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Patrick S. Duffy

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By PATRICK S. DUFFY*

THE Supreme Court said in 1925 that parents may, in the discharge of their duty under state compulsory education laws, send their children to a religious rather than a public school if the school meets the secular educational requirements which the state has power to impose.[1] Succeeding opinions on state aid to nonpublic schools have acknowledged that landmark decision and accompanied it with an endorsement of nonpublic education. Thus, we read in the 1968 textbook case of *Board of Education v. Allen*:[2]

> Underlying these cases, and underlying also the legislative judgments that have preceded the court decisions, has been a recognition that private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience.[3]

In its most recent decision in this area, the Court was equally complimentary to church-related schools:

> Finally, nothing we have said can be construed to disparage the role of church-related elementary and secondary schools in our national life. Their contribution has been and is enormous.[4]

This same Court also took cognizance of the fiscal crises confronting nonpublic schools in these words:

> Nor do we ignore their economic plight in a period of rising costs and expanding need. Taxpayers generally have been spared vast sums by the maintenance of these educational institutions by religious organizations, largely by the gifts of faithful adherents.[5]

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* A.B., 1950, Carlow College, Ireland; Ph.D., 1966, Stanford; J.D., 1970, Catholic University.

1. Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925).
2. 392 U.S. 236 (1968).
3. *Id.* at 247.
4. Lemon v. Kurtzman, 403 U.S. 602, 625 (1971).
5. *Id.*

Thus, while acknowledging the constitutional right of these schools to exist, their national merit, economic crises, and general benefit to all taxpayers, such factors have not been the issues before the Court in state aid to nonpublic school cases. Rather, the sole question is whether state aid to these schools is consistent with the mandate of the religious clauses of the First Amendment. The overriding problem of federal or state aid to nonpublic schools remains a constitutional one;[6] that is to say, would such aid violate the United States Constitution? To answer this question requires a review of the First and Fourteenth Amendments to the Constitution, the subject of standing to sue, and pertinent church-state constitutional decisions. Consideration of alternatives to federal or state aid to nonpublic schools also warrants the inclusion of Supreme Court decisions dealing with religion in public schools.

General Considerations

First Amendment

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .[7]

The formula in this first section of the First Amendment has been a guiding principle in church-state affairs for the past 180 years. "Establishment" and "free exercise" are the two key elements in the deceptively simple sixteen word equation. They govern two categories of school cases: those involving religion in the public school and those involving the use of public funds for nonpublic education.

Cases do not always clearly fall under either the establishment clause or the free exercise clause and any generalization in this regard must be tempered by a warning against oversimplification. Although cases involving aid to sectarian schools are generally treated as establishment cases, nevertheless, it has been argued vigorously that the free exercise rights of parents who wish to have their children educated in sectarian schools are infringed when aid equivalent to that given to public schools is denied sectarian schools.[8] Categorization is further complicated when a determination has to be made as to what constitutes religion,[9] or when a distinction must be made between primary religious

6. *See* L. PFEFFER, CHURCH, STATE AND FREEDOM 520-29 (rev. ed. 1967).

7. U.S. CONST. amend. I.

8. *See* R. DRINAN, RELIGION, THE COURTS, AND PUBLIC POLICY 192 (1963).

9. *See* Torcaso v. Watkins, 367 U.S. 488 (1961), where the Court declared unconstitutional a Maryland law requiring a profession of belief in the existence of God before one could hold public office. Mr. Justice Black listed both ethical culture and

and secular effects.[10]

History is often invoked to answer these questions. It has been said that "[n]o provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment."[11] Considerable judicial opinion and periodical commentary have had liberal recourse to the history of the First Amendment for the purpose of reinforcing the doctrines, theories, and tests which they espouse. These scholarly endeavors have been beset by two major problems—namely, the scant documentation of early legislative history and the internal inconsistencies of available data.[12] In his celebrated historical outline of the First Amendment, Justice Brennan was constrained to observe: "[O]n our precise problem the historical record is at best ambiguous, and statements can readily be found to support either side of the proposition,"[13] and to warn: "A too literal quest for the advice of the Founding Fathers upon the issues of these cases seems to me futile and misdirected . . . ."[14]

Obviously, the Founding Fathers did not foresee the expanding and interrelating functions of both government and religion or the succeeding church-state issues which would ensue. Yet, the political, religious, and social history of the First Amendment era illuminates at least the original climate and "historic purpose of the First Amendment."[15] There is a general concensus that the free exercise clause entrusted to us a delicate respect for the inviolability of conscience and that the establishment clause was designed to protect us from the evils of a government establishment of religion. In the words of a contemporary legal authority on the First Amendment:

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secular humanism as religions. *Id.* at 495 n.11 (dictum). *See also* United States v. Seeger, 380 U.S. 163 (1965) (the Supreme Court in granting draft exemptions to humanists recognized the movement as a religion even though there was no belief in a Supreme Being).

10. *See* McGowan v. Maryland, 366 U.S. 420, 448 (1961), wherein a secular effect independent of religion is attributed to Sunday closing laws; Everson v. Board of Educ., 330 U.S. 1, 7 (1947) (the secular effect of protecting children going to and from church schools from the very hazards of traffic). *But see* School Dist. v. Schempp, 374 U.S. 203, 226 (1963); Engel v. Vitale, 370 U.S. 421, 424 (1962).

11. Everson v. Board of Educ., 330 U.S. 1, 33 (1947) (Rutledge, J., dissenting).

12. *See* Sky, *The Establishment Clause, the Congress and the Schools: An Historical Perspective*, 52 VA. L. REV. 1395, 1401-02 (1966).

13. School Dist. v. Schempp, 374 U.S. 203, 237 (1963) (Brennan, J., concurring).

14. *Id.*

15. Jones, *Church-State Relations: Our Constitutional Heritage*, in RELIGION AND CONTEMPORARY SOCIETY 163 (H. Stahmer ed. 1963).

