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Constitutional Law—Separation of Church and State: Application of the Excessive Entanglements Test in Cases of Public Aid to Parochial Schools

CASE COMMENT

CONSTITUTIONAL LAW—SEPARATION OF CHURCH AND STATE: *Application of the Excessive Entanglements Test in Cases of Public Aid to Parochial Schools*

INTRODUCTION

Direct public aid to the secular functions of sectarian schools can withstand constitutional scrutiny as long as the procedures required for administration of the aid program do not foster excessive entanglement between church and state. This conclusion, drawn from the Supreme Court's recent decisions in *Tilton v. Richardson*[1] and *Lemon v. Kurtzman*,[2] suggests that the constitutional concept of a "wall of separation between Church and State"[3] has undergone substantial change since 1947 when the Court declared in *Everson v. Board of Education*[4] that "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions . . . ."[5] Both the consequences of that change and the current standards being applied will be explored in this comment.

A THREE-PRONGED TEST OF "ESTABLISHMENT"

The Court acknowledged in its opinions in *Tilton* and *Lemon* that "the lines of demarcation in . . . [the] extraordinarily sensitive area" of public aid to parochial schools can be "only dimly [perceived]."[6] This statement is particularly relevant to the Court's use of the excessive entanglements test, first enunciated in Chief Justice Burger's majority opinion in *Walz v. Tax Commission*.[7] Nevertheless, the *Tilton* and *Lemon* decisions have clarified the current focus of the issues considered when legislation is tested in terms of the first amendment prohibition that "Congress shall make no law respecting an establishment of religion."[8]

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1. 403 U.S. 672 (1971), *aff'g* Tilton v. Finch, 312 F. Supp. 1191 (D. Conn. 1970).
2. 403 U.S. 602 (1971), *rev'g* 310 F. Supp. 35 (E.D. Pa. 1969) *and aff'g* DiCenso v. Robinson, 316 F. Supp. 112 (D.R.I. 1970).
3. Everson v. Board of Educ., 330 U.S. 1, 16 (1947). The Court was quoting Thomas Jefferson.
4. 330 U.S. 1 (1947).
5. *Id.* at 16.
6. 403 U.S. 602, 612.
7. 397 U.S. 664, 674-75 (1970).
8. U.S. CONST. amend. I.

The Court, after reviewing "the cumulative criteria developed over many years,"[9] integrated prior formulations of the establishment test into a three-pronged checklist:

> First, does the Act reflect a secular legislative purpose? Second, is the primary effect of the Act to advance or inhibit religion? Third, does the administration of the Act foster an excessive government entanglement with religion?[10]

In addition to these questions, the Court considered the separate issue of whether the aid program in question would produce political fragmentation and conflict on religious grounds.[11]

The manner in which these tests were applied in *Tilton* and *Lemon* indicates that the Court is more concerned with the practical effect of an aid statute than with the particular form the aid takes and that the form of the aid is significant not intrinsically, but only in its operative consequences. While neither of the decisions dealt with the issue of indirect public assistance to parochial schools through financial aid to students,[12] as with a voucher plan,[13] it is suggested that the nature of the tests applied in *Tilton* and *Lemon* affords considerable guidance to legislatures contemplating enactment of proposals in this area as well as proposals for other more direct forms of aid to parochial schools.

To provide a substantive foundation for this discussion, the statutes involved in *Tilton* and *Lemon* will be described and the federal district court decisions upon which the appeals were based will be summarized briefly. Then the Supreme Court decisions will be analyzed in greater detail, followed by consideration of potential difficulties which may arise in further adjudication in this area.

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9. 403 U.S. 672, 678.

10. *Id.*; *accord,* 403 U.S. 602, 612-13. The first two prongs, frequently referred to as the "purpose and primary effect" test, were first enunciated by the Court in *School District v. Schempp,* 374 U.S. 203 (1963).

11. 403 U.S. 672, 688-89; *accord,* 403 U.S. 602, 622.

12. Justice Douglas' concurring opinion in *Lemon* contained the following cryptic remark: "Whatever might be the result in case of grants to students, it is clear that once one of the States finances a private school, it is duty bound to make certain that the school stays within secular bounds and does not use the public funds to promote sectarian causes." 403 U.S. 602, 632-33 (footnote omitted). Appended to this statement is the footnote, "Grants to students in the context of the problems of desegregated public schools have without exception been stricken as tools of the forbidden discrimination." *Id.* n.17 (citations omitted). It is unclear from this comment whether Justice Douglas does or does not believe that direct aid to students in the form of vouchers would withstand constitutional scrutiny, although other statements would seem to indicate that Justice Douglas is opposed to aid to religious schools in *any* form. *See, e.g., id.* at 640-42.

13. *See* Note, *Education Vouchers—Challenge to the Wall of Separation?,* 5 VAL. U.L. REV. 569 (1971).

