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EXCESSIVE ENTANGLEMENTS: A NEW DIMENSION TO THE PAROCHIAL AID CONTROVERSY UNDER THE FIRST AMENDMENT

Rising educational demands and costs on all levels over the past years have resulted in significant attempts by both state and federal legislatures to assist both private and public educational institutions.[1] As a result of these attempts a controversy concerning the constitutionality of those programs which provide assistance to religiously affiliated schools has arisen. Actions were brought in three federal district courts challenging the validity of such programs.

An action was brought before a three judge United States District Court in the Eastern District of Pennsylvania[2] seeking to enjoin the alleged unconstitutional approval and expenditure of state funds under the Pennsylvania Nonpublic Elementary and Secondary Education Act.[3]

The Act authorized the Superintendent of Public Instruction to purchase specified secular services from nonpublic schools. The state directly reimbursed these schools for their actual expenditures for teachers' salaries, textbooks and instructional materials. The reimbursement was limited to certain secular courses presented in the public school curricula. Reimbursement was prohibited for any course containing subject matter expressing religious teaching, or the morals or forms of worship of any sect. The schools were required to keep financial records, subject to state inspection and audit, that identified the separate cost of secular educational services. The textbooks for the secular courses required the approval of the State Superintendent of Public Instruction.

The individual plaintiffs were citizens and taxpayers of Pennsylvania. Lemon, in addition to being a taxpayer and father of a child attending school, alleged that he purchased a race track ticket and

1. In 1960 the federal government provided $500,000,000 to private colleges and universities. Amounts contributed by state and local government to private schools at any level was negligible. Ten years later federal aid to private colleges and universities had grown to $2.1 billion. State aid began and reached $100 million. (Statistical Abstract of the United States 105 (1970); Lemon v. Kurtzman, 403 U.S. 602, 625 (Douglas, J., concurring).)

2. Lemon v. Kurtzman, 310 F. Supp. 35 (E.D. Pa., 1969).

3. 24 PA. STAT. ANN. §§ 5601-09 (1968).

thus paid the specified tax that supported the expenditures of the Act.[4] The defendants were state officials who administered the Act and seven sectarian elementary and secondary educational institutions which had contracted for the purchase of their secular services under the Act.

The Act was challenged as violative of the fourteenth amendment's Equal Protection Clause and the first amendment's Establishment Clause and Free Exercise Clause. The district court held that no plaintiff had standing to raise the equal protection claim because the complaint did not allege that any plaintiff had a child that had been denied admission to any nonpublic school on racial or religious grounds.[5] The court then dismissed the complaint for failure to state a claim upon which relief could be granted.[6]

On appeal, in a unanimous eight man decision, the United States Supreme Court reversed and remanded the case, holding that the plan fostered excessive entanglements between government and religion and thus violated the Establishment Clause of the first amendment.[7]

A similar action was brought before a three judge United States District Court in the District of Rhode Island[8] challenging the validity of the Rhode Island Salary Supplement Act.[9] This Act provided a 15% salary supplement to be paid to teachers in the nonpublic schools in which the average pupil expenditures on secular education did not exceed the average for the state public schools for a specified period. To qualify for the supplement a teacher was required to have a teaching certificate and to be teaching a course comparable to one taught in the public schools using text books approved for public use. The teacher was also required to agree not to teach any class in religion.

The plaintiffs, as taxpayers and citizens of Rhode Island, alleged that the Catholic schools were the primary beneficiaries of the Act;

4. The organizational plaintiffs were associations of persons residing in Pennsylvania which share the common objective of separation of church and state and opposition to public aid to parochial schools or other private schools whose practices discriminate against persons by race or religion. Also included was the Pennsylvania State Conference of the NAACP whose purpose is to eliminate racial discrimination. They based their standing solely on the fact that they are organizations established for such purposes. They therefore failed to show any "personal stake" in the outcome or "adverse legal interest" in the suit as required by Flast v. Cohen, 392 U.S. 83 (1967). They therefore were dismissed for lack of standing with respect to both the religious and the equal protection issues. 310 F. Supp. at 41.

5. 310 F. Supp. at 42-43.

6. *Id.*, at 48-49.

7. 403 U.S. 602 (1971).

8. DiCenso v. Robinson, 316 F. Supp. 112 (D.R.I. 1970).

9. R.I. GEN. LAWS c. 16-51 (1969).

that the goal of such schools was the propagation of the Catholic faith; and that the statute, therefore, had the purpose, and primary effect of advancing religion in violation of the Establishment Clause of the first amendment. They also alleged that the statute constituted compulsory taxation for the aid of religion in violation of the Free Exercise Clause of the first amendment.[10] The defendants in the action were the state officials who were involved in the administration of the Act.

The district court found that the parochial school system was "an integral part of the religious mission of the Catholic Church" holding that the Act fostered "excessive entanglements" between government and religion and thus violated the Establishment Clause of the first amendment.[11] On appeal the United States Supreme Court affirmed the district court in an eight to one decision.[12]

A three judge United States District Court in the District of Connecticut was convened to hear an action[13] brought by fifteen Federal taxpayers and residents of Connecticut seeking declaratory and injunctive relief with respect to the Higher Education Facilities Act of 1963.[14] The Act provides Federal construction grants for college and university facilities. However, the Act forbids grants for construction of any facility used or to be used for sectarian instruction, or as a place of religious worship, or primarily in connection with any part of a program of a school or department of divinity. The United States was to retain a twenty-year interest in any facilities constructed under the Act. If during that period the recipient violated the statutory restrictions the United States was entitled to recover a proportion of the present value of the facility equal to the proportion of the original cost provided by the government.

