10-1972

Committee on Public Education and Religious Liberty v. Nyquist

Lewis F. Powell Jr.

JHW, lfp/ls 1/8/73

Note these cases

72-753
72-791
72-929
72-694

} Establishment of Religion cases involving N.Y. laws to aid private & parochial schools through tuition grants & tax credits.

DISCUSS

Note - See my discussion section - JHW

PRELIMINARY MEMO

Imp. issues which must be resolved.

January 19, 1973

No. 72-753

BRYDGES

v.

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY

(See attached memo in No. 72-694)

Wilkinson

JHW, HHpls 1/8/73

DISCUSS

PRELIMINARY MEMO

January 19, 1973

No. 72-791

NYQUIST

v.

COMMITTEE FOR PUBLIC EDUCATION
AND RELIGIOUS LIBERTY

(See attached memo in No. 72-694)

Wilkinson

JHW,lfl:pls 1/8/73

DISCUSS

PRELIMINARY MEMO

January 10, 1973

No. 72-929

CHERRY

V.

COMMITTEE FOR PUBLIC EDUCATION
AND RELIGIOUS LIBERTY

(See attached memo in No. 72-694)

Wilkinson

JHW, III:pls

Note

Const. of N.Y. Statute providing various forms of aid to parochial schools

DISCUSS

PRELIMINARY MEMO

No. 72-694

COMMITTEE FOR PUB. EDUCATION AND RELIGIOUS LIBERTY

v.

NYQUIST

Timely

Appeal from USDC SD (New York)... (Gurfein, Cannella, Hays...in part concurring in the result and dissenting in part.

1. Summation - This case involves the constitutionality under the Establishment clause of the First Amendment of a New York statute which provides for the various forms of maintenance aid, tuition grants, and tax credits to church controlled and church operated elementary and secondary schools and to the parents whose children attend them.

2. Facts - The challenged statute provides three basic forms of aid. Section 1 provides for grants of money directly from the state treasury to non-

public schools for maintenance of the buildings if the non-public school has been designated during a base year as "serving a high concentration of pupils from low income families for purposes of Title IV, The Federal Higher Education Act of 1965." If the school qualifies under the federal standard, it is to be given a direct grant of $30 per pupil in attendance, which is increased to $40 per pupil to those schools which are more than 25 years old. The grants, which are given directly to the particular non-public schools eligible for them, are to be in reimbursement of maintenance and repair costs incurred in the preceding year. Maintenance and repair is defined as the provision of heat, light, water, ventilation and sanitary facilities, cleaning, janitorial and custodial services; snow removal; necessary upkeep and renovation of buildings, grounds and equipment; fire and accident protection; and such other items as the state commissioner of education may deem necessary to insure the health, welfare and safety of enrolled pupils.

Section 1 is preceded by certain legislative findings that it is the primary responsibility of the state to insure the health, welfare and safety of children attending public and non-public schools; that financial resources necessary to properly maintain and repair deteriorating buildings are beyond the capacities of low income people whose children attend non-public schools; and that healthy and safe non-public schools contribute to the stability of urban neighborhoods.

Section 2 of the Act provides for flat tuition grants from the state treasury to parents with family incomes of less than $5,000 a year who have children attending elementary or secondary non-public schools. The grant is in the sum of $50 a year for children in grades 1-8 and $100 in grades 9-12. The tuition reimbursement cannot exceed 50% of the actual tuition payment made by the parent.

Section 2 is prefaced by legislative findings that (1) the vitality of our pluralistic society is dependent upon the capacity of individual parents to select a school, other than public, for the education of their children; (2) that the Supreme Court of the United States has recognized this right of selection, but the right is diminished or denied to children of poor families whose parents have the least options in determining where their children are to be educated; (3) that any precipitous decline in the number of non-public school pupils would cause a massive increase in public school enrollment and costs which would seriously jeopardize quality education for all children.

