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# Financial Aid for Nonpublic Education: A Decision for the Courts or Legislatures

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# NOTES

## FINANCIAL AID FOR NONPUBLIC EDUCATION: A DECISION FOR THE COURTS OR LEGISLATURES?

### I. Introduction

Three distinct financial aid programs for nonpublic education in the state of New York were attacked as violations of the establishment clause almost immediately after they became effective. The first program provided for direct money grants to nonpublic, nonprofit elementary or secondary schools serving a high concentration of pupils from low-income families.[1] The grants were to be used for "maintenance and repair" of facilities and equipment for the purpose of securing the student's "health, welfare and safety." The second program was a "tuition reimbursement" plan whereby a low-income parent of a nonpublic school student could receive up to $50 per grade school child and $100 per high school student so long as those amounts did not exceed 50% of actual tuition paid.[2] The third program was designed to give tax relief to parents failing to qualify for the tuition reimbursement because their annual income was over $5,000.[3] Under this plan each eligible parent was entitled to deduct a stipulated sum from his adjusted gross income for each child attending a nonpublic school. The amount of the tax credit decreased as the amount of the taxable income increased, but was unrelated to the amount of tuition actually paid. A three-judge district court held that the programs for maintenance and repair and tuition reimbursements were unconstitutional but that the "tax credit" provisions did not violate the establishment clause.[4] On direct appeal, the Supreme Court *held* in *Committee for Public Education and Religious Liberty v. Nyquist*:

> All three programs are unconstitutional and violative of the Establishment Clause of the First Amendment since the *effect* of each of the New York programs is to provide financial support and encouragement to the religious mission of sectarian schools.[5]

In *Sloan v. Lemon,* a parent whose children were enrolled in the public school system brought suit against the State Treasurer of Pennsylvania to have the Pennsylvania Parent Reimbursement Act for Nonpublic Education[6] declared unconstitutional and to enjoin its operation. This Act provided for the reimbursement of tuition payments to parents whose children completed a year of instruction in a nonpublic school located in Pennsylvania. Reimbursement was allowed up to $75 for an elementary school child and up to $150 for a secondary school student, or the actual tuition paid, whichever was less.

1 N.Y. EDUC. LAW, §§ 549-553 (McKinney Supp. 1973-74).
2 N.Y. EDUC. LAW §§ 559-563 (McKinney Supp. 1973-74).
3 N.Y. TAX LAW, § 612 (j) (McKinney Supp. 1973-74).
4 Committee for Public Education & Religious Lib. v. Nyquist, 350 F. Supp. 655 (S.D.N.Y. 1972).
5 93 S. Ct. 2955 (1973) (emphasis added).
6 PA. STAT. ANN. tit. 24, §§ 5701-09 (Supp. 1973-74).

The Act was challenged on the grounds that it violated both the free exercise and the establishment clauses of the first amendment of the United States Constitution as well as the equal protection clause of the fourteenth amendment. A three-judge panel found the Pennsylvania program to be in violation of the establishment clause because the primary effect of the act was to advance religion.[7] In affirming, the Supreme Court held:

> There is no constitutionally significant difference between Pennsylvania's tuition grant scheme and the New York tuition reimbursement program. The Pennsylvania Act has the ultimate effect of preserving and supporting religion-oriented institutions.[8]

The decisions in these two related cases are indicative of both the national trend to provide across-the-board financial aid to private and parochial schools and the general lack of success of these efforts to meet constitutional standards.

In the past state legislatures avoided across-the-board grants such as tuition payments, teachers' salaries, and large-scale purchases of secular services. The majority of earlier legislation had involved grants of limited aid in certain non-educational or secular educational areas. Later legislative efforts have attempted to separate the secular from the religious educational services in order to provide tax funds for the one but not the other.

The recent trend in state legislatures has been toward large-scale and broader based financial support for church-related schools.[9] Twenty-three states have pending or enacted legislation providing for aid which is above and beyond the generally accepted bus transportation, textbook, and auxiliary facilities acts. Arizona, Connecticut, Kansas, New Jersey, and West Virginia have proposed or enacted reimbursement laws generally modeled after Pennsylvania's which are undoubtedly condemned by the *Sloan v. Lemon* decision. Five states have enacted state income tax credit plans on a broader scale than New York's. The "shared time" or "dual enrollment" program, whereby children can satisfy the mandatory attendance requirements in more than one school, is operational in nine states. Kentucky, South Dakota, New Hampshire, and Maine have legislation authorizing public school authorities to lease nonpublic school facilities. The resulting co-occupancy makes the nonpublic school children part-time public school students eligible under the general subsidy formula for the per student allotment to the school district.

In order to evaluate the significance of the *Nyquist* and *Sloan* decisions, as well as the constitutional chances of other legislative efforts in this area such as shared time programs, it is necessary to examine the tests developed by the

7 Lemon v. Sloan, 340 F. Supp. 1356 (E.D. Pa. 1972).

8 93 S. Ct. 2982 (1973).

9 Committee for Public Ed. & Religious Lib. v. Nyquist, 93 S. Ct. 2993, 2994 n.2 (1973) (White, J., dissenting).

Beyond the plans enumerated in the text, Louisiana has a tuition voucher plan, while Kansas and Missouri have proposed variations of that plan. Maryland and Illinois provide scholarships and grants respectively to nonpublic students based on financial need. Delaware has pending legislation modeled after the Maryland Law. For a more detailed analysis and summary of legislative attempts to provide aid to nonpublic education, see Comment, *The Sacred Wall Revisited—The Constitutionality of State Aid to Nonpublic Education Following Lemon v. Kurtzman and Tilton v. Richardson,* 67 NW. U. L. REV. 118, 125-42 (1972).

Supreme Court in a recent line of cases—tests which dominate any examination by the Court into the religion clauses of the first amendment.

The first amendment of the United States Constitution provides in part that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . . ." This clause is divided into two separately treated sections commonly referred to as the establishment clause and the free exercise clause. As pointed out by Chief Justice Burger in *Walz v. Tax Commission*,[10] these religion clauses were not intended to be read as statutes, and there is a broad range of interpretation available within each clause.

Cases do not always clearly fall under either the establishment clause or the free exercise clause, but decisions involving aid to sectarian schools have generally been treated by their authors and by counsel from both sides as establishment clause cases. The two religion clauses of the Constitution, however, are often in conflict with one another, necessitating the consideration of both clauses in any case involving aid to nonpublic schools.

