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SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 55 | Number 3

Article 5

3-1-1977

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Recommended Citation

James C. Kirby Jr., *Everson to Meek and Roemer: From Separation to Detente in Church-State Relations*, 55 N.C. L. REV. 563 (1977).

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EVERSON TO MEEK AND ROEMER: FROM SEPARATION TO DÉTENTE IN CHURCH-STATE RELATIONS

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As part of a symposium honoring a leading constitutional law scholar upon his retirement, it is appropriate to devote an article to what appears to be a closing chapter of church-state relations under the first amendment. In 1959 Frank Strong wrote of the metaphorical wall of separation: "Something of a wall of separation remains, yet it may be scaled, so to speak, in circumstances where truly important public interests outweigh the seriousness of threatened invasions of individual and group religious interests."¹ This has proved to be a more accurate assessment of trends than most that were attempted during that period. The balancing that it suggests has prevailed in the free exercise area and the net results under the establishment clause have been to strike a sort of balance in permissible aids to religion in general and religious education in particular.

In 1976 in *Roemer v. Board of Public Works of Maryland*,² the Supreme Court completed a process of validating substantial state financial aid to church-related higher education, soon after effectively foreclosing support of similar magnitude for education at the elementary and secondary levels (lower education) in *Meek v. Pittinger*.³ To some, the results may smack of compromise. The two cases can, however, be reconciled and each rests upon a coherent doctrinal basis that is part of a practical détente upon the entire subject of aids to religious education. There are grounds for optimism that this topic will recede as a major source of constitutional litigation and scholarship. Only this hope and esteem for the symposium's honoree move this writer to add to the literature of a subject that has already commanded far more than its fair share of scholarly attention.⁴

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1. Strong, *Church Law: Foreword*, 20 OHIO ST. L.J. 387, 387 (1959).

2. 96 S. Ct. 2337 (1976).

3. 421 U.S. 349 (1975).

4. The scholarly literature on aid to religious education since 1969 includes:

The tortuous development of this *détente* began in 1947 in *Everson v. Board of Education*,⁵ which may hold the record for being cited most often as a precedent on opposite sides of the same question. *Everson's* holding, that New Jersey could constitutionally provide public funds for transporting children to parochial schools,⁶ lent support for nearly thirty years to efforts to validate other forms of public support of secular components of parochial school programs.

It was the strict separationist language of *Everson*, however, at odds with its holding, that was to become a powerful weapon of opponents of government aids to religion of all types, ranging from public school prayers to tax exemptions. Justice Black's oft-quoted language must necessarily be our beginning point and bears repeating:

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*

Boles, *The Burger Court & Parochial Schools: A Study in Law, Politics, & Educational Reality*, 9 VAL. U.L. REV. 459 (1975); Calhoun, *The Elementary and Secondary Education Act and the Establishment Clause*, 9 VAL. U.L. REV. 487 (1975); Doerr, *The Enduring Controversy: Parochialism and the Law*, 9 VAL. U.L. REV. 513 (1975); Gianella, *Lemon and Tilton: The Bitter and the Sweet of Church-State Entanglement*, 1971 SUP. CT. REV. 147; Katz, *Radiations from Church Tax Exemptions*, 1970 SUP. CT. REV. 93; Kauper, *The Supreme Court and the Establishment Clause: Back to Everson?*, 25 CASE W. RES. L. REV. 107 (1974); Kauper, *Public Aid for Parochial Schools and Church Colleges: The Lemon, DiCenso, and Tilton Cases*, 13 ARIZ. L. REV. 567 (1971); Kauper, *The Walz Decision: More on the Religion Clauses of the First Amendment*, 69 MICH. L. REV. 179 (1970); Morgan, *The Establishment Clause and Sectarian Schools: A Final Installment?*, 1973 SUP. CT. REV. 57; Nowak, *The Supreme Court, the Religion Clauses and the Nationalization of Education*, 70 NW. U.L. REV. 883 (1976); Pfeffer, *Aid to Parochial Schools: The Verge and Beyond*, 3 J.L. & EDUC. 115 (1974); Pfeffer, *The Supremacy of Free Exercise*, 61 GEO. L.J. 1115 (1973); Powe, *Evolution to Absolutism: Justice Douglas and the First Amendment*, 74 COLUM. L. REV. 371 (1974); Smith, *Emerging Consequences of Financing Private Colleges with Public Money*, 9 VAL. U.L. REV. 561 (1975); Sugarman, *Family Choice: The Next Step in the Quest for Equal Educational Opportunity?*, 38 LAW & CONTEMP. PROB. 513 (1974); Underwood, *Permissible Entanglement under the Establishment Clause*, 25 EMORY L.J. 17 (1976); Zoetewy, *Excessive Entanglement: Development of a Guideline for Assessing Acceptable Church-State Relationships*, 3 PEPPERDINE L. REV. 279 (1976).