Sections 3, 4 and 5 of the Act provide that an individual shall be entitled to subtract, for state income tax purposes, from his federal adjusted gross income an amount shown in a table [redacted]

[redacted] multiplied by the number of his dependents, not exceeding three, attending a non-profit, non-public school on a full-time basis, provided that he has paid at least $50 in tuition for each such dependent. This exclusion may be taken only by parents with adjusted gross incomes of from $5,000 to $25,000 who do not receive a tuition-assistance payment under Section 2. The exclusion could be as much as $1,000 for each child, up to three children, enrolled in grades 1-12. The amount of income that may be excluded is reduced as the individual's adjusted gross income increases. A New York parent whose adjusted gross income is less than $9,000 receives a deduction for each dependent of $1,000, whereas a parent with an adjusted gross income of $23,000 to $25,000 receives only a deduction of $100 for each dependent.

This part of the Act is prefaced by legislative findings that (1) statutes already provide for the deduction from gross income for tax purposes of amounts contributed to religious, charitable and educational institutions; (2) that non-public educational institutions are entitled to a tax exempt status by virtue of legislation which has been sustained by the Court; and (3) that similar modifications of federal adjusted gross income should also be provided to parents for tuition paid to non-public schools.

3. Opinion Below - The three judge court struck down Section 1 as a violation of the Establishment Clause. It noted that of the estimated 280 schools in the low income areas, which the legislature sought to help, all or practically all were conceded to be related to the Roman Catholic Church

and to teach Catholic religious doctrine to some degree. The state had made the argument that maintenance and repair costs were obviously not involved with the teaching of religion. The court rejected this argument as bottomed on the assumption that a parochial school budget is divisible. "Not having to pay the janitor makes it reasonable to assume that the money otherwise going to him can be used to increase the salary of a religious teacher or the fund for the purchase of objects of religious devotion." The court then invalidated this section as fostering the excessive entanglement between government and religion forbidden in Lemon v. Kurtzman, 403 U.S. 602 (1971).

The court below also struck down Section 2 as a violation of the Establishment Clause. It noted that although the payment is to the parent, the recipient is the parochial school. The court noted simply that it is the school which benefits by getting tuitions from state funds which it might not otherwise receive. New York had argued that the free exercise of religion is inhibited if the needy may not be subsidized with state funds to aid their right to a parochial school education for their children. The court rejected this argument with the statement that a subsidy to those who practice a particular religion to enable them to observe its tenets is not compatible with either clause of the First Amendment. The court further admitted that the possible closing of Catholic parochial schools would indeed cast a heavy burden on state public education, but contended that economic hardship alone was not enough to overcome the strictures of the First Amendment.

The court sustained the third part of the statute. It noted that the tax credit for tuition paid by parents to non-public schools was not restricted to areas which by concession were known to contain practically only Catholic parochial schools as in Section 1. Rather, this section of the statute, the court noted, covers attendance at all non-profit, private schools in the state, and does not involve a subsidy or grant of money from the state treasury as in Sections 1 and 2. The court noted further that this section of the statute had a particular secular intent - one of equity - to give some recompense by way of tax relief to our citizens who bear their share of the burden of maintaining public schools and who because of religious belief or otherwise send their children to non-public schools full time, as is their constitutional right. Lastly the court noted that tax credits presented a minimum of administrative entanglement with the non-public schools and a minimum risk of ongoing political activity divided on strictly religious lines. In sustaining this part of the statute, the court below relied primarily on Walz v. Tax Commission, 397 U.S. 664 (1970), where the court sustained the real property tax exemption provisions for churches. The court noted that this case meant to draw a distinction between direct grants of public funds to religious institutions, which were generally prohibited, and tax exemption for religious institutions which was generally permitted.

Judge Hays, concurring in part and dissenting in part, would have held the entire statute in violation of the Establishment Clause. He contended that the purpose and effect of the tax credit provision was the same as the

other portions of the statute, i.e., to subsidize religious training for children. He noted that both the second and third parts of the statute had the similar aim of reimbursing parents who chose to send their children to religious schools and were constitutionally indistinguishable.

4. Contentions - Both sides contest the holding below. The state seeks to have this court sustain Sections 1 and 2 of the statute. It stresses that maintenance of non-public schools is a vital part of its total educational program. It contends that Tilton v. Richardson, 403 U.S. 672 (1971) upheld the grant of non-theological aid to church related colleges. New York contends that in the instant case the maintenance aid to non-public schools is secular, neutral and non-ideological.

