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Book Notes

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PRIVATE CHURCHES AND PUBLIC MONEY: CHURCH-GOVERNMENT FISCAL RELATIONS. By Paul J. Weber[1] and Dennis A. Gilbert.[2] Westport, Connecticut: Greenwood Press 1981. Pp. xx, 260. $27.95.

The separation of church and state has always been a fundamental principle of American law. In *Private Churches and Public Money: Church-Government Fiscal Relations*, Paul J. Weber and Dennis A. Gilbert focus on the controversy this principle has generated regarding public aid to religion. Despite the theoretical separation of church and state, enormous amounts of government aid, from property tax exemptions to higher education grants, flow to religious organizations.[3] The reality of public aid conflicts with the theoretical separation of government and religion and is one factor leading to confusion and burgeoning litigation. The Supreme Court of the United States, the authors argue, has compounded this confusion by allowing some aid to religion while prohibiting it at other times without clearly distinguishing the situations (pp.37-67).

Weber and Gilbert respond to this confusion by advocating a theory of "fiscal neutrality." This theory only prohibits government aid directed to religious organizations performing uniquely religious functions (p. 186). Religious organizations' secular functions would thus be treated in the same manner as similarly situated private organizations.

Weber and Gilbert reject a strict interpretation of the first amendment's religion clauses by referring to their legislative history. The authors identify two classic schools of thought on these clauses: the separationist school and the accommodationist school. The separationist argues that the Establishment Clause forbids any form of governmental economic assistance to religion. The accommodationist contends that the Free Exercise Clause requires government to accommodate Americans — by economic assistance if necessary — in their desire to exercise religion (pp. xiii-xiv). The first amendment's legislative history shows the Establishment Clause prohibited government from coercing, disabling or privileging a person or organization

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3 Weber and Gilbert say that federal obligations to religiously affiliated institutions of higher education amounted to nearly $500 million in 1975 (p. 20).

due to religious affiliation. The Establishment Clause's prohibition against privileging religion weakens the strict accommodationist view because providing economic assistance selectively to a religious organization would clearly violate this clause by privileging one organization over another due to religious affiliation (pp 82-87). Congress, however, never directly prohibited or even discussed aid to religion. Thus, the separationist argument for an "absolute" prohibition against government aid also lacks a substantial foundation in the legislative history of the first amendment (pp. 15-20).

In discussing aid-to-religion cases, Weber and Gilbert show how the Supreme Court has nevertheless applied both accommodationist and separationist arguments to arrive at the current law.[4] This has led to a confused series of tests for different types of aid. The authors contrast the holdings in *Tilton v. Richardson*,[5] which allowed direct aid to higher education, with *Lemon v. Kurtzman*,[6] which disallowed similar direct aid to elementary education. Weber and Gilbert assert that such a result apparently indicates that the Supreme Court believes colleges and universities can separate secular from sectarian functions while elementary schools cannot (p.42). The authors argue that these cases show the "double-standards" and "questionable historical interpretation" inherent in the Court's holdings concerning aid to higher education (p.54).

Weber and Gilbert dub these confusing and inconsistent holdings a classic example of "case-knife mentality" (p.73). In *The Adventures of Huckleberry Finn*, Huck and Tom Sawyer try to free a friend from imprisonment in a shed by digging him out. Having just read *The Count of Monte Cristo*, Tom insists that their picks are case knives since the only "right" way to dig an escape tunnel is with a case knife. The authors argue that the Supreme Court similarly "pretends" to prohibit aid to religion by distinguishing direct and indirect aid. Weber and Gilbert assert that no such distinction exists since an indirect $100 tax exemption benefits its recipient just as

4 Concentrating on aid to education cases, Weber and Gilbert analyze Roemer v. Board of Public Works, 426 U.S. 736 (1976), Meek v. Pittenger, 421 U.S. 349 (1975), Levitt v. Committee for Public Education and Religious Liberty, 413 U.S. 472 (1973), and Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1973). These cases led to the current three-prong test of Wolman v. Walter, 433 U.S. 229 (1977). To meet this test a statutory aid program must: (1) have a secular legislative purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) not foster excessive government entanglement with religion (p. 51).

5 397 U.S. 664 (1970).

6 403 U.S. 672 (1971).

much as a direct $100 government payment. By admitting this, they argue, the Court would clear the path for a consistent approach to religious aid questions. The present "case-knife" approach merely breeds "cynicism" as "legislators try to mold policies to fit the constitutional contortions demanded by the Court" (pp. 74-75).

Other decisions have adopted a neutralist approach to some types of state aid to religion. The authors cite *Walz v. Tax Commission*[7] as a major step toward a neutralist interpretation of the religion clauses (p. 55). *Walz* involved an indirect form of aid—a tax exemption requiring no direct payment from government to religion. The Court in *Walz* upheld the tax exemption and recognized three elements of fiscal neutrality: (1) abandonment of strict separationist views; (2) acknowledgement that government aids religion; and (3) treatment of religious organizations in the same manner as similarly situated secular organizations (p.56).

Weber and Gilbert have developed their theory of fiscal neutrality in response to the need for a more uniform approach. They convincingly assert that fiscal neutrality will deal more consistently and equitably with public aid to religion questions. Expanding on a theory developed by Professor Phillip Kurlund of the University of Chicago Law School, the authors argue that the first amendment's religion clauses should be read as a single precept prohibiting government from using religion as a classification to confer a benefit or to impose a burden (p. 137). Weber and Gilbert argue that these clauses should also be read in conjuction with the fourteenth amendment's equal protection clause (p. 144). Fiscal neutrality, therefore, would treat religious organizations like all similarly situated organizations. These similarly situated organizations, such as charities or non-sectarian private schools, perform many functions often performed by religious organizations. The authors assert that in these secular functions all such institutions, including religious organizations, may be both regulated and aided by government. Only when a function is unique to religion will government have no proper role in regulating or aiding religion (p. 186).

The last element of fiscal neutrality, which Weber and Gilbert term "suspect classification," sets their theory apart from Kurland's. Where Kurland preferred no classification, fiscal neutrality would allow classification according to religion in two situations: whenever increased governmental regulation severely burdens the free exercise of religion, or when government extends benefits to voluntary organi-

7 403 U.S. 602 (1971).

zations and it would be both fair and efficient to include religious associations on an equal basis (p. 149). The attractiveness of using religion as a suspect classification stems from its flexibility. The classification establishes the general rule that courts should treat all similarly situated organizations alike. In rare circumstances religion, like "race" or "nationality," may be considered to prevent inequity.

Weber and Gilbert's efforts have resulted in a thorough and easily understandable work. While they admit that their fiscal neutrality theory stands untested and that other possible solutions remain, they objectively explore the consequences that would result from their theory's adoption and show how it fits into many tests already used by the courts. *Private Churches and Public Money: Church-Government Fiscal Relations* provides a timely alternative in an increasingly uncertain area and would appeal to practitioners and academicians alike.

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