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Constitutional Law - School District of Hartington v. State Board of Education - The Lease as a Solution

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CONSTITUTIONAL LAW—SCHOOL DISTRICT OF HARTINGTON v. STATE BOARD OF EDUCATION—THE LEASE AS A SOLUTION

On September 3, 1969, the School District of Hartington, Nebraska, applied to the Nebraska State Department of Education for a grant of federal funds which were to be used to institute a special program for educationally deprived children pursuant to Title I of the Elementary and Secondary Education Act of 1965.[1] The planned project was to have public and private students who were qualified attend remedial reading and mathematics classes in two classrooms located in the Cedar Catholic High School. These rooms were to be rented from the parochial school, because the public school lacked the available space. This lease proposal was incorporated into the application along with the school district's assurances that it would maintain full control over the classrooms and the program, and that prior to the commencement of the project all religious symbols would be removed from the rooms. The State Department of Education, in rejecting the application, cited as its reason the lease agreement between the public and private schools. The controversy found its way to the Nebraska Supreme Court where, on February 25, 1972, it was decided that it is constitutional for a public school district to rent classrooms from a parochial school if the space leased is under the control of the public schools, and the instruction offered is secular.[2] *State ex rel. School District of Hartington v. Nebraska State Board of Education,* 188 Neb. 1, 195 N.W. 2d 161 (1972).

Ever since the first litigation arose concerning the establishment clause in its application to the States,[3] methods of providing public aid to private schools have become increasingly more sophisticated. Prompted by these subtle but nonetheless effective measures, the Supreme Court of the United States, in an effort to uphold the first amendment's religion mandate,[4] has formulated increasingly more stringent standards

1. Elementary and Secondary Education Act, 20 U.S.C. § 885 (Supp. 1965).

2. In an attempt to contest the decision of the Nebraska Supreme Court, the State Board of Education applied for a writ of certiorari. The Supreme Court denied this application. School District of Hartington v. State Board of Education, 188 Neb. 1, 195 N.W.2d 161 (1972), *cert. denied,* 409 U.S. 921 (1972).

3. Everson v. Board of Education, 330 U.S. 1 (1947).

4. U.S. CONST. amend. I, reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

by which to determine the extent that the sovereign may permissibly involve itself with the church. The Court's exacting tests, when viewed with an awareness that decreasing private school enrollment has substantially increased the cost to the taxpayer of financing public education,[5] demonstrates the significance of the *Hartington* decision. The leasing of space in parochial buildings may be the way that a state government can relieve some of the financial burden felt by its constituents and still avoid the constitutional pitfalls of public aid to private schools. The purpose of this case note is to analyze how the lease can avoid becoming merely another unconstitutional attempt at providing parochial assistance.[6] In order to understand how a rental agreement can be successful, an initial understanding of the Supreme Court decisions confronting the problem is required.

Ever since 1925, when the Court held as violative of the due process clause of the fourteenth amendment a statute requiring that all children be educated in the public schools,[7] the church-state conflict with the first amendment became inevitable. In the 1930 case of *Cochran v. Board of Education,*[8] the Supreme Court was faced with a state statute that permitted the spending of public funds for textbooks which were then loaned to students attending both public and private schools. In sustaining the constitutionality of the scheme, the Court again rejected the due process clause argument that the state was using public money for a private purpose. The majority reasoned that since these non-sectarian books were loaned to the children and not to the private schools, there was simply no substance to the allegation that a private purpose was involved. Although not articulated as such, that reasoning represented the first of the constitutional standards by which the Supreme Court would decide if the first amendment had been violated; it was to be termed the "child benefit theory."[9]

5. *See* Table No. 181 (Catholic Elementary and Secondary Schools: 1950 to 1969) and Table No. 173 (Public Elementary and Secondary Schools—Enrollment, Teachers, and Schoolrooms: 1955 to 1970) in STATISTICAL ABSTRACT OF THE UNITED STATES (1971) which point out the relationship between the enrollment trend in public schools and the trend in Catholic schools.

