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State Aid to Nonpublic Elementary and Secondary Schools: Stymied in a Constitutional Cross Fire, 7 J. Marshall J. of Prac. & Proc. 265 (1974)

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COMMENTS

STATE AID TO NONPUBLIC ELEMENTARY AND SECONDARY SCHOOLS: STYMIED IN A CONSTITUTIONAL CROSS FIRE

INTRODUCTION

Education has long held a cherished priority in the United States, supported by the premise that an educated electorate is necessary for a functional republic. Church related schools form an integral part of the educational institution,[1] in response to demands for an alternative to the secular, public education provided by the states. In recent years educational institutions at all levels have experienced increased difficulties in meeting the costs of educating their students. Nonpublic schools are subject to this problem of rising costs, with the additional burden of relying on tuition and donations rather than taxes to finance their schools.

State legislatures in the past quarter-century have attempted to alleviate the financial burden on nonpublic schools by providing for various types of state aid to these schools. The general purposes of such aid have been to preserve the diversity of choice in education, with the attendant recognition that we are a pluralistic society, and to stem the influx of nonpublic school students from their financially plagued schools into the already crowded public school system.

The controversy surrounding parochiaid legislation in recent years has not centered around the purposes for such aid, but stems from the first amendment as it applies to aid to church related schools, which comprise the major portion of nonpublic elementary and secondary schools.[2] The first amendment, made applicable to the states by the fourteenth amendment,[3] commands that a state "shall make no law respecting

[1] In 1972, 5.2 million elementary and secondary school students attended approximately 21,200 nonpublic schools, of which some 18,000 are church related. In Illinois, nonpublic school enrollment was 451,724 students. These statistics were taken from Justice White's dissenting opinion in Committee For Pub. Educ. And Religious Liberty v. Nyquist, 413 U.S. 756 (1973), citing *Final Report, President's Panel on Nonpublic Education*, 5-6, 15-19 (1972).

[2] Roman Catholic schools alone comprise 83% of the total nonpublic school membership, enrolling 4.37 million pupils. Committee For Pub. Educ. And Religious Liberty v. Nyquist, 413 U.S. 756, 816 (1973).

[3] Murdock v. Commonwealth of Pennsylvania, 319 U.S. 105 (1943).

an establishment of religion, or prohibiting the free exercise thereof."[4] The United States Supreme Court decided four cases in June of 1973,[5] and the Illinois Supreme Court decided two cases in June and October of 1973,[6] on parochiaid legislation. These six cases will serve as a focal point for the following discussion of state aid to nonpublic elementary and secondary schools, with emphasis on their prospective effects in Illinois.

STATE AID TO NONPUBLIC PRIMARY AND SECONDARY SCHOOLS UNDER THE UNITED STATES SUPREME COURT DECISIONS

The Illinois Supreme Court in *Board of Education v. Bakalis*[7] held that any program which is constitutional under the federal establishment clause is constitutional under the present wording of the Illinois constitutional provision relating to state aid to sectarian schools.[8] Since the Illinois and Federal Constitutions are coextensive in their effects in this area of the law, a historical review of the United States Supreme Court decisions serves a dual function. First, a historical review will show the gradual development of the present Supreme Court standard on parochiaid. Second, the present standard of the Supreme Court provides the context in which to evaluate the recent Illinois decisions and possible forms of future aid.

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[4] The most general expression of the controversy can be summarized by the dicta of Justice White and of Justice Powell in two recent decisions:

> Constitutional considerations aside, it would be understandable if a State gave such parents a call on the public treasury up to the amount it would have cost the State to educate the child in public school, or, to put it another way, up to the amount the parents save the State by not sending their children to public school. Committee For Pub. Educ. And Religious Liberty v. Nyquist, [413 U.S. 756, 814 (1973) (White, J. dissenting)].
>
> But if novel forms of aid have not readily been sustained by this Court the 'fault' lies not with the doctrines which are said to create a paradox but rather with the Establishment Clause itself: 'Congress' and the States by virtue of the Fourteenth Amendment 'shall make no law respecting an establishment of religion.' With that judgment we are not free to tamper . . . Sloan v. Lemon, 413 U.S. 825, 835 (1973).

[5] Norwood v. Harrison, 413 U.S. 455 (1973); Levitt v. Comm. For Pub. Educ. And Religious Liberty, 413 U.S. 472 (1973); Comm. For Pub. Educ. And Religious Liberty v. Nyquist, 413 U.S. 756 (1973); Sloan v. Lemon, 413 U.S. 825 (1973).

[6] Board of Educ. v. Bakalis, 54 Ill. 2d 448, 299 N.E.2d 737 (1973); People *ex rel.* Klinger v. Howlett, 56 Ill. 2d 1, 305 N.E.2d 129 (1973).

[7] 54 Ill. 2d at 461-65, 299 N.E.2d at 743-45.

[8] The Illinois provision is article X, section 3 of the 1970 Illinois Constitution, accompanying the text for note 109 *infra*, where a more explicit analysis of *Bakalis* is given. The Illinois Supreme Court in *Bakalis* cited the Committee on Education's comments in retaining the wording of the 1870 Illinois Constitution, indicating that the provision as retained yields the same results as the word "establish" in the federal first amendment, and held that this was also the understanding of the convention and voters of the state who adopted it. 54 Ill. 2d at 463-65, 249 N.E.2d at 744-45.

Everson v. Board of Education,[9] decided in 1947, was the first Supreme Court decision to apply the establishment clause to a state aid statute. The local school board in *Everson*, pursuant to a New Jersey statute, authorized reimbursement to parents of money expended by them for the transportation of their children on regular busses operated by the public transportation system. The effect of the statute was that part of the reimbursement would be paid to parents with children in sectarian schools.[10] In an opinion by Justice Black, the Court held that the statute was constitutional, by analogizing bussing to other health, safety, and welfare measures such as police and fire protection and sewage disposal. The Court adopted a neutral stance toward religion, in that bussing is separable from the religious functions of sectarian schools, and to deny it would deny parochial students of "public welfare legislation."[11] However, Justice Black emphasized that the first amendment erected a wall of separation between Church and State,[12] and that this statute approached the "verge" of the state's power.[13]

In *People ex rel. McCollum v. Board of Education*,[14] decided in 1948, the Court examined a released time proposal whereby pupils from public schools, whose parents consented, could receive religious instruction from religious teachers during regular hours of the school day set apart for such purpose.[15] The Court held that the released time proposal was unconstitutional under the first amendment.[16] In the majority opinion, Justice Black stated that the use of tax supported schools for religious teaching was an aid to religion prohibited by the separation of Church and State doctrine.[17] However, in *Zorach v. Clauson*, decided in 1952, a released time provision providing that public schools release a student during the school day for religious instruction in religious centers, provided there was a written request from his parents, was held constitutional.[18] Justice Douglas, writing for the majority, distinguished the *Zorach* released time program

[9] 330 U.S. 1 (1947).
[10] *Id.* at 2.
[11] *Id.* at 16-18.
[12] *Id.* at 18.
[13] *Id.* at 16. That this statute approaches the verge was reflected in the 5-4 decision. Justice Douglas of the majority recently has indicated he would decide this landmark case differently, thus reversing the result in *Everson* and robbing it of its precedent value in the trend to allow more permissive forms of aid. Walz v. Tax Comm., 397 U.S. 664, 703 (1970). The dissent of Justice Rutledge attacked the decision as a breach in the wall of separation which would lead to a corrosion of the first amendment rights as a precedent to build on. *Id.* at 29.
[14] 333 U.S. 203 (1948).
[15] *Id.* at 205-06.
[16] *Id.* at 210.
[17] *Id.* at 212.
[18] 343 U.S. 306 (1952).

from that involved in *McCollum,* in that the *Zorach* plan involved neither the use of public school facilities nor public funds.[19]

Justice Clark, in *School District of Abington Township, Pennsylvania v. Schempp,*[20] decided in 1963, set down two of the three tests later used to determine the constitutionality of legislation under the establishment clause. Justice Clark stated that "there must be secular legislative purpose and a primary effect that neither advances nor inhibits religion."[21]

The statute in *Board of Education v. Allen,*[22] decided in 1968, required local public school authorities to *lend* textbooks to students, rather than renting or selling them as was previously done. Students attending private schools were included in the class of students benefiting from the statute.

