Public Money for Parochial Schools?

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JAMES Madison suggested that we should take caution with the least experimentation with our liberties for fear a trickling stream might become a raging torrent. His view may have been prophetic in describing the concern presently being displayed toward the use of public monies for parochial education.

For more than 100 years the battle to make public schools free from sectarian religious ideas has been waged in America. And for as many years strong attempts to finance parochial education from the public coffers have been resisted. Yet now Jefferson's envisioned "wall of separation" seems to be crumbling. In the broad area of elimination of religious practices in the public school curriculum the wall has been kept high, even reinforced through the rulings of the U.S. Supreme Court. But the "wall" has been seriously eroded as it relates to the use of public monies for religious education. Each of the fifty states has constitutional provisions forbidding the expenditure of public money for religious purposes. Typical of such provisions is *Article 4, Section 8* of the Louisiana State Constitution:

> No money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect, or denomination of religion, or in aid of any priest, preacher, minister or teacher thereof, as such, and no preference shall ever be given to, nor any discrimination made against, any church, sect or creed of religion, or any form of religious faith or worship. . . .
>
> *Article 12, Section 13:*
>
> No public funds shall be used for the support of any private or sectarian school . . .

Yet, it was in Louisiana that court decisions gave rise to the child benefit theory. This sociopolitical issue of church-state relations is destined to become one of the most controversial and explosive issues of our time.

Colonial America

That church-state relationships have been antithetical throughout the history of mankind is recognized. The battle for supremacy has found first the state and then

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the church in the position of control. Various political and religious spokesmen espoused the theory of separation, but none, up to the colonization of America, had actually implemented the idea. It was in America that the ideal of separate powers of the church and state, each in its appropriate realm, found its proving grounds. It was truly an American experiment, tailored to meet the diverse interests of a highly pluralistic nation. In no previous nation had both religion and government flourished simultaneously.

The work of Jefferson and Madison, in their fight in Virginia against Patrick Henry's 1784 bill entitled "A Bill Establishing a Provision for Teachers of the Christian Religion," became a cornerstone in securing a Bill of Rights to the U.S. Constitution. Statements of religious freedom found in Jefferson's *Notes on Virginia* and Madison's *Memorial and Remonstrance* are classic. And it was Jefferson who insisted upon a Bill of Rights saying:

> . . . A bill of rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse, or rest on inference.[1]

The First Amendment of the Bill of Rights, adopted in 1791, reads in its relevant part for consideration here:

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

It was not until 1940 that the Court brought freedom of religion, as specified by the First Amendment, under the due process clause of the Fourteenth Amendment, thereby making it applicable to the states.[2]

Child-Benefit Theory

The United States Supreme Court first upheld the concept that certain financial aid to parochial school students was of benefit to the child rather than to the sectarian institution per se, in the 1930 Cochran case.[3] The ruling was simply that the furnishing of textbooks free of cost to parochial students was a direct benefit to the student alone and that such a practice constituted no aid to the institution. In delivering the opinion of the Court, Mr. Chief Justice Hughes asserted that:

> The appropriations were made for the specific purpose of purchasing school books for the use of school children of the state, free of cost to them. It was for their benefit and the resulting benefit to the state that these appropriations were made. True, these children attend some school, private or public, the former, sectarian or nonsectarian, and that the books are to be furnished them for their use, free of cost, whichever they attend. The schools, however, are not the beneficiaries of these appropriations. . . . The school children and the state alone are the beneficiaries. . . ."[4]

And thus the scene was set for forty years and more of controversy.

Seventeen years following Cochran, in 1947, the child-benefit theory was again used as the basis for the granting of public monies to parochial school students.[5] A New Jersey statute authorized its local school districts to make rules and contracts for the transportation of children to and from schools. The Ewing Township Board of Education, acting pursuant to this statute, authorized reimbursement to parents of money expended by them for bus transportation of their children on regular buses operated by a public transportation system. Part of this money was for the payment of transportation of some children in the community to Catholic parochial schools.

Everson, in his capacity as a district taxpayer, filed suit in a state court, challenging the right of the board to reimburse parents of parochial school students. The state court upheld the board's right to pay parents of parochial school students for money expended by them for bus transportation. The U.S. Supreme Court upheld the New Jersey

[1] Paul L. Ford, editor. *The Works of Thomas Jefferson*. Volume 5. New York: G. P. Putman's Sons, 1892. pp. 371-72.

[2] Cantwell *v.* Connecticut, 310 U.S. 296 (1940).

[3] Cochran *v.* Louisiana State Board of Education, 281 U.S. 370, 375 (1930).

[4] *Ibid.*

[5] Everson *v.* Board of Education of Township of Ewing, 330 U.S. 1 (1947).

State Court in a five-four decision. Mr. Justice Black delivered the opinion of the Court, stating:

> . . . We cannot say that the First Amendment prohibits New Jersey from spending tax-raised funds to pay the bus fares of parochial school students as a part of a general program under which it pays the fares of pupils attending public and other schools. . . . State paid policemen, detailed to protect children going to and from church schools from the very real hazards of traffic, would serve much the same purpose and accomplish much the same results as state provisions intended to guarantee free transportation of a kind which the state deems to be best for the school children's welfare. . . . Of course, cutting off church schools from these services, so separate and indisputably marked off from the religious function, would make it far more difficult for the schools to operate. But such is not the purpose of the First Amendment. That Amendment requires the state to be a neutral in its relation with groups of religious believers and non-believers; it does not require the state to be their adversary. . . . The First Amendment has erected a wall between church and state. The wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here. Affirmed.[6]

While the decision spells out a position of state neutrality toward religion rather than one of child benefit, the latter of these two positions is implicit in the Court's opinion.

