

Protestants, Catholics and the Battle over the Books in Rhode Island: The Case of

Bowerman v. O'Connor

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There is certainly irony in the fact that Rhode Island, the first colony to allow for the maintenance of Christian morality along with cooperation with other theological worldviews, has provided the U.S. Supreme Court with multiple opportunities to rule on the meaning of the Establishment Clause of the First Amendment in the latter part of the twentieth century.² In *DiCenso v. Robinson* (1971),³ which was joined for decision with the landmark case of *Lemon v. Kurtzman*⁴, the Court invalidated an act that supplemented the salaries of teachers in non-public schools. The plan, which was pushed through the General Assembly by the largely Catholic organization, Citizens for Educational Freedom (CEF), and favored by the superintendent of the Catholic diocesan schools, Reverend Edward Mullen, would have largely offered aid to financially unstable schools. These schools happened to be primarily Catholic elementary schools.⁵ The infamous three-prong test, known in legal circles as the “Lemon Test,” was actually developed by

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² For an excellent discussion of the theology of Roger Williams’s see James Calvin Davis, *The Moral Theology of Roger Williams: Christian Conviction and Public Ethics* (New York: John Knox Press, 2004). On Rhode Island’s role in supplying Establishment Clause controversies see the brief discussion in Patrick T. Conley’s *A Legal History of Rhode Island* (Providence, RI: Rhode Island Publications Society, 1998), 432-434. See also Milton Stanzler, *Eternally Vigilant: A History of the Rhode Island ACLU* (1998), 83-93 and James Ryan and John Jeffries, “The Political History of the Establishment Clause,” *Michigan Law Review* (2001), 292.

³ 403 U.S. 602 (1971). For an insightful analysis see Patrick T. Conley & Fernando Cunha, “State Aid to Rhode Island’s Private Schools: A Case Study of *DiCenso v. Robinson*,” *22 The Catholic Lawyer* 330 (Autumn, 1976): 329-43.

⁴ 403 U.S. 602 (1971).

⁵ Conley and Cunha, “State Aid to Rhode Island’s Private Schools,” 332.

the Court from a review of the issues in the *DiCenso* case. Under the Lemon Test, for a statute not to violate the Establishment Clause, (1) it must have a clear secular purpose, (2) its primary effect must be one that neither advances or inhibits religion, and (3) it must not create a situation of excessive entanglement with religion. In *Lynch v. Donnelly* (1984),⁶ a divided Court upheld the city of Pawtucket's Christmas display because there was no discernible intent to promote one religious faith over another.⁷ Finally, in *Lee v. Weisman* (1992)⁸ the justices ruled that a requirement in the capital city of Providence that required students to stand and remain silent during "nonsectarian" prayers at the graduation exercises violated the Establishment Clause.

The *DiCenso* case was the final act in a multiple decade-long drama dealing with state aid to non-public education. The discussion of state aid to non-public education, particularly Catholic education, was the major public policy issue in Rhode Island in the 1960s. On the separationist side of the issue were the local affiliates of the American Civil Liberties Union (ACLU) and the National Association for the Advancement of Colored People (NAACP). These two groups were joined by the National Council of Churches, the Unitarians, the Baptists, and the Anti-Defamation League.⁹ As two leading scholars on the Establishment Clause have argued, "three powerful segments of society opposed" the arguments put forth by the largest potential recipient of state aid, the Catholic Church. Almost "all Protestants, who remained cohesive on this issue; almost all Jews; and almost all secularists" were united in opposition to any aid being afforded to

⁶ 465 U.S. 668 (1984).

⁷ The displays included such objects as a Santa Claus house, a Christmas tree, a banner reading "Seasons Greetings," and a nativity scene. See Wayne R. Swanson, *The Christ Child Goes to Court* (Philadelphia: Temple University Press, 1989)

⁸ 505 U.S. 577 (1992). See Susan Sherry, "Lee v. Weisman: Paradox Redux," *Supreme Court Review* (1992): 123-54.

⁹ The Anti-Defamation League of B'Nai B'Rith submitted a length amicus curiae brief to the Rhode Island Supreme Court in *Bowerman v. O'Connor*.

parochial education.¹⁰ All made profound arguments on the connection between American public education, and the health of its democratic institutions and all argued that diversion of funds for public education was a threat to the democratic polity. Martin Marty was certainly correct when he wrote in 1959 that religion of democracy “has an ‘established church’ in the field of public education.”¹¹

Legal scholar Sanford Levinson rightfully reminds us that it “is in thinking about public schools that we most directly confront the questions of social reproduction and the inculcation of values that constitute us as a distinctive social order.”¹² In his famous concurring opinion in *Abington Township v. Schempp*¹³ Justice William Brennan stated that it was “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.”¹⁴ Almost twenty years later, Justice Brennan maintained that “the deprivation of public education is not like the deprivation of some other governmental benefit. Public education has a pivotal role in maintaining the fabric of our society and in sustaining our political and cultural heritage.”¹⁵

The basic principle underlying all the appeals for aid to non-public education, from transportation in the 1950s, to the use of public textbooks in the early 1960s, to tuition grants in 1968, and to non-public school teacher salary supplements at the very end of the decade, centered on the idea that it was unjust for the state to deny educational

¹⁰ James Ryan and John Jeffries, “The Political History of the Establishment Clause,” 313.

¹¹ Martin E. Marty, *The New Shape of American Religion* (New York: Harper and Row, 1958), 80.

¹² Sanford Levinson, “Some Reflections on Multiculturalism, ‘Equal Concern and Respect,’ and The Establishment Clause of the First Amendment,” 27 *University of Richmond Law Review* (1992-1993), 996.

¹³ 374 U.S. 203 (1963).

¹⁴ *Ibid.* at 241-242.

¹⁵ *Plyler v. Doe* 457 U.S. 202 (1982) at 203.

benefits, to which a child or family would otherwise be entitled, on the basis of the family's decision to educate the child in a religious setting. The earliest attempt by Rhode Island Catholics to secure indirect aid to their schools, an effort by pastors in the coastal city of Newport in 1913, was rejected as a violation of the separation of church and state.¹⁶ The ongoing battle in Rhode Island in the 20th century over state aid to non-public education was a political and judicial contest among various interest groups, both religious and secular, with competing positions on the proper relationship between church and state.

The supposed threat to the public school from the insular, separatist Catholic school was the embodiment of the supposed Catholic threat to America. Arthur Schlesinger Sr. called anti-Catholicism “the deepest-held bias in the history of the American people.”¹⁷ Richard Morgan maintains that suspicion of Roman Catholics was very much a part of American cultural traditions from the seventeenth century to the middle of the twentieth century.¹⁸ The theologian Reinhold Niebuhr, in his classic work, *The Children of Light and the Children of Darkness* (1944), highlighted the great divide “between the presuppositions of a free society and the inflexible authoritarianism of the Catholic religion.”¹⁹ In a dissent in the 1968 case of *Board of Education v. Allen*²⁰, Supreme Court Justice Hugo Black warned that the loaning of public textbooks to non-public school students in New York parochial schools was due to the work of “powerful sectarian religious propagandists ... looking toward complete domination and supremacy

¹⁶ Robert W. Hayman, “Romanists in the Land of Roger Williams: The Diocese of Providence Observes Its 125th Anniversary,” *Rhode Island History* 55 (Nov., 1997), 129.

¹⁷ Quoted in James Martin, “The Last Acceptable Prejudice,” *America* (Mar. 25, 2000).

¹⁸ See Richard Morgan, *The Supreme Court and Religion* (New York: Free Press, 1972), 82-93

¹⁹ Reinhold Niebuhr, *The Children of Light and the Children of Darkness* (New York: Charles Scribner's Sons, 1944), 128.

²⁰ 392 U.S. 236 (1968)

of their particular brand of religion.”²¹ In the mode of many nineteenth century nativists, Black maintained that the Catholic “propagandists” who had succeeded in passing a law in loaning textbooks to parochial schools were threatening “the citadels of liberty.”²²

The school aid debate often seemed to drive people’s attitudes on church-state matters. More than any other church-state issue, the use of tax funds for the support of religious education, particularly Catholic education, was a contentious issue in the legislatures and in the courts. By 1965, 87 percent of students enrolled in private schools attended a Catholic school.²³ Therefore, any government aid to private schools was viewed as support of the Catholic Church and their schools. On this issue, “all sorts of Protestants, Jews, and secularists, - those politically and doctrinally conservative, and those of extremely liberal persuasions ... could make common cause.”²⁴ Despite the availability of free public education in the 1960s, the citizens of Rhode Island relied on non-public education more than any other state in the Union.²⁵ Through the 1950s and 1960s, the majority of Rhode Island’s Protestant community, especially the Methodists and the Baptists, attempted to block efforts by the Catholic diocese to obtain state aid for their school system. As CEF began to push its agenda of educational freedom in 1968, Protestants and Other Americans United for the Separation of Church and State (POAU) described the group in one of their publications as nothing less than “a militant Roman Catholic Action Group.”²⁶ The opening salvo of the POAU against the Catholic Church in the closing years of the 1940s maintained that aid to parochial schools “would divide

²¹ Ibid., at 251.

²² Ibid., at 251.

²³ James E. Ryan, “Brown, School Choice, and the Suburban Veto,” *Virginia Law Review* 90 (2004), 1640

²⁴ Quoted in Ibid., 1640.

²⁵ See Henry M. Brickell, *Non-public Education in Rhode Island: Alternatives for the Future* (Rhode Island Board of Education, 1969), 2. (Providence College Archive, Providence, Rhode Island).

²⁶ *Church and State*, 21 (March, 1968), 12. The magazine was published by Protestants United for the Separation of Church and State.

American society itself into hostile sectarian camps.”²⁷ For the critics of state aid for non-public education, the Catholic Church could not assert on one hand that they had a right to operate their schools free from state interference while at the same time assert that the state had a duty to support their institutions with taxpayer’s dollars.

Historian Robert Ellwood has argued that in the post-World War II period “government aid to parochial schools” was a “hotly disputed” topic. The “dismal state of Catholic-Protestant relations in the early Fifties remained an important, almost the dominant issue, in U.S. religious news in those years.”²⁸ In the 1950s, Roman Catholicism appeared as a threat because of its increased cultural influence and visibility. Catholic families were leaving their traditional homes in the cities and moving to suburbia in droves and, for the first time, attending college in massive numbers.²⁹ A prominent Catholic lawyer, William Brennan, was appointed to the Supreme Court in 1957. The ensuing battle over state aid to non-public education was indeed part and parcel of a larger national debate on the growing power of the Catholic Church in America. Contrary to historian Jay Dolan’s argument, there was not a “marriage between Catholicism and the American liberal reform movement” in the post-war era.³⁰ As legal scholar Thomas Berg has emphasized, the fact that many “liberals of the New Deal Era embraced active, welfare-state government in general” but rejected “school aid during that same period” can be explained by the “fear and distrust of Roman Catholicism and

²⁷ Reprinted in *The Christian Century* 65 (1948), 79.

²⁸ Robert S. Ellwood, *The Fifties Spiritual Marketplace* (New Brunswick, N.J.: Rutgers University Press, 1997), 51.

²⁹ Thomas C. Berg, “Proclaiming Together?” Convergence and Divergence in Mainline and Evangelical Evangelism, 1945-1967” *Journal of Religion and American Culture* 5:1 (Winter, 1995), 56.

³⁰ Jay P. Dolan, *The American Catholic Experience: A History from Colonial Times to the Present* (Notre Dame, IN: University of Notre Dame Press, 1992), 407.

its parochial schools.”³¹ This was certainly ironic because many liberals found common ground with Catholics in their criticism of laissez-faire capitalism and their support of President Franklin Roosevelt’s New Deal. Berg maintains that only a continued presence of anti-Catholic sentiment can explain the opposition from New Deal liberals to aid for parochial school students.³²

The attempt at providing state aid for private school students also coincided with efforts in many southern states to escape from the Supreme Court’s desegregation rulings by enrolling in private schools.³³ University of Norte Dame historian John McGreevy has argued that the battle against school desegregation and aid to Catholic schools in the post-World War II period was inextricably joined. “Linking these efforts,” according to McGreevy, “was the fear that ethnic prejudice (against Jews and African Americans) and authoritarian institutions (the Catholic Church) might prevent the emergence of a fully democratic culture in a world demonstrably hostile to democracy.”³⁴ The National Catholic Welfare Conference and the NAACP, both federal aid proponents, “had redrawn the parameters of the federal aid debate, the former seeking to include non-public schools, the latter working to exclude racially segregated institutions.”³⁵

³¹ Thomas C. Berg, “Anti-Catholicism and Modern Church-State Relations,” *Loyola University Chicago Law Journal* (2001-2002), 131.

³² *Ibid.*

³³ The editors of *The New Republic* frequently made this connection. See, for example, “Parochial and Public,” (Mar., 20, 1961), 4. See also “Are Parochial Schools Racial Escape Valves,” *Christian Century* 83:43 (Oct., 26, 1966), 1298..

³⁴ John T. McGreevy, “Thinking on One’s Own: Catholicism in the American Intellectual Imagination, 1928-1960,” *The Journal of American History* 84 (Jun., 1997), 125.

³⁵ Lawrence McAndrews, *Broken Ground: John F. Kennedy and the Politics of Education* (New York: Garland Publishing, 1991), 1. The NAACP’s David Grant wrote one of the founders of the Citizens for Educational Freedom, a national organization dedicated to securing public monies for non-public education, noting the omission of an antisegregation provision in the initial draft of the group’s constitution.” (35).

While recent narratives of the twentieth century have certainly dwelled at great length on the legacy of *Brown v. Board of Education* (1954)³⁶, few have mentioned the church-state divide and the battles between Catholics and mainline Protestants over education. For example, award-winning works from historians James Patterson, William Chafe, and Sean Wilentz have little to say in their pages on the conflict over state and federal aid to non-public education.³⁷ In his thousand page, Pulitzer prize-winning biography of the abortive presidency of John F. Kennedy, the late Arthur M. Schlesinger Jr. did not even mention President Kennedy's conflict with the Catholic Church over his educational policy.³⁸ The development of a cottage industry in the history of American anti-Catholicism and its lingering presence in American society, which has been labeled by numerous scholars as the "last acceptable prejudice," has produced some fascinating studies that illuminate this often neglected side of American cultural history.³⁹ In 2000, one Supreme Court justice went as far as to conclude that "hostility to aid to pervasively sectarian schools has a shameful pedigree" and is "born of bigotry."⁴⁰ The four-justice

³⁶ 347 U.S. 483 (1954).

³⁷ See Patterson's two volumes in the Oxford History of the United States series: *Grand Expectations: The United States, 1945-1976* (New York: Oxford University Press, 1996) and *Restless Giant: The United States from Watergate to Bush v. Gore* (New York: Oxford University Press, 2006); Chafe, *The Unfinished Journey: America Since World War II* (New York: Oxford University Press, 2006); Wilentz, *The Age of Reagan: A History, 1974-2008* (New York: Harper and Row, 2008).

³⁸ Arthur Schlesinger Jr., *A Thousand Days: John F. Kennedy in the White House* (New York: Houghton Mifflin & Co., 1965). On this see point see Lawrence McAndrews, *Broken Ground: John F. Kennedy and the Politics of Education*.

³⁹ See John T. McGreevy's *Catholicism and American Freedom: A History* (New York: W. W. Norton, 2003); Christopher Jenks, *The New Anti-Catholicism: The Last Acceptable Prejudice* (New York: Oxford University Press, 2003); Mark S. Massa, S.J., *Anti-Catholicism in America: The Last Acceptable Prejudice* (New York: The Crossroad Publishing Company, 2003); and Margaret O'Brien Steinfels (ed.), *American Catholics, American Culture: Tradition and Resistance* (New York: Rowman and Littlefield, 2004).

⁴⁰ *Mitchell v. Helms*, 530 U.S. 793 (2000) at 832 (plurality opinion of Justice Clarence Thomas). See also James Ryan and John Jeffries, "The Political History of the Establishment Clause," 278-81. At issue in *Mitchell* was Chapter 2 of the Education Consolidation and Improvement Act of 1981. Chapter 2 funds are channeled to local educational agencies (LEA's), which are usually public school districts, via state education agencies (SEA's), to implement programs to assist in children in elementary and secondary schools. LEA's and SEA's must offer assistance to both public and private schools. For a view of the

plurality in the controversial case *Mitchell v. Helms* (2000), which ruled that federal funds could constitutionally be used by parochial schools, noted that even in the modern no-aid opinions, the tag “sectarian” continued to be affixed primarily to Catholic schools. Parochial schools remained the classic example of the “pervasively sectarian” school, barred from receiving aid because it is committed to “indoctrination.”⁴¹ The sectarian label was frequently tossed around in public policy debates in Rhode Island in the 1960s because of the sheer size of the parochial school system.

Nearly ninety percent of the nearly six million American students in nonpublic schools in the 1960s attended a parochial school.⁴² Almost sixty percent of Rhode Island’s population was Catholic and twenty-seven percent of school children were enrolled in Catholic schools.⁴³ Since almost all non-public education in America and certainly in Rhode Island was operated under the auspices of the Catholic Church, it is easy to see “anti-Catholicism” lurking around every corner. While “perception[s] of Roman Catholic faith, practice, and polity as superstitious, corrupt, undemocratic, and ‘un-American’” were very much a part of American political culture in the post-war period, they do not capture the whole picture.⁴⁴ There were certainly elements of traditional nativism alive in the 1960s in Rhode Island; however, another issue driving opponents of state aid to non-public education was a deep-seeded belief in the importance

potential dangers of *Mitchell* see this article by legal scholar Derek Davis:
http://www.bc.edu/bc_org/avp/law/lwsch/journals/bclawr/43_5/02_TXT.htm

⁴¹ *Ibid* at 831-832.

⁴² See Richard Morgan, “The Establishment Clause and Sectarian Schools: A Final Judgment,” *The Supreme Court Review* (1973), 58-9.

⁴³ The Catholic church maintained 119 schools, with total enrollment of about 49,000. Public school enrollment was about 140,000. The non-Catholic private schools enrolled around 2000. See Davis W. Griffith, “R.I. Textbook Issue Going to High Court,” *Evening Bulletin*, Oct. 2, 1962, p.1.

⁴⁴ Mark S. Massa, S.J., *Anti-Catholicism in America: The Last Acceptable Prejudice* (New York: The Crossroad Publishing Company, 2003), 7.

of public education.⁴⁵ Prominent members of Rhode Island's Jewish community, such as the founder of the Hebrew Day School in Providence, Archie Smith, were affiliated with the largely Catholic CEF. Moreover, the state board of education was actually headed by Rev. Cornelius B. Collins, pastor of St. Michael's Church, a large Roman Catholic parish in South Providence.

Historians concerned with the presence of anti-Catholic prejudice in American culture have generally neglected the intense legal battles in the 1960s over state aid to a vast Catholic school system. McGreevy, for example, in his magisterial work, *Catholicism and American Freedom* (2003), rightfully pays particular attention to the divisive issues of contraception and abortion that arose in the 1960s and thoroughly divided Catholics and liberals, but he neglects the continuing debate over the nature of American public education that often saw the Catholic Church and Evangelical Protestants on one side and mainline Protestants (Methodists, Baptists, Episcopalians, and Presbyterians) on the other.⁴⁶ Specifically, adherence to the doctrine of strict separation of church and state, insofar as it meant no funding of religious schools (particularly Catholic schools) continued to be the site of the most sustained debate over Catholic influence in American culture throughout the 1960s and early years of the 1970s. While the presence of anti-Catholicism was certainly not as defined as it had been in the 1940s and 1950s, a distrust of Catholic influence was still prevalent in the debate

⁴⁵ Nativist sentiments of the power of Catholic Church, of course, had a long pedigree in Rhode Island and the nation at large. Nativist fears of giving Irish Catholic immigrants the vote played a large role in Rhode Island's "comic opera of a civil war" known as the Dorr Rebellion. The 1842 Constitution, which was ratified in the wake of Thomas Wilson Dorr's failed attempt to take over the reins of the state government, established a \$134 freehold suffrage qualification for naturalized citizens, most of which were Irish Catholics. This restriction, which was the most blatant manifestation nativist provision in any state constitution was not removed until 1888. Moreover, section 12 of the Rhode Island Constitution, which prohibits aid to non-public education, was part of the original 1842 version.

⁴⁶ McGreevy, *Catholicism and American Freedom: A History*: 214-15.

over state aid to nonpublic education because it was linked to the continued vitality of the public system.

The New Republic argued that to “accept the principle of general support of public and private schools equally out of public funds is to abandon the mission of the state, since it removes the single most effective inducement available to the state to draw people to its system of schools and away from centrifugal systems.”⁴⁷ At the center of the debate was the perceived connection between the success of the American dream and American public education. Supreme Court Justice Felix Frankfurter remarked, the “public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools.”⁴⁸ According to Justice Robert Jackson, “the American public school, if not a product of Protestantism,” was “at least” much “more consistent with it than with the Catholic culture and scheme of values.”⁴⁹

At the heart of the debate in the early 1960s was not only the performance of Catholic schools, but the Establishment Clause, along with Article I, Section 3 of the Rhode Island Constitution which states that “no man shall be compelled to frequent or to support any religious worship, place, or ministry except in fulfillment of his own voluntary contract.” According to Yale Law professor Akhil Amar, there were “basically two images” contending for control. The first was “the image of strict separation, the wall. The second was the idea of equality. The separation idea says no government money can ever go to religion in any way. The equality idea says government should not be giving money to religion as such, but if government is giving money to everyone, then

⁴⁷ “Parochial and Private,” *The New Republic* 144: 12 (Mar., 20, 1961), 4.

⁴⁸ *McCullum v. Board of Education*, 333 U.S. 203 (1948) at 231.

⁴⁹ *Everson v. Board of Education* 330 U.S. 1 (1947) at 23.

religions should get money on equal terms,” said Amar.⁵⁰ As one scholar has phrased the issue, “governments, while free to establish their own public schools and to make education compulsory for certain age groups” cannot use state power “to eliminate competing, private sector educational institutions that may serve to create heterogeneity and to counter the state’s dominance over the education of the young.”⁵¹ The city of Cranston, a traditional Yankee enclave, provided the test case for this position.⁵²

On February 16, 1965, a bill of equity was brought by Frederick E. Bowerman and four other residents from the city of Cranston challenging the state’s 1963 textbook loan statute.⁵³ The plaintiffs in *Bowerman v. O’Connor* were taxpayers who brought suit against the members of the Cranston school committee. Their complaint alleged that the law was unconstitutional because it was an imposition of a tax for private purposes. John O’Connor was the chairman of the Cranston school committee. The suit challenged the action of the Cranston school committee in interpreting the state law to mean that textbooks could be loaned free to pupils in the elementary and secondary schools conducted by or for religious organizations. The Catholic diocese operated five parochial schools in Cranston. Textbooks were also loaned to students attending a Christian day school in Providence and Providence Hebrew Day school. The respondents’ complaint alleged that Chapter 12 of the Public Laws of Rhode Island be declared unconstitutional due to its imposition of a tax for private purposes in violation of the Establishment Clause of the First Amendment and Article I, Section 3 of the Rhode Island Constitution.

⁵⁰ Quoted in Jodi Wolgoren, “Florida Case Casts Shadow of Doubt Across the Future of School Vouchers,” *New York Times*, Mar., 19, 2000.

⁵¹ Mark G. Yudof, *When Government Speaks* (Berkeley, CA: University of California Press, 1988), 229.

⁵² Residents of Cranston also raised the most significant challenge to the states 1937 busing statute which allowed for public transportation of non-public school students.

⁵³ “Cleric Calls Book Loaning Constitutional,” *Providence Sunday Journal*, Aug. 21, 1966, N-14. Bowerman was joined by Michael and Ann Lezanic, Gerald Abrams and Delcie King.

When Rhode Island's textbook loan program was being debated, the state's Methodist community condemned the action. The official position of the Methodist Church was the "unalterable opposition" to the diversion of tax funds to the support of private and sectarian schools.⁵⁴ Even though the handbook of school regulation for the Catholic Diocese of Providence maintained that the Catholic school was not a party to the textbook loan program, and was not under any circumstance, to become a party of the transaction, lawyers for the plaintiffs continually brought up the fact that the diocese was the first to raise the issue of textbook aid. Indeed, Judge Fred Perkins dwelled at length on this in his opinion.⁵⁵ Proponents of the statute argued that the state's textbook loan program helped students to pursue a secular education in a parochial school, which satisfied the compulsory education requirement. Texts were confined to the subjects of mathematics, science and foreign languages. A detailed report issued by a nonpartisan commission set up "to study state participation in acquisition of scientific and mathematic texts and materials for non-public schools" concluded that the "public actually benefits financially from the presence of private schools in Rhode Island, which has the largest percentage of private school pupils of any state."⁵⁶ However, Rev. Canon William N. Shumaker, director of education for the Episcopal Diocese of Providence, maintained that the loaning of publicly funded textbooks to parochial school students would amount to "the death-knell of public education in Rhode Island."⁵⁷

⁵⁴ Robert D. Whitaker, "N.E. Methodist Opposition to Parish School Aid Cited," *Providence Journal*, June 14, 1962 p.12. See also Robert D. Whitaker, "Methodists Oppose School Aid Demands," *Providence Sunday Journal* June 17, 1962, p.N-5.

⁵⁵ *Bowerman v. O'Connor*, RI Superior Court (1967), 10-12.

⁵⁶ "Commission to Study State Participation in Acquisition of Scientific and Mathematic Texts and Materials for Non Public Schools" (1962), 17. (Rhode Island State House Archives).

⁵⁷ "Parish Schools Text Book Aid Foes are Heard," *Providence Journal*, Nov. 10, 1962, p.1.

II

It was not until 1925, for example, that the U.S. Supreme Court, in the famous case of *Pierce v. The Society of Sisters*,⁵⁸ upheld the right of parents to send their children to parochial schools.⁵⁹ The Court found that an Oregon statute requiring nearly every parent to send a child between the ages of eight and sixteen to public schools interfered with the liberty of parents to direct the education of their children along with threatening the destruction of the plaintiff's property. The Court declared that the "fundamental theory of liberty under which all governments in this union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only."⁶⁰ Legal scholar Max Lerner remarked at the time that *Pierce* was a "dangerous inroad" on "the nation's stake in having a common democratic education for all its children."⁶¹ The *Pierce* decision was a major victory for the National Catholic War Council (later the National Catholic Welfare Conference). At the time of the decision, numerous state constitutions still included so-called Blaine Amendments, modeled after the failed effort of Senator James Blaine (Maine –R) to amend the Constitution in 1875 by forbidding public aid to religious schools.⁶² The Blaine Amendment would have added to the Fourteenth Amendment a rule that no state money "shall ever be under the

⁵⁸ *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). *Pierce* was decided under the doctrine of "substantive due process. Later the court described the right of parents to send their children to religious schools as arising under the free exercise clause. See *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973).

⁵⁹ See Mark G. Yudof, "When Governments Speak: Toward a Theory of Government Expression and the First Amendment," *Texas Law Review* 57 (1979): 863-918.

⁶⁰ 268 U.S. 510 at 535.

⁶¹ Quoted in McGreevy, *Catholicism and American Freedom*: 182.

⁶² See Thomas E. Buckley, S.J., "A Mandate for Anti-Catholicism: The Blaine Amendment," *America*, Sept. 27, 2004, p.18.

control of any religious sect” or be given to any “school . . . wherein the creeds of any particular religious or antireligious sect, organization, or denomination shall be taught.”⁶³

Tensions increased during with the development of the so-called “child benefit theory.” In *Cochran v. Board of Education* (1930) the United States Supreme Court upheld a Louisiana law that allowed the state to purchase textbooks for students attending parochial schools. It was here that the Court first began to articulate the “child-benefit theory” by “drawing a significant distinction between government aid that benefits individuals and aid that benefits the institutions they attend.”⁶⁴ It should be noted that *Cochran* did not deal with the religious clauses of the First Amendment. The Court ruled that the statute in question did not constitute a violation of the Fourteenth Amendment by taking public property for a private purpose. It was only after the conclusion of World War II that the Supreme Court began to confront the issue of whether government funding could extend to religious education in any detail.

The fundamental change in the role of government ushered in by the New Deal, an increased effort by Catholic schools to obtain equal funding, and the Supreme Court’s decision in the landmark case, *Everson v. Board of Education*⁶⁵ were all factors. Moreover, Catholic arguments began to shift in this period. If students could receive aid under the GI Bill to attend a Catholic college, “why not view governmental aid as assistance to children, not institutions?”⁶⁶ By 1940, American bishops also realized that increased in property taxes that were put in place in many communities in order to bolster

⁶³ Quoted in Michael W. McConnell, John H. Garvey, and Thomas C. Berg, *Religion and the Constitution* (Denver, CO: Aspen Publishing, 2002), 452-53.

⁶⁴ Joseph P. Viteritti, “Blaine’s Wake: School Choice, the First Amendment, and State Constitutional Law,” *Harvard Journal of Law and Public Policy* 21 (1997-1998), 679.

⁶⁵ 330 U.S. 1 (1947).

⁶⁶ McGreevy, *Catholicism and American Freedom*: 183.

the public school system would create an even bigger burden on Catholic parents who desired to pay twice for their child's education.⁶⁷ The longstanding tradition of education as a matter of local control helped to make the debate about federal aid emotionally charged. Proposals for federal aid to education often elicited charges that it would lead to totalitarian control of schools.⁶⁸ The first policy area to be considered was public busing of parochial school students.

In 1947, the Supreme Court upheld public transportation for non-public school children. The administered aid was framed as assistance to the child rather than aid to the school.⁶⁹ The New Jersey law in *Everson* authorizing bus reimbursements was introduced in 1937 and passed in 1941 as Depression-era welfare measure. The verdict in *Everson*, which was upheld by the narrowest of margins, authorized the use of New Jersey tax funds to reimburse parents for the cost of bus fares to attend non-public school. As historian Philip Hamburger has argued, an "old nativist order initiated the *Everson* case." The plaintiff, Arch Everson, was a member of the Junior Order of United American Mechanics, which had a long history of nativist activity.⁷⁰ Since transportation subsidies served a public purpose, according to the Court, and since they were afforded to students

⁶⁷ James Ryan and John Jeffries also point out that another connected issue at play was Catholic support for school prayer. Catholics came out against the Supreme Court's invalidation of prayer in the public school (*Engel v. Vitale*, 1962) in order to highlight the growing secularization of society along with public school hostility to religion. The strategy behind this tactic was to build support for their state aid programs. See James Ryan and John Jeffries, "The Political History of the Establishment Clause," 323.

⁶⁸ Bulletin of the Friends of the Public Schools, 11:7 (Jan., 1949), 5. See John E. Fogarty Files, Providence College Archives, Box 1, Folder 4, 81st Congress, 1st session, 1949.

⁶⁹ See William M. Wiecek, "The Stone and Vinson Courts," in Christopher Tomlins (ed.), *The United States Supreme Court: The Pursuit of Justice* (New York: Houghton and Mifflin Co., 2005), 256, 258. As Wiecek notes, the Court unanimously endorsed a doctrine of strict separation between church and state. The justices did obviously split, but only over the application of the new doctrine. The Court, with Black again writing for the majority, continued on the separationist path by striking down an Illinois program that allowed religious instruction to take place in public schools during school hours (*McCullum v. Board of Education* 333 U.S. 203 1948). See also Formicola, Jo Renee & Morken Hubert (eds.) *Everson Revisited: Religion, Education, and Law at the Crossroads* (New York: Roman and Littlefield Publishers, 1997).

⁷⁰ See Philip Hamburger, *Separation of Church and State* (Cambridge, MA: Harvard University Press, 2002), 455-56. See also McGreevy, *Catholicism and American Freedom*: 184-86.

attending any accredited nonprofit school in the district, they held that the statute did not favor or aid religion.⁷¹

In his opinion for the Court, Justice Black wrote a historical essay in which he went all the way back to the 1786 Virginia Statute of Religious Freedom on the reasons for the separation of church and state. He frequently quoted Thomas Jefferson, stating that the clause had been intended to erect “a wall of separation between Church and State,” a wall, Black claimed, that had to be sustained.”⁷² However, the so-called “wall of separation,” which appears nowhere in the Constitution, was simply Jefferson’s personal belief – a belief which the Framers did not adopt. As legal historian William M. Wiecek rightly notes, “Black adopted Jefferson’s metaphor, the wall of separation, as canonical for the meaning of the establishment clause, even though Jefferson had penned the phrase two decades” after the ratification of the 1787 Constitution.⁷³ In dissent, Justice Robert Jackson argued that Black’s “reasoning” confirmed his conclusions “that there was no good grounds upon which to support” the New Jersey busing statute. Moreover, “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.”⁷⁴

Ironically, the prohibitive language in *Everson*, which would be cited throughout the 1960s by the Rhode Island ACLU, proved far more influential than the actual ruling

⁷¹ 330 U.S. 1 (1947) at 17-18.

⁷² 330 U.S. 1 (1947) at 16. The statute was enacted in response to James Madison’s 1785 “Memorial and Remonstrance Against Religious Assessments,” which was written to strike up opposition to Patrick Henry’s proposed bill to provide for teachers of the Christian religion in Virginia. Both are reprinted in their entirety in the appendix section to the Court’s ruling. The “wall of separation” is contained in Jefferson’s famous 1802 letter to the Danbury Baptists in Connecticut.

⁷³ See Wiecek, 258.

⁷⁴ 330 U.S. 1 (1947), 19.

in the case which, of course, upheld transportation for non-public school students.⁷⁵ Judge Fred Perkins' opinion in *Bowerman v. O'Connor* rested on this conception of *Everson*. Perkins even went as far as to cite the admission of Supreme Court Justice William O. Douglas that he erred in siding with the majority in *Everson* as proof that the even the transportation issue may not be settled.⁷⁶ As Daniel Dreisbach notes, *Everson's* "interpretative approach and rhetoric often overshadows the holding in discussion among scholars and lawyers."⁷⁷ Moreover, as University of Texas legal scholar Sanford Levinson has argued, it "is hard to read some of the dissenting opinions in [*Everson*] (and opinions in other cases as well during that era) without seeing in them traces of quite traditional Protestant suspicion of – some have described it as bigotry against – Roman Catholics, who were by far the largest group of beneficiaries of the challenged state policies."⁷⁸

It is no surprise that Protestants and Other Americans United for Separation of Church and State (POAU), a national organization, was formed in 1947 with the single purpose to oppose moves on the part of the hierarchy of the Catholic Church to secure support from public funds for their schools.⁷⁹ In its manifesto, which was printed in the pages of *The Christian Century*, the prominent Protestant periodical, the leaders of the

⁷⁵ Berg argues that the "prohibitive language" in *Everson* was "far more influential over time than did the narrow approval of bus reimbursements." See Berg, "Anti-Catholicism and Modern Church-State Relations," 127.

⁷⁶ Perkins, 55. During the oral arguments in the case, Douglas passed a note to Hugo Black, warning, "If the Catholics get public money to finance their religious schools, we better insist on getting some good prayers in public schools or we Protestants are out of business." Quoted in McGreevy, *Catholicism and American Freedom*: 184-85.

⁷⁷ Daniel L. Dreisbach, "Everson and the Command of History: The Supreme Court, Lessons in History, and the Church-State Debate in America" in Jo Renee Formicola and Herbert Morken (eds.) *Everson Revisited: Religion, Education, and Law at the Crossroads* 23, 24 (1997).