The statute was attacked on first amendment grounds because of its authorization of a loan of textbooks to students attending parochial schools.[23] The Court held that the statute was constitutional[24] in a six-three decision. On behalf of the majority, Justice White applied the tests set down in *Schempp,* and stated that, like *Everson,* the *Allen* statute was a law having "a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[25] He based this conclusion on the premise that "religious schools pursue two goals, religious instruction and secular education,"[26] and that the two processes of secular and religious training are not intertwined.[27] Justice White observed that the loaning of each book had to be approved by the public school authorities and that only secular books would receive approval.[28] Thus, the statute would advance only the secular goal of sectarian education and not the religious goal. Justice White reinforced the majority position by noting that the financial benefit generated by the statute was to the parents and children, and that no funds or books were furnished to the parochial schools.[29]

In 1970, *Walz v. Tax Commission*[30] added a third test to the

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[19] *Id.* at 308-09.

[20] 374 U.S. 203 (1963). The *Schempp* case centered on the issue of Bible readings in public schools. The Court in an 8-1 decision held the readings unconstitutional.

[21] *Id.* at 222. Justice Clark cited the *Everson* case and McGowan v. Maryland, 366 U.S. 420 (1961) as his authority for the tests.

[22] 392 U.S. 236 (1968).

[23] *Id.* at 238-39.

[24] *Id.* at 238.

[25] *Id.* at 243.

[26] *Id.* at 245. *See* Pierce v. Society of Sisters, 268 U.S. 510 (1925).

[27] 392 U.S. 236, 248 (1968).

[28] *Id.* at 244-45.

[29] *Id.* at 243-44.

[30] 397 U.S. 664 (1970). The *Walz* case held that property tax exemptions to religious organizations for properties used solely for religious worship were constitutional.

two outlined in *Schempp*. The *Walz* Court stated that the result of legislation in aid of education should not be an excessive government entanglement with religion. Chief Justice Burger admitted that this test involved degrees of entanglement,[31] but added:

> [T]he questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement.[32]

In *Tilton v. Richardson*,[33] Chief Justice Burger acknowledged that the three tests developed by the court in *Schempp* and *Walz* were not absolute and involved risks in their application. He stated that these tests should be used "as guidelines with which to identify instances in which the objective of the Religion Clauses have been impaired,"[34] and that "candor compels the acknowledgment that we can only dimly perceive the boundaries of permissible government activity in this sensitive area of constitutional adjudication."[35]

Shortly after *Tilton*, a statute providing reimbursement for the cost of teachers' salaries, textbooks, and instructional materials in specified secular subjects and another statute providing a salary supplement of fifteen percent to teachers in nonpublic elementary schools were at issue in *Lemon v. Kurtzman*.[36] Both

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[31] *Id.* at 674.

[32] *Id.* at 675.

[33] 403 U.S. 672 (1971). In his majority (5-3) opinion Chief Justice Burger held that the Higher Education Facilities Act of 1963 providing for nonsectarian facilities was constitutional over the contention that grants to church related colleges and universities under the Act rendered it unconstitutional under the first amendment. Chief Justice Burger based his conclusions on the premise that there are "significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools." 403 U.S. at 685. This article is confined to the discussion of the establishment clause in relation to state aid to nonpublic elementary and secondary schools, due to this distinction.

[34] *Id.* at 678.

[35] *Id.*

[36] 403 U.S. 602 (1971). This opinion also considers Earley v. DiCenso and Robinson v. DiCenso, joined in this appeal. In *DiCenso*, the Rhode Island Salary Supplement Act of 1969 was contested. The Act recognized that higher salaries were needed to attract competent and dedicated teachers to nonpublic elementary schools and therefore proposed a supplement of 15% to their current annual salary. The limitations on the supplement were: 1) the nonpublic school teacher's salary could not exceed the maximum paid to public school teachers; 2) financial data to regulate must be furnished by the eligible schools to the State Commissioner of Education; 3) teachers eligible for salary supplements must (a) teach only those subjects offered in the state's public schools, (b) use only teaching materials used in the public schools, and (c) agree in writing not to teach a course in religion while receiving the supplement. *Id.* at 607-09.

In *Lemon*, the Pennsylvania Nonpublic Elementary and Secondary Education Act was contested. The Act recognized the crisis in nonpublic schools, and authorized the state to "purchase" specified "secular educational services" from nonpublic schools. This involved direct state reimbursement of nonpublic school expenditures for teachers' salaries, textbooks, and instructional materials. The limitations on the reimbursement were: 1) schools seeking reimbursement must maintain prescribed accounting procedures, identify secular costs, and be subject to a state audit; 2) courses benefited

were held unconstitutional. In speaking for the majority, Chief Justice Burger emphasized the word "respecting" in the establishment clause. A distinction between a law "establishing" religion and one "respecting an establishment" of religion yields a greater prohibitive effect in the latter. Chief Justice Burger wrote:

> A given law might not *establish* a state religion but nevertheless be one "respecting" that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment.[37]

The Court then applied the three tests formulated in *Schempp, Allen,* and *Walz* to the statutes at issue in *Lemon.* The first test, that the statute must have a secular legislative purpose, was met by the express legislative intent in both statutes to "enhance the quality of the secular education in all schools covered by the compulsory attendance laws."[38] In this respect, the Court adopted the same premise as in *Allen,* that "secular and religious education are identifiable and separable."[39] The second test, that the statute in its principal or primary effect must be one that neither advances nor inhibits religion, was not discussed at length,[40] since the Court used the third test of excessive government entanglement with religion to declare both statutes unconstitutional.[41]

The Court in *Lemon* found an impermissible degree of entanglement, and set the following guidelines for making such a determination:

> [W]e must examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority.[42]

The character and purposes of parochial schools were found to involve substantial religious activity.[43] Busses, textbooks, and other forms of aid were acknowledged as either secular, neutral, or nonideological,[44] whereas the potential for a teacher involving the content of a secular course with religion, in light of the religious environment of a parochial school, necessitates a much

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were limited to purely secular subjects taught in public schools; 3) textbooks and other instructional materials were to be approved by the state; and 4) a denial of reimbursement for courses containing "any subject matter expressing religious teaching, or the morals or forms of worship of any sect." *Id.* at 609-11.

[37] 403 U.S. at 612.

[38] *Id.* at 613.

[39] *Id.*

[40] *Id.*

[41] *Id.* at 614.

[42] *Id.* at 615.

[43] *Id.* at 616.

[44] *Id.*

higher degree of discipline and control over the teacher.[45] Thus, a "comprehensive, discriminating, and continuing state surveillance" would be required to avoid a first amendment violation, which involves excessive entanglement.[46]

The Court also followed the distinction made in *Everson* and *Allen,* that the state aid must be provided to the student and his parents, and not to the sectarian school.[47] Chief Justice Burger concluded by discussing the devisive political potential of this type of state program, warning that they led into "political fragmentation and divisiveness on religious lines . . . ."[48] which was "one of the principal evils against which the First Amendment was intended to protect."[49]

In June of 1973, the Court decided four cases on state aid to nonpublic schools.[50] In *Levitt v. Committee For Public Education and Religious Liberty,*[51] the constitutionality of a New York law, whereby the state reimbursed nonpublic schools for certain costs of testing and record keeping, was attacked. Both the tests and examinations contemplated by the statute were state prepared papers, such as "Regents' examinations" and "Pupil Evaluation Program Tests," as well as tests prepared by the individual teachers to measure the students' progress in subjects required to be taught under state law.[52] The Court held the statute unconstitutional in an eight-one decision; Chief Justice Burger stating that the statute constituted an impermissible aid to religion, in that the aid devoted to secular functions was "not identifiable and separable from aid to sectarian activities."[53] The Court cited the absence of restrictions to assure that the teacher-prepared tests would be free of religious instruction. The danger that a teacher would "inculcate students in the re-

[45] *Id.* at 617. The Court later stated:
> We simply recognize that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral. *Id.* at 618.

[46] *Id.* at 619.

[47] *Id.* at 621.

[48] *Id.* at 623. Justice Burger envisioned a situation where religious groups demanded more and more appropriations as their needs increased, using a permissive decision here as precedent; and also a situation where only a few religious groups, especially the Roman Catholics, would receive the major portion of benefits due to their established school system, thus creating an animosity in religious groups not so benefited.

[49] *Id.* at 622.

[50] Cases cited note 5 *supra.* The first of these four cases, Norwood v. Harrison, is not important to our present discussion. *Norwood* involved state aid to private schools in Mississippi which had racially discriminatory policies and thus was uncontitutional.

[51] 413 U.S. 472 (1973).

[52] *Id.* at 475. The schools that qualified under the statute received "$27 for each pupil in average daily attendance in grades one through six and $45 for each pupil in average daily attendance in grades seven through twelve." *Id.* at 476.

