# Brennan: Concurrence

I agree that the judgments in Nos. 569 and 570 must be affirmed. In my view, the judgment in No. 89 must be reversed outright. I dissent in No. 153 insofar as the plurality opinion and the opinion of my Brother WHITE sustain the constitutionality, as applied to sectarian institutions, of the Federal Higher Education Facilities Act of 1963, as amended, 77 Stat. 363, 20 U.S.C. § 711 *et seq.*(1964 ed. and Supp. V). In my view, that Act is unconstitutional insofar as it authorizes grants of federal tax monies to sectarian institutions, but is unconstitutional only to that extent. I therefore think that our remand of the case should be limited to the direction of a hearing to determine whether the four institutional appellees here are sectarian institutions.

I continue to adhere to the view that, to give concrete meaning to the Establishment Clause,

"the line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers. It is a line which the Court has consistently sought to mark in its decisions expounding the religious guarantees of the First **[p. 643]** Amendment. What the Framers meant to foreclose, and what our decisions under the Establishment Clause have forbidden, are those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends, where secular means would suffice. When the secular and religious institutions become involved in such a manner, there inhere in the relationship precisely those dangers -- as much to church as to state -- which the Framers feared would subvert religious liberty and the strength of a system of secular government."

*Abington School District v. Schempp,* 374 U. S. 203, 374 U. S. 294-295 (1963) (concurring opinion); *Walz v. Tax Commission,* 397 U. S. 664, 397 U. S. 680-681 (1970) (concurring opinion).

The common feature of all three statutes before us is the provision of a direct subsidy from public funds for activities carried on by sectarian educational institutions. We have sustained the reimbursement of parents for bus fares of students under a scheme applicable to both public and nonpublic schools, *Everson v. Board of Education,* 330 U. S. 1 (1947). We have also sustained the loan of textbooks in secular subjects to students of both public and nonpublic schools, *Board of Education v. Allen,* 392 U. S. 236 (1968). *See also Bradfield v. Roberts,* 175 U. S. 291 (1899).

The statutory schemes before us, however, have features not present in either the *Everson* or *Allen* schemes. For example, the reimbursement or the loan of books ended government involvement in *Everson* and *Allen.* In contrast, each of the schemes here exacts a promise in some form that the subsidy will not be used to finance **[p. 644]** courses in religious subjects -- promises that must be and are policed to assure compliance. Again, although the federal subsidy, similar to the *Everson* and *Allen* subsidies, is available to both public and nonpublic colleges and universities, the Rhode Island and Pennsylvania subsidies are restricted to nonpublic schools, and, for practical purposes, to Roman Catholic parochial schools.[[1]](#footnote-1) These and other features I shall mention mean for me that *Everson* and *Allen* do not control these cases. Rather, the history of public subsidy of sectarian schools, and the purposes and operation of these particular statutes, must be examined to determine whether the statutes breach the Establishment Clause. *Walz v. Tax Commission, supra,* at 397 U. S. 681(concurring opinion). **[p. 645**]

## I

In sharp contrast to the "undeviating acceptance given religious tax exemptions from our earliest days as a Nation," *ibid.,* subsidy of sectarian educational institutions became embroiled in bitter controversies very soon after the Nation was formed. Public education was, of course, virtually nonexistent when the Constitution was adopted. Colonial Massachusetts in 1647 had directed towns to establish schools, Benjamin Franklin in 1749 proposed a Philadelphia Academy, and Jefferson labored to establish a public school system in Virginia.[[2]](#footnote-2) But these were the exceptions. Education in the Colonies was overwhelmingly a private enterprise, usually carried on as a denominational activity by the dominant Protestant sects. In point of fact, government generally looked to the church to provide education, and often contributed support through donations of land and money. E. Cubberley, Public Education in the United States 171 (1919).