THE ISSUES

Federal Construction Grants for Secular Academic Facilities at Institutions of Higher Education

Title I of the Higher Education Facilities Act of 1963[14] authorizes grants for construction of academic facilities at institutions of higher education. The Act specifically provides that no funds will be granted for buildings used for sectarian instruction or worship or for any facilities "to be used primarily in connection with any part of the program of a school or department of divinity."[15]

In *Tilton v. Finch*,[16] taxpayers brought suit in federal district court against the officials charged with administering the aid program and against four church-related colleges and universities[17] which had received grants under the program for construction of two libraries, a music-drama-arts center, a physical science building and a modern foreign language laboratory.[18] Plaintiffs alleged that the Act did not authorize grants to the named schools, or, in the alternative, that if the grants were authorized, the Act violated the establishment and free exercise clauses of the first amendment.[19] The three-judge district court determined that the particular grants in question were in fact authorized by the Act. The court further found, however, that since the Act had a secular purpose and its regulatory provisions successfully limited the grants to secular as opposed to religious functions, the grants did not constitute aid to religion in violation of either the establishment or free exercise clause.[20]

State Purchase of Secular Educational Services from Non-Public Schools

The Pennsylvania Nonpublic Elementary and Secondary Education Act[21] authorizes reimbursement to non-public schools for the actual cost of teachers' salaries, textbooks and instructional materials for courses in mathematics, modern foreign languages, physical sciences and physical education. The courses must be without religious content and similar to parallel courses in the public schools. Moreover, the books and materials used must have state approval, students taking the courses

14. 20 U.S.C. §§ 701-58 (1964).
15. *Id.* § 751(a)(2).
16. 312 F. Supp. 1191 (D. Conn. 1970), *aff'd*, 403 U.S. 672 (1971).
17. The schools were Sacred Heart University, Annhurst College, Fairfield University and Albertus Magnus College, all located in Connecticut.
18. 312 F. Supp. at 1203-04.
19. *Id.* at 1194.
20. *Id.* at 1200.
21. PA. STAT. ANN. tit. 24, §§ 5601-09 (Supp. 1971).

must perform satisfactorily on standardized state examinations on the subjects funded and, within five years of the statute's enactment, all teachers whose salaries are reimbursed to the school must have achieved state certification.[22] Schools intending to request reimbursement must maintain separate accounts of their expenditures for the sanctioned secular courses, to be subject to state audit.[23]

In *Lemon v. Kurtzman*,[24] suit was instituted in federal district court against the state officials administering the Pennsylvania statute and against several parochial schools seeking reimbursement under the Act. The plaintiffs claimed that the program violated the establishment and free exercise clauses of the first amendment. The defendants moved for dismissal for lack of standing and for failure to state a claim upon which relief could be granted.[25] Though finding that one plaintiff did have standing to contest the constitutionality of the Act,[26] the court, in a two to one decision, granted the motion to dismiss for failure to state a proper claim.[27] The court determined that the state, in pursuance of a public purpose and with appropriate administrative regulations, could give direct aid to the secular function of a parochial school without breaching the establishment prohibition.[28] Chief Circuit Judge Hastie filed a vigorous dissent, arguing essentially that despite the public purpose of the program, any aid to a religious school necessarily resulted in direct support of the school's religious enterprise. This effect could not be avoided or justified by the simultaneous benefit accruing to the state.[29] He also noted with dismay the diminishment of the school's freedom resulting from the administrative intrusion of the state.[30]

State Salary Supplements to Teachers of Secular Subjects in Non-Public Schools

The Rhode Island Salary Supplement Act of 1969[31] undertakes "to assist non-public schools to provide salary scales which will enable them to retain and obtain teaching personnel who meet recognized

22. *Id.* §§ 5603-04. However, the requirement for certification within five years was waived for individuals who were full time teachers in non-public schools at the time the statute was enacted. *Id.* § 5604. The Act also established a ceiling formula to determine the total to which any school could be reimbursed. *Id.* § 5607(b.1).
23. *Id.* § 5607(a).
24. 310 F. Supp. 35 (E.D. Pa. 1969), *rev'd* 403 U.S. 602 (1971).
25. *Id.* at 38.
26. *Id.* at 41-42.
27. *Id.* at 49.
28. *Id.* at 46.
29. *Id.* at 50-51.
30. *Id.* at 52.
31. R.I. GEN. LAWS ANN. §§ 16-51-1 to -9 (Supp. 1970).

standards of quality."[32] Specifically, the Act authorizes supplemental payments made directly to teachers in grades one through eight of up to 15 percent of the teachers' annual salaries in order to bring their salaries up to the public school level. The average per pupil expenditures for secular subjects at schools whose teachers are eligible for supplements must not exceed the public school average.[33] Eligible teachers are required to have a state teaching certificate and must teach only those subjects offered in the public schools, using public school materials.[34] The Act includes administrative procedures to insure that the eligibility requirements are enforced.[35]

Citizens and taxpayers of Rhode Island brought suit in federal district court in *DiCenso v. Robinson*[36] against state officials responsible for administering the Salary Supplement Act, alleging that the Act violated the establishment and free exercise clauses because "its purpose and primary effect [was] the advancement of religion."[37] The three-judge court, relying upon *Walz v. Tax Commission*[38] which had been decided the previous month by the Supreme Court, found that the effect of the Act was to involve the state and the religious schools in "the kind of reciprocal embroilments . . . which the First Amendment was meant to avoid"[39] and that the Act was therefore unconstitutional.[40]

Application of the Excessive Entanglement Test

The district courts' actions dismissing *Lemon* and holding the Rhode Island statute unconstitutional in *DiCenso* were appealed to the Supreme Court and were there consolidated. The *Tilton* decision upholding the constitutionality of federal construction grants was also appealed. The actions were considered by the Court at the same time; the opinions on appeal, *Lemon v. Kurtzman* and *Tilton v. Richardson,* were announced on June 28, 1971.

