Constitutional Law -- The Establishment Clause: Drawing the Line on Aid to Religious Schools

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that an *ex post facto* justification will suffice if judicial action is initiated under section five.[69]

The Court's pragmatic approach to annexations is not without merit. The attainment of power by blacks in a city that is no longer economically viable is an empty victory. However, in its eagerness to afford relief to beleaguered cities, the Court seriously undercut the power of section five. The burden of proof concerning the question of discriminatory purpose has become meaningless. By ignoring pre-annexation minority political influence, the Court has invited that influence to be diluted. Politicians in the states and subdivisions covered by section five can no longer successfully prevent blacks from voting. However, annexations may become one method of preventing blacks from winning or deciding elections. The promise of full voting rights is an elusive one if it is subject to manipulations of this kind. In the wake of the violence at Selma, Alabama, President Johnson urged Congress to enact voting rights legislation. The President stated, "No law we now have on the books . . . can ensure the right to vote when local officials are determined to deny it."[70] The *Richmond* decision serves notice to local officials determined to prevent blacks from wielding real power that there is now no law that prevents annexations from being used to dilute the political influence of blacks.

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Since its first ruling on an establishment clause[1] challenge to state aid to religious schools,[2] the United States Supreme Court has sought to

69. Annexations are often viewed as a safety valve for our larger cities. This decision will also affect much smaller cities eager to add white voters for their tax dollars and their votes. *Perkins* involved the expansion efforts of Canton, Mississippi, a town with a 1970 census of 10,703; *Petersburg* involved Petersburg, Virginia, a city with a 1970 population of 36,103.

70. *See Hearings on Extension, supra* note 34, at 5.

1. The establishment clause provides: "Congress shall make no law respecting an establishment of religion, ..." U.S. CONST. amend. I.

2. Everson v. Board of Educ., 330 U.S. 1 (1947). The establishment clause was presumed applicable to the states via the fourteenth amendment in *Everson, supra* at 15, and has subsequently been expressly applied to the states. *See, e.g.*, Board of Educ. v. Allen, 392 U.S. 236 (1968); McCollum v. Board of Educ., 333 U.S. 203 (1948).

apply the Jeffersonian view of the first amendment as "a wall of separation between church and state."[3] Implementing this separation, the Court has developed the following three-pronged test to be applied to challenged state assistance:[4] the aid statute must have a secular legislative purpose;[5] its "primary effect" must neither inhibit nor advance religion;[6] and the statute must not involve government in "excessive entanglement" with religious matters or institutions.[7] In *Meek v. Pittinger*[8] the Court applied these tests but reached conclusions as to the various forms of aid being challenged that cannot be reconciled under an even-handed application of the tests.

Plaintiffs in *Meek*[9] brought suit in federal district court[10] seeking to enjoin expenditure of funds under two Pennsylvania statutes[11] that mandated state aid to "nonpublic schools."[12] The challenged aid was divided into four classifications: "auxiliary services,"[13] "instructional equipment," "instructional materials" and "textbooks."[14] Plaintiffs con-

3. Everson v. Board of Educ., 330 U.S. 1, 16 (1947).

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

5. *Id.*; *see* School Dist. of Abington v. Schempp, 374 U.S. 203 (1963).

6. *See* School Dist. of Abington v. Schempp, 374 U.S. 203 (1963).

7. *See* Lemon v. Kurtzman, 403 U.S. 602 (1971). Another consideration, potential for political devisiveness, may be considered a fourth test, though it has not yet been elevated to that level by the Court. This consideration was the focus of Mr. Justice Brennan's dissent, with whom Mr. Justice Douglas and Mr. Justice Marshall joined, in Meek v. Pittinger, 95 S. Ct. 1753, 1767 (1975).

8. 95 S. Ct. 1753 (1975).

9. Plaintiffs were three individual resident taxpayers of Pennsylvania and four organizations with resident taxpayer members. Standing was granted to both groups with respect to their establishment clause claims under Flast v. Cohen, 392 U.S. 83 (1968) (first amendment challenge by taxpayer with standing granted) and Sierra Club v. Morton, 405 U.S. 727 (1972) (organization has standing to represent injured members) respectively. Meek v. Pittinger, 374 F. Supp. 639, 646-47 (E.D. Pa. 1974). The Supreme Court affirmed standing of all parties, 95 S. Ct. at 1758 n.5.

10. Meek v. Pittinger, 374 F. Supp. 639 (E.D. Pa. 1974). A three-judge district court was convened pursuant to 28 U.S.C. §§ 2281-84 (1970).

11. PA. STAT. ANN. tit. 24, §§ 9-972, -973 (1975).

12. *Id.* § 9-972(b) defines a "nonpublic school" as: "[A]ny school, other than a public school within the Commonwealth of Pennsylvania, wherein a resident of the Commonwealth may legally fulfill the compulsory school attendance requirements of this act and which meet the requirements of Title VI of the Civil Rights Act of 1964 (Public Law 88-352)."

13. *Id.* defines "auxiliary services" as:

> [G]uidance, counseling and testing services; psychological services; services for exceptional children; remedial and therapeutic services; speech and hearing services; services for the improvement of the educationally disadvantaged . . . , and such other secular, neutral, non-ideological services as are of benefit to nonpublic school children and are presently or hereafter provided for public school children of the Commonwealth.

14. *Id.* § 9-973(b) defines the following terms:

> "Instructional equipment" means instructional equipment, other than fixtures annexed to and forming part of the real estate, which is suitable for and to be used by children and/or teachers. The term includes but is not limited to

tended that expenditures under the statutes[15] violated the establishment clause of the first amendment and deprived unconsenting taxpayers of their rights under the free exercise clause.

Applying the tripartite test previously developed by the Supreme Court,[16] the three-judge district court upheld all of the statutory classes of aid except "instructional equipment"[17] that could be diverted to religious purposes.[18] On direct appeal[19] the Supreme Court reversed, upholding only the textbook provision.[20]

The Pennsylvania programs were invalidated on two grounds. First, the Court observed that seventy-five percent of the schools eligible to receive aid were sectarian in nature and that their secular and religious functions were "inextricably intertwined."[21] Characterizing instructional materials and equipment as "massive aid,"[22] the Court concluded that the aid to the sectarian institutions had the unconstitutional "primary effect"[23] of advancing religion. Secondly, the Court invalidated the auxiliary services provision by holding that an "intolerable

projection equipment, recording equipment, laboratory equipment, and any other educational secular, neutral, non-ideological materials as may be of benefit to the instruction of non-public school children and are presently or hereafter provided for public school children of the Commonwealth.

"Instructional materials" means books, periodicals, documents, pamphlets, photographs, reproductions, pictorial or graphic works, musical scores, maps, charts, globes, sound recordings, including but not limited to those on discs and tapes, processed slides, transparencies, films, filmstrips, kinescopes, and videotapes, or any other printed and published materials of a similar nature . . . . The term includes such other secular, neutral, non-ideological materials as are of benefit to the instruction of nonpublic school children and are presently or hereafter provided for public school children . . . .

. . . .

"Textbooks" means books, workbooks, including reusable and nonreusable workbooks, and manuals, whether bound or in looseleaf form, intended for use as a principal source or study material for a given class or group of students, a copy of which is expected to be available for the individual use of each pupil in such class or group. Such textbooks shall be textbooks which are acceptable for use in any public, elementary, or secondary school of the Commonwealth.

15. *Id.* §§ 9-972, -973.

16. See text accompanying notes 4-7 *supra.*

17. See note 14 *supra.*

18. 374 F. Supp. at 661. The district court found no merit in the plaintiffs' free exercise claim since taxes resulting from the expenditures in question had no real effect on free exercise rights. *Id.* at 662.

19. 28 U.S.C. § 1253 (1970) allows direct appeal to the Supreme Court from a judgment of a three-judge district court concerning the constitutionality of a state law.

20. 95 S. Ct. at 1767. The Court was badly divided, with Stewart (writing for the Court), Blackmun, and Powell in the majority as to all statutory provisions. Burger, Rehnquist and White dissented except as to the upholding of the textbook loan program. Brennan, Douglas and Marshall joined with the Court except as to the upholding of the textbook program.

21. *Id.* at 1764, *quoting* Lemon v. Kurtzman, 403 U.S. 602, 657 (1971) (Brennan, J., concurring).

22. 95 S. Ct. at 1763.

23. *Id.* See text accompanying note 6 *supra.*

degree of entanglement[24] between church and state" would result in overseeing the program's administration.[25]

The Court found the textbook provision to be identical "in every material respect"[26] to the program approved in *Board of Education v. Allen*[27] seven years earlier, and upheld it on that basis alone. In doing so, the majority did not subject this particular program to the analysis that it applied to the other provisions.[28] Distinguishing between the forms of assistance in this manner, the Court apparently tried to achieve governmental neutrality without depriving either the state legislature of the right to benefit its citizens or parents of the right to exercise their religious beliefs.

In order to understand the principles applied in *Meek*, it is necessary to examine the earlier cases that dealt with the establishment clause limitations on state involvement with religious matters. *Everson v. Board of Education*[29] was the first Supreme Court decision to deal with the establishment clause in the context of state aid to religious schools. In *Everson* the Court held that the reimbursement of parents of the costs of busing their children to parochial schools was only incidentally beneficial to the sectarian schools since it was a legitimate, nondiscriminatory welfare statute analogous to police and fire protection.[30] The *Everson* rationale has since become known as the "pupil benefit theory."[31] In *Board of Education v. Allen*[32] the Court extended the pupil benefit theory to include secular textbooks provided directly to all school children through expenditures of state funds.

A competing line of cases approached the state aid problem by developing and relying primarily upon the three-part test. In *School District of Abington v. Schempp*,[33] though not a state assistance case,

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24. See text accompanying note 7 *supra*.
25. 95 S. Ct. at 1765.
26. *Id.* at 1761.
27. 392 U.S. 236 (1968).
28. 95 S. Ct. at 1760-62.
29. 330 U.S. 1 (1947). In 1899 the Court upheld federal construction grants to a hospital administered by a religious order, thus rejecting the view that the establishment clause of the first amendment prohibits any form of financial aid to religious institutions. Bradfield v. Roberts, 175 U.S. 291 (1899).
30. 330 U.S. at 17. The Court further stated that in guarding against intrusion upon Establishment Clause principles "we must be careful . . . that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens . . . ." *Id.* at 16. This dictum expresses the crux of the problem in *Meek* as well.
31. Note, *Establishment Clause of the First Amendment—Free Textbook Loans to Pupils in Private Schools Held Constitutional*, 37 FORDHAM L. REV. 123, 124 (1969).
32. 392 U.S. 236 (1968).
33. 374 U.S. 203 (1963).

the Court set forth two criteria by which a statute should be tested under the establishment clause. These criteria were the requirements of "secular purpose" and "primary effect."[34]

In *Lemon v. Kurtzman*[35] the Court added the requirement that the aid program not involve "excessive entanglement"[36] of church and state. Under this third test, state salary supplements to teachers of secular subjects were invalidated. The Court in *Kurtzman* held that entanglement of government and religion would result from the state's ensuring that teachers who received the supplement remained religiously neutral.[37] The *Kurtzman* Court also developed a fourth consideration, potential for political division along religious lines, which, though not given the weight of the other tests, was deemed a "warning signal"[38] of unconstitutionality.

The conflict inherent in the principles that were the basis of *Everson* and *Schempp* did not go unnoticed by the Court. In *Walz v. Tax Commission*[39] the Court upheld real property tax exemptions granted by New York to religious organizations. Though the rationale for the decision was the incidental nature of the benefit to religion, which was comparable to fire and police protection,[40] the Court paid particular attention to the inconsistency in the developing case law. The Court observed that inconsistencies in the opinions of the Court derived from "too sweeping utterances on aspects of these [religion] clauses that seemed clear in relation to the particular cases but have limited meaning as general principles."[41]

The Court in *Walz* suggested that the struggle to establish neutrality was one of finding a "neutral course between the two Religion Clauses."[42] The source of the conflict, the Court concluded, lay in the

34. 374 U.S. at 222. See text accompanying notes 5-6 *supra*. The requirement of valid "secular purpose" is the least stringent requirement of the tripartite test because of the difficulty in refuting the argument that aid is provided to benefit primarily the state's citizens. Aid statutes may preempt the problem by placing statements of policy in the statute's preamble. *See, e.g.*, PA. STAT. ANN. tit. 24, §§ 9-972(a), -973(a) (1975).

35. 403 U.S. 602 (1971).

36. *Id.* at 613. See text accompanying note 7 *supra*. The Court has applied the various tests with far less severity when the institution involved is one of higher education and where the Court can take notice of a free academic atmosphere. *See* Tilton v. Richardson, 403 U.S. 672 (1971); *see also* Hunt v. McNair, 413 U.S. 734 (1973).

37. 403 U.S. at 620-21.

38. *Id.* at 625.

39. 397 U.S. 664 (1970).

40. *Id.* at 676. *See* Everson v. Board of Educ., 330 U.S. 1 (1947).

41. 397 U.S. at 668. Though *Walz* is not a state aid to religion case, the establishment/free exercise clause principles involved are identical.

42. *Id.*

fact that the religion clauses "are cast in absolute terms, . . . either of which, if expanded to a logical extreme, would tend to clash with the other."[43] Because the *Meek* decision rested on both the pupil benefit theory as to textbooks and the tripartite test as to the other programs, it was inevitable that it would show the strains of the conflict delineated in *Walz*.

An analysis of the *Meek* case must begin with an examination of the manner in which the tripartite test was extended to cover the invalidated provisions.[44] The auxiliary services program[45] was invalidated because the Court felt that in order for the state to guarantee teacher autonomy from religious authorities, it would necessarily become excessively entangled with those authorities. Though *Lemon v. Kurtzman*[46] was used as authority for this portion of the holding, the teachers in *Meek* were chosen *by the state* for special functions associated more with health-related services than with regular classroom activites.[47] The Court noted these differences but gave them little weight in its factual analysis.[48] This approach to excessive entanglement extended the Court's invalidating power beyond the *Kurtzman* case to situations that present very little danger of actual "fostering of religion."[49]

The Court likewise changed its means of determining whether a statute has the primary effect[50] of advancing religion. In the past, programs were held to violate the establishment clause only if the *character* of the aid was such that religion would be directly advanced thereby, as when a statute authorized assistance without expressly limiting it to nonreligious uses.[51] In *Meek* the Court declared aid to be impermissible when it exceeds an acceptable *quantitative* limit. The instructional materials and equipment programs were struck, not because they could be diverted for religious use,[52] but because they

43. *Id.* at 668-69.
44. See text accompanying note 20 *supra.*
45. See note 13 *supra.*
46. 403 U.S. 602 (1971).
47. See note 13 *supra.*
48. *See* 95 S. Ct. at 1766.
49. *Id.* The Court noted in dicta that speech and hearing services of a "diagnostic" character were probably constitutional but found that clause nonseverable from the invalid section, even though a severability clause was present in the statute. *Id.* at 1766 n.21.
50. See text accompanying note 6 *supra.*
51. *See* Levitt v. Committee for Pub. Educ., 413 U.S. 472 (1973). *See also* Sloan v. Lemon, 413 U.S. 825 (1973); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973).
52. 95 S. Ct. at 1763. The district court had based its test on whether or not aid could be diverted to religious purposes. The court invalidated only that portion that could be so diverted. *See* text accompanying note 18 *supra.*

constituted "massive aid."[53] This development extended the "primary effect" limitation to cover state assistance that is suspect both in character and in quantity.

The Court did not make clear its reasons for exempting the textbook provision from the tripartite test. "[S]ubstantial amounts of direct support" was the stated concern of the Court.[54] There is, however, no indication in the holding or in dicta why textbooks were not considered "substantial" assistance, except that in *Allen*[55] a similar provision was upheld. Likewise, Mr. Justice Brennan's argument in his dissent that the textbooks were going in fact to the school and not to the students remains unanswered.[56] In short, the textbooks seem to be direct aid to the nonpublic schools and appear no less "substantial" than the other provisions.

On the other hand, if the *Everson* approach (treating textbooks as primarily benefiting the pupil) is used, the textbook program is justifiable. The Court did in fact use the pupil benefit theory to support the textbook provision in *Meek*.[57] Using *Everson* and *Allen* as starting points, it is difficult to justify the striking of the instructional materials program as unconstitutional. No explanation was given by the Court as to why it distinguished between aid that provided textbooks, which was held constitutional, and aid that provided "books, periodicals, documents, pamphlets" etc.,[58] which was not. On the basis of the nature of the materials, no rational distinction can be made.[59] To retain consistency the Court should have either upheld at least the auxiliary materials under the pupil benefit theory[60] or struck the textbook provision under

53. 95 S. Ct. at 1763.
54. *Id.*
55. 392 U.S. 236 (1968).
56. Brennan argued that the loan procedures and the language of the administrative guidelines show that the loans are in fact made to the schools, not the children, 95 S. Ct. at 1770-71.
57. *Id.* at 1761.
58. PA. STAT. ANN. tit. 24, § 9-973 (1975). Choice of materials and administrative distribution procedure remained with the state as was the case with the textbooks.
59. Rehnquist made this observation: "I fail to see how the instructional materials and equipment program can be distinguished [from the textbook program] in any significant respect. Under both programs 'ownership remains, at least technically, in the State'." 95 S. Ct. at 1776.
60. Though the Court claims the distinction lies in the fact that the instructional materials program was "direct" aid to schools and the textbook program was not, it is highly doubtful that if the aid had been given directly to students that it would have been upheld. Both Brennan and Rehnquist in separate dissents and for different reasons show that the "direct" aid argument of the majority is simply a makeshift one. *See id.* at 1770-71, 1776.

the tripartite test. The Court chose instead to sacrifice internal consistency.

