QUESTIONS AND ANSWERS ON THE TUITION TAX CREDIT BILL

Q) Would parents who send their children to segregated schools be eligible for tuititon tax credits under this bill?

A) No. The bill expressly prohibits any person from receiving a credit for payments made to a school that uses racial criteria in any of its programs or policies, including admissions.

Q) What about schools that do not exclude minority group members but have policies that use race as a criterion, such as a policy against interracial dating?

A) Payments to such schools would also not qualify anyone to receive a tax credit, since the bill prohibits credits for payments to "any organization that uses race as a criterion in any of its policies or programs."

Q) Would a predominantly black or predominantly white private school be required to take steps to bring its racial balance into conformity with the racial percentages in the local community?

A) No. The bill reflects the Reagan Administration's commitment to a color-blind society rather than a race-conscious one. The bill expressly rejects the use of racial quotas, either as a test for whether discrimination is occurring or as a remedy for past discrimination. It is the use of race as a criterion, not a failure to have a certain number of minority students, that would make

payments to a school ineligible for tax credits. Similarly, the remedy for racial discrimination is not the imposition of "reverse" discrimination, but an end to all discrimination.

Q) Would a private school which chooses to have its own affirmative action program to increase its percentage of minority students be thereby disqualified from receiving payments for which tax credits would be allowed?

A) No. The bill provides an express exception to the "no racial criteria" rule, statingthat no school shall be disqualified on the ground that it has an affirmative action program that uses racial criteria on behalf of members of minority groups. On the other hand, the bill also provides that no school shall be disqualified on the ground that it does not have an affirmative action program.

Q) Would the federal government be authorized to conduct audits or investigations of schools to determine whether they use racial criteria?

A) No. The bill specifically excludes this policy, in recognition of the First Amendment rights of religious schools against government entanglement in their affairs. Since the Constitution also forbids the government to discriminate between religious and non-religious institutions, the anti-entanglement provisions would apply to all private schools, religious and secular.

Q) If the bill does not allow the government to conduct audits or investigations, how can it determine whether a school is

using racial criteria?

A) The government is authorized, first, to require that each school receiving payments for which credits are claimed submit annual statements certifying that race has not been used as a criterion in connection with any policy or program of the school. This certification would be under oath, and criminal penalties for perjury would apply to intentional false statements in the certification. A second safeguard against the use of race as a criterion is that the bill authorizes the federal government to bring suit against the school, seeking a declaratory judgment to the effect that the school has used race as a criterion. If the government was successful in such an action, the school would be disqualified from receiving payments for which credits would be allowed for a period of at least three years. The only way the school could re-establish its eligibility for receipt of payments for which credits would be allowed would be by bringing its own action, after the expiration of three years, to prove that it no longer used race as a criterion in any of its policies or programs. Thus no school that actually discriminates by race will receive payments for which tax credits will be allowed. Neither, however, will the tuition tax credit bill afford opportunities for harassment of private schools by government agents, or for impermissible entanglement of church and state.

Q) Would a school's receipt of tuition payments for which taxpayers would receive tax credits amount to a receipt of federal financial assistance?

A) No. The bill provides for tax relief for parents who choose to send their children to private schools, in recognition of the fact that these parents pay federal, state and local taxes that support the public schools. Under current law, these parents are faced with a choice between paying twice for their children's education or sending their children to schools with whose values or educational policies they may sincerely disagree. The benefits provided by this bill are thus tax credits, not subsidies; and they are received by taxpayers, not by schools. The bill explicitly recognizes that schools receiving payments for which taxpayers subsequently claim credits are not thereby rendered recipients of federal financial assistance.

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

February 18, 1983

TO: Bill Barr
Jack Burgess
Ken Cribb

FROM: Bob Kabel BK

SUBJECT: S. 528, the Educational Opportunity and Equity Act of 1983

Not knowing whether you would receive this independently, attached is a copy of the Congressional Record materials submitted by Senator Dole on S. 528, the Administration's tuition tax credit bill. The Moynihan and Roth statements enhance the initial perception of this bill.

PIK program will not produce adverse consequences with respect to the preservation of the cooperative's current tax status.

Passage of this measure will go a long way toward alleviating the fears of those farmers who are rightfully concerned about the tax problems with the PIK program.●

By Mr. DOLE (for himself, Mr. PACKWOOD, Mr. MOYNIHAN, Mr. ROTH, and Mr. D'AMATO):

S. 528. A bill to amend the Internal Revenue Code of 1954 to provide a Federal income tax credit for tuition; to the Committee on Finance.

EDUCATIONAL OPPORTUNITY AND EQUITY ACT OF 1983

● Mr. DOLE. Mr. President, I have been a long-time supporter of providing Federal income tax relief for lower and middle income families who carry the additional burden of supporting the public schools while sending their children to private schools. Because of this double burden, an alternative to public education simply is not available to lower income families today and is not available to middle income families without substantial sacrifice. Inflation in recent years has made matters worse. Yet, alternatives to public education contribute to the pluralism that helped make our society strong. Alternatives to public education can also help stimulate improvements in our public schools through the competition those alternatives present. A strong system of private schools available to all income classes should contribute to a better education for all of our children and an educated skilled populace is an essential ingredient in maintaining this Nation's technological and industrial prominence.

President Reagan made a campaign promise to provide relief to these families who carry a double burden by providing a tax credit for a portion of the tuition they pay for their childrens' education. During the last Congress, I was pleased to introduce the administration's tuition tax credit bill. Hearings on the bill were held before the Senate Finance Committee on July 16, 1982, and in September, the committee ordered favorably reported a bill providing for tuition tax credits.

Unfortunately, we were unable to bring the bill to the Senate floor in the 97th Congress. It is my sincere hope that Finance Committee hearings and markup on tuition tax credits will be scheduled quickly so that a tuition tax credit bill can be reported to the Senate early in this Congress. In order to expedite consideration of this important legislation, I am today introducing a tuition tax credit bill transmitted yesterday by the President to the Congress.

The President's new bill is substantially the same as the bill reported last September by the Senate Finance Committee, with some minor modifications and technical corrections.

PHASED IN NONREFUNDABLE CREDIT

This bill would phase in, over 3 years, a nonrefundable tax credit for one-half of tuition payments for the primary or secondary education of a taxpayer's dependents, up to a maximum per student of $100 in 1983, $200 in 1984, and $300 thereafter. The credit would be phased out for families with incomes of more than $40,000 and those with incomes of more than $60,000 per year would be ineligible. The well to do will not benefit from this bill.

Some supporters of tuition tax credits feel that private school tuition assistance should be available to individuals with no tax liability, on the same basis as higher income individuals with tax liability. They feel, accordingly, that any tuition tax credit legislation should include provisions making the tax credits refundable, in order that the benefits provided by the bill be available to lower income individuals. Last year, the members of the Finance Committee expressed their strong support for the concept of a refundable tuition tax credit. I fully expect that the issue of refundability will be considered again this year when the Finance Committee reviews this proposed legislation.

NO CREDITS FOR DISCRIMINATORY SCHOOLS

Although I support tuition tax credits in principle, I would not support any bill without adequate safeguards insuring that tax credits would not be allowed for payments to private schools with racially discriminatory policies or practices. Last year the Finance Committee carefully reviewed the antidiscrimination provisions of the administration's tuition tax credit bill. Extensive discussions were held with administration officials, and experts and interested laymen in the fields of education, civil rights and law. The final product of the Finance Committee's deliberations is a set of antidiscrimination rules that are airtight.

An eligible school will be required to include a statement regarding its maintenance of a nondiscriminatory policy in any published bylaws, admission materials and advertising. In addition, an eligible school must file annually with the Treasury Department a statement that it has not followed a racially discriminatory policy. Generally, a copy of this statement will have to be furnished to each individual who pays tuition to the school and must be attached to any return on which credits are claimed. In addition, the bill will disallow credits for payments to any school found to be following a racially discriminatory policy in an action brought by the Attorney General under the bill's declaratory judgment provisions.

Finally, although the bill has a general effective date of August 1, 1983, no credits will be allowed until a final decision of the Supreme Court of the United States or an act of Congress prohibits the granting of tax exemption under the Internal Revenue Code to private educational institutions that maintain a racially discriminatory policy or practice as to students. Since eligible schools must be tax exempt educational institutions under the Internal Revenue Code, this effective date provision provides an additional safeguard to insure that credits will not provide even indirect assistance to racially discriminatory private schools. Following the Finance Committee's careful review of the antidiscriminatory issue, I am convinced that the enactment of this bill will not in any way frustrate our fundamental national policy against racial discrimination in education.

CONSTITUTIONALITY

Some opponents of tuition tax credits claim that because of the religious affiliation of many private schools, tax relief for tuition payments violates the establishment clause of the first amendment. I do not agree, but it does not necessarily matter what I or any other Senator thinks about the constitutionality of this measure so long as we are not convinced that the provision does not clearly violate the first amendment—and the court decisions in this area are anything but unanimous and clear. It is up to the Supreme Court to decide the constitutionality of this bill, not us.

FISCAL RESTRAINT

Other opponents of tuition tax credits point to burgeoning deficits, and the painful process that Congress faces over the next few years in learning what fiscal restraint means. However, the Finance Committee's modifications to the original bill as introduced have effected substantial economies that significantly reduce the cost of tuition tax credits. By reducing the amount of allowable credits, delaying the bill's effective date, and lowering the phase-out and ineligibility criteria, this bill eliminates all revenue losses in fiscal year 1983, and reduces the total revenue loss over the 3-year period ending in fiscal year 1985 by $450 million. When the bill is fully effective in fiscal year 1986, the bill will cost less than $800 million each year. Of course, these costs are not insignificant. But in light of the long-term economic benefits to be obtained from encouraging investment in human capital, and promoting greater diversity and competition in education, these costs are a sound and prudent investment in our Nation's future.

Mr. President, I ask unanimous consent to include in the RECORD a copy of the bill, and a technical explanation of the bill's provisions.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

S. 528

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Educational Opportunity and Equity Act of 1983".

SEC. 2. CONGRESSIONAL FINDINGS AND PURPOSES.

(a) FINDINGS.—the Congress finds that it is the policy of the United States to foster educational opportunity, diversity, and choice for all Americans. Therefore, this Act recognizes that—

(1) pluralism is one of the great strengths of American society, diversity in education is an important contributor to that pluralism, and nonpublic schools play an indispensable role in making that diversity possible;

(2) the existence and availability of alternatives to public education tend to strengthen public education through competition and to improve the educational opportunities of all Americans;

(3) Americans should have equal opportunities to choose between the education offered by public schools and available in private educational systems and should not be compelled because of economic circumstances to accept education provided by government-created and government-operated school systems, and to force such a selection is an unfair and unjust discrimination against persons of lesser means;

(4) increasing numbers of American families are unable to afford nonpublic school tuition in addition to the State and local taxes that go to support public schools, and tax relief for nonpublic school tuition expenses is necessary if American families are to continue to have a meaningful choice between public and private education at the elementary and secondary levels;

(5) tax relief in the form of tuition tax credits is the fairest way to extend a choice in education to a wide range of individuals, tax relief in the form of tuition tax credits creates the least possible danger of interference in the lives of individuals and families consistent with achieving these ends, and tax relief in the form of tuition tax credits achieves these ends with a minimum of complexity so that those for whom the tax relief is intended will be able to understand and take advantage of it;

(6) the tax revenue loss occasioned by a tuition tax credit for a child would be small compared to the cost to the State and local taxpayers of educating the child at a public school;

(7) equality of educational opportunity is the policy of the United States, and the tax relief afforded by this legislation should not be used to promote racial discrimination.

The Congress finds that this Act will expand opportunities for personal liberty, diversity, and pluralism that constitute important strengths of education in America.

(b) PURPOSE.—The primary purpose of this Act is to enhance equality of educational opportunity, diversity, and choice for Americans.

SEC. 3. CREDIT FOR TUITION EXPENSES.

(a) IN GENERAL.—Subpart A of part IV of subchapter A of chapter 1 of the Internal Revenue Code of 1954 (relating to credits allowable) is amended by inserting after section 44G the following new section:

"SEC. 44H. CREDIT FOR TUITION EXPENSES.

"(a) GENERAL RULE.—At the election of an individual, there shall be allowed as a credit against the tax imposed by this chapter for the taxable year an amount equal to 50 percent of the qualified tuition expenses paid by such individual during the taxable year for any qualified dependent.

"(b) LIMITATIONS.—

"(1) MAXIMUM DOLLAR AMOUNT PER QUALIFIED DEPENDENT.—

"(A) IN GENERAL.—The amount of the credit allowable to the taxpayer under subsection (a) with respect to any qualified dependent for any taxable year shall not exceed the applicable amount.

"(B) APPLICABLE AMOUNT.—For purposes of this paragraph, the term 'applicable amount' means the excess, if any, of—

"(i) $300, over

"(ii) 1.5 percent (3 percent in the case of a married individual who does not file a joint return) of the amount, if any, by which the adjusted gross income of the taxpayer for the taxable year exceeds $40,000 ($20,000 in the case of such married individual).

"(C) TRANSITIONAL RULE.—For taxable years beginning after December 31, 1982, and before January 1, 1985, subparagraph (B) shall be applied—

"(i) in taxable years beginning in 1983, by substituting—

"(I) '$100' for '$300',

"(II) '0.5 percent' for '1.5 percent', and

"(III) '1 percent' for '3 percent', and

"(ii) in taxable years beginning in 1984, by substituting—

"(I) '$200' for '$300',

"(II) '1 percent' for '1.5 percent', and

"(III) '2 percent' for '3 percent'.

"(2) CREDIT NOT TO EXCEED TAX LIABILITY.—The credit allowed by subsection (a) shall not exceed the tax imposed by this chapter for the taxable year, reduced by the sum of the credits allowable under a section of this subpart having a lower number or letter designation than this section, other than credits allowable by sections 31, 39, and 43.

"(c) CREDIT DENIED FOR AMOUNTS PAID TO RACIALLY DISCRIMINATORY INSTITUTIONS.—

"(1) DECLARATORY JUDGMENT ENTERED.—

"(A) IN GENERAL.—No credit shall be allowed under this section for any amount paid to an educational institution during any taxable year if—

"(i) within the calendar year ending with or within such taxable year or in any preceding calendar year—

"(I) a judgment has been entered by a district court of the United States under section 7408 (regardless of whether such judgment is appealed) declaring that such educational institution follows a racially discriminatory policy, or

"(II) an order by any United States Court of Appeals has been made which, by its terms, requires the district court to enter such a judgment, and

"(ii) no order described in section 7408(f)(2) with respect to such educational institution has been entered which is in effect for the calendar year ending with or within such taxable year.

"(B) REVERSALS OF DECLARATORY JUDGMENTS OR ORDERS.—

"(i) IN GENERAL.—A judgment or order described in subparagraph (A)(i) entered in an action brought with respect to an educational institution shall not be taken into account under subparagraph (A) for any taxable year if, after all appeals in such action have been concluded or the time for filing such appeals has expired, the declaration contained in such judgment, or required to be entered under the terms of such order, that such institution has followed a racially discriminatory policy is negated (other than by reason of an order described in section 7408(f)(2)).

"(ii) WAIVER OF LIMITATIONS.—Notwithstanding section 6511(a) or any other period of limitation or lapse of time, a claim for credit or refund of overpayment of the tax imposed by this chapter which arises by reason of this subparagraph may be filed by any person at any time within the 1-year period beginning on the earlier of—

"(I) the date on which all appeals with respect to the judgment or order described in subparagraph (A)(i) have been concluded, or

"(II) the date on which the time for such appeals has expired.

Sections 6511(b) and 6514 shall not apply to any claim for credit or refund filed under this subparagraph within such 1-year period.

"(C) STAY OF DECLARATORY JUDGMENT.—

"(i) IN GENERAL.—Any judgment or order described in subparagraph (A)(i) shall not be taken into account under subparagraph (A) for any taxable year if such judgment or order is stayed as of the close of such taxable year.

"(ii) REMOVAL OF STAY.—If a stay entered against a judgment or order described in subparagraph (A)(i) is vacated—

"(I) this subparagraph shall not apply with respect to such judgment or order for any taxable year preceding the taxable year in which such stay is vacated, and

"(II) notwithstanding any other provision of this title or of any other law, the statutory period for the assessment of a deficiency attributable to the disallowance of any credit under this section by reason of this clause shall not expire before the date which is 3 years after the close of the calendar year in which such stay is removed.

