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# Constitutional Law - Aid to Parochial Schools and the Establishment Clause - Everson to Allen: From Buses to Books and Beyond

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bear watching to see if a realistic system of loss distribution will be formulated through the adoption of both contribution and comparative negligence. If contribution is adopted, third party practice in Illinois will be ready.

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## CONSTITUTIONAL LAW—AID TO PAROCHIAL SCHOOLS AND THE ESTABLISHMENT CLAUSE—*EVERSON* TO *ALLEN*: FROM BUSES TO BOOKS AND BEYOND

Section 701 of the Education Law of the State of New York requires local public school authorities to lend textbooks free of charge to all students in grades seven through twelve upon the individual request of any student in a public or private school.[1] Only textbooks which are required for one semester or more in a particular class and those textbooks which are either designated for use in a public school in the state or approved by a board of education may be lent.[2] Plaintiffs, members of local school boards, sought a declaratory judgment that the statutory requirement was invalid as violative of the state[3] and federal constitutions.[4] It was their contention that the lending of textbooks by the State of New York free of charge to students attending parochial schools amounted to an establishment of religion and that the requirement of paying taxes to provide textbooks for such students inhibited plaintiffs' free exercise of religion. In a 4-3 decision the New York Court of Appeals held that the statute violated neither the state nor the federal constitution.[5] The United States Supreme Court, concerned only with the federal constitutional question, affirmed the decision of the Court of Appeals. *Board of Education v. Allen*, 392 U.S. 236 (1968).

The "primary purpose and effect" test first adopted by the United States Supreme Court in *Abington Township v. Schempp*[6] formed the basis of the majority opinion. The Court considered section 701 of New York's education law to have a secular legislative purpose and primary effect which neither advanced nor inhibited religion.[7] In 1965 the New York legislature in amending section 701 stated the purpose for the adoption of the legisla-

[1] N. Y. EDUC. LAW § 701(3) (McKinney 1968).

[2] N. Y. EDUC. LAW § 701(3) (McKinney 1968).

[3] N. Y. CONST. art. 11, § 4 (1894).

[4] U. S. CONST. amend. I.

[5] Board of Educ. v. Allen, 20 N.Y.2d 109, 228 N.E.2d 791 (1967).

[6] 374 U.S. 203 (1963).

[7] Board of Educ. v. Allen, 392 U.S. 236, 243 (1968).

tion: "The public welfare and safety require that the state and local communities give assistance to educational programs which are important to our own national defense and general welfare of the state."[8] The Court adopted the legislature's opinion: "The express purpose of section 701 was stated by the New York legislature to be the furtherance of the educational opportunities available to the young."[9]

To establish a permissible primary effect, the "child benefit" theory adopted by the Court in *Cochran v. Louisiana State Board of Education*[10] and subsequently approved in *Everson v. Board of Education*[11] was again employed by the Court in *Allen*.[12] The Court found that no financial benefit accrued to any of the private schools as a result of the legislation.[13] Prior to the enactment of the statute, none of the private schools in question provided free textbooks for their students. Books were paid for by the parents of the children; ownership remained in the state. "The financial benefit is to the parents and children. . . ."[14] Actual secondary effects were recognized by the Court as flowing from the statute: "Perhaps free books make it more likely that some children choose to attend a sectarian school. . . ."[15] But this effect, although viewed as supporting religion, did not exist to an unconstitutional degree.[16] Although it was impliedly recognized that there could be other collateral effects of the statute which could exist to an unconstitutional degree,[17] the Court was not concerned with these. What were held to be critical were the "necessary effects of the statute that are contrary to its stated purpose."[18] The Court found none.

There was, however, one suggested effect of section 701 which was not susceptible to cursory determination, the consideration of which consumed the major portion of the Court's opinion. It was posited and accepted that books are critical to the teaching process, and in a sectarian school, that the teaching process is employed to teach religion.[19] Presumably, if the entire teach-

[8] [1965] N. Y. Sess. Laws, ch. 320, § 1.

[9] *Supra* note 7.

[10] 281 U.S. 370 (1930).

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

[12] Board of Educ. v. Allen, 392 U.S. 236, 243 (1968).

[13] *Id.* at 244.

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.* at 243.

[18] *Id.*

[19] *Id.* For a recent appraisal of the continued importance of religious education in Catholicism, *see* THE DOCUMENTS OF VATICAN II 642-48 (W. Abbott ed. 1966).

ing process in a parochial school were utilized to teach religion, textbooks furnished by the state regardless of their content would, consequently, be used to teach religion. This would amount to an establishment of religion contrary to the first amendment. The Supreme Court did not find that all teaching in parochical schools was designed to teach religion; but rather, it acknowledged that as a result of previous decisions it had recognized that religious schools pursue two goals: religious instruction and secular education.[20] The Court then took a decisive step forward, declaring that the religious function and the secular function could be separated in a given institution, such that governmental aid could be given to the secular without resultant unconstitutionality.

> We cannot agree . . . 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 the public are in fact instrumental in the teaching of religion.[21]

The significance of the Supreme Court's opinion in *Board of Education v. Allen*[22] is twofold. Governmental aid to education which includes secular aid to parochial schools has been approved as a constitutional primary purpose of legislation.[23] Further, this aid may be designed to support the secular aspect of parochial education without effecting an unconstitutional degree of governmental support of religion.[24] In addition, the Court continues to limit aid to these institutions to that aid which qualifies under the "child benefit" theory.[25]

While the majority opinion takes an analytical approach to the problem of state aid to secular schools, discussing the type, purpose and effect of the aid, the minority opinions of Justices Black, Douglas, and Fortas take a more absolute approach. It is their apparent contention that any aid by the state to a secular institution is unconsitutional regardless of degree. The "primary purpose and effect" test is uniformly rejected and in its place is substituted a "possible purpose and effect" test. All three dissenters contend that if the inherent nature of the activity involved could possibly admit of a purpose or effect that would advance or inhibit religion, then the activity is unconstitutional. A statement in Justice Black's opinion is characteristic of this attitude:

> The First Amendment's bar to establishment of religion must preclude a State

[20] Board of Educ. v. Allen, 392 U.S. 236, 245 (1968).

[21] *Id.*

[22] *Id.* at 243.

[23] *Id.*

[24] *Id.* at 243-44.

[25] *Id.*

from using funds levied from all of its citizens to purchase books for use by sectarian schools, which, although "secular," realistically will in some way inevitably tend to propogate the religious views of the favored sect.[26]

He again expressed his fear of secondary effects when he stated, ". . . it is nearly always by insidious approaches that the citadels of liberty are most successfully attacked."[27]

Justice Douglas described at length books on various subjects which could be used to teach religion. He suggested that this type of book could ultimately be provided by the state for secular schools. He did not consider the absolute direction of the statute to provide only secular textbooks. Nor did he indicate whether any books similar to those he suggested managed to slip through the rigorous screen established by the statute.[28]

Justice Fortas termed the statute a "transparent camouflage" by which the state provided sectarian schools with sectarian textbooks.[29] His sole objection was to the involvement of religious authorities in the selection of the material.[30] It appears from his opinion that he considered this condition fatal to the legislation.

The opinions of the minority Justices stand starkly in the face of precedent and the continually developing trend toward increased aid to parochial schools under constitutional approval. The absolutist position which they represent is more consonant with pre-judicial considerations of the Establishment Clause than with that of the judiciary.[31] The tests and considerations employed by the majority, on the other hand, have evolved over a twenty-year period of constitutional consideration of the problem and represent an additional step forward in the constitutional development.

The first case to consider the Establishment Clause was *Everson v. Board of Education*,[32] but the background for the case was laid long before that time. Interpretation of the Establishment Clause had already been polarized when the Supreme Court first instituted its analysis of the question. Thomas

[26] *Id.* at 252.

[27] *Id.* at 251-52.

[28] *Id.* at 254-69.

[29] *Id.* at 270.

[30] *Id.* at 269-72.

[31] The historical background of the Establishment Clause, including a discussion of its pre-judicial history, may be found in Justice Waite's opinion in *Reynolds v. United States*, 98 U.S. 145 (1878), in Justice Black's opinion in *Everson v. Board of Educ.*, 330 U.S. 1 (1947), in Justice Frankfurter's opinion in *McCollum v. Board of Educ.*, 333 U.S. 203 (1948), in Justice Clarke's opinion in *Abington v. Schempp*, 374 U.S. 203 (1963), in Justice Rutledge's dissent in *Everson v. Board of Educ., supra* note 11, and in 2 COOLEY, CONSTITUTIONAL LIMITATIONS 960-85 (8th ed. 1927).

[32] *Supra* note 11.