The plaintiffs sought injunctive relief against the officials who administer the act. Four colleges and universities, recipients under the Act, were also named as defendants.[15]

The plaintiffs contended that the Act did not authorize grants to

10. 316 F. Supp. at 113-14.
11. *Id.*, at 122.
12. Lemon v. Kurtzman, 403 U.S. 602 (1971).
13. Tilton v. Finch, 312 F. Supp. 1191 (D. Conn. 1970) (*sub nomine* Tilton v. Richardson in the United States Supreme Court).
14. 20 U.S.C.A. §§ 701-58.
15. The federal funds had been used for five projects at the defendant schools: (1) a library building at Sacred Heart University; (2) a music, drama and arts building at Amhurst College; (3) a science building at Fairfield University; (4) a library building at Fairfield; (5) a language laboratory at Albertus Magnus College (312 F. Supp. at 1203-04.)

sectarian institutions. They further contended that if the Act authorized grants for such institutions, it violated the Establishment Clause and Free Exercise Clause of the first amendment.[16]

The district court held that the Act did authorize grants to church related schools, and that such grants did not have the purpose or effect of promoting religion and, therefore, did not violate the Constitution.[17] On appeal the United States Supreme Court, in a five to four decision, held the Act did not violate the Religion Clauses of the first amendment, except the provision for a twenty-year limitation on the religious use restrictions.[18]

The Supreme Court has thus taken a substantial step in resolving the controversy over the application of the first amendment's Establishment Clause and Free Exercise Clause to governmental assistance to religiously affiliated schools.

CONSTITUTIONAL GUIDELINES

As the Court approached the instant cases involving the constitutional question of government assistance to sectarian schools, it was guided by constitutional principles and criteria developed over the past years through an extensive examination of the Religion Clauses. In *Abington School District v. Schempp*[19] the Court combined the various principles developed over the past years into a workable test:

> [T]he 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 understand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.[20]

16. 312 F. Supp. at 1194-95.
17. *Id.*, at 1200.
18. Tilton v. Richardson, 403 U.S. 672 (1971). The Court found that 20 U.S.C. 754(b)2, which imposed a twenty-year limitation on the enforcement of the act against a violation of the use restrictions contained in 20 U.S.C. 751(a)2, was unconstitutional. This limitation on enforcement destroyed assurances that the financial aid would not advance religion. However, because the provision was not essential to the statutory program, it was deemed severable. Tilton v. Richardson, *supra* at 676.
19. 374 U.S. 203 (1963). The case involved the constitutionality of a Pennsylvania law which required the reading of ten verses of the Bible without comment at the beginning of each school day. The Court found that the law violated the Establishment Clause of the first amendment. Not only did the Court formulate a workable test to deal with the problems arising under the Religion Clauses, but they went on to point out the difference between a violation of the Establishment Clause and the Free Exercise Clause. That is, "a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended." *Id.*, 223.
20. *Id.*, at 227.

Recently in *Walz v. Tax Commission*[21] the Court supplemented this test with an independent measure of constitutionality. That is, does the program foster "excessive government entanglement with religion . . . ."[22] These principles formed the guidelines with which the Court was to resolve the Constitutional question of government assistance to sectarian schools. Yet the problem was not easily resolved and many questions were left unanswered. As Mr. Justice Frankfurter once described the situation in this area:

> [T]he mere formulation of a relevant Constitutional principle is the beginning of a solution of a problem, not its answer.[23]

THE DECISION IN *Lemon* AND *DiCenso*

Mr. Chief Justice Burger delivered the Opinion of the Court holding both the Rhode Island Salary Supplement Act and the Pennsylvania Nonpublic Elementary and Secondary Education Act unconstitutional. At the outset of the analysis of the issues, the Chief Justice recognized the difficulty encountered when dealing with the Religion Clauses since "we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law." He attributed this difficulty to the language of the Religion Clauses which he described as "at best opaque."[24]

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21. 397 U.S. 664 (1970). The Court upheld the constitutionality of a tax exemption for religious property granted by the New York City Tax Commission. The Court applied the test formulated in Abington School District v. Schempp, 374 U.S. 203, 227 (1963), determining that the purpose of the exemption was neither the advancement nor the inhibition of religion, but rather the assurance that certain entities which foster the state's "moral and mental improvement" would not be inhibited in their activities by property taxation, 397 U.S. at 672.

Their analysis, however, went further than the *Schempp* test would direct them. The Court said: "We must also be sure that the end result—the effect—is not an excessive government entanglement with religion. This test is inescapably one of degree." *Id.*, at 674. The exemption in this case would actually result in less involvement between government and religion than would taxation itself. Therefore the exemption did not violate the Religion Clauses by having a primary effect of advancing religion or by creating excessive government entanglement with religion.

22. 397 U.S. at 674.