⁷⁸ Robert G. McCloskey (rev. by Sanford Levinson), *The American Supreme Court* (Chicago: The University of Chicago Press, 2004), 233.

⁷⁹ Lawrence J. McAndrews, *The Era of Education: The Presidents and the Schools, 1965-2001* (Chicago, 2006), 4-5. The organization was formed by Methodist Bishop G. Bromley Oxnam.

POAU warned that the Catholic Church had “committed itself in authoritative declarations and by positive acts to a policy plainly subversive of religious liberty as guaranteed by the Constitution.”⁸⁰ The editors warned that the “effect of state-supported church schools would spell the end of our public school system as it has been established, fostered, and protected for more than a century.”⁸¹

After the decision in *Illinois ex rel. McCollum v. Board of Education*⁸² was handed down, *Everson* was seen by many Catholics as a “pyrrhic victory.”⁸³ In the Illinois case, the Supreme Court held that release time programs for religious instruction on public school property violated the First Amendment. In the January 1949 issue of the bulletin for the national organization Friends of the Public Schools, the editors argued that the Catholic Church was “emphasizing everywhere” that it was “above and beyond the Constitution of the U.S. and the laws made in accordance therewith if it disagrees with the Catholic dogma.” The editors warned that Catholics were conspiring to bring a case to the Supreme Court in order that the justices may overturn their decision in *McCollum* and allow the “American public to support through public taxes the Roman Catholic Church schools.”⁸⁴

Critics of the Catholic Church maintained that the Catholic religion was inconsistent with democracy. Critics often focused on the Church’s hierarchical structure.

⁸⁰ “Separation of church and State: A Manifesto by ‘Protestants and Other Americans United,’” in *The Christian Century* 65:3 (Jan. 21, 1948), 79.

⁸¹ *Ibid.*, 80.

⁸² 333 U.S. 203 (1948). In *Zorach v. Clauson* 343 U.S. 306 (1952) the Supreme Court upheld release time programs that were conducted off of school property.

⁸³ The phrase was actually used by Justice Hugo Black in a letter to friend to Truman Hobbs. Quoted in Berg, “Anti-Catholicism and Modern Church-State Relations,” 127-28. For more on anti-Catholicism and the Supreme Court see McGreevy, *Catholicism and American Freedom*: pp.122-27.

⁸⁴ Bulletin of the Friends of the Public Schools, 11:7 (Jan., 1949), 6. See John E. Fogarty Files, Providence College Archives, Box 1, Folder 4, 81st Congress, 1st session, 1949. Note: Fogarty was in contact with Rev. Thomas V. Cassidy, superintendent of Catholic Schools in Rhode Island. See Fogarty to Cassidy, Mar. 25, 1949, Box 1, Folder 4.

In his best-selling 1949 polemic, Paul Blanshard warned that Catholic priests and bishops were interested in controlling the thoughts and deeds of their brethren.⁸⁵ At a time when the fear of communism and fascism was at its height, this type of censorship was seen as the antithesis of a democratic culture. “In the field of culture and information,” said Blanshard, Americans “should stand for the American public school, from kindergarten through college, as the foundation of American democracy.”⁸⁶ Invoking nineteenth century nativist ideology, Blanshard proposed “continuous and scientific inspection of all parochial school” – partly for respectable purposes but also to ensure that “classes are taught in English language and that textbooks do not distort history, science and sociology in an un-American manner for the benefit of the hierarchy.”⁸⁷ Blanshard wrote in 1963 that a battle between Catholics and America was being fought, “with organized world Catholicism committed to a program and a philosophy of ecclesiastical education ... while the law and tradition of the United States favor public support for public schools only.”⁸⁸

Reflecting on the late 1940s, a leader of POAU recalled: “The official Catholic emphasis on a separate parochial school system was felt to be divisive by many Protestants.”⁸⁹ The editorial and letter columns of the *Washington Post* were full of references to nineteenth century papal statements and American liberals worried publicly

⁸⁵ Paul Blanshard, *American Freedom and Catholic Power* (New York: The Beacon Press, 1949), 181-82. “The censorship system of the Roman Catholic Church in the United States is neither a spasmodic nor an intermittent phenomenon. It is a highly organized system of cultural and moral controls that applies not only to books, plays, magazines, and motion pictures, but to persons and places” (180). See also Philip Jenkins, *The New Anti-Catholicism: the Last Acceptable Prejudice* (New York: Oxford University Press, 2003), 36-40.

⁸⁶ *Ibid.*, 304.

⁸⁷ *Ibid.*, 304-5.

⁸⁸ Paul Blanshard, *Religion and the Schools: The Great Controversy* (Boston: Beacon Press, 1963), 120.

⁸⁹ Quoted, Philip Hamburger, *Separation of Church and State* (Cambridge, MA: Harvard University Press, 2002), 453.

about the possible threat to the American tradition posed by increasing Catholic political influence.⁹⁰ As McGreevy has made clear, the Catholic Church's effort to shape the political and social views of Catholics offended many liberals' conception of a free society.⁹¹ *The Christian Century* warned of the continuing struggle of the Catholic hierarchy to obtain a share of federal funds for their schools, citing a statement by the administrative board of the NCWC to the effect that the First Amendment to the Constitution does not forbid federal aid to churches, that separation of church and state is not an American principle in history or law, that religion must be taught in public schools, and that the Catholic religion must be taught in Catholic schools aided by public funds.⁹² Catholic laymen created the Citizens for Educational Freedom (CEF) as a counter to POAU in the late 1950s. Their spokesman was a leading Jesuit priest, Virgil Blum.⁹³

In 1958, as Cold War tensions increased with the Soviet launch of the Sputnik I satellite, Congress overwhelmingly passed the National Defense Education Act (NDEA).⁹⁴ Title III of the act provided fellowships, grants and loans to encourage the study of science, mathematics and foreign language and funded school construction and equipment. Historian Lawrence J. McAndrews has argued that the passage of NDEA

⁹⁰ Paul E. Sigmund, "The Catholic Tradition and Modern Democracy," in Leslie Griffin (ed.), *Religion and Politics in the American Milieu* (Notre Dame, IN: University of Notre Dame Press, 1986), 15.

⁹¹ McGreevy, "Thinking on One's Own," 98. The debate became even more rancorous with the introduction of the Barden Bill in the House of Representatives in the summer of 1949.⁹¹ Graham Barden (D) was a representative from North Carolina. His bill, which called for federal aid to public education, but not non-public education, had the firm support of the POAU. Naturally, Catholics were outraged. The National Catholic Welfare Conference called it "the worst and most objectionable federal aid to education bill ever approved by any congressional committee."⁹¹ The bill, like most federal aid proposals in the period, did not pass.

⁹² "Out in the Open," *The Christian Century* 65:49 (December 8, 1948), 1328.

⁹³ Thomas C. Hunt, Thomas Oldenski, and Theodore Joseph Wallace, *Catholic School Leadership* (New York: Routledge, 1999), 43. See also Virgil C. Blum, *Freedom of Choice in Education* (New York: Paulist Press, 1963).

⁹⁴ The success of education reformer James Conant's *The American High School Today* (1958) was due in large part to the Soviet launch of Sputnik a few months earlier.

“was the first significant legislative victory” for the NCWC.⁹⁵ Prior to the launch of Sputnik, President Dwight D. Eisenhower had opposed any federal aid to education in fear that it would lead to greater federal control of a traditional state prerogative.⁹⁶ Even the passage of the NDEA was a significant step forward, the federal role in education was relatively miniscule. As Brown University historian Carl Kaestle has noted, “it remained a low priority on most politicians’ agendas, either because they believed firmly in local control or because they were reluctant to delve into the treacherous racial and religious issues that always accompanied aid-to-education debates.”⁹⁷ Subsequent legislations aimed at widening the scope of aid to private schools faltered before the anti-Catholic and anti-segregation support forces in Congress. The best that could be delivered a re-passage of the NDEA.

There was little support from President John F. Kennedy, the nation’s first Catholic president, in the area of federal aid for non-public education.⁹⁸ In February 1961, Kennedy recommended \$2.3 billion over three years for general federal aid for public

⁹⁵ McAndrews, *The Era of Education*: 4.

⁹⁶ In a 1949 letter to Congressman Ralph W. Gwinn of New York, Eisenhower, then President of Columbia University maintained that he “firmly” believed “that the army of persons who urge greater and greater centralization of authority and greater and greater dependence upon the Federal Treasury are really more dangerous to our form of government than any external threat that can possibly be arrayed against us.” See John E. Fogarty Files, Providence College Archives. Box 1, Folder 7, 1949. Both Franklin Roosevelt and Harry Truman believed that one could lose politically “by taking a stand in educational fights between Protestants and Catholics.” See Carl F. Kaestle, “Changing National Polity for Education, 1957-2007,” in Carl F. Kaestle and Alyssa E. Lodewick, *To Educate a Nation: Federal and National Strategies of School Reform* (Lawrence, KA: University Press of Kansas, 2007), 21.

⁹⁷ Kaestle, 24. Nevertheless, during the Eisenhower administration the increased role of the federal judiciary in enforcing equal education opportunities laid the groundwork for future programs. It was the role of the federal judiciary in calling for drastic changes in education policy in the wake of *Brown v. Board of Education* (1954) that awakened many people to the power of the federal government to change state policy. They Court demanded that the federal government intervene forcefully in support of racial integration in local school districts.

⁹⁸ See Charles Whelan, “Only Higher Education, Mr. President?” *America*, Mar. 11, 1961, p.2. Several weeks before the 1960 Republican National Convention, Rhode Island Governor Christopher Del Sesto (R) initiated a nationwide movement to nominate Labor Secretary James P. Mitchell as the GOP’s vice-presidential candidate in 1960. Republicans believed that a Nixon-Mitchell ticket could frustrate Democratic hopes for Catholic bloc support in November 1960.

elementary and secondary schools but not to parochial schools. Kennedy received harsh criticism from many Catholics for his lack of support for federal aid to their schools. One Kennedy aid summed up the problem this way: “The first Catholic President was being frustrated on one of his top priority legislative proposals by leaders of his own Church; they, for their part, had come to believe that that the Church’s interest in education might be better served by a non-Catholic President and indeed they were right.”⁹⁹ However, even though President Kennedy’s remained committed to his no-aid stance for parochial schools, former critics of aid, such as *The New Republic*, switched positions in March 1963. The editors now began to argued that it was in the “national interest” for “all children of race, creed, or parental income” to be educated.” The new “enemy” was “ignorance.” The Catholic Church seemed to be off the hookwas off the hook.¹⁰⁰

The new, more conciliatory position of one of the nation’s leading Protestant periodicals, *Christianity and Crisis* was a key factor. As early as 1952, theologian Reinhold Niebuhr, one of the editors, had begun to point out that the “main political struggles in the United States ‘would appear to be between Jews and Catholics who are left of the Center and Protestants who are right of it’ because of their lamentable individualism.”¹⁰¹ Historian Mark Hulsether has argued that *Christianity and Crisis* “now correlated U.S. democracy, not with a Protestant America defined against the enemy of Catholicism, but with a triple alliance of liberal Protestants, Catholics, and Jews, defined

⁹⁹ Quoted in Michael O’Brien, *John F. Kennedy: A Biography* (New York: Macmillan Press, 2005), 567

¹⁰⁰ See “Church-Related Schools,” *The New Republic* 148:9 (Mar. 2, 1963): 4-5.