Jefferson envisioned the Clause as raising an impregnable "wall of separation between Church and State."[33] To James Madison it would not allow "a shadow of a right in the general government to intermeddle in religion."[34] Jefferson's wall was granted constitutional dimensions in *Reynolds v. United States*.[35] Chief Justice Waite accepted Jefferson's "wall" "as an authoritative declaration of the scope and effect of the amendment thus secured."[36]

The single constant issue which has run throughout the Supreme Court's consideration of the Establishment Clause is the "child benefit" theory,[37] which first appeared in *Borden v. Louisiana Board of Education* in 1928.[38] The Louisiana legislature appropriated public funds to be used for purchasing textbooks for all students in the state regardless of the school they attended. It was held that the legislation did not benefit any school but merely relieved the parents of the burden of purchasing the books. The companion case to *Borden, Cochran v. Louisiana State Board of Education*,[39] approved the reasoning of *Borden*, and the "child benefit" theory was given its constitutional birth. Since the fourteenth amendment had not as yet been made applicable to the states, the Supreme Court did not concern itself with the church-state issue.[40] Plaintiff claimed that the textbook legislation constituted the taking of private property for a private use. Chief Justice Hughes speaking for a unanimous Court quoted the *Borden* decision to distinguish between aid to the children and aid to the schools:

> The schools, however, are not the beneficiaries of these appropriations. They obtain nothing from them, nor are they relieved of a single obligation, because of them. The school children and the state alone are the beneficiaries.[41]

Prior also to the Court's consideration of the Establishment Clause, it had been established that religious schools provide an acceptable secular education. *Pierce v. Society of Sisters*[42] held that a parochial school provided

[33] Reynolds v. United States, 98 U.S. 145, 164 (1878).

[34] *Supra* note 11, at 38 (Rutledge J., dissent).

[35] *Supra* note 33.

[36] *Supra* note 33, at 164. *See also* Everson v. Board of Educ., *supra* note 11, at 36.

[37] *See* La Noue, *The Child Benefit Theory Revisited: Textbooks, Transportation and Medical Care*, 13 J. PUB. LAW 76 (1964).

[38] 168 La. 1005, 123 So. 655 (1928).

[39] *Supra* note 10.

[40] The first amendment was made applicable to the states through the fourteenth amendment in 1942. Murdock v. Pennsylvania, 319 U.S. 105 (1942).

[41] *Supra* note 10, at 375.

[42] 268 U.S. 510 (1925).

a secular education sufficient to fulfill a state's legitimate interest in requiring a secular education.

When the Supreme Court was thus confronted directly with the Establishment Clause itself in *Everson v. Board of Education*, its consideration was colored by three constitutionally sanctioned doctrines: a wall of separation between church and state, the "child benefit" theory, and the legitimacy of parochial education. It was in light of this background that the Court rendered its apparently contradictory opinion.[43] The factual situation before the Court involved a New Jersey law which allowed tax-raised funds to be used to pay the bus fares of parochial school pupils as part of a general program under which such fares were paid to pupils attending public and other schools. The issue of the separation of church and state was skillfully avoided by the Court. Its opinion was rendered without any attempt to establish a test to determine what would or would not be permissible state aid to religion. Indeed, the Court began with language equally as strong as that of *Reynolds*. Justice Black, speaking for the majority wrote: "The First Amendment has erected a wall between church and state. The wall must be high and impregnable. We could not approve the slightest breach."[44] In explicit terms the opinion detailed exactly what was forbidden by the Clause:

> The establishment of religion Clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs for church attendence or non-attendance. 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 adapt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups or *vice versa*. In the words of Thomas Jefferson, "the clause against establishment of religion by law was intended to erect a wall or separation between church and State."[45]

The statute in question was said to have approached the "verge" of constitutional limits,[46] but what the limits were or where they began was never discussed. Even the nonestablishment language of the case was only dicta.

[43] The most frequently quoted description of the majority opinion was offered by Justice Jackson in his dissenting opinion in *Everson*, *supra* note 11, at 19: "The case which irresistably comes to mind as the most fitting precedent is that of Julia who, according to Byron's reports, 'whispering "I will ne'er consent,"—consented.' "

[44] Everson v. Board of Educ., 330 U.S. 1, 18 (1947).

[45] *Id.* at 15-16.

[46] *Id.* at 16.

The decision of the Court in *Everson* was not based on a determination of the Establishment Clause. It was based on the opinion that the payment of bus fares for parochial school children was public welfare legislation similar to that of police and fire protection.[47] Justice Black recalled the seventy-year-old "child benefit" theory of *Cochran* to find that the aid involved was to the parents and children and that the schools received no funds.[48] Thus the legislation was deemed constitutional without reference to the Establishment Clause. There was some indication that had an Establishment Clause test been promulgated, the Court would have allowed some aid to parochial schools. The Court did concede that it was possible that more children would attend parochial schools because of the legislation;[49] however, this concept is diminished by the fact that this aid was also approved as public welfare in the same category as police and fire protection. Regardless, increased enrollment is a long step from police and fire protection.