Nor was there substantial change in the years immediately following ratification of the Constitution and the Bill of Rights. Schools continued to be local and, in the main, denominational institutions.[[3]](#footnote-3) But the demand for public education soon emerged. The evolution of the struggle in New York City is illustrative.[[4]](#footnote-4) In 1786, the first New York State Legislature ordered that one section in each township be set aside for the "gospel and schools." With no public schools, various private agencies and churches operated "charity schools" for the poor of New **[p. 646]** York City and received money from the state common school fund. The forerunner of the city's public schools was organized in 1805 when DeWitt Clinton founded

"The Society for Establishment of a Free School in the City of New York for the Education of such poor Children as do not belong to or are not provided for by any Religious Society."

The State and city aided the society, and it built many schools. Gradually, however, competition and bickering among the Free School Society and the various church schools developed over the apportionment of state school funds. As a result, in 1825, the legislature transferred to the city council the responsibility for distributing New York City's share of the state funds. The council stopped funding religious societies which operated 16 sectarian schools, but continued supporting schools connected with the Protestant Orphan Asylum Society. Thereafter, in 1831, the Catholic Orphan Asylum Society demanded and received public funds to operate its schools, but a request of Methodists for funds for the same purpose was denied. Nine years later, the Catholics enlarged their request for public monies to include all parochial schools, contending that the council was subsidizing sectarian books and instruction of the Public School Society, which Clinton's Free School Society had become. The city's Scotch Presbyterian and Jewish communities immediately followed with requests for funds to finance their schools. Although the Public School Society undertook to revise its texts to meet the objections, in 1842, the state legislature closed the bitter controversy by enacting a law that established a City Board of Education to set up free public schools, prohibited the distribution of public funds to sectarian schools, and prohibited the teaching of sectarian doctrine in any public school.

The Nation's rapidly developing religious heterogeneity, the tide of Jacksonian democracy, and growing **[p. 647]** urbanization soon led to widespread demands throughout the States for secular public education. At the same time, strong opposition developed to use of the States' taxing powers to support private sectarian schools.[[5]](#footnote-5) Although the controversy over religious exercises in the public schools continued into this century, *Schempp,* 374 U.S. at 374 U. S. 268-277 (BRENNAN, J., concurring), the opponents of subsidy to sectarian schools had largely won their fight by 1900. In fact, after 1840, no efforts of sectarian schools to obtain a share of public school funds succeeded. Cubberley, *supra,* at 179. Between 1840 and 1875, 19 States added provisions to their constitutions prohibiting the use of public school funds to aid sectarian schools, *id.* at 180, and by 1900, 16 more States had added similar provisions. In fact, no State admitted to the Union after 1858, except West Virginia, omitted such provision from its first constitution. *Ibid.*Today, fewer than a half-dozen States omit such provisions from their constitutions.[[6]](#footnote-6) **[p. 648]** And, in 1897, Congress included in its appropriation act for the District of Columbia a statement declaring it

"to be the policy of the Government of the United States to make no appropriation of money or property for the purpose of founding, maintaining, or aiding by payment for services, expenses, or otherwise, any church or religious denomination, or any institution or society which is under sectarian or ecclesiastical control."

29 Stat. 411.

Thus, for more than a century, the consensus, enforced by legislatures and courts with substantial consistency, has been that public subsidy of sectarian schools constitutes an impermissible involvement of secular with **[p. 649]** religious institutions.[[7]](#footnote-7) If this history is not itself compelling against the validity of the three subsidy statutes, in the sense we found in *Walz* that "undeviating acceptance" was highly significant in favor of the validity of religious tax exemption, other forms of governmental involvement that each of the three statutes requires tip the scales, in my view, against the validity of each of them. These are involvements that threaten

"danger as much to church as to state which the Framers feared would subvert religious liberty and the strength of a system of secular government."

*Schempp,* 374 U.S. at 374 U. S. 295 (BRENNAN, J., concurring).

"[G]overnment and religion have discrete interests which are mutually best served when each avoids too close a proximity to the other. It is not only the nonbeliever who fears the injection of sectarian doctrines and controversies into the civil polity, but, in as high degree, it is the devout believer who fears the secularization of a creed which becomes too deeply involved with and dependent upon the government."