"(D) WAIVER OF LIMITATIONS IF INSTITUTION CEASES TO DISCRIMINATE.—Notwithstanding section 6511(a) or any other period of limitation or lapse of time, a claim for credit or refund of overpayment of the tax imposed by this chapter which arises by reason of a reversal of any order denying a motion under section 7408(f)(1)(A) may be filed by any person at any time within the 1-year period beginning on the date on which such reversal is made. Sections 6511(B) and 6514 shall not apply to any claim for credit or refund filed under this subparagraph within such 1-year period.

"(2) REQUIRED STATEMENTS.—

"(A) STATEMENTS FURNISHED BY INSTITUTIONS TO THE SECRETARY.—No credit shall be allowed under subsection (a) for amounts paid to any educational institution during the taxable year if such educational institution has not filed with the Secretary (in such manner and form as the Secretary shall by regulation prescribe) within 30 days after the close of the calendar year ending with or within such taxable year a verified statement which—

"(i) declares that such institution has not followed a racially discriminatory policy during such calendar year;

"(ii) indicates whether—

"(I) a declaratory judgment or order described in paragraph (1)(A)(i) has been entered against such institution in an action brought under section 7408;

"(II) a stay against such judgment or order is in effect; and

"(III) an order described in section 7408(f)(2) is in effect; and

"(iii) attests that such institution has complied with the requirements of subsection (d)(3)(D) during such calendar year.

"(B) STATEMENTS FURNISHED TO TAXPAYERS.—Except as otherwise provided by regulations, within 30 days after the close of the calendar year to which the statement described in subparagraph (A) relates, the educational institution shall furnish a copy of such statement to all persons who paid tuition expenses to the institution in the calendar year to which such statement relates.

"(C) STATEMENTS FURNISHED BY TAXPAYERS TO THE SECRETARY.—No credit shall be allowed to a taxpayer under subsection (a) for amounts paid to an educational institution during the taxable year if the taxpayer does not attach to the return on which the taxpayer claims the credit the statement described in subparagraph (a) which is furnished by such institution for the calendar

year ending with or within such taxable year of the taxpayer.

"(3) ENFORCEMENT RESPONSIBILITY.—The Attorney General shall have exclusive authority under this subsection to investigate and to determine whether an educational institution is following a racially discriminatory policy.

"(4) RACIALLY DISCRIMINATORY POLICY.—For purposes of this subsection—

"(A) IN GENERAL.—An educational institution follows a racially discriminatory policy if such institution refuses, on the basis of race, to—

"(i) admit applicants as students;

"(ii) admit students to the rights, privileges, programs, and activities generally made available to students by the educational institution; or

"(iii) allow students to participate in its scholarship, loan, athletic, or other programs.

"(B) QUOTAS, ETC.—The term 'racially discriminatory policy' shall not include failure of any educational institution to pursue or achieve any racial quota, proportion, or representation in the student body.

"(C) RACE.—The term 'race' shall include color or national origin.

"(d) DEFINITIONS.—For purposes of this section—

"(1) QUALIFIED TUITION EXPENSES.—The term 'qualified tuition expenses' means the excess of—

"(A) the amount of tuition expenses paid by the taxpayer during the taxable year to any eligible educational institution for any qualified dependent of such taxpayer, over

"(B) any scholarship or financial assistance paid during such taxable year to such qualified dependent or to the taxpayer with respect to such qualified dependent or to the taxpayer with respect to such qualified dependent.

"(2) QUALIFIED DEPENDENT.—The term 'qualified dependent' means any individual—

"(A) who is a dependent of the taxpayer (other than an individual described in paragraph (4), (5), (7), or (8) of section 152(a)),

"(B) who has not attained 20 years of age at the close of the taxable year, and

"(C) with respect to whom a deduction under section 151 is allowable to the taxpayer for the taxable year.

"(3) ELIGIBLE EDUCATIONAL INSTITUTION.—The term 'eligible educational institution' means an educational institution—

"(A) Which provides a full-time program of elementary or secondary education;

"(B) which is a privately operated, not-for-profit, day or residential school;

"(C) which is exempt from taxation under section 501(a) as an organization described in section 501(c)(3), including church-operated schools to which subsections (a) and (b) of section 508 do not apply; and

"(D) which includes in any published bylaws, advertisements, admission application forms and other such published materials, a statement (in such form and manner as the Secretary may by regulations prescribe) that it does not discriminate against student applicants or students on the basis or race.

"(4) TUITION EXPENSES.—

"(A) IN GENERAL.—The term 'tuition expenses' means tuition and fees paid for the full-time enrollment or attendance of a student at an educational institution, including required fees for courses.

"(B) CERTAIN EXPENSES EXCLUDED.—The term 'tuition expenses' does not include any amount paid for—

"(i) books, supplies, and equipment for courses of instruction;

"(ii) meals, lodging, transportation, or personal living expenses;

"(iii) education below the first-grade level; or

"(iv) education above the twelfth-grade level.

"(5) SCHOLARSHIP OR FINANCIAL ASSISTANCE.—The term 'scholarship or financial assistance' means—

"(A) a scholarship or fellowship grant (within the meaning of section 117(a)(1)) which is not includible in gross income under section 117;

"(B) an educational assistance allowance under chapter 32, 34, or 35 of title 38, United States Code; or

"(C) other financial assistance which—

"(i) is for educational expenses, or attributable to attendance at an educational institution, and

"(ii) is exempt from income taxation by any law of the United States (other than a gift, bequest, devise, or inheritance within the meaning of section 102(a)).

"(e) ELECTION.—The election provided under subsection (a) shall be made at such time and in such manner as the Secretary shall by regulations prescribe.".

(b) DISCLOSURE OF INFORMATION TO ATTORNEY GENERAL.—Subsection (h) of section 6103 of such Code (relating to disclosure to certain Federal officers and employees for tax administration purposes) is amended by adding at the end thereof the following new paragraph:

"(6) CERTAIN INVESTIGATIONS AND PROCEEDINGS REGARDING RACIALLY DISCRIMINATORY POLICIES.—Upon the request of the Attorney General or the Secretary's own motion, the Secretary shall disclose any return or return information which is relevant to—

"(A) any investigation conducted by the Attorney General under section 44H(c) with regard to whether an educational institution is following a racially discriminatory policy (within the meaning of section 44H(c)(4)), or

"(B) any proceeding which may be brought under section 7408,

to any officer or employee of the Department of Justice who is directly and personally involved in such investigation or in preparation for such a proceeding.".

(c) CONFORMING AMENDMENT.—

"(1) The table of sections for subpart A of part IV of subchapter A of chapter 1 of such Code is amended by inserting after the item relating to section 44G the following:

"Sec. 44H. Tuition expenses.".

"(2) Section 6504 of such Code (relating to cross references with respect to periods of limitation) is amended by adding at the end thereof the following new paragraph:

"(12) For disallowance of tuition tax credits because of a declaratory judgment that a school follows a racially discriminatory policy, see section 44H(c).".

SECTION 4. DECLARATORY JUDGMENT PROCEEDING.

(a) IN GENERAL.—Subchapter A of chapter 76 of the Internal Revenue Code of 1954 (relating to judicial proceedings) is amended by redesignating section 7408 as section 7409 and by inserting after section 7407 the following new section:

"SEC. 7408. DECLARATORY JUDGMENT RELATING TO RACIALLY DISCRIMINATORY POLICIES OF SCHOOLS.

"(a) IN GENERAL.—Upon filing of an appropriate pleading by the Attorney General under subsection (b), the district court of the United States for the district in which an educational institution is located may make a declaration with respect to whether such institution follows a racially discriminatory policy. Any such declaration shall have the force and effect of a final judgment of the district court and shall be reviewable as such.

"(b) FILING OF PLEADING.—

"(1) IN GENERAL.—The Attorney General is authorized and directed to seek a declaratory judgment under subsection (a) against any educational institution upon—

"(A) receipt by the Attorney General within the previous 1-year period of any allegation of discrimination against such institution, and

"(B) a finding by the Attorney General of good cause.

"(2) ALLEGATION OF DISCRIMINATION.—For purposes of this section, the term 'allegation of discrimination' means an allegation made in writing by any person which alleges with specificity that—

"(A) a named educational institution has committed a racially discriminatory act against a named student applicant or student within one year preceding the date on which such allegation is made to the Attorney General, or

"(B) the educational institution made a communication, within one year preceding such date, expressing that the institution follows a racially discriminatory policy.

"(3) NOTICE OF ALLEGATIONS OF DISCRIMINATION.—Upon receipt of any allegation of discrimination made against an educational institution, the Attorney General shall promptly give written notice of such allegation to such institution.

"(4) OPPORTUNITY TO COMMENT.—Before any action may be filed against an educational institution by the Attorney General under subsection (a), the Attorney General shall give the institution a fair opportunity to comment on all allegations made against it and to show that the alleged racially discriminatory policy does not exist or has been abandoned.

"(5) AVAILABILITY OF CERTAIN INFORMATION TO COMPLAINANT.—

"(A) IN GENERAL.—If an allegation of discrimination against an educational institution is made to the Attorney General and the Attorney General—

"(i) declines to bring an action under subsection (a) against such institution, or

"(ii) enters into a settlement agreement with such institution under subsection (d) before such an action is brought, the Attorney General shall make available to the person who made such allegation the information upon which the Attorney General based the decision not to bring such an action or to enter into such settlement agreement. The Attorney General shall promptly give written notice to such person that such information is available for his inspection.

"(B) PRIVACY LAWS.—Nothing in this paragraph shall be construed to authorize or require the Attorney General to disclose any information if such disclosure would violate any applicable State or Federal law relating to privacy.

"(c) REQUIREMENTS FOR A FINDING OF FOLLOWING A RACIALLY DISCRIMINATORY POLICY.—A district court may declare that an educational institution follows a racially discriminatory policy in an action brought under subsection (a) only if the Attorney General establishes in such action that—

"(1) the institution has, pursuant to such policy, committed a racially discriminatory act against a student applicant or student within the two years preceding commencement of such action;

"(2) the institution has, within the two years preceding commencement of such action, made a communication expressing that it follows a racially discriminatory policy against student applicants or students; or

"(3) the institution has engaged in a pattern of conduct intended to implement a racially discriminatory policy, and that some act in furtherance of this pattern of conduct

was committed within two years preceding commencement of such action.

"(d) SETTLEMENTS.—

"(1) IN GENERAL.—Prior to, and in lieu of, filing an action under subsection (a), the Attorney General may, at his discretion, enter into a settlement agreement with the educational institution against which an allegation of discrimination has been made if the Attorney General finds that the institution has been acting in good faith and has abandoned its racially discriminatory policy.

"(2) VIOLATION OF SETTLEMENT AGREEMENT.—If the Attorney General has entered into a settlement agreement with an educational institution under paragraph (1) and the Attorney General finds that such institution is in violation of such agreement, the Attorney General may—

"(A) notwithstanding subsection (b)(1)(A), bring an action under subsection (a) without having received any allegation of discrimination against such institution, or

"(B) bring an action to enforce the terms of such agreement.

"(3) COPY OF SETTLEMENT AGREEMENT TO COMPLAINANT.—The Attorney General shall give a copy of any settlement agreement which is entered into with any educational institution under paragraph (1) to any person from whom the Attorney General has received an allegation of discrimination against such institution.

"(e) RETENTION OF JURISDICTION.—Any district court which makes a declaration under subsection (a) that an educational institution follows a racially discriminatory policy shall retain jurisdiction of such case.

"(f) DISCONTINUANCE OF RACIALLY DISCRIMINATORY POLICY.—

"(1) MOTION.—

"(A) IN GENERAL.—At any time after the date which is 1 year after the date on which a judgment is entered in an action brought under subsection (a) declaring that an educational institution follows a racially discriminatory policy, such institution may file with the district court a motion to modify such judgment to include a declaration that such institution no longer follows a racially discriminatory policy.

"(B) AFFIDAVITS.—Any motion filed under subparagraph (A) shall contain affidavits—

"(i) describing with specificity the ways in which the educational institution has abandoned its previous racially discriminatory policy;

"(ii) describing with specificity the ways in which such institution has taken reasonable steps to communicate its policy of nondiscrimination to students, to faculty, to school administrators, and to the public in the area it serves;

"(iii) averring that such institution has not, during the preceding year—

"(I) committed a racially discriminatory act against a student applicant or student pursuant to a racially discriminatory policy,

"(II) made a communication expressing that it follows a racially discriminatory policy against student applicants or students; or

"(III) engaged in a pattern of conduct intended to implement a racially discriminatory policy, and committed some act in furtherance of this pattern of conduct; and

"(iv) averring that such institution has complied with the requirements of section 44H(d)(3)(D).

"(2) ORDER.—If a motion is made under paragraph (1), the district court shall issue an order modifying the judgment entered in the action to include a declaration that the educational institution no longer follows a racially discriminatory policy unless the Attorney General establishes that—

"(A) any affidavit provided by the institution under paragraph (1)(B) is false;

"(B) the institution has, during the preceding year, committed any act, made any communication, or engaged in any pattern of conduct described in paragraph (1)(B)(iii); or

"(C) the institution has not, in fact, complied with the requirements of clauses (ii) and (iv) of paragraph (1)(B).

"(3) APPEAL OF ORDERS.—Any order of the district court granting or denying a motion made under paragraph (1) shall be reviewable.

"(g) ATTORNEY'S FEES.—If an educational institution prevails in an action under this section, the court may award the institution costs and reasonable attorneys' fees in such action.

"(h) DEFINITIONS.—For purposes of this section—

"(1) RACIALLY DISCRIMINATORY POLICY.—The term 'racially discriminatory policy' has the meaning given to such term by section 44H(c)(4).

"(2) RACIALLY DISCRIMINATORY ACT.—

"(A) IN GENERAL.—An educational institution commits a racially discriminatory act if such institution refuses, on the basis of race, to—

"(i) admit any applicant as a student;

"(ii) admit any student to the rights, privileges, programs, and activities generally made available to students by the educational institution; or

"(iii) allow any student to participate in its scholarship, loan, athletic, or other programs.

"(B) QUOTAS, ETC.—The term 'racially discriminatory act' shall not include the failure of such institution to pursue or achieve any racial quota, proportion, or representation in the student body.

"(C) RACE.—The term 'race' shall include color or national origin.

"(i) REPORT.—Within 90 days of the close of each calendar year, the Attorney General shall submit a report to the Congress concerning the disposition during such calendar year of—

"(1) any allegations of discrimination received by the Attorney General, and

"(2) any actions brought under this section.".

(b) Conforming Amendments.—

(1) The table of sections for subchapter A of chapter 76 of such Code (relating to civil actions by the United States) is amended by striking out the item relating to section 7408 and inserting in lieu thereof:

"Sec. 7408. Declaratory judgment relating to racially discriminatory policies of schools.

"Sec. 7409. Cross references.".

(2) Section 2201 of title 28, United States Code (relating to creation of declaratory judgment remedy) is amended by striking out "section 7428" and inserting in lieu thereof "section 7408 or 7428".

SECTION 5. TAX CREDITS ARE NOT FEDERAL FINANCIAL ASSISTANCE.

Tax credits claimed under section 44H of the Internal Revenue Code of 1954 shall not constitute Federal financial assistance to educational institutions or to the recipients of such credits.

SECTION 6. EFFECTIVE DATE: SPECIAL RULE.

(a) CERTIFICATION REQUIRED.—The amendments made by this Act shall not take effect until the Attorney General certifies to the Secretary of the Treasury that, pursuant to—

(1) an Act of Congress which has been enacted, or

(2) a final decision of the United States Supreme Court, the Internal Revenue Code of 1954 prohibits the granting of tax exemption under section 501(a) by reason of section 501(c)(3) to private educational institutions maintaining a racially discriminatory policy or practice as to students.

(b) APPLICATION WHEN CERTIFICATION IS MADE.—

(1) IN GENERAL.—If the certification described in subsection (a) is made to the Secretary of the Treasury—

(A) except as provided in paragraph (2), the amendments made by section 3 shall apply with respect to expenditures made after the date on which such certification is made to the Secretary of the Treasury in taxable years beginning after December 31, 1982, and ending after such date, and

(B) the amendments made by section 4 shall take effect on the date on which such certification is made to the Secretary of the Treasury.

(2) NO APPLICATION BEFORE JULY 31, 1983.—In no event shall the amendments made by section 3 apply with respect to expenditures made before August 1, 1983.

(c) ESTIMATED INCOME TAX AND WAGE WITHHOLDING.—

(1) ESTIMATED INCOME TAX.—Any credit allowable to any taxpayer under section 44H of the Internal Revenue Code of 1954 shall not be taken into account under section 6015(d) in determining the estimated tax of such taxpayer for any taxable year beginning before January 1, 1984.