Six separate opinions were filed in the two cases. The Court plurality opinion in each case was written by Chief Justice Burger.

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32. *Id.* § 16-51-1.
33. *Id.* § 16-51-2.
34. *Id.* § 16-51-3.
35. *Id.* § 16-51-5.
36. 316 F. Supp. 112 (D.R.I. 1970), *aff'd sub nom.* Lemon v. Kurtzman, 403 U.S. 602 (1971).
37. *Id.* at 113.
38. 397 U.S. 664 (1970).
39. 316 F. Supp. at 122.
40. *Id.* District Judge Pettine concurred in the result and in the finding that the program resulted in proscribed "reciprocal embroilments," but dissented in a second finding of the majority that the Act gave "substantial support for a religious enterprise."

Justice Douglas wrote a concurring opinion in *Lemon* in which Justice Black joined, and Justice Marshall joined as to the Rhode Island case. Justice Douglas also filed a dissent in *Tilton* in which he was joined by Justices Black and Marshall. Justice Marshall took no part in consideration of the Pennsylvania case. Justices Brennan and White each wrote separate opinions incorporating all three cases.[41]

Essentially, the various opinions in *Tilton* and *Lemon* can be summarized in four points. First, the Court upheld federal grants for construction of higher education facilities[42] but declared that both state statutes were unconstitutional.[43] Secondly, the Court plurality based its analysis in both cases upon the *Walz* excessive entanglements language relied upon by the *DiCenso* court[44] and foreshadowed by Chief Judge Hastie's dissent in the district court's decision in *Lemon*.[45] Thirdly, neither Justice Brennan nor Justice White could discern a credible distinction between the state and federal statutes which would support the plurality's finding that excessive entanglements would result from the state statutes but not from the federal statute.[46] Finally, a minority of the Court (Justices Douglas, Black, Marshall and Brennan) maintained the strict doctrinal position voiced in Chief Judge Hastie's *Lemon* dissent[47] that public aid to the secular activities of sectarian schools necessarily supports the religious functions of those schools and is therefore unconstitutional.[48]

The Court plurality, speaking through Chief Justice Burger, based its decisions upon the conclusion that the state programs would involve excessive entanglement between church and state, whereas the federal program would not. Chief Justice Burger distinguished the federal program from the state programs in the *Tilton* opinion, examining in each instance the fundamental purpose of the institution funded, the object of the funding and the resulting relationship between the institution and the government.

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41. 403 U.S. 602, 642-61 (Brennan, J., dissenting in *Tilton v. Richardson* and concurring in *Lemon v. Kurtzman*); 403 U.S. 602, 661-71 (White, J., concurring in *Tilton v. Richardson* and concurring in result in Pennsylvania case and dissenting in Rhode Island case in *Lemon v. Kurtzman*).

42. 403 U.S. 672, 689. A section of the federal statute provided that the religious use restrictions would apply only during the first twenty years of the life of a funded building. 20 U.S.C. § 754(b) (1964). The Court ruled that this provision would advance religion, but invalidated only that portion of the statute. 403 U.S. 672, 683-84.

43. 403 U.S. 602, 607.

44. *See* notes 38-39 *supra* and accompanying text.

45. *See* notes 29-30 *supra* and accompanying text.

46. 403 U.S. 642, 660-61; 403 U.S. 661, 668.

47. *See* note 29 *supra* and accompanying text.

48. 403 U.S. 602, 625-42; 403 U.S. 672, 689-97.

The Fundamental Purpose of the Institutions Funded

Chief Justice Burger distinguished the nature of parochial primary and secondary schools from that of sectarian colleges and universities on the ground that "[t]here are generally significant differences between the religious aspects"[49] of the two types of schools. On the one hand, as the district court had found in *DiCenso*, parochial primary and secondary schools were "an integral part of the religious mission of the Catholic Church."[50] The Chief Justice found full support in the *DiCenso* record for the district court's "conclusion that the inculcation of religious values was a substantial if not the dominant purpose of the institutions."[51] On the other hand, the colleges and universities named in the *Tilton* complaint were "institutions with admittedly religious functions but whose predominant higher education mission is to provide their students with a secular education."[52] The basis for this distinction, as well as analysis of the Chief Justice's treatment of this aspect of the problem, will be discussed at length in a later section of this comment.[53] It is mentioned here in the first instance because Chief Justice Burger relied upon the distinction as one basis for his conclusion that excessive entanglement would not result from the federal program. He argued that since the fundamental purpose of the colleges was secular rather than religious, there was "less likelihood than in primary and secondary schools that religion [would] permeate the area of secular education."[54] Correspondingly, there was less risk that government aid to secular functions of a college would in fact support religious training. In turn, this resulted in less need for extensive administrative surveillance and hence less likelihood that the aid program would entail excessive entanglement of church and state.[55]

The Object of the Funding

Chief Justice Burger also argued that the degree of entanglement fostered by the three programs could be distinguished because of the differences in what was funded under the program.

