ANOTHER LOOK AT THE WALL: A REPORT ON THE CONSTITUTIONALITY OF PROVIDING PAROCHIAL SCHOOLS WITH PUBLIC FINANCIAL AID

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CHAPTER I

INTRODUCTION

The First Amendment provision that, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof," has always presented somewhat of a constitutional anomaly. When the framers of the First Amendment set out to enshrine the freedoms of speech, press, assembly, and petition they contented themselves with single clauses imposing negative restrictions upon the new federal government. Congress was to make no laws abridging these freedoms but it was left a free hand to encourage their exercise as it saw fit. (The "Fairness Doctrine" is an example of government taking affirmative action to facilitate freedom of speech.) However, when it came to the subject of religious freedom, we find that the framers encased this freedom in a dual proscription: government was neither to aid (establish) religion nor was it to discourage (prohibit) it. Insofar as religion was concerned, government was instructed to navigate between the Scylla of establishment and the Charybdis of free exercise; to be neither good nor bad. In an increasingly complex and regulated society involving inevitable interactions between the state and every other

societal unit (including the church), the proper relationship between church and state as prescribed by the First Amendment has frequently become the focus of judicial construction. To attempt a review of church-state relations in general since the appearance of the "wall" in 1947 would be the work of a dissertation or, at the minimum, a thesis. Therefore, the more limited objective of this report is to review the trend of Supreme Court decisions since the appearance of Justice Black's wall that have treated the question of proper church-state relations in the area of public aid to nonpublic religious educational institutions.

Relevance

The issue of the constitutionality of providing nonpublic religious educational institutions with public financial support goes far beyond merely providing constitutional scholars with raw material for abstruse conjecture and speculation. Rather, the resolution of the issue carries far-reaching economic and political implications, as well as enormous implications for the future of the American educational system.

The economic implications of nonpublic school aid are fairly apparent. Parochial schools have an essentially religious role, but they also perform a secular

civic function. To the extent that parochial schools cease to function the state stands to bear the additional burden of the cost of the secular instruction that children formerly received in their church-related schools. The following sampling of statistics suffices to indicate the economic significance of any constitutional decision regarding the continued existence of church-related schools:

1) In 1969, the most recent Catholic investigation into school closings revealed 295 elementary and 80 secondary schools failed in that year alone, and 63,697 students were displaced.

2) Decreases in nonpublic school enrollment have been projected for the next 10 years. Catholic schools, now enrolling 83 percent of nonpublic school students, may lose up to 52 percent of present enrollment if the present trend continues.

3) The increased costs to states of absorbing nonpublic school students is concentrated in the industrial states of New York, Illinois, Michigan, New Jersey, Pennsylvania, Ohio and California.

4) The nation's urban areas, which can least afford the added burden, would be hardest hit. The concentration in large urban areas of persons preferring nonpublic schools has resulted in percentages far in excess of the national average.[1]

5) Nonpublic school enrollment has dropped at the rate of 6 percent per year for the past five years. Since 1965 nonpublic school enrollment

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[1]Broderick, "Financial Aid for Nonpublic Education: A Decision for the Courts or Legislatures?" 49 Notre Dame Lawyer 378, 379 (1973).

> has dropped 23 percent while the public schools show an increase of 12 percent.[2]

The statistics are awesome and though the Court purports not to make economic hardship a major criterion for judging constitutional issues,[3] the statistics make the issue anything but academic.

The issue of public aid to parochial schools also involves the possibility of political implications. Both the Court and commentators have on numerous occasions expressed fears concerning the political consequences of allowing church-related educational institutions to draw upon the public treasury. According to Justice Douglas:

> Public money devoted to payment of religious costs, educational or other, brings the quest for more. It brings too the struggle of sect against sect for the larger share or for any. ...It is the very thing that Jefferson and Madison experienced and tried to guard against. ...The end of such strife cannot be other than to destroy the cherished liberty. The dominating group will achieve the dominant benefit; or all will embroil the state in their dissensions.[4]

Other commentators, differing with the Douglas view, contend that refusing financial aid to parochial schools in no way serves to avoid political strife but, rather, merely alters the source of such strife. Professor Alan

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[2]Committee for Public Education and Religious Liberty v. Nyquist, 93 S. Ct. 2995 (1973).

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

[4]Engle v. Vitale, 370 U.S. 421, 444 (1962).

Schwarz indicated the gist of such a viewpoint in writing that

> aid to parochial schools may exacerbate strife by antagonizing Protestants who for the most part would not derive advantages from such an aid program. Failure to aid, however, antagonizes Catholics who pay taxes to support public school education and pay separately to educate their own children at parochial schools. Even if strife avoidance were an independent constitutional value, it would support a no-aid standard only if religious groups generally agreed to a no-aid principle. Since there is no such agreement, both aid and no-aid cause strife.[5]

Moreover, Schwarz would contend that, even granting the correctness of the assumption that aid to parochial schools would be productive of an increased political strife, nevertheless, if strife avoidance is to be ascribed an independent constitutional value, then no legislation could be permitted concerning any subject which arouses strong and divided feelings.[6]

The issue of whether financial aid to parochial schools must necessarily lead to increased political-religious strife in the United States remains open to opinion and speculation. The European and Latin American experiences of church-state involvement are proffered by no-aid

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[5]Schwarz, "No Imposition of Religion: The Establishment Clause Value," 77 Yale Law Journal 692, 711 (1968).

[6]Id.

exponents as harbingers of what the United States may expect if parochial schools are granted the keys to the public treasury.[7] On the other hand, parochial school advocates, caught in a squeeze between economic conditions and the educational demands of religion, have increasingly turned to the political process as a means of solving their dilemma. This trend can reasonably be expected to continue absent any abandonment of the parochial school idea; something that parochial school leaders have refused to consider.[8] Regardless of the actual consequences of a Supreme Court decision concerning aid to parochial schools, the potentially explosive political ramifications add another dimension to the significance of the issues resolution.

A final area for which resolution of the aid to parochial schools issue holds great consequence is that of the American educational system. According to Alexander Bickel, the Supreme Court, imbued with an undiscriminating egalitarianism, has viewed the American public school system as being charged with

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[7]Lowell, The Great Church-State Fraud 93 (1972).

[8]"The Court's Ban on Parochial-School Aid," 82 Newsweek 64 (July 9, 1973).

a national assimilationist mission.[9] Indeed, in his McCollum v. Board of Education concurring opinion, Justice Frankfurter specifically referred to the American public school system as being "designed to serve as perhaps the most powerful agency for promoting cohesion among a heterogenous democratic people" and as "a symbol of our secular unity."[10]

No doubt one of the most important functions of the public school system is the fostering of "secular unity" among citizens. Futhermore, it is clear that to the extent the public school enjoys an educational monopoly, the value of secular unity stands to be furthered while to the extent nonpublic schools (parochial or not) flourish the secular unity value tends to be contravened. However, there is no constitutional mandate of secular unity and the non-assimilationist religiously-motivated interest of disassociation or the interest of educational excellence for all students might just as well receive emphasis as the secular unity interest.[11] When cast in terms of educational philosophies, resolution of the "aid, no-aid" issue tends to be reflective of an underlying predilection toward either a monolithic, assimi-

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[9]Bickel, The Supreme Court and the Idea of Progress 123 (1970).

[10]McCollum v. Board of Education, 333 U.S. 203, 216, 217 (1948).

[11]Schwarz, supra note 5, at 716-718.

lationist educational system designed to foster secular unity, or else a more fragmented, pluralistic system designed primarily to accommodate disassociation and educational excellence interests. Both the assimilationists[12] and the pluralist[13] philosophies have outspoken advocates and both are vitally aware of the fact that implementation of their philosophy is inextricably linked with resolution of the aid, no-aid question.

THE "WALL"--ITS ORIGIN AND MEANING(S)

As a metaphorical description of the nature of the separation between church and state demanded by the establishment clause, the term "wall" was coined by Thomas Jefferson and first employed in his now famous letter to the Danbury Baptists wherein he explained his unwillingness as President to proclaim religious days of fasts or thanksgiving:

> Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that the legislative powers of government reach actions only, and not opinions, I contemplate with sovereign reverency that act of the whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between church and state.[14]

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[12]Bickel, supra note 9, at 124, 125.

[13]McGarry, "To Turn The Tide" In The Courts," 11 Educational Freedom 23 (1972-73).

[14]Cogley, Religion in America 73 (1958).