23. Illinois *ex rel.* McCollum v. Board of Education, 333 U.S. 203, 212 (1948). The Court held unconstitutional a Champaign, Illinois released time program by which children in public schools were released during class time to attend religious instruction given once a week on school property by private instructors. Although the decision was prior to the formulation of the *Schempp* test, the reasoning is consistent with it, since the obvious primary effect would be to aid religious instruction by use of the tax supported school system.

A distinction, however, was drawn by the Court in Zorach v. Clauson, 343 U.S. 306 (1952) in which the Court upheld the New York released time plan. The saving distinction was that the religious instruction was conducted on private property. Thus the state was not using tax supported facilities to advance religious instruction, but rather it was merely rescheduling a public event to accommodate religion. *Id.*, at 313-14.

24. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

In the continual attempts to penetrate this language the opinion noted that the Court has recognized three evils against which the language was intended to protect: "sponsorship, financial support and active envolvement of the sovereign in religious activity."[25] In attempting to determine if a government has entered any of these prohibited areas, the Chief Justice relied upon the cumulative criteria developed through the prior decisions in this area. This included a three step analysis of the legislation. First, the statute must reflect a "secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; and finally, the statute must not foster an excessive governmental entanglement with religion."[26]

In determining whether the statutes reflected a secular legislative purpose the Court did not find it necessary to look beyond the face of the statutes, which clearly stated that "they are intended to enhance the quality of secondary education in all grade schools covered by compulsory attendance laws."[27] Since there was no showing of something which undermined the stated legislative intent, the Court decided "it must therefore be accorded appropriate deference."[28]

The constitutional difficulties arose in effectuating this valid legislative purpose, since it must be done in a manner which does not have the primary effect of aiding or inhibiting religion. In order to hold the statutes constitutional, it would have been essential to determine whether the sectarian and secular functions of the parochial schools are so intertwined and inseparable that the state could not aid one without having a primary effect of aiding the other. The Court was confronted with this issue in *Board of Education v. Allen*,[29] in which they upheld the constitutionality of a New York program by which public authorities loaned secular textbooks to school children, including children attending sectarian schools. The Court refused to accept the contention of the opponents of the program that the functions were so in-

25. *Id.*, at 612. These three areas which the first amendment was designed to guard against were first outlined in Walz v. Tax Commission, 397 U.S. 664, 668 (1970).
26. 403 U.S. at 612-13.
27. *Id.*, at 613.
28. *Id.*
29. 392 U.S. 236 (1968). The Court applied the *Schempp* test to the New York program finding both a legitimate purpose as well as a valid primary effect. The stated purpose of the program was the furtherance of educational opportunities for the young, and in the absence of anything shown to the contrary, the Court accepted that as valid. In analyzing the effect of the program the Court looked to find the "primary" effect. Thus, although the Court realized the program may have an incidental effect of benefiting religion by perhaps enabling some students to attend the schools by relieving them of a financial burden, the Court found the primary effect to be aiding children in obtaining a secular education.

tertwined that the textbooks could not be provided for the secular function without benefiting the religious instruction.[30] In *Lemon* and *DiCenso* the Court said they agreed "at least in the abstract" with the conclusion of the Rhode Island and Pennsylvania legislatures that these functions were "identifiable and separable."[31]

Thus, it would seem that if the legislature directs the assistance to the identifiable secular function of the parochial schools, and imposes restrictions and regulations to insure that it is only used for this purpose, there would be little danger of the benefit primarily going to the religious function of the school.

The Court, however, found it unnecessary to resolve this issue because of a different violation of the Religion Clauses.

> We need not decide whether these legislative precautions restrict the principal or primary effect of the programs to the point where they do not offend the Religion Clauses, for we conclude that the cumulative impact of the entire relationship arising under the statutes in each state involves excessive entanglement between government and religion.[32]

The Court had sounded its warning of such dangerous entanglement in *Walz v. Tax Commission.*[33] While the Court discussed this concept in a case upholding the constitutionality of a tax exemption for church property, this principle, as clarified in *Lemon* and *DiCenso*, was meant "to confine rather than enlarge the area of permissible state involvement with religious institutions by calling for close scrutiny of the degree of entanglement involved in the relationship."[34] The Court pointed out, however, that the prior cases involving the Religion Clauses had long recognized that complete separation of church and state was impossible, and some relationship between government and religion was inevitable.

Thus, the problem has been recognized as one of degree.[35] The limit of permissible activity was characterized by Jefferson as a "wall

30. In Pierce v. Society of Sisters, 268 U.S. 510 (1925), the Court recognized that the parochial schools provide both the secular as well as the religious instruction of their students. They thus held unconstitutional the application of Oregon's Education laws which would require students to attend public schools.
In *Allen* it was therefore only necessary to determine if these functions were so intertwined that secular textbooks could not be provided without being instrumental in the religious instruction.
31. 403 U.S. 602, 613.
32. *Id.*, at 613-14.
33. 397 U.S. 664, 675 (1970).
34. 403 U.S. at 614.
35. Zorach v. Clauson, 343 U.S. 306, 314 (1952).

of separation."[36] In *Everson v. Board of Education*, Justice Black described this wall as "high and impregnable."[37] However, in *Lemon* and *DiCenso* this limit was viewed differently. The limit, "far from being a 'wall,' is a blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship."[38]

The examination of the Court of the degree of entanglement was directed to three areas: first, the character and the purposes of the institutions which were benefited; second, the nature of the aid that the state provided; and third, the resulting relationship between government and religious authority.[39]