The origin of the inconsistency lies primarily in the case law that preceded *Meek* and in the conflicting interests present within any concept of government neutrality. If in striving for neutrality government becomes the adversary of religion, free exercise rights will be adversely affected.[61] This struggle for neutrality is the cause of the Court's acknowledgment in *Meek* that the lines between permissible and impermissible aid are blurred and that the various tests are little more than guidelines.[62]

Apparently not wanting to cut off all state power to benefit citizens who exercise their religious rights, the Court stood on the precedential authority of the "pupil benefit" cases. Additionally, fearful of increasing state entanglement in religious affairs and of fueling political division on religious grounds, the Court drew the line, albeit somewhat arbitrarily, as to the extent of permissible state aid. The result of the clash between these competing considerations was the inconsistency in the Court's treatment of the aid provisions in *Meek*.

The *Meek* decision is significant because it made relatively clear the line between permissible and impermissible aid. While affirming the constitutionality of state aid that supplies busing,[63] textbooks,[64] health care and lunches,[65] the Court further raised the barrier to state aid not within these protected classes of assistance. As a result, state legislatures should be forewarned that it is unlikely that the Court will approve state assistance to religious schools[66] unless it comes within or is closely associated with one of the protected classes.

It is unfortunate that the Court ignored its own statement on aid classifications: state assistance is invalid if aimed at the "primary, religious-oriented educational function of the sectarian school."[67] In this

61. This struggle for neutrality is the struggle described in *Walz*. *See* text accompanying notes 41-42 *supra*.

62. 95 S. Ct. at 1760.

63. Everson v. Board of Educ., 330 U.S. 1 (1947), had upheld transportation cost reimbursement to parents, and was noted with approval by the Court in *Meek*. 95 S. Ct. at 1760.

64. 95 S. Ct. at 1762-63, *aff'g* Board of Educ. v. Allen, 392 U.S. 236 (1968).

65. In dicta the Court in *Meek* noted that health care and school lunches are permissible aid, 95 S. Ct. 1763. Likewise, the Court noted that "speech and hearing services" would have been upheld if severable from the remainder of the auxiliary services program. *Id.* at 1766 n.21.

66. "Religious schools" in this context refers to primary and secondary religious schools. Tilton v. Richardson, 403 U.S. 672 (1971), shows a less strict approach to institutions of higher learning administered by religious groups. *See* note 35 *supra*.

67. 95 S. Ct. at 1763.

rough formula the Court posed a reasonable answer to the religious aid issue. Lunches, health care and transportation can be upheld under the pupil benefit theory as not being part of the actual educational function that the Court has found to be "inextricably intertwined"[68] with religion. Textbooks, however, are an inseparable part of the primary educational function of schools and should have been invalidated. Though this approach would require the bolder actions of overruling *Board of Education v. Allen*[69] and striking the textbook program in *Meek*, it would more clearly establish the lines of state neutrality without requiring the sacrifice of consistency.

ERIC NEWMAN

Criminal Procedure—Prison Escapee's Pending Appeal Dismissed Despite Early Recapture

Escape from prison or other official custody is not only a common-law[1] or statutory[2] offense but it can also be a ground for major procedural disabilities. Summary dismissal of the pending appeal of a prison escapee or other fugitive from justice, at least while the appellant is still at large, is accepted practice in many appellate courts.[3] The result of this procedure is a total preclusion of review of an escaping prisoner's original conviction. In *Estelle v. Dorrough*[4] the United States Supreme Court extended its approval of this practice twofold by holding that a Texas statute[5] that allowed the automatic dismissal of an escaping

68. *Id.* at 1764, *quoting* Lemon v. Kurtzman, 403 U.S. 602, 657 (1971). *See* text accompanying note 21 *supra.*

69. 392 U.S. 236 (1968).

1. United States *ex rel.* Manzella v. Zimmerman, 71 F. Supp. 534 (E.D. Pa. 1947); Smith v. State, 145 Me. 313, 75 A.2d 538 (1950); State v. Pace, 192 N.C. 780, 136 S.E. 11 (1926).

2. *E.g.*, N.C. GEN. STAT. § 148-45 (1973); TEX. PENAL CODE art. 38.07 (1974).

3. *See* text accompanying notes 32-41 *infra.*

4. 420 U.S. 534 (1975) (per curiam).

5. TEX. CODE CRIM. PRO. ANN. art. 44.09 (1966). This statute provides:

> If the defendant, pending an appeal in the felony case, makes his escape from custody, the jurisdiction of the Court of Criminal Appeals shall no longer attach in the case. Upon the fact of such escape being made to appear, the court shall, on motion of the State's attorney, dismiss the appeal; but the order dismissing the appeal shall be set aside if it is made to appear that the defendant has voluntarily returned within ten days to the custody of the officer from whom he escaped; and in cases where the punishment inflicted by the jury is death or confinement in an institution operated by the Department of Correc-