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## Constitutional Law - Aid to Parochial Schools. *Lemon v. Kurtzman*, 91 S. Ct. 2105 (1971)

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tribution of electric power was a necessary adjunct to its sale, and not a separate product.<sup>13</sup> On this basis alone, the court could have effectively disposed of the controversy

The decision in *Washington Gas Light* is unnecessarily broad, relying on the state action immunity doctrine to resolve an issue which is far from the classic state action situation presented in *Parker*. In so doing, the court implies that acts committed by state-regulated industries, if condoned by the regulatory agency, are not reviewable under federal antitrust laws. Such a result can only obstruct uniform enforcement of the Sherman Act, and may present serious difficulties with respect to the federal supremacy clause of the United States Constitution.<sup>14</sup>

RICHARD B. BLACKWELL

**Constitutional Law—AID TO PAROCHIAL SCHOOLS. *Lemon v. Kurtzman*, 91 S. Ct. 2105 (1971)**

Taxpayers sought to enjoin expenditures of funds under a Pennsylvania statute<sup>1</sup> which authorized the state to purchase selected secular educational services from nonpublic schools. The district court dismissed the complaint for failure to state a claim for relief.<sup>2</sup> The Supreme Court reversed, and held that the Pennsylvania Nonpublic Elementary and Secondary Education Act violated the establishment clause of the first amendment<sup>3</sup> because the act resulted in excessive government entanglement with religion.<sup>4</sup>

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Sherman Act, the supplier refuses to sell the consumer product "A" (generally a scarce or otherwise required commodity) unless the consumer also agrees to buy product "B" (usually of much less demand value and at an inflated price). In this way the supplier creates a false market for product "B", the tied product, and thereby imposes an illegal restraint of trade. Cf. *Fortner Enterprises v. United States Steel Corp.*, 394 U.S. 495 (1969).

13. 438 F.2d at 254, quoting from *Gas Light Co., of Columbus v. Georgia Power Co.*, 313 F Supp. 860, 869 (M.D. Ga. 1970).

14. U.S. CONST. art VI.

1. Nonpublic Elementary and Secondary Education Act, PA. STAT. ANN. tit. 24, § 5601 (Supp. 1968).

2. *Lemon v. Kurtzman*, 310 F Supp. 35 (E.D. Pa. 1969).

3. "Congress shall make no law respecting an establishment of religion" U.S. CONST. amend. I.

4. The case was remanded for further proceedings. *Lemon* is part of a trilogy of cases decided on the same day. See *DiCenso v. Robinson*, 91 S. Ct. 2105 (1971); *Tilton v. Richardson*, 91 S. Ct. 2091 (1971).

In *DiCenso*, the Court invalidated the Rhode Island Salary Supplement Act of 1969 which provided public funds as salary supplements for teachers of secular subjects in

Previously, the Court has held that the establishment clause is not violated by a statute authorizing reimbursement of fares paid for the transportation of children to parochial schools,<sup>5</sup> or by a statute requiring school boards to loan secular textbooks, without charge, to parochial school children.<sup>6</sup> In addition, the granting of a tax-exempt status to church schools has been held not to violate the establishment clause.<sup>7</sup> However, religious instruction,<sup>8</sup> the establishment of an official prayer,<sup>9</sup> or readings from the Bible<sup>10</sup> in public school facilities have been held to be violative of the establishment clause.

In *Everson v. Board of Education*,<sup>11</sup> the Court first enunciated the test by which alleged violations of the establishment clause are to be judged, saying, "No tax in any amount, large or small, can be levied to support any religious activities or institutions."<sup>12</sup> However, under the free exercise clause, state law benefits must be extended to "all citizens without regard to their religious belief."<sup>13</sup> Therefore, under the

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parochial schools. Payment, unlike in *Lemon*, went to individual teachers instead of to schools. The excessive entanglement of government with religion, in both cases, arose from the necessity of government surveillance of religious schools in order to insure school compliance with the laws.

In *Tilton*, the Court upheld, in part, the Higher Education Facilities Act of 1963 which provides federal construction grants to public and private colleges. While allowing four Catholic colleges to use the grants for "religiously neutral" buildings the Court distinguished *Tilton* from *Lemon* and *DiCenso* on three grounds: 1) there is less danger that religion will seep into college classes than into pre-college classes; 2) the *Tilton* aid is religiously neutral; and 3) one-time grants are not continuing as are salary supplements. Together, these factors meant that government and religion were not excessively entangled.

