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The Prospects for Public Aid to Parochial Schools

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I. INTRODUCTION

Elementary and secondary education in America is predominantly public, but some diversity is provided by church-related private schools and, to a lesser degree, by secular private schools. Most of the church schools are maintained by the Roman Catholic Church and its orders. Church schools are usually chosen by parents because of their desire to have their children's instruction related to their religion and to the philosophical positions of their church. In some instances, however, the schools are chosen because it is believed that they are academically superior to the available public school without regard to the special curricular concerns of the church schools.1 The secular private school is usually selected because it is considered to be academically superior or methodologically distinctive, although in the cases of some schools social status is a motivating factor.

The educational diversity afforded by the private elementary and secondary schools does not, of course, compare with the diversity in higher education afforded by the wide range of private colleges and universities as well as the variety of state-supported colleges and universities. Unlike college age people, young children usually live at home which further limits their educational choice. Clearly the range of options for elementary and secondary education, in both absolute and comparative terms, is very limited. It would seem to be in the national interest to preserve the limited options which presently exist. This is not only because cultural diversity is desirable in itself, but also competition among schools for enrollment and recognition is likely to serve as an incentive to achieve academic quality. There is, in addition, the dollars and cents consideration that private schools perform educational services at little cost to the taxpayers.

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1. In a recent poll Catholics were asked, “For what reasons, aside from religion, do you think Catholics send children to parochial schools?” Responses were: “for better education”—33%; “for discipline”—30%; “for racial reasons”—7%. They were also asked, “If no government funds were allowed for parochial schools, would you be willing to spend more to keep them going?” “Yes”—49%; “No”—38%. Newsweek, Oct. 4, 1971, at 83.
The recent decision of the United States Supreme Court, *Lemon v. Kurtzman*,2 concerning Rhode Island and Pennsylvania legislation which was supportive of church schools makes it more difficult to maintain educational diversity at the elementary and secondary level. It is dangerous to generalize too broadly from this decision, but it is clear that it is unconstitutional to pay the salaries of parochial school teachers from public funds. Teachers' salaries are the major expense in the administration of the schools. The Court has held in the past that the state may constitutionally reimburse parents of church school children for bus fare to and from school,3 and may furnish secular books to church school children,4 but these are minor educational expenses. The recent Supreme Court decision does not affect the constitutionality of the payment of state funds for teachers' salaries in secular private schools, but for political reasons it would appear most unlikely that state legislatures would appropriate funds for secular private schools which could not be appropriated for church schools. Presumably the established secular private schools attended primarily by the children of wealthy parents will be able to raise the necessary funds from private sources, but the more recently created innovative institutions may have great difficulty doing that. The impact of the *Lemon* decision upon educational diversity therefore extends beyond the church school.

There are many who view the church school as socially divisive and intellectually undesirable, and there are many who view the secular private school as undemocratic. Obviously such people are not impressed with the hardship which the Supreme Court decision may impose upon such schools or with the danger to their quality or viability. There are those who believe that private schools enrich our educational system but believe that it is wrong in principle that they should receive public funds to achieve their special educational objectives. If insufficient funds are available to maintain some of these private schools, then a judgment has to be made as to whether the preservation of the principle is worth the loss of the educational value. The writer's bias is that the principle is not worth the loss, and that the loss of any portion of the limited diversity that presently exists would be most unfortunate. There is also the consideration that if church schools are required to close for lack of funds, their stu-

2. 403 U.S. 602 (1971).
dents will attend the public schools, thereby adding to the ex-

pense of the public school systems which are already hard-

pressed to maintain standards with their present enrollment. The Lemon decision should be analyzed and assessed in the light of its potential educational consequences.\(^5\)

The function of this article is to describe the holdings of the several decisions involving the use of public funds in support of church schools, to analyze critically the reasoning of these deci-
sions, and to consider whether there are constitutionally per-

missible alternatives for public funding of elementary and sec-

ondary church schools.\(^6\)

II. THE PUBLIC AID CASES

Everson v. Board of Education\(^7\) was the first case in which

\(^{5}\) The Cleveland Plain Dealer, Sept. 18, 1971, § A, at 1, col. 3, reported that in 1964 there were six million students in 14,600 Catholic elementary and secondary schools, whereas in June, 1971 there were 11,352 Catholic elementary and secondary schools with an enrollment of 4.5 million students. Since June, 1971, it is estimated that 800 Catholic schools have closed. The decline in the number of Catholic schools is attributed to financial pressures. The National Catholic Educational Association predicts that about one-half the present Catholic school enrollment will be in public schools by 1975 unless more govern-

ment aid is made available. Newsweek, Oct. 4, 1971, at 83.


\(^{7}\) 330 U.S. 1 (1947).
the United States Supreme Court dealt directly with the constitutionality of the use of state funds in support of church schools under the "establishment of religion" clause of the First Amendment. A New Jersey statute authorized local boards of education to provide for the transportation of children to and from schools other than private schools operated for profit. Pursuant to the statute, a local board of education authorized the reimbursement of parents for fares paid for the transportation to and from school of children attending Roman Catholic schools as well as public schools. The statute and the board action were challenged by a taxpayer as a violation of the establishment clause of the First Amendment as made applicable to the states by the Fourteenth Amendment. The New Jersey court upheld the statute and the board action. The United States Supreme Court affirmed in a five to four decision.

The Supreme Court employed some rather restrictive language in arriving at its permissive result:

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 . . . .

... New Jersey cannot consistently with the "establishment of religion" clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church . . . .

The Court nevertheless concluded that:

Measured by these standards, we cannot say that the First Amendment prohibits New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools . . . .

8. In Cochran v. Louisiana State Bd. of Ed., 281 U.S. 370 (1930), the Supreme Court held the furnishing of secular textbooks to private school students, including students in church schools, was not violative of the due process clause of the Fourteenth Amendment as a use of tax funds for a private purpose. The question of the constitutionality of the legislation under the establishment clause of the First Amendment was not considered since at that time it had not been decided that the clause was binding upon the states through the Fourteenth Amendment.


10. In Everson, the Court noted that there was nothing in the record to indicate that there were any children in the township who attended other than public or Catholic schools or who would have attended other than public or Catholic schools if transportation had been provided. 330 U.S. at 4 n.2.