After a rather honorable history of serving to embellish judicial dicta, the wall of separation between church and state postulated by President Jefferson in 1806 was elevated to constitutional stature in the 1947 case of Everson v. Board of Education.[15] However, like many judicial metaphors (e.g., "All deliberate speed"), the wall has been more symbolic and literary than explanatory. Therefore, in order to render Everson and subsequent church-state opinions more intelligible, it is useful to first examine some of the various historical interpretations offered by constitutional observers as to the actual meaning behind the phrase, "wall of separation" and also to examine the concept of "neutrality."

Historically, the American tradition of church-state separation has consisted of two distinct strands: the secularist strand, tracing its roots to the writings of Thomas Jefferson and James Madison, and the Protestant strand, derived from Roger Williams. Both Jefferson and Williams wrote metaphorically of a wall of separation between church and state, but they viewed the wall as serving quite different purposes. According

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15Everson v. Board of Education, 330 U.S. 1 (1947).

to Professor Mark Howe, the Jeffersonian principle of separation was rooted in an attitude of anticlericalism. Under the Madison-Jefferson view, church and state were to be separated in order to "safeguard public and private interests against ecclesiastical depredations and excursions."[16] On the other hand, Roger Williams' wall of separation existed

> not because he was fearful that without such a barrier the arm of the church would extend its reach. It was, rather, the dread of the worldly corruptions which might consume the churches if sturdy fences against the wilderness [of secularism] were not maintained.[17]

Thus, unlike the Madison-Jefferson wall, the wall of Williams was constructed for the primary purpose of protecting religious freedom and therefore did not necessarily prohibit all government aid to religion but, rather, only those aids which might be incompatible with full religious freedom.

The significance of this Williams-Madison historical digression is that it facilitates an understanding of modern writers' analyses of the religion clauses. Writers such as Professor Howe, beginning from a Williams historical approach, tend to assume that the two religion clauses were both primarily intended to safeguard only one value, that of freedom of

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[16]Howe, The Garden and the Wilderness 2 (1965).

[17]Id. at 6.

worship.[18] To the extent such writers attribute any independent force to the establishment clause they conclude that it merely requires that all religions be treated alike and that no special preference be granted by the state to one religion as opposed to all others. As Edward S. Corwin expressed it:

> What the "establishment of religion clause" does, and all that it does, is to forbid Congress to give any religious faith, sect or denomination a preferred status;...[19]

Conversely, other modern analysts of the constitution, starting with the Madison-Jefferson historical bias, tend to ascribe a number of independent values (purposes) to the establishment clause, the most important of which is strife avoidance both among religions and between religion and irreligion.[20] According to such writers, the drafters of the First Amendment, feeling that religion presented peculiarly explosive political dangers, inserted the establishment clause for the purpose of achieving tranquillity through the creation of a state of equipoise between all religions and between religion and irreligion.[21] Of course,

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[18]Morgan, The Supreme Court and Religion 189 (1972).

[19]Corwin, "The Supreme Court As A National School Board," 61 Law and Contemporary Problems 10 (1949).

[20]Bickel, supra note 9, at 710, 719.

[21]Morgan, supra note 18, at 190.

as will be noted later, proponents of this view face the necessity of providing a rationale for resolving any intra-Constitutional stalemate which might conceivably arise between the establishment and the free exercise clauses.

NEUTRALITY "A COAT OF MANY COLORS"

Not only does subscription to a particular version of history tend to color a writer's emphasis upon the independent value of the establishment clause, it also influences his interpretation of another term which has been much bandied about in the literature of the religion clauses: that of "neutrality."

In analyses of what constitutes the proper relationship of church and state under the First Amendment, the concept of neutrality has been mentioned almost as often as the concept of a wall of separation. However, as Justice Harlan has observed, neutrality is a coat of many colors.[22] Depending upon the particular writer's interpretative hue, neutrality may stress even-handed treatment of religious interests before the law,[23] equal treatment of religion and irreligion,[24] the free exercise of religion by providing for government to

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[22]Board of Education v. Allen, 392 U.S. 236, 249 (1968).

[23]Corwin, supra note 19, at 19.

[24]Pfeffer, Church State and Freedom 154 (1967).

extend certain aids to religion in situations where to refuse to do so would result in a disadvantage to religion,[25] or an "equal protection"-like prohibition against the use of religion as a basis of classification for government action.[26] Because of these various and somewhat conflicting interpretations of the meaning of neutrality, the term has failed to provide any consistent doctrinal guidelines for analyzing the religion clauses. However, as we shall see, with each new Court decision the term seems to once again be resurrected and called upon to do rationale duty.

Everson v. Board of Education
(A Test, a Tradition, and a Neutrality Explanation)

In its first bout with the establishment clause in the area of aid to parochial schools the Court issued a somewhat enigmatic decision which pleased no one.[27] The issue in the Everson case concerned the question of whether the expenditure of tax-raised funds for bus transportation of parochial school children to and from school constituted a violation of the establishment clause. In delivering the majority opinion of a Court divided 5-4, Mr. Justice Black concluded that the

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[25]Cogley, supra note 14, at 97.

[26]Kurland, "Of Church and State and the Supreme Court," 29 University of Chicago Law Review 1, 96 (1961).

[27]Morgan, supra note 18, at 92.

establishment clause

> means at least this; neither a state nor the federal government can set up a church. Neither can pass laws which aid one religion, aid all religions or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion....No tax in any amount, large or small, can be levied to support any religious activities of institutions, whatever they may be called, or whatever form they may adopt to teach and practice religion. Neither a 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 establishment of religion by law was intended to erect "a wall of separation between church and state."[28]

However, having propounded such an absolutist view of the wall of separation, Mr. Justice Black then further 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..."[29] and that

> the First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here.[30]

The upshot of Everson was to countenance aid (bus transportation) while simultaneously purporting to rely

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[28] 330 U.S. at 15, 16.

[29] Id. at 17.

[30] Id. at 18.

upon the Jefferson-Madison historical tradition of strict separation to support the promulgation of a no-aid standard. The resolution of the apparent conflict between the Black rationale and the Everson result was revealed in that portion of the Black opinion wherein he wrote:

> [C]utting off church schools from these services ...would make it far more difficult for the schools to operate. But such is obviously not the purpose of the First Amendment. That amendment requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them.[31]

In light of the above language it appears that the neutrality that Black proposed in Everson under the guise of a Jefferson-Madison type separation of church and state was actually something much less than an absolute neutrality. Rather, the "Black wall" connoted a neutrality more akin to that of Wilbur G. Katz than to that of Jefferson and Madison.

According to Wilbur Katz the neutrality commanded by the First Amendment is of a type which may properly be "bent" in order to serve the interest of religious freedom in certain situations. An example of a situation in which Katz argues that government "may do a

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[31] Id.

great deal which superficially appears to aid religions,"[32] is that of the armed services provision for chaplains to servicemen who may, because of government demands, otherwise be inadvertently prohibited from freely exercising their religion, thus resulting in a violation of the neutrality principle.[33] Under the Katz view of neutrality the otherwise incongruous rationale and result of Everson become reconcilable and, doubtless, Justice Black was thinking in Katz' neutrality terms when he wrote that

> we must be careful in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious beliefs.[34]

McCOLLUM AND ZORACH: AN AFFIRMATION AND DENIAL

After Everson, the next cases dealing with the issue of public aid to parochial schools were McCollum v. Board of Education[35] and Zorach v. Clauson.[36] Both cases involved very similar facts but had widely differing rationales as well as results.

The McCollum case was largely an extension and an affirmation of the Everson holding. In McCollum the Court had before it an Illinois "released time" program

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[32]Cogley, supra note 14, at 99.

[33]Id. at 97.

[34]330 U.S. at 16.

[35]McCollum v. Board of Education, 333 U.S. 203 (1948).

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

in which public school classrooms were utilized to conduct classes in religion for students desiring to attend. Echoing at length the Everson "wall" interpretation of the First Amendment, the Court, by an eight to one vote, had little difficulty in striking down the program. Perhaps as significant as the actual holding of the case was the fact that the Court resisted the urging of the Board of Education to abandon the Jefferson-Madison tradition announced in Everson in favor of the Williams historical approach. After noting that "counsel for respondents (Board of Education)...argue that historically, the First Amendment was intended to forbid only government preference of one religion over another, not an impartial governmental assistence of all religions," the Court then responded summarily: "After giving full consideration to the arguments presented, we are unable to accept this contention."[37] After McCollum, the Everson decision appeared secure: the standard for church-state relations was to be one of no-aid and the philosophy of separation was that of the Jefferson-Madison tradition although it was to be implemented in

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[37]Id. at 211.

a form of neutrality which might properly prefer religion when circumstances forced a showdown between an absolute neutrality and a free exercise of religion.

