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