11. Id. at 5.


14. Id. at 17.
The Court likened the provision of transportation to the furnishing of the services of the police and fire departments, connections for sewage disposal, and highways and sidewalks to the parochial schools. The payment of bus fares was characterized as a safety measure and in no sense a subsidization with public funds of religious instruction. The Court also noted that the state funds were paid directly to the parents and not to the parochial schools. The Court recognized that furnishing bus fare to parochial school students made it easier for parents to send them to those schools, but pointed out that the same could be said for the variety of other public services furnished to these schools, which unquestionably were constitutionally permissible.

The characterization of the bus fare reimbursement as a safety measure raised the hypothetical issue of whether the "freedom of religion" clause of the First Amendment required that parochial school parents be reimbursed if public school parents were reimbursed. The Court stated that it did not mean to intimate that such equality of treatment would be required. The Court, however, emphasized that the establishment clause did not require the state to be an adversary of religion by denying it such safety services.

Twenty-one years after Everson the Court dealt with state financial assistance to church schools in the form of furnishing

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15. Id. at 16. In Hughes v. Board of Ed., 174 S.E.2d 711 (W. Va. 1970), cert. denied, 403 U.S. 944 (1971), the supreme court of West Virginia held the refusal by a school board to furnish bus transportation to parochial school students when it is furnished to public school students to be unconstitutional as a denial of equal protection and an infringement of the freedom of religion. See also R. Drinan, Religion, the Courts and Public Policy 188-201 (1963).

secular textbooks. In *Board of Education v. Allen*, certain school boards in the State of New York brought an action challenging the constitutionality under the establishment clause of the First Amendment of a provision of New York's Education Law which required local school boards to lend textbooks free of charge to all public and private school students in grades seven through 12, including students in church schools. The law was construed by the New York Court of Appeals to require that only secular textbooks be furnished to church school students, although the language of the statute was not absolutely clear on this point. The New York court went on to hold that the statute was not violative of the First Amendment, and the United States Supreme Court affirmed, Justices Black, Douglas and Fortas dissenting.

The Supreme Court employed the standard expressed in *Abington School District v. Schempp* which involved the constitutionality of religious ceremonies in the public schools, 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." The Court stated that just as the establishment clause did not prevent New Jersey from paying the bus fares of parochial school pupils as part of a general program of paying fares of school students, it did not prevent New York from making secular textbooks available to parochial school students as part of a general program of furnishing textbooks to school students. As in *Everson*, the legislative purpose was secular and its primary effect neither advanced nor inhibited religion. The legislation literally provided that the books were to be lent to the student at his request and ownership remained in the state. The Court pointed out that no funds or books were to be furnished to the parochial schools, but rather the financial benefit of the program was to the parents and the children. In actual operation, it appeared that the parochial schools furnished to the school boards summaries of the student requests, and the books acquired were stored on the premises of the parochial schools.

The appellant school boards attempted to distinguish *Everson* from this case by contending that buses have nothing to do

with teaching but books do, and that the function of the church school is to weave religion into the teaching of what are normally secular subjects. The Court responded by noting the dual secular and religious functions of the church schools and the state requirements that they comply with secular educational standards. The Court also pointed out that the case was decided by summary judgment entered on the pleadings, and that there was nothing in the record to support the contention that the secular books would be used to teach religion or that secular and religious instruction were intertwined in the parochial schools.\(^2\)

It should be noted that the Court in *Allen*, as in *Everson*, made a point of the fact that the benefit of the legislation ran to the pupils and not to the parochial school as such. Why any constitutional consequence should follow from such a distinction is less than clear. It should also be noted that the Court in *Allen* made no reference to the problems of policing the secular nature of the textbooks furnished by the school boards and the "church-state entanglement" issue which might flow from it; this issue was to become most significant in the subsequent *Lemon* case.\(^2\) Also, no mention was made in *Allen* of the danger of political pressures from religious groups upon local school boards, which was to become a major consideration in the *Lemon* case. Justice Douglas in his dissent in *Allen* stressed these matters.

\(^{22}\) Id. at 248. See also Protestants and Other Americans United v. United States, 266 F. Supp. 473 (S.D. Ohio 1967), rev'd and remanded, 435 F.2d 627 (6th Cir. 1970), cert. denied, 403 U.S. 955 (1971), where an action was brought to enjoin enforcement of the Elementary and Secondary Education Act, 20 U.S.C. §§ 821-27 (1965), which authorized federal grants for library and instructional materials for use in public and private schools, including parochial schools. The trial court declined to convene a three-judge court and granted the defendant's motion for summary judgment. The Sixth Circuit ordered a three-judge court be convened noting that the *Allen* case was not necessarily controlling since under the statute the materials went directly to the schools. The Supreme Court denied certiorari. Recently a three-judge court was convened to consider the constitutionality of a New York statute providing for state subsidization of testing and pupil record services for parochial schools. Committee for Public Ed. and Religious Liberty v. Rockefeller, 322 F. Supp. 678 (S.D. N.Y. 1971).

The Oregon supreme court has held the furnishing of secular books to parochial schools students violative of its state constitution. Dickman v. School Dist., 232 Ore. 238, 366 P.2d 533 (1961). However, the New Hampshire Supreme Court has held that the furnishing of secular books, testing services, and medical services to parochial schools is not violative of the state constitution. Opinion of the Justices, 109 N.H. 576, 258 A.2d 343 (1969). The Rhode Island supreme court has held that furnishing textbooks to parochial schools does not violate provisions of the state or federal constitution. Bowerman v. O'Connor, 247 A.2d 82 (R.I. 1968).

\(^{23}\) 403 U.S. 602 (1971).
Two years later the Supreme Court decided in *Walz v. Tax Commission*\(^{24}\) that the exemption from the property tax granted to church property used for worship was not violative of the establishment clause. This case has a direct bearing upon the issue of state aid to church schools because it involves a type of financial subsidy of religion, and much of the reasoning employed in the Court's opinion is related to the previous *Everson* and *Allen* cases and the subsequent *Lemon* case and *Tilton v. Richardson*.\(^{25}\) The Court stated its guiding principle to be that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.\(^{26}\)

The Court noted that the "aids" furnished religion in *Everson* and *Allen* were consistent with this neutrality as programs of financial assistance to education of general applicability. Similarly, the State of New York determined that certain types of institutions that foster moral and mental improvement should not be inhibited in their activities by property taxation. Such institutions include nonprofit hospitals, libraries, schools and houses of religious worship, among others. Churches were not singled out for special tax treatment; rather they were considered to come within the classification of organizations entitled to tax exemption because they shared certain charitable characteristics.

