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

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Summary

A recurring issue in constitutional law concerns the extent to which the Establishment Clause of the First Amendment imposes constraints on the provision of public aid to private sectarian schools. The U.S. 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 later decisions 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 analyzes the categories of aid that have been addressed by the Court. The report explains which categories have been held to be constitutionally permissible or impermissible, both at the elementary and secondary school level and at the college level. The report also briefly discusses H.R. 1 of the 111th Congress, economic stimulus legislation that includes provisions that would provide assistance to institutions of higher education for modernization, renovation, and repair of facilities.

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Overview

The Establishment Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion ...."[1] The U.S. Supreme Court has construed the Establishment Clause, 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 typically applied the tripartite test it first articulated in *Lemon v. Kurtzman*.[2] The *Lemon* test requires that an aid program (1) serve a secular legislative purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) not foster an excessive entanglement with religion. Because education is an important state goal, the secular purpose aspect of this test has rarely been a problem for direct aid programs. But prior to the Court's latest 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.[3] 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.[4] 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.[5] 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 decisions in *Agostini v. Felton*[6] and *Mitchell v. Helms*,[7] 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.[8]

[1] U.S. Const. amend. I. 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).

[3] *See, e.g.*, Committee for Public Education v. Nyquist, 413 U.S. 756 (1973).

[4] *See, e.g.*, Aguilar v. Felton, 473 U.S. 402 (1985), overruled by Agostini v. Felton, 521 U.S. 203 (1997).

[5] *See, e.g.*, Wolman v. Walter, 433 U.S. 229 (1977), overruled by Mitchell v. Helms, 530 U.S. 793 (2000).

[6] 521 U.S. 203 (1997).

[7] 530 U.S. 793 (2000).

[8] *See Agostini*, 521 U.S. 203.

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.[9] 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 decision in *Zelman v. Simmons-Harris*,[10] 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.

Specific Decisions Concerning Public Aid to Sectarian Elementary and Secondary Schools

Bus Transportation

In *Everson v. Board of Education*,[11] 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*,[12] 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.

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,[13] and in *Wolman v. Walter*,[14] it upheld the inclusion in such a textbook loan program of related manuals and reusable workbooks. The Court has reasoned 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*[15] and *Wolman v. Walter*[16] held the provision of instructional

[9] *See, e.g.*, Mueller v. Allen, 463 U.S. 388 (1983).

[10] 536 U.S. 639 (2002).

[11] 330 U.S. 1 (1947).

[12] 433 U.S. 229 (1977).

[13] Board of Education v. Allen, 392 U.S. 236 (1968); Meek v. Pittenger, 421 U.S. 349 (1975); and Wolman v. Walter, 433 U.S. 229 (1977).

[14] Id.

[15] 421 U.S. 349 (1975).

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 because such aid provides substantial aid to the sectarian enterprise as a whole and inevitably has a primary effect of advancing religion. But in *Mitchell v. Helms*, 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: (1) the aid was secular in nature; (2) was distributed according to religiously neutral criteria; and (3) could be limited to secular use within the sectarian schools without any intrusive government monitoring.

Teachers and Other Personnel

In *Lemon v. Kurtzman*,[17] 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 Court reasoned that 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 excessively entangle government with the schools. For a similar reason in *Meek v. Pittenger*,[18] the Court 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 personnel. And in *Aguilar v. Felton*,[19] 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*,[20] 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*,[21] 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*[22] 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.

(...continued)

[16] 433 U.S. 229 (1977).

[17] 403 U.S. 602 (1971).

[18] 421 U.S. 349 (1975).

[19] 473 U.S. 402 (1985)

[20] 473 U.S. 373 (1985).

[21] 521 U.S. 203 (1997).

[22] 509 U.S. 1 (1993).

Tests and State-Required Reports

In *Levitt v. Committee for Public Education*,[23] 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 because the teachers controlled the tests and might include religious content in them. In contrast, in *Wolman v. Walter*,[24] the Court 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*,[25] 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 Court reasoned that such tests were limited by their nature to secular use. In *Regan*, the Court also upheld as constitutional a program that 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. The Court reasoned that the requirements were imposed by the state and did not involve the teaching process.

Maintenance and Repair Costs

In *Committee for Public Education v. Nyquist*,[26] 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, including costs incurred for heating, lighting, renovation, and cleaning, on the grounds the subsidy inevitably aided the schools' religious functions.

Vouchers and Tax Benefits

In *Committee for Public Education v. Nyquist*[27] and *Sloan v. Lemon*,[28] 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 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*[29] 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*[30] involved a grant to a blind person who wanted

[23] 413 U.S. 472 (1973).

[24] 433 U.S. 229 (1977).

[25] 444 U.S. 646 (1980).

[26] 413 U.S. 756 (1973).

[27] *Id.*

[28] 413 U.S. 825 (1973).

[29] 463 U.S. 388 (1983).

[30] 474 U.S. 481 (1986).

to attend a religious 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*,[31] 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.

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;[32] and in *Wolman v. Walter*,[33] 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.[34]

General Public Services

In dicta in *Everson v. Board of Education*,[35] the Court affirmed as constitutional the provision of such general public services as police and fire protection, connections for sewage disposal, highways, and sidewalks to sectarian schools. According to the Court, the Establishment Clause does not require that religious schools be cut off from public services "so separate and so indisputably marked off from the religious function ...."[36]

Specific Decisions Concerning Public Aid to Sectarian Colleges and Universities

General Aid

In *Roemer v. Maryland Board of Public Works*,[37] the Court upheld a state program of noncategorical grants to all private colleges in the state, including ones that were church-affiliated, because the program included a statutory restriction barring the use of the funds for

[31] 536 U.S. 639 (2002).

