

NOTE

California Teachers Association v. Riles: California Sets a New Standard for Public Aid to Parochial Schools

by Carol A. Opatow*

Introduction

Late in the summer of 1981, the California Supreme Court published an opinion concerning the authorization and appropriation of money for a textbook loan program to nonpublic schools. In *California Teachers Association v. Riles*,¹ the court abruptly reversed California's prior adherence to the federal three-part Establishment Clause test. This note examines the selection of a new test under the California Constitution.

The proscription against government subsidization of religious activities is grounded in the First Amendment to the United States Constitution.² The First Amendment religion clauses were written to protect personal religious liberty, and the courts have been actively articulating and revising standards³ in an effort to safeguard religious freedom⁴ "[b]y preventing the government from coercing religious belief and from taxing for religious purposes."⁵ The task of the courts is to give effect to the First Amendment guarantees of free exercise and nonestablishment.

* B.A., 1970, University of Massachusetts; M.S., 1971, University of Wisconsin (Madison); member, third year class.

1. 29 Cal. 3d 794, 632 P.2d 953, 176 Cal. Rptr. 300 (1981).

2. U.S. CONST. amend. I: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;" These two clauses are known respectively as the Establishment Clause and the Free Exercise Clause. J. NOWAK, R. ROTUNDA, & J. YOUNG, *HANDBOOK ON CONSTITUTIONAL LAW* 849 (1978) (hereinafter cited as J. NOWAK).

3. See J. NOWAK, *supra* note 2, ch. 19 at 849-94.

4. The goal is government neutrality. See *id.* at 849.

5. Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 CALIF. L. REV. 260, 340 (1968).

The meaning of the Establishment Clause was enunciated by the United States Supreme Court in the landmark case of *Everson v. Board of Education*:

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. . . . 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. . . . 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."⁶

Despite this unequivocal statement by the Court, between 1965 and 1970 federal assistance to religious schools totaled \$250 million.⁷ This federal aid would appear to "establish" religion by preferring or supporting one religion over another, since Roman Catholic schools account for sixty-three percent of all church-related schools.⁸ By the same token, obligations attached to such aid might render the Roman Catholic Church susceptible to government involvement or control, in violation of the right of free exercise.⁹

When a governmental assistance program is challenged under the Establishment Clause, a federal court will look to the traditional reasoning behind assistance. While "[g]overnment action for *religious* purposes is highly suspect . . . government action for *secular* purposes does not fall within the core of the Establishment Clause's concern—the 'nonestablishment guarantee is directed at public aid to the *religious* activities of religious groups.'"¹⁰ The Supreme Court has struggled with the distinction between religious and secular purposes, and in *Lemon v. Kurtzman*¹¹ ultimately devised a three-part test¹² to determine what constitutes aid and which activities are religious.¹³

State courts are also grappling with the question of support for

6. 330 U.S. 1, 15-16 (1947) (citation omitted).

7. M. SMITH & J. BRYSON, CHURCH-STATE RELATIONS: THE LEGALITY OF USING PUBLIC FUNDS FOR RELIGIOUS SCHOOLS 70 (1972).

8. See STATISTICAL ABSTRACT OF THE UNITED STATES 155 (101st ed. 1980).

9. Among the evils the First Amendment is supposed to protect against are: "sponsorship, financial support, and active involvement of the sovereign in religious activity." Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 772 (1973) (quoting Walz v. Tax Comm'r, 397 U.S. 664, 668 (1970)).

10. Choper, *supra* note 5, at 268-69 (quoting P. FREUND, RELIGION AND THE PUBLIC SCHOOLS 11 (1965)) (emphasis in original).

11. 403 U.S. 602 (1971).

12. See *infra* text accompanying note 37.

13. See Choper, *supra* note 5, at 260-61.

sectarian entities under state constitutions.¹⁴ Part I of this note traces the development of the federal and California Establishment Clause tests. Part II analyzes the California Supreme Court's decision in *California Teachers Association*¹⁵ and takes a close look at the test formulated in that decision, assessing its strengths and suggesting revisions to correct its weaknesses.

I. Development of the Federal and California Establishment Clause Tests in the Context of State Aid to Parochial Schools

A. The Federal Tripartite Test

In 1947, the United States Supreme Court set out a framework for Establishment Clause analysis in *Everson v. Board of Education*,¹⁶ the first case to apply the Establishment Clause to the states.¹⁷ *Everson* involved a state statute providing tax dollars to reimburse parents for their children's bus fares to either public or parochial schools. In a five-to-four decision, the Court upheld the statute as doing no more than providing "a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools."¹⁸

The Court reasoned that if some children attended church schools because of the subsidized fares who otherwise would not, such incidental benefit to the schools was constitutionally permissible.¹⁹ This reasoning has been described as the "child benefit theory"—when there is a primary benefit to children, an incidental religious benefit does not invalidate a statute.²⁰ Justice Jackson noted the incongruity of this decision, arguing in his dissent that "the undertones of the opinion, advocating complete and uncompromising separation of Church from State, seem utterly discordant with its conclusion yielding support to their commingling in educational matters."²¹

Twenty-one years after *Everson*, in 1968, the Court returned to the

14. See Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 907-12 (1976).

15. 29 Cal. 3d 794, 632 P.2d 953, 176 Cal. Rptr. 300 (1981).

16. 330 U.S. 1 (1947).

17. The Establishment Clause applies to state as well as federal action through the incorporation of its principles into the Fourteenth Amendment's Due Process Clause. See L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 813-14 (1978). The Free Exercise Clause was first applied to the states in *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

18. *Everson*, 330 U.S. at 18.

19. See *id.* at 17.

20. The child benefit theory was first set out in *Cochran v. Louisiana State Bd. of Educ.*, 281 U.S. 370, 374-75 (1930). See also M. SMITH & J. BRYSON, *supra* note 7, at 46-47.

21. *Everson*, 330 U.S. at 19 (Jackson, J., dissenting).

issue of state aid to parochial education. *Board of Education v. Allen*²² involved a textbook loan program in which textbooks purchased and approved by the public schools, were loaned free of charge to students in public and private schools, including church schools.²³ The Court used a two-part test, first set out in *Abington School District v. Schempp*,²⁴ to distinguish forbidden from permissible state involvements with religion. This test looks to the purpose and effect of the challenged legislation:

[W]hat 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.²⁵

Applying the test to the loan program, the Court in *Allen* found that the secular legislative purpose of textbook loans was to further student educational opportunity. Evaluating the primary effect, the Court reiterated the *Everson* child benefit theory, stating that a general program of lending books benefits all children and parents, not the schools.²⁶ Although appellees invited the Court to distinguish books from bus fares because the former furthered the religious teaching of the school,²⁷ the Court declined, stating:

In the meager record before us in this case,²⁸ we cannot agree with appellants either that all teaching in a sectarian school is religious, or that the processes of secular and religious training are so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion.²⁹

Two important assumptions derive from the "effect test" of *Allen* and *Everson*. First, an incidental religious benefit does not invalidate a primary secular benefit, and second, church school instruction can be divided into separate religious and secular spheres.

As in *Everson*, strong dissents followed the *Allen* opinion. Justice Black, who wrote for the majority in *Everson*, distinguished the non-

22. 392 U.S. 236 (1968).

23. *Id.* at 243-45.

24. 374 U.S. 203, 222 (1963). In *Schempp*, a state law requiring passages from the Bible be read or that the Lord's prayer be recited in public schools was found to violate the Establishment Clause. Note that the Establishment Clause has been applied to cases involving religion in the public schools (as in *Schempp*) and to public aid to religious schools (as in the textbook loan cases).

25. *Allen*, 392 U.S. at 243 (quoting *Schempp*, 374 U.S. at 222).

26. *See Allen*, 392 U.S. at 243-44.

27. *See id.* at 245.

28. This case came to the Court after summary judgment on the pleadings. *Id.* at 248.

29. *Id.*

ideological nature of transportation from that of books, "which, although 'secular,' realistically will in some way . . . propagate the religious views of the favored sect."³⁰ Justice Fortas faulted the child benefit theory, stating that the rationale that the aid was to the student rather than to the school was a "transparent camouflage."³¹

The Court's next review of a textbook loan program was in *Meek v. Pittenger*³² in 1975. In that case, a Pennsylvania statute authorizing instructional material loans, auxiliary services, and textbook loans to nonpublic school children was challenged under the Establishment Clause.³³ The textbook loan program was the only part of this legislation to withstand constitutional attack.³⁴

In its analysis, the Court applied a three-part Establishment Clause test. The first two prongs of this test consisted of the components of the two-part "purpose and effect" test used in *Allen*. The third prong was derived from the Court's previous decisions in *Committee for Public Education & Religious Liberty v. Nyquist*³⁵ and *Lemon v. Kurtzman*,³⁶ Establishment Clause cases not involving textbook loans. The new test requires statutes to have: (1) a secular legislative purpose, (2) a primary secular effect, and (3) an avoidance of excessive government entanglement with religion.³⁷

In *Meek*, loans of instructional materials, such as periodicals, maps, and charts, to nonpublic schools were found to have the secular legislative purpose of developing the children's intellectual capacities. However, the materials had "the unconstitutional primary effect of advancing religion because of the predominantly religious character of the schools benefiting from the Act."³⁸ More than seventy-five percent of Pennsylvania's nonpublic schools complying with the compulsory attendance law, a program requirement, were found to be church-related.³⁹

In disallowing the loan of such instructional materials, the Court concluded that "the secular education those schools provide goes

30. *Id.* at 252 (Black, J., dissenting).

31. *Id.* at 270 (Fortas, J., dissenting).

32. 421 U.S. 349 (1975).

33. *See id.* at 352-55.

34. *See id.* at 359.

35. 413 U.S. 756 (1973).

36. 403 U.S. 602 (1971).

37. *See Meek v. Pittenger*, 421 U.S. 349, 358 (1975). The concept of excessive entanglement was first articulated in *Walz v. Tax Comm'r*, 397 U.S. 664 (1970). However, it was considered part of the analysis of "secular effect" and did not emerge as an independent third part of the Establishment Clause test until *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

38. *Meek*, 421 U.S. at 363. The Court never reached the third factor, excessive entanglement, with respect to the loans of materials because the impermissible effect of advancing religion was sufficient ground for holding the statute unconstitutional. *Id.* at 363 n.13.

39. *Id.* at 364.

hand in hand with the religious mission that is the only reason for the schools' existence. Within the institution, the two are inextricably intertwined.'"⁴⁰ This conclusion directly contradicted the Court's assumption in *Allen* that secular and religious instruction are separate.⁴¹

Pennsylvania's provision of "auxiliary services" on the nonpublic school premises—including counseling, testing, psychology, and speech⁴²—was likewise struck down. The Court emphasized that continuing government surveillance would be required to insure the religious neutrality of the providers of these services, raising questions of administrative as well as potential political entanglement between church and state. This potential for continuing political strife—"divisive conflict over the issue of aid to religion"—led the Court to conclude that this statute did not pass the excessive entanglement part of the Establishment Clause test.⁴³

In contrast, the Court upheld the textbook loan program. Three Justices considered the program to "merely [make] available to all children the benefits of a general program to lend school books free of charge."⁴⁴ The parents and children were found to be the recipients of this benefit, not the nonpublic schools.⁴⁵ Two Justices found the textbook loan program constitutional because it was almost identical to the program upheld in *Allen*.⁴⁶ Three dissenting Justices would have invalidated the book loans because the school was the true ultimate beneficiary.⁴⁷

The most recent case involving a textbook loan program came before the Supreme Court in 1977. In *Wolman v. Walter*⁴⁸ an Ohio statute authorizing various forms of aid was challenged under the Establishment Clause. Expenditure of funds for testing and scoring standardized tests,⁴⁹ speech and hearing diagnostic services in the nonpublic schools,⁵⁰ therapy services off the nonpublic school premises,⁵¹ and a textbook loan program⁵² similar to those in *Allen* and

40. *Id.* at 366 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 657 (1971)).

41. *See supra* text accompanying notes 29-30.

42. *Meek*, 421 U.S. at 367.

43. *Id.* at 372.

44. *Id.* at 360 (Stewart, Blackmun, and Powell, JJ.).

45. *Id.* at 361.

46. *Id.* at 388 (Rehnquist and White, JJ., concurring in part). Note that the *Allen* case was decided on no factual record. *See supra* note 28 and accompanying text.

47. *Id.* at 379-81 (Brennan, Douglas, and Marshall, JJ., dissenting in part).

48. 433 U.S. 229 (1977). The most recent state aid to religious schools case, *Committee for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646 (1980), is not discussed here because (1) it does not involve textbook loans, and (2) it simply applies the three-part Establishment Clause test without any doctrinal changes.

49. *Wolman*, 433 U.S. at 238-41.

50. *Id.* at 241-44.

51. *Id.* at 244-48.

Meek was held to be constitutional. However, the Court singled out a program lending instructional materials and equipment to pupils as impermissible:⁵³

Appellees seek to avoid *Meek* by emphasizing that it involved a program of direct loans to nonpublic *schools*. In contrast, the material and equipment at issue under the Ohio statute are loaned to the *pupil* or his parent. In our view, however, it would exalt form over substance if this distinction were found to justify a result different from that in *Meek*. . . . Despite the technical change in legal bailee, the program in substance is the same as before. . . . *In view of the impossibility of separating the secular education function from the sectarian*, the state aid inevitably flows in part in support of the religious role of the schools.⁵⁴

Thus, the rationale of *Allen*—if not its holding—was rejected by this Court,⁵⁵ resulting in an internally inconsistent opinion: textbook loans to students were held permissible under the doctrine of stare decisis, following the decision of a Court that had assumed the religious and secular educational functions of a church school were separable. But the lending of materials, also to students, was held to violate the Establishment Clause because the religious and secular functions were intertwined. These positions, as the Court has admitted,⁵⁶ are difficult to reconcile.

Justice Marshall, in dissent, recognized this inconsistency and urged that *Allen* be overruled: “The Court upholds the textbook loan provision, . . . on the precedent of *Board of Education v. Allen*. . . . It also recognizes, however, that there is ‘a tension’ between *Allen* and the reasoning of the Court in *Meek v. Pittenger*. . . . I would resolve that tension by overruling *Allen*.”⁵⁷ Marshall’s dissent flatly rejected the assumption that a religious school’s religious and secular functions are separable.⁵⁸

In summary, the United States Supreme Court has established a three-part purpose-effect-entanglement test to determine when state aid to church-related elementary and secondary schools is within the limits imposed by the First Amendment’s Establishment Clause. The requirement of a secular legislative purpose means “that governmental

52. *Id.* at 236-38.

53. *Id.* at 248-51. Provision of field trip transportation was likewise held impermissible. *Id.* at 252-55.

54. *Id.* at 250 (emphasis added).

55. See Note, *Limitations on Permissible State Aid to Church-Related Schools Under the Establishment Clause: Wolman v. Walter*, 5 PEPPERDINE L. REV. 573, 583-84 (1978).

56. See *Wolman*, 433 U.S. at 251 n.18.

57. *Id.* at 256-57 (Marshall, J., dissenting) (citations omitted).