6. Some of the unsuccessful schemes to provide aid to private schools have been: Released time programs, McCollum v. Board of Education, 333 U.S. 203 (1948); special educational services, Lemon v. Kurtzman, 403 U.S. 602 (1971), Johnson v. Sanders, 319 F. Supp. 421 (D. Conn. 1970); teacher salary supplements, Robinson v. DiCenso and Early v. Dicenso, 403 U.S. 602 (1971).

7. Pierce v. Society of Sisters, 268 U.S. 510 (1925).

8. 281 U.S. 370 (1930).

9. The "child benefit theory" was announced in Everson v. Board of Education, 330 U.S. 1 (1947), in which Justice Rutledge, in his dissent, pointed out that although Cochran did not raise the first amendment issue, it was still responsible

The establishment clause was challenged in the landmark decision of *Everson v. Board of Education.*[10] In controversy was a New Jersey statute which authorized the payment of public funds to parents of parochial school children as reimbursement for the costs of private transportation to and from school. Justice Black, basing his majority opinion on the first amendment, felt that transportation is not the type of service that is ordinarily associated with the educational function of the school; it is, instead, analogous to a public welfare service such as police or fire protection. Therefore, the primary benefit goes to the child with only an incidental advantage extending to the parochial school. This is the "child benefit theory." In application it means that children as children are entitled to equal educational benefits regardless of their faith; thus, any legislation which initially benefits the child will not be struck down merely because it also benefits the church.[11] The *Everson* decision is not only important because it incorporated the establishment clause into the purview of the fourteenth amendment, thereby making it applicable to the States; it also foreshadowed the emergence of a new constitutional criterion, the neutrality test.[12]

The *Everson* "child benefit theory" was applied in *Engel v. Vitale*[13] to strike down a New York public school's practice of reciting a prayer at the beginning of each day. However, within the context of the *Vitale* decision, doubt was cast upon *Everson's* validity.[14]

Although responsible for the debate concerning the applicability of

for the *Everson* decision. "For just as *Cochran v. Board of Education*, 281 U.S. 370, has opened the way by oblique ruling for this decision, so will the two make wider the breach for a third." *Id.* at 29.

10. 330 U.S. 1 (1947).

11. For two examples of the application of the "child benefit theory," *see* Zorach v. Clauson, 343 U.S. 306 (1952) (released time program where students went to the church buildings for religious instruction held constitutional); McCollum v. Board of Education, 333 U.S. 203 (1948) (released time program which authorized public school classrooms to be used for religious instruction held unconstitutional).

12. Justice Black stated: "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 . . . . 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 adopt to teach or practice religion." Everson v. Board of Education, 330 U.S. 1, 15-16 (1947).

13. 370 U.S. 421 (1962).

14. Justice Douglas, who helped comprise the majority in the 5-4 *Everson* decision stated in his concurrence: "The *Everson* case seems in retrospect to be out of line with the First Amendment. Its result is appealing, as it allows aid to be given to needy children. Yet by the same token, public funds could be used to satisfy other needs of children in parochial schools—lunches, books, and tuition being obvious examples." 370 U.S. at 443.

Everson, the importance of the *Vitale* decision was overshadowed one year later when the case of *School District of Abington Township v. Schempp*[15] arose. In finding a Pennsylvania statute which authorized Bible-reading in the public schools, constitutional, the Court in *Schempp* established a new standard called the "secular purpose-primary effect" position.

> The test may be stated as follows: What are the purpose and primary effect 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 that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.[16]

As a result of the formulation of this standard, the decision in *Schempp* raised a question as to which one of the tests the Supreme Court would apply in subsequent cases. The answer came in the case of *Board of Education v. Allen*.[17]

In *Allen* the subject matter of the litigation was a textbook lending scheme, financed by public funds pursuant to a New York statute. The Court applied both the "secular purpose-primary effect" test and the "child benefit theory" to the challenged statute to uphold its constitutionality. It was reasoned, first, that none of the effects of this type of aid were inconsistent with the law's secular purpose of providing educational opportunities to the young, and secondly, that although free books might influence some children into attending parochial schools who otherwise might not, this, when compared with the great degree of benefit for the student, did not qualify as an unconstitutional amount of support for a religious institution. While the dual doctrine approach in *Allen* is important, probably the most noteworthy aspect of the decision was the underlying assumption around which the majority fashioned its arguments. The Court felt that it could not be said:

> either 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 students by the public are in fact instrumental in the teaching of religion.[18]

This policy announcement merely affirmed the evident: some public aid to church schools does not offend the establishment clause. However, the question which remained unanswered was the constitutionally permissible limit of that state support.

In positing the solution to this problem, the Supreme Court in *Walz v.*

15. 374 U.S. 203 (1963).
16. *Id.* at 222.
17. 392 U.S. 236 (1968).
18. *Id.* at 248.

Tax Commission[19] was faced with a challenge to the constitutionality of a New York statute which exempted from taxation any group organized "for the moral or mental improvement of man."[20] From the *Walz* decision came the third requirement that state aid to private schools must meet in order to be judged inoffensive to the first amendment. Chief Justice Burger, in writing for the majority which upheld the statute, cautioned that a scheme to aid religion would be unconstitutional if it involved excessive administrative entanglement between the participating institutions.[21] He defined excessive entanglement as involvement necessitating sustained or detailed administrative relationships. In light of the announcement of this new standard, it is difficult in *Walz* to reconcile the decision the Court reached. However, if the statute would have been declared unconstitutional, the government's involvement with religion would actually have increased, because then the church would have had to involve itself with the government in the form of tax payments.[22] The Court also reaffirmed the applicability of the secular purpose-primary effect test,[23] and in his dissent Justice Douglas again questioned the validity of the once prevalent "child benefit theory."[24]

The case of *Johnson v. Sanders*[25] further defined the *Walz* entanglement formulation and demonstrated its relation to the *Schempp* effect-purpose doctrine. In issue was the validity of a Connecticut statute which authorized the state to contract with the parochial school system for the purchase by the state of secular educational services. In declaring the statute unconstitutional, the federal court initially focused on the entanglement problem.[26] The majority reasoned that, in order to insure the

19. Walz v. Tax Commission, 397 U.S. 664 (1970). *See also* Diffenderfer v. Central Baptist Church of Miami, Fla., Inc., 316 F. Supp. 1116 (S.D. Fla. 1970).

20. N.Y. REAL PROP. TAX § 421(b) (McKinney 1972).

21. Chief Justice Burger, in acknowledging that complete separation of church and state is impossible said: "No perfect or absolute separation is really possible; the very existence of the Religion Clauses is an involvement of sorts—one that seeks to make boundaries to avoid excessive entanglement." 397 U.S. at 670. *See also* Board of Education v. Allen, 392 U.S. at 248.

22. For a further discussion, *see* Duval, *The Constitutionality of State Aid to Nonpublic Elementary and Secondary Schools*, 1970 U. ILL. L.F. 342.

23. "Each value judgment under the Religion Clauses must therefore turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so." 397 U.S. at 669.

24. "Even so, the *Everson* decision was five to four and, though one of the five, I have since had grave doubts about it, because I have become convinced that grants to institutions teaching a sectarian creed violate the Establishment Clause." 397 U.S. at 703. *See also* Engel v. Vitale, 370 U.S. 421 (1962).

25. 319 F. Supp. 421 (D. Conn. 1970), *aff'd mem.*, 403 U.S. 955 (1971).

26. The federal court stated its view of what constitutes entanglement when it said: "A constitutional funding measure requires not just artful legislative language,

program's secular success, public officials would have to constantly investigate curricula, materials, and teaching methods. Also, the state would necessarily have to become involved in the auditing of parochial financial records. This analysis led to the final determination that the primary purpose of the scheme was the advancement of religion.[27] In parting, the court suggested that even if the program had met all of the necessary criteria it would still be unconstitutional if the classes were conducted in rooms with religious symbols present.[28]

The precision with which the Supreme Court had enunciated the various constitutional standards tended to create the impression that the Court was mechanically dealing with the emotionally complex problem of church-state relations. This impression was obviated in the 1971 decision of *Tilton v. Richardson*.[29] The controversy concerned Title I of the Higher Education Facilities Act of 1963,[30] which authorized federal funds to be granted to both public and religiously affiliated colleges to help finance the construction of new buildings. The only condition accompanying these grants was that none of the buildings were to be used for religious purposes. The Court upheld the statute, basing its ruling on the premise that sectarian indoctrination does not permeate buildings used for secular functions on campuses controlled by religious organizations. Chief Justice Burger expressed the majority's sentiments when he said that the establishment clause is meant to protect against state sponsorship, financial support, and active involvement. He then set out the ultimate test that would be used in deciding if the forbidden situations were present. The opinion discussed, as this newly stabilized formula, the "secular purposes-primary effect" test and the "excessive entanglement" doctrine, but added this important caveat:

Every analysis must begin with the candid acknowledgement that there is no single constitutional caliper which can be used to measure the precise degree to which

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but also the creation of an administrative mechanism through which government may restrict its spending to a readily identifiable secular educational function without 'continuing surveillance leading to an impermissible degree of entanglement.'" 319 F. Supp. 421, 431 (D. Conn. 1970).

27. Pub. Act 791, C.G.S. § 10-281(b) (1969) (repealed 1973), states the policy of the program. The last sentence reads: "As part of a general program to promote education, the state can properly support the public schools and render some financial aid to the nonpublic schools." It is also stated within this same section: "To the extent these church established schools teach secular subjects in a secular manner, they are entitled to the same assistance as other nonpublic schools."

28. This is why *Hartington*'s application for funds contained the stipulation that all religious symbols would be removed from the leased classrooms.

29. 403 U.S. 672 (1971).

30. Act of December 16, 1963, Pub. L. No. 88-204, *as amended* 20 U.S.C. §§ 711-21 (Supp. V, 1964).

these three factors are present or absent. Instead, our analysis in this area must begin with a consideration of the cumulative criteria developed over many years and applying to a wide range of governmental action challenged as violative of the Establishment Clause.[31]

In the *Hartington* case the question presented to the court was whether a public school could constitutionally rent space from a parochial school.[32] In order to answer that question, the constitutional requirements as summarized in *Tilton* must be applied.

The secular purpose-primary effect test was used in the *Tilton v. Finch* case[33] to resolve an issue parallel to the one decided in *Tilton v. Richardson;* that is the constitutionality of aid to a church-related college. In upholding the scheme, the federal district court pointed out that the main focus is on the function which the aid subsidizes and not on the nature of the institution receiving the aid.[34] In view of the *Finch* approach, the "secular purpose-primary effect" requirement does not seem to present much of an obstacle to the *Hartington* facts. The purpose of the lease is to acquire needed space for a public school program, with the primary effect being the successful institution of a program to improve the quality of the American educational system without promoting the Catholic faith.[35] In terms of entanglement, the rental agreement's validity is questionable, since any contract of this nature necessitates interaction between the lessor and lessee.

In a series of three cases, disposed of in the same opinion, the Supreme Court faced the problem of entanglement.[36] *Lemon v. Kurtzman* concerned Pennsylvania's Non-public Elementary and Secondary Education Act of 1968, which authorized the State Superintendent of Public Instruction to contract with private schools for certain "secular educational services."[37] *Early v. DiCenso* and *Robinson v. DiCenso* dealt with Rhode Island's

31. 403 U.S. at 677-78.

32. The dissent vehemently disagreed with the majority's framing of the issue. Chief Justice White felt, due to the fact that the lease was so closely associated with the application for Title I funds, that the real question the court should decide is the constitutionality of Title I of the Elementary and Secondary Education Act of 1965. The majority dismissed this contention by citing Barrera v. Wheeler, 441 F.2d 795 (8th Cir. 1970) for the application of the abstention doctrine.

33. Tilton v. Finch, 312 F. Supp. 1191 (D. Conn. 1970).

34. *See generally* McCanna v. Sills, 103 N.J. Super. 480, 247 A.2d 691 (Eq. 1968); Honohan v. Holt, 17 Ohio Misc. 57, 244 N.E.2d 537 (1968); Bowerman v. O'Connor, 104 R.I. 519, 247 A.2d 82 (1968).

35. Act of April 11, 1965, Pub. L. No. 89-10, 79 Stat. 27 (1965) and Act of April 14, 1965, Pub. L. No. 89-11, 79 Stat. 58, 20 U.S.C. § 885 (Supp. I, 1965).

