FOCUS ON COLLEGES, UNIVERSITIES, AND SCHOOLS
VOLUME 4, NUMBER 1, 2010

State Aid to Private Schools: A Question of Separation of Church and State

Fred C. Lunenburg
Sam Houston State University

ABSTRACT

Historically, the Supreme Court generally has prevented public tax funds from going to parochial schools. Today, however, we have seen a dramatic shift in policy. The courts have allowed tax funds to flow to religious schools. The continuing crumbling wall of separation of church and state concerning aid to parochial schools is based on the philosophical rationale enunciated by Chief Justice Rehnquist in *Wallace v. Jaffree* (1985). Rehnquist maintained that the true intent of the Establishment Clause of the First Amendment was merely to prohibit a "national religion" and to discourage the preference of any particular religion over another. According to Rehnquist, the intent of the Establishment Clause was not to create "government neutrality between religion and irreligion, nor prohibit the federal government from providing non-discriminating aid to religion." This neutrality philosophy allows state and federal tax funds to go to religious schools as long as one or a few religious sects are not given preferential treatment. In this article, I examine a number of pertinent cases pertaining to this issue.

Approximately 12 percent of all K-12 students in the United States attend private schools or home instruction (National Center for Education Statistics, 2005). Despite state constitutional provisions to the contrary, several states provide state aid to private school students, including those enrolled in parochial schools. The primary types of aid provided are for transportation, the loan of textbooks, state-mandated testing programs, special education, and counseling services. Because the use of public funds for private, primarily sectarian education have raised serious questions about the proper separation of church and state under the First Amendment, their constitutionality has been examined by the United States Supreme Court.

The Early Years

Public funds to support religious schools dates back to 1930 when the United States Supreme Court in *Cochran v. Louisiana State Board of Education* (1930) held that a state plan to provide textbooks to parochial school students does not violate the Fourteenth Amendment. The decision in *Cochran* was rendered ten years before the Supreme Court recognized in *Cantwell v. Connecticut* (1940) that the fundamental concept of "liberty" embodied in the Fourteenth Amendment incorporates First Amendment guarantees and safeguards them against state interference. Since then, supreme courts have adopted the "child benefit" doctrine in many instances to defend the appropriation of public funds for private and parochial school use.

The U.S. Supreme Court, in *Everson v. Board of Education* (1947), held that the use of public funds for transportation of parochial school children does not violate the First Amendment. The Court adopted the "child benefit" doctrine and reasoned that the funds were expended for the benefit of the individual child and not for religious purpose. Forty-one years later, the U.S. Supreme Court, in *Board of Education of Central School District No. 1 v. Allen* (1968), applied the reasoning of the *Cochran* and *Everson* cases in ruling that the loan of textbooks to parochial school students does not violate the Establishment Clause of the First Amendment. The Court reasoned that because there was no indication that the textbooks were being used to teach religion and because private schools serve a public purpose and perform a secular function as well as a sectarian function; such an expenditure of public funds is not unconstitutional.

The decision of the Supreme Court in *Allen* created many questions on the part of public and parochial school administrators throughout the nation. The Court used the public purpose theory in the Allen case "that parochial schools are performing, in addition to their sectarian function, the task of secular education." Thus, the Court reasoned that the state could give assistance to religious schools as long as the aid was provided for only secular services in the operation of parochial schools.

Many parochial school administrators interpreted this statement to mean that a state could provide funds to parochial schools for such things as teachers' salaries, operations, buildings, and so forth, as long as the parochial schools used the funds only for "public secular purposes." A plethora of bills flooded state legislatures to provide state support of parochial schools. Some were passed; others failed.

