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NOTES
EDUCATION VOUCHERS—CHALLENGE TO THE WALL OF SEPARATION?

INTRODUCTION

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ...."1

Under the proposed voucher system, a publicly accountable agency would issue a voucher for a year's schooling for each eligible child. This voucher could be turned over to any school which had agreed to abide by the rules of the voucher system. Each school would turn in its vouchers for cash.2

It must be remembered that the very existence of the religious school—whether Catholic or Mormon, Presbyterian or Episcopalian—is to provide an education oriented to the dogma of the particular faith.3

And because it seems so innocuous and well-intended (who would deny a handout to the little children?), the movement to do just a little shattering of the wall which separates private belief from public power is doubly dangerous.4

The above quoted passages serve to illustrate that events widely separated in time do often come together to create the conflicts which rock the very foundation of our society. In 1791 the first amendment to the Constitution of the United States was ratified.5 In 1955 an economist proposed that the state give money to parents to be used in securing education for their children in whatever schools the parents might choose.6 In 1970 a federal government executive office7 proposed to implement such a plan.8

The events have transpired at differing points upon the continuum of time, but the conflict they generate when considered together is now

1. U.S. CONST. amend. I.
2. CENTER FOR THE STUDY OF PUBLIC POLICY, EDUCATION VOUCHERS 2 (1970) [hereinafter cited as JENKS REPORT and referred to as Jenks Report or the Report].
5. U.S. CONST. amend. I.
7. The Office of Economic Opportunity.
8. Basic information concerning the proposed voucher experiment is contained in the Jenks Report.
being felt. School boards are looking for new or alternative methods of financing schools. Concurrently, voters are refusing to approve many new school tax proposals. Parents are voicing their beliefs that schools are "unresponsive;" others, those who send their children to private or parochial schools, say that they are being taxed doubly, once for the public schools and once in the tuition they must pay. Other voices cry out that those who choose to send their children to schools other than the public schools must pay the price of exercising their free choice.

The purpose of this note is to discuss the background events that have led to the proposal of education vouchers, to enumerate the features of a typical plan, to present the main non-legal arguments for and against the plan, and, finally and primarily, to deliberate upon the plan against the fabric of the first amendment, as applied to the several states through the fourteenth amendment.

THE VOUCHER PLAN—WHY?

The voucher plan in its basic form is quite simple. Essentially, a voucher or check would be issued to a family for each school age child. The amount of the voucher would represent the average per year cost of educating a child in the public schools. The family could select any approved school of its choice, public or private, and enroll the child therein. The voucher would be given to the school as payment of tuition charges; the various schools could then exchange their collected vouchers for cash.

While this plan seems simple enough, the actual operation of a voucher system is much more complex. Certain aspects of this complexity will be discussed in a later section of this note.

Two Reasons for Vouchers

Two basic reasons have been advanced in support of the voucher plan. Others exist, no doubt, but to include every possible or even logical reason would prolong this discussion without point. These two fundamental arguments contain the elements of most others.

10. Id.
13. Fox & Levenson, supra note 9, at 133.
16. See notes 62-72 infra and accompanying text.
The first argument was advanced by Milton Friedmann in 1955.\(^{17}\) It is based upon economic concepts espoused by Friedmann. The primary point of this argument is that the public has an interest in providing a certain minimum education for all children. To do so permits the children to become more effective citizens and thus provides a desired benefit to the society in general. Friedmann, however, found no such benefit on which to justify public operation of the schools and concluded that the competition engendered by a school's need to get and keep students would produce a much improved educational product.\(^{18}\)

The second argument to be mentioned is that large numbers of children, principally those from ghetto and other low income areas, are seriously disadvantaged by their inability to obtain an education geared to their needs. The disadvantage is self-sustaining and virtually perpetual; children who receive a poor education grow into adults who suffer chronic unemployment and attendant economic difficulties. Their children, in turn, become the disadvantaged of the next generation because the public schools of the ghetto have been and are inadequate. A voucher plan would enable these children to escape the ghetto and obtain adequate schooling on a competitive basis with children from more affluent families.\(^{19}\)

Thus, it may be seen that the arguments are related; both contain the common element of free choice in the selection of schools. Yet they are distinguishable and have been advanced by different persons or agencies.\(^{20}\)

**The Education Voucher Experiment**

While a number of programs to aid education have been proposed or enacted,\(^{21}\) the voucher plan under consideration here has not yet reached fruition.\(^{22}\) However, an agency of the federal Government is now planning a voucher experiment and hopes to implement a pilot program in the near future.\(^{23}\) It is likely that the demonstration would be

17. Friedmann 126.
18. *Id.* at 127.
20. The arguments made by Professor Friedmann seem primarily economic in concept; the arguments advanced by the Jenks Report stem from the desire to improve the educational lot of disadvantaged children.
21. Such programs include those which would provide direct grants to private schools as well as so-called purchase of services plans. The latter involves government payment of the salaries of teachers of secular subjects in parochial schools or government reimbursement to parochial schools for the costs of providing secular education.
22. Initial research on the voucher plan was begun in December, 1969, by the Center for the Study of Public Policy, Cambridge, Massachusetts.
23. The voucher experiment was apparently intended to begin in September, 1971.
funded by, and subject to the regulation of, the Office of Economic Opportunity. A local school district desiring to participate in a voucher experiment would, presumably, be left free to adapt the plan to its own peculiar situation so long as the OEO's general requirements are met.

The Plan

The Education Voucher Experiment proposed by the OEO is the work of Christopher Jenks, Co-Director of the Center for the Study of Public Policy and Associate Professor of Education, Harvard University, and his staff. Various proposals are discussed at length in a report prepared for the OEO by the Center. The Report considers seven alternative plans, each of which may be varied from the basic outline. In each, the per pupil expenditure is at least equal to the pre-experiment public school expenditures in the district. Since schools may wish to obtain additional funds, various plans present differing means of so doing. The plans, in outline, are as follows:

1. **Unregulated Market Model**: The value of the voucher is the same for each child. Schools are permitted to charge whatever additional tuition the traffic will bear.

2. **Unregulated Compensatory Model**: The value of the voucher is higher for poor children. Schools are permitted to charge whatever additional tuition they wish.

3. **Compulsory Private Scholarship Model**: Schools may charge as much tuition as they like, provided they give scholarships to those children unable to pay full tuition. Eligibility and size of scholarships are determined by the [Education Voucher Agency], which establishes a formula showing how much families with certain incomes can be charged.

4. **The Effort Voucher**: This model establishes several different possible levels of per pupil expenditure and allows a school to choose its own level. Parents who choose high-expenditure schools are then charged more tuition (or tax) than

Although definite information is difficult to obtain, there seems to be some question of whether a program can be instituted by that date.

24. Hereinafter referred to as OEO.
25. JENKS REPORT, Preface, at v.
26. JENKS REPORT.
27. Id. at 19.
28. Id.
29. Id.
parents who choose low-expenditure schools. Tuition (or tax) is also related to income, in theory the "effort" demanded of a low-income family attending a high-expenditure school is the same as the "effort" demanded of a high-income family in the same school.

5. "Egalitarian" Model: The value of the voucher is the same for each child. No school is permitted to charge any additional tuition.