5. *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

6. *Board of Educ. v. Allen*, 392 U.S. 236 (1968).

7. *Walz v. Tax Comm'n*, 397 U.S. 664 (1970).

8. *McCollum v. Board of Educ.*, 333 U.S. 203 (1948). *But cf. Zorach v. Clauson*, 343 U.S. 306 (1952), holding that public school students, upon the written request of their parents, may be released from public school during school hours in order to receive religious instruction because a "released time" program does not require public classrooms or public funds.

9. *Engel v. Vitale*, 370 U.S. 421 (1962) *But see Stein v. Oshunsky*, 224 F Supp. 757 (E.D.N.Y. 1963), stating that if prayer is voluntary and without coercion, the establishment clause is not violated.

10. *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963).

11. 330 U.S. 1 (1947).

12. *Id.* at 16. Even though a wall must separate church from state the separation is not absolute. The general benefits of state law may extend to the religious and non-religious alike. The establishment clause requires the government to be neutral between groups of religious believers and non-believers. *Id.* at 18. For a list of permissible federal aid to parochial schools, see D. FELLMAN, *THE LIMITS OF FREEDOM* 40-41 (1959).

13. 330 U.S. at 16.

*Everson* test, if a statute is found to benefit the public by aiding school children rather than religious schools, the establishment clause is not violated.<sup>14</sup> The decision in *Abington School District v. Schempp*<sup>15</sup> added a second guideline known as the "secular purpose and primary effect test." The Court ruled that reading the Bible to public school children was a religious exercise which had the primary effect of advancing religion and was therefore impermissible under the establishment clause.<sup>16</sup>

The Court in *Board of Education v. Allen*<sup>17</sup> expanded the area of permissible state aid to parochial schools. By holding a textbook loan program to be constitutional, the Court determined that the secular and religious portions of education could be separated in a parochial school so the primary effect of the law neither advanced nor inhibited religion, but "merely made available to all children the benefits of a general program to lend school books. . . The financial benefit is to parents and children, not to schools."<sup>18</sup> While *Allen* allows government aid to the

14. The *Everson* test is called the child-benefit theory. For criticism of this test see Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680 (1969); Giannella, *Religious Liberty, Nonestablishment and Doctrinal Development: Part II. The Non-establishment Principle*, 81 HARV. L. REV. 513 (1968). For state courts rejecting this theory see, e.g., *Matthews v. Quinton*, 362 P.2d 936 (Alas. 1961); *Opinion of the Justices*, 216 A.2d 668 (Del. 1966); *McVey v. Hawkins*, 364 Mo. 44, 258 S.W.2d 927 (1963); *Board of Educ. v. Antone*, 384 P.2d 911 (Okla. 1963); *Visser v. Nooksack Valley School Dist.*, 33 Wash. 2d 699, 207 P.2d 198 (1949).

15. 374 U.S. 203 (1963).

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.

*Id.* at 222.

16. *Id.* See also *McGowan v. Maryland*, 366 U.S. 420, 459 (1961) (Frankfurter, J. concurring). A statute which has merely an incidental effect of aiding religion is not a violation of the establishment clause under this test. In determining whether the effect of a statute is primary or incidental a court must examine other means to determine if the state could reasonably have attained the secular end by means which do not further the promotion of religion. 366 U.S. at 459. See *Torasco v. Watkins*, 367 U.S. 488 (1961) (religious oath of office); *McGowan v. Maryland*, 366 U.S. 420 (1961) (Sunday closing law).

17. 392 U.S. 236 (1968).

18. *Id.* at 243-44. The difference between *Allen* and *Schempp* is illustrated in *Horace Mann League of the United States of America, Inc. v. Board of Pub. Works*, 242 Md. 645, 220 A.2d 51 (1966). In *Mann*, the court applied the *Schempp* test to determine whether four church-related colleges were eligible for government matching construction grants. The grants were not allowed to three of the colleges because they were too

secular function<sup>19</sup> of church-related schools, the permissible extent of such aid is undefined.<sup>20</sup>

In *Walz v. Tax Commission*,<sup>21</sup> the Court held that although the granting of a tax-exempt status to church affiliated schools has the effect of aiding religion, such a degree of government involvement with religion is permissible; but where the involvement results in actual sponsorship of religion, then the degree is excessive.<sup>22</sup> The degree of entanglement test is a modification of the *Schempp* "primary purpose and effect test."<sup>23</sup> *Walz* declares: "[T]he questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement."<sup>24</sup> Under *Schempp*, a statute violates the establishment clause when its purpose or primary effect aids or hinders religion, while *Walz* focuses instead on the degree of involvement between church and state.