58. *Id.* at 256-59.

action at least be justifiable in secular terms,"⁵⁹ a criterion easily met.⁶⁰ Primary secular effect is the second requirement. Even if the purpose of the state action is secular, that aid is unconstitutional if the actual effect primarily aids religion. Professor Tribe points out that "the Court has transformed [this test] into a requirement that any non-secular effect be remote, indirect and incidental."⁶¹ The child benefit theory is derived from this requirement: the child is the primary beneficiary, and any simultaneous benefit accruing to a religious institution is incidental and constitutionally permissible.⁶² The final requirement that there be no excessive government entanglement with religion rests "upon the premise that both religion and government can best work to achieve their lofty aims if each is left free of the other within its respective sphere."⁶³

Although the Court has had a majority "that formally supports the three part test, . . . fewer Justices may actually wish to employ the test in this school aid area" in the future.⁶⁴ Strong dissenting opinions and inconsistent results show that the test has less support than its track record would indicate.

B. The California Test

*Bowker v. Baker*⁶⁵ was the first California case to challenge state aid to church elementary schools under the state establishment clauses. Although *Bowker* was decided in 1946, a year before the United States Supreme Court's decision in *Everson*, the facts and holdings of the two cases are remarkably similar. The challenger in each case sought to restrain the school district from transporting parochial school pupils in public school buses. The California Court of Appeals in *Bowker* held that "an incidental benefit flowing to a denominational school from free transportation of its pupils should not be sufficient to deprive the Legislature of the power to authorize a school district to transport such pupils."⁶⁶ The incidental, or child benefit, test became the establishment clause standard under the California Constitution.

The next major California decision in this area, *California Educa-*

59. L. TRIBE, *supra* note 17, at 835. "The court will usually find in the statutory language or elsewhere a secular purpose for the challenged law [—any purpose that is arguably non-religious—] and will then move on to a consideration of the remaining two criteria." (citing *Lemon v. Kurtzman*, 403 U.S. 602 (1971)). L. TRIBE, *supra* note 17, at 836. *See also id.* at 835-39.

60. *See* L. TRIBE, *supra* note 17, at 835.

61. *Id.* at 840 (emphasis omitted).

62. *See* M. SMITH & J. BRYSON, *supra* note 7, at 82.

63. L. TRIBE, *supra* note 17, at 866 (quoting *McCullum v. Board of Educ.*, 333 U.S. 203, 212 (1948)).

64. J. NOWAK, *supra* note 2, at 857.

65. 73 Cal. App. 2d 653, 167 P.2d 256 (1946).

66. *Id.* at 663, 167 P.2d at 261.

tional Facilities Authority v. Priest,⁶⁷ restated and strengthened the incidental benefit test. In *Priest*, the California Supreme Court upheld, on both federal and state constitutional grounds, the authorization of revenue bonds to provide private, nonprofit higher educational institutions, including church-related schools, a means to expand academic facilities. The court applied the three-part purpose-effect-entanglement test established by the United States Supreme Court in its analysis of the First Amendment issue.⁶⁸ Analyzing state constitutional grounds, the court reasoned that the California Constitution bars direct expenditures of public funds in support of sectarian organizations and purposes, but does not "prohibit a religious institution from receiving an indirect, remote, and incidental benefit from a statute which has a secular primary purpose."⁶⁹ The test to be applied was not whether a legislative act provides a benefit, "but whether that benefit is *incidental* to a primary public purpose."⁷⁰

II. Analysis of *California Teachers Association v. Riles*

On August 27, 1981, the California Supreme Court filed its opinion in *California Teachers Association*,⁷¹ thereby adopting a new test for the state establishment clauses.⁷² A close examination of that opinion follows.

A. Facts

Plaintiffs, the California Teachers Association and the American Civil Liberties Union of Southern California, challenged the constitutionality of then sections 60315 and 60246 of the California Education Code.⁷³ These sections authorize and fund a state program for lending public school-adopted textbooks to nonprofit, nonpublic school students.⁷⁴

67. 12 Cal. 3d 593, 526 P.2d 513, 116 Cal. Rptr. 361 (1974).

68. *See id.* at 600-03, 526 P.2d at 517-19, 116 Cal. Rptr. at 365-67.

69. *Id.* at 605, 526 P.2d at 521, 116 Cal. Rptr. at 369.

70. *Id.* (emphasis added).

71. 29 Cal. 3d 794, 632 P.2d 953, 176 Cal. Rptr. 300 (1981).

72. *See infra* text accompanying notes 98-114.

73. CAL. EDUC. CODE §§ 60315, 60246 (West Supp. 1982) (amended 1983).

74. Section 60315 provides in its entirety: "The Superintendent of Public Instruction shall lend to pupils entitled to attend the public elementary schools of the district, but in attendance at a school other than a public school under the provisions of Section 48222, the following items adopted by the state board for use in the public elementary schools: (a) Textbooks and textbook substitutes for pupil use. (b) Educational materials for pupil use. (c) Tests for pupil use. (d) Instructional materials systems for pupil use. (e) Instructional materials sets for pupil use. No charge shall be made to any pupil for the use of such adopted materials. Items shall be loaned pursuant to this section only after, and to the same extent that, items are made available to students in attendance in public elementary schools. However, no cash allotment may be made to any nonpublic school. Items

The statutes were challenged under the Establishment Clause of the First Amendment to the United States Constitution, and the establishment clauses of the California Constitution. Article IX, section 8 of the California Constitution specifically prohibits the appropriation of public money for the support of sectarian schools or any nonpublic school,⁷⁵ and article XVI, section 5, is a broad prohibition of public aid or support to a religious sect or to a religiously controlled institution.⁷⁶

The trial court in *California Teachers Association* found that "in 1975, 87 percent of the schools participating in the textbook loan program were religious schools" and that the program's cost in the 1976-77 school year was more than \$2 million.⁷⁷ Although the complaint challenged a benefit to all religious schools, the California Supreme Court focused on Catholic schools, which figured prominently in the trial court evidence.⁷⁸ The trial court found that Catholic schools comprised seventy-two percent of the participating religious schools, and did offer

shall be loaned for the use of nonpublic elementary school students after the nonpublic school student certifies to the State Superintendent of Public Instruction that such items are desired and will be used in a nonpublic elementary school by the nonpublic elementary school student."

Section 60246 provides in its entirety: "The State Controller shall during each fiscal year, commencing with the 1978-79 fiscal year, transfer from the General Fund of the state to the State Instructional Materials Fund, an amount of thirteen dollars and thirty cents (\$13.30) per pupil in the average daily attendance in the public and nonpublic elementary schools during the preceding fiscal year, as certified by the Superintendent of Public Instruction, except that this amount shall be adjusted annually in conformance with the Consumer Price Index, all items, of the Bureau of Labor Statistics of the United States Department of Labor, measured for the calendar year next preceding the fiscal year to which it applies. For purposes of this section, average daily attendance in the nonpublic schools shall be the enrollment reported pursuant to Section 33190." In discussing section 60315, the court said: "Although this provision allows the state to lend instructional materials to students as well as textbooks, the lending program is in fact confined to textbooks. The section does not by its terms confine the program to nonprofit nonpublic schools. However, other provisions make it clear that only nonprofit schools are included in the program." *California Teachers Ass'n v. Riles*, 29 Cal. 3d 794, 796 n.1, 632 P.2d 953, 954 n.1, 176 Cal. Rptr. 300, 301 n.1 (1981).

75. "No public money shall ever be appropriated for the support of any sectarian or denominational school, or any school not under the exclusive control of the officers of the public schools. . . ." CAL. CONST. art. IX, § 8.

76. "Neither the Legislature, nor any county, city and county, township, school district, or other municipal corporation, shall ever make an appropriation, or pay from any public fund whatever, or grant anything to or in aid of any religious sect, church, creed, or sectarian purpose, or help to support or sustain any school, college, university, hospital, or other institution controlled by any religious creed, church, or sectarian denomination whatever; nor shall any grant or donation of personal property or real estate ever be made by the state, or any city, city and county, town, or other municipal corporation for any religious creed, church, or sectarian purpose whatever; . . ." CAL. CONST. art. XVI, § 5.

77. *California Teachers Ass'n v. Riles*, 29 Cal. 3d at 799, 632 P.2d at 955, 176 Cal. Rptr. at 302.

78. *Id.*

secular curricula. However, a purpose of the schools was found to be "the teaching of the tenets of their faith."⁷⁹

The loan program itself was administered in essentially the same manner as those considered and upheld by the United States Supreme Court in *Allen, Meek, and Wolman*.⁸⁰ The parents would sign a general request for books, the school would choose specific books from those adopted by the public schools, and the list would be approved by the archdiocese (in the case of a Catholic school) and forwarded to the State Department of Education. The books would then be "shipped directly to the [religious] schools, retained by them, . . . distributed in successive terms," and finally disposed of when obsolete or worn out "in any way the religious school sees fit."⁸¹

The trial court, applying the three-part federal test, found only an indirect benefit to the parochial schools and held the statutory program to be constitutionally permissible under both the federal and California Constitutions.⁸² The Court of Appeal affirmed.⁸³ However, the California Supreme Court reversed in a unanimous opinion, concluding that the challenged loan program violated the California Constitution by appropriating funds for the support of sectarian schools.⁸⁴

B. Dissatisfaction with Precedent

The California Supreme Court, faced with a textbook loan program challenged under the United States and California Establishment Clauses,⁸⁵ reviewed both the United States Supreme Court and California decisions in an effort to determine the appropriate standard to apply. In fact, the court discussed federal precedent at some length, a surprising effort, since the court's decision ultimately rested on state grounds and federal precedent was therefore not controlling.

The long discussion of federal law may have been included as a means to justify the court's rejection of both California and federal precedents. Both lines of cases adopt the same standard, but since there are many more federal than California cases, the federal cases provide fact patterns that highlight the inconsistencies of that ap-

79. *Id.* at 799, 632 P.2d at 956, 176 Cal. Rptr. at 303.

80. *See supra* text accompanying notes 22-58.

81. *California Teachers Ass'n v. Riles*, 29 Cal. 3d at 800, 632 P.2d at 956, 176 Cal. Rptr. at 303.

82. *California Teachers Ass'n v. Riles*, 109 Cal. App. 3d 989, 993, 167 Cal. Rptr. 676, 679 (1980), *rev'd*, 29 Cal. 3d 794, 632 P.2d 953, 176 Cal. Rptr. 300 (1981).

83. 109 Cal. App. 3d at 1005, 167 Cal. Rptr. at 685.

84. *California Teachers Ass'n v. Riles*, 29 Cal. 3d at 813, 632 P.2d at 964, 176 Cal. Rptr. at 311. Chief Justice Bird and Justices Tobriner, Richardson, Newman, Staniforth, and Wiener (the last two assigned by the Chairperson of the Judicial Council) concurred in Justice Mosk's opinion.

85. *Id.* at 797, 632 P.2d at 953-54, 176 Cal. Rptr. at 300-01.

proach. Due to those inconsistencies, the California court was unable to harmonize the holdings in *Allen*, *Meek*, and *Wolman*⁸⁶ and was therefore unable to extract a clear standard to apply.

The California Supreme Court's frustration with the federal precedent is not unique. Cases and commentators have vigorously criticized the federal test, in part because of its adherence to the child benefit theory: Justice Fortas, in his *Allen* dissent, called it a "transparent camouflage" to say that the books loaned were furnished to, and therefore of benefit to, the students and not the schools.⁸⁷ Justice Brennan, dissenting in *Meek*, termed it "pure fantasy to treat the textbook program as a loan to students."⁸⁸ Dean Jesse Choper believes that the child benefit theory fails to provide a viable constitutional test, placing "form over substance."⁸⁹ In a similar vein, Professor Paul Freund calls the distinction between pupil and school benefit a "chimerical constitutional criterion."⁹⁰ In *California Teachers Association*, Justice Mosk points out that *any* expenditure for a school might be construed as a benefit to the child, and then that expenditure would be constitutionally permissible.⁹¹ Such a result would frustrate the nonestablishment principles of the First Amendment.

The United States Supreme Court's assumption that the religious and secular functions served by parochial schools are separable has likewise come under attack.⁹² This assumption has even been rejected by the Court itself with respect to materials and equipment loans,⁹³ but retained when reviewing textbook loans.⁹⁴ The *Meek* court bluntly stated that it would "simply ignore reality" to separate secular educational functions from the predominantly religious role of church-related schools.⁹⁵

86. *Id.* at 807-08, 632 P.2d at 960-61, 176 Cal. Rptr. at 307-08.

87. 392 U.S. at 270 (Fortas, J., dissenting).

88. 421 U.S. at 379 (Brennan, J., concurring in part and dissenting in part).

89. Choper, *supra* note 5, at 313.

90. Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1682 (1969).

91. *See California Teachers Ass'n v. Riles*, 29 Cal. 3d at 807, 632 P.2d at 960, 176 Cal. Rptr. at 307 (citing Choper, *supra* note 5, at 313).

92. "[The] premise [of separability of education into a religious and a non-religious component] underlies the Court's thinking in *Allen* . . . [but] is . . . incompatible with the philosophy that largely fosters the maintenance of parochial schools." Freund, *supra* note 90, at 1688. Religious dogma is intended to permeate all education in a religious school. *See M. SMITH & J. BRYSON, supra* note 7, at 5-7.

93. *See Wolman v. Walter*, 433 U.S. 229 (1977); *Meek v. Pittenger*, 421 U.S. 349 (1975).

94. *Wolman v. Walter*, 433 U.S. 229 (1977); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Board of Educ. v. Allen*, 392 U.S. 236 (1968). The Court's assumption of separate secular and religious educational spheres as applied to textbook loans has been criticized. *See Wolman*, 433 U.S. at 256-58 (Marshall, J., dissenting); *Allen*, 392 U.S. at 252 (Black, J., dissenting).

95. 421 U.S. at 365.

Faced with these “dissonant decisions,”⁹⁶ criticisms, and a complaint in the case at bar citing both the United States and California Constitutions, the Supreme Court of California rested its decision on state constitutional grounds.⁹⁷ This course of action, based on the adequate and independent state grounds doctrine, rescued the court from the necessity of relying upon United States Supreme Court precedents.⁹⁸ California was therefore able to develop a new, stricter standard for establishment clause review.

C. Holding

In *California Teachers Association*, the California Supreme Court adopted a new two-part test in assessing the validity of the challenged program under the California Constitution: “[W]e consider first, whether it only indirectly benefits parochial schools, and second, the character of the benefit conferred by the program.”⁹⁹ The court then applied this new standard to the facts.

1. Directness of the Benefit

In assessing the first requirement of its new test—whether the challenged program “only indirectly benefits parochial schools”¹⁰⁰—the California Supreme Court agreed with Justice Brennan’s dissent in *Meek* that it is “pure fantasy” to treat the textbook loan program as a loan to students, since it is handled entirely by the schools.¹⁰¹ The court concluded that the benefits to the pupil and the school are indivisible; it was “unable to perceive any significant distinction from a constitutional standpoint whether [the books] are loaned to the students for use in the school, or to the school for use by the students.”¹⁰² Either way, both the child and the school receive a direct benefit.¹⁰³

In reaching this conclusion, the California Supreme Court rejected the child benefit theory expounded by the United States Supreme

96. *California Teachers Ass’n v. Riles*, 29 Cal. 3d at 807, 632 P.2d at 960, 176 Cal. Rptr. at 307.

97. *Id.* at 813, 632 P.2d at 964, 176 Cal. Rptr. at 311.

98. Each state supreme court has the ultimate responsibility for final interpretation of questions under its state constitution. See *Michigan v. Mosley*, 423 U.S. 96, 120 (1975) (Brennan, J., dissenting), quoted in Howard, *supra* note 14, at 874; *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945) (“Each State has power to impose higher standards governing police practices under state law than is required by the Federal Constitution.”); *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590, 636 (1874). See Howard, *supra* note 14, at 874-76, for a discussion of the adequate state grounds doctrine in general, and California’s use of it in particular.

99. 29 Cal. 3d at 809, 632 P.2d at 962, 176 Cal. Rptr. at 309.

100. *Id.*

101. *Id.* at 810, 632 P.2d at 962, 176 Cal. Rptr. at 309.

102. *Id.*

103. *Id.* at 810-11, 632 P.2d at 962-63, 176 Cal. Rptr. at 309-10.

Court in *Everson, Allen, and Meek*,¹⁰⁴ and by the California courts in *Bowker and Priest*,¹⁰⁵ labeling the results of that doctrine "logically indefensible."¹⁰⁶

2. Character of the Benefit

As the court in *California Teachers Association* stated, "[t]he conclusion that the benefit to religious schools provided by section 60315 is neither indirect nor remote does not end our inquiry. . . . The question still remains whether the character of the benefit provided by the textbook loan program results in the 'support of any sectarian . . . school.'"¹⁰⁷

The United States Supreme Court requires a secular rather than sectarian benefit.¹⁰⁸ In the instant case, however, the California court declined to make that distinction because the specific language of the applicable California constitutional provisions does not merely prohibit support for religious, as distinguished from secular, instruction.¹⁰⁹ Rather, the provisions include a broad proscription against the appropriation of funds for *any* purpose in the support of sectarian schools.¹¹⁰ Therefore, in deciding whether support of any sectarian school results, the California court distinguished between "generalized services government might provide to schools in common with others" and programs that advance the schools' educational function.¹¹¹

In short, the California court drew a clean line, approving general public services with no instructional content (such as police and fire protection), while proscribing programs that advance the educational function of the school (such as textbook loans).¹¹² Providing textbooks at public expense is an appropriation of money to advance directly the educational function which is the essential objective of the sectarian school.¹¹³ The court thus held that this appropriation of tax dollars supported the school in direct contravention of the California

104. See *supra* text accompanying notes 20-45.

105. See *supra* text accompanying notes 65-70.

106. *California Teachers Ass'n v. Riles*, 29 Cal. 3d at 809, 632 P.2d at 962, 176 Cal. Rptr. at 309.

107. *Id.* at 811, 632 P.2d at 963, 176 Cal. Rptr. at 310. The court is quoting the California Constitution, art. IX, § 8.

108. See *supra* text accompanying note 25. See also *L. TRIBE, supra* note 17, at 839-46.

109. See *California Teachers Ass'n v. Riles*, 29 Cal. 3d at 812, 632 P.2d at 964, 176 Cal. Rptr. at 311.

110. See *supra* notes 75-76.

111. *California Teachers Ass'n v. Riles*, 29 Cal. 3d at 811, 632 P.2d at 963, 176 Cal. Rptr. at 310. See Justice Marshall's dissent in *Wolman v. Walter*, 433 U.S. 229, 259 (1977), for a similar proposal.

112. *California Teachers Ass'n v. Riles*, 29 Cal. 3d at 811-12, 632 P.2d at 963, 176 Cal. Rptr. at 310.

113. *Id.* at 811, 632 P.2d at 963, 176 Cal. Rptr. at 310.

Constitution.¹¹⁴

In summary, the California Supreme Court held that the textbook loan program directly benefited the parochial school recipients, and the character of that benefit was to advance the essential objective of those schools: the education of the child. Such a program is therefore impermissible under the California Constitution because it appropriates public funds for the support of the schools,¹¹⁵ even though the United States Supreme Court has consistently upheld essentially identical programs under the United States Constitution.¹¹⁶

D. Strengths and Weaknesses of California's New Establishment Clause Standard

The strength of California's new test is that it is easier to apply than the federal test and should therefore lead to more consistent results. Lack of consistency is the primary problem with the federal cases. As recently as 1980, the United States Supreme Court rationalized its inability to set out a clear standard for distinguishing permissible from impermissible aid to religious schools by stating that the three-part test "sacrifices clarity and predictability for flexibility."¹¹⁷

Justice Marshall agrees that the federal cases are unclear and fears that First Amendment protections are suffering as a result. For example, in his dissent in *Wolman v. Walter* he states: "I am now convinced that *Allen* is largely responsible for reducing the 'high and impregnable' wall between church and state erected by the First Amendment, [citation omitted] to a 'blurred, indistinct, and variable barrier,' incapable of performing its vital functions of protecting both church and state."¹¹⁸

California's new test should make this wall a little less nebulous. The California Supreme Court has achieved this clarity, in part, by abandoning the assumptions that have led to conflicts among the cases. In *dicta*, the court states that it "rejects the application of the 'child benefit' principle"¹¹⁹ and it "cannot agree that a benefit to the school in the form of a loan of textbooks is justified because the books will be used only for secular instruction."¹²⁰ The court added, however, that neither assumption was relevant to the instant case.¹²¹ Certainly,

114. *Id.* at 813, 632 P.2d at 964, 176 Cal. Rptr. at 311.

115. *Id.*

116. *See supra* text accompanying notes 22-29, 44 & 52.

117. *Committee for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 662 (1980).

118. 433 U.S. 229, 257 (1977) (quoting *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947) and *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971)).

119. *California Teachers Ass'n v. Riles*, 29 Cal. 3d at 809, 812, 632 P.2d at 962, 964, 176 Cal. Rptr. 309, 310, 311.