Having used McCollum to reaffirm the Everson approach to church-state relations, the Court, four years later on facts nearly identical to McCollum, signalled a retreat from Everson in the case of Zorach v. Clausen. In Zorach the Court again had before it a a program similar to the "released time" program. The only significant difference between the program involved in Zorach and that involved in McCollum was the fact that the Zorach program was conducted off school premises. Ostensibly clinging to Everson, the Court condoned the off-premises program but, in doing so, employed language which indicated a shift both in its historical philosophy and in its view of what constituted a proper neutrality.

The majority opinion of Zorach evidenced a striking retreat by the Court from its earlier subscription to the Jefferson-Madison view of separation. This shift in the Court's thinking was illustrated not only by what it said in Zorach but also by what it left unsaid. In Zorach, the Court refrained from reiterating the definitive interpretation of the First Amendment set

forth in the Everson case and echoed in McCollum in the paragraph beginning "Neither a State nor the Federal Government can set up a church," and ending with the Jeffersonion reference to the "wall of separation between church and state."[38] Instead, in keeping with the Williams historical tradition, Justice Douglas asserted that

> the First Amendment...does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert of union or dependency one on the other. That is the common sense of the matter.[39]

Furthermore, the Everson and McCollum reflection of the Jefferson-Madison prescription of neutrality between religion and irreligion is also absent from Zorach. Instead, appearing to prefer the Williams tradition, the Court said only that "We sponsor an attitude on the part of government that shows no partiality to any group" and that "the government must be neutral when it comes to competition between sects."[40]

The Court's opinion in Zorach did more than signal a retreat from espousal of the Jefferson-Madison historical tradition. It also contained language which

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[38]Pfeffer, supra note 24, at 175.

[39]333 U.S. at 312.

[40]Id. at 313,314.

suggested a new theory of neutrality; one later dubbed "benevolent neutrality." Read closely, the Zorach opinion indicated that government could properly go beyond merely removing or alleviating governmentally created disadvantages (the limit of permissible government action under the neutrality of Everson and of Wilbur G. Katz) to affirmatively promoting religion. Such would appear to be the implication of Justice Douglas' words when he noted that:

> We are a religious people whose institutions presuppose a Supreme Being...[and]...When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs.[41]

Whether termed "encouragement," "accommodation," or "promotion" the neutrality inherent in the Zorach opinion countenanced as well as presaged some aid running from government to parochial schools. Though a juxtaposition of the facts of McCollum and Zorach suggested that undue mixture (involvement) of church and state was a crucial factor to consider, the permissible limits of such aid remained largely unfixed by the Court.

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[41] Id.

Following Zorach, the Court decided two cases in 1961, McGowan v. Maryland[42] and Torcaso v. Watkins,[43] both of which reiterated the "wall" paragraph of the Everson holding. However, the next holding bearing directly upon our inquiry regarding parochial schools was Abington Township v. Schempp.[44] But before turning to the Schempp case it is appropriate at this point to consider the contribution of Professor Phillip B. Kurland to the literature of the religion clauses.

THE KURLAND NEUTRALITY PRINCIPLE

One of the difficulties inherent in the Everson approach was that it posed a potential problem of a conflict between the establishment and the free exercise clauses. Noting this aspect of the Everson approach in 1961, Professor Kurland attempted to provide the Court with an alternative intellectual approach to the religion clauses which would avoid the necessity of indicating a constitutional preference in the case of a conflict between free exercise and establishment demands. Observing that:

> The utilization or application of these clauses in conjunction is difficult. For if the command

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

[43] Torcaso v. Watkins, 367 U.S. 488 (1961).

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

> is that inhibitions not be placed by the state on religious activity, it is equally forbidden that the state confer favors upon religious activity. These commands would be impossible of effectuation unless they are read together as creating a doctrine more akin to the reading of the equal protection clause....[45]

Kurland then proposed that:

> The freedom and separation clauses should be read as stating a single precept: that government cannot utilize religion as a standard for action or inaction because these clauses, read together as they should be, prohibit classification in terms of religion either to confer a benefit or to impose a burden....[46]

The idea of reading the religion clauses together was, in itself, nothing novel. As we have seen, Wilbur Katz had already proposed a unitary interpretation of the religion clauses in which the establishment clause was to be viewed as merely instrumental in achieving the paramount interest of both clauses; that of free exercise of religion. The novelty of Kurland's proposal was that it sought to achieve an absolute neutrality; government was required to behave as though religion did not exist. As paraphrased by Richard Morgan, under the Kurland neutrality principle "government will act to secure its otherwise legitimate ends and religion simply will not be taken into account."[47]

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[45]Kurland, Religion and the Law 17, 18 (1962).

[46]Kurland, supra note 26, at 96.

[47]Morgan, supra note 18, at 200.

The Kurland principle of neutrality appeared to have at least a surface affinity to the Jefferson-Madison tradition of strict separation. Certainly an absolute prohibition upon government (state) touching upon religion resembled the absolute separation demanded by Jefferson and Madison. In fact, the Kurland variety of neutrality appeared, at least semantically, to better accord with the Jefferson-Madison tradition espoused in Everson than did the Katz neutrality which the Court there appeared to employ. Despite, however, a semantic compatibility with the Jefferson-Madison tradition of absolute separation, the actual policy consequences of the application of the Kurland principle would lead to a wall even more permeable than was that of Everson. As Morgan observed, it would mean

> that any religious institution was eligible for participation in any government program which was not specifically designed to advantage religious institutions. Thus a program to aid all private schools...would be open to religious schools without restriction on sectarian overtones as long as the religious schools met all of the criteria of qualification established for all schools wishing to participate. It would not be possible for the government authority to establish additional criteria to limit the religious character of participant schools, for this would be to employ religion as a basis of classification.[48]

As the Court approached the Schempp case in 1963,

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[48] Id. at 49.

the Kurland principle of neutrality provided what one writer called "an easily understood, intellectually parsimonious principle which promised to allow for a logical and integrated interpretation of the religion clauses."[49] The Schempp Court would have to decide whether the doctrinal coherence offered by the principle was worth the price of tolerating the policy outcomes of its application.

THE SCHEMPP CASE: TWO ADDITIONAL TESTS

In the Schempp case the Court was not directly concerned with the issue of public aid to parochial schools. Instead, the Court was winding up a series of cases dealing with the issue of governmentally sponsored religious exercises in public schools. Nevertheless, the case did hold great significance for the area of public aid to parochial schools because of the fact that the Court utilized it to announce two guidelines for evaluation of legislation challenged under the religion clauses which had not yet appeared in any of the previous opinions. The tests according to Justice Clark were:

> What are the purpose and primary effect of the enactment? If either is the advancement or the inhibition of religion then the enactment exceeds the scope of the legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures

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[49] Id. at 200.

> of the Establishment Clause there must be a secular purpose and a primary effect that neither advances nor inhibits religion.[50]

The Schempp opinion appeared to represent, at least by implication, a Court rejection of the Kurland neutrality principle. In an opinion replete with references to neutrality Justice Clark made it quite clear that he based his opinion upon some version of neutrality when he stated that

> in the relationship between man and religion the state is firmly committed to a position of neutrality. Though the application of that rule requires interpretation of a delicate sort, the rule itself is clearly and concisely stated in the words of the First Amendment.[51]

Then, though he alluded to a Jefferson-Madison type neutrality in saying that

> the wholesome "neutrality" at which this Court's cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions...to the end that official support of the State or Federal Government would be placed behind the tenents of one or of all orthodoxies....[52]

and though he explicitly left room for a Katz "neutralizing aids to religion" view of neutrality in refusing to pass judgment on the issue of military service provision of chaplains,[53] at no point in the

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[50] 374 U.S. at 222.

[51] Id. at 226.

[52] Id. at 222.

[53] Id. at 226.

opinion did he mention the Kurland brand of neutrality. Furthermore, it cannot be assumed that the Court was merely unaware of the Kurland principle, for on the same day that Schempp was decided the Court also decided Sherbert v. Verner[54] where Justice Harlan took pains to explain his personal views as to why the Kurland principle should be rejected.[55]

In the final analysis, Schempp appeared to do three things: it added the new tests of primary purpose and primary effect; it rejected, or at least ignored, the Kurland neutrality suggestion; and, though the language of the wall was omitted, it represented another reaffirmance of the Jefferson-Madison approach to church-state relations originally announced in Everson. On the other hand, though heavy on neutrality language, the Schempp opinion failed to add much to the previous discussions of neutrality and, more importantly for the future, it failed to make clear exactly what the Court meant by its primary effect test. The Schempp represented an attempt by the Court to articulate practical guidelines for implementation of the Everson philosophy. However, the primary purpose and effect tests soon threatened to spearhead an assault upon the Everson wall.