The Court went on to state that "[d]etermining that the legislative purpose of tax exemption is not aimed at establishing, sponsoring, or supporting religion does not end the inquiry, however. We must also be sure that the end result—the effect—is not an excessive government entanglement with religion."\(^{27}\) The Court pointed out that both taxation and exemption from taxation involve some degree of entanglement, but taxation would involve a greater degree of entanglement because of the problems of valuation, liens, foreclosures and the accompanying confrontations of state and church arising from the legal processes. Although exemption is a type of economic benefit, it produces minimal involvement or entanglement and tends to separate the church and the state and insulate each from the other.

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27. *Id.* at 674.
The Court concluded by pointing out that exemption of churches from various forms of taxation for two centuries indicated that the establishment clause was never intended to prohibit such exemption. The Court also noted that two centuries of exemption has not produced anything remotely resembling an establishment, but rather has operated to guarantee the free exercise of all religions.

Recently the Supreme Court decided cases involving state aid to church schools in Rhode Island and Pennsylvania. In 1969 Rhode Island enacted legislation providing a 15% supplement to the salaries of teachers of secular subjects in nonpublic elementary schools. The supplement was paid directly to the teacher. As supplemented, the salary could not exceed the maximum paid to teachers in the public schools. It was required that the recipient be certified in the same manner as public school teachers and teach in a nonpublic school at which the average per pupil expenditure on secular education was less than the average in the public schools. The legislation also required that the teacher must teach only those subjects that are offered in the public schools, use only teaching materials used in the public schools, and agree that he will not teach a course in religion while he is receiving the salary supplement. The schools also were required to submit financial information in connection with some of the above requirements.

In 1968 Pennsylvania enacted legislation which authorized the “purchase” of certain “secular educational services” from nonpublic schools. The state would reimburse nonpublic schools directly for their actual expenditures for teachers’ salaries, textbooks and instructional materials in connection with

30. Pa. Stat. tit. 24, §§ 5601-09 (Supp. 1969). In Schade v. Allegheny County Institution Dist., 386 Pa. 507, 126 A.2d 911 (1956), the prohibition in the Pennsylvania constitution of appropriations to sectarian institutions was held not to preclude the state from paying a sectarian children’s home for keeping certain neglected juveniles subject to the jurisdiction of the court. In effect, the state was contracting for the purchase of needed services. This is why the Pennsylvania legislation in issue in Lemon was phrased in terms of purchase of secular educational services, instead of a grant of funds. In fact, funds were appropriated to be paid to sectarian schools. The rather contrived formulation was for the purpose of avoiding the state constitutional issue. The federal district court in the Lemon case observed that the “purchase” formulation had no bearing upon its decision upholding the constitutionality of the statute under the first Amendment. 310 F. Supp. 35, 39 n.7 (E.D. Pa. 1969).
courses offered in the public schools in mathematics, modern foreign languages, physical science and physical education. Textbooks and instructional materials were required to be approved by the state educational authority. Any school seeking reimbursement was required to maintain prescribed accounting procedures identifying the separate costs of the secular educational service for which reimbursement was requested, which accounts were subject to state audit.

The Rhode Island actions were brought in federal district court by taxpayers to declare the legislation unconstitutional and to enjoin its operation on the ground that it violated the establishment and free exercise clauses of the First Amendment. A three-judge court decided that the legislation violated the establishment clause of the First Amendment.31 The Pennsylvania action was brought in federal district court by taxpayers, among others, challenging the constitutionality of the legislation under the First Amendment. The three-judge court granted Pennsylvania's motion to dismiss the complaint for failure to state a claim for relief, holding that the legislation violated neither the establishment nor the free exercise clause.32 The United States Supreme Court, in a consolidated opinion, affirmed the judgments in the Rhode Island cases, Justice White dissenting, and reversed the judgment and remanded the Pennsylvania case without dissent.

The Court stated the criteria for determining whether the state aid to the church schools in these cases violated the establishment clause. The statute must have a secular purpose, and its principal or primary effect must be one that neither advances nor inhibits religion (required by Allen); and the statute must not foster an excessive governmental entanglement with religion (required by Walz). The Court concluded that the legislative purpose in each case was secular. As to the effect of the state aid, the Court noted that while elementary and secondary church schools have a significant religious mission, the legislation attempted to guarantee that the aid would be restricted to secular purposes. State funding of religious instruction would be constitutionally impermissible. The Court, however, deemed it unnecessary to resolve the issue of whether the primary effect of the legislation would be to advance religion, since it concluded that the "cumulative impact of the entire relationship arising un-

der the statutes in each State involves excessive entanglement between government and religion." In making the determination that the entanglement is excessive, there must be considered "the character and purposes of the institutions which are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority." The Court applied these standards to the Roman Catholic elementary schools in Rhode Island, since they had been the only beneficiaries of that State's legislation. The Court noted that the schools were controlled and managed by clerics and were vehicles for the transmission of the Roman Catholic faith to the next generation. The process of inculcating the faith is enhanced by the impressionable age of the students. The nature of the aid furnished in Rhode Island was distinguished from the aid furnished in Allen:

> [T]eachers have a substantially different ideological character than books. In terms of potential for involving some aspect of faith or morals in secular subjects, a textbook's content is ascertainable, but a teacher's handling of a subject is not. We cannot ignore the danger that a teacher under religious control and discipline poses to the separation of the religious from the purely secular aspects of pre-college education. The conflict of functions inheres in the situation.

About two-thirds of the teachers were nuns, but the Court saw the same entanglement problems where lay teachers were concerned.

We simply recognize that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral . . . . With the best of intentions such a teacher would find it hard to make a total separation between secular teaching and religious doctrine.

The Court concluded that the enforcement by the state of the secularity of the instruction involved excessive entanglement between government and religion.

A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed . . . . Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment. These prophylactic contacts will involve excessive and enduring entanglement between state and church.

34. Id. at 615.
35. Id. at 617.
36. Id. at 618.
37. Id. at 619.
The Court also perceived impermissible entanglement in the state's surveillance of expenditures for secular and religious education which was required under the statute.

The Court found the same impermissible church-state entanglement in the Pennsylvania legislation that it found in the Rhode Island legislation. The Court also noted that the funds were paid directly to the parochial school; in Everson the bus fare reimbursement went to the parent, in Allen the books were lent to the student, and in Rhode Island the supplement went directly to the teacher. The Court saw in this form of continuing direct subsidy added dangers of government control and surveillance.