[32] *Lemon*, 403 U.S. 602; *Meek*, 421 U.S. 349; *Wolman*, 433 U.S. 229.

[33] Id.

[34] *Lemon*, 403 U.S. 602; *Meek*, 421 U.S. 349.

[35] 330 U.S. 1 (1947).

[36] *Id*. at 18.

[37] 426 U.S. 736 (1976).

sectarian purposes. The Court stressed that the church-related colleges that benefited were not "pervasively sectarian" and that the aid was statutorily restricted to secular use.

Construction Assistance

In *Tilton v. Richardson*,[38] 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*,[39] 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.

Student Publication Subsidy

In *Rosenberger v. The Rector and Board of Visitors of the University of Virginia*,[40] 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 held that it would constitute viewpoint discrimination in violation of the free speech clause of the First Amendment to deny the subsidy to a student publication offering a religious perspective.

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*[41] and *Americans United for the Separation of Church and State v. Blanton*[42] 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 students independently decided to attend.

In *Locke v. Davey*,[43] the Court considered the constitutionality of a state scholarship program that included a restriction on recipients that prohibited the use of scholarship funds to pursue devotional theological degrees. The Court noted that, because the recipient would make an

[38] 403 U.S. 672 (1971).

[39] 413 U.S. 734 (1973).

[40] 515 U.S. 819 (1995).

[41] 429 F.Supp. 871 (W.D.N.C.), aff'd mem., 434 U.S. 803 (1977).

[42] 433 F.Supp. 97 (M.D. Tenn.), aff'd mem., 434 U.S. 803 (1977).

[43] 540 U.S. 712 (2004).

independent choice regarding how to spend the funds, the federal Establishment Clause would not be violated by such a program.[44]

Legislative Proposals in the 111th Congress

The economic stimulus package (H.R. 1) proposed in January 2009 includes several provisions for federal assistance to schools and other education programs. This report will analyze two provisions that provide assistance to schools as illustrations of the First Amendment issues that may arise in other provisions of public aid to schools. One provision for federal assistance to institutions of higher education (§ 9302) would allow for the modernization, renovation, and repair of "facilities that are primarily used for instruction, research, or student housing."[45] Section 9302 would provide assistance that generally may be used for repairing or installing electrical wiring, plumbing, ventilation systems, safety alarms, emergency systems, educational laboratories, and energy efficiency modifications.[46] This section includes a prohibition on the use of funds for facilities "(i) used for sectarian instruction, religious worship, or a school or department of divinity; or (ii) in which a substantial portion of the functions of the facilities are subsumed in a religious mission."[47]

Under current Supreme Court precedent, § 9302 appears to meet the constitutional requirements of the First Amendment. The Court addressed the use of public funds for the construction and maintenance of religious schools in *Tilton*, *Nyquist*, and *Hunt*, as discussed earlier. In each of those cases, the Court refused to allow public aid for religious schools if that aid would be used for facilities used for sectarian instruction or religious worship. The Court imposed the broadest prohibition on the use of public funds for religious schools in *Nyquist*, the only case of the three that applied to elementary and secondary schools rather than colleges. Because Establishment Clause restrictions are heightened in elementary and secondary school settings due to the impressionable nature of those students,[48] the Court in *Nyquist* held that public aid could not subsidize maintenance and repair of sectarian school facilities, including costs for heating, lighting, renovation and cleaning.

The aid program proposed under § 9302 would apply to higher education facilities, not elementary and secondary schools. Furthermore, the public funds must be used for certain purposes, which generally address building safety and efficiency issues, and are explicitly prohibited from being applied to projects that have religious uses. Accordingly, it is likely that a court would find that § 9302's list of permissible and prohibited uses complies with the restrictions established by the Supreme Court in *Tilton* and *Hunt*.

[44] The issue that the Court faced in *Locke* was centered on a more restrictive prohibition on establishment of religion contained in the Washington state constitution. The state constitution required the prohibition on the use of state funds to pursue religious degrees, but the recipient challenged the restriction as a violation of the federal Free Exercise Clause. The Court held that the withholding of the funds did not improperly infringe on the federal right to free exercise. *Id.*

[45] H.R. 1, § 9302(a) (111th Cong.).

[46] This list is not exhaustive. *See* § 9302(d)(1) for a more specific listing of permissible use of the funds provided under the bill.

[47] *Id.* at § 9302(d)(3)(C).

[48] *See* Edwards v. Aguillard, 482 U.S. 578, 583-84 (1987).

A similar provision (§ 9301) would provide assistance for "public school facilities, based on their need for such improvements, to be safe, healthy, high-performing, and up-to-date technologically."[49] Section 9301 also would provide assistance that generally may be used for similar purposes as § 9302, including heating, electrical wiring, plumbing, lighting, security mechanisms, safety alarms, educational laboratories, and other needs that advance public welfare and safety goals.[50] Although § 9301 does not prohibit the use of funds for religious schools,[51] because the provision allows aid to be distributed only to public schools, there is likely no constitutional problem raised by this provision.

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[49] H.R. 1, § 9301(b) (111th Cong.).

[50] *Id.* at § 9301(e).

[51] *See id.* at § 9301(f).