In *Lemon*, the *Schempp* and *Walz* tests were not viewed as conflicting but were treated as cumulative criteria. Chief Justice Burger announced that: "Three such tests may be gleaned from our 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; and finally, the statute must not foster 'an excessive government entanglement with religion.'"<sup>25</sup> The concept of excessive entanglement limits aid which, under *Allen*, is allowed to the secular

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heavily under religious domination. Aid to such colleges would have had a primary effect of advancing religion. Under *Allen*, however, aid could go to the secular portion of a religious school. *Lemon* qualifies *Allen* in that such an aid program cannot result in excessive government entanglement with religion.

19. Under the *Allen* test the scope of state aid is greatly enlarged. "It is doubtful that there is a legislature in the land so tongue-tied that it could not find a multitude of secular purposes to cover any religious interest it wished to accommodate." La Noue, *The Child Benefit Theory Revisited: Textbooks, Transportation and Medical Care*, 13 J. Pub. L. 76, 77-78 (1964).

20. Whether secular aid can be excessive and thus, under *Schempp*, have a primary effect of aiding religion, is an unresolved question in *Allen*. But see *DiCenso v. Robinson*, 316 F. Supp. 112 (D.R.I. 1969), wherein the court stated: "[G]overnment aid to purely secular activity may nevertheless involve the State " too deeply *Id.* at 120. (Emphasis supplied).

21. 397 U.S. 664 (1970).

22. Earlier Court decisions suggested that the problem is one of degree. See, e.g., *Zorach v. Clauson*, 343 U.S. 306 (1952).

23. *Schempp* is not cited in the *Walz* opinion.

24. 397 U.S. at 675.

25. 91 S. Ct. at 2111.

part of a church-related school. Secular aid is permissible only if government is not overly involved with religion.

Although the new concept of excessive entanglement is more clearly defined in *Lemon* the Court has not provided adequate guidelines against which the many remaining questions may be judged.<sup>26</sup> Government is heavily entangled with religious schools in such areas as lunch programs, medical clinics, teacher certification, textbook loans, and transportation. These forms of secular assistance involve government with religion, yet not excessively. The reasons why this is so are obscure. Furthermore, the line dividing permissible from impermissible entanglement is unclear. To clarify an area of the law that is fast becoming as muddled as a Serbian bog the Court should abandon the doctrine of excessive entanglement and rely, instead, upon *Schempp* and *Allen*. Aid to the secular portion of a religious school should be permissible so long as the purpose or primary effect of the aid program does not directly advance religious teaching.

STEPHAN J. BOARDMAN

**Constitutional Law—CLEAR AND PRESENT DANGER TEST APPLIED TO OVERBROAD UNLAWFUL ASSEMBLY STATUTE.** *Owens v. Commonwealth*, 211 Va. 633, 179 S.E.2d 477 (1971)

The appellants, members of an unruly crowd who ignored a police order to disperse, were convicted of the statutory offense of remaining at the place of an unlawful assembly after having been lawfully warned to disperse.<sup>1</sup> On appeal, they claimed that the statute was an impermissible infringement upon their first amendment right "peaceably to assemble."<sup>2</sup>

The Supreme Court of Appeals of Virginia reversed, holding that the

26. Whether a particular program, such as the "voucher" plan, results in excessive entanglement can only be determined on a case-by-case analysis. In *Lemon*, the Court examined "the character and purposes of the institutions which [were] benefited, the nature of the aid that the state provide[d], and the resulting relationship between the government and the religious authority" 91 S. Ct. at 2112. Other factors examined were whether the program was innovative, self-perpetuating and self-expanding. *Id.* at 2117

1. VA. CODE ANN. 18.1-254.4 (Supp. 1971). "Remaining at a place of riot, rout, or unlawful assembly after warning to disperse.—Every person except public officers and persons assisting them, remaining present at the place of any riot, rout, or unlawful assembly after having been lawfully warned to disperse, shall be guilty of a misdemeanor."

2. U.S. CONST. amend. I: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble . . ."