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# Public Aid to Private Schools: Committee for Public Education & (and) Religious Liberty v. Regan

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# NOTES

## Public Aid to Private Schools: Committee for Public Education & Religious Liberty v. Regan

In 1974 the New York State Legislature enacted a statute providing direct financial reimbursements to nonpublic schools for actual costs incurred in complying with state-mandated reporting and testing requirements.[1] The Committee for Public Education and Religious Liberty sued to enjoin payment of the reimbursements to religiously affiliated nonpublic schools and to have the statute declared unconstitutional as violating the establishment clause of the first amendment to the United States Constitution.[2] A panel of three judges sitting for the district court of the Southern District of New York found the statute in violation of the establishment

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1. 1974 N.Y. Laws ch. 507. The statute provides in part:

> § 3. Apportionment. The commissioner shall annually apportion to each qualifying school . . . an amount equal to the actual cost incurred by each such school during the preceding school year for providing services required by law to be rendered to the state in compliance with the requirements of the state's pupil evaluation program, the basic educational data system, regents examinations, the statewide evaluation plan, the uniform procedure for pupil attendance reporting, and other similar state prepared examinations and reporting procedures.
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> . . . .
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> § 5. Maintenance of records. Each school which seeks an apportionment pursuant to this act shall maintain a separate account or system of accounts for the expenses incurred in rendering the services required by the state to be performed . . . .
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> . . . .
>
> § 7. Audit. No application for financial assistance under this act shall be approved except upon audit of vouchers or other documents by the commissioner as are necessary to insure that such payment is lawful and proper.
>
> The state department of audit and control shall from time to time examine any and all necessary accounts and records of a qualifying school to which an apportionment has been made pursuant to this act for the purpose of determining the cost to such school of rendering the services referred to in section three of this act. If after such audit it is determined that any qualifying school has received funds in excess of the actual cost of providing the services enumerated in section three of this act, such school shall immediately reimburse the state in such excess amount.

2. U.S. CONST. amend. I provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." Parts of the first amendment were held to be applicable to the states by operation of the fourteenth amendment in Everson v. Board of Educ., 330 U.S. 1 (1947) (establishment clause); Murdock v. Pennsylvania, 319 U.S. 105 (1943) (freedom of speech, press, and religion); Cantwell v. Connecticut, 310 U.S. 296 (1940) (freedom of religion and speech); and Schneider v. State, 308 U.S. 147 (1939) (freedom of speech and press).

For cases discussing the permissible scope of government aid to sectarian schools under the establishment clause, see Wolman v. Walter, 433 U.S. 229 (1977); Roemer v. Board of Pub. Works, 426 U.S. 736 (1976); Meek v. Pittenger, 421 U.S. 349 (1975); Sloan v. Lemon, 413 U.S. 825 (1973); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973); Hunt v. McNair, 413 U.S. 734 (1973); Levitt v. Committee for Pub. Educ. & Religious Liberty, 413 U.S. 472 (1973); Tilton v. Richardson, 403 U.S. 672 (1971); Lemon v. Kurtzman, 403 U.S. 602 (1971); Board of Educ. v. Allen, 392 U.S. 236 (1968); Everson v. Board of Educ., 330 U.S. 1 (1947). For a discussion of other issues arising under the establishment clause, see cases cited in notes 10-19 *infra*.

clause because it had the "primary effect of advancing religion."[3] On direct appeal[4] the United States Supreme Court vacated and remanded for a determination in light of its decision in *Wolman v. Walter*.[5] On remand the district court, citing the Supreme Court's relaxation in *Wolman* of earlier constitutional restrictions on state aid to sectarian schools,[6] found that the reimbursements provided by the statute did not constitute an advancement of religion.[7] An appeal again was made to the United States Supreme Court. *Held, affirmed*: The statute providing for direct cash reimbursement to nonpublic sectarian schools for actual costs incurred in complying with state-mandated services is not a violation of the establishment clause of the first amendment because it has a secular legislative purpose, has a primary effect that neither advances nor inhibits religion, and does not foster an excessive government entanglement with religion. *Committee for Public Education & Religious Liberty v. Regan*, 100 S. Ct. 840, 63 L. Ed. 2d 94 (1980).

## I. THE ESTABLISHMENT CLAUSE

Although the prohibition against the establishment of religion was a significant concern of the framers of our Constitution,[8] the Supreme Court has considered the boundaries of the establishment clause only within the last forty years.[9] The cases before the Court have encompassed a broad range of topics, including prayers and Bible reading in public schools,[10]

3. Committee for Pub. Educ. & Religious Liberty v. Levitt, 414 F. Supp. 1174, 1178 (S.D.N.Y. 1976). The case is currently styled with Edward Regan as the defendant because he succeeded Arthur Levitt as Commissioner of Education of the State of New York. The three-judge panel was convened under 28 U.S.C. § 2281 (1976) (current version at 28 U.S.C. §§ 2283-2284 (1976)).