5. 330 U.S. 1 (1947).

6. *Id.* at 18.

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."⁷

Despite its inconsistency with the *Everson* holding, this strict separationist, or no-aid, view of the establishment clause dominated the subject of government aids to religion for the next two decades. ("*Everson*" will hereafter refer to the quoted no-aid dictum.)

Everson was followed in 1948 by *McCollum v. Board of Education*,⁸ invalidating programs under which religious organizations supplied teachers for voluntary religious instruction on public school premises during school hours. *McCollum*, however, was soon to be countered by a decision of opposite thrust in *Zorach v. Clauson*.⁹ There, Justice Douglas wrote for the majority in upholding released time programs under which voluntary religious instruction was given by religious groups off the school premises, but during school hours and aided by the school's compulsory attendance machinery. *Zorach* included an eloquent passage that was frequently to be quoted in opposition to *Everson*. It too bears repeating:

We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions.¹⁰

When the school prayer cases arose in the early sixties, *Zorach* and *Everson* stood as competing accommodationist and separationist tools of analysis. Neither proved to be adequate to the tasks of those cases and the school-aid cases that were to follow.

7. *Id.* at 15-16 (citing *Reynolds v. United States*, 98 U.S. 145, 164 (1878)) (emphasis added).

8. 333 U.S. 203 (1948). The *McCollum* case, which received much more critical attention at the time than did *Everson*, was viewed by Leo Pfeffer as the greater prize, well worth the *Everson* holding. He saw at the time that the cause of separation would be aided much more by the *Everson* no-aid doctrine than it would be harmed by its holding. Pfeffer, *Religion, Education and the Constitution*, 8 LAW. GUILD REV. 387 (1948).

9. 343 U.S. 306 (1952).

10. *Id.* at 313-14.

The first prayer decision, *Engel v. Vitale*,¹¹ produced a firestorm of public reaction, both for its holding and for its reasoning. Much of the criticism resulted from Douglas' concurrence, conceptually opposed to his *Zorach* reasoning, in which he pointed to a number of accepted governmental involvements with religion and, quite unprophetically, pronounced the invalidity of all.¹² Black's majority opinion, carefully limited to the invalidity of officially composed and sponsored religious services, disclaimed the thrust of Douglas' concurrence but it was nonetheless a somewhat doctrinaire exercise in *Everson*-like strict separationism.

The holdings of *Engel* and *Abington School District v. Schempp*,¹³ the latter a prayer and Bible reading decision, drew wide support from constitutional scholars as logical and necessary disapprovals of official sponsorship of devotional services in governmental programs. However, one respected scholar, who approved the results of the cases on free exercise grounds, thoughtfully faulted the Court on its misuses of first amendment history and systematic distortion of first amendment values. He was Mark De Wolfe Howe of Harvard who developed his thesis at length in 1965 in his last work, *The Garden And The Wilderness*.