Lemon Test

At around this time, the U.S. Supreme Court, in *Lemon v. Kurtzman* (1971), was asked to rule on the constitutionality of two such statutes, one from Pennsylvania and another from Rhode Island. The Court invalidated both statutes. The Pennsylvania statute provided financial support to non-public schools by reimbursing the cost of teachers' salaries, textbooks, and instructional materials. The Rhode Island statute provided a salary supplement to be paid to teachers dealing with secular subjects in nonpublic schools. The Court found that "secular purpose" standard to be inadequate and then added another standard "excessive entanglement between government and religion."

In *Lemon v. Kurtzman*, the Supreme Court first applied a three-part test to assess whether a state statute is constitutional under the establishment clause of the First Amendment. To withstand scrutiny under this test, often referred to as the Lemon test, governmental action must (a) have a secular purpose, (b) have a primary effect that neither advances nor impedes religion, and (c) avoid excessive government entanglement with religion.

In 1973 the Supreme Court delivered three opinions regarding financial aid to private schools after *Lemon*. The U.S. Supreme Court, in *Levitt v. Committee for Public Education and Religious Liberty* (1973), invalidated a New York statute which provided that nonpublic schools would be reimbursed for expenses incurred in administering, grading, compiling, and reporting test results; maintaining pupil attendance and health records, recording qualifications and characteristics of personnel; and preparing and submitting various reports to the state. The Court stated that such aid would have the primary purpose and effect of advancing religion or religious education and that it would lead to excessive entanglement between church and state. The United States Supreme Court, in *Committee for Public Education and Religious Liberty v. Nyquist* (1973), struck down a New York statute that provided for the maintenance and repair of nonpublic school facilities, tuition reimbursement for parents of nonpublic school students, and tax relief for those not qualifying for tuition reimbursement. And the U.S. Supreme Court, in *Sloan v. Lemon* (1973) invalidated a Pennsylvania statute that provided for parent reimbursement for nonpublic school students. The Court reasoned that there was no constitutionally significant difference between Pennsylvania's tuition-granting plan and New York's tuition-reimbursement scheme, which was held to violate the Establishment Clause in *Nyquist*.

Crumbling of Support for Church-State Separation

The tripartite *Lemon* test was used consistently in Establishment Clause cases involving church-state relations issues until around 1992. A majority of the current justices, Reagan-Bush appointees to the U.S. Supreme Court, have voiced dissatisfaction with the test, and reliance on Lemon has been noticeably absent in the Supreme Court's recent Establishment Clause rulings. Support for church/state separation seems to be crumbling.

The Supreme Court has allowed increasing government support for parochial school students beginning in the 1980s. In 1980, the U.S. Supreme Court, in *Committee for Public Education and Religious Liberty v. Regan* (1980), upheld government support for state-mandated testing programs in private schools. A few years earlier, the Supreme Court ruled, in *Levitt* and later in *Meek v. Pittenger* (1975), that using state funds to develop and administer state-mandated as well as teacher-made tests was in violation of the Establishment Clause, because such tests could be used to advance sectarian purposes. In 1983, the U.S. Supreme Court, in *Mueller v. Allen* (1983), upheld a state tax benefit for educational expenses to parents of parochial school students. Ten years later the Supreme Court, in *Zobrest v. Catalina Foothills School District* (1993), held that providing state aid to sign-language interpreters in parochial schools is not a violation of

the First Amendment. This decision represented a paradigm shift toward the use of public school personnel in sectarian schools.

The U.S. Supreme Court, in *Agostini v. Felton* (1997) held that using federal education funds under Title I of the *Elementary and Secondary Education Act (ESEA) of 1965* to pay public school teachers who taught in programs aimed at helping low-income, educationally deprived students within parochial schools was allowed. This decision overruled two earlier Supreme Court decisions announced 12 years earlier, which had not allowed the practice: see *Aguilar v. Felton* (1985) and *Grand Rapids School District v. Ball* (1985). ESEA, which has gone through a number of reauthorizations since enacted in 1965, requires comparable services to be provided for eligible students attending nonpublic schools. The most recent reauthorization of ESEA is the No Child Left Behind Act of 2001. The Court in *Agostini*, for the first time, held that comparability can be achieved by permitting public school personnel to provide instructional services in sectarian schools. The Court further recognized that in *Zobrest* it abandoned its previous assumption that public school teachers in parochial schools would inevitably inculcate religion to their students or that their presence constituted a symbolic union between government and religion.