[53] *Id.* at 480.

ligious precepts of the sponsoring church" through such tests required stated restrictions, and their non-inclusion, probably to avoid excessive entanglements, created a potential for conflict which rendered the statute unconstitutional.[54]

Three forms of state aid to nonpublic schools pursuant to a New York statutory amendment were held unconstitutional in *Committee For Public Education & Religious Liberty v. Nyquist*.[55] The first section of the amendment provided for direct money grants to "qualifying" nonpublic schools to be used for "maintenance and repair" of facilities and equipment to ensure the students' "health, welfare and safety." Qualifying schools were those nonpublic elementary or secondary schools serving a high concentration of pupils from low income families.[56] The second section established a tuition reimbursement plan for parents of children attending nonpublic elementary and secondary schools, providing a $50 or $100 reimbursement to those parents whose annual taxable income was less than $5,000.[57] The next three sections provided for tax relief to parents failing to qualify for tuition reimbursement. The taxpayer-parents were entitled to a deduction from their adjusted gross income according to the number of their children attending nonpublic schools, and the deduction decreased as their taxable income increased.[58]

The *Nyquist* Court found each of these provisions to have "a primary effect that advances religion" and offends the constitutional prohibition against laws "respecting the establishment of religion."[59] In so concluding, the Court applied the three tests that had emerged from earlier decisions. The first requirement, that the statute must reflect a "secular legislative purpose," was met by the New York legislature in its recited goals of preserving a healthy and safe educational environment for all its school children, relieving the overburdened public schools, and promoting pluralism and diversity among its public and nonpublic schools.[60]

The Court in *Nyquist* did not consider the application of the excessive entanglements test to these provisions, but dicta in the majority opinion by Justice Powell indicated that "assistance of the sort here involved carries grave potential for entanglement in the broader sense of continuing political strife over aid to religion."[61] While political divisiveness between Church and State and between different church groups over aid proposals

[54] *Id.*
[55] 413 U.S. 756 (1973).
[56] *Id.* at 762-63.
[57] *Id.* at 764.
[58] *Id.* at 765-66.
[59] *Id.* at 798.
[60] *Id.* at 773.
[61] *Id.* at 794.

would "not alone warrant the invalidation of state laws that otherwise survive the careful scrutiny required by the decisions of this Court, it is certainly a 'warning signal' not to be ignored."[62]

The first section of the New York amendment providing for fixed payments for maintenance and repair contained no restrictions that the sums be used only on secular portions of the school buildings or to pay salaries of employees working on such exclusively secular portions. The absence of such restrictions led to the Court's holding that the primary effect of this provision was to advance religion "in that it subsidizes directly the religious activities of sectarian elementary and secondary schools."[63] The Court analogized this aid to that in *Tilton*[64] and stated:

> If the State may not erect buildings in which religious activities are to take place, it may not maintain such buildings or renovate them when they fall into disrepair.[65]

Even though this aid was limited to fifty percent of the school's maintenance and repair budget, a mere statistical restriction on aid does not guarantee that a portion of such aid will not be used to finance the sectarian portion of religious education.[66]

The tuition reimbursement program also failed the "effect" test in that it provided no "effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes. . . ."[67] The effect of the provision which delivered the grants to parents rather than schools was not controlling, since this was only one factor among many to be considered in determining the constitutionality of a statute. The Court found that the absence of effective restrictions which would prohibit such aid from being used for sectarian purposes was the controlling factor in this case.[68] Even though this provision provided for reimbursement without coercion on the parent to use such funds for his child's education, the "substantive impact" is the same as a subsidy to send the child to a nonpublic school. Also, the limitation of reimbursement to fifty percent of any parent's actual outlay was a mere statistical assurance already found to be inadequate. Finally, the ruling of unconstitutionality did not violate the free exercise clause, for even though this provision would promote the free exercise of

[62] *Id.* at 797-98.
[63] *Id.* at 774.
[64] 403 U.S. 672 (1971).
[65] 413 U.S. at 777.
[66] *Id.* at 777-78.
[67] *Id.* at 780.
[68] *Id.* at 780-83. The Court distinguished both *Everson* and *Allen*, which

religion, it would violate the state's mandate of "neutrality" concerning religion.[69]

The final three sections providing for income tax benefits are distinguished from the tuition grants only in that the parent receives an actual cash payment under the tuition grant provision, while the parent is entitled to reduce his payment of tax to the state under the tax deduction provisions.[70] Thus, the tax benefit provisions suffered from the same constitutional deficiencies as the tuition grant provision.[71]

The final statute reviewed by the Supreme Court in June of 1973 was a Pennsylvania statute providing funds to reimburse parents for a portion of tuition expenses incurred in sending their children to nonpublic schools. The Court in *Sloan v. Lemon*[72] held the statute unconstitutional in a six-three decision. The statute was apparently passed to avoid the "excessive entanglements" ruling in *Lemon v. Kurtzman,*[73] but the Court in *Sloan* found no "constitutionally significant difference" between the Pennsylvania statute at issue and the New York statute stricken in *Nyquist.*[74] The Court stated that the consequences of tuition reimbursement were "to preserve and support religion-oriented institutions."[75]

Justice White, in his dissent in *Lemon,* had referred to the "insoluble paradox" created by the interplay of the "primary effect" and "excessive entanglements" tests.[76] He noted that if the state drafts restrictions into the legislation to ensure that aid will not be used for a sectarian purpose, the enforcement of such restrictions will usually be held to excessively entangle the state with the church related schools. However, if the provision does not provide these restrictions, there is no guarantee that the funds will not have the primary effect of advancing religion.

Justice Powell recognized this "insoluble paradox" in *Sloan,* but stated that the Court was prohibited by the first amendment's proscriptions from tampering with the clear wording of

provided direct grants to parents, in that bus rides and textbooks were amenable to restrictions guaranteeing their secular effects.

[69] *Id.* at 785-89.

[70] *Id.* at 791.

[71] *Id.* at 794. The analogy to the tax exemptions for church properties allowed in *Walz* was rejected by the Court, in that church property exemptions have enjoyed a long historical acceptance to prevent oppressive taxation of religious institutions by the state and because exemptions are granted for educational and charitable purposes. *Id.* at 791-94.

[72] 413 U.S. 825 (1973).

[73] 403 U.S. 602 (1971).

[74] 413 U.S. at 828.

[75] *Id.* at 832.

[76] 403 U.S. at 668.

the establishment clause in reviewing the novel forms of aid enacted in the states.[77]

THEORIES CONCERNING THE CONSTITUTIONALITY OF STATE AID TO NONPUBLIC SCHOOLS

Constitutional authorities, Justices of the United States Supreme Court, and numerous litigants have espoused theories on state aid to nonpublic schools which, in modified form, have been reflected in the Supreme Court decisions. A brief discussion of these theories is necessary for an understanding of the Court's present position on the issue, and in formulating a theory of how the Court will deal with forthcoming cases challenging aid provisions.[78]

Two theories which have been advanced adopt absolute positions in interpreting the first amendment. The first theory adopts a literal reading of the establishment clause and holds that the framers of the Constitution intended a strict separation.[79] Therefore, *no* aid by the states to sectarian schools is permitted. Further supporting this theory is the interpretation that the free exercise clause prohibits aid, in that taxpayers would be coerced to support a religion to which they do not subscribe, and that government controls on aid would eventually restrict the free exercise of religion. The main proponents of this theory were Justices Black[80] and Rutledge,[81] and presently Justice Douglas.[82]

The second absolute theory is at polar extremes with the first, contending that aid is *required.* While by law children must attend school, parents are free to choose a religious school, and aid is necessary to facilitate that choice. The double burden on the parents of nonpublic school children, to support public schools through taxes and to pay tuition for their children attending religious schools, forces the parents to forego state assistance due to the free exercise of their religion. Justices White,

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[77] 413 U.S. at 835.

[78] An excellent analysis of these theories is given in *Aid To Parochial Schools: A Re-Examination,* 14 WM. & MARY L. REV. 128 (1972) [hereinafter cited as *Aid to Parochial Schools*]. The classification of theories used in that article is adopted here due to the clarity it lends to this discussion.

[79] This view is supported by James Madison's *Memorial and Remonstrance Against Religious Assessments* published in 1785, set forth in appendices to Justice Rutledge's opinion in Everson v. Bd. of Educ., 330 U.S. 1 (1947), and to that of Justice Douglas in Walz v. Tax Comm., 397 U.S. 664 (1970). Madison was attacking a taxing measure which would support Christian churches, whose main advocate was Patrick Henry. One of the reasons cited in opposition to such a measure was that: "[I]t will destroy that moderation and harmony which the forebearance of our laws to intermeddle with Religion has produced amongst its several sects."

[80] *See* Everson v. B. of Educ., 330 U.S. 1, 41 (1947); and People *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203 (1948).