6. Achievement Model: The value of the voucher is based on the progress made by the child during the year.

7. Regulated Compensatory Model: Schools may not charge tuition beyond the value of the voucher. They may "earn" extra funds by accepting children from poor families or educationally disadvantaged children. (A variant of this model permits privately managed voucher schools to charge affluent families according to their ability to pay.)

The plan recommended by the study is the so-called "Regulated Compensatory Model." In this plan, every child would receive a voucher "roughly equal to the cost of the public schools of his area." No participating school would be permitted to charge tuition in excess of the voucher amount. Parochial schools would receive only a stated percentage of the basic voucher to insure that funds not be expended for sectarian purposes.

Supplemental vouchers, in varying amounts up to the basic voucher level, would be given to "disadvantaged" children. This would provide economic incentive for schools to enroll such students, thus fulfilling at least one of the fundamental objectives of the experiment. Schools might also seek additional funds from other sources.

Divers other aspects of the "Regulated Compensatory Model" are here omitted. These consist of various means of regulating exact voucher amounts and admissions problems and are not relevant to the purpose of this note.

30. Id. at 20.
31. Id. at 109.
32. Id. at 50.
33. Id. at 109.
34. Id. at 50.
35. Id. at 8.
36. Id. at 50.
37. See id. at 50-56.
Professor Friedmann's Stand

Professor Friedmann's proposal38 is perhaps best characterized as *laissez-faire*; it is apparently based upon the concepts of Friedmann's economic philosophies and provides for public financing, but not operation, of schools.39

Friedmann's basic idea proceeds from the division of education into two functions: 1) subsidizing educational costs and 2) operating instructional institutions.40 These two functions, he says, are separable; government can and should finance education but should leave parents free to select the school they wish their child to attend.41

The plan is relatively free from restraints and regulations.

The role of government would be limited to assuring that the schools met certain minimum standards such as the inclusion of a minimum common content in their programs, much as it now inspects restaurants to assure that they maintain minimum sanitary standards.42

Friedmann further states that the public monopoly in education is inefficient, costly and not responsive to the needs of its "customers."43 Competition would widen the range of choice for parents, create a more efficient school system and reduce social stratification.44 Although the best solution might be a mixture of types of schools, some private and some public,45 it is conceivable that public school facilities might eventually be sold to private operators.46

The Arguments Against Friedmann's Plan

The mere fact that the two functions mentioned above, financing and operation, are separable is scarcely a valid reason to sever them. Some government intrusion into education, inspection for example, is a salient feature of the plan.47 It is at least arguable that government can

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38. Friedmann 126.
39. *Id.*
40. *Id.* at 127.
41. *Id.*
42. *Id.*
44. Friedmann 129-30.
45. *Id.*
46. *Id.* at 132.
47. *Id.* at 127.
more efficiently regulate that which it also operates.

Whether or not this assertion is true, the problems of regulating myriad schools not under direct governmental control would be immense. The present school system has a "chain of command" running from teacher to department head to principal to superintendent to school board. The individual teacher is usually required to teach a more or less standard content and is subject to direct supervision by his superiors. These supervisors are, in turn, responsible to higher authority, usually on the state level, which has established the curriculum to provide for a "common core of values deemed requisite for social stability" in society.48

In contrast, many of the schools which Friedmann feels "will spring up to meet the demand"49 will be operated and administered by individuals who seek to make a profit. They must package and market a saleable commodity and make this package attractive to potential consumers.50 Inspection at best would be cursory and difficult; at worst it would be totally ineffective. Some opponents of the plan argue that "appropriate safeguards for quality could [not] be implemented without greatly increased governmental control and influence throughout both the public and private education institutions."51

Friedmann himself admits that the voucher system would initially be more expensive to operate than the present system.52 While it is difficult to speculate about the future, it seems reasonable to assume that educational costs would follow the general trend of other prices in our economy. This trend is, of course, upward.

Other proponents of the voucher plan point to a goal which is at odds with Friedmann's purpose of reducing costs, i.e., that expenditures for education would actually increase under a voucher system.53 This would follow since 1) education is presently under-invested and 2) most families would supplement the voucher allowance with additional funds.54

One writer has even suggested that public schools would have more dollars per pupil available if a shift of pupils to private schools occurred.55

48. C. Benson, supra note 12, at 322.
49. Friedmann 129.
50. It is not beyond the realm of possibility that privately operated schools participating in a voucher plan would seek to gain students by use of advertising. Conceivably, parents might select schools in much the same way they now select and purchase breakfast cereals, cosmetics, appliances and used cars.
51. Fox & Levenson, supra note 9, at 134.
52. Interview, supra note 43.
53. Fox & Levenson, supra note 9, at 132.
54. Id. at 132-33.
This author writes that "the effect of an increased enrollment in non-public schools has been to increase the funds available per pupil ... in the public schools."56 This position presupposes conditions which would not exist in a voucher plan. When students have transferred from public schools in the past, public funds have not followed them. Under a voucher plan, money once available to a public school would be paid to the transeree school.

Furthermore some [persons] felt that the drain on the public purse would lead legislators to reduce the basic voucher support level as taxation became more difficult. Thus the support level of the publicly operated systems would also be reduced while those who could afford to do so would be obligated to put out increasing amounts to supplement the tuition grants for their children in private institutions. There is, then, the strong possibility that these two factors might operate together so as to diminish rather than increase the public support of education and likewise the total investment by society in elementary and secondary education.57

No doubt alternatives to public schools would arise if a voucher plan were begun. Parents would have a wider choice of alternatives. However, this apparent benefit must be tempered by the realization that establishing a school would require considerable capital outlay for facilities and equipment. In addition, there seems to be no clear consensus that free choice would be a necessary outgrowth of the voucher plan.68 Even Friedmann admits that "the establishment of private schools does not of itself guarantee the desirable freedom of choice on the part of parents."59

Because the plan contains no provision for additional aid to children from low income groups, greater social stratification may well result. Those who are able may supplement the voucher and seek higher priced schools. Others, unable or unwilling to pay more, may be relegated to the public schools or those charging lower fees. This would, in Fuller's view,60 inject a note of divisiveness into society. "The minority public school with its underprivileged clientele could no longer be an effective force for unity."61

56. Id.
57. Fox & Levenson, supra note 9, at 133.
58. Id.
59. Friedmann 131.
61. Id.
In sum, each benefit advanced by proponents can be countered by an opposing argument. Little light is shed on the subject by dialectics.

**The OEO Viewpoint**

The position of the OEO, as enounced by the Jenks Report, is twofold. First, schools and school boards work "clumsily and ineffectively." They are unresponsive and relatively immune to attack or change. "As a result, effective control over the character of the public schools is largely vested in legislators, school boards, and educators, not parents."

Secondly, disadvantaged children must be aided to secure higher quality education in order to "close the gap" between the advantaged and disadvantaged. Social problems result from various inequalities; closing the education gap will aid in the solution of social ills by fostering more equitable distribution of wealth and power than now obtains.

**The Opposition**

Opposition to the voucher plan is widespread and vocal. However, only limited amounts had appeared in print at the time this note was prepared. Consequently, the present section does not adequately represent either the extent or depth of opposition to the plan.

Whether a voucher plan would actually give parents wider choice in the selection and operation of schools seems questionable. Opponents argue that such freedom would be limited as a practical matter because of the paucity of alternative schools. Others argue that freedom of choice is of little value since most parents are not qualified to make such a choice.

