Order Code RS21273
July 30, 2002

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

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Summary

One of the most persistent 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. The Supreme Court's past jurisprudence construed the clause to impose severe restrictions on aid 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. The Court's recent decisions have loosened the constitutional limitations on both direct and indirect aid . 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 ...."[1] 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. But the Court has drawn a constitutional distinction between aid that flows directly to sectarian schools and aid that benefits such schools indirectly as the result of voucher or tax benefit programs.

With respect to direct aid, the Court has consistently employed the tripartite test it first articulated in *Lemon v. Kurtzman*.[2] That test requires that an aid program serve a secular legislative purpose, have a primary effect that neither advances nor inhibits religion, and not foster an excessive entanglement with religion. The secular purpose

[1] 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).

[2] 403 U.S. 602 (1971).

aspect of this test has rarely been a problem for direct aid programs. But prior to the Court's recent decisions, both the primary effect and entanglement prongs were substantial barriers. To avoid a primary effect of advancing religion, the Court required direct aid programs to be limited to secular use and struck them down if they were not so limited. But even if the aid was so limited, the Court often found the primary effect prong violated anyway because it presumed that in pervasively sectarian institutions it was impossible for public aid to be limited to secular use. Alternatively, it often held that direct aid programs benefiting pervasively sectarian institutions were unconstitutional because government had to so closely monitor the institutions' use of the aid to be sure the limitation to secular use was honored that it became excessively entangled with the institutions. These tests were a particular problem for direct aid to sectarian elementary and secondary schools, because the Court presumed that such schools were pervasively sectarian. It presumed to the contrary with respect to religious colleges.

The Court's recent decisions in *Agostini v. Felton*[3] and *Mitchell v. Helms*,[4] however, have recast these tests in a manner that has lowered the constitutional barriers to direct aid to sectarian schools. The Court has abandoned the presumption that sectarian elementary and secondary schools are so pervasively sectarian that direct aid either results in the advancement of religion or fosters excessive entanglement. It has also abandoned the assumption that government must engage in an intrusive monitoring of such institutions' use of direct aid. The Court still requires that direct aid serve a secular purpose and not lead to excessive entanglement. But it has recast the primary effect test to require that the aid be secular in nature, that its distribution be based on religiously neutral criteria, and that it not be used for religious indoctrination.

The Court's past jurisprudence imposed fewer restraints on indirect aid to sectarian schools such as tax benefits or vouchers. The Court still required such aid programs to serve a secular purpose; but it did not apply the secular use and entanglement tests applicable to direct aid. The key constitutional question was whether the initial beneficiaries of the aid, *i.e.*, parents or schoolchildren, had a genuinely independent choice about whether to use the aid for educational services from secular or religious schools. If the universe of choices available was almost entirely religious, the Court held the program unconstitutional because the government, in effect, dictated by the design of the program that a religious option be chosen. But if religious options did not predominate, the Court held the program constitutional even if parents chose to receive services from pervasively sectarian schools. Moreover, in its recent decision in *Zelman v. Simmons-Harris*[5] the Court legitimated an even broader range of indirect aid programs by holding that the evaluation of the universe of choice available to parents is not confined to the private schools at which the voucher aid can be used but includes as well all of the public school options open to parents.

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[3] 521 U.S. 203 (1997).

[4] 530 U.S. 793 (2000).

[5] 70 U.S.L.W. 4683 (2002).

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 instructional materials. In several decisions the Court has upheld as constitutional the loan of secular textbooks 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 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. In contrast, the Court in *Meek v. Pittenger, supra,* and *Wolman v. Walter, supra,* 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 those aspects 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.

(3) Teachers and other personnel. In *Lemon v. Kurtzman, supra,* 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. The state, the Court said, would have to engage in intrusive monitoring to ensure that the subsidized teachers did not inculcate religion; and it held such monitoring to excessively entangle government with the schools. For a similar reason the Court in *Meek v. Pittenger, supra,* struck down a program of "auxiliary services" to children in nonpublic schools which included enrichment and remedial educational services, counseling and psychological services, and speech and hearing therapy by public

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[6] 330 U.S. 1 (1947).