(2) WAGE WITHHOLDING.—Any credit allowable under section 44H of such Code shall not be taken into account in determining the number of withholding exemptions to which any taxpayer is entitled under section 3402 of such Code with respect to remuneration paid before January 1, 1984.

TECHNICAL EXPLANATION OF THE EDUCATIONAL OPPORTUNITY AND EQUITY ACT OF 1983

I. SUMMARY

The bill provides a nonrefundable credit for 50 percent of tuition expenses paid to private elementary and secondary schools for certain qualified dependents of the taxpayer. The maximum credit is $100 in 1983, $200 in 1984, and $300 in 1985 and subsequent years. The maximum credit amount is phased down for taxpayers with adjusted gross incomes of greater than $40,000 and no credit is allowed for taxpayers with adjusted gross income of $50,000 or more.

For tuition expenses to be creditable, a school cannot follow a racially discriminatory policy. An eligible school will be required to include a statement of its nondiscriminatory policy in any published by-laws, admissions materials, and advertising, and to file annually with the Treasury Department a statement that it has not followed a racially discriminatory policy. Generally, a copy of this statement also will have to be furnished to each individual who pays tuition to the school and must be attached to any return on which credits are claimed. In addition, the bill disallows credits for payments to any school found to be following a racially discriminatory policy in an action brought by the Attorney General under the bill's declaratory judgment provisions.

The bill generally applies to tuition paid or incurred after July 31, 1983, for taxable years beginning after December 31, 1982; however, no credits will be allowed until either a final decision by the Supreme Court of the United States or an Act of Congress prohibits the granting of a tax exemption under section 501(a) of the Internal Revenue Code by reason of section 501(c)(3) to private educational institutions that maintain a racially discriminatory policy or practice as to students. Credits will be effective on a prospective basis after such final decision or Act of Congress.

II. DESCRIPTION OF PROVISIONS

Congressional findings

The bill contains a policy statement that sets forth several propositions that are based upon a Congressional finding that it is the policy of the United States to foster educational opportunity, diversity, and choice for all Americans. This policy statement concludes that the primary purpose of the bill is to enhance equality of educational opportunity, diversity, and choice for all Americans and that the bill will expand opportunities for personal liberty, diversity, and pluralism that constitute important strengths of education in America.

Credit for tuition expenses

Under the bill, an individual is allowed to claim a nonrefundable tax credit for 50 percent of the tuition expenses paid during the taxable year to one or more eligible private educational institutions for certain dependents who are under age 20 at the close of the taxable year in which the expenses are paid and with respect to whom the individual is permitted to claim dependency exemptions. Provide that over half of his or her support is received from the taxpayer, the payment of tuition expenses for (1) a son or duaghter or a descendant of either, (2) a stepson or stepdaughter, (3) a brother, sister, stepbrother, or stepsister, (4) a son or daughter of a brother or sister, or (5) an individual (other than the taxpayer's spouse) who has as his or her principal place of abode the home of the taxpayer and who is a member of the taxpayer's household, will qualify for the credit. Except for the taxpayer's children, these individuals must have less than $1,000 of gross income for the calendar year in order to be claimed as dependents.

Eligible educational institutions and qualified tuition expenses

The credit will be available only with respect to tuition paid to certain educational institutions. An educational institution must meet a number of requirements in order for tuition paid to it to be a creditable expense.

The institution must provide a full-time program of elementary or secondary education. While ordinarily, a vocational high school that offers a regular academic secondary school curriculum in addition to vocational courses will qualify, a school that offers only vocational courses, such as stenographic courses, will not.

The institution must be a privately operated, not-for-profit, day or residential school. The school also must be exempt from taxation under Code section 501(a) as an organization described in section 501(c)(3). These are organizations that are organized and operated exclusively for religious, charitable, educational, or other enumerated purposes, no part of the net earnings of which inures to the benefit of any private shareholder or individual and which met certain other specified requirements. Under the bill, church schools that currently are exempt from the requirement that they notify the Internal Revenue Service of their applications for recognization of tax-exempt status will continue to be exempt.

While the bill does not require a private school to have by-laws, advertisements, admission application forms, or other such publications, if an institution does have any such publications they must include a statement that the institution does not discriminate against applicants or students on the basis of race. The form or manner for making this statement is to be prescribed by Treasury Regulations. Forms, brochures, and other publications printed before the effective date of this bill but distributed or used after that date must be amended or "stickered" with an appropriate statement of non-discrimination.

Tuition expenses eligible for the credit are tuition and fees paid for the full-time enrollment or attendance of a student at an educational institution, including fees for courses. However, amounts paid for (1) books, supplies, and equipment for courses of instruction; (2) meals, lodging, transportation, or personal living expenses; (3) education below the first-grade level, such as attendance at a kindergarten, nursery school, or similar institution; and (4) education beyond the twelfth-grade level are not eligible for the credit.

Limitations on credit amount

The credit will be subject both to a maximum dollar amount and a phase-out based upon the amount of a taxpayer's adjusted gross income. Both the maximum dollar amount of the credit and the maximum phase-out rate will be phased in over a three-year period.

The maximum credit allowable to a taxpayer with respect to tutition expenses paid on behalf of each dependent will be:

(1) $100 in the case of tuition expenses paid or incurred after July 31, 1983, in taxable years beginning in 1983;

(2) $200 in the case of tuition expenses paid or incurred after December 31, 1983, in taxable years beginning in 1984; and

(3) $300 in the case of tuition expenses paid or incurred after December 31, 1984, in taxable years beginning in 1985 or later.

However, any tuition tax credits available to any taxpayer may not be taken into account in determining the estimated tax of such taxpayer for any taxable year beginning before January 1, 1984 or in determining the number of withholding exemptions to which any taxpayer is entitled with respect to remuneration paid before January 1, 1984.

The maximum credit amount will be reduced by a specified percentage of the amount by which a taxpayer's adjusted gross income for the taxable year exceeds $40,000 ($20,000 in the case of a married individual filing a separate return). The phase-odt rate will be 1.0 percent for taxable years beginning in 1983; 2.0 percent for taxable years beginning in 1984, and 3.0 percent for taxable years beginning in 1985 and thereafter. These percentage phase-out rates are doubled for married individuals filing separate returns. Thus, a taxpayer with adjusted gross income of $50,000 or more ($25,000 in the case of a married individual filing a separte return) will receive no tax credit.

Special rules

Under the bill, otherwise eligible tuition expenses will be reduced by certain amounts paid to the taxpayer or his dependents. These amounts are: (1) amounts received from tax-free scholarships or fellowship grants; (2) certain Veterans benefits; and (3) other tax-exempt educational financial assistance (except for excluded gfts, bequests, devises, or inheritances). If the scholarship is paid directly to the school and the school sends a bill for tuition to the taxpayer that is net of the scholarship, the taxpayer is not deemed to have been paid the scholarship; the scholarship is excluded for the computation of tuition expense.

Anti-discrimination provisions

No tax credit will be permitted for tuition payments to schools that follow racially discriminatory policies.

Under the bill, an educational institution follows a racially discriminatory policy if it refuses, on account of race (1) to admit applicants as students; (2) to admit students to the rights, privileges, programs, and activities generally made available to students by the educational institution; or (3) to allow students to participate in its scholarship, loan, athletic, or other programs. In administering its scholarship, loan, athlethic or other programs, a school may not classify students on the basis of race. A racially discriminatory policy does not include failure to pursue or achieve any racial quota, proportion, or representation in the student body. The term "race" includes color or national origin.

A school will be required to file annually with the Treasury Department a statement declaring that it has not followed a racially discriminatory policy and also indicating whether a judgment declaring that the school has followed a racially discriminatory policy is in effect. The statement also must indicate whether the school has complied with the requirement that it include a statement of nondiscriminatory policy in its published by-laws, application forms, advertising, etc. Except as otherwise provided in Treasury Regulations, the nondiscrimination statement must be furnished to each person who pays tuition to the school, and a taxpayer claiming the credit must attach a copy to his return. It is anticipated, for example, that regulations may provide that such statement need not be provided to parents who certify to the school that they will not claim a credit for tuition paid to such school.

Declaratory judgment proceedings

The bill provides that, upon the filing of an appropriate pleading by the Attorney General, the district court of the United States for the district in which a school is located will have jurisdiction to make a declaration with respect to whether such school follows a racially discriminatory policy. This declaration will have the force and effect of a final judgment of the district court and will be reviewable as such.

Under the bill, the Attorney General is authorized and directed to seek a declaratory judgment against a school after receiving a written allegation of discrimination filed by a complainant against the school and finding good cause. This written allegation must allege with specificity that the school has committed a racially discriminatory act against a student applicant or student within one year preceding the date on which the allegation is made, or that the school has made a communication within one year preceding the date on which the allegation is made, expressing that the school follows a racially discriminatory policy.

The Attorney General is required, upon receipt of a written allegation, promptly to notify the school, in writing, of the existence of the allegation. Before commencing a declaratory judgment action, the Attorney General also is required to give the school a fair opportunity to comment on the allegations made against it by the complainant and to show that the racially discriminatory policy alleged in the written allegation either does not exist or has been abandoned.

If the Attorney General decides not to seek a declaratory judgment against the school, he must make available to the complainant the information on which the Attorney General based his decision, including any relevant information submitted by the school. He is not required or authorized, however, to make available any information the disclosure of which violates any Federal or State law protecting personal privacy or confidentiality. The Attorney General must also notify the complainant of the availability of this information.

The bill provides that a district court may declare that a school follows a racially discriminatory policy, in a declaratory judgment action, only if the Attorney General establishes that:

(1) The school has, pursuant to such policy, committed a racially discriminatory act against a student applicant or student within the two years preceding commencement of the action;

(2) The school has, within two years preceding commencement of the action, made a communciation expressing that it follows a racially discriminatory policy against student applicants or students; or

(3) The school has engaged in a pattern of conduct intended to implement a racially discriminatory policy, and that some act in furtherance of this pattern of conduct was committed within two years preceding commencement of the action.

Any district court that makes a declaration that a school follows a racially discriminatory policy will retain jurisdiction of the case.

Instead of filing a declaratory judgment action, the Attorney General may, at his discretion, enter into a settlement agreement with a school against which an allegation of discrimination has been made. However, before doing so, the Attorney General must find that the school has been acting in good faith and has abandoned its racially discriminatory policy. A copy of any settlement agreement must be furnished to the complainant whose allegations resulted in the Attorney General's investigation. If the school violates the settlement agreement, then no subsequent allegation need be filed before the Attorney General can initiate a declaratory judgment proceeding, or bring an action to enforce the terms of the settlement. It is anticipated that settlement agreements may provide that a violation of the terms of the settlement will constitute an act in furtherance of a pattern of conduct intended to implement a racially discriminatory policy. Thus, violation of the terms of a settlement could lead promptly to a declaratory judgment disallowing credits.

In describing the requirements for making an allegation of discrimination, the requirements for prevailing in a declaratory judgment action against a school, and other requirements, the bill's references to a communication made by a school are intended to include communications of employees, officers, or agents of the school that express that the school follows a racially discriminatory policy. In describing the requirements for prevailing in a declaratory judgment action against a school, the bill's reference to an action pursuant to a racially discriminatory policy is not intended to create any inference that a single act of discrimination, without more, could not constitute evidence of a racially discriminatory policy.

Attorneys fees

The bill authorizes the district court to award costs and reasonable attorneys fees to a school prevailing in a declaratory judgment proceeding brought by the Attorney General. The courts, of course, should not award attorneys fees where circumstances would make an award unjust. However, the courts should take into account the financial burden that may be imposed on a private school in defending against a declaratory judgment action under this bill.

Discontinuance of racially discriminatory policy

The bill provides that a school against which a declaratory judgment has been rendered may, at any time after one year from the date of the judgment, file with the district court a motion to modify the judgment to include a declaration that the school no longer follows a racially discriminatory policy. This motion must contain affidavits that:

(1) Describe with specificity the ways in which the school has abandoned its previous racially discriminatory policy;

(2) Describe with specificity the ways in which the school has taken reasonable steps to communicate its policy of non-discrimination to students, to faculty and school administrators, and to the public in the area that it serves;

(3) Avers that the school has not, during the preceding year, (a) committed a racially discriminatory act against an applicant or student pursuant to a racially discriminatory policy, (b) made a communication expressing that it follows a racially discriminatory policy against applicants or students, or (c) engaged in a pattern of conduct intended to implement a racially discriminatory policy and committed some act in furtherance of such policy; and

(4) Avers that the school has complied with the requirement that it indicate its nondiscriminatory policy in its published bylaws, advertisements, admission applications, etc. during the preceding year.

The motion by the school will be granted unless the Attorney General establishes that:

(1) An affidavit submitted by the school in support of the motion is false;

(2) The school has, within the preceding year, (a) committed a racially discriminatory act against an applicant or student pursuant to a racially discriminatory policy, (b) made a communication expressing that it follows a racially discriminatory policy against applicants or students, or (c) engaged in a pattern of conduct intended to implement a racially discriminatory policy and committed some act in furtherance of such policy.

(3) The school has not, in fact, complied with the nondiscrimination publication or communication requirements.

The requirement that a school take reasonable steps to communicate its nondiscriminatory policy should be satisfied if the school takes vigorous steps to make known its nondiscriminatory policy, which steps are reasonable in light of the school's financial resources.

Period of disallowance of tax credits

No credits will be allowed for amounts paid to a school during the period in which a declaratory judgment against the school is in effect. Generally, a declaratory judgment is in effect beginning with the calendar year in which it is entered by the district court, whether or not it is appealed. The period of disallowance ends only if a motion to reinstate credits is granted by the district court. In that event, credits are again allowed beginning with the year the motion is granted by the district court, whether or not that motion is appealed.

If a subsequent judgment (or appellate order requiring entry of judgment) is entered against the school, the reinstatement order will cease to be in effect. Similarly, if an order reinstating credits is reversed or vacated, that reinstatement order will cease to be in effect, and entry of the order reversing or vacating the reinstatement order will be treated as if it were a subsequent declaratory judgment against the school. In either event, credits will again be disallowed indefinitely, beginning with the year in which the subsequent judgment (or appellate order requiring entry of judgment) or order reversing or vacating a reinstatement order is entered. If an appellate order reversing a reinstatement order is subsequently reversed, and the reinstatement order is upheld, then credits will be allowable from the year the valid reinstatement order was originally entered. In that event, the statute of limitations for filing a refund claim will be extended. If a district court judgment in favor of a school is reversed on appeal, the period of disallowance begins with the earlier of the calendar year in which a subsequent district court judgment against the school is entered on remand, or the calendar year in which the court of appeals entered an order that would require the district court to enter such a judgment. This rule is intended to prevent a delay in the beginning of the period of disallowance if a stay of such an appellate order is entered pending further proceedings. If all judgments against a school entered in an action are subsequently reversed or vacated, all credits disallowed on the basis of any district court judgments in the action will be allowable. However, credits for that period will not be allowed until the action is finally concluded. Accordingly, the period for filing a refund claim will be extended.

If a declaratory judgment against a school (or an appellate order requiring such a judgment) is entered but stayed, credits will be disallowed until the stay is vacated, but the period of disallowance will begin with the year in which the judgment or order is entered. Accordingly, the statute of limitations for determining deficiencies will also be extended in that event. Stays should be entered only in extraordinary circumstances where the school demonstrates the traditional requirements for obtaining a stay pending appeal. See Virginia Petroleum Jobbers Association v. Federal Power Commission, 104 App. D.C. 106, 259 F. 2d 921 (1958). This strict standard is appropriate, inasmuch as the effect of a stay in this context is tantamount to the effect of an order restraining the assessment or collection of taxes. See Section 7421, Internal Revenue Code of 1954, Enochs v. Williams Packing & Navigation Co., 370 U.S. 1 (1962).

Enforcement responsibility

The bill vests the Attorney General with exclusive authority to investigate and, prior to bringing an action, to determine whether an educational institution is following a racially discriminatory policy under the provisions of this bill. However, the Secretary of the Treasury is directed to provide the Attorney General with any information relevant to his investigations and actions which the Attorney General requests or the Secretary wishes to provide.

Reports by Attorney General

The bill requires the Attorney General to report annually to the Congress on his anti-discrimination enforcement activities. These reports should include a description of all activities undertaken pursuant to petitions filed with the Attorney General.

Credit not to be considered as Federal assistance

The bill provides that tuition tax credits will not constitute Federal financial assistance to educational institutions or the recipients thereof.