4. The Supreme Court had jurisdiction to review the district court decision by direct appeal pursuant to 28 U.S.C. § 1253 (1976). The Court vacated and remanded without opinion. 433 U.S. 902 (1977).

5. 433 U.S. 229 (1977). In *Wolman* the Court upheld an Ohio statute that provided free standardized testing and scoring services to nonpublic schools. *See* notes 55-65 *infra* and accompanying text.

6. *See* Meek v. Pittenger, 421 U.S. 349 (1975), *discussed at* notes 45-54 *infra* and accompanying text.

7. Committee for Pub. Educ. & Religious Liberty v. Levitt, 461 F. Supp. 1123, 1129 (S.D.N.Y. 1978). The two-to-one decision contained a vigorous dissent by Judge Ward. *Id.* at 1131.

8. *See* Everson v. Board of Educ., 330 U.S. 1, 28-74 (1947) (Rutledge, J., dissenting) (description of the historical foundation of the establishment clause); J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 850 (1978) [hereinafter cited as J. NOWAK]; 2 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 1051-52, 1088-89 (1971). For a discussion of the history of the establishment clause and Thomas Jefferson's key role in its construction, see Comment, *Jefferson and the Church-State Wall: A Historical Examination of the Man and the Metaphor*, 1978 B.Y.U.L. REV. 645.

9. *See* Boles, *The Burger Court & Parochial Schools: A Study in Law, Politics & Educational Reality*, 9 VAL. U.L. REV. 459 (1975); Buchanan, *Governmental Aid to Sectarian Schools: A Study in Corrosive Precedents*, 15 HOUS. L. REV. 783 (1978); Annot., 37 L. Ed. 2d 1147 (1974).

10. *See, e.g.*, School Dist. v. Schempp, 374 U.S. 203 (1963) (Bible readings in public schools unconstitutional); Engel v. Vitale, 370 U.S. 421 (1962) (prayer programs in schools unconstitutional).

"released time" programs,[11] parochial teacher salary reimbursements,[12] tuition reimbursements and tax credits,[13] aid to nonpublic colleges and universities,[14] tax exemptions for religious organizations,[15] construction grants for religious hospitals,[16] Sunday closing laws,[17] free exercise of religion,[18] and interference in church ecclesiastical matters.[19]

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11. *See, e.g.*, Zorach v. Clauson, 343 U.S. 306 (1952) (permitted student absences from school for religious services held elsewhere); Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (1948) (rejected program allowing student absences from class to attend religious instruction conducted in a public school).

12. *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602 (1971) (rejected reimbursement to nonpublic schools for teachers' salaries, textbooks, and other materials used in secular classes); Earley v. DiCenso, 403 U.S. 602 (1971) (decided with *Lemon*) (invalidated a Rhode Island statute reimbursing teacher salaries); Annot., 37 L. Ed. 2d 1147, 1184-86 (1974).

13. *See, e.g.*, Sloan v. Lemon, 413 U.S. 825 (1973) (invalidated cigarette tax funding reimbursements to parents for portion of nonpublic school tuition); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) (held unconstitutional tuition reimbursement grants and income tax benefits to parents of children attending nonpublic schools); Public Funds for Pub. Schools v. Byrne, 590 F.2d 514 (3d Cir.) (denied deduction from parents' taxable income for each child attending nonpublic schools), *aff'd mem.*, 442 U.S. 907 (1979); Minnesota Civil Liberties Union v. Roemer, 452 F. Supp. 1316 (D. Minn. 1978) (permitted deduction from taxable income for expenses incurred by parents for their children attending both public and nonpublic schools); Kosydar v. Wolman, 353 F. Supp. 744 (S.D. Ohio 1972) (invalidated tax credit for parents with excessive educational expenses because the class of beneficiaries was primarily sectarian), *aff'd mem. sub nom.* Grit v. Wolman, 413 U.S. 901 (1973). *See also* Note, *Government Neutrality and Separation of Church and State: Tuition Tax Credits*, 92 HARV. L. REV. 696 (1979); Annot., 37 L. Ed. 2d 1147, 1188-90 (1974).

14. Roemer v. Board of Pub. Works, 426 U.S. 736 (1976) (upheld noncategorical grants to nonpublic colleges and universities because the grants did not constitute an establishment of religion); Hunt v. McNair, 413 U.S. 734 (1973) (permitted revenue bond aid for private college facilities not to be used for religious purposes); Tilton v. Richardson, 403 U.S. 672 (1971) (upheld Higher Education Facilities Act providing grants for construction of private college facilities not to be used for religious purposes); Smith v. Board of Governors, 429 F. Supp. 871 (W.D.N.C.) (validated tuition and financial assistance to students at religiously affiliated colleges), *aff'd mem.*, 434 U.S. 803 (1977); *see* J. NOWAK, *supra* note 8, at 858-61; Boles, *supra* note 9, at 465-67; Annot., 95 A.L.R.3d 1000 (1979); Annot., 37 L. Ed. 2d 1147, 1186-87 (1974).