The U.S. Supreme Court, in *Mitchell v. Helms* (2000), held that using federal aid to purchase instructional materials and equipment for student use in sectarian schools did not violate the Establishment Clause. Specifically, the decision permits the use of public funds for computers, software, and library books in religious schools under Title II of ESEA federal aid program. The Court reasoned that the aid was allocated based on neutral, secular criteria that neither favored nor disfavored religion; was made available to both religious and secular beneficiaries on a nondiscriminatory basis; and flows to religious schools simply because of the private choices of parents. *Mitchell* overruled decisions in *Meek v. Pittenger* (1975) and *Wolman v. Walter* (1977) which barred state aid from providing maps, charts, overhead projectors, and other instructional materials to sectarian schools.

Conclusion

Historically, the Supreme Court generally has prevented public tax funds from going to parochial schools. Today, however, we have seen a dramatic shift in policy. The courts have allowed tax funds to flow to religious schools. The continuing crumbling wall of separation of church and state concerning aid to parochial schools is based on the philosophical rationale enunciated by Chief Justice Rehnquist in *Wallace v. Jaffree* (1985). Rehnquist maintained that the true intent of the Establishment Clause of the First Amendment was merely to prohibit a "national religion" and to discourage the preference of any particular religion over another. According to Rehnquist, the intent of the Establishment Clause was not to create "government neutrality between religion and irreligion, nor prohibit the federal government from providing non-discriminating aid to religion." This neutrality philosophy allows state and federal tax funds to go to religious schools as long as one or a few religious sects are not given preferential treatment.

References

Agostini v. Felton, 521 U.S. 203, 117 S. Ct. 1997 (1997).
Aguilar v. Felton, 473 U.S. 402, 105 S. Ct. 3232 (1985).
Board of Education of Central School District No. 1 v. Allen, 463 U.S. 388, 103 S. Ct. 3062 (1968)
Cantwell v. Connecticut, 310 U.S. 296, 60 S. Ct. 900 (1940).
Cochran v. Louisiana State Board of Education, 281 U.S. 270, 50 s. Ct. 335 (1930).
Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756, 93 S. Ct. 2955 (1973).
Committee for Public Education and Religious Liberty v. Regan, 444 U.S. 646 (1980).
Everson v. Board of Education, 330 U.S. 1, 67 S. Ct. 504 (1947).
Grand Rapids School District v. Ball, 473 U.S. 373 (1985).
Lemon v. Kurtzman, 403 U.S. 602, 91 S. Ct. 2105 (1971).
Levitt v. Committee for Public Education and Religious Liberty, 413 U.S. 472 (1973).
Meek v. Pittenger, 421 U.S. 349 (1975).
Mitchell v. Helms, 530 U.S. 793, 120 S. Ct. 2530 (2000).
Mueller v. Allen, 463 U.S. 388, 103 S. Ct. 1923 (1983).
National Center for Education Statistics (2005). *Private School Universe Survey*. Washington, DC: U.S. Department of Education.
No Child Left Behind Act of 2001, Pub. L. No. 107-110, 20 U.S.C., sec. 6301 (2002).
Sloan v. Lemon, 413 U.S. 825, 93 S. Ct. 2982, rehearing denied, 414 U.S. 881, 94 S. Ct. 30 (1973).
Wallace v. Jaffree, 472 U.S. 38, 107, 114, 105 S. Ct. 2479, 2516, 2519 (1985).
Wolman v. Walter, 433 U.S. 229 (1977).
Zobrest v. Catalina Foothills School District, 509 U.S. 1, 113 S. Ct. 2462 (1993).