the individual students on request. Title to the books remains in the state.

58. The law has been construed by the New York Court of Appeals as allowing the lending of only secular textbooks. Appellants did not contend that any books for religion classes had been requested by individuals.

of education in the state.[59] Thus, the Court concluded that it was the parent and child who benefited from this program and not the school. This reasoning accepts the child benefit doctrine as did the Court in *Everson*. The Court accepts the contention that but for the free textbooks some children would not attend sectarian schools.[60] However it cites *Everson* in saying that this result alone does not demonstrate an unconstitutional support of religion in violation of the establishment clause, any more than the furnishing of bus fares to parochial school children in New Jersey violates the establishment clause.[61] The Court further reasoned that under *Pierce v. Society of Sisters*[62] parents have a constitutional right to send their children to church related schools as long as these schools meet certain state requirements. Since the state's interest in secular education is sufficiently accomplished in private schools, one cannot deny that secular education and religious training can be carried out under one school roof. The majority, while not denying that textbooks are an integral part of the teaching process, was not persuaded that this relationship between textbooks, teaching process and school requires or even admits of a finding of aid to religion.[63] The majority citing *Pierce* predicated a workable dichotomy between secular and religious education indicating that the books furnished are employed only in the pursuance of the first goal—secular education.[64] The Court concluded with the general policy argument that private education plays a significant role in the American educational scheme and is relied on by many Americans who place education extremely high in the order of priorities.[65]

The crucial link in the majority's analysis is the conclusion that the primary beneficiary under this law is the child attending school or his parent. This is an adoption of the child benefit doctrine.[66] This theory has been applied in other cases where public funds were used to meet the educational needs of pupils attending private sectarian schools.[67] The problem with this theory is limiting it

59. New York Education Laws § 701(3) sets out the requirements for lending the textbooks.

60. Board of Education v. Allen, 392 U.S. 236, 242 (1968).

61. Everson v. Board of Education, 330 U.S. 1, 17 (1947). The Court states that the payment of bus fares by the state helps children to get to parochial school and in some instances without such reimbursement, some parents might not send their children to sectarian schools. But this result was not prohibited by the first amendment.

62. 268 U.S. 510 (1925).

63. Board of Education v. Allen, 392 U.S. 236. Appellants tried to distinguish *Everson* on the grounds that transportation is not critical to the teaching process but textbooks are. Therefore when the state furnishes textbooks procured from public funds it is aiding a religious school in its religious function.

64. *Id.* at 245.

65. *Id.* at 247.

66. *Id.* at 243-4.

67. Bowker v. Baker, 73 Cal. App. 2d 653, 167 P.2d 256 (1946) The transportation expenses of pupils attending parochial schools was paid for by the state. Borden v. Louisiana State Board of Education, 168 La. 1005, 123 So. 655 (1929). Textbooks were furnished to all children regardless of the schools they attended. Adams v. County Commissioners of St. Mary's County. 180 Md. 550, 26 A.2d 377 (1942). Parochial schools were reimbursed by the state for transporting its students. Board of Education v. Wheat, 174 Md. 314, 199 A. 628 (1938). Transportation was furnished to parochial school students. Chance v. Mississippi State Textbook Rating & Purchasing Board, 190 Miss. 453, 200 So. 706 (1941). Textbooks

within some kind of rational bounds. The court in *Gurney v. Fegerson*[68] pointed to this very problem when it said:

> It is true this use of public money and property aids the child, but it is no less true that practically every proper expenditure for school purposes aids the child.[69]

Opponents of the child benefit doctrine contend that under its rationale public funds could be used to erect parochial school buildings, pay the salaries of teachers in these schools and defray the expenses of maintaining and operating the school facility.[70] This contention is logically sound. However, the Supreme Court has apparently used a pragmatic test of who or what is being primarily benefited in determining what is constitutionally permissible. The modifier *primarily* is important because in a student-school relationship one cannot totally obliterate one of the parties. The relationship is dynamic; what effects one of the components must of necessity effect the other. Those who adhere to the child benefit theory accept this relationship for what it is and look to the primary beneficiary of the state aid. It is submitted that it is practical to say that those who concur with the child benefit doctrine would find state appropriations for parochial school teachers' salaries an establishment of religion and therefore prohibited by the first amendment because of the nature and primary purpose of the aid.