> In *Lemon* and *DiCenso* . . . the state programs subsidized teachers, either directly or indirectly. Since teachers are not

49. 403 U.S. 672, 685.
50. 316 F. Supp. at 117.
51. 403 U.S. 672, 685.
52. *Id.* at 687.
53. *See* notes 80-100 *infra* and accompanying text.
54. 403 U.S. 672, 687.
55. *Id.*

> necessarily religiously neutral, greater governmental surveillance would be required to guarantee that state salary aid would not in fact subsidize religious instruction. There we found the resulting entanglement excessive. . . . [In *Tilton*,] on the other hand, [with federal aid for construction of college buildings] the government provides facilities that are themselves religiously neutral. The risks of government aid to religion and the corresponding need for surveillance are therefore reduced.[56]

Justice Brennan considered this distinction and found it unconvincing. He argued that it was not a "non-ideological" building but teachers and course content which would have to be policed under the federal program, and that the policing was therefore "precisely the same as under the state statutes."[57] Justice Douglas agreed with Justice Brennan, wondering how the Government could determine what was being taught within the walls of the "neutral" building "without a continuous auditing of classroom instruction."[58] One answer to Justice Douglas' question may be the nature of the particular buildings financed: one could argue that there is less likelihood that religious content will creep into college courses held in physical science buildings and modern language laboratories than in general-purpose classroom buildings. A second answer to his question can be found in a footnote to Justice Brennan's opinion. The footnote indicates that the Office of Higher Education stipulated in district court that on-site review of completed projects included analysis of "class schedules and course descriptions contained in the school catalog . . . to ascertain that nothing in the nature of sectarian instruction is scheduled in any area constructed with the use of Federal funds."[59] Although one might question the effectiveness of this method of review, it is nevertheless apparent that as far as entanglement is concerned, perusal of college catalogs is far less objectionable than the in-class surveillance which the Chief Justice seemed to believe was required under the state plans.

Though Chief Justice Burger concluded that surveillance was necessary to administer the state programs, neither the Pennsylvania nor the Rhode Island statute, by its terms, calls for such a measure. The Pennsylvania Act forbids reimbursement of expenses for courses "expressing

56. *Id.* at 687-88.
57. 403 U.S. 602, 661.
58. 403 U.S. 672, 694.
59. 403 U.S. 602, 650-51 n.9.

religious teaching, or the morals or forms of worship of any sect."[60] However, the administrative procedures of the Act indicate that the Pennsylvania legislature was assured that the restriction could be enforced simply by limiting the kinds of courses for which reimbursement was authorized. The Act therefore applies only to those courses in "mathematics, modern foreign languages, physical science and physical education" which used textbooks and materials approved by the state Secretary of Education.[61] The Rhode Island legislature, on the other hand, chose to guarantee that state aid would not go to support religious teaching by requiring, and then relying upon, the signed pledges of teachers receiving salary supplements that they did not teach religious courses or inject religion into their nominally secular courses.[62] On the face of things, it would seem that these state controls are no more entangling in a substantive sense than the controls employed in the federal statute.

Justice White studied the argument made by the Chief Justice distinguishing the state from the federal programs and concluded that the reasoning was "a curious and mystifying blend, but a critical factor appears to be an unwillingness to accept the District Court's express findings [in the Rhode Island case] that on the evidence before it none of the teachers . . . [receiving salary supplements] mixed religious and secular instruction."[63] He commented further: "Nor can I imagine . . . [on what basis the Court finds] college clerics more reliable in keeping promises than their counterparts in elementary and secondary schools . . . ."[64]

In fairness to the Chief Justice and the other members of the plurality, it should be noted that Justice White apparently failed to recognize the crux of their argument. In discussing the Rhode Island statute, Chief Justice Burger made it very clear that he did not question the good faith of the teachers in making their pledges and that he did not necessarily believe it was impossible for a teacher to keep religious teaching from intruding into a secular course. What was controlling in the situation was that the essential proselytizing mission of religious primary and secondary schools had two necessary effects on the operation of the state aid programs. First, it would be very difficult for teachers to

60. PA. STAT. ANN. tit. 24, § 5603 (Supp. 1971).
61. *Id.* § 5604. State approval of textbooks for use in parochial schools had passed the test of constitutionality previously. *See, e.g.,* Board of Educ. v. Allen, 392 U.S. 236 (1968).
62. R.I. GEN. LAWS ANN. § 16-51-3 (Supp. 1970).
63. 403 U.S. 602, 666.
64. *Id.* at 668.

separate religious teaching from secular courses, and second, to preserve the aid program it would be necessary for the state to engage in intimate supervision of the program in operation. The Chief Justice stated:

> The Rhode Island legislature has not, and could not, provide state aid on the basis of a mere assumption that secular teachers under religious discipline can avoid conflicts. The State *must be certain,* given the Religion Clauses, that subsidized teachers do not inculcate religion . . . .[65]

He went on in his discussion of the Pennsylvania statute to indicate that under that program, too, as long as aid was given, the possibility existed that the aid might go to support religious teaching.[66] In essence, then, he argued that a state could not discharge its constitutional obligation simply by adhering to the letter of the administrative controls specifically provided in the statutes. The nature of the goals of the statutes necessarily compelled the state to supervise the execution of the administrative controls themselves. In so doing, however, the state would become excessively entangled with the religious school. Both state aid programs thus were caught between the Scylla of giving aid to a religious enterprise and the Charybdis of excessive entanglement.