15. Walz v. Tax Comm'n, 397 U.S. 664 (1970). The Court upheld tax exemptions to religious organizations for property used exclusively for religious worship. The statute also included exemptions for educational and charitable institutions. *See also* Annot., 7 A.L.R. Fed. 548 (1971).

16. Bradfield v. Roberts, 175 U.S. 291 (1899) (permitted public funding for construction of hospital building run by Roman Catholic nuns). *See also* 42 U.S.C. § 254c(c) (1976), which authorizes grants to public and nonprofit private entities to plan and develop community health centers.

17. The purpose of the Sunday closing laws is to provide a uniform day of rest and therefore does not violate the establishment clause. *See* Gallagher v. Crown Kosher Super Mkt., 366 U.S. 617 (1961); McGowan v. Maryland, 366 U.S. 420 (1961). *See also* Annot., 37 L. Ed. 2d 1147, 1207-11 (1974).

18. The disqualification of a person from unemployment compensation because she refused to work on Saturday, in accordance with her religious beliefs, imposed an unconstitutional burden on the free exercise of her religion. Sherbert v. Verner, 374 U.S. 398 (1963); *see* J. NOWAK, *supra* note 8, at 871-94.

19. Serbian E. Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976) (state supreme court improperly interfered with decision of hierarchical church); Presbyterian Church v. Mary Elizabeth Blue Hull Memorial Presbyterian Church, 393 U.S. 440 (1969) (property dispute between local and general church involving ecclesiastical doctrine). The Supreme Court has made it clear in these decisions that civil courts are not to determine matters of ecclesiastical cognizance.

*Everson v. Board of Education*[20] is the recognized forerunner in cases involving public aid to sectarian schools. The plaintiff-taxpayers[21] in *Everson* claimed that an authorized reimbursement to parents for bus transportation costs of their children to and from school was an establishment of religion to the extent that it reimbursed parents with children in Catholic schools. The Court upheld the reimbursement as a general welfare program that benefited all students and contributed no money to the religiously affiliated schools.[22] The result was perplexing because the Court resurrected Thomas Jefferson's "high and impregnable wall" between church and state yet held that the New Jersey statute did not breach that wall.[23] The decision served, nevertheless, as a foundation for later cases that opened further the door to public aid.[24]

Twenty-one years after *Everson* the Supreme Court addressed a related issue under the establishment clause in *Board of Education v. Allen*.[25] The Court in *Allen* utilized a two-prong test to determine the constitutionality of state involvement with religious institutions under the establishment clause: " '[T]here must be [both] a secular legislative purpose and a primary effect that neither advances nor inhibits religion.' "[26] Relying on *Everson*, the *Allen* Court upheld a New York statute providing for the free loan of textbooks to all students in grades seven through twelve, including those in nonpublic sectarian schools.[27] Acknowledging that the Court

20. 330 U.S. 1 (1947). For a discussion of this decision, see Kauper, *Everson v. Board of Education: A Product of the Judicial Will*, 15 ARIZ. L. REV. 307 (1973).

21. Although this case involved state taxpayers, the Supreme Court upheld the right of federal taxpayers to challenge federal government aid to religiously affiliated schools under the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 241e (1976) (repealed 1978), in Flast v. Cohen, 392 U.S. 83 (1968). *But cf.* Frothingham v. Mellon, 262 U.S. 447 (1923) (federal taxpayer lacked standing to challenge constitutionality of federal taxation for failure to allege direct injury).

22. 330 U.S. at 18.

23. *Id.* Justice Jackson, dissenting, stated:

> [T]he undertones of the opinion, advocating complete and uncompromising separation of Church from State, seem utterly discordant with its conclusion yielding support to their commingling in educational matters. The case which irresistibly comes to mind as the most fitting precedent is that of Julia who, according to Byron's reports, "whispering 'I will ne'er consent,'—consented."

*Id.* at 19.

*But see* Comment, *supra* note 8, at 645, 650, 652, 658. The author indicates that Jefferson's "high and impregnable wall" metaphor may be interpreted too literally by today's courts. He suggests that in fact Jefferson was concerned primarily about federal interference and would consent to more flexible religious liberty, tolerance, and accommodation at the state level.

24. *See* cases cited at note 2 *supra*.

25. 392 U.S. 236 (1968).