*Id.* at 374 U. S. 259 (BRENNAN, J., concurring). All three of these statutes require "too close a proximity" of government to the subsidized sectarian institutions and, in my view, create real dangers of "the secularization of a creed." **[p. 650**]

## II

The Rhode Island statute requires Roman Catholic teachers to surrender their right to teach religion courses and to promise not to "inject" religious teaching into their secular courses. This has led at least one teacher to stop praying with his classes,[[8]](#footnote-8) a concrete testimonial to the self-censorship that inevitably accompanies state regulation of delicate First Amendment freedoms. *Cf. Smith v. California,* 361 U. S. 147 (1959); *Speer v. Randall,* 357 U. S. 513, 357 U. S. 526(1958). Both the Rhode Island and Pennsylvania statutes prescribe extensive standardization of the content of secular courses, and of the teaching materials and textbooks to be used in teaching the courses. And the regulations to implement those requirements necessarily require policing of instruction in the schools. The picture of state inspectors prowling the halls of parochial schools and auditing classroom instruction surely raises more than an imagined specter of governmental "secularization of a creed."

The same dangers attend the federal subsidy, even if less obviously. The Federal Government exacts a promise that no "sectarian instruction" or "religious worship" will take place in a subsidized building. The Office of Education polices the promise.[[9]](#footnote-9) In one instance, federal **[p. 651]** officials demanded that a college cease teaching a course entitled "The History of Methodism" in a federally assisted building, although the Establishment Clause

"plainly does not foreclose teaching about the Holy Scriptures or about the differences between religious sects in classes in literature or history."

*Schempp,* 374 U.S. at 374 U. S. 300 (BRENNAN, J., concurring). These examples illustrate the complete incompatibility of such surveillance with the restraints barring interference with religious freedom.[[10]](#footnote-10)

Policing the content of courses, the specific textbooks used, and indeed the words of teachers is far different from the legitimate policing carried on under state compulsory attendance laws or laws regulating minimum levels of educational achievement. Government's legitimate interest in ensuring certain minimum skill levels and the acquisition of certain knowledge does not carry with it power to prescribe what shall not be taught, or what methods of instruction shall be used, or what opinions the teacher may offer in the course of teaching.

Moreover, when a sectarian institution accepts state financial aid, it becomes obligated, under the Equal Protection Clause of the Fourteenth Amendment, not to discriminate in admissions policies and faculty selection. **[p. 652]** The District Court in the Rhode Island case pinpointed the dilemma:

"Applying these standards to parochial schools might well restrict their ability to discriminate in admissions policies and in the hiring and firing of teachers. At some point, the school becomes 'public' for more purposes than the Church could wish. At that point, the Church may justifiably feel that its victory on the Establishment Clause has meant abandonment of the Free Exercise Clause."

316 F.Supp. at 121-122 (citations omitted).

## III

In any event, I do not believe that elimination of these aspects of "too close a proximity" would save these three statutes. I expressed the view in *Walz* that "[g]eneral subsidies of religious activities would, of course, constitute impermissible state involvement with religion." 397 U.S. at397 U. S. 690 (concurring opinion). I do not think the subsidies under these statutes fall outside "[g]eneral subsidies of religious activities" merely because they are restricted to support of the teaching of secular subjects. In *Walz,* the passive aspect of the benefits conferred by a tax exemption, particularly since cessation of the exemptions might easily lead to impermissible involvements and conflicts, led me to conclude that exemptions were consistent with the First Amendment values. However, I contrasted direct government subsidies:

"Tax exemptions and general subsidies, however, are qualitatively different. Though both provide economic assistance, they do so in fundamentally different ways. A subsidy involves the direct transfer of public monies to the subsidized enterprise, and uses resources exacted from taxpayers as a whole. An exemption, on the other hand, involves no such **[p. 653]** transfer. It assists the exempted enterprise only passively, by relieving a privately funded venture of the burden of paying taxes. In other words, '[i]n the case of direct subsidy, the state forcibly diverts the income of both believers and nonbelievers to churches,' while,"

"[i]n the case of an exemption, the state merely refrains from diverting to its own uses income independently generated by the churches through voluntary contributions."

"Thus,"

"the symbolism of tax exemption is significant as a manifestation that organized religion is not expected to support the state; by the same token the state is not expected to support the church."