[81] *See* Everson v. Bd. of Educ., 330 U.S. 1 (1947).

[82] *See* Douglas' dissent in McGowan v. Maryland, 366 U.S. 420 (1961).

Burger, and Rehnquist have advanced views similar to this absolute position.[83]

Other theories have adopted positions in the continuum between these two absolutes.

The child benefit theory argues that permissibility of aid should hinge on the identity of the recipient. If the child is directly benefited, the fact that the school is incidentally benefited is of no consequence.[84]

The neutrality theories merge the establishment and free exercise clauses to attain a single principle. Under one neutrality theory, espoused by Professor Philip Kurland,[85] there should be perfect equality between religious and nonreligious sectors. This theory would allow state funds for religious schools if the legislative classification was broad enough to include like organizations in the public sector. Thus, the state would not use religion as a standard for action or inaction, since the neutrality of the first amendment clauses prohibits classification in terms of religion. A second neutrality theory, advanced by Professors Paul Freund and Donald Giannella, is based on the values the first amendment was designed to protect.[86] These values are voluntarism, mutual abstention, and neutrality. "Voluntarism" is a policy that religion "must not be coerced or dominated by the state, and individuals must not be coerced into or away from the exercise or support of religion."[87] "Mutual abstention" demands that politics be kept out of religion and religion out of politics. "Neutrality" refers to "government neutrality among religions and between religion and non-religion."[88]

Under the "no imposition" theory, not all aid to religious schools is prohibited, but only that aid which imposes or induces religious belief.[89] Aid which facilitates free exercise without imposition is permissible,[90] and if it indirectly or directly fur-

[83] *See* Lemon v. Kurtzman, 403 U.S. 602 (1971); Committee For Pub. Educ. And Religious Liberty v. Nyquist, 413 U.S. 756 (1973).

[84] 330 U.S. 1 (1947).

[85] Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1 (1961).

[86] Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680 (1969) [hereinafter cited as FREUND]; Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development Part II. The Nonestablishment Principal*, 81 HARV. L. REV. 513 (1968); Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development Part I. The Religious Liberty Guarantee*, 80 HARV. L. REV. 1381 (1967). This was also supported by Justice Clark in Abington School District v. Schempp, 374 U.S. 203, 222 (1963). The "secular purpose" and "primary effects" tests are a reflection of this principle.

[87] FREUND, note 86 *supra*, at 1684.

[88] *Id.* at 1686.

[89] Schwarz, *The Nonestablishment Principle: A Reply To Professor Giannella*, 81 HARV. L. REV. 1465 (1968).

[90] Schwarz, *No Imposition of Religion: The Establishment Clause Value*, 77 YALE L.J. 692, 730 (1968).

thers religion, a balancing test[91] is employed which considers such factors as whether it advances proselytism of religion,[92] the convertibility of funds from nonproselytising functions to prohibited functions, and whether such aid is substantial.[93]

The "quid pro quo" theory allows direct or indirect state aid to nonpublic sectarian schools up to the value of the secular educational service tendered by the school.[94] These funds may be spent on any service in the school including those for religious purposes, as long as the aid did not exceed the value of the secular services in that school. The state, it is reasoned, would be repaying nonpublic schools for services which the state would have been obligated to provide, and thus would be a quid pro quo purchase of services.

The balancing technique, though not a theory, is the approach used by the courts in *Everson* and several religion cases not involving aid.[95] As each case is decided, the public benefit of the provision is balanced against the aid to religion through an examination of such factors as the purpose of the aid, the amount of the fund, and the selection of recipients.[96] This technique leaves the courts broad leeway in deciding each case on its own circumstances, but lends itself to confusion and unpredictability in forecasting whether particular aid provisions are constitutional.[97]

The Three-part Test and Its Effects on Theories and Legislation

As discussed earlier in this comment, the Supreme Court has developed a standard, three-part test which, in effect, contradicts most of the theories concerning the constitutionality of state aid to nonpublic schools. The standard is that the law in question must: 1) reflect a clearly secular legislative purpose; 2) have a primary effect that neither advances nor inhibits religion; 3) avoid excessive government entanglement with religion.[98]

The first test requiring a "clearly secular legislative purpose" has not been used by the Court to strike down aid legislation. Its only purpose, in effect, is to require a recital in the aid provisions of health, safety and welfare goals, a

[91] *Id.* at 731-32.
[92] *Id.* at 734.
[93] *Id.* at 735.
[94] Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 CALIF. L. REV. 260, 265-66 (1968) [hereinafter cited as CHOPER].
[95] Everson v. Bd. of Educ., 330 U.S. 1 (1947); McGowan v. Maryland 366 U.S. 420 (1961); Zorach v. Clawson, 343 U.S. 306 (1952).
[96] CHOPER, note 94 *supra*, at 324.
[97] *Aid to Parochial Schools*, note 78 *supra*, at 146.
[98] Committee For Pub. Educ. And Religious Liberty v. Nyquist, 413 U.S. 756, 773 (1973).

desire for diversity, or other secular goals. The Court, in examining such recitals, seems to take judicial notice of the fact that each state has a valid interest in "promoting pluralism and diversity," and in relieving an "overburdened public school system."[99]

The second and third tests together lend a broad prohibitive effect to the standard whereby aid proposals are measured. The Court has recognized that religious schools pursue two goals in education and that the religious and secular goals may be separable.[100] To ensure that the funds from aid proposals are used only for the secular sector, legislatures must be wary of too many restrictions which might lead to excessive entanglement.[101] Too few restrictions, however, do not sufficiently guarantee that the aid will be used to advance only the secular functions.[102] Therefore, under the three-part standard, only the limited forms of aid which require minimal restriction to guarantee their secular effect will be upheld in the future.

The Supreme Court, in June of 1973 and in the *Lemon* case, dashed the rationale of the previously discussed theories concerning the constitutionality of state aid to nonpublic schools on the rocks of this three-part standard. "Child benefit" was rejected as a controlling factor in *Nyquist*.[103] The "quid pro quo" theory loses its effectiveness when reimbursement or direct grants for services are entangled in restrictions to ensure their secular effect.[104] The "no imposition" theory has been incorporated into the second test requiring that the primary effect of the aid neither advance nor inhibit religion. However, the third test of "excessive entanglements" strips this theory to a mere support for the "primary effects" test. The "neutrality" theory of Professor Kurland has never been accepted by the Court,[105] and Professors Freund and Giannella's theories of neutrality have been severely qualified by the "excessive entanglements" test.[106]

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[99] *Id.* at 773.

[100] 403 U.S. at 613. A theory supporting state aid to the secular functions of parochial schools based on this premise of separability of functions is advanced in Valente & Stanmeyer, *Public Aid to Parochial Schools — A Reply To Professor Freund*, 59 GEO. L.J. 59 (1970).

[101] Cases cited at note 5 *supra*.

[102] 403 U.S. 602 (1971).

[103] 413 U.S. at 781-83.

[104] *See* Lemon v. Kurtzman, 403 U.S. 602 (1971). A statistical limitation on aid would not involve excessive entanglement in its built in restriction on funds. However, the Court in *Lemon* and *Nyquist* held that such a restriction was not a sufficient guarantee of the secular effect of the aid. Therefore, a loophole in the cross fire of the "primary effects" and "excessive entanglements" tests was quickly closed.

[105] *Aid to Parochial Schools*, note 78 *supra*, at 140.

[106] The Court in *Nyquist* recognized that the first amendment "compels the State to pursue a course of 'neutrality' toward religion." 413 U.S. at 792-93. Yet, even if an aid proposal exhibits such a neutrality, it may be defeated by the "excessive entanglements" test. 403 U.S. 602 (1971).

The "balancing technique" is still viable in areas of legislation other than state aid to nonpublic schools. But in reviewing the aid proposals, the Court gives only lip service to such factors as *who* the recipient of the aid will be,[107] and seems to apply the three-part test as a rigid standard to strike down most aid provisions.

The effects of the three-part test and its application have moved the Court closer to the absolute prohibition of aid. The second and third tests in concert may be interpreted to invalidate almost every substantial aid proposal. The constitutional philosophers favoring an absolute construction of the Bill of Rights in general and the first amendment in particular may well be pleased that in substance, if not in form, their philosophy is being forwarded. The emergence of the three-part test on a case by case, ad hoc basis, has been and will continue to be criticized by those wishing for more "play in the joints" in state aid proposals.[108]

THE ILLINOIS DECISIONS ON STATE AID TO NONPUBLIC PRIMARY AND SECONDARY SCHOOLS

The 1970 Illinois Constitution contains a specific section entitled "Public Funds For Sectarian Purposes Forbidden." Article X, section 3, adopted verbatim from the 1870 Illinois Constitution,[109] states:

> Neither the General Assembly nor any county, city, town,

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[107] 413 U.S. at 781-82.

[108] Prof. Paul G. Haskell submitted his views in *The Prospects for Public Aid to Parochial Schools*, 56 MINN. L. REV. 159 (1971) as follows:

> It is the writer's view that in making a judgment of constitutionality under the establishment clause, the Court should not direct its inquiry to the expressed purposes for which the funds are to be employed, but should look more broadly at the social function performed by the parochial schools. There can be no doubt that parochial schools were created so that the religious and philosophical positions of the church would be an integral part of the instruction. But it is submitted that the principal or primary social function or achievement or effect of the parochial school is the furnishing of education comparable to the education furnished by the public school system.

Id. at 184.

Prof. Haskell also stated:

> If sufficient funds are available to maintain some of these private schools, then a judgment has to be made as to whether the preservation of the principle [no aid to parochial schools] is worth the loss of the educational value. The writer's bias is that the principle is not worth the loss, and that the loss of any portion of the limited diversity that presently exists would be most unfortunate.

Id. at 160.

> It is this writer's opinion that the principle of separation between Church and State should not be compromised by the circumstances of our times. Although the separation doctrine may be interpreted in many ways, it is submitted that the limited aid provisions of today, if held constitutional, would lend themselves as precedents to more extensive aid provisions in the future. This would lead to an extensive involvement of Church and State, and thus the principle of separation should not be lightly discarded for the exigencies of the moment.

[109] ILL. CONST. art. VIII, § 3 (1870).

> township, school district, or other public corporation, shall ever make any appropriation or pay from any public fund whatever, anything in aid of any church or sectarian purpose, or to help support or sustain any school, academy, seminary, college, university, or other literary or scientific institution, controlled by any church or sectarian denomination whatever; nor shall any grant or donation of land, money, or other personal property ever be made by the State, or any such public corporation, to any church, or for any sectarian purpose.[110]

Until November of 1972, only a few older cases had been decided on the application of section 3. The Illinois Supreme Court in 1888 held that tuition payments paid by the county, for dependent children who were committed by judicial order to an industrial school controlled by the Roman Catholic Church, violated section 3.[111] The court rejected an argument that such payments were in return for tuition and clothing, and thus not "in aid" of a sectarian purpose.[112]

In 1917, the issue was again presented to the Illinois Supreme Court.[113] The Cook County Board had appropriated funds for the care and maintenance of the girls committed by the juvenile court to the industrial school.[114] The court held that such payments were constitutional in that they were not an "aid to the Catholic church or its sectarian purposes. . . ."[115] Two grounds were advanced for this conclusion. First, the "letter and spirit of the Constitution" would not prevent the children of members of a church from receiving the religious instruction they would have received at home, if the state had not assumed their control. Second, the payments received by the school were less than the actual cost for each girl in a similar institution maintained by the state.[116] This second point had been proved by the evidence in the case, and thus could be distinguished from the earlier case.[117]

This decision was subsequently followed under very similar factual situations.[118] Each later case was decided on the ground that the payments from the state were less or equal to the institution's value to the state. Thus, the payments were treated

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[110] ILL. CONST. art. X, § 3 (1970).

[111] County of Cook v. Chicago Industrial School for Girls, 125 Ill. 540, 18 N.E. 183 (1888).

[112] *Id.* at 570-71, 18 N.E. at 197-98.

[113] Dunn v. Chicago Industrial School for Girls, 280 Ill. 613, 117 N.E. 735 (1917).

[114] *Id.* at 614, 117 N.E. at 735.

[115] *Id.* at 619, 117 N.E. at 737.

[116] *Id.* at 618-19, 117 N.E. at 737.

[117] *Id.*

[118] Dunn v. Addison Manual Training School for Boys, 281 Ill. 352, 117 N.E. 993 (1917); Trost v. Ketteler Manual Training School for Boys, 282 Ill. 504, 118 N.E. 743 (1918); St. Hedwig's Industrial School for Girls v. County of Cook, 289 Ill. 432, 124 N.E. 629 (1919).

as a purchase of services rather than as aid to the institutions.[119] This theory, it may be noted, is identical to the "quid pro quo" theory of aid, which has been rejected by the United States Supreme Court in its recent decisions.[120]

For over a half-century there were no reported Illinois cases on state aid to nonpublic schools. However, in an opinion filed June 25, 1973, the Illinois Supreme Court upheld a statute providing transportation to children attending nonpublic schools in *Board of Education v. Bakalis*.[121] The statute in issue stated that a school board which provides transportation to public school students must also provide transportation to nonpublic school students on the same regular routes.[122] Pursuant to this statute, the plaintiff school board was requested to furnish transportation for more than seventy-six pupils enrolled in religious schools in that district. The school board stated that this would result in substantial additional cost,[123] and sought a declaratory judgment that the statute was unconstitutional under both the Federal and Illinois Constitutions, as well as the issuance of a writ of injunction, enjoining the defendants from withholding funds because of the plaintiff's refusal to furnish transportation to nonpublic school pupils.[124]

The school board argued that this transportation provision constituted assistance to church controlled schools and thus, an aid to the church which controlled that school, despite the benefits under the statute being received by the child.[125] The Illinois Supreme Court, citing the *Everson* case extensively,[126] the *Walz*[127] and *Lemon* decisions,[128] and various state appellate and supreme court decisions on bussing,[129] held that:

> [This provision] was enacted for the secular legislative purpose of protecting the health and safety of children traveling to and from

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[119] 282 Ill. at 510, 118 N.E. at 745-46.

[120] *See* Lemon v. Kurtzman, 403 U.S. 602 (1971); Committee For Pub. Educ. And Religious Liberty v. Nyquist, 413 U.S. 756 (1973).

[121] 54 Ill. 2d 448, 299 N.E.2d 737 (1973).

[122] ILL. REV. STAT. ch. 122, ¶ 29-4 (1973) provides as follows:
The school board of any school district that provides any school bus or conveyance for transporting pupils to and from the public schools shall afford transportation, without cost, for children who attend any school other than a public school, who reside at least 1½ miles from the school attended, and who reside on or along the highway constituting the regular route of such public school bus or conveyance, such transportation to extend from the homes of such children or from some point on the regular route nearest or most easily accessible to their homes to and from the school attended, or to or from a point on such regular route which is nearest or most easily accessible to the school attended by such children.

[123] 54 Ill. 2d at 452, 299 N.E. 2d at 739.

[124] *Id.* at 451-52, 299 N.E.2d at 738-39.

[125] *Id.* at 461, 299 N.E.2d at 743.

[126] *Id.* at 453-59, 299 N.E.2d at 739-42.

[127] *Id.* at 457-58, 299 N.E.2d at 741-42.

[128] *Id.* at 458, 299 N.E.2d at 742.

[129] *Id.* at 459-60, 299 N.E.2d at 742-43.

> nonpublic schools; that the primary effect of the statute neither advances nor inhibits religion, that any benefit to the parochial school or church controlling it is incidental and that the statute does not foster an excessive government entanglement with religion.[130]

The school board contended that the Illinois Constitution was more restrictive than the first amendment, and prohibited "even incidental aid or benefits to sectarian schools."[131] The court in *Bakalis* looked not only at voter understanding of the provision when they adopted it, but also at the constitutional convention's intent as witnessed by their debates preceding the retention of the 1870 wording.[132] The Education Committee, in retaining the language, cited legal authorities who "indicated that the present language is no more restrictive than the Federal language but rather yields the same substantive results."[133] Thus, the committee concluded "that any program which is constitutional under the Federal 'establishment' clause is constitutional under the present wording of Article VIII, Section 3."[134] The court held that since this was the understanding of the provision by the committee, the convention, and the voters, it did not violate the Illinois Constitution.[135]

The court also held that the validity of the provision under the three-part test placed it "outside the prohibition of section 3 of article I against any preference being given by law to any religious denomination."[136] The transportation of school children, whether public or nonpublic, served a public purpose and thus did not contravene the 1970 Constitution, Article VIII, section 1(a) which provides: "Public funds, property or credit shall be used only for public purposes."[137] Justice Ryan, in a special concurrence, agreed with the decision of the majority, but expressed the opinion that section 3 of Article X of the 1970

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[130] *Id.* at 461, 299 N.E.2d at 743. The court recognized the difficulty of distinguishing funds for the public's welfare and funds which aid or sustain religious institutions. *Id.* at 457, 299 N.E.2d at 741. However, the court stated, after their study of the cases, that:

> [T]he majority view and the trend of judicial opinion is that transportation at public expense of parochial school students on the same basis as public school students is considered primarily a health-and-safety measure for the benefit of all students, and that any aid to the parochial school, or the church supporting it, is incidental.