While discussion of the Establishment Clause was avoided by the Court, the Free Exercise Clause was seized to prevent New Jersey from refusing such aid. "Other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion."[50] Free exercise brought neutrality to church-state relations:

> That amendment requires the state to be a neutral in its relations with religious believers and non-believers; it does not require that the state be this adversary. State power is no more to be used so as to handicap religions than it is to favor them.[51]

In essence the *Everson* decision had the following effect: first, it allowed a state to provide aid to parochial schools in the form of public welfare legislation; second, it precluded the withholding of aid of this type from these schools because they were parochial schools; and third, it rendered permissible aid of this type to benefit the children and parents of children attending parochial schools. A consideration of the consequences of legislation which has some effect on religious institutions was avoided. This issue was squarely encountered and answered in *Allen*. The *Allen* Court was prepared to do so by a number of cases which filled the gap between *Everson* and *Allen*. The cases decided by the Court during this period indicate a definite and growing trend toward a workable compromise between the extremes

[47] *Id.* at 17.

[48] *Id.* at 18.

[49] *Id.* at 17.

[50] *Id.* at 16.

[51] *Id.* at 18.

of an "impregnable wall of separation" and state support of religion. *Allen* represents the furthest extension of this trend.

*McCollum v. Board of Education*[52] was the first Establishment Clause case decided by the Supreme Court after *Everson*. At issue was the constitutionality of a "released time" program which allowed religious teachers of various denominations to hold classes in public school buildings for students who had volunteered for religious instructions. Once a week, for a period of thirty minutes, religious education would be substituted for secular education required under the compulsory education law during regular hours set apart for secular teaching. Unlike *Everson*, the *McCollum* opinion raised the issue of church-state relations. The opinion involved a determination as to whether the activity involved was forbidden or allowed by the Establishment Clause. A number of defects were found to exist in the relationship which rendered it unconstitutional: first, "tax supported property [was used for] religious instruction . . .";[53] second, there existed a "close cooperation between the school authorities and the religious council in promoting religious education";[54] and third, "[t]he operation of the state's compulsory education system . . . assist[ed] and [was] integrated with the program of religious instruction. . . ."[55] In short, the state's compulsory education system provided pupils for religious classes.[56] It appears that in the first forthright consideration of the Establishment Clause the questioned legislation was prohibited by the Court not solely because aid to religious education was involved, but because of the manner in which it was accomplished.

Cooperation between church and state was expressly approved by the Court four years later in *Zorach v. Clauson*,[57] in which a released time program very similar to that of *McCollum* was tested. New York had a program which permitted its public schools to release students during the day so that they might leave the school building and school grounds and go to religious centers for religious instruction or devotional exercise. The only tangible difference between *McCollum* and *Zorach* was that in the second case the religious instruction was provided away from the public school premises.[58] In both situations compulsory state school attendance laws required attendance on the day and at the time the religious classes were held, and both

[52] 333 U.S. 203 (1948).

[53] *Id.* at 209.

[54] *Id.*

[55] *Id.*

[56] *Id.* at 209-10.

[57] 343 U.S. 306 (1952).

[58] *Id.* at 308.

cases allowed religious classes to be substituted for scheduled secular classes. Students who did not desire to attend religious classes continued scheduled classes. Students were released only on the condition that they would attend the religious class. In *McCollum* the students never left the school grounds, so their attendance or non-attendance at the religious classes could be regulated. In *Zorach*, although the students left the school grounds, the religious centers were required to report attendance to the public schools. Hence two of the defects which rendered *McCollum* unconstitutional were conspicuously present in *Zorach*: there was close cooperation between church and state, and compulsory attendance laws seemingly provided students for religious instruction. *Zorach* was held not in violation of the Establishment Clause.

