# White: Partial Dissent

It is our good fortune that the States of this country long ago recognized that instruction of the young and old ranks high on the scale of proper governmental functions, **[p. 662]** and not only undertook secular education as a public responsibility, but also required compulsory attendance at school by their young. Having recognized the value of educated citizens and assumed the task of educating them, the States now before us assert a right to provide for the secular education of children whether they attend public schools or choose to enter private institutions, even when those institutions are church-related. The Federal Government also asserts that it is entitled, where requested, to contribute to the cost of secular education by furnishing buildings and facilities to all institutions of higher learning, public and private alike. Both the United States and the States urge that, if parents choose to have their children receive instruction in the required secular subjects in a school where religion is also taught and a religious atmosphere may prevail, part or all of the cost of such secular instruction may be paid for by governmental grants to the religious institution conducting the school and seeking the grant. Those who challenge this position would bar official contributions to secular education where the family prefers the parochial to both the public and nonsectarian private school.

The issue is fairly joined. It is precisely the kind of issue the Constitution contemplates this Court must ultimately decide. This is true although neither affirmance nor reversal of any of these cases follows automatically from the spare language of the First Amendment, from its history, or from the cases of this Court construing it, and even though reasonable men can very easily and sensibly differ over the import of that language.

But, while the decision of the Court is legitimate, it is surely quite wrong in overturning the Pennsylvania and Rhode Island statutes on the ground that they amount to an establishment of religion forbidden by the First Amendment. **[p. 663]** No one in these cases questions the constitutional right of parents to satisfy their state-imposed obligation to educate their children by sending them to private schools, sectarian or otherwise, as long as those schools meet minimum standards established for secular instruction. The States are not only permitted, but required by the Constitution, to free students attending private schools from any public school attendance obligation. *Pierce v. Society of Sisters,* 268 U. S. 510(1925). The States may also furnish transportation for students, *Everson v. Board of Education,* 330 U. S. 1 (1947), and books for teaching secular subjects to students attending parochial and other private as well as public schools, *Board of Education v. Allen,* 392 U. S. 236 (1968); we have also upheld arrangements whereby students are released from public school classes so that they may attend religious instruction. *Zorach v. Clauson,* 343 U. S. 306 (1952). Outside the field of education, we have upheld Sunday closing laws, *McGowan v. Maryland,* 366 U. S. 420 (1961), state and federal laws exempting church property and church activity from taxation, *Walz v. Tax Commission,* 397 U. S. 664 (1970), and governmental grants to religious organizations for the purpose of financing improvements in the facilities of hospitals managed and controlled by religious orders. *Bradfield v. Roberts,* 175 U. S. 291 (1899).

Our prior cases have recognized the dual role of parochial schools in American society: they perform both religious and secular functions. *See Board of Education v. Allen, supra,* at 392 U. S. 248. Our cases also recognize that legislation having a secular purpose and extending governmental assistance to sectarian schools in the performance of their secular functions does not constitute "law[s] respecting an establishment of religion" forbidden by the First Amendment merely because a secular program may incidentally benefit a church in fulfilling its religious mission. **[p. 664]** That religion may indirectly benefit from governmental aid to the secular activities of churches does not convert that aid into an impermissible establishment of religion.

This much the Court squarely holds in the *Tilton* case, where it also expressly rejects the notion that payments made directly to a religious institution are, without more, forbidden by the First Amendment. In *Tilton,* the Court decides that the Federal Government may finance the separate function of secular education carried on in a parochial setting. It reaches this result although sectarian institutions undeniably will obtain substantial benefit from federal aid; without federal funding to provide adequate facilities for secular education, the student bodies of those institutions might remain stationary, or even decrease in size, and the institutions might ultimately have to close their doors.

It is enough for me that the States and the Federal Government are financing a separable secular function of overriding importance in order to sustain the legislation here challenged. That religion and private interests other than education may substantially benefit does not convert these laws into impermissible establishments of religion.

It is unnecessary, therefore, to urge that the Free Exercise Clause of the First Amendment at least permits government, in some respects, to modify and mold its secular programs out of express concern for free-exercise values. *See Walz v. Tax Commission, supra,* at 397 U. S. 673 (tax exemption for religious properties; "[t]he limits of permissible state accommodation to religion are by no means coextensive with the noninterference mandated by the Free Exercise Clause. To equate the two would be to deny a national heritage with roots in the Revolution itself"); *Sherbert v. Verner,* 374 U. S. 398 (1963) (exemption of Seventh Day Adventist from eligibility requirements for **[p. 665]** unemployment insurance not only permitted, but required, by the Free Exercise Clause); *Zorach v. Clauson, supra,* at 343 U. S. 313-314 (students excused from regular public school routine to obtain religious instruction; "[w]hen the state encourages religious instruction . . . , it follows the best of our traditions. For it then respects the religious nature of our people, and accommodates the public service to their spiritual needs"). *See also Abington School District v. Schempp,* 374 U. S. 203, 374 U. S. 308 (1963) (STEWART, J., dissenting); *Welsh v. United States,* 398 U. S. 333, 398 U. S. 367 (1970) (WHITE, J., dissenting). The Establishment Clause, however, coexists in the First Amendment with the Free Exercise Clause, and the latter is surely relevant in cases such as these. Where a state program seeks to ensure the proper education of its young, in private as well as public schools, free exercise considerations at least counsel against refusing support for students attending parochial schools simply because, in that setting, they are also being instructed in the tenets of the faith they are constitutionally free to practice.

I would sustain both the federal and the Rhode Island programs at issue in these cases, and I therefore concur in the judgment in No. 153[[1]](#footnote-1) and dissent from the judgments in Nos. 569 and 570. Although I would also reject the facial challenge to the Pennsylvania statute, I concur in the judgment in No. 89 for the reasons given below.

The Court strikes down the Rhode Island statute on its face. No fault is found with the secular purpose of the program; there is no suggestion that the purpose of the program was aid to religion disguised in secular attire. Nor does the Court find that the primary effect of the program is to aid religion, rather than to implement secular goals. The Court nevertheless finds **[p. 666]** that impermissible "entanglement" will result from administration of the program. The reasoning is a curious and mystifying blend, but a critical factor appears to be an unwillingness to accept the District Court's express findings that, on the evidence before it, none of the teachers here involved mixed religious and secular instruction. Rather, the District Court struck down the Rhode Island statute because it concluded that activities outside the secular classroom would probably have a religious content. and that support for religious education therefore necessarily resulted from the financial aid to the secular programs, since that aid generally strengthened the parochial schools and increased the number of their students. In view of the decision in *Tilton,* however, where these same factors were found insufficient to invalidate the federal plan, the Court is forced to other considerations. Accepting the District Court's observation in *DiCenso* that education is an integral part of the religious mission of the Catholic church -- an observation that should neither surprise nor alarm anyone, especially judges who have already approved substantial aid to parochial schools in various forms -- the majority then interposes findings and conclusions that the District Court expressly abjured, namely, that nuns, clerics, and dedicated Catholic laymen unavoidably pose a grave risk in that they might not be able to put aside their religion in the secular classroom. Although stopping short of considering them untrustworthy, the Court concludes that, for them, the difficulties of avoiding teaching religion along with secular subjects would pose intolerable risks, and would, in any event, entail an unacceptable enforcement regime. Thus, the potential for impermissible fostering of religion in secular classrooms -- an untested assumption of the Court -- paradoxically renders unacceptable the State's efforts at insuring that secular teachers under religious discipline successfully avoid conflicts between the religious mission **[p. 667]** of the school and the secular purpose of the State's education program.

The difficulty with this is twofold. In the first place, it is contrary to the evidence and the District Court's findings in *DiCenso.* The Court points to nothing in this record indicating that any participating teacher had inserted religion into his secular teaching, or had had any difficulty in avoiding doing so. The testimony of the teachers was quite the contrary. The District Court expressly found that

"[t]his concern for religious values does not necessarily affect the content of secular subjects in diocesan schools. On the contrary, several teachers testified at trial that they did not inject religion into their secular classes, and one teacher deposed that he taught exactly as he had while employed in a public school. This testimony gains added credibility from the fact that several of the teachers were non-Catholics. Moreover, because of the restrictions of Rhode Island's textbook loan law . . . and the explicit requirement of the Salary Supplement Act, teaching materials used by applicants for aid must be approved for use in the public schools."

*DiCenso v. Robinson,* 316 F.Supp. 112, 117 (RI 1970). Elsewhere, the District Court reiterated that the defect of the Rhode Island statute was "not that religious doctrine overtly intrudes into all instruction," *ibid.,* but factors aside from secular courses, plus the fact that good secular teaching was itself essential for implementing the religious mission of the parochial school.

Secondly, the Court accepts the model for the Catholic elementary and secondary schools that was rejected for the Catholic universities or colleges in the *Tilton* case. There, it was urged that the Catholic condition of higher learning was an integral part of the religious mission of the church, and that these institutions did everything they could to foster the faith. The Court's response was that, on the record before it, none of **[p. 668]** the involved institutions was shown to have complied with the model, and that it would not purport to pass on cases not before it. Here, however, the Court strikes down this Rhode Island statute based primarily on its own model and its own suppositions and unsupported views of what is likely to happen in Rhode Island parochial school classrooms, although, on this record, there is no indication that entanglement difficulties will accompany the salary supplement program.

The Court thus creates an insoluble paradox for the State and the parochial schools. The State cannot finance secular instruction if it permits religion to be taught in the same classroom; but if it exacts a promise that religion not be so taught -- a promise the school and its teachers are quite willing and, on this record, able, to give -- and enforces it, it is then entangled in the "no entanglement" aspect of the Court's Establishment Clause jurisprudence.

