to happen in Rhode Island parochial school classrooms. . . ."[86]

The higher education cases turn heavily on assumptions that the Court makes about church-related institutions and, as a corollary, how the Court assigns burdens of proof. The Court takes nonsectarianism at private colleges to be the norm. Generalizing in Tilton, Chief Justice Burger took this norm to include the skepticism of college students, the internal disciplines of courses of instruction, commitment to academic freedom, and an atmosphere of open enquiry.[87]

The plaintiff challenging a program aiding private colleges will find himself being obliged to show, on the facts of the particular case, that a given college departs from the assumed norm. In Tilton Chief Justice Burger found that the "record here would not support a conclusion that any of these four institutions departed from this general pattern."[88] In Hunt Justice Powell was even more explicit about the burden of proof: "the burden rests on appellant to show the extent to which the College is church-related. . . ." Powell concluded that the program's challenger had failed to show that the Baptist College at Charleston was "any more an instrument of religious indoctrination than were the colleges and universities involved in Tilton."[89]

Roemer, the Maryland case, reflects the Court's unwillingness to second-guess a district court that has found an aided college not to be "pervasively sectarian." Justice Blackmun, having re-stated the trial court's findings, said he could not characterize those findings as "clearly erroneous."[90]

Formal ties between a college and a religious body--such as a church's power to appoint trustees or to approve charter amendments--do not make the college "pervasively sectarian." All four of the colleges in Tilton were governed by Catholic religious organizations.[91] In Hunt the South Carolina Baptist Convention elected the college's trustees, had a veto over certain financial transactions, and had to approve any charter amendments.[92] The colleges in Roemer had a "formal affiliation with the Roman Catholic Church," which was represented on their governing boards.[93] Nevertheless, the Court approved the aid programs in all three cases.

The Court directs its enquiry, therefore, to a college's actual operations--its admissions and faculty hiring policies, compulsory chapel, required religion courses, and the like. The Court has not been notably stringent in reviewing these factors. The faculty and student body at the four colleges in Tilton were predominantly Catholic, but the Court was satisfied by the finding that non-Catholics were admitted as students and given faculty appointments. All four institutions required students to take theology courses, but Chief Justice Burger noted that courses were taught according to the academic requirements of the subject matter and the teacher's concepts of professional standards and that the courses covered a range of human experience not limited to Catholicism.[94] In Roemer some classes were begun with prayer, but the Court accepted the trial court's finding that this was left up to each instructor and was not a matter of "actual college policy."[95] On such records the Court has been able to

conclude that the colleges' basic mission was secular rather than sectarian education.

The Court does insist on safeguards, even in the college cases. Even when satisfied, as in both Tilton and Hunt, with the basic contours of an aid program, the Court looks for evidence that there are devices to prevent public funds from being channeled to religious uses. In Tilton Chief Justice Burger thought it important that the federal act had been drafted to ensure that federally subsidized facilities would be used for secular and not religious functions and that these restrictions were being enforced in the act's actual administration.[96] Likewise, in Hunt no aid could be used for facilities used for religious purposes--a ban backed up by clauses in each lease forbidding religious use and allowing inspections to enforce the agreement.[97] Without these limitations and safeguards, it is hard to imagine that a majority could have been mustered in either Tilton or Hunt to uphold the respective statutes.

The Court, in brief, takes a pragmatic approach to programs aiding church-related colleges. The dissenters, especially Brennan, would take a tougher line on such aid. Brennan found impermissible entanglement in both Tilton and Hunt; he complained in Hunt that the Court has "utterly failed to explain how programs of surveillance and inspection of the kind common to both cases differ from the Pennsylvania and Rhode Island programs" invalidated in Lemon.[98] But while the majority do require safeguards to prevent aid being used to support religious functions at church-

related colleges, they are clearly less concerned than in the parochaid cases about either entanglement or political divisiveness. The Court finds less danger of entanglement because church-related colleges pursue a secular objective similar to that sought by other colleges and because the atmosphere and attitudes on college campuses, church-related or not, gives less opportunity for religious indoctrination than does the parochial school environment. Likewise, the Court is less apprehensive about political divisiveness where the aid is to colleges, as the student constituency is more diverse, aid goes to private colleges generally (more than two-thirds of which have no religious affiliation), and a church-related college is likely to be more autonomous than a parochial school.[99]

Roemer makes the higher education versus primary and secondary education distinction all the clearer. In finding a lack of excessive entanglement in Tilton, Chief Justice Burger had emphasized that the federal construction aid was a "one-time, single-purpose" grant. It was distinguishable therefore from Lemon's "direct and continuing payments under the Pennsylvania program, and all the incidents of regulation and surveillance" in that case.[100] One might have wondered whether the Court might not be more concerned about a state program which, though directed to colleges, took the form of ongoing, annual appropriation. Roemer answered that question in favor of the aid. Litigants in Roemer urged that the case was controlled by previous cases, such as Lemon and Nyquist, "in which the form of aid was similar" rather

than those, like Tilton and Hunt, in which the character of the aided institution was similar. Justice Blackmun rejected that argument. What was important was not the annual nature of the aid, but the character of the aided institutions.[101]

If pragmatism characterizes the Court's college aid decisions, impatience seems the earmark of its parochaid decisions. As legislators have come up with one after another form of aid, the Court has beaten it back. The justices have many arrows in their sling -- purpose, effect, entanglement, and political divisiveness -- and it is the rare kind of aid that does not run afoul of one or more of those tests. Failure to create sufficient safeguards brings a program into collision with the effect test; creation of safeguards raises the spectre of entanglement.

After the Court's 1975 Meek decision, John Nowak said that the majority "will use any 'test' necessary to invalidate any program granting aid to parochial elementary or secondary schools or aid to the students who attend them." Indeed, he concluded, Meek signaled "the end of the use of 'tests' to determine the legitimacy" of such programs.[102]

It was never likely that a majority on the Court could be persuaded that the free exercise clause requires the states to lighten the burden carried by parents who choose to send their children to religious schools. But after Allen and Walz there seemed a better chance that, while direct aid to schools would doubtless be forbidden, a spirit of "accommodation" might permit some forms of aid to parents, such as tax relief. John Courtney Murray, S.J., argued that the alternative was to establish "secularism."[103]

The Court has its accommodationists, but they have not carried the day. Overruling Chief Justice Burger's calls for "equity" and Justice Rehnquist's complaint that the Court is throwing its weight on the side of those who believe in a purely secular society, the majority has persisted in rebuffing aid to parochial schools and their patrons. Paul Kauper thought that the Court's tack betrays "a dogmatic and authoritarian quality." He speculated that the Court, in its impatience with efforts to aid parochial schools, was serving notice of its intent to discourage further litigation in this area.[104]

The persistence of the parochaid forces and the Court's refusal to be moved on the issue reminds one of the sequels to Brown v. Board of Education. In the years after 1954, Southerners devised countless legal strategems--freedom of choice, tuition grants, etc.--to evade school desegregation. The Court at length had to say that the burden was on school boards "to come forward with a plan that promises realistically to work, and promises realistically to work now."[105] Similarly, having declared in 1973 a woman's constitutional right to have an abortion, the Court has had to confront the relentless efforts of anti-abortionists to devise ways to limit or thwart the right to an abortion.[106] Hope springs eternal in the breasts of those who dislike Supreme Court rulings, and parochaid supporters seem not to be quitters. The recent drive in Congress to get tax credits for private school parents (discussed below) is yet one more piece of evidence to that effect. It may be that some of the categorical flavor of the Court's aid-to-schools opinions springs from a "we really mean it" state of mind on the Court.

THE SEARCH FOR "TESTS"

The uninitiated observer who seeks to make sense of the Supreme Court's rulings in establishment clause cases is in for a shock. Looking simply at the results in the aid-to-education cases, he will find that a state may reimburse parents for the cost of bus transportation to parochial schools but may not reimburse them for the cost of field trips, even though the destination of the former trip is a school permeated with religious instruction and the destination of the latter may be a museum or the state capitol (not usually thought of as a place wherein one seeks spiritual guidance).[107] He will learn that a state may lend textbooks to students in parochial schools but may not lend other kinds of instructional equipment, such as tape recorders and maps.[108] Therapeutic and diagnostic health services may be given at state expense to parochial school students in a mobile unit parked next door to the school but may not be given in the parochial school itself, even though the services be rendered in either case by public employees.[109] The casual reader of opinions that draw such seemingly fine distinctions may be forgiven if he thinks that he has stumbled into the forest of Hansel and Gretel, the birds having eaten all the crumbs that mark the way out.[110]

One explanation -- though perhaps not justification--for such curious distinctions in the cases would turn on the fact that some of the decisions just mentioned were handed down at different points in the Court's search for standards or "tests" by which to measure violations of the establishment clause. Some years after Everson, the Warren Court's effort to articulate standards yielded the "secular legislative purpose" and "primary effect tests."