397 U.S. at 397 U. S. 690-691 (footnotes and citations omitted) (concurring opinion).

Pennsylvania, Rhode Island, and the Federal Government argue strenuously that the government monies in all these cases are not "[g]eneral subsidies of religious activities," because they are paid specifically and solely for the secular education that the sectarian institutions provide.[[11]](#footnote-11)

Before turning to the decisions of this Court on which this argument is based, it is important to recall again the history of subsidies to sectarian schools. *See* 403 U. S. S. 654� I, *supra.* The universality of state constitutional provisions forbidding such grants, as well as the weight of judicial authority disapproving such aid as a violation of our tradition of separation of church and state, reflects a time-tested judgment that such grants do indeed constitute impermissible aid to religion. *See* nn. 6 and 7, *supra.* The recurrent argument, consistently rejected in the past, has been that government grants to sectarian schools ought not be viewed as impermissible subsidies

"because [the schools] relieve the State of a burden, which it would otherwise be itself required to bear. . . . they will render a service to the state by performing for it its duty of educating the children of the people."

*Cook County v. Chicago Industrial School,* 125 Ill. 540, 571, 18 N.E. 183, 197 (1888).

Nonetheless, it is argued once again in these cases that sectarian schools and universities perform two separable functions. First, they provide secular education, and second, they teach the tenets of a particular sect. Since the State has determined that the secular education provided in sectarian schools serves the legitimate state interest in the education of its citizens, it is contended that state aid solely to the secular education function does not involve the State in aid to religion. *Pierce v. Society of Sisters,* 268 U. S. 510 (1925), and *Board of Education v. Allen, supra,*are relied on as support for the argument. Our opinion in *Allen* recognized that sectarian schools provide both a secular and a sectarian education:

"[T]his Court has long recognized that religious schools pursue two goals, religious instruction and secular education. In the leading case of *Pierce v. Society of Sisters,* 268 U. S. 510 (1925), the Court held that . . . Oregon had not shown that its interest in secular education required that all children attend publicly operated schools. A premise of this **[p. 655]** holding was the view that the State's interest in education would be served sufficiently by reliance on the secular teaching that accompanied religious training in the schools maintained by the Society of Sisters."

"*\* \* \* \*"*

[T]he continued willingness to rely on private school systems, including parochial systems, strongly suggests that a wide segment of informed opinion, legislative and otherwise, has found that those schools do an acceptable job of providing secular education to their students. This judgment is further evidence that parochial schools are performing, in addition to their sectarian function, the task of secular education.

*Board of Education v. Allen,* 392 U.S. at 392 U. S. 245, 392 U. S. 247-248 (footnote omitted). But I do not read *Pierce* or *Allen* as supporting the proposition that public subsidy of a sectarian institution's secular training is permissible state involvement. I read them as supporting the proposition that, as an identifiable set of skills and an identifiable quantum of knowledge, secular education may be effectively provided either in the religious context of parochial schools or outside the context of religion in public schools. The State's interest in secular education may be defined broadly as an interest in ensuring that all children within its boundaries acquire a minimum level of competency in certain skills, such as reading, writing, and arithmetic, as well as a minimum amount of information and knowledge in certain subjects such as history, geography, science, literature, and law. Without such skills and knowledge, an individual will be at a severe disadvantage both in participating in democratic self-government and in earning a living in a modern industrial economy. But the State has no proper interest in prescribing the precise forum in which such skills and knowledge are learned, since acquisition of this **[p. 656]** secular education is neither incompatible with religious learning, nor is it inconsistent with or inimical to religious precepts.

When the same secular educational process occurs in both public and sectarian schools, *Allen*held that the State could provide secular textbooks for use in that process to students in both public and sectarian schools. Of course, the State could not provide textbooks giving religious instruction. But since the textbooks involved in *Allen* would, at least in theory, be limited to secular education, no aid to sectarian instruction was involved.