In examining the nature of the institutions benefited under the Rhode Island plan, the Court relied upon the findings of the district court. The lower court's examination had focused upon the Catholic school system which at the time was the sole beneficiary under the Act. This examination included the relation of the parish to the school, the authority structure in the school system, the role of the instructors, and the characteristics of the buildings and facilities. In conclusion it found the schools constituted "an integral part of the religious mission of the Catholic Church," making them a "powerful vehicle for transmitting the Catholic Faith to the next generation."[40] In the Pennsylvania case, because the complaint had been dismissed for failure to state a claim for relief, the Court was required to accept as true the allegations that the schools have the purpose of propagating and promoting a particular religious faith, and that they conduct their operations to fulfill that purpose.[41] Thus, after considering the nature of these institutions, the Court concluded that the programs would require careful governmental control and regulation to insure that the primary effect of the programs was restricted to the aid of the secular functions.

The Court found the nature of the aid involved clearly distinguishable from that permitted in *Everson v. Board of Education*[42] and

36. 8 THE WRITINGS OF THOMAS JEFFERSON 113 (1905).
37. 330 U.S. at 18.
38. 403 U.S. at 614.
39. *Id.*
40. *Id.*, at 616.
41. *Id.*, at 620.
42. 330 U.S. 1 (1947). *Everson* has been recognized as the first significant analysis of the Establishment Clause by the Court. The Court considered the constitutionality of a New Jersey program which provided reimbursement to parents for bus fares spent by their children attending parochial schools. The program was challenged as violative of the Due Process Clause of the fourteenth amendment by taxing for private use, and violative of the first amendment's Establishment Clause by using tax money to support religious schools.
The Court upheld the constitutionality of the program against both challenges,

Board of Education v. Allen.[43] The program sustained in *Allen* provided secular textbooks, while the program in *Everson* provided reimbursement to parents for bus fares spent by children attending school. These forms of aid were non-ideological and neutral, and, therefore, did not require excessive government supervision to insure neutrality.

In the Rhode Island and Pennsylvania plans, however, there was assistance directed to the teachers and, as the Court recognized, "teachers have a substantially different ideological character from books."[44] Furthermore, teachers were under religious control and supervision. As a result, the state surveillance and regulation would have to extend into the classroom and be continual to assure that the benefit provided by the state did not aid the religious instruction. The Court found a further fault with the aid given in the Pennsylvania Act in that the financial assistance was provided directly to the institution.[45] The Court had warned of such a danger in *Walz*; "[o]bviously, a direct money subsidy would be a relationship pregnant with involvement. . . ."[46]

Thus an intimate relationship between government and religion was occasioned by these programs. This relationship resulted from the comprehensive, discriminating and continuing state surveillance which was necessary to assure that the Religion Clauses were not violated.[47] The relationship presented a danger of excessive entanglement which would violate the Establishment Clause.

The Court found an even broader base of entanglement was presented by the devisive political potential of these programs. The Court felt:

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viewing it as analogous to other public welfare programs provided by the state such as police and fire protection, sewage disposal, streets and sidewalks. These programs benefit the public at large without regard to religion. *Id.*, at 17-18. One of the most significant aspects of the decision was Justice Black's attempt to outline the basic meaning of the Establishment 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 or influence a person to go to or 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 attendance 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 adopt to teach or practice religion. Neither the state nor the federal government can, openly or secretly participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against the establishment of religion was intended to erect a 'wall of separation between Church and State.'" *Id.*, at 15-16.

43. 392 U.S. 236 (1968).
44. *Id.*, at 617.
45. *Id.*, at 621.
46. 397 U.S. at 675.
47. 403 U.S. at 619.

> It would be unrealistic to ignore the fact that many people confronted with issues of this kind will find their votes aligned with their faith.[48]

The Court distinguished the devisive political effect of these programs from that created by the tax exemption in *Walz* on the basis that the tax exemptions benefited all religions. These programs, however, benefited relatively few religious groups, thus intensifying the fragmentation and devisiveness. The Court did not, however, discuss the nature of the political devisiveness created under such programs as those sustained in *Everson* or *Allen*. One distinguishing factor seems to be that those programs were directed toward all state education, public as well as private. The issue of religion would only arise in the negative sense. That is, should the religious schools be excluded from the benefits of the program because of their religious affiliation? In the Pennsylvania and Rhode Island programs the assistance was directed solely toward private education. Thus the religious issue arose with respect to the nature of the entire legislation. The religious issue would receive greater focus in such legislation and, therefore, have greater potential for devisiveness along religious lines.

In conclusion, the Court warned against the self-perpetuating and self-expanding propensities of modern governmental programs. In the area of church and state relationships the involvement or entanglement between the two serves as a warning signal. Thus the relationships created under both state programs were such that they marked the violation of the Establishment Clause of the first amendment.

It is significant to note that the holding in *Lemon* and *DiCenso* was based upon the "cumulative impact of the entire relationship arising under the statutes."[49] No individual factor in and of itself was controlling. Therefore, merely because a program provides direct financial assistance or because the institutions are elementary or secondary schools does not mean that the program will necessarily violate the Establishment Clause. It is only when the cumulative impact of the entire relationship crosses that "blurred, indistinct and variable barrier"[50] that the legislation will create the constitutionally forbidden entanglement.