## II. Background

The first bout with the establishment clause in the realm of aid to nonpublic education began with *Everson v. Board of Education*[11] wherein a New Jersey taxpayer challenged the validity of a statute which permitted local school boards to contract for the transportation of children to and from schools other than private schools operated for profit. One local school board authorized the reimbursement of parents for fares paid to public carriers by children attending Catholic schools. A bare majority of the U.S. Supreme Court held that the expenditure of tax-raised funds for transportation of parochial school students was a service which a state may provide to all its children as a general health or safety measure much like free milk and lunches, nursing services, or dental and eye examinations. The majority opinion set forth a celebrated interpretation of the establishment clause:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another . . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and State."[12]

Ironically, this broad no-aid language has been cited by both advocates and opponents of public aid to nonpublic education. It was obvious to the *Everson*

10 397 U.S. 664, 668 (1970). The free exercise and establishment clauses of the first amendment were applied to the states through the fourteenth amendment in Cantwell v. Connecticut, 310 U.S. 296 (1940).

11 330 U.S. 1 (1947).

12 *Id.* at 15-16.

Court that the bus transportation aided Catholic students in the pursuit of their religious training,[13] but the Court reasoned:

> On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians or the members of any other faith, *because of their faith, or lack of it,* from receiving the benefits of public welfare legislation.[14]

The Court thus resolved a conflict between the two religion clauses of the first amendment in favor of the free exercise clause.

In an ensuing series of cases, the Court made a cautious retreat from its position of absolute separation of church and state. In *Zorach v. Clauson*[15] the Court upheld a released-time program whereby public schools in New York, on receipt of written requests from parents, released students before the close of the school day so that they might attend religion classes or services outside the public school premises. In *Abington School District v. Schempp*[16] the Supreme Court reviewed a Pennsylvania law which required Bible reading in the public school classrooms and a Baltimore rule which mandated reading of the Lord's Prayer. Both laws were found unconstitutional under the establishment clause. This case is significant in the area of public aid because the Court made its first attempt to promulgate guidelines for the weighing of legislation challenged under the establishment clause:

> The test may be stated as follows: what are the *purpose* and the *primary effect* of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution.[17] (Emphasis added.)

After *Schempp* attention returned to the nonpublic school aid cases, and in *Board of Education v. Allen*[18] U. S. Supreme Court upheld a New York statute requiring local school boards to furnish *secular* textbooks to all students regardless of where they attended school. The Court analogized this New York statute to the one upheld in *Everson,* reasoning that the benefits proceeded to the student or his parents and were merely indirect benefits to the parochial schools, much like police or fire protection to citizens or buildings generally, regardless of religious affiliation or character. The law had a secular legislative purpose and a primary effect that neither advanced nor inhibited religion.[19]

13 *Id.* at 17.
14 *Id.* at 16.
15 343 U.S. 306 (1952).
16 374 U.S. 203 (1963).
17 *Id.* at 222.
18 392 U.S. 236 (1968).
19 *Id.* at 243. Norwood v. Harrison, 93 S. Ct. 2804 (1973), which was decided the same day as the *Sloan* and *Nyquist* cases, reaffirms the *Allen* precedent. In *Norwood,* a Mississippi statutory program whereby textbooks were lent to students in both public and nonpublic schools was attacked as a denial of equal protection under the fourteenth amendment in that many of the private schools to which textbooks were supplied had racially discriminatory policies. The Supreme Court reaffirmed the *Allen* holding, but was careful to point out that *Allen* was not dispositive of the issue at bar.

The *Everson* ruling had only taken the nonpublic students to their school's door; the *Allen* case is an important precedent because it took the public aid (textbooks) beyond the door and into the nonpublic classrooms. It is noteworthy that this case, like others to succeed it, came to the Supreme Court after summary judgment on the pleadings. Thus, there was no evidentiary record before the Court. This prompted Justice White to conclude:

> Nothing in this record supports the proposition that all textbooks, whether they deal with mathematics, physics, foreign languages, history, or literature, are used by the parochial schools to teach religion . . . . We are unable to hold, based solely on judicial notice, that this statute results in unconstitutional involvement of the State with religious instruction . . . .[20]

The door was thus opened for arguments in favor of public aid for secular teachers and a broad range of educational services.

It was not judicially determined that the secular and religious portions of education in a church-related school could be separated. *Allen* allowed government to aid the secular function in these schools, but it was still uncertain as to how far or to what degree this aid might extend. There was still the danger that the "primary effect" test of *Schempp* would be exceeded.

In *Walz v. Tax Commission*[21] the Court upheld the centuries-old practice of granting tax-exempt status to church-affiliated schools. Thomas Jefferson's "wall of separation" was lowered, and a relationship of "benevolent neutrality" between church and state was announced.[22] In treading across the tightrope of a neutral course, the two *Schempp* tests were again promulgated without, however, referring to *Schempp*. A third criterion developed as a modification of the *Schempp* primary effect test when the Court said: "We must also be sure that the end result—the effect—is not an excessive government entanglement with religion."[23] This entanglement test was described as one of degree.[24]

It is clear that granting a tax exemption is a far lesser involvement than taxing church-related properties. The exemption is the antithesis of involvement —a move away from the entanglements of property taxes.[25] But behind all this logic is a realization that tax-exemptions for churches and church-related schools have existed for two centuries in our country; the Court was not about to disturb a system which had functioned so smoothly for such a long time.[26] The *Walz*

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> [T]he transcendent value of free religious exercise in our constitutional scheme leaves room for "play in the joints" to the extent of cautiously delineated secular governmental assistance to religious schools, despite the fact that such assistance touches on the conflicting values of the Establishment Clause by indirectly benefiting the religious schools and their sponsors. *Id.* at 2813.

When, however, the sole conflict is with the equal protection clause, and the Constitution places no value on discrimination as it does on the free exercise of religion, the fourteenth amendment wins absolutely. The establishment clause permits a greater degree of state assistance to sectarian schools than may be given to private schools which engage in discriminatory practices.

20 392 U.S. at 248.
21 397 U.S. 664 (1970).
22 *Id.* at 669.
23 *Id.* at 674.
24 *Id.*
25 *Id.* at 676.
26 *Id.* at 676-77.

holding relied heavily on the historical aspect and thus confined, rather than expanded, the areas of permissible state involvement with church-related institutions by demanding close scrutiny of the degree of entanglement.

In summary, the Supreme Court had developed three "cumulative"[27] tests:

1. The statute must have a secular legislative purpose.
2. The statute's principal or primary effect must be one that neither advances nor inhibits religion.
3. The statute must not foster excessive government entanglement with religion.

*Tilton v. Richardson*,[28] *Lemon v. Kurtzman*[29] and *Earley v. DiCenso*[30] demonstrate the application of the entanglement doctrine of *Walz*.

In *Kurtzman*, the Supreme Court dealt with Pennsylvania's attempt to give direct subsidies to the nonpublic schools,[31] and in *DiCenso* scrutinized Rhode Island's effort to supplement salaries of private school teachers who did not teach religion.[32] Both laws were invalidated under the excessive entanglement theory. The Court avoided any examination under the primary effect test since it found a path of least resistance in the entanglement approach.