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[54]Sherbert v. Verner, 374 U.S. 395 (1963).

[55]Katz, "Radiations From Church Tax Exemptions," 70 The Supreme Court Review 93, 103 (1970).

ALLEN AND THE "INDIVIDUAL BENEFIT THEORY"

After Schempp the Court next turned its attention to parochial school aid in the case of Board of Education v. Allen.[56] The issue in Allen concerned the constitutionality of a New York law requiring local school districts to furnish textbooks from state approved lists to all schools (including parochial schools) within their jurisdictions. Under the plan school districts were to retain title to the books though, in fact, the books would be in the possession of the schools until finally written off as worthless because of wear and tear. Despite the warning by Justice Black in Everson that bus transportation had taken the Court to "the verge"[57] of the wall of separation erected by the First Amendment, the Court, by a six to three vote, upheld the New York plan and, in an opinion which seemed to indicate a change in the posture of the Court on the issue of aid to religious institutions,[58] Justice White gave credence to an entirely new theory of the sort of separation demanded by Everson, that of "individual-benefit."

Following the Everson decision, no one expected that unrestricted grants to parochial schools would pass

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[56]Board of Education v. Allen, 392 U.S. 236 (1968).

[57]330 U.S. at 16.

[58]Morgan, supra note 18, at 102.

constitutional muster. But during the Everson-Allen interim, parochial school advocates propounded a reading of Everson referred to as the "individual-benefit" theory. According to this interpretation of Everson, if benefit to religious institutions was only incidental to aid given to individuals then such aid was permissible.[59] The Schempp primary purpose and effect tests, though posed in the separationist language of Everson, bore considerable resemblance to the individual-benefit language, and therefore lent encouragement to its proponents. The Allen case lent even more.

Applying the Schempp tests for the first time, Justice White had little difficulty in Allen concluding that the New York legislation passed the requirement of having a secular purpose. After all, the legislature had based the program directly upon its findings that

> public welfare and safety require that the state and local communities give assistance to educational programs which are important to our national defense and the general welfare of the state.[60]

However, when it came to the second of the Schempp tests, the primary effect of the legislation was a much more difficult matter to assess. It will be recalled that

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[59]Morgan, The Politics of Religious Conflict 74 (1968).

[60]392 U.S. at 239.

the Schempp Court had left open the question of what was to constitute a "primary effect." Was it to be interpreted as a chief or principal effect or, rather, was it to be only any direct, immediate and important effect? In analyzing whether the New York legislation violated Schempp by having a primary effect that advanced religion, Justice White merely considered what the initial or first-in-time effect of the legislation would be. Concluding that "no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools,"[61] White ignored the fact that another important and possibly major effect of the legislation was to benefit the parochial schools themselves, an effect which was far from being a secular one. White's interpretation of the "primary effect" test as well as his dependence upon the lower court's finding that "the law's purpose was to benefit all school children"[62] arguably gave Court approval to the "individual-benefit" theory, thereby greatly raising the hopes of parochial school advocates.

In addition to providing parochial school advocates

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[61] Id. at 244.

[62] Id. at 241.

with hope that Allen's individual-benefit reading of the Schempp test would provide a bridge to a more permissive reading of the religion clauses, the Allen case was also noteworthy for another reason. In attacking the constitutionality of the New York textbook program, the major reason offered by the appellants for distinguishing free textbooks from the free transportation sanctioned under Everson was that books, though not buses, were critically interwoven into the teaching process, and that in a sectarian school that process was employed to teach religion.[63] The essence of the argument was that when it came to the actual educational process of sectarian schools, the strands of secular and sectarian instruction were inseparable and that therefore since the state could not identify the recipient of its aid it must be withheld. The White opinion forthrightly rejected the above inseparability argument. Noting that the case was before the Court after summary judgment on the pleadings in the lower court, White said:

> We cannot agree with appelants either that all teaching in a sectarian school is religious or that the processes of secular and religious training are so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion. ...Nothing in this record supports the proposition

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[63] Id. at 245.

> that all textbooks, whether they deal with mathematics, physics, foreign languages, history or literature, are used by the parochial schools to teach religion....[64]

Although based upon the absence of evidence before the Court, White's suggestion that the two aspects of religious instruction and secular education were separable had far-reaching implications. If textbooks, though integral to the teaching process, could be singled out to receive public aid under the application of the Schempp test, why not the salaries of teachers who taught secular subjects within the parochial schools? As one writer observed after Allen, "The door was...opened for arguments in favor of public aid for secular teachers and a broad range of educational services."[65]

Allen presented a quite porous version of the Everson wall. Not only busses but now books had transgressed its confines and the limits of its porosity remained yet undefined. Absent violation of the primary effect test of Schempp as applied in Allen, almost any aid appeared possible of transmission through the wall, while all the while paying lip service to Everson's command of no aid to church schools. Inevitably the Court would be pressed by parochial school advocates to allow additional forms

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[64] Id. at 392.

[65] Broderick, supra note 1, at 370.

of aid. During the decade of the 1970s the Court faced these demands, but before it did so the wall received some unexpected repair work from an unlikely source.

CHAPTER II

THE WALL OF THE 1970'S

WALZ AND YET ANOTHER TEST

In Walz v. Tax Commission[1] the Supreme Court faced for the first time the issue of the constitutionality of government tax exemptions extended to churches and church-related institutions. The Court had twice dismissed tax exemption appeals in 1956 and 1962 and therefore it was a surprise to many observers when the Court noted probable jurisdiction of Walz in 1970.[2] However, in light of the centuries-old tradition of giving religious institutions tax exempt status, it surprised no one when Chief Justice Burger, writing his first church-state opinion and speaking for five of the eight Justices, found the exemptions to be constitutional. Regardless of the Court's motivations in deciding to hear Walz, when viewed in retrospect the facts of the case appear to have provided a perfect opportunity for the Court to fashion a response to the inevitable post-Allen demands of parochial school advocates.

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[1]Walz v. Tax Commission, 397 U.S. 664 (1970).

[2]Katz, "Radiations From Church Tax Exemptions," 70 The Supreme Court Review 93 (1970).

In approaching the tax exemption in Walz, Chief Justice Burger relied upon both the Schempp tests, but also added a third test which was a modification of the Schempp primary effect test:

> Determining that the legislative purpose of tax exemption is not aided 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.[3]

As for what constituted excessive governmental entanglement with religion, the Chief Justice went on to note that, "the test is inescapably one of degree" and that

> in analyzing...the questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement.[4]

Upon application of his new threefold test the Chief Justice had no difficulty justifying the tax exemptions, concluding that "The exemption creates only a minimal and remote involvement between church and state and far less (than would) taxation of churches."[5]

Though, following in the wake of Allen, the additional "entanglements" test promised to significantly

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[3] 397 U.S. at 674.

[4] Id.

[5] Id. at 676.

strengthen the wall of separation demanded by Everson, the actual language of Burger's opinion appeared to indicate an aversion to the Madison-Jefferson tradition of absolute separation as embodied in the wall. Burger saw no value in maintaining an absolute neutrality, observing that "The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions...." Instead, citing much of the Zorach opinion and resorting to a skeletal analogy wherein he likened the religion clauses to bones, Burger asserted that "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."[6] As for the absolute no-aid standard of Everson, Burger cited it once again but this time only for the purpose of illustrating the "hazards of placing too much weight of a few words or phrases of the Court."[7] Observing that, insofar as church and state are concerned, "No perfect or absolute separation is really possible...",[8] Burger described the judicial

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[6] Id. at 669.

[7] Id. at 670.

[8] Id.

obligation of maintaining proper church-state relations as one of "traversing a tight rope."[9] No longer was the Court's task viewed as one of "keeping high and impregnable" the wall.

Burger's announcement of the existence of a "benevolent neutrality" toward religion as well as his disparagement of any idea of an absolute wall of separation between church and state gave parochial school advocates ground for hoping that the new entanglements test would not prove fatal to the promise of Allen. Their hopes were soon to be dashed.

ENTANGLEMENT APPLIED---TILTON, LEMON, AND Di CENSO

Walz had clearly indicated that some involvement between church and state was permissible and even necessary in order to effectuate a posture of "benevolent neutrality." However, the permissible limits of "benevolence" has yet to be clearly delineated. A year after Walz, three cases reached the Court which served to illuminate the practical operation of the new entanglements test of Burger.

In the companion cases of Lemon v. Kurtzman[10] and

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[9]Id. at 672.

[10]Lemon v. Kurtzman, 403 U.S. 602 (1971).

Early and Robinson v. Di Censo[11] the Court confronted legislation enacted by Pennsylvania and Rhode Island which was designed to aid parochial schools through "purchase of services" programs. Taking their cue from White's opinion in Allen, both states grounded their programs upon a secular motive (purpose) of desiring to benefit the entire community. Relying heavily upon that portion of White's Allen opinion wherein it was suggested that the secular and sectarian functions of parochial schools were separable, the thrust of each program was to provide support only for those secular functions that were performed by parochial schools. However, in striking down both programs, the Court indicated that separability was not the sole factor to consider. Noting that "a certain momentum develops in constitutional theory and it can be a 'downhill thrust' easily set in motion but difficult to retard or stop" and that, "nor can we fail to see that...some steps, which when taken were thought to approach 'the verge,' have become the platform for yet further steps",[12] Chief Justice Burger, speaking for the Court, concluded that "while

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[11]Early and Robinson v. Di Censo, 403 U.S. 602 (1971).

[12]Id. at 624.

some involvement (of church and state) are inevitable, lines must be drawn."[13]

In drawing the lines in these two cases Burger began with the proposition that

> every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster "an excessive government entanglement with religion."[14]

Granting the secular purpose of the states programs but concluding that they ran afoul of the entanglements test, Burger found it unnecessary to examine the issue of the programs' primary effect. Acknowledging White's dictum in Allen that secular and religious functions of parochial schools were separable, Burger was willing to assume, at least in the abstract, that teachers' activities could be catagorized as being either religious or secular. However, unlike books or buses, the ideological nature of teaching was felt to necessitate an undue involvement of the state with the parochial school in order to insure that aid flowed only to the support of teachers' secular functions. After all, Justice

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[13]Id. at 625.

[14]Id. at 612, 613.

Burger noted that

> 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 prophylatic contacts will involve excessive and enduring entanglement between state and church.[15]

Burgers conclusion was unequivocal: notwithstanding the built-in safeguards of the disputed legislation, and partly because of them, "the cummulative impact of the entire relationship arising under the statutes of each state involves excessive entanglement between government and religion."[16] Furthermore, a portion of the Pennsylvania program which also sought to provide direct financial aid to parochial schools was found to be in violation of the entanglements standard. Citing both Everson and Allen, the Chief Justice explained that

> obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative standards....[17]

In utilizing his test of excessive entanglements in Lemon, Burger was not concerned merely with protecting church operation of parochial schools from the intrusive

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[15] Id. at 619.

[16] Id. at 614.

[17] Id. at 621.

effects of continuing governmental inspections. Observing that "the highways of church and state relationships are not likely to be one-way streets," he also feared the hazards of religion intruding into the political arena.[18] Reflecting the Jefferson-Madison principle that "political division along religious lines was one of the principal evils against which the First Amendment was intended to protect,"[19] Burger concluded that

> the potential for political divisiveness related to religious belief and practice is aggravated in these two statutory programs by the need for continuing annual appropriations and the likelihood of larger and larger demands as costs and populations grow.[20]

Thus, though not spelled out in the opinion, Burger's entanglements criterion bore resemblance to a modified version of the Jefferson-Madison view of absolute neutrality. Some intermingling of church and state was to be permissible in both directions: church might allowably encroach upon state up to the point of "divisiveness to the political process" and likewise, the state might properly invade the domain of religion up to the point of "a continuing state surveillance."

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[18] Id. at 623.

[19] Id. at 622.

[20] Id. at 623.

One of the ironies of the Lemon and Di Censo opinions was the contrast of Burger's rhetoric with his result. Though he denigrated the Everson wall in observing that "the line of separation, far from being a 'wall', is a blurred, indistinct and variable barrier depending on all the circumstances of a particular relationship,"[21] he then concluded his opinion by drawing the line at the point where "a comprehensive discriminating, and continuing state surveillance ...will be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected."[22] Another oddity of the Lemon case involved the doctrine of neutrality. Though Burger had originated the "entanglements" test in Walz because of the dictates of a "benevolent neutrality", no mention is made of neutrality, benevolent or otherwise, in Lemon. In Walz, the doctrine had been invoked for the Williams-like purpose of protecting religion from the state. However, a year later the effect of the Burger opinion reflected a view more in keeping with the Jefferson-Madison tradition of a strict separation requiring

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[21] Id. at 614

[22] Id. at 619.

insulation of the state from interacting with, and possibly being influenced by, the clerics. At least one writer, noting the Jeffersonian flavor of Lemon, complained that, "Fidelity to its prior decisions required the Court to explain why neither benevolent neutrality nor the principle of equality should permit the state to aid the secular functions of parochial schools."[23]

TILTON

Tilton v. Richards[24] concerned those provisions of the 1963 Higher Education Facilities Act which provided for the transmission of federal aid to church-related colleges and universities for construction of buildings and facilities to be used for secular purposes. For purposes of this report, the case is useful to illustrate the boundaries of the entanglement doctrine as envisioned by the Burger Court.

In applying the entanglements test to the case of higher education, the Court found that the degree of entanglement in Tilton was empirically different from that existing in Lemon and Di Censo. Three factors were cited as substantially diminishing the potential

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[23] Giannella, "Lemon and Tilton: The Bitter and the Sweet of Church State Entanglement," 71 The Supreme Court Review 147, 186 (1971).

[24] Tilton v. Richards, 403 U.S. 672 (1971).

danger of excessive church-state entanglement in the Tilton case.

First, the goals, students and courses of study at the college and university level were found to differ from those of the parochial elementary and secondary schools. Unlike the elementary and secondary schools, the Court found that "religious indoctrination is not a substantial purpose or activity of these church-related colleges and universities."[25] Also, the Court deemed college-age students to be less impressionable and susceptible to religious indoctrination than younger students.[26] Finally, the Court thought the nature of college coursework to be, in itself, a limit upon the opportunities for sectarian influence.[27]

The second factor of Tilton which was felt to obviate the necessity of excessive entanglements was the non-ideological character of the aid that the state was providing. Unlike the subsidization of teachers, here the state was providing facilities (brick and mortor) that were religiously neutral.

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[25] Id. at 687.

[26] Id. at 686.

[27] Id.

The final factor serving to distinguish the Tilton entanglement from the Lemon and Di Censo excessive entanglement was that the grants in Tilton were one-time, single-purpose construction grants. Focusing upon this distinction, the Court contrasted the nature of the aid in Lemon with that in Tilton by observing that

> unlike the direct and continuing payments of the Pennsylvania program, and all the incidents of regulation and surveillance,...[here] [t]here are no continuing financial relationships or dependencies, no annual audits, and no government analysis of an institution's expenditures on secular as distinguished from religious activities. Inspection as to use is minimal contact.[28]

Having factually distinguished the degree of potential entanglement present in Tilton from that present in Lemon and Di Censo, the Court then again revealed the "two-way" nature of the entanglements test by noting that

> we think that cumulatively these three factors also substantially lessen the potential for divisive religious fragmentation in the political arena.[29]

and that, "correspondingly, the necessity for intensive government surveillance is diminished and the resulting entanglements between government and religion lessened."[30]

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[28] Id. at 688.

[29] Id.

[30] Id. at 687.

As in Lemon and Di Censo, Tilton demonstrated that some entanglements were permissible but nevertheless, government was not to go so far as to intrude upon religion with "continuing state surveillance" nor was religion to be allowed to "fragment the political arena."

One further aspect of Tilton is deserving of at least fleeting attention. Under the federal act involved in Tilton, the religion-related schools were permitted an unrestricted use of the government built buildings after the passage of twenty years. Observing that

> it cannot be assumed that a substantial structure has no value after that period and hence the unrestricted use of valuable property is in effect a contribution of some value to a religious body,[31]

the Court invalidated the 20-year provision of the Act. Some scholars of the Constitution had doubted the continued vitality of Black's no-aid test offered in Everson.[32] However, the Court's action in Lemon of summarily striking down the direct aid provisions of that program, and its excision of the 20-year provision in Tilton, made it clear that the Court remained adamant

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[31]Id. at 683.