New York also contends that this statute differs in one significant respect from the statutes at issue in Wolman v. Essex, 342 F. Supp. 399 which the Court affirmed at the October 10 Conference and Lemon v. Sloan, No. 72-459 which the Court has relisted for the Conference of January 12. The statutes of Ohio and Pennsylvania at issue in those cases provided tuition reimbursement to all parents of children attending non-public schools, whereas the New York statute here provides for reimbursement only to low income parents in schools serving low income areas.

The Committee for Public Education and Religious Liberty, represented by Leo Pfeffer, seeks to affirm the District Court's invalidation of Sections 1 and 2 of the New York statute but urges this Court to strike down the tax credit provision of the Act as equally offensive to the Establishment Clause.

The Committee contends that the latter sections are an ingenious attempt to do by indirection what is forbidden to be done directly, namely finance tuition payments to schools that provide sectarian instruction in religious worship. The Committee suggests that sophisticated devices such as tax credits are no less immune to judicial challenge than the more simplistic ones of salary supplements, maintenance payments, and tuition reimbursements. The Committee farther contends:

> "Even if it be assumed that tax deductions for contributions to churches are within the ambit of Walz and are constitutional, and even if it be assumed that tuition to church schools is constitutionally equivalent to contribution to churches, the fact remains that the New York statute is not a tax deduction statute. Contributions to church schools are already deductible under New York law, and this new statute specifically provides that its benefits are available even if the taxpayer elects not to itemize his contributions. ...The antiquity and ubiquity of tax exemption is strong if not conclusive evidence of constitutionality. But the present statute does not come to the Court with that protection. It is a novel device fashioned to evade the constitutional barrier to tuition grants."

5. Discussion - I do not see how the Court can avoid taking this case. Several states in the wake of Lemon have passed statutes providing direct tuition grants to parents to try to avoid the entanglement problem deemed fatal in Lemon. While three judge courts in New York, Ohio, and Pennsylvania have struck down such payments, they have not done so without a struggle and this Court ought to clarify in one way or another what obviously is a recurring question of public importance and division.

Further, this New York statute presents two points of difference with Sloan v. Lemon, No. 72-459 which has been relisted for the Conference of January 12. The aid under the New York statute both in the case of the maintenance aid to schools and the tuition grants to parents is geared to low income areas and parents. This might be seen as adding some bite to the "free exercise" argument New York has advanced to sustain the statute since low income parents do not have the option of sending children to non-public religious schools that affluent parents do.

Secondly, the tax credit provisions which were sustained by a divided court below are not present in Sloan v. Lemon, No. 72-459. Even if the tuition payments to parents can be said to be controlled by the entanglement criteria in Lemon, the tax credit provisions in the New York statute present a novel case.

There are responses.

Wilkinson

Conf. 1/19/73

Court .... Voted on................, 19...

Argued ...., 19... Assigned ...., 19... No. 72-694

Submitted ...., 19... Announced ...., 19... 72-753

72-791

72-929

COMMITTEE FOR PUBL EDUCATION & RELIGIOUS LIBERTY v. NYQUIST

BRYDGES v. COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY

vs.

NYQUIST v. COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY

CHERRY v. COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY

Some of issues here are similar to Pa case - although N.Y. case is broader

There is a single judgment in these cases

72-694 - Noted

72-753 - Noted (Douglas + Brennan would affirm)

72-791 - Noted (Brennan - affirm)

72-929 - Noted Douglas + Brennan would affirm

Consolidate - 1 hr per side

72-694

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	POST	DIS	AFF	MERITS REV	AFF	MOTION G	D	ABSENT	NOT VOTING
Rehnquist, J.				✓									
Powell, J.				✓									
Blackmun, J.				✓									
Marshall, J.				✓									
White, J.				✓									
Stewart, J.				✓									
Brennan, J.				✓									
Douglas, J.				✓									
Burger, Ch. J.				✓									

Benbh Memo

Nos. 72-694, 72-791, 72-753, 72-929 (N.Y.); Nos. 72-459, 72-620 (Pa.)