Although the facts in the two cases are remarkably similar, the decisions cannot be reconciled. *McCollum* held that a state could not, consistent with the first and the fourteenth amendments, "utilize its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideas. . . ."[59] This decision did not manifest a hostility to religion.[60] It merely indicated that the first amendment "rests upon the premises that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere."[61] The *McCollum* Court quoted *Everson*: "[T]he First Amendment has erected a wall between Church and State and it must be kept high and impregnable."[62]

While *McCollum* separated the spheres of religion and government, *Zorach* took a different tack. In *Zorach* it was held that to fail to respect the religious nature of the people and accommodate public services to their spiritual needs would represent a callous indifference to religion on the part of the government, and this the Court felt was not required by the Constitution:[63] "When the state encourages religious instruction or cooperates with religious authorities by adjusting public events to sectarian needs, it follows the best of our traditions."[64] *Zorach* held that public institutions may cooperate in a religious program to the extent of making it possible for students to participate in it. "Whether [it is done] occasionally for a few students or regularly for one; or pursuant to a systematized program designed to further the religious needs of all the students does not alter the character of the act."[65] *McCollum* cited *Everson* to establish its standard of constitutional

[59] McCollum v. Board of Educ., 333 U.S. 203, 211 (1948).

[60] *Id.*

[61] *Id.* at 212.

[62] *Id. See also, supra* note 44, at 16.

[63] Zorach v. Clauson, 343 U.S. 306, 314 (1952).

[64] *Id.* at 313-14.

[65] *Id.* at 313.

separation, but Jefferson's famous metaphor is glaringly absent in *Zorach*. The constitutional standard prescribed in *Zorach* allowed cooperation between church and state because the problem of separation was no longer absolute, but "like many problems in Constitutional Law, [it] is one of degree."[66] Consequently, the conclusion of *McCollum* calling for absolute separation was remarkably altered by *Zorach*, which held: "The First Amendment within its scope and coverage permits no exception, the prohibition is absolute. The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State."[67]

While *Everson v. Board of Education*[68] discussed state action which benefited religions or religious institutions, only benefits which could be classified as public welfare legislation were approved. Prior to *Zorach* no case had considered state benefits other than those of public welfare. With the advent in *Zorach* of the doctrine that separation is a problem of degree, the Court was prepared nine years later to determine specifically what benefits would be allowed to flow to religious institutions from governmental legislation. The Supreme Court in *Braunfield v. Brown*[69] held that it would be willing to uphold public welfare legislation even if it provided incidental benefits to religion. The Sunday closing cases clearly indicate that the Establishment Clause does not mean that the secular aims of the state must be achieved in a manner deliberately designed to preclude any incidental aid to religion.[70] *McGowan v. Maryland*[71] held that even a statute which had an unmistakable religious origin might not violate the Clause. Further, the *McGowan* Court ruled that the "Establishment Clause did not ban federal or state regulation of conduct where the reason or effect merely happens to coincide or harmonize with tenets of some or all religions."[72] The Supreme Court in *McGowan* laid down a clear direction to guide the conduct of government. It directed that where a degree of cooperation between church and state was involved, the present purpose and effect must be primarily secular and the secular purpose cannot reasonably be achievable without incidental benefit to a religious

[66] *Id.* at 314. As authority for this standard the Court cited *McCollum v. Board of Educ.*, *supra* note 59, at 231. Although it is implicit in that opinion that some degree of cooperation is allowable, the tenor of the opinion creates the opposite effect. This quote from Zorach, therefore, represents a long step forward for the Court.

[67] Zorach v. Clauson, *supra* note 63, at 312.

[68] *Supra* note 44.

[69] 366 U.S. 599 (1961).

[70] *See generally* McGowan v. Maryland, 366 U.S. 420 (1961); Two Guys v. McGinley, 366 U.S. 582 (1961); Braunfield v. Brown, 366 U.S. 599 (1961); Gallagher v. Crown Kosher Market, 366 U.S. 617 (1961).

[71] 366 U.S. 420 (1961).

[72] *Id.* at 442.

organization.[73] That is, government may use religious means to achieve a secular purpose, even where there is an incidental benefit to a religious institution, if it is clearly demonstrated that a non-religious means would not suffice.[74]

On the last day of the 1961 term, the trend toward permissible aid to parochial institutions received an apparent setback. The School Prayer Case, *Engel v. Vitale*,[75] was decided. Justice Black, speaking for the majority, wrote that the constitutional bar on establishment of religion precluded state officials—the regents and teachers of the New York public school systems—from formulating and conducting a voluntary religious ritual: namely, a daily prayer in which school children acknowledged their "dependence" on "Almighty God."[76] To some the School Prayer Case robbed *Everson* of virtually all of its precedential impact.[77] If this were true, inferentially *Engel* would have done so to *Zorach, Braunfield,* and *McGowan*.[78] It was not to have such effect, however, possibly because of its limited holding. The case dealt basically with direct, affirmative benefits and not with the many possible incidental forms of aid.