There are considerable dicta in *Kurtzman* relating to the *Allen* suggestion that religious and secular education are identifiable and separable,[33] but the legislative attempts to assure separation and to guard against public funds entering the forbidden area of religious education were the very features which led to the

27 Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).
28 403 U.S. 672 (1971).
29 403 U.S. 602 (1971).
30 403 U.S. 602 (1971).
31 Nonpublic Elementary and Secondary Education Act, Act 109 of the Pa. General Assembly, June 19, 1968. That Act empowered the State Superintendent of Public Instruction to use the proceeds from a certain tax on horse racing for reimbursement to nonpublic schools for the "purchase of secular educational services." The Act required that the secular teaching services, textbooks, and instructional materials be approved by the Superintendent of Public Instruction and that payments be made directly to the school itself. School accounts were made subject to state audit. No payment was to be made for any course containing "any subject matter expressing religious teaching." A three-judge district court upheld the constitutionality of the Act, granting defendant's motion to dismiss for failure to state a cause of action. Lemon v. Kurtzman, 310 F. Supp. 35 (E.D. Pa. 1969). The two-judge majority ruled that the purpose and primary effect of the act were secular and that any incidental benefit to the sectarian schools was not an infringement upon the first amendment.

The safeguards included in the Act impelled the U.S. Supreme Court to declare that the Act was unconstitutional because of excessive entanglement of the state in the affairs of the church-related schools. The idea of direct and continuing subsidies to the schools was totally incompatible with the Court's notion of constitutional separation of church and state. 403 U.S. at 621.

New York, Connecticut and New Jersey all enacted purchase of secular service laws modeled after the 1968 Pennsylvania legislation. All were constitutionally doomed after the ruling in *Kurtzman*. New York Laws, 1970 ch. 138 §§ 1-10 were declared unconstitutional in Levitt v. Committee for Public Education & Religious Lib., 93 S. Ct. 2814 (1973) affirming 342 F. Supp. 439 (S.D.N.Y. 1972).

Connecticut's statute, Pub. L. No. 791 (Jul. 1, 1969) fell in Sanders v. Johnson, 403 U.S. 955 (1971), affirming 319 F. Supp. 421 (D. Conn. 1970).

New Jersey Laws 1970 ch. 235, §§ 1-21 was repealed by New Jersey Laws 1971, ch. 336 § 10 (Dec. 7, 1971). The repealing act substituted provisions providing for reimbursement of parents for purchase of secular, nonideological textbooks, instructional materials and supplies. N.J. STAT. ANN., tit. 18A, §§ 58-60 to 58-67 (Supp. 1973).

32 R.I. GEN. LAWS. ANN. §§ 16-51-1 to-9 (Supp. 1972).
33 403 U.S. at 613.

condemnation of these two state laws. Without such safeguards, however, the Court declared that there was a substantial danger that religious instruction would pervade the secular aspects of pre-college education.[34] Consequently, *Kurtzman* and *DiCenso* circumscribed the doctrine of *Allen*: a textbook can be categorized as either religious or secular, but a teacher in a church-related school —even a teacher of secular subjects—cannot separate his religious and moral instructions from his secular instructions in such subjects as math, physics and history.

Finally, in *Tilton* the Court upheld the constitutionality of federal aid to church-related colleges and universities for construction of buildings and facilities used exclusively for secular educational purposes. In evaluating the statute[35] in terms of its effect, the Court found that it was carefully drafted to insure that federally subsidized buildings would be devoted to secular and not religious functions.[36] The Court concluded, however, that a provision of the law which permitted unrestricted use of the buildings after 20 years violated the primary effect test. The entanglement question was also settled in favor of federal aid in the main thrust of the decision.

The *degree* of entanglement in *Tilton* was found to be empirically different from that found in *Kurtzman* and *DiCenso*. The Court reasoned that religious indoctrination is not the paramount purpose of church-related colleges and universities while such indoctrination is the avowed dominant policy in the elementary and secondary schools.[37] Also, the federal grants in *Tilton* were one time only, and there was no continuing financial relationship. This should be compared with the *Kurtzman* and *DiCenso* legislation where continuing audits and close scrutiny by state agencies were required.

The *Tilton, Kurtzman,* and *DiCenso* decisions must be considered major setbacks for parochial school aid. The entanglement portion of the primary effect test has put a double-edged sword in the hands of opponents of public aid to nonpublic schools. If legislators include in their statutes safeguards to guarantee that public funds will go only toward secular education, then there is excessive entanglement of the state in the affairs of the church; if such safeguards are

34 *Id.* at 617.

35 Higher Education Facilities Act of 1963, 20 U.S.C. §§ 701-58 (1970).

36 403 U.S. at 680. At trial the sectarian colleges presented evidence that there had been no religious services or worship in the federally financed facilities. Appellants presented no evidence to the contrary.

37 *Id.* at 686-87. The doctrine that colleges and universities are more likely beneficiaries of public aid was reemphasized in Hunt v. McNair, 93 S. Ct. 2868 (1973). The Supreme Court upheld a South Carolina statute which established an Educational Facilities Authority to assist higher education institutions in constructing buildings, facilities, etc., but not including any facility for sectarian instruction or religious worship. The Act did not violate the tripartite test employed in Lemon v. Kurtzman even though the Baptist college involved had a 60% Baptist enrollment.

At the hearing for *Nyquist* and *Sloan* there was much dialogue between the bench and counsel attempting to analogize and/or distinguish the G.I. Bill, 38 U.S.C. §§ 1601-34 (1970) in reference to tuition grants. Since the G.I. Bill allows a veteran to attend a sectarian university or law school, does it not have the effect of indirectly channeling money to religious institutions? 41 U.S.L.W. 3561 (U.S. Apr. 24, 1973). The constitutionality of the G.I. Bill is sound, and proponents of the child-benefit theory of nonpublic school aid have latched onto its operational rationale. *See, e.g.,* Areen, *Public Aid to Nonpublic Schools: A Breach of the Sacred Wall?* 22 CASE W. RES. L. REV. 230 (1971). However, the G.I. Bill is placed in no jeopardy by the failure of the child-benefit theory. The logic of *Tilton* and *Hunt* saves the Bill, since its use is confined to institutions of higher education.

omitted, then the statutes are construed as having the primary effect of advancing religion.[38] This feared paradox of *Lemon v. Kurtzman* turned to stark reality in *Nyquist* and *Sloan.*

## III. *Nyquist* and *Sloan*

In *Nyquist* the Court evaluated distinct programs which provided assistance to nonpublic education at three levels: direct payments to the schools, direct payments to low income parents, and indirect assistance by means of tax benefits to middle income parents.[39] In *Sloan* the Court scrutinized state authorized grants to all parents of children in nonpublic schools regardless of income level. The programs were scrutinized directly under the tripartite test derived from *Schempp* and *Walz.* The Court conceded that all the laws involved were gilded with the proper preambles which gave them a secular legislative purpose. However, the well-worded legislative policy statements, drafted specifically to meet Supreme Court standards, could not immunize the statute against further scrutiny under the "effect" and "entanglement" standards.[40]

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38 403 U.S. at 668. (White, J., dissenting).