Aid to Non-public Schools Cases, April 1973

1. The N.Y. plan provides three separate aid programs in its various sections:

a. Direct money grants to x non-public schools for "maintenancem and xxpxxx repair." This terms includes "heat, light water, ventilation and sanitary facilities; cleaning, janitorial and custodial xxxxxx services; snow removal; necessary upkeep and renovation of buildings, grounds and equipment; fire and accident protection; and such other items as the commissioner may deem necessary to ensure the health, welfare and safety of engolled pupils." [Emphasis added.] The amount is $30 to $40 per pupil. xxxxxxxx "Non-public schools" are those tax-exempt schools serving high concentrations of low income students.

b. Direct money grants (tuition grants) to parents of students attending non-public schools who have taxable incomes of $5,000 or less. Payments are $50 (per student) a year for students in grades 1-8 and $100 for grades 9-12, with a limit of 50% of tuition.

c. Tax "credits" to parents of students attending non-public schools. The law permits the deduction from taxable income of $1,000 per child for parents with taxable incomes of $9,000 or less (with a three-child limit). The deduction permitted decreases as income rises, with a deduction of $100 per child for parents with taxable incomes between $23,000 and $24,999. This works out to a tax savings of from $50 per child to $12 per child. This "Credit" is also subject to the maximum limitation of 50% of tuition.

2. Analysis by application of the three-pronged Lemon and Tilton test (and/to be utilized in Hunt v. McNair):

a. Secular purpose. Both N.Y. and Pa. statutes pass this test. The legislatures have expressed an justifiable and credible concern with maintaining a pluralistic society, protecting the capacity of low-income parents to freely exercise their religious beliefs, protecting the health and safety of children in non-public schools, and avoiding the disastrous financial impact of massive closings of non-public schools on the public school systems.

b. Entanglement. Lemon seems to speak of two distinguishable types of entanglement to be avoided. The first is administrative ~~entanglement~~ entanglement. Does the state law require very close scrutiny of non-public school expenditures, so that a close administrative

relationship between the state and religiously affiliated schools must be maintained? The Court found this problem present in Lemon and relied on it in ~~xxxxxxxxxxx~~ striking down the statutes. Both Pa. and N.Y. statutes pass this test. Neither seems to require any close administrative relationship. Even the maintenance and repair grants in N.Y. are simply ~~xxxx~~ calculated on the basis of a number of pupils formula. The fact that the other ~~x~~ types of aid under scrutiny are paid directly to parents instead of the schools doesn't make much difference ~~make them significantly less objectionable~~ with regard to administrative entanglement ~~entanglement~~. Even if such payments were ~~xxxxx~~ made directly to schools, the important point is that no allocation between secular and ~~xxx~~ religious uses is required.

The other type of ~~x xxxxxxxx~~ entanglement to be avoided is political. This is really integral with the question of primary effect. If significant amounts of money go to religiously affiliated schools, then continuation of this aid will inject ~~x~~ religious issues into the political appropriations process.

c. Primary effect. Rather than try to define the term "primary," I will briefly review some of the cases to determine what sorts of aid constitute "law respecting an establishment of religion." In Everson, the Court permitted reimbursements to parents for bus fares to and from parochial schools. The Court recognized that this aid, though neutral on its face, would have the effect of freeing other funds of parochial schools ~~xx~~ or the parents involved to use for ~~xxx~~ religious ~~xxxxxxxx~~ activities. But since the particular payment provided by the state was

Everson - reimbursement of bus fares

for a secular service, the aid was permitted. Yet the majority said the state was approaching the limits of its power to aid religiously affiliated schools.

Allen

Allen adopted the same reasoning in allowing free secular textbooks to parochial school students. Both cases involved aid allocated to strictly secular services, both involved no administrative entanglement (since these secular services were easily separable from the religious activities of the religiously affiliated schools), and neither provided, even indirectly, a significant portion of the private schools's tuition, if any, or overall working budget. This last factor was not explicitly mentioned by the Court, but it seems to me it must have had some influence. (see infra)

Prop. tax exemption

In Walz the Court upheld property tax exemptions on church property. Among the factors which the Court relied on were the overwhelming historical precedent for this sort of aid (which aid had not in fact led to the divisiveness sought to be avoided by the Establishment Clause), the effect of the exemption in reducing administrative contacts between church and state, and the fact that many non-religious institutions were beneficiaries of the same exemption--charities, cultural, and educational groups. This last factor reduced the dangers of political entanglement; the larger class of beneficiaries made it less likely that debates over the exemption would be reduced to debates over aiding religion.