More important, since the textbooks in *Allen* had been previously provided by the parents, and not the schools, 392 U.S. at 392 U. S. 244 n. 6, no aid to the institution was involved. Rather, as in the case of the bus transportation in *Everson,* the general program of providing all children in the State with free secular textbooks assisted all parents in schooling their children. And as in *Everson,* there was undoubtedly the possibility that some parents might not have been able to exercise their constitutional right to send their children to parochial school if the parents were compelled themselves to pay for textbooks. However, as my Brother BLACK wrote for the Court in *Everson,*

"[C]utting off church schools from these [general] services, so separate and so indisputably marked off from the religious function, would make it far more difficult for the schools to operate. But such is obviously not the purpose of the First Amendment. That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them."

330 U.S. at 330 U. S. 18. **[p. 657]** *Allen,* in my view, simply sustained a statute in which the State was "neutral in its relations with groups of religious believers and nonbelievers." The only context in which the Court in *Allen*employed the distinction between secular and religious in a parochial school was to reach its conclusion that the textbooks that the State was providing could and would be secular.[[12]](#footnote-12) The present cases, however, involve direct subsidies of tax monies to the schools themselves, and we cannot blink the fact that the secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence. Within the institution, the two are inextricably intertwined.

The District Court in the *DiCenso* case found that all the varied aspects of the parochial school's program -- the nature of its faculty, its supervision, decor, program, extracurricular activities, assemblies, courses, etc. -- produced an "intangible *religious atmosphere,'"* since the *"diocesan school system is an integral part of the religious mission of the Catholic Church,"* and *"a powerful vehicle for transmitting the Catholic faith to the next generation."* 316 F.Supp. at 117*.* Quality teaching in secular subjects is an integral part of this religious enterprise. *"Good secular teaching is as essential to the religious mission of the parochial schools as a roof for the school or desks for the classrooms*." 316 F.Supp. at 117-118.That teaching cannot be separated from the environment in which it occurs, for its integration with the religious mission is both the theory and the strength of the religious school.

The common ingredient of the three prongs of the test **[p. 658]** set forth at the outset of this opinion is whether the statutes involve government in the "essentially religious activities" of religious institutions. My analysis of the operation, purposes, and effects of these statutes leads me inescapably to the conclusion that they do impermissibly involve the States and the Federal Government with the "essentially religious activities" of sectarian educational institutions. More specifically, for the reasons stated, I think each government uses "essentially religious means to serve governmental ends, where secular means would suffice." This Nation long ago committed itself to primary reliance upon publicly supported public education to serve its important goals in secular education. Our religious diversity gave strong impetus to that commitment.

"[T]he American experiment in free public education available to all children has been guided in large measure by the dramatic evolution of the religious diversity among the population which our public schools serve. . . . The public schools are supported entirely, in most communities, by public funds -- funds exacted not only from parents, nor alone from those who hold particular religious views, nor indeed from those who subscribe to any creed at all. It is implicit in the history and character of American public education that the public schools serve a uniquely public function: the training of American citizens in an atmosphere free of parochial, divisive, or separatist influences of any sort -- an atmosphere in which children may assimilate a heritage common to all American groups and religions. This is a heritage neither theistic nor atheistic, but simply civic and patriotic."

*Schempp,* 374 U.S. at 374 U. S. 241-242 (citation omitted) (BRENNAN, J., concurring). **[p. 659]** I conclude that, in using sectarian institutions to further goals in secular education, the three statutes do violence to the principle that

"government may not employ religious means to serve secular interests, however legitimate they may be, at least without the clearest demonstration that nonreligious means will not suffice."

*Schempp, supra,* at 374 U. S. 265 (BRENNAN, J., concurring).

## IV

The plurality's treatment of the issues in *Tilton,* No. 153, diverges so substantially from my own that I add these further comments. I believe that the Establishment Clause forbids the Federal Government to provide funds to sectarian universities in which the propagation and advancement of a particular religion are a function or purpose of the institution. Since the District Court made no findings whether the four institutional appellees here are sectarian, I would remand the case to the District Court with directions to determine whether the institutional appellees are "sectarian" institutions.