36. Lemon v. Kurtzman, 403 U.S. 602 (1971).

37. PA. STAT. ANN. tit. 24 §§ 5601-09 (Supp. 1971), *as amended,* PA. STAT. ANN. tit. 24, §§ 5701, *et seq.* (Supp. 1972).

1969 Salary Supplement Act, which provided for a fifteen per cent salary supplement to be paid to teachers in non-public schools where the average per-pupil expenditure was below that of the average in the state public schools.[38] The Court held that both the Rhode Island and Pennsylvania statutes violated the first amendment,[39] emphasizing again that the establishment clause was designed to protect against sponsorship, support, and active involvement by the state with religion.[40] The method of ascertaining whether any of these prohibitions had been affected in a given situation was outlined in the opinion:

> In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority.[41]

An examination of these guidelines, in light of the Supreme Court's view that within the confines of a parochial school the sectarian and the secular can be separated,[42] leads to the conclusion that the lease is constitutional. The rental agreement, although involving a state institution with the Catholic Church, is still being consummated between two schools with the mutual purpose of improving education. In this case, the aid the state is providing is a direct money payment to the church. However, in exchange the church is losing both space and control over part of its domain. In the conventional sense of the word, it is questionable whether such a scheme even qualifies as "aid."[43] The resulting relationship is, rather, landlord-tenant, and although the state's presence in the parochial building does mean a certain amount of entanglement, it need not be extreme. All that is required of the state as a tenant is a timely payment of the rent. It is difficult to imagine a court terming such a minimal

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38. R.I. GEN. LAWS ANN. § 16-51-1, *et seq.* (Supp. 1970).

39. For examples of state aid programs to private schools which have been held not to involve an unconstitutional amount of entanglement, *see* Clayton v. Kervick, 59 N.J. 583, 285 A.2d 11 (1971); College of New Rochelle v. Nyquist, 37 App.Div.2d 461, 326 N.Y.S.2d 765 (1971); Protestants and Other Americans United for Separation of Church and State v. Essex, 28 OhioSt.2d 79, 275 N.E.2d 603 (1971); Hunt v. McNair, — S.C. —, 187 S.E.2d 645 (1972).

40. The Court said: "[W]e must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'" Lemon v. Kurtzman, 403 U.S. 603, 612 (1971).

41. 403 U.S. at 615.

42. Board of Education v. Allen, 392 U.S. 236, 248 (1968). *See also* Chief Justice Burger's opinion in Tilton v. Richardson, 403 U.S. 672 (1971). *But see* Justice Douglas' dissenting opinion in *Tilton*. *Id.* at 689.

43. Black's Law Dictionary defines "aid": "To support, help, assist, or strengthen." BLACK'S LAW DICTIONARY 91 (4th ed. 1951).

degree of contact excessive. The ultimate determination that the *Hartington* lease agreement does not offend the United States Constitution does not end the challenge for it still must withstand the rigors of its own state mandate, the Nebraska constitution.

Article VII, §11, of the Nebraska constitution reads:

> [N]either the state Legislature nor any county, city or other public corporation, shall ever make any appropriation from any public fund, or grant any public land in aid of any sectarian or denominational school or college, or any educational institution which is not exclusively owned and controlled by the state or a governmental subdivision thereof.

Although this type of lease situation has never been litigated in Nebraska before,[44] several official interpretations of Article VII, §11 have been rendered, and they provide helpful insight into the provision's meaning.

In 1956 the Nebraska Supreme Court decided the case of *United Community Services v. Omaha National Bank.*[45] A public power corporation had contributed money to the United Community Services which engaged in both religious and charitable activities. Even though the grant was accompanied by the condition that the money was not to be used for sectarian purposes, the court sustained the constitutional challenge by saying:

> If by giving to agencies of this character, even though the money given is designated to be used for activities non-sectarian in character, it makes available to such agency for religious or educational purposes money it has on hand to an extent not otherwise possible, thus indirectly doing what the Constitution prohibits, we think it would be bad.[46]

The court indicated, therefore, that contrary to the Supreme Court's position, it would condemn any aid which would provide even a secondary effect of advancing religion. Also, in 1957 the Nebraska Attorney General, expressing an official opinion on the constitutional ramifications of instituting a program of state scholarships for deserving students, delved into the debates that led to the passage of Article VII, §11. He opined that the intent of the provision was to eliminate the possibility of any type of aid to religion under any program.[47] Thus, it initially appears that the Nebraska constitution maintains a more separatist position regarding

44. *But see* State ex rel. Gilbert v. Dilley, 95 Neb. 527, 145 N.W. 999 (1914), which sustained a religious group's use of a public school for their weekly meetings. However, this case was decided under article one, section four of the Nebraska Constitution of 1875 which says nothing about state funds.