39 In a separate case decided the same day, the Court decided that yet a fourth provision of New York's program of assistance to nonpublic education was unconstitutional. See note 31 *supra,* for the holding of Levitt v. Committee for Public Education & Religious Lib., 93 S. Ct. 2814 (1973). It was argued in *Levitt* that the State could reimburse church-related schools for the costs incurred by them in administering services mandated by state law, specifically record-keeping of health and attendance reports and testing via state-prepared and teacher-prepared examinations. The Court was fearful since no attempt was made and no means were available short of "entanglement" to assure that internally prepared tests which have an "integral role . . . in the total teaching process" were free of religious instruction. 93 S. Ct. at 2819.

40 The legislative findings of New York's tuition reimbursement act covers a whole range of social philosophies. N.Y. EDUC. LAW § 559 (McKinney Supp. 1973-74).

> The legislature hereby finds and declares that:
>
> 1. The vitality of our pluralistic society is, in part, dependent upon the capacity of individual parents to select a school, other than public, for the education of their children. A healthy competitive and diverse alternative to public education is not only desirable but indeed vital to a state and nation that have continually reaffirmed the value of individual differences.
>
> 2. The Supreme Court of the United States has recognized and reaffirmed this right of selection. This right, however, is diminished or even denied to children of lower-income families, whose parents, of all groups, have the least options in determining where their children are to be educated.
>
> 3. Quality education is made possible for all children in our state only because the burden of providing it has been carried by taxpayers who support both public and nonpublic education. Any precipitous decline in the number of nonpublic school pupils would cause a massive increase in public school enrollment and costs. Such an increase would seriously jeopardize quality education for all children and aggravate an already serious fiscal crisis in public education.
>
> 4. In recognition of the initiative of parents who support both public and nonpublic education, it is a legitimate purpose for the state to partially relieve the financial burden of parents who provide a nonpublic education for their children which satisfies the compulsory education laws of the state. Such assistance is clearly secular, neutral and nonideological in nature and is consistent with the historical and continuing role of the state in providing a quality education for all children and in nurturing a pluralistic society . . . .

The district court in Wolman v. Essex, 342 F. Supp. 399 (S.D. Ohio 1972), *aff'd mem.,* 93 S. Ct. 61 (1972), in examining an Ohio nonpublic school aid law, readily found a well-tailored and valid secular purpose behind that law and was prompted to note:

> It is the opinion of this Court that the first prong of the Lemon [v. Kurtzman] test will almost invariably be satisfied in cases of this type, and may not truly exist as a distinct, dispositive requirement. *Id.* at 411 n.13.

### A. *Direct Grants*

Direct grants to private schools under the maintenance and repair provision of the New York act were limited to not more than 50% of the average statewide per pupil cost of maintenance and repair in public schools.[41] In addition, only those schools that served a high concentration of low-income pupils qualified for this aid. This provision was enacted for the express purpose of protecting the health and safety of the children attending those schools. As such, the state urged it was not intended to aid private schools but was a valid exercise of the state's police power to protect school children generally.

Since the Court had concluded in *Tilton* that the provision which permitted unrestricted use of the federally financed buildings on sectarian campuses after 20 years was a violation of the primary effect test, there was no difficulty in reaching the conclusion that maintenance and repair funds to elementary and secondary sectarian schools, without any limitation on the use of the funds, had the effect of subsidizing and advancing the religious mission of the sectarian schools. This holding was the basis for the Court's decision on the same day in *Levitt v. Committee for Public Education & Religious Liberty*[42] wherein New York's subsidy for testing and record-keeping in the private schools was invalidated. The invalidation of these portions of New York's legislation was a foregone conclusion after *Lemon v. Kurtzman*. The Supreme Court has never allowed direct cash benefits to nonpublic elementary and secondary schools.[43]

### B. *Tuition Reimbursement—The Child Benefit Theory*

The tuition relief portion of New York's plan resembled welfare provisions in which the state participates in helping low-income families. To qualify, the parent's annual taxable income had to be less than $5,000. The amount of reimbursement was $50 per grade school child and $100 per high school pupil, so long as the amounts did not exceed 50% of actual tuition paid. The New York program required annual appropriations by the state legislature. In Pennsylvania, to be eligible for the tuition reimbursement of up to $75 for elementary school students and $150 for secondary school students, each parent was required to file a verified statement that the student had completed the school year in a nonpublic school and that he had paid, or had become legally obligated to pay, tuition in excess of that claimed for reimbursement. Funding did not

41 The 50 percent figure was supposed to supply a statistical guarantee of separation of secular and religious applications of the funds. The legislature assumed that at least 50% of the ordinary public school maintenance and repair budget would be devoted to purely secular upkeep in the sectarian schools. This statistical approach purported to be a replacement for specific provisions which would have articulated secular restrictions but which would have been entanglements. The Court was not impressed by this approach which left the sectarian schools free to spend the money in any way they chose. 93 S. Ct. 2955, 2968 (1973).

42 93 S. Ct. 2814 (1973). *See* notes 29, 37 *supra*.

43 The only cases upholding direct cash benefits to a religiously affiliated institution are Bradfield v. Roberts, 175 U.S. 291 (1899) and Tilton v. Richardson, 403 U.S. 672 (1971). *Bradfield* dealt with construction grants to hospitals and *Tilton* concerned similar grants to institutions of higher learning. Both made lump-sum payments which presumably involve less entanglement between religion and state than periodic payments. None of the grants' recipients had the primary purpose of religious indoctrination.

depend upon annual appropriations, but rather was funded by a fixed percentage of the revenue collected under Pennsylvania's cigarette tax. Both provisions relied heavily upon the child-benefit theory: grants to parents, unlike grants to institutions are constitutionally acceptable because the schools receive no direct benefits. If the money proceeds to the parents who are free to spend the money in whichever way they like, then although the schools *may* be indirectly benefited, the parent or child receives the preponderance of the benefits, and the aid thus advances education generally—not religion.[44] This theory developed from the holdings in *Everson* and *Allen* but never really received endorsement from the Supreme Court.