The Resulting Relationship Between the Funded Institution and the State

Chief Justice Burger pointed to a third factor which reduced the likelihood of excessive entanglement under the federal program. The federal aid was "a one-time, single-purpose construction grant"[67] with "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,"[68] as the state programs required.

Justice White found that this distinction had little factual basis. He noted that the need for state entanglement in the financial affairs of the schools was considerably less in practical application, at least in the case of Rhode Island, than the Chief Justice feared in potential.[69] The Rhode Island plan required separate accounts of expenditures for secular and

65. *Id.* at 619 (emphasis added).
66. *Id.* at 620-21.
67. 403 U.S. 672, 688.
68. *Id.*
69. 403 U.S. 602, 668-69. *But see* Note, *Sectarian Books, the Supreme Court and the Establishment Clause,* 79 YALE L.J. 111 (1969).

religious instruction only when the parochial school's average per pupil expenditures exceeded those of the public schools.[70] Because the parochial per pupil expenditures reflected the lower salary level of teaching sisters (which was one-third the salary of public school teachers), none of the parochial schools whose lay teachers were receiving salary supplements had been required to maintain separate accounts.[71] As long as this was the case, Justice White's criticism is well taken: furnishing the state with annual per pupil expenditure figures seems no more entangling than providing course descriptions, which the Chief Justice apparently considered innocuous.

Two other arguments were made attacking this distinction. Justice White pointed out the fallacy of concluding that the "one-time" grant involved no continuing relationship: "It is apparent that federal interest in any grant will be a continuing one since the conditions attached to the grant must be enforced."[72] Justice Douglas compared the annual state grants to the one-time federal grant and called it "sophistry" to argue that "small violations of the First Amendment over a period of years are unconstitutional . . . while a huge violation occurring only once is *de minimus*."[73]

Distinguishing the federal plan from the state plans on the basis that the federal plan would not result in a continuing relationship between the school and the government seems to be the weakest of Chief Justice Burger's "excessive entanglement" arguments. However, he admitted that none of the three factors alone was sufficient in itself to uphold the federal plan but concluded that

> cumulatively all of [the factors] shape a narrow and limited relationship with government which involves fewer and less significant contacts than the two state schemes before [the Court] in *Lemon* and *DiCenso*. The relationship therefore has less potential for realizing the substantive evils against which the Religion Clauses were intended to protect.[74]

The Potential for Political Divisiveness

Turning from the issue of excessive entanglement, Chief Justice

70. 403 U.S. 602, 607-08 & n.2, *construing* R.I. GEN. LAWS ANN. § 16-51-2 (Supp. 1970).
71. DiCenso v. Robinson, 316 F. Supp. 112, 115 & n.6 (D.R.I. 1970).
72. 403 U.S. 602, 669.
73. 403 U.S. 672, 693.
74. *Id.* at 688.

Burger distinguished the state programs from the federal program on one other ground: the potential for political divisiveness. The Chief Justice considered this factor at some length in his *Lemon* opinion. He pointed to the "monumental and deepening financial crisis"[75] faced by parochial schools and to the fact that, though the state statutes, by their terms, did not single out for aid the schools of any particular religious affiliation, in practical effect the issue was reduced to aid to "relatively few religious groups."[76] Because of the projected continuing need for aid, "state assistance [would] entail considerable political activity"[77] and would produce "political fragmentation and divisiveness on religious lines."[78] On the other hand, Chief Justice Burger felt that "[t]he potential for divisiveness inherent in the essentially local problems of primary and secondary schools is significantly less with respect to a college or university whose student constituency is not local but diverse and widely dispersed."[79]

None of the other Justices took issue with this argument, and the distinction, though undocumented, seems reasonable. However, the weight of this argument standing alone is probably insufficient to uphold the federal aid program. With regard to the state programs, Chief Justice Burger proffered the issue of political divisiveness simply as a policy consideration providing additional, but not essential, support for holding the two state statutes unconstitutional.

Underlying Bases of the Court's Arguments

Despite Chief Justice Burger's concentration upon the *Walz* "excessive entanglements" language, analysis of all of the opinions filed in *Lemon* and *Tilton* indicates that two more fundamental issues underlie the arguments made by members of the Court. First of all, different factual assumptions about the nature of sectarian higher education produced different conclusions regarding the constitutionality of federal construction grants. Secondly, members of the Court propounded different philosophical positions concerning whether it is possible and constitutional to aid only the secular functions of religious schools.