Teachers' salaries - entanglement

In Lemon the states tried to apportion teachers' salaries between the secular and religious elements. Because this created large dangers of entanglement the Court struck the plans down without explicitly reaching

the primary effect test. But the underlying assumption was made clear:

> The Rhode Island Legislature has not and could not, provide state aid on the basis of a mere assumption that secular teachers under religious discipline can avoid conflicts. The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion..." Lemon, 403 U.S. 602,619.

The recent N.Y. cases argued during the March session also, as I understand the Court's vote, make clear that the state cannot pay for teaching in religiously affiliated schools. Everyday testing is integral to teaching and cannot be paid for by the state. State-formulated, standardized tests may, however, be paid for, since these are neutral expenditures which may be reimbursed without administrative entanglement.

NH cases argued in March

In Tilton and Hunt v. McNair the Court is recognizing a distinction between religiously affiliated college and pre-college education. So long as the state does not pay for specifically religious activities or facilities it may give more substantial amounts of aid to colleges. Although the state can pay for a secular building at a sectarian college, I assume it cannot pay for a parochial elementary school. The distinction is based different degrees of influence the religious affiliation has on teaching at the two educational levels and is, I think, quite rational.

This brings us to the present cases. All the statutes involved provide for aid to pre-college sectarian education. The assumption underlying Tilton and McNair, which I think must be valid, it that it is inherently more difficult to separate the

teaching of religion from the teaching of secular subjects at this age and educational level. The purpose of parochial schools is to give students a Catholic education. [Over 80% of non-public schools in both Pa. and N.Y. are Catholic.] Therefore, I think past decisions of this Court require that state aid must be restricted to clearly secular activities or facilities if it is to be permitted.

General Rule

(1) The payments for "maintenance and repair" do not pass this test. Such payments apparently contemplate state aid being used for any building ~~as~~ expense short of ~~of~~ (?) the construction of a new building. Plus the costs of running the entire physical plant are eligible for state payment. These are general expenses of the school. They are as much necessary for strictly religious activities as for strictly secular activities. They are on the same plane with state aid for construction. Even in Tilton, a college case, the Court unanimously struck down the provision that permitted the ~~x~~ building to be used for ~~xxxx~~ religious ~~xx~~ purposes after 20 years. Using state money to operate and repair the buildings of pre-college parochial schools in effect permits state money to ~~x~~ be used for religious purposes from the outset.

(2) The parent reimbursement payments in both states. This Court recently affirmed a three-judge court striking down an Ohio plan for parent reimbursement of tuition payments which ~~was~~ is, in my view, essentially similar to both plans here under consideration. ~~Xx~~ Essex v. Wolman, 342 F. Supp. 399 (SD Ohio), aff'd 93 S. Ct. 61. There the DC pointed out that the $90 reimbursement payments were available to cover tuition and therefore went beyond paying for

secular ~~xx~~ elements of parochial schools education.

N.Y. argues here that its plan is distinguishable because it imposes a ~~xx~~ limit of 50% of the school tuition on the reimbursement allowed. Since tuition is only about 30% of the cost of running non-public schools, and since only half of this/will be paid for by the state, therefore the state is not paying for any religious instruction. I think this argument cannot withstand analysis. First, the Court surely does not want to get in the position of having to draw lines based on percentages. If 50% tuition is all right, it will not be ~~x~~ feasible to say that 60 or 70 or 80%, etc. is not all right. Under N.Y.'s argument, even 100% ~~tuition~~ payments would be okay since this only covers 30% of total expenses. But if the state is allowed to pay tuition for parochial students, then inevitably that ~~xxxx~~ tuition will rise to take pressure off the ~~xxxxxxx~~ religious organizations now providing support.

In sum, the ~~x~~ effect of the ~~xxxxxx~~ reimbursement ~~xx~~ plans is to aid religious instruction to an impermissible degree. And I think this is what the Court has meant in speaking of "primary effect."