A different but significant form of entanglement was also seen by the Court to follow from the Rhode Island and Pennsylvania legislation, namely, the divisive political potential of these programs. The issue of the size of annual appropriations for church schools would potentially divide the electorate along religious lines since most of the aid benefits one denomination. Political division along religious lines was one of the evils against which the First Amendment was intended to protect. The Court also noted that governmental programs have an expanding propensity, and the likelihood of greater state involvement in and contribution to church schools over time is indicated by the serious financial needs of such schools and the considerable political support for public aid. This was in contrast to the absence of any substantial state involvement with religion resulting from 200 years of tax exemption for churches as discussed in Walz.

It is interesting that the church-state entanglement rationale and the "camel's nose in the tent" thinking should have been so useful in the resolution of Lemon and ignored in Allen. Books certainly can be subtle tools for sectarian indoctrination, and certainly state surveillance of content would be a continuing effort as texts are revised and new books are ordered. The danger of political division arising from state aid of this nature is substantial. And once the state buys books for the parochial school student, surely the hard-pressed parochial schools will make additional requests of the legislature. Books, of course, constitute a much smaller item of educational expense than teachers' salaries. A little bit of "secular" aid may be all right, but too much "secular" aid is unconstitutional. 38

38. In Seegers v. Parker, 256 La. 1039, 241 So. 2d 213, cert. denied, 403 U.S. 955 (1971), it was held that Louisiana legislation authorizing the expenditure of funds for salaries of teachers of secular subjects in pri-
On the same day that the Supreme Court decided the *Lemon* case, it also decided *Tilton v. Richardson* which involved the constitutionality under the religion clauses of the First Amendment of certain provisions of the Higher Education Facilities Act of 1963 authorizing federal grants and loans to colleges and universities for the construction of a wide variety of facilities. The act did not prohibit aid to church-related colleges and universities as such, but did exclude aid for "any facility used or to be used for sectarian instruction or as a place for religious worship, or . . . any facility which . . . is used or to be used primarily in connection with any part of the program of a school or department of divinity . . . ." The United States retained, in effect, a 20 year interest in any facility constructed with these funds; if during the period any such facility were to be used for any of the prohibited religious purposes, the government would be entitled to recover an amount equal to the proportion of its value at such time which the federal grant bore to the original cost of the facility. After the expiration of the 20 year period, the restrictions on use would no longer be in effect.

Four church-related colleges and universities in Connecticut received grants for five buildings: two library buildings, a music, drama and arts building, a science building and a language laboratory. The action was brought in federal district court by taxpayers against the officials who administered the act and the four church-related colleges and universities. The three judge court held that the act authorized grants to church-related private schools, including parochial schools, was violative of the Louisiana constitution. In *Sanders v. Johnson*, 319 F. Supp. 421 (D. Conn. 1970), aff'd mem., 403 U.S. 955 (1971), a three-judge court held that Connecticut legislation providing support for salaries of teachers of secular subjects in private schools, including parochial schools, and providing secular books for the schools, was violative of the First Amendment. The Supreme Court summarily affirmed subsequent to *Lemon*. The supreme court of Maine has held that state subsidy of salaries of teachers of secular subjects in parochial schools, and of secular books for such schools, violates the state constitution and the First Amendment. Opinion of the Justices, 261 A.2d 58 (Me. 1970). Similar proposed legislation was held to violate the Massachusetts constitution. Opinion of the Justices, 258 N.E.2d 779 (Mass. 1970). The supreme court of Michigan held that such legislation was not violative of the Michigan constitution or the First Amendment. In *In re Legislature's Request for an Opinion*, 384 Mich. 265 (1970), appeal dismissed, 401 U.S. 929 (1971). The Michigan constitution has subsequently been changed. See *In re Proposal C*, 384 Mich. 390, 185 N.W.2d 9 (1971).

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colleges and universities, and sustained the constitutionality of the act under the religion clause of the First Amendment. The United States Supreme Court held that the act authorized grants to church-related institutions, and also held that the act did not violate the First Amendment except with respect to the expiration of the 20 year limitation on religious use. Chief Justice Burger issued an opinion in which Justices Harlan, Stewart and Blackmun joined. Justice White issued a separate concurring opinion. The other four justices dissented.

The establishment issue was analyzed in terms of the principles expressed in several previous cases: Does the act reflect a secular legislative purpose? Is the primary effect of the act to advance or inhibit religion? Does the administration of the act foster an excessive government entanglement with religion? The legislative purpose was expressed in the preamble to the act, stating that it is important to assist colleges and universities to accommodate the rapidly growing number of young people seeking higher education. This was summarily accepted as a legitimate secular purpose. On the question of whether the legislation advanced religion, it was noted that bus transportation and textbooks for parochial school children and tax exemption for church property assist religion and have been upheld as constitutional; the crucial question is not whether benefit accrues but rather whether the primary effect of the legislation is to advance religion. The grants to the Connecticut schools were for buildings serving secular educational purposes. There was no evidence that religious education seeped into the use of these secular educational facilities. The primary effect of the grants was not to advance religion, except with respect to the provision in the act that after 20 years the facility could be used for religious purposes, which was violative of the establishment clause since it could have the effect of advancing religion.

Concerning the issue of excessive entanglement between church and state resulting from this legislation, the Court discussed the differences in the educational purposes of the parochial elementary and secondary school and the church-related institution of higher learning and the differences in the nature of the aid in this case from the aid in the Lemon case. Religious indoctrination is a significant function of the parochial school, whereas it is not a substantial purpose of these four colleges and universities although they are governed by Roman Catholic or-

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ganizations. There are non-Catholics on the faculty and in the student body, and the academic atmosphere of these institutions appeared to be intellectually free. Thus there is little likelihood that religion will permeate secular education, and consequently the need for governmental surveillance is limited and the danger of excessive entanglement is reduced. The act subsidizes facilities dedicated to secular educational purposes, which require less governmental surveillance to assure religious neutrality than surveillance of teachers who are themselves not religiously neutral. In addition, the grants under the act occur only once, and as a consequence there are no continuing financial relationships and periodic analyses of expenditures as required under the Rhode Island and Pennsylvania legislation. Inspection to insure secular use was described as a minimal contact. It was also noted that this legislation would appear to have less potential for political division on religious lines than the Rhode Island and Pennsylvania legislation in part because of the absence of intimate continuing relationships between government and the church-related institutions of higher learning, and also because the problems of elementary and secondary schools are local in nature, whereas these Connecticut colleges and universities have a student constituency which is widely dispersed.