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75. 403 U.S. 602, 623, *quoting* DiCenso v. Robinson, 316 F. Supp. 112, 116 (D.R.I. 1970). However, some critics of state aid programs dispute the conclusion that this "financial crisis" works to the ultimate detriment of parochial schools. *See* 403 U.S. 672, 695-96 (Douglas, J., dissenting); Swomley, *Are Parochial Schools Imperiled?*, 66 Liberty, Sept.-Oct., 1971, at 10.

76. 403 U.S. 602, 623.

77. *Id.* at 622.

78. *Id.* at 623.

79. 403 U.S. 672, 688-89.

The Nature of Sectarian Higher Education

As previously mentioned,[80] Chief Justice Burger found that the "predominant higher education mission" of the colleges named in the *Tilton* complaint was "to provide their students with a secular education."[81] This distinguished the colleges from parochial primary and secondary schools whose fundamental purpose was to indoctrinate young people in a religious faith "to assure future adherents to a particular faith by having control of their total education at an early age."[82] Chief Justice Burger pointed to three features of the sectarian college experience which lessened the likelihood that formal instruction in a college could or would serve as a vehicle for religious indoctrination. First, he voiced the "common observation"[83] that college students are endowed with a characteristic skepticism which renders them less susceptible to indoctrination of any kind. Secondly, he argued that formal instruction in colleges and universities is confined within the internal constraints of separate scholarly disciplines, and that this tends to reduce the opportunity to inject religious training into secular courses. Finally, he noted the "high degree of academic freedom" characterizing "many church-related colleges and universities."[84] This last observation presumably was intended to suggest that despite the religious affiliation of these schools, their administrators and teachers have little desire to engage in indoctrination of any kind. Examining the *Tilton* record, Chief Justice Burger found no allegation or evidence that the colleges and universities named in the complaint did not follow the general pattern he had described.[85]

The effect of Justice Douglas' treatment of this problem was to discard as extraneous Chief Justice Burger's argument that the fundamental purpose of church-related colleges and universities is secular. According to Justice Douglas, "[p]arochial schools are not beamed at agnostics, atheists, or those of a competing sect. The more sophisticated institutions may admit minorities; but the *dominant religious character* is not changed."[86] Underpinning all of Justice Douglas' arguments was the belief that as long as a college maintains religious sponsorship,

80. *See* notes 49-52 *supra* and accompanying text.
81. 403 U.S. 672, 687.
82. *Id.* at 685-86, *quoting* Walz v. Tax Comm'n, 397 U.S. 644, 671 (1970).
83. 403 U.S. 672, 686.
84. *Id.*
85. *Id.*
86. *Id.* at 692 (emphasis added).

secular instruction is provided within a broader framework which is permeated by religious values giving order and direction to the day-to-day activities of its students.

Justice Brennan and Justice White, reviewing the arguments of Chief Justice Burger and Justice Douglas, agreed with each other that one of those arguments was based upon presumption rather than proof. However, they could not agree upon which of those arguments was faulty. Justice Brennan, who concurred with the plurality's decision that the state statutes were unconstitutional, would have held the federal statute unconstitutional insofar as it purported to authorize aid to sectarian institutions. Justice Brennan, however, apparently was unwilling to assume with Justice Douglas that *every* church-related college has a "dominant religious character," and therefore would have remanded *Tilton* for consideration of whether the four colleges named in the complaint were in fact "sectarian" schools.[87]

Justice White took the opposite approach and would have held all three statutes constitutional.[88] He criticized Chief Justice Burger's plurality opinion in *Lemon* for striking down the Rhode Island statute

> primarily on [the plurality's] own model and its own suppositions and unsupported views of what is likely to happen in Rhode Island parochial school classrooms, although on this record there is no indication that entanglement difficulties will accompany the salary supplement program.[89]

Apparently Justice White did not assign the same importance as the Chief Justice did to the district court's finding that the Rhode Island schools were "an integral part of the religious mission of the Catholic Church."[90] In addition, Justice White disagreed with the Chief Justice's prediction that excessive entanglements would necessarily arise.[91] Whether or not Justice White's evaluation of the district court's factual findings is correct, at least to the extent that theoretically necessary consequences fail to correspond to real consequences, Justice White's criticism may be justified.

Neither would Justice White have substituted "presumption for

87. 403 U.S. 602, 661.
88. 403 U.S. 602, 665, 671.
89. *Id.* at 668.
90. DiCenso v. Robinson, 316 F. Supp. 112, 117 (D.R.I. 1970). The Chief Justice's treatment of this factual finding is at 403 U.S. 602, 616. Justice White's argument is found *id.* at 666-67.
91. 403 U.S. 602, 666-69.

proof"[92] in the Pennsylvania case, which came before the Court on appeal by opponents of the statute from a dismissal for failure to state a claim upon which relief could be granted. Justice White agreed that the complaint should not have been dismissed, but would have remanded the case for trial to determine whether religious content did in fact enter into courses for which state aid was given.[93] He pointed out that in the Pennsylvania case, the relationship between the church and the religious schools had only been alleged in the complaint. While the Court had to accept the allegations as true for the purposes of review,[94] Justice White believed that the plurality had gone beyond the scope of review to find the statute unconstitutional on the basis of allegations rather than findings of fact.[95] This portion of Justice White's argument seems to be well-founded. If the constitutionality of the statute is dependent upon the degree of entanglement which will arise, and the entanglement is predicted from the nature of the school and its relationship to the church, then it seems improper to declare summarily that the statute is unconstitutional when the nature of the school in relation to the church has only been alleged and has not been determined by a full trial of the facts.[96]