Effective date

The bill is generally effective for tuition payments made after July 31, 1983. However, no credits will be available until either a final decision of the Supreme Court of the United States or an Act of Congress prohibits the granting of a tax exemption under Code section 501(a) by reason of section 501(c)(3) to private educational institutions maintaining a racially discriminatory policy or practice as to students.●

● Mr. MOYNIHAN. Mr. President, the tuition tax credit legislation I am

offering today with Senator DOLE and Senator PACKWOOD is a "matter of justice" for the over 5 million students currently enrolled in the Nation's elementary and secondary nonpublic schools.

I have been a strong proponent of tuition tax credit legislation, having introduced such measures in the 95th, 96th, and 97th Congresses. The first bill I introduce (with Senator PACKWOOD) upon coming to the Senate proposed the creation of a tuition tax credit plan not unlike the measure the Finance Committee recommended to the full Senate for enactment last year. In 1978, Senator PACKWOOD and I chaired 3 full days of hearings on an elementary, secondary, and postsecondary tuition tax credit measure we had introduced. Tuition tax credit legislation passed the House of Representatives that year and our proposal nearly passed the Senate as well. Senator PACKWOOD and I reintroduced our bill in the 96th Congress but no action was taken on it during that session.

In the opening weeks of the 97th Congress, I introduced an "educational reform package," which was designed to assist both the public schools and the parents of those who choose to send their children to nonpublic schools. I proposed three bills. The first, S. 543, proposed substantial increases over the next decade in general school aid; my second proposal, S. 544, would have reimbursed State and local education agencies for the cost of complying with Federal education mandates, the most notable of these perhaps being the Education for All Handicapped Children Act. My third proposal, S. 550, which I introduced with my colleague Senator PACKWOOD, called for a tuition tax credit program at the elementary, secondary, and postsecondary levels. In June of 1981, Senator PACKWOOD and I chaired 2 days of hearings on S. 550, receiving testimony from a wide array of interested witnesses. And, of course, additional hearings were held by the Finance Committee on S. 2673, President Reagan's tuition tax credit proposal. I regret that the two other education measures I introduced did not receive the same amount of attention and support as the tuition tax credit plan.

This has not been a business for the short winded. In 1961, I wrote an article for the Reporter, entitled "How Catholics Feel About Federal School Aid." In it, I addressed the upcoming debate over the question of whether Federal aid ought to be provided to education. I emphasized that if such aid were to be forthcoming, the question of providing such aid to the Catholic schools (at the time they enrolled over 85 percent of the students attending nonpublic schools at the elementary and secondary levels) would need to be resolved if Federal aid to education was to become a reality. As it happened, I was to become further involved with this matter while a member of the administration of President Kennedy. President Kennedy had proposed, in 1961, the creation of a $2.3 billion program of grants to States for classroom construction and for increasing teachers' salaries. The President's advisers, however, opposed making such aid available to church-related schools. Having failed to include provisions for the participation of the church-related schools, the churches opposed the measure and this led in part to it not being approved by Congress. Similar efforts the following 2 years were unsuccessful as well. In 1964, after extensive negotiations, in which I was the mediating party, the issue of Federal aid to education including church-related schools was resolved as between the Johnson administration and the advocates of aid to all schools. It fell to me that summer to draft the Democratic Party platform embodying that agreement. It read:

> New methods of financial aid must be explored, including the channeling of federally collected revenues to all levels of education, and to the extent permitted by the Constitution, to all schools.

President Johnson signed the Elementary and Secondary Education Act of 1965 on April 11 of that year. Included among its many provisions was a promise that nonpublic schools would receive their fair share of Federal assistance provided to education. Title 1 of that act provides:

> That to the extent consistent with the number of educationally deprived children in the school district of the local educational agency who are enrolled in private elementary and secondary schools, such agency has made provision for including special educational services and arrangements (such as dual enrollment educational radio and television, and mobile educational services and equipment) in which such children can participate;

In the main this was intended to mean that title 1 services would be provided to needy school children, regardless of where they attended school. Instructional equipment and other aid authorized by the act was to be treated in a similar fashion. But the promise of 1965 has not been kept. In the 17 years since Congress passed and President Johnson signed that landmark measure into law, participation by the nonpublic sector has never equaled the commitment made. Successive Congresses and administrations have been either unable or unwilling to take whatever steps are needed to see that nonpublic schools receive their fair share. Given this history of failed promises, and given what I view as the desirability of encouraging the diversity and pluralism which the nonpublic sector brings to education in this Nation, I believe it entirely appropriate for Congress to enact a system of tuition tax credits designed to assist those parents who choose to send their children to nongovernmental schools.

Such assistance has been promised repeatedly in recent years by both the Democratic and Republican Parties and their Presidential candidates. In 1972, the Democratic Party Platform said:

> The next Democratic Administration should channel financial aid by a constitutional formula to children in nonpublic schools.

The late Hubert H. Humphrey, while campaigning for his party's nomination for the Presidency in 1972 expressed his support:

> I favor the creation of a system where parents would be able to receive a tax credit when their children attend approved private schools.

George S. McGovern in 1972 announced his:

> • • • Support of the tax credit approach to aid the parents and children attending parochial and other bona fide nonpublic schools.

More recently, in 1976, the Democratic Party Platform in a plank I drafted stated:

> The Party renews its commitment to the support of a constitutionally acceptable method of providing tax aid for the education of all pupils in nonsegregated schools in order to insure parental freedom in choosing the best education of their children.

Again, in 1980, both parties committed themselves to aiding the nonpublic schools. The Democratic Platform plank, which again I drafted, said:

> Private schools, particularly parochial schools, are also an important part of our diverse educational system. The Party accepts its commitment to the support of a constitutionally acceptable method of providing tax aid for the education of all pupils in schools which do not racially discriminate and excluding so-called segregation academies.

The Republican Platform said:

> • • • We reaffirm our support for a system of educational assistance based on tax credits that will in part compensate parents for their financial sacrifices in paying tuition at the elementary, secondary, and postsecondary level.

When President Reagan sent his proposal for tuition tax credits last year, I commended him for being the first American President to propose such legislation. This was indeed a momentous occasion. While other candidates had pledged so to do, President Reagan was the only one in a position to carry out his campaign promise. Thus, on July 16, with only a few months remaining in the 97th Congress (and with little assurance that a consensus could be reached) the Finance Committee began hearings on S. 2673, the administration's tuition tax credit plan, introduced by my colleague, Senator DOLE, the distinguished chairman of the committee.

With respect to the specific provisions of the bill, as I indicated on the first day of our hearings on this measure, there were two matters that had to be addressed before I would lend my support. First, no student attending a school which practices illegal discrimination would benefit from the availability of tuition tax credits. In my view, the administration bill as intro-

duced was inadequate on that point. The committee, by adopting additional safeguards greatly improved the bill and strengthened the chances of the bill's enactment. As amended in committee, the bill directed the Attorney General upon a finding of good cause to seek declaratory judgments against schools which discriminate. Such an action could be brought in response to a complaint of discrimination filed by individuals or upon evidence presented showing that a school was following a racially discriminatory policy. If the Attorney General brought such an action and prevailed, the parents of any student attending the school would be ineligible for tuition tax credits. In addition, the tuition tax credit program would not go into effect until it was firmly established that section 501(c)(3) of the Internal Revenue Code required a school to maintain a racially nondiscriminatory policy. This issue would be decided by either the Supreme Court in connection with cases currently before it or, failing that, action by Congress.

Second, I maintained that the tuition tax credit must be refundable so as to benefit low-income families who choose to send their children to nonpublic schools. I am pleased that members of the committee shared this view and intended to address this matter in the form of a committee amendment when the bill reached the floor of the Senate.

The committee took a number of other actions that, in my view, improved the bill. In recognition of the budget constraints we faced, the effective date of the credit was delayed to July 1983, and the amount of the credit was reduced from a maximum of $500 to $300. Furthermore, the amount of the credit was tied to family income. Families with incomes above $40,000 would have their credit reduced; those making $50,000 and above would receive no credit. By providing for a phaseout at higher incomes, the committee embraced a principle already well established in other Federal student financial aid programs.

On September 23, the committee voted to report out the bill as an amendment in the form of a substitute for H.R. 1635. At the time, I had hoped that our colleagues in the Senate would have the chance to review both the bill and the testimony compiled from hearings during the previous 5 years. I was confident that having done so, they would agree with the judgment of the committee. But, alas, our efforts were to no avail, and the 97th Congress came to adjournment without the full Senate having considered the tuition tax credit measure.

I reiterate this history to make the point that assistance to education, including aid to the nonpublic sector, is a well established idea. It has been endorsed repeatedly by many both in and outside of Government. Still, as I have remarked at the hearings Senator PACKWOOD and I have held on this subject over the past 6 years, many remain of the view that providing any assistance to nonpublic schools is a concept somehow foreign to the American experience. I believe that our hearings have had substantial educational value in this regard. They have, in my view, dispelled the myth that State aid to private schools is somehow a new concept or that the Founding Fathers believed that the first amendment barred any assistance to church-related schools. There is a history here and if our hearings have accomplished anything they have served to establish the important historical and contemporary role that nonpublic schools have played in our society.

The legislation we offer today is intended to insure that students in nonpublic schools receive a fair share of assistance from the Federal Government. The public schools do and must come first; the vast bulk of current Federal education expenditures goes to the public schools and their students. This is as it should be. But that does not mean we should forget the nonpublic schools and their students. Rather, we should strive to confer justice on nonpublic education, to treat private school students the same as public school students, and finally to fulfill the promise we made in 1964. I continue to regard tuition tax credits as a reasonable and desirable means of achieving these objectives, and urge my colleagues to give our proposal the consideration it merits.●

● Mr. ROTH. Mr. President, today I am joining the distinguished chairman of the Committee on Finance in cosponsoring legislation to provide tax credits for parents who send their children to nonpublic schools.

I have been a champion of the concept of tuition tax credits since 1976 when I introduced the first tuition tax credit legislation in the Congress.

My original proposal would have provided a credit for tuition paid to colleges and universities. The legislation I am introducing today is clearly a step in the right direction and in that sense carries out the intent of my original legislation.

I believe a tuition tax credit will restore freedom of choice to the millions of American families who are struggling to pay both nonpublic school tuition and higher taxes for public schools. The tax burden on the average family has increased substantially during the past 14 years and middle-income families have less disposable income to spend on a college or private elementary and secondary education for thier children. Indeed, middle-income Americans are being squeezed out of college.

There are millions of families today who are neither affluent enough to afford the high cost of college nor considered poor enough to qualify for the many different Government assistance programs their taxes make possible.

We are rapidly approaching a situation in this country where only the very affluent and the very poor will be able to attain a higher education. The group in the middle—the very taxed—will be unable to afford it. In my judgment, something is drastically wrong when today's diploma costs more than yesterday's house.

A tuition tax credit is the simplest and most equitable way to provide middle-income families relief from mounting educational costs. This credit will allow people to keep more of their own hard-earned money rather than have it taxed away by Uncle Sam. The tuition tax credit offers the beauty of no administrative overhead, no forms to fill out, and no need to beg, plead, or ask for a Government handout.

However, although I strongly endorse this legislation, I am disappointed that the bill does not provide for a college tuition tax credit. I realize the bill limits tuition tax relief to secondary schools due to budgetary considerations. Nevertheless, I am hopeful that college tuition expenses will ultimately be entitled to the credit.

It is in the area of college tuition expenses that we have seen the most dramatic escalation in costs in recent years.

The cost of sending one's children to college today has reached a point where it is unthinkable for many middle-income families. This is particularly true in the case of nonpublic universities. Although, quite frankly, many public colleges are also pricing themselves out of the middle-class market.

Therefore, I would hope that something can be done to provide relief from higher and higher college tuition costs. In my judgment, the tuition tax credit is the most efficient and direct approach to providing this much needed relief.

We must preserve the freedom of choice in educational opportunities for the vast majority of the American people. It is, I believe, an American birthright.

The credit approach is not the total solution to the problem of rising educational costs. But it will allow middle America to hold the line, at least in part, in the battle against inflation in our schools and universities. We owe our Nation's children nothing less.●

By Mr. SIMPSON:

S. 529. A bill to revise and reform the Immigration and Nationality Act, and for other purposes; to the Committee on the Judiciary.

IMMIGRATION REFORM AND CONTROL ACT OF 1983

Mr. SIMPSON. Mr. President, it was 11 months ago that I stood before this distinguished body and debated that our present immigration law and enforcement procedures no longer serve

UNITED STATES CATHOLIC CONFERENCE
Department of Education
Office for Educational Assistance

February 18, 1983

Dear Bill:

Thought you might be interested in our press release on the State of the Union address and the introduction of the tuition tax credit bill.

Ed

Ed Anthony

Enclosures

EA/pb

1312 Massachusetts Ave., NW
Washington, D.C. 20005
(202) 659-6864

UNITED STATES CATHOLIC CONFERENCE

NEWS

DATE: February 17, 1983

FROM: William Ryan

O - 202/659-6700
H - 202/686-1824

FOR IMMEDIATE RELEASE

BISHOPS' AIDE URGES ENACTMENT
OF TUITION TAX CREDIT BILL

WASHINGTON--The General Secretary of the United States Catholic Conference hailed introduction of President Reagan's tuition tax credit bill and urged its speedy enactment by the 98th Congress.

"Nonpublic schools make an enormous contribution to the country's well being by providing a quality education to millions of youngsters including, in many cases, the severely disadvantaged, while at the same time saving taxpayers millions of dollars annually," said Msgr. Daniel F. Hoye. "It is high time that the parents who support these schools, often at the cost of great personal sacrifice, got some assistance in return.

"I expect that the nonpublic school community, its supporters and all fair minded people will rally round this legislation and make the urgency of their concern felt by Congress," Msgr. Hoye stated. "We have waited a long while. It is now time for some action."

President Reagan submitted to the 98th Congress on Feb. 17 a tuition tax credit bill ("The Educational Opportunity and Equity Act of 1983") that is substantially the same as the one reported by the Senate Finance Committee last year.

NATIONAL CATHOLIC OFFICE FOR INFORMATION

1312 MASSACHUSETTS AVENUE, N.W. · WASHINGTON, D. C. 20005

He called upon Congress to give enactment of the bill "the highest priority."

The bill would provide tuition tax credits to parents whose children attend nonpublic elementary and secondary schools. Only parents who send their children to tax-exempt, nonprofit, educational institutions at the elementary and secondary level could claim the credit. In no case could people who send their children to schools that discriminate on the basis of race, color or national origin claim the credit.

Following is the text of the statement by Msgr. Hoye:

"I welcome the introduction of President Reagan's tuition tax credit bill in the 98th Congress and I urge its speedy enactment. Nonpublic schools make an enormous contribution to the country's well being by providing a quality education to millions of youngsters including, in many cases, the severely disadvantaged, while at the same time saving taxpayers millions of dollars annually. It is high time that the parents who support these schools, often at the cost of great personal sacrifice, got some assistance in return.

I expect that the nonpublic school community, its supporters and all fair minded people will rally around this legislation and make the urgency of their concern felt by Congress. We have waited a long while. It is now time for some action."

# # #

X,A,ED,SCD

UNITED STATES CATHOLIC CONFERENCE

NEWS

DATE: January 26, 1983

FROM: William Ryan

O - 202/659-6700
H - 202/686-1824

FOR IMMEDIATE RELEASE

USCC OFFICIAL PRAISES PRESIDENT FOR TUITION TAX CREDIT PLEDGE

WASHINGTON--The director of the Office for Educational Assistance, United States Catholic Conference, praised President Reagan's emphasis on the passage of tuition tax credits in his State of the Union address. Dr. Edward Anthony also urged parents and others concerned about nonpublic education to help the President convince Congress that the time for enactment of tax credits legislation has arrived.

This is no time for complacency, Dr. Anthony stated.

"We have long recognized the importance of having the President's personal commitment" to this issue, he said. "Based on his comments in the State of the Union address it is apparent that Mr. Reagan recognizes the need to help low and middle income families in making educational choices for their children."

The USCC official said the concept of tuition tax credits supported by the President will have longterm economic benefits for the country despite the difficult economic conditions of the present day.

/more

President Reagan, in his State of the Union message (January 25), listed passage of tuition tax credits for parents who want to send their children to private or religiously affiliated schools as one of the "four major education goals" of his administration in 1983.

Following is Dr. Anthony's statement:

"We have long recognized the importance of having the President's personal commitment to passage of tuition tax credits. Based on his comments in the State of the Union address, it is apparent that Mr. Reagan recognizes the need to help low and middle income families in making educational choices for their children.