> History should furnish the informed perspective needed to fashion a rational constitutional standard that serves several purposes, including cognizance of the evil consequences feared by the framers, appreciation of values presently cherished, and capability of consistent application to the relevant problems.[16]

Fourteenth Amendment

The free exercise and establishment clauses of the First Amendment were prohibitions directly addressed to Congress. However, the Supreme Court applied the religious clauses to state action through the due process clause of the Fourteenth Amendment.[17] They were considered to belong in that core category of rights "of the very essence of a scheme of ordered liberty,"[18] encompassed within the Fourteenth Amendment. All of the clauses of the Fourteenth Amendment—"abridgment of privileges or immunities," "due process," and "equal protection"—have been pleaded but thus far the Court has only recognized the due process clause for the purpose of securing religious liberty without specific reliance on the First Amendment. In the celebrated case of *Pierce v. Society of Sisters*,[19] the Supreme Court held that a state statute requiring all children to attend a public school violated the Fourteenth Amendment by interfering with the liberty of parents in the education of their children and depriving private schools of their property without due process.

Although the equal protection clause has been better known for its application to segregation cases in education,[20] it is appearing in church-state cases with recurring frequency. Where aid to nonpublic schools has been denied, an equal protection of sectarian school children and parents argument has been advanced without reference to the First Amendment.[21] Opponents of aid to nonpublic schools now plead the equal protection clause as a matter of course on the grounds that private and sectarian schools discriminate in religious, race, and by social and economic criteria.[22]

16. Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 CALIF. L. REV. 260, 264 (1968).

17. Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (1948) (establishment clause); Cantwell v. Connecticut, 310 U.S. 296 (1940) (free exercise clause).

18. *See* Palko v. Connecticut, 302 U.S. 319, 325 (1937).

19. 268 U.S. 510 (1925).

20. Brown v. Board of Educ., 349 U.S. 294 (1955); Brown v. Board of Educ., 347 U.S. 483 (1954); Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

21. *See* School Dist. v. Kelley (Mich., filed Nov. 12, 1970).

22. *See* Lemon v. Kurtzman, 310 F. Supp. 35 (E.D. Pa. 1969), *rev'd and re-*

In effect, restrictions of the First and Fourteenth Amendments must be examined together with restrictions of a state constitution and its amendments when deciding the validity of state enactments involving aid to nonpublic education or public school involvement with religion.

Standing to Sue

Until 1968, *Frothingham v. Mellon*[23] barred suits by federal taxpayers challenging the validity of government spending. In 1968 the forty-year-old precedent was limited by the decision in *Flast v. Cohen*.[24] The *Frothingham* rule, essentially a judicial gatekeeping policy, had distinguished litigants who had a substantial stake from those whose interests were de minimis in the issues they sought to bring to trial. The *Flast* Court concluded that such a bar, admitting of degrees of interest, cannot be absolute and for standing to sue they fashioned a new criterion which has a twofold requirement—namely, that there be a logical nexus or relation between the status of the litigant on the one hand and both the challenged legislative enactment and the precise nature of the alleged constitutional infringement on the other. Thus, for instance, in a Pennsylvania case[25] the lower court eliminated all but one plaintiff in its narrow test of standing, and he survived by virtue of the fact that he had attended the harness races and had accordingly contributed to the precise tax from which the state had paid the subsidy in issue to nonpublic schools. However, that same plaintiff was not permitted to raise equal protection issues claiming an adverse effect from the litigated subsidy upon Negro children in the public schools, because his children had neither applied for, nor been denied admission to, a nonpublic school.

The immediate result of *Flast* was to at least crack the door to judicial testing of federal expenditures under the Establishment Clause. Having acquired standing to sue in *Flast*, counsel there abandoned the purpose of his case which was to test the Elementary and Secondary Act of 1965,[26] choosing instead to challenge the Higher Education

manded, 403 U.S. 602 (1971); DiCenso v. Robinson, 316 F. Supp. 112 (D.R.I. 1970), *aff'd*, 403 U.S. 602 (1971); King, *Rebuilding the "Fallen House"—State Tuition Grants for Elementary and Secondary Education*, 84 HARV. L. REV. 1057, 1084 (1971).

23. 262 U.S. 447 (1923).

24. 392 U.S. 83 (1968).

25. Lemon v. Kurtzman, 310 F. Supp. 35 (E.D. Pa. 1969), *rev'd and remanded*, 403 U.S. 602 (1971).

26. Pub. L. No. 89-10, 79 Stat. 27 (codified in sections of 20, 42 U.S.C.). U.S.C.).

Facilities Act of 1963,[27] in a three-judge federal court in Connecticut.[28] Since 1968, standing to sue has been modified to a point where it is no longer considered an obstacle to bringing civil rights or church-state issues before the courts.[29]

Establishment Clause

The legal exegesis of the establishment clause began with *Everson v. Board of Education*[30] in 1947. Of the twelve subsequent landmark cases in this area, nine have dealt with education in the broadest sense of the term. Of these, four have considered aid of various forms to nonpublic schools, four have dealt with a nexus between religion and public schools, and one was concerned with federal aid to church-related colleges and universities. The following is an abbreviated table of the pertinent cases:

EDUCATION CASES UNDER THE ESTABLISHMENT CLAUSE

Year	Case Name	Religion & Public Schools	Aid to Nonpublic Schools	Issue
1947	Everson	-	1	Bus Rides for Nonpublic School Children
1948	McCollum	1	-	Released Time Program On Public School Premises
1952	Zorach	2	-	Released Time Program Off Public School Premises
1962	Engel	3	-	Prayer in Public Schools
1963	Schempp	4	-	Bible Reading in Public Schools
1968	Allen	-	2	Textbooks for Nonpublic School Pupils
1971	DiCenso	-	3	Teacher Salary Supplements for Nonpublic Schools
1971	Lemon	-	4	Purchase of Services from Nonpublic Schools
1971	Tilton	-	5	Aid to Church-Related Higher Education

27. 20 U.S.C. §§ 701-21, 751-58 (1970).

28. Tilton v. Finch, 312 F. Supp. 1191 (D. Conn. 1970), *vacated and remanded*, 403 U.S. 672 (1971).

29. *See* Data Processing Serv. v. Camp, 397 U.S. 150 (1970).