A similar criticism can be applied fruitfully to Chief Justice Burger's conclusions about the nature of sectarian higher education. Unlike the two state cases, in *Tilton* the Court was not presented with district court findings or by pleadings establishing the nature of the colleges receiving federal grants.[97] Chief Justice Burger's conclusions were his own, though documented by scholarly studies on parochial education.[98]

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92. *Id.* at 668.

93. *Id.* at 670-71.

94. 403 U.S. 672, 685.

95. 403 U.S. 602, 670-71.

96. This argument seems valid even though Chief Justice Burger did not rely entirely upon the excessive entanglement argument to find the Pennsylvania statute unconstitutional. While the Chief Justice pointed out that the Pennsylvania program had "the further defect of providing state financial aid directly to the church-related school," 403 U.S. 602, 621, his opinion gave no indication that the direct-aid argument was controlling or even that it had particular significance apart from his conclusion that the program would produce excessive entanglements. This view of the importance of the direct-aid argument gains additional credibility from consideration of the fact that the federal program for construction grants, which was upheld, was also a direct-aid program.

97. 403 U.S. 672, 685.

98. Chief Justice Burger footnoted his conclusions with the following studies: J. FICHTER, PAROCHIAL SCHOOLS: A SOCIOLOGICAL STUDY (1958); M. PATTILLO & D. MACKENZIE, CHURCH-SPONSORED HIGHER EDUCATION IN THE UNITED STATES (1966); Freund, *Comment: Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680 (1969); Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development*, 81 HARV. L. REV. 513 (1968).

However, it is not clear from his opinion whether the foundation for those conclusions was tested before the Court. If Chief Justice Burger took unofficial judicial notice of the studies which he cited, or if the Court heard arguments supporting only one side of the question, then the Chief Justice's conclusions about the nature of church-related colleges can be criticized for being based on "presumption rather than proof."

Justice Douglas' position that parochial education at all levels is permeated by religious values is subject to criticism of the same kind. In the first place, the scholarly sources cited by Justice Douglas speak in general terms about the parochial education of *children*, which suggests that the conclusions of those sources were not intended to refer to college education.[99] Furthermore, Justice Douglas, in the face of the distinction drawn by the plurality between parochial pre-college and college education, did not provide documentation for his contention that church-related colleges are as much a part of the religious mission of the church as are primary and secondary schools, and that all church-related schools regardless of level engage in the same kind of religious indoctrination.[100]

In light of these criticisms of both Chief Justice Burger's plurality approach and Justice Douglas' minority position, Justice Brennan's "middle ground" approach might seem most sensible: that the constitutionality of an aid statute, as applied, is dependent upon a determination in any given case that the degree to which religious values permeate all aspects of instruction is insufficient to classify the school as "sectarian." However, this approach only produces another problem. If the propriety of public aid is dependent upon the degree to which the church involved declares religious values ought to be part of a child's total education, then it follows that public aid will be granted or denied on the basis of distinctions in religious beliefs. Rather than serving to insure the constitutionality of public aid, Justice Brennan's approach would discriminate against the very religious in favor of the not-so-religious.[101]

The Philosophical Argument: Severability of Secular and Religious Functions in Church-Related Schools

Both Justice Brennan and Justice Douglas argued essentially that

99. *See* 403 U.S. 602, 635 n.20; 403 U.S. 672, 692 n.2.

100. 403 U.S. 672, 693-95.

101. *See* Drinan, *Does State Aid to Church-Related Colleges Constitute an Establishment of Religion?—Reflections on the Maryland College Cases,* 1967 UTAH L. REV. 491, 503-04; Giannella, *supra* note 98, at 588-89.

any aid given to a parochial school necessarily assists the school in fulfilling its religious functions. According to their view, "a parochial school is a unitary institution with subtle blending of sectarian and secular instruction,"[102] and aid to the institution is per se unconstitutional since it serves to benefit the sectarian as well as the secular.

Chief Justice Burger rejected this "unitary" view, which had been argued by the appellants in *Tilton*,[103] and turned to a less "simplistic"[104] analysis of whether the secular and sectarian functions of a school are severable.[105] In both *Lemon* and *Tilton* the plurality found that, in general, religious teaching is not necessarily inextricably intertwined with secular instruction.[106] The Chief Justice pointed to administrative procedures contained in all of the statutes under consideration which were intended to insure that the aid provided would support only secular functions—procedures which were based upon the legislative assumption that severability was in fact possible.[107]

Justice Brennan believed that the Chief Justice's treatment of the problem was too limited in scope. Speaking of the Chief Justice's *Tilton* opinion, he argued:

> The plurality would examine only the activities that occur within the federally assisted building and ignore the religious nature of the school of which it is a part. The "religious enterprise" aided by the construction grants involves the maintenance of an educational environment—which includes high-quality, purely secular educational courses—within which religious instruction occurs in a variety of ways.[108]