"It is important to note in this time of difficult economic conditions that the concept of tuition tax credits supported by the President will have longterm economic benefits for the country. Nonpublic school parents save taxpayers over $10 billion annually. Because of economic conditions, many families may no longer be able to keep their children in nonpublic schools. When this happens, a loss of $300 in tax credits against federal revenues then becomes a loss of over $2,000 in local and state revenues--the cost of educating that child in the public schools. Tuition tax credits make good economic sense, especially in hard times, because they can save tax dollars down the road.

"Catholics and others in the nonpublic school community have always argued that tuition tax credits is a matter of social justice, providing for human dignity through educational choice. We can take satisfaction in noting the President shares this viewpoint, but this is no time for complacency. Much work remains to be done by the President, parents and others to convince Congress the time for tuition tax credits is at hand."

# # #

X,ED,A

File - TTC

CARDINAL'S OFFICE
1011 FIRST AVENUE
NEW YORK, N.Y. 10022

133982

March 21, 1983

Dear Mr. President:

I wish to express my gratitude and also the deep appreciation of the parents of the children attending non-public schools for your strong leadership in sending to the Congress the important legislation entitled "Educational Opportunity and Equity Act of 1983." This is an historic moment in the history of the United States and you will always be remembered for the effort that you are making in this matter. It is so important that parents and their children are able to exercise their freedom of choice in education and thereby to encourage the rich diversity in education in our country.

I share with you your deep concern for the quality of education for all of our nation's children and we are doing all that we can to support this legislation.

With prayerful good wishes, I am

Very sincerely yours,

+ James Cardinal Cooke

Archbishop of New York

The Honorable Ronald W. Reagan
The White House
Washington, D. C. 20500

Fla. TTC

CARDINAL'S OFFICE
1011 FIRST AVENUE
NEW YORK, N.Y. 10022

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Very sincerely yours,

Archbishop of New York

The Honorable Ronald W. Reagan
The White House
Washington, D. C. 20500

The Heritage Foundation Issue Bulletin

File - TTC

No. 94 | The Heritage Foundation • 513 C Street • N.E. • Washington, D.C. • 20002 • (202) 546-4400

June 27, 1983

TUITION TAX CREDITS: Rx FOR AMERICAN EDUCATION

INTRODUCTION

The American educational system is a shambles. This is the verdict of three independent panels of experts who recently released their findings. Test scores have plummeted over the past twenty years, and despite huge increases in spending on education and the creation of a new federal department, 13 percent of the nation's 17 year-olds are considered functionally illiterate. Excellence in education has been difficult to achieve in great part because of the public school system's virtual monopoly of elementary and secondary education. This gives teachers and administrators little incentive to maintain quality. In higher education, however, healthy competition has turned many public universities into institutions that challenge the very best private schools.

Private elementary and secondary education are accessible only to upper income groups and those families willing to make a tremendous financial sacrifice in the hope of buying a better education for their children. Since families with children in private schools also would have to pay state and local taxes to support public schools, many find the alternative of private schooling out of financial reach. To alleviate this unfair double burden, parents should receive some tax credit for the cost of educating their children. This tuition tax credit would enable average and low income Americans to choose the best schools for their children, whether public or private.[1] More important, perhaps, it would create the long-overdue pressure on the public schools that will force them to improve.

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1 For a detailed analysis, see E. G. West, The Economics of Education Tax Credits (Washington, D.C.: The Heritage Foundation, 1981).

monopoly position, they can combine higher wages with lower teaching standards than teachers and administrators in private schools who must compete with other schools for students. Competition in any profession tends to lower costs and improve quality. Education is no different. Introducing real competition between schools would benefit both private and public schools. It is because public universities always have had to compete with private schools for students that many state-run institutions rank with the best private colleges. Elementary and secondary schools would benefit from the same competition.

The alternative to tax credits is to spend more money on public education while doing nothing to foster competition. This has not worked in the past and cannot be expected to work now. The cost of educating a child in a public school nearly tripled between 1970 and 1980, while bellweather indicators such as SAT scores steadily declined. Verbal scores declined from 460 to 423 between the 1969-70 and 1979-80 school years, and math scores dropped from 488 to 467.

OBJECTIONS TO CREDITS

Mass Exodus: Opponents of tuition tax credits charge that credits would destroy public schools. They claim that the result would be a mass exodus of better students to private schools, leaving public educators to cope with slow learners and "problem" students. Yet, if overall quality of education improves because of the competition triggered by tax credits, academically sound public schools would have no problem keeping their students. Schools neglecting quality and standards, on the other hand, would have to improve radically or close. In any case, a disruptive mass migration from public to private schools seems highly unlikely. An NBC News/Associated Press survey of October 1981 found that only 30 percent of adults with school-age children would be more likely to enroll their children in private schools if tuition tax credits were available.

Unconstitutional: The First Amendment states "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...." Tuition tax credits do exactly that, complain the critics, since the majority of private schools are church-affiliated. Yet, tuition tax credits would not aid any institution, religious or otherwise, since the credit would benefit the individuals who would be free to choose any private institution. After all, the charitable income tax deduction is not unconstitutional simply because donations are made to religious organizations. The credits do not favor any religion over another, and in no way serve to establish a state religion.

Discrimination: Critics charge that some private schools discriminate against minorities and could become indirect recipients of federal money through tuition tax credits. All evidence refutes this. The recent Supreme Court ruling on the Bob Jones

combined with the fact that they must still pay state and local school taxes for the public system. Tuition tax credits are an effective way of giving these citizens a real choice. While most parents undoubtedly would continue to choose to send their children to public schools, some would opt to place their children in private schools if costs were less prohibitive.

Parents who are able to send their children to private schools after using the credits will directly benefit from them. Tuition tax credits would give middle and low income Americans and their children an opportunity denied them for much too long. The indirect benefits are even greater. The competition between public and private schools would mostly help to reintroduce quality and effective standards back into the public system.

Robert J. Valero
Senior Research Assistant

July 13, 1983

Dear Senator Durenberger:

On behalf of the President, I would like to acknowledge and thank you for your letter regarding the Supreme Court's June 29 decision and the President's tuition tax credit plan.

We appreciated hearing from you and receiving your thoughts on extending the tax credits for both public and private school tuition. Rest assured that we will be taking a close look at your proposal in coordination with the President's policy advisers.

With best wishes,

Sincerely,

Kenneth M. Duberstein
Assistant to the President

The Honorable Dave Durenberger
United States Senate
Washington, D.C. 20510

KMD:CMP:dps

cc: w/copy of inc, Ed Harper - for DRAFT responce to follow-up
cc: w/copy of inc, Bill Barr - FYI
cc: w/copy of inc, Bob Kabel - FYI

THE WHITE HOUSE
WASHINGTON

Date 4/1

To: Steve Galebach

From: Morton C. Blackwell

_____ Please respond on behalf of the President

_____ Please prepare draft for Elizabeth Dole's signature

_____ Please prepare draft for my signature

X FYI

_____

United States Senate
COMMITTEE ON FINANCE
WASHINGTON, D.C. 20510

June 29, 1983

151881

The President
The White House
Washington, D.C. 20500

Dear Mr. President:

The Supreme Court's decision in Mueller et al. v. Allen (No. 82-195, June 29, 1983) is a positive forecast for the future of tuition tax credits in the United States. Your leadership on this issue and your efforts to make quality education a priority in your Administration are to be commended.

Although the Court, in all probability, has answered the question whether tuition tax credits are permissible, there are several very important distinctions between the Minnesota law, which the Court upheld, and the pending tuition tax credit legislation. The most significant distinction, in my opinion, is the availability of the deduction for all Minnesota parents with children in elementary and secondary schools. The Court relied heavily upon the neutrality of the Minnesota statute to distinguish Nyquist, 413 U.S. 756, and uphold its constitutionality.

> Other characteristics of §290.09(22) argue equally strongly for the provision's constitutionality. Most importantly, the deduction is available for educational expenses incurred by all parents, including those whose children attend public schools and those whose children attend non-sectarian private schools or sectarian private schools.
> (Page 8)

Judging from the reliance the Court placed upon this provision of the Minnesota law, it is my belief that your legislation must provide tax credits for both public and private school tuition to be constitutional.

If a tuition tax credit program is to succeed it cannot be restricted to families with children enrolled in non-governmental organizations. The program must be structured as governmental tax policy aid to all children--not just those who patronize a certain class of institution.

Tuition tax credits are not a trade-off between public and private education. Effective consumer choice can only exist in an environment where both systems are strong. Consumers must have access to alternatives, not only between government and non-government systems, but more importantly, among differing systems within each sector. Tuition tax credits are not an excuse to weaken traditional governmental support for the "public school" system. On the contrary, a commitment to consumer choice means a recommitment to the principles underlying that support.

Our goal must be to expand consumer choice and return financing alternatives to the real decisionmakers -- the parents. We cannot afford, from either a policy perspective or a constitutional perspective, to discriminate among consumers.

For these reasons, I will offer an amendment on the Senate Floor to extend the tax credit to families with children in school--public or private. Although this amendment was not adopted when I offered it at the Senate Finance Committee Mark-Up, I believe the Court's decision now mandates adoption of this amendment.

I also intend to work to see this legislation expanded to include, not only tuition, but also fees, books, and transportation. This change would enhance the pending legislation by bringing it closer to the Minnesota law.

If we are to have a serious and informative debate on this issue in the Senate, I believe it is imperative that my amendments be adopted. I hope that you will be supportive when that time arises.

Thank you very much.

Respectfully,

Dave Durenberger
United States Senator

political cover — backing off from earlier attempts to cut off money to the anti-Sandinista rebels in Honduras and approving most of the money the President has requested for El Salvador. The threat has also stopped the Democratic candidates from putting any convincing muscle into their policy prescriptions.

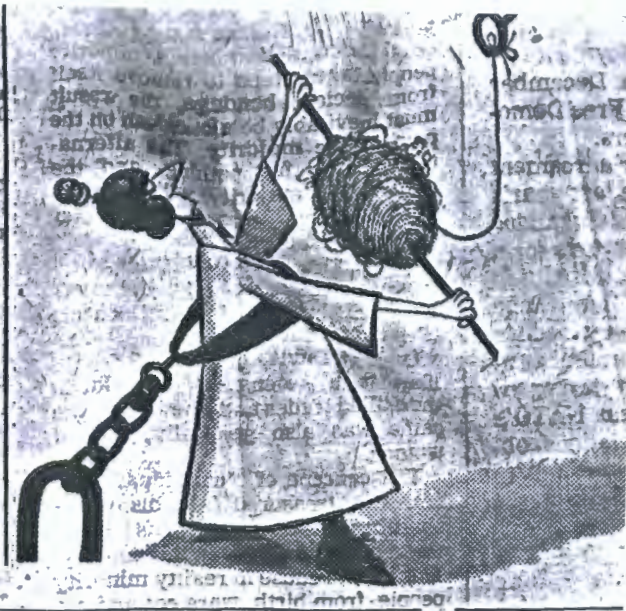
Walter Mondale has suggested "more aid to El Salvador, but conditioned on social reform and efforts at serious negotiation." But Mr. Mondale has not said what steps should be taken if the Salvadoran Government continues to resist pressure for reform and negotiations. Senator John Glenn has proposed an amendment to the foreign aid bill that would require the Salvadoran Government to bring right-wing death squads under con-

Carla Anne Robbins is staff editor at Business Week and author of "The Cuban Threat."

racy, but it would not necessarily become a Soviet pawn. Even now, when the United States and Nicaragua are on the brink of war, the Soviet Union has given only limited military aid and is still not willing to bail out Nicaragua's deeply troubled economy. There is still room for coexistence and limited United States influence.

This is not to suggest that the Democrats should promote left-wing victories in El Salvador or anywhere else. But without serious consideration of how we can coexist with such governments, the United States is going to find itself repeatedly embroiled in Vietnam-like conflicts.

And until the Democratic Party makes it clear that it is willing to accept such coalition governments, rather than a military commitment, the Administration and the Salvadoran Government cannot be expected to listen to Democrats' demands that we begin negotiations in good faith.



Court Has High Aim, Bad Plan On Bias

By Robert M. Cover

NEW HAVEN — The Supreme Court has again provided us with some spine-tingling rhetorical flourishes designed to convey a national commitment to racial equality in general and to integrated schools in particular. Unfortunately, as in the past, the Court has coupled its statements with actions that undermine the achievement of equal opportunity in education.

The Court has twice focused on the impact of tax benefits on the nation's private schools. In one case, Bob Jones University v. United States, the Justices upheld a decision by the Internal Revenue Service to deny tax-exempt treatment to schools that discriminate on the basis of race, even when such discriminatory treatment arises from religious beliefs honestly held by adherents to the faith of the sectarian private school.

In the second case, Mueller v. Allen, the Court upheld a Minnesota statute that provides a state income tax deduction for tuition and other school expenses. This case may have a much more significant, though indirect, impact on the racial composition of the nation's schools.

The Bob Jones decision was full of the language of equality. The Court stated strongly that "racial discrimination in education is contrary to public policy" and that "racially discriminatory educational institutions cannot be viewed as conferring a public benefit within the 'charitable' concept" of the tax code. And while the practical implications of the Bob Jones decision are not great (honest and sincere religious commitment to racial discrimination is not all that common), the extension of a public subsidy to such practices through the tax code would have been a dangerous signal conferring respectability and moral legitimacy on positions quite properly considered abhorrent — to be tolerated in a spirit of liberty but emphatically not to be encouraged. The Court's decision and opinion were therefore welcome.

Unfortunately, no parallel sensitivity was at work in shaping the opinion in what may turn out to be a far more important decision for the actual practice of integrated education. In Mueller v. Allen, the Court upheld Minnesota's tuition tax deduction against the objection that it afforded unconstitutional public support to sectarian, religious education. Since 95 percent of Minnesota's private school population attends religious schools, such an attack was to be expected. However, as both participants and observers understood, the Court's opinion was also an important signal in the context of the Reagan Administration's proposals for tuition tax credits for parents of children attending private schools. A national program of private school tuition tax credits is high on the reactionary agenda not only because it is a boon to parochial education but also because it amounts to a public subsidy for the "white flight" that sabotages effective racial integration in so many communities.

White flight takes two forms: flight to the suburban public school system and flight to private (secular or parochial) schools. The Burger Court almost a decade ago encouraged the first type of white flight by protecting many suburban school systems from effective integration remedies. But in places where suburban schools are not adequate for one reason or another, private education has become a real, though expensive, alternative. The Mueller decision, by opening the way to further subsidies for private education, is likely to make this alternative increasingly attractive.

This in turn will damage the process of integration in many communities even if such subsidies are made available (as is true in Minnesota and in the Administration proposal pending before the Senate) only to schools which raise no formal bar to the admission of minority students. The use of the tax system as the instrument of subsidy insures that there will be a strong class bias, with the wealthy benefiting most if the subsidy is in the form of a deduction and with everyone except the least well-off benefiting from a modest tax credit scheme of the type proposed by the Administration.

It is a pious fraud to say that there is a commitment in America to combat discrimination in education while the courts open the way to such dramatic subsidization of white flight. The Reagan tuition tax credits, now viable after the Court's Mueller decision, would give a tax subsidy to practices that are likely to be as destructive to school integration as Bob Jones University and its like could ever have become. The Court that protects the sanctuaries of white flight and the administration that panders to it are more responsible for the patterns of segregation and inequality in education than are the misguided fundamentalists of Bob Jones.

Robert M. Cover is Chancellor Kent Professor of Law and Legal History at the Yale Law School.

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The *Ranger* will be escorted to San Juan, Puerto Rico by the Coast Guard Buoy Tender USCGC *Sagebrush* and will arrive at approximately noon on Tuesday, July 19.

U.S.S. *Kidd* is commanded by Navy Commander William J. Flanagan, Jr., and is homeported in Norfolk, Va. U.S.S. *Kidd* was flying the U.S. Coast Guard Ensign during the course of this operation.●

TUITION TAX CREDITS

● Mr. BOREN. Mr. President, I wish to focus the Senate's attention today on the issue of tuition tax credits for parents who send their children to private schools. I believe such credits would be bad policy for several reasons.

First, tuition tax credits will lead to the destruction of fundamental principles of equality in which Americans have always believed. The Equal Opportunity Act of 1983 is ironically named: Instead of contributing to an educational system that will serve as an "open door" through which all children regardless of race, creed, or economic background can pass, the educational system will become "two-tiered." If this legislation is adopted, the most promising and brightest students will be skimmed from our public schools and placed in private schools. Such skimming will defeat one of the primary purposes of the public school system—the goal of providing all children an equal chance to enter the mainstream of American life and to achieve success.

