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PUBLIC AID FOR PAROCHIAL SCHOOLS AND CHURCH COLLEGES: THE LEMON, DiCENSO AND TILTON CASES

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In *Everson v. Board of Education*,[1] decided in 1947, the Supreme Court of the United States for the first time held that the establishment clause of the first amendment was applicable to the states via the fourteenth amendment. Justice Black, in his celebrated opinion in that case, also gave the establishment limitation a comprehensive and far-reaching interpretation.[2] Since then, debate has continued on the question whether and to what extent government may give assistance to church-related educational enterprise, using that term here to include both schools operated by a church at the primary and secondary level, usually referred to as parochial schools, and colleges and universities affiliated with a church. Some things had become quite clear. Notwithstanding the broad no-aid language of the opinion, the precise holding in *Everson* was that states

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1. 330 U.S. 1 (1947).

2. *Id.* at 15-16:

> 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 and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State' . . . .

could subsidize bus transportation for children going to parochial as well as public and other private schools. In *Board of Education v. Allen*[3] the Court held it permissible for a state to distribute secular textbooks to children in parochial schools. The recognition that parochial schools served both secular and religious purposes and that the secular purpose could be identified and isolated for allocation of public support was important to the *Allen* holding.

These decisions left untouched the question whether government might more immediately assist parochial schools by making payments directly to them or their teachers. Whatever theory might be advanced to interpret the establishment clause or to support particular forms of state assistance which would result in some benefit to the institutions themselves, a line could be drawn between forms of assistance which would only indirectly benefit the school and which were under the control of public school authorities such as providing bus transportation, textbooks and health services, and assistance in the form of benefits directly bestowed on the institution and where the administration of the program was not under the immediate control of the public authorities such as subsidies in payment of teaching services. The argument had also been made that there were such differences between parochial schools and church colleges as to warrant governmental support for the latter while denying it to the former.[4]

The general line of doctrinal development in the interpretation of the religion clauses of the first amendment pointed to a plausible case in support of the constitutionality of public assistance to church-related schools as part of a program in support of the whole educational enterprise. In *School District of Abington Township v. Schempp*[5] the Court had put much emphasis on neutrality and had formulated the secular purpose and primary effect test.[6] It would not be difficult to devise programs whereby the government extended assistance earmarked in support of the secular aspects of the educational programs of church-related institutions. Using neutrality as a criterion and assuming that neutrality means that the religious factor will not be used as a basis of classification to benefit or hinder religion, what could be more neutral than a state

3. 392 U.S. 236 (1968).

4. *See* P. KAUPER, RELIGION AND THE CONSTITUTION 114-16 (1964); GENERAL COUNSEL OF DEPT. OF HEW, CONSTITUTIONALITY OF FEDERAL AID TO EDUCATION IN VARIOUS ASPECTS, S. DOC. No. 29, 89th Cong., 1st Sess. 23 n.18 (1965); Giannella, *Religious Liberty, Nonestablishment and Doctrinal Development Part II. The Nonestablishment Principle*, 81 HARV. L. REV. 513, 583-90 (1968).

5. 374 U.S. 203 (1963).

6. *Id.* at 222:

> The test may be stated as follows: what are the purpose and the 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.

law which extends assistance with an even hand to all schools within the state regardless of the religious factor, or one which approaches neutrality by extending limited assistance to all private schools?

In another line of reasoning, the Court had developed the "accommodation" theory pursuant to which the government may accommodate its assistance programs to the religious interests of its people and thereby serve the values protected by the free exercise clause.[7] This, too, fitted the parochial school situation. In extending assistance to all private schools, including parochial schools, the government would be recognizing and implementing parental freedom of choice. To deny these benefits to parochial schools would be using the religious factor as a basis for hampering the exercise of a fundamental right and for establishing a discriminatory classification.

The recent movement in favor of parochiaid legislation, an arrangement for the use of public funds to pay all or a part of the cost of teaching secular subjects in private schools, including parochial schools, focused new attention on the parochial school issue, and the same arguments were marshalled in support of its validity.[8] But the force of these arguments was blunted by several practical considerations. In the first place, whatever its doctrine, the Court had not yet upheld grants either directly to teachers or to the institutions themselves to pay for the cost of teaching services. This would be a step beyond *Everson* and *Allen.* Moreover, state constitutions on the whole reflect a general policy of opposition to direct public support of parochial schools.[9]

Another cloud appeared on the horizon when the Supreme Court in *Walz v. Tax Commission,*[10] upholding the constitutionality of the property tax exemption for property used for religious purposes, formulated the "excessive entanglements" test as a further or even overriding con-

7. *See* Kauper, *Schempp and Sherbert: Studies in Neutrality and Accommodation,* 1963 RELIGION & PUB. ORDER 3, 10-23.

8. For discussions pro and con on the parochial school issue, see V. BLUM, FREEDOM OF CHOICE IN EDUCATION (rev. ed. 1963); W. KATZ, RELIGION AND AMERICAN CONSTITUTIONS 72-75 (1963); P. KAUPER, *supra* note 4, at 109-13; L. PFEFFER, CHURCH, STATE AND FREEDOM 509-604 (rev. ed. 1967); Choper, *The Establishment Clause and Aid to Parochial Schools,* 56 CALIF. L. REV. (1968); Drinan, *The Constitutionality of Public Aid to Parochial Schools,* in THE WALL BETWEEN CHURCH AND STATE 55-72 (D. Oaks ed. 1963); Freund, *Public Aid to Parochial Schools,* 82 HARV. L. REV. 1680 (1969); Giannella, *Religious Liberty, Nonestablishment and Doctrinal Development Part II: The Nonestablishment Principle,* 81 HARV. L. REV. 513 (1968); Gordon, *The Unconstitutionality of Public Aid to Parochial Schools,* in THE WALL BETWEEN CHURCH AND STATE 73-94 (D. Oaks ed. 1963); Jones, *The Constitutional Status of Public Funds for Church-Related Schools,* 6 J. CHURCH & ST. 61 (1964); Schwarz, *No Imposition of Religion: The Establishment Clause Value,* 77 YALE L.J. 692 (1968); Stanmeyer, *Free Exercise and the Wall: The Obsolescence of a Metaphor,* 37 GEO. WASH. L. REV. 223 (1968); Valente, *Aid to Church-Related Education—New Directives Without Dogma,* 55 VA. L. REV. 579 (1969); Valente & Stanmeyer, *Public Aid to Parochial Schools—A Reply to Professor Freund,* 59 GEO. L.J. 59 (1970).

9. *See* C. ANTIEAU, P. CARROL & I. BURKE, RELIGION UNDER THE STATE CONSTITUTIONS, 23-50 (1965).

10. 397 U.S. 664 (1970).

sideration in the interpretation of the establishment language.[11] Chief Justice Burger, writing for the Court in *Walz*, said that a policy of exempting churches from property taxation tended to minimize the kinds of entanglement between church and state which the Constitution sought to avoid and which would result if property used for religious purposes were subject to taxation. At the same time, as if suggesting a preview of the cases involving governmental subsidies for church-related educational institutions, various members of the Court in *Walz* chose to point up the difference between tax exemptions and direct subsidies. It was clear that the entanglements test would play an important role in the arguments before the Supreme Court in the cases involving government assistance to church-related enterprises.

Three cases dealing with such assistance were already in the federal courts at the time of the *Walz* decision. In *Tilton v. Finch*[12] the plaintiffs challenged the constitutionality of grants for capital purposes, under Title I of the Higher Education Facilities Act,[13] to four Catholic colleges in the State of Connecticut.[14] The other two cases involved state legislation which embodied what were essentially parochiaid schemes although they took different forms. The Pennsylvania statute,[15] challenged in *Lemon v. Kurtzman*,[16] authorized payment of public funds to nonpublic schools for teachers' salaries attributable to, and textbooks and instructional materials used in the teaching of specified secular subjects. It was based on the theory that the state was contracting to purchase secular educational services from the private schools. The Rhode Island statute,[17] challenged in *DiCenso v. Robinson*,[18] took a different form. It authorized state officials to pay a 15 percent salary supplement directly to teachers in schools at which the average per-pupil expenditure on secular education was below the average in public schools. As supplemented, a non-public school teacher's salary could not exceed the maximum paid to teachers in the state's public schools, and the recipient was required to be certified by the state board of education in substantially the same manner as public school teachers. Both the Pennsylvania and Rhode Island statutes con-

11. *See* Katz, *Radiations from Church Tax Exemption*, 1970 S. CT. REV. 93; Kauper, *The Walz Decision: More on the Religion Clauses of the First Amendment*, 69 MICH. L. REV. 179 (1970).