To these yardsticks, Chief Justice Burger in Walz added the excessive entanglement test. And, beginning with Harlan's concurring opinion in Walz, there has emerged the "political divisiveness" test.

The proliferation of tests has hardly clarified the issues. Entanglement, for example, has operated as a kind of Catch-22. Aware of the need to avoid allowing state aid to be used to support parochial schools' religious functions, Pennsylvania and Rhode Island took elaborate steps to ensure that only secular instruction benefited. Having taken those steps, the two states ran headlong into the entanglement test in Lemon v. Kurtzman. When the majority invoked the entanglement test in Meek v. Pittinger, Justice Rehnquist, in dissent, commented that school authorities "are left to wonder whether the possibility of meeting the entanglement test is now anything more than"--quoting the late Justice Jackson--"a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will."[111]

Philip B. Kurland derides the Court's entanglement test as being "either empty or nonsensical."[112] Jesse Choper objects to the entanglement principle on the ground that administrative entanglement between government and religion neither can, nor should, be a value to be judicially secured by the establishment clause. Indeed, he submits, scrupulous avoidance of administrative entanglement between church and state might well require abandonment of virtually all regulation of religious activities, even those having such desirable purposes as ensuring minimal educational standards in private, as in public, education.[113]

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21 JUL 1981

June 20, 1981

PHONE (614) 471-1967

Ronald W. Reagan
White House
Washington, D.C.

Dear President Reagan:

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A resume is enclosed.

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I sincerely desire an interview with you personally, if you have similar sentiments and if it is expedient for you to have under consideration a nationally unknown lawyer.

Thank you for your attention.

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John F. Heath, Candidate,
JUDGE, COURT OF APPEALS,
Tenth Appellate Court District,
Term commencing January 2, 1980

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Some justices have proposed scrapping some or all of the tests now being used. While he concurred with the Court's judgment in Roemer, upholding Maryland's annual grants to private colleges, Justice White voiced his dislike for the entanglement test, which he found "curious and mystifying." White would stick to purpose and effect: "As long as there is a secular legislative purpose, and as long as the primary effect of the legislation is neither to advance nor inhibit religion," White saw no reason to take the constitutional enquiry further.[114] Justice Stevens is another critic of the Court's tests, although Stevens reaches more separationist results than does White. In a 1977 opinion Stevens ventured that the Court, having failed to improve on the Everson test, had simply encouraged the states "to search for new ways of achieving forbidden ends." Therefore, Stevens would throw out the three-part test (purpose, effect, entanglement) altogether and return to Black's Everson standard.[115] Thus, somewhat over thirty years after Everson we find at least one justice, the Court's newest member, coming full circle.

"POLITICAL DIVISIVENESS"

In Lemon v. Kurtzman, Chief Justice Burger portrayed the dangers of voters dividing along religious lines because of proposals to aid church-related schools. Granting that political debate and divisions are normal and healthy in a democratic system, Burger maintained that "political division along religious lines was one of the principal evils against which the First Amendment was intended to protect." Burger saw competition among religious groups for public funds as a "threat to the normal

political process."[116]

Whether political divisiveness is an independent ground of decision or simply used to reinforce other tests is not clear. In Lemon Burger referred to divisiveness as a "broader base of entanglement of yet a different character."[117] In Nyquist, having found the challenged New York laws to have the impermissible effect of advancing religion, Powell did not consider whether such aid would result in entanglement of state and religion. He went on to say, however, that "apart from any specific entanglement of the State in particular religious programs, assistance of the sort here involved carries grave potential for entanglement in the broader sense of continuing strife over aid to religion." Nevertheless, Powell stopped short of saying that political divisiveness could stand by itself as a ground of decision: "And while the prospect of such divisiveness may 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."[118] At least three justices--Brennan, Douglas, and Marshall--appear to have elevated the political divisiveness principle to independent status. In Meek Brennan cited Lemon as having added "a significant fourth factor to the establishment clause test"--political divisiveness. Brennan invoked that test to argue for striking down Pennsylvania's loan of textbooks to students in parochial schools. Brennan thought Allen (which he had joined) not controlling, as it had been decided before the Court began using the political divisiveness factor.[119]

In a separate opinion in Walz, Justice Harlan said that "history cautions that political fragmentation on sectarian lines must be guarded against."[120] Both Harlan in Walz and Burger in Lemon cited a comment by Professor Paul Freund in the Harvard Law Review, where Freund had said that "political division on religious lines is one of the principal evils that the first amendment sought to forestall."[121] Freund did not elaborate. Other than citing Freund (as Powell also did in Nyquist), the Burger Court, in speaking of political divisiveness, has contented itself with resting on the Court's own opinions.

The notion of political divisiveness as a limit on governmental involvement with religion has roots in Madison's concerns about factions. In the Federalist No. 10, Madison defined a faction as "a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulsive passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interest of the community." Relief from the danger of factions, he thought, "is only to be sought in the means of controlling its effects."[122] Following Madison's advice, government does enact legislation to regulate factions, at least where they take the form of self-interest interest groups. Labor legislation is an example. But the First Amendment stands in the way of regulating religious groups as factions. Hence, for want of the normal governmental mechanism for controlling factions, the Court's political divisiveness formula may address the dangers of faction when it is religious groups that are acting as self-interest interest groups.[123]

Madison's Memorial and Remonstrance against Religious Assessments bears even more directly on the modern Court's political divisiveness doctrine. In objecting to the bill assessing taxpayers for the support of religion, Madison declared that the bill would

> destroy that moderation and harmony which the forebearance of our laws to intermeddle with Religion has produced among its several sects. . . . The very appearance of the Bill has transformed "that Christian forebearance, love and charity," which of late mutually prevailed, into animosities and jealousies, which may not be soon appeased.[124]

Even though the avoidance of religious divisions did not become a full-blown feature of the Court's First Amendment doctrine until the Burger Court's parochaid cases, this Madisonian principle had informed decisions of individual justices as early as Justice Rutledge's dissent in Everson.[125]

Despite the Madisonian credentials, the political divisiveness doctrine rests somewhat uncomfortably alongside the norms of the Court's free speech opinions. In a case arising under the First Amendment's speech clause, the Court would reject out of hand a state's argument that a statute--say, a law stifling unpopular speakers--ought to be upheld because what the speaker would say might be "divisive." When an Alabama jury awarded a local official a sizeable libel judgment against civil rights leaders and against the New York Times (which had carried a civil rights advertisement), Justice Brennan wrote the Court's opinion overruling that judgment. The principle at stake, Brennan said, was "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide. . . ."[126] It is hard to see why that principle should not

apply to arguments about aid to religion as to other questions. Yet the kind of argument that the Court will not hear as supporting restrictions on speech, it will use itself to decide what kinds of issues people ought not to be debating lest the dispute proceed along religious lines. Why the country can survive rancorous debate over race or the Vietnam War but is threatened by disputes over aid to religion is not self-evident.

In short, notwithstanding the roots of the political divisiveness doctrine in the thinking of so central a First Amendment figure as Madison, there remains something unsettling about the Court's deciding which issues are suitable for public debate and which are not. As one commentator has said, "If there is any single large public question that has been debated more politely in legislative chambers and litigated more respectfully through the courts than the matter of public aid to parochial schools, it is hard to think of it."[127] If the Court is to talk of political divisiveness, it is well that the Court has done so largely in the context of records where other tests, such as finding an effect of advancing religion, have been met. So long as the political divisiveness doctrine is used in a more cautious and supplementary manner, it can be more readily confined. Should it become an independent norm, there will be more cause for concern.

THE TENSION BETWEEN FREE EXERCISE AND ESTABLISHMENT

Securing free exercise of religion and prohibiting an establishment of religion are two ways of attaining a common object -- religious liberty. Freedom to worshp as one chose and freedom from exactions to support a religious establishment were implicit in Madison's proposal for a religious freedom section in Virginia's first Bill of Rights. Neither Jefferson nor Madison thought the fight for religious liberty complete in Virginia until both rights were secure. It was natural, therefore, that the First Amendment should contain both a free exercise and an establishment clause.