The second point of the OEO's position, that disadvantaged children should be helped to obtain better quality education, seems the paramount rationale for a voucher system. The plan selected by the Report contains provisions for insuring that disadvantaged children become financially attractive to schools and that various types of segregation do not come into operation. While raising the general level of education in

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63. Id. at 1.
64. Id.
65. Id.
66. Id. at 8.
67. Id. at 8-9.
68. Fox & Levenson, supra note 9, at 133.
69. Id.
71. Id. at 11.
the society seems a laudable aspiration, voices will certainly arise in opposition to an attempt to "homogenize" society.

In any event, the OEO program seems better equipped to fulfill its purposes than the Friedmann proposal; it should be remembered, however, that the original Friedman proposal was merely an outline, a skeleton. Professor Friedmann apparently now backs the OEO plan. 72

THE FIRST AMENDMENT—WALL OR PORTAL?

Numerous attempts have been made to fuse various functions of government and religion in the United States. Many cases have come before the Supreme Court; in some the fusion was permitted while in others it was rejected. The proposal of a voucher system to finance education poses just such a dilemma.

If a voucher plan is instituted, parochial schools will undoubtedly participate, and, even though the plan may contain provisions to keep the functions of education and religion separate, the question of state aid to religion will be in issue. It is not the purpose of this note to make a brief either for or against religious education nor to take to task any particular church group. The fact remains, however, that "the issue of state aid to religious education in the United States is almost entirely the issue of state aid to Catholic parochial schools." 73 It was estimated in 1963 that nearly six million children were enrolled in Catholic elementary and secondary schools in the United States. 74 A 1960 estimate placed only about 310,000 children in sectarian schools of other denominations. 75 The first amendment implications are obvious. Therefore, it will be beneficial to consider some of the cases that have been before the Supreme Court, what tests the Court devised to deal with the cases, how the voucher proposal purports to treat these issues and what the ultimate disposition before the Court of a case involving the voucher plan may be.

Parochial Schools and the Constitution

The right of a parent to send his child to a parochial school was established by Pierce v. Society of Sisters. 76 This important case arose as a challenge to the validity of an Oregon statute which required virtually all children in the state to attend only public schools. 77

72. Interview, supra note 43.
73. L. PFEFFER, CHURCH, STATE AND FREEDOM 509 (rev. ed. 1967) (footnote omitted).
74. Id. at 510.
75. Id. at 509.
76. 268 U.S. 510 (1925).
77. L. PFEFFER, supra note 73, at 515.
The challenge was made by a religious group, the Society of Sisters, which operated and maintained a number of sectarian schools in Oregon. The prime contention of the Society was not religious in character; they complained of being deprived of the right to operate a profitable business and of the possibility of losing the large financial investment in buildings and equipment.  

While the decision thus rested on the ground of protection of business, it did vindicate the right of a parent to select parochial education as an alternative to the public schools. In other words, while the state may require that children of certain ages attend schools, parents have a constitutional right to satisfy the requirement by sending their children to sectarian schools.  

In *Meyer v. Nebraska*, the Court struck down state laws which required the only language of instruction to be English and which prohibited teaching any foreign language to a child who had completed less than eight grades of school. The defendants, teachers in Lutheran schools, were convicted of violating these laws by teaching Bible stories in German. 

The two cases serve to illustrate "that not only is the state constitutionally inhibited from totally outlawing parochial schools, but also from arbitrarily and unreasonably restricting their curriculum." Thus, a religious group may establish its own school, parents may send their children to such a school and the school may, within certain limitations, teach what it will in the manner it chooses.

Transportation, Health and Safety Measures

In *Everson v. Board of Education*, a local board of education, pursuant to New Jersey statutory authorization, resolved to reimburse parents within the district for the cost of bus transportation for their children to and from schools. Some of the money was paid to parents of students attending Catholic schools and Everson brought suit to challenge the practice. The Court, in a 5-4 decision, upheld the practice; transportation was compared to police and fire services and to health and safety measures which are available to all citizens irrespective of religion. Justice Black, writing the majority opinion, stated that "[i]t
is much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no purpose." He thus dismissed Everson's contention that taxation for such purposes was in violation of the due process clause of the fourteenth amendment.

In a frequently quoted statement, Justice Black attempted to set somewhat definitive limits upon the effect of the establishment clause of the first amendment.

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church; Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force 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 person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups or 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."

While Justice Black indicated that this decision took the concept of separation to the "verge," Justice Jackson, in his dissent, seemed to fear that the decision would be extended in later cases to support further types of aid to religious institutions. He noted that the function of the parochial school was to foster and proselytize the school's faith and that such practice was to "occupy the first place." He touched the question of the free exercise clause when he said that regulation often accompanies aid.

Justice Rutledge also feared later extension of the decision; he thought that Cochran v. Louisiana Board of Education had opened a

85. Id. at 7.
86. Id. at 15-16.
87. Id. at 16.
88. Id. at 18.
89. Id. at 22-23.
90. Id. at 27.
91. 281 U.S. 370 (1930).
“breach” in the wall of separation. In Justice Rutledge’s view, the object of the first amendment was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion.

Separation within the purview of the first amendment denoted that “money taken by taxation from one is not to be used or given to support another’s religious training or belief, or indeed one’s own.”

It seems clear that the split in the Court was not over whether religion and government should be separate. The rift was based upon the manner in which the facts of the case were to be applied to the concept of separation. The majority felt that the payment of transporation costs was not an aid to religion; such a program merely “help[s] parents get their children . . . safely and expeditiously to and from accredited schools.” The dissenters, on the other hand, felt that the program was an aid to religion. “By no declaration that a gift of public money to religious uses will promote the general or individual welfare, or the cause of education generally, can legislative bodies overcome the Amendment’s bar.”

In any event, busing was upheld. Everson provided a springboard for the very extension that the dissenters and even some of the majority seemed to fear.

The School Prayer and Bible Reading Cases

In 1951 the New York State Board of Regents recommended that local schools adopt a nonsectarian prayer for daily recitation. Although few local boards adopted the prayer, the practice of one school using the prayer was challenged in the courts. The case, Engel v. Vitale, eventually reached the Supreme Court which declared the practice

92. 330 U.S. 1, 29.
93. Id. at 31-32.
94. Id. at 44 (footnote omitted).
95. Id. at 18.
96. Id. at 52.
97. Justice Douglas, who voted with the majority in Everson, later indicated that he felt the decision to be an anomaly. He called Everson “out of line with the First Amendment.” Engel v. Vitale, 370 U.S. 421, 443 (1962) (concurring opinion). Perhaps the case would have been decided differently had it come before the Court at a later date.
98. L. Pfeffer, supra note 73, at 461.
99. Id. at 463.
100. Id.
unconstitutional by a vote of 6-1.\textsuperscript{102}

Justice Black, writing for the majority, indicated that New York was using the public schools to pursue a religious activity\textsuperscript{103} contrary to the strictures of the establishment clause.\textsuperscript{104} The Court made short work of the contention that to strike down the prayer would be to establish a religion of secularism,\textsuperscript{105} thus decreeing that such a religious function could not be permitted in the public schools even though the prayer was non-denominational and participation was not compulsory.\textsuperscript{106}