12. 312 F. Supp. 1191 (D. Conn. 1970) (3-judge panel), *vacated*, 403 U.S. 672 (1971).

13. 20 U.S.C. §§ 701-58 (1964).

14. The grants were to the following institutions for the purposes indicated: a library at Sacred Heart University; a music, drama, and arts building at Annhurst College; a science building and a library at Fairfield University; and a language laboratory at Albertus Magnus College. 403 U.S. at 676.

15. The Pennsylvania Nonpublic Elementary and Secondary Education Act, 24 PA. STAT. ANN. §§ 5601-09 (Supp. 1969).

16. 310 F. Supp. 35 (E.D. Pa. 1969) (3-judge panel), *rev'd*, 403 U.S. 602 (1971).

17. The Rhode Island Salary Supplement Act of 1969, R.I. GEN. LAWS § 16-51 (Supp. 1970).

18. 316 F. Supp. 112 (D.R.I. 1970) (3-judge panel), *aff'd*, 403 U.S. 602 (1971).

tained restrictions designed to prevent use of the authorized payments for religious purposes and, as revealed by the analysis of the *Lemon* and *DiCenso* opinion which follows, these restrictions played an important part in the disposition of the cases.

The three-judge court in *Tilton*, after a hearing on the merits, upheld the constitutionality of the federal statute in its application to the grants in question.[19] In reaching this result it utilized a straightforward application of the secular purpose and primary effect test stated in *Schempp*. Similarly the federal court in *Lemon*, with Judge Hastie dissenting, upheld the Pennsylvania parochiaid statute by applying the *Schempp* test.[20] Both *Tilton* and *Lemon* preceded the Supreme Court decision in *Walz* and nothing was said, therefore, about "entanglements." It is important also to note that the Pennsylvania case arose on the pleadings. The three-judge court granted a motion to dismiss the complaint which attacked the constitutionality of the act and requested an injunction against payments to parochial schools under the authority of the act.

Importantly, the three-judge federal court convened to hear the attack on the Rhode Island statute in *DiCenso* conducted a hearing on the merits and rendered its opinion after the *Walz* decision. Its findings, in terms of "entanglements," proved later to be of crucial importance. Finding that teachers in Catholic parochial schools would be the chief beneficiaries of the salary supplement plan, the three-judge court focused its attention on the nature and purpose of parochial schools in the total program of the Catholic church. Although the court found that concern for religious values did not necessarily affect the content of secular subjects, it also found that the parochial school system was "an integral part of the religious mission of the Catholic Church."[21] Two members of the court, rejecting the *Schempp* test as unworkable, were ready to find the statute invalid on the ground that it had the impermissible effect of giving "significant aid to a religious enterprise."[22] All three members of the court concluded that the act violated the establishment clause because it fostered "excessive entanglement" between government and religion. To support this conclusion the court noted the obligation not to teach any courses in religion assumed by teachers who received the supplemental payments, the impact the statute had already had on the freedom of teachers, and the subjection of school records to audits by state authorities. Finally, the court dwelt on the notion that this would be the beginning of a series of increasing annual subsidies. The court noted that the ensuing political controversy had given rise to divisions along religious lines—one of the very things that the first amendent was designed to preclude. Accordingly, the court held that the plaintiffs were entitled to a declara-

19. Tilton v. Finch, 312 F. Supp. 1191 (D. Conn. 1970) (3-judge panel).
20. Lemon v. Kurtzman, 310 F. Supp. 35 (E.D. Pa. 1969) (3-judge panel).
21. 316 F. Supp. at 117.
22. *Id.* at 120.

tory judgment that the Rhode Island statute violated the first amendment to the extent that it authorized aid to teachers employed by denominational schools, and to an injunction forbidding defendants and their agents from making disbursements to such teachers.[23]

The *Tilton, DiCenso* and *Lemon* cases were scheduled for concurrent argument before the Supreme Court.[24] It was evident from the briefs and oral arguments before the Court that the parties expected the "entanglement" factor to play a major role in these cases. The two decisions handed down in June 1971 confirmed this expectation.

In the first opinion, which encompassed both *Lemon* and *DiCenso,* the Court, with Chief Justice Burger delivering the opinion, held both the Rhode Island and Pennsylvania parochiaid schemes unconstitutional as violative of the establishment clause.[25] Accordingly, the Court affirmed *DiCenso* and reversed and remanded *Lemon* for further proceedings consistent with the opinion.[26] Justice White was the sole dissenter.[27] In *Tilton,* the second opinion, the Court by a five-to-four vote sustained the constitutionality of the federal grants for capital purposes to the four Catholic colleges in Connecticut.[28]

23. DiCenso v. Robinson, 316 F. Supp. 112 (D.R.I. 1970). The decree prohibited payments to teachers in all denominational schools, even though the court's findings related only to Roman Catholic parochial schools. The court thus left the statute intact with respect to supplementary payments to teachers in nonparochial private schools.

24. The Rhode Island case originated as *DiCenso v. Robinson.* Earley, a parent of children in parochial schools, was permitted to intervene. Both Robinson and Earley appealed the decision, so that nominally they were companion cases before the court on the validity of the Rhode Island statute. *DiCenso* will be used to designate these two cases throughout the text.

25. Lemon v. Kurtzman, 403 U.S. 602 (1971).

26. Although Chief Justice Burger said that both the Rhode Island and Pennsylvania statutes were unconstitutional, it is not clear that the effect of the Court's decisions is to declare both statutes void on their face. The Court affirmed the lower court's decision in *DiCenso* which declared the Rhode Island scheme invalid in its application to all denominational schools. Theoretically, then, the statute may still be operative with respect to nondenominational private schools. *See* note 23 *supra.* The impact of the decision on the Pennsylvania statute is also unclear. The case was decided on the basis of the findings in *DiCenso* respecting Roman Catholic schools in Rhode Island and was remanded to the three-judge court. Presumably, the court on remand could proceed to issue an injunction against any payments under the statute to Roman Catholic schools, or more broadly to any denominational schools, or on a theory of nonseparability, enjoin enforcement of the statute entirely. It does not appear that the trial court is now free to conduct a hearing to determine whether the evidence supports the plaintiff's allegations.

27. Mr. Justice White actually voted to remand in *Lemon,* but for the purpose of a hearing to determine whether, as applied to the facts of this case, the Pennsylvania statute financed and participated in the blending of sectarian and secular instruction.

28. 403 U.S. 672 (1971). While the Court, in substance, affirmed the judgment of the three-judge district court below, it ordered a remand to the district court with directions to enter a judgment consistent with the Court's opinion which declared one section of the federal statute unconstitutional, as will be noted in the discussion of *Tilton* in the text accompanying notes 51-62 *infra.* Chief Justice Burger delivered the judgment of the Court in an opinion joined by Justices Harlan, Stewart and Blackmun. Justice White concurred in a separate opinion. Justice Douglas, joined by Justices Black and Marshall, and Justice Brennan dissented. *Tilton* was treated as a separate case and gave rise to a separate opinion, although the *Tilton* opinion by the Chief Justice necessarily took *Lemon* and *DiCenso* into account.

This article will analyze the *Lemon-DiCenso* and *Tilton* cases, evaluate their doctrinal significance, and assess their practical significance with respect to governmental support of church-related educational enterprise.

LEMON-DICENSO: AN ANALYSIS

Chief Justice Burger, writing for the Court in *Lemon-DiCenso,* remarked at the outset that "[c]andor compels acknowledgment that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law."[29] Drawing on his opinion in *Walz,*[30] he said that in the absence of precisely stated constitutional prohibitions, the Court must draw lines with reference to the three main evils against which the establishment clause was intended to afford protection: "sponsorship, financial support, and active involvement of the sovereign in religious activity."[31] He then referred to the tests gleaned from the cases: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . finally the statute must not foster 'an excessive government entanglement with religion.' "[32]

Starting with these premises as its point of departure, the Court proceeded to analyze the Rhode Island and Pennsylvania programs. Apparently it was satisfied that the statutes were designed to achieve secular purposes since they clearly stated that the intent was to enhance the quality of secular education in all schools covered by compulsory attendance laws. Drawing at this point on its holding in *Allen,*[33] the Court said that in the abstract it could have no quarrel with the conclusion of the Rhode Island and Pennsylvania legislatures that secular and religious education are identifiable and separable.