It should be noted that Chief Justice Burger's opinion emphasized that the Court was deciding the establishment issue only with respect to church-related institutions of higher learning with the primarily secular educational purposes of these Connecticut schools. The conclusion might well be different with respect to aid to church-related colleges whose educational purposes were more religious in nature.43 It should also be noted

43. The New Jersey and South Carolina supreme courts have held that the issuance of bonds by state educational authorities for the construction of buildings for private colleges, including church-related colleges, payable from college revenues and not obligations of the states as such, is not violative of the state constitutions or the federal constitution. Clayton v. Kervick, 56 N.J. 523, 267 A.2d 503 (1970); Hunt v. McNair, 255 S.C. 71, 177 S.E.2d 362 (1971). The United States Supreme Court vacated these judgments and remanded in the light of the Lemon and Tilton decisions. Clayton v. Kervick, 403 U.S. 945 (1971); Hunt v. McNair, 403 U.S. 945 (1971). A similar state plan to assist the financing of private institutions of higher learning, including church-related institutions, was held valid under the Florida constitution and the First Amendment. Nohrr v. Brevard County, 247 So. 2d 304 (Fla. 1971). Similar legislation was held not to violate the Massachusetts constitution except with respect to institutions which train clergymen. Opinion of the Justices, 236 N.E.2d 523 (Mass. 1968). A similar form of assistance was held valid under the United States Constitution. Vermont Ed. Bldgs. Financing Agency v. Mann, 127 Vt. 262, 247 A.2d 68 (1968), appeal dis-
that under the federal act the aid went directly to the church-related institution. This was considered to be a factor militating against the constitutionality of the Pennsylvania legislation in *Lemon*. In upholding the book loan arrangement in the *Allen* case and the bus fare reimbursement in *Everson*, the Court noted that the benefits passed directly to the parochial school family and not to the school itself.

III. HOW USEFUL ARE THE STANDARDS?

In the *Lemon* and *Tilton* cases, the Supreme Court clearly enunciated the three criteria which were to be employed in the determination of the constitutionality under the establishment clause of public aid to church schools: (1) The statute must have a secular legislative purpose; (2) the principal or primary effect of the statute must be one that neither advances nor inhibits religion; and (3) the statute must not foster an excessive government entanglement with religion. If any of the three criteria is not complied with, the legislation is unconstitutional as a law "respecting the establishment of religion." In the *Allen* case, the Court did not employ the "entanglement" criterion, but rather limited its rationale to the "purpose" and "effect" criteria. In the *Everson* case, no explicit formula was employed, although the reasoning was similar to that of the *Allen* case.

A. LEGISLATIVE PURPOSE

It is, of course, accepted that legislative purpose is relevant when a question of statutory construction is before a court. But the history of the use of legislative purpose in the determination of constitutionality is mixed. There is authority in Supreme Court decisions both for and against the proposition that an unconstitutional legislative purpose is a sufficient ground for invalidating legislation. For example, with respect to the taxing and commerce powers of Congress, legislative purpose to regulate "local" matters was at one time held to be constitutionally de-

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terminative, but subsequently was held to be irrelevant. In a recent "speech" case, legislative purpose was held to be irrelevant, but in the area of racial discrimination it has been held to be constitutionally determinative. Now, under the religion clauses it has been made relevant.

With respect to statutes providing public funds to church schools, how does one determine whether the legislative purpose is secular or religious? In the Allen, Lemon and Tilton cases, the Court concluded that the legislatures and the Congress had a secular purpose in mine in enacting the legislation because the language of the statutes in each of the cases indicated that the purpose was to enhance secular education although church schools would benefit from the legislation. The Court dealt briefly with the purpose issue in all these cases. It would seem sufficient to satisfy this secular purpose requirement that the pre-amble state that a secular educational goal is what is in mind, provided, of course, that the impact of the legislation is reasonably related to a secular educational purpose. So it seems that the "purpose" requirement is unlikely to be the basis of unconstitutionality except in the improbable situation of legislation which aids religious educational objectives without any substantial secular education objective, in which case the legislation fails also because it is violative of the "principal or primary effect" standard. It seems most unlikely that violation of the "purpose" standard would ever constitute an independent basis of unconstitutionality. There does not appear to be any purpose served in discussing the difficulties of determining legislative purpose by piecing together legislative debates and committee discussion and drafting changes when the Court has evidenced a willingness in the several cases which have been before it to accept at face value the secular goals expressed in the legislation itself.

B. Principal or Primary Effect

The Supreme Court dealt with the meaning of this standard

in the *Allen* and *Tilton* cases, and in effect it did so in the *Everson* case, although the standard had not been expressly formulated in *Everson*. In *Lemon* the Court did not have to resolve the "effect" issue because of its conclusion that the legislation was violative of the establishment clause since it produced excessive church-state entanglement. The only instance in which the Court has determined that the principal or primary effect of legislation assisting church-related education was to advance religion was in the *Tilton* case with respect to the expiration of the 20 year limitation upon secular use.

The common factors in the cases in which it was held that the primary effect of the legislation was secular were (a) that the legislative programs were for the benefit of educational institutions generally, whether state-supported or private, or the students attending such institutions, and (b) that the use of the funds going to church-related schools or their students were restricted to secular purposes. The Court has made it clear that if the public funds supported the religious aspects of education in any substantial measure as well as the secular aspects of education in the church school, the "effect" standard would be violated.49 In the *Tilton* case, the expiration of the limitation on building use to secular purposes after 20 years was held to be violative of the "effect" standard; the purely secular use for the first 20 years of the building's life was not sufficient to satisfy the requirement that the "principal or primary effect" of the legislation was not to advance religion. It is not quite as clear that the program of secular aid must be one which is applicable generally to all schools, public and private, if benefit to the church school is to be sustained. That is to say, it is conceivable that a program of secular aid might be legislated for church schools which was not considered necessary for public schools and private secular schools, and be deemed to be in compliance with the "effect" standard. The fact remains, however, that in the opinions much has been made of the fact that the legislative programs were broadly applicable to both public and private education.