30. 330 U.S. 1 (1947).

Neutrality

In *Everson* we find the celebrated dictum which undertook to clarify the establishment of religion clause:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another . . . . 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.[31]

It was apparently an unequivocal introduction to the sensitive subject of aid to sectarian schools, but it has had the unhappy history of having been invoked by advocates on both sides of the issue of what constitutes aid. The Court sustained a state tax supported program for the reimbursement of funds spent by parents for the bus transportation of their children to public or Catholic parochial schools. The Court admitted the

> possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the State.[32]

Busing was classified, with such things as the furnishing of police and fire protection and of water and sewage services, as "public welfare legislation" which provides services "indisputably marked off from the religious function" of the schools.[33] Thus, the Court was considered to have gone to the threshold of the sectarian school with aid; the constitutionality of the issue rested at this point until twenty-one years later when the Court heard the *Allen* case concerning state supplied textbooks for nonpublic school children.[34] In *Everson* and later in *Allen*, the Court approved state aid to nonpublic school children and parents. Varying forms of direct federal assistance[35] to nonpublic schools were not issues before the Court. The constitutional test of such aid in recent Supreme Court cases had concentrated rather on

31. *Id.* at 15-16.
32. *Id.* at 17.
33. *Id.* at 17-18.
34. Board of Educ. v. Allen, 392 U.S. 236 (1968).
35. Federal programs providing secular assistance at the elementary and secondary level include: National School Lunch Act, 42 U.S.C. §§ 1752, 1755, 1758, 1761 (1970); National Defense Education Act of 1958, 20 U.S.C. §§ 401-602 (1970); Manpower Development and Training Act of 1962, 42 U.S.C. §§ 2571-626 (1970); Economic Opportunity Act of 1964, 42 U.S.C. §§ 2701-994 (1970); Elementary and Secondary Education Act of 1965, 20 U.S.C. §§ 236-44(a) (1970).

the tests or safeguards surrounding federal and state aid to nonpublic schools.

Religion in the Public Schools

In 1948 the Court, in *McCollum*,[36] declared unconstitutional the Champaign Plan under which weekly classes in religious instruction were offered in public school buildings to public school pupils whose parents requested that they be permitted to attend. Instruction was given by religious teachers, at no expense to school authorities, but instructors were subject to the approval and supervision of the superintendent of schools.

By contrast, in 1952 the Court, in *Zorach*,[37] upheld a "released-time" program whereby public schools in New York, on receipt of written requests from parents, released students before the close of the school day so that they might attend religious instruction or devotional services on religious premises. In 1962 the Court, in *Engel v. Vitale*,[38] declared unconstitutional the mandatory daily recitation of a prescribed prayer by each class in the presence of a teacher at the beginning of each school day. Finally, in the fourth of the schooling and religion cases, in 1963 the Court, in *Schempp*,[39] struck down a Pennsylvania statute requiring a daily reading of at least ten verses from the Bible in public schools.

To many, the combined decisions in *McCollum*, *Engel* and *Schempp* would appear to foreclose the subject of religion where public schools are concerned. This interpretation is unduly restrictive and, in fact, unwarranted on a close reading of those opinions.

In *McCollum* the Court addressed itself specifically to the utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith.[40] The Court found that a state could not consistently with the First and Fourteenth Amendments utilize its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals.[41] Four members of the Court found that the State of Illinois had "authorized the commingling of sectarian with secular instruction in the public schools."[42]

36. Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (1948).
37. Zorach v. Clausen, 343 U.S. 306 (1952).
38. 370 U.S. 421 (1962).
39. School Dist. v. Schempp, 374 U.S. 203 (1963).
40. Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 209 (1948).
41. *Id.* at 210.
42. *Id.* at 212 (Frankfurter, J., concurring).

In *Engel* the Court undertook to preclude government officials from composing "modes of worship" or prayers for use in public schools, regardless of the brevity, simplicity or denominational neutrality of their devotional compositions. The Court saw fit to distinguish school exercises, which, though religiously oriented to some degree, it considered primarily patriotic or ceremonial rather than religious.

The *Schempp* case proscribed the use of the Bible as an instrument of religious ceremony or observance in the public schools of Pennsylvania. The Court rejected the contention of counsel "that the Bible is here used either as an instrument for nonreligious moral inspiration or as a reference for the teaching of secular subjects."[43]

These decisions—which ruled on the teaching of sectarian religion, school prayer and Bible reading in public schools—underscore the inextricable links between religion and the cultural life of the nation. Thus the *Engel* majority opinion finds "[t]he history of man is inseparable from the history of religion."[44] Similarly, in *Zorach* Mr. Justice Douglas wrote in the majority opinion: "We are a religious people whose institutions presuppose a Supreme Being."[45] In *Schempp* we read: "It is true that religion has been closely identified with our history and government."[46]

How then, it might well be asked, can a student in public school imbibe the full historical and literary inheritance of our society without exposure to the religious values which infused the life of the nation? The question seems to have been anticipated. In *McCollum*, Mr. Justice Frankfurter stated, "We do not consider, as indeed we could not, school programs not before us . . . ."[47] Speaking of the Champaign Plan, the same concurring opinion of four justices states: "The courses do not profess to give secular instruction in subjects concerning religion. Their candid purpose is sectarian teaching."[48] Thus, the Court contemplates the concept of secular or nonsectarian religion. The constitutional propriety of teaching about religion is more clearly enunciated in the *Schempp* opinion:

> [I]t might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly

43. 374 U.S. at 224.
44. Engel v. Vitale, 370 U.S. 421, 434 (1962).
45. Zorach v. Clausen, 343 U.S. 306, 313 (1952).
46. 374 U.S. at 212.
47. Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 231 (1948).
48. *Id.* at 226.