The Chief Justice, in dissenting from the holdings of both the Pennsylvania and New York cases, asserted the proposition that "government aid to individuals generally stands on an entirely different footing from direct aid to religious institutions."[45] Justice Powell, writing the majority opinions in both cases,[46] was unconvinced. "[T]he fact that aid is disbursed to parents rather than to the schools is only one among many factors to be considered." For much the same reasons which governed the failure of the maintenance and repair grants, the tuition reimbursements were held to have the likely effect of advancing or encouraging the inculcation of religion in the sectarian schools. There was no attempt to guarantee that the funds given to the parents would no be devoted to religious educational functions.[47] As the Court said in *Sloan:*

> Whether that benefit be viewed as a simple tuition subsidy, as an incentive

44 *See generally,* Areen, *Public Aid to Nonpublic Schools: A Breach of the Sacred Wall?* 22 Case W. Res. L. Rev. 230, 248-53 (1971); Choper, *Aid to Parochial Schools,* 56 Calif. L. Rev. 260, 313-15 (1968); LaNove, *The Child Benefit Theory Revisited: Textbooks, Transportation and Medical Care,* 13 J. Pub. L. 76 (1964).

Alternatively stated, the theory urges that the element of parental choice, or voluntarism in the expenditure of the voucher money sufficiently insulates the state from impermissible financing of religious activities.

Appellants in *Nyquist* vigorously argued that the parents were not required to pay the funds to the parochial schools. The Court reasoned that the state is still not relieved of its duty to insure that the funds are not used to support religious activities. The Court pointed to the significant risk that funds may serve to support religious activity. 93 S. Ct. 2955, 2970-71 (1973). Lemon v. Sloan, 340 F. Supp. 1356, 1364 (E.D. Pa. 1972). This significant risk theory abrogates the religious/secular dichotomy that was accepted in *Allen,* and embraces the *Tilton* teaching that the *possibility* of a religious use is enough to strike down a public aid statute. Undeniably, there is a substantial effect which advances religion. The Supreme Court seems now reluctant to weigh and choose between the various primary effects.

45 93 S. Ct. at 2988, 2990. The Chief Justice relied upon *Everson, Allen* and Quick Bear v. Leupp, 210 U.S. 50 (1908) for this proposition. The majority made it clear that they would go no further than *Everson* and *Allen;* they distinguished *Quick Bear* where the funds which were utilized by the Indians to provide sectarian education were treaty and trust funds which the Court emphasized belonged to the Indians as payment for the cession of Indian land. It was their money and the Court held that for Congress to have prohibited them from expending their own money to acquire religious education would have constituted a prohibition of the free exercise of religion. *Nyquist* is quite unlike *Quick Bear* since the earlier case did not involve the distribution of public funds, directly or indirectly, to compensate parents who send their children to religious schools. 93 S. Ct. at 2969 n.37.

46 The majority in both cases consisted of Justices Powell, Douglas, Brennan, Stewart, Marshall, and Blackmun. Chief Justice Burger and Justice Rehnquist joined the majority only so far as invalidating the maintenance and repair section of the New York law and dissented on all other provisions. Justice White dissented from the rulings on all provisions.

47 *Tilton* seems to establish a presumption of secularity in programs of church-affiliated colleges and universities. Both *Tilton,* and *Lemon v. Kurtzman* indicate, however, that as to the education of elementary and secondary school children, the burden of proof of secularity falls on the school or on the parent. 403 U.S. at 685-86.

> to parents to send their children to sectarian schools, or as a reward for having done so, at bottom its intended consequence is to preserve and support religion-oriented institutions.[48]

The child-benefit theory may still retain some life but only as an explanation for *Everson* and *Allen*. It is now dead as a guiding principle for legislatures seeking to find a constitutionally acceptable form of aid to nonpublic schools.

### C. *Tax Benefits*

Sections 3, 4, and 5 of the New York legislation[49] established a system of income tax benefits to parents of nonpublic school children. These sections allowed a parent to subtract from adjusted gross income a specified amount if they did not receive a tuition reimbursement (because their income exceeded $5,000) and if their adjusted gross income was less than $25,000. The amount of the deduction was unrelated to the amount of money actually expended by the parent on tuition. The amount was calculated on the basis of a formula[50] which assured that the tax benefit would be comparable to the tuition grant to low-income families. The Court concluded, with surprising ease:

> In practical terms there would appear to be little difference, for purposes of determining whether such aid has the effect of advancing religion, between the tax benefit allowed here and the tuition grant allowed under § 2. The qualifying parent under either program receives the same form of encouragement and reward for sending his children to nonpublic schools. The only difference is that one parent receives an actual cash payment while the other is allowed to reduce by an arbitrary amount the sum he would otherwise be obliged to pay over to the State. We see no answer to Judge Hays' dissenting statement below that "[i]n both instances the money involved represents a charge made upon the state for the purpose of religious education."[51]

The majority was careful to point out that the New York program before them was the only tax procedure upon which they were ruling. They specifically stopped short of prejudging any program which might have the elements of a genuine tax deduction or exemption and which might thereby qualify under the "neutrality" test of *Walz*.[52] The New York tax credit program was inextricably linked with the unconstitutional tuition reimbursement provisions. Additionally, the parents' benefits were unrelated to any deduction available for charitable contributions to religious institutions. The majority felt that the analogy to the property tax exemption upheld in *Walz v. Tax Commission* was unpersuasive

48 93 S. Ct. at 2986. The *Nyquist* and *Sloan* holdings should have come as no surprise to parties on either side of the issue since the result was almost inevitable after Wolman v. Essex, 342 F. Supp. 399 (S.D. Ohio 1972), *aff'd mem.*, 93 S. Ct. 61 (1972). The Ohio law declared unconstitutional by the district court was generically similar to the Pennsylvania law providing tuition reimbursements. Also, the New York and Pennsylvania tuition relief acts had previously been held unconstitutional by unanimous three-judge district courts.

49 N.Y. TAX LAW § 612 (j) (McKinney Supp. 1973).

50 The tables are reproduced in Committee for Public Education & Religious Lib. v. Nyquist, 93 S. Ct. 2955, 2962 nn.18, 19 (1973).

51 93 S. Ct. at 2974.

52 93 S. Ct. at 2974 n.49.

since the New York tax benefits were not sufficiently restricted to assure that they would not have the effect of advancing sectarian activities in nonpublic schools.

The Court has chosen to proceed in this area on a case-by-case basis much like its examination of "reasonable" searches and seizures under the fourth amendment.[53] There have been no sweeping utterances, but only fine distinctions in this sensitive area. However, tax credit programs in other states which are not applicable to parents of public and nonpublic school children alike and which are likely to encourage attendance at sectarian schools are in serious jeopardy.[54]

## IV. Statistics and Economics

### A. *The Benefited Class*

One difference between tax exemptions for church property (*Walz*) and tax benefits for parents is that the property exemptions are not restricted to a class composed exclusively or predominantly of religious institutions.[55] The exemption covers all educational, religious, and charitable purposes. The Court was preoccupied by the fact that the benefits under nonpublic school aid laws flowed to too narrow a class.