¹⁰¹ Quoted in Mark Hulsether, *Building a Protestant Left: Christianity and Crisis Magazine, 1941-1993* (Knoxville, TN: 1999), 63. This is not to say that all mainstream Protestants abandoned the strict separationist position. *The Christian Century*, used an analogy from Greek mythology to describe political and constitutional problems created by the ESEA. On one side, “Scylla – refusal to great some of the nation’s beneficences to some of the nation’s children. On the other side, Charybdis – use of public funds for the support, teaching and propagation of one or more religions.” See editorial, *The Christian Century* 82:4 (Jan. 27, 1965), 100.

against secularism, communism, and all the other enemies of pluralism, including the conservative wings of the three major faiths.”¹⁰²

Nevertheless, while the ecumenical movement was indeed leading to greater interfaith cooperation, long standing fears of the Catholic Church, which was very much a part of the 1960 presidential campaign, were still very powerful.¹⁰³ Works such as Presbyterian minister Loraine Boettner’s popular 1962 book, *Roman Catholicism*, still maintained that Catholic education “is filled with propaganda.” The purpose of parochial schools was “not so much to educate, but to indoctrinate and train, not to teach Scripture truths and Americanism, but to make loyal Roman Catholics. The children are regimented, and are told what to wear, what to do, and what to think.”¹⁰⁴ For the lawyers representing the Cranston residents, the fact that textbook loan bill originated from a request from the Catholic Diocese of Providence was case in point.

III

The textbook issue began in September 1961 when Monsignor Arthur T. Geoghegan, superintendent of schools for the diocese of Providence, made a request for such aid to Michael F. Walsh, the state commissioner of education.¹⁰⁵ Under Geoghegan there was an attempt to improve the quality of Catholic education in the state. “With or without aid,” wrote Geoghegan, “our schools will continue in operation, and in most instances they will have to continue to turn away many children who apply for admission

¹⁰² Ibid., 65.

¹⁰³ See Thomas J. Carty, *A Catholic in the White House? Religion, Politics, and John F. Kennedy’s Presidential Campaign* (New York: Palgrave Macmillan, 2004).

¹⁰⁴ Loraine Boettner, *Roman Catholicism* (Philadelphia PA: Presbyterian and Reformed Publishing Co, 1962), 360.

¹⁰⁵ The letter was dated September 21, 1961. (Catholic Diocese of Providence Archive)

because they can accommodate no more.” However, “without state assistance,” noted Geoghegan, “efforts to provide a top quality education in science and mathematics” would be “hampered.” Catholic children “would be the losers and the state and nation the losers too.”¹⁰⁶ Geoghegan expressed the hope that the request would be discussed “as an issue of national needs and students’ best interests, not a religious issue.”¹⁰⁷

The key for supporters of aid to parochial schools in the form of texts and materials in science, mathematics and diagnostic testing was that the issue be viewed as one of national needs and students’ best interests. They questioned why the nation should aid only part of its young population if the Cold War threatened all. On December 8, 1961, an editorial in the *Providence Visitor*, the Rhode Island Catholic mouthpiece, noted ominously: “A missile gap is built on an education gap, and that if we are to compete successfully with Russia either militarily or economically we must get more out of our education effort, not less ... No weak spot will be allowed to develop in Soviet education, so none should be allowed to develop in our own.”¹⁰⁸ Geoghegan concluded his letter to Walsh with the admonishment:

I believe that the State of Rhode Island should do for its private schools what the federal government does for the public schools ... For the common good of our country and our community, the former children should receive the best education available in science and mathematics.¹⁰⁹

¹⁰⁶ “Diocese Asks for Textbook Aid,” *Providence Journal*, Nov.29, 1961, p.1. See also Robert D. Whitaker, “Churches Oppose Textbook Aid,” *Providence Journal*, Jan. 24, 1962, p.1. The letter was quoted at length in the judgment from the Rhode Island Superior Court. See *Bowerman v. O’Connor*, RI Superior CT. 1967, pp.10-11.

¹⁰⁷ “Diocese Asks for Textbook Aid,” *Providence Journal*, Nov. 29, 1961, p.1.

¹⁰⁸ “The Textbook Request,” *Providence Visitor*, Dec. 8, 1961, p.1. Frequently mentioned in the pages of the *Providence Journal* and the *Visitor* was the phrase, “What Ivan Knows but Johnny Doesn’t,” which came from the title of a popular book in 1961.

¹⁰⁹ “Textbook Aid See Challenge to Reasonable Men,” *Providence Visitor*, Dec. 1, 1961, p.1. A complete copy of Geoghegan’s letter is reprinted in this edition of the *Visitor*. It was also quoted at length by Judge Perkins in his opinion in *Bowerman v. O’Connor*.

Geoghegan was not surprised when the state board of education voted unanimously to table his request for state aid in mid-December until Congress had considered proposals for federal support to non-public schools.¹¹⁰ As already noted, Congress decided to prevent the question of federal aid to non-public schools from being introduced into the upcoming session by extending without revision the provisions of the NDEA for another two years.

On January 9, 1962, Governor John A. Notte called for a public airing of the question of the constitutionality and expense of any state assistance to non-public schools for purchase of mathematics and science texts, along with diagnostic testing materials. Democratic Majority Leader James H. Kiernan proposed a resolution creating a seven-member special commission to study the subject.¹¹¹ A commission to “study state participation in acquisition of scientific and mathematic texts and material for non-public schools” was approved by the governor on February 17, 1962.¹¹² The commission was to be made up of two state representatives appointed by Speaker Harry F. Curvin and two senators named by Lt. Gov. Edward P. Gallogly, with bipartisan representation for each branch and three members nominated by Governor Notte. Notte’s three appointees were Dr. David H. Freeman of the University of Rhode Island, who served as chairman, Dr. William F. Flanagan of Rhode Island College, and Dr. Thomas G. Sanders, a professor of

¹¹⁰ “Education Board Tactics Labeled as Undemocratic,” *Providence Visitor*, Dec. 15, 1961, p.1.

¹¹¹ “Public Airing on Textbooks Asked by Notte,” *Providence Journal*, Jan. 10, 1962, p.1.

¹¹² See Acts and Resolves of the Rhode Island General Assembly, January 1962, p.1233. The purpose of the commission was (1) to confer with authorities in the field of education and school administration (2) to ascertain the needs of the non-public schools for such materials (3) to consider the fiscal responsibilities and additional burdens which would be imposed by State participation (4) to consider the constitutional questions involved in State participation (5) to consider existing federal programs and proposed federal programs in this area (6) to make recommendations concerning the feasibility of State participation and extent thereof. See also “Public Airing on Textbooks Asked by Notte,” *Providence Journal*, Jan. 10, 1962, p.1.

religion at Brown University.¹¹³ The General Assembly members were Senators Irving J. Bilgor (D) and E. Rex Coman (R) and Representatives Jeremiah C. Lynch, Jr. (D) and Oliver L. Thompson, Jr. (R).¹¹⁴ With the appointment of the commission, the Catholic School Board formally withdrew its request to the state board of education for aid in late March 1962. The position of the diocese was that any possible action by the state board of education made their initial request “superfluous” in view of the open hearings initiated by the commission created to study the matter of assistance to parochial school children.¹¹⁵

Rev. Burrett E. McBee, executive director of the Rhode Island State Council of Churches, was furious that Governor Notte did not discuss possible appointees with him. He objected to the lack of any strong religious affiliation on the board, especially the lack of appointments from the major Protestant denominations in the state.¹¹⁶ The three men appointed by the governor, according to McBee, were “not members of the American Baptist Convention, the Congregational – Christian Churches, the Protestant Episcopal Church in the U.S., the Methodists or the United Presbyterian communions, nor are there any Lutherans.” As a result, over 100,000 Rhode Island Protestants were not fairly represented in McBee’s view.¹¹⁷ Geoghegan, in response, noted that it was odd “for a religious group which champion[ed] true pluralism” to “propose that a commission concerned with a question of public policy be comprised of members selected on the

¹¹³ Sanders published an article in *Christianity and Crisis* arguing that the rights the Catholic Diocese believed were involved in the issue were really guarantees against government activity, not principles for passing legislation. See *Providence Journal*, May 25, 1962, p.18.

¹¹⁴ The legislature’s appointments were made on February 27. Governor Notte did not announce his appointments until March 17.

¹¹⁵ “Drop Request of Aid, State Board is Asked,” *Providence Visitor*, Mar. 30, 1962, p.1 and “Catholics Shift Approach in School Aid Plea,” *The Evening Bulletin*, Mar. 30, 1962, p.1.

¹¹⁶ “Parochial School Study Selections are Questioned,” *Providence Journal*, June 18, 1962, p.1.

¹¹⁷ “Group to Study School Aid Set,” *Providence Journal*, Mar. 3, 1962, p.18.

basis of their religion.”¹¹⁸ Governor Notte did not see the question as one involving religion, but one that required knowledge in the area of education.

The Catholic school board submitted a proposal to the textbook committee for cities and towns to pay most of the cost of textbook aid requested for parochial and private schools.¹¹⁹ The diocesan plan called for the state commissioner of education to set forth rules and regulations for the selection of math, science, and language texts. This was inserted to allow for uniformity in cases where a local school committee would be supplying a text for a student attending a private or parochial school in another community.¹²⁰ Geoghegan believed the program would add roughly \$100,000 a year to the total operating costs of the state’s educational system. In their brief to the textbook loan committee, the diocese cited *Cochran* and *Everson* as legal precedent for their proposed legislation. The core tenet of the brief was that the matter should be considered as one affecting education, and not religion.

On October 9, 1962, John H. Chafee, then the Republican candidate for governor, gave his support to the “reasonable position” taken by the Catholic school board on the loaning of publicly funded textbooks.¹²¹ Chafee, a Republican, would beat the incumbent Democrat, John Notte in a very close election. Contributing factors in Notte’s defeat were the loss of support from the state’s labor leaders and as well as the textbook issue. The school aid question, according to Notte was becoming an “obsession” and “a political football to boot.” “Regrettably, scores of voters will let their decision at the polls be

¹¹⁸ Criticism Discussed by Msgr. Geoghegan,” *Providence Visitor*, Mar. 16, 1962, p.1.

¹¹⁹ “Catholic Plan Places Costs on Cities, Towns,” *Providence Journal*, Oct. 4, 1962, p.1. See also “Catholic Plan Places Costs on Cities, Towns,” *The Evening Bulletin*, Oct. 4, 1962 p. 1

¹²⁰ Note: William F. Mathon, a Pawtucket attorney, assisted the diocese in drafting the proposal. Dr. William P. Robinson, Jr. was acting as the state’s Commissioner of Education at this point.

¹²¹ “Chafee Backs Parish School Textbook Aid,” *Providence Journal*, Oct. 10, 1962, p.1.

guided solely by what the respective candidates think or – worse still – what they say about the problem of government aid to non-public schools,” said Notte.¹²²

In November objections from Protestant spokesmen to tax-supported aid to parochial and private school were voiced at the state study commission. Speaking against textbook aid were spokesmen for the Episcopal Diocese of Rhode Island, the Rhode Island State Council of Churches, the Rhode Island Baptist State Convention, the South Country Ministerial Association, the Rhode Island District Lutheran Church and the POAU. In addition to the views of the Protestant clergy, the commission heard further constitutional arguments against textbook aid from the ACLU.¹²³ The ACLU filed a brief with the state study commission on May 24. The brief was presented to the committee by Milton Stanzler and Ronald Jacks. The ACLU’s position against any public aid afforded to private institutions was framed as one involving civil liberties.¹²⁴

By the turn of the year, the state’s powerful Democratic Party, which was comprised of a high percentage of Catholics, had taken up the torch by sponsoring a textbook loan bill.¹²⁵ The Commission’s report was finally delivered in mid-January 1963.¹²⁶ The report stressed that the aid request from the diocese was modest and that the expenditure suggested was miniscule in comparison with its benefits. The final report found that there “was no constitutional prohibition, either in the Federal or state

¹²² “Notte Declares School Aid a ‘Political Football,’” *Providence Journal*, Oct. 13, 1962, p.1.

¹²³ “Parish Schools Textbook Aid Foes are Heard,” *Providence Journal*, Nov. 10, 1962, p.1.

¹²⁴ “ACLU Presents Brief,” May 25, 1962, p.1.

