The Continuing Debate Over Tuition Tax Credits

By HOWARD O. HUNTER*

I. Introduction

Prior to the end of World War II, the federal government had little involvement in educational matters. Since then it has become a principal benefactor of higher education and has provided substantial financial assistance to public elementary and secondary schools.[1] In addition, the federal government has funded various programs for preschool education, for adult education, for the training of physically or mentally disabled persons, for student loans, for veterans' benefits and for numerous other educational programs.[2] Thus education, once a matter for private control and support and for local and state government regulation has now become a matter of significant concern to the federal government.

There is no doubt that federal financial assistance has done much good. Tax dollars have funded important, basic research. They have provided needy students the wherewithal to obtain a college education. They have relieved local governments of some of the costs of running

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1. For an excellent discussion of the impact of federal financial aid on scientific research, see B. SMITH & J. KARLESKY, THE UNIVERSITIES IN THE NATION'S RESEARCH EFFORT (1977). *See also* Wolanin and Gladieux, *A Charter for Federal Policy Toward Postsecondary Education: The Education Amendments of 1972*, 4 J. L. & EDUC. 301 (1975). Aid to public schools comes in a variety of forms from help with construction of the schools' facilities to hot lunches to pre-school programs like Head Start.

2. The various aid programs available to students are listed in these federal publication: H.R. DOC. No. 92-90, 92d Cong., 1st Sess. 3 (1971). There are literally dozens of ways by which federal assistance may be obtained for various educational programs. The index to federal statutes relating to educational programs covers almost 20 pages. For a current guide, see THE COUNCIL FOR ADVANCEMENT AND SUPPORT OF EDUCATION, FEDERAL AFFAIRS 1978-79 (1978).

schools. They have funded programs, built buildings, paid salaries and purchased food and equipment. Indeed at the university level, federal aid may have made the difference between continued quality and severe cutbacks. In some cases the very survival of an institution may have depended on federal assistance.

Such aid, however, has not come without cost. For instance, local authority over education has been severely eroded. At the university level, there is growing concern with the loss of institutional autonomy, excessive regulation, increased bureaucratization and potential interference with academic freedom.[3] Many of these concerns deserve and have received close attention. But few, if any, of the critics of federal intrusion into educational matters desire an end to federal aid. Thus far, most critics believe that the benefits outweigh the costs (although the time may be approaching when that is no longer the case).[4] There is, for the most part, a consensus that it is proper for the federal government to provide financial assistance to educational institutions.

There has been good reason for this consensus. Inflation has been one of the most serious problems besetting schools. A private college has no way to deal with increased costs except by increasing tuition, spending endowment capital, curtailing programs, cutting salaries or jobs, or seeking additional outside aid. However these draconian measures still have not always proven successful. Increases in tuition cannot be continued indefinitely; otherwise there will be virtually no students who can afford the fees. By the same token, spending endowment capital is suicidal over the long term. Some programs and positions can usually be eliminated, but wholesale cuts may change the

3. *See generally* Brooks, *The Federal Government and the Autonomy of Scholarship*, in CONTROVERSIES AND DECISIONS: THE SOCIAL SCIENCES AND PUBLIC POLICY (C. Frankel ed. 1976); O'Neil, *God and Government at Yale: The Limits of Federal Regulation of Higher Education*, 44 U. CIN. L. REV. 525 (1975); Kidd, *The Implications of Research Funds for Academic Freedom*, 28 L. & CONTEMP. PROB. 613 (1963); Kirk, *Massive Subsidies and Academic Freedom*, 28 L. & CONTEMP. PROB. 607 (1963). *See also* 42 U.S.C. § 2000d (1970); 20 U.S.C. §§ 1681-82 (1972); 29 U.S.C. § 794 (Supp. 1977); 45 C.F.R. §§ 80.6-80.10, 86.71, 84.61 (1979).

4. As one commentator has noted, "Still, it is arguable that the core activities of the university, teaching and research, have been largely untouched by the direct hand of public regulation. That is emphatically not to say that the substance of the institution's work has been unaffected by government funding decisions and priorities. Clearly it has been, and in some areas profoundly so. But, remarkably, with few exceptions the hand of the government has been largely absent from the classroom, the laboratory, and even the admission committee—despite the enormous sums of federal money spent on teaching research and student assistance." Rosenzweig, *An End to Autonomy: Who Pulls the Strings?*, CHANGE, March 1978, at 28-29. The author did go on to note that government is becoming less reluctant to intervene.

very nature of the institution.[5] Public schools and colleges can, of course, get more money from state or local governments as well as from the federal government and private donors. The impact of higher taxes for education may be felt more directly at the state or local level and this may sometimes make it politically difficult to increase funding from such sources.[6] The sole satisfactory remedy for both private and public institutions is increased outside financial help, and in that respect the federal government has been a good friend to education.

Despite extraordinary federal support to higher education and to lower public schools, private elementary and secondary schools have largely been excluded from direct aid programs. This exclusion has resulted in large part from the Supreme Court's interpretation of the establishment clause of the First Amendment.[7] Most nonprofit private schools below the university level are sectarian. The Court's restrictive First Amendment pronouncements have had the greatest impact on these private schools. The Court's interpretation of the Constitution limiting such aid has been hotly debated.[8] (The current state of the law in this area is discussed in the next part of this article.)

During the past decade there has been a good deal of discussion about assistance programs which might provide direct benefits with a minimum of regulatory impact and which might be available for private elementary and secondary schools without running afoul of the establishment clause. A perennial favorite of many has been the tuition tax credit. Some form of tuition tax credit legislation has been

5. Inflationary pressures may have some beneficial effect. Schools and colleges may be forced to examine their basic purposes and goals. As a result the quality of the offerings may be improved by a reduction in quantity and by a concentration rather than a diffusion of resources. Educators are certainly not immune to the growth syndrome.

6. Taxes are also the source of federal grants. This means that monies spent on education by the central government may contribute to higher taxes or to greater deficits with their inflationary impact. Because the federal government is more distant and the burden is spread out over a larger group, it may still be politically easier to obtain such assistance than to seek more money from local and state governments.

7. The First Amendment to the United States Constitution provides in part that "Congress shall make no law respecting an establishment of religion. . . ." U.S. CONST. amend. I.

8. *Compare, e.g.*, Butler & Scanlan, *Wall of Separation—Judicial Gloss on the First Amendment*, 37 NOTRE DAME LAW. 288 (1962); Costanzo, *Federal Aid to Education and Religious Liberty*, 36 U. DET. L.J. 1 (1958); Forkasch, *Religion, Education, and the Constitution—A Middle Way*, 23 LOY. L. REV. 617 (1977); Kenealy, *Equal Justice Under Law—Tax Aid to Education* 7 CATH. LAW. 183 (1961); and Manning, *Aid to Education—Federal Fashion*, 29 FORDHAM L. REV. 495 (1961); *with* Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680 (1969); Pfeffer, *Federal Funds for Parochial Schools? No*, 37 NOTRE DAME LAW. 309 (1962); *and* Comment, *Textbook Loans to Sectarian Students—A Weathering of the Wall*, 1 U. TOL. L. REV. 117 (1969).

considered by every Congress since the second session of the 88th Congress in 1964.[9] Although the various bills have differed significantly in detail, they have all had a common purpose: the alleviation of some of the burden of tuition payments to private schools by allowing taxpaying students or their parents to take a credit against income tax liabilities equal to a portion of the tuition payments. This article will use the most recent proposals as models for discussing the constitutionality of tuition tax credits. On June 1, 1978, the House passed a bill which would allow a credit of twenty-five percent of tuition and fees to a maximum for college students of $100 in 1978, $150 in 1979 and $250 in 1980. Elementary and secondary school students would have received a maximum credit of $50 in 1978 and $100 for each of the next two years. The legislation was to expire after three years.[10] The Senate Finance Committee reported favorably on a similar bill, which would have allowed a credit equal to 50% of tuition and fees up to a maximum of $250 for two years during which time the credits would also be limited to college tuition. After two years the credit maximum would have arisen to $500 and would have been extended to elementary, secondary and graduate students.[11] The Senate has passed similar legislation in the past.[12] This particular bill had forty-three sponsors when it was introduced in September 1977, from Senators Helms and Thurmond on the right to Senator Ribicoff and the late Senator Humphrey on the left. Past history and the breadth of current bipartisan support indicate that the Senate is likely to act favorably again (although the President has announced he is inclined to veto a tuition tax credit bill).[13]

Regardless of whether any of the proposals actually become law in the near future they will probably remain in the news. Congress will continue to debate the issue as long as educational institutions continue to have serious financial needs. However, should a bill eventually become law, it will almost certainly be challenged in the courts. This has

9. For a catalogue of the various proposals, see Pastorius, *Tax Relief to Students and Parents for Higher Education Expenses*, Cong. Research Service No. 76-221 CR, at CRS-21, n.1 (1976).

10. The bill as passed was an amended verison of H.R. 12050, which was favorably reported out by the Committee on Ways and Means on April 17, 1978. For a general discussion of H.R. 12050 see, H.R. REP. No. 95-1056, 95th Cong., 2d Sess. (1978) [Hereinafter HOUSE REP.].

11. The Senate bill is S. 2142, 95th Cong., 1st Sess. (1977). Its chief sponsors were Senators Moynihan (N.Y.) and Packwood (Or.), but forty-one additional Senators joined in sponsoring the bill when it was introduced in September 1977.

12. *See generally* Pastorius, *supra* note 9.

13. *See, e.g.*, Atlanta J., June 2, 1978, at 3-A, col. 1.

invariably happened to similar state statutes.[14] There is no reason to believe that the experience would be different at the federal level.

The proponents of tuition tax credits base their arguments, in general, on four basic assumptions: (i) Private education, both at the university level and below, is an important asset in that it provides an alternative to state-sponsored education and adds significantly to cultural diversity and creative scholarship; (ii) Tuition-paying parents, especially in the middle-income levels, need both a tax break and help in coping with inflation;[15] (iii) Tax credits, although directed toward parents and students, will necessarily help private schools and colleges by relieving some of the demands for scholarships and by increasing the available pool of applicants; (iv) Tax credits provide a simple, unobstrusive, and relatively inexpensive means for aiding private education. With these assumptions in mind, Senator Moynihan of New York, one of the principal supporters of tuition tax credit legislation, has put the issue in terms of an attempt to preserve and protect the private sector against public monopolization:

> Equality of educational opportunity has been the purpose of this legislation and the programs that resulted have made great strides in achieving that objective. But thus far we have succeeded in providing equality only to those who enroll in government schools. We have failed the parents who prefer to send their children to the schools that are descended from the older, private school systems. We are rapidly enroute to a complete conquest of the private sector of American education by the public sector.[16]

For the most part, the opponents of tuition tax credits agree with the general view that the federal government should provide assistance to education. They argue, however, that tax credits would violate the First Amendment by supporting sectarian schools, that credits might wind up providing support for segregated schools, that the legislation would benefit a relatively small class of reasonably wealthy citizens at the expense of all other taxpayers, that the proposals bear no relation to need, that the cost would be prohibitive in terms of the benefits, that

14. *See* notes 50-67 and accompanying text *infra*.

15. In the words of Rep. Elliott Levitas, one of the sponsors of tuition tax credit legislation in the House, "The fact is that this bill is not an education bill as such. This bill is a tax relief bill. This bill is the first effort in recent memory to provide some tax relief to the working, productive middle-income people. I hope it is only the first of many such steps to relieve the middle-class American who is being bled to death by the taxation burden he or she bears." 124 CONG. REC. 82 (1978) (Extensions of Remarks by Rep. Levitas).

16. D. Moynihan, *Why Private Schools Merit Public Aid*, Washington Post, Mar. 5, 1978, at 1, col. 1.

the effects would be inflationary and that pressure may develop to cut existing programs.

This article will consider the principal constitutional issues involved in this question: those which involve establishment of religion questions and those which involve problems of racial discrimination. The proposed legislation will be analyzed in the context of the First Amendment and due process/equal protection theories. The tuition tax credit proposals now under consideration would likely be found to be unconstitutional under the First Amendment, although there are sufficient safeguards against the misuse of credits for the support of "segregation academies," and the proposals would probably withstand an equal protection analysis.

II. Religious Freedom and School Aid

Because many of the original settlers were members of religious sects who were fleeing from persecution, the framers of the Constitution and the Bill of Rights intended that the young republic not have a state-sponsored religion. This is not to say that the American colonies were free of religious prejudice. The story of Roger Williams, among others, made the opposite quite clear. By the post-revolutionary period, however, there was significant political support for the proposition that religious tolerance was to be respected as much as a national religion was to be feared.[17] The First Amendment was designed to protect the one and to prevent the other by prohibiting any "establishment" of religion and by safeguarding the "free exercise" of religious beliefs. The full intention of the Framers and the scope of the First Amendment's protection of and against religion has been the subject of a good deal of historical analysis and commentary, none of which is ultimately conclusive.[18] Concerning tuition tax credits, the most relevant history is limited to a series of judicial decisions, principally by the Supreme Court, during the past thirty years. The current understanding and interpretation of the establishment clause has developed almost exclusively from decisions involving challenges to state aid programs which benefit sectarian schools or challenges to religious activities in public

17. *See, e.g.*, the arguments of James Madison discussed and reprinted in connection with the dissent by Justice Douglas to the decision in Walz v. Tax Comm'n, 397 U.S. 664, 719-27 (1970) (Douglas, J., dissenting).

18. *See, e.g.*, C. ANTIEAU, A. DOWNEY & E. ROBERTS, FREEDOM FROM FEDERAL ESTABLISHMENT (1964); C. ANTIEAU, P. CARROLL & T. BURKE, RELIGION UNDER THE STATE CONSTITUTIONS (1965); P. KURLAND, RELIGION AND LAW (1962); J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 627-34 (5th ed. 1891); Costanzo, *Thomas Jefferson, Religious Education and Public Law*, 8 J. PUB. L. 81 (1959).

schools.[19] The decisions have severely limited the permissible scope of government aid to sectarian schools.

The Court has treated colleges and universities differently from elementary and secondary schools. Therefore, the following discussion analyzes the cases concerning these two types of educational institutions separately.

A. Government Aid to Private Elementary and Secondary Schools

Any proposal for public assistance to private schools below the college level which does not exclude assistance to sectarian schools carries with it a presumption of constitutional invalidity. That is the teaching of Supreme Court decisions since the Court first addressed the issue thirty-one years ago in *Everson v. Board of Education*.[20] The *Everson* case is particularly noteworthy for two reasons: (i) it specifically applied the establishment clause to the states through the Fourteenth Amendment, and (ii) it adopted, implicitly if not expressly, a "child benefit" approach to the analysis of aid programs which continues to have some vitality.[21] *Everson* involved a local district plan for the reimbursement of bus fares to parents of all school children whether they attended private or public schools. The only private, non-profit school in the district was a Catholic parochial school. By a five to four margin the Court held the plan constitutional because it provided a benefit of general application, directed toward children (and their parents) rather than a benefit directed toward the support of any particular religion or sect. The majority analogized the provision of bus transportation to the provision of other basic services, such as fire and police protection which are available to all citizens and institutions. All such benefits were said to be of general application—they could be given to sectarian schools as part of a general aid program without violating the First Amendment. *Everson* had a limited application. It certainly did not open the door for significant public aid to sectarian schools. If any-

19. These decisions have been criticized for limiting the free exercise clause by imposing a state sponsored secularism that makes it more difficult to practice religion. *See, e.g.*, Costanzo, *Federal Aid to Education and Religious Liberty*, 36 U. DET. L.J. 1 (1958); Drinan, *Implications of the Allen Textbook Decision*, 14 CATH. LAW. 285 (1968); Manning, *Aid to Education—Federal Fashion*, 29 FORDHAM L. REV. 495 (1961); Note, *Financial Aid for Nonpublic Education: A Decision for the Courts or Legislatures?*, 49 NOTRE DAME LAW. 366 (1973).

20. 330 U.S. 1 (1947).

21. The "child benefit" approach is quite straightforward. It analyzes a program from society's view of its responsibilities for the welfare, health and education of children. Thus the focus is more on the goal and the means of achieving it than on the character of the institution which is providing the service.

thing, it suggested that the proponents of such aid would have to follow a narrow path.[22]

The locus of litigation subsequent to *Everson* concerning the establishment clause and schools shifted from the private to the public sector and to the question of religious instruction in public schools. In 1948 the Supreme Court invalidated an Illinois program of offering religious instruction to public school students during times of mandatory attendance, although students were given the opportunity to opt out of the instruction and to use the time for study or other activities on the school campus.[23] Four years later, however, the Court approved a "released time" program whereby public school students were allowed to attend religious classes during regular school hours at other locations. The Court found the program to be permissible because the religious instruction occurred off-campus and without direct state aid.[24]

The most significant and controversial[25] decisions concerning the First Amendment and schools involved prayers and not aid. In *Engel v. Vitale*,[26] the Supreme Court held that reading a nondenominational prayer,[27] which had been drafted by a bureaucrat, in public school classrooms was a violation of the establishment clause. The case of *School District v. Schempp*,[28] decided a year later, presented a somewhat more subtle problem, a program of voluntary *Bible* reading and recitation of the Lord's Prayer. The Court, following *Engel*, invalidated this program calling it a generalized form of state support for religion even though the program did not advance the beliefs of any particular sect.[29] The opinion was careful though to allow incidental

22. The narrowness of the margin was made clear by the complete reversal of opinion by Justice Douglas, a member of the *Everson* majority, some fifteen years later. *See* Engel v. Vitale, 370 U.S. 421, 443-44 (1962) (Douglas, J., concurring).

23. Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (1948).

24. Zorach v. Clauson, 343 U.S. 306 (1952). It has been suggested that the approval of this program was an accommodation which furthered the purposes of the free exercise clause. *See* J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 869 (1978). For sharp criticisms of *Everson, McCollum* and *Zorach*, see Kenealy, *Equal Justice Under Law—Tax Aid to Education*, 7 CATH. LAW. 183 (1961); Tinnelly, *The Right to Educate—The Role of The Parent, the Church and the State*, 4 CATH. LAW. 198 (1958).

25. The controversy was, for the most part, of the Court rather than among the Justices.

26. 370 U.S. 421 (1962).

27. Although described as nondenominational, the prayer most closely resembled the language of Protestant Christianity. It was not a form of prayer likely to be heard in a synagogue, a Catholic church, a Mosque or even in an Episcopalian service.

28. 374 U.S. 203 (1963).

29. "Voluntary" may be something of a misnomer when applied to programs such as these. There may be no official institutional requirement of participation, but there may be extraordinary peer pressure to conform. Children do not generally like to be "different."

references to religion during ceremonies and the study of the *Bible* or religion as an academic subject.

Several years later, in *Epperson v. Arkansas*,[30] the Supreme Court brought to a final, belated conclusion the battle between William Jennings Bryan and Clarence Darrow over Darwinism.[31] The state of Arkansas forbade the teaching of evolution as a biological theory. Not surprisingly, the Supreme Court found that this amounted to state advocacy of a particular religious belief and was, therefore, an impermissible limitation on the curricula of public schools.

Several general criteria for testing specific policies against the establishment clause emerged from the public school cases. One of the more significant guide posts was the Court's rejection of the argument that the prohibition of religious teaching violated the free exercise clause because the prohibition amounted to state advocacy of an anti-religious secularism.[32] Another was its support for a "neutrality principle." The Court's "neutrality" principle, the basis of which is that a public institution must not support or advocate a religious belief, has been and continues to be severely criticized,[33] but it is still a central feature of First Amendment adjudication. Proceeding from the basis of the "neutrality" principle, the cases from *Everson* through *Epperson* tested particular programs and policies according to what is often called a "purpose and effect" analysis. A program may be constitutional if its purpose is secular and its primary effect is not to advance (or to inhibit) religious beliefs. For example, transportation is certainly secular: its principal effect is to get children to school, rather than to inculcate any theistic ideas, provided that it is generally available to all students and is not limited principally to sectarian school students. Prayer in school, however, fails on both counts. Released time is more difficult, but the Court has been willing to lean in favor of it, perhaps in deference to the free exercise clause.

Although there was a great deal of discussion about federal aid to education during the early and mid-sixties,[34] it was not until 1968 that

30. 393 U.S. 97 (1968).

31. *See* Scopes v. State, 154 Tenn. 105, 289 S.W. 363 (1927).

32. *See* School Dist. v. Schempp, 370 U.S. 203, 225-26 (1963).

33. For instance, a Roman Catholic priest recently stated, "These schools (public) are neither neutral in the matter of religion nor even proreligion, unless it be the atheism/secular humanism that is their *de facto* catechism." Letter from Fr. G. D. Wiebbe, S.S.C., 73 LIBERTY 32 (May-June 1978). For more on the "neutrality principle," see Costanzo, *Wholesome Neutrality: Law and Education*, 43 N. DAKOTA L. REV. 605 (1967).

34. *See, e.g.*, Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 CALIF. L. REV. 260 (1968); Drinan, *Should the State Aid Private Schools?*, 37 CONN. B.J. 361 (1963); Giannella, *Religious Liberty, Nonestablishment and Doctrinal Development*, 80 HARV. L.

the Supreme Court directly faced the problem of public assistance to parochial schools again. In *Board of Education v. Allen*,[35] the Court upheld a New York textbook loan program which provided for the loan of textbooks to private and public schools. Only those books approved for use in the public schools or approved by the local school board as being secular could be lent to private schools. By applying the purpose and effect test, the Court came to a conclusion similar to that in *Everson*. A state subsidy of secular textbooks for schoolchildren was held to be a general benefit for a secular purpose (the education of cihldren) which does not have the primary effect of advancing religion despite the incidental benefits to parochial schools.[36]

As particularly noted by Justice Harlan in his concurring opinion,[37] the *Allen* case introduced a new element into the methodology of analyzing establishment clause cases—the question of the potential "political divisiveness" attendant to the aid package. In *Allen* the question of divisiveness was closely related to what has come to be known as the "excessive entanglement" problem. In order to determine the purpose and effect of a program or policy and to insure that it remains secular, a government may have to become so excessively involved in analyzing, planning and administering a school curriculum that the result is an aid plan which is a bureaucratic nightmare. If so, the courts must be careful in approving it, for it may involve the government too deeply in sectarian affairs. In later cases the "entanglement" test became a bootstrap means for invalidating programs under the purpose and effect test.

Two years later parochial schools won an indirect and ultimately pyrrhic victory in their battle for public aid. In *Walz v. Tax Commis-*

REV. 1381 (1967); Hayes, *The Constitutional Permissibility of the Participation of Church-Related Schools in the Administration's Proposed Program of Massive Federal Aid to Education*, 11 DE PAUL L. REV. 161 (1962); Nat'l Cath. Welfare Conf., *The Constitutionality of the Inclusion of Church-Related Schools in Federal Aid to Education*, 50 GEO. L.J. 397 (1961); Rafalko, *The Federal Aid to Private School Controversy: A Look*, 3 DUQ. L. REV. 211 (1965); Comment, *The Elementary and Secondary Education Act*, 65 MICH. L. REV. 1184 (1967).

35. 392 U.S. 236 (1968).

36. The *Allen* case is interesting to read in connection with Norwood v. Harrison, 413 U.S. 455 (1973). There, a textbook loan program was invalidated because some of the private school recipients pursued racist policies. *See* notes 129-37 and accompanying text *infra*.

37. 392 U.S. 236, 249 (1968) (Harlan, J., concurring). For criticism of *Allen, see, e.g.*, Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680 (1969); Comment, *Textbook Loans to Sectarian Students—A Weathering of the Wall*, 1 U. TOL. L. REV. 117 (1969). *Cf.* Note, *Aid to Parochial Schools and the Establishment Clause—Everson to Allen: From Buses to Books and Beyond*, 18 DE PAUL L. REV. 785 (1969); Note, *Sectarian Books, The Supreme Court and the Establishment Clause*, 79 YALE L.J. 111 (1969).

sion,[38] the Court ruled that churches were entitled to tax exemptions just as any other non-profit institution. Although this decision preserved the existence of church exemptions from First Amendment challenge, the Court in *Walz* more clearly added the "excessive entanglement" element to its purpose and effect test for establishment clause cases. As a result, the Court set the stage for a series of cases which placed even stricter limitations on the aid which may be given to sectarian schools.

In the next term of Court, the "excessive entanglement" element became central to the decision in *Lemon v. Kurtzman (Lemon I)*.[39] *Lemon I* involved a Rhode Island program of salary supplements to private school teachers of secular subjects in districts where public schools had higher salary scales, as well as a Pennsylvania program for a similar purpose in which payments were made to the schools rather than to the teachers. Most of the affected schools were run by the Catholic Church, but the subsidies were specifically limited to secular subjects and materials. The Court invalidated both state programs and, in doing so, focused principally on the entanglement issue. Chief Justice Burger wrote the Court's opinion and cited three factors to be considered in determining whether a program created an excessive entanglement: (i) the character and purpose of the institution benefited; (ii) the nature of the aid; and (iii) the resulting relationship between government and church officials.[40] The application of this test led to a circular

38. 397 U.S. 664 (1970). For an interesting discussion of some of the implications of *Walz*, see Note, *Public Aid to Private Education*, 20 CATH. U. L. REV. 528 (1970).

39. 403 U.S. 602 (1971). For a rather sharp criticism of this decision and the earlier *Walz* case, see Giannella, *Lemon and Tilton: The Bitter and the Sweet of Church-State Entanglement*, 1971 SUP. CT. REV. 147 (1971).

40. 403 U.S. at 615. *See also*, J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 854 (1978). The *Lemon* decision spawned a host of academic comments. *See, e.g.*, Haskell, *The Prospects for Public Aid for Parochial Schools*, 56 MINN. L. REV. 159 (1971); Taylor, *Nine Rulings: Three Wins, Three Losses, and Three Remands on Government Aid to Church-Related Institutions*, 17 CATH. LAW. 182 (1971); Note, *State Aid to Nonpublic Schools: The Lemon Test*, 25 ARK. L. REV. 535 (1972); Note, *Constitutionality of Tax Credits as a Means of Providing Financial Assistance to Parochial Schools*, 52 B.U. L. REV. 871 (1972); Note, *Constitutional Barriers to Public Assistance for Parochial Schools*, 17 CATH. LAW. 189 (1971); Note, *Aid to Parochial Schools: The First Pronouncement of Precise Standards for State Aid to Parochial Schools*, 21 DE PAUL L. REV. 784 (1972); Note, *Separation of Church and State*, 40 FORDHAM L. REV. 371 (1971); Note, *Excessive Entanglements: A New Dimension to the Parochial Aid Controversy Under the First Amendment*, 3 LOY. CHI. L. J. 73 (1972); Note, *State Aid to Church Related Schools*, 18 LOY. L. REV. 416 (1971-72); Note, *Financial Aid to Nonpublic Schools*, 25 RUTGERS L. REV. 535 (1971); Note, *Aid to Parochial Education*, 6 SUFFOLK U. L. REV. 654 (1972); Note, *Government Assistance to Church-Sponsored Schools: Tilton v. Richardson and Lemon v. Kurtzman*, 23 SYRACUSE L. REV. 113 (1972); Note, *State Aid to Parochial Schools*, 24 U. FLA. L. REV. 378 (1972); Note, *Lemon v. Kurtzman: First Amendment Religion Clauses Reexamined*, 33 U. PITT. L. REV.

argument. Parochial schools are permeated with sectarian religiosity;[41] religious overtones thus result in even the most secular subjects. Separation of secular purposes from religious purposes is either impossible or requires extraordinarily close supervision of the schools by government officials. Therefore, aid even for a secular subject and even for limited purposes necessarily creates an excessive entanglement which violates the establishment clause.[42]

Two years later the establishment clause was before the Court again,[43] this time in contexts of particular importance in the consideration of federal tuition tax credits. Three major decisions involving state aid programs in New York and Pennsylvania were handed down on June 25, 1973. The decisions found the state subsidies to be unconstitutional in all three cases.

The first of the decisions, *Levitt v. Committee for Public Education and Religious Liberty*,[44] focused on a 1970 New York law which appropriated $28,000,000 to reimburse private schools,

> for expenses of services for examination and inspection in connection with administration, grading and the compiling and reporting of the results of tests and examinations, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualifications and characteristics and the preparation and submission to the state of various other reports. . . .[45]

Reimbursement was to be made for services mandated by the state. The Court noted that by far the greatest expense was for student testing, done by state-prepared exams or by teacher-prepared tests. The statute included a secular purpose limitation, but it did not provide for

330 (1971); Note, *Constitutional Law*, 17 VILL. L. REV. 574 (1972); Note, *Aid to Parochial Schools*, 14 WM. & MARY L. REV. 128 (1972); Comment, *Constitutional Law—Separation of Church and State*, 6 VAL. L. REV. 213 (1972).

41. If one accepts this premise, then it is almost impossible to provide any state assistance. On this general point, see, Piekarski, *Nyquist and Public Aid to Private Education*, 58 MARQ. L. REV. 247 (1975).

42. The Chief Justice also noted specifically that such programs are politically divisive. It was an interesting observation, but one which does not, without more, usually carry a connotation of constitutional dimensions. 403 U.S. at 622. This is not the same as saying the issue is *political* and therefore not justiciable. *See generally*, Henkin, *Is There A "Political Question" Doctrine?*, 85 YALE L. J. 597 (1976); Scharpf, *Judicial Review and the Political Question: A Functional Analysis*, 75 YALE L. J. 517 (1966).

43. Lemon v. Kurtzman (Lemon II), 411 U.S. 192 (1973). The *Lemon* case itself came back with the question whether private schools had to return all the money they had received pursuant to the invalidated state programs. No, said the Court. They had reasonably relied upon the validity of the statutory program.

44. 413 U.S. 472 (1973).

45. N.Y. LAWS 1970, c. 138, § 2.

auditing or monitoring procedures. Chief Justice Burger, who wrote the Court's opinion invalidating the statute, was particularly concerned with the absence of any controls over internally prepared tests: "We cannot ignore the substantial risk that these examinations, prepared by teachers under the authority of religious institutions, will be drafted with an eye, unconsciously or otherwise, to inculcate students in the religious precepts of the sponsoring church."[46] He was not moved by the argument that the state was justified in reimbursing the schools because it required them to give the tests and keep the records.[47] The Chief Justice made it clear that the excessive entanglement test was coequal with the purpose and effect test in establishment clause cases. "The essential inquiry in each case, . . . is whether the challenged state aid has the primary purpose or effect of advancing religion or religious education or whether it leads to excessive entanglement by the State in the affairs of the religious institution."[48] *Levitt* was clearly a victory for the permeation theory of excessive entanglement. The state was simply repaying schools the costs of what the state required them to do, but according to the Court the program was impermissibly infected with religiosity because sectarian school personnel prepared some of the materials and handled the basic administration.[49]

In *Committee for Public Education and Religious Liberty v. Nyquist*,[50] the Court considered a much more comprehensive system of aid to New York's private schools which involved three different categories of assistance:

1) Nonpublic schools serving high concentrations of students from low income families were entitled to per capita grants of varying amounts for repairs and maintenance.[51]
2) Parents with annual taxable incomes of less than $5,000 were entitled to tuition reimbursements of up to $50 per elementary school student and $100 per high school student, but not more than fifty percent of actual tuition.[52]

46. 413 U.S. at 480.

47. 413 U.S. at 481. The Chief Justice stated, "To the extent that appellants argue that the State should be permitted to pay for any activity 'mandated' by state or local law or regulation, we must reject the contention. State or local law might, for example, 'mandate' minimum lighting or sanitary facilities for all school buildings, but such commands would not authorize a state to provide support for those facilities in church-sponsored schools." *Id.*

48. 413 U.S. at 481 (emphasis added).

49. *See generally*, Piekarski, *supra* note 41; 86 HARV. L. REV. 1068 (1973).

50. 413 U.S. 756 (1973).

51. 1972 N.Y. LAWS, c. 414, § 1, *amending* N.Y. EDUC. LAW, ART. 12, §§ 549-53 (Supp. 1972-73). The amounts varied with the age of the school.

52. 1972 N.Y. LAWS, c. 414, § 2, *amending* N.Y. EDUC. LAW, ART. 12-A, §§ 559-63 (Supp. 1972-73).

3) Parents not eligible for tuition reimbursements could take a tax deduction on a graduated scale that decreased as taxable income increased.[53]

The New York Legislature had clearly stated the purposes of the legislation. The first part of the law was for general health, safety and welfare, while the second and third parts were intended to provide specific aid for the maintenance of a dual educational system and the preservation of choice for parents by helping to lessen the fiscal problems of private schools and those who attended them.[54] In each instance the aid was tied to need. Poorer families and schools serving disadvantaged areas were targeted as the principal beneficiaries. The entire plan was determined to be unconstitutional by a Supreme Court majority of six,[55] a decision which one commentator described as "nailing down the lid on the public coffer."[56]

Justice Powell, who wrote the Court's opinion, had no trouble dispensing with the first part of the statute. Some eighty-five percent of the private schools in New York were affiliated with a church and it was not difficult to reason that direct assistance for repairs and maintenance constituted aid for the furtherance of religious activities. Moreover, the statute did not provide a limitation use for secular purposes.[57]

As for the tuition reimbursement plan, the Court paid little attention to the argument that the payments were not in aid of sectarian institutions because they went to parents rather than to schools. According to Justice Powell, since payments directly to the schools were not allowable,[58] and this statute had the exact effect of a school reimbursement program, the statute was invalid. The Court stated that,

> Indeed, it is precisely the function of New York's law to provide assistance to private schools, the great majority of which are sectarian. By reimbursing parents for a portion of their tuition bill, the State seeks to relieve their financial burdens sufficiently to assure that they continue to have the option to send their children to religion-oriented schools. And while the other purposes for that aid—to perpetuate a pluralistic educational environment and to protect the fiscal integrity of over-burdened public

53. 1972 N.Y. LAWS, c. 414, §§ 3, 4, 5, *amending*, N.Y. TAX LAW §§ 612(c), 612(j) (Supp. 1972-73).

54. *See* 413 U.S. at 764-67.

55. Justices Douglas, Brennan, Stewart, Marshall, Blackmun and Powell.

56. Comment, *Aid to Parochial Schools: A Lid on the Public Coffer*, 19 ST. LOUIS L.J. 56 (1974).

57. This case should be compared with the allowance of similar aid to colleges and universities. *See* notes 98-128 and accompanying text *infra*. Such assistance is, however, limited to secular uses.

58. 413 U.S. at 780.

> schools—are certainly unexceptionable, the effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions.[59]

For the same reasons, the Court also invalidated the tax deduction plan for those families who were not eligible for reimbursements. However, the majority opinion left several intriguing issues undecided. One argument in favor of the plan was its consistency with tax exemptions for churches as approved in *Walz*, and with the allowance of charitable deductions for contributions to churches.[60] Justice Powell argued that the exemptions allowed in *Walz* were part of a long historical tradition for which there was considerable precedent. The deductions also favored the neutrality principle by removing the government from the involvement necessitated by any taxing procedures. Finally, churches were but one of many groups and institutions which were exempt from taxation.[61] The New York law, on the other hand, was directed to a small (in terms of percentage) and identifiable class. Although Justice Powell did not rely on the class benefit factor, he did say that, "Without intimating whether this factor alone might have controlling significance in another context in some future case, it should be apparent that in terms of the potential divisiveness of any legislative measure the narrowness of the benefited class would be an important factor."[62]

Because the Court specifically noted that eighty-five percent of New York's private schools were sectarian and that virtually all the "maintenance and repair" funds went to sectarian schools,[63] it is appar-

59. *Id.* at 783. Justice Powell distinguished *Nyquist* from *Everson* and *Allen* on two grounds. First, the aid programs in *Everson* and *Allen* were expressly limited to secular purposes and, second, the programs were directed to all students, public as well as private. *Id.* at 780-82, 782 n.38. The latter seems to be the sounder reason, especially if the "child benefit" theory still has any currency. Bus fare, as in *Everson*, is a fairly minor matter with which to be concerned, but a history textbook—even one approved for use in secular schools— may be interpreted and used in such a way as to promote a religious purpose. The Chief Justice and Justices Rehnquist and White thought that *Everson* and *Allen* were good precedents for upholding the tax deductions and tuition reimbursements. *See* 413 U.S. at 798-805 (Burger, C.J., concurring in part and dissenting in part); 413 U.S. at 805-813 (Rehnquist, J., dissenting in part); 413 U.S. at 813-824 (White, J., dissenting). For another criticism of the majority opinion, *see Symposium: Law and Education*, 50 WASH. L. REV. 653 (1975).

60. See Note, *Racial Exclusion by Religious Schools: Brown v. Dade Christian Schools, Inc.*, 91 HARV. L. REV. 879 (1978); Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056 (1978). *See also* Brown v. Dade Christian Schools, Inc., 556 F.2d 310 (5th Cir. 1977) (en banc).

61. See I.R.C. § 501(c) for the basic criteria for exempt status.

62. 413 U.S. at 794.

63. *Id.* at 768.

ent that the Court was cognizant of the specificity and limited nature of the program. The comments of Justice Powell quoted above, coupled with his reference to *Everson* and *Allen* as examples of acceptable programs because of their general applicability to all students, leaves the impression that some form of generalized aid program in which religious schools were not so obviously the main beneficiaries might pass muster.

Finally, Justice Powell said that regardless of other arguments, neither the tax deduction nor the reimbursement program was "sufficiently restricted."[64] This phrase suggested that a carefully restricted plan might also be constitutional if the restrictions were not so great that they created entanglement problems. Whether this amounted to a retreat from the permeation approach was left unclear.

In its last case that day, *Sloan v. Lemon*,[65] the Court found a Pennsylvania tuition reimbursement plan to be unconstitutional. The majority could find no functionally significant difference between the Pennsylvania plan and the New York statutes invalidated in *Nyquist*.[66]

Pennsylvania's legislature was obviously displeased with the Supreme Court decisions, for a new Pennsylvania statute was soon before the Court again in the case of *Meek v. Pittinger*.[67] The statute provided for three kinds of aid to private schools: 1) textbook loans; 2) loans of secular instructional aids; 3) guidance, testing and similar services. The textbook loan program was upheld on the basis of *Allen*. The other two parts of the program were declared invalid because they provided direct and substantial assistance to religious programs, or

64. *Id.* at 794. What is interesting about the whole discussion of *Walz* is the failure to consider an elementary tax principle—a charitable deduction is available only for a gift, not for payments for products or services. A concert-goer is not allowed to deduct the cost of a ticket to a symphony orchestra performance. Tuition payments are in the same category. Thus, the analogy with *Walz* fails at a basic level.

65. 413 U.S. 825 (1973).

66. 413 U.S. at 832. Justice Powell, who also wrote the Court's opinion in *Sloan*, said, "The State has singled out a class of its citizens for a special economic benefit. Whether that benefit be viewed as a simple tuition subsidy, as an incentive 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. We think it plain that this is quite unlike the sort of 'indirect' and 'incidental' benefits that flowed to sectarian schools from programs aiding *all* parents by supplying bus transportation and secular textbooks for their children. Such benefits were carefully restricted to the purely secular side of church-affiliated institutions and provided no special aid for those who had chosen to support religious schools. Yet such aid approached the 'verge' of the constitutionally impermissible." *Id.*

67. 421 U.S. 349 (1975). For a general criticism of this case, *see* Nowak, *The Supreme Court, The Religion Clauses and The Nationalization of Education*, 70 NW. U. L. REV. 883 (1976).

presented the possibility of excessive entanglement. From these cases it is difficult to distinguish the purpose and effect of the textbook loans from that of the other aid programs. It seems that the Court considers book loans acceptable but not much else.[68] In addition, by this time a subtle but very significant change had occurred in the application of the "purpose and effect" test. The test had evolved to become one of *direct* or *immediate* effect on the religious purpose rather than one of *primary* effect. This made the test considerably harsher in its impact.[69]

Despite the apparently negative reaction of the Supreme Court to the issue of public aid to nonpublic schools, such aid programs continued to be enacted. In *Wheeler v. Barrera*,[70] the Court had to consider Title I of the Elementary and Secondary Education Act of 1965[71] (ESEA), which provided for federal funding of certain special programs for deprived children. The Act did not limit aid to children in public or nonsectarian schools; rather, its focus was on the educational handicaps of the child, regardless of the type of school he attended.[72] The actual administration of Title I was left to local school authorities subject to the general guidelines and controls of the United States Commissioner of Education who had to decide whether a plan, among other things, provided services for eligible private school students which were "comparable in quality, scope, and opportunity for participation to those provided for public school children with needs of equally high priority."[73] The complainants, parents of children in private schools, contended that Missouri school officials had adopted a program of additional instructional services which did not provide any benefits to nonpublic school students that were comparable to those available to public school students. The government authorities responded with two basic arguments: The provision of services identical to those given to public school students would violate the Missouri state constitution and the First Amendment to the United States Constitution. Missouri law was particularly important in the case because it limited the use of public employees in private schools. The Supreme Court essentially avoided the issues, because it did not have before it a

68. Had *Allen* not been decided before the *Lemon, Levitt, Nyquist, Sloan, Meek* series, there is a good chance that even a textbook loan program would not have survived.

69. *See generally* Note, *Establishment Clause Analysis of Legislative and Administrative Aid to Religion*, 74 COLUM. L. REV. 1175 (1974).

70. 417 U.S. 402 (1974), *judgment modified*, 422 U.S. 1004 (1975).

71. 20 U.S.C. § 241a *et seq.* (1970).

72. *See* 20 U.S.C. §§ 241a, 244 and 45 C.F.R. § 116.1.

73. UNITED STATES OFFICE OF EDUCATION, PROGRAM GUIDE No. 44, ¶ 4.5 (1968), *cited at* 417 U.S. 402. *See also* 45 C.F.R. § 116.19.

particular program to test against the standards set up by *Lemon, Nyquist* and the other cases. The Court, however, did state several illuminating rules: (i) that the implementation of a Title I program would have to comport in general with state as well as federal constitutional standards; (ii) that aid to private schoolchildren need not be identical to public schoolchildren so long as it was comparable; and (iii) that the state could not simply refuse to provide any Title I assistance to private schoolchildren when such aid was offered to those in public schools. The court said: "In order to equalize the level and quality of services offered, something must be substituted for the private schoolchildren. The alternatives are numerous. Providing nothing to fill the gap, however, is not among the acceptable alternatives."[74] The Court, though, simply refused to consider the First Amendment question[75] apparently due to the absence of a specific plan.

The majority opinion in *Wheeler* is somewhat confusing especially in that the programs which seem to be suggested by the Court as being consistent with Title I of ESEA are not substantially different from many of those invalidated in *Levitt* a year earlier and in *Meek v. Pittenger* a year later. The potential for inconsistency was aptly noted in the concurring opinions of Justices Powell[76] and White,[77] and in the dissenting opinion of Justice Douglas.[78] Justice Powell read the opinion of the Court to hold that (i) federal courts may not ignore state-law limitations on use of public employees in private schools; (ii) Title I does not require on-premises instruction in private schools;[79] (iii) Title I does not mandate identical services in public and private schools. Therefore, according to Justice Powell, there was no need to consider whether the use of public school teachers in private schools would violate the establishment clause. If that question were presented, Justice Powell suggested that he would lean toward a finding of unconstitutionality on the basis of *Nyquist*.[80]

74. 417 U.S. at 425.

75. *Id.* at 426. For more on ESEA, *see* Calhoun, *The Elementary and Secondary Education Act and the Establishment Clause*, 9 VAL. L. REV. 487 (1975); Krasicky, *Problems Emerging in ESEA*, 22 CATH. LAW. 226 (1976); Levin, *Between Scylla and Charybdis: Title I's "Comparable Services" Requirement and State and Federal Establishment Clauses*, 1976 DUKE L.J. 39 (1976).

76. 417 U.S. at 428 (Powell, J. concurring).

77. *Id.* at 429 (White, J., concurring).

78. *Id.* at 428-29 (Douglas, J., dissenting).

79. This brings such instruction in line with released time cases. *Compare, e.g.*, Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (1948) *with* Zorach v. Clausen, 343 U.S. 306 (1952).

80. 417 U.S. at 428 (Powell, J., concurring).

Justice White, who had dissented from most of the Court's earlier decisions on aid to sectarian schools, thought the Court had retreated from its hard line approach.

> [U]nless the State is being asked to chase rainbows, it is implied that there are programs and services comparable to on-the-premises instruction that the State could furnish private schools without violating the First Amendment. I would have thought that any such arrangement would be impermissible under the Court's recent cases construing the Establishment Clause. Not having joined those opinions, I am pleasantly surprised by what appears to be a suggestion that federal funds may in some respects be used to finance nonsectarian instruction of students in private elementary and secondary schools. If this is the case, I suggest that the Court should say so expressly. Failing that, however, I concur in the judgment.[81]

Justice Douglas agreed with Justice White's understanding of the Court's decision, and dissented for that reason.[82]

If *Wheeler* suggested that some federal aid programs were permissible under the establishment clause, even though state programs continued to receive a negative reception, then *Wolman v. Walter*,[83] a 1977 decision, muddied the problem even more. The complainants in *Wolman* challenged an Ohio statute[84] which authorized six different categories of aid to private schools, including schools which were sectarian. The types of assistance included: (i) textbook loans, limited to secular books approved for use in public schools; (ii) supply of standardized tests and scoring services as used in the public schools (no private school personnel were to be involved in the scoring or drafting and no direct financial assistance was involved); (iii) provision of speech, hearing, and psychological diagnostic services on nonpublic school premises by board of education employees and contract physicians; (iv) therapeutic, guidance and remedial services for children needing them to be provided by public employees away from private school premises; (v) loans to students or parents of instructional materials and equipment of the type used in public schools provided that the materials were "incapable of diversion to religious use" and (vi) certain field trip and other transportation services. The Court issued an almost incomprehensible series of opinions on the Ohio statute.[85] A majority (al-

81. 417 U.S. at 429 (White, J., concurring).

82. 417 U.S. at 429-32 (Douglas, J., dissenting).

83. 433 U.S. 229 (1977).

84. OHIO REV. CODE ANN. § 3317.06 (Supp. 1976).

85. Justice Blackmun wrote an eight part opinion and announced the Court's decision. Parts I, V, VI, VII and VIII mustered majorities and constituted the opinion of the Court, albeit a somewhat shifting group. As the author, it may safely be concluded that Justice

though not always composed of the same people) did agree, however, on the following points:

1. The textbook loan program was constitutional on the basis of *Allen* and *Meek*.
2. The diagnostic and treatment services were acceptable because their primary purpose was secular (i.e., health of the children) and because they were to be administered entirely by public officials which avoided the entanglement problem.
3. Everything else was impermissible.

The Court reasoned that the lending of instructional materials inescapably had the effect of aiding the sectarian purpose of parochial schools. It amounted to a grant in kind rather than direct grants in aid.[86] As for the field trips, the Court thought that the supervision necessary to insure the secular purpose of the trips would create an excessive entanglement problem and that if the direction of the trips were left to private school authorities, the program would be equivalent to a direct grant.[87] It is, of course, difficult to fathom how the Court could say that textbook loans were permissible but not loans of other educational equipment and teaching aids. The only explanation seems to be the Court's reluctance to overrule *Allen* or to expand its rationale beyond the strict confines of textbook loan programs. As Justice Powell said, "Our decisions in this troubling area draw lines that often must seem arbitrary."[88]

The *Wolman* decision no doubt will foster further litigation as states seek ways to provide support to nonpublic schools without overstepping the Supreme Court's guidelines.[89] The post-*Wolman* situation

Blackmun agreed with all parts of his opinion, but Justice Stewart was the only other member of the Court to agree fully with Blackmun. In addition to Justices Blackmun and Stewart, the various majorities included: (i) As to Part I, Chief Justice Burger and Justices Brennan, Marshall, Powell and Stevens; (ii) as to Part V, Chief Justice Burger and Justices Marshall, Powell and Stevens; (iii) as to Part VI, Chief Justice Burger and Justices Powell and Stevens; (iv) as to Parts VII and VIII, Justices Brennan, Marshall and Stevens. The Chief Justice and Justice Powell joined with Justices Blackmun and Stewart to form a plurality as to Parts II, III, and IV. The Chief Justice dissented as to Parts VII and VIII. Justices Brennan, Marshall and Stevens filed separate opinions concurring in part and dissenting in part. Justice Powell wrote an opinion concurring in part, concurring in the judgment in part and dissenting in part. Justices White and Rehnquist filed a statement concurring in the judgment in part and dissenting in part. Rarely has the Court been so badly divided on a case. It makes predicting future decisions virtually impossible.

86. 433 U.S. at 250-51.

87. *Id.* at 252-54.

88. *Id.* at 262 (Powell, J., concurring in part, concurring in the judgment in part, and dissenting in part).

89. The doggedness of the New York State Legislature is well illustrated by the recent decision in New York v. Cathedral Academy, 434 U.S. 125 (1977). The Supreme Court's 1973 decision in *Levitt* was an affirmance of a decision by a three-judge district court panel

is chaotic,[90] and the splits on the Court make it difficult to predict how the Court might rule in any given case. The purpose and effect test seems to have become of less importance, while limitations placed on the uses of state aid seem almost invariably to create entanglement problems. Nevertheless, in *Wheeler*, the Court clearly indicated that some forms of restrictions on the sectarian use of the aid might suffice to prevent the aid from becoming impermissibly entangling. *Wolman* also revived, to a certain extent, the "child benefit" theory[91] by allowing the state to provide certain health services so long as only state employees and not sectarian school employees administered the services and so long as essentially the same services were provided for all schoolchildren. Strangely enough, if the state of Ohio had simply required all schools to provide such services and maintain records of them and had then reimbursed private schools for the costs incurred in amounts roughly equivalent to the tax support available to public schools for such services, it is doubtful the plan could have withstood the impact of the *Levitt* decision (even though most people would agree

in April 1972. Comm. for Pub. Educ. and Religious Liberty v. Levitt, 342 F. Supp. 439 (S.D.N.Y. 1972). The district court had enjoined any payments under the New York statute including reimbursements for expenses incurred during the last half of the 1971-72 academic year while the case was pending. In June 1972, the Legislature responded to the district court by passing another statute which expressly recognized a "moral obligation" for the state to make reimbursements for expenses up to June 13, 1972, and conferred jurisdiction on the New York Court of Claims "to hear, audit and determine" the claims of nonprofit private schools for such expenses. Cathedral Academy filed a claim, and the New York Attorney General was in the ironic position of defending against the claim by arguing that the statute was unconstitutional. The Court of Claims dismissed the suit and held the statute to be in violation of the First and Fourteenth Amendments. Cathedral Academy v. State, 77 Misc. 2d 977, 354 N.Y.S.2d 370 (1974). The Appellate Division affirmed, 47 A.D.2d 390, 366 N.Y.S.2d 900 (1975), but the Court of Appeals reversed. 39 N.Y.2d 1021, 387 N.Y.S.2d 246, 355 N.E.2d 300 (1976). The United States Supreme Court then reversed the Court of Appeals, which was not surprising because the Legislature had clearly tried to circumvent a constitutional decision by a federal court—a decision which had itself been affirmed by the Supreme Court. Of course, the main thrust of the Act was to protect those who had relied on its validity. Justice Stewart, who wrote the Court's opinion, was not impressed with this line of argument. "To approve the enactment of ch. 996 would thus expand the reasoning of *Lemon II* to hold that a state legislature may effectively modify a federal court's injunction whenever a balancing of constitutional equities might conceivably have justified the court's granting similar relief in the first place. . . . This rule would mean that every such unconstitutional statute, like every dog, gets one bite, if anyone has relied on the statute to his detriment." 434 U.S. at 130.

For a discussion of the continuing controversy in state courts in particular, see Doerr, *The Enduring Controversy: Parochiaid and the Law*, 9 VAL. L. REV. 513 (1975).

90. Note, *Church and State: The Past, Present, and Future of State Aid to Parochial Schools*, 9 SW. U. L. REV. 1211 (1977). *See also* Note, *The Establishment Clause: Drawing the Line on Aid to Religious Schools*, 54 N.C.L. REV. 216 (1976).

91. That approach was also implicit in *Wheeler's* approval of ESEA grants.

that measles, mumps and chicken pox are peculiarly secular and catholic in their attacks and effects). The differences between much of the programs approved in *Wolman* and those disapproved in *Levitt* and *Meek* seem to be, in reality, distinctions without substance. It is obvious that the Court is reluctant to adopt a clear breaking point, one which would probably require that *Allen*, part of *Meek*, and perhaps *Everson* be overruled. The result is that the Court is unable to focus on the real connection, if any, between certain forms of aid and religion. Rather, these decisions still indicate, that the permeation issue continues to be of considerable importance. Any aid program which provides assistance to a church related school, no matter how indirect, insubstantial and secular in purpose the assistance may be, nonetheless is likely to be viewed with suspicion.[92]

Predicting the ultimate outcome of a school aid case is little more than a guessing game. It is difficult to see how a federal tax credit program could survive the *Nyquist* and *Sloan* decisions unless children who attend sectarian schools were made ineligible.[93] Undoubtedly the proposed federal program is somewhat different from the New York and Pennsylvania programs and it is directed toward a larger class of recipients. The national scope of any federal program will dilute the impact on sectarian schools. New York and Pennslyvania have heavy concentrations of Catholics and a large number of parochial schools, whereas states such as Alabama or Mississippi do not. Nevertheless, a substantial portion of the tax relief afforded by the proposed tax credit would go to families with children in parochial schools. Thus, the differences between the federal bill and the New York and Pennsylvania statutes are probably not significant enough in any constitutional sense to warrant different treatment. If the bill does what its sponsors hope it

92. A rather extreme recent example of the application of establishment clause case law occurred in the California case of Johnson v. Huntington Beach Union High School Dist., 68 Cal. App. 3d 1, 137 Cal. Rptr. 43 (Calif. App.), *cert. denied*, 434 U.S. 877 (1977). There, it was held that to allow a student Bible study club to meet in a vacant classroom during the lunch hour would be a violation of the establishment clause. The opinion relied heavily on *Lemon I* and largely ignored the students' arguments about free speech and free assembly. There was no question here of state sponsorship. This was simply a student group that wanted to meet, one presumes, in much the same way as the Math Club, History Club, or even the Hi-Y and Tri-Hi-Y. Indeed, the decision seems to lean over so far in favor of the establishment clause as to raise some question about intrusion into the free exercise area. For more on the case see Note, *Toward the Logical and Consistent Adjudication of Establishment Clause Cases*, 5 W. ST. U.L. REV. 117 (1977).

93. This is certainly the view of the current Administration. *See, e.g.*, Letter of Attorney General Griffin Bell to the New York Times, March 19, 1978, at 37, col. 1. *See also* Note, *Financial Aid for Nonpublic Education: A Decision for the Court or Legislatures?* 49 NOTRE DAME LAW. 366 (1973).

will do—that is, aid private education in order to preserve an important cultural institution as well as parent's freedom of choice—then it will, without question, provide direct aid of a financial nature to private schools, many of which are affirmatively sectarian. This result would run directly counter to *Nyquist* and *Sloan*.

The tuition tax credit idea has created a storm of controversy not only among politicans but among educators and taxpayers in general. The "political divisiveness" issue which the Court has noted several times is therefore very much in evidence. This would give added strength to a finding of unconstitutionality based on *Nyquist* and *Sloan*.

Ultimately, federal tuition tax credits should be examined on their own merits before dismissing them as unconstitutional. As *Wolman* made clear, the current Court is hopelessly divided on establishment clause issues. This division has not helped those who support assistance programs. The balance has consistently been struck against such aid, but there is enough uncertainty that a favorable decision is not beyond the realm of possibility. In addition, a significant opening was left by the *Wheeler* decision. In *Wheeler*, the Court noted that Title I of ESEA was an aid program for all children, not just for those in private schools. Thus it did not amount to class legislation for the benefit of a particular group and with a principal impact on church related schools. Tuition tax credits have been criticized as class legislation,[94] but if tax credits are lumped together with all federal education programs, the class effects are not so obvoius. Certainly tax credits would benefit parents of children in nonpublic schools, many if not most of which are sectarian, and certainly this form of aid would not be available to parents of children in public, tuition-free schools. However, public school students already receive massive amounts of public assistance. Current estimates are that the federal government now provides aid to public schools at the rate of $128 per student.[95] If the federal approach to education is viewed as a whole and not atomized, then a tax credit plan could be viewed as one means of equalizing the aid to public and private schools for the purpose of education in general. Such an argument might find favor with the Court were it to adopt an

94. *See, e.g.*, HOUSE REPORT, *supra* note 10, at 29 (Dissenting views of Rep. Charles B. Rangel); *Id.* at 31 (Minority views of Rep. William M. Ketchum).

95. This was the figure cited by Secretary Califano in his appearance before the House Ways and Means Committee during hearings on tuition tax credits. He also said that the federal government currently provides aid to private schools at the rate of $50 to $70 per capita. It is unclear what goes to make up the $50-$70 figure for private school students unless indirect forms of assistance such as tax exemptions are included. *See*, HOUSE REPORT, *supra* note 10, at 23 (Additional views of Rep. William R. Cotter).

analysis that focused on the validity of tax credits not as a separate and distinct form of financial support, but as one segment of a comprehensive approach to the protection and encouragement of the entire machinery of education.[96] Two other factors support this line of argument. First, the tax credits, as proposed, would be available to *all* students at nonprofit private elementary and secondary schools and to students at both private and public colleges and universities. This would dilute the impact on sectarian schools. Second, the entanglement issue would be of minimal importance. The program would be self-administered through the taxing system.

Unfortunately, there are significant problems with the preceding argument. The dilution of the impact on parochial schools by making credits available to all private nonprofit school students might be a more forceful position if the Court were to return to the application of a "primary purpose and effect test." But even if it did the Court might test the purpose and effect of the credits by a standard of "direct" or "immediate" aid, which would likely invalidate even a plan of general applicability. Similarly, the entanglement problem, while certainly minimized by a tax credit approach, is still not eliminated. If the Court continues to apply a "permeation" theory, then by definition, almost any assistance will constitute an impermissible entanglement.

Although it is possible to develop a logical and consistent argument in favor of the constitutionality of tuition tax credits, it is doubtful that the Court would find the plan acceptable. Such a plan is too similar in substance, despite the broader class affected, to the New York and Pennsylvania programs overthrown by *Nyquist* and *Sloan*. The Supreme Court may well have gone too far in cutting off state aid programs. (It is a bit difficult to connect a loan of a world map (as in Ohio) with an establishment of a state religion. Certainly, such aid is a far cry from state-sponsored prayer sessions.) However, there is a strong argument that courts should always be chary of aid programs whose chief beneficiaries are religious institutions, and this argument has consistently found majority support in the Court despite contradictory approaches to specific cases.[97]

96. Justice Powell hinted at such an approach in his *Wolman* opinion. *See* 433 U.S. at 266 (Powell, J., concurring in part, concurring in the judgment in part and dissenting in part).

97. For an interesting and comprehensive colloquy on the major points of disagreement about the scope of the establishment clause, see Greenawalt, Whalen, Riles, Sugarman and Karsh, *Education in a Democracy: Financial Support of Private, Public and Parochial Schools*, 3 HUMAN RIGHTS 17 (1973).

B. Colleges and Universities

The Supreme Court has applied the establishment clause in a fundamentally different manner in cases involving aid to institutions of higher learning. Much greater assistance has been held to be constitutionally permissible at the college level than at the elementary and secondary school level.

The recent history of judicial lawmaking in this area begins with *Tilton v. Richardson*,[98] a 1971 decision in which the Court upheld the Higher Education Facilities Act of 1963.[99] That Act provided for the issuance of federal construction grants for colleges and universities with the proviso that facilities built with such grants could be used only for secular, non-religious purposes during a twenty-year period or the institution would have to return the money. The complainants challenged five construction grants made to four church-related colleges in Connecticut. The Court held that the Act was constitutional and that the grants did not violate the establishment clause. It noted, however, that the twenty-year limitation was insufficient. A permanent ban on the religious use of the facilities was required. The precedential value of *Tilton* was somewhat unclear because there was no majority opinion. The Chief Justice announced the judgment of the Court and wrote an opinion in which Justices Harlan, Stewart and Blackmun joined. Justice White concurred in the judgment, thus creating a majority supporting the result but he filed a separate opinion disagreeing with the Chief Justice's rationale.[100] Justices Black, Douglas and Marshall concurred in part and dissented in part. They agreed with the plurality that the twenty-year limitation was unconstitutional, but they further felt that the grants themselves were improper.[101] Justice Brennan dissented on grounds discussed in his concurrence in *Lemon v. Kurtzman*—that aid to sectarian institutions was unconstitutional, but that the trial court should first determine whether the nature of the institution was in fact sectarian.[102]

Tilton was decided the same day as *Lemon I*, and the Court was

98. 403 U.S. 672 (1971).

99. 20 U.S.C. §§ 711-721 (1970), *repealed*, Pub. L. 92-318, Title I, § 161(b)(2), 86 Stat. 303 (1972).

100. Justice White wrote a single opinion concurring in the *Tilton* and *Lemon I* judgments and dissenting in two companion cases. 403 U.S. 661 (White, J., concurring and dissenting).

101. 403 U.S. at 689 (Douglas, J., dissenting in part). Justices Black and Marshall joined this opinion.

102. 403 U.S. at 642 (Brennan, J., dissenting in part). Justice Brennan's opinion also applied to *Lemon I* and two companion cases.

faced with the awkward problem of explaining why construction grants by the federal government to sectarian colleges were constitutional while Pennsylvania's salary equalization plan for private elementary and secondary schools, most of which were sectarian, was unconstitutional.[103]

The plurality met the problem directly and stated three reasons for treating colleges differently from lower schools. First, the characters of the recipients were fundamentally different. Colleges, in general, including the ones involved in the case, tend to be secularized institutions which strive to maintain an air of critical inquiry. The students are older and less susceptible to influence and the institutions are not generally permeated with an air of religiosity.[104] Less government involvement is necessary to ensure the use of aid for secular purposes and thereby the entanglement problem is lessened. Second, the aid offered by the federal government was clearly non-ideological and similar in form to the kind of aid approved in *Everson* and *Allen*,[105] although it was also simliar to one of the categories of aid that was disallowed in *Nyquist*. Third, the assistance was in the form of a one-time grant which created no long-term relationship with the government. This also limited the possibility of excessive entanglement and the chances for political divisiveness.[106]

Justice Douglas found the plurality's arguments concerning the absence of significant entanglement problems to be less than convincing. If, as Chief Justice Burger argued, a building constructed with federal assistance could be used only for secular purposes during its useful life, then, Justice Douglas contended, continuing federal surveillance would be necessary and such surveillance would interfere with the free exercise clause.

> The price of the subsidy under the Act is violation of the Free Exercise Clause. Could a course in the History of Methodism be taught in a federally financed building? Would a religiously slanted version of the Reformation or Quebec politics under Duplessis be permissible? How can the Government know what

103. The Court's willingness to examine in some detail the inherent character of a recipient institution necessarily suggests an *ad hoc*, case by case, approach.

104. 403 U.S. at 685-86. Chief Justice Burger relied heavily on the writings of several commentators including J. FICHTER, PAROCHIAL SCHOOL: A SOCIOLOGICAL STUDY (1958); M. PATTILLO & D. MACKENZIE, CHURCH-SPONSORED HIGHER EDUCATION IN THE UNITED STATES (1966); Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680 (1969); Gianella, *Religious Liberty, Nonestablishment, and Doctrinal Development, pt. II, The Nonestablishment Principle*, 81 HARV. L. REV. 513 (1968).

105. 403 U.S. at 687-88.

106. *Id.* at 688.

> is taught in the federally financed building without a continuous auditing of classroom instruction? Yet both the Free Exercise Clause and academic freedom are violated when the Government agent must be present to determine whether the course content is satisfactory.[107]

The plurality's opinion also required rather careful scrutiny of the nature of the recipient institution. They did not go so far as to say that any college or university is sufficiently secularized to be entitled to receive public aid. There continue to be a number of institutions of higher education with a strong religious tradition which might be said to be permeated with religiosity. Seminaries and divinity schools come readily to mind, as do fundamentalist schools such as Bob Jones University and Oral Roberts University. The Court did not change its approach from one founded on an analysis of the recipient, but it did suggest that colleges, as opposed to lower schools, would be given the benefit of the doubt.

In *Hunt v. McNair*,[108] decided two years after *Tilton*, the Court managed to put together a solid majority to reaffirm the plurality's general approach in *Tilton*. At issue in *Hunt* was a South Carolina statute establishing an Educational Facilities Authority to assist colleges in physical construction projects by issuing revenue bonds to finance them.[109] The recipient institution eventually had to pay the costs of a project, but the bonds provided a reasonable and available form of loan support. A specific statutory provision limited the use of bond proceeds to secular purposes, and the Authority retained a right of inspection. The particular case before the Court involved a plan to issue bonds to help the Baptist College at Charleston make certain improvements in its dining hall. By a six-to-three margin the Court upheld the constitutionality of the statute.[110]

As in *Tilton*, the general purpose of the Act was to aid higher education, public as well as private, and it was clearly limited to secular purposes. Thus it did not have a primary purpose of aiding religion.

107. *Id.* at 694 (Douglas, J., dissenting). For further criticism of *Tilton* along the lines suggested by the various opinions other than the plurality one, see Giannella, *Lemon and Tilton: The Bitter and the Sweet of Church-State Entanglement*, 1971 SUP. CT. REV. 147 (1971); Note, *Recent Developments Regarding the Establishment of Religion*, 49 CHI.-KENT L. REV. 100 (1972); Comment, *State Aid to Nonpublic Schools: An Examination and Demonstration of Needs and Alternatives*, 15 ST. LOUIS U.L.J. 616 (1971).

108. 413 U.S. 734 (1973).

109. S.C. CODE ANN. §§ 22-41 (Supp. 1971).

110. Justice Powell wrote the Court's opinion in which the Chief Justice and Justices Stewart, White, Blackmun and Rehnquist joined. Justices Douglas, Brennan and Marshall dissented.

In addition, the majority reasoned, an excessive entanglement problem was not likely. Religion did not permeate the college (the Court noted that only sixty percent of the students were Baptists)[111] and therefore, the necessity for continuous surveillance and government intrusion was minimal. The Court did, however, make it clear that *Tilton* required an analysis of the character of the recipient institution. "The Court's opinion in *Lemon* and the plurality opinion in *Tilton* are grounded on the proposition that the degree of entanglement arising from inspection of facilities as to use varies in large measure with the extent to which religion permeates the institution."[112] The permeation question in *Hunt* also was important (impliedly, if not expressly) in the finding that the purpose and effect was not to aid religion. If a dining hall were built for a college, a college that was permeated with religiosity, then applying the rationale developed in the parochial school cases, the dining hall construction would be a direct grant for the advancement of a religious purpose, and, therefore, it would be unconstitutional. But if it were determined at the outset that the institution were more secular than religious, then assistance would be permitted unless it was to be for a clearly religious use. Thus, the initial determination of the religiosity question emphasized the importance of the permeation test, and indirectly revived the primary purpose and effect test.

Justice Brennan disagreed with the majority's conclusions about the entanglement problem. In *Tilton* the concern was with one-time grants, and the subsequent political and administrative regulation of the facilities. In *Hunt*, the South Carolina statute expressly provided for a regular and continuous audit by the state during the term of the bonds. Accordingly Justice Brennan and his colleagues in dissent considered this to be an even clearer example of intrusion and entanglement than *Tilton*.[113]

Three years later in *Roemer v. Board of Public Works of Maryland*,[114] the Court was again seriously divided but it upheld yet another plan for public financial assistance to colleges and universities. In 1971 Maryland enacted a law[115] which authorized the payment of monies to private institutions of higher education other than those awarding only seminarian or theological degrees, according to a formula based on the

111. 413 U.S. at 744.

112. *Id.* at 746.

113. *Id.* at 753-55 (Brennan, J., dissenting). Justices Douglas and Marshall concurred in this opinion.

114. 426 U.S. 736 (1976).

115. MD. ANN. CODE Art. 77A, §§ 65-69 (1957).

number of students in attendance.[116] The grants could be used for any nonsectarian purpose. The statute required each recipient institution to file an annual report itemizing the use of the funds. The Maryland Council for Higher Education was to police the program. The case involved a challenge to the constitutionality of the statute in the specific context of grants to four colleges affiliated with the Roman Catholic Church. A three-judge district court, applying the *Lemon I* three-pronged test, determined that the program was valid. The district court found, as a matter of fact, that the colleges in question were not pervasively sectarian. Further, the court concluded that the basic purpose of the statute was not to aid or to advance religion, but to assist all private colleges in the improvement of educational opportunities. The district court therefore determined there was no significant entanglement problem. Admittedly, audits would sometimes be necessary, but audit procedures could be quite simple, and there was no need, in the court's opinion, for any inquiry into the particular educational program of a given college. This last conclusion was based on the court's initial finding that the colleges as a whole were not pervasively sectarian.[117]

On appeal,[118] the Supreme Court affirmed by a five-to-four vote, but five separate opinions were filed and no more than three Justices joined in any one opinion.[119] Justice Blackmun, joined by Chief Justice Burger and Justice Powell, found that the program came well within the three-pronged test as established in *Lemon I*. The secular purpose of the program was not disputed, and the Court found that the program did not have the primary effect of advancing religion, nor did it involve excessive entanglement. Justice White concurred, joined by Justice Rehnquist. They felt that the estabishment clause was not violated as long as the purpose and primary effect of the legislation was secular. In their view, no further analysis was necessary. Justice Brennan, joined by Justice Marshall, dissented, as in *Lemon I*, and labelled the program an impermissible subsidy of public funds.[120] Justice Stevens dissented separately and emphasized "the pernicious tendency of

116. Students in seminary or theological courses of study were excluded from the computations.

117. Roemer v. Board of Pub. Works 387 F. Supp. 1282 (D. Md. 1974).

118. 426 U.S. 767. This was a direct appeal pursuant to 28 U.S.C. § 1253 (1970).

119. Justice Blackmun announced the Court's decision and wrote an opinion in which Chief Justice Burger and Justice Powell joined. Justice White wrote a separate opinion concurring in the judgment in which Justice Rehnquist joined to make up a majority for affirmance. 426 U.S. 736 (White, J., concurring in the judgment). Justices Brennan, Stewart and Stevens all filed dissenting opinions. *Id.* at 770, 773, 775. Justice Marshall joined in Justice Brennan's dissent.

120. *Id.* at 771.

a state subsidy to tempt religious schools to compromise their religious mission. . . ."[121] Finally, Justice Stewart dissented because, unlike *Tilton*, the theology courses taught at the institutions involved were not mere academic subjects but rather were more likely to serve a sectarian purpose.[122]

For the time being it appears that a majority of the Court will support significant public assistance programs for private colleges, including those with sectarian affiliations, even though such aid would not be allowable for private elementary and secondary schools. An examination of each Justice's personal views on the question indicates as much. Justice White has consistently taken a permissive view toward aid to private education and has been sharply critical of the Court's limitations on the scope of assistance programs, particularly the entanglement prong of the *Lemon I* test.[123] He would apply nothing more than a primary purpose and effect test.[124] Justice Rehnquist seems inclined to agree with him.[125] The Chief Justice and Justices Blackmun and Powell, on the other hand, have been willing to support aid only at the college level. Justice Stewart, who dissented in *Roemer*, voted in favor of the aid programs in *Tilton* and *Hunt*. He seems to be moving in the direction of Burger, Blackmun and Powell. On the current court only Justices Brennan and Marshall have followed a consistently hard line even in college cases. They oppose aid in nearly all cases. Justice Stevens is still something of an unknown. Thus, unless there are unexpected changes in opinions or in the make-up of the Court, it is reasonably likely that college aid programs will receive generally favorable judicial review.[126]

Tuition tax credits are, of course, a different kind of aid from any of the programs approved in *Tilton, Hunt* or *Roemer*.[127] Even so, with

121. *Id.* at 775.

122. *Id.* at 774-75.

123. *See, e.g.*, Justice White's dissenting opinions in *Lemon I*, 403 U.S. at 661, and *Nyquist*, 413 U.S. at 813, and his concurring opinion in *Wheeler*, 417 U.S. at 428. For more on the problems that can be created by the entanglement test and the inconsistent approach to higher and lower education, see Underwood, *Permissible Entanglement Under the Establishment Clause*, 25 EMORY L.J. 17 (1976).

124. Roemer v. Board of Pub. Works, 426 U.S. 736, 768 (White, J., concurring in the judgment).

125. Justices Rehnquist and White were together in *Roemer, Hunt, Wolman, Levitt, Nyquist*, and *Sloan*.

126. For the approach of some lower courts, *see, e.g.*, Americans United for Separation of Church and State v. Dunn, 384 F. Supp. 714 (M.D. Tenn. 1974) and Americans United for Separation of Church and State v. Bubb, 379 F. Supp. 872 (D. Kan. 1974). *See generally* Note, *Private Colleges, State Aid, and the Establishment Clause*, 1975 DUKE L.J. 976 (1975).

127. *See* notes 9-16 and accompanying text *supra*.

recent case law, it seems likely that a tax credit would be constitutional at the college and university level.[128]

III. The Problem of Segregation Academies

It is an unfortunate fact that a number of private schools were founded as segregation academies in response to the racial integration of the public schools.[129] It is also regretable that many private schools which do not profess an overtly racist policy have very few, if any, students from minority groups. The latter situation is often the result of tradition, location, social perspectives and economics, rather than from any consciously discriminatory practices. The fact of racial separation applies to many of our institutions, not just to private schools. On the other hand, there are a number of private educational institutions which were created principally for the education of minorities, especially blacks. With the gradual breakdown of racial barriers, these institutions are not as critically important as they once were, but they continue to be cultural centers and they perform a significant educational function. Should parents who send their children to racially segregated private schools and colleges be entitled to the benefits of tuition tax credits? The answer is clearly that they should not be so entitled if the institution follows, for secular reasons, a policy of overt discrimina-

128. Indeed, many, if not most, of our private colleges trace their origins to church sponsorship. Yale long had very close ties with the Congregational Church. Emory University continues to be affiliated with the Methodist Church (and even has an ordained Methodist minister as President), but there is no doubt that the primary focus of both universities today is on secular rather than ecclesiastical concerns.

One would think from reading some of the Court's opinions that parochial schools were little more than small scale divinity schools. The religious experience is obviously important in such schools, but I daresay that most school time is spent on mundane matters like arithmetic. In at least one Diocese there appears to have been a significant secularization of the parochial schools. In the Diocese of Savannah ten years ago about 57% of the instructors were priests or other religious members of the church. Today, over 70% of the faculty members are lay teachers. About one-third of the high school students and about one-fifth of the elementary school students are non-Catholic. These figures were provided by the Diocese of Savannah, Bishop Raymond W. Lessard, Ordinary, and Rev. Ralph E. Seikel, Superintendent. They are current figures through the 1977-78 academic year. Direct grants to colleges come with a complex maze of requirements. Anti-bias regulations are a good example. *See, e.g.*, 42 U.S.C. § 2000d (1976); 20 U.S.C. §§ 1681-82 (1976); 29 U.S.C. § 794 (Supp. 1976); 45 C.F.R. §§ 80.6-80.10; § 84.61; § 86.71.

129. The experience in Mississippi is instructive. During the 1963-64 academic year there were 17 private schools other than those operated by the Catholic Church. These schools had a total enrollment of 2,362 students, of whom 916 were black. Some 192 of the total were enrolled in special programs for the handicapped, orphaned or abandoned. By the fall of 1970, there were 155 private, non-Catholic schools with a student population of about 42,000, almost all of whom were white. Norwood v. Harrison, 413 U.S. 455, 457 (1973).

tion. The answer is less clear for those schools which are in fact, but not in policy, segregated, and it is peculiarly murky for those practicing racial segregation for legitimately held religious beliefs.[130]

Aid to segregated academies was first attacked in 1973. In the case of *Norwood v. Harrison*[131] the Supreme Court unanimously invalidated a Mississippi program for textbook loans to public and private school students. Mississippi had started the program in 1940. The state purchased textbooks which were approved for public school use and lent them to both public and private school students.[132] It was not until Mississippi had developed a large state-wide system of segregation academies, however, that the scheme was attacked as a form of state aid to racial segregation. In *Norwood*, the Court used a three-step analysis to conclude that the program was unconstitutional: 1) Private schools have a right to exist and to operate, but the state has no duty to provide them with affirmative assistance.[133] 2) Free textbooks are a form of tangible financial aid which benefits the schools themselves and constitutes direct state involvement with institutions which practice, as a matter of policy, racial discrimination.[134] (Of course, that involvement is not any less with sectarian schools which are entitled to textbook loans under the reasoning of *Allen*.) 3) Aid to a sectarian school, if carefully circumscribed, may be limited to a secular purpose, but the legitimate educational function of private discriminatory schools cannot be isolated from the pervasiveness of the segregationist policy.[135] Thus, Mississippi still had a dual educational system that was supported in substantial and significant ways by the state.[136] The Court distinguished segregated schools from sectarian schools by not-

130. Such schools may be ineligible under the establishment clause.

131. 413 U.S. 455 (1973).

132. The plan would have probably withstood a First Amendment challenge under the rationale adopted in the *Allen* case. *See* notes 35-37 and accompanying text, *supra*.

133. The representatives of the private schools had argued that because the Supreme Court placed constitutional limitations on state control of private education in Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) and Wisconsin v. Yoder, 406 U.S. 205 (1972), the denial of state aid similar to that given public schools would be a violation of equal protection. Chief Justice Burger, who wrote the Court's opinion, gave short shrift to that argument. "In *Pierce*, the Court affirmed the right of private schools to exist and to operate; it said nothing of any supposed right of private or parochial schools to share with public schools in state largesse, on an equal basis or otherwise." 413 U.S. at 462.

134. 413 U.S. at 463-68. The Court distinguished textbook loans from state assistance in the form of fire and police protection. The latter are generally available to all citizens and institutions through state monopolies. Textbooks, on the other hand, are a specialized need, and they may as easily be obtained by a private school as by anyone else from a variety of different sources. *Id.* at 465.

135. Thus, the permeation test was applied to racism as well as to religion.

136. 413 U.S. at 468-70.

ing that religion occupies a constitutionally protected position. In doing so, the Court noted that some assistance to a religiously affiliated institution may be countenanced. But racial discrimination, on the other hand, is constitutionally disfavored and no aid to racist institutions should be permitted.[137]

One could argue that a tuition tax credit for tuition paid to a segregated school might be allowed because it is not a direct subsidy of a racially discriminatory institution, but is simply a form of tax relief for parents who have exercised the right guaranteed by earlier Court decisions to choose to send their children to private schools.[138] This argument did not convince the Court in *Nyquist* or *Lemon* when it was faced with establishment clause questions. It is even less likely to convince a court which is asked to consider the effect of such a policy on racially discriminatory institutions. An analogous problem was considered by a federal court in South Carolina in *Bob Jones University v. Johnson*.[139] That case sheds some light on how the Courts might treat tuition tax credits were they to be used to the advantage of segregationists. The federal government cut off veterans' educational benefits to students attending Bob Jones because of its openly racist policies.[140] The court upheld the termination, even though it was argued that the aid was directed to the individual students and not to any particular institution. The court reasoned that the benefits program amounted to a subsidy for attendance at a school which was discriminatory, and was an indirect but very real form of aid to the institution.[141] The decision seems to suggest what the statutory law already generally indicates[142]— to allow tuition tax credits for attendance at a "segregation academy" would not only raise constitutional questions such as those considered

137. *Id.* at 469-70. Of course, the racial discrimination must be invidious. The use of race in the pursuit of an affirmative action program may be allowable. *See* Bakke v. Bd. of Regents 438 U.S. 265 (1978).

138. *See*, Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925); Wisconsin v. Yoder, 406 U.S. 205 (1972).

139. 396 F. Supp. 597 (D.S.C. 1974), *aff'd mem.*, 529 F.2d 514 (4th Cir. 1975).

140. The college openly admitted that it denied admission to unmarried blacks because Negroes "agitated" for interracial marriage. 396 F. Supp. at 600, n.9.

141. This reasoning was not strained. Anyone who has been involved in university administration realizes that external student assistance programs are a great boon. They relieve some of the pressures on limited scholarship funds and they make it possible for some people to attend who might otherwise go to another less expensive institution.

142. For an example of anti-bias legislation, *see* Civil Rights Act of 1964, tit. VI, 42 U.S.C. § 2000d (1976) (racial discrimination); Education Amendments of 1972, tit. IX, 20 U.S.C. §§ 1681-82 (1976) (sex discrimination); Rehabilitation Act of 1973, § 504, 29 U.S.C. § 794 (1976) (handicap discrimination).

in *Norwood*, but also would be contrary to the policies governing federal aid to education.

Most proponents of tuition tax credit legislation agree that credits should not be available to parents whose students attend racially segregated schools. To insure that this limitation is observed, the tuition tax credit bills which have been considered in Congress have generally provided that a tax credit would be available only for tuition paid to a school which qualifies for an exemption from income taxation pursuant to the applicable provisions of the Internal Revenue Code.

The Internal Revenue Service has specifically ruled that a private school which does not have a "racially nondiscriminatory policy" is not entitled to a tax exemption. The necessary policy is defined as follows:

> A "racially nondiscriminatory policy as to students" is defined as meaning that the school admits the students of any race to all the rights, privileges, programs, and activities generally accorded or made available to students at that school and that the school does not discriminate on the basis of race in administration of its educational policies, admissions policies, scholarship and loan program, and athletic and other school administered programs.[143]

The IRS has promulgated extensive regulations for policing exempt organizations and for insuring that the non-discriminatory requirements are met.[144] Of particular importance are the requirements that a school publish a statement to the effect that it does not discriminate on the basis of race, color, national or ethnic origin and that it advertise this policy to all segments of the community served by the school. In addition there are extensive reporting and auditing procedures.[145]

The IRS procedures are no doubt far from perfect, but they do provide an existing mechanism for reducing the possibility that discriminatory organizations will receive the benefit of tuition tax credits.[146] Defining eligible institutions to include only those with tax exemptions should substantially limit the benefits accruing to those who send their children to racial schools.[147] It is also a simple, straightforward limitation that would not significantly increase bureaucratic

143. Rev. Rul. 71-447, 1971-2 C.B.230. For the general requirements *see* I.R.C. § 501(c)(3); *see also* Rev. Rul. 75-231, 1975-1 C.B. 158. After the issuance of Rev. Ruling 71-447, some 100 schools gave up their exemptions rather than comply with the anti-discrimination provisions. News Release IR-1930 (Jan. 9, 1978).

144. *See* Rev. Proc. 75-50, 1975-2 C.B. 587.

145. *Id.* § 4.02-.03 at 588.

146. *See* Green v. Connally, 330 F. Supp. 1150 (D.D.C.), *aff'd sub nom.* Coit v. Green, 404 U.S. 997 (1971). This case arose from Mississippi and that state is still subject to the court orders as well as the IRS guidelines. *See* Rev. Proc. 75-50, § 8, 1975-2 C.B. 587, 590.

147. Rev. Rul. 75-231, 1975-1 C.B. 158.

difficulties. In any event, since the IRS can grant tax exemptions only to non-discriminatory institutions,[148] tuition tax credit legislation, in the form of the current proposals, will not add an additional policing burden on the IRS.

Unfortunately, little if anything can be done without creating extraordinarily difficult administrative problems to see that tuition tax credits do not go to benefit the parents of those who send their children to *de facto* as opposed to *de jure* segregated schools.[149] Many private schools with non-discriminatory policies simply do not have any significant number of minority students. This is not necessarily a result of any overt discrimination. Economically disadvantaged Americans cannot afford St. Paul's or Groton. But neither the proposed tuition tax credit legislation nor the IRS regulations includes any requirements for affirmative action to remedy the *de facto* segregation of those schools. To add such requirements would necessarily create additional administrative and enforcement problems and could create problems of intrusion into the educational process which would negate any benefits accruing from the program.[150] Such a result is probably the price which must be paid for using a relatively simple administrative device which is already part of a functioning system.[151]

A problem still persists in connection with church-affiliated schools which practice racial discrimination for ostensibly religious reasons. The IRS has taken a rather hard line with these schools and has refused to grant exemptions to them[152]—this would exclude them from the category of eligible institutions under the current proposals.[153]

148. McGlotten v. Connally, 338 F. Supp. 448 (D.D.C. 1972). On the other hand, a tax exemption does not constitute "state action" within the meaning of the Fourteenth Amendment so as to bring into play equal protection considerations. *See, e.g.*, Ascherman v. Presbyterian Hosp. of Pac. Medical Center, Inc., 507 F.2d 1103 (9th Cir. 1974); Blackburn v. Fisk Univ., 443 F.2d 121 (6th Cir. 1971); Browns v. Mitchell, 409 F.2d 593 (10th Cir. 1969).

149. Needless to say, this is not a problem which is peculiar to private schools.

150. This problem is addressed more directly in section V, *infra*.

151. On the other hand, there may well be racially integrated schools which have chosen not to seek tax exemptions so as to avoid the problem of federal regulations. This would limit their fund raising abilities. Contributions would not be tax deductible. But this might not be a significant handicap to a small school with a solid basis of community support.

152. "That those responsible for a given course of conduct may sincerely believe that they have a religious duty to act in a certain manner does not alter the situation. The First Amendment, which provides in part that Congress shall make no law prohibiting the free exercise of religion, does bar governmental interference with mere religious beliefs and opinions, but it does not affect the legal consequences otherwise attending a given practice or action that is not inherently religious." Rev. Rul. 75-231, 1975-1 C.B. 158.

153. Bob Jones University lost its tax exemption because of its racial policies. It challenged the revocation on the grounds that it was an interference with the free exercise of reilgion, an intrusion into freedom of association and a denial of due process and equal

The courts have taken a somewhat different approach from that taken by the IRS. In *Runyon v. McCrary*,[154] the Supreme Court ruled that the refusal to admit black students was a sufficient basis for a private civil rights action against a private, commercial, nonsectarian elementary school. The Court specifically left open the question whether such an action would lie for racial discrimination by a church-affiliated school.[155] Courts have generally been more tolerant of acts of private discrimination, not because of any particular value attributed to discriminatory behavior, but because neither the Fourteenth nor the Fifth Amendments reaches private as opposed to public acts. In certain specific areas (notably housing and contract-making) the court has, however, allowed the maintenance of private suits to prevent private discrimination on the theory that such suits are necessary to remove the badges of slavery prohibited by the Thirteenth Amendment.[156] If a valid claim of religious purpose supports a policy of racial discrimination, two initial questions arise: first, whether this constitutes a private act of discrimination of such magnitude that it could be challenged by a lawsuit based upon a federal civil rights statute; and, second, whether the religious purpose implicates the free exercise clause of the First Amendment and thereby tips the balance in favor of the school's policy. If the first question is answered in the negative and the second in the affirmative, then may the government validly withhold assistance from such a school if there is a program for aid to private schools?

The first two questions were considered by the Court of Appeals for the Fifth Circuit in *Brown v. Dade Christian Schools, Inc.*[157] Black parents brought an action to challenge the refusal of the school to ad-

protection. There is no decision on the merits. The suit was dismissed because it was construed to be an action to enjoin a tax ruling, a remedy that is unavailable under federal laws. Bob Jones Univ. v. Simon, 416 U.S. 725, 746 (1974). Bob Jones should have proceeded through the IRS administrative appeals procedure or have paid its income taxes and sued for a refund. *See, e.g.*, Enochs v. Williams Packing & Navigation Co. Inc., 370 U.S. 1 (1962).

154. Runyon v. McCrary, 427 U.S. 160 (1976).

155. *Id.* at 167-68. For a discussion of the sectarian school "loophole," *see* Note, *Racial Discrimination in Private Schools, Section 1981, and The Free Exercise of Religion: The Sectarian Loophole of Runyon v. McCrary*, 48 U. COLO. L. REV. 419 (1977).

156. *See, e.g.*, Runyon v. McCrary, 427 U.S. 160 (1976); Tillman v. Wheaton-Haven Recreation Ass'n, Inc., 410 U.S. 431 (1973); Sullivan v. Little Hunting Park, Inc., 396 U.S. 229 (1969); Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968); Morris v. Cizek, 503 F.2d 1303 (7th Cir. 1974).

157. 556 F.2d 310 (5th Cir. 1977) (en banc), *cert. denied*, 434 U.S. 1063 (1978). For a general discussion of the case see Note, *Racial Exclusion by Religious Schools*, 91 HARV. L. REV. 879 (1978).

mit black students.[158] The school invoked its religious affiliation in defense; it was located on church grounds, received church subsidies and was run by church members. Admission was not limited to church members, but it was limited to whites. The district court held for the plaintiffs after conducting a non-jury trial and after determining that the school's discriminatory policy was based on a secular policy and philosophy and was not a part of a valid religious belief.[159] The Court of Appeals affirmed the district court's opinion, but the thirteen judges who considered the appeal were sharply divided.

Judge Hill announced the Court's decision and wrote an opinion which four other judges joined.[160] The plurality essentially followed the approach of the district court and concluded that the school's defense of its segregationist policy on religious grounds was a sham, because it was not a valid tenet of the Christian religion or of the particular sect to which the church members belonged.

> [T]he trial judge concluded that, if belief in school segregation was religious in nature, neither the officers of the school nor the congregation of the church were aware of it. He found that as social conditions changed and the issue arose, a policy was formulated by the school leaders. While a religious belief may be of recent vintage or formed instantaneously, the trial judge's conclusion that school segregation was nothing more than a recent policy developed in response to the growing issue of segregation and integration was amply supported by the evidence.[161]

Judge Goldberg filed an extensive concurring opinion in which he sharply criticized the plurality's refusal to afford any real consideration to the religious views of individual church members, and for the failure to recognize any but the traditional indicia of religious belief.[162] In fact, Judge Goldberg concluded that the evidence tended to support a finding that segregation was based on a legitimately and sincerely held religious belief.[163] On balance, however, he concluded that the policy against racial discrimination outweighed the school's First Amendment interest in the free exercise of its religious beliefs in segregation because

158. The action was based on 42 U.S.C. § 1981 (1976), which provides, in pertinent part, that, "All persons . . . shall have the same right in every State and Territory to make and enforce contracts, . . . as is enjoyed by white citizens. . . ."

159. Brown v. Dade Christian Schools, Inc., No. 73-1313 (S.D. Fla., May 28, 1975).

160. Judges Godbold, Dyer, Morgan and Gee. Brown v. Dade Christian Schools, Inc. 556 F.2d 311 (5th Cir. 1977).

161. *Id.* at 313.

162. *Id.* at 314 (Goldberg, J., concurring).

163. *Id.* at 314-24.

the racial issue was not central to the religion.[164]

Chief Judge Brown created the majority by concurring in the result and in that portion of Judge Goldberg's opinion which outlined the balancing test.[165]

Judge Roney, in dissent, agreed with Judge Goldberg that the plurality's definition of religion was improperly restrictive and that there was a factual basis in the record for a finding that the segregationist policy was religious in nature. Unlike Judge Goldberg, he would have remanded the case to the trial court for an application of a balancing test between the competing constitution interests.[166]

Judge Coleman filed a separate dissenting opinion in which he implied that the case raised establishment clause as well as free exercise questions: "If the church is to remain absolutely separate and apart from the state, then no court should have the power to compel any church to admit any student to any school operated for religious reasons."[167] Judge Coleman did not carry his thought through to its ultimate conclusion, that if the state interjects itself into admissions decisions by negating the validity of a religious belief (assuming its sincerity), then the state is in effect, "establishing" a particular religious belief as well as preventing the exercise of another.

Although the *Dade Christian School* case provides no definitive answers, it illustrates the difficulty encountered by judges in determining what is actually a religion and what is merely some personal, social or political belief that is given religious overtones.[168] Judges should not be discouraged if they have yet to come up with a satisfactory answer. Theologians and philosophers have been struggling with the problem for thousands of years. The task is not made any easier by litigants who proclaim with zealous fervor their religious belief in the use of a particular cat food,[169] or hallucinogens,[170] or polygamy,[171] or even segregation.

164. *Id.* at 320-24. That leaves open the possibility that a claim of centrality for segregationist beliefs might prevail.

165. *Id.* at 314 (Brown, C.J., concurring).

166. *Id.* at 324-26 (Roney, J., dissenting). He was joined by Judges Gewin, Coleman, Ainsworth, Clark and Tjoflat.

167. *Id.* at 326 (Coleman, J., dissenting).

168. On this point see Note, *Toward a Constitutional Definition of Religion*, 91 HARV. L. REV. 1056 (1978), which discusses and cites a number of the more interesting articles and cases on the subject of the legal definition of religion.

169. *See* Brown v. Pena, 441 F. Supp. 1382 (S.D. Fla. 1977), an employment discrimination case in which the plaintiff alleged that he had been discriminated against because of his " 'personal religoius creed' that 'Kozy Kitten People/Cat Food . . . is contributing significantly to [his] state of well being . . . [and therefore] to [his] overall work performance' by

For our purposes though, the following may be gleaned from the *Dade Christian School* decision: (1) of the fourteen judges (including the trial judge) who reviewed the case, six[172] thought only a general review of the institutional beliefs and a comparison of them to traditional theistic beliefs was necessary to determine what was a religion, but seven[173] thought there should be a more individualistic investigation into the personal sincerity of the adherents to the faith to determine the validity of the tenet in question;[174] and, (2) an absolute majority[175] believed that there should be a balancing test applied between the constitutional interest in the free exercise of religion and the constitutional interest in the pursuit of racial integration and harmony with the apparent agreement that only a "compelling state interest"[176] would justify an interference with the exercise of a religious belief.

In short, the impact of the sectarian school "loophole" left by *Runyon* is still unclear. Certainly there have been instances in which the free exercise of a strongly held religious belief has had to give way to a secular policy.[177] It would not be inconsistent to hold that the free exercise clause may be limited in areas of racial discrimination, at least where the discrimination occurs in certain important institutional contexts such as schools. To do so would, however, almost certainly necessitate a balancing between the interest in vindicating the purposes of the Thirteenth Amendment through private lawsuits against a constitutional interest in protecting the free exercise of religion.

In addition, the fact that a school may be protected from a private civil rights action for the exercise of religiously based racial discrimination does not mean that the state can, or should, provide financial

increasing his energy." *Id.* at 1384. The district court held that plaintiff's professed belief in pet food did not qualify as a religion. *Id.*

170. *See, e.g.*, Leary v. United States, 383 F.2d 851 (5th Cir. 1967), *rev'd on other grounds*, 395 U.S. 6 (1969); State v. Big Sheep, 75 Mont. 219, 243 P. 1067 (1926); Llewellyn v. State, 489 P.2d 511 (Okla. 1971); *but cf.* People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964).

171. Reynolds v. United States, 98 U.S. 145 (1878).

172. The five members of the Fifth Circuit plurality plus the trial judge.

173. The six dissenters plus Justice Goldberg.

174. The views of Chief Judge Brown on this point were not clear.

175. The six dissenters plus the two concurring judges.

176. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 406-09 (1963) and Reynolds v. United States, 98 U.S. 145, 165-68 (1878) for more on what is a compelling state interest.

177. This has been especially true in medical treatment cases. *See, e.g.*, Jacobson v. Massachusetts, 197 U.S. 11 (1905); Jehovah's Witnesses v. King County Hospital, 278 F. Supp. 488 (W.D. Wash. 1967), *aff'd*, 309 U.S. 598 (1968); Kennedy Memorial Hospital v. Heston, 58 N.J. 576, 279 A.2d 670 (1971); *In re* Sampson, 29 N.Y.2d 900, 278 N.E.2d 918, 328 N.Y.S.2d 686 (1972). *But compare, In re* Estate of Brooks, 32 Ill. 2d 361, 205 N.E.2d 435 (1965).

assistance to the school directly through grants or indirectly through favorable tax treatments. It is one thing to tolerate an act of private discrimination; it is altogether a different matter to give assistance to a discriminatory institution. Direct state assistance would transform acts of private discrimination into public ones and would be condemned by the rationale of *Norwood v. Harrison*. If *Nyquist* and *Sloan* mean what they say, and if veterans' benefits to students at Bob Jones University can be cut off, then tuition tax credits should not be available even to segregated schools which may be exempted from civil rights lawsuits for religious reasons.

As a practical matter, the tuition tax credit proposals now under consideration will not benefit overt segregation academies. The limitation of eligible institutions to those which meet IRS criteria for exempt status is a reasonably effective and administratively simple method for the assurance that benefits accrue only (or at least principally) to schools with acceptable racial policies. The more difficult problem as a matter of policy, and not necessarily of constitutional law, is whether this legislation would tend to foster segregation indirectly by providing assistance to a class of institutions (private elementary and secondary schools) in which there are relatively few minority students.[178]

IV. Equal Protection and Tuition Tax Credits

Any of the various proposals for tuition tax credits would amount to a transfer of tax revenues obtained from taxpayers without children in colleges or private schools to parents of college and private school students. Everyone can agree that the latter group is much smaller than the former. Any legislation which provides a specific benefit for one group at the expense of another group of citizens suggests a *prima facie* question of equal protection. No doubt, many such transfers are permissible. Otherwise, no welfare program could exist, and a number of the provisions of our taxing laws would be unconstitutional. However, there must be at least a reasonable and non-arbitrary rationale to support such differential treatment. The tuition tax credit legislation now under consideration will probably withstand an equal protection challenge, but an analysis of the proposals in the context of equal protection can serve to highlight some of the policy's shortcomings.

The tuition tax credit proposals are currently engendering most

178. There are parochial schools which do have high concentrations of minority students. It is not surprising, for instance, that a school in a Puerto Rican section of New York or an Hispanic section of San Antonio would have a large number of minority students.

discussion at the federal level rather than in the states. The Fourteenth Amendment equal protection clause is not applicable, but the courts have held that an equal protection element is inherent in the Fifth Amendment's guarantee of due process.[179]

Would tuition tax credit legislation raise equal protection/due process problems? There are three categories of persons who would directly benefit from such legislation: (i) students (or their parents) in colleges and universities; (ii) parents of students in private non-sectarian schools; and (iii) parents of students in private sectarian schools. Of course, the schools or colleges attended must all fit within the criteria for federal tax exemption, which excludes "segregation academies." These groups are certainly identifiable, although the specific membership may vary from place to place. All other taxpayers, would make up the class that would pay for these benefits. Specifically among individuals the class of paying taxpayers would include all those who (i) have no children, or (ii) have children who are not yet of elementary school age, or (iii) have grown children who are out of school, or (iv) have children in public schools. In addition there is a "neutral" group—those who for one reason or another pay no taxes. In point of fact, the "neutrals" are not entirely without an interest in the credit. Individuals may from time to time leave the neutral category for one of the others.

The classifications are not immutable. A recipient may take his child out of private school and become a payor or vice versa. Different tax treatment is not the result of some peculiar status, biological characteristic or heritage. Nevertheless, at any given time it would be reasonably easy to identify those who receive and those who give. If such categorizations were the beginning and end of due process/equal protection analysis, the task would be over. The tax credit favors identifiable groups of citizens at the direct expense of other groups. But many laws have a similar effect and yet do not violate the equal protection guarantee.[180] Certainly the tax code is replete with examples of discriminatory treatment, e.g., investment tax credits, mineral depletion

179. For a discussion of the leading cases and the general doctrine of equal protection as contained in the Fifth Amendment see Karst, *The Fifth Amendment's Guarantee of Equal Protection*, 55 N.C. L. REV. 541 (1977); Tussmann & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

180. Hampton v. Mow Sun Wong, 426 U.S. 88 (1976). That case involved a challenge by a group of aliens to a Civil Service Commission regulation that barred them from federal jobs. The aliens won, but the Court suggested that a statute, as opposed to an agency rule, might have been upheld. *Id.* at 114-16. Professor Karst has suggested that *Hampton* indicates that a federal law prohibiting the hiring of aliens for government positions would be subjected to a "rational basis" rather than a "strict scrutiny" test but that a similar state statute might be viewed more harshly. Karst, *supra* note 179, at 558.

allowances, child care tax credits, interest deductions on home mortgages, capital gains tax rates. The traditional approach, once it has been determined that a particular law results in different treatment for identifiable groups, has been to subject the law to a two-tiered analysis.[181] If the discrimination is "invidious" in that it involves a "suspect" class or intrudes upon the enjoyment of a fundamental liberty, such as freedom of speech, then the statute will be strictly scrutinized and will only survive if it vindicates a compelling state interest.[182] On the other hand, a statute which merely results in discriminatory treatment and does not create a suspect classification or invade a fundamental right will normally be subjected only to a "rational basis" test. That is, the statute will be upheld if there is a rational connection between the legislative goal and the means chosen to achieve that goal.[183] As it has been applied, only a few statutes will survive a strict scrutiny test, but most will be upheld if a rational basis test is applied. Thus, the crucial point is usually the initial determination as to which test is applicable.[184]

The equal protection decision most pertinent to an analysis of tuition tax credits is *San Antonio Independent School District v. Rodriguez*.[185] In that case the Supreme Court determined that the Texas system of financing public schools did not violate the Fourteenth Amendment, even though there were gross discrepancies in the per student expenditures from district to district. Public schools are, for the most part, subsidized by property taxes. The monies available for a local school district will vary according to the tax base and the tax rates of each district. Typically, the state will make some effort to lessen the district differentials. The system is clearly imperfect and it often results in different treatment for different and identifiable groups. Those who pay are those who own property whether or not they have children in public schools. The direct beneficiaries are those who have school chil-

181. *See, e.g.*, Mathews v. Lucas, 427 U.S. 495 (1976); Jimenez v. Weinberger, 417 U.S. 628 (1974); Frontiero v. Richardson, 411 U.S. 677 (1973); *see also* Karst, *supra* note 179, at 555-56.

182. *See generally*, J. NOWAK, R. ROTUNDA, J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 522-29 (1978).

183. For a good and comprehensive discussion of this and the "strict scrutiny" test, *see Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

184. For further discussion of this point, see Karst & Horowitz, *Reitman v. Mulkey: A Telophase of Substantive Equal Protection*, SUP. CT. REV. 39 (1967); Yackle, *Thoughts on Rodriguez: Mr. Justice Powell and the Demise of Equal Protection Analysis in the Supreme Court*, 9 U. RICH. L. REV. 181 (1975).

185. 411 U.S. 1 (1973).

dren, especially those who are not property owners.[186] This transfer (from those who have property to those who have children in school) is justified by the overriding public interest in education.[187] But what if those students who live in tax poor districts have less money spent per capita on education than do those who live in wealthier districts? The Supreme Court addressed the latter question in *Rodriguez*, and decided that there was no equal protection violation. Four members of the Court dissented. One member of the majority even characterized the plan as "chaotic and unjust."[188]

The majority based its decision on three conclusions: (i) education is not a fundamental right, even though it may have an important relationship to other fundamental rights, such as speech and voting;[189] (ii) wealth (or poverty) alone is not a suspect classification unless it is coupled with an absolute deprivation of a basic interest;[190] (iii) the plaintiffs in *Rodriguez* were not representative of an identifiable class of prejudiced citizens. The classifications went to districts, not to individuals, and there could be poor persons in rich districts and vice versa.[191] The absence in this case of an identifiable class which was subjected to discrimination was itself enough, according to the Court, to establish the absence of an equal protection violation. Coupled with the conclusion that wealth is not a suspect classification and that education is not a fundamental right, this compelled the application of a "rational basis" rather than a "strict scrutiny" test,[192] and the system was upheld.

186. One commentator has suggested that such transfers should be viewed as income to the recipients, thereby providing a more reasonable justification for treating private school tuition as an expense akin to a business expense. Note, *Income Tax Deductions and Credits for Nonpublic Education: Toward a Fair Definition of Net Income*, 16 HARV. J. LEGIS. 1 (1979).

187. In some states this interest is so important that it is embodied in the state constitution. For instance the Connecticut Constitution provides that: "There shall always be free public elementary and secondary schools in the state. The general assembly shall implement this principle by appropriate legislation." CONN. CONST. art. VIII, § 1.

188. 411 U.S. at 59 (Stewart, J., concurring).

189. The contrary argument was that education is a penumbral right, such as privacy or freedom of association, because it is inextricably connected with the ability to exercise other rights such as voting, speaking and so on. *See, e.g.*, 411 U.S. at 62-63 (Brennan, J., dissenting).

190. The Court noted that if a state charged tuition at public schools and refused to provide financial aid to indigents, there would be a greater argument for judicial interference. 411 U.S. 1, 25 n.60. *See* Boddie v. Connecticut, 401 U.S. 371 (1971); Dandridge v. Williams, 397 U.S. 471 (1970).

191. 411 U.S. at 23. As something of an aside, the Court noted that the equal protection clause does not require precise equality. *Id.* at 24.

192. At the state level the controversy was sharply defined before *Rodriguez* and it has not abated. The leading state decision is that in Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971), in which the California system was ruled unconstitutional. A

Tuition tax credits do not create an identification problem. Those who would be entitled to them are identifiable, tuition paying parents of students. But the other two *Rodriguez* holdings would remove such legislation from the possibility of a "strict scrutiny" analysis. The class of payors would include many wealthy, middle class, and poor persons. There would certainly be no *denial* of educational opportunities as public schools would still be available to everyone. The classifications made by the legislation are also based on the parental decision to choose private over public education and not on any known "suspect" classification. Furthermore, since education is not a fundamental right, any intrusion that might result from tuition tax credit legislation, would not give rise to equal protection problems.[193] Therefore, such legislation would probably be tested against a "rational basis" standard which should insure its constitutionality, at least under the Fifth Amendment.

However, this rather mechanistic approach to adjudication of equal protection issues has received considerable criticism. Justice White, for instance, stated in his *Rodriguez* dissent,

If the State aims at maximizing local initiative and local choice,

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legislative attempt to fit within the decision's guidelines also failed several years later in Serrano v. Priest (Serrano II), 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1977). The leading article opposing property tax financing of public schools is J. COONS, W. CLUNE & S. SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION (1970). *See also* Parker v. Mandel, 344 F. Supp. 1068 (D. Md. 1972); Spano v. Board of Educ., 68 Misc. 2d 804, 328 N.Y.S.2d 229 (N.Y. 1972); Simon, *The School Finance Decisions: Collective Bargaining and Future Finance Systems*, 82 YALE L.J. 409 (1973); Note, *A Statistical Analysis of the School Finance Decisions: On Winning Battles and Losing Wars*, 81 YALE L.J. 1303 (1972). For criticism of *Serrano see* Goldstein, *Interdistrict Inequalities in School Financing: A Critical Analysis of Serrano v. Priest and its Progeny*, 120 U. PA. L. REV. 504 (1972). Leading post-*Rodriguez* cases include: Board of Educ. v. Nyquist, 94 Misc. 2d 466, 408 N.Y.S.2d 606 (Sup. Ct. 1978) (New York's financing system held unconstitutional under both New York and federal constitutions.) Horton v. Meskill, 172 Conn. 615, 376 A.2d 359 (1977) (Connecticut's system held unconstitutional under state constitution); Olsen v. State, 276 Or. 9, 554 P.2d 139 (1976) (upholding Oregon's financing system); Buse v. Smith, 74 Wis. 2d 550, 247 N.W.2d 141 (1976) (Wisconsin district equalization scheme unconstitutional under state constitution); *see also*, Lindquist & Wise, *Developments in Education Litigation: Equal Protection*, 5 J. OF LAW & EDUC. 1, 23-55 (1976); McCarthy, *Is the Equal Protection Clause Still a Viable Tool for Effecting Educational Reform?*, 6 J. OF LAW & EDUC. 159 (1977); Note, 46 U. CIN. L. REV. 905 (1977).

193. Professor Michelman has written, " 'Equal protection' radar is sensitized to governmental implication in systematic inequality. It blips whenever a government seems (a) to be 'classifying' persons so as to extend to them unequal treatments, or (b) otherwise to be acting in a way which results in systematic inequality in treatments received by definable groups of persons." Michelman, *The Supreme Court 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 33 (1969). Tax credit legislation could "blip" Michelman's radar, but the additional requirements of an invidious discrimination or the invasion of a fundamental right do serve to weed out many governmental policies and statutes which would, on their face, show up on Professor Michelman's radar.

> by permitting school districts to resort to the real property tax if they choose to do so, it utterly fails in achieving its purpose in districts with property tax bases so low that there is little if any opportunity for interested parents, rich or poor, to augment school district revenues. Requiring the State to establish only that unequal treatment is in furtherance of a permissible goal, without also requiring the State to show that the means chosen to effectuate that goal are rationally related to its achievement, makes equal protection analysis no more than an empty gesture.[194]

In *Rodriguez*, the Court did not retreat from the traditional two-tiered approach, but several commentators have noted a perceptible movement toward a middle ground among some of the members of the Court. Justice Marshall, another of the *Rodriguez* dissenters, argued in 1970 for a "sliding scale analysis,"[195] that would move away from the all-or-nothing mechanistic application of the two-tiered formula. This argument was echoed[196] by Professor Gunther who suggested that the Court should focus first on the legislative goal and then on the means by which that goal was to be achieved to determine whether the means substantially furthered the end without significantly impairing the interests of any other class of citizens. It is not at all certain that the Court is inclined to move in the direction of an intermediate balancing approach to equal protection cases. The arguments in favor of such a test are certainly strong, and recent cases do indicate some movement in that direction.[197]

Of what importance might this be to a possible court challenge to a tuition tax credit law? A tax credit would probably withstand a *Rodriguez*-type analysis. It is not an "invidious" form of discrimination and there is some rational connection to generally valid legislative pur-

194. 411 U.S. at 68 (White, J., dissenting).

195. Dandridge v. Williams, 397 U.S. 471, 508-30 (1970) (Marshall, J., dissenting).

196. Gunther, *The Supreme Court 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972). For further discussion of this particular issue, *see* Yackle, *Thoughts on Rodriguez: Mr. Justice Powell and the Demise of Equal Protection Analysis in the Supreme Court*, 9 U. RICH. L. REV. 181 (1975); and *see generally* Wilkinson, *The Supreme Court, The Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945 (1975); Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral and Permissive Classifications*, 62 GEO. L.J. 1071 (1974); J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW (1978).

197. As the Court said in Massachusetts v. Feeney, 47 U.S.L.W. 4650 (1979), "[R]ecent cases teach that such classifications must bear a 'close and substantial relationship to important governmental objectives'." *Id.* at 4655, quoting Craig v. Boren, 429 U.S. 190, 197 (1976). *See, e.g.*, Orr v. Orr, 47 U.S.L.W. 4224 (1979), Caban v. Mohammed 47 U.S.L.W. 4462 (1979), Califano v. Goldfarb, 430 U.S. 199 (1977).

poses, e.g., tax relief and aid to education. A "means-focused" analysis, however, might be more useful than the two-tiered model for identifying some of the shortcomings of the legislation.

The Constitution does not protect education as a fundamental right; *Rodriguez* makes that clear. Nor does the Constitution require that governments, state or federal, provide for public education (this is not necessarily true of various state constitutions). On the other hand, the Constitution does not prevent the federal government from using public funds to support educational programs. Such programs are permissible unless the funds are used for a prohibited purpose, such as the advancement of religion or racial segregation. If it is permissible to give aid (and generally it is), then the use of tax credits rather than direct grants should be allowable. A means-focused analysis, however, highlights the inconsistencies in the legislation and serves to illustrate that it might tend to hurt rather than to help educational institutions. This result might not be sufficient for a finding of unconstitutionality, but it would indicate that the proposal is unwise for reasons of policy rather than for reasons of constitutional law.

The general goals of the tax credit proposal are praiseworthy. The proponents hope to stimulate interest in private education in order to help preserve a dual school system. Private schools have made numerous contributions to our society and they provide an alternative and an opportunity for diversity which is useful and important. Indeed, their existence has been found to be constitutionally protected. The legislation would also lessen the tax burden on the recipients and would, therefore, be a help in fighting inflation. Middle income parents, whose college age students do not qualify for loans or scholarships, are the largest group of potential beneficiaries of the proposed statute.[198]

But if we assume that one of the goals is to strengthen private education at the post-secondary level, the effect of the tax credit may be to do precisely the opposite. Consider, for instance, parent "A" whose son goes to a state university with an annual tuition fee of $500, and parent "B" whose daughter goes to a private university with an annual tuition fee of $5,000. A $100 tax credit for each parent would result in a twenty percent tuition reduction for parent "A" and a two percent tuition reduction for parent "B". That sort of discrepancy is hardly likely to strengthen the private universities or to afford parents a more meaningful choice.[199] The absolute dollar figures are so low that if the

198. *See, e.g.*, HOUSE REPORT, *supra* note 10, at 6.

199. This point has not been overlooked by the critics. *See, e.g.*, Letter from Presidents

credit becomes law, the effects are likely to be minimal.[200] The benefit to the institution is negligible.[201] The means are, at best, of little utility and, at worst, may operate to negate interest in private education.

This particular problem would not exist at the primary and secondary level because the public schools do not charge tuition. However, even at this level, the small amount of the credit is very unlikely to have much effect on parents. At most it might cause a few parents to keep their children in private schools. A mass migration from the public to the private sector is not likely to occur.[202]

With respect to easing the tax burden and helping with inflation a limited class of persons may get a small tax break and would, presumably, be glad to receive it. However, the overall effect of the credit would undoubtedly be inflationary and inflation would negate much of the tax advantage while increasing the cost of the program to the class of "payors." Although no one seems to know the actual cost of the various tuition tax credit proposals there is agreement that they would all be reasonably expensive: from hundreds of millions to billions of dollars annually.[203] This money would no doubt increase the spending power of some Americans and would obviously increase certain other tax revenues, e.g., sales taxes. However, it would also increase the federal deficit and add substantially to the general inflationary pressure of governmental spending without providing a concomitant increase in productivity unless there were to be offsetting reductions in other expenditures. Tax credits, such as the one for capital investments or for child care for working mothers, are generally directed toward the encouragement of decisions which will increase the productive output of

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of Smith College, M.I.T., Washington University and Northwestern University to the editor, Washington Post, April 22, 1978, § A at 12, col. 4 [hereinafter cited as Letter].

200. The pitifully small dollar figure contained in the legislation has been the subject of considerable criticism. *See* Letter *supra* note 197 and HOUSE REPORT *supra* note 10, at 31-32 (additional views of Reps. Abner J. Mikva and William M. Ketchum).

201. The school might increase its tuition by an amount equivalent to the tax credit, but that would, of course, negate the value to the parent.

202. There is also an important psychological issue. Parents have to be able to pay or to make some provision for paying tuition at the beginning of the academic year. The promise of a $100 tax credit the following April is not likely to be much of an incentive in August or September.

203. *See* HOUSE REPORT *supra* note 10 which contains estimates ranging from $16 million for the first year to $896 million for the third year to $2.2 billion for a post-secondary credit of up to $500. For an excellent review of the comparative costs of various different tax credit bills, *see*, Frankel, *Revenue Loss Estimates and Distributions of Tax Benefit of Selected Educational Tax Allowance Bills Introduced in the 95th Congress*, CONG. REC. SERV. No. 77-172 E (1977).

the private sector. But unlike other credits, this particular tax credit would not have any direct effect on productivity.

Furthermore, the proposal is not geared to financial need. The dollar figures are so low that they are likely to make little real difference to those who may need help the most. At the other end of the scale, it does not make sense to spend deficit dollars to help those who can already afford to pay. Between these two extremes, what little advantage may be gained after compensating for inflation is mitigated by the short term, experimental nature of most proposals under consideration.

In short, the goals may be well-intentioned, but the means not only seem unlikely to advance the social order toward those goals in any significant way, but also appear to work counter to some of the goals themselves.

As already noted, in light of *Rodriguez*,[204] it is highly unlikely that a challenge to the tuition tax credit on equal protection/due process grounds would meet with much success. The "payors," who may be wealthy as well as poor or middle class, are not being deprived of anything except a little money. They can send their children to public schools or they can choose to join the recipients in the private school class. It may not be a particularly sensible form of income redistribution, nor particularly practical, fair, or likely to be successful, but that does not make it unconstitutional, at least in terms of the Fifth Amendment.

There is, though, a fundamental problem in the continued exacerbation of differences in wealth. Those who support tuition tax credits are quick to point out that many students in private schools come from low income and middle income families.[205] This is no doubt true partly because the economic mixture in parochial schools tends to parallel that in public schools and partly because the same is probably true of many recently created private schools in the South. Also, at the college level, private and public scholarship and loan programs have

204. The Supreme Court made clear its reluctance to consider wealth based classifications as violative of the equal protection clause in the 1977 abortion cases. *See* Poelker v. Doe, 432 U.S. 519 (1977) (sustaining an executive order of the St. Louis mayor, an avowed abortion opponent, which prohibited municipal hospitals from performing non-therapeutic abortions); Maher v. Roe, 432 U.S. 464 (1977) (upholding a Connecticut statute which provided medical assistance to indigent women for pregnancy and childbirth costs but prevented the use of public funds for non-therapeutic abortions); Beal v. Doe, 432 U.S. 438 (1977) (holding that the Medicaid provisions of the social security laws do not require the funding of abortions as a condition to participation in the Medicaid program).

205. *See, e.g.*, 124 CONG. REC. E2170 (daily ed. Apr. 26, 1978) (comments of Rep. Frenzel).

made it possible for many less well-off students to attend private colleges. However, if parochial schools and segregation academies are excluded from the mix, common sense suggests that the majority of the students in private educational institutions come from families which, economically, are better off than the average.[206] Although many of the payors may also be middle income families, the transfer of funds by tuition tax credits will be from a large cross-section to a more narrowly circumscribed group that is, as against the average, already in a somewhat favorable position.

Some commentators have argued that the courts should pay particular attention to laws that could have an adverse impact on poorer persons. An income redistribution plan that takes from a large class, which includes many poor persons, and gives to a small class which includes relatively few poor persons would be just such a law.

Professor Nowak has said,

> The question is not whether the Court should abstain completely from reviewing laws which have an especially burdensome impact on poor persons, but what standard the Court should employ in reviewing such legislation. Although the Court may be unable to guarantee fulfillment of certain needs of the poor, it has a duty under the equal protection clause to review laws which burden poor persons.[207]

Wealth may not be a suspect classification in a constitutional system, but a transfer of income to a class of persons who are not poor[208] to the possible (some might say probable) disadvantage of a class of persons which includes the poor, does raise a prima facie issue of fair-

206. In 1976 approximately 60% of dependents in the college age cohort (18-24) from families with incomes in excess of $15,000 per year were enrolled in college. For families with incomes of $5,000 or less, this figure was about 22%. The enrollment figures include all colleges and universities, from community colleges to "mega-universities." Thus, a child of a middle to upper class family may be said to be three times more likely to go to college than a child of a poor family. If private colleges were separated out, one would expect the wealth differential to be even greater. These figures are from the U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, SERIES P-20, No. 319 (Feb. 1978), *cited in* 124 CONG. REC. E2170 (daily ed. Apr. 26, 1978).

207. Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classification*, 62 GEO. L.J. 1071, 1110 (1974).

208. Again, this is a point of some controversy. Rep. Charles Rangel has stated that 78% of the benefits of the Senate bill sponsored by Senators Moynihan and Packwood would go to families with incomes over $20,000 per year, whereas families with incomes of less than $9,000 would receive only six percent of the benefits. HOUSE REPORT *supra* note 10 at 29. Rep. Bill Frenzel, one of the supporters, has argued that 85% of the benefits will go to families with adjusted gross incomes of $30,000 or less. Rep. Frenzel's figures may be correct but they hardly support an argument that tuition tax credits are a plan to aid the poor. *See* 124 CONG. REC. E2170 (daily ed. Apr. 26, 1978).

ness. If a "fundamental fairness," "means-focused" test were used in due process/equal protection cases, a reasonable argument that this type of transfer implicates issues of a constitutional dimension could well be raised. It would demand a type of "moral theory" argument of constitutional adjudication which Professor David A.J. Richards proposed in an article sharply critical of the *Rodriguez* case.[209] One of Richards' principal concerns with *Rodriguez* was that it preserved what he perceived to be an inequity in the opportunity for education—the failure to recognize education as a substantive interest closely related to and approaching the level of fundamental rights:

> Since free speech and voting are clearly constitutionally protected fundamental interests, the concern should be about inequalities in educational opportunity that affect the equal exercise of those rights. To regard educational minimal as the proper standard incorrectly assumes that only minimal conditions for the exercise of free speech and voting rights are constitutionally relevant. The Court fails to recognize the moral force of opportunity as a general good on a par with liberty, and similarly regulated by a principle of substantive equality.[210]

Richards suggested the application of a different standard based upon his "principles of justice."

> *The principle of equal liberty and opportunity*. Basic institutions are to be arranged so that every person in the institution is guaranteed the greatest equal liberty and opportunity compatible with a like liberty and opportunity for all.
>
> *The principle of justified inequality*. Inequalities in the distribution by institutions of general goods like money, property, and status are to be allowed only if those inequalities are a necessary incentive to elicit the exercise of superior capacities, and only if the exercise of those capacities advances the interests of typical people in all standard classes in the institution and makes the life expectation of desire satisfaction of the typical person in the least advantaged class as high as possible.[211]

The application of Richards' principles could have caused a very different result in *Rodriguez*. If we accept the premise that dollars invested are related to the quality of education (and there is a debate over this assumption),[212] then the opportunity for education is not as readily

209. Richards, *Equal Opportunity and School Financing: Towards a Moral Theory of Constitutional Adjudication*, 41 U. CHI. L. REV. 32 (1973).

210. *Id.* at 63.

211. *Id.* at 47-48.

212. *See* OFFICE OF EDUCATION, U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, EQUALITY OF EDUCATIONAL OPPORTUNITY (1966); J. COONS, W. CLUNE & S. SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION (1970); Bowles & Levin, *The Determinants of Scholastic Achievement—An Appraisal of Some Recent Evidence*, 3 J. HUMAN RESOURCES 3

available in tax poor districts as it is in the tax rich districts. Richards' approach is simplified by the absence of any need to determine whether an identifiable group that is being denied an educational opportunity comprises a "suspect" group or not. Further, lest he be labelled as a radical egalitarian, he does make allowances for the imperfections of human society by allowing for certain inequalities, especially when the inequality is related to the development of superior capabilities. Thus, a special-program for gifted children would be acceptable even though the per student expenditures might be much higher than the average.[213]

Under Richards' rather egalitarian approach to equal protection analysis the tuition tax credit legislation might not pass muster.[214] An effective plan which would provide significant aid to private schools and attract students and teachers away from the public schools would raise questions under the Richards' model as to equality of treatment. Most students at the elementary and secondary level go to state supported schools. It would be an anomaly for the national government to address itself to the nurture of private schools which are attended by only a very small minority of students at the expense of the public schools. The quintessential problem with tuition tax credit legislation is its creation of precedents for further aid to private education which may, by their nature, effect a tilt toward wholesale support by the federal government for nonpublic schools. This is not to suggest that the national government should never provide support to private elementary and secondary schools; rather, it is to suggest that any such aid program should be carefully scrutinized and limited to insure that it does not unfairly advantage the relatively small number of students served by private schools.

Significant distinctions exist between aid to higher education and aid to elementary and secondary schools. The tuition tax credit proposals now under consideration would allow credits for tuition paid to public as well as private colleges, but the principle of federal financial assistance to private universities has long been accepted in both theory and practice. As discussed above, even the establishment clause has

(1968); Bowles, *Towards Equality of Educational Opportunity?*, 38 HARV. EDUC. REV. 89 (1968).

213. Needless to say, this would cause controversies about the definition of "gifted" in view of cultural deprivations. However, it is the height of folly to fail to provide additional challenges for bright young intellects.

214. A statute might still pass muster if it is unlikely to be effective because the amounts to be awarded are so small. Unless a statute is effective its impact may not be invidious. That is a bootstrap argument, to be sure, and one which suggests that the statute should not be enacted for reasons of policy or utility.

not prevented significant state and federal support to sectarian colleges. An aid program for colleges, even one which is principally directed toward the private sector, does not necessarily create the same type of conflict as one which is directed toward lower schools. School attendance to a certain age is mandatory in every state (although the ages vary), and to be a fully functioning member of our society it is necessary to have basic skills of literacy and mathematics. An inability to read, to write or to do simple arithmetic makes it almost impossible to obtain and hold a job, get a driver's license, have a bank account, or even use a vending machine. If society has achieved a level of complexity which requires fundamental literacy (which it has), and if attendance at school of some kind is required from about age six to about age sixteen (which it is), then the government has a fundamental responsibility to insure that schools are available to all children and that these schools give them the reasonable opportunity to obtain the skills necessary to be contributing members of the social order. The public schools bear the principal burden. This burden is certainly shared by the private schools. But the government must be careful to insure that any assistance to private schools[215] is in addition to and not at the expense of aid to public schools. It is the latter institutions which serve, for the most part, the poor and the disadvantaged children, the individuals for whom the government should be most concerned at the basic levels of education.

At the college level the situation is fundamentally different. One assumes (or at least one hopes) that college freshmen can read, write, add, subtract, multiply and divide sufficiently well to get along. Higher education should be just that—education for the development of greater intellectual abilities and professional competence in a given field. It is not required by the state; rather, it is a matter of choice. There are many publicly supported colleges and universities which are available at low cost, but admission (with few exceptions) is not guaranteed and attendance is certainly not required. The United States is also different from most countries in that it has an extraordinarily large number of private colleges and universities, many of which are major research institutions of the highest caliber. Government aid at this level is not for the purpose of insuring an opportunity for all children to obtain basic skills. Instead, it is for the purpose of supporting fundamental research and of training new generations of skilled profession-

215. Private school supporters sometimes argue that the public schools are not any good. That may be true, but, if so, it suggests that government's priority should be upgrading those schools which serve the great bulk of our young people.

als.[216]

This situation is very different at the elementary/secondary school level. The concern at this level is that tuition tax credits may further exacerbate class differences based on wealth by effecting a transfer to a relatively small, reasonably well off group.[217] This concern results at least in part from the failure of the tax credit proposals to relate credits to need. Anyone who pays tuition is eligible, whether he makes $5,000 or $50,000. This failure to tie the aid to need creates two problems. One is the so-called perception problem. Regardless of what the figures show (and they show relatively few rich people as tax credit recipients if parochial schools are included), there is bound to be a negative reaction on the part of most taxpayers to a transfer of tax monies to parents of children attending an expensive preparatory school. The second problem is the impact of tuition tax credits. A family with an adjusted gross income of $25,000 will probably have a federal income tax liability of $8,600.[218] Obviously a $100 tax credit is not much of a reduction (1.16% to be exact) and hence not much of an incentive. On the other hand, the credit is more substantial as a percentage of the ultimate tax liability if the adjusted gross income is $8000, but a family with an adjusted gross income of $8,000 is not likely to have much extra money available for private tuition payments absent some much more substantial forms of assistance.[219]

V. The Problem of Autonomy and Alternatives to Tuition Tax Credits

The federal government often becomes involved in a particular

216. In a more generalized sense, a liberal education and institutions of higher education contribute to the general "humaneness" of society by developing a common appreciation for intellectual achievements and cultural pursuits.

217. There is no doubt that a $25,000 annual family income no longer equals real wealth and both taxes and inflation take a great deal of that income. However, no family in that income bracket can be classified as poor and such families do have access to publicly subsidized education from kindergarten through the highest levels of graduate schools. There is also some question about the real need of such families now as compared with several years ago. For instance, for the period 1970-71 to 1976-77, the average cost of attending a public college rose 57% and of attending a private college rose 54%. During the same time the median income of all families rose 52%. Of those with college age children, the increase was 46%. *See* 124 CONG. REC. E2170 (daily ed. Apr. 26, 1978) (remarks of Rep. Frenzel). Obviously, there is a differential, but it is not as great as it might seem from a simple comparison of tuition figures.

218. Frankel, *supra* note 203, at CRS-12 (1977).

219. At the margin, the effect is obviously reversed. A tax credit of $100 represents a 25% savings on the last $1000 of income in the 40% bracket but only a 12.5% savings on the last $1000 of income in the 20% bracket.

program for the best of motives, but once it is involved there is always the danger that it will destroy the essence of what it seeks to preserve. This dilemma currently faces higher education. Universities have reaped tremendous benefits from federal assistance, and they do not want to lose government grants and subsidy programs, but the costs of such aid are beginning to be felt. The maze of regulations which attach to government aid have increasingly bureaucratized university life and have taken time, personnel and money away from teaching and scholarship. This has necessitated a reevaluation of aid programs in the university community with an eye toward preserving institutional autonomy and academic freedom from the impact of federal regulation. In order to retain government aid without sacrificing academic freedom, careful attention must be paid to the regulations and intrusions which attend on any aid program.[220]

Private elementary and secondary schools are in a different position altogether. Currently, they do not receive direct federal assistance in any significant amounts except through Title I of ESEA and through indirect subsidies. Certainly, these schools want additional sources of financial assistance, but before they press too much for federal aid they should carefully weigh the potential costs in loss of autonomy and intrusions into areas of academic freedom that accompany the aid.[221]

Tuition tax credit legislation does have one desirable characteristic. It does not further involve the government in educational administration. There might be some additional complications involved in filing tax returns, but no new, intrusive regulatory procedures are associated with the legislation. In one sense it may be regarded as evidence of congressional recognition that the purposes of aid programs may sometimes be stymied by the regulations which accompany them. This laudable trait, however, does not save the legislation, for it has too many other faults.

There are at least four proposals which might be more effective than tuition tax credits in pursuing the same general goals: (i) a modification of the tuition tax credit legislation to key it to need; (ii) an ex-

220. I have dealt with this problem at length elsewhere and do not intend to go into any detail here. *See* Hunter, *Federal Antibias Legislation and Academic Freedom: Some Problems with Enforcement Procedures*, 27 EMORY L.J. 607 (1978). *See also*, Rosenzweig, *An End to Autonomy: Who Pulls the Strings?*, CHANGE, Mar. 1978 at 28; O'Neil, *God and Government at Yale: The Limits of Federal Regulation of Higher Education*, 44 U. CIN. L. REV. 525 (1975).

221. Of course, lower schools are subjected to some regulation already which would not be countenanced at the college level. The justification lies in the state's concern for basic education and the fact that education to a certain age is usually mandatory.

pansion of the student loan program to include more middle income families; (iii) a tuition deferral plan; and (iv) increased deductions or tax credits for charitable contributions to educational institutions. The first proposal would ease some of the political problems associated with tuition tax credits, but it would not alleviate the establishment clause problem nor would it probably have much practical effect unless the dollar amounts were increased. The second proposal would simply expand on an existing program and would not necessarily cost as much because the money (or most of it) would be repaid eventually, although the interest rates have usually been lower than the rate of inflation. This proposal might, however, increase the overall level of bureaucratization through its administrative procedures. The third and fourth proposals are perhaps the most interesting.

Representative Abner Mikva[222] has proposed a plan that would allow a tuition paying taxpayer to deduct, whether or not he itemizes, a portion of tuition paid up to a stated maximum. This would reduce his tax liability by a percentage of the deduction equal to his marginal tax rate. Unfortunately, the tax reduction would amount only to a deferral rather than a saving, because several years later (the time could be keyed to school obligations) the taxpayer would have to pay the deferred tax, together with interest at a modest rate. This proposal is essentially a variation of the loan program, but one self-administered through the taxing system. It has one serious political flaw. The benefits are greater in actual dollars to those in the higher brackets. (In terms of percentage of total income the benefits to lower income taxpayers could be significant.) The plan would also be quite costly at the outset, although the initial costs should be recaptured in later years. Ultimately, the plan suffers from the same First Amendment problems as tuition tax credit legislation.

The final proposal, increasing deductions or credits for charitable contributions, has several advantages, some of which are shared with other proposals. It is self-policing through the taxing mechanism. It does not involve the government any further in the administration of education. The money goes directly to schools and colleges to use as they see fit (unless there are permissible limitations on the gifts), thereby fostering institutional autonomy. It encourages private support for education. Constitutional problems are avoided.[223] In sum, the

222. HOUSE REPORT *supra* note 10 at 24-25, (additional view of Rep. Abner Mikva and Rep. William Ketchum).

223. A charitable deduction is available for gifts to institutions which qualify for tax-exempt status. *See* I.R.C. § 170. Parochial schools are usually tax-exempt and certainly

plan is the only one of the four which would directly aid private elementary and secondary schools without raising establishment clause problems. Nonetheless, there are still two serious problems. A formula which provides an incentive, without being exorbitantly expensive[224] would have to be devised. Additionally, *credits* for gifts to schools and colleges would have to be justified politically, because only *deductions* are allowed for other charitable contributions.

A credit for gifts to schools would not be a tax relief bill, except for those who give, but it could have a direct and positive effect on educational institutions. It would provide them with additional support at no additional cost in government control. It is a proposal worthy of further consideration.

VI. Conclusion

The current proposals for tuition tax credits are simply different versions of an idea that has been debated in Congress for over a decade. The desire to aid educational institutions and the desire to help parents with the problem of tuition, taxes and inflation may be laudable, but the proposals raise a host of problems. The legislation as framed is probably unconstitutional under the First Amendment because it would assist sectarian schools. It raises serious policy questions of fairness in that it exacerbates wealth distinctions by favoring a small class which, as a whole, is not needy. It is costly and inflationary. It provides no direct subsidies to educational institutions. It is not keyed to economic need, and there is the possibility that it would tend to encourage offsetting reductions in other aid programs.

No doubt taxpayers want lower taxes. Everybody wants inflation to be controlled. No doubt schools and colleges are in financial need. There are certainly political reasons for government action. Tuition tax credit legislation is, however, the wrong action at the wrong time.

contributions to them should be acceptable as deductions or credits if gifts directly to churches are acceptable. *See, e.g.*, Walz v. Tax Comm'n, 397 U.S. 664 (1970).

224. Coupled with this would be the problem of deciding whether to allow a credit for gifts made by anyone or only for those who itemize. For more on this general subject see Steinbach, *Tax Reform and the Voluntary Support of Higher Education*, 8 U. RICH. L. REV. 245 (1974).