Id. at 460, 299 N.E.2d at 743.

[131] *Id.* at 461, 299 N.E.2d at 743.

[132] *Id.* at 461-64, 299 N.E.2d at 743-45, citing People *ex rel.* Keenan v. McGuane, 13 Ill. 2d 520, 527, 150 N.E.2d 168, 172 (1958).

[133] *Id.* at 463-64, 299 N.E.2d at 745.

[134] *Id.*

[135] *Id.* at 464-65, 299 N.E.2d at 745.

[136] *Id.* at 466, 299 N.E.2d at 746. This refuted the plaintiff's contention that providing for free transportation granted a preference to the Catholic Church who controls 88% of the elementary and 95% of the secondary school children attending nonpublic schools in Illinois. *Id.* at 465, 299 N.E.2d at 745-46.

[137] *Id.* at 466, 299 N.E.2d at 746.

Constitution was more restrictive than the first amendment.[138]

On July 1, 1972, the Governor of Illinois signed into law three enactments providing aid to nonpublic schools.[139] The first act provided for state reimbursement of a portion of the costs of educating nonpublic elementary and secondary school children to families whose total income was less than $3,000 per year. The grants were limited to the actual per-pupil amount contributed by the state to the public school district in which the nonpublic school child resided. The second act provided for the furnishing at state cost of secular textbooks and services to children in nonpublic elementary and secondary schools. The books and services were to be the same as those provided for public school children in the state. They were also to be limited in amount to the actual per-pupil amount of aid contributed by the state to the public school district in which the nonpublic school child resides. The third act authorized creation of a board to make state grants to finance exemplary and innovative elementary and secondary school programs of a secular nature. The programs were to be conducted by public or combined public and nonpublic personnel.[140]

The supreme court denied leave to file an original action of mandamus to compel the Auditor of Illinois to implement these programs. The court suggested that the action be brought in the circuit court in an adversary proceeding.[141] The circuit court held that the Parental Grant Act and the Development Board Act were constitutional under the three-part test, but that the Low Income Family Act was unconstitutional under *Lemon* as having a "primary effect that advances religion."[142] Both parties appealed to the Illinois Supreme Court, which awaited the United States Supreme Court's decisions of June 25, 1973. The Illinois

[138] *Id.* at 472-78, 299 N.E.2d at 752.

[139] Nonpublic State Parental Grant Plan for Children of Low Income Families Act, P.A. 77-1890, [1972] Ill. Laws 1st & 2nd Spec. Sess. 246; Nonpublic State Parental Grant Act, P.A. 77-1891, [1972] Ill. Laws 1st & 2nd Spec. Sess. 252; Illinois Educational Development Board Act, P.A. 77-1895, [1972] Ill. Laws 1st & 2nd Spec. Sess. 260.

[140] Innovative programs such as remedial instruction, school health, psychological and vocational guidance and counseling, specialized instruction, and others were contemplated by this Act. ILL. REV. STAT. ch. 122, ¶ 1059 (1973).

[141] Under 1970 ILL. CONST. art. VI, § 4(4), the supreme court may exercise original jurisdiction in mandamus cases. The court denied leave to file as a matter of procedure:

> It appears to the Court, based in part upon our earlier consideration of similar legislation, that the degree of 'entanglement' of church and State involved in the implementation of the questioned statutes can best be assessed on the basis of a record of testimony or other evidence presented initially in an adversary action in a trial court, and thereafter expeditiously reviewed pursuant to the provisions of Rule 302 (b).

Order, Illinois Supreme Court, July 6, 1972.

[142] Memorandum Opinion and Judgment Order of the Circuit Court of Cook County, People of the State of Illinois *ex rel.* Klinger v. Howlett, No. 72 L 8703 (1972).

Supreme Court, in *People ex rel. Klinger v. Howlett,* thereafter decided all three acts were unconstitutional in a five-two decision.[143]

The court restated the three-part test as the standard by which these statutes were to be measured.[144] The court affirmed the unconstitutionality of the grant plan for low income families.[145] The legislative purposes were found to be "unexceptional"; however, the program could not be distinguished from that ruled unconstitutional in *Nyquist.* The court found that the "effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions," and thus its primary effect was to advance religion.[146]

The second act, concerning the furnishing of textbooks and "auxiliary services" to nonpublic school students, was also found unconstitutional.[147] The Illinois Supreme Court considered textbooks and auxiliary services separately. The act provided that parents of nonpublic school children should request textbooks from a list maintained by the state. The school district would either loan or rent the textbooks to the nonpublic school students, depending on the arrangement with the public school students.[148] The court announced two reasons for invalidating this arrangement. Textbooks for public school children are paid for by the taxpayers of the local school district, whereas under this act the cost of textbooks for nonpublic school students is paid for by the state. "[T]he result is to create a State subsidy for textbooks furnished to children who attend nonpublic schools which is not available for textbooks furnished to students who attend public schools."[149] The court cited dicta in *Sloan* which indicated that programs supplying bus transportation and secular textbooks must aid "all parents," whereas this act aided only nonpublic school students.[150] The second reason for invalidating the textbook provision was based on the theory expressed in the act that the nonpublic school child was "entitled" to such payment as a matter of "right and duty." The court denied the existence under

[143] 56 Ill. 2d 1, 305 N.E.2d 129 (1973). Justice Schaeffer wrote the majority opinion, with Justices Kluczynski and Ward dissenting.

[144] *Id.* at 4, 305 N.E.2d at 130.

[145] *Id.* at 6-7, 305 N.E.2d at 132.

[146] *Id.* at 6, 305 N.E.2d at 132.

[147] *Id.* at 11-12, 305 N.E.2d at 134.

[148] *Id.* at 8, 305 N.E.2d at 132-33. For example, in Cook County, textbooks, workbooks, and all nontextual instructional materials except 16-mm. films are furnished to all students on a free-loan basis through the Bureau of Instruction Materials. THE LEAGUE OF WOMEN VOTERS, THE KEY TO OUR LOCAL GOVERNMENT 76 (3d ed. 1972). Thus, in Cook County textbooks would have been loaned to nonpublic school students. Chicago levies a tax to support this free-loan arrangement. However, many other districts provide textbooks on a rental basis.

[149] 56 Ill. 2d at 8-9, 305 N.E.2d at 133.

[150] *Id.* at 9, 305 N.E.2d at 133.

the first amendment of such a "duty."[151]

The statute respecting auxiliary services was similar to the textbook provisions. However, it was distinguished in two ways: first, the grants were paid directly to the school district; second, the school district was reimbursed by the state only for services rendered to nonpublic school students, but not those rendered to public school students.[152] The court found that the health services contemplated were "either purely secular or they can be determined to be secular without such policing as would amount to 'excessive entanglement.' "[153] However, the school guidance and counseling services, psychological services, and remedial and therapeutic programs for educationally disadvantaged children were found to be "not susceptible of supervision to assure a strictly secular content." The potential for conflict "inheres in the situation," and since the state failed to impose restrictions guaranteeing their secular content, this constituted an impermissible aid to religion. The secular and sectarian functions of such services were not identifiable and separable.[154] The court also held that the auxiliary services program suffered from the same infirmity as the textbook provision, in that its finance was not alike for both public and nonpublic students.[155]

The purpose of the board created by the third act was to establish "exemplary and innovative" programs in elementary and secondary schools by providing grants.[156] At the date of decision by the court, the board had not been appointed and no grants had been made. In the absence of express policies, the court warned that the fiscal control of the public school district could lead to excessive entanglements of government with church schools. If no such supervision was created, there would be no assurance "that the state-supported activity is not being used for religious indoctrination."[157] Neither contingency might occur, but in the absence of implementation, the court held that the third act was also unconstitutional.[158]

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[151] *Id.* at 9-10, 305 N.E.2d at 133.
[152] *Id.* at 10, 305 N.E.2d at 134.
[153] *Id.*
[154] *Id.* at 11-12, 305 N.E.2d at 134.
[155] *Id.* at 11, 305 N.E.2d at 134.
[156] *Id.* at 12-13, 305 N.E.2d at 134-35.
[157] *Id.* at 14, 305 N.E.2d at 136, citing *Levitt.*
[158] *Id. at* 14, 305 N.E.2d at 136. Justice Kluczynski, in his dissent, agrees with the holding of unconstitutionality of the first act. However, he would hold the second and third acts constitutional. He compares the textbook provision favorably with that approved in *Allen.* The distinction by the majority is rejected since Justice Kluczynski felt that each taxpayer would be treated equally within his classification, and that the majority's argument, if valid, would only be under fourteenth amendment "equal protection" grounds. He viewed the auxiliary services as valid health, safety, and welfare measures. Finally, he would uphold the third act despite the absence of implementation, by according it a presumption of validity. *Id.* at 14-21, 305 N.E.2d at 136-39.

