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The Law of Church and State: Public Aid to Sectarian Schools

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Summary

The Supreme Court has held that private sectarian schools have a constitutional right to exist.[1] But it has also held that the establishment of religion clause of the First Amendment imposes constraints on the extent to which such schools can receive public assistance, particularly at the elementary and secondary school level. In a number of cases over the last fifty years the Court has had to determine the constitutionality of particular forms of public aid to sectarian schools and their students. This report gives an overview of the standards established by the Court in these cases and briefly summarizes its decisions on particular categories of aid, both at the elementary and secondary school level and at the college level.[2]

Overview

The First Amendment provides in pertinent part that "Congress shall make no law respecting an establishment of religion ...."[3] The Supreme Court has construed that clause to mean that government cannot directly sponsor or finance religious instruction or indoctrination and that public aid benefiting sectarian institutions must be "secular, neutral, and nonideological."[4] As a consequence, a critical issue with respect to the constitutionality of public aid programs benefiting religious schools has been the nature

[1] Pierce v. Society of Sisters, 268 U.S. 510 (1925).

[2] For a fuller discussion of the Court's decisions concerning public aid to sectarian schools and related doctrinal developments, *see* CRS, *The Law of Church and State: Developments in the Supreme Court Since 1980* (1998) (Report No. 98-65A).

[3] The First Amendment has been held to apply to the states as well as to the federal government. *See* Cantwell v. Connecticut, 310 U.S. 296 (1940) (free exercise clause) and Everson v. Board of Education, 330 U.S. 1 (1947) (establishment clause).

[4] Committee for Public Education v. Nyquist, 413 U.S. 756, 780 (1973).

of the schools benefited, *i.e.*, whether the schools are predominantly secular or pervasively religious. If they are the former, then public aid to their secular functions has been found not to pose a serious constitutional problem. But if they are the latter, public aid has been held to be substantially constrained.

Sectarian elementary and secondary schools the Court has repeatedly found to be pervasively sectarian, *i.e.*, so permeated by a religious purpose and character that their secular functions and religious functions are "inextricably intertwined." As a result, direct public aid to such institutions has been held to be limited by the establishment clause (although not absolutely barred). Sectarian colleges, on the other hand, the Court has found to be generally secular in nature. As a consequence, much broader forms of direct public aid have been held to be constitutionally permissible.

This factual distinction between the two levels of education has had less import for the constitutionality of programs which channel assistance to students or their parents and only indirectly benefit sectarian schools. Indirect public aid programs such as vouchers and tax benefit plans must still be religiously neutral and have been struck down by the Court where their structure and design has virtually guaranteed that the assistance ultimately flows largely to pervasively sectarian schools. But where the design of the programs has left the initial beneficiaries a genuine choice about where to use the assistance, indirect aid programs have been upheld by the Court even though pervasively sectarian schools have benefited. This has been true at both the college level and the elementary and secondary school level.[5]

Specific Decisions Concerning Public Aid to Sectarian Elementary and Secondary Schools

(1) Bus transportation. In *Everson v. Board of Education*[6] the Court held it to be constitutionally permissible for a local government to subsidize bus transportation between home and school for parochial schoolchildren as well as public schoolchildren. The Court said the subsidy was essentially a general welfare program that helped children get from home to school and back safely.

In *Wolman v. Walter*,[7] on the other hand, the Court held the establishment clause to be violated by the public subsidy of field trip transportation for parochial schoolchildren on the grounds field trips are an integral part of the school's curriculum and wholly controlled by the school.

(2) Textbooks and other instructional materials. In several decisions the Court has upheld as constitutional the loan of secular textbooks which are authorized for use in

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[5] For a fuller discussion of the constitutionality of indirect aid programs, *see* CRS, *Education Vouchers: The Constitutional Standards* (1997) (Report No. 97-50A).

[6] *Id.*

[7] 433 U.S. 229 (1977).

the public schools to children in sectarian elementary and secondary schools,[8] and in *Wolman v. Walter, supra,* it upheld the inclusion in such a textbook loan program of related manuals and reusable workbooks. The Court's rationale was that the textbooks are by their nature limited to secular use and that the loan programs are general welfare programs that only incidentally aid sectarian schools.

However, in two other decisions the Court has held it to be unconstitutional for other secular instructional materials, such as periodicals, photographs, maps, charts, films, sound recordings, projection and recording equipment, and lab equipment, to be provided either directly to sectarian schools or to sectarian schoolchildren on the grounds such aid provides substantial aid to the sectarian enterprise as a whole.[9]

(3) Teachers. In *Lemon v. Kurtzman*[10] the Court held it to be unconstitutional for a state to subsidize parochial school teachers of such secular subjects as math, foreign languages, and the physical sciences, either by way of a direct subsidy of such teachers' salaries or by means of a "purchase of secular services" program. In both instances, the Court said, the state would have to engage in intrusive monitoring to ensure that the subsidized teachers did not inculcate religion; and it held such monitoring to unconstitutionally entangle the states with the schools. Similarly, in *City of Grand Rapids v. Ball*[11] the Court found the establishment clause violated by a program in which the school district hired parochial school teachers to provide after-school extracurricular programs to their students on the premises of their sectarian schools.

But in *Agostini v. Felton*[12] the Court recently reversed an earlier line of decisions and upheld as constitutional the provision of remedial educational services to sectarian schoolchildren by **public** teachers on the premises of sectarian schools. Earlier decisions had required such services to be provided off the sectarian school grounds.[13] Similarly, in *Zobrest v. Catalina Foothills School District*[14] the Court also upheld as constitutional the provision at public expense under the Individuals with Disabilities Education Act (IDEA) of a sign-language interpreter for a disabled child attending a sectarian secondary school. In both instances the Court reasoned that the programs were general welfare programs available to students without regard to whether they attended public or private (sectarian) schools.

(4) Tests and state-required reports. In *Wolman v. Walter, supra*, the Court upheld as constitutional a program in which a state provided standardized tests in secular subjects and related scoring services to nonpublic schoolchildren. Similarly, in *Committee for*

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[8] Board of Education v. Allen, 392 U.S. 236 (1968); Meek v. Pittenger, 421 U.S. 349 (1975); and Wolman v. Walter, *supra*.

[9] Meek v. Pittenger, *supra*, and Wolman v. Walter, *supra*.

[10] 403 U.S. 602 (1971).

[11] 473 U.S. 373 (1985).

[12] 521 U.S. ___ (1997).

[13] *See* Aguilar v. Felton, 473 U.S. 402 (1985); City of Grand Rapids v. Ball, *supra*; Wolman v. Walter, *supra*; and Meek v. Pittenger, *supra*.

[14] 509 U.S. 1 (1993).

Public Education v. Regan[15] the Court upheld a program reimbursing sectarian schools for the costs of administering such state-prepared tests as the regents exams, comprehensive achievement exams, and college qualifications tests. In both instances the rationale was that such tests were limited by their nature to secular use. In the latter case the Court also upheld as constitutional a program which reimbursed sectarian and other private schools for the costs of complying with certain state-mandated record-keeping and reporting requirements about student enrollment and attendance, faculty qualifications, the content of the curriculum, and physical facilities on the grounds the requirements were imposed by the state and did not involve the teaching process.

On the other hand, in *Levitt v. Committee for Public Education*[16] the Court struck down a program reimbursing sectarian schools for the costs of administering and compiling the results of teacher-prepared tests in subjects required to be taught by state law for the reason that the tests might include religious content.

(5) Non-curricular services. The Court has in *dicta* repeatedly affirmed the constitutionality of the public subsidy of physician, nursing, dental, and optometric services to sectarian schoolchildren in sectarian schools,[17] and in *Wolman v. Walter, supra*, it specifically upheld the provision of diagnostic speech, hearing, and psychological services by public school personnel on sectarian school premises. In addition, the Court has repeatedly in *dicta* affirmed the constitutionality of the public subsidy of school lunches for eligible children in sectarian schools.[18]

(6) Maintenance and repair costs. In *Committee for Public Education v. Nyquist, supra,* the Court struck down as unconstitutional a state program subsidizing some of the costs incurred by sectarian schools for the maintenance and repair of their facilities on the grounds the subsidy inevitably aided the schools' religious functions.

(7) Vouchers and tax benefits. In *Committee for Public Education v. Nyquist, supra*, and *Sloan v. Lemon*[19] the Court held unconstitutional programs which provided tuition grants and tax benefits to children attending sectarian schools and their parents. In both instances the Court found that the benefits of the programs were confined to children attending private schools, that most of those schools were pervasively sectarian, and that as a consequence the programs had a primary purpose and effect of subsidizing such schools.

In two other decisions, however, the Court upheld voucher and tax benefit programs where the benefits were available to children attending public as well as private schools or their parents. *Mueller v. Allen*[20] involved a state program giving a tax deduction to the parents of all elementary and secondary schoolchildren for a variety of educational

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[15] 444 U.S. 646 (1980).

[16] 413 U.S. 472 (1973).

[17] Lemon v. Kurtzman, *supra*; Meek v. Pittenger, *supra*: and Wolman v. Walter, *supra*.

[18] Lemon v. Kurtzman, *supra,* and Meek v. Pittenger, *supra*.

[19] 413 U.S. 825 (1973).

[20] 463 U.S. 388 (1983).

expenses, including tuition. *Witters v. Washington Department of Services for the Blind*,[21] in turn, involved a state vocational rehabilitation program which gave a grant to a blind person who wanted to attend a Bible college to prepare for a religious vocation. In each instance the Court's rationale in upholding the programs was that they were general welfare programs in which sectarian schools benefited only as the result of the independent choices of students or their parents.

Specific Decisions Concerning Public Aid to Sectarian Colleges and Universities

(1) **General aid**: In *Roemer v. Maryland Board of Public Works*[22] the Court found a statutory restriction barring the use of the funds for "sectarian purposes" sufficient to enable it to uphold a program of noncategorical grants to all private colleges in the state, including ones that were church-affiliated. The Court stressed that the church-related colleges that benefited were not "pervasively sectarian" and that the aid was statutorily restricted to secular use.

(2) **Construction assistance**: In *Tilton v. Richardson*[23] the Court upheld as constitutional a federal program that provided grants to colleges, including church-affiliated colleges, for the construction of needed facilities, so long as the facilities were not used for religious worship or sectarian instruction. The statute provided that the federal interest in any facility contructed with federal funds would expire after 20 years, but the Court held that the nonsectarian use requirement would have to apply so long as the buildings had any viable use.

Subsequently, in *Hunt v. McNair*[24] the Court upheld a state program in which the state issued revenue bonds to finance the construction of facilities at institutions of higher education, including those with a religious affiliation. The program barred the use of the funds for any facility used for sectarian instruction or religious worship.

(3) **Vouchers**: In two summary affirmances the Court has upheld the constitutionality of programs providing grants to students attending institutions of higher education, including religiously-affiliated colleges. Both *Smith v. Board of Governors of the University of North Carolina*[25] and *Americans United for the Separation of Church and State*[26] involved grants given on the basis of need for students to use in attending either public or private colleges, including religiously affiliated ones. In affirming the decisions the Supreme Court issued no opinion in either case, but the lower courts reasoned that the religious colleges benefited from the programs only if the aided students independently decided to attend.

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[21] 474 U.S. 481 (1986).

[22] 426 U.S. 736 (1976).

[23] 403 U.S. 672 (1971).

[24] 413 U.S. 734 (1973).

[25] 429 F.Supp. 871 (W.D.N.C.), *aff'd mem.*, 434 U.S. 803 (1977).

[26] 433 F.Supp. 97 (M.D. Tenn.), *aff'd mem.*, 434 U.S. 803 (1977).

(4) **Student publication subsidy**: In *Rosenberger v. The Rector and Board of Visitors of the University of Virginia*[27] the Court held that it would be constitutional for a state university to subsidize the printing costs of an avowedly religious student publication. The university made the subsidy available to non-religious student publications as a way of fostering student expression and discussion, and the Court said it would constitute viewpoint discrimination violative of the free speech clause of the First Amendment to deny the subsidy to a student publication offering a religious perspective.

Other Pertinent Decisions

(1) General public services. In *dicta* in *Everson v. Board of Education, supra,* the Court affirmed as constitutional the provision to sectarian schools of such general public services as police and fire protection, connections for sewage disposal, highways, and sidewalks. The establishment clause, the Court intimated, does not require that religious schools be cut off from public services "so separate and so indisputably marked off from the religious function ...."[28]

(2) Property tax exemption. Finally, in a case that did not specifically involve a sectarian school, it might be noted that in *Walz v. Tax Commission of New York*[29] the Court upheld as constitutional an exemption from property taxes for church property. The Court reasoned that the exemption did not have a primary effect of advancing religion because it was given to a large class of educational and charitable organizations along with religious entities.

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[27] 515 U.S. 819 (1995).

[28] Everson v. Board of Education, *supra,* at 18.

[29] 397 U.S. 664 (1970).