Howe noted that there were two separate and somewhat conflicting strands of first amendment history. He viewed *Everson*, *McCullum* and *Engel* as looking exclusively to a Jeffersonian strand which he characterized as "political" and as reflecting the anti-clerical bias of eighteenth-century rationalism. Jefferson's wall of separation, which was detailed specifically as law by Virginia's Act for Establishment of Religious Freedom,¹⁴ was to keep church and state apart to safeguard against ecclesiastical depredations and excursions into both public and private interests. A full reading of that Act drives home its underlying distrust of organized religion and a full realization that Jeffersonian separation was anti-clerical and designed to protect the state from being misused as an instrument of the church.

In Howe's view, this religiously hostile political strand of first amendment history must compete with a more sympathetic theological strand traceable to Roger Williams, another principal architect of our

11. 370 U.S. 421 (1962).

12. *Id.* at 437 n.1.

13. 374 U.S. 203 (1963).

14. 12 W. HENING, STATUTES AT LARGE 84-86 (1823) (recited in VA. CODE § 57-1 (1974)).

heritage of religious freedom. Howe drew his title from an earlier separationist metaphor in a classic passage from Williams which he quoted more fully as follows:

The faithful labors of many witnesses of Jesus Christ, extant to the world, abundantly proving that the church of the Jews under the Old Testament in the type, and the church of the Christians under the New Testament in the antitype, were both separate from the world; and that when they have opened a gap in the hedge or wall of separation between the garden of the church and the wilderness of the world, God hath ever broke down the wall itself, removed the candlestick, and made His garden a wilderness, as at this day. And that therefore if He will ever please to restore His garden and paradise again, it must be of necessity be walled in peculiarly unto Himself from the world; and that all that shall be saved out of the world are to be transplanted out of the wilderness of the world, and added unto his church or garden.¹⁵

Thus, Roger Williams' wall of separation was designed to protect the garden of the church from being overrun by the wilderness of the state and outside world in the form of corrupting effects of government involvement. The Williams strand of separation as interpreted by Howe, and later by Professor Wilber Katz,¹⁶ does not forbid all governmental aids to religion—only those incompatible with religious freedom. The prayer decisions were viewed by Howe as embodying a "radical analysis" that unnecessarily bypassed free exercise grounds of coerciveness in order to place in question public favors to religion having no substantial secular purposes, without regard to whether dangers to personal liberty are threatened by such public favors.¹⁷

The Court soon shifted its analysis and moved from Jefferson closer to Roger Williams in evolving its establishment clause doctrine. Howe had easily reconciled Roger Williams' wall of separation with tax exemption of churches, which had been brought in question by Douglas' *Engel* concurrence. In 1970, in *Walz v. Tax Commission*,¹⁸ the Burger Court upheld such exemptions under what Chief Justice Burger called "benevolent neutrality."¹⁹ The decision brought approval from Wilber Katz in the names of both Howe and Williams.²⁰

15. M. HOWE, *THE GARDEN AND THE WILDERNESS* 5-6 (1965) (quoting P. MILLER, *ROGER WILLIAMS: HIS CONTRIBUTION TO THE AMERICAN TRADITION* 89, 98 (1953)).

16. Katz, *supra* note 4.

17. M. Howe, *supra* note 15, at 143.

18. 397 U.S. 664 (1970).

19. *Id.* at 669.

20. Katz, *supra* note 4, at 97.

Howe's posthumous vindication was, however, to be considerably less than total. He also supported the validity of aid to parochial schools as consistent with historic first amendment values,²¹ though he did not suggest that Roger Williams would be equally comfortable with public support of Catholic schools. Here Howe's position did not prevail because he had failed to consider a third strand of first amendment history. As Richard Morgan has pointed out,²² Howe somewhat simplistically read the first amendment as embodying no anti-establishment value independent of freedom of worship. This ignored an important strand of history that is traceable to James Madison's famous "A Memorial and Remonstrance"²³ against religious assessments. This strand brings to the establishment clause the independent value of avoidance of religio-political strife.

While strife-avoidance was not to become a full-fledged element of first amendment doctrine until the Burger Court's decisions of the seventies, it had figured along the way in the reasoning of several justices. Justice Rutledge had drawn directly from Madison's Memorial and Remonstrance in his ringing dissent from the *Everson* holding, saying:

Public money devoted to payment of religious costs, educational or other, brings the quest for more. It brings too the struggle of sect against sect for the larger share or for any. Here one by numbers alone will benefit most, there another. That is precisely the history of societies which have had an established religion and dissident groups It is the very thing Jefferson and Madison experienced and sought to guard against, whether in its blunt or in its more screened forms The end of such strife cannot be other than to destroy the cherished liberty. The dominating group will achieve the dominant benefit; or all will embroil the state in their dissensions.²⁴

In *Schempp*, Justices Goldberg and Harlan condemned the official school religious services at issue there as involving the state "so significantly and directly in the realm of the sectarian as to give rise to those very divisive influences and inhibitions of freedom which both religion clauses of the First Amendment preclude."²⁵ Harlan repeated this

21. M. HOWE, *supra* note 15, at 117.

22. R. MORGAN, *THE SUPREME COURT AND RELIGION 185-86* (1972).

23. 8 *THE PAPERS OF JAMES MADISON* 298-304 (R. Rutland & W. Rachel eds. 1973).

24. 330 U.S. 1, 53-54 (1947). Rutledge cited specific provisions of Madison's Memorial and Remonstrance and attached the full text to his opinion as an appendix.

25. 374 U.S. 203, 307 (1963).

consideration in his concurring opinion in *Board of Education v. Allen*,²⁶ and Justice Douglas relied upon it heavily in dissent. Douglas viewed the textbook loan program upheld in *Allen* as inviting continuing strife over the content of books between public school boards and parochial school officials.²⁷

The *Allen* decision was criticized on strife-avoidance grounds by Paul Freund of Harvard, regarded by some as "the tenth Justice of the Supreme Court."²⁸ His perceptive and widely noted article²⁹ was soon to be influential in school-aid cases and to be cited for the Madisonian proposition that "political division along religious lines was one of the principal evils against which the First Amendment was designed to protect."³⁰

The Burger Court's full recognition of the strife-avoidance value began when it announced the "entanglement" criterion in *Walz*.³¹ Previously, under the two factor test of *Schempp*, it had assessed aids to religion for secular purposes and for primary effects that neither advance nor inhibit religion. As originally announced in *Walz*, administrative entanglement of government with religion was the primary concern. To tax was to become entangled. The next year, however, in the first round of the school aid cases of the seventies, the Court added the test of potential political divisiveness, either as a separate fourth factor or as a refinement of the entanglement factor.

Some feel that Madisonian principles and ease of analysis are both best served by treating administrative entanglement and political divisiveness as embodying the single value of strife-avoidance. As Richard Morgan noted in reviewing the 1973 school decisions, "It strains the imagination to conceive of a real-world situation where government would begin, by design or accident, to exercise control within a religious institution which would not quickly result in religio-political strife."³² This unification has not yet emerged in the multiple opinions of the Court, but recent results are consistent with it.

The injection of entanglement in *Walz* caused the textbook loan victory in *Allen* to be a false signal that other secular components of

26. 392 U.S. 236 (1968).

27. *Id.* at 265.

28. See Wyzanski, *The Third Sulzbacher Memorial Lectures*, 7 COLUM. HUMAN RIGHTS L. REV. 405, 407 (1975).

29. Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680 (1969).

30. *Lemon v. Kurtzman*, 403 U.S. 602, 622 (1971).

31. 397 U.S. at 670.