The requirement that the aid to the church school or its students be earmarked for secular purposes to satisfy the "effect" standard involves rather questionable reasoning. The Court expressly recognizes that the church schools perform a secular and religious educational function. Certainly the furnishing of sec-

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cular aid to church schools may free up funds for religious educational purposes which otherwise might be required to satisfy secular educational needs. It appears, therefore, that religion is likely to be advanced by secular educational aid. Conversely, if the state were to provide funds to parochial schools for religious education, funds may be freed up for secular education that otherwise might be required for religious education; it appears that secular education is likely to be advanced by such religious educational aid. The point is that earmarking of the fund does not necessarily determine its effect. In Everson and Allen, the Court has obliquely recognized this point by stating that the furnishing of bus fare or the furnishing of secular textbooks might make it more likely that parents would send their children to parochial schools. For the purpose of determining compliance with the "effect" requirement it does not seem to make good sense to distinguish between secularly earmarked aid to parochial schools and a general grant to such schools. The economic and educational results are likely to be substantially the same either way. The weakness of the secular earmarking argument has been discussed in several minority opinions. 50

One should not lose sight of the fact that the "effect" standard speaks of the need for the "principle or primary effect" to be secular; an incidental religious effect is permissible. It is submitted that the issue should not be how the statute categorizes the funds furnished to the church school, but rather what the principal or primary function of the church school is. If the principal or primary social contribution of the church school is the furnishing of an education to its students substantially comparable to the education which is afforded by the public school, then it appears that the "effect" standard is satisfied regardless of any categorization of the funds. It is obvious that the parochial schools came into existence so that the instruction of the young would be related to the religious and philosophical positions of the church and to assure that the students remained in the faith, but their principal or primary effect or achievement may be secular, i.e., the training of the mind, the accumulation of knowledge and the preparation for a career. 51


51. See text accompanying notes 63-64 infra.
C. CHURCH-STATE ENTANGLEMENT

In the *Lemon* case, the Supreme Court held the statutes unconstitutional because of the potential for excessive church-state entanglement. In *Tilton*, however, the Court held that whatever potential for entanglement existed under the statute in issue was within constitutional limits. The entanglement standard was not expressed by the Court in the *Allen* case, but in the *Lemon* case the Court indicated that the legislation in *Allen* providing secular textbooks to church schools did not have the same potential for entanglement as legislation providing for the subsidization of teachers' salaries.

The relevant elements in the consideration of the entanglement issue are the surveillance of the educational and fiscal operations of the church school by the state authorities and the political divisions along religious lines as a consequence of the legislation. The Court has indicated that the surveillance required to ensure that a building is used for secular educational purposes is less where a church-related college or university is involved than where a church-related elementary or secondary school is involved, because of the greater likelihood at the elementary and secondary level of the injection of religion into nominally secular subjects. It also appears from the discussion in *Lemon* that the surveillance required to ensure that only secular books are furnished to church schools involves less entanglement than the surveillance required to see to it that the secular teacher steers clear of religion. In *Lemon* the Court also noted the entangling effect of the periodic financial audits required under the legislation in issue and the potential for political division along religious lines as a consequence of annual appropriations to support church elementary and secondary schools, most of which were maintained by one denomination. In *Tilton*, the Court saw greater potential for political division in the support of elementary and secondary schools than in the support of church-related colleges and universities because of the peculiarly local nature of the former as contrasted with the geographically dispersed student constituency of the latter.

The distinction made by the Court between teachers and books has a certain surface cogency. One never knows what a teacher is going to say in the classroom, but one knows what the book says and it doesn’t change. Books which allude to divine influence in science and in man’s relationship with man do not pose the problem. But what about books which speak favorably of social or political positions with which the church is in sym-
pathy, or which interpret the actions of the church in a favorable light, or which deal with moral questions in a manner which is favored by the church, or which suggest that order in the universe is the result of a plan? Are such books religious? Certainly there is no prohibition upon a school textbook having a point of view, and many church positions are supportable on secular grounds. It should be remembered that Einstein expressed the belief that the structure of the universe was not the product of chance. Presumably if a book repeatedly takes positions in line with the thinking of the church, it may be concluded that the book is not secular. The point is that the determination of what is a secular book and what is not can be a very difficult and subtle task of "surveillance," different indeed from checking on the teacher's secularism but nevertheless quite "entangling."

It is the author's view that it is unsound to determine constitutionality on the basis of the relative difficulty of ensuring that no religious content enters into the purposes for which the funds are earmarked. As mentioned above, it is not realistic to conclude that earmarking for the secular does not benefit the religious. If the furnishing of secular aid frees up more funds for religious educational purposes, then why worry about whether the teacher cheats a little by bringing some religion into the study of French? The basic question should be whether the church school serves primarily a secular function in our society. With respect to the issue of political division along religious lines where aid to church schools is involved, there is no doubt that such potential exists. It also exists where the church schools are not aided by public funds; parents of parochial school children who pay taxes and also pay for their children's parochial education are frequently unsympathetic to school levies. Abortion and divorce laws also divide people politically along religious lines, as do various international issues. Such divisions are not good for the country. But the loss of diversity in education is not good for our society.

D. Benefit to Child or Parent

It is not clear whether payment to the church school student or his family, as distinguished from payment directly to the church school, has any bearing upon the constitutionality of pub-

lic aid. The benefit went directly to the parent in *Everson* and to the student in *Allen*, which facts were mentioned in the cases in support of the conclusion of constitutionality. The benefit flowed to the school directly in the Pennsylvania legislation in *Lemon*, which was alluded to by the Court in support of its conclusion of unconstitutionality. The benefit went directly to the school in *Tilton*, which fact was not commented upon in the opinion upholding the constitutionality of the federal legislation. The benefit went to the teacher directly, as distinguished from the school, in the Rhode Island legislation in *Lemon*, but there was no reference made to the relevance of this fact in the opinion. The identity of the recipient of the public aid has not been the *ratio decidendi* of any of the Supreme Court decisions in this area, but instead has been employed, if at all, as a make-weight.

It is hard to understand why any payment of public funds for church school purposes should be unconstitutional if paid directly to the school but constitutional if paid to the family. It would seem that legislative purpose and primary effect must be analyzed in the same manner regardless of who the recipient is, and the danger of political division resulting from the aid program would seem to be the same. It is arguable, however, that the payment to the parent or child merely assists him in making an educational choice to which he is constitutionally entitled. But it seems that he would be similarly assisted by a payment in that same amount made directly to the school.

**IV. WHAT IS THE FUTURE OF PUBLIC AID TO PAROCHIAL SCHOOLS?**

What costs of elementary and secondary church school education can the state subsidize? Probably the costs of transpor-

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54. The "child benefit" theory was criticized in the dissenting opinions of Justices Jackson and Rutledge in the *Everson* case. 330 U.S. 1, 24, 45, 55 (1947). See also Opinion of Justices, 259 N.E.2d 564 (Mass. 1970); Hartness v. Patterson, 255 S.C. 503, 179 S.E.2d 907 (1971) (tuition reimbursements paid to church school students held violative of the Massachusetts and South Carolina constitutions).

55. Professor Paul Freund has commented that the sharp dichotomy between pupil benefit and benefit to the (parochial) school seems to me to be a chimerical constitutional criterion. It is akin to the ineffectual effort in the mid-nineteenth century to classify such local measures as pilotage laws as either regulations of safety or regulations of commerce, and to make their validity turn on the classification. It was the beginning of wisdom when the Court candidly recognized that such measures were regulations of both safety and commerce. Freund, *Public Aid to Parochial Schools*, 82 Harv. L. Rev. 1669, 1682 (1969).
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...tation to and from school, school lunches, and other such expenses incurred by the family incidental to the educational process can be reimbursed. It appears that the use of secular books can be subsidized, at least if the subsidy is structured to run from the state to the student or the family. It is not clear that buildings can be subsidized even if the use is limited to secular educational purposes; it appears that the subsidization of a building that was to be used for both secular and religious instruction would not be constitutionally permissible. It is clear that public aid earmarked for salaries of teachers of secular subjects is impermissible. It also appears that direct grants to the schools for operating expenses without any restrictions as to the application of the funds would not be permissible. Grants to the schools limited in amount to the expenses of secular education would not be permissible because they would involve the same teacher and fiscal surveillance problems which invalidated the legislation in Lemon. Teachers' salaries are the major expense of education; if funds earmarked for that purpose as well as unrestricted grants and grants for "secular education" are out, how can the schools be supported in any material way?

It may be that there is no way to subsidize the church elementary or secondary school in any substantial form. By its application of the "effect" and "entanglement" standards, the Supreme Court may have decided, in effect, that such schools can receive only very limited funds for such purposes as transportation and secular books. The Court may have employed a verbal formula to impose a quantitative limit upon parochial school funding. In other words, a little aid is all right, but a lot is unconstitutional.

It appears, however, that the so-called "shared time" arrangement may not be violative of the establishment clause under the reasoning of the recent decisions. In "shared time" situations, the parochial school students attend classes in the public school conducted by public school teachers for part of the day, or alternatively the public school teachers conduct certain classes for parochial school students in the parochial school. In effect, the parochial school student becomes a public school student for a portion of his educational program. Assuming that the teachers engaged in the shared time arrangement are bona fide members

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56. For the suggestion that grants limited in amount to the cost of the secular education provided by the parochial school would not violate the First Amendment, see Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 Calif. L. Rev. 260 (1968).
of the public school faculty and teach public school subjects using public school teaching materials, a convincing argument can be made that there is no breach of the establishment clause under the standards enunciated by the Supreme Court. The legislative purpose is clearly the secular one of providing secular education to young people. Under the reasoning of Allen and Tilton, the principal or primary effect is secular since the instruction is limited to secular subject matter. It also appears that the entanglement problem which was the stumbling block in Lemon is avoided in the shared time arrangement. The teachers are employees of the public school system teaching public school courses to students who are enrolled in a church school. There would seem to be no more need for surveillance to ensure that there is no religious instruction than there is in the case of the instruction of students who are enrolled in the public school. Also, there would be no entangling financial relationship because there would be no payment or reimbursement made with public funds to the church school; the teacher would be on the payroll of the public school system and the instructional materials would be furnished by the public school system or by the parochial schools or by the students themselves.\textsuperscript{57} The argument may be made that the teacher is likely to be influenced to inject religious elements into the secular instruction when instructing parochial school students, particularly if the classes are held in the parochial school. But on the assumption that the teachers are bona fide members of the public school faculty, such conduct would constitute a breach of professional duty. There can be no absolute assurance even in the instruction of public school students that religion will not be intertwined with the secular instruction.\textsuperscript{58} There is, of course, the constitutional obstacle in "shared time" legislation that it has the potential for political division along religious lines.

An educational voucher system has been suggested whereby the state issues a voucher in a certain amount to the student, the

\textsuperscript{57} Certain forms of shared time have been held valid under the Michigan constitution. \textit{In re Proposal C}, 384 Mich. 390, 185 N.W.2d 9 (1971).

\textsuperscript{58} It should be noted that if the shared time principle is applied to subjects with significant value content, the cultural distinctiveness of the church school is lessened. The use of state funds to pay salaries of public school teachers working in parochial schools was held invalid under the Montana state constitution. Chambers v. School Dist., 155 Mont. 422, 472 P.2d 1013 (1970). Similar legislation was held to be in violation of the Missouri constitution. Special Dist. for the Education & Training of Handicapped Children v. Wheeler, 408 S.W.2d 60 (Mo. 1966).
student picks his school, and the state honors the voucher by paying the amount of the voucher to the public or private school, as the case may be.\textsuperscript{59} There have been proposals for a tuition reimbursement plan whereby the state pays the parent for the private school tuition or a part of it,\textsuperscript{60} or some form of tax deduction or tax credit plan whereby the parent receives a credit or a deduction for the tuition expense, or a part of it, of the private school.\textsuperscript{61} The constitutional justification for these plans would seem to be that neither the parochial school nor religion is being aided or advanced, but rather that the child and his family are being aided in obtaining the education which they are constitutionally entitled to elect.\textsuperscript{62} The fact of benefit to the child or the family was noted in \textit{Allen} and \textit{Everson}, and the direct payment to the school under the Pennsylvania legislation was commented upon adversely in \textit{Lemon}, but the recipient of the funds has not been the \textit{ratio decidendi} in any case. It is difficult to understand why such schemes would be constitutional if a direct grant to the church school in the same amount would not be. The financial significance is identical. The direct grant to the school of a certain amount per pupil aids the family in its educational choice just as much as the indirect devices. Although the Court has not ruled specifically on the constitutionality of the unrestricted direct grant to the church school, the language and reasoning of \textit{Everson}, \textit{Allen}, \textit{Tilton} and \textit{Lemon} strongly indicate that it would be unconstitutional. The funds could be used for religious educational purposes. The grant might have the primary effect of advancing religion. If policing teachers of secu-


\textsuperscript{62} A strong case can be made for treating a tuition grant to the student as a benefit to him rather than to the church school where it is in the nature of a reward for past military service or for outstanding academic achievement. These situations seem very different from a tuition grant generally available to all.
lar subjects to ensure that they do not include some religion renders their salary supplement unconstitutional, then surely providing funds to pay teachers of secular or religious subjects without restriction cannot stand.

It is the writer's view that in making a judgment of constitutionality under the establishment clause, the Court should not direct its inquiry to the expressed purposes for which the funds are to be employed, but should look more broadly at the social function performed by the parochial schools. There can be no doubt that parochial schools were created so that the religious and philosophical positions of the church would be an integral part of the instruction. But it is submitted that the principal or primary social function or achievement or effect of the parochial school is the furnishing of education comparable to the education furnished by the public school system. The parochial school graduates go on to Harvard as well as Holy Cross, Michigan as well as Notre Dame. They become doctors, lawyers, plumbers, bartenders, engineers, accountants, architects, teachers and businessmen, just like graduates of public schools. Certainly the parochial school indoctrinates, but it is patently obvious that its principal accomplishment is the same as the principal accomplishment of the public school. It is often said that the public school has the virtue of bringing together children of different faiths and races and economic levels. This certainly is true, but it is not contended that this "democratic" function is the principal social function or achievement of the public school system. It is viewed as an important secondary function; obviously the public school's principal function is the formal education it offers. Similarly the religious element in the education of the children in the parochial school is a secondary function. Since the parochial school children spend about the same amount of time in school as the public school children, and since they graduate about as well prepared as the public school students for college and careers, it is clear that the principal accomplishment of the parochial school is necessarily the same as that of the public school.

It is the writer's view that the unrestricted grant to the church school, whether paid directly to the school or indirectly by funneling it through the parents or the students by way of educational vouchers, tuition reimbursement or tax credits should be

constitutional. Using the standards employed by the Supreme Court, the legislative purpose of such grants is secular because the purpose is the subsidization of education which is comparable to that obtained in the public school. One of the reasons offered by the Supreme Court for the constitutionality of the real property tax exemption in the Walz case was that New York had adopted the policy of encouraging charitable enterprises by exempting a variety of them from taxation, including churches; hospitals, libraries, schools and churches serve the secular goal of mental and moral improvement. The same reasoning is, of course, available to rationalize the constitutionality of income, estate and gift tax exemptions and deductions for charities and their donors, including churches and their donors. If a secular rationale can be constructed for indirect subsidization of churches as such, it is difficult to understand why there should be any difficulty in finding a secular rationale for direct grants to church schools.

The writer believes that to require that funds be restricted to purely secular purposes in order to satisfy the "effect" test is unsound. The primary effect of a secular grant is not necessarily secular; the funds which the church school had previously allocated to the secular educational cost which is now being paid by the state may be used for religious expenditures that otherwise would not have been made. Conceivably there may be grants for secular services which would not have been furnished at all by the church school but for the grant; in such case, it can be said that the restriction actually assures that state funds serve secular ends. But this would not be easy to establish, and arguably the investigation of such factors would involve excessive entanglement of government and church. It is submitted that the direct or indirect uncategorized grant has an effect which is primarily secular because the primary achievement of the parochial school is the furnishing of an education comparable to that provided by the public school.65

65. Since parents are constitutionally entitled to send their children to parochial schools which meet state educational standards (Pierce v. Society of Sisters, 268 U.S. 510 (1925)), arguably any prohibition upon aid to parochial schools is an inhibition of religion and violative of the establishment clause under the Allen, Lemon and Tilton decisions. See Drinan, Public Aid to Parochial Schools, 75 CASE AND COM., No. 2, Mar.-April 1970, at 13. See Hughes v. Board of Ed., 174 S.E.2d 711 (W. Va. 1970), cert. denied, 403 U.S. 944 (1971), for a different rationale for the same result. The Massachusetts supreme judicial court has held that the state constitutional prohibition of aid to sectarian schools does not violate the First Amendment. Opinion of the Justices, 269 N.E.2d 564 (Mass. 1970).
The "excessive entanglement" obstacle with respect to the
direct or indirect grant must also be cleared. There is no sur-
veillance issue since there is no requirement that the funds be
used only for secular purposes. The only entanglement issue is
the potential for political division along religious lines resulting
from the annual legislative appropriation for the church schools.
There are also similar divisions produced where state aid is de-
nied parochial schools; the parents of the parochial students who
pay taxes and pay for parochial education are likely to be un-
friendly toward school levies. And there is potential for division
along religious lines where legislation on divorce, abortion, liquor,
gambling, Israel and Communism are involved. A certain
amount of political division on religious lines or racial lines or
class lines is inevitable in a free and dynamic society. Certainly
the characterization of entanglement as excessive or constitu-
tionally permissible is related to one's judgment concerning the
value of the legislation involved. It is submitted that the loss of
educational diversity would be more damaging to our society
than the religious division which follows from annual appropri-
ations for church-related elementary and secondary schools. We
should also keep in mind that it is not only the danger of loss of
the parochial school that is involved, but also the secular private
school with limited sources of private support, due to the fact that
for political reasons the legislatures are not likely to give money
to the secular private school if the church school is denied funds.

If one accepts arguendo the constitutionality of the direct or
indirect grant, the question may be asked what the limit is, if
any, to the amount of public aid that may be granted to parochial
schools. If the state furnishes funds equal to the total budget of
the parochial school, then in view of the dual secular and reli-
gious nature of the education, it would appear that the state is
supporting more than the secular function. But it has been
pointed out that even where the funds are earmarked for secular
purposes, in all likelihood religious education is aided because
school funds that would otherwise have been spent for secular
purposes are made free for possible religious use. If public aid
is to be made available to church schools, there is realistically no
way to avoid aiding religious education. The question of the
quantity of aid should be left to the legislature once it is accepted
that the primary effect or achievement of the church school is
secular.66

66. When church schools receive public funds, an issue arises as to
the extent to which the recipient becomes subject to the constitutional
V. CONCLUSION

In its recent decision involving the constitutionality of Rhode Island and Pennsylvania legislation providing support for parochial schools, the Supreme Court has cast serious doubt upon the power of the state or federal government to aid such schools in any substantial way. A strong argument can be made, however, for the constitutionality of a "shared time" arrangement. Possibly the Court will uphold some form of voucher or tuition reimbursement system under a "child benefit" theory, or allow some form of tax deduction or tax credit to the parents of church school children, but it is difficult to understand why the Court would uphold such indirect unrestricted subsidies when the direct unrestricted subsidy to the parochial school would be unconstitutional. It is suggested that the Court has failed to recognize that the principal or primary effect or social contribution of the church school is secular, i.e., the furnishing of education substantially comparable to that furnished in the public schools. If that is so, then even under the standards established by the Court, unrestricted direct or indirect funding of church schools should be permissible.

The educational options at the elementary and secondary level are few. Unless the Court allows some form of substantial public aid to the church school, much of the limited diversity that presently exists may be lost. The secular private schools are also indirectly involved in this controversy, since it is unlikely funds will be made available to such schools which could not be made available to the church school. If church schools, and other private schools, are forced to close down in substantial numbers, the resulting additional burden upon public school systems is not likely to enhance the quality of the education offered by them.