We now see that, though the two clauses may complement each other, they sometimes conflict. Concurring in the Court's 1963 ruling against prayers and Bible reading in public schools, Justice Brennan noted this conflict. There are some practices, he thought, which, though questionable under the establishment clause, might be permissible in the interest of free exercise. Brennan's examples included provision of chaplains and places of worship for prisoners and soldiers cut off from civilian opportunities for public communal worship.[128]

In several cases the Burger Court has had to worry about how to reconcile potential tensions between free exercise and establishment. The possibility of conflict seemed not to trouble the Court in Yoder. There Chief Justice Burger granted the establishment implications of allowing a religious group an exemption from general laws. But he concluded that enforcing the compulsory attendance laws on the Amish would have such a telling impact on

their religious practices that the Court came down on the side of free exercise.

Other cases have proved more troublesome to the justices. Programs of aid to parochial schools have provoked the sharpest quarrels among the justices. In Nyquist Justice Powell read the Court's precedents as requiring that, in order to resolve the tension that "inevitably exists" between free exercise and establishment, the state must maintain "an attitude of 'neutrality,' neither 'advancing' nor 'inhibiting' religion."[129] For Powell and the majority, that approach meant striking down New York's efforts to relieve the financial pinch felt by parents whose children were in private schools. The dissenters, on the other hand, saw free exercise interests imperiled by the Court's ruling. Justice White argued that, in light of the free exercise clause, a state "should put no unnecessary obstacles in the way of religious training for the young."[130] Likewise, Chief Justice Burger thought that "where the state law is genuinely directed at enhancing the freedom of individuals to exercise a recognized right . . . then the Establishment Clause no longer has a prohibitive effect."[131]

"BENEVOLENT NEUTRALITY" -- THE ACCOMMODATION OF RELIGION

Of all the themes in the religion cases perhaps none had greater appeal than "neutrality." Justice Black appealed to that standard in Everson when he said that the First Amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers."[132] Yet, like the "wall of separation" metaphor, "neutrality" has proved an elusive standard, difficult of application to concrete facts. Black thought government was

being neutral when it reimbursed parochial school parents for the cost of bus transportation. Yet when Justice Douglas, in Zorach, invoked the neutrality principle in upholding New York City's released time program, Black dissented.[133]

A wag once commented that there are as many kinds of natural law as there are pies at the Leipzig Fair.[134] The same could be said for "neutrality" under the Constitution's religion clauses. Professor Kurland states his neutrality principle in terms of equality of treatment:

> The freedom and separation clauses should be read as stating a single precept: that government cannot utilize religion as a standard for action or inaction because these clauses, read together as they should be, prohibit classification in terms of religion either to confer a benefit or to impose a burden.

Kurland's notion of neutrality leads him to endorse government aid to parochial schools.[135] Paul Freund also points to neutrality as a central premise of the religion clauses. Yet Freund's idea of neutrality brings him to oppose parochaid.[136]

In an age of limited government -- before government began to play a role in ordering such a vast range of social and economic activities -- it mattered less precisely what one meant by "neutrality." Strict separationists, such as Jefferson and Madison, would have argued that the neutrality ordained by the First Amendment required the government give no aid of any kind to religion. Two hundred years later, in an age of positive government, equating neutrality with a strict "no-aid" position invites a more spirited argument. Donald Giannella has maintained that the founding fathers expected religion to play a part in the established social order

but also assumed that the state would play a minimal role in forming that order. In our own time, his argument runs, the question of how to treat religious groups and interests "has become a fundamentally different one" from that confronting the founders. Political equality for religious groups requires that they be able to participate in and have access to the benefits of government programs on the same terms as other groups.[137] Were the Supreme Court to adopt Giannella's reasoning, a "no-aid" theory -- of the kind Justice Black had in mind -- would have to give way to "neutrality" of the sort conceived by Professor Kurland. The implications of such a shift would be the most marked in education cases, notably those involving aid at the elementary and secondary level of private education.[138]

On the Court, Chief Justice Burger himself has been an especially active spokesman for neutrality -- or, as he puts it, "benevolent neutrality." His first religion opinion, Walz v. Tax Commission, turns on this principle. Rejecting what he called "absolute" readings of the First Amendment, Burger seems to have joined the ranks of those, on the Court and off, who have criticized the "absolutist" Justice Black and, specifically, Black's opinion in Everson. Cautioning against relying on "too sweeping utterances" in earlier cases, Burger in Walz argued for "play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference."[139]

In the context of tax exemptions, Burger had little difficulty in lining up his brethren in support of "benevolent neutrality" (only Douglas dissented in Walz). But subsequent cases have shown

Burger (along with White and Rehnquist) to be emphatically more of an accommodationist than the majority of his colleagues. Granted, burger wrote for the majority in Lemon v. Kurtzman, invalidating the Pennsylvania and Rhode Island aid programs. But rather than resting his holding on the programs having an impermissible effect of aiding religion, he relied on the excessive entanglement likely to result from the states' need to police the programs to prevent aid to parochial schools' religious functions.[140]

Burger's commitment to accommodating religion became clear in Nyquist. Burger, dissenting in part, saw tuition grant and tax relief programs as "general welfare" statutes -- sustainable, as in Everson, on the theory that it was individual parents, not the parochial schools, who should be viewed as the beneficiaries of the aid. Burger adopted the argument traditionally put forth by Catholic proponents of parochaid -- a principle of equal treatment for Catholic parents who must pay tuition costs for their own children while also paying taxes to support public schools:[141]

> It is beyond dispute that the parents of public school children in New York and Pennsylvania presently receive the "benefit" of having their children educated totally at state expense; the statutes enacted in those States and at issue here merely attempt to equalize that "benefit" by giving to parents of private school children, in the form of dollars or tax deductions, what the parents of public school children receive in kind. It is no more than simple equity to grant partial relief to parents who support the public schools they do not use.

Indeed, it is hard to escape the conclusion that, apart from the bare question of the constitutionality of help for the patrons of private schools, Burger agrees with the policy underlying aid programs. That agreement is reflected in the closing paragraph

of Burger's Nyquist dissent, where he invoked the "debt owed by the public generally to the parochial school systems" and praised the "wholesome diversity" those schools make possible.[142]

Justices White and Rehnquist have also taken the accommodationist point of view. Indeed, White was in that camp in the parochaid cases even before Burger; White dissented in part in Lemon v. Kurtzman.[143] Invoking the principle of benevolent neutrality, Rehnquist is disturbed that the Court should "throw its weight on the side of those who believe that our society as a whole should be a purely secular one."[144]

A CURRENT ISSUE: TUITION TAX CREDITS

As early as 1964 proposals surfaced in Congress for the Federal Government to use the federal income tax laws to assist parents or students paying tuition to private schools and colleges.[145] In every session of Congress from that time to the present, bills have been introduced, varying in detail, but having one common purpose: permitting taxpaying students or their parents to take a credit against income tax liability equal to a portion of the tuition payments. Although versions of such a bill have passed one house or the other, to date none has been enacted into law.

The best known proposal is the Packwood-Moynihan bill, introduced in September 1977.[146] The list of 43 sponsors was dominated by conservative names, such as Senators Helms and Thurmond, but included some senators of liberal hue, notably Humphrey and McGovern. The Packwood-Moynihan bill would enable a taxpayer to subtract from his taxes a sum equal to 50% of amounts paid as tuition, the credit being limited to $500 per year per student.

In the debate over tuition tax credits, the limits imposed by the Supreme Court's interpretation of the First Amendment must always be reckoned with. Nevertheless, in measuring a proposal such as the tuition tax credit bill against the Constitution, one ought to have a full appreciation of the policy arguments made on both sides. Many of the arguments, of course, would apply to forms of aid to the private sector quite beyond tuition tax credits. In any event, taking stock of the policy arguments will give a fuller sense of the implications of concluding that an aid proposal -- tuition tax credits or some other device -- would or would not be constitutional.