The essential issue involved in this argument is whether analysis in terms of "severability" diverts attention from a more fundamental consideration, the second prong of the plurality's test of establishment: whether the primary effect of the aid is to support a religious enterprise. The opportunity to illuminate this complex area was clearly before the Court in *Lemon* and *Tilton*. The *Lemon* district court majority had based its decision upholding the Pennsylvania statute upon the existence

102. 403 U.S. 672, 694 (Douglas, J., dissenting).
103. *Id.* at 680.
104. *Id.* at 679.
105. *Id.* at 680-81.
106. *Id.* at 681-82; 403 U.S. 602, 613.
107. 403 U.S. 602, 613, 616; 403 U.S. 672, 679.
108. 403 U.S. 602, 660.

of severability,[109] while the district court dissent argued in "unitary" terms.[110] The *DiCenso* district court described at some length the difficulty of applying the "primary effect" test. That court very realistically noted that the Rhode Island statute had

> two significant effects: on the one hand, it aids the quality of secular education; on the other, it provides support to a religious enterprise. Judicial efforts to decide which of these effects is "*the* primary effect" . . . are likely to be no more satisfactory than efforts to rank the legs of a table in order of importance.[111]

The *DiCenso* court thereupon dispensed with efforts to find which effect was the more important by interpreting the "primary effect" test to require only "*substantial support* for a religious enterprise" which would entail "the kind of reciprocal embroilments of government and religion which the First Amendment was meant to avoid."[112]

Rather than seizing the opportunity to clarify the significance of the "primary effect" test, Chief Justice Burger affirmed the viability of the test but effectively side-stepped the problem. In the *Tilton* opinion, he gave consideration to the issue, but solved the problem conveniently by finding that since the fundamental purpose of the colleges was not religious but secular, the principal effect of the construction grants must be secular as well.[113] In *Lemon,* Chief Justice Burger avoided the issue entirely, declaring that it was not necessary to consider the question of primary effect since there was sufficient reason to declare the state statutes unconstitutional on the basis of excessive entanglements alone.[114]

It is suggested that this treatment of the "primary effect" portion of the test is very unsatisfying. The argument is very plausible that whether or not secular functions of parochial schools can be separated from religious training, aid to a parochial school's secular functions ultimately serves to assist whatever religious goals the school promotes—whether by making private funds formerly spent on secular activities available for religious functions or by enhancing the church school's capacity to retain or add to its student body. This surely is provision of "substantial support" to a church-related institution, and in view of the

109. 310 F. Supp. at 46.
110. *Id.* at 50-51.
111. 316 F. Supp. at 119.
112. *Id.* at 122 (emphasis added).
113. 403 U.S. 672, 679-82.
114. 403 U.S. 602, 613-14.

Court's historical concern with the issue of state aid to religion, it seems inappropriate for the Court plurality to fail to deal squarely with the issue in these cases.

While this sin of omission may cause the proponents of separation of church and state to dismay, the plurality's treatment of another aspect of the problem may provide a ray of hope. Two types of aid programs were involved in *Tilton* and *Lemon*: direct assistance to the church-related school through construction grants and reimbursement for secular educational services and indirect assistance through salary supplements to parochial school teachers. The Chief Justice considered the direct-indirect distinction significant not in itself, but for the resulting entanglement involved in administration of a program.[115] It is suggested that voucher plans, tax credits and other proposals for indirect aid to parochial schools will be subject to careful constitutional scrutiny regarding their operational consequences. It is further suggested that as long as parochial primary and secondary schools have religious goals, any assistance program which provides public funds to such schools, whether directly or through an intermediary, will necessarily require stringent administrative procedures to insure that public funds support only secular instruction. Judging from the Court's treatment of the Rhode Island and Pennsylvania statutes, it will be difficult to invent procedures which will not be deemed to cause excessive entanglement between church and state.

CONCLUSION

By drawing together elements from previous tests of establishment into a cohesive checklist, the *Lemon* and *Tilton* plurality opinions have clarified the present law regarding aid to parochial schools. However, it is apparent from analysis of the Court's internal arguments in the two cases that the excessive entanglements test is quite subjective. Furthermore, the full impact of the combined test has yet to be shown since the question of primary effect was not fully considered. In addition, the fact that several members of the Court continued to support the strict doctrine that aid to parochial schools in any form supports the religious goals of the schools indicates that constitutional debate over this philosophical issue will continue.

A final question of perhaps the most profound potential significance remains unanswered. This problem was summarized by the *DiCenso* district court:

115. *Id.* at 616-17, 621.

> Private conduct which is heavily subsidized by the state may be viewed as state action and subjected to the same standards of impartiality which we demand of the government. Applying these standards to parochial schools might well restrict their ability to discriminate in admissions policies, and in the hiring and firing of teachers. At some point the school becomes "public" for more purposes than the Church could wish. At that point, the Church may justifiably feel that its victory on the Establishment Clause has meant abandonment of the Free Exercise Clause.[116]

116. 316 F. Supp. at 121-22 (footnotes omitted).