It was unnecessary, however, to consider whether, in view of the significant religious mission and substantial religious activities of church-related elementary and secondary schools, the statute had a principal or primary effect that did not advance religion. The Chief Justice bypassed this question since, turning to the third test, he concluded "that the cumulative impact of the entire relationship arising under the statutes in each State involves excessive entanglement between government and religion."[34]

On the philosophy of the "excessive entanglements" criterion the Chief Justice said that the objective was to prevent, as far as possible, the

29. 403 U.S. at 612.
30. Walz v. Tax Comm'n, 397 U.S. 664 (1970). See text accompanying note 10 *supra.*
31. 403 U.S. at 612.
32. *Id.* at 612-13.
33. Board of Educ. v. Allen, 392 U.S. 236 (1968). See text accompanying note 3 *supra.*
34. 403 U.S. at 614.

intrusion of either the state or religious institutions into the precinct of the other. He recognized that total separation in an absolute sense was not possible—that some form of contact between the government and parochial schools is necessary and permissible[35]—and that to determine whether the government entanglement with religion is excessive, "we must examine the character and purposes of the institutions which are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority."[36]

The Court then turned to its examination of the Rhode Island and Pennsylvania programs. It is important to follow the Chief Justice's method of attack at this point. He started with the Rhode Island statute before the Court in *DiCenso* where a trial had been conducted, a record compiled and findings made. The lower court had made the finding that parochial schools were "an integral part of the religious mission of the Catholic Church."[37] The Court summarized this point by saying that "parochial schools involve substantial religious activity and purpose."[38] The substantial religious character of these schools gave rise to entangling church-state relationships of the kind the religion clauses sought to avoid. The Rhode Island scheme took the form of payment of salaries of teachers. The Court said it could not ignore the dangers that a teacher under religious control and discipline posed to the separation of the religious from the purely secular aspects of pre-college education. "The teacher is employed by a religious organization, subject to the direction and discipline of religious authorities, and works in a system dedicated to rearing children in a particular faith."[39] A dedicated teacher, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, would inevitably experience great difficulty in remaining religiously neutral. The potential for impermissible fostering of religion would be always present.

The state had to be certain that subsidized teachers did not inculcate religion, and, therefore, it carefully conditioned its aid with pervasive restrictions. To be eligible for the salary supplement the teacher could teach only those courses that were offered in the public schools and use only those texts and materials utilized in the public schools. Moreover, the teacher must have agreed that he would not teach any courses in religion. In the Court's view, these restrictions, aimed at the very purpose of preventing the blending of the secular and the religious, proved to be the undoing of the system, since these restrictions introduced entangling relations. "A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are

35. *Id.*
36. *Id.* at 615.
37. 316 F. Supp. at 117.
38. 403 U.S. at 616.
39. *Id.* at 618.

obeyed and the First Amendment otherwise respected . . . . These prophylactic contacts will involve excessive and enduring entanglement between state and church."[40] Moreover, the financial reporting requirements and state inspections of school records to determine how much of a school's total expenditure was attributable to secular education and how much to religious activity created a relationship "pregnant with dangers of excessive governmental direction of church schools and hence of churches."[41]

Having concluded that the Rhode Island statute was unconstitutional, at least in its application to Catholic parochial schools,[42] the Court then turned its attention to the Pennsylvania statute before it in *Lemon* and proceeded to dispose of it rather summarily. Since *Lemon* had been decided on the pleadings, there was no record compiled in the trial court portraying the nature and purpose of parochial schools in Pennsylvania, or bearing on the question whether it was possible to keep the secular aspects separate from the religious. Nevertheless, because the plaintiffs had alleged that the church-related elementary and secondary schools were controlled by religious organizations, which had the purpose of propagating and promoting a particular religious faith and which operated the school system to fulfill this purpose, the Court said that the complaint "describe[d] an educational system very similar to the one existing in Rhode Island."[43] The record compiled in *DiCenso*, however, was devoted entirely to Roman Catholic schools in Rhode Island.[44] In effect, the Court in *Lemon* employed the Rhode Island findings to establish a profile of a parochial school which it used in passing judgment on the Pennsylvania plan even though other parochial schools besides Catholic schools were receiving payments in Pennsylvania.[45] This is interesting and remarkable since the Chief Justice in his opinion in *Tilton* expressly rejected the profile approach in dealing with the church college problem.[46] Having decided that parochial schools in Pennsylvania conformed to the pattern of Catholic parochial schools in Rhode Island, the Chief Justice then found the same risks of entanglement in the administration of the statute. Under the Pennsylvania scheme, which was based on the theory of reimbursing private schools for the costs of teaching secular subjects and supplying materials for secular courses, reimbursement was limited to courses of-

40. *Id.* at 619.
41. *Id.* at 620.
42. See notes 23 & 26 *supra.*
43. 403 U.S. at 620.
44. It appears from the findings of the three-judge district court that teachers in Catholic parochial schools were the only private school teachers who had applied for the salary supplement payments. DiCenso v. Robinson, 316 F. Supp. 112, 115 (1970).
45. Included among the schools which had contracted with the state for the purchase of secular educational services under the statute and which were named defendants in the *Lemon* suit were the Akiba Hebrew Academy and Beth Jacobs Schools of Philadelphia and Germantown Lutheran Academy. 310 F. Supp. at 38-39.
46. See text accompanying note 56 *infra.*

fered in the public schools and materials approved by state officers. The statute excluded "any subject matter expressing religious teaching or the morals or forms of worship of any sect." Schools seeking reimbursement were required to maintain accounting procedures that required the state to establish the cost of the secular as distinguished from the religious instruction. Moreover, as emphasized by the Court, under the Pennsylvania scheme state financial aid went directly to the church-related schools, as distinguished from the aid to students and parents in *Everson* and *Allen*. "The history of government grants of a continuing cash subsidy indicates that such programs have almost always been accompanied by varying measures of control and surveillance."[47]

Finally, in respect to both the Rhode Island and Pennsylvania statutes, the Chief Justice noted that "[a] broader base of entanglement of yet a different character is presented by the divisive political potential of these state programs."[48] The controversies over the annual subsidy which was likely to increase each year had produced political debates and discussions whereby groups had become aligned against each other along religious lines. The Constitution was intended to remove questions like this from politics.

The Chief Justice then concluded his opinion as follows:

> Under our system the choice has been made that government is to be entirely excluded from the area of religious instruction and churches excluded from the affairs of government. The Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that while some involvement and entanglement is inevitable, lines must be drawn.[49]

Thus, the Rhode Island and Pennsylvania schemes were held to run afoul of the establishment clause, since the substantial religious character of these schools created a risk of impermissible entanglement in any legislative program to compensate the teacher or to reimburse the school for the teaching of secular subjects.[50]

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47. 403 U.S. at 621.
48. *Id.* at 622.
49. *Id.* at 625.
50. Although Justice Douglas joined the Court's opinion, he expressed at length his views as to the rationale of the decision in a separate concurring opinion in which Justice Black joined. While he agreed that the surveillance needed to police the grants would result in excessive entanglements, he placed principal stress on the proposition that since everything taught in parochial schools is directed to the ultimate goal of religious education, a state may not finance the secular part of a sectarian school's educational program.

Justice Marshall, who did not participate in the *Lemon* decision, concurred in Justice Douglas's opinion in *DiCenso*, although in so doing he intimated no view as to the continuing vitality of the *Everson* case.