32. Morgan, *supra* note 4, at 65 n.32.

parochial school programs could similarly be financed. In a series of cases in 1971, 1973 and 1975 the Court struck down every new form of such aid, including supplements of salaries of teachers of secular subjects,³³ institutional reimbursement of costs of textbooks and other neutral materials,³⁴ state income tax deductions for tuition payments, tuition reimbursement grants for low income parents, direct institutional grants for maintenance and repair of facilities,³⁵ institutional reimbursement of the costs of required testing and recordkeeping³⁶ and reimbursement of costs of secular auxiliary services.³⁷ In *Meek*, the 1975 finale, textbook loans survived on the strength of *Allen* despite their logical similarity to the other neutral instruments of secular instruction that were denied public financing. The only explanation was *stare decisis*.³⁸

During substantially the same period the Court was reaching opposite results for analogous aid to church-related colleges and universities. In *Tilton v. Richardson*³⁹ it upheld single-shot construction grants for buildings and facilities required to be used for secular educational purposes.⁴⁰ In *Hunt v. McNair*,⁴¹ it upheld similar aid through state-guaranteed revenue bonds. The blockbuster came in *Roemer*,⁴² in which a five to four majority sustained annual noncategorical grants to support the sectarian educational functions of church-related colleges. Here the Court sustained a form of substantial direct institutional aid to religious higher education which it had denied to lower education. Recurring annual appropriations had been viewed by the Court in lower education as having a fatal potential for divisiveness.

Nonetheless, in both *Meek* and *Roemer* the Court has remained faithful to the three-pronged establishment clause test as it evolved from *Walz*. In both cases secular legislative purposes can be conceded, but the cases are distinguishable as to primary effects and entanglement. The differing results are most notable for the triumph of Madison's

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

34. *Meek v. Pittinger*, 421 U.S. 349 (1975).

35. *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756 (1973).

36. *Levitt v. Committee for Pub. Educ.*, 413 U.S. 472 (1973).

37. *Meek v. Pittinger*, 421 U.S. 349 (1975).

38. *Id.* at 359-61.

39. 403 U.S. 672 (1971).

40. The *Tilton* Court, however, struck down a provision of the Higher Education Facilities Act of 1963, 20 U.S.C. §§ 701-703 (1970), limiting that use to 20 years.

41. 413 U.S. 734 (1973).

42. 96 S. Ct. 2337 (1976).

strife-avoidance by the incorporation of political divisiveness with administrative entanglement.

It may be conceded that the primary purposes of legislative supporters of lower school aid are to help preserve parochial schools as providers of secular education. To accept such schools as satisfying the public purpose behind compulsory education laws but to forbid public funds from following that public purpose is troubling. There is logic in Justice White's dissenting language:

Positing an obligation on the State to educate its children, which every State acknowledges, it should be wholly acceptable for the State to contribute to the secular education of children going to sectarian schools rather than to insist that if parents want to provide their children with religious as well as secular education, the State will refuse to contribute anything to their secular training.⁴³

The difficulty is that the extension of this reasoning would allow the state to finance the entire secular component of parochial schooling, or at least all that can be treated as separable. This would make the church and the government working partners in the total educational function of the church. Without rebuilding a Jeffersonian wall, one can still be offended by the form and degree of government aid to religion that would inhere in such a partnership. Without returning to the "no-aid" absolutism of *Everson*, one can consistently say that the first amendment means at least "no partnership."

Furthermore, the predominance of secular purposes is not controlling in first amendment analysis; violations of the Bill of Rights might often serve useful secular purposes. Public morality and convenience might be aided by religio-political partnerships, but the establishment clause condemns such partnerships in the interest of other and higher values.

In analyzing *Meek* and *Roemer*, one must recognize that aids to religious lower education advance religious belief in a vastly different way than do aids to higher education. At the lower levels, Catholic education is an integral part of the practice and propagation of the Catholic faith. Justice Jackson developed this at length in his *Everson* dissent⁴⁴ and Catholic representatives do not deny it. Indeed, a leading spokesman recently pointed to the pervasively religious quality of

43. *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756, 814-15 (1973), *quoted with approval in Meek v. Pittinger*, 421 U.S. 349, 395 (1975) (Rehnquist, J., concurring in part and dissenting in part).