[32]Kelly, "The Court and Parochiaid," 90 The Christian Century 1025 (October 17, 1973).

in its refusal to allow any aid to flow directly from the state to schools themselves.

The Tilton, Lemon, and Di Censo decisions were considered major setbacks for parochial school aid.[33] The decisions marked the first time the Court had struck down laws concerned with giving public funds to parochial schools. Tilton had indicated that there was yet "some play in the joints" of the establishment clause but parochial school advocates still appeared to be trapped between the second and third tests of the Burger Court: if safeguards were included in parochial school aid programs to guarantee that public funds went only toward secular education functions, then they encountered the bar of excessive entanglements; if safeguards were omitted, they were alleged to have the primary effect of aiding and advancing religion.[34]

Since Tilton the Court has decided two cases involving aid to parochial schools: Committee for Public Education and Religious Liberty v. Nyquist[35] and also

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[33]Broderick, "Financial Aid for Nonpublic Education: A Decision for the Courts or Legislatures?" 49 Notre Dame Lawyer 372 (1973).

[34]403 U.S. at 668. (White, J., dissenting).

[35]Committee for Public Education and Religious Liberty v. Nyquist, 93 S. Ct. 2955 (1973).

the case of Sloan v. Lemon.[36] Both these cases have confirmed the worst fears of parochial school advocates.

NYQUIST AND SLOAN

Even following the ominous Lemon and Di Censo opinions, parochial school advocates, working through their state legislatures, continued to produce schemes designed to circumvent and/or satisfy the three-pronged test of Burger. The results of their efforts in New York and Pennsylvania were the cases of Nyquist and Sloan. In Nyquist the Court evaluated three distinct portions of a New York program under which parochial schools received public funds: direct state payments for the purpose of "maintenance and repair"; state tuition reimbursements for low income parents; and indirect financial assistance by means of tax benefits to parents of nonpublic school children. In Sloan the Court was concerned with Pennsylvania's program of tuition reimbursement to all parents of nonpublic school children.

The invalidity of the portion of the New York program that provided financial aid directly to parochial schools for "maintenance and repair" was a foregone conclusion after Lemon and Di Censo.[37] Having verified

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[36]Sloan v. Lemon, 93 S. Ct. 2982 (1973).

[37]Broderick, supra note 33, at 374.

the vitality of the Everson admonition of "no aid" to religious institutions by the Tilton finding that the 20-year provision had the effect of aiding religion, the Court, in Nyquist had no difficulty in arguing that

> if tax-raised funds may not be granted to institutions of higher learning where the possibility exists that those funds will be used to construct a facility utilized for sectarian activities 20 years hence, a fortiori they may not be distributed to elementary and secondary sectarian schools for the maintenance and repair of facilities without any limitation on their use.[38]

The Pennsylvania tuition reimbursement program, as well as those portions of the New York program involving tuition reimbursement and tax credits, presented much more subtle attempts to evade the strictures of Lemon and Di Censo's three tests. Relying upon the individual-benefit theory implicitly espoused in Allen, the state, Nyquist, contended that tuition reimbursement and tax credits to parents, unlike similar grants to schools, paid due respect to the "wall of separation" required by the Constitution.[39] Though Chief Justice Burger, in a dissenting opinion agreed that "government aid to individuals generally stands on an entirely different footing than direct aid to religious institutions,"[40]

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[38] 93 S. Ct. at 2967.

[39] Id. at 2968, 2972.

[40] Id. at 2988.

Justice Powell, writing for the majority, remained unpersuaded. According to Powell, Everson and Allen were distinguishable from Nyquist on other grounds. There, the nature of the aid (nonideological busses) and state inspection agencies (the Allen school authorities) had acted to ensure that it would flow only to support secular aspects of parochial school functions. For Powell, the fact that aid was disbursed to parents rather than to the schools was not to be determinative; rather, it was merely "one among many factors to be considered."[41]

Notwithstanding the increased subtlety of the tuition reimbursement and tax credit programs, the Court struck them down with the same ease that it had invalidated the direct aid portion of the programs. Applying the three-pronged test announced by Burger, the Court conceded the existence of a secular purpose behind the programs but felled them on the basis of the second test, deeming their primary effect as "serving to advance religion."[42] It will be recalled that Schempp, in formulating the primary effect test, had left unclear its exact meaning. Allen, evincing a

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[41] Id. at 2970.

[42] Id. at 2974.

fondness for the individual-benefit theory, had construed primary effect to be merely the first effect in time, and had thus upheld textbook aid because its "first" effect was not to advance religion-related schools but rather to give books to individual students. In striking down the aid programs in Nyquist, the Court clearly altered the Allen interpretation of what was to constitute a primary effect. Under the Nyquist interpretation it was no longer sufficient that aid legislation avoid having as its first effect one which advanced religion. Nor was it even enough that it avoid having as its dominant effect advancement of religion. Rather, according to Powell, it must not have even a "substantial," "inevitable," or "direct and immediate" effect of advancing religion.[43]

The Nyquist redefinition of primary effect raised the bar on the second hurdle of the Court's aid tests by a considerable measure. Prior to Nyquist and Sloan it had appeared that the principal obstacle standing in the way of parochial school aid was the entanglements test. However, under the Powell interpretation, the primary effect test promises to be at least as great, if not a greater, barrier. The decision caused one

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[43]Kelly, supra note 32.

observer to go so far as to conclude that "the Court has declared as unconstitutional any statute whose intended consequence is to preserve and support religious-oriented institutions!"[44]

Though the Court in Nyquist found it unnecessary to reach an application of the entanglement test, its dictum did shed additional light on it. Earlier in Walz, Lemon, and Di Censo, the Court had acknowledged that entanglements were a "two-way street" and that continued state surveillance and politicization along religious lines marked no-entrance points. In Nyquist the Court's dictum addressed only that aspect of entanglements involving the potential of political grouping along religious lines. Though the Court noted that church-state relationships were a deeply emotional issue in the United States and recognized that a serious potential for divisive political consequences was present, nonetheless the Court stated that

> [t]he prospects of such divisiveness may not alone warrant the invalidation of state laws that otherwise survive the careful scrutiny required by the decisions of this Court,... [though] it is certainly a "warning signal" not to be ignored.[45]

The inescapable implication of the Court's language was

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[44]Wood, "The Impermissibility of Public Funds and Parochial Schools," 15 Journal of Church and State 188, 189 (Spring, 1973).

[45]93 S. Ct. at 2978.

that that aspect of the entanglement test which guarded against religious politicization was not, in itself, an independent test. Lemon had clearly indicated that the counterpart "state-surveillance" aspect of entanglement was a prohibition absolute in itself. Moreover, Lemon had hinted that the potential of political division along religious lines was also an absolute bar to a parochial school aid program when the Court there stated:

> It conflicts with our whole history and tradition to permit questions of the Religion Clauses to assume such importance in our legislatures and in our elections that they could divert attention from the myriad issues and problems that confront every level of government.[46]

However, rather than a constitutional bar, under the Nyquist dictum the potential of religious politicization is relegated to the status of a "warning signal" setting of a necessity of close judicial inspection. If the Nyquist dictum accurately represents the opinion of the Court on the application of the entanglement test then it is no longer tenable for opponents of parochial school aid legislation to rely solely upon a program's potential for politically divisive effects.

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[46] 403 U.S. at 623.

RE-ENTER NEUTRALITY

Nyquist injected the neutrality principle back into the Court's opinions. Utilizing the principle of neutrality within the context of the primary effect test was found to be surprisingly simple:

> Special tax benefits, however, cannot be squared with the principle of neutrality....To the contrary, insofar as such benefits render assistance to parents who send their children to sectarian schools, their purpose and inevitable effect are to aid and advance those religious institutions.[47]

Used in this manner, neutrality was merely a corollary of the primary effects test.

The more difficult problem came in determining what constituted a neutral path between parental desire to be economically free to exercise religion (by sending their children to parochial schools) and the negative proscription of the establishment clause. Here the Court was faced with the challenge of charting a neutral course with regard to legislation admittedly designed to promote free exercise of religion (and thus avoid a prohibiting of free exercise) and which, under the primary effect test, was violative of the establishment clause. Only twice, before Nyquist, had the Court dealt with a direct conflict between the free exercise clause and the establishment clause, and in neither of the previous cases

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[47] 93 S. Ct. at 2975, 2976.

had the issue of public aid to parochial schools been involved.

In the cases of Sherbert v. Verner[48] and Wisconsin v. Yoder[49] the Court's conclusions appeared to indicate that in the case of a conflict between the religion clauses a neutral course between the clauses would properly include a "bend" in favor of the value of free exercise. In considering whether allowing the Amish to escape the force of school attendance laws (their form of free exercise of religion) constituted an establishment of religion, the Yoder Court had stated:

> The Court must not ignore the danger that an exception from a general obligation of citizenship on religious grounds may run afoul of the Establishment Clause, but that danger cannot be allowed to prevent any exception no matter how vital it may be to the values promoted by the right of free exercise. By preserving doctrinal flexibility and recognizing the need for a sensible and realistic application of the Religion Clauses we have been able to chart a course that preserved the autonomy and freedom of religious bodies while avoiding any semblance of established religion.[50]

Because of Yoder's "sensible" caveat concerning "doctrinal flexibility" there was no need for Nyquist to overrule Yoder. However, Nyquist, if not in disagreement,

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[48]Sherbert v. Verner, 374 U.S. 395 (1963).

[49]Yoder v. Wisconsin, 406 U.S. 205 (1972).

[50]Id. at 220, 221.

was at least out of tune with the Court's rulings in Yoder and Sherbert. Reflecting the Jefferson-Madison view concerning the independent value of the establishment clause, Powell in Nyquist required that an equal, if not preferential, place be accorded the establishment clause whenever it came into conflict with the free exercise clause. Noting that "tension inevitably exists between the Free Exercise and the Establishment Clauses" and that "it may often not be possible to promote the former without offending the latter,"[51] Powell purported to chart a neutral course between the two clauses.[52] However, the nature of his version of neutrality was revealed in his conclusion that neither the social importance of the state's purpose nor its desire to promote the free exercise of religion "may justify an eroding of the limitations of the Establishment Clause now firmly implanted."[53]

Nyquist and Sloan appear to represent two more sharp defeats for supporters of aid to parochial schools. In Nyquist the Court met the free exercise argument head-on and utilized neutrality language to indicate that, at

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[51] 93 S. Ct. at 2973.

[52] Id. at 2975.

[53] Id. at 2973.

least in the area of public aid to religiously-oriented schools, the values inhering in the establishment clause were to take preference over those represented by the free exercise clause. After Nyquist, Black's "wall" and Burger's "line" appeared as very formidable barriers. Apart from transportation, books, auxiliary aids, and higher education, after Nyquist and Sloan there appears to be little additional "play in the joints" of the establishment clause. In terms bearing ominous implications for future aid schemes, Justice Powell concluded the Sloan opinion by noting that the Court was well aware of the fact that the three establishment tests, as interpreted by the Court, had the effect of presenting aid advocates with what might be considered an "insoluble paradox." However, he asserted that, if such was the case, "the 'fault' lies ...with the Establishment Clause itself."[54]

POST-NYQUIST

Leo Pfeffer, a long time legal adversary of aid to parochial schools, remarked after Nyquist and Sloan were handed down that "the fight for aid will continue but proponents have almost run out of methods to gain aid."[55] Pfeffer's observation appears to be accurate. The Court's

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[54] 93 S. Ct. at 2988.

[55] Wood, supra note 44, at 191.

tri-partite test appears to stand as an invincible barrier (wall?) to any substantial additional forms of aid to parochial schools. Notwithstanding the ingenuity of aid advocates, few conceivable programs can be expected to successfully run the gamut of primary effect and entanglement. One by one, aid programs and their rationales have been felled by the Court's tests. After the Nyquist version of the primary effect test the individual-benefit theory appears to be obsolescent.[56] Nyquist also appears to have destroyed any possibility of reliance upon free exercise arguments to counter establishment prohibitions. Tuition reimbursement was clearly invalidated by Nyquist and though the Nixon Administration continues to support federal tax credit legislation, its validity is also seriously in doubt after Nyquist. Even resort to the Equal Protection Clause in order to avoid establishment clause demands was denied to aid advocates in Sloan.[57] The future of parochial school aid appears at best bleak. Nevertheless, aid advocates have not yet completely exhausted

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[56]Broderick, supra note 33, at 376.

[57]93 S. Ct. at 2988.

their ingenuity in attempting to avoid the reach of the Court's tests; they have yet another card left to play and one in which they have some faint hope for success: the "educational voucher" system.

The basic idea of the voucher system is simple. It consists of merely transforming the traditional system of using tax funds to finance public schools into an arrangement whereby individual parents would receive tax vouchers from the government and could then choose and purchase the education they desired for their children. Using the vouchers as cash, parents would then be given the opportunity of purchasing education in a marketplace of diverse schools.[58] Implementation of the voucher system would obviously have a number of important social and educational implications. However, its most immediate virtue, from the viewpoint of aid exponents, was that it was thought to have some chance of surviving Court scrutiny after the announcement of the Lemon and Di Censo decisions. However, though the voucher plan has not yet come before the Court, the latest rulings in Nyquist and Sloan suggest that it will suffer the same fate as its aid-plan predecessors.[59]

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[58]La Noue, Educational Vouchers: Concepts and Controversies v. (1972).

[59]Wood, supra note 44, at 191.

Though likely to fail, the voucher plan does promise to come the closest of any to date to passing Court inspection. Looking first at the secular purpose test, there is little doubt but what the program may pass as one legitimately designed to achieve the purpose of "educational quality" or some other "general welfare" objective. Indeed, as one writer has observed:

> It is doubtful that there is a legislature in the land so tongue-tied that it could not find a multitude of secular purposes to cover any religious interest it wished to accommodate.[60]

On the score of entanglements, the voucher system might also conceivably pass this test. One of the most appealing aspects of the voucher system is that, in channelling educational funds to parents, it avoids any necessity of a "continual surveillance" of church-related schools. Though the effect of transferring funds to parents is admittedly the same as that of tax credits, it is argued that "the collecting and payment mechanisms are different."[61] As for that aspect of the entanglement test designed to avoid political fragmentation along religious lines, it will be recalled that the Nyquist dictum indicated that it was not

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[60] Kelly, supra note 2.

[61] La Noue, supra note 58, at vii.

sufficient, in itself, to invalidate an aid program. Moreover, since a voucher system would provide all parents (both religious and irreligious) with additional educational freedom, it would likely be less productive of political discord than would previous aid programs.

It is upon the primary effect test that the voucher plan will be most likely to run adrift. Regardless of other collateral effects, it is difficult to conclude that the plan would not also include a "direct and immediate," "substantial" and "inevitable" effect of serving to aid parochial schools and thus, of "advancing religion." Of course, even standards such as "substantial" and "direct and immediate" entail interpretations of degree and aid advocates will no doubt tout the program as one having other primary effects (e.g., educational excellence or increased parental choice). However, the tenor of the Court's decision in Nyquist as well as the common sense of its language leads this writer to conclude that such protestations will be futile. The Court has stiffened its neck against parochial school aid and appears to be willing to strike down any program whose "intended consequence is to preserve and support religion-oriented institutions."[62]

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[62] Wood, supra note 44, at 188, 189.

Though logic seems to forecast failure for the voucher system, the Chief Justice has warned students of the Court against looking for logic in the Court's church-state decisions.[63] Zorach was hardly to be anticipated after McCollum nor was the Nyquist re-definition of the Allen primary effect test. Perhaps the fate of the voucher system, and of the aid issue generally, is more dependent upon the reigning social philosophy of the majority of the Court than upon the logic of stare decisis. If so, then rather than "wall" precedents, the determinative issue will be: "Is pluralism in education to be encouraged or allowed to decay?"[64]

CONCLUSION

The opinions from Everson to Nyquist make it clear that the concept of "a wall of separation between church and state" is far from self-defining. Religion, in its comprehensive sense, pervades, and religious intuitions have traditionally regulated, virtually all human activity. Aware of the fact that state codes and the dicates of faith must overlap, the Court has recognized the necessity of providing for what Elwyn Smith calls "a quality of interplay"[65] between the state and church, by positing a

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[63] 397 U.S. at 671.

[64] Broderick, supra note 33, at 383.

[65] Smith, Religious Liberty in the United States 319 (1972).

"play in the joints" of the establishment clause. However, the Court has refused to go so far as to adopt the Williams proposition that religious freedom is the only, or even paramount, goal of both clauses. Instead, reflecting the Jefferson-Madison philosophy, the Court has ascribed an independent status to the establishment clause. In steering a course between what it has chosen to view as co-equal and independent clauses the Court has shunned the Kurland suggestion for achieving an absolute neutrality. Rather, it has developed three practical guidelines for determining what constitutes a neutral course. The result of the Court's application of these neutrality guidelines has resulted in a wall of separation between church and state much similar to that of Black's in Everson.

As the result in Everson indicated and as the present Court admits, neither the 1947 wall nor the 1973 wall were intended to effect an absolute separation of church and state. Both walls reveal evidence of some "play in their joints." In Everson, Justice Black was not clear as to how much "play" his wall contained, noting only that bus transportation went to the "verge" of the sort of aid that was permissible. Perhaps the only major change in the wall from Everson to Nyquist has been that

the Court has had the opportunity to refine its articulation of the degree of "play" it is to contain. Whereas Everson weighed the demands of the establishment clause by employing the crude abstraction of a wall and its verge, Nyquist employed the sophisticated instrumention of effect and entanglement: both reached similar results.

As for the future direction that the Court will take concerning the parochial school aid issue, who can say? In delivering the majority opinion of Nyquist in the summer of 1973, Mr. Justice Powell sounded almost apologetic in explaining that it was the "fault" of the establishment clause itself which was occasioning the "insoluble paradox" confronting parochial schools. The apparent implication of his statement is that fidelity to the demands of the establishment clause clearly precludes the government from rescuing the fast-failing parochial school system in the United States regardless of social considerations. If such is the case then it is a fairly safe prediction to say that the Court has, for all practical purposes, laid to rest the parochial school aid issue. However, only time will determine whether social considerations may yet modify the nature of the Justices' "fidelity" to supposed constitutional dictates.

If, as many suspect, public policy considerations and notions concerning the simple nature of fairness are as important determinants of judicial opinions as are naked constitutional dictates then it is the opinion of this writer that the Court may find good reason in the future to reverse the trend of its opinions concerning the parochial school aid issue.

First, regarding public policy considerations, it seems to me that the primary educational implications stemming from the Court's interpretation of the wall concern the issue of whether the nation shall strive to create and promote a pluralistic or, rather, a monolithic educational system. Of course, there is the possibility of maintaining some middle ground where a remenant of unusually well funded parochial and private secular institutions would continue to exist and provide some minimal alternative to the educational philosophy and atomosphere of the public school system. However, in practical terms, rising educational costs are quickly making the possibility of this middle ground unfeasible.

Even in courses devoid of specific religious content it is the view of this writer that there are distinct, though largely ineffable, differences in the nature of

the instruction offered in public and parochial schools. Real education necessarily involves dealing with loyalties and values many of which derive from religious precepts. When the educational process occurs within a context of a religious-like commitment such loyalties and values tend to acquire a depth of meaning not likely to result from a dispassionate and objective instructional approach. Furthermore, not only is greater commitment to value positions likely to be produced by parochial school instruction but also wholly different philosophical values are likely to be engendered. Absolutism tends to prevail over relativism, subjectivity over objectivity, dogmatism over skeptism and individualism over collectivism. One need not subscribe to these philosophical emphases to admit that they nevertheless have contributed and continue to contribute valuable and necessary input to the American cultural milieu. Though many of these philosophical values are currently unfashionable among the public school academic community it is the opinion of this writer that the nation can ill afford to jettison, in the name of secular unity, either these value viewpoints or the schools that manufacture them. If faced with the prospect of a complete collapse of the parochial school system

it seems not unlikely that the Court will reconsider and revise its estimate of "constitutional dictates."

Looking next to conceptions concerning the simple nature of justice, I feel that here also the Court's present stance misses the mark. The public's idea of the nature of justice varies over time. What appears fair in the mind of the public is a function of the interaction of a society's interest groups at one particular moment in time. At one period of American history the public conscience was little concerned that suffrage was reserved for males. At the time of Everson most Americans' notions of justice countenanced government facilitation of religious belief by provision of chaplains in the armed services. However, for many, simple notions of fairness were not so broad as to include government facilitation of religious belief when that belief manifested itself in parental insistence upon a religious education for their children. By the time of Allen, assuming that the Supreme Court is somewhat reflective of the public conscience, notions of justice had stretched to the point that it was considered proper to facilitate religious education to the extent of supplying textbooks, but transmission of public funds for construction of buildings was still

going "too far." The criterion for what is perceived to be right and wrong by the American public is merely the changing experience of the people. In an era of ever-increasing educational costs the American public must once again re-examine what constitutes a fair price to be exacted from those wishing to exercise their religious belief by sending their children to parochial schools. Insofar as the decision is based upon considerations of fairness, I think it not unlikely that the American conscience will conclude that this form of religious exercise ought not be conditioned upon a willingness to endure extreme economic sacrifice. Historically, the American conscience has countenanced the attaching of a price tag to this form of religious exercise. However, I doubt such notions of fairness will tolerate exorbitance.

Succinctly stated, the Court's present position with regard to the parochial school aid issue might be said to be: a little aid is all right, but only a little. Both in terms of achieving justice as well as in promoting wise public policy it is the opinion of this writer that the Court ought to move in the direction of allowing greater aid to pass to parochial schools. Obviously this opinion is wholly subjective, being

based upon a predilection toward educational pluralism andnotions of simple fairness. There are available to the Court numerous constitutional rationales which it may reasonably employ in effecting a change in its present position. (White's definition of primary effect in Allen and the individual-benefit theory are but two that are available.) Though a change in the Court's present position will surely entail additional interpretative problems (e.g., determining what organizations qualify for the status of religious organizations), in my judgment the advantages outweigh the problems.

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ANOTHER LOOK AT THE WALL: A REPORT ON THE CONSTITUTIONALITY OF PROVIDING PAROCHIAL SCHOOLS WITH PUBLIC FINANCIAL AID

by

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B. A., Kansas State University, 1968

AN ABSTRACT OF A MASTER'S REPORT

submitted in partial fulfillment of the

requirements for the degree

MASTER OF ARTS

Department of Political Science

KANSAS STATE UNIVERSITY
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1974

"CONGRESS SHALL MAKE NO LAW RESPECTING AN ESTABLISHMENT OF RELIGION, OR PROHIBITING THE FREE EXERCISE THEREOF."

The focus of this report is upon the religion clauses of the First Amendment to the United States constitution and the import they have for the issue of whether church-related schools may properly receive public funds. Because the religion clauses conjoin a constitutionally unique proscription upon both affirmative (establishment) as well as negative (prohibition) state action, they have historically invited discussion in terms of "separation" and "neutrality." Though there has always been a consensus concerning the Constitutional command of separation between church and state, the precise nature of the prescribed cleavage has long been hotly disputed. Some would have it that the prescribed cleavage suggested a desire by the Framers to protect religion from the state by providing it with a one-way protective barrier behind which it could take refuge but through which it could also receive state favors. Others, considering it the intent of the Framers to protect both church and state from the influence of each other, assert that a proper cleavage should exhibit the attributes of a buffer zone. Finally, still others, citing the anti-clericalism of the Framers, argue that the cleavage was intended to be in the nature of a chasm, absolutely isolating the state from the influence of churchmen.

Each view of the nature of the constitutionally

prescribed cleavage between church and state carries with it a conception of what constitutes governmental neutrality with regard to religion. If the cleavage is in the nature of a protective barrier providing refuge for religion, then neutrality consists merely in even-handedness by the state in granting favors to different religious sects. If the cleavage is viewed as being in the nature of a buffer, then neutrality connotes some ad hoc method of balancing the interests of church and state. Finally, if the cleavage is viewed as having effected a chasm, then neutrality prescribes an absense of interaction between the respective spheres of church and state.

In the Court's first confrontation with the aid to parochial schools issue in Everson v. Board of Education, the Court announced the existence of a "wall" of separation between the spheres of church and state. However, despite its metaphorical absoluteness, the Court's use of the concept of "neutrality" indicated that the Court's wall was not to be construed as a chasm. Utilizing various historical interpretations of the attributes of "separation" and "neutrality" as an analytic format, this report traces the maturation of the Everson wall from its birth in 1947 to its present expression by the Court.

Though its dimensions have varied during the 26 years since Everson, the 1947 and 1973 versions of the wall between church and state have varied little in effect.

Everson's rhetoric suggested a cleavage akin to a chasm but its holding indicated that religion might properly receive some forms of state assistance. Recent Court opinions, though suggesting that the cleavage is more in the nature of a buffer, have nevertheless arrived at much the same conclusions concerning aid. Apart from developing practical guidelines for determining precisely the extent of aid that may traverse the required cleavage the Court has moved little beyond its position in Everson.