45. 162 Neb. 786, 77 N.W.2d 576 (1966), *see also* State ex rel. Public School District v. Taylor, 122 Neb. 454, 240 N.W. 573 (1932).

46. 162 Neb. at 804-805, 77 N.W.2d at 589.

47. OP. NEB. ATTY. GEN. No. 22, Jan. 25, 1957.

church-state relations than does the United States Constitution. However, neither the facts of the *United Community Services* case nor the situation prompting the attorney general's opinion even closely resemble a lease, and they need not be given any weight as precedence. Therefore, the next step is to look to other jurisdictions to see if the same or an analogous situation has arisen and how it has been handled.

The Michigan constitution contains a section almost identical to that of Nebraska.[48] Also, a recent case arose which interpreted the Michigan provision in its application to a Title I lease scheme.[49] The controversy originated from the Michigan Attorney General's opinion that the passage of Proposal C, a constitutional initiative amendment, would prohibit public money from being used for several proposed legislative programs between the state and private organizations.[50] One of these proposals was a Title I lease plan, exactly identical to the plan involved in the *Hartington* application. The court ruled that Proposal C would not prohibit the use of public funds for a Title I program. During the course of that opinion the court disposed of the rental controversy by saying:

> Premises occupied by lease or otherwise for public school purposes under the authority, control and operation of the public school system by public school personnel as a public school open to all eligible to attend a public school are public schools. This is true even though the lessor or grantor is a non-public school and even though such premises are contiguous or adjacent to a non-public school.[51]

The Michigan Supreme Court was concerned only with the character and control of the curriculum and not with the location of its presentation. The recency of this decision coupled with the consonance of issue it shared with *Hartington* constituted an ultimately persuasive authority, which the Nebraska Supreme Court followed in ruling the lease agreement constitutional.[52]

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48. MICH. CONST. art. VIII, § 2 states: "[n]o public monies or property shall be appropriated or paid . . . directly or indirectly to aid or maintain any private, denominational or other nonpublic, pre-elementary, elementary, or secondary school."

49. Elementary and Secondary Education Act, 20 U.S.C. § 185 (Supp. I 1965).

50. Traverse School Dist. v. Attorney General, 384 Mich. 390, 185 N.W.2d 9 (1971).

51. *Id.* at 415, 185 N.W.2d at 19-20.

52. Michigan and Nebraska are not the only jurisdictions which have allowed the state to lease space from parochial schools: Millard v. Board of Education, 121 Ill. 297, 10 N.E. 669 (1887); State *ex rel.* Johnson v. Boyd, 217 Ind. 374, 28 N.E. 2d 256 (1940); and Scripture v. Burns, 59 Iowa 70, 12 N.W. 760 (1882). ***But see*** Knowlton v. Baumhover, 182 Iowa 691, 166 N.W. 202 (1918); Rawlings v. Butler, 290 S.W.2d 801 (Ky.App. 1956); Swadley v. Haynes, 41 S.W. 1066 (Tenn. Ch. App. 1918); Dorner v. School Dist. No. 5, 137 Wis. 147, 118 N.W. 353 (1908); and State *ex rel.* Conway v. District Board of Joint School Dist. No. 6, 162 Wis. 482, 156 N.W. 477 (1916). However, none of these cases were decided under the constitutional standards now being used.

If the establishment clause is to have effect, and the cost of education controlled, the approach used by the Nebraska Supreme Court in *Harting-ton* should prevail. The case does not just condone the use of a lease in church-state relations; it represents the judicial attitude of placing the emphasis on substance and not form. Properly instituted rental agreements allow both the public and private schools the latitude to adjust the size of their educational facilities without passing a bond issue or raising tuition.

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