I am also opposed to tuition tax credits because of their excessive cost. At a time of record budget deficits and diminished Federal support for public education, it would be irresponsible to enact tuition tax credits and drain additional billions of dollars from the Federal Treasury.

Recently, I received a letter from former Senator Sam Ervin, Jr., of North Carolina, in which he outlined his reasons for being opposed to tuition tax credits. While in the Senate, Sam Ervin was a strong supporter of public education.

In an open letter to the President last year, Senator Ervin discussed in some detail why he believes tuition tax credits are a bad idea. In the same letter, he makes a forceful argument challenging their constitutionality. He also discussed this latter point in remarks delivered to the National Press Club on March 16, 1983.

I believe the issues raised in these papers by Senator Ervin are important ones for the Senate to consider. I therefore ask that the letter and the remarks of Senator Ervin be printed in the RECORD.

The material follows:

SAM J. ERVIN, JR.,
Morganton, N.C., April 20, 1982.

AN OPEN LETTER TO PRESIDENT RONALD REAGAN FROM FORMER SENATOR SAM ERVIN

Re the tuition tax credit.

The PRESIDENT,
The White House
Washington, D.C.

DEAR MR. PRESIDENT: When they send their children to parochial and private schools which teach religion, parents are primarily motivated by their understandable desire to have them instructed in the religious faith of their churches.

No matter how worthy your motive for urging it may be, the proposal that Congress grant these parents credit on their federal income taxes for the tuition they pay to these schools is indefensible for three reasons. It is unwise; it is unjust; it is unconstitutional.

WHY THE PROPOSAL IS UNWISE

The proposal is unwise because it is repugnant to good government, sound economics, and true religion.

Government owes the people specific obligations, which require substantial taxes to finance them. The teaching or the financing of the teaching of religion is not one of them. But public education is.

Apart from its constitutional infirmities, the tax credit proposal is repugnant to good government.

The government's financial resources are limited. It has none beyond what it can exact from taxpayers without improverishing them or crippling the economy.

Government should never dissipate its limited financial resources to finance non-government obligations. When it does, it offends both good government and sound economics because it impairs its capacity to perform its own obligations in an acceptable way.

If it should approve the tax credit proposal, Congress would diminish the nation's ability to finance the public schools, and public education would suffer accordingly.

This observation is always true. Its importance is much magnified, nowadays, however, because the nation is staggering under a national debt in excess of a trillion dollars, and is anticipating a deficit in the coming fiscal year exceeding one hundred billion dollars. It is no time for government to increase the deficit by financing a non-governmental and constitutionally forbidden undertaking.

Furthermore, the tax credit proposal is repugnant to true religion. Under God's plan, religion is dependent for its support on the persuasive power of the truth it proclaims, and not on the coercive power of governmental taxation.

The Man of Galilee affirmed this to be so when he said, "Ye shall know the truth, and the truth shall make you free" (John, c. viii, v. 32), and "render, therefore unto Caesar the things which are Caesar's, and unto God the things that are God's" (Matthew c. xxii, vs. 15-22).

Government is contemptuous of true religion when it confiscates the taxes of Caesar to finance the things of God.

If it is to be faithful to itself, religion must look to the voluntary contributions of its adherents and not to the involuntary taxes of Caesar for its support. Churches merit no praise for undertakins if its own members are unable or unwilling to finance them.

WHY THE PROPOSAL IS UNJUST

It is unjust for government to compel one taxpayer to pay taxes and to exempt another, either in whole or in part, from paying like taxes. Yet that is exactly what the tax credit proposal, if approved by Congress, would do.

Moreover, it would do this with a vengeance. While every man receiving as income the bare pittance which subjects him to federal income taxes would be compelled by it to pay his income taxes in full, the proposal would grant special exemptions from taxation, in whole or in part, to parents for tuition paid by them to schools teaching religion, even though their incomes total $75,000.00 a year.

Taxation to support the established church in Virginia was abolished by Thomas Jefferson's Statute of Virginia for Religious Freedom.

This Statute declares that it is both sinful and tyrannical for government to compel men to make contributions of tax moneys for the propagation of religious opinions they disbelieve.

It is just as sinful and tyrannical for government to do this in 1982 as it was in Thomas Jefferson's day.

Yet that is exactly what the tax credit proposal, if adopted by Congress, would do. Protestants and Jews and all other Americans who do not send their children to parochial and private schools for religious instruction would be compelled to pay taxes to propagate the religious doctrines these schools teach, even if they disbelieve them.

This is so because these Protestants, Jews, and other Americans would be compelled by law to supply the deficiency in treasury receipts the tax credit would occasion.

WHY THE PROPOSAL IS UNCONSTITUTIONAL

In times past government imprisoned the minds and spirits of men and women in intellectual and spiritual jails. It did so by denying them freedom of religion, and by compelling them to pay taxes to support churches established by it, even if they disbelieved the doctrines the churches proclaimed.

The Founding Fathers knew the history of these governmental tyrannies, and were determined that they would not be repeated in our land. They staked the very existence of America as a free Republic on their abiding conviction that the state must keep its hands off religion, and religion must keep its hands off the state in general and the public purse in particular.

To this end, they added the First Amendment to the Constitution, and thus forbade government to make any law "respecting an establishment of religion, or prohibiting the free exercise thereof."

The tax credit proposal is repugnant to both prohibitions of the First Amendment.

If it were adopted by Congress, the tuition tax credit would be a law "respecting an establishment of religion" because it would indirectly supply to parochial and private schools tax credits to aid them to teach religion.

If it were approved by Congress, the tuition tax credit would also be a law "prohibiting the free exercise of religion" because it would tax Americans who do not send their children to parochial and private schools for religious instruction to supply the deficiency in treasury receipts arising out of the tax credits to those who do.

SUMMARY

Tuition tax credits would be governmental rewards to taxpayers who send their children to parochial and private schools to be taught the religious faith of their churches. The rewards would be funded by imposing on taxpayers who send their children to public schools the burden of supplying the deficiency in treasury receipts the tax credits would cause, and by impairing the financial capacity of public schools to perform

their essential public mission. Moreover, the tuition tax credits would confiscate taxes of Caesar to finance things of God.

As a Senator, I always endeavored to make the First Amendment a reality for all Americans. If it should make the tuition tax credit proposal a reality, Congress would mortally wound the First Amendment.

I pray Congress will not murder the First Amendment.

Sincerely yours,

SAM J. ERVIN, Jr.,
Former U.S. Senator.

THE CONSTITUTION AND RELIGION

(Remarks prepared by former Senator Sam J. Ervin, Jr., of Morganton, N.C., for delivery to a conference commemorating the birthday of President James Madison at the National Press Club in Washington, D.C., at 1:30 p.m., March 16, 1983)

I entitle my remarks "The Constitution and Religion."

Religion is man's belief in and reverence for a superhuman power recognized as the creator and governor of the universe. Believers call this power God.

I am a Presbyterian, whose Scotch-Irish, English, and French Huguenot ancestors came to America before the Revolution. All of them were Protestants. Most of them dissented from the established churches in the lands of their origin.

Religious faith, which is tolerant of other beliefs, is, in my opinion, the most wholesome and uplifting power on earth. Religious faith is not a storm cellar to which men and women can flee to escape the storms of life. It is, instead, an inner spiritual strength that enables them to face those storms with courage and serenity.

The Constitution makes two references to religion. One appears in Article 6, section 3 of the original Constitution, and the other is found in the first words of the First Amendment and the Bill of Rights.

Article 6, section 3 provides that all legislative, executive, and judicial officers "of the United States and the several States shall be bound by oath or affirmation to support this Constitution, but no religious test shall ever be required as a qualification to any office or public trust under the United States."

The First Amendment provides in pertinent part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

If we are to understand the meanings of these provisions, we must understand the historic events which prompted the Founding Fathers to embody them in the Constitution.

RELIGIOUS INTOLERANCE

The ugliest chapters in history are those which reveal the religious intolerance of the civil and ecclesiastical rulers of the Old World and the religious persecutions it inspired. I quote two comments indicating their nature and history.

Blaise Pascal, the French mathematician and philosopher, was moved by them to proclaim this tragic truth more than 300 years ago: "Men never do evil so completely and cheerfully as when they do it from religious conviction."

Chief Justice Walter P. Stacy, of the North Carolina Supreme Court, epitomized them in these words in *State* v. *Beal*, 199 N. C. 278, 302 (1930):

"It would be almost unbelievable, if history did not record the tragic fact, that men have gone to war and cut each other's throats because they could not agree as to what was to become of them after their throats were cut. Many sins have been committed in the name of religion. Alas! the spirit of proscription is never kind. It is the unhappy quality of religious disputes that they are always bitter. For some reason, too deep to fathom, men contend more furiously over the road to heaven, which they cannot see, than over their visible walks on earth."

Religious intolerance was fostered in Great Britain and virtually all the nations of Europe by unholy alliances between governments and particular churches recognized and established by law as the sole custodians of religious truth.

The objective of the unholy alliance in each nation was to persuade or coerce the people to accept and practice the political and religious orthodoxy sanctioned by the state and the established church. As Pragmatists, state and church sought to accomplish this objective by imprisoning the minds and spirits of the people within intellectual and spiritual jails.

The British Parliament made the Church of England the established church in Great Britain. It created the crime of seditious libel to punish those who spoke ill of the government or its officers, and the crime of blasphemous libel to punish those who spoke ill of the established church. Besides, the British Parliament enacted laws compelling the people to pay tithes or taxes for the support of the established church, and to attend its worship services; denying those who dissented from its doctrines the capacity to hold civil office in government; and forbidding ministers of dissenting congregations to administer the sacraments to their members.

As a consequence of these attempts to regulate relations between men and religion, dissenters from the established church were compelled to make contributions of money for the propagation of religious opinions they disbelieved; required to listen to the exposition of religious doctrines they rejected; and denied the right to hold civil offices in government. Besides, they sometimes had their marriages annulled and their children adjudged illegitimate for daring to speak their marital vows before ministers of their own faiths than clergymen of the established church.

ESTABLISHED CHURCHES IN THE COLONIES

While they were joined by many Germans and French Huguenots and smaller numbers of Dutch, Swedes, and Swiss, natives of the British Isles constituted by far the greater part of those who migrated from the Old World to the thirteen British colonies in America.

A substantial proportion of the colonists were dissenters from the churches established by law in the lands of their origins.

Like the colonists who conformed to the established churches, these dissenters came to America to better their economic lots. But they were also motivated by the hope that they would find in the New World the political and religious freedom denied them by the civil and ecclesiastical rulers of the Old.

When they reached America, however, they discovered to their disappointment that in many of the colonies predominant groups had set up established churches here, and that they were compelled, in such colonies, to pay taxes for the support of established churches whose doctrines they disbelieved. Moreover, most of the colonies had established religious qualifications in their oaths for public office holders. As a rule, these tests were designed to exclude dissenters, Catholics, Jews, Deists, or unbelievers.

There is more than a modicum of historical truth in this statement of Artemas Ward, a humorist of a by-gone generation: "The Puritans nobly fled from a land of despotism to a land of freedom, where they could not only enjoy their own religion, but could prevent everybody else from enjoying his."

The colonies of Virginia, North Carolina, South Carolina, Georgia, and Maryland had established churches, and the Anglican Church was the favorite under their laws.

In the colonies of Massachusetts, Connecticut, and New Hampshire, the Congregational Church was the established church.

In the colony of New York, the Dutch Reformed and Anglican Churches were, in turn, established by law.

The people in these nine colonies were compelled by law to pay taxes for the support of these established churches, and in some cases to attend their services.

The dissenters were outraged by these requirements. They believed it tyrannical for government to attempt to regulate by law the relationship between an individual and his God. Moreover, as they pondered verses 15 to 22 of the 22nd chapter of Matthew and its moral, "Render, therefore, unto Caesar the things that are Caesar's, and unto God the things that are God's," they concluded that in addition to being tyrannical, the attempt to regulate religion by law was also sinful.

SEPARATION OF CHURCH AND STATE IN THE STATES

As a consequence, they demanded the separation of church and state in America.

During the Revolution and the years immediately following it, the dissenters found staunch allies in their fight for separation of church and state among non-church members and those adherents of established churches who believed that it was abhorrent to reason as well as freedom for earthy government to regulate the relationship between human beings and religion.

The separation of church and state presented no problems in Rhode Island, where Baptists led by Roger Williams had settled under a royal charter granting complete religious freedom to all, or in Delaware, New Jersey, and Pennsylvania, where establishment never acquired a foothold.

When their revolt against Great Britain converted the thirteen colonies into self-governing states, Rhode Island retained separation under its original charter, and Delaware, New Jersey, and Pennsylvania did so under Constitutions adopted in 1776. North Carolina, New York, Georgia, and Virginia granted the right of freedom of worship to all and disestablished religion within their borders before the drafting of the First Amendment, and South Carolina did likewise before the Amendment was ratified.

Hence, the only states maintaining any financial and legal relationship to religion at the time the First Amendment became a part of the Constitution were Connecticut, Maryland, Massachusetts, and New Hampshire. These four states were able to do this after the adoption of the First Amendment because the Amendment applied originally to the federal government and not to the States.

But in those four states there was no single established church at that time. As a concession to those demanding complete separation of church and state, they had substituted for single established churches multiple establishments and were providing for an impartial use of taxes for the support of all churches they deemed respectable.

The last of these four states to terminate such relationship to religion was Massachusetts, which did so in 1833.

THE STATUTE OF VIRGINIA FOR RELIGIOUS LIBERTY

It is not surprising that James Madison loathed religious intolerance and loved religious liberty. As a student at what is now Princeton University, he sat at the feet of the great educator and patriot, John Witherspoon, the Scottish divine, who taught that a mere condescending tolerance of other religious views is not enough; that every man is entitled to worship God as he chooses or not at all; and that every church should be supported by the contributions of its own members and not by taxation.

On entering politics in his native Virginia, Madison adopted as his wise and trusted counselor Thomas Jefferson, the great apostle of liberty, who had sworn on the altar of God eternal hostility to all forms of tyranny over the mind of man.

Jefferson, the theorist, and Madison, the pragmatist, were an ideal combination. They led the fight for the disestablishment of religion in Virginia. Madison subsequently authored the religious clauses of the First Amendment. For these reasons, the fight for religious freedom in Virginia illuminates the meaning of these clauses, and merits detailing.

In 1776, Virginia, as an independent Commonwealth, adopted a new Constitution. James Madison was a member of the constitutional convention which drafted it, and he succeeded in writing into it the proposition that all men are equally entitled to the free exercise of religion according to the dictates of conscience.

Shortly after the adoption of the new constitution, the Virginia Legislature met, and a conflict ensued between the members who demanded total separation of church and state in Virginia, and those who favored supplanting the single established Anglican Church by an establishment of all the churches deemed to be respectable.

As a member of this legislature, James Madison was able to persuade his colleagues to provide that no dissenters should be compelled to pay taxes to the Anglican Church, which had been established in Virginia in 1629. He also secured the enactment of a law which suspended for the time being the requirement that members of the Anglican Church should pay taxes for its support.

But the Legislature of 1776 expressly reserved for the future the crucial decision of whether general taxes should be levied for the support of all the denominations which the controlling element in the Virginia Legislature deemed to be respectable.

The conflict was renewed in the Virginia Legislature of 1779, when James Henry introduced a bill for a multiple establishment, and James Madison introduced a bill which was drafted by Thomas Jefferson, and which is known to history as the Virginia Statute for Religious Liberty.

James Henry's bill undertook to establish by law virtually all of the Christian churches of Virginia as the established churches of Virginia, and to levy taxes for the support of all of them on an impartial basis. It is significant that in this bill reference to an establishment appears at a number of points, in contexts which clearly show that James Henry and the others of his day understood the term "an establishment of religion" to mean an official connection between the state and one or more churches whereby the state recognized such church or churches and provided for taxation for its or their support.

The bill for religious freedom which was drafted by Thomas Jefferson and introduced by James Madison, is one of the great documents which preceded the writing of the Constitution. It was designed to effect complete separation of church and state in Virginia.