26. *Id.* at 243 (quoting School Dist. v. Schempp, 374 U.S. 203, 222 (1963)). The *Allen* Court borrowed the two-prong test from School Dist. v. Schempp, 374 U.S. 203, 222 (1963). The *Schempp* Court had held that no state law or school board could require that passages from the Bible be read or that the Lord's Prayer be recited in public schools. The Court cited *Everson* as its authority, articulating the purpose-effect test for determining the validity of any issue under establishment clause scrutiny. For a discussion of further developments of this test, see notes 32, 35-36 *infra* and accompanying text.

27. 392 U.S. at 243. The fact that the program applied to all children without regard to religious affiliation was decisive. *Id.* at 241-43. Subsequent cases permitting loan programs include Wolman v. Walter, 433 U.S. 229 (1977), and Meek v. Pittenger, 421 U.S. 349 (1975).

"has long recognized that religious schools pursue two goals, religious instruction and secular education,"[28] it therefore rejected the contention that secular textbooks would be instrumental in teaching religion.[29] Justice Black, however, who authored the opinion in *Everson*, called the decision a "flat, flagrant, open violation of the First and Fourteenth Amendments."[30]

In *Walz v. Tax Commission*[31] the Supreme Court, upholding property tax exemptions for religious organizations, refined the two-prong test for constitutionality enunciated in *Allen* by adding a third prong: "that the end result—the effect—is not an excessive government entanglement with religion."[32] This purpose-effect-entanglement test became firmly established in *Lemon v. Kurtzman*.[33] The Court in *Lemon* declared unconstitu-

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One commentator has stated, "[I]t appears that *Allen* will not be reexamined and that these text book programs will be upheld on the basis of *stare decisis*." J. NOWAK, *supra* note 8, at 856. *But cf.* Norwood v. Harrison, 413 U.S. 455 (1973) (unconstitutional to lend textbooks to children attending private schools that racially discriminate); Marburger v. Public Funds for Pub. Schools, 358 F. Supp. 29 (D.N.J. 1973) (reimbursement for money spent on textbooks to parents of nonpublic school students violates the first amendment), *aff'd mem.*, 417 U.S. 961 (1974); Dickman v. School Dist., 366 P.2d 533 (Or. 1961) (free use of textbooks to all pupils violates state constitution prohibiting public money going to the benefit of religious institutions; the use of textbooks was found to be inextricably connected with the teaching of religious concepts), *cert. denied*, 371 U.S. 823 (1962). *See also* Annot., 93 A.L.R.2d 986 (1964).

The first Supreme Court textbook loan case was Cochran v. Louisiana State Bd. of Educ., 281 U.S. 370 (1930). *Cochran*'s effect on *Allen* was minimal, however, because the issue in *Cochran* was whether the state textbook loan program violated the fourteenth amendment as a taking of private property, that is taxes, for private use. The establishment clause issue was not raised.

28. 392 U.S. at 245 (citing with approval Pierce v. Society of Sisters, 268 U.S. 510 (1925)); *see* Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 775 (1973). *Contra* Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1688-91 (1969). Freund argues against the theory of separable functions because the theory contravenes the very purpose and philosophy for which parochial schools were established. For later developments on the separability theory, see note 51 *infra* and accompanying text.

29. 392 U.S. at 248.

30. *Id.* at 250 (Black, J., dissenting). Justice Douglas supported Justice Black in a dissent that cited numerous examples of textbooks containing explicit religious references that nevertheless qualify under the program. *Id.* at 257-59 (Douglas, J., dissenting). Justice Douglas also observed that "[a] parochial school textbook may contain many, many more seeds of creed and dogma than a prayer. Yet we struck down in *Engel v. Vitale* . . . an official New York prayer for its public schools . . . ." *Id.* at 257 (citation omitted). In the *Engel* case Justice Douglas admitted that the *Everson* decision in which he participated may have exceeded the first amendment bounds. 370 U.S. 421, 443 (1962) (Douglas, J., concurring).

31. 397 U.S. 664 (1970).

32. *Id.* at 674. For a discussion of *Walz*, see Kauper, *The Walz Decision: More on the Religious Clauses of the First Amendment*, 69 MICH. L. REV. 179 (1970), and note 15 *supra*. *See also* J. NOWAK, *supra* note 8, at 854-55, 863-68. The Court has accepted this three-prong test as a basis upon which to judge the constitutionality of establishment clause cases. *See, e.g.*, Wolman v. Walter, 433 U.S. 229, 235-36 (1977); Roemer v. Board of Pub. Works, 426 U.S. 736, 748 (1976); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 772-73 (1973). Drafters of legislation have rarely had difficulty with the secular purpose requirement. In only one case, Epperson v. Arkansas, 393 U.S. 97 (1968), has the Court found that a statute had a primarily religious purpose.