Proponents of nonpublic school aid argue that the laws do not fix eligibility along religious lines. Because the act reimburses parents with children in "nonpublic" rather than "church-related" or "Catholic" or "religious" schools, proponents argue that the scope of the act is sufficiently broad to encompass Catholic and sectarian school students only as incidental beneficiaries. According to this argument, the Court should find evidence that the state is exercising the "benevolent neutrality" defined in *Walz*. In that case, a concurring opinion pointed to the proper test for examining neutrality:

53 Walz v. Tax Commission, 397 U.S. 664, 679 (1970).

54 The Minnesota Tax Credits for Nonpublic Education Support Act of 1971 (MINN. STAT. § 290.086 (Supp. 1973)) permits parental tax credits against the state income tax for the amount paid per student for education costs incurred in nonpublic schools. These costs include tuition, classroom instructional fees, and textbooks. The maximum permissible credit is determined by the per pupil cost of educating a student at that grade level in a public school. If the allowable credit exceeds the total income tax due, the state reimburses the parent for the difference between these amounts. The Minnesota plan would not survive in the federal courts. Ohio legislation modeled after the Minnesota Act was declared unconstitutional in Kosydar v. Wolman, 353 F. Supp. 744 (S.D. Ohio 1972).

Louisiana allows a $50 tax credit for tuition paid to nonpublic elementary and secondary schools. LA. REV. STAT. §§ 47:85-:89 (Supp. 1973). California has a provision which allows for a tax credit which varies in amount, like New York's, depending on adjusted gross income of the taxpayer. If adjusted gross income is less than $15,000 then the maximum tax credit is $125. For adjusted gross income of $19,000 and over, there is no credit allowed. CAL. REV. & TAX CODE ANN. §§ 17065-67 (West Supp. 1973).

The Hawaii income tax credit (HAWAII REV. STAT. § 235-57(b) (Supp. 1972)) extends to any parent whose child "was enrolled or [was] in attendance as a student at school in grades kindergarten through twelve." It is interpreted as applying to parents of public or nonpublic school children, a fact which distinguishes it from other tax credit programs. The maximum yearly credit per student is twenty dollars and that amount diminishes as the adjusted gross income of the applicant increases.

For a more detailed analysis see Comment, *The Sacred Wall Revisited—The Constitutionality of State Aid to Nonpublic Education Following Lemon v. Kurtzman and Tilton v. Richardson*, 67 NW. U.L. REV. 118, 139-42 (1972); Note, *New Trends in Education and the Future of Parochial Schools*, 57 CORNELL L. REV. 256, 271-72 (1972); Note, *Aid to Parochial Schools—Income Tax Credits*, 56 MINN. L. REV. 189 (1971).

55 93 S. Ct. at 2976.

> In any particular case the critical question is whether the circumference of legislation encircles a class so broad that it can be fairly concluded that religious institutions could be thought to fall within the natural perimeter.[56]

The statistical reality demonstrates that the nonpublic class is not so broad as one would expect. In Pennsylvania more than 96% of the nonpublic school students attend church-related institutions; of these schools, 88% are Catholic.[57] In Ohio approximately 98% of nonpublic students attend denominational schools; 95% are in the Catholic schools.[58] In New York almost 20% of the state's entire elementary and secondary school population attend over 2,000 nonpublic schools; approximately 85% are church-affiliated.[59] Confronted by such ponderous statistics, it is easy for any court to dismiss neutrality arguments under the "circumference of legislation" theory. The church-related schools simply do not fall naturally within the legislation's borders. The predominance of denominational schools is too great. Throughout the series of opinions in this area, the Court has stressed that the legislative programs that were constitutionally permissible were broadly applicable to both public and private school students.[60]

### B. *Economic Consequences*

In reality there would appear to be at least two principal effects of nonpublic school aid legislation: one religious, the other secular. On appeal from pretrial motions to dismiss, before any trial records have been established, it is difficult to perceive how the Court could hold one effect to predominate over the other. The parochial schools have an essentially religious role, but they also perform a secular civic function.

If there were no parochial schools, the state would have to pay for the secular instruction that the religiously educated children now receive in their church-related schools. This argument, used by advocates of public aid to circumvent the primary effect test, expounds the economic woes of both the public and parochial schools in an attempt to gain sympathy from the courts and to point up the substantial secular effects of nonpublic school aid. It is persuasive. A sampling of the statistics will suffice:

> 1. In 1969, the most recent Catholic investigation into school closings revealed 295 elementary and 80 secondary schools failed in that year alone, and 63,697 students were displaced.[61]

56 Walz v. Tax Commissioner, 397 U.S. 664, 696 (1973) (Harlan, J., concurring).
57 Sloan v. Lemon, 93 S. Ct. 2982, at 2986 (1973).
58 Wolman v. Essex, 342 F. Supp. 399, 403 (S.D. Ohio 1972).
59 Committee for Public Education and Religious Lib. v. Nyquist, 93 S. Ct. 2955, 2963 (1973). "[A]ll or practically all of the 280 schools entitled to receive 'maintenance and repair' grants are related to the Roman Catholic Church and teach Catholic religious doctrine to some degree." *Id.*
60 *See e.g.*, Tilton v. Richardson, 403 U.S. 602, 687 (1971).
61 OFFICE FOR EDUCATIONAL RESEARCH, UNIV. OF NOTRE DAME, ECONOMIC PROBLEMS OF NONPUBLIC SCHOOLS: A REPORT TO THE PRESIDENT'S COMMISSION ON SCHOOL FINANCE 5 (1971). (Hereinafter cited as NOTRE DAME REPORT ON NONPUBLIC SCHOOLS.) '(Two reports of this project have been published. One is a substantive summary report; the second is

2. Decreases in nonpublic school enrollment have been projected for the next 10 years. Catholic schools, now enrolling 83% of nonpublic school students, may lose up to 52% of present enrollment if the present trend continues.[62]

3. The increased cost to states of absorbing nonpublic school students is concentrated in the industrial states of New York, Illinois, Michigan, New Jersey, Pennsylvania, Ohio and California.[63]

4. The nation's urban areas, which can least afford the added burden, would be hardest hit.[64] The concentration in large urban areas of persons preferring nonpublic schools has resulted in percentages far in excess of the national average.[65]

Such statistics are awesome. They have received judicial notice, but they have not lessened the fervor with which the Court has enforced its interpretation of the first amendment. Economic hardship has not been a major criterion for judging constitutional issues.[66] Even if the economic consequences were viewed sympathetically by the Court, they still would be counteracted by the statistics showing that the class being benefited is predominantly Catholic. If sectarian school aid is to succeed, proponents must turn to arguments of a constitutional stature.

## V. The Free Exercise Argument

The theory of absolutism has been completely abandoned. The simplistic argument that every form of financial aid to church-sponsored activity violates the "religion clauses" was rejected long ago in *Bradfield v. Roberts*.[67] Bus transportation, textbooks, federal grants, and tax exemptions all have the economic consequence of aiding religious institutions. Yet all have been constitutionally upheld.