¹²⁵ Catholic support for the Democratic Party was part of a long and complicated history dating back to the antebellum period. The Republican Party, which was in power for almost all of the second half of the nineteenth century and the early twentieth century, was vehemently anti-Catholic.

¹²⁶ See “Report of the Commission to Study State Participation in Acquisition of Scientific and Mathematic Texts and Materials for Non Public Schools” – Rhode Island State House Archives. I thank Tom Evans at the State Library for helping me find this document.

constitutions.”¹²⁷ The report was “based on the ‘child benefit theory’ upheld in *Cochran* and *Everson*.”¹²⁸ The commission “could not be indifferent to a reasonable request from spokesmen [diocese] who indubitably represent a large segment of public opinion in the State.”¹²⁹ Simply put, politicians could make an instrumental use of the issue because it represented something that a considerable group in the electorate wanted.

The commission envisioned that textbooks could be loaned without charge to pupils rather than to schools through local school committees. The committee that this provision distinguished their proposed legislation from an Oregon statute that had been struck down by that state’s Supreme Court (*Dickman v. School District*, 1961). The Oregon law provided for the loaning of textbooks “to the heads of the non-public schools rather than to the pupils or parents themselves.”¹³⁰ The final report from the commission stated that under “no circumstances shall the textbooks approved by the local school committees contain religious or sectarian content or orientation.”¹³¹ Through the “furnishing” of textbooks “in the basic fields of science, mathematics, and modern foreign languages ... the State can guarantee a certain standard for the material to be considered. The State can thus help prevent use of sub-standard texts in these areas.”¹³² Sen. Frank Sgambato, Democratic majority leader and chairman of the judiciary committee, announced that his committee would hear the views of any individual or group on February 9, 1963.¹³³ John G. McWeeney, the Democratic state chairman,

¹²⁷ *Ibid.*, 8.

¹²⁸ *Ibid.*, 11.

¹²⁹ *Ibid.*, 21.

¹³⁰ *Ibid.*, 13.

¹³¹ *Ibid.*, 5.

¹³² *Ibid.*, 18. “Because of the crisis of our particular historical period, the Commission judges it desirable to encourage non-public school pupils to receive the best possible training in science, mathematics, and modern foreign languages.” See p. 20.

¹³³ “Textbook Aid Hearings Set,” *Providence Journal*, Feb. 2, 1963, p.1.

insisted that the bill provide equal privilege to private school pupils. Most of the testimony that was given for and against the proposed bill was a recapitulation of arguments already given to the commission.

IV

The textbook loan bill passed the Rhode Island Senate on a voice vote with no opposition recorded, and it carried the House by a margin of 67 to 8. The major legislative sponsor of the law was Sen. Bilgor of Providence. But Bilgor, while believing in the spirit of the law that he helped to enact, acknowledged that the bill would indeed be tested in the courts.¹³⁴ On February 27, 1963, Rhode Island Governor Chafee signed into law a statute entitled “Loan of Textbooks” (Chapter 12, Public Laws). The *Providence Visitor* hailed the passing of the law as “justice” being served.¹³⁵ The preamble noted that the General Assembly found “that the public welfare and safety required that the state and local communities give assistance to education for programs which [were] important to [the] national defense and the general welfare of the state.” The law directed school committees in every community to loan free of charge upon request textbooks in mathematics, science and modern foreign languages to all elementary and secondary school pupils in such community.¹³⁶

Following the recommendation of the commission, the statute called for the office of the commissioner of education to establish an approved list of textbooks dealing with said subjects from which list elementary and secondary school students attending non-

¹³⁴ “Revised Textbook Bill is Seen Constitutional,” *Providence Visitor*, Feb. 15, 196, p.1.

¹³⁵ “Justice Has Been Served,” (editorial) *Providence Visitor*, Mar. 1, 1963, p.3.

¹³⁶ R.I. General Laws, 1956, Section 16-32-2 was amended by this law. See Acts and Resolves of the Rhode Island General Assembly, January 1963, pp. 36-38. For a discussion of the administration of the law see James K. Sunshine, “Texts Aid System Drafted,” *The Evening Bulletin*, May 21, 1963, p.1.

public schools could select their textbooks. Distribution of the books was accomplished by insertion of an advertisement in the newspaper by a local school committee, which specified a time within which students could apply for the loan of the specified books during the following academic year. The list of approved textbooks to be provided for students in the state's private and parochial schools would be drawn without a "special approach" to the diocese, assured William P. Robinson, Jr., the state's commissioner of education. At the end of the school year, the textbooks were to be returned to the school committees of the various cities and towns by the students. Clearly expressed in the law was that no textbooks of a "sectarian nature" would be recommended "for use in the public schools."¹³⁷

Even before the textbook act was passed the Rhode Island ACLU membership cast a unanimous vote to support a test of the proposed law. When "translated into terms of civil liberties," said the ACLU, the issue became "whether the citizens of Rhode Island, regardless of their regular affiliation or lack of affiliation would be required to pay taxes to support particular religious educational activities."¹³⁸ The city of Cranston would provide that test. Cranston pupils attending Catholic schools run by the diocese of Providence, the Providence Hebrew Day School in Providence, and the Christian Day School (run by St. Paul's Evangelical Lutheran Church) were all eligible to receive textbooks.¹³⁹ However, since most parochial schools had already ordered their books for

¹³⁷ Acts and Resolves of Rhode Island General Assembly, January 1963, p.38 (section 16-1-9). The number of books borrowed expanded from 600 in 1963 to 4,000-5,000 in 1966. Of the 4,131 books borrowed, only 3 were for use in an independent school in 1965-1966. See Brief for Appellees in *Bowerman v. O'Connor* at 7.

¹³⁸ "Chafee Signs Textbook Bill; Test is Seen," *Providence Journal*, Feb. 28, 1963, p.1. This sentiment was shared by the *Providence Journal*. See, for example, the editorial on Feb. 28, 1963, "Waiting for a Test of the Textbook Law," p.21.

¹³⁹ It is significant to note that residents of Cranston had a history of objecting to statutes passed by the General Assembly that aided non-public education. In 1953, the Cranston School Committee rejected a

the 1963-64 year the law had little affect. It was really not until 1964 that the statute began to take affect.

In a lengthy opinion issued on September 19, 1967, Judge Fred Perkins held that assistance given to children of church schools under the 1963 law was different in degree and kind than the transporting of school children. "Transportation involves only the getting of pupils to the place where the educational process takes place," said Perkins. "There is involved," according to Perkins, "safety in transportation of pupils on the public streets on the way to a place of education, helping to avoid the hazards of that transportation possessed in common with that to a public school." However, "in the case of furnishing of textbooks the expenditure of public moneys does not stop at the school but overflows into the school itself, and takes care of part of the education taking place."¹⁴⁰

In Perkins's view, public funds were "expended for the essential functioning of the school itself, a school under religious auspices the support of which basically is banned by the First Amendment."¹⁴¹ Readily dismissing the child benefit theory, Perkins insisted that "the line must in any case be drawn at the entrance to the school. "It is there that the educational process begins." He argued that it "may be mixing the concrete with the theoretical but the outer wall of a religious school must clearly be the inner 'wall of separation of church and state' if the existence of that wall is to continue in any meaningful manner."¹⁴² The Superior Court, according to Perkins, gave "consideration at

plea of several parents to have transportation provided for their children in order that they might attend a local parochial grammar school. Michael Walsh, the state educational commissioner, reversed the committee's ruling. See *Providence Journal*, August 9, 1953, p.1.

¹⁴⁰ *Bowerman v. O'Connor*, RI Superior CT. 1967, 28-29.

¹⁴¹ *Ibid.*, 29.

¹⁴² *Ibid.*, 31.

length to the child welfare theory” and rejected it, “for the reason” that it went “too far, and once applied,” would not “logically be precluded from extension to matters clearly impermissible.”¹⁴³

Denying the validity of the majority opinion in *Everson*, Perkins maintained that as “far as precedent is involved, in the field of transportation *Everson*” was “severely impeached by the frank admission by a swing judge [Justice William O. Douglas] that in his opinion it was wrong and that he now adhered to the point of view so strongly expressed” by Justice Wiley Rutledge in dissent.¹⁴⁴ Perkins also found supporting evidence for his opinion in the majority opinion. Even though Justice Black sustained the New Jersey statute in *Everson* that allowed school districts to reimburse parents of parochial school students for costs incurred in transporting them, his entire opinion, as already noted, seemed to argue for the opposite result.

Believing that he was adhering to Black’s opinion in *Everson* when he declared the Rhode Island textbook law unconstitutional in 1967, Perkins insisted that the Court was “bound to conclude that if the furnishing of transportation was the ‘verge’ of the power of the state ... the difference in degree involved in the furnishing of textbooks would tend to push it over the edge.”¹⁴⁵ In the closing pages of his 70-page opinion for the court, Perkins also concluded that the state’s textbook loan law violated Article I, section 3 of the Rhode Island constitution, a provision that was more “impressive” and “clearer” than the First Amendment.¹⁴⁶

¹⁴³ *Ibid.*, 48-49.

¹⁴⁴ *Ibid.*, 55.

¹⁴⁵ *Bowerman v. O’Connor*, RI Superior CT. 1967, p.28. See also Francis L. Murphy, “Court Bars Book Aid for Church Schools,” *Providence Journal*, Sep. 20, 1967, p.1.

¹⁴⁶ *Ibid.*, 67. It is important to note that Perkins did not agree that the act was in violation of Article XII, section 1, 2, and 4 of the Rhode Island Constitution as the plaintiffs urged. Article XII, which deals exclusively with education, reads: Section 1. Duty of general assembly to promote schools and libraries. --

Commissioner Robinson urged a “wait and see” posture after Perkins handed down his ruling. Attorney General Herbert F. DeSimone announced that when the Cranston School Committee prepared their appeal, the state would ask the RI Supreme Court’s permission to join in the appeal as amicus curiae to support the constitutionality of the textbook aid law.¹⁴⁷ The injunction was stayed pending appeal to the high court. The thrust of DeSimone’s brief was that the statute closely mirrored the National Defense Education Act.¹⁴⁸ DeSimone noted that the law was “no more an aid to religion than the use of the public libraries by students of parochial schools for research projects or supplemental readings ... or the payment of state college scholarships to students attending Catholic or religiously orientated colleges, which payments under the Rhode Island law and regulations of the Department of Education are made directly to the colleges.”¹⁴⁹ Governor Chafee expressed surprise at the ruling from the Superior Court in Providence. In his opinion, the law “was drawn to differentiate between aid to the schools and aid to the pupils.”¹⁵⁰ The outspoken assistant superintendent of schools for the

The diffusion of knowledge, as well as of virtue among the people, being essential to the preservation of their rights and liberties, it shall be the duty of the general assembly to promote public schools and public libraries, and to adopt all means which it may deem necessary and proper to secure to the people the advantages and opportunities of education and public library services.

Section 3. Donations. -- All donations for the support of public schools, or for other purposes of education, which may be received by the general assembly, shall be applied according to the terms prescribed by the donors.

Section 4. Implementation of article -- Diversion of funds prohibited. -- The general assembly shall make all necessary provisions by law for carrying this article into effect. It shall not divert said money or fund from the aforesaid uses, nor borrow, appropriate, or use the same, or any part thereof, for any other purpose, under any pretence whatsoever.

¹⁴⁷ “Educators Await Textbook Aid Issues,” *Providence Journal*, Sep. 21, 1967, p.37. See also “DeSimone to Back Bd. In Book Suit,” *The Evening Bulletin*, Nov. 28, 1967, p.24 and “Textbook Case to be Appealed,” *Providence Journal*, Oct. 3, 1967, p.34. The Cranston School Committee petitioned William P. Robinson Jr., the state Commissioner of Education, for a reimbursement of the cost of litigation because the issues involved concerned matters of state and federal law. See “Cranston Seeks Aid in Appeal,” *Providence Journal*, Nov. 21, 1967, p.1.

¹⁴⁸ Brief for Herbert F. DeSimone, Attorney General, Intervening Defendant-Appellant, *Bowerman v. O’Connor*, RI 247 A.2d 82 (1968). pp. 12-13.

¹⁴⁹ *Ibid.*, 17.

¹⁵⁰ “Educators Await Textbook Aid Issues,” *Providence Journal*, Sep.21, 1967, p.37.

Roman Catholic Diocese of Providence, Edward W. K. Mullen, maintained that the Superior Court's ruling in *Bowerman v. O'Connor* invalidating the 1963 textbook loan program "enshrine[d]" what he believed was "a Protestant theological interpretation of the First Amendment."¹⁵¹

Crucial to the Rhode Island issue was the U.S. Supreme Court's decision in mid-January to rule on the constitutionality of a New York law that closely mirrored Rhode Island's textbook loan statute. In June 1967 the New York Court of Appeals, in a 4-to-3 decision, ruled that the New York law did not violate either the Blaine Amendment to the state's constitution, which prohibited direct or indirect aid to sectarian schools, or the First Amendment to the federal Constitution. The New York court held that the state practice of loaning textbooks to parochial school students did not contravene either the state or federal constitution because it "merely" made available "secular textbooks at the request of the individual student."¹⁵² The Supreme Court's decision to hear the case was significant because six states – Louisiana, Mississippi, Rhode Island, West Virginia, Indiana, and Kansas – lent state-owned textbooks to parochial school students. DeSimone filed a brief in support of the New York State textbook aid law in which he maintained that the law was "a necessary result of the state's comprehensive plan to aid elementary and secondary school education in New York."¹⁵³

Edward Day, Jr. and Abraham Goldstein remained the counsels for the defendants when *Bowerman* went before the Rhode Island Supreme Court. Their major contention was that Perkins had erred in his dismissal of the relevance of the child-benefit theory as espoused in *Cochran*. Day's and Goldstein's brief, in short, maintained that the

¹⁵¹ Quoted in an editorial in the *Providence Evening Bulletin*, Sept. 21, 1967, p.32.

¹⁵² Quoted in Paul A. Freund, "Public Aid to Parochial Schools," *Harvard Law Review* 82 (1969), 1680-81.

¹⁵³ "DeSimone Files Brief in Support of Textbook Aid," *Providence Journal*, Apr. 3, 1968.

“importance of the *Cochran* case” was that the child-benefit theory “was accepted by the Supreme Court” since it quoted “the operation of the textbook law” in Louisiana “in the words of the Louisiana Court and then” made “its own simple comment that ‘individual interests are aided only as the common interest is safeguarded’”¹⁵⁴ Rejecting the core of the Superior Court’s ruling, they maintained that it was the same child benefit theory advanced by the Court in *Cochran* that “became the *ratio decidendi* of the *Everson* case of 1947.”¹⁵⁵ Amici curiae briefs filed in support of the textbook loan law noted, the “fallacy” of Perkins’s approach was that the majority decision in *Everson* remained the law of the land, and had not been supplanted by the view of the dissenting justices in prior cases.

Relying heavily on a series of law journal articles, Day and Goldstein also countered Perkins’s claim that *Sherbert v. Verner*¹⁵⁶ was of no concern in the case because the opinion of the Court was only concerned in that case with the free exercise of religion doctrine and not with establishment of religion.¹⁵⁷ They deemed the trial court’s conclusion as “unwarranted, because any case involving the free exercise of religion principle automatically” brought “within its purview the correlative proposition relating to the prohibition against establishment of religion.”¹⁵⁸ Day and Goldstein maintained that the decision in the *Sherbert* case “established religion, since public funds” were

¹⁵⁴ Brief for Appellants *Bowerman v. O’Connor*, RI 247 A.2d 82 (1968) at 13.

¹⁵⁵ *Ibid.*

¹⁵⁶ 374 U.S. 398 (1963).

¹⁵⁷ Brief for Appellants at 14-24. See the articles by Leo Farhat in *The Michigan State Bar Journal*, April 1964; Leonard J. Bucki, “*Sherbert v. Verner*: The Trojan Horse,” *University of Pittsburg Law Review* 25 (Jun., 1964) 711; Note, *Villanova Law Review*, 10 (Winter, 1965) 341. For Perkins’ discussion of *Sherbert v. Verner* see pp. 36-41 of his opinion. See also Brief for Appellees, *supra* note 16, at 46-48.

¹⁵⁸ *Ibid.* 14. This argument was presented again in 1969 in support of the Non-Public School Teacher Salary Supplement Act. It was rejected when a special three judge District Court panel disagreed with the notion that the Free Exercise Clause demands permanent state action. See *DiCenso v. Robinson*, 316 F. Supp. 112 (D.R.I., 1970) at 123.

afforded to someone who had removed himself from their place of employment due to religious beliefs. These funds “subsidize[d] the religious beliefs of the welfare recipients, who otherwise might be compelled to refuse to follow certain of his religious convictions because of economic compulsion.”¹⁵⁹ Essentially, what Day and Goldstein were getting at with this line of argument was how could the state, given the Court’s ruling *Sherbert*, deny aid to a child attending a parochial when it was impermissible to deny compensation benefits to someone who refused to work for religious reasons.

In a lengthy and impressive brief, Milton Stanlzer, a young Rhode Island ACLU lawyer, returned to the question of the relevancy of *Cochran*. For Stanzler, the Louisiana case was “irrelevant” since the Court did not consider or discuss the federal constitutional question at issue in *Bowerman* of whether or not the proposed aid violates the Establishment Clause. The expenditure of public funds, the affirmative aid given by the state and municipalities in lending textbooks to parochial school students was, according to Stanzler, in line with what the Court had struck down in *McCollum v. Board of Education*. In regards to the controversial *Everson* case, the brief for the Cranston taxpayers noted that bus transportation was upheld “solely because it was designed to preserve the physical safety and well-being of the child.” The purpose of textbook aid, in their view, was clearly to provide “an educational welfare service. Its concern [was] with the education, not with his physical health or safety.”¹⁶⁰ Whether the aid to parochial schools was of an indirect or direct benefit, or whether granting it would be a proper exercise of the welfare power of the legislature, was of no concern to Stanzler. His brief vigorously maintained that “if the aid in question” was “education in nature and help[ed]

¹⁵⁹ Brief for Appellants, 14.

¹⁶⁰ *Bowerman v. O’Connor*, RI 247 A.2d 82 (1968) Brief for Appellees at 18 and 29.

or foster[ed] education in a religious institution in any degree whatsoever,” it was unconstitutional under the First Amendment and Article I, Section 3 of the Rhode Island constitution.¹⁶¹

In discussing the equally controversial “child-benefit theory,” Stanzler warned that if the doctrine was accepted by the Rhode Island high court, what was next: “newer desks, school buildings, better paid teachers, more highly trained administrative personnel, etc.”¹⁶² Any public assistance provided by the General Assembly to the state’s parochial school system “supports” its operation, sustains its “existence,” and “ultimately assists in supporting its purposes” concluded Stanzler.¹⁶³ Stanzler’s relied heavily on the fact that the Catholic Diocese initiated the textbook loan program with their 1961 request for state assistance. The fact the a non-partisan, non-religiously affiliated publicly appointed commission approved the aid was barely mentioned in his brief. Instead Stanzler dwelled at length on the sectarian nature of Catholic education and the belief that each student was going to be subject to coercion into the priesthood or religious life.¹⁶⁴ As was the case with the amicus curiae brief from the Anti-Defamation League Stanzler viewed aid to parochial schools as enabling them to “recruit” young for religious orders.¹⁶⁵ The “ultimate result” of the textbook loan statute “was impermissible aid to a

¹⁶¹ Ibid., 30.

¹⁶² Ibid., 31. Little did Stanzler imagine at the time that “better paid teachers” would be on the agenda in the January 1969 session of the Rhode Island General Assembly.

¹⁶³ Ibid., 36. While Stanzler’s view on the issue was not acceptable in the Rhode Island Supreme Court, he would find vindication the following year in the case of *DiCenso v. Robinson*, 316 F. Supp. 12 (D.R.I.). A special three judge court maintained: “The diocesan school system is an integral part of the religious mission of the Catholic Church. It is not that religious doctrine overtly intrudes into all instruction. Rather the combined conveniences of ready access to church and pastor, a homogenous student body, and ability to schedule throughout the day a blend of secular and religious activities makes the parochial school a powerful vehicle for transmitting the Catholic faith to the next generation.”

¹⁶⁴ Ibid., 9.

¹⁶⁵ The word “recruit” appears in the amicus curiae brief for Anti-Defamation League. See supra note 6 at 7.

school system which has a major, if not prime purpose, in the teaching, inculcating and establishing religious objectives.”¹⁶⁶

Central to the issue in Rhode Island was the U.S. Supreme Court decision in June 1968 upholding New York’s textbook loan law. In an opinion written by Justice Byron R. White, the Court affirmed the decision of the New York Court of Appeals holding that the New York statute (New York Education Law Section 701, 1967 Supp.) providing for textbook aid, was not unconstitutional under either the New York or United States Constitution.¹⁶⁷ Justices Hugo Black, William O. Douglas and Abe Fortas dissented. Chief Justice Earl Warren and Associate Justices John M. Harlan, William J. Brennan Jr., Potter Stewart and Thurgood Marshall signed a concurring opinion.

The *Allen* decision rested heavily on the view that parochial schools served a secular educational function as well as a religious educational function. Justice White maintained that the Court could not “agree ... that all teaching in a sectarian school” was “religious or that the processes of secular and religious training” were so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion.”¹⁶⁸ The majority relied on the *Everson* decision. Justice White noted that police and fire protection, sewage facilities and other public function are of some value to religious schools, but did not amount to support of a religious institution in violation of the First Amendment. In dissent, Justice Fortas proclaimed in no uncertain

¹⁶⁶ *Bowerman v. O’Connor*, RI 247 A.2d 82 (1968) Brief for Appellees at 11.

¹⁶⁷ Memorandums on the effect of the case were prepared by both sides. In his brief Stanzler noted that it was clear that it was the failure of the parties in the New York textbook case to provide “evidence as to the background of the law, and especially as to how this textbook aid would affect or aid religious instruction, that was a major factor, if not determinative, of the court’s decision.” See Supplemental Brief for Appellees, 2.

¹⁶⁸ 392 U.S. 236 (1968) at 237.

terms that the “program in its unconstitutional features is hand-tailored to satisfy the specific needs of sectarian schools.”¹⁶⁹

Father Edward Mullen, who became superintendent of diocesan schools after Geoghegan was moved to a pastorship in Rumford, noted that the Court’s decision was possibly “the key to survival of Catholic education here in Rhode Island.”¹⁷⁰ *Allen* clearly dealt with “the issue of whether the textbooks in question could, conformable to the provisions of the statute, be loaned to students attending parochial schools,” noted the opinion in *Bowerman*.¹⁷¹ The appeal was summarily sustained on October 28, 1968 and the judgment of the Rhode Island Superior Court was reversed in three short pages.

V

In the frantic, final days of the recent legislative session in the Rhode Island General Assembly, the House Health, Education and Welfare Committee voted against a controversial measure submitted by Rep. Edith H. Ajello, D-Providence.¹⁷² The proposed bill called for the elimination of several services, including textbooks and busing, currently provided to private and parochial school students by local school districts.¹⁷³ There are currently fifty-one Catholic schools operating in Rhode Island with a student population of over 16,000. An additional 11,000 students attend one of the state’s twenty-four private schools. All private schools, regardless of religious affiliation, are eligible for

¹⁶⁹ *Ibid.*, 271.

¹⁷⁰ “Court Ruling Seen Key to Educational Survival,” *Providence Visitor*, Jun. 14, 1968, p.1.

¹⁷¹ *Bowerman v. O’Connor*, 287-A (RI, 1968), 3.

¹⁷² See also Erik J. Chaput, “Parochial Lifeline to Public Schools: The R.I. Textbook War Continues,” *Providence Journal*, Sept. 3, 2008.