CONCLUSION AND LEGISLATIVE PROPOSALS

The Illinois Supreme Court invalidated the textbook grant in *Klinger* on a ground novel to parochiaid litigation. The court added a restriction to the already imposing three-part test: state aid must include both nonpublic and public school children in the same classification when disbursing state funds. Thus, while the state may enact legislation which benefits the public schools only, a proposal intended to benefit nonpublic school children must also include children in public schools.

The Court cited both the statute in *Allen* and the dicta in *Sloan* as its basis for determining that the textbook provision was unconstitutional in *Klinger* and for imposing the additional restriction on the three-part test. The statute upheld in *Allen* required local public school authorities to lend textbooks to all students, and included both public and nonpublic school students in the same category.[159] Dicta in the *Sloan* decision attacked the tax reimbursement scheme for having "singled out a class of its citizens for a special economic benefit,"[160] and distinguished it from programs benefiting *all* children or parents.[161]

However, the United States Supreme Court in *Allen* and *Sloan* never addressed itself to the classification issue which concerned the Illinois Supreme Court. The Court in *Allen* had upheld the New York textbook provision under the three-part test and had held that the statute would advance only the secular goal of sectarian education.[162] The *Sloan* case had involved a statute providing for tax reimbursement to parents of nonpublic school children,[163] an aid far different in its effect and amenability to government control than textbook provisions. Therefore, the non-inclusion of public school students in the *Klinger* provisions should have been decided on fourteenth amendment grounds. The court's determination would then have been based on whether the classification excluding public school students had some rational basis, to avoid the contention of a denial of "equal protection of the laws."[164]

Since *Klinger* is now the law in Illinois, state legislators and special interest groups must rely on a four-part standard to determine the constitutionality of state aid to public schools. First, the purpose of such aid must be secular, and neither advance nor inhibit religion. If the aid is classified as a health, safety, and welfare measure, the state may include language describing such aid as a duty of the state to the child, or a right of the child to

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[159] 392 U.S. 236 (1968).
[160] 413 U.S. at 832.
[161] *Id.*
[162] 392 U.S. 236 (1968).
[163] 413 U.S. 825 (1973).
[164] U.S. CONST. amend. XIV, § 1.

such aid. However, if the aid falls out of this category, a recital of "duty," "right," "entitlement," or words to that effect may be fatally defective to the legislation.

Second, the primary effect of the aid must be secular, and neither advance nor inhibit religion. Realizing that religious schools serve a dual function, sufficient restrictions in the legislation are necessary to guarantee that the aid is used only for the secular function.

Third, the legislation or the possible implementation thereof must not involve excessive government entanglement with the Church. Express policies governing the fiscal control over the aid provision must be enacted to provide a basis from which the court may determine the degree of entanglement involved. The aid must be sufficiently neutral to satisfy the second test and yet require minimal restrictions to satisfy the third test.

Fourth, state legislation providing state funds for nonpublic school students must pre-empt the local school district's funding of the public school students in that specific area of legislation, and then provide state funds for both the nonpublic and public students alike. Or, the state may earmark funds already being provided to local districts by the state for the financing of categorical aid for both public and nonpublic school students in that area. This option seems unlikely in view of the increasing pressure on local districts to meet the financial demands of educating public school students. It would only controvert the expressed legislative purpose of relieving the already overburdened public school systems, and could be expected to meet with heavy legislative opposition.

Either of these options would overcome the objections regarding the financing of textbooks and health services asserted in *Klinger*. The first option could greatly increase the state's role in financing local schools. Presently, Illinois public schools are receiving over fifty percent of their funding from local taxpayers.[165] The percentages of local, state, and federal funding could be readjusted in the future to provide even more state funding to accommodate programs for nonpublic school children. However, increasing state funding would coincide with increasing state control of local school districts and their administrative and policy decisions. Diminishing local autonomy and control over education could produce undesirable results which might not

[165] The Illinois percentages in 1968-69 were 68.1% local, 26.7% state, and 5.2% federal funding. (Figures taken from THE LEAGUE OF WOMEN VOTERS, THE KEY TO OUR LOCAL GOVERNMENT 73 (3d ed. 1972). The state's percentage of funding since then has been increased. In the Chicago area, the local taxpayers provide 53.8%, the state 35.7% and the federal government 10.5% of the funding. (Taken from "The 1974 School Board of Education's Annual Budget for the City of Chicago.")

justify the desirable features of a shift in financing.

Further, a constitutional controversy has been raging in the past few years over the system of school financing based on local property taxes, which results in an unequal tax dollar behind children in wealthy, as compared to poor, school districts.[166] The theory underlying the attack against the traditional system of school finance based on ad valorem property taxes is that children from poorer school districts are denied equal protection of the law due to unequal funding.[167] This argument was recently rejected by the United States Supreme Court.[168] Consequently, the states are now being asked to supply a greater percentage of educational financing as a matter of policy, rather than as a constitutional right.[169]

A legislative collision between advocates of state aid to nonpublic schools and proponents of increased public education funding by the state would therefore appear imminent. Any substantial effort at funding nonpublic school students' textbooks or other forms of aid would compete for additional tax dollars with those interests lobbying for increased state funding to break down inequities in funding behind students. In reality, however, many legislators who represent districts with a poor population have strong religious support in their district as well and in many instances these groups are the same. Due to the financial requirement in *Klinger*, supporters of state aid to nonpublic schools will certainly welcome increased state funding of public schools and the concerns of both interest groups may ultimately

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[166] *See* Kamin, *The School Finance Language of the Education Article: The Chimerical Mandate*, 6 JOHN MAR. J. PRAC. & PROC. 331 (1973); Richards, *Equal Opportunity and School Financing: Towards a Moral Theory of Constitutional Adjudication*, 41 U. CHI. L. REV. 32 (1973); Keenan, *Current Issues in Illinois School Law: The Consumer's Perspective*, 23 DEPAUL L. REV. 402 at 457-61 (1973).

[167] *See* Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241 (1971).

[168] San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973). This decision was criticized in Richards, *Equal Opportunity and School Financing: Towards a Moral Theory of Constitutional Adjudication*, 41 U. CHI. L. REV. 32 (1973). Richards adopted Professor Ronald Dworkin's maxim that there should be a fusion of constitutional law and moral theory. The moral ideal of equal opportunity would then require the "strict scrutiny" of any legislative scheme for review on equal opportunity grounds. Thus, he would uphold the "strict scrutiny" in *Serrano* and reverse the "weak" standard in *Rodriguez*. Equal Protection would also require a strict scrutiny of state aid to nonpublic schools, and require "an expansive reading of constitutional inhibitions against such aid and provide a reason to resist political moves in that direction." *Id.* at 71.

[169] In Illinois, proponents of increased state funding of education sued the state seeking to require it to provide not less than 50% of the funding for elementary and secondary public schools. The basis of their contention was the wording in the 1970 Illinois Constitution that "The State has the primary responsibility for financing the system of public education." The court rejected this contention and held that the language was merely hortatory and only expressed a goal to be strived for. Blase v. State, 55 Ill. 2d 94, 302 N.E.2d 46 (1973). Thus, a possible state constitutional mandate was also denied to Illinois.

be aligned to pass legislation favorable to each.

Suggestions for future legislative proposals for state aid to nonpublic schools in Illinois must be made with two factors in mind. First, consideration must be given to federal aid provisions now in effect which have been viable in providing certain programs to nonpublic schools in Illinois. Second, the legislative proposal must meet the three-part test set up by the United States Supreme Court and the financing requirement in Illinois.

Areas in which federal aid provisions have been effective in supplying the needs of both public and nonpublic schools must be examined before legislative proposals are made, in order to determine whether they are sufficiently satisfying the need for aid in those areas, or whether a state supplement to the federal programs in those areas would be desirable. Federal programs by which nonpublic schools now enjoy benefits include the national school lunch program,[170] special milk programs,[171] loans for scientific and language equipment,[172] and many of the title programs deriving from the Elementary and Secondary Education Act of 1965.[173] The title programs have been beneficial to nonpublic schools by providing for reading programs for educationally deprived children in disadvantaged areas,[174] health services,[175] library resources and library textbooks,[176] supplementary education centers and services,[177] and bilingual education.[178] It must be emphasized that the title programs are provided to both public

[170] National School Lunch Act, 42 U.S.C. 1751 *et seq.* (1946).