The primary effect test reads: a statute's principal or primary effect must be one that neither advances *nor inhibits* religion. If the large-scale sectarian school aid bills are going to succeed, their advocates must insist upon more consideration for the free exercise portion of that test. This free exercise argument has been

a compendium of studies conducted on the several parts of the project. All citations here are to the summary report.) All of the statistics are compatible with those cited by Justice White in his dissenting opinion in *Nyquist*, 93 S. Ct. at 2995.

62 NOTRE DAME REPORT ON NONPUBLIC SCHOOLS at 16.

Catholic elementary school enrollment declined from a peak of 4.49 million in 1965 to 3.07 million in 1971. Secondary school enrollment declined from 1.08 million to .95 million during the same time period.

63 *Id.* at 17.

64 *Id.* at 18.

65 The enrollments in nonpublic schools in the country's 15 largest cities, and the corresponding percentages are set forth by Justice White in his lengthy presentation of the economic argument in *Nyquist* at page 2995 in footnote 5. One half of all nonpublic school children attend school in the center cities. In the nation's 10 largest cities, 25 percent of the school children are in nonpublic schools. PRESIDENT'S COMMISSION ON SCHOOL FINANCE, SCHOOLS, PEOPLE, AND MONEY: THE NEED FOR EDUCATIONAL REFORM, FINAL REPORT 54 (1972).

66 Everson v. Board of Education, 330 U.S. 1, 18 (1947); Tilton v. Richardson, 403 U.S. 602, 679 (1971).

67 175 U.S. 291 (1899).

asserted in the past, but not persuasively. Parents have a constitutional right to send their children to church-related schools.[68] A constitutional right should be exercisable without the incurrence of a penalty. Those who exercise *this* constitutional right, however, must not only pay taxes but also tuition. Thus parents of nonpublic school children are being handicapped for exercising a constitutional privilege.

The conflict between the free exercise clause and the establishment clause is apparent. In certain instances enforcement of the establishment prohibition serves to protect the values of both constitutional clauses; *e.g.*, the establishment clause deterrent against government proclamation of an official state church protects the individual's free exercise rights. If the state, however, in its efforts to avoid establishment, displays a hostility toward religion, free exercise is endangered. This is the source of the struggle in the courts to find a neutral course between the two religion clauses.

One extreme denies all aid to nonpublic schools because the establishment clause must be strictly construed. The other extreme asserts that there be public aid to sectarian schools as a matter of constitutional right. This second extreme position was challenged before a three-judge district court in *Brusca v. Missouri ex rel. State Board of Education*.[69] Plaintiff contended that the Missouri Constitution was invalid in part because it prohibited the use of funds to aid, directly or indirectly, religious or sectarian schools. The court rejected this argument relying on *Lemon v. Kurtzman* and the tripartite test of secular purpose, primary effect, and excessive entanglement. Although these standards have been applied generally to establishment clause claims, the court in *Brusca* found no difficulty in applying them to a free exercise claim.

> [T]he state could not, without manifesting hostility rather than the "wholesome neutrality" commanded by the First Amendment, prevent a parent from choosing a sectarian-sponsored private school for no reason other than its substantial religious character. But a parent's right to choose a religious private school for his children may not be equated with a right to insist that the state is compelled to finance his child's nonpublic school education . . . .[70]

The voluntary exercise of a right by some parents should not be subsidized involuntarily by all. If the court in *Brusca* had sustained the free exercise claim, it would have conceivably precluded a taxpayer from arguing that he was being coerced to support religious schools as long as families favoring parochial schools are forced to support public schools. Modern writers contend that this approach violates the principle of voluntarism in the religion clauses because individuals should not be made to support or not support religion.[71] Thus it is

68 Pierce v. Society of Sisters, 268 U.S. 510 (1925). This holding was recently reaffirmed in Wisconsin v. Yoder, 406 U.S. 205 (1972).

69 332 F. Supp. 275 (E.D. Mo. 1971), *aff'd mem.*, 92 S. Ct. 1493 (1972).

70 *Id.* at 277.

71 Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1685-86 (1969). The "coercion" theory has been used by opponents of parochial aid to urge that they are being forced to utilize their tax monies for religious purposes, an inhibition of their first amendment religious freedom in the sense that the first amendment relieves them of the duty

argued that voluntarism does not *require* compensation by the government of persons disadvantaged due to their religion. On the other hand, if the disadvantage stems from the action of the government, i.e., public school taxes, then the government should be *allowed* to remedy the situation to permit a person to freely choose his mode of education. It is apparent that the solution for avoiding conflict between the establishment and free exercise clauses is a balancing which attempts to achieve the ideal of "neutrality."

The neutrality concept was born in *Everson* to resolve just such a conflict. In *Walz* it was expanded to a "benevolent neutrality." The Supreme Court, in the name of neutrality, has ignored all free exercise arguments by advocates of large-scale aid to nonpublic schools. *Nyquist* met the free exercise argument head-on and strongly reaffirmed the "neutrality" theory.[72]

A premise of the neutrality theory and an assumption which has been made by the Court in all of its public aid to nonpublic school cases is that the public schools are themselves neutral. This assumption could be attacked by an evidentiary presentation at a trial if the nonpublic school aid cases could proceed past the point of pre-trial motions to dismiss and summary judgment determination. If the neutrality of the public schools is successfully attacked, then the whole foundation of neutrality would be substantially shifted,[73] and the door would be opened to a far greater extent for free exercise claims that the parents of parochial school students must pay twice—taxes and tuition—for the exercise of a constitutional right. If it can be shown that the state government is not neutral in its own administration and dissemination of education in the public schools, then those who attend schools that are admittedly not neutral can demand greater benefits from the state government.

The unsupported assumption of public school neutrality was spelled out by Justice Jackson in his dissenting opinion in *Everson*:

> [The public education system] is organized on the premise that secular education can be isolated from all religious teaching so that the school can inculcate all needed temporal knowledge and also maintain a strict and lofty neutrality as to religion . . . . Whether such a disjunction is possible, and if possible whether it is wise, are questions I need not try to answer.[74]

There are two directions in which an attack upon the neutrality of public schools can travel.[75] The first attempts to show that in the classrooms of our

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to support a religion. There must be some showing of coercion, however. *See* Board of Education v. Allen, 392 U.S. 236, 264 (1968) (Black, J., dissenting); Zorach v. Clausen, 343 U.S. 306, 311 (1952).

72 93 S. Ct. at 2973.

73 One author contended that the neutrality concept was already on the wane since it was completely ignored in *Tilton*. Kauper, *Public Aid for Parochial Schools*, 13 ARIZ. L. REV. 567, 583 (1971).

74 330 U.S. at 23-24.

75 Freund, *supra* note 71 at 1689 postulates two different directions: that public school education is empty of religious content and therefore not genuine education at all, or that it inculcates a religion of its own, secularism, and hence the parochial schools are entitled to equal support for their brand of religious education.