I reach this conclusion for the reasons I have stated: the necessarily deep involvement of government in the religious activities of such an institution through the policing of restrictions, and the fact that subsidies of tax monies directly to a sectarian institution necessarily aid the proselytizing function of the institution. The plurality argues that neither of these dangers is present.[[13]](#footnote-13)

At the risk of repetition, I emphasize that a sectarian university is the equivalent in the realm of higher education of the Catholic elementary schools in Rhode Island; it is an educational institution in which the propagation **[p. 660]** and advancement of a particular religion are a primary function of the institution. I do not believe that construction grants to such a sectarian institution are permissible. The reason is not that religion "permeates" the secular education that is provided. Rather, it is that the secular education is provided within the environment of religion; the institution is dedicated to two goals, secular education and religious instruction. When aid flows directly to the institution, both functions benefit. The plurality would examine only the activities that occur within the federally assisted building, and ignore the religious nature of the school of which it is a part. The "religious enterprise" aided by the construction grants involves the maintenance of an educational environment -- which includes high-quality, purely secular educational courses -- within which religious instruction occurs in a variety of ways.

The plurality also argues that no impermissible entanglement exists here. My Brother WHITE cogently comments upon that argument:

"Why the federal program in the *Tilton* case is not embroiled in the same difficulties [as the Rhode Island program] is never adequately explained."

*Post* at 403 U. S. 668. I do not see any significant difference in the Federal Government's telling the sectarian university not to teach any nonsecular subjects in a certain building, and Rhode Island's telling the Catholic school teacher not to teach religion. The vice is the creation through subsidy of a relationship in which the government polices the teaching practices of a religious school or university. The plurality suggests that the facts that college students are less impressionable and that college courses are less susceptible to religious permeation may lessen the need for federal policing. But the record shows that such policing has occurred, and occurred in a heavy-handed way. Given the dangers of self-censorship in such a situation, I cannot agree that the dangers of **[p. 661]** entanglement are insubstantial. Finally, the plurality suggests that the "nonideological" nature of a building, as contrasted with a teacher, reduces the need for policing. But the Federal Government imposes restrictions on every class taught in the federally assisted building. It is therefore not the "nonideological" building that is policed; rather, it is the courses given there, and the teachers who teach them. Thus, the policing is precisely the same as under the state statutes, and that is what offends the Constitution.

## V

I therefore agree that the two state statutes that focus primarily on providing public funds to sectarian schools are unconstitutional. However, the federal statute in No. 153 is a general program of construction grants to all colleges and universities, including sectarian institutions. Since I believe the statute's extension of eligibility to sectarian institutions is severable for the broad general program authorized, I would hold the Higher Education Facilities Act unconstitutional only insofar as it authorized grants of federal tax monies to sectarian institutions -- institutions that have a purpose or function to propagate or advance a particular religion. Therefore, if the District Court determines that any of the four institutional appellees here are "sectarian," that court, in my view, should enjoin the other appellees from making grants to it.

\* This opinion also applies to No. 153, *Tilton et al. v. Richardson, Secretary of Health, Education, and Welfare, et al., post,* p. 403 U. S. 672.

1. At the time of trial, 95% of the elementary school children in private schools in Rhode Island attended Roman Catholic schools. Only nonpublic school teachers could receive the subsidy, and then only if they taught in schools in which the average per-pupil expenditure on secular education did not equal or exceed the average for the State's public schools. Some 250 of the 342 lay teachers employed in Rhode Island Roman Catholic schools had applied for and been declared eligible for the subsidy. To receive it, the teacher must (1) have a state teaching certificate; (2) teach exclusively secular subjects taught in the State's public schools; (3) use only teaching materials approved for use in the public schools; (4) not teach religion; and (5) promise in writing not to teach a course in religion while receiving the salary supplement.