Proponents' case

Among the arguments that proponents of tuition tax credits make are the following:

(1) Aid proponents argue that parochial and other private schools may have religious aspects but that they also perform a public function, education -- a function that state schools would have to perform for the students in the private schools if those schools did not exist. Philip B. Kurland has maintained:[147]

> A parochial school is not a church. It is, indeed, required to provide an adequate education in secular subjects as measured by state law. It must be accredited as a grammar school in order for its pupils to attend without violating the compulsory education laws. It is performing a state function as well as a religious function. It is not a place of worship; it is a school.

By this reasoning, it would be permissible for government to give aid in support of the secular functions of a church-related school,

at least in proportions that do not exceed the outlay that can be fairly attributed to such secular objects.

(2) A related argument is grounded in assumptions about equity and fairness. Parents who choose to send their children to private schools in effect pay twice: as taxpayers they contribute to the support of public schools, and as patrons of private schools they pay tuition as well. As withdrawing children from the public school system saves he public fisc the cost of educating those children, equity, it is submitted, entitles the private school parents to share in the savings, through tax credits. Indeed, for many proponents, tuition tax credits can be justified as tax relief, especially for the middle class. One of the sponsors of tuition tax legislation in the House of Representatives, Representative Levitas, said, "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."[148] It is no accident that the extensive hearings on the Packwood-Moynihan bill and similar proposals, held in January 1978, were styled hearings, not on "tuition tax credit bills," but on "tuition tax relief bills."[149]

(3) The values of diversity and pluralism in American education are often sounded by proponents of aid to private education, including church-related schools. Senator Moynihan has put the point with his usual flair:[150]

> Diversity, pluralism, variety. These are values, too, and perhaps nowhere more valuable than in the experiences that our children have in their early years, when their values and attitudes are formed, their minds awakened, and their friendships formed. . . . It is time liberalism redefined its purposes in the area of education. State monopoly is no more appropriate to liberal belief in this field than in any other.

(4) Proponents of aid point to the rising evidence of the success of nonpublic schools in maintaining higher academic standards than their public counterparts, especially in urban areas. In a recent, and highly controversial, study, the prominent sociologist, James S. Coleman, points to "strong" evidence that "Catholic schools more nearly approximate the 'common school' ideal of American education than do public schools," in that the achievement levels of students from different parental educational backgrounds, of black and white students, and of Hispanic and non-Hispanic white students are more nearly alike in Catholic schools than in public schools. Moreover, Dr. Coleman concluded that, even after family backgrounds that predict achievement are controlled, the evidence is that students in both Catholic and other private schools achieve at a higher level than do students in public schools.[151]

To the extent that achievement and learning are promoted by discipline, it is common knowledge that one of the incentives parents have for sending their children to private schools is the hope that they will study in a safer and better ordered environment. That hope is given impetus by the Coleman report. The "greatest difference" between public and nonpublic schools, Coleman reported, is that private schools "provide a safer, more disciplined, and more ordered environment."[152]

Dr. Coleman's methodology, especially his sampling methods, has been sharply criticized. Ernest L. Boyer, president of the Carnegie Foundation for the Advancement of Teaching, has called Coleman's study "unavoidably flawed" and said that to base policy recommendations on Coleman's "shaky conclusions" is "at best

hazardous and at worst disastrous."[153] Moreover, Coleman himself, since the release of his report, has said that his major finding was not that private schools do a better job than do public schools but that effective schools in both sectors have certain characteristics in common, such as an ordered environment and strong academic demands. "Good public schools do just as well as those in the private sector," he said, but he added that "it is not insignificant that these characteristics are more often found in the private sector."[154] However the Coleman report be interpreted there is little doubt that it has fueled the arguments of proponents of tuition tax credits.

(5) The health of private education, it is urged, is especially important to minorities, to the poor, and to students in urban areas. Thomas Sowell, a well-known black economist, supports the Packwood-Moynihan proposal as giving to "ghetto youngsters and their parents the one thing they most lack in today's educational system, namely, a voice and a choice." Sowell has high praise for the Catholic schools: "One of the great untold stories of contemporary American education is the extent to which Catholic schools, left behind in ghettoes by the departure of their original white clientele, are successfully educating black youngsters there at low cost." He concludes, "It would be hard to think of any other area where $500 would buy so much."[155]

Along similar lines, it is argued that parochial schools do a better job at assimilating children of immigrants and other minorities than do public schools.[156] A Catholic priest and sociologist, the Rev. Andrew M. Greeley, believes that Catholic schools are more effective at teaching minority groups because

such schools first came into being to educate the children of Irish, Polish, and other ethnic groups during their immigrations to this country.[157]

Opponents' case

Opposition to tuition tax credits, like opposition to other forms of aid to nonpublic education, comes from many quarters. Some of the opposition turns on church-and-state concerns, some on more general grounds. Among the arguments of a non-religious character are the following:

(1) Channelling public resources to the private sector of education is perceived as a threat to public education. Andrew Leigh Gunn, executive director of Americans United for Separation of Church and State, objects to the Packwood-Moynihan bill as weakening the public schools' competitive position, converting them into "wastebaskets" for poor, minority, and handicapped students. "The dream of a great common school system," he concludes, "would be shattered."[158]

(2) Opponents of tuition tax credits fear that the size of the credits, thought to be modest by proponents, will be only the beginning. James E. Wood, Jr., executive director of the Baptist Joint Committee on Public Affairs, contends that the Packwood-Moynihan proposal, if passed, "would open the door for divisive struggles to increase tax credits to a meaningful level" -- that is, to a level that would provide more than merely "psychological" relief to the typical middle-class taxpayer.[159] Opponents also worry lest enactment of a tax tuition credit lead to public funds being diverted from existing

educational programs geared essentially to the public sector -- programs already being cut back, of course, by budget policies of the Reagan Administration.[160]

(3) Opponents meet the proponents' arguments about diversity head-on. Florence Flast, chairman of the Committee for Public Education and Religious Liberty (a group active in parochaid litigation), labels the diversity argument "mythical." Non-public schools' "selective admissions and retention policies" -- based on religion, academic achievement, national origin, behavior, and socioeconomic status -- make those schools "more elitist than pluralistic."[161]

Racial segregation, Flast argues, is too often one of the byproducts of nonpublic education. She cites a report issued in 1972 by a New York State study commission that found racial segregation in sectarian schools to exceed that in public schools.[162]

(4) Opponents also dispute the proponents' appeals to equity. Editorializing against the Packwood-Moynihan bill, The New York Times spelled out the logical consequences of the "fairness" argument:[163]

> If it is fair in effect to relieve private school parents of school taxes, what about taxpayers generally? The elderly, single people, and childless couples receive no direct services from public schools. Shouldn't they also be entitled to tax credits? Carried to an extreme, the idea would undermine the egalitarian purpose of public education, indeed of public services generally.

(5) Central to most opponents' concern about tuition tax credits is the church-and-state issue -- an awareness that parochial schools stand to be chief beneficiaries of the tax credits. Testifying against the Packwood-Moynihan bill, Andrew Leigh Gunn claimed that the "genesis and promotion of this bill

represent a certain confluence of religious and political interests." He noted that five Catholic priests were involved in the drafting of the bill and stated flatly that the "underlying purpose of the bill is to give aid to parochial schools." Producing figures that at the elementary and secondary school level, denominational schools enroll over 90% of nonpublic school students, Gunn declared that the bill would encourage religious, ethnic, and class balkanization of American society -- citing the unhappy example of Northern Ireland.[164] The Coleman report finds "strong" evidence that private schools "are divisive along religious lines, segregating different religious groups into different schools."[165]

Tuition tax credits and the First Amendment

Any effort to reconcile proposals for federal tuition tax credits with the First Amendment must reckon with the Supreme Court's 1973 decision in Nyquist.[166] Under the New York law being reviewed in that case, parents were permitted to deduct from their adjusted gross income (for state income tax purposes) a designated amount for each dependent for whom they had paid at least $50 in tuition to a nonpublic school. The higher the taxpayer's income, the lower was the ceiling on the total deduction he might take (if the taxpayer's income was over $25,000 no deduction was allowed).[167]