THE DECISION IN *Tilton*

The Court upheld the constitutionality of the Federal Government's

48. *Id.*, at 622.
49. *Id.*, at 614.
50. *Id.*

Higher Education Facilities Act applying the same guiding principles that led them to a contrary result with respect to the state plans in *Lemon* and *DiCenso*.

The difficulty encountered by the Court in the analysis of the Federal Act was not only evidenced by the close decision (5-4), but also by the absence of an opinion concurred in by a majority of the Court.[51]

Mr. Chief Justice Burger wrote the plurality opinion. The initial question of whether the Act was intended to include sectarian institutions was easily disposed of in the affirmative. Because the Act defined the institutions of higher education in broad and inclusive terms, Chief Justice Burger reasoned that it must be taken to include church related colleges and universities.

In the application of the same criteria used in *Lemon* and *DiCenso* Chief Justice Burger cautioned of the danger of using these criteria as tests:

> Constitutional adjudication does not lend itself to the absolutes of physical sciences or mathematics. The standards should rather be viewed as guidelines with which to identify instances in which the objectives of the Religion Clauses have been impaired.[52]

As in *Lemon* and *DiCenso* these guidelines led the plurality to ask four essential questions:

> First, does the Act reflect a secular legislative purpose? Second, is the primary effect of the Act to advance or inhibit religion? Third, does the administration of the Act foster an excessive government entanglement with religion? Fourth, does the implementation of the Act inhibit the free exercise of religion.[53]

In answering the first question concerning the legislative purpose of the Act, the Chief Justice was once again convinced of the validity of the stated purpose on the face of the Act.[54] It therefore seems clear that the Court has firmly recognized that there is a valid secular legislative purpose served by aiding the secular education in private

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51. Mr. Chief Justice Burger announced the Court's judgment and delivered an opinion in which Justices Harlan, Blackmun and Stewart joined. Justice White filed an opinion concurring in the result. *Id.*, at 661. Justice Douglas filed a dissenting opinion, joined by Justices Black and Marshall. *Id.*, at 692. Justice brennan filed a dissenting opinion. *Id.*, at 642.

52. 403 U.S. at 678.

53. *Id.*

54. 20 U.S.C.A. § 701 (1969). That section of the Act reads as follows: "[T]he security and welfare of the United States require that this and future generations of American youth be assured ample opportunity for the fullest development of their intellectual capacities, and that this opportunity will be jeopardized unless the Nation's colleges and universities are encouraged and assisted in their efforts to accommodate rapidly growing numbers of youth who aspire to a higher education."

and parochial schools. Once again the difficulties arise in effectuating the program so as to avoid the other constitutional pitfalls in this sensitive area.

The Chief Justice described the second question of the analysis in terms consistent with the prior Religion Clause cases:

> The crucial question is not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal or primary effect advances religion.[55]

The Chief Justice examined the nature of the four defendant institutions and found the secular and religious functions identifiable and separable, thus once again rejecting one of the major contentions of the opponents to government assistance to religiously affiliated schools. Since the secular functions were separable from the religious functions, the government could provide statutory restrictions to prevent the assistance from aiding the religious functions later. Thus the government could directly aid the secular functions of religiously affiliated colleges and universities without having a primary effect of advancing religion in violation of the Establishment Clause.

In allowing the government to assist the religious institutions by a direct grant the Court has gone further than they did in *Everson* and *Allen*. In both those cases the assistance was given to the children and their parents. The government did not contribute anything directly to the school or relieve them of any financial burden. In *Tilton*, however, the assistance was given directly to the school. The benefit to the school's secular function was direct, and the aid did relieve the schools of a financial burden which they would have otherwise assumed. As Mr. Justice Douglas pointed out in his dissent: "Money saved from one item in the budget is free to be used elsewhere."[56] Thus the money which would have previously been spent for the secular facilities was now freed to be spent for the religious activities of the school. However, it must be remembered that the crucial question is not whether some benefit accrues to the religious activity, but whether the primary effect is the advancement of religion. This freeing of funds must therefore be viewed as an incidental benefit of the Act and not as the primary effect.

This reasoning seems consistent with the decision in *Walz*. The tax exemption sustained in *Walz* would obviously have the effect of freeing substantial funds for religious use which would have otherwise not

55. 403 U.S. at 679.
56. *Id.*, at 695 (Douglas, J., dissenting).

been available. The significant point of similarity in both cases is that the funds used to benefit the religious activities are, and always were, the institution's own private funds. The government funds in *Tilton* and the tax exemption in *Walz* have the incidental effect of freeing private funds for private use, along with the primary effect of accomplishing a legitimate secular legislative purpose. Thus, neither government action violated the Establishment Clause.

Chief Justice Burger did, however, find one defect in the statute's enforcement provisons. While these provisions were designed to prevent the program from having the primary effect of aiding religion, the government interest in the grant and the right to enforce the restrictions were limited to twenty years. Thus, after twenty years the facilities could be used for religious purposes; this would have the primary effect of aiding religion. However, the unconstitutionality of this section of the Act did not cause the entire Act to be defeated since the Chief Justice found its excision would not impair either the operation or administration of the Act to any significant degree.[57] The time restriction was thus eliminated from the Act giving the government continual interest in the facilities.

In answering the third question concerning excessive entanglements, Chief Justice Burger analyzed the same three factors considered in *Lemon* and *DiCenso*. After considering the skepticism of college students, the high degree of academic freedom, the limiting nature of college and graduate courses to sectarian influences, and the lack of religious restrictions on student admissions and faculty, the Chief Justice concluded:

> [T]he evidence shows institutions with admittedly religious functions but whose predominant higher education mission is to provide their students with a secular education.[58]

If this conclusion is justified by the evidence, there is a very significant difference between the nature of the higher educational sectarian schools and the lower educational sectarian schools, which were found to be "an integral part of the religious mission of the Catholic Church."[59] Therefore, there would be less chance of the religious influence seeping into the government subsidized activities in the higher educational institutions.

Chief Justice Burger found the nature of the aid to be similar to

57. *Id.*, at 684.
58. *Id.*, at 687.
59. *Id.*, at 616.

that permitted in *Everson* and *Allen* in that a building is secular, neutral and non-ideological. This aid contrasted sharply with the aid given in the Pennsylvania and Rhode Island programs, part of which was directed to the teachers, who are neither "religiously neutral" nor "non-ideological." As a result, Chief Justice Burger felt that the Federal Act would require less surveillance than the state plans. A further aspect of the Federal Act was that it was given as a one-time single-purpose grant; thus there would not be the continual financial relationship occasioned by the state plans. Upon the analysis of these factors Chief Justice Burger determined:

> [C]umulatively all of them shape a narrow and limited relationship with government which involves fewer and less significant contacts than the two state schemes before us in *Lemon* and *DiCenso*. The relationship therefore has less potential for realizing the substantive evils against which the Religion Clauses were intended to protect.[60]

Furthermore, Chief Justice Burger felt that cumulatively, these factors further lessened the potential for devisive religious fragmentation in the political arena. His explanation of this is not exactly clear:

> This conclusion is admittedly difficult to document, but neither have appellants pointed to any continuing religious aggravation on the matter in this political process.[61]

One possible reason for the lessening of political devisiveness of the Federal Act is that it is directed to aid all higher educational institutions. In this respect it is like the programs in *Everson* and *Allen*, for the religious issue comes up only in the negative sense of whether the religious schools should be excluded from the legislation. Since the Federal Act, unlike the Pennsylvania and Rhode Island plans, is not directed to benefit merely private schools, it seems likely that it may result in less devisiveness on the religious issue.

Finally, Chief Justice Burger found that there was no violation of the Free Exercise Clause, since the appellants were unable to show any coercion directed at the practice of their religious beliefs. Chief Justice Burger felt that the financial impact upon the individuals by the program was not fundamentally distinguishable from the impact of the tax exemption sustained in *Walz*, or the supplying of textbooks sustained in *Allen*.[62] The Act, therefore, with the exception of the sec-

60. *Id.*, at 688.
61. *Id.*
62. *Id.*, at 689.

tion limiting the government's interest to twenty years, did not violate the Religion Clauses of the first amendment.

COMPARISON OF THE DECISIONS

Upon examination of these three decisions an obvious question arises. Is the contrary result reached by the Court in *Tilton* significantly distinguishable from the decisions reached in *Lemon* and *DiCenso*, or does the *Tilton* decision reflect an inconsistency in the reasoning of the Court? Both dissenting opinions in *Tilton*[63] as well as the opinion of Mr. Justice White,[64] who concurred in *Lemon* and *Tilton* and dissented in *DiCenso*, seem to express this latter attitude. Mr. Justice White stated:

> Why the federal program in the *Tilton* case is not embroiled with the same difficulties is never adequately explained.[65]

However, a comparative analysis of the reasoning expressed in the Opinion of the Court in *Lemon* and *DiCenso* with that of the plurality opinion in *Tilton* will reveal that the decisions are not inconsistent.

Both decisions reflect a conclusion consistent with the prior decisions of the Court by recognizing that the state has a legitimate interest in the secular education of children, even in the private and sectarian schools. Therefore, any legislation designed to secure the quality of this interest reflects a valid secular legislative purpose.

The determination in *Tilton* that the secular and religious functions of the schools are separable does not contradict the findings of *Lemon* and *DiCenso* or any other Court decisions. In *Allen* the Court refused to accept the contention that these functions were intertwined and inseparable, at least to the extent that textbooks could be provided for the secular education without being instrumental in the religious education. In *Lemon* and *DiCenso* the Court did not make any determination of this issue, but they did say that they agreed, at least in the abstract, with the conclusions of the legislatures that the functions were separable and identifiable.

While the holding in *Tilton* that the subsidy did not have the primary effect of advancing or inhibiting religion did establish new precedent in allowing direct financial assistance to a religiously affiliated school, this holding is not inconsistent with *Lemon* and *DiCenso*. In

63. 403 U.S. at 692 (Douglas, J., dissenting). *Id.*, at 642 (Brennan, J., dissenting).
64. *Id.*, at 661.
65. *Id.*, at 668.

those cases the Court found it unnecessary to resolve that issue because of the excessive entanglements occasioned by the programs.

The apparent inconsistency must therefore arise in the final analysis by the Court in determining if the program results in an excessive entanglement between government and religion. The Court found that the Federal Act resulted in a narrow and limited relationship which involves fewer and less significant contacts than did the two state schemes in *Lemon* and *DiCenso*.[66] To justify this conclusion it was not necessary to show great differences between the state programs and the Federal Act. Since the problem involved is one of degree, even minor differences when viewed cumulatively may have lessened the degree to the point of permissible involvement between government and religion. As the Court has long recognized, some government involvement with religion is inevitable. The point at which that involvement becomes unconstitutional is marked by "a blurred, indistinct, and variable barrier depending upon all the circumstances of a particular relationship."[67] The fact that the distinctions between the Federal Act and the state plans are not great would only tend to indicate that the barrier is located somewhere between them, not too far from either.

It is submitted that the Federal Act may represent the upper limit of permissible degree of constitutional involvement between government and religion. The state programs, on the other hand, may represent the lower limit upon the unconstitutional degree of involvement. Viewing these two decisions in this light would seem to lend at least some degree of certainty to the location of that "blurred, indistinct and variable barrier." While admittedly some of the distinctions drawn by the plurality in *Tilton* seem questionable, some of them are clear, and would necessarily lead to a lessening of the involvement as compared to both state plans.

In analyzing the nature of the institution one could hardly contend that there is no significant difference between the lower educational institutions and the higher educational institutions. The conclusion that the predominant mission of the higher educational institutions is to provide the students with a secular education seems justified.[68] This contrasts sharply with the finding of the Rhode Island district court, which was accepted by the United States Supreme Court, that the lower educational institutions constituted "an integral part of the reli-

66. Tilton v. Richardson, 403 U.S. 672, 688 (1971).
67. Lemon v. Kurtzman, 403 U.S. 602, 614 (1971).
68. 403 U.S. 672, 687.

gious mission of the Catholic Church."[69] Upon these findings it would seem that the state programs involved with the lower educational institutions would require greater restrictions and surveillance, thereby resulting in a greater degree of involvement between government and religion.

In comparing the nature of the aid given in the programs the distinctions do not seem as great as the plurality opinion would suggest. Mr. Justice Brennan adequately pointed this out in his dissenting opinion in *Tilton*:

> Finally, the plurality suggests that the "non-ideological" nature of a building, as contrasted with a teacher, reduces the need for policing. But the Federal Government imposes restrictions on every class taught in the Federally assisted building. It is therefore not the "non-ideological" building which is policed; rather it is the courses given there and the teachers who teach them. Thus the policing is precisely the same as under the state statutes, and that is what offends the Constitution.[70]

There is, however, one significant difference in the nature of the aid which the plurality pointed out. The aid given under the Federal Act was a one-time, single-purpose construction grant. There were no continual financial relationships or dependencies, no annual audits or analysis to separate religious expenditures from secular ones. All of these consequences would have resulted from the state plans, and thus increased the degree of involvement between government and religion. Justice Douglas apparently dismissed the significance of this distinction when he commented in his dissenting opinion in *Tilton*:

> The fact that money is given once at the beginning of a program rather than apportioned annually as in *Lemon* and *DiCenso* is without constitutional significance.[71]

There is constitutional significance in this distinction when we are determining if a program fosters excessive government entanglement with religion, since the continuing programs would obviously result in greater government involvement.

The plurality did find difficulty distinguishing the potential political devisiveness created by the Federal Act from that arising under the state programs. The most accurate statement by the plurality concerning their conclusion is: "This conclusion is admittedly difficult to document. . . ."[72] It does seem that the Federal Act would result

69. 403 U.S. at 616.
70. 403 U.S. at 661.
71. 403 U.S. at 692-93 (Douglas, J., dissenting).
72. *Id.*, at 688.

in less political devisiveness because it was a general program to benefit all higher educational institutions as compared to the state programs which were directed solely to private educational institutions.

If we consider all these factors cumulatively, it seems that it can clearly be said that the Federal program does result in less involvement than the state plans. While the degree of difference might not be as great as the plurality opinion indicates, it does exist. Therefore, it appears that the Court was not inconsistent in holding that the Federal plan lies within the permissible barrier between government and religion and the state plans lie outside the barrier.

The Impact of the Decisions

The major significance of the decisions is the impact they will have upon legislative activity in the educational field. Prior to these decisions the legislatures were guided by the principles of the *Schempp* test and the entanglement test of *Walz*. However, there was a great deal of uncertainty as to how the legislatures should be guided by these principles. While these decisions leave many questions unresolved, they do give the legislatures an understanding of the practical application of these principles to the problem. They thus give the legislature greater direction, so as to avoid the many constitutional pitfalls in this area, and to direct their attention to the narrow area of permissible activity.

It now appears to be clearly established that legislation designed to secure the quality of secular education in religiously affiliated schools serves a legitimate secular legislative purpose. All three decisions reflect this conclusion. The constitutional problems will, therefore, arise in effectuating this legitimate purpose in such a way that it will not have the primary effect of advancing or inhibiting religion. The legitimate purpose must also be effectuated in a manner that does not result in an unconstitutional degree of involvement between government and religion. In *Tilton,* the Court rejected the contention that the educational functions in sectarian schools of higher education were inseparable. While this determination was limited to the individual schools in the case, it seems that this would be applicable to most higher educational institutions.