*Abington Township v. Schempp*[79] followed *Engel.* The facts and holding in *Schempp* were similar to the *Engel* case. *Schempp* prohibited the reading of passages from the Bible or the recitation of the Lord's Prayer in public schools. The decision cited both *McGowan* and *Everson* as authority for a new constitutional test for legislation affected by the Establishment Clause. (This test should have put to rest the fears created by *Engel.*) *Everson* was

[73] *Id.* at 442-45.

[74] *Id.* at 447-52, 466-67 (Frankfurter J., dissenting). *See also* Torcaso v. Watkins, 367 U.S. 488 (1961).

[75] 370 U.S. 421 (1962).

[76] Mr. Justice Douglas concurred in this opinion. He also concurred in the 5-4 *Everson* decision where his one vote placed the payment of bus fares for parochial school children in the sphere of the state and out of the sphere of religion, thus making it constitutionally permissible. In *Engel* he repented that decision and admitted it complicated his present one, *supra* note 75, at 443: "The *Everson* case seems in retrospect to be out of line with the First Amendment." This statement could only mean that he now saw *Everson* as giving some aid to religion and, therefore, as unconstitutional. He went so far as to say that financial aid to religion "is an unconstitutional undertaking whatever form it takes." *Supra* note 75, at 437. His opinion in *Engel,* therefore, was also repugnant to the majority opinion which he wrote in *Zorach v. Clauson.* Justice Douglas did not say in *Engel* that he repented his *Zorach* opinion, but there he wrote: "The problem, like many in Constitutional Law, is one of degree." See text accompanying note 66.

[77] *See* 71 YALE L.J. 1451, 1457 (1962).

[78] If the aid in *Everson* was unconstitutional because some aid, whatever the form, was given to religious institutions, then *Zorach, Braunfield* and *McGowan* were also unconstitutional. Each of the cases allowed some benefit to flow to religion.

[79] 374 U.S. 203 (1963).

presumably cited for its basic standard of Establishment Clause prohibitions;[80] *McGowan* as authority for its allowances.[81]

> The test may be stated as follows: what are the purposes and primary effects of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and primary effect that neither advances nor prohibits religion.[82]

Justice Brennan's concurring opinion represents an awareness of the consequences of the Court's analysis. He concluded: "Not every involvement of religion in public life violates the Establishment Clause."[83] He also conceptualized the stand of the Court:

> What our decisions under the Establishment Clause have forbidden, are those involvements of religious with secular institutions which (a) serve the essential religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; (c) use essentially religious means to serve government ends, where secular means would suffice. On the other hand, there may be myriad forms of involvement of government and religion which do not import such dangers (Which would subvert religious liberty and the strength of a system of secular government) and therefore, should not . . . be deemed to violate the Establishment Clause.[84]

Although the Court condemned an instance of church-state involvement in *Schempp*, it exerted every effort to encourage other relationships of that nature in the future. Much to the probable dismay of James Madison, who cautioned that "it is proper to take alarm at the first experiment on our liberties,"[85] the Court seems to suggest such experiments. Justice Goldberg, with Justice Brennan, gave his counsel: "[O]f course, today's opinion does not mean that all incidents of government which import of the religious are therefore and without more banned by the strictures of the Establishment Clause."[86] While the formula for an extension of state aid to religious institutions was established by *Schempp*, it was left for future decisions to determine whether particular incidents of government which import of the religious were constitutional or otherwise. The Supreme Court determined just that in *Board of Education v. Allen*.[87]

[80] *Supra* note 44, at 15-16.

[81] McGowan v. Maryland, 366 U.S. 420, 442 (1961).

[82] Abington Township v. Schempp, 374 U.S. 203, 222 (1963).

[83] *Id.* at 294.

[84] *Id.* at 294-95.

[85] Everson v. Board of Educ., 330 U.S. 1, 40 (1947).

[86] *Supra* note 82, at 307.

[87] 392 U.S. 236 (1968).

*Allen* applied the *Schempp* test, adopted in a school prayer situation, to the lending of textbooks. While employing *Schempp* as its primary tool for determining the constitutionality of the activity, the Court in *Allen* approached the problem from two aspects. First it attempted to place *Allen* within the category of *Everson v. Board of Education*,[88] where the aid in question would be considered directly within the sphere of the state and thus permissible. The lending of books was classified with the payment of bus fares as public welfare legislation. The benefits of the legislation were seen as flowing to the child and not the institution. In order to maintain the classification, the Court took the extreme and definite forward step of separating education in religious schools into secular and religious parts and then declared that one segment could be aided without adversely affecting the other. The Court could have stopped at this point and relied completely upon *Everson* as precedent for upholding the legislation. The fact that it did not is indicates that the Court is encouraging increased aid to parochial schools and that it is attempting to establish a way in which it can be accomplished. But the fact that the Court still relies upon *Everson* manifests the caution with which it approaches the problem.