Mr. Justice Brennan, who concurred in the result in *DiCenso* and *Lemon* but dissented from the holding in *Tilton*, wrote a single opinion dealing with these cases. He devoted a major part of his opinion to the history of sectarian education in this country and made the point that "for more than a century, the consensus, enforced by legislature and courts with substantial consistency, has been that public subsidy of

TILTON: AN ANALYSIS

Tilton v. Richardson involved a challenge to capital grants, under Title I of the Federal Higher Education Facilities Act of 1963, to assist in the construction of academic facilities used for secular purposes at four Catholic colleges in Connecticut.[51] The Act authorizes federal grants and loans for the construction of a wide variety of "academic facilities" but expressly excludes "any facility used or to be used for sectarian instruction or as a place of religious worship or . . . any facility which . . . is used or to be used primarily in connection with any part of the program of a school or department of divinity."[52] Attention is focused here on the plurality opinion by Chief Justice Burger—an opinion joined by Justices Harlan, Stewart and Blackmun.[53]

Turning to the initial question whether the statute authorized grants to church-related colleges, the Chief Justice said it was clear that the intent of Congress was to include within the act all colleges and universities regardless of any affiliation with or sponsorship by a religious body. Four constitutional questions were raised: whether the act reflected a secular legislative purpose; whether the primary effect of the act was to advance or inhibit religion; whether the administration of the act fostered an excessive government entanglement with religion; and whether the implementation of the act inhibited the free exercise of religion.

The first question was easily answered. The stated legislative purpose was expressed in the preamble of the act, where Congress declared that in order to insure the fullest development of the intellectual capacities of present and future generations of American youth, the nation's colleges and universities must be encouraged and assisted in their efforts to accommodate the growing numbers of aspirants to higher education.[54] This legislative ideal, stated the Court, was the expression of a legitimate secular objective entirely appropriate for governmental action.

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sectarian schools constitutes an impermissible involvement of secular with religious institutions." 403 U.S. at 648-49. General subsidies of religious activities constitute impermissible state involvement with religion. He said he did not interpret prior cases to mean that a state could support the secular aspects of parochial school education. To support quality secular teaching is to support the whole religious enterprise since this is an integral part of the enterprise.

Mr. Justice White, who wrote a separate opinion directed to the three cases, dissented from the holding in *DiCenso* and also from the holding in *Lemon* insofar as it held the Pennsylvania statute invalid on its face in its application to parochial schools. Stressing the constitutional right of parents to send their children to private schools, sectarian or otherwise, he said that the prior decisions had recognized that parochial schools perform dual functions and that it was enough for him that the states were financing what he regarded as a separable secular function of overriding importance.

51. 403 U.S. 672 (1971). See note 13 and accompanying text *supra*.

52. 20 U.S.C. § 751(a)(2) (1970).

53. Justice White, whose concurring vote was essential to the majority holding, stated in his separate opinion that he concurred in the judgment in *Tilton*. See note 50 *supra* & note 62 *infra*.

54. 20 U.S.C. § 701 (1970).

On the question of whether the primary effect of the act was to advance or inhibit religion, the Chief Justice first observed that the simplistic argument that the religion clauses are violated by every form of financial aid to church-sponsored activity had been rejected long ago in *Bradfield v. Roberts*,[55] which upheld a federal construction grant to a hospital operated by a religious order. The crucial question was not whether a religious institution benefited as a consequence of the legislative program, but whether its principal or primary effect advanced religion. The act itself was carefully drafted to ensure that the subsidized facilities would not be devoted in any way to the religious function of recipient institutions. It authorized grants and loans for academic facilities only where such facilities would be used for defined secular purposes and expressly prohibited their use for religious instruction, training or worship. These restrictions, the Court found, were enforced in the actual administration of the funding program; indeed, certain church-affiliated institutions had been required to disgorge benefits for failure to obey the restrictions. Furthermore, the finding of the district court that none of the four institutions under discussion had violated the statutory restrictions was fully supported by the record.

Turning then to the argument that government may not subsidize any activities of an institution of higher learning which in some of its programs teaches religious doctrine, the Chief Justice said that the appellants' position depended upon the validity of the proposition that the secular education provided by church-related colleges and universities was so permeated by religion that their religious and secular educational functions were in fact inseparable. He noted, however, that Congress had not found this argument persuasive and also that the Court in *Allen* had refused to assume that religiosity necessarily permeated the secular education provided in parochial elementary and secondary schools. Furthermore, the record here provided no basis for such an assumption. He then referred to the nature of the buildings financed and said that there was no evidence that religion seeped into the use of any of these facilities.

Continuing, the Chief Justice referred to the interesting argument advanced by the appellants in which they sought to shift the Court's attention to a "composite profile" that they had constructed of the "typical sectarian" institution of higher education. "We are told that such a 'composite' institution imposes religious restrictions on admissions, requires attendance at religious activities, compels obedience to the doctrine and dogmas of the faith, requires instruction in theology and doctrine, and does everything it can to propagate a particular religion."[56] Conceding that perhaps some church-related schools fitted the pattern that appellants described, he noted that some colleges had been declared ineligible for aid

55. 175 U.S. 291 (1899).
56. 403 U.S. at 682.

by the authorities that administered the act. Asserting that individual projects could be scrutinized on a case-by-case basis if and when questions were raised and evidence presented regarding the characteristics to which appellants had alluded hypothetically, Chief Justice Burger refused to strike down the act on the basis of an imaginary profile.

There was, however, one aspect of the statute which the Court decided was in need of correction. The statute provided that if a recipient institution violated any of the statutory restrictions on the use of a federally financed facility, the government would be permitted to recover an amount equal to the proportion of the facility's present value which the federal grant bore to its original cost. But this remedy was effective only if the statutory conditions were violated within 20 years after completion of construction.[57] Insofar as the 20-year limitation on the statutory restrictions made it possible for the building to be used after 20 years for religious purposes, it was unconstitutional, and the Court accordingly deleted the 20-year limitation.

Having satisfied itself that there was a primary effect which neither encouraged nor discouraged religion and that the secular and religious functions could be separated, the plurality opinion then turned to the question of whether the relationship between government and church under the act was characterized by excessive entanglements. Pointing to the substantial differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools, the Chief Justice said that whereas one of the dominant purposes of the instruction in pre-college church schools was to promote adherence to a particular faith, there was substance to the contention that college students are less impressionable and less susceptible to religious indoctrination. The skepticism of the college student is a considerable barrier to any attempt or tendency to subvert the objectives and limitations of Congress. Furthermore, the opportunities for sectarian influence in college and post-graduate courses are limited by virtue of their internal disciplines. Finally, many church-related institutions of higher education seek to evoke free and critical responses from their students and are characterized by a high degree of academic freedom. The record did not support a conclusion that any of the four institutions involved departed from this general pattern.

While all four schools were governed by Catholic organizations and the faculty and student body of each were predominantly Catholic, non-Catholics were admitted as students and appointed to the faculty. Students of the four institutions were not required to attend religious services. The parties stipulated that the theology courses required at each institution were taught according to the academic requirements of the subject

57. 20 U.S.C. § 754(a)&(b) (1970).

matter and the teacher's concept of professional standards. Evidence was introduced to show that the schools made no attempt to indoctrinate students or to proselytize. Finally, the Court emphasized that the four institutions subscribed to well-established principles of academic freeom, and that nothing in the record showed that they had not in fact followed those principles. "In short, the evidence shows institutions with admittedly religious functions but whose predominant higher education mission is to provide their students with a secular education."[58]

Since religious indoctrination was not a substantial purpose of the church-related institutions, there was less likelihood than in elementary and secondary schools that religion would permeate the realm of secular instruction. Thus, the risk that government aid would in fact serve to support religious activities was accordingly lessened. Correspondingly, the need for governmental surveillance was diminished. The effect was a minimization of entanglements between government and religion, a result supported by the nonideological character of the aid. Since the facilities were in themselves religiously neutral, the risk of governmental aid to religion and the corresponding need for surveillance were reduced.

The final determinative factor persuading the Court that government entanglements with religion were reduced was the circumstance that unlike the direct and continuing payments under the Pennsylvania plan, and the attendant regulation and surveillance, the aid in this case was a one-time, single-purpose construction grant. Under the Higher Education Facilities Act of 1963 "[t]here are no continuing financial relationships or dependencies, no annual audits, and no government analysis of an institution's expenditures on secular as distinguished from religious activities. Inspection as to use is a minimal contact."[59] While none of these factors standing alone was controlling, cumulatively they shaped a narrow and limited relationship with government which involved fewer and less significant contacts than the state schemes in *Lemon* and *DiCenso*. Such facts also substantially lessened the potential for divisive religious fragmentation in the political arena. Recognizing the difficulty of documenting this conclusion, the Chief Justice noted that the appellants had not shown any continuing religious aggravation on this subject in the political processes. This could possibly be explained by the character and diversity of the recipient colleges and universities, coupled with the absence of any intimate continuing relationship or dependency between the government and the religiously affiliated institutions. "The potential for divisiveness inherent in the essentially local problems of primary and secondary schools is significantly less with respect to a college or university whose student constituency is not local but diverse and widely dispersed."[60]

58. 403 U.S. at 687.
59. *Id.* at 688.
60. *Id.* at 688-89.