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

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

personnel. And in *Aguilar v. Felton*[9] it 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. Finally, in *City of Grand Rapids v. Ball*[10] the Court also struck down a similar state program of remedial and enrichment services as well as 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*, *supra*, the Court overturned the *Aguilar* decision and the pertinent parts of *Meek* and *Ball* and upheld as constitutional the provision of remedial and enrichment educational services to sectarian schoolchildren by public teachers **on** the premises of sectarian schools. In addition, the Court in *Zobrest v. Catalina Foothills School District*[11] 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 cases the Court reasoned that the programs were general welfare programs available to students without regard to whether they attended public or private (sectarian) schools; and in *Zobrest* it reasoned as well that the parents controlled the decision about whether the assistance took place in a sectarian school or a public school.

(4) Tests and state-required reports. In *Levitt v. Committee for Public Education*[12] 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. In contrast, the Court in *Wolman v. Walter, supra,* upheld a program in which a state provided standardized tests in secular subjects and related scoring services to nonpublic schoolchildren, including those in religious schools. Similarly, in *Committee for Public Education v. Regan*[13] the Court upheld a program that reimbursed sectarian schools for the costs of administering such state-prepared tests as the regents exams, comprehensive achievement exams, and college qualifications tests. In both cases the rationale was that such tests were limited by their nature to secular use. In *Regan* 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.

(5) 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

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[9] 473 U.S. 402 (1985)

[10] 473 U.S. 373 (1985).

[11] 509 U.S. 1 (1993).

[12] 413 U.S. 472 (1973).

[13] 444 U.S. 646 (1980).

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

(6) Vouchers and tax benefits. In *Committee for Public Education v. Nyquist, supra,* and *Sloan v. Lemon*[14] the Court held unconstitutional programs which provided tuition grants and tax benefits to the parents of children attending private schools, most of which were religious. In both instances the Court found that the programs benefited only those with children in private schools, that most of those schools were sectarian, and that the programs had a primary purpose and effect of subsidizing such schools.

In three other decisions, however, the Court has 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*[15] 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,*[16] in turn, involved a grant to a blind person who wanted to attend a Bible college to prepare for a religious vocation under a state vocational rehabilitation program which provided educational assistance for a wide variety of vocations. In *Zelman v. Simmons-Harris, supra,* the Court upheld a voucher program that assisted parents in failing public schools in Cleveland to send their children to private schools, most of which were sectarian. In each instance the Court's rationale in upholding the programs was that the benefits were available on a religiously neutral basis and that sectarian schools benefited only indirectly as the result of the independent choices of students or their parents. In *Zelman* the Court further held that the universe of choice open to parents was not limited to the private schools where the vouchers could be used but included the full range of public school options open to them as well.

(7) 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 children 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]

(8) 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 ...."

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[14] 413 U.S. 825 (1973).

[15] 463 U.S. 388 (1983).

[16] 474 U.S. 481 (1986).

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

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

Specific Decisions Concerning Public Aid to Sectarian Colleges and Universities

(1) General aid. In *Roemer v. Maryland Board of Public Works*[19] 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*[20] 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. Subsequently, in *Hunt v. McNair*[21] 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) Student publication subsidy. In *Rosenberger v. The Rector and Board of Visitors of the University of Virginia*[22] 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.

(4) 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*[23] and *Americans United for the Separation of Church and State*[24] 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.

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[19] 426 U.S. 736 (1976).

[20] 403 U.S. 672 (1971).

[21] 413 U.S. 734 (1973).

[22] 515 U.S. 819 (1995).

[23] 429 F.Supp. 871 (W.D.N.C.), *aff'd mem.*, 434 U.S. 803 (1977).

[24] 433 F.Supp. 97 (M.D. Tenn.), *aff'd mem.*, 434 U.S. 803 (1977).