> may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment.[49]

Mr. Justice Brennan, concurring, said:

> The holding of the Court today plainly does not foreclose teaching *about* the Holy Scriptures or about the differences between religious sects in classes in literature or history. Indeed, whether or not the Bible is involved, it would be impossible to teach meaningfully many subjects in the social sciences or the humanities without some mention of religion. To what extent, and at what points in the curriculum, religious materials should be cited are matters which the courts ought to entrust very largely to the experienced officials who superintend our Nation's public schools. They are the experts in such matters, and we are not.[50]

Consequently, teaching about religion from purely cultural, historical or literary perspectives is permissible within the constitutional framework of the First Amendment. A public school program of studies in comparative religion with a secular purpose and a primary effect that neither advances nor inhibits religion would pass muster on the *Schempp* test, observe the neutrality of *Everson*, and avoid the church-state entanglements proscribed in the church-tax exemption case of *Walz*.[51]

In at least four states, there exist public school courses that "teach about religion."[52] The history of the Judaeo-Christian heritage, world religions, the philosophy of religion and the Bible as literature are among the courses being taught in English, social studies, and other curriculum areas in public schools. The training of teachers in cultural areas of religion in secular universities is showing signs of expansion.[53] The scholarly publication by ecumenical experts of books suited to nonsectarian studies in religion is lending momentum to this development.[54]

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49. 374 U.S. at 225.

50. *Id.* at 300.

51. Walz v. Tax Comm'n, 397 U.S. 664 (1970).

52. Nebraska, Pennsylvania, Florida and Indiana might be considered to have exceeded the experimental stages that included collaboration between state departments of education and state university departments of education and religion, the production of suitable curriculum, the training of teachers in religious subject matter, and initial experimental teaching about religion in public school classrooms.

53. Workshops, institutes and courses to prepare teachers to teach religion in public schools have been expanding and gaining enrollments. The most widely known programs appear to be at Florida State University at Tallahassee, Pennsylvania State University at University Park and Indiana University at Bloomington.

54. *E.g.*, W. ABBOTT, A. GILBERT, R. HUNT & J. SWAIN, THE BIBLE READER

Aid to Nonpublic Education

In June of 1968, the Court, in the *Allen* case, upheld a New York law requiring each local public school district to lend textbooks free of charge "to all children residing in such district who are enrolled in grades seven to twelve of a public or private school."[55] This case established an important precedent by constitutionally escorting public aid beyond the door of the nonpublic school. Once the concept of a secular textbook in a private or sectarian school was accepted by the Court and its subsidization declared constitutional, arguments in favor of secular teachers and unlimited educational services were predictable.[56]

Allen, though focused on the specific issue of textbooks, was in fact the first constitutional test of federal aid. By the time of the decision, in approximately thirty states (including New York), an opinion had been issued by the local State Attorney General categorizing ESEA funds as federal all the way to the beneficiary, and, as such, immune to any strictures in state constitutions or legislative enactments to the contrary.[57]

Justice White in the *Allen* majority opinion, applied the *Schempp* test and found that the New York law had "a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[58] The opinion saw in the law the authorization of secular books only and assumed the criterion that books lent to students in private schools "are books that are not unsuitable for use in the public schools because of religious content."[59] The court refined the appellant's contention that all teaching in a sectarian school is religious or that "the processes of secular and religious training are so intertwined that secular textbooks furnished to students by the public are in fact instrumental in

(1969), which is edited by a Jesuit, two protestant ecumenical scholars and a rabbi; E. GAUSTAD, A RELIGIOUS HISTORY OF AMERICA (1966).

55. N.Y. EDUC. LAW § 701 (McKinney 1969).

56. Duffy, *The Textbook Case*, 29 THE JURIST 279, 290 (1969).

57. Title II of the Elementary and Secondary Education Act of 1965 in its original form contemplated outright grants to public and nonpublic schools for supplies and equipment. Considerable opposition modified its terms so as to channel federal funds through the states to the school district which in the case of textbooks, purchased the books and lent them to school children. There was constitutional precedent for this procedure in Cochran v. Board of Educ., 281 U.S. 370 (1930), where it was held that a state plan to provide textbooks to parochial school students did not violate the due process clause of the Fourteenth Amendment.

58. Board of Educ. v. Allen, 392 U.S. 236, 243 (1968).

59. *Id.* at 245.

the teaching of religion," by adding: "Nothing in this record supports the proposition that all textbooks, whether they deal with mathematics, physics, foreign languages, history or literature, are used by the parochial schools to teach religion."[60]

Of the two most recent cases on aid to nonpublic schools before the Supreme Court, *Lemon v. Kurtzman*[61] challenged the constitutionality of Pennsylvania's 1968 Nonpublic Elementary and Secondary Education Act.[62] The act provided that all of the proceeds from a certain tax on horse racing up to $10 million, and one half of all the proceeds in excess of $10 million should, under the direction of the Superintendent of Public Instruction, be used for reimbursement to nonpublic schools for the "purchase of secular educational services."[63] Secular services are defined as consisting of courses in mathematics, modern foreign languages, physical science and physical education. The reimbursement is limited to the actual cost to a nonpublic school of the teacher's salaries, textbooks and the instructional material used in the teaching of courses in those four categories.

The act required that the textbooks and instructional materials be approved by the Superintendent of Public Instruction, that a satisfactory level of pupil performance shall have been attained, and made provisions respecting teacher certification in nonpublic schools. The application for reimbursement and the payments themselves were to take place after the close of the year in which the teaching occurred. The act directed that the payments be made directly to the school itself and the school accounts were made subject to state audit. No payment was to be made for any course containing "any subject matter expressing religious teaching." There were no civil rights provisions in the act.

In *Lemon* the United States District Court for the Eastern District of Pennsylvania, voting 2 to 1, upheld the constitutionality of the act, granting defendant's motion to dismiss for failure to state a cause of action. The two judge majority ruled that the purpose and primary effect of the act were secular and that any incidental benefit to the sectarian schools was not an infringement of the First Amendment.

In *DiCenso v. Robinson*[64] the issue was the constitutionality of

60. *Id.* at 248.

61. 310 F. Supp. 35 (E.D. Pa. 1969), *rev'd & remanded*, 403 U.S. 602 (1971).