The parties in Nyquist disagreed over what label best fitted the tax benefits conferred by the New York statute -- whether they should be called "deductions," or "credits," or something else. To Justice Powell, who wrote the Supreme Court's majority opinion, the label was a matter of indifference. What mattered was that,

from the standpoint of determining whether the tax benefit had the purpose of advancing religion, there was "little practical difference" between the tax provision at issue here and the direct tuition grants (authorized by another section of the New York law) given to parents having an annual taxable income of less than $5,000 and having children attending nonpublic elementary or secondary schools. Whether the parents received (as poor parents did) an actual cash payment or were allowed a tax credit (in the section under review), the result was the same: "In both instances the money involved represents a charge made upon the state for the purposes of religious education." Both sections, Justice Powell concluded, had a "primary effect that advances religion." Moreover, Powell saw in the New York law "grave potential" for "continuing political strife over aid to religion." Hence the New York law, tuition grants and tax credits alike, violated the First Amendment's establishment clause.[168] In a companion case, Sloan v. Lemon, a similar tuition credit program enacted by Pennsylvania was struck down.[169]

It is hard to escape the conclusion that proposals for federal tuition tax credits to parents of children in parochial and other church-related elementary and secondary schools fall within the interdiction of the Nyquist and Sloan decisions. There are, of course, technical differences in the way the state statutes in New York and Pennsylvania and the various federal proposals would work, including the formula by which the amount of a credit is to be computed. But one cannot read the Supreme Court's parochaid decisions without realizing that the Court has laid down a firm line against aid flowing to religious schools, no matter how

sophisticated the technique adopted. Dissenters, notably Chief Justice Burger and Justices White and Rehnquist, have protested (as they did in Nyquist and Sloan) that tuition credits ought to survive, in the interest of equity, diversity, and other values, but to no avail.[170]

Several arguments might be advanced by those who would distinguish Nyquist and Sloan in order to uphold federal tuition tax credits. One is that the Supreme Court would be more deferential to federal legislation than to a state law. This is a slender reed on which to hang the argument. There are indeed areas in which the Court is more likely to give Congress wider scope in dealing with a problem than it would give the states. Race relations is an obvious example; having invalidated a state medical school's affirmative action program in the Bakke case, the Court was markedly deferential to Congress two years later in upholding a racial set-aside for minority employers in public works programs.[171] There is no suggestion, however, in the Court's religion decisions that Congress will be given a free hand where church-and-state issues are at stake. Indeed, such an approach would be ironic in the extreme in dealing with an amendment whose original purpose was to limit federal, rather than state, power. It was to tie the hands of the Federal Government that the First Amendment was originally enacted (it has, of course, since been extended to the states), and one can only imagine what the framers' reaction would be to the notion that the dangers of nationwide aid to religion ought to be viewed as less threatening than aid at the state level.

Another argument that might be advanced to distinguish Nyquist and Sloan would be to argue that the class of beneficiaries under federal tuition credit legislation would be far broader than under the New York and Pennsylvania statutes. The records in those cases made it clear that the vast majority of the tax benefits would accrue to patrons of sectarian (mostly Catholic) schools. Proponents of federal legislation argue that, by contrast, the Packwood-Moynihan proposal includes tuition paid to private and public colleges and universities, as well as to elementary and secondary schools. Benefits would thus be spread more generally, patrons of religious schools being simply part of a larger, secular class -- patrons of schools and colleges generally.

The First Amendment issue cannot be avoided as easily. The Supreme Court has been demonstrably more relaxed in reviewing state programs aiding private colleges (including church-related institutions) than in passing upon aid at the elementary and secondary level. Yet one cannot realistically suppose that, had a state lumped parochaid together in a package with aid to higher education, the Court would have been in the least bit more disposed to approve aid flowing to parochial schools. The Court's Walz opinion (upholding tax exemptions for church-owned property) is not in point.[172] Long-standing history and tradition had much to do with the Court's willingness to view those exemptions as acceptable as being part of a larger, secular class of tax exemptions. Current efforts to help the private sector of elementary and secondary education are rooted in no such traditions.[173] Quite the contrary, they are inevitably marked by the religiously based concerns that

have led the Court to air its concerns about the political divisiveness engendered by efforts to aid church-related schools.

The Court's repeated expressions of concern about the political divisiveness inherent in programs aiding religion underscore the conclusion that a federal program of tuition tax credits would not survive Nyquist and Sloan. Even though Nyquist involved only a state tax credit, Justice Powell marked the parallel between the dangers of political "entanglement" at both state and federal levels. Powell said that

> we know from long experience with both Federal and State Governments that aid programs of any kind tend to become entrenched, to escalate in cost, and to generate their own aggressive constituencies. And the larger the class of recipients, the greater the pressure for accelerated increases. . . . In this situation, where the underlying issue is the deeply emotional one of Church-State relationships, the potential for serious divisive political consequences needs no elaboration.[174]

The Supreme Court may, of course, change its mind. Reversals are by no means unknown on the bench. But parochaid cases have been before the Court repeatedly during the past decade. The issues have been fully and heatedly debated. Congress, as a coordinate branch, is free to pass such legislation as it will and see what happens. But it seems whistling in the dark to suppose that the limits in the parochaid area are not already rather well mapped out.

PRAGMATISM AND DOCTRINE IN THE SUPREME COURT

Justices of the Supreme Court often seek to anchor their opinions in history. In the Court's first interpretation of the free exercise clause, Reynolds v. United States, Chief Justice Waite looked to the writings of Jefferson for an "authoritative"

understanding of the First Amendment.[175] In Everson Justice Black looked to the fight led by Madison and Jefferson in disestablishment in Virginia as having had the "same objective" as the First Amendment.[176]

Historians are not slow to criticize the Court's use of history. Mark DeWolfe Howe voiced his disenchantment with the justices' effort to play historian: "The judge as statesman, purporting to be the servant of the judge as historian, often asks us to believe that the choices he makes -- the rules of law that he establishes for the nation -- are the dictates of a past which his abundant and uncommitted scholarship has discovered." Howe thought that "illusion born of oversimplification" has brought the Court to favor the Jeffersonian version of the "wall of separation" -- a political principle grounded in rationalism -- over Roger Williams' version -- a theological concern to preserve the "garden of the church" in the "wilderness of the world." Modern liberals, according to Howe, have not sufficiently recognized the complexities of motive which fashioned the policy of separation. Howe was concerned that the Court's "current inclination to extract a few homespun absolutes from the complexities of a pluralistic tradition" would stand in the way of accommodating the religious strands in American life.[177]

The years since Everson have brought so much gloss on the First Amendment that the Court has fallen into the habit -- natural to judges as to lawyers -- of putting gloss on gloss. Thus it becomes more important to reconcile an opinion with Allen or Lemon than to go back to first principles. Moreover, the tradition of a "living Constitution" -- a continuing process of reinter-

pretation -- affects religion decisions as much as any other. Finally, the justices -- again like lawyers -- often seem more comfortable with immediate, real life problems than with theory and abstract principle. Thus they get the feel of the issue before them -- aid to parochial schools, or whatever -- and try their hand at what seems like a workable approach to the problem. As a result we see the Court evolving pragmatic decisions in which aid to primary and secondary schools is one thing, and aid to colleges another.

Justice Holmes once remarked that a "page of experience is worth a volume of history."[178] Holmes had a way of writing pithy, readable opinions that sometimes made things seem simpler than they actually were. With the advent of the Burger Court, constitutional adjudication seems to have taken on a more ad hoc, episodic quality -- in constitutional cases generally, not just in religion cases.[179] But since so much of the case law on establishment, especially aid to education, comes from the Burger era, the present Court's pragmatic instincts have particular importance in understanding judicial glosses on the First Amendment's religion clauses. The justices are by no means oblivious to the origins of the First Amendment. The contours of the religion cases, however, often owe as much to pragmatic institutions as to doctrine grounded in historical judgments.

FOOTNOTES

1. The title of this paper recalls student vernacular of the restless sixties. See Papish v. Board of Curators, 410 U.S. 667 (1973).

2. Before I built a wall I'd ask to know
What I was walling in or walling out,
And to whom I was like to give offense.
Something there is that doesn't love a wall,
That wants it down.

Robert Frost, "Mending Wall," Modern American and Modern British Poetry, ed. Louis Untermeyer (New York, 1955), p. 48.

3. Thomas Jefferson to Committee of the Danbury Baptist Association, January 1, 1802, reprinted in Adrienne Koch and William Peden, The Life and Selected Writings of Thomas Jefferson (New York, 1944), pp. 332-33. See also Joseph Martin Dawson, Baptists and the American Revolution (New York, 1980), p. 38.