As to the second aspect, the Court is willing to recognize and allow that there is some crossover between the respective spheres of church and state. This is implicit in its adoption of the *Schempp* test, recognizing that there is a constitutionally allowable degree of state aid to religion. Where the primary thrust of legislation is secular, the legislation will not be considered sectarian merely because a secondary effect benefits religion. Indeed, the only particular secondary benefit which the Court seems to approve is the ever present public welfare type. But, this problem of particular secondary benefits is almost completely avoided by the division of secular and religious education in a parochial school. The single objective of the legislation in this area has been to aid the secular. If the secular can be separated from the religious so that aid applied to the secular does not affect the religious, fear of secondary benefits is passé. This was the accomplishment of *Allen*. The consequence of the use of the "primary purpose and effect" test of *Schempp* is not that secondary benefits are allowed, but that the degree of cooperation between church and state in education is no longer of importance.

An additional consequence of the *Allen* Court's reliance upon the *Schempp* case appears rooted in the decision. The theories of *Everson* and *Schempp* are not separated in *Allen*. Public welfare is the primary purpose; "child benefit" is the primary effect. Since the Court need not have used *Schempp*, its use indicates that there may be primary purposes other than public welfare and primary effects other than "child benefit." What such purposes and effects may be is left to the experimentation of future legislatures.

[88] *Supra* note 85, at 18.

The remaining guideline for legislation in this area is that any aid directed to a religious educational institution must be directed toward the secular aspect of that education and the aid itself must be secular. It also appears that a result of *Allen's* reliance upon the "child benefit" theory that the legislation cannot relieve a religious institution of a burden it had previously assumed.

The degree of permissible constitutional support for a religous institution allowed by *Allen* is considerable. The Court has come a long way from buses to books. Books are certainly the single most important tool of education, and they normally present a considerable source of expense. *Allen* provides legislatures with a vehicle with which they may provide aid to religious educational institutions. How far the Court will venture from *Allen* is difficult to say. Over the past twenty years from *Everson* to *Allen* the Court has evidenced a growing concern for parochial institutions, and that trend is definitely toward increased aid. *Allen* has provided a springboard from which the Court can allow dissemination of aid to many different areas of parochial education. By acknowledging the dual purpose of a religious institution to provide secular and religious education and the fact that in certain instances the secular aspect can be aided without impermissible support of the religious aspect, the Court has opened the door to innumerable types of aid to the secular which would not unconstitutionally benefit the religious. This aid could possibly include payment of teachers' salaries in certain courses, the erection of certain school buildings, and the purchase and maintenance of equipment used for particular purposes where the school had not previously assumed the burden.

The motivating force of the Court's trend toward increased aid to parochial schools has two likely sources. The first is the dilemma faced by the parents of parochial school children. Their government demands that they pay taxes to support education, and their consciences demand that they send their children to parochial schools. If taxes may not be used to aid parochial school education, these parents are being denied the benefit of their own taxes which are collected to aid the education, which parochial schools are admittedly accomplishing. But such aid is denied because of the specter of the "establishment of religion." Individual members of the Supreme Court have for many years sympathized with the plight of these parents. And the Court cannot be blind to the fact that about one-eighth of all school children attend private schools.[89]

The second likely source of the prevailing spirit of the Court is the dialectical influence of governmental aid to education.[90] Individuals have a right

[89] Note, 17 CATH. U.L. REV. 242, 246 (1967).

[90] "Whenever an area of activity is brought within the control or regulation of government, to that extent equality supplants liberty as the dominant ideal and constitutional

to send their children to parochial schools, and parochial schools perform a secular function sufficient to fulfill mandatory education requirements.[91] If all governmental benefits are studiously withheld from parochial schools, these schools cannot hope to maintain educational standards equal to those of secular schools. In effect the taxes of the parents of parochial school children are being used to destroy the requisite equality.[92] Realistically, parents will choose the best education for their children and, thus, if no benefits are allowed to flow to parochial school children, the freedom of choice of these parents will have been destroyed by governmental action.[93] This action is certainly not required by the Establishment Clause.