   Unlike the Rhode Island case, the Pennsylvania case lacks a factual record, since the complaint was dismissed on motion. We must therefore decide the constitutional challenge as addressed to the face of the Pennsylvania statute. Appellants allege that the nonpublic schools are segregated in Pennsylvania by race and religion, and that the Act perpetrates and promotes the segregation of races "with the ultimate result of promoting two school systems in Pennsylvania -- a public school system predominantly black, poor and inferior and a private, subsidized school system predominantly white, affluent and superior." Brief for Appellants Lemon et al. 9. The District Court held that appellants lacked standing to assert this equal protection claim. In my view, this was plain error. [↑](#footnote-ref-1)
2. E. Cubberley, Public Education in the United States 17 (1919); Abington School District v. Schempp,374 U. S. 203, 374 U. S. 238 n. 7 and authorities cited therein (BRENNAN, J., concurring). [↑](#footnote-ref-2)
3. C. Antieau, A. Downey, E. Roberts, Freedom from Federal Establishment 174 (1964). [↑](#footnote-ref-3)
4. B. Confrey, Secularism in American Education: Its History 127-129 (1931). [↑](#footnote-ref-4)
5. See generally R. Butts, The American Tradition in Religion and Education 111-145 (1950); 2 A. Stokes, Church and State in the United States 47-72 (1950); Cubberley, supra, n. 2, at 155-181. [↑](#footnote-ref-5)
6. See Ala.Const., Art. XIV, § 263; Alaska Const., Art. VII, § 1; Ariz.Const., Art. II, § 12, Art. XI, §§ 7, 8; Ark.Const., Art. XIV, § 2; Calif.Const., Art. IX, § 8; Colo.Const., Art. IX, § 7; Conn.Const., Art. VIII, § 4; Del.Const., Art. X, § 3; Fla.Const., Decl. of Rights, Art. I, § 3; Ga.Const., Art. VIII, § 12, par. 1; Hawaii Const., Art. IX, § 1; Idaho Const., Art. IX, § 5; Ill.Const., Art. VIII, § 3; Ind.Const., Art. 8, § 3; Kan.Const., Art. 6, § 6(c); Ky.Const., § 189; La.Const., Art. XII, § 13; Mass.Const., Amend. Art. XLVI, § 2; Mich.Const., Art. I, § 4; Minn.Const., Art. VIII, § 2; Miss.Const., Art. 8, § 208; Mo.Const., Art. IX, § 8; Mont.Const., Art. XI, § 8; Neb.Const., Art. VII, § 11; Nev.Const., Art. 11, § 10; N.H.Const., Pt. II, Art. 83; N.J.Const., Art. VIII, § 4, par. 2; N.Mex.Const., Art. XII, § 3; N.Y.Const., Art. XI, § 3; N.Car.Const., Art. IX, §§ 4, 12; N.Dak.Const., Art. VIII, § 152; Ohio Const., Art. VI, § 2; Okla.Const., Art. II, § 5; Ore.Const., Art. VIII, § 2; Penn.Const., Art. 3, § 15; R.I.Const., Art. XII, § 4; S.C.Const., Art. XI, § 9; S. Dak.Const., Art. VIII, § 16; Tenn.Const., Art. XI, § 12; Tex.Const., Art. VII, § 5; Utah Const., Art. X, § 13; Va.Const., Art. IX, § 141; Wash.Const., Art. IX, § 4; W.Va.Const., Art. XII, § 4; Wis.Const., Art. I, § 18, Art. X, § 2; Wyo.Const., Art. 7, § 8.

   The overwhelming majority of these constitutional provisions either prohibit expenditures of public funds on sectarian schools or prohibit the expenditure of public school funds for any purpose other than support of public schools. For a discussion and categorization of the various constitutional formulations, see Note, Catholic Schools and Public Money, 50 Yale L.J. 917 (1941). Many of the constitutional provisions are collected in B. Confrey, Secularism in American Education: Its History 47-125 (1931).