4. Robert A. Rutland, ed., The Papers of George Mason, 1725-1792 (Chapel Hill, N.C., 1970), I, 278.

5. William T. Hutchinson and William M. E. Rachal, eds., The Papers of James Madison (Chicago, 1962), I, 1974.

6. A. E. Dick Howard, "'For the Common Benefit': Constitutional History in Virginia as a Casebook for the Modern Constitution-Maker," 54 Va. L. Rev. 816, 825 (1968).

7. Petition of Prince Edward County, quoted in David John Mays, Edmund Pendleton, 1721-1803: A Biography (Cambridge, Mass., 1952), II, 133.

8. Papers of the American Historical Association, II, 26, quoted in H. J. Eckenrode, Separation of Church and State in Virginia (New York, 1910), p. 44.

9. Hutchinson and Rachal, eds., The Papers of James Madison, VIII, 295.

10. Julian P. Boyd, ed., The Papers of Thomas Jefferson (Princeton, N.J., 1950), II, 545-53.

11. Va. Const. (1830), Art. III, § 11.

12. Va. Const., Art. I, § 16. See The Constitution of Virginia: Report of the Commission on Constitutional Revision (Charlottesville, Va., 1969), p. 101.

13. See Anson Phelps Stokes, Church and State in the United States (New York, 1950), I, 358-446.

14. See generally Robert A. Rutland, The Birth of the Bill of Rights, 1776-1791 (Chapel Hill, N.C., 1955).

15. Barron v. Baltimore, 7 Pet. (32 U.S.) 487 (1833).

16. Permoli v. New Orleans, 44 U.S. 589 (1845).

17. Especially was this true of provisions banning appropriations to aid nonpublic education.

18. 98 U.S. 145 (1878).

19. Thomas Jefferson to Committee of the Danbury Baptist Association, January 1, 1802, supra note 3.

20. 98 U.S. at 164.

21. See David Little, "Thomas Jefferson's Religious Views and Their Influence on the Supreme Court's Interpretation of the First Amendment," 26 Cath. U. L. Rev. 57 (1976).

22. See Everson v. Board of Educ., 330 U.S. 1, 11-13 (1947). See also Justice Rutledge's even lengthier reliance on Madison in his dissent in Everson, 330 U.S. at 33-43 (Rutledge, J., dissenting).

23. Davis v. Beason, 133 U.S. 333 (1890).

24. See, e.g., Lovell v. Griffin, 303 U.S. 444 (1938); Cox v. New Hampshire, 312 U.S. 569 (1941).

25. Cantwell v. Connecticut, 310 U.S. 296, 304 (1940).

26. Minersville School District v. Gobitis, 310 U.S. 586, 594 (1940).

27. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

28. Leo Pfeffer, "The Supremacy of Free Exercise," 61 Geo. L.J. 1115, 1122 (1973).

29. E.g., id., p. 1127.

30. Braunfeld v. Brown, 366 U.S. 599, 606 (1961).

31. 374 U.S. 398 (1963).

32. 374 U.S. at 420 (Harlan, J., dissenting).

33. 406 U.S. 205 (1972).

34. 406 U.S. at 219-20.

35. 406 U.S. at 234-35 n. 22, quoting Sherbert v. Verner, 374 U.S. 398, 409 (1963).

36. 406 U.S. at 222, 235-36.

37. Bradfield v. Roberts, 175 U.S. 291 (1899).

38. 330 U.S. 1 (1947).

39. A. E. Dick Howard, "Mr. Justice Black: The Negro Protest Movement and the Rule of Law," 53 Va. L. Rev. 1030, 1068-69 (1967).

40. 330 U.S. at 15-16.

41. 330 U.S. at 18.

42. Adamson v. California, 332 U.S. 46, 59 (Frankfurter, J., concurring), 68 (Black, J., dissenting)(1947); see Charles Fairman,

"Does the Fourteenth Amendment Incorporate the Bill of Rights?: The Original Understanding," 2 Stan. L. Rev. 5 (1949).

43. Abington School District v. Schempp, 374 U.S. 203, 309-10 (1963)(Stewart, J., dissenting).

44. A. E. Dick Howard, State Aid to Private Higher Education (Charlottesville, Va., 1977), p. 27; Howard, "State Courts and Constitutional Rights in the Day of the Burger Court," 62 Va. L. Rev. 873, 907-12 (1976).

45. Howard, State Aid to Private Higher Education, p. 29.

46. Paul A. Freund, "Public Aid to Parochial Schools," 82 Harv. L. Rev. 1680 (1969).

47. Erwin Griswold, "Absolute is in the Dark," 8 Utah L. Rev. 167 (1963).

48. Paul G. Kauper, "Everson v. Board of Education: A Product of Judicial Will," 15 Ariz. L. Rev. 307, 317 (1973).

49. McCollum v. Bd. of Educ., 333 U.S. 203, 238 (1948) (Jackson, J., concurring).

50. McCollum v. Bd. of Educ., 333 U.S. 203 (1948); Zorach v. Clauson, 343 U.S. 306 (1952).

51. Engel v. Vitale, 370 U.S. 421 (1962)(Regents' prayer); Abington School District v. Schempp, 374 U.S. 203 (1963)(Bible readings, Lord's Prayer).

52. 370 U.S. at 430.

53. McGowan v. Maryland, 366 U.S. 420 (1961).

54. Board of Educ. v. Allen, 392 U.S. 236 (1968).

55. Engel v. Vitale, 370 U.S. 421, 445-46 (Stewart, J., dissenting).

56. Zorach v. Clauson, 343 U.S. 306, 313 (1952).

57. Engel v. Vitale, 370 U.S. 421, 443 (Douglas, J., concurring).

58. Board of Educ. v. Allen, 392 U.S. 236, 254 (Douglas, J., dissenting).

59. 374 U.S. 203, 222 (1963).

60. Walz v. Tax Comm'n, 397 U.S. 664, 675, 677 (1970).

61. 403 U.S. 602 (1971).

62. 397 U.S. at 674.

63. 403 U.S. at 619.

64. 403 U.S. at 622-24.

65. 413 U.S. 756 (1973).

66. Sloan v. Lemon, 413 U.S. 825 (1973); Levitt v. Comm. for Public Educ., 413 U.S. 472 (1973).

67. 413 U.S. at 795.

68. Justice White was the third dissenter.

69. 413 U.S. at 803, 805 (Burger, C.J., dissenting in part).

70. 421 U.S. 349 (1975).

71. 421 U.S. at 385, 387 (Burger, C.J., and Rehnquist, J., respectively, dissenting in part).

72. 433 U.S. 229 (1977).

73. Tilton v. Richardson, 403 U.S. 672, 686 (1971).

74. 403 U.S. at 687.

75. 413 U.S. 734 (1973).

76. 413 U.S. at 743.

77. 426 U.S. 736 (1976).

78. 426 U.S. at 755-67.

79. See generally, A. E. Dick Howard, State Aid to Private Higher Education (Charlottesville, Va., 1977).

80. 403 U.S. at 619, 622. See 403 U.S. at 608 n.2.

81. 403 U.S. at 667 (White, J., dissenting).

82. 413 U.S. at 759.

83. 413 U.S. at 752 (emphasis supplied)(Brennan, J., dissenting).

84. 403 U.S. at 682.

85. 413 U.S. at 742.

86. 403 U.S. at 667-78 (White, J., dissenting).

87. 403 U.S. at 685-87.

88. 403 U.S. at 686.

89. 413 U.S. at 746, 746-47 n.8.

90. Roemer v. Maryland Public Works Bd., 426 U.S. 736, 758 (1976).

91. 403 U.S. at 686.

92. 413 U.S. at 743.

93. 426 U.S. at 755.

94. 403 U.S. at 686-87.

95. 426 U.S. at 756.

96. 403 U.S. at 682-84.

97. 413 U.S. at 744.

98. 413 U.S. at 753 (Brennan, J., dissenting).

99. See 426 U.S. at 765-66.

100. 403 U.S. at 688.

101. 426 U.S. at 766.

102. John E. Nowak, "The Supreme Court, the Religion Clauses, and the Nationalization of Education," 70 Nw. U. L. Rev. 883, 891-92 (1976).

103. John Courtney Murray, "Law or Prepossessions?" 14 L. & Contemp. Prob. 23 (1949).

104. Paul G. Kauper, "The Supreme Court and the Establishment Clause," 25 Case West. L. Rev. 107, 129 (1974).

105. Green v. County School Bd., 391 U.S. 430, 439 (1968).

106. See, e.g., Planned Parenthood v. Danforth, 428 U.S. 52 (1976). The Court seems, however, to have lost its nerve in the 1977 abortion cases. See Beal v. Doe, 432 U.S. 438 (1977); Maher v. Roe, 432 U.S. 464 (1977); Poelker v. Doe, 432 U.S. 519 (1977).