In the closing part of his opinion the Chief Justice briefly disposed of the argument that the implementation of the federal statute violated the free exercise clause. Rejecting the appellants' claim that the obligation to pay taxes to finance grants under the act was a violation of their religious freedom, he said that the appellants were "unable to identify any coercion directed at the practice or exercise of their religious beliefs," and that "[t]heir share of the cost of the grants under the Act is not fundamentally distinguishable from the impact of the tax exemption sustained in *Walz* or the provision of textbooks upheld in *Allen*."[61]

Accordingly, the Court, by a narrow five-to-four vote, upheld the constitutionality of Title I of the Higher Education Facilities Act in its application to the grants for academic facilities to the four Catholic colleges before the Court, subject to the Court's action in deleting the 20-year limitation on the use of the property for religious purposes.[62]

DOCTRINAL SIGNIFICANCE OF THE CASES

What, if anything, do these cases contribute to the theories developed in the interpretation of the religion clauses of the first amendment and more particularly of the establishment clause? The Court recognized that the problems presented admitted of no easy solutions. Chief Justice Burger said that candor compelled acknowledgment that the Court "can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law,"[63] and characterized the language of the religion clauses of the first amendment as "at best opaque."[64] Likewise, he recognized the internal tension in the first amendment between the establishment and free exercise clauses. It follows that the Chief Justice

61. *Id.* at 689.

62. Mr. Justice Douglas wrote a dissenting opinion joined by Justices Black and Marshall. He saw no difference between these colleges and parochial schools so far as sectarian purposes were concerned, and characterized as sophistry the plurality opinion's distinction between annual subsidies to parochial schools and the one-time capital grant to the church colleges. Mr. Justice Brennan in the part of his opinion dissenting from the *Tilton* holding said "the Establishment Clause forbids the Federal Government to provide funds to sectarian universities in which the propagation and advancement of a particular religion are a function or purpose of the institution." Lemon v. Kurtzman, 403 U.S. 602, 659 (1971). On the entanglements issue he saw no substantial difference between telling a sectarian university not to teach any nonsecular subjects in a building financed with federal funds and a state telling Catholic teachers in parochial schools not to teach religion. In his view the case should have been remanded to the district court to determine whether the appellees were "sectarian" institutions.

Mr. Justice White who dissented from the holdings in *Lemon* and *DiCenso* and concurred in the *Tilton* holding saw no essential difference between governmental support of the secular purposes of parochial schools and governmental support of the secular purposes of church colleges. He characterized as makeweight the argument that college students are more resistant to indoctrination, could not understand why the Court thought college clerics were more reliable in keeping their promises than parochial school teachers, and was not impressed by the emphasis in the plurality opinion on the differences between one-time grants and annual subsidies.

63. 403 U.S. at 612.

64. *Id.*

in the *Lemon-DiCenso* and *Tilton* cases, as in his *Walz* opinion, rejected an absolutist interpretation of the establishment clause. He did not start with a "wall of separation." According to the Chief Justice, "[T]otal separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable . . . . Judicial caveats against entanglement must recognize that the line of separation, far from being a 'wall,' is a blurred, indistinct and variable barrier . . . ."[65]

The No-Aid Doctrine

The broad and now discredited no-aid-to-religion doctrine of *Everson* gets no support from these cases. The grants to the colleges in *Tilton* were upheld even though they were made to institutions which served religious purposes and which played a significant role in a total religious enterprise. The fact alone that some benefits redounded to religious activities from governmental programs was not determinative. This aspect of the governing opinion was significantly highlighted both by the Court's failure in *Lemon* and *DiCenso* to rest its decision on the basis that aid to parochial schools had the effect of giving "significant aid to a religious enterprise," and by the contrasting views expressed in the separate opinions of Justices Douglas and Brennan.[66]

Neutrality

In his opinions in both the parochial schools and church colleges cases, the Chief Justice emphasized three tests which have emerged over the years bearing on the question of establishment: (1) the statute must have a secular legislative purpose; (2) the principal or primary effect must be one that neither advances nor inhibits religion; and (3) the statute must not foster an excessive government entanglement with religion.

This statement of the controlling criteria is significant for several reasons. The *Schempp* test, ignored in *Walz*,[67] is now broken into two separate parts and restored to its pre-*Walz* significance. Spending in aid of secular programs of church-related educational institutions is recognized to be an appropriate exercise of governmental power. On the other hand, the neutrality standard, mentioned so frequently in the *Walz* opinion, received no substantial emphasis from the Chief Justice in the recent cases. This is understandable for if strict neutrality is the controlling and, indeed, overriding criterion, the Court could not have justified a result in the parochial school cases which required the states to discriminate against denominational schools in the dispensation of public funds for educational programs which served public purposes. The result of the Court's

65. *Id.* at 614.
66. See notes 50 & 62 *supra.*
67. *See* Kauper, *supra* note 11, at 200-01.

decision is that a state is free to give direct aid to all private schools at the elementary and secondary levels except parochial schools. One is led to wonder, however, why the Chief Justice failed to emphasize "neutrality" in his opinion in *Tilton*, where it obviously applied in a clear way and was peculiarly relevant to the result reached. It may be that these recent cases herald a significant decline in the neutrality standard. In any event, it is now subordinate to the entanglements criterion.

Accommodation

The accommodation idea fared even worse in these cases. The Court paid no serious attention to the notion that since all children are required to attend school up to a certain level, and since parents have a constitutional right to send their children to parochial schools, therefore a proper regard for the balancing of establishment against free exercise limitations would suggest that the Court give some weight to the constitutional freedom of the parents in deciding the issue. Mr. Justice White, in his dissent, was alone in making this point.[68] The other members of the Court, in resolving the tension between free exercise and establishment, chose the establishment limitation as the dominant consideration. The Court impliedly rejected the argument, premised on *Sherbert v. Verner*,[69] that a state's policy of discriminating in the disbursement of tax funds for educational purposes against parents who elect to send their children to parochial schools imposes an indirect and constitutionally impermissible burden on the free exercise of religion.[70] At this point, claims under the free exercise clause yield to the constraints imposed by the establishment clause.

What emerges is that the entanglements concept, first stressed in *Walz*, is assuming an ascending significance. Entanglement is now employed by the Court as a criterion independent of other criteria previously developed. A program which results in benefits to churches or to church-related organizations, even though it can otherwise be upheld on secular purpose, neutrality or accommodation theories, may nevertheless be invalid under the establishment clause if its administration either requires or poses the risk of excessive intrusion by the civil government into religious matters. To put the matter another way, the government in taking actions which in one way or another are supportive of religious activity cannot permit itself to become substantially involved in the administration or surveillance of the internal affairs of a religious organization.

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68. See note 50 *supra*.
69. 374 U.S. 398 (1963).
70. *See* Duval, *The Constitutionality of State Aid to Nonpublic Elementary and Secondary Schools*, 1970 U. ILL. L.F. 342, 360-62; Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680 (1969); Valente & Stanmeyer, *Public Aid to Parochial Schools—A Reply to Professor Freund*, 59 GEO. L.J. 59 (1970).

Secular Purpose, Primary Effect and Entanglements

The Court's use of the primary effect test, along with the entanglements factor, gets to the crux of these cases and also creates the greatest difficulties in assessing their ultimate impact. In *Lemon-DiCenso* the Court said that it was unnecessary to consider the primary effect question, since it found "excessive entanglements." The Court, therefore, found it unnecessary to resolve in a clear way the ambiguity inherent in the statement of the primary effect test: does the aid have a primary effect that neither advances nor inhibits religion? This can mean that so long as it has a primary effect which advances the secular purpose, it satisfies the test, regardless of how much it also advances religion, and, conversely, that if it has a primary effect which advances religion, the aid is invalid, regardless of how much it also advances a secular purpose. This analysis proceeds on the assumption that there can be only one "primary effect." But may not a program have two substantial effects—secular and religious—either of which could be labeled "primary"? In that case should not the aid program satisfy the test? If there can be only one "primary effect," the Court must choose between the dual effects, a conclusion which reveals the inherent ambiguity and weakness of the test. In *Tilton*, the Chief Justice stated that the crucial question was whether the legislative program's "principal or primary effect advances religion."[71] He concluded that the evidence showed "institutions with admittedly religious functions but whose predominant higher education mission is to provide their students with a secular education."[72] This use of adjectives suggests that "primary," "principal" and "predominant" may be interchangeable terms, and that the Court will weigh purpose and results to determine a single primary effect.