44. 330 U.S. at 18.

their schooling in the course of claiming a right to public support. Consider the following:

In the past, many Catholic educators talked, as I did, about being "partners with public schools" and looked to them to see how Catholic schools were doing. We now are just about ready to say we are not partners but competitors. We know the market for schools is going to be extremely tight. The great shortage ahead, even more severe than the shortage of money, is going to be a shortage of students. Because the competition for students is going to be so intense, forward-looking Catholic educators are ready to say to the public schools: We will take you on; we are going to run the best schools ever put together. We will have schools permeated with values from the moment the pupils arrive until they leave. We are not going to ape the public schools. We will implement our theology and our philosophy of education all the way. Our schools won't be partners because they are going to be radically different from the public schools. They are going to be radically Christian.⁴⁵

Such value-laden education will still satisfy minimal state secular education requirements and continue to relieve the public schools and treasuries of great burdens. Nonetheless, aid for such pervasively religious education must have a primary effect of advancing the Catholic religion. Government can hardly be allowed, consistent with the first amendment, to become a financial partner in such evangelical missions.

By contrast, under national standards of academic freedom and tenure, there is much truly separable secular instruction in church-related higher education. Such separability is to be a condition of valid aid under the *Roemer* decision. The nation's higher secular education needs are being met at many such institutions that by common knowledge are not, in the Court's words, "pervasively sectarian."⁴⁶ The latter, those institutions that still have primarily evangelical missions, seem unlikely to dilute their evangelical effort by publicly claiming to be nonsectarian in order to obtain state aid.

The third criterion, entanglement or strife-avoidance, is even more convincing as a basis for different results at the higher and lower education levels. One need only look at the parties in the lower education cases to appreciate the divisive potential of such aid. Catholic

45. McManus, *Felix Culpa—Report from the Ad Hoc Committee on School Aid*, 20 CATH. LAW. 347, 354-55 (1974).

46. 413 U.S. at 743.

groups are regularly pitted against Protestants, Jews, civil libertarians, and the National Association for the Advancement of Colored People, which fears diversion of funds from public schools. Annual lobbying efforts for substantial appropriations with demands for ever increasing portions could make legislatures into continuous religious battlegrounds with intensifying effects of religious intolerance and divisiveness.

Higher education is a different scene and has not been similarly divisive.⁴⁷ Even Thomas Jefferson, as Rector of the University of Virginia, endorsed a form of state aid to theology schools under which their students obtained scientific instruction and library privileges at the University.⁴⁸ More recently, the lobbying efforts of private higher education have become something of a unifying factor. Non-sectarian private colleges and universities in some states are presenting a united front with church-related institutions at both federal and state levels in seeking public support for all. Also, sectarian institutions of other than the Catholic faith are much more likely to share in state aid to higher education than at the lower levels, where beneficiaries of aid are predominantly if not exclusively Catholic. A clue to the difference is that one of the three higher education cases involved South Carolina aid to a Baptist college.⁴⁹

Thus, the entanglement test is both conceptually and pragmatically successful. It restores the Madisonian strife-avoidance strand to doctrinal analysis and it achieves a compromise that will permit substantial aid to church-related education at the higher levels, perhaps thereby freeing some church resources for relief at the lower levels.

Whether entanglement will generally be successful as an analytical tool and in variations from the education models dealt with to date remains to be seen. The critic who at one point faulted Mark Howe for overlooking the strife-avoidance establishment value later questioned its use as a doctrinal premise in the school-aid cases because it is "almost universally unexamined."⁵⁰ Another who has closely examined it views it as displaying paranoia as to lower education and

47. Underwood, *supra* note 4, at 48.

48. For brief elaboration, see P. KAUPER, *RELIGION AND THE CONSTITUTION* 114-16 (1964); Underwood, *supra* note 4, at 46-50.