107. Compare Everson v. Board of Educ., 330 U.S. 1 (1947), with Wolman v. Walter, 433 U.S. 229 (1952).

108. Compare Board of Educ. v. Allen, 392 U.S. 236 (1968), with Meek v. Pittinger, 421 U.S. 349 (1975).

109. Compare Wolman v. Walter, 433 U.S. 229 (1952), with Meek v. Pittinger, 421 U.S. 349 (1975).

110. Jesse Choper has observed that application of the Court's three-pronged test in the school aid cases "has generated ad hoc judgments which are incapable of being reconciled on any principled basis." Choper, "The Religious Clauses of the First Amendment: Reconciling the Conflict," 41 U. Pitts. L. Rev. 673, 680 (1980). Nathan Lewin characterizes the Court's establishment decisions as a "drunkard's reel." Lewin, "Disentangling Myth from Reality," 3 J. L. & Educ. 107, 108 (1974).

111. 421 U.S. at 394, quoting Edwards v. California, 314 U.S. 160, 186 (1941)(Jackson, J., concurring).

112. Kurland, "The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court,"

24 Villanova L. Rev. 3, 19 (1978-79). For a further critique of the entanglement test, see Kenneth F. Ripple, "The Entanglement Test of the Religion Clauses -- A Ten Year Assessment," 27 U.C.L.A. L. Rev. 1195 (1980).

113. Choper, op. cit. supra note 110, at 681-83.

114. 426 U.S. at 768 (White, J., concurring).

115. Wolman v. Walter, 433 U.S. 229, 264 (1977)(Stevens, J., concurring and dissenting).

116. 403 U.S. at 622.

117. 403 U.S. at 622.

118. 413 U.S. at 797-98, quoting Lemon v. Kurtzman, 403 U.S. 602, 625 (Douglas, J., concurring).

119. 421 U.S. at 374 (Brennan, J., concurring and dissenting).

120. 397 U.S. at 695 (opinion of Harlan, J.).

121. Paul A. Freund, "Public Aid to Parochial Schools," 82 Harv. L. Rev., 1680, 1692 (1969).

122. Jacob E. Cooke, ed., The Federalist (Middletown, Conn., 1961), p. 57.

123. Leo Pfeffer distinguishes between groups of people organizing to protect and advance their own position in society and organizing to promote a shared attitude. In the former instance, they act as a self-interest group; in the latter, as an ideological interest group. The trade union movement, organizing to improve wages and working conditions is an example of the former; a league to abolish capital punishment, the latter. Pfeffer submits that the Court "rejects the church as a self-interest interest group but accepts it as an ideological interest group." Pfeffer, God, Caesar, and the Constitution: The Court as Referee of Church-State

Confrontation (Boston, 1975), p. 62.

124. Robert Rutland and William Rachal, eds., The Papers of James Madison (Chicago, 1962-), VIII, 302-03.

125. 330 U.S. 1, 28, 33-41 (1947)(Rutledge, J., dissenting).

126. New York Times v. Sullivan, 376 U.S. 254, 270 (1964).

127. Lewin, op. cit. supra note 110, at 111. For other criticisms of the political divisiveness doctrine, see Choper, op. cit. supra note 110, at 683-85; Kurland, op. cit. supra note 112, at 19; Nowak, op. cit. supra note 102, at 905-08.

128. Abington School District v. Schempp, 374 U.S. 203, 296 (1963)(Brennan, J., concurring).

129. 413 U.S. at 788.

130. 413 U.S. at 814 (White, J., dissenting).

131. 413 U.S. at 803 (Burger, C.J., dissenting in part).

132. 330 U.S. at 18.

133. 343 U.S. at 315-20 (Black, J., dissenting).

134. Arnold Brecht, an international lawyer.

135. Philip B. Kurland, Religion and the Law (Chicago, 1962), p. 112. Professor Kurland continues to stick by his guns. See Kurland, op. cit. supra note 112, at 22, 24.

136. Freund, "Public Aid to Parochial Schools," 82 Harv. L. Rev. 1680, 1686 (1969).

137. Donald A. Gianella, "Religious Liberty, Nonestablishment, and Doctrinal Development. Part II: The Nonestablishment Principle," 81 Harv. L. Rev. 513, 514-15 (1968).

138. Michael J. Malbin argues that, under the "original meaning" of the establishment clause, federal aid to private schools

would have been allowed, perhaps even aid limited to religious schools, depending upon there being a secular purpose and upon how one defined "religion." Malbin, Religion and Politics: The Intentions of the Authors of the First Amendment (American Enterprise Institute; Washington, D.C., 1978), preface. See also Walter Berns, The First Amendment and the Future of American Democracy (New York, 1976), pp. 1-32.

139. 397 U.S. at 669.

140. 403 U.S. at 619-21.

141. 413 U.S. at 803 (Burger, C.J., dissenting in part).

142. 413 U.S. at 805.

143. 403 U.S. at 661 (White, J., dissenting in part).

144. 421 U.S. at 395 (Rehnquist, J., concurring and dissenting).

145. See Howard O. Hunter, "The Continuing Debate over Tuition Tax Credits," 7 Hastings Con. L.Q. 523, 525-26 (1980).

146. S. 2142, 95th Cong., 1st Sess. (1977).

147. Kurland, op. cit. supra note 112, at 22.

148. 124 Cong. Rec. 82 (1978)(extension of remarks by Rep. Levitas). To like effect, see remarks by Senator Moynihan in Tuition Tax Relief Bills, Hearings before the Subcommittee on Taxation and Debt Management Generally, Comm. on Finance, U.S. Senate, 95th Cong., 2d Sess. (1978), p. 51 [hereinafter cited as Hearings].

149. See Hearings cited supra note 148.

150. Daniel Patrick Moynihan, "Government and the Ruin of Private Education," Harper's, April 1978, pp. 28, 38.

151. James Coleman, Thomas Hoffer, and Sally Kilgore, Public and Private Schools (U.S. Dept. of Educ., Nat'l Center for Educ.

Statistics; Washington, D.C., 1981), pp. xx, xxvii [hereinafter cited as Coleman Report].

152. Id., p. xxii.

153. New York Times, April 12, 1981, p. 22, col. 1.

154. New York Times, May , 1981, p. , col. .

155. Hearings, pp. 706-07.

156. See Philip Lampe, Comparative Study of the Assimilation of Mexican-Americans' Parochial Schools versus Public Schools (paper presented to annual meeting, Southwest Sociological Soc'y, March 29, 1975), cited in Peter M. Schotten, "The Establishment Clause and Excessive Governmental-Religious Entanglement: The Constitutional Status of Aid to Nonpublic Elementary and Secondary Schools," 15 Wake Forest L. Rev. 207, 243 n. 204 (1979).

157. Greeley, Catholic Secondary Schools and Minority Students (to be published fall 1981 by Rutgers University). See New York Times, April 8, 1981, p. A12, col. 2.

158. Hearings, p. 323.

159. Id., p. 327.

160. Ibid.

161. Id., p. 329.

162. Ibid.

163. New York Times, March 10, 1981, p. A18, col. 1.

164. Hearings, pp. 311, 322-23.

165. Coleman Report, pp. xxiv.

166. Committee for Public Educ. v. Nyquist, 413 U.S. 756 (1973).

167. N.Y. Laws 1972, c. 414, §§ 3, 4, and 5, amending N.Y. Tax Law, §§ 612(c), 612(j)(McKinney Supp. 1972).

168. 413 U.S. at 789-98.

169. 413 U.S. 825 (1973).

170. See 413 U.S. at 798 (Burger C.J., concurring in part, dissenting in part); 413 U.S. at 813 (White, J., dissenting); 413 U.S. at 805 (Rehnquist, J., dissenting in part).

171. Compare University of California Regents v. Bakke, 438 U.S. 265 (1978), with Fullilove v. Klutznick, 100 S. Ct. 2758 (1980).

172. Walz v. Tax Comm'n, 397 U.S. 664 (1970).

173. "Tax exemptions for church property enjoyed an apparently universal approval in this country both before and after the adoption of the First Amendment. . . . We know of no historical precedent for New York's recently promulgated tax relief program." Committee for Public Educ. v. Nyquist, 413 U.S. 756, 792 (1973).