Two rulings have recently been handed down by the United States Supreme Court which will have much bearing on religion and education.

In Flast *et al. v.* Cohen *et al.* the Court pushed aside a 45-year-old ruling that a federal taxpayer is without standing to challenge the constitutionality of a federal statute.[7] The Flast case was filed to bring a decision regarding whether a taxpayer could attack a federal statute on the ground that it violates the Establishment and Free Exercise Clauses of the First Amendment. Flast *et al.* filed suit to enjoin the allegedly unconstitutional expenditure of federal funds under Titles I and II of the Elementary and Secondary Education Act of 1965. Most legal commentators have suggested that Frothingham was not a constitutional bar to taxpayer suits but that the Court had simply imposed a nonconstitutional rule of self-restraint. The Court reached the following decision, delivered by Mr. Chief Justice Warren:

> While we express no view at all on the merits of appellants' claims in this case, their complaint contains sufficient allegations to give them standing to invoke a federal court's jurisdiction for an adjudication on the merits.[8]

This ruling, in effect, means that federal aid-to-education programs involving parochial schools may now be challenged in the courts by a taxpayer. Title I, providing educational programs for environmentally handicapped children, and Title II, which pro-

Elementary and Secondary Education Act:

Title I—Assistance to Educationally Deprived Children

FY 1966	
Obligations	$30,000,000 [1]
FY 1967	
Obligations	$35,000,000 [1]

Title II—School Library Resources

FY 1966	
Obligations	$11,000,000 [2]
FY 1967	
Obligations	$11,000,000 [2]

Title III—Supplementary Educational Centers and Services

FY 1966	
Obligations	$ 3,700,000 [3]
FY 1967	
Obligations	$13,100,000 [3]

[1] Represents 4 percent of the total expenditures (rounded figures).

[2] Estimated.

[3] Nonpublic schools do not receive Federal funds under this program. However, 8 percent of the pupils served as nonpublic school students; the amount shown is 8 percent of total program obligations.

Table 1. Federal Participation in Nonpublic Schools *

* Loose-leaf printed materials sent directly to the author by the Office of Education, U.S. Department of Health, Education, and Welfare.

[6] *Ibid.*, pp. 17-18.

[7] Frothingham *v.* Mellon, 262 U.S. 447 (1923).

[8] Flast *et al. v.* Cohen *et al.*, U.S. 416 (1968).

vides for school library resources and other instructional materials, are most vulnerable. Major portions of ESEA funds that have gone to private schools have been distributed through Titles I and II. A breakdown of federal participation in nonpublic schools, and as administered by the Office of Education, is reported in Table 1 (see page 248).

Additional programs are administered through the Office of Economic Opportunity and the Department of Agriculture, including the school lunch, Head Start, Follow Through and Upward Bound programs.

A second recent U.S. Supreme Court decision reviewed the issue created by a New York statute requiring local school authorities to lend textbooks free of charge to all students in grades 7-12, including students in private schools.[9] Specific issues here included:

1. Whether all teaching in a sectarian school is religious, thus causing free textbooks to be used for religious purposes;

2. Whether the processes of secular and religious training are so intertwined that secular textbooks furnished by public monies are in fact instrumental in the teaching of religion.

Again the child-benefit theory was called into action. Mr. Justice White, in delivering the opinion of the Court, stated:

> The law merely makes available to all children the benefits of a general program to lend school books free of charge. Books are furnished at the request of the pupil and ownership remains, at least technically, in the State. Thus no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools.[10]

White continued by saying:

> Underlying these cases, and underlying also the legislative judgments that have preceded the court decisions, has been a recognition that private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience. . . . the continued willingness to rely on private school systems, including parochial systems, strongly suggests that a wide segment of informed opinion, legislative and otherwise, has found that these schools do an acceptable job of providing secular education to their students.[11]

The judgment of the lower court upholding the state law was affirmed. This case presents an interesting departure from previous cases where public monies in parochial institutions were in dispute. Not only did the Court point up the doctrine of child benefit and neutrality, but it chose to consider the importance of the parochial institution in providing secular education to a sizable portion of the populace.

This begs the question, for most would readily admit that parochial institutions do provide education other than sectarian. However, the question is one of whether a parochial institution can separate its ecclesiastic and secular functions so clearly that one does not impinge upon the other. If so, free textbooks may well be a benefit to the child only. But if this distinction cannot be made between secular and sectarian education, and it is this author's contention that it cannot, then free textbooks clearly serve the function of religious education. And such a function is a contravention of constitutional provisions.

The past three years have witnessed the entry of federal financial support of education to a degree heretofore unknown in the history of the United States. No substantial federal aid program had been approved by Congress prior to ESEA of 1965 because of the religious and integration questions. In this legislation, one of the major barriers, public monies for parochial purposes, was skirted. The constitutionality of this act will now be tested in the courts, the outcome of which will have major implications for public and parochial education and for the potential growth and effectiveness pattern of each.

Should the U.S. Supreme Court uphold the constitutionality of the ESEA, the floodgates of public aid to parochial education would be opened. And with this "raging torrent" would come the eventual destruction of a great American dream—separation of church and state. □

[9] Board of Education of Central School District No. 1 *et al. v.* Allen *et al.*, U.S. 660 (1968).

[10] *Ibid.*, pp. 6-7.

[11] *Ibid.*, p. 10.