School District of Abington Township v. Schempp\textsuperscript{107} involved a Pennsylvania statute requiring the reading of a number of verses from the Bible without comment at the opening of public schools each day. Any child who presented a written request of his parent or guardian could be excused. The Court ruled that such practice violated the establishment clause.\textsuperscript{108}

\begin{itemize}
\item \textsuperscript{102} Id. (Justice Frankfurter was ill and did not participate; there was also one vacancy on the Court.)
\item \textsuperscript{103} ... [B]y using its public school system to encourage recitation of the Regents' prayer, the State of New York has adopted a practice wholly inconsistent with the Establishment Clause. There can, of course, be no doubt that New York's program of daily classroom invocation of God's blessings as prescribed in the Regents' prayer is a religious activity.
\item \textit{Id.} at 424.
\item \textsuperscript{104} Such an activity was considered unconstitutional by the Court since the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as part of a religious program carried on by government.
\item \textit{Id.} at 425.
\item \textsuperscript{105} Justice Black wrote that [i]t has been argued that to apply the Constitution in such a way as to prohibit state laws respecting an establishment of religious services in public schools is to indicate a hostility toward religion or toward prayer. Nothing, of course, could be more wrong.
\item \textit{Id.} at 433-34.
\item \textsuperscript{106} Justice Stewart was the sole dissenter; he indicated his belief that no "official religion" could be established by the mere use of a prayer to open the school day. He further stated his feeling that it might be a denial of free exercise of religion to refuse permission to those who wished to recite the prayer. \textit{Id.} at 445.
\item \textsuperscript{107} 374 U.S. 203 (1963).
\item \textsuperscript{108} The case is important not only for the ruling but also for the test which was announced.
\end{itemize}

The test may be stated as follows: what are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.

\textit{Id.} at 222 (citation omitted).

The test with some further modification, which will be discussed in a later section, is still in use today. \textit{See} notes 217-25 \textit{infra} and accompanying text.
Released Time

The question of "released time" from the public schools in order that children might participate in religious training activities first came before the Court in *McCollum v. Board of Education*. The essential facts of *McCollum* are that the students of the public schools in Champaign, Illinois, were permitted, upon written request of their parents, to be released from their regular classes in order to participate in a period of religious instruction on a weekly basis. The religious education classes were held in the various school buildings and were conducted by instructors employed by an inter-denominational group. Children not participating in the instructional program left rooms being used for religious classes but were required to remain in the building. *Zorach v. Clauson* presented released time in a slightly different context. The New York City Board of Education, pursuant to a state statute, established a released time procedure which permitted students, upon request of parent or guardian, to leave the public school in order to attend a program of religious instruction.

In holding that the released time plan in *McCollum* was unconstitutional, the Court, again speaking through Justice Black, indicated that such a practice was an aid to religion in spreading its doctrines for at least two reasons: the program utilized public school facilities and made use of the state's compulsory school attendance system.

Justice Douglas' opinion in *Zorach* distinguished the two cases on the point that in *McCollum* public school facilities were used for the religious programs, while in *Zorach* the instruction was conducted off school property. The opinion concluded that such a released time

111. N.Y. EDUC. LAW § 3210 (McKinney 1947).
112. 343 U.S. at 308.
113. Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes. This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faiths. And it falls squarely under the ban of the First Amendment (made applicable to the States by the Fourteenth) as we interpreted it in *Everson v. Board of Education* . . . .

... Here not only are the State's tax-supported public school buildings used for the dissemination of religious doctrines. The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the State's compulsory public school machinery. This is not separation of Church and State.

333 U.S. at 209-10, 212 (citation omitted).
114. 343 U.S. at 308-09.
program, without coercion to attend and with no use of public school facilities, was constitutional.

Justice Black vigorously dissented.\textsuperscript{115} He found that the facts of \textit{Zorach} did not warrant a different result and emphasized that his majority opinion in \textit{McCollum} had stressed that the decision was not based solely upon use of school property for religious instruction but was applicable to any released time case.\textsuperscript{116}

Justice Frankfurter, who perhaps left the door open for the majority to distinguish \textit{Zorach} and \textit{McCollum}, also dissented.\textsuperscript{117} He saw a difference between closing the doors of the schools and releasing all students and permitting some students to leave during school hours for religious purposes. Justice Frankfurter found coercion to attend the religious observances even though the majority found none in the record, and indeed, the lower court had excluded such evidence.\textsuperscript{118} Justice Jackson also found coercion because the state compelled attendance at the public schools and then released some of the required time to the student on the condition that the time so released be used for the purpose of attending religious classes.\textsuperscript{119}

The importance of \textit{McCollum} and \textit{Zorach} to this discussion of the voucher system is that while a released time program conducted in the public school buildings offends the Constitution, one where the

\textsuperscript{115} \textit{Id.} at 315.

\textsuperscript{116} \textit{Id.} at 316. In contrast to his opinion in \textit{Everson}, Justice Black here seems to advocate total separation of church and state. "In considering whether a state has entered this forbidden field the question is not whether it has entered too far but whether it has entered at all." \textit{Id.} at 318. His disapproval of the method used in \textit{Zorach} to create the church-state connection is characterized by his assertion that "[g]overnment should not be allowed, under cover of the soft euphemism of 'co-operation,' to steal into the sacred area of religious choice." \textit{Id.} at 320.

\textsuperscript{117} In \textit{McCollum}, Justice Frankfurter, apparently wishing to emphasize that no other type program was being considered, stated: "We do not consider, as indeed we could not, school programs not before us which, though colloquially characterized as 'released time,' present situations differing in aspects that may well be constitutionally crucial." 333 U.S. at 231. The statement seems almost to anticipate the fact situation which occurred in \textit{Zorach}.

\textsuperscript{118} 343 U.S. at 321-22.

\textsuperscript{119} \textit{Id.} at 323-24. Justice Jackson also stated his belief that, "[w]e start down a rough road when we begin to mix compulsory public education with compulsory godliness." \textit{Id.} at 325. Noted attorney and author Leo Pfeffer has suggested that \textit{Zorach} is based upon the fiction that the released-time program involves no more than that the public school "closes its doors or suspends operations as to those who want to repair to their religious sanctuary for worship or instruction." In reality, released time does not mean releasing time for religious instruction; it means releasing children for religious instruction and not releasing those who do not want to partake in religious instruction.

L. Pfeffer, \textit{supra} note 73, at 435.

https://scholar.valpo.edu/vulr/vol5/iss3/5
instruction is carried on away from the public schools does not. This distinction will assume some importance in a later section of this note.120

The Book Cases

Although it is no longer of prime importance, Cochran v. Louisiana State Board of Education121 deserves some mention. The case involved a Louisiana statute which provided state funds to purchase school books for all children, whether enrolled in public or private schools. The statute was held valid in the face of challenge on the ground of its being an unconstitutional deprivation of property for private purposes. Thus, the first amendment was not directly considered and the case was decided on the more nebulous grounds of the fourteenth amendment. Yet, one aspect of the Schempp test appeared. The Court indicated that the statute was not an aid to religion. "The school children and the state alone are the beneficiaries."122 This statement seems to anticipate the "primary effect" portion of the test announced in Schempp.

As regards the question of state aid to parochial schools, Board of Education v. Allen123 was of prime importance. Thus, Paul Freund has stated that "[s]ince June 10, 1968, a discussion of state aid to parochial schools can profitably start with the Supreme Court decision of that date in . . . Allen."124 The conflict involved in Allen grew out of a 1965 New York statute125 which required local school boards to purchase text books and to loan them free of charge to all children attending the first through twelfth grades in any school in the district. This, of course, included those children attending parochial schools.