49. *Hunt v. McNair*, 413 U.S. 734 (1973).

50. Morgan, *supra* note 4, at 96. For a brief rejection of strife avoidance as an independent value, see Schwartz, *No Imposition of Religion: The Establishment Clause Value*, 77 *YALE L.J.* 692, 710-11 (1968).

undue optimism as to higher education and concludes that it is a doctrine that "is less one of mature, reasoned decision-making and more one of a fickle, erratic adolescence."⁵¹

The Court undoubtedly is acting intuitively. It is also sweeping broadly and with somewhat authoritarian generalizations,⁵² but towards real alleviation of religio-political strife. Results to this point are encouraging. Further refinement may be necessary as unavoidable questions of degree arise, but it appears that the entanglement criterion has settled the basic principles and their application to most factual variations. If so, church and state have arrived at something of a *détente*, as that term has recently been used to describe relations between coexisting powers.⁵³

Like the other, this *détente* is not internally consistent in all respects. It continues at least three precedents of permissible aid to religious education that cannot be reconciled with current doctrine. This is illustrated by a recent Virginia case⁵⁴ involving a released time program like that in *Zorach*. The federal district court reexamined *Zorach* in light of the contemporary three-pronged test and concluded that the second part was violated by a primary effect that advanced religion. The Fourth Circuit Court of Appeals reversed, principally on ground that *Zorach* is still "good law." Despite logical inconsistency with the modern test, *Zorach* was deemed to be controlling because it had been cited approvingly in the *Meek* opinions.⁵⁵ The Supreme Court denied certiorari.

Zorach and released time, like *Allen* and textbook loans, seem sure to remain valid, if only by virtue of *stare decisis*. School transportation seems similarly secure because the *Everson* holding is frequently cited as an example of permissible aid. School lunches and public health services have been approved by dictum. These aids, along with tax exemption of school property and income tax deductibility of contributions to the sponsoring religious organizations, add up to a significant package of aid to lower education. Taken with *Roemer's* approval of

51. Underwood, *supra* note 4, at 62.

52. Kauper, 25 CASE W. RES. L. REV. 107, *supra* note 4.

53. Application of the term to church-state relations is consistent with the dictionary definition: an easing or relaxation of strained relations and political tensions between nations. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, unabr. (G. & C. Merriam Co. 1961).

54. *Smith v. Smith*, 391 F. Supp. 443 (W.D. Va.), *rev'd*, 523 F.2d 122 (4th Cir. 1975), *cert. denied*, 96 S. Ct. 856 (1976).

55. 523 F.2d at 124-25.

more substantial aid to higher education, the détente appears not to be ungenerous to religious education as a whole. Détente is not defeat.

The result is a mosaic of inconsistencies, but a net combination that permits some aid to religion, but not too much. Along with other positive involvements of government with religion, this détente should help to preserve our religiously pluralistic society. As Wilber Katz has eloquently sketched it, key elements in such a society include toleration, dialogue, realization by groups and individuals that they have stakes in each other's religious freedom and "sensitivity to the differing needs of various groups and a disposition to accommodate these needs."⁵⁶ It is hoped that excessive concern for entanglement will not endanger this pluralism, in which both division and divisiveness must necessarily inhere.

The conceptual result is also something of a détente among the competing historic strands of first amendment history. Jefferson's political or anti-clerical strand prevails in *Engel* and *Schempp* with their bans on official religious services in public schools. Roger Williams' wall between the garden and the wilderness is respected by freeing churches from taxation in *Walz*. Finally, Madison's strife-avoidance value is the key to *Meek* and *Roemer* and the higher-lower dichotomy in aids to religious education.

Thus, on both historic and pragmatic grounds *Walz*, *Meek* and *Roemer* may prove to be major achievements of the Burger Court and key elements in our new wall of separation, which has come more to resemble an artful latticework.

56. Katz, *supra* note 4, at 107.