62. PA. STAT. tit. 24, §§ 5601-09 (Supp. 1971).

63. *Id.* § 5606 (repealed 1970). This section was replaced by section 5606.1 which was to siphon 14 percent of the cigarette tax revenues into the Nonpublic Elementary and Secondary Education Fund.

64. 316 F. Supp. 112 (D.R.I. 1970), *aff'd*, 403 U.S. 602 (1971).

Rhode Island's Salary Supplement Act of 1969. The State of Rhode Island appropriated $375,000 from the state's general treasury for a 15 percent salary supplement for eligible teachers in nonpublic elementary schools under the following terms:

> Every nonpublic schoolteacher shall, upon his or her request, be paid by the state through the commissioner of education, a salary supplement in the amount fixed by law in such installments and at such intervals as shall be fixed by regulation promulgated by the commissioner of education. As a condition for the payment of such salary supplement the commissioner of education shall be satisfied that the teacher:
>
> 1. Is one who teaches in any grade from grade one through grade eight exclusively only those subjects required to be taught by state law to the same extent as those subjects are taught in public schools, or which are provided in public schools throughout the state, or any other subjects that are taught in public schools.
>
> 2. Has a teaching certificate issued by or under the authority of the state board of education in substantially the same manner that such certificates are issued to teachers in public schools.
>
> 3. Is receiving a salary which, including the salary supplement, meets the minimum salary standards for public schools required for eligibility under title 16, chapter 7 of the general laws of Rhode Island.
>
> 4. Is using only teaching materials which are used in the public schools of the state.
>
> 5. Is one who does not teach a course in religion and who signs a statement in which he or she promises not to teach a course in religion for so long as or during such time as he or she receives any salary supplements provided for under the provisions of this chapter.[65]

On June 15, 1970, a three judge district court held this act unconstitutional. The court found the standing of the taxpayer-plaintiffs well settled. On the merits, all three judges ruled that operation of the Salary Supplement Act involved those "reciprocal embroilments of government and religion which the First Amendment was meant to avoid."[66] Two judges also held that the effect of the act was to substantially support a religious enterprise in contravention of the Establishment Clause.

The *Lemon* and *DiCenso* cases were appealed to the Supreme Court where they were consolidated and decided on June 28, 1971. The opinion of the Court summarizes the provisions of both the Rhode Island and the Pennsylvania statutes before it, together with the findings

65. R.I. GEN. LAWS ANN. § 16-51-3 (Supp. 1970).
66. 316 F. Supp. at 122.

of the lower courts in each case. Then the Court with the customary acknowledgment of the grey constitutional areas surrounding the Religion Clauses of the First Amendment underscored the word "respecting" in the Establishment Clause. "A given law might not *establish* a state religion but nevertheless be one 'respecting' that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment."[67] From the *Walz* case which was controlling in this opinion, the Court repeats the three main evils against which the Establishment Clause was designed to afford protection, "sponsorship, financial support, and active involvement of the sovereign in religious activity."[68]

The Court then gleaned three tests from former cases:

—A statute must have a secular legislative purpose.

—A statute's principal or primary effect must be one that neither advances nor inhibits religion.

—A statute must not foster an excessive government entanglement with religion.

Heretofore, the first two tests were known as the *Schempp* test as applied in the *Allen* textbook case of 1968 and the third test was devised in the *Walz* tax exemption case of 1970.

The Court found the respective legislative purposes of Pennsylvania and Rhode Island to be secular. However, it found both primary effects that advance religion and a fostering of church-state entanglements in each case. The third test of entanglement predominates throughout the opinion. Thus, the separation that proved to be a church boon in tax exemption became a barrier in aid to church-related schools.

A section of the opinion is devoted to a working definition and an application of the *Walz* church-state entanglement test. Recognizing the impossibility of total church-state separation, the Court cites "fire inspections, building and zoning regulations and state requirements under compulsory school attendance laws" as examples of "necessary and permissible contacts." If these examples are to be interpreted strictly, the enforcement of federal, state and municipal laws, rules, and regulations are the only permissible constitutional bases of church-state contacts. The criteria used by the Court to measure the degree of entanglement in the cases before it were:

67. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (emphasis added).

68. Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970).

—the character and purpose of the institutions benefited;
—the nature of the aid that the state provides;
—the resulting relationship between the government and the religious authority.

In applying its own criteria to the findings of the district court in Rhode Island, the opinion outlines what the Court conceives to be the religious purpose of sectarian schools, the means employed to attain that purpose, and attendant circumstances that constitute a religious atmosphere in sectarian schools.

Recognizing with the district court that "religious values did not inevitably or necessarily intrude into the content of secular subjects," the Court looked to the "careful governmental controls and surveillance" prescribed by state authorities "to ensure that state aid supports only secular education" as, at least, anticipation by the legislature of the entanglement.

The Court specifically lists bus transportation, school lunches, public health services and secular textbooks as secular, neutral, or non-ideological services, facilities, or materials which were not thought to offend the Establishment Clause in decisions in *Everson* and *Allen*.

In the context of religious neutrality, a distinction is made between textbooks and teachers on the grounds that "a textbook's content is ascertainable, but a teacher's handling of a subject is not." To underscore "the danger that a teacher under religious control and discipline poses to the separation of the religious from the purely secular aspects of pre-college education," the Court examines the religious authority structure, staff composition and norms[69] which obtain in schools in the Diocese of Providence, Rhode Island. Given those cumulative circumstances, the Court finds the notion of a neutral teacher in a Catholic school constitutionally hazardous with the teacher's responsibilities hovering "on the border between secular and religious instruction."

State aid cannot be provided on:

> the basis of a mere assumption that secular teachers under religious discipline can avoid conflicts. The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion—indeed the State here has undertaken to do so.[70]

The Court does not accept the state's conditions guaranteeing neutrality because it feels that:

69. Gleaned by the Court from a "Handbook of School Regulations" which was promulgated by the Diocesan Superintendent of Schools and binding with the force of synodal law in the Diocese.

70. 403 U.S. at 619.

> Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment.[71]

Furthermore, and this would appear to be the essence of this opinion, the very precautions taken by the state to insure that state aid will be surrounded by religious neutrality become themselves the sort of entanglement that the Constitution forbids. The auditing and examination of school records and personnel by the "comprehensive, discriminating, and continuing state surveillance . . . required to ensure that these restrictions are obeyed and the First Amendment otherwise respected," become "a relationship pregnant with dangers of excessive government direction of church schools and hence of churches."[72] Such involvement in church schools constitutes the "excessive entanglements" of *Walz.*

Turning to the Pennsylvania statute the Court does not repeat the application of its criteria because it finds "an educational system that is very similar to the one existing in Rhode Island" with similar purposes, and as a consequence of state aid, similar effects and church-state entanglements.

Nevertheless, in this section of the opinion, the Court distinguishes *Everson* and *Allen* from the Pennsylvania statute on the grounds that the former aid by way of transportation and textbooks was "provided to the student and his parents," whereas the Pennsylvania statute provides "state financial aid directly to the church-related school." Consonant with this distinction, the Court repeats its warning in *Walz:*

> Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards . . . .[73]

The directness of aid test will probably become the constitutional standard emerging from this opinion.

The Court expanded the base of entanglement to include "the divisive political potential of these state programs," thereby raising political divisiveness to the level of a constitutional criterion. The Court acknowledged its former espousal by the late Justice Harlan and former Justice Goldberg and Professor Freund. It was also embraced by Judge Hastie in his dissenting opinion in the *Lemon* case. The Court

71. *Id.*
72. *Id.* at 620.
73. *Id.* at 621, *quoting* Walz v. Tax Comm'n, 397 U.S. 664, 675 (1970).

made two significant allusions in this context, the one to the history of many countries attesting to "the hazards of religion intruding into the political arena" and the other to the relatively few religious groups benefiting by the appropriations before the Court.[74] Briefly, the Court does not favor the injection of state aid to church-related schools into political elections or legislatures in the United States lest political decisions would be influenced by sheer numerical strength of advocates or proponents.

In the final section of the opinion the Court adopted the progression argument rejected in *Walz*. This argument is premised on the view that "modern governmental programs have self-perpetuating and self-expanding propensities." The Court considered the state aid programs before it as innovative to the extent that they constituted a departure from the *Everson* transportation and *Allen* textbook benefits to students and parents.

The Court pays a generous tribute to the enormous contribution of church-related elementary and secondary schools to our national life and concludes by restating its position on aid to these schools:

> Under our system the choice has been made that government is to be entirely excluded from the area of religious instruction and churches excluded from the affairs of government. The Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that while some involvement and entanglement is inevitable, lines must be drawn.[75]

Conclusions

The present forms of state aid to nonpublic schools that survive *Lemon* and *DiCenso* are perhaps best summarized in the words of the Court:

> 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

74. *See* DiCenso v. Robinson, 316 F. Supp. 112 (D.R.I. 1970), *aff'd sub nom.* 403 U.S. 602 (1971), where the district court found that about 25% of the state's elementary students attended nonpublic schools, about 95% of whom attended Roman Catholic affiliated schools, and that to date about 250 teachers at Roman Catholic schools are the sole beneficiaries under the Act. 315 F. Supp. at 14-15. *See* Lemon v. Kurtzman, 310 F. Supp. 35 (E.D. Pa. 1969), *rev'd & remanded*, 403 U.S. 602 (1971), where contracts were made with nonpublic schools which have more than 20% of all students in the state, most of which were affiliated with the Roman Catholic Church.

75. *Id.* at 625.

> common to all students were not thought to offend the Establishment Clause.[76]

In the following words the Court added a crucial condition to its foregoing permissible secular or religiously neutral services, facilities and materials:

> The Pennsylvania statute, moreover, has the further defect of providing state financial aid directly to the church-related school. This factor distinguishes both *Everson* and *Allen*, for in both cases the Court was careful to point out that state aid was provided to the student and his parents—not to the church-related school.[77]

Accordingly, it would appear to be a constitutional formula that in the case of auxiliary services, as they are sometimes termed, all such state benefits to nonpublic education must be secular and directly conferred on all students and parents.

Legislation enacted or proposed in thirteen states[78] similar to that of Pennsylvania and Rhode Island have been adversely affected by this latest Supreme Court decision. What is not readily apparent is the fate of varied state-proposed or enacted legislative programs of assistance to nonpublic schools that include tuition grants, voucher plans, scholarships, tax deductions and exemptions, dual enrollment, shared facilities, shared personnel and similar forms of aid.

It would seem gratuitous to assume that tuition grants, voucher plans, scholarships and tax credits, conform to the standards set in *Lemon* because they confer benefits on students and parents directly, thus avoiding the prohibition of direct aid to nonpublic schools. Legislation involving these elements must also avoid secular-religious distinctions that would entail state supervision thereby giving rise to church-state entanglement. Additionally, the state may not provide public money for unspecified use in a school with a purpose or mission to transmit a faith to children of "an impressionable age." This is the quandary confronting legislative drafting that would channel state aid to the nonpublic school student or parent. Although education grants to parents in varied forms[79] are advocated in the public sector of education, the Court's exclusively religious definition of a church-related school in its latest opinion renders it impossible to equate any of its curricular

76. *Id.* at 616-17.

77. *Id.* at 621.

78. National Catholic Education Ass'n, State Aid to Nonpublic Schools, as of May 15, 1971 (1971).

79. *See* Coons & Sugarman, *Family Choice in Education: A Model State System for Voucher Plans*, 59 CALIF. L. REV. 321 (1971); THE CENTER FOR THE STUDY OF PUBLIC POLICY, FINANCING EDUCATION BY GRANTS TO PARENTS (1970).

areas with those in the public school for the purpose of common state subsidy or financing plans.

Dual enrollment has not been a subject of church-state litigation. The Court in the past has upheld the right of a student to attend a private or a public school. In the absence of legal challenge and a decision to the contrary, it appears to be commonly accepted that students may distribute their time between public and private schools, electing to attend courses in both.

By contrast, shared facilities and shared personnel are issues presently before lower courts.[80] At stake in these cases are such arrangements as the leasing of nonpublic school facilities to the public schools for the conducting of classes by public school teachers for students enrolled at the church-related school and the contracting of public school teachers to nonpublic schools at public expense. Basically, they amount to lease and contract arrangements between public and nonpublic schools. It is difficult to see how these accommodations can withstand the entanglement test applied to *Lemon* and *DiCenso*. A more immediate practical question may arise as to whether church-related schools may be leased to public schools with churches retaining the right to use the premises for the purpose of teaching religion at times other than during public school hours. This arrangement on its face would appear to fall afoul of the 1948 *McCollum* decision forbidding the use of public school property for the purpose of teaching religion.[81]

Underlying all measures of state aid to nonpublic schools will be the consideration of political divisiveness. This criterion has been raised to the status of a constitutional standard. It has the potential to imperil all forms of aid other than those in direct social and neutral services condoned by the Court. It is correlated with the degree of opposition generated against any measure of state aid to nonpublic schools. It is closely linked to the progression argument whereby ongoing and increasing measures of a given form of aid would constitute a "self-expanding and self-perpetuating" religious issue in the political arena.

80. Smith v. Fitzgerald School Dist., Circuit Court for the County of Macomb (Michigan, filed June 26, 1969); Citizens to Advance Public Educ. v. Porter, Circuit Court for the County of Ingham (Michigan, filed Dec. 18, 1969); Montana *ex rel.* Chambers v. School Dist. No. 10, (D. Mont. filed May 20, 1969); Fisher v. School Dist. No. 1, Circuit Court of the State of Oregon for the County of Clackamas (filed Jan. 14, 1970).

81. *See* Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (1948).

It may be added that although the charge of denial of equal protection under the Fourteenth Amendment on the grounds of racial discrimination only merited a footnote in the *Lemon* majority opinion, the issue bids fair to receiving more attention in future state aid to nonpublic school cases. The nonpublic school has become a euphemism[82] with varying definitions depending on social and geographical circumstances. Cases now pending in lower courts against private and sectarian schools charging them with racial discrimination are apt to merit the Court's attention in the not too distant future. The outcome will doubtless add another constitutional rider to any and all forms of state aid to the nonpublic sector of education.

Some significant features of this latest church-state decision on aid to nonpublic elementary and secondary schools merit special attention. The vote in the Pennsylvania case was 8-0 and in the Rhode Island case 8-1. This decisiveness in voting speaks for itself and it contrasts sharply with the 5-4 decision in *Tilton*[83] granting aid to nonpublic higher education. Should the Court later attempt to reconcile the disparities between its opinion denying state aid to nonpublic primary and secondary schools in *Lemon* and *DiCenso* and its reasons for granting federal aid to nonpublic higher education in *Tilton* it is not conjecture to assume that their unanimity in the former may average out to become a reversal of *Tilton*, that is, unless Catholic and other denominational colleges and universities sever all but nominal ecclesiastical identification as illustrated in the history of the Ivy League universities.[84]

For the first time, the Court exceeded its criterion of secular legislative purpose to examine also the religious purposes of parochial elementary and secondary education. This piercing of the ecclesiastical veil created a radical precedent on the part of the Court. In this excursion behind the wall, the Court found a Catholic hierarchical structure and at least a theoretical philosophy of what Catholic education ought to be. As a result, the Court embraced the doctrine of religious permeation. This factor should eliminate future arguments for aid based on secularity at the expense of a religious philosophy of education. That religion permeated the curriculum of denominational

82. *See* Kurland, *The Clouded Crystal Ball: The Supreme Court on Government Aid to Parochial Schools*, 79 SCHOOL REV. 325, 348 (1971).

83. Tilton v. Finch, 312 F. Supp. 1191 (D. Conn.), *vacated & remanded sub nom.* 403 U.S. 672 (1971).

84. *See* Hooper & Pinkerton, *Harvard University*, in 11 ENCYCLOPAEDIA BRITTANICA 138 (1971).

schools has been vigorously argued in the past by opponents of aid to nonpublic schools. The strength of their arguments derived from official documents of the denominations whose schools would benefit from governmental aid. Catholic bishops, writers, and educators have continually repeated the norm of Pope Pius XI "that every . . . subject taught, be permeated with Christian piety."[85] The Supreme Court found this ideal reflected in the Manual of the Superintendent of Schools in the Diocese of Providence, a diocese which is coterminus with the State of Rhode Island. The Court was thus confronted by the Catholic Church arguing the secularity of part of its educational enterprise while remaining officially and, at least theoretically, committed to religious permeation in its philosophy of Catholic education.

Ideally, the Catholic Church in the United States should approach the Supreme Court with aims and objectives in education that reflect internal consensus and consistency. This unity would hardly be possible even if the Court were conceivably examining the religious doctrine curriculum itself which is taught in the Catholic schools of any given diocese. At one end of the opinion scale on Catholic education one finds a repeated obsessive loyalty to a theocentric curriculum which can even spawn such esoteric preoccupations as metaphysical misgivings about the new math.[86] Some affiliation with this philosophical camp and unswerving loyalty to Catholic education are still indispensable attributes to episcopal promotion in the United States Catholic Church. At the other extremes are the liberal proponents of Catholic schools with a small "c" or just Catholic opponents of Catholic schools.

All denominations with primary and secondary schools have a stated purpose of having their curricula reflect their religious values.[87] Were it otherwise the burden would seem to be on the denominational school to justify its role in education.[88] It is precisely in defense of religious objectives that some religious denominations have refused to accept governmental aid and have filed briefs opposing such aid.[89] Log-

85. Pius XI, Encyclical Letter, *Divini Illius Magistri* (1929); On The Christian Education of Youth 12-16 (National Catholic Welfare Conference transl.) (1930).

86. M. Werner, An Educational Analysis of Certain Philosophical Implications in Modern Mathematics (1968) (unpublished dissertation in The Catholic University).

87. *See* G. LA NOUE, PUBLIC FUNDS FOR PAROCHIAL SCHOOLS? 31 (1963).