Similarly, in *Lemon* and *DiCenso,* although there was no determination of the issue, the Court admitted in dicta that it had no quarrel with the conclusion that the religious and secular functions were sepa-

rable. This dicta, when read in conjunction with the *Allen* case which found the functions separable to a certain extent, would seem to indicate that in most instances the Court would be willing to find them identifiable and separable in the lower educational institutions. The assistance can, therefore, be directed solely to the secular activities of the religiously affiliated lower and higher educational institutions. If this assistance is directed under the proper regulation and with proper restrictions it will not have the primary effect of advancing religion.

In *Tilton,* the statutory restrictions, with the exception of the twenty-year time limit on the interest, were found to be effective to prevent the primary effect of advancing religion, since any violation of the restriction would result in a forfeiture of the benefits. In *Lemon* and *DiCenso,* the Court never determined whether the restrictions would be effective. It seems, however, that there would be no reason to find them any less effective than those in the Federal Act. Therefore, even direct assistance could be given to the secular activities of a religiously affiliated school without having the primary effect of advancing religion, if the proper restrictions are placed upon it. Thus, the problem of having a program with the primary effect of advancing religion does not seem great as long as the legislature can impose such restrictions and regulations as will be necessary to secure this goal.

However, as the restrictions and regulations are increased to secure this proper constitutional effect, the legislation enters another dangerous area, that of excessive involvement between government and religion. This creates a dilemma. As the danger of an unconstitutional effect of advancing religion is decreased, the danger of an unconstitutional involvement between government and religion is increased. A program must therefore be designed so as to decrease the need for government regulation and supervision, while at the same time provide assistance in a manner which will have the least chance of having a primary effect of advancing the religious function of the school. Some degree of involvement will be tolerated to secure the proper primary effect. In *Tilton* there was involvement occasioned by the assistance and regulation which was permissible. However, when that involvement reaches the degree found in *Lemon* and *DiCenso* it will be excessive and the legislation will fail. A balancing of the various factors is necessary to insure that the cumulative impact of the program is within the constitutional barrier to excessive involvement. If one factor creates a serious danger there must be a lessening of the danger presented by the other factors. No single factor in and of itself is controlling.

Programs designed to benefit the sectarian elementary and secondary schools present a greater danger of involvement than programs benefiting the higher educational institutions. This is because the nature of lower educational institutions and the role that they play in propogating the faith demand greater regulation and supervision to insure that the benefit does not accrue to the religious function. Therefore programs designed to assist these institutions require a lessening of the impact in other factors. Thus, while a direct money subsidy was tolerated in the higher education field in *Tilton,* such a factor if coupled with the nature of the lower educational institution would probably push the cumulative impact beyond the permissible degree of constitutional involvement.

The nature of the assistance becomes a significant factor in lessening the degree of involvement. While the nature of the institution cannot be changed by the legislature, the nature of the assistance can. Assistance directed to the schools in the form of sectarian, non-ideological materials and services, as in *Everson* and *Allen,* present the least danger of involvement. There is less regulation and surveillance necessary to assure that these types of materials will not be used to advance the religious education. An increase of assistance in this form would probably not present any difficulties of excessive involvement. Such assistance could include recreational and physical education facilities, science and laboratory equipment and other such secular material aids which present little danger of being used for the advancement of the religious functions of the school. The fact that these aids relieve the school of a financial burden and thus enable it to devote more of its own money to the religious functions is of not controlling significance. The Federal program had this same result but it was considered to be an incidental, not primary effect of the legislation.

The method of delivering the assistance becomes significant in attempting to lessen the cumulative impact. In *Tilton,* a direct financial grant was permissible, however, the other factors lessened the cumulative impact of the program. Normally this type of assistance would create an extreme danger of excessive involvement. However, if a direct money subsidy is given, the type given in the Federal Act would create the least involvement. The one-time, single-purpose grant eliminates the continual financial relationship occasioned by the state plans in *Lemon* and *DiCenso.* These plans resulted in periodic auditing and inspection of financial records which created a significant continual

financial relationship. The type of delivery which would minimize the involvement the greatest would be indirect assistance such as that provided in *Everson* and *Allen*. Under these programs the assistance was directed to the parents and the children thus eliminating the relationship with the institution. When a program is being formulated it is necessary to examine all the factors, and provide the assistance in a manner which minimizes the impact with respect to each factor. Since no single factor, in and of itself, is controlling in the determination, any potentially dangerous factors can be offset by lessening the impact of the other factors.

One difficult area is that of the potential political devisiveness along religious lines which is created by this legislation. It seems that programs of a general character, designed to assist the educational field in general, create the least likelihood of political division along religious lines. The programs sustained in *Everson*, *Allen* and *Tilton* are all of this nature. Programs designed solely to assist private educational institutions, such as those in *Lemon* and *DiCenso* seem to have the greatest potential for political devision along religious lines. Therefore, legislation directed in the form of the general nature will probably present the least constitutional difficulties.

The major difficulties that will be encountered in the future analysis by legislatures and courts will be in weighing the various factors to determine where exactly the cumulative impact of a given program lies. The barrier separating the area of permissible involvement from unconstitutional involvement is elusive. These three decisions only begin to establish its location, if it can ever be established. We can at least say that it lies somewhere between the involvement occasioned by the Federal plan and the involvement occasioned by the state plans. It is certainly not far from either.

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