Mr. Justice Fortas' dissenting opinion in *Allen* involves the mechanics of selecting the textbooks to be used in the sectarian school. Apparently, the statute would be constitutional in his view if the books to be loaned were chosen by the public school authorities.[71] He argues that because private school pupils are loaned books selected by private school authorities, they are using *special*[72] books which are not a part of a general program of loaning textbooks to all children. Mr. Justice Fortas' opinion seemingly does not meet the issue under adjudication. His opinion somehow assumes that religiously oriented textbooks will be used by sectarian school pupils even though two criteria are established within the statute requiring a public school board or official to approve the text-

---

were supplied to parochial students. Everson v. Board of Education, 330 U.S. 1 (1947). Parents were reimbursed for school transportation expenses regardless of the non-profit school their children attended.

68. 190 Okla. 254, 122 P.2d 1002 (1942). This case concerned the use of public funds to furnish transportation for children attending parochial schools.

69. *Id.*, at 255, 122 P.2d at 1003.

70. The underlying assumption of the theory is that the child is not disqualified from receiving those benefits which the state bestows on all children merely because he attends a private sectarian school. The fact that the parochial school derives some benefit is thought to be incidental. *See* R. Drinan, Religion And Courts And Public Policy 154 (1963).

71. Board of Education v. Allen, 392 U.S. 236. The textbooks are selected by the private school using the following criteria which is in the state law:

> Text-books which are designated for use in any public elementary or secondary schools of the state or are approved by any boards of education, trustees or other school authorities.

72. *Id.* at 271.

book.[73] The majority states clearly that only secular textbooks may be approved.[74]

Mr. Justice Douglas traveled the same path as Mr. Justice Fortas but he walked a much more circuitous and lengthy route. But at the end of his path he viewed the same scenery: private school students using textbooks which are sectarian in slant and which propagandized the doctrines of the particular religion which maintains the school.[75] Douglas cited passages from a number of books which are definitely not objective presentations of the subjects.[76] He feared that state authorities would not be able to differentiate between secular textbooks and religiously oriented textbooks.[77] But while these fears may be grounded in fact, this does not mean that the statute itself is unconstitutional. It could mean only that the manner in which the statute is implemented is unconstitutional and this depends on proof that these kinds of textbooks are being requested by parochial school students and loaned by the public school boards.

Mr. Justice Black argued that "books are the heart of any school"[78] and this statute authorized financial aid in teaching and propagating sectarian religious viewpoints.[79] He made the basic assumption that the textbooks furnished to the students will directly assist the teaching of religious ideology. Yet, it seem plausible to utilize his language relating to the transportation[80] situation in reference to the textbook situation. Textbooks employed in sectarian schools need not necessarily give religious slants to what would normally be identified as secular subjects.

IV. Conclusions

The constitution does not forbid all aid to religious institutions.[81] It does prohibit all aid to a *religious function.*[82] The problem raised by the New York Textbook Loan Law is whether this is an aid to a religious function. Those who would consider this statute as a law respecting an establishment of religion consider that the loaning of textbooks to students attending sectarian schools is equivalent to financial support of such schools by the state. While *Pierce v.*

---

73. New York Education Laws § 701 (1967 Supp.) requires that textbook to be loaned is either designated for use in any primary or secondary schools in the state or is approved by any board of education, trustee or school authority in the state.

74. Board of Education v. Allen 392 U.S. 236, 245 (1968).

75. *Id.* at 262.

76. *Id.* at 258-61.

77. *Id.* at 257.

78. *Id.* at 253.

79. *Id.* at 252.

80. Everson v. Board of Education, 330 U.S. 1, 17 (1947). The Court regarded such general governmental services as police and fire protection as permissible aid to religious institutions. Government neutrality is the touchstone. (330 U.S. at 18).

> [The First] Amendment requires the state to be neutral in its relations with nonbelievers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religious than it is to favor them.

81. Cushman, *Public Support of Religious Education in American Constitutional Law,* 45 Ill. L. Rev. 333, 348 (1950).

82. Everson v. Board of Education, 330 U.S. 1, 15-16 (1947).

Society of Sisters[83] settles the right of parents to educate their children in schools which teach religious doctrines, the opponents of the Textbook Loan Law say that this does not mean that the state must or *may* contribute funds to such educational processes.

The proponents of the law view it as a general welfare measure completely within the constitutional powers of the state. They consider the student as the primary recipient of the aid and the school as an incidental beneficiary.