This comment finds a different alternative and accepts only Freund's latter postulate as a possible thesis, though not a likely selection for the courts.

public schools the doctrine of secular humanism—a religion in itself—is taught. This argument was before the district court in *Brusca v. Missouri.*[76]

Secular humanism is the philosophy which claims that religion is irrelevant in the affairs of state and must be kept totally separate. Proponents of sectarian school aid argue that the teaching of religion is constitutionally banned. Thus, the doctrine of secular humanism is fostered in the public schools. But secular humanism is itself a religion much like atheism and is not a neutral philosophy.[77] It is totally opposed to the tenets of other religions like Catholicism, Judaism, etc. Therefore, the state has established its own religion of secular humanism and/or the state has inhibited the free exercise of religion among those who attend the public schools and those who embrace a religion other than secular humanism.

This argument had no success before the courts in *Brusca* because, there again, the case was decided in the lower court at the pre-trial stage with no evidentiary presentation to support such an argument. Further, this argument will likely never have much chance of success in the U. S. Supreme Court since to embrace such logic the Court would have to reject its own reasoning in a long line of school prayer cases including *McCollum v. Board of Education,*[78] *Engel v. Vitale,*[79] and *Abington School District v. Schempp.*[80]

The school prayer cases, however, may actually *support* another line of attack upon neutrality in public schools. These decisions, which ruled on teaching of sectarian religion, school prayer, and Bible reading in public schools, underscore the inescapable nexus between religion and the secular life of the nation.[81] In *Engel* the majority found that "[t]he history of man is inseparable from the history of religion."[82] In *Schempp*, we read, "[i]t is true that religion has been closely identified with our history and government."[83] And in *Everson v. Board of Education,* Justice Jackson stated: "[o]ur public school system, if not a product of Protestantism, at least is more consistent with it than with the Catholic culture and scheme of values."[84] What is sought to be established is the thought that religion in the conventional sense, i.e., religion in the general Christian mold, is inextricably involved in the instruction given in public schools. General intuition and personal experience may support this thesis, but the Supreme Court will require empirical evidence of the kind it is only likely to get if and when a non-public school aid case passes the pre-trial level in the district courts. The textbook evidence for this proposition does exist.[85] The teaching of religion in public

76 332 F. Supp. 275 (E.D. Mo. 1971), *aff'd mem.*, 92 S. Ct. 1493 (1972).

77 The Supreme Court so held in Torcaso v. Watkins, 367 U.S. 488, 495 n.11 (1961); *see* Washington Ethical Soc'y v. District of Columbia, 249 F.2d 127 (D.C. Cir. 1957); Valente, *Aid to Church Related Education — New Directions Without Dogma,* 55 VA. L. REV. 579, 609 (1969).

78 333 U.S. 203 (1948).

79 370 U.S. 421 (1962).

80 374 U.S. 203 (1963).

81 *See* Duffy, *A Review of Supreme Court Decisions on Aid to Nonpublic Elementary and Secondary Education,* 23 HAST. L.J. 966, 973-74 (1972).

82 370 U.S. at 434.

83 374 U.S. at 212.

84 330 U.S. at 23.

85 Valente, *supra* note 77 at 595 n.75, 609 nn.141-42, lists the following authorities for the proposition that conventional religion permeates the public schools: AMERICAN ASSN. OF SCHOOL ADMINISTRATORS, REPORT ON RELIGION IN THE PUBLIC SCHOOLS 63 (1964); P. Phenix, THE SCHOLARS LOOK AT SCHOOLS, 18 (1962); Hirst, *Public and Private Values, and*

schools is subtle and is not a matter of policy, but the fact of its presence should call for considerable re-evaluation of the neutrality concept.

## VI. Conclusion

It may be that there is no way to subsidize parochial elementary or secondary schools in any substantial manner. The Court's double-edged sword of the "effect" and "entanglement" standards may be a way of saying that a little aid is all right, but a lot is unconstitutional. "The Court may have employed a verbal formula to impose a quantitative limit upon parochial school funding."[86]

It is doubtful that the three-pronged test descended from *Schempp* and *Walz* will be changed. These are sound standards which protect the full interests of both church and state. We do not need new tests but rather re-emphasis of certain parts of the existing tests and balancing of all the factors which come into play under these criteria. There must be a re-emphasis of free exercise rights when the Court seeks to ascertain the secular purpose, primary effect, and entanglement standards essentially created as establishment clause criteria. Legitimate secular purposes and effects should be given more weight by the Court and not just summarily dismissed as substantial but irrelevant.

Despite the grave constitutional issues, the problem of nonpublic school aid inevitably boils down to a question of social philosophy: is the largely urban phenomenon of nonpublic education desirable? Is pluralism in education to be encouraged or allowed to decay?

There are many who equate pluralism and diversity with divisiveness and polarity; the role of education should be the elimination of ethnic and cultural differences which are the root causes of prejudice and discrimination. On the other hand, advocates of pluralism assert that nonpublic education is a healthy alternative to traditional public education.[87] The issue of pluralism is one which the state legislatures should be entitled to resolve.[88]

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*Religious and Public Education,* RELIGION AND PUBLIC EDUCATION 330 (A. Sizer ed. 1967); Hutchins, *The Future of the Wall, in* THE WALL BETWEEN CHURCH AND STATE, 17, 20 (D. Oaks ed. 1963); Kohlberg, *Moral and Religious Education and the Public Schools,* in RELIGION AND PUBLIC EDUCATION, 164-65 (A. Sizer ed. 1967).

86 Haskell, *The Prospects for Public Aid to Parochial Schools,* 56 MINN. L. REV. 159, 181 (1971).

87 *See,* Americans United for Sep. of Church & State v. Oakey, 339 F. Supp. 545, 553 (Oakes, J., concurring) (D. Vt. 1972):

> In the advancement of this pluralistic society, the parochial school system has played a not insignificant part. *Lemon,* I fear, will tend toward a homogenization of American education. There will, therefore, be all the more reason to search for ways within the American system of public education that will preserve, indeed promote, the diversity of individual belief—religious, political and social—that, along with our Bill of Rights, distinguishes us so plainly from certain uniform, unified and uni-governed societies elsewhere in the world.

*See also* Note, *Education Vouchers: The Fruit of the Lemon Tree,* 24 STAN. L. REV. 687 n.1 (1972):

> [The arguments in favor of pluralism] include greater responsiveness by educators to the demands of education consumers, both parents and children, greater satisfaction within a community toward its educational system, and increased tailoring of specific educational programs to individual needs. *See,* CENTER FOR THE STUDY OF PUBLIC POLICY, EDUCATION VOUCHERS 1-6 (1970); M. FRIEDMAN, CAPITALISM AND FREEDOM 91-94 (1962).

88 *Cf.* New York's statement of legislative policy *supra* note 40, §§ 1-2.