To this end, the bill laid down these propositions in its preamble: First, "Almighty God hath created the mind free"; second, "to compel a man to furnish contributions of money for the propagation of opinions he disbelieves is sinful and tyrannical"; third, "the proscribing any citizen as unworthy the public confidence by laying upon him an incapacity of being called to offices of trust and emolument, unless he profess or renounce this or that religious opinion is depriving him injuriously of those privileges and advantages in which in common with his fellow citizens he has a natural right"; fourth, such action "tends only to corrupt the principles of that religion it is meant to encourage by bribing with a monopoly of worldly honors and emoluments those who will externally profess and conform to it"; fifth, "to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency is a dangerous fallacy, which at once destroys all religious liberty, because he being of course judge of that tendency will make his opinions the rule of judgment, and approve or condemn the sentiments of others only as they will square with or differ from his 'own"; sixth, "it is time enough for the rightful purpose of civil governments for its officers to interfere when principles break into overt acts against peace and good order"; and, seventh, "truth is great • • • and has nothing to fear from the conflict" with error, and "will prevail" over error, and error will cease "to be dangerous" unless by human interposition "truth is disarmed by her natural weapons, free argument and debate."

On the basis of these propositions, the bill proposed that the Virginia Legislature make these enactments: First, "that no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever"; second, that no man "shall be enforced, restrained, molested, or burthened in his body or goods" or "otherwise suffer on account of his religious opinions or beliefs"; third, "that all men shall be free to profess, and by argument to maintain, their opinion in all matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities"; and, fourth, that "the rights hereby asserted are of the natural rights of mankind, and • • • if any act shall be hereafter passed to repeal the present or to narrow its application, such act shall be an infringement of natural right."

The opposing forces in the Virginia Legislature of 1779 were so nearly equal in power that it was impossible to secure the enactment of either the James Henry bill for a multiple establishment of religion or the Jefferson bill for complete religious freedom.

The contest was renewed in the Virginia Legislature of 1784, when James Madison again presented Jefferson's bill for religious freedom and Patrick Henry sponsored a new bill for a multiple establishment.

Patrick Henry's bill, which was entitled "A Bill Establishing A Provision For Teachers Of The Christian Religion", undertook to recognize the legal interest of Virginia in virtually all the Christian churches functioning within its borders, and to impose taxes on all Virginians for their support.

When the Legislature was apparently on the verge of passing Patrick Henry's bill, Madison persuaded it to postpone a final vote until its next session, which was scheduled for November 1785.

Between that time and the next meeting of the Legislature, Madison composed a most convincing and eloquent appeal for religious freedom, which he called "The Memorial and Remonstrance Against Religious Assessment." In it Madison said:

"It is proper to take alarm at the first experiment on our liberties . . . The same authority which can establish Christianity, in exclusion of all otehr religions, may establish with the same ease any particular sect of Christians, in exclusion of all other sects . . . The same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever."

This document is crucial in determining what the Founding Fathers meant when they yield to the insistence of James Madison and wrote into the First Amendment the provision that Congress shall make no law respecting an establishment of religion.

In this document, which was a protest against the bill sponsored by Patrick Henry to levy taxes for the support of virtually all Christian churches in Virginia, Madison used the word "establishment" at least five times in contexts which showed that in his mind "an establishment of religion" meant an official relationship between the state and one church or many churches or all churches, and the imposition of taxation for the support of one church or many churches or all churches.

Madison caused "The Memorial and Remonstrance Against Religious Assessments" to be widely distributed throughout Virginia. By so doing, he insured his victory. When the members of the Legislature which was scheduled to convene in November 1785 were elected, those who supported Jefferson and Madison in their fight for religious freedom were in an overwhelming majority. Upon convening, they enacted into law Jefferson's bill for religious freedom.

THE FIRST AMENDMENT

After the Constitution of the United States was drafted and submitted to the States for ratification or rejection, many Americans were dissatisfied with it because it did not contain any bill of rights, or any provision relating to religious freedom other than Article 6 prescribing that no religious test should be required as a qualification for any office or public trust in the United States.

When New York, New Hampshire, and Virginia ratified the Constitution, they adopted resolutions which insisted that the Constitution should be amended by incorporating in it guaranties of religious freedom and freedom from taxation for the support of religion.

North Carolina and Rhode Island both postponed ratifying the Constitution, and their conventions resolved they would not ratify it unless it was amended to provide for the disestablishment of religion.

As a result of the actions of these five states and the demands of multitudes of Americans in the other original states, the Constitution was amended in these respects by the First Amendment which, as part of the Bill of Rights, was adopted by the requisite number of states by December 15, 1791.

The Constitution was so amended as a result of the efforts of James Madison, who was elected a Representative from Virginia to the First Congress which met after its ratification.

As soon as this Congress convened, Madision began his great fight to have the First Amendment added to the Constitution. Some of his colleagues did not want the Amendment to deny to government the power to support religion, and others insist-

ed that the religious clauses of the amendment should merely prohibit a single established church.

But Madison contended at all times that the First Amendment should embody in it provisions that Congress should pass no law respecting an establishment of religion or prohibiting its free exercise.

He triumphed after much effort.

As has been observed, the First Amendment was originally an inhibition on the federal government and not on the states.

In July, 1868, the Fourteenth Amendment was added to the Constitution. Section 1 of this Amendment provides that no state shall deprive any person of liberty without due process of law.

The Supreme Court clearly adjudged for the first time in *Cantwell* v. *Connecticut*, 310 U.S. 296, which was decided in 1940, that the fundamental concept of liberty embodied in the Fourteenth Amendment embraced the liberties guaranteed by the First Amendment relating to religion, and that in consequence the First and Fourteenth Amendments in combination forbid the states as well as the federal government to make any law or take any action respecting the establishment of religion or prohibiting its free exercise, and thus secure to all people in the United States religious freedom. This ruling has been subsequently reaffirmed by the Supreme Court in many cases.

The First and Fourteenth Amendments do this by erecting a wall of separation between government and religion at all levels and in all areas of the United States. By prohibiting any official relationship between government and religion, they forbid government to undertake to control or support religion, and deny any religious group or groups the power to control public policy or the public purse.

The constitutional separation of government and religion is best for government and best for religion. It enables each of them to seek to achieve its rightful aims without interference from the other. Besides, it is wise. History reveals that political freedom cannot exist in any nation where religion controls government, and that religious freedom cannot survive in any nation where government controls religion.

Moreover, constitutional separation of government and religion is indispensable to the domestic tranquility of the United States "whose people came from the four corners of the earth and brought with them a diversity of religious opinion." As the Supreme Court revealed in *Abington School District* v. *Schempp* and *Murray* v. *Curlitt*, 374 U.S. 203, 214 (1963): "Today authorities list 83 separate religious bodies, each with a membership exceeding 50,000, existing among our people, as well as innumerable smaller groups." These organizations compete for the religious allegiance of the people.

By securing the absolute equality before the law of all religious sects and requiring government to be neutral in respect to them, the constitutional separation of government and religion makes the love of religious freedom and the other things which unite our people stronger than their diversities, and enables Americans of varying religious faiths to live with each other in peace.

As made applicable to the states by the Fourteenth Amendment, the religious clauses of the First Amendment accomplish their wholesome objectives in their entirety in these ways:

1. They prohibit the federal government and the states from establishing any religious test as a qualification for any public office at any level of government.

2. "The establishment of religion clause of the First Amendment means at least this: Neither a state nor the federal government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the federal government can, openly or secretly, participate in the affairs of any religious organizations or groups or vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect a wall of separation between church and state." (*Everson* v. *Board of Education*, 330 U.S. 1, 15–16 (1947))

3. The free exercise clause of the First Amendment secures to every person the absolute right to accept as true the religious beliefs that appeal to his conscience and to reject all others; to practice the religious beliefs he accepts in any mode of worship not injurious to himself or others; to seek by peaceful persuasion to convert others to his religious beliefs and practices; and to be exempt from taxation for the support of religious activities or teachings. A person is denied religious freedom if he is taxed to support any religious faith, including his own.

OPPOSITION TO THE FIRST AMENDMENT

Numerous Americans of the utmost sincerity are not in intellectual and spiritual rapport with the First Amendment's separation of government and religion. Whether they are hostile to the principle of separation itself or do not understand what it entails, I do not know and will not surmise.

One group demands that the public schools of the states teach religion to the children attending them; and the other group demands that government provide public funds to aid and support private schools maintained by various churches to teach their religious doctrines to the children attending them. In so doing, the second group demands that the taxes of Caesar be used to finance the things of God.

While one is concerned with the public schools and the other with private religious schools, both groups base their demands on the assumption that governmental fidelity to the First Amendment frustrates the religious education of children.

This assumption is without foundation. While it forbids government to teach religion, the First Amendment leaves individuals, homes, and non-governmental institutions, such as Sunday schools, churches, and private schools, free to do so. Indeed it encourages them to do so by securing religious freedom to all.

Churches should look to their members and their friends only for the financing of their undertakings, and no church should engage in any undertaking, no matter how laudable it may be, which its members and friends are unable or unwilling to finance.

THE PUBLIC SCHOOLS

For generations before the school prayer cases, the public schools of various states conducted religious exercises each school day conforming to the religious beliefs which prevailed in the communities where the schools were located. The school prayer cases are *Engel* v. *Vitale*, *School District of Abington Township* v. *Schempp*, and *Murray* v. *Curlett*.

The *Engel* case, 370 U.S. 421 (1962), involved the constitutionality of a New York regulation requiring the following prayer to be said aloud by each class in a public school in the presence of a teacher at the beginning of each school day: "Almighty God, we acknowledge our dependence upon thee, and we beg thy blessing upon us, our parents, our teachers, and our country."

The *Abington School District* and *Murray* cases, which were consolidated for decision, involved the constitutionality of a Pennsylvania statute which required that "at least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day", and a rule of the School Commissioners of Baltimore, Maryland, which required the holding of opening exercises in the schools of the city consisting primarily of "reading, without comment, of a chapter in the Holy Bible and/or the use of the Lord's Prayer."

It was provided in each instance that any child would be excused from participating in the prescribed religious exercises on the request of his parent or guardian.

By a vote of 6 to 1 in the *Engel* case and 8 to 1 in the *Abington School District* and *Murray* cases, the Supreme Court ruled that by using their public school systems to require these religious exercises, New York, Pennsylvania, and Maryland violated the Establishment Clause of the First Amendment, and that the regulation, statute, and rule requiring them were, therefore, unconstitutional.

The Court dismissed as immaterial the circumstance that any child was excused on request from participating in the exercises on the ground that governmental coercion is not an essential ingredient of government establishment of religion.

The rationale of the rulings was thus summarized in the opinion in the *Abington School District* and *Murray* cases: "They are religious exercises required by the state in violation of the command of the First Amendment that the government maintain strict neutrality, neither aiding nor opposing religion."

These rulings shocked sincere people throughout the nation. It is not surprising that this was so. The custom of holding religious exercises in public schools had been followed in many states for generations, and the school authorities in these states had acted on the assumption that it was proper for these schools to teach the religious beliefs which prevailed in the communities in which they operated.

Many sincere persons charge that the school prayer cases show the Supreme Court to be hostile to religion. This charge is untrue and unjust. In these cases the Supreme Court was faithful to its judicial duty. It enforced the First Amendment, which commands government to maintain strict neutrality respecting religion, neither aiding nor opposing it.

In these and other cases, the Supreme Court recognizes the supreme value of religious faith in the lives of individuals and through them in the life of the nation.

The First Amendment forbids the states to teach religion to the children attending their public schools. Without impairing this principle to any degree, the Supreme Court makes this observation in its opinion in the *Abington School District* and *Murray* cases:

"It might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of

religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment." (374 U.S. 203, 225)

It is to be noted, moreover, that the school prayer cases do not question the soundness of the prior ruling in *Zorach* v. *Clauson*, 343 U.S. 306 (1952) where the Supreme Court held that the New York system of released time for religious instruction did not violate the First Amendment. Under this system, the state authorities in charge of public schools released from their customary studies an hour a week children, acting without any pressure from them, who desired to receive religious instruction in churches or church schools outside public school property.

Those who demand that public schools be made instruments to teach religion to the children attending them suggest varying ways to achieve their objective.

Since the school prayer cases adjudged the religious exercises involved in them to be rupugnant to the First Amendment because they were required by state authorities, they propose initially that state authorities sanction voluntary religious exercises in public schools. Despite their good faith, this proposal is fatally defective. In the nature of things, religious exercises sanctioned by public authorities are not, in reality, voluntary.

They propose secondarily that Congress deprive federal courts of jurisdiction to hear and determine cases in which states are alleged to have taught religion to the children attending their public schools in violation of the First Amendment. If it should take such action, Congress would nullify the First Amendment in substantial part by abolishing judicial enforcement of one of the Amendment's commands.

They propose finally that Congress and the states amend the Constitution to authorize the states to teach religion to children attending their public schools. If consummated, this forthright proposal would repeal the First Amendment in substantial part insofar as it applies to the public schools.

As a general rule, those who demand that the public schools of the states be made instruments to teach religion are motivated by their desire to have the children attending them taught the religious beliefs of their particular sect of Christianity.

The word "religion" as used in the Constitution is not restricted in its meaning to any particular sect of Christianity, or to the Christian religion in general. It embodies Buddhism, Hinduism, Judaism, Mohammedanism, Shintoism, and all other religions; and the Constitution confers on all persons of all religious persuasions an equality of constitutional right. If those who demand that the public schools be made instruments to teach religion would pause and ponder these things, the ardor of their demand might abate.

PRIVATE SCHOOLS THAT TEACH RELIGION

The Supreme Court held in *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925), that a state statute requiring all children to attend the public schools was unconstitutional because the guaranty of liberty of the due process clause of the Fourteenth Amendment gave Catholic parents a constitutional right to send their children to a Catholic School to receive both secular and religious instruction from it.

Although multitudes of Catholics revere and understand the First Amendment in its entirety and oppose taxation of any Americans to support the teaching of any religion, Catholics comprise the majority of those who insist that government give financial aid to private schools which teach religion.

The Catholic Church establishes and operates its parochial schools to teach the children of Catholic parents its religious doctrines and observances. Since the First Amendment forbids the public schools to teach any religion, Catholic parents who desire their children to be taught the Catholic faith send their children to parochial rather than public schools. As taxpayers, these Catholic parents pay taxes to help the state to maintain the public schools; and as parents, they bear the added expense of the instruction of their children in the parochial schools.

Many of these parents and others demand that government should provide public funds either directly or indirectly to aid and support the parochial schools. They base their demand on the propositions that it is unjust to compel Catholic parents to pay taxes for the support of public schools and bear the additional expense occasioned by sending their children to the parochial schools, and that the Catholic Church saves government enormous outlays of money because Catholic children go to parochial rather than public schools.

Without questioning the validity of the unadorned facts underlying these assertions, these observations are of crucial import:

1. The Catholic parents voluntarily impose the additional financial burden on themselves by sending their children to the parochial schools to obtain instruction in the Catholic faith, instruction which the First Amendment forbids the public schools to give them.

2. The Catholic Church operates the parochial schools to insure that it rather than government will control the education of Catholic children.

Justices Jackson and Rutledge present irrefutable reasons in their dissenting opinions in the *Everson case* why government must refuse to give financial aid and support, either directly or indirectly, to parochial and other private schools which teach religion if the religious freedom the First Amendment establishes is to endure in the United States. Justice Jackson added the warning that government may regulate the private schools it subsidizes.

CONCLUSION

As Justice Jackson stated in his dissent in the *Everson* case, 330 U.S. 1, 22-28, the First Amendment occupies first place in the Bill of Rights because its objective occupied first place in the minds of the Founding Fathers. He made the objective of the Bill of Rights clear in the opinion he wrote for the Court in *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624, 638 (1943):

"The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. . . . One's right to freedom of worship . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

The Oklahoma Court proclaimed truth when it said in *Cline* v. *State*, 9 Okla. Crim. 40, 130 P. 510:

"The crowning glory of American freedom is absolute religious liberty; every American has the unquestioned and untrammeled right to worship God according to the dictates of his own conscience, without let or hindrance from any person or any source."

It is just as sinful and tyrannical now as it was in the day of Jefferson and Madison for government to tell people what they must think about religion, or to compel them to pay taxes for the propagation of religious opinions they disbelieve.

May America cherish the First Amendment and thus keep religious freedom inviolate for its people as long as time shall last.

NOTES

1. North Carolina embodied this declaration in its Constitution of 1776, "that all men have a natural and unalienable right to worship Almighty God according to the dictates of their own conscience," and added to it as an amendment in 1835 the words "and no human authority should, in any case whatever, control or interfere with the rights of conscience."

2. *Torcaso* v. *Maryland*, 367 U.S. 488 (1961)

3. The statement revealing the meaning of the Establishment Clause appears in the majority opinion in *Everson* v. *Board of Education*, 330 U.S. 1, 15-16 (1947), which was written by Justice Black. In this case the Supreme Court upheld the constitutionality under the Establishment Clause of a statute which required New Jersey to use state funds to reimburse the cost of transportation of children to the state's public schools and Catholic parochial schools. The state was not permitted, however, to reimburse the cost of transportation of children attending private schools operated for profit.