(3) Finally, the N.Y. law includes a plan of tax "credits." The DC below upheld this provision, over one dissent (Hays). This tax relief is distinguishable from that permitted in Walz. First, ~~xxxx~~ property tax exemptions on ~~xxxxxx~~ church property have had a very long history. In Walz the Court had the benefit of hindsight; the exemption had not in ~~x~~ fact case divisiveness along religious lines. It has been accepted by all for a long time. Second, the exemption is part of a larger tax policy of exempting

charitable, scientific, educational, etc. institutions. Finally, the exemption diminishes the administrative contacts between church and state. N.Y.'s tax credit plan has no long history. It is designed for one purpose: To do what the Court has held it may not do directly, i.e., pay parochial schools tuition. The only groups benefited by this tax program are non-public schools, and they happened to be around 90% religiously affiliated schools. It is possible that tax credits will less politically divisive than direct subsidies, but this is not clear. The Pa. subsidy plan creates a special fund, supplied with 23% of the states cigarette taxes, which probably would be as insulated from frequent legislative controversy as a tax credit provision. But if the Court permits this sort of circumvention, I would guess that both tax credits and permanent fund subsidies could become more political and divisive than they may have been in the past.

In sum, I think the tax credit plan must be considered together with the subsidy programs. To sustain the former and not the latter would have the perverse effect to denying aid to those who need it most--parents who pay less in taxes than the state allows them in tuition tax credits. However, for reasons already set out, I think both plans must fall.

To put these tuition grant cases in perspective, I quote from Mr. Justice Frankfurter's concurrence in McCollum v. Board of Education, 333 U.S. 203, 214, 215. In that case the Court invalidated a state law permitting religious instruction in public schools, at the option of

each child's parents.

> As the momentum for popular education increased and in turn evoked strong claims for State support of religious education, contests not unlike that...in Virginia...appeared in various forms in [illegible] other States....In New York, the rise of the common schools led...to the barring of tax funds to church schools, and later to any school in which sectarian doctrine was taught....The upshot of these controversies, often long and fierce, is fairly summarized by saying that long before the Fourteenth Amendment subjected the States to new limitations, the prohibition of furtherance by the State of religious instruction [illegible] became the guiding principle, in law and feeling, of the American people....
>
> Separation in the field of education, then, was not imposed upon unwilling States by force of superior law. In this respect the Fourteenth Amendment merely reflected a principle then dominant in our national life. To the extent that the Constitution thus made it binding upon the States, the basis of the restriction is the whole experience of our people....

This statement fits in with my observation about Everson and [illegible] Allen: Underlying those cases was the fact that not only did the state aid go to a [illegible] specific [illegible] neutral, secular purpose, but the total [illegible] effect of the aid, both direct and indirect, was small in comparison [illegible] with the total financial burden of parochial schools. The plans here do not restrict state aid to neutral, secular purposes. But perhaps more important, they permit aid to a much greater extent than could ever be funneled through textbooks or transportation. [illegible] Allowing these plans would remove any constitutional barrier that I can perceive to total state financing of the cost of parochial school education. And this is true whether the payments are directly to schools, [illegible] to parents as subsidies, or as offsets to their state [illegible] tax liabilities.

If the state is permitted to pay for religiously affiliated schooling, then increased state involvment in such schools seems inevitable. Given this country's strong

aversion to discriminatory public institutions. I don't see how we could permit religious restrictions on pupils or teachers, or compulsory religious instruction, or many of the other sectarian aspects that permeate parochial and other religiously affiliated schools today. If the state pays for these schools, then it will have to regulate them. And both church and state will suffer.

TWR

4-15-73

No. 72-694 Committee for Public Education and Religious Liberty v. Nyquist — Argued 4/16/73

72-753
72-791
72-924

} All of these were consolidated — involve validity of 3 provisions of N. Y. law providing aid to private schools.

Pfeffer (for Committee for Pub. Ed. & Rel. Lib.)

He attacks the Tax Credit — agrees with Judge Hayes

Statute does not forbids use of school facilities — to be maintained under Sec. 1 — from use for religious purposes.

Majority of 3 D/Ct sustained Sec. 4/5 — as to Tax Credit & held it was severable. Now Pfeffer's argument addressed as to it & held — re showing Leg. purpose & intent, scope of aid, etc. Not severable.