The Board of Education of Central School District Number 1 in Rensselaer and Columbia counties brought suit to enjoin the Commissioner of Education from removing them for non-compliance with the law and seeking an order to restrain distribution of funds for the purchase of books to be used by parochial school students. The complaint alleged that the statute violated both the New York and federal Constitutions.126 The trial court held for the plaintiffs and declared the law unconstitutional.127 On appeal the decision was reversed.128 The New York

120. See notes 216-17 infra and accompanying text.
121. 281 U.S. 370 (1930).
122. Id. at 375.
123. 392 U.S. 236 (1968).
Court of Appeals, by a vote of 4-3, ruled that the law was not unconstitutional,\textsuperscript{129} and the case went to the United States Supreme Court. The Supreme Court upheld the statute in a 6-3 decision, relying on \textit{Everson} and using the \textit{Schempp} test.\textsuperscript{130}

The law merely makes available to all children the benefits of a general program to lend school books free of charge. \ldots Thus no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools.\textsuperscript{131}

The Court, through Justice White, stressed that books are not religious in character and that any book provided to parochial school students must be approved by public school authorities.\textsuperscript{132} Justice White referred to the "meager record" and indicated that "secular and religious training are \textit{[not] so intertwined}" that an "unconstitutional involvement" between church and state had occurred.\textsuperscript{133}

Justice Harlan wrote in his concurring opinion:

I would hold that where the contested governmental activity is calculated to achieve nonreligious purposes otherwise within the competence of the State, and where the activity does not involve the State "so significantly and directly in the realm of the sectarian as to give rise to \ldots divisive influences and inhibitions of freedom," it is not forbidden by the religious clauses of the First Amendment.\textsuperscript{134}

Separate dissenting opinions were written by Justices Black, Douglas and Fortas. Justice Black minced no words in voicing his opposition to the majority position. "I believe the New York law held valid is a flat, flagrant, open violation of the First and Fourteenth Amendments \ldots ."\textsuperscript{135} His statements in support of his dissent were in keeping with those he made in \textit{Everson} and \textit{McCollum}. Justice Black indicated that although books are secular, their use "realistically will in some way inevitably tend to propagate the religious views of the favored sect."\textsuperscript{136}

In his view, \textit{Everson} and \textit{McCollum} provided ample ground on which to

\textsuperscript{130} 392 U.S. 236, 243.
\textsuperscript{131} \textit{Id.} at 243-44 (footnote omitted).
\textsuperscript{132} \textit{Id.} at 244.
\textsuperscript{133} \textit{Id.} at 248.
\textsuperscript{134} \textit{Id.} at 249 (citation omitted).
\textsuperscript{135} \textit{Id.} at 250.
\textsuperscript{136} \textit{Id.} at 252.
invalidate the New York statute.

The Everson and McCollum cases plainly interpret the First and Fourteenth Amendments as protecting the taxpayers of a State from being compelled to pay taxes to their government to support the agencies of private religious organizations the taxpayers oppose.¹³⁷

Justice Black feared, as had Justice Rutledge in Everson, that the decision would be further extended to provide other types of aid to parochial education.

It requires no prophet to foresee that on the argument used to support this law others could be upheld providing for state or federal government funds . . . to pay the salaries of the religious school teachers, and finally to have the sectarian groups cease to rely on voluntary contributions of members of their sects while waiting for the Government to pick up all the bills for the religious schools.¹³⁸

Justice Douglas pointed out that textbooks may indeed have religious overtones.¹³⁹ This fact could have serious consequences in terms of the process to be used for selecting “approved” books and could inject a note of divisiveness into society.

Now that “secular” textbooks will pour into religious schools, we can rest assured that a contest will be on to provide those books for religious schools which the dominant religious group concludes best reflect the theocentric or other philosophy of the particular church.¹⁴⁰

He further noted that divisiveness can work in two directions, either toward church control of the state or toward state control of the church.¹⁴¹

Justice Fortas pointed out, contrary to the assumption apparently made by the majority, that the books are selected and prescribed by religious authorities; individual students, those who are said to request and receive the books, can use no others.¹⁴² In addition, while the bus ride in Everson was essentially the same for all students, the books to

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¹³⁷ Id. at 251.
¹³⁸ Id. at 253.
¹³⁹ Id. at 258-62.
¹⁴⁰ Id. at 265 (footnote omitted). See also Note, Sectarian Books, the Supreme Court and the Establishment Clause, 79 Yale L.J. 111 (1969).
¹⁴² Id. at 270.

Produced by The Berkeley Electronic Press, 1971
be furnished are "special, separate, and particular books . . . chosen by religious sects or their representatives . . . ." Thus, he concluded, furnishing textbooks is not at all comparable to providing public health and safety measures such as those approved in Everson.

Allen has raised many important questions. Some of these may shortly be answered by the decisions in cases now before the United States Supreme Court. Professor Freund calls the case the "beginning, not the end, of constitutional litigation . . . to determine the bounds of public aid to parochial schools." Cases involving the application of a voucher plan could well provide further chapters in the story.

Miscellany

A number of other court cases and opinions should also be considered. Among these are cases from lower federal courts and state courts and a number of Opinions of the Justices of state supreme courts. Most of these cases and opinions deal with questions arising from plans which would authorize states to purchase secular instructional services from parochial schools.

Several state supreme courts have been called upon to deliver opinions concerning the constitutionality of such plans. The Supreme Court of New Hampshire considered proposed bills which would, inter alia, 1) provide tax exemptions to parents with children attending non-public schools, 2) provide transportation for children attending non-public schools outside the school district in which they live, 3) furnish physician, nurse, health, guidance, psychologist, educational testing and other services to students of all schools and 4) provide for textbook loans to students of all schools. The court indicated the belief that tax exemptions were unconstitutional, that the transportation services were of doubtful constitutionality, that providing health and educational services was probably constitutional and that the loaning of textbooks was constitutional.

The Maine House of Representatives requested that state's Supreme Judicial Court to determine whether any provision of the proposed

143. Id. at 271.
144. See notes 231-33 infra and accompanying text.
147. Id. at —, 258 A.2d at 346.
148. Id. at —, 258 A.2d at 347.
149. Id. at —, 258 A.2d at 347.
150. Id. at —, 258 A.2d at 347.
Education Assistance Act\(^{151}\) violated either the establishment or free exercise clauses of the United States Constitution. The law authorized local school administrative units "to contract and pay for secular education service" if the closing of non-public schools would 1) cause the tax rate to rise or 2) if such closing would create overcrowding in the public schools. As regards the question of the establishment clause, the court determined the law to be unconstitutional as applied to sectarian schools.\(^{152}\) Three of the justices felt bound by the *Schempp* test.