¹⁷³ Students are still eligible to receive textbooks in mathematics, science, foreign language, and social studies.

the free services, which are also supplied to public school students.¹⁷⁴ It was reported in 2000 that eighteen states permitted the public loaning of textbooks, twenty-six allowed public transportation, and twenty-eight authorized public auxiliary services to non-public school students. Five states – Florida, Maine, Vermont, Ohio, and Wisconsin – have school voucher programs in place. Moreover, twenty-one governors maintained that they were open to some form of non-public school choice for their young citizens.¹⁷⁵ In order to keep in line with these national trends, a 10-1 vote of no passage was issued by the Rhode Island House Health, Education and Welfare committee on June 17.

The arguments on both sides of the recent debate in Rhode Island were presented in terms of cost/benefit analysis. The position of the Providence School District was that the capital city spends \$3.3 million a year in providing aid for non-public school students. In contrast, the Catholic diocese, the largest recipient of state aid, maintained that public services for parochial school students allow their schools to stay open and thus save the public school system millions of dollars in potential costs. From this economic viewpoint, many public administrators have concluded that it would be better to finance parochial schools to the extent necessary to keep them solvent. A March 2007 report entitled “Yesterday, Today and Tomorrow: Catholic Schools: Beacons of Hope,” commissioned by the diocese, found that parochial schools save the state nearly \$200 million in educational costs.¹⁷⁶ “For every child who attends a Catholic school, additional taxpayer

¹⁷⁴ Jennifer D. Jordan, “Bill to Cut Public Dollars for Private School Costs Rejected,” *Providence Journal*, June 18, 2008, p.1. See also Emily Donahue, “Legislators Preserve Private School Support,” *Providence Visitor*, June 26, 2008, p.1.

¹⁷⁵ Lawrence J. McAndrews, “Friends Like These: George W. Bush and Federal Aid to Non-public Schools,” *Journal of Church and State* 47:4 (Autumn, 2005), 771. See also Nina Skokraii Rees, *School Choice 2000: What’s Happening in the United States* (Washington, DC: Heritage Foundation, 2000).

¹⁷⁶ E. Lynn Ascoli, “Value of Catholic Schools Touted at the State House,” *Providence Visitor*, Mar. 29, 2007, p.1.

funds are made available for those students and teachers in public schools,” said Sheila Durante, superintendent of Rhode Island Catholic Schools.¹⁷⁷

The case against equal educational opportunity for families with children in religious schools has become “increasingly anachronistic.”¹⁷⁸ One reason for this is the high quality of non-public education, particularly Catholic education.¹⁷⁹ Although anti-Catholic bias did not play a role in today’s debate over public funding of private education, the 1960s was a different time when anti-Catholic bias was more widely diffused. The competing sides in the contentious debate over the textbook loan issue in Rhode Island believed that they were fighting for the survival of the core of a democratic polity, the educational system. As political theorist Amy Gutmann has argued, “a primary purpose of schools is to cultivate common democratic values among all children, regardless of their academic ability, class, race, religion, or sex.”¹⁸⁰ Participants in the debate expected remedies for their perceived wrongs to be effected through processes provided by formal legal institutions and they viewed their activities, both informal and formal, as touching on issues of constitutional interpretation. Constitutional discourse served simultaneously to bolster the power of those opposed to such legislation and, at the same time, to create an alternative political discourse that fueled opposition. U.S. Supreme Court decisions upholding state-provided textbooks in secular subjects to

¹⁷⁷ Ibid.

¹⁷⁸ Ira C. Lupu, “The Increasingly Anachronistic Case Against School Vouchers,” *Notre Dame Journal of Legal Ethics and Public Policy* 13 (1999), 375.

¹⁷⁹ Anthony S. Bryk, Valerie E. Lee, and Peter B. Bolland, *Catholic Schools and the Common Good* (Cambridge, MA: Harvard University Press, 1993), 297-304. The authors conclude that Catholic Schools “work better not because they attract better students (which is somewhat true) or because they have more qualified faculty (which does not appear to be the case). In general these inputs, or what economists call “human capital,” are quite ordinary. Rather, Catholic schools benefit from a network of social relations, characterized by trust, that constitutes a form of social capital” (314).

¹⁸⁰ Amy Gutmann, *Democratic Education* (Princeton, NJ: Princeton University Press, 1987), 116.

private schools and bus transportation for both public and private schools were an inherent part of the public rhetoric in the 1960s.¹⁸¹

The commission to study the state of Rhode Island's participation in acquisition of scientific and mathematics texts considered "it to be good public policy ... to provide pupils in non-public schools with the same aid" because it "enhances aspects of welfare or education that concern the State or the nation."¹⁸² The debate in Rhode Island was a disagreement over whether aid the non-public sector was a way to ultimately make the public sector work better or whether it was an opening wedge, as many opponents of the textbook loan bill argued, in an effort to replace public education.

In his concurring opinion in *Lemon v. Kurtzman* (the Rhode Island cases of *DiCenso v. Robinson* and *Earley v. DiCenso* were joined for decision) Justice William O'Douglas maintained that "[w]e deal not with evil teachers but with zealous ones who may use any opportunity to indoctrinate a class."¹⁸³ While the Catholic diocese was successful in its drive for busing and textbooks for its students, moves for greater aid generally met a dead end in the 1970s. This was due in large measure to the declining standard of Catholic education in the later part of the 1960s. Many citizens did not want to support what appeared to be a dying institution.¹⁸⁴

¹⁸¹ Discussions evolved around *Cochran v. Board of Education* (1930) & *Everson v. Board of Education of Ewing TP* (1947). See also "School Aid Rulings Cited by Catholics," *Providence Journal*, September 24, 1962, p.1. More recently debate has centered around three recent rulings by the Supreme Court that have afforded aid to parochial schools that had previously been denied. See the discussion of *Agostini v. Felton* (1997), *Mitchell v. Helms* (2000) and *Zelman v. Simmons-Harris* (2002) in Thomas M. Keck, *The Most Activist Supreme Court in History: The Road to Judicial Conservatism* (Chicago, IL: The University of Chicago Press, 2004), 226-29.

¹⁸² Report of the Legislative Committee Created by the Rhode Island General Assembly entitled "Commission to Study State Participation in Acquisition of Scientific and Mathematic Texts and Materials for Non Public Schools" (1962), p.15. Rhode Island State House Archives

¹⁸³ *Lemon v. Kurtzman*, 403 U.S. 602 at 635.

¹⁸⁴ Factors included: The enrollment and contribution drop in many city parishes due to the suburban exodus; rising educational costs due to inflation; the less competitive position of Catholic schools as a result of continually increasing government aid to public education. Another contributing factor in the

Reflecting on the previous year in 1969, Mullen maintained in no uncertain terms that 1968 was “the most disastrous year in the history of Catholic education in the diocese.”¹⁸⁵ Moreover, even though the Catholic schools stood to gain from any tuition-grant issue in 1968, Mullen, who was well-versed in constitutional law - earning his law degree from Boston College - insisted that “the courts” would “brush aside the elaborate façade of child benefit” and would treat the issue “as an appropriation for the support of private schools.”¹⁸⁶ However, with recent increases in enrollment in the last few decades and higher marks in academic achievement tests, the state’s parochial school system has made a comeback.

Public services for parochial school students are now sacrosanct. This development has coincided with the jurisprudence of the Supreme Court over the last twenty years or so.¹⁸⁷ The conservative direction of the Court has allowed public payments for religious school tuition in two cases involving separation of church and state. With these rulings, the Court essentially transformed a long-standing federal constitutional issue into state or local political issue, moving away from the strict separationist approach of the Burger and Warren Courts.¹⁸⁸ In recent decades, the so-called “wall of separation” between religion and the public realm has been chipped away by the conservative jurisprudence of the Supreme Court.¹⁸⁹ The recent shift in the

economic hardship facing many of the parochial school was the precipitous decline in the number of religious who made up the bulk of the educational staff.

¹⁸⁵ See Special Memorandum on “The Condition of Schools throughout the Diocese,” issued by Rev. Edward W. K. Mullen, April 5, 1969 (Diocese of Providence).

¹⁸⁶ Mullen, “Statement on Constitutionality of Tuition Grants to Parents: An Analysis of Msgr. Geoghegan’s Recent Proposal,” August 8, 1967, p. 5 (Diocese of Providence).

¹⁸⁷ See James Ryan and John Jeffries, “The Political History of the Establishment Clause,” 366-71.

¹⁸⁸ *Mueller v. Allen* (Minnesota), 463 U.S. 388 (1983) and *Zelman v. Simmons-Harris* (Cleveland, Ohio), 536 U.S. 639 (2002).

¹⁸⁹ See Thomas M. Keck, *The Most Activist Supreme Court in History: The Road to Judicial Conservatism* (Chicago: The University of Chicago Press, 2004).

doctrine of the separation of church and state in our constitutional system has indeed been influenced by the changes in the way Roman Catholicism has been understood.¹⁹⁰ For example, in *Zelman v. Simmons-Harris* (2002)¹⁹¹, the Rehnquist Court upheld the constitutionality of including religious schools in voucher programs given to families for elementary and secondary education.¹⁹² Legal scholar Stephen Gottlieb has argued that the Rehnquist Court allowed the “public secular education” to no longer be treated as a “common neutral floor,” but rather as “one education among others.” Because of their “religious point of view,” the Rehnquist Court ushered in a revolution that will “put the country on the road to routinely requiring vouchers, ending American public education as we have known it in favor of an educational system much more like those of Europe and other parts of the world, where children are divided by faith early in their lives.”¹⁹³

The fact that Catholic ideas of human sexuality and human life forced many Catholics to sever their long-time allegiance to the Democratic Party and drift over to Republican ranks - the most ardent of supporters of aid to non-public education - should not be overlooked.¹⁹⁴ The present Supreme Court has five Catholics, including Chief

¹⁹⁰ In the area of what exactly constitutes an “establishment of religion,” the question has always been a perplexing one. As the late Leonard Levy noted, “a strict separationist and a zealous accomodationist are likely to agree that the Supreme Court would not recognize an establishment of religion if it took life and bit the justices.” Leonard Levy, *The Establishment Clause: Religion and the First Amendment* (New York: Macmillan, 1986), 163.

¹⁹¹ 536 U.S. 639 (2002).

¹⁹² The Court maintained that legislation establishing public subsidies to enable children to move from public to private or parochial schools was permissible as long as the choice was given to the parents and the legislation was written without explicit reference to religion. For an insightful analysis see Thomas Berg, “Vouchers and Religious Schools: New Constitutional Questions,” *University of Cincinnati Law Review* 72 (Fall, 2003): 151-223. James E. Ryan, “Brown, School Choice, and the Suburban Veto,” *Virginia Law Review* (2004): 1635-1655.

¹⁹³ Stephen Gottlieb, “The Rehnquist Court,” in Christopher Tomlins (ed.), *The United States Supreme Court* (New York: Houghton Mifflin & Co., 2005), 351.

¹⁹⁴ See generally William B. Prendergast, *The Catholic Voter in American Politics* (Washington, DC: Georgetown University Press, 1999); Michael Zoller, *Washington and Rome* (South Bend, IN: University of Norte Dame Press, 1999).

Justice John Roberts, in its ranks.¹⁹⁵ It now appears that members of the Court might be willing to accept the argument from legal scholar and Tenth Circuit Judge, Michael W. McConnell concerning aid to private schools. McConnell argues that the use of public funds for non-public education “is the only way that parents can escape state standardization is by forfeiting their entitlement to a free education for their children – that is by paying twice: once for everyone else’s schools (through property taxes) and once for their own.”¹⁹⁶ It was this very standardization that was hailed as the bedrock of our educational system by opponents of aid to non-public schools in Rhode Island in the 1960s.

¹⁹⁵ The other four are: Clarence Thomas, Samuel Alito, Antonin Scalia, and Anthony Kennedy.

¹⁹⁶ Michael McConnell, “Religious Participation in Public Programs” 59 *University of Chicago Law Review* (1999), 132.