120. *Id.* at 812, 632 P.2d at 964, 176 Cal. Rptr. at 311.

121. *Id.* at 809, 812, 632 P.2d at 962, 964, 176 Cal. Rptr. at 309, 311.

neither is essential to the holding, as that was compelled by the specific language of the California Constitution.

California's test seems to have struck a reasonable balance, permitting general "police" services while denying support of educational programs. It is a stricter standard than the federal test because it disallows aid to the secular aspects of denominational schools. This stance recognizes the three primary principles of constitutional freedom of religion: (a) voluntarism in matters of religion—taxpayers are not forced to support denominational schools; (b) separation of church and state—the state is not aiding religion; and (c) neutrality of government toward religion—the state is not taking the adversarial position of denying general services.¹²²

The outstanding weakness in the opinion is the formulation of the new standard itself. The court sets out a two-step test for assessing the validity of a challenged program: the directness of the benefit to the parochial schools, and the character of the benefit conferred.¹²³ However, the relevance of the first part of the test—the directness of the benefit—is questionable.

The court itself acknowledges that the first part of its standard could not be determinative:

The conclusion that the benefit to religious schools . . . is neither indirect nor remote does not end our inquiry, however, for not all public expenditures directly for the benefit of sectarian schools are prohibited (e.g., providing fire protection), and not all expenditures for the immediate benefit of children [e.g., indirect benefits] are valid (e.g., reimbursement for the purchase of religious articles by students in public and nonpublic schools).¹²⁴

The court went on to evaluate the character of the benefit, and that aspect of the test proved to be the crucial inquiry.

The directness of the benefit did not affect the outcome here and the court gives no clue as to when such an inquiry would effect a different result. However, such situations are conceivable. The court may be anticipating challenges to programs, such as room and board reimbursement, which can neither be characterized as a general police service available to all, nor as an educational program. Rather than guess at the result of such a challenge, the court could have reframed the test to solely inquire into the character of the benefit. Then the analysis could simply be whether a benefit supports the school—and not exclusively the educational function—or whether the benefit merely provides a general public service available to all citizens. In other words, a general public service available to all would be upheld, and any other

122. See generally L. TRIBE, *supra* note 17, at 821; Freund, *supra* note 90, at 1684-86.

123. California Teachers Ass'n v. Riles, 29 Cal. 3d at 809, 632 P.2d at 962, 176 Cal. Rptr. at 309.

124. *Id.* at 811, 632 P.2d at 963, 176 Cal. Rptr. at 310.

service, aid, or support would be invalidated. Thus, books, supplies, tuition, institutional fees, room, board, and busing, for example, would be prohibited.¹²⁵ On the other hand, police and fire protection, roads, sidewalks, and sewers, for example, would be permitted.¹²⁶ The suggested standard leads to the same result as in *California Teachers Association*, and it would desirably lead to even more predictable results.

Conclusion

This note has examined California's new standard for distinguishing permissible from impermissible aid to parochial schools under article IX, § 8¹²⁷ and article XVI, § 5¹²⁸ of the California Constitution. This new standard, announced in *California Teachers Association v. Riles*,¹²⁹ looks to the specific language of the state constitution in striking down a textbook loan program, and reaches a result contrary to federal precedent.¹³⁰

The new standard looks to the directness of the benefit to the parochial school from the challenged program, and the character of that benefit. The court found that book loans provided a direct benefit to the schools, and the character of that benefit was to support the school, contrary to the dictates of the state constitution.

In analyzing the character of a benefit, the court distinguished between aid to educational programs, which is proscribed, and general police services, which are permitted. This note suggests a reformulation of the test to eliminate the analysis of directness of benefit and focus exclusively on character of the benefit. Such an approach would approve general public services available to all citizens, and disapprove any other service, aid, or support. The language of the California Constitution seems to compel this approach.

125. See *Almond v. Day*, 197 Va. 419, 89 S.E.2d 851 (1955), in which the Virginia Supreme Court struck down a program providing for payment of tuition, institutional fees, board, room, rent, books, and supplies. See also *Epeldi v. Engelking*, 94 Idaho 390, 488 P.2d 860 (1971), *cert. denied*, 406 U.S. 957 (1972), where the Idaho Supreme Court struck down a statute providing for busing of parochial school students. Both the Virginia and Idaho constitutional provisions are very similar to the California sections challenged here. See IDAHO CONST. art. IX, § 5; VA. CONST. § 141.

126. See *California Teachers Ass'n v. Riles*, 29 Cal. 3d at 805, 632 P.2d at 959, 176 Cal. Rptr. at 306 (citing *Bowker v. Baker*, 73 Cal. App. 2d 653, 167 P.2d 256 (1956)).

127. See *supra* note 75.

128. See *supra* note 76.

129. 29 Cal. 3d 794, 632 P.2d 953, 176 Cal. Rptr. 300 (1981).

130. The court's holding was the focus of an initiative in the November 1982 California elections. Proposition 9 would have, in effect, overruled the decision by amending article IX, sections 7.5 and 8 of the California Constitution to specifically permit textbook loans to nonpublic schools. The initiative was rejected by the voters. Thus, barring a future effort, *California Teachers Association v. Riles* remains the standard for determining public aid to sectarian schools.