Applying the *Schempp* test, the purpose and primary effect of L.D. 1751 is to subsidize those sectarian schools, the closing of which would cast an increased student burden on the public school system . . . . Such subsidization by its assuring the continuance of the school, assures the continuance of the purpose for which the school exists, —advancement of the faith it represents.\(^{153}\)

One justice concurred but would limit his findings to schools "providing instruction in both sectarian and secular subjects."\(^{154}\) Two other justices declared the law to be constitutional, seeing it as a logical extension of the *Everson* and *Allen* decisions.\(^{155}\) All six justices agreed that the law presented no conflict with the free exercise clause since there would be no coercion to attend parochial schools.\(^{156}\)

An opinion by the Supreme Judicial Court of Massachusetts\(^{157}\) considered only whether a pending legislative bill authorizing purchase of secular educational services was in conflict with provisions of the Massachusetts Constitution.\(^{158}\) The court apparently considered that the legislature had a legitimate purpose in proposing the law.\(^{159}\) However, the effect of the law was found to be in conflict with a state constitutional provision which states:

[N]o grant, appropriation or use of public money or property or loan of public credit shall be made or authorized by the commonwealth or any political division thereof for . . . aiding

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153. Id. at 67.
154. Id. at 68.
155. Id. at 70.
156. Id. at 76.
159. —Mass. at —, 258 N.E.2d at 782. The purpose of the bill was to promote the general welfare by improving education.
any school . . . whether under public control or otherwise, wherein any denominational doctrine is inculcated. . . .

The Michigan Supreme Court held a similar proposed statute did not offend the establishment clause. The court adhered to the Schempp test and found that the primary effect of the act was neither to advance nor inhibit religion. Two justices dissented and would have declared the act unconstitutional.

Other cases involving similar questions include DiCenzo v. Robinson and Johnson v. Sanders. Both courts were of the opinion that the laws were invalid. Clayton v. Kervick considered the question of a New Jersey statute authorizing financing of facilities for both secular and religious schools on a self-liquidating basis. The law was upheld. The Louisiana Supreme Court in Seegers v. Parker held invalid a law authorizing state purchase of secular instructional services from teachers in parochial schools.

A BRIEF IN FAVOR OF VOUCHERS

Contained within the report of the Jenks group for the OEO is an appendix which presents arguments in favor of the constitutionality of the voucher plan. The central question of the appendix is: "What features of the voucher program best protect it from successful constitutional challenge?" Since the Report was compiled under the sponsorship of the OEO, and since the OEO will sponsor the voucher experiment, the arguments contained in the appendix are presented herein in support of the plan's constitutionality. Four major cases which have dealt with the issue of governmental support of the secular functions of religious groups are used to support the Report's position. In each of the four cases, Bradfield v. Roberts, Quick Bear v. Leupp, Everson and Allen, the support was held to be constitutional.

162. Id. at —, 180 N.W.2d at 273.
163. Id. at —, 180 N.W.2d at 275.
167. Id.
170. Id.
171. 175 U.S. 291 (1899).
The Report seeks to support the voucher plan against challenge from the establishment clause on two major premises.

First, the essential feature of the voucher program—its reliance on individual freedom of choice—makes it constitutionally immune. The first premise of this argument is that private acts which may benefit religion are not constitutionally prohibited. The second premise is that the voucher program puts effective control of the educational funds in private hands. . . .

Second, and in the alternative, the program envisioned by this report does not confer unconstitutional benefits on religious institutions. The vouchers are to cover no more than the cost of secular education. Allen and other cases make it clear that this is a constitutional expenditure even when religious institutions are instrumental in its effectiveness.175

Education Vouchers Legally Embody Only Private Support and Are Therefore Constitutional

The first point above relies for its basis upon Quick Bear v. Leupp.176 In Quick Bear, the Supreme Court upheld the expenditure of government funds through the Commissioner of Indian Affairs to support a Catholic school on a Sioux Indian reservation. The expenditure was upheld because 1) the Indians were entitled to the money and 2) the ultimate destination of the money was freely determined by the Indians and not the Government.177

The Report argues, by analogy, that both these features would be present in a voucher plan. The voucher plan itself would entitle every school age child to "use vouchers at eligible schools."178 In addition, most states have constitutional provisions requiring them to provide for the education of the young.179

The entitlement of the young to state-purchased education would be, in fact, no less significant under the voucher program than it was in Quick Bear. . . . Thus the requisite entitlement would exist.180

The free choice aspect is provided by the fact that, under a voucher

177. Jenks Report 133.
178. Id.
179. Id.
180. Id. at 134.
plan, the parents and children would have complete control over their individual use of the voucher, *i.e.*, they could select the school the child is to attend. Any possible benefit to the school selected would occur "only through and after the intervening exercise of private choice."\(^{181}\)

In *Quick Bear* the Indians themselves chose the school; they were entitled to the money because of their treaty with the United States. They also chose to spend the money on a particular mode of education. Under a voucher plan children would be entitled to a sum of money (voucher) to be used for education; they could exercise free choice in selecting a school. The plan thus becomes immune to constitutional attack.

In conclusion, it can be argued that the voucher program, as a way of facilitating private free choice, is immune to successful attack on Establishment grounds. *Quick Bear* v. *Leupp* seems directly on point and controlling.\(...) Once the freedom of individual choice is assured, the voucher program probably can be defended from Constitutional attack. It is the choice of private parties that determines to whom the state pays money, and, without government selection of the recipient of the funds, the government can in no way be accused of violation of the Establishment clause even if a benefit accrues to the recipient of the funds.\(^{182}\)

*Education Vouchers Limited to the Cost of Secular Education in Sectarian Schools Confer No Proscribed Benefit on Those Institutions*

The second argument is that even if the intervention of free choice does not protect the voucher plan, the fact that the plan is designed to pay no more than the cost of the secular educational services involved is sufficient.\(^{183}\) Some aid to religious institutions has been sanctioned; police and fire protection, transportation of pupils, free textbooks, school lunches and health services have all been approved.\(^{184}\) The question is resolved in terms of the *Schempp* test, the test of purpose and effect.

The Report indicates that the voucher plan meets the requirements of the test in both particulars. As to purpose,

[T]he purposes of the voucher scheme are implicit both in the problems that gave rise to its being proposed and in the organization of the programs. It is a scheme designed to pro-

\(^{181}\) *Id.* at 135.

\(^{182}\) *Id.* at 139.

\(^{183}\) *Id.*

\(^{184}\) *Id.* at 140.
mote better education, not religious proselytizing. That this is a legitimate secular purpose is not open to question.  

Since the Schempp test also includes the question of primary effect, the Report considers the voucher plan in that light. While conceding that direct money grants would be "suspect," the Report concludes that to determine that direct grants are unconstitutional is "to ignore the reasoning of these cases [Everson and Allen] and to rely on surface language." The proper basis for a decision is said to be the use to which the grant will be put.  

Two plans are proposed which would protect the voucher system from attack. One plan is to make the voucher program a purchase of services arrangement which would pay only the actual cost of the secular instruction provided. The other is to pay a parochial school less than the actual cost of the secular services, thus insuring that the voucher funds could not be used for sectarian purposes. In either event, the Report sees the children and not the schools as the primary beneficiaries of vouchers "for it is their education which is supported by the vouchers."  