The Court's handling of the entanglements question, both in *Lemon-DiCenso* and *Tilton*, sheds interesting light on the primary effect issue. The Court, in *Lemon-DiCenso*, did not say that the programs failed to achieve a primary secular effect. But because they supported teaching programs at institutions which, as found by the district court in *DiCenso*, were an "integral part of the religious mission of the Catholic Church"[73] and which the Court said "involve substantial religious activity and purpose,"[74] appropriate controls had to be exercised to prevent the intrusion of the religious function into the secular activity financed by the government. This, however, was not possible without running into excessive entanglements. The argument at this point becomes circular. Government may aid the secular purpose but it may not do so without imposing controls which invalidate the program under the establishment clause.

71. 403 U.S. at 679.
72. *Id.* at 687.
73. 316 F. Supp. at 117.
74. 403 U.S. at 616.

Even if the teaching supported by the state has a primary effect that does not advance religion, this purpose is imperiled because the teaching takes place in an institution committed to religious indoctrination.

The upshot in this situation is that ultimately it is the *nature of the institution* which is determinative when subsidies to religious institutions are involved. In *Walz* where the Court first enunciated the entanglements test, a direct benefit was conferred on a religious institution by means of a tax exemption, but the central difference between *Walz* and *Lemon* on the entanglements issue is the nature of the benefit and the resulting relation between government and the churches. An exemption reduces the risk of entanglement, whereas a subsidy tends to increase the risk. The purpose of the tax exemption is to protect the religious purpose; the purpose of the subsidy is to promote the secular purpose. Entanglements result from subsides when the nature of the institution and its commitment to religious indoctrination require a surveillance to protect the secular purpose. The *Lemon-DiCenso* rationale thereby undercuts the secular purpose and primary effect test by looking not at the secular purpose supported by the government or whether it is actually achieved but at the institutional context in which it takes place. Thus, government may not constitutionally support in an affirmative way the secular aspects of the total program conducted by a religious institution if it is necessary to employ substantial surveillance by public authorities to ensure that the secular purposes are achieved without simultaneously contributing to a predominantly religious purpose. *Lemon* and *DiCenso* thus seem to stand for the proposition that it is not enough that a program is directed to a secular purpose and achieves a substantial secular effect if in the institutional context there is a substantial risk that it cannot be accomplished without at the same time furthering a predominantly religious purpose.

This interpretation is confirmed by the *Tilton* opinion which brings the interrelationship of the primary effect and entanglement issues into sharp focus. Because the colleges in that case were viewed as having a principal purpose of promoting quality secular education, even though they also served religious purposes, this finding satisfied the primary effect test but, significantly, it also was relevant on the entanglements question. The factors which determine whether the institution's program achieves a primary secular purpose simultaneously measure the need for surveillance and the corresponding risk of entanglements. The same factors which determine that the grants have a primary effect that does not advance religion become a principal criterion in determining that extensive surveillance, leading to excessive entanglements, is not required—namely, that the church colleges, unlike parochial schools, do not have a predominant purpose of religious indoctrination. Rather their principal purpose is to provide a quality secular education. That promotion of sectarian indoctrination is not the primary purpose or effect is revealed

by the openness of the institution, its acceptance of principles of academic freedom, adherence to the internal discipline of the academic profession in the teaching of courses, admission of non-Catholics to the student body and faculty, and freedom of students from compulsion to take part in religious exercises. Moreover, college students are more mature and less impressionable to religious indoctrination. Here again it is the Court's characterization of the particular church college before it which assumes central significance. If the college is sufficiently open in its policies to negative any charge that sectarian indoctrination is its predominant goal, this satisfies the primary effect test and simultaneously diminishes the need for entangling controls.

The Court in *Tilton* mentioned two other factors which reduced the risk of entanglement. The federal grants to the colleges were for ideologically neutral buildings as contrasted to the Rhode Island and Pennsylvania subsidies for salaries of teachers who, in the context of the parochial school situation, could not be considered ideologically neutral. Moreover, the one-time capital grants to the colleges, unlike annual subsidies, reduced the contacts between the government and the institution and again reduced the risk of entanglements. These distinctions have a surface plausibility. As Justice Brennan pointed out, however, it was the teaching in the classroom which was subject to the restriction on religious use, and as Justice White pointed out, the grant for the building created a theoretical need for continued surveillance during the whole life of the building whereas an operating subsidy for a given year invited surveillance for that 1-year period only. The Court further bolstered its findings on entanglements in the college cases by the congressional restriction on the use of the building which, by judicial amendment of the statute, is now construed to apply to the building's entire life.

Again it should be emphasized that what is really significant in the Court's total analysis is its understanding of the nature of these institutions and the degree to which they are committed to religious indoctrination. If the Court had accepted the profile of the typical sectarian college and used it to characterize all church-related colleges, it is unlikely that the grants could have been saved by their capital nature, their nonrecurring character or the reduced impressionability of the students to religious indoctrination. On the other hand, if the Court is satisfied from the nature of the institution, its internal policies and programs that it is not primarily oriented to sectarian indoctrination, then restrictions on the use of funds or even the necessity for restrictions on use become less relevant.

The risk that sectarianism would creep into the teaching function and that entanglement would result when the state engaged in the surveillance necessary to counter this risk were the central elements in the *Lemon-DiCenso* cases. Paradoxically, as Justice White observed in his separate opinion, the more the state does to counter the risk, the more vulnerable

the program is to the entanglements objection. The Court's use of the entanglements factor is simply a means of saying that state assistance cannot be given directly to a teaching function in what is a predominantly sectarian setting.

If it is the sectarian nature of the institution which is decisive and if support of its secular purpose invites a risk of supporting sectarian education, why do not the bussing of children to parochial schools and the supplying of secular textbooks to parochial school children create the same difficulties? The Court clearly assumed the continued validity of the *Everson* and *Allen* decisions and took pains to say that not everything which aids religious institutions is in itself prohibited. Indeed, the *Tilton* case makes clear that governmental grants may be made directly to church colleges. Bussing may be distinguishable from support of teaching in parochial schools either because it is under the direct control of public authorities or because there is no risk of sectarian intrusion. The textbook case is less clear. Even though the books approved by the state authorities for distribution to parochial schools are secular books, their use by teachers in a sectarian school seems to invite the intrusion of sectarian influence. If the line is drawn between supplying books and paying teachers it must be for either of two reasons: that the control asserted by the state in approving the books is deemed adequate while creating no excessive entanglements, or that paying for books is still a step removed from paying the salaries of teachers.

Political Divisiveness

A further aspect of entanglements which led the Chief Justice to distinguish between the subsidies to support teaching in parochial schools and capital grants to church colleges was the entanglement between church and state in the political process. The Court made much of the potential for community divisiveness along religious lines when annual appropriations are made to support parochial schools. This part of the majority opinion in *Lemon-DiCenso* was obviously inspired by Justice Harlan's statement in his *Walz* opinion.[75] The Chief Justice stated that political division along religious lines was one of the principal evils which the first amendment was intended to preclude and that the potential divisiveness of such conflict was a threat to the normal political process. The Rhode Island and Pennsylvania cases involved successive and, very likely, permanent annual appropriations which benefitted few religious groups. Thus there was a very real potential for political divisiveness along religious lines, aggravated by the need for continuing annual appropriations and the likelihood of increasing demands as costs and populations grew.

75. 397 U.S. at 695. Justice Harlan in turn referred to the article by Professor Freund, *supra* note 8.

Interestingly, the Chief Justice in *Tilton* distinguished the federal grants on this score and found that the federal program and grants under it had not provoked the same kind of controversy along religious lines. Why this should be the case is a question which opens a substantial field of inquiry since it concerns the entire political process and the forces which shape public opinion. The Chief Justice suggested that the intensely local character of subsidies for elementary and secondary schools, as opposed to the grants for colleges which are more widely dispersed and attended by students from various communities, accounted for differences in the depth of public sentiment. Other considerations may also be noted. A feeling that support of parochial schools is more likely to advance religious indoctrination than support of church-related colleges, a point already made by the Court, is another element in the picture. The fact that federal legislation authorizing grants to colleges is completely neutral on its face, whereas the Rhode Island and Pennsylvania statutes are specially designed for the relief of private schools, is also relevant. Perhaps the most critical factor is that relatively few churches, and predominantly the Roman Catholic Church, operate parochial schools. Thus aid to private schools seems to benefit one church primarily, whereas nonpublic colleges represent a wide variety of interests, both secular and denominational, and the church colleges, representing wide differences in degree of support and control by church bodies, represent a number of church groups, for example, Catholic, Protestant and Jewish. Aid to private colleges, therefore, is not primarily a matter of aid to church-related colleges, much less to the colleges of any one church. In short, the much wider distribution of benefits resulting from public support of private colleges tends to mute any religious feelings generated by the program.

The Court's use of the potential divisiveness factor as a consideration in determining whether legislation violates the establishment clause suggests some interesting questions, particularly since the Chief Justice concluded his opinion with the statement that "[t]he Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice . . . ."[76] Taken at its face value this statement suggests that religion has no relevance with respect to the public order, but it is clear that the Chief Justice did not have this in mind.[77] Presumably he meant that the legislative process may not be invoked to provide legal support for religious doctrine. It is another thing to suggest, however, that it is inappropriate for legislative bodies to consider proposals to provide public assistance to institutions, including religious institutions, which serve public purposes. The Chief Justice is

76. 403 U.S. at 625.

77. Indeed, he referred to his statement in *Walz* that "[a]dherents of particular faiths and individual churches frequently take strong positions on public issues," 397 U.S. at 670, and added: "We could not expect otherwise, for religious values pervade the fabric of our national life." 403 U.S. at 623.

speaking of measures which in a de facto sense are viewed as favoring one or more churches and thereby fanning the flames of religious prejudice. Parochiaid proposals best fit this picture on the assumption that they particularly favor the Catholic Church. To cite this as an illustration, however, is to expose pitfalls in "community divisiveness" as an element in the judicial construction of the Constitution. Courts at most may speculate on these matters. What means are there for measuring the intensity of religious feeling generated by a legislative proposal? In some states the issue of bus transportation for children to private schools has stirred sharp controversy and feelings. Yet there is nothing to indicate that the Court has regarded this as a relevant factor in passing on the constitutionality of such measures.

If the Court is going to use its judicial power through interpretation of the establishment clause to foreclose from the realm of public debate and the legislative process any measures which will excite division along religious lines, it will be embarking on a dubious journey. If institutions and groups feel that it is unjust to withhold public funds from private schools, this feeling will not be excised by judicial decree. The constitutional amendment process is still available. To be sure, the divisiveness factor is a relevant consideration in the operation of the political process; it is not wise to stir up religious prejudice and animosity. The question raised here is whether it is a workable norm to guide judicial interpretation of the establishment clause.

The State Agency Question

Chief Justice Burger, writing the majority opinion in *Lemon-DiCenso* and the plurality opinion in *Tilton*, made no mention of what may be characterized as another entanglements factor. Justices Douglas (who was joined by Justices Black and Marshall) and Brennan asserted in their separate opinions that private institutions by accepting governmental assistance thereby assumed a public aspect and became subject to the limitations of the fourteenth amendment.[78] These limitations resulting from operations of law and having the effect of subjecting the private institutions to a continuing judicial surveillance may result in an even greater entanglement between church and state than that which results from public administrative surveillance of an institution to see whether the restrictions in the grant are observed. If, for instance, by virtue of receiving a subsidy from the state, a parochial school became subject to the equal protection and due process clauses and to all the features of the Bill of Rights which have been incorporated into the fourteenth amendment, it would for most purposes lose its identity as a private institution. It could neither grant preference on religious grounds in choice of students or faculty, nor require attendance at religious services or exercises. Indeed, if

78. 403 U.S. at 632, 651-52, 693-94.

it really became a state agency it could not conduct chapel services or perhaps even engage in a program of voluntary prayer and Bible-reading.

It is quite understandable that the Chief Justice was not ready to speak to this issue. Whether and to what extent a private institution subjects itself to constitutional limitation by acceptance of governmental assistance for a restricted purpose is a question the Court has not yet had occasion to explore, much less decide in a definitive way. But the problem is there.[79] Four justices dissenting in *Tilton* were ready to subscribe to the view that by accepting grants from the federal government the church colleges subjected themselves to constitutional limitations. Justice White in a significant footnote at the end of his separate opinion said that if the evidence in any of these cases (*DiCenso, Lemon* and *Tilton*) showed that any of the involved schools restricted entry on racial or religious grounds, or required all students gaining admission to receive instruction in the tenets on a particular faith, he would regard the legislation to that extent to be unconstitutional.[80] Justice White did not say that acceptance of this assistance would subject these institutions to constitutional limitations. He approached the problem in terms of limitations on the spending power and found the government constitutionally disabled from giving assistance to schools which discriminated in their admission policy on racial or religious grounds or required students to submit to religious instruction in the tenets of a particular faith.

Although the Chief Justice in his opinion in *Lemon-DiCenso* did not touch on this question, his plurality opinion in *Tilton* broached the problem in at least a limited way. In reaching the conclusion that the risks of entanglement were not as great in the college case, he pointed to a number of considerations which indicated that the achievement of a quality secular education, in contrast to sectarian indoctrination, was the principal goal of these institutions. Earlier the Chief Justice rejected the idea that the Court, instead of directing its attention to the four Catholic colleges before it, should focus on the profile of the "typical sectarian" institution. He said that perhaps some church-related schools fitted this pattern and that individual projects could be properly evaluated if and when challenges arose with respect to particular recipients and some evidence was presented to show that the institution did in fact possess these characteristics.

This language suggests that the Chief Justice, and the three Justices who shared his opinion, would approach the problem in the same manner as Justice White. Under this approach the attributes of a college requiring its characterization as a closed sectarian community may disqualify

79. *See* Simkins v. Moses H. Cone Memorial Hospital, 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 376 U.S. 938 (1964), where the court of appeals held that a private hospital which accepted governmental grants under the Hill-Burton Act was subject to a constitutional duty not to discriminate on racial grounds.

80. 403 U.S. at 671 n.2.

that college for a grant, either because it would be unconstitutional per se for the government to finance colleges of this kind, or because these characteristics point to a commingling of secular and religious functions, or because there is such a risk of commingling that extensive surveillance will be needed in order to carry out the conditions of the statutory grant, thereby creating excessive entanglements. Although *Tilton* opens the way for grants under the federal statute to colleges with a decidedly religious orientation, it leaves open the possibility that grants to institutions in which religious indoctrination assumes the dominant role will be held invalid.

CONCRETE IMPACT OF THE CASES

To what extent do these decisions limit the freedom of the government to give financial assistance to church-related educational enterprise? The *Lemon-DiCenso* cases do not affect the prior decisions with respect to bussing children to parochial schools or providing them with free textbooks. They have no bearing on the validity of tax exemptions for property used for educational purposes, including church-related schools. They do not affect the validity of health programs conducted on parochial school premises by public school authorities. They do not affect the validity of statutes providing for the furnishing of auxiliary services to children in both private and public schools, at least not where these services are furnished on public school premises. Even where furnished on parochial school premises, it is not clear that, so long as the programs are under the control of the public school authorities, any serious entanglements issue arises. Shared time programs are not necessarily condemned under the entanglements approach although more problems arise here because of the need of coordinating both public and private school programs. The decisions do not directly affect the validity of proposed tax exemptions or credits for parents sending children to private schools. This is not to suggest that other substantial questions may not arise. The point here emphasized is that the *Lemon-DiCenso* decisions on their face apply only where financial support is given directly to parochial schools or parochial school teachers in payment for teaching services.[81]

The situation is not so clear-cut with respect to church-related colleges. In view of the close vote in *Tilton*, the changes in Court personnel following the retirement of the late Justices Black and Harlan, could have important consequences. Justice Black dissented in *Tilton* whereas

81. While the *Lemon* and *DiCenso* decisions on their face apply only to payments made directly to parochial schools or their teachers, the thought expressed by the Chief Justice that the states are under a constitutional duty to ensure that these funds are spent only for secular purposes suggests that a program of tuition payments to parents or a voucher system would run into difficulty if these were regarded as indirect attempts to pay for teaching services in parochial schools. The use in southern states of a system of tuition grants for parents sending their children to private schools has been held unconstitutional where this was seen to be a device for maintaining racially segregated schools at public expense. See the cases cited in Justice Douglas' opinion in Lemon v. Kurtzman, 403 U.S. at 632 n.17.

Justice Harlan was one of the four justices who supported the plurality opinion. Of the present Court who participated in *Tilton*, Justices Douglas and Marshall apparently feel that governmental assistance to a college is invalid if it appears to serve any kind of religious purpose. Justice Brennan would hold assistance invalid if the college is distinctively a "sectarian" college. While he does not elaborate upon this term, he apparently has in mind the factors employed in constructing the profile rejected as the model or standard in the plurality opinion.[82] Presumably, Justice Brennan would permit some religious activity at a college without a finding that it is sectarian.

The plurality opinion approaches the problem differently. For the Chief Justice the question is whether by reference to all the factors relevant to the institution's program there is a substantial risk that the property or funds contributed by the government assistance will be used for a religious purpose absent a close and continuous surveillance by the government. To put the matter another way, the inquiry is whether there is a substantial risk that the financial assistance furnished by the government will support a program which in its totality is aimed at religious indoctrination. It may be that the policies of a given college will be so narrowly exclusivistic that grants to it will be held invalid. It may be that if a college discriminates on a racial or religious basis in its admissions policy or requires all students to take a course aimed at religious indoctrina-

82. The decision of the Maryland Court of Appeals in Horace Mann League of United States v. Board of Public Works, 242 Md. 645, 220 A.2d 51 (1966), supports Justice Brennan's view. The court held that although the first amendment did not bar state grants to all church-related colleges, it did prohibit grants to "sectarian" religious institutions. Note the following paragraph taken from the court's opinion on the criteria employed in determining whether a college is "sectarian":

> The experts on both sides are in general accord that the following factors are significant in determining whether an educational institution is religious or sectarian: (1) the stated purposes of the college; (2) the college personnel, which includes the governing board, the administrative officers, the faculty, and the student body (with considerable stress being laid on the substantiality of religious control over the governing board as a criterion of whether a college is sectarian); (3) the college's relationship with religious organizations and groups, which relationship includes the extent of ownership, financial assistance, the college's memberships and affiliations, religious purposes, and miscellaneous aspects of the college's relationship with its sponsoring church; (4) the place of religion in the college's program, which includes the extent of religious manifestation in the physical surroundings, the character and extent of religious observance sponsored or encouraged by the college, the required participation for any or all students, the extent to which the college sponsors or encourages religious activity of sects different from that of the college's own church and the place of religion in the curriculum and in extra-curricular programs; (5) the result or "outcome" of the college program, such as accreditation and the nature and character of the activities of the alumni; and (6) the work and image of the college in the community.

Id. at 672, 220 A.2d at 65. For discussion of the case, see Drinan, *Does State Aid to Church-Related Colleges Constitute an Establishment of Religion—Reflections on the Maryland College Cases*, 1967 UTAH L. REV. 491 (1967); Kauper, *Religion, Higher Education and the Constitution*, 19 ALA. L. REV. 275 (1967). *See also* Gellhorn & Greenwalt, *Public Support and the Sectarian University*, 39 FORDHAM L. REV. 395 (1967).

tion, it is constitutionally ineligible for governmental assistance. Justice White would say that grants to colleges with restrictive practices of this kind would be unconstitutional.

In light of the criteria suggested by the plurality opinion, however, there is room for a college to be distinctively a church-related college and to recognize a distinctive religious mission as part of its enterprise without necessarily creating that risk of indoctrination which would invalidate the federal grants. The *Tilton* decision means that the Department of Health, Education and Welfare (HEW) may properly make grants to colleges which pursue practices that fit the pattern of the four Catholic colleges involved in that case. Problems will arise in the case of a college which departs from this pattern and follows more exclusive practices. The term church college is an all-embracing term, and the degree of religiosity covers a wide spectrum. The question of how sectarian a college may become and still fall within the *Tilton* rationale will be a matter of ad hoc adjudication with respect to individual colleges, and ultimately HEW faces the unenviable task of measuring a college's sectarianism. This is, indeed, an extraordinary consequence of the *Tilton* holding, and it is perhaps ironic that to avoid entanglements the Court has proposed criteria which will require a federal administrative agency to become embroiled and entangled in the issue of sectarianism.

Tilton dealt with legislation authorizing capital grants to colleges for academic facilities and, subject to specific conditions, designed to prevent the use of these facilities for sectarian purposes. Suppose Congress appropriated funds for colleges and universities, public and private alike, in aid of their secular educative objectives but with no strings attached. If the earlier analysis is correct, namely, that it was the character of the institutions which was central in *Tilton*, rather than the restrictions imposed on the grants, it should follow that unrestricted subsidies to church colleges will be valid so long as colleges fit the *Tilton* pattern, so that extensive controls and surveillance are not needed to assure achievement of the secular purpose. On the other hand, colleges ineligible for grants under the Higher Education Facilities Act because of their sectarianism would by parity of reasoning be ineligible for such subsidies.

Again it should be emphasized that the discussion has centered on direct grants to the institutions. A wide variety of means are available to government for aiding students who attend college—public or private—including loan scholarship programs. The GI allowance after World War I is an excellent example. The student is aided, his freedom of choice is preserved, and the institution benefits indirectly. Here there is no inquiry whether the institution the student elects to attend is sectarian or whether the assistance given requires surveillance and resulting entanglements. Programs of this kind leave a college free to define its objectives and practices and maintain its autonomy.

The recent decisions point to differences in result depending both on the character of the institution and the type of aid extended. Direct assistance to parochial schools or to their teachers in payment of teaching services is unconstitutional. Fringe benefits such as bus transportation, the furnishing of textbooks and of health services are permitted. Grants may be made to church-related colleges provided they are not too sectarian in their practices. Criteria are employed and distinctions are made which earmark the opinions as a pragmatic rather than conceptual or doctrinaire approach to the problem. The results cannot be explicated in wholly logical terms. They are reinforced by a wide body of public opinion which, resting on tradition and conceptions of public policy, supports the idea that some, but not too much, assistance should be given to parochial schools. The late Reinhold Niebuhr saw the parochial school question as a case of accommodating justice to the imponderables dictated by prudence. The opinions here examined reflect this kind of practical wisdom.[83]

83. After making the point that "prudence requires that many imponderable factors be weighed in deciding questions of justice," he continued:

> Among the imponderables we must consider chiefly two: 1) the long tradition of the free public school, supported by tax money. Such traditions cannot be lightly changed without disturbing the public peace. 2) the religious pluralism of America which makes any concession on this point inadvisable. Any tax exemption for Catholic parents or tax support for Catholic schools would open the door to a multiplicity of parochial schools. These would tend to disturb the unity of the nation. The nation can afford some slight deviation from the principle of the common school; it cannot afford the total loss.
>
> There ought to be, of course, some prudential compensation for the 'injustice' of double taxation. I should think that any 'fringe' benefits to Catholic children and parents, such as free luncheons and common rides on school buses, would be advisable forms of relief; they would neither violate a constitutional provision nor endanger the general pattern of education in which a pluralistic nation does the best it can to 'preserve the harmony of the whole without annulling the vitality of the parts.'
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> There is not much point in advising Catholics to refrain from making the ultimate claim of tax support for parochial schools, for from their standpoint this would mean a correction of an injustice they suffer under. There is however a point in asserting that the claim for tax support is likely to be granted only at the cost of terrible political turmoil. There is point, too, in advising non-Catholics that the grant of fringe-benefits would ease the Catholic sense of injustice considerably. It would be an earnest on the part of the non-Catholic majority of its good will and of its recognition that while political complexities make the full grant of 'justice' (as interpreted by the Catholic side) impossible, there is always merit in giving proof of good will and in recognizing the reciprocal concessions which must be made by all sides to reach something like a tolerable justice.

Niebuhr, *A Note on Pluralism*, in RELIGION IN AMERICA 49-50 (J. Cogley ed. 1958).