It is submitted that neither of these opposing views is dispositive of the issue. We live in a pluralistic society which no longer fears an establishment of a state religion as our forefathers did.[84] Yet, as taxpayers and individuals, professing various religious beliefs, we do not want our tax money used to finance a school operation in which views repugnant to our own are taught. However, we realize how important quality education is for the man of the 20th century. Less and less is he making a living by the sweat of his brow. More and more, our society is demanding individuals with skills and technical knowledge.

But how does this all relate to the constitutional requirements of the first amendment? The interpretation of a "law respecting an establishment of religion" must reflect the times we live in. The majority of the Court has not accepted an absolute approach to the establishment clause.[85] If the state can show a valid reason for aiding the educational processes within a sectarian school, it is submitted that the Court will conclude that there is no violation of the establishment clause. This seems to be the rationale of the *Everson* and *Allen* cases. The Court believed that both statutes in the above cases involve public welfare legislation which embraces all school children regardless of the school they attend. The improvement of the child's educational opportunities was the purpose and intent of the legislation. The Court did not view these statutes as aiding a religious function.

The Supreme Court's interpretation of the establishment clause becomes more important when we consider the federal government's vast financial involvement in education: The Elementary and Secondary Education Act of 1965. Until this year, federal taxpayers could not sue alleging unlawful federal expenditures.[86] Now, the Court has carved out an exception to this rule in *Flast v. Cohen*[87] which holds that a federal taxpayer has standing to challenge a federal statute on the ground that it violates the Establishment and Free Exercise Clause of the First Amendment. Both Title I[88] and Title II [89] of the 1965 Education Act provide certain benefits for children regardless of the

83. 268 U.S. 510 (1925).
84. Everson v. Board of Education, 330 U.S. 1, 8 (1947).
85. *See* Note, 48 Minn. L. Rev. 929 (1964).
86. Frothingham v. Mellon, 262 U.S. 447 (1923). The Court ruled that a federal taxpayer does not have standing to challenge the constitutionality of a federal statute.
87. 392 U.S. 83 (1968).
88. *Id.* at 86.
89. *Id.* at 86-7.

school they attend. It is possible to suggest that the Supreme Court may view this federal law in the same light as the New York Textbook Loan Law and accordingly sustain its constitutionality.

HELEN M. KANEY

ACCORD AND SATISFACTION: CONDITIONAL TENDER BY CHECK UNDER THE UNIFORM COMMERCIAL CODE

Frequently, in commercial relations, a dispute arises as to the amount due on an admittedly existing debt. Assume that A and B are engaged in the trading of hay and that A has ordered five hundred bales at one dollar per bale. When the hay arrives A discovers that there are only four hundred and fifty bales in the shipment. Since A could have sold the missing fifty bales of hay at a profit of one dollar per bale, he believes that one hundred dollars should be deducted from his bill to B representing fifty dollars lost value of hay and fifty dollars lost profit. B on the other hand reasons that only the cost of the missing hay—fifty dollars—should be deducted from the purchase price. In an effort to compromise, A subtracts seventy-five dollars from the debt and tenders a check marked "payment in full." It is at this juncture that the legal problem, which this comment considers, arises.

A tender upon the condition of full payment is often made when there is a dispute as to the exact amount owed. In order to avoid litigation, or a continuing conflict, the debtor may submit a check for more than the amount he thinks he owes but for less than the creditor claims is due.

The hypothetical above assumes the good faith of the debtor, which is certainly not always the case. In an effort to examine the problem from both sides, suppose that all five hundred bales arrive as ordered. A is unable to sell all of the hay and as a result fifty bales remain unsold. A then writes to B and claims that he ordered only four hundred and fifty bales, and as a result of the excess shipment the other fifty bales have spoiled and are useless. He sends a check for four hundred and fifty dollars to B marked "payment in full" in the hope of escaping payment of what he justly owes.

If the debtor is tendering more than he believes is due in order to compromise, he wants to be assured that the check will either be accepted in full payment or returned. He fears that the creditor will take advantage of him by cashing the check and merely applying it to reduce the debt; to guard against this prospect, the debtor marks his check "payment in full."

Upon receiving a check from a debtor stating that it is in full payment, the creditor is confronted with a difficult problem. Naturally, he would prefer to cash the check and still preserve his right to sue for the balance that he believes is due. There is a possibility, however, that when the creditor sues for