This contention is based, in part, upon a semantic distinction between "recipient" and "beneficiary." A recipient is said to be the one "who receives the money or goods" while a beneficiary is "the one for whose benefit the money is spent." A religious group which operated a hospital received funds for the care of poor patients in Bradfield v. Roberts. The hospital was termed a recipient while the indigent patients were said to be the beneficiaries. In a voucher system the schools could be termed recipients of the aid, but the students would be the beneficiaries. Since the schools must "reciprocate with secular services of equal or greater value, no benefit is bestowed upon the institution." Similarly, the religious functions of the institution do not benefit; the money received pays only for the secular services rendered. Thus, the Report indicates that payment of the cost of secular services does not confer a benefit on the institution as a whole. Its effect is to enhance secular educational services. If the program has any tangential effect
on the religious activities of religious institutions, they are like those noted by the Court in *Everson* and *Allen* and, therefore, would not sustain successful constitutional challenge.\(^{193}\)

In conclusion, the Report states two main grounds for considering vouchers constitutionally protected:

1) Any benefit that accrues to a religion is not the result of government action, but rather of the free choice of private individuals. Such a benefit is not constitutionally proscribed.

2) The program is designed to cover only the cost of secular education. As such, no proscribed benefit is conferred on religious institutions.\(^{194}\)

In addition to these reasons, the Report states that an understanding of the contemporary legal climate gives more support to the contention that the courts would uphold a voucher plan. One justification for this position is found by comparing vouchers with the G.I. Bill which permits funds to reach sectarian institutions. The Report further says that the Supreme Court has rejected a strict, formalistic approach to the resolution of church-state issues and expresses a belief that present conditions within our society will force courts to be sympathetic toward governmental attempts to provide financial support to parochial schools.\(^{195}\)

**A Brief in Opposition to Vouchers**

The arguments made in favor of the constitutionality of the voucher plan may seem convincing. Numerous writers and groups, however, have stated positions which are in opposition to the plan. Their positions are generally based upon non-legal considerations. The remaining portions of this note will attempt to shed further light on the constitutional issues and to hazard a guess as to the eventual outcome of a case involving the voucher plan.

*The Private Support Argument*

At first glance the argument that education vouchers are, in reality, private means of supporting educational institutions seems valid. It is the child, or the parent, who is “entitled” to the voucher; it is the child, or again the parent, who decides where to utilize the voucher. If these premises be accepted, then the conclusion swiftly follows that it is the

\(^{193}\) Id. at 147.

\(^{194}\) Id. at 156.

\(^{195}\) Id. at 157.
individual who provides the support and not the government at all.

The argument, however, seems analogous to the thought processes of one who erects a sheet of transparent plastic film in front of some unwanted or unsightly object and then pretends that the object does not exist. The object is still there; anyone looking past the surface of the covering would recognize it. If we look past the surface of "entitlement" and "free choice," we can easily comprehend that the government is, in fact, paying for the educational services involved.

Quick Bear seems to give little, if any, backing to the private support argument. The Government had promised, by way of treaty, to provide funds for the education of the Indians, i.e., the Government had agreed to give the money to the Indians. In contrast, states have not promised to give money to individuals for their education; states have bound themselves to provide an education for the children. The premise that children are entitled to receive the funds with which to secure an education is, at best, tenuous.

The fact of free choice in the selection of a school is, likewise, of small importance. The funds still come from the government. The government would still be directly financing an education in a parochial school and the scheme of having the voucher pass through the hands of parents or children is a mere subterfuge or indirect method of financing such an education. Justice Douglas, in his concurring opinion in the Schempp case, remarked that "[w]hat may not be done directly may not be done indirectly lest the Establishment Clause become a mockery." 196

The No Benefit Argument

A voucher plan for financing education is said to be immune from attack since the funds would pay only the cost of the secular instructional services actually rendered. 197 It must be conceded that the purpose of the voucher plan, to insure better education for all children, cannot be questioned. That the state has a legitimate interest in providing education for all its citizens was recognized by the Court in Everson. 198 Purpose, however, is only one aspect of the test; the effect must also be considered. The Report's position is that since the voucher would pay only for the secular services rendered (or for only a portion thereof under an option) no benefit accrues to the parochial school involved.

The legitimacy of this position, however, should be considered in light of the present situation. Parochial schools today must finance not

only their sectarian instruction but also the secular portions. If the secular instruction were paid for out of public funds, the money previously spent for such instruction would be freed for use in the program of religious education. Moreover, it has been recognized that the mere continuation of the school assures the continuance of its primary purpose, the imparting of religious education, and thereby advances the faith the school represents. To argue that either of these effects would not constitute a benefit to the parochial institution is to refuse to face reality.

The distinction made between recipient and beneficiary seems chimerical. The term beneficiary is not restricted to the meaning ascribed to it in the Report—that a beneficiary is the "one for whose benefit the money is spent." The definition also encompasses "one who receives . . . advantages." The parochial school which no longer is forced to bear the expense of its secular educational program receives a decided advantage.

One additional point deserves mention. The Report stresses that an arrangement which provides only the actual cost (or a portion thereof) of the secular education may withstand constitutional attack. This presupposes that the actual cost of such services is readily ascertainable. One of the recent cases, DiCenso v. Robinson, considered this question. The court there noted that the various expenses of a religious school could, by a sophisticated method of bookkeeping, be almost wholly charged off to the school's secular program, thus providing an almost total subsidy to the religious institution. Justice Douglas, in his concurring opinion in Schempp, also addressed the problem. He wrote:

Financing a church either in its strictly religious activities or in its other activities is equally unconstitutional, as I understand the Establishment Clause. Budgets for one activity may be technically separable from budgets for others. But the institution is an inseparable whole, a living organism, which is strengthened in proselytizing when it is strengthened in any

199. 261 A.2d at 67.
200. JENKS REPORT 145.
201. AMERICAN COLLEGE DICTIONARY 144 (1953).
202. The school might use the money thus gained in a variety of ways; teacher salaries could be raised, additional equipment might be purchased, programs could be expanded, tuition charges might be lowered or the money saved might be spent on various religious activities of the sponsoring church.
203. JENKS REPORT 145.
205. Id. at 120.
department by contributions from other than its own members. 208

The Purpose of Sectarian Schools

The Court in Allen complained of an incomplete record. 207 Professor Freund has suggested that had the record been clear as to the total atmosphere of the school and the manner in which the books were to be used the result in Allen might have been different. 208

The Supreme Court has often pointed out the very facts the majority in Allen declined to affirm by judicial notice. In his dissent in Allen Justice Douglas noted that

[i]t must be remembered that the very existence of the religious school—whether Catholic or Mormon, Presbyterian or Episcopalian—is to provide an education oriented to the dogma of the particular faith. 209

Justice Jackson, dissenting in Everson, said that the function of a parochial school is to foster and proselytize its faith and that such purpose should "occupy the first place." 210 Justice Douglas remarked in a concurring opinion in Schempp that "[e]ducation, too, is usually high on the priority list of church interests." 211 The Supreme Judicial Court of Maine also expressed similar sentiments when it said that "[s]ectarian school education is selected for its religious atmosphere and teaching." 212

If these statements are not considered sufficient, one need only look to the utterances of church authorities. No less an authority than Pope Pius XI once stated that

the only school approved by the Church is one where . . . the Catholic religion permeates the entire atmosphere [and where] all teaching and the whole organization of the school and its teachers, syllabus and textbooks in every branch [is] regulated by the Christian spirit. 213

The Reverend Joseph H. Fichter has written:

It is a commonplace observation that in the parochial school

208. Freund, supra note 124, at 5.
210. 330 U.S. 1, 22-23.
211. 374 U.S. at 227-28 (footnote omitted).
religion permeates the whole curriculum and is not confined to a single half-hour period of the day. Even arithmetic can be used as an instrument of pious thoughts...\textsuperscript{214}

If one accepts these words, the words of eminent courts and jurists and of a world religious leader and a religious scholar, the conclusion seems inevitable. The conclusion must be that the atmosphere of religion and religious teaching so permeates the parochial school that a truly meaningful separation of church and state under the voucher plan would be impossible. However, it might be suggested that a simple device could alleviate the problem. We should now consider that subject.