88. The first publication to raise a national internal debate within the Catholic Church in the United States on the fulfillment of Catholic purposes in Catholic schools was published by M. RYAN, ARE PAROCHIAL SCHOOLS THE ANSWER? (1963). *See also* Deedy, *Should Catholic Schools Survive?*, NEW REPUBLIC Mar. 13, 1971, at 15; Friedman & Binzen, *Politics and Parochiaid, id.* Jan. 23, 1971, at 12.

89. The Jewish National League and Seventh Day Adventists together with some branches of other denominations have traditionally opposed government aid.

ically it would seem that conservative Catholic leaders should have filed a brief opposing state "purchase of secular services" in Catholic schools in Pennsylvania.

While the Court condoned the auxiliary services already mentioned, it found open-ended programs of aid like those of Pennsylvania and Rhode Island unacceptable. This leaves only integral, one-shot forms of aid and constitutes a severe restriction. The Court referred specifically to the expanding and self-perpetuating tendencies of government in the distribution of public funds. If European history has any relevance, however, demand would be commensurate with supply in this instance. In *Lemon* the Church presented the State of Pennsylvania and the Court with an argument based on the secularity of mathematics, modern foreign languages, physical science and physical education.[90] In effect this argument erases distinction between public and nonpublic schools in these four areas of curriculum which comprise a sizeable segment of school instruction. The state and the Court could reasonably anticipate that the Church would be back to argue the secularity of its instruction in English, home economics, social science, commercial training or the remainder of grade and high school areas of instruction. Parity of support in all instruction areas save religion would be the ultimate objective in subject subsidy. Given the free neutral textbook aid granted in *Allen*, the Court could not have accepted the secularity of *Lemon* without foreseeing accumulative subject subsidy and future Church arguments based on the neutrality and secularity of a desk, blackboard, ceiling, floor and four walls together with all the educational appurtenances needed for a purely secular educational enterprise under private ecclesiastical control.

The Court's expressed concern over the political divisiveness that attends governmental appropriations for nonpublic schools envisaged a protracted political struggle for complete federal and state subsidization of a private reproduction of the public school system with some form of religious instruction and exercises attached. The Court's allusion in these contexts to the history of other countries[91] is significant. England provides an example of what the Court had in mind. Denominational schools, the vast majority of which are Roman Catholic, have reached the 75 percent mark on their journey to full government subsidy. The struggle toward this goal has spanned the present century. It is credited with having threatened major rifts at the national

90. *See* 310 F. Supp. at 46.

91. 403 U.S. at 631 (Douglas, J., concurring).

level in political parties and became an ingredient of many political election campaigns.[92] Resulting compromises constitute a chronology of continued increasing increments in government subsidization of denominational schools.

The rise of private denominational schools subsidized by the Netherlands Government has been in direct proportion to the decline in the number of public schools in that country. In 1850, 77 percent of primary pupils in the Netherlands attended public and 23 percent attended private primary schools. In 1969 these figures were almost totally reversed with 26 percent of Dutch pupils attending public and 74 percent attending private primary schools.[93] Similarly 1969 attendance figures for secondary schools in the Netherlands show 29,746 students in public and 176,823 students in private secondary schools.[94] The struggle over the schools established the major lines of the Dutch party system. The "vertical pluralism" and "columnizing" effects of denominational schools in the Netherlands have been a subject of study by both Dutch and foreign scholars.[95]

In invoking the potential of political divisiveness inherent in programs of aid to church-related schools, the Court stopped at the threshold of the argument of social divisiveness which is often invoked against Catholic schools in pluralistic societies. Within the Catholic Church in the United States the question was raised before the turn of the century by the eminent intellectual Church leader, Archbishop John Ireland.[96] Recent major sociological studies[97] have attempted to refute the recurring charge of social divisiveness but it continues to be

92. See Duffy, *Religion and Education in England, the Netherlands, Scotland and Sweden*, in THE COLLAPSE OF NONPUBLIC EDUCATION: RUMOR OR REALITY?; 11 *The Report on Nonpublic Education in the State of New York* (The Fleischman Report) for the New York State Commission on the Quality, Cost and Financing of Elementary and Secondary Education, c-122 (1971).

93. P.J. Idenburg, Schets van het Nederlandse Schoolwezen 118-19 (1964) in A. CLAYTON, RELIGION AND SCHOOLING: A COMPARATIVE STUDY 143 (1969).

94. NETHERLANDS MINISTRY OF EDUCATION, EDUCATION REPORT: FOR THE YEAR 1969 45 (1970).

95. *See* Clayton, *supra* note 93, at 114-30.

96. IRELAND, STATE SCHOOLS AND PARISH SCHOOLS, in THE CHURCH IN MODERN SOCIETY 199-214 (2d ed. 1897).

97. *See* J. FICHTER, PAROCHIAL SCHOOLS: A SOCIOLOGICAL STUDY 116 (1958); A. GREELEY & P. ROSSI, THE EDUCATION OF CATHOLIC AMERICANS (1966); Greeley, Rossi, & Pinto, THE SOCIAL EFFECTS OF CATHOLIC EDUCATION (1964); Rossi & Ross, *Some Effects of Parochial School Education in America*, 90 DAEDALUS 300 (1961); Rossi & Rossi, *Backgrounds and Consequences of Parochial School Education*, HARV. EDUC. REV. 195 (1957).

reinforced by overseas illustrations. Denominational schools are considered by critics to have been a contributing factor to the recent spectre of religious polarization in Northern Ireland. If the position of the public schools in the United States becomes imperiled by proposals such as the voucher system[98] the concept of social divisiveness is apt to lose its parochial context and assume national dimensions that may merit the attention of the Court in the not too distant future.

Ironically and perforce, Catholics are returning to the public schools at a time when the public schools' function and fulfillment are undergoing reassessment. It is to be hoped that the judiciary already has, and that the executive and legislative branches of federal and state government will, together with public and private leaders in education, view and meet the challenge of the *Lemon* and *DiCenso* decisions in terms that transcend the purely monetary. With sincere condolences, the Supreme Court has accorded a full-dress constitutional burial to the *ad terrorem* economic arguments in favor of aid to nonpublic schools.

98. See text accompanying note 73 *supra.*