174. 413 U.S. at 797.

175. 98 U.S. 145, 164 (1878).

176. 330 U.S. at 13.

177. Mark De Wolfe Howe, The Garden and the Wilderness: Religion and Government in American Constitutional History (Chicago, 1965), pp. 4-10, 174.

178.

179. See A. E. Dick Howard, "The Burger Court: A Judicial Nonet Plays the Enigma Variations," 43 L. & Contemp. Probs. 7 (1980).

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KNOWLEDGE FOR WHAT? AND FOR WHOM?

Bridging the Humanities and Sciences at the Smithsonian

Office of
sonian Symposia and Seminars

A DECADE OF DISCOURSE

January 6, 1979, marks the tenth anniversary of the Smithsonian's symposia and seminar program as it is now structured for interdisciplinary exchange between sciences and humanities among the Institution's professional staff and their colleagues elsewhere in the United States and throughout the world. These 10 years have produced 4 major symposia, a special Bicentennial international conference, over 15 continuing seminar series and special seminars, celebration of the Smithsonian's 125th birthday and innumerable additional significant ceremonial observances, and a range of resource services to universities, foundations, and government groups. Many of these activities have brought lasting liaison with other organizations and a variety of important published educational materials. Financial support from more than 75 contributors has made possible these and other accomplishments. The symposia and seminar programs' audiences range from those of academic distinction to students of intermediate training and the concerned layman; participation is designed to bring scholars into close association with non-specialists in common exploration toward new knowledge and insight.

and new questions and publishing plain English "answers" from the sciences and the humanities. Increasing and diffusing knowledge—the purpose of the Smithsonian—requires a partnership of scholars and citizens. The laboratories, art galleries, classrooms, museums, libraries, observatories, and field stations of the Smithsonian are part of a much larger intellectual network within which ideas, artifacts, and specimens can circulate and illuminate each other. Such light can be switched on through encounters between persons who rarely meet in the course of normal academic events. Wits are sharpened by contrasting techniques and assumptions, clashing styles of ordering data and drawing out implications. Books, articles, exhibitions, telecommunications, and recordings capture and carry further these efforts to synthesize fragments of knowledge. "The public" participates in the process by posing yet new questions of the specialists. It is a modern version of the *kula* ring of the Trobriand islanders where every participant reciprocally is a donor and recipient.

Such an open approach to learning runs against much of the current grain of American scholarship. Few are willing to follow that old Smithsonian ideal of pursuing the unfashionable by the unconventional. Cullen Murphy's recent *Harper's* essay, "In Darkest Academia," reminds readers of the perils awaiting scholars whose works attract public attention. Rules of academic humility operate against scholars who exhibit curiosity beyond their specialties. Rewards go to those who publish and speak to their peers. How do taxpayers and their representatives respond? Some demand more "accountability" and "evaluation" of research and teaching, with a strong reliance on measuring as the basis for legitimacy. The consumer movement has entered the world of higher learning at the very moment that inflation and tenure battles force a retreat from interdisciplinary discourse. The time clock and computer become pejorative metaphors of the "knowledge industry" in the minds of those who know that human learning cannot flower easily on the assembly line, and that quantification is necessary but not sufficient.

INTERNATIONAL SYMPOSIA SERIES

Knowledge Among Men, 1965. In commemoration of the 200th anniversary of the birth of James Smithson, founder of the Smithsonian Institution.

The Fitness of Man's Environment, 1967. Introduction by The Right Honorable Jennie Lee, M.P., Great Britain. Reprinted by Voice of America as *The Quality of Man's Environment.*

Man and Beast: Comparative Social Behavior, 1969. Alex A. Kwapong, University of Ghana, Chairman. Edited by John F. Eisenberg and Wilton S. Dillon.

The Cultural Drama, 1970. A new look at the melting pot theory. Michio Nagai, Japanese sociologist, Chairman. Edited by Wilton S. Dillon.

The Nature of Scientific Discovery, 1973. In commemoration of the 500th anniversary of the birth of ...rnicus. Janusz Groszkowski, Polish Academy of ...ces, Chairman. Edited by Owen Gingerich.

Kin and Communities, 1977. A study of families in America. Margaret Mead, American Museum of Natural History, Chairman. Edited by Allan J. Lichtman and Joan Challinor. Publication by Smithsonian Institution Press scheduled for spring 1979.

In planning: seventh international symposium, 1981, to examine biological and cultural factors in human adaptation and their implications for the future. Donald J. Ortner, Smithsonian anthropologist, will edit the proceedings.

THE QUESTIONS WE ASK

The Office of Smithsonian Symposia and Seminars dedicates its second decade to the unfinished educational work of two of its most ardent supporters and patrons, Senator Hubert H. Humphrey (1911-1978) and Dr. Margaret Mead (1901-1978). These two uncommon American leaders launched our 1977 symposium on "Kin and Communities." They continue to inspire all those who specialize in bringing the humanities and sciences to bear on understanding and improving life on this small planet.

Senator Humphrey, a Smithsonian Regent during his Vice-Presidency, and Dr. Mead, who chaired our last major education program, appreciated the great potential of the Smithsonian as a link between town and country, capital and province, scholars and other citizens. "We all benefit," he wrote to Secretary S. Dillon Ripley on July 8, 1977, "from the sch... and artistic interchange when people are brou... the capital from local academic and civic communities and share the fruits of their projects with larger audiences."

At the time of her death on November 15, 1978, Dr. Mead was working with the Smithsonian to plan celebrations marking the centennial of Albert Einstein's birth and the International Year of the Child. She served the Institution in diverse ways. She was with us so often that a mother once told her, "I think I'll bring my children up to see you in that office at the Smithsonian where you live." "In each age," wrote Mead in *New Lives for Old,* "there is a series of pressing questions to be asked and answered. On the correctness of the questions depends the survival of those who ask; on the quality of the answers depends the quality of the life those survivors will lead."

The Office of Smithsonian Symposia and Seminars enters its eleventh year January 6, 1979, with a record of asking a wide range of questions. We remember that the Copernican revolution started by Kopernik's asking "What is night, and how is it produced?" We ask in 1979 a less cosmic but important question: "Are art, science, and technology the products of the play impulse in mammals?" With such queries, we will continue to lead scholars and their patrons into a vital joint enterprise: asking old

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Is there hope for "darkest academia"?

In their respective autobiographies, *The Education of a Public Man* and *Blackberry Winter,* Hubert Humphrey and Margaret Mead clearly regarded setbacks as opportunities rather than defeats. They were aware of cyclical movements and moods of citizen-scholars alternating between participation and withdrawal. Despite their prodigious energy, they respected the usefulness of privacy, retreat, and reflection, and would want to protect some scholars from the social pressures to make all learning an immediate solution to a problem. They realized the lessons to be learned from tension and conflict. What was important to both was to find ways and means of keeping human curiosity alive long after the childhood years of exploring and testing. They would not be alarmed that in a democarcy of learning, sch[illegible] need the help of politicians, business executives, children, and television producers in posing questions and seeking eclectic answers.

Our small office is one social invention for giving a choice to those specialists and generalists who want to exercise their sense of wonder and take an occasional glimpse at a larger whole without losing sight of specifics. Its functions are similar to those of the Committee on Social Thought of the University of Chicago and the New York Institute for the Humanities. In the Smithsonian house one finds many mansions. We join all of our households to ask the daily question, "Knowledge for what and for whom?" That is another way of asking, "Who has the right to an idea?" These deceptively simple questions are central to those educators at the Smithsonian who share ideas, hypotheses, data, and insight with people having curiosity about the major themes and problems of modern civilization. They include teachers, parents, authors, broadcast writers and producers, public officials, and scholars unafraid to venture beyond their fields. Two decades after Lord Snow's provocative essays on "the two cultures"—science and literary humanism—the Smithsonian continues to experiment with scholarly communications aimed at bringing both the sciences and humanities to bear on answering questions of possible common interest to scholars and their patrons, the taxpaying public.

—*Wilton S. D[illegible]*

The Office of Smithsonian Symposia and Seminars specializes in interdisciplinary approaches to knowledge and the sharing of such knowledge with the academic community and the wider public. It is served by an Advisory Committee made up of scholars and other specialists from various components within the Institution.

Winter 1979

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