The majority and dissenting opinions illuminate the Establishment Clause. The Justices did not disagree as to its meaning. They disagreed only as to its application to the New Jersey statute.

The majority concluded that the expenditure required by the New Jersey statute was comparable to governmental expenditures for fire and police protection, and were for the public purpose of promoting the safety of the children traveling between their homes and the public and parochial schools. The dissenters maintained that the expenditure did nothing to increase the safety of the children over that of other patrons of the transportation system and was for the private purpose of aiding parochial schools to teach the Catholic faith to the children attending them.

Some years after the *Everson* decision, the Supreme Court explained in the first school prayer case, *Engel* v. *Vitale*, 370 U.S. 421 (1962) that the Establishment Clause is unlike the Free Exercise Clause in that governmental coercion is not an essential ingredient of it, and enunciated the several reasons why the Founding Fathers embodied the Establishment Clause in the Constitution. In so doing, the Court said:

"Although these two clauses may in certain instances overlap, they forbid two quite different kinds of governmental encroachment on religious freedom. The Establishment Clause, unlike the Free Exercise Clause, does not depend on any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion, whether those laws operate directly to coerce nonobserving individuals or not. This is not to say, of course, that laws officially prescribing a particular form of religious worship do not involve a coercion of such individuals. When the power, prestige, and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain. But the purposes underlying the Establishment Clause go much further than that. Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion. The history of governmentally established religion, both in England and in this country, showed that

whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred hatred, disrespect, and even contempt of those who held contrary beliefs. That same history showed that many people had lost their respect for any religion that had relied upon the support of government to spread its faith. The Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate. Another purpose of the Establishment Clause rested upon an awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand. . . . It was in large part to get completely away from . . . religious persecution that the Founders brought into being our Nation, our Constitution, and our Bill of Rights with its prohibition against any governmental establishment of religion."

4. *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940); *Jones* v. *Opelika*, 316 U.S. 584 (1942); *West Virginia Board of Education* v. *Barnette*, 319 U.S. 624 (1943); *Follett* v. *City of McCormick*, 321 U.S. 573 (1944); *Kovacs* v. *Cooper*, 336 U.S. 77 (1949); *Sherbert* v. *Verner*, 374 U.S. 398 (1963); *Flast* v. *Cohen*, 392 U.S. 83 (1968).

Justice Rutledge made the meanings of both the Establishment and Free Exercise Clauses plain in his dissent in *Everson* v. *Board of Education*, 330 U.S. 31-63 (1947). He said:

"Not simply an established church, but any law respecting an establishment of religion is forbidden. The Amendment was broadly but not loosely phrased. It is the compact and exact summation of its author's views formed during his long struggle for religious freedom. In Madison's own words characterizing Jefferson's Bill for Establishing Religious Freedom, the guaranty he put in our national charter, like the bill he piloted through the Virginia Assembly, was a 'model of technical precision, and perspicuous brevity.' Madison could not have confused 'church' and 'religion' or 'an established church' and 'an establishment of religion.'"

"The Amendment's purpose was not to strike merely at the official establishment of a single sect, creed or outlawing only a formal relation such as had prevailed in England and some of the colonies. Necessarily it was to uproot all such relationships. But the object was broader than separating church and state in this narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion. In proof the Amendment's wording and history unite with this Court's consistent utterances whenever attention has been fixed directly upon the question."

"'Religion' appears only once in the Amendment. But the word governs two prohibitions and governs them alike. It does not have two meanings, one narrow to forbid 'an establishment' and another, much broader, for securing 'the free exercise thereof.' 'Thereof' brings down 'religion' with its entire and exact content, no more and no less, from the first into the second guaranty, so that Congress and now the states are as broadly restricted concerning the one as they are regarding the other."

"No one would claim today that the Amendment is constricted in 'prohibiting the free exercise' of religion to securing the free exercise of some formal or creedal observance, of one sect or many. It secures all forms of religious expression, creedal, sectarian or nonsectarian, wherever and however taking place, except conduct which trenches upon the like freedoms of others or clearly and presently endangers the community's good order and security. For the protective purposes of this phase of the basic freedom, street preaching, oral or by distribution of literature, has been given 'the same high estate under the First Amendment as . . . worship in the churches and preaching from the pulpits.' And on this basis parents have been held entitled to send their children to private, religious schools. *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925). Accordingly, daily religious education commingled with secular is 'religion' within the guaranty's comprehensive scope. So are religious training and teaching in whatever form. The word connotes the broadest content, determined not by the form or formality of the teaching or where it occurs, but by its essential nature regardless of those details."

"'Religion' has the same broad significance in the twin prohibition concerning 'an establishment.' The Amendment was not duplicitous. 'Religion' and 'establishment' were not used in any formal or technical sense. The prohibition broadly forbids state support, financial or other, of religion in any guise, form or degree. It outlaws all use of public funds for religious purposes."

"Two great drives are constantly in motion to abridge, in the name of education, the complete division of religion and civil authority which our forefathers made. One is to introduce religious education and observances into the public schools. The other, to obtain public funds for the aid and support of various private religious schools. . . . In my opinion both avenues are closed by the Constitution. Neither should be opened by this Court. The matter is not one of quantity, to be measured by the amount of money expended. Now, as in Madison's day, it is one of principle, to keep separate the separate spheres as the First Amendment drew them: to prevent the first experiment upon our liberties; and to keep them from becoming entangled in corrosive precedents. We should not be less strict to keep strong and untarnished the one side of the shield of religious freedom than we have been of the other.

5. After pointing out that parochial schools are established and maintained by the Catholic Church to teach "Catholic faith and morals", and that its Canon Law prescribes that they shall be "schools where religious and moral training occupy the first place", Justice Jackson declared in his dissenting opinion in the *Everson* case, 330 U.S. 22-28:

"It is no exaggeration to say that the whole historic conflict in temporal policy between the Catholic Church and non-Catholics comes to a focus in their respective school policies. The Roman Catholic Church, counseled by experience in many ages and many lands and with all sorts and conditions of men, takes what, from the viewpoint of its own progress and the success of its mission, is a wise estimate of the importance of education to religion. It does not leave the individual to pick up religion by chance. It relies on early and indelible indoctrination in the faith and order of the Church by the word and example of persons consecrated to the task."

"Our public school, if not a product of Protestanism, at least is more consistent with it than with the Catholic culture and scheme of value. It is a relatively recent development dating from about 1840. It is organized on the premises that secular education can be isolated from all religious teaching so that the school can teach all needed temporal knowledge and also maintain a strict and lofty neutrality as to religion. The assumption is that after the individual has been instructed in wordly wisdom he will be better fitted to choose his religion. Whether such disjunction is possible, and if possible is wise, are questions I need not try to answer."

"I should be surprised if any Catholic would deny that the parochial school is a vital, if not the most vital part of the Roman Catholic Church. If put to the choice, that venable institution, I should expect, would forego its whole service for mature persons before it would give up education for the young, and it would be a wise choice. Its growth and cohesion, discipline and loyalty, spring from its schools. Catholic education is the rock on which the whole structure rests, and to render tax aid to its Church school is indistinguishable to me from rendering the same aid to the Church itself."

"It is of no importance in this situation whether the beneficiary of tax-raised funds is primarily the parochial school and incidentally the pupil, or whether the aid is directly bestowed on the pupil with indirect benefits to the school. The state cannot maintain a Church and it can no more tax its citizens to furnish free carriage to those who attend a Church. The prohibition against establishment of religion cannot be circumvented by a subsidy, bonus or reimbursement of expense to individuals for receiving religious instruction and indoctrination . . ."

"I agree that this Court has left, and always should leave to each state, great latitude in deciding for itself, in the light of its own conditions, what shall be public purposes in its scheme of things. It may make public business of individual welfare, health, education, entertainment or security. But it cannot make public business of religious worship or instruction, or of attendance at religious institutions of any character. There is no answer to the proposition . . . that the effect of the religious freedom to our Constitution was to take every form of propagation of religion out of the realm of things which could directly or indirectly be made public business and thereby be supported in whole or in part at taxpayers' expense. That is a difference which the Constitution sets up between religion and almost every other subject matter of legislation, a difference which goes to the very root of religious freedom. . . . This freedom was first in the Bill of Rights because it was first in the forefathers' minds; it was set forth in absolute terms, and its strength is its rigidity. It was intended not only to keep the state's hands out of religion, but to keep religion's hands off the state, and, above all, to keep bitter religious controversy out of public life by denying to every denomination any advantage from getting control of public policy and the public purse. . . ."

"This policy of our Federal Constitution has never been wholly pleasing to most religious groups. They all are quick to invoke its protections; they all are irked when they feel its restraints. . . ."

"But we cannot have it both ways. Religious teaching cannot be a private affair when the state seeks to impose regulations which infringe on it indirectly, and a public affair when it comes to taxing citizens of one faith to aid another, or those of no faith to aid all. If these principles seem harsh in prohibiting aid to Catholic education, it must not be forgotten that it is the same Constitution that alone assures Catholics the right to maintain these schools at all when predominant local sentiment would forbid them. *Pierce* v. *Society of Sisters*, 268

U.S. 510 (1925). Nor should I think that those who have done so well without this aid would want to see this separation between church and state broken down. If the state may aid these religious schools, it may therefore regulate them. Many groups have sought aid from tax funds only to find that it carried political controls with it. Indeed, this Court has declared that 'It is hardly lack of due process for the government to regulate that which it subsidizes.'"

"But in any event, the great purposes of the Constitution do not depend on the approval or convenience of those they restrain."

Justice Rutledge made these observations in his dissent in *Everson v. Board of Education*, 330 U.S. 58-60 (1947):

"No one conscious of religious values can be unsympathetic toward the burden which our constitutional separation puts on parents who desire religious instruction mixed with secular for their children. They pay taxes for others' children's education, at the same time the added cost of instruction for their own. Nor can one happily see benefits denied to children which others receive, because in conscience they or their parents for them desire a different kind of training others do not demand."

"But if those feelings should prevail, there would be an end to our historic constitutional policy and command. No more unjust or discriminatory in fact is it to deny attendants at religious schools the cost of their transportation than it is to deny them tuitions, sustenance for their teachers, or any other educational expense which others receive at public cost. Hardship in fact there is which none can blink. But, for assuring to those who undergo it the greater, the most comprehensive freedom, it is one written by design and firm intent into our basic law."

"Of course discrimination in the legal sense does not exist. The child attending the religious school has the same right as any other to attend the public school. But he foregoes exercising it because the same guaranty which assures this freedom forbids the public school or any agency of the state to give or aid him in securing the religious instruction he seeks."

"Were he to accept the common school, he would be the first to protest the teaching there of any creed or faith not his own. And it is precisely for the reason that their atmosphere is wholly secular that children are not sent to public schools under the *Pierce* doctrine. But that is a constitutional necessity, because we have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state and best for religion."

"That policy necessarily entails hardship upon persons who forego the right to educational advantages the state can supply in order to secure others it is precluded from giving. Indeed this may hamper the parent and the child forced by conscience to that choice. But it does not make the state unneutral to withhold what the Constitution forbids it to give. On the contrary it is only by observing the prohibition rigidly that the state can maintain its neutrality and avoid partisanship in the dissensions inevitable when sect opposes sect over demands for public moneys to further religious education, teaching or training in any form or degree, directly or indirectly. Like St. Paul's freedom, religious liberty with a great price must be bought. And for those who exercise it most fully, by insisting upon religious education for their children mixed with secular, by the terms of our Constitution the price is greater than for others."

"The problem then cannot be cast in terms of legal discrimination or its absence. This would be true, even though the state in giving aid should treat all religious instruction alike. Thus, if the present statute and its application were shown to apply equally to all religious schools of whatever faith, yet in the light of our tradition it could not stand. For then the adherent of one creed still would pay for the support of another, the childless taxpayer with others more fortunate. Then too there would seem to be no bar to making appropriations for transportation and other expenses of children attending public or other secular schools, after hours in separate places and classes for their exclusively religious instruction. The person who embraces no creed also would be forced to pay for teaching what he does not believe. Again, it was the furnishing of 'contributions of money for the propagation of opinions which he disbelieves' that the fathers outlawed. That consequence and effect are not removed by multiplying to all-inclusiveness the sects for which support is exacted. The Constitution requires, not comprehensive identification of state with religion, but complete separation."●

THE AIR TRAVELERS SECURITY ACT OF 1983

● Mr. WARNER. Mr. President, yesterday, the Senator from Tennessee (Mr. SASSER) and I appeared before the Aviation Subcommittee of the House Public Works and Transportation Committee to testify in favor of the Air Travelers Security Act (H.R. 2053 and S. 765).

This is one of the most important proderegulation, proconsumer rights, procompetition bills to come before the Congress in some time. It is a bill which insures that the consumer is protected from fraud in the marketing of travel accommodations while at the same time the opportunities for competition in the marketing of travel accommodation are made unlimited.

So that all Senators may have the opportunity to gain a broader understanding of this important measure, I ask that the statements made by the Senator from Tennessee (Mr. SASSER) and myself be printed in full in the RECORD.

The statements foll ow:

SENATOR JIM SASSER—STATEMENT ON H.R. 2053 BEFORE THE COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION, SUBCOMMITTEE ON AVIATION

Mr. Chairman, I want to thank you for this opportunity to discuss, along with Senator Warner—with whom I co-chair the Senate Tourism Caucus, my views on H.R. 2053.

I suppose I could sum up what I have to say, Mr. Chairman, by posing as a question the title of a popular song of the 1960's, "Do You Know The Way to San Jose?"

I am sure that you do. But someone from my home state of Tennessee probably wouldn't know. They would probably contact their local travel agent in order to learn the quickest way. Likewise, the people from your home district in San Jose would probably have to contact their travel agent if they wanted to visit the "Home of the Blues" on Beale Street in Memphis or the Grand Ol' Opry in Nashville.

The problem is this: the ability of people to find the way to San Jose, or to Memphis, or to Nashville, is going to be seriously threatened come January 1984—if we don't set aside last year's narrow CAB decision. H.R. 2053 would do just this, vacate that decision and provide immunity for the current relationship between travel agents and the airline industry.

Other witnesses this morning will more than cover the many arguments related to H.R. 2053 and its Senate companion, S. 764. My brief remarks focus on what I believe will be the outcome . . . if immunity from antitrust statutes is not maintained for the Air Transport Conference.

Let's take the precedent of so-called rate deregulations. I supported deregulation of the airline industry and the sunset of the Civil Aeronautics Board. I had hoped that deregulation would encourage a healthy competition among carriers. I had hoped that short-haul carriers would fill in on those routes that were less-than-lucrative for major airlines.

That's what I had hoped. What we got was: a suicidal rate war among the airlines in which cut-rate prices made it attractive to go from Washington to Miami—but both costly and inconvenient to go from Washington to Chattanooga; a rate war that contributed to the demise of Braniff airlines; a rate war that still threatens the basic stability of the industry.

No one in the Congress really wants to regulate once again the routes or rate structures of airlines. But there is strong sentiment toward that direction—unless the airlines can exercise restraint and common sense on their own.

That kind of industry self-restraint, that kind of working and workable arrangement, is already in operation in the relationship among travel agents and the airlines. I say: let it continue to work.

The last thing we need is another episode of suicidal competition among airlines and travel agents. But I submit that this is exactly what could happen should the CAB ruling be allowed to stand.

I am concerned, too, about the economic impact to my state should the CAB decision be effected.

The more than 1,000 people working at travel agencies in Tennessee were responsible last year for $195 million in airline bookings. The payroll derived from booking commissions and the tax revenues these agencies generated for federal, state and local governments represent scores of millions more in positive economic impact for our state.

So, it comes down to this: common sense tells us it would be illogical not to act on the CAB ruling; economic sense tells us it would be too costly not to act.

I therefore urge this subcommittee to act, and to act favorably and quickly on H.R. 2053.

TESTIMONY OF SENATOR JOHN W. WARNER BEFORE THE AVIATION SUBCOMMITTEE, HOUSE PUBLIC WORKS COMMITTEE

Thank you, Mr. Chairman.

I appreciate the courtesy you have extended Senator Sasser and me, as the primary Senate sponsors of the Air Travelers Security Act, to testify before the Aviation Subcommittee on this very important travel and tourism, consumer rights legislation.

There are some critical issues surrounding this measure which I feel must be examined more fully. The general public and the parties interested in the outcome of this debate must have every opportunity to completely understand these issues. They are:

(1) "Exclusivity," and

(2) Antitrust immunity."