

# CRS Report for Congress

Received through the CRS Web

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

David M. Ackerman  
Legislative Attorney  
American Law Division

### Summary

One of the most difficult issues of constitutional law concerns the extent to which the establishment of religion clause of the First Amendment imposes constraints on the provision of public aid to private sectarian schools. Most of the Supreme Court's jurisprudence has construed the clause to impose severe restrictions on such aid when given directly to sectarian elementary and secondary schools but to be less restrictive when given to colleges or indirectly in the form of tax benefits or vouchers. Recent decisions have loosened the constitutional limitations on direct aid to an as-yet indeterminate degree. This report gives a brief overview of the evolution of the Court's interpretation of the establishment clause in this area and itemizes the categories of aid that have been addressed by the Court and held to be constitutionally permissible or impermissible, both at the elementary and secondary school level and at the college level.

### Overview

The First Amendment provides in pertinent part that "Congress shall make no law respecting an establishment of religion ...."<sup>1</sup> That clause has been construed by the Supreme Court, in general, to mean that government is prohibited from sponsoring or financing religious instruction or indoctrination. In determining whether public aid programs benefiting sectarian schools violate the establishment clause, the Court, until recently, has examined such factors as the purpose of the program; whether the aid itself is "secular, neutral, and nonideological"<sup>2</sup>; whether the schools benefited are so pervasively sectarian that their secular functions cannot be isolated from their religious functions; and whether government or independent private decision makers determine whether the aid

---

<sup>1</sup>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).

<sup>2</sup>*Committee for Public Education v. Nyquist*, 413 U.S. 756, 780 (1973).

ever reaches sectarian schools. Within that framework the Court had generally held **direct** public aid to sectarian elementary and secondary schools to be severely constrained, because it deemed such schools to be so pervasively sectarian that their secular functions could not be isolated from their religious functions for purposes of public subsidy and because any aid would require an excessively intrusive government monitoring to be sure it was used only for secular purposes. On the other hand, the Court had held that public aid to sectarian colleges could more readily be made available for the reason that such institutions were **not** deemed to be pervasively sectarian. It also had held direct public aid to be much more severely constrained than **indirect** aid, *i.e.*, aid that was made available in the form of tax benefits or vouchers, because in the latter programs (if genuinely neutral in design) the aid reached sectarian schools not as the result of the government's decision but of the independent choices of private individuals. Indeed, in indirect aid programs the Court had made clear that the schools that ultimately benefited could use the aid for all of their functions, including religious ones.

The Court's recent decisions in *Agostini v. Felton*<sup>3</sup> and *Mitchell v. Helms*,<sup>4</sup> however, have overturned three of the Court's prior decisions and altered this structure to some extent. In particular, for purposes of direct aid at the elementary and secondary school level the Court has de-emphasized the issue of whether a school is pervasively sectarian. As a consequence, the Court now appears to allow a greater degree of direct aid to such schools than it did formerly. For a direct aid program benefiting sectarian schools to be held constitutional, the Court now seems to require that its purpose be secular; that the aid be distributed on a nondiscriminatory basis according to neutral, secular criteria; that the aid itself be secular in nature; that the aid be limited to secular use within the sectarian schools; and that it not create an excessive entanglement between government and religion. The Court also appears to still maintain a distinction between direct and indirect public aid. Indirect aid must still serve a secular purpose and be allocated on a nondiscriminatory basis according to neutral criteria. But the limitation to secular use within the sectarian schools imposed on direct aid does not appear to apply to indirect aid. Because individuals make the decision to channel the aid to the schools, any use of the aid for religious purposes thereafter is not attributable to the government.

Finally, it should be noted that the Court has left open the possibility that other, as-yet unspecified factors may apply with respect to the constitutionality of any particular aid program.

## **Specific Decisions Concerning Public Aid to Sectarian Elementary and Secondary Schools**

**(1) Bus transportation.** In *Everson v. Board of Education*<sup>5</sup> 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.

---

<sup>3</sup>521 U.S. 203 (1997).

<sup>4</sup>120 S.Ct. 2530 (2000).

<sup>5</sup> 330 U.S. 1 (1947).

In *Wolman v. Walter*,<sup>6</sup> 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.** In several decisions the Court has upheld as constitutional the loan of secular textbooks which are authorized for use in the public schools to children in sectarian elementary and secondary schools,<sup>7</sup> 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 has been 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.