Why the federal program in the *Tilton* case is not embroiled in the same difficulties is never adequately explained. Surely the notion that college students are more mature and resistant to indoctrination is a makeweight, for, in *Tilton,* there is careful note of the federal condition on funding and the enforcement mechanism available. If religious teaching in federally financed buildings was permitted, the powers of resistance of college students would in no way save the federal scheme. Nor can I imagine the basis for finding college clerics more reliable in keeping promises than their counterparts in elementary and secondary schools -- particularly those in the Rhode Island case, since, within five years, the majority of teachers in Rhode Island parochial schools will be lay persons, many of them non-Catholic.

Both the District Court and this Court in *DiCenso* have seized on the Rhode Island formula for supplementing **[p. 669]** teachers' salaries since it requires the State to verify the amount of school money spent for secular, as distinguished from religious, purposes. Only teachers in those schools having per-pupil expenditures for secular subjects below the state average qualify under the system, an aspect of the state scheme which is said to provoke serious "entanglement." But this is also a slender reed on which to strike down this law, for, as the District Court found, only once since the inception of the program has it been necessary to segregate expenditures in this manner.

The District Court also focused on the recurring nature of payments by the State of Rhode Island; salaries must be supplemented and money appropriated every year, and hence the opportunity for controversy and friction over state aid to religious schools will constantly remain before the State. The Court, in *DiCenso,* adopts this theme, and makes much of the fact that, under the federal scheme, the grant to a religious institution is a one-time matter. But this argument is without real force. It is apparent that federal interest in any grant will be a continuing one, since the conditions attached to the grant must be enforced. More important, the federal grant program is an ongoing one. The same grant will not be repeated, but new ones to the same or different schools will be made year after year. Thus, the same potential for recurring political controversy accompanies the federal program. Rhode Island may have the problem of appropriating money each year to supplement the salaries of teachers, but the United States must each year seek financing for the new grants it desires to make and must supervise the ones already on the record.

With respect to Pennsylvania, the Court, accepting as true the factual allegations of the complaint, as it must for purposes of a motion to dismiss, would reverse the dismissal of the complaint and invalidate the legislation. **[p. 670]** The critical allegations, as paraphrased by the Court, are that

"the church-related elementary and secondary schools are controlled by religious organizations, have the purpose of propagating and promoting a particular religious faith, and conduct their operations to fulfill that purpose."

*Ante* at 403 U. S. 620. From these allegations, the Court concludes that forbidden entanglements would follow from enforcing compliance with the secular purpose for which the state money is being paid.

I disagree. There is no specific allegation in the complaint that sectarian teaching does or would invade secular classes supported by state funds. That the schools are operated to promote a particular religion is quite consistent with the view that secular teaching devoid of religious instruction can successfully be maintained, for good secular instruction is, as Judge Coffin wrote for the District Court in the Rhode Island case, essential to the success of the religious mission of the parochial school. I would no more here than in the Rhode Island case substitute presumption for proof that religion is or would be taught in state-financed secular courses or assume that enforcement measures would be so extensive as to border on a free exercise violation. We should not forget that the Pennsylvania statute does not compel church schools to accept state funds. I cannot hold that the First Amendment forbids an agreement between the school and the State that the state funds would be used only to teach secular subjects.

I do agree, however, that the complaint should not have been dismissed for failure to state a cause of action. Although it did not specifically allege that the schools involved mixed religious teaching with secular subjects, the complaint did allege that the schools were operated to fulfill religious purposes. and one of the legal theories stated in the complaint was that the Pennsylvania Act "finances and participates in the blending of sectarian **[p. 671]** and secular instruction." At trial under this complaint, evidence showing such a blend in a course supported by state funds would appear to be admissible and, if credited, would establish financing of religious instruction by the State. Hence, I would reverse the judgment of the District Court and remand the case for trial, thereby holding the Pennsylvania legislation valid on its face but leaving open the question of its validity as applied to the particular facts of this case.

I find it very difficult to follow the distinction between the federal and state programs in terms of their First Amendment acceptability. My difficulty is not surprising, since there is frank acknowledgment that "we can only dimly perceive the boundaries of permissible government activity in this sensitive area of constitutional adjudication," *Tilton v. Richardson, post* at 403 U. S. 678, and that "[j]udicial caveats against entanglement" are a "blurred, indistinct and variable barrier." *Ante* at 403 U. S. 614. I find it even more difficult, with these acknowledgments in mind, to understand how the Court can accept the considered judgment of Congress that its program is constitutional, and yet reject the equally considered decisions of the Rhode Island and Pennsylvania legislatures that their programs represent a constitutionally acceptable accommodation between church and state.[[2]](#footnote-2)

1. I accept the Court's invalidation of the provision in the federal legislation whereby the restriction on the use of buildings constructed with federal funds terminates after 20 years. [↑](#footnote-ref-1)
2. As a postscript, I should note that both the federal and state cases are decided on specified Establishment Clause considerations, without reaching the questions that would be presented if the evidence in any of these cases showed that any of the involved schools restricted entry on racial or religious grounds or required all students gaining admission to receive instruction in the tenets of a particular faith. For myself, if such proof were made, the legislation would, to that extent, be unconstitutional. [↑](#footnote-ref-2)