Argued that tot. payments under G.I. Benefits for tuition (regardless of schools attended) is distinguished. Could have argued (Pfeffer says) that to deny G.I. right to attend neighborhood school might have impinged upon her religious liberty. Pfeffer conceded

Pfeffer raised new interesting point

→ court. of G.I. Benefits. (Money went directly to schools in both cases, tho later it went to G.I. for tuition.

Pfeffer (cont).

90% of private schools in N.Y. are Catholic - but when asked by C.J. if his argument would be different if only 10% were religious, Pfeffer said this makes no difference. Can't allow tax credits to any parents who send children to religious school,

If we uphold tuition grants, tax credits are also valid. Reverse of this also true.

A tax deduction would be OK.

Mrs. Conn (Asst AG N.Y.)

Argued validity of tax deduction.

Not a tax credit. Law provides for a deduction against gross income

A tax credit comes off the end figure. Here the deduction comes off the "beginning": % of deductions against subject to tax. % is not taken off the amount of tax.

A modification of gross income is within power of state to determine reasonable classifications for tax purposes

Tuition Corp (for N.Y. - Cont)

Tax form does not require ~~[illegible]~~ name of schools.

There is graduated deduction.

Those allowed if income is 25,000 or over. No over-lap with tuition grant - as this applies only if income is less than 5000, & this deduction commences with 5,000 income.

As to Sec 1 (maintenance), it applies only to schools in low income areas - only a fraction of total religious schools in N.Y.

Examples of govt aid to education: - ~~[illegible]~~ lunch funds, books, buses, ~~[illegible]~~ G.I Bill, etc. See list in N.Y. State Brief

Check this out

These laws are within police power of state. (But how does this support argument?)

Laws granted to low income children, - are in line with welfare & housing legislation

Schools may not discriminate on a/c of race. But if a school has a religious qualification, it still qualifies

Porter Chandler (for Pub Chancy in 1929)

Emphasis: statistical aimed to help parents – not schools.

750,000 non-public school children in N.Y.

Over 3 million " " " " "

300 schools are not religious related.

70,000 families have income at poverty level (mostly Spanish speaking)

N.Y. for 200 yrs has had a simple system of education including both public & private schools.

See Chandler's Brief for other types of "aid" to religion

Poor people are deprived of choice of sending children to private or religious schools.

Haggerty (for Cardenas, Majority Leader of N.Y. Senate)

18% of ed. N.Y. kids go to private schools.

Total cost of public school ed in N.Y. is about 5 billion.

Private schools are funded by churches, gifts, etc - with tuition paying only small fraction of total cost.

If N.Y. had to take over entire cost of ed. 750,000 add. children, the added tax burden would be significant.

Haggerty (cont).

The Cases are not isolated. They are part of total state contributions to pub. ed.

State could validly provide tuition grants to all parents whether children were in public or private schools. If this is true, why can't state make this classification?

Schools must be in compliance with Civil Rts Act.

Only 270 schools (under 15%) of all private schools are eligible to participate in the remedial program. There are schools with a sub. % of public funding on Fed workfare.

Pfeffer (Rebuttal)

There is no violation of 14th Amend. in a classification which 1st Amend compels.

In Wisc we mandate bus expenditures - applicable to all schools & children.

Cont. 4/18/73

Court ..... *Voted on* ....., 19...

Argued ....., 19... *Assigned* ....., 19...

Submitted ....., 19... *Announced* ....., 19...

No. 72-694
72-753
72-791
72-929

COMMITTE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY
v. NYQUIST

BRYDGES V. COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY

vs.

NYQUIST v. COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY

CHERRY v. COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	DIS	AFF	G	D		
Rehnquist, J.													
Powell, J.													
Blackmun, J.													
Marshall, J.													
White, J.													
Stewart, J.													
Brennan, J.													
Douglas, J.													
Burger, Ch. J.													

[APRIL 18, 1973]

72-694
-753
-791
-929

N.Y. Aid to Religious School Cases

C.J.

Three separate cases:

1st Maintenance - controlled by precedents.

Affirm on #10 Klein

2nd Tuition Grants - ~~Since~~ class 9. Goes only to impoverished parochials. Reversed judgment on #2.