[171] Agricultural Act of 1954, 7 U.S.C. 1446(c) (1954).

[172] National Defense Education Act of 1958, 20 U.S.C. 445 (1958).

[173] This Act has been incorporated throughout Title 20 of the United States Code.

[174] Elementary and Secondary Education Act of 1965, 20 U.S.C. 241(a) *et seq.* (1965). These are the federal Title I programs. Illinois receives approximately 66 million dollars of this aid, with the Chicago area receiving approximately 40 million of that portion. The Chicago nonpublic schools receive most of their federal assistance in the title programs from the Title I provisions. Forty schools in the Cook and Lake County areas are entitled to this aid and are participating in these programs. The two criteria for a district to qualify for Title I assistance are: 1) the geographical area must be a low income area, and 2) the child must be educationally deprived, at least one or two years behind in his educational skills. Remedial reading programs are the top priority, although fairly comprehensive health services are also provided. During the last year, these programs have been shifting from merely public school programs in which all students who qualify may participate, to programs provided in public and nonpublic schools alike.

[175] *Id.*

[176] *Id.* §§ 821 *et seq.* These are the Title II programs, and they presently provide $1.25 per student per year for the purchase of such materials.

[177] *Id.* §§ 841 *et seq.* These are the Title III programs which contemplate projects such as guidance and counseling, remedial instruction, physical education, special instruction, and equipment for advanced scientific subjects. Eight million dollars is presently being expended in Illinois on these programs, although the public schools are not providing the innovative programs necessary to attract the nonpublic schools.

[178] Bilingual Education Act, 20 U.S.C. 880b *et seq.* (1968). Most of the assistance here is from the state, although the federal Title VII program provides for such assistance.

and nonpublic schools, and thus do not suffer from the infirmity of an exclusive legislative classification found in the *Klinger* decision.[179] Although control of the more controversial of these programs is vested in the public schools, with the nonpublic schools' participation severely limited, a study of federal programs and the aid they are providing could establish a basis from which to draft legislative proposals for state aid.[180]

The Illinois legislature is not considering any new proposals for state aid at the present time. This inactivity results from two factors: first, the recent *Klinger* decision held the ambitious programs for state aid to nonpublic schools unconstitutional; second, major interest groups for such aid have been awaiting a decision from the United States Supreme Court on the constitutionality of the Title I program and its benefits to nonpublic schools.[181] That decision could provide further definitive language from the Court on the constitutionality of aid proposals. The emergence of a standard test whereby establishment clause cases may be adjudicated indicates that perhaps some stability and predictability will be found in this area of the law. The low income family grant program, such as that held unconstitutional in *Klinger*, and tuition reimbursement, tax credit, voucher,[182] or other pro-

[179] For a discussion of the federal programs enacted in 1965 which benefit nonpublic schools, see Rousseau, *Church-State: A Legal Survey — 1966-68*, 43 NOTRE DAME LAWYER 684 at 734-64 (1968); *Elementary and Secondary Education Act of 1965 and the First Amendment*, 41 IND. L.J. 302 (1965); Sky, *The Establishment Clause, The Congress and the Schools; An Historical Perspective*, 52 VA. L. REV. 1395 (1966). The last article gives an excellent perspective on the formulation of the establishment clause by tracing the influence of Madison, and to a lesser extent Jefferson, on its formulation.

[180] This article is limited in scope to a study of state aid to nonpublic schools. Therefore, the discussion of federal aid provisions has been limited to a brief survey of those programs benefiting elementary and secondary nonpublic schools only as a basis for determining where and to what extent state aid will be necessary to supplement the federal programs and to show the areas in which federal funding is lacking.

[181] Barrera v. Wheeler, 475 F.2d 1338 (8th Cir. 1973). This case is now before the United States Supreme Court which has heard the arguments. The decision will probably be rendered before June. The case is a class suit brought by supporters of federal aid to nonpublic schools to enjoin Title I funds from being arbitrarily denied to nonpublic school children in Missouri. The Court of Appeals in the Eighth Circuit held for these plaintiffs. Of special interest to other states receiving funds under Title I are the issues of: 1) whether private schools should share in funding of this program on an equitable basis of quality, scope, and opportunity; and 2) whether public personnel should be allowed to teach under this program on nonpublic school premises.

[182] Voucher plans were proposed before the *Nyquist*, *Levitt*, and *Sloan* decisions in 1973. These plans would provide each parent with a voucher to be used at any accredited school participating in the voucher system. The schools, in turn, would present the accumulated vouchers to the state education agency for reimbursement. The voucher plans were proposed to avoid the third test of excessive entanglement. However, their substantive impact would be to subsidize religion, and thus would fail the second test by having a primary effect of advancing religion. *See* CENTER FOR THE STUDY OF PUBLIC POLICY, *Education Vouchers* 1-6 (1970); Friedman, *Capitalism and Freedom* 91-94 (1962); *Education Vouchers: The Fruit of the Lemon Tree*, 24 STAN. L. REV. 687 (1972).

grams which operate in such a manner that the substantive impact is a subsidy of religion, will continue to be invalid.

However, state aid which provides textbooks of a secular nature to nonpublic schools may be enacted in Illinois and, if enacted, would help to ease the financial strain on these schools. The earmarking of present funds, given to public school districts for textbooks to be used by both public and nonpublic schools, would meet with heavy opposition from local public school districts who are already being pressed to meet their own financial needs. However, a state legislative proposal providing for additional funds to finance textbooks to *all* school children in the state would satisfy both the finance requirement in *Klinger* and the political opposition of the local public school districts. This proposal would have to eliminate language couching this aid in terms of the state's "duty" or "entitlement" of the student to such aid.

Shared-time proposals would also seem to be constitutional under the recent decisions. Shared-time, or dual enrollment, is a concept whereby a nonpublic school student receives a portion of his education from a public school in that area under a mutual agreement of the public and nonpublic school officials.[183] A shared-time program has been carried out in Chicago between a public and nonpublic school,[184] and was held constitutional under the 1870 Illinois Constitution.[185] However, a shared-time program would suffer from several limitations. First, it would result in increased costs to the public school system, although it might preclude the closing of a nonpublic school in a certain area and stem the influx of those students into the public school system, thereby minimizing such increased costs. Second, it would provide administrative and transportation difficulties for the participating schools and those nonpublic school students receiving an education in the nonpublic and public schools. Finally, if carried to the extreme, it would diffuse the nonpublic school's effect on the individual student, and adversely affect his ability to relate to one school.

Health services and remedial and therapeutic programs for nonpublic school children could be enacted on the basis of similar federal programs in these areas, to supplement the funds now being received by nonpublic schools from the federal programs. Minor restrictions would guarantee that these funds were used only for secular purposes. In the event that the remedial and therapeutic program was not held to be sufficiently restricted, a

[183] *Shared-Time — Permissible Aid To Sectarian Education*, 17 DEPAUL L. REV. 373 (1968).

[184] *Id.*

[185] Morton v. Bd. of Educ. of City of Chicago, 69 Ill. App. 2d 38, 216 N.E.2d 305 (1966).

prominent severability clause in the legislation would insure the maintenance of the health services. The financing of such services would again be maintained by the state for all school children alike.

The board created to establish exemplary and innovative programs in *Klinger* could be resurrected by the enactment of distinct policies and restrictions to insure its secular nature, using the federal Title III program as a guide. This legislation would then have the vitality and sustained success of a similar federal program and its implementation to support its constitutionality.

The expenditure of state funds pursuant to a statute which is later found unconstitutional does not render the state liable for reimbursement of those funds.[186] Therefore, legislators should not be concerned that "exploratory" legislation in this area would render a harmful retroactive effect on the nonpublic schools it was intended to assist. Speculative legislation in this area to fulfill a portion of the nonpublic school student's needs may therefore be a wise alternative to a resignation to the constitutional limitations the decisions have invoked.

In conclusion, Illinois may now move to pass legislation in the area of aid to nonpublic schools on the basis of tests which, because of United States and Illinois Supreme Court decisions interpreting them, emerge more clear in definition and admit more readily to anticipated construction. Certain vital forms of aid, which include the major expenses of education, are almost strictly prohibited. These include any subsidies, or forms of payment amounting to a subsidy of teachers' salaries, tuition, building funds, or maintenance and repair funds. However, certain aid programs relieving a smaller portion of operating expenses may be instituted and should find sanction in the rapidly restricting "play in the joints" of the Constitution, referred to in 1970.[187]

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[186] Lemon v. Kurtzman, 411 U.S. 192 (1973). This decision was based on a different issue from those presented in the 1971 *Lemon* decision.

[187] 397 U.S. at 669.