The affect which *Allen* shall have upon future legislation is not certain. Certainly legislatures may act with greater security to provide aid to parochial schools. However, the Court has recently ruled on a case which will act as a check upon all legislation in this area, *Flast v. Cohen*.[94] Perhaps envisioning a rapid increase in legislation favoring the sectarian schools because of *Allen*, the Court held that taxpayers have standing to object to the appropriation of their taxes. These two decisions taken together appear to establish a balance, but the opposite effect could result.

In the past, Congress and state legislatures have never felt that the Constitution decreed an absolute separation between church and state, contrary to the Court's opinion. They have in the past provided almost every type of aid.[95] *Allen* affirms in many instances only what was already done in the past and possibly increases the types of aid available. Taxpayers in the past, however, have never been allowed to bring actions under the Establishment

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demand . . . . To think primarily in terms of protection against encroachment by public authority is not to commit the sin of irrelevance." Tussman & ten Broek, *Equal Protection of the Law*, 37 CALIF. L. REV. 341, 380 (1949). The theory has been advanced that the no aid aspect of the separating of church and state should be relaxed in direct proportion to the extent of governmental regulation of education. Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development*, 81 HARV. L. REV. 513 (1968).

[91] "The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instructions from public teachers only." Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925).

[92] A large number of church-related schools are being forced to close because of just this situation. The Roman Catholic Church maintains the largest number of these schools in the United States. In 1968, 4,165,504 pupils were enrolled in 10,757 Catholic elementary schools. In the same year, 2,580 secondary schools enrolled 1,523,232 students. In 1967 there were 4,369,845 pupils enrolled in 10,926 Catholic elementary schools. In the same year 2,646 secondary schools enrolled 1,534,831 students. The trend is evident. These situations may be found in the *General Summary* of the OFFICIAL CATHOLIC DIRECTORY (1967-1968).

[93] *See* 61 NW. U.L. REV. 777 (1966).

[94] 392 U.S. 83 (1968).

[95] Engel v. Vitale, 370 U.S. 421, 437 (1962).

Clause,[96] and now they may under *Flast*. Many of the types of aid previously provided by legislatures with impunity may now be subject to attack.

A substantial barrier remains in the path of increased aid which is theoretically unaffected by *Allen*. Almost every state has a constitutional provision prohibiting the "establishment of religion," many of which are stricter than the United States Constitution.[97] And state courts acting under their own constitutions have prohibited aid to parochial schools by striking down such legislation, even though approved by the Supreme Court as not violative of the first amendment.[98]

Having made the transition from police and fire protection to bus fares and books, it is unlikely that the Supreme Court in the face of post-*Flast* opposition will invalidate state legislative efforts even beyond books. And the states themselves, more closely attuned to the apparent need, coupled with the growing realization that these schools could be forced to cease operation, will follow the lead of the Supreme Court and relieve the strictures exerted by state constitutions.[99] The question is no longer if, but how far, and it is a much shorter step from books to buildings than it was from buses to books.

*Thomas Coffey*

[96] Frothingham v. Mellon, 262 U.S. 447 (1923).

[97] *See* Note, 50 YALE L.J. 917 (1941). *See generally* ANTIEUA CARROLL & BURKE, RELIGION UNDER THE STATE CONSTITUTION 173-239 (1965).

[98] Most states in which the issue was considered rejected the theory. *See* Note, 17 CATH. U.L. REV. 242 (1967). *See also* McKenna, *The Transportation of Private and Parochial School Children at Public Expense*, 35 TEMP. L.Q. 259 (1962) for a broad coverage of cases forbidding aid under state constitutions.

[99] The leading case prohibiting state lending of textbooks is *Judd v. Board of Educ.*, 278 N.Y. 200, 15 N.E.2d 576 (1938). This decision was accepted by the courts of several states. *See, e.g.*, Gurney v. Fergeson, 190 Okla. 254, 122 P.2d 1002 (1941); Mitchell v. Consol. School Dist., 17 Wash.2d 61, 135 P.2d 79 (1943); Matthews v. Quinton, 362 P.2d 932 (Alaska 1961). Possibly indicating the beginning of a trend at the state court level, *Judd* was overruled by *Board of Educ. v. Allen*, 20 N.Y.2d 109, 228 N.E.2d 791 (1967).

## CRIMINAL LAW—BORDER SEARCHES—REQUIRING A "CLEARER INDICATION" IN ALLOWING INTRUSIVE BODY SEARCHES

On March 13, 1966, Oscar John Huguez and a companion traveled by automobile from Tijuana, Mexico, to San Ysidro, California, where they were stopped by United States customs officials for routine border questioning. During this questioning, Inspector Teela became suspicious, because of the unnatural appearance of the two men's eyes, that they were under the influ-