3rd Tax Credits - no 9 on the high economic interest of state. C.J. sees parallel but, this tax credit & the IRC tax exemption & contributions credit not different in result from tax credit (But I note that ~~Court~~ contributions credit is part of a tax scheme which applies to wide spectrum of charitable & educational contributions, public & private.) Affirm as to Klein.

Douglas { Affirm on #1 & #2
Reverse on #3.

All these statutes are unconst. Agrees with Harlan in all 3 cases.

Brennan { Agrees with Douglas.

These are all devices to subsidize religious schools. Thus they violate 1st Amend.

All these would be OK as to non-religious schools.

U. of. School Cases

Stewart { Affirm re #1 & #2 / Reverse re #3 } tentative

Cases close & difficult

#1 is hard to distinguish from text book case (Allen) & Irving case (Everson)

But tentatively would vote with Douglas & Brennan

White - Reverse re Maintenance (#1) & Tuition (#2)

Affirm re #3

Marshall

[redacted] - Affirm #1 (Everson & Allen wrong)

Reverse #2

Reverse #3

Parent is required & Buffer between Church & State

Blackmun - Affirm #1 / Affirm #2 / Reverse #3 } Tentative

Powell - Agree with Blackmun, Stewart, Douglas & Brennan

Rehnquist - Agree with Byron

Dinner with Potter

Potter - suggests that I leave open spot of two tax deductions.

72-694 Committee v Nyquist 5/27/73
Key Notes on Cases Most Relevant

(1) Everson 330 U.S. 1.

(4) Lemon 403 U.S. 602

(3) Walz v Tax Comm 397 U.S. 664

(5) Tilton v. Richardson 403 U.S. 672

(2) Bd Ed v Allen 392 U.S. 236

Everson 330 U.S. 1 (Black) 5 to 4

Upheld reimbursement for bus transportation of all children except those attending schools operated for profit

Excellent on establishment w 1787 which prompted 1st Amend & the purpose - 8
Mutual persecution - 8, 9, 10

use - in trial re freedom of religion

Role of Va - 11

Use => Excellent quote on to taxes - 11

Madison's Memorial & Remonstrance - 12
Appendix - 63

Jefferson's - Bill of Religious Liberty - 12, 13 (quote), 28, 29, 31, 33

Hist. of Va Statutes

1st Amend. had same purpose as Va Bill of R/L - 15, 28, 29 (see note 1, p 28).

Quote

Superb summary by Black of meaning of 1st Amend - 15, 16 Extr. re to no tax, large or small - 16, 41

Jefferson: "wall of separation" - 16

Tension bet. the two clauses - 16
1st Amend does not exclude all aid to

Everson (cont - p 2)

Emphasizes that all children are provided bus fare - cites police protections, etc - 17

Rutledge, dissent

Use — Links 1st Amend with Va's statute & Jefferson - 28, 29, 31 (Madison characterization of Va Bill), 33-41

Madison sponsored 1st Amend 34

Use — Madison was co-author with Mason of religious clause in Va Decl of Rts 1776 - 34

White - 6 - 3
Harlan - concur
Black, Douglas
& Fortas dissent

Bd of Ed. v. Allen 392 U.S. 236

N.Y. law authorizing lending of
text books required for use in pvt
approved schools - to students of all schools - 239

Relies on Everson, & on the "test"
stated in Abington S/Dist v Schempp 374/203
-243

For all children, & only books
books approved for lending - 243-245

Pierce

Ct's discussion of Pierce is interesting - 245

Might quote in Amish section

→ Importance of private school ed - 247, 248

Harlan's brief concurrence - 249

Emphasizes possibility of
divisiveness - 249

Walz v Tax Comm 397 U.S. 664 — Burger – 8 to 1; Brennan + Harlan concur; Douglas dissent

Attack on validity of prop. tax exemptions for religious org. – 666

Tension – Cf Lemon struggled to set neutral course – 668

Strongly reaffirm Everson – 671 & Allen – 672

"Direct money grant subsidy would be a relationship pregnant with involvement." – Burger 673 (Good quote)

Brennan relies heavily on history – 680, 681

Avoidance of strife