33. 403 U.S. 602 (1971); *see* Note, *Lemon v. Kurtzman: First Amendment Religion Clauses Reexamined*, 33 U. PITT. L. REV. 330 (1971). One commentator regards the *Lemon-DiCenso* cases, decided in the same opinion, as the start of a Supreme Court shift away from

tional a statute providing reimbursements to nonpublic schools for teachers' salaries, textbooks, and materials used in teaching secular subjects because the payments involved an excessive entanglement of state with church.[34] The *Lemon* Court based its finding of excessive entanglement in part on the fear of "political division along religious lines,"[35] a concern that at least one Justice has since used as a fourth prong to the establishment clause test.[36] The application of the excessive entanglement prong was restricted when the Court in *Hunt v. McNair*[37] discerned a distinction between religiously affiliated primary and secondary schools and colleges and universities. According to the Court, colleges and universities were not substantially oriented toward a sectarian purpose and their education was not as likely to be permeated with religious indoctrination.[38] The Court has used the distinction to justify substantial aid to institutions of higher education.[39]

In *Committee for Public Education & Religious Liberty v. Nyquist*,[40] decided the same day as *Hunt*, the Court rejected a statutory attempt to provide maintenance and repair grants to nonpublic elementary and secondary schools because the inevitable effect was to subsidize and thus advance the religious mission of sectarian schools.[41] Similarly, in *Levitt v. Committee for Public Education & Religious Liberty*[42] the Court refused to validate a New York statute reimbursing nonpublic schools for state-mandated testing services. Under the New York statutory scheme in *Levitt*, the payments were to be made on a per pupil allotment basis and included reimbursement for the preparation, administration, and grading of

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the public aid advances made in *Everson* and *Allen*. Young, *Implementation of Wolman*, 24 CATH. LAW. 277, 279 (1979). *See also* Sanders v. Johnson, 319 F. Supp. 421 (D. Conn. 1970), *aff'd mem.*, 403 U.S. 955 (1971).

34. 403 U.S. at 609.

35. *Id.* at 622. One author has stated: "While political debate and division is normally a wholesome process for reaching viable accommodations, political division on religious lines is one of the principal evils that the first amendment sought to forestall." Freund, *supra* note 28, at 1692.

36. Justice Brennan, who supported the textbook loan program in *Allen*, dissented from the Court's approval of a similar program in Meek v. Pittenger, 421 U.S. 349 (1975), because of the "political divisiveness" factor set forth in *Lemon*. *Id.* at 374 (Brennan, J., concurring in part, dissenting in part).

37. 413 U.S. 734 (1973). The *Hunt* Court upheld the issuance of state revenue bonds benefiting a Baptist college.

38. *Id.* at 746. Justice Powell, speaking for the Court, derived the distinction from the plurality opinion in Tilton v. Richardson, 403 U.S. 672, 687 (1973). In *Tilton* Justice White declined the distinction, stating: "It is enough for me that the States and the Federal Government are financing a separable secular function of overriding importance in order to sustain the legislation here challenged." *Id.* at 664 (White, J., concurring).

39. *See* cases cited in note 14 *supra*.

40. 413 U.S. 756 (1973).

41. *Id.* at 774. The Court also rejected tuition grants for students from low-income families and tax credits to parents for the same reason. The decision bears out the distinction made in *Hunt*. *See* notes 37-39 *supra* and accompanying text. For further discussion of *Nyquist*, see Piekarski, *Nyquist and Public Aid to Private Education*, 58 MARQ. L. REV. 247 (1975); Note, *Voucher Systems of Public Education After Nyquist and Sloan: Can a Constitutional System Be Devised?*, 72 MICH. L. REV. 895 (1974).

42. 413 U.S. 472 (1973).

teacher-prepared tests. The Court first criticized the statute as an impermissible aid to religion because it failed to provide a means of assuring that the payments were for solely secular services.[43] Additionally, the Court feared that teacher-prepared tests would be "drafted with an eye, unconsciously or otherwise, to inculcate students in the religious precepts of the sponsoring church."[44]

*Meek v. Pittenger*[45] represented a strict application of the purpose-effect-entanglement test and dispelled any notions that judicial leniency might be practiced in reviewing state aid statutes.[46] In *Meek* the Court rendered several opinions that together upheld a textbook loan program to school students[47] but invalidated a loan program for instructional materials and equipment.[48] According to the Court, the latter was distinguishable from the textbook program because the materials and equipment were lent directly to the qualifying nonpublic elementary and secondary schools and therefore had "the unconstitutional primary effect of advancing religion because of the predominantly religious character of the schools benefiting from the Act."[49] The Court substantially modified its earlier statement[50] that sectarian schools had separable religious and secular purposes by stating that the two were "inextricably intertwined."[51] Finally, the Court invalidated a provision for auxiliary services[52] provided to students on the nonpublic school premises because being on the premises could lead to an "intolerable degree of entanglement between church and state,"[53] and be-

43. *Id.* at 479-80. The Court quoted from its decision in *Nyquist* to support its reasoning. In neither instance, however, did it wholly reject direct payments to sectarian schools. Rather, emphasis was placed on the failure to restrict payments exclusively to secular purposes.

44. *Id.* at 480. Justice White dissented without opinion. *Id.* at 482.

45. 421 U.S. 349 (1975). For an in-depth discussion of the case, see Buchanan, *supra* note 9, at 809-12; Skelly, *Meek v. Pittenger: Will It Precipitate a Solution?*, 20 CATH. LAW. 335 (1974).

46. One commentator termed *Meek* "the most harsh decision . . . ever rendered by the Supreme Court of the United States with respect to aid to nonpublic school pupils." Young, *supra* note 33, at 280.

47. 421 U.S. at 359. Justice Brennan would have invalidated the textbook program on the basis of *Lemon*. *See* note 36 *supra* and accompanying text. Citing *Allen* for support, Justice Stewart emphasized that the program benefited all students regardless of the school they attended and that the financial benefit went to the parents of the children who were required to buy the books, not to the school. 421 U.S. at 360 n.8, 361.

48. 421 U.S. at 363.

49. *Id.*

50. Board of Educ. v. Allen, 392 U.S. 236, 245 (1968).

51. 421 U.S. at 366 (quoting Lemon v. Kurtzman, 403 U.S. 602, 657 (1971) (Brennan, J., concurring)). The Court used this rationale to support its rejection of the proposed material and equipment loan program. Since *Allen* used the separability argument, in part, to justify allowing the textbook loan program, it is difficult to understand how *Meek* proceeded to validate a textbook loan program based on *Allen* without making any reference to *Allen*'s recognition that religious schools pursue both secular education and religious instruction. *See generally* 2 A. STOKES, CHURCH AND STATE IN THE UNITED STATES 654 (1950); Freund, *supra* note 28, at 1688-89.

52. The services consisted of remedial and accelerated instruction, guidance counseling and testing, and speech and hearing services performed by a professional staff supplied by the Secretary of Education.

53. 421 U.S. at 370.

cause the appropriation process for such services created recurrent opportunity for "political fragmentation and division along religious lines."[54]

*Wolman v. Walter*[55] presented a divergence of views, as had *Meek*, in four separate opinions, reflecting the Court's "kaleidoscopic pattern of conjunctive and disjunctive opinions" as "evidence of conceptual disarray."[56] The Ohio statute upheld in *Wolman* included the refinements prescribed by the *Meek* Court in that the therapeutic, guidance, and remedial services, for example, were provided away from the nonpublic school premises.[57] The Court permitted on-premises diagnostic health services provided by public employees because there was little likelihood for the intrusion of sectarian views.[58] To support its position the Court cited *Lemon*'s discussion of *Allen* and *Everson*, recognizing the constitutionality of public health services when provided in common to all students.[59] Although the Court upheld a textbook loan program in *Wolman*,[60] it invalidated a program for lending instructional materials and equipment similar to that in *Meek*[61] and likewise rejected a field trip funding program.[62] More importantly, the Court approved a provision for supplying standardized tests and scoring services without charge to the students through the nonpublic schools.[63] In *Levitt* the Court had invalidated a similar statute because the tests were teacher-prepared and thus susceptible to the inculcation of religious ideas.[64] The Ohio statute had rectified this deficiency by requiring that the drafting and scoring of tests be done by nonpublic school personnel.[65] By upholding the standardized test and scoring provi-

54. *Id.* at 372.

55. 433 U.S. 229 (1977); *see* Young, *supra* note 33; Comment, *Wolman v. Walter and the Continuing Debate over State Aid to Parochial Schools*, 63 IOWA L. REV. 543 (1977); Note, *Public Aid to Parochial Elementary and Secondary Schools After Wolman v. Walter*, 42 ALB. L. REV. 701 (1978).

56. Buchanan, *supra* note 9, at 810.

57. 433 U.S. at 244 n.12. Providing the services off the nonpublic school premises was sufficient for the Court to hold that the services did not advance religion or involve an excessive entanglement of church with state. *Id.* at 248.

58. *Id.* at 244.

59. *Id.* at 242. Consider also Justice Marshall's view favoring general welfare, nonideological services for all students. *Id.* at 259 (Marshall, J., concurring in part, dissenting in part). *See also* Freund, *supra* note 28, at 1691.

60. 433 U.S. at 238.

61. *Id.* at 250-51. Although the Ohio statute provided that the materials would be lent directly to the student to comply with *Meek*'s invalidation of materials lent to the school, the Court rejected the statute because it was impossible to separate the secular from the sectarian educational function in the use of the materials. As a result, the concept of aid to the student rather than to the school prevails for textbooks, but, according to the Court, to validate material and equipment loan programs merely because of a "technical change in legal bailee" from the school to the student "would exalt form over substance" when the state aid inevitably supports the religious role of the schools. *Id.*

62. *Id.* at 254. The Court premised this finding on a parallel comparison of field trips and maps and charts. To illustrate the confusing distinctions, the district court upheld the field trip provision by comparing it to the bus fare reimbursements in *Everson*. Wolman v. Essex, 417 F. Supp. 1113, 1124-25 (N.D. Ohio 1976).

63. 433 U.S. at 241.

64. *See* Levitt v. Committee for Pub. Educ. & Religious Liberty, 413 U.S. 472, 480 (1973).

65. 433 U.S. at 239.

sions of the statute, the Court set the stage for *Regan*.

## II. COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY V. REGAN

The principal issue presented in *Regan* was whether cash payments made directly to nonpublic sectarian schools as reimbursement for actual costs incurred in complying with state-mandated services violated the establishment clause of the first amendment.[66] Applying the established purpose-effect-entanglement test to the New York statute's standard testing provision, the Court pointed out that there was clearly a secular purpose.[67] Recognizing that the decision in *Wolman v. Walter* controlled, Justice White, writing for the majority, stated that although the instant statute was different from the Ohio statute, "the differences [were] not of constitutional dimension."[68] Although nonpublic school personnel were to grade the state-mandated tests, the school "[did] not control the content of the test or its result"[69] and, therefore, "there was no substantial risk that the examinations could be used for religious educational purposes."[70] Labeling the attendance recording and reporting services as ministerial functions, the Court concluded that those services could not foster an ideological outlook and, as a result, they also had a secular purpose and effect.[71]

In passing on the "effect" prong, the Court dispensed with the issue of direct payments to the sectarian schools in spite of the prohibition of tax support for sectarian schools pronounced in *Everson*.[72] Recognizing that other cases had invalidated direct aid to sectarian schools,[73] the Court stated: "[G]rading the secular tests furnished by the State in this case is a function that has a secular purpose and primarily a secular effect. This conclusion is not changed simply because the State pays the school for performing the grading function."[74] After emphasizing the secular nature of the grading function, the Court rejected the argument that all aid was forbidden because aid to one aspect of a religious institution allowed that

66. 100 S. Ct. at 844, 63 L. Ed. 2d at 98-99.

67. *Id.* at 847, 63 L. Ed. 2d at 102.

68. *Id.*, 63 L. Ed. 2d at 103. The admitted distinction of the New York statute is that it provides for a direct cash reimbursement to the nonpublic schools while the statute in *Wolman* provide only for the tests and scoring services.

69. *Id.* at 848, 63 L. Ed. 2d at 104 (quoting *Wolman*, 433 U.S. at 240).

70. 100 S. Ct. at 848, 63 L. Ed. 2d at 104.

71. *Id.*

72. 330 U.S. 1 (1947); *see* notes 20-24 *supra* and accompanying text. The *Everson* Court stated: "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." 330 U.S. at 16.

73. *See, e.g.*, Meek v. Pittenger, 421 U.S. 349, 360-61 (1975); Board of Educ. v. Allen, 392 U.S. 236, 243-44 (1968). In Wolman v. Walter, 433 U.S. 229 (1977), cited by the *Regan* Court as support, the Court stated that "the schools, rather than the children, truly are the recipients of the service and, as this Court has recognized, this fact alone may be sufficient to invalidate the program as impermissible direct aid." *Id.* at 253.

74. 100 S. Ct. at 848, 63 L. Ed. 2d at 104-05.

institution to apply the freed resources to religious ends.[75]

In comparing the existing statute to an earlier version, the Court further found that the statute did not give rise to excessive entanglement.[76] Whereas the earlier statute had no method for auditing expenditure of public funds to ensure that the funds were sufficiently restricted to secular uses, the legislature had enacted the new statute with specific provision for state auditing procedures.[77] The Court found that these procedures were not an excessive government entanglement with religion because the reimbursable services were discrete and clearly identifiable.[78] Moreover, the reimbursement program was routine, with little cost variance among similarly sized schools, and therefore was subject to simple supervision.[79] Finally, the Court relegated the political divisiveness factor of the entanglement prong to a footnote, finding no merit in that contention.[80]

Addressing the claim that the decision in *Meek* prohibited all aid to sectarian schools, Justice White stated that the decision should be read more narrowly[81] to permit programs that do not have the primary effect of advancing the sectarian aims of nonpublic schools.[82] He carefully avoided overruling *Meek*, stating that the district court properly put *Meek* and *Wolman* together to sustain the reimbursement program because the program had been shown to serve a secular end without risk of transmitting religious views.[83]

In contrast to Justice White's assertion that the New York statute posed no constitutional differences to the statute approved in *Wolman*, Justice Blackmun,[84] the author of the *Wolman* decision, maintained that the "direct financial assistance provided by Chapter 507 differs significantly from the types of state aid to religious schools approved by the Court in *Wolman v. Walter*."[85] Justice Blackmun concluded that "[the statute], by providing substantial financial assistance directly to sectarian schools, has a primary effect of advancing religion"[86] and cited three instances of the Court's rejection of such assistance.[87] Furthermore, the reimbursements

75. *Id.* at 849, 63 L. Ed. 2d at 105.

76. *Id.* at 844-46, 63 L. Ed. 2d at 99-102. The predecessor to ch. 507 was challenged in Levitt v. Committee for Pub. Educ. & Religious Liberty, 413 U.S. 472 (1973), *discussed at* notes 42-44 *supra* and accompanying text.

77. 100 S. Ct. at 846, 63 L. Ed. 2d at 101.

78. *Id.* at 850, 63 L. Ed. 2d at 106.

79. *Id.*

80. *Id.* at 850 n.8, 63 L. Ed. 2d at 106-07 n.8. *See also* Wolman v. Walter, 433 U.S. 229, 243 n.11 (1977), in which the Court discussed the political divisiveness factor only in a footnote. One commentator who has claimed that *Wolman* reflected a retreat from the political divisiveness argument, can find support for that theory in *Regan*. *See* Young, *supra* note 33, at 288.

81. 100 S. Ct. at 850-51, 63 L. Ed. 2d at 107.

82. *Id.* at 851, 63 L. Ed. 2d at 107.

83. *Id.*

84. Justices Brennan and Marshall joined Justice Blackmun in dissent.

85. 100 S. Ct. at 853, 63 L. Ed. 2d at 110 (Blackmun, J., dissenting).

86. *Id.* at 854, 63 L. Ed. 2d at 111.

87. *Id.* at 851-52, 63 L. Ed. 2d at 108. Justice Blackmun cited Sloan v. Lemon, 413 U.S. 825 (1973) (tuition expense reimbursements); Committee for Pub. Educ. & Religious Liberty

covered costs that nonpublic schools must incur to secure accreditation from the state and, therefore, the reimbursements necessarily aided the sectarian school enterprise as a whole.[88] Finally, Justice Blackmun stated that state surveillance of the program and the system of reimbursement fostered excessive government entanglement with religion.[89]

Justice Stevens, in a separate dissent, stated his belief that the direct subsidies to the sectarian schools violated the establishment clause[90] and that the "high and impregnable wall between church and state" should be resurrected.[91] He criticized the Court's decision as "but another in a long line of cases making largely ad hoc decisions about what payments may or may not be constitutionally made to nonpublic schools."[92] The numerous cases heard by the Supreme Court dealing with this establishment clause issue lend credence to Justice White's contention.

## III. CONCLUSION

In *Committee for Public Education & Religious Liberty v. Regan* the United States Supreme Court upheld the constitutionality of a New York statute providing direct cash reimbursements to nonpublic sectarian schools. The Court applied a three-prong test for constitutionality and concluded that the statute had a secular purpose, had a primary effect that neither advanced nor inhibited religion, and did not foster an excessive entanglement with religion. Although the Court relied on its decision in *Wolman v. Walter*, in which it had sustained legislation providing testing materials alone to the schools, *Regan* represents a departure from *Wolman* and preceding cases by approving cash payments made directly to the nonpublic schools. Earlier cases had rationalized granting aid because it benefited the students rather than the nonpublic school, but *Regan* indicates that aid that inures to the benefit of the nonpublic school also will be allowed if a purely secular purpose can be demonstrated that presents no threat of the transmission of religious doctrines. Thus, state legislatures can anticipate a more lenient degree of scrutiny for nonpublic school aid legislation than has been experienced in the past. Nonetheless, no clear standards for drafting such legislation have evolved from the Supreme Court decisions so that evaluation of state statutes will continue to be ad hoc.

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v. Nyquist, 413 U.S. 756 (1973) (maintenance and repair programs, tuition grants); and Lemon v. Kurtzman, 403 U.S. 602 (1971) (teacher salary supplements and secular education "purchase" contracts).

88. 100 S. Ct. at 854, 63 L. Ed. 2d at 111-12.

89. *Id.*, 63 L. Ed. 2d at 112.

90. *Id.* at 855-56, 63 L. Ed. 2d at 113-14.

91. *Id.* at 856, 63 L. Ed. 2d at 114.

92. *Id.* at 855, 63 L. Ed. 2d at 113.