   Many state constitutions explicitly apply the prohibition to aid to sectarian colleges and universities. See, e.g., Colo.Const., Art. IX, § 7; Idaho Const., Art. IX, § 5; Ill.Const., Art. VIII, § 3; Kan.Const., Art. 6, § 6(c); Mass.Const., Amend. Art. XLVI, § 2; Mo.Const., Art. IX, § 8; Mont.Const., Art. XI, § 8; Neb.Const., Art. VII, § 11; N.Mex.Const., Art. XII, § 3; S.C.Const., Art. XI, § 9; Utah Const., Art. X, § 13; Wyo.Const., Art. 7, § 8. At least one judicial decision construing the word "schools" held that the word does not include colleges and universities, Opinion of the Justice, 214 Mass. 599, 102 N.E. 464 (1913), but that decision was overruled by constitutional amendment. Mass.Const., Amend. Art. XLVI, § 2. [↑](#footnote-ref-6)
7. See, e.g., Wright v. School Dist., 151 Kan. 485, 99 P.2d 737 (1940); Atchison, T. & S. F. R. Co. v. City of Atchison, 47 Kan. 712, 28 P. 1000 (1892); Williams v. Board of Trustees, 173 Ky. 708, 191 S.W. 507 (1917); Opinion of the Justices, 214 Mass. 599, 102 N.E. 464 (1913); Jenkins v. Andover, 103 Mass. 94 (1869); Otken v. Lamkin, 56 Miss. 758 (1879); Harfst v. Hoegen, 349 Mo. 808, 163 S.W.2d 609 (1942); State ex rel. Public School Dist. v. Taylor, 122 Neb. 454, 240 N.W. 573 (1932); State ex rel. Nevada Orphan Asylum v. Hallock, 16 Nev. 373 (1882); Synod of Dakota v. State, 2 S.D. 366, 50 N.W. 632 (1891). [↑](#footnote-ref-7)
8. "Already, the Act has restricted the role of teachers. The evidence before us indicates that some otherwise qualified teachers have stopped teaching courses in religion in order to qualify for aid under the Act. One teacher, in fact, testified that he no longer prays with his class, lest he endanger his subsidy."

   316 F.Supp. at 121. [↑](#footnote-ref-8)
9. The Office of Education stipulated as follows:

   "The Office of Education is now engaged in making a series of on-site reviews of completed projects to verify that conditions under which Federal assistance was provided are being implemented. During these visits, class schedules and course descriptions contained in the school catalog are analyzed to ascertain that nothing in the nature of sectarian instruction is scheduled in any area constructed with the use of Federal funds. If there is found to be an indication that a portion of academic facilities constructed with Federal assistance is used in any way for sectarian purposes, either the questionable practice must be terminated or the institution must assume full responsibility for the cost of constructing the area involved."

   App. in No. 153, p. 82 (emphasis added). [↑](#footnote-ref-9)
10. The plurality opinion in No. 153 would strike down the 20-year "period of Federal interest," 20 U.S.C. § 754(a), upon the ground that "[t]he restrictive obligations of a recipient institution under § 751(a)(2) cannot, compatibly with the Religion Clauses, expire while the building has substantial value." Post at 403 U. S. 683. Thus, the surveillance constituting the "too close a proximity" which for me offends the Establishment Clause continues for the life of the building. [↑](#footnote-ref-10)
11. The Pennsylvania statute differs from Rhode Island's in providing the subsidy without regard to whether the sectarian school's average per-pupil expenditure on secular education equals or exceeds the average of the State's public schools. Nor is there any limitation of the subsidy to nonpublic schools that are financially embarrassed. Thus, the statute, on its face, permits use of the state subsidy for the purpose of maintaining or attracting an audience for religious education, and also permits sectarian schools not needing the aid to apply it to exceed the quality of secular education provided in public schools. These features of the Pennsylvania scheme seem to me to invalidate it under the Establishment Clause as granting preferences to sectarian schools. [↑](#footnote-ref-11)
12. The three dissenters in Allen focused primarily on their disagreement with the Court that the textbooks provided would be secular. See 392 U.S. at 392 U. S. 252-253 (BLACK, J., dissenting); id.at 392 U. S. 257 (DOUGLAS, J., dissenting); id. at 392 U. S. 270 (Fortas, J., dissenting). [↑](#footnote-ref-12)
13. Much of the plurality's argument is directed at establishing that the specific institutional appellees here, as well as most church-related colleges, are not sectarian in that they do not have a purpose or function to advance or propagate a specific religion. Those questions must await hearings and findings by the District Court. [↑](#footnote-ref-13)