**3) Other instructional materials.** In *Meek v. Pittenger, supra*, and *Wolman v. Walter, supra*, the Court had held the provision of instructional materials other than textbooks, such as periodicals, photographs, maps, charts, films, sound recordings, projection and recording equipment, and lab equipment, to sectarian schools or sectarian school children to be unconstitutional on the grounds such aid provides substantial aid to the sectarian enterprise as a whole and inevitably has a primary effect of advancing religion. But in its most recent decision, *Mitchell v. Helms, supra*, the Court overturned that aspect of *Meek* and *Wolman* and held it to be constitutional for government to include sectarian schools in a program providing instructional materials (including computer hardware and software) on the grounds the aid was secular in nature, was distributed according to religiously neutral criteria, and could be limited to secular use within the sectarian schools without any intrusive government monitoring.

**(4) Teachers.** In *Lemon v. Kurtzman*<sup>8</sup> 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. For a similar reason the Court in *Aguilar v. Felton*<sup>9</sup> held unconstitutional the provision of remedial and enrichment services to eligible children in sectarian schools by public school teachers under the Title I program if they were provided on the premises of the sectarian schools. In *City of Grand Rapids v. Ball*<sup>10</sup> the Court found the establishment clause also to be 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.

---

<sup>6</sup>433 U.S. 229 (1977).

<sup>7</sup>*Board of Education v. Allen*, 392 U.S. 236 (1968); *Meek v. Pittenger*, 421 U.S. 349 (1975); and *Wolman v. Walter, supra*.

<sup>8</sup>403 U.S. 602 (1971).

<sup>9</sup>473 U.S. 402 (1985)

<sup>10</sup>473 U.S. 373 (1985).

But in *Agostini v. Felton*<sup>11</sup> the Court overturned the *Aguilar* decision and upheld as constitutional the provision of remedial educational services to sectarian schoolchildren by public teachers on the premises of sectarian schools. In *Zobrest v. Catalina Foothills School District*<sup>12</sup> 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.

**(5) 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 Public Education v. Regan*<sup>13</sup> 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 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*<sup>14</sup> 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 teachers controlled the tests and might well include religious content in them.

**(6) Health and nutrition 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<sup>15</sup>; 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.<sup>16</sup>

**(7) 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,

---

<sup>11</sup>521 U.S. 203 (1997).

<sup>12</sup>509 U.S. 1 (1993).

<sup>13</sup>444 U.S. 646 (1980).

<sup>14</sup>413 U.S. 472 (1973).

<sup>15</sup>*Lemon v. Kurtzman, supra*; *Meek v. Pittenger, supra*; and *Wolman v. Walter, supra*.

<sup>16</sup>*Lemon v. Kurtzman, supra*, and *Meek v. Pittenger, supra*.

including costs incurred for heating, lighting, renovation, and cleaning, on the grounds the subsidy inevitably aided the schools' religious functions.

**(8) Vouchers and tax benefits.** In *Committee for Public Education v. Nyquist*, *supra*, and *Sloan v. Lemon*<sup>17</sup> 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*<sup>18</sup> involved a state program giving a tax deduction to the parents of **all** elementary and secondary schoolchildren for a variety of educational expenses, including tuition. *Witters v. Washington Department of Services for the Blind*,<sup>19</sup> 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 which allocated their benefits on the basis of religiously neutral criteria and that sectarian schools benefited only indirectly 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*<sup>20</sup> the Court found a statutory restriction barring the use of the funds for "sectarian purposes" sufficient to enable it to uphold a state 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*<sup>21</sup> 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 constructed 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.

---

<sup>17</sup>413 U.S. 825 (1973).

<sup>18</sup>463 U.S. 388 (1983).

<sup>19</sup>474 U.S. 481 (1986).

<sup>20</sup>426 U.S. 736 (1976).

<sup>21</sup>403 U.S. 672 (1971).

Subsequently, in *Hunt v. McNair*<sup>22</sup> the Court upheld a program in which a 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*<sup>23</sup> and *Americans United for the Separation of Church and State*<sup>24</sup> 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 benefitted from the programs only if the aided students independently decided to attend.

(4) **Student publication subsidy:** In *Rosenberger v. The Rector and Board of Visitors of the University of Virginia*<sup>25</sup> 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 ...."

(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*<sup>26</sup> 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.

---

<sup>22</sup>413 U.S. 734 (1973).

<sup>23</sup>429 F.Supp. 871 (W.D.N.C.), *aff'd mem.*, 434 U.S. 803 (1977).

<sup>24</sup>433 F.Supp. 97 (M.D. Tenn.), *aff'd mem.*, 434 U.S. 803 (1977).

<sup>25</sup>515 U.S. 819 (1995).

<sup>26</sup>397 U.S. 664 (1970).