\textit{A Religionless Parochial School—What of Free Exercise?}

Up to now the discussion has largely centered upon the problem of reconciling a voucher system with the establishment clause of the first amendment. But what if it be proposed that, in order to qualify as an approved school, the parochial school must delete religion from its daily schedule? Religious classes might well be taught after regular school hours to avoid conflict. Would this satisfy the question of establishment? More importantly, could this plan withstand the challenge of the parochial school itself on free exercise grounds?

If it were necessary for a parochial school to remove religious instruction from its regular schedule, the very purpose for which such schools have been established would be defeated. The schools are established and supported by the church and parents who choose to send their children to them to impart religious training. The secular education provided by the sectarian school could be obtained as well in the public schools.\textsuperscript{215} Would it not impinge upon the free exercise of religion to insist that parochial schools not teach religion?

\textit{Pierce v. Society of Sisters}\textsuperscript{216} established that parochial schools can be used as an alternative to the public system, \textit{i.e.}, parents can satisfy the state’s requirement that all children receive a certain degree of education by sending their children to sectarian schools. If religion cannot be a part of the curriculum of parochial schools, such parents and children will have lost a portion of their right of free exercise.

The possible effect of the decision in \textit{McCollum} should also be considered at this point. \textit{McCollum} tells us that a system of released time

\textsuperscript{215} One of the chief objections mentioned about parochial school education is that some think it to be inferior in quality to that obtained in the public schools. \textit{See}, \textit{e.g.}, L. Pfeffer, \textit{supra} note 73, at 514.
\textsuperscript{216} 268 U.S. 510 (1925).
for religious instruction is unconstitutional if such instruction is carried out in the buildings of the public schools. If parochial schools are approved to receive voucher funds, they, in effect, become arms of the public school system. They would be supported, at least in the secular aspects of their programs, as participating members of a publicly financed educational system. If the parochial schools could be considered a part of the public education program, then it logically follows that, under McCollum, there could be no religious instruction carried out in the buildings of the parochial schools.

_A New Twist to an Old Test_

One of the most recent cases decided by the Supreme Court which has a possible bearing on the voucher system is _Walz v. Tax Commission of the City of New York._217 The plaintiff, Walz, owned certain real estate in Richmond County, New York, and brought suit to enjoin the New York Tax Commission from giving exemptions to religious organizations for religious properties used solely for religious purposes. His contention was that such exemptions indirectly required him to contribute to religious bodies and thus violated the establishment clause of the first amendment.

The Court emphasized that its prior decisions were intended to apply to the various factual situations found in the cases and were not to be taken as broad general principles.218

The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of these expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.219

The tax exemptions in question were said to involve some indirect benefit to religion but were held constitutional.

Of most immediate concern to this note is the new twist placed on the _Schempp_ test. This innovation further refines the "primary effect" portion of the test. "We must also be sure that the end result—the effect—is not an excessive government entanglement with religion. The

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218. _Id._ at 668.
219. _Id._ at 669.
test is inescapably one of degree." The test was then spelled out in more detail:

In analyzing either alternative [whether to grant tax exemptions to religious properties] 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.

Several courts have recently applied this refinement to the Schempp test and the decisions seem applicable to a consideration of the voucher plan. *DiCenso v. Robinson* and *Johnson v. Sanders* held purchase of services statutes unconstitutional because, *inter alia*, such statutes foster an "excessive entanglement." The Michigan Supreme Court found such a plan to be free of an excess of entanglement, although two of the justices dissented.

Under the provisions of the voucher plan, the state will play an active role. There will likely be inspections to insure that buildings and facilities meet health and safety requirements. The state will probably, as it does now, require compliance with a basic course of instruction to insure a minimum common content to the programs of approved schools. There will also be contact for such items as teacher certification, teacher evaluation, insuring compliance with admissions regulations, educational testing, health services, guidance and numerous other functions. As regards the parochial schools, the state will likely insist on elaborate and detailed financial statements and will closely scrutinize the bookkeeping and accounting methods and records of the schools involved. It would seem, therefore, that the state and federal governments may have a close and continuing relationship with the parochial schools that would foster the "excessive government entanglement" forbidden by *Walz*. Indeed, the Court notes in *Walz* 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 relationships for enforcement of statutory or administrative standards.
CONCLUSION

An education voucher plan, while it may seem justified on purely sociological or educational grounds, contains elements which probably will not withstand the challenge of the establishment clause of the first amendment. The first amendment "was intended to erect a 'wall of separation between Church and State.'"226 The first amendment was seen by its framers as forbidding "sponsorship, financial support, and active involvement of the sovereign in religious activities."227 The restrictions of the establishment clause are a "tight rope"228 which must be walked. The path of this tight rope is too narrow to be negotiated by the voucher system. The voucher plan, if implemented, would free parochial schools of the financial burden of their secular education programs. Under the Schempp test this should be considered a primary effect, although not the only one, of such a plan.

Under a voucher program the functions of secular and sectarian education would be fused. Justice Frankfurter has written that "'[s]eparation is a requirement to abstain from fusing functions of Government and of religious sects . . . .'"229 In Zorach v. Clauson the Court said that "Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person."230

The fact that voucher payments would reach parochial schools indirectly does not provide immunity from constitutional attack. The money for which vouchers may be redeemed is nonetheless tax money; payments would be made by a voucher agency or by a local school board. Both must be considered agents of the government.

ADDENDUM

As this note is being prepared, a case is before the United States Supreme Court which could be decisive of the question of a voucher plan's constitutionality. The case is Lemon v. Kurtzman,231 and a

226 Everson v. Board of Educ., 330 U.S. 1, 16 (1947).
227 397 U.S. at 668.
228 Id. at 672.
decision may well be announced before this note reaches print. For that reason, the case must be mentioned here.

The issue in Lemon v. Kurtzman is whether the State of Pennsylvania may constitutionally provide a fixed annual amount to be paid to parochial schools for instruction in mathematics, modern foreign languages and physical training. The funds would be derived from the state's revenue from a cigarette tax and could presumably be used in the discretion of the individual school. The statute was upheld by a majority of a three-judge district court.

Should such a plan as this be held constitutional, a voucher plan should also withstand the challenge of the first amendment. A purchase of services plan, such as the one in question in Lemon v. Kurtzman, provides for payments of money directly from the state to the parochial schools; one of the features relied upon to make the voucher program immune from successful constitutional attack is that payments are made indirectly through the parents. If, however, the Pennsylvania statute is declared unconstitutional, then the church-state issue will rise up again in a challenge to the voucher experiment.*


*As this issue went to press, the United States Supreme Court announced its decision in Lemon and DiCenso v. Robinson. See notes 164, 204 and 222 supra and accompanying text. A unanimous Court, Justice Marshall not taking part, held that the statute in each case fostered an excessive entanglement between church and state and was, therefore, invalid. Lemon v. Kurtzman, 39 U.S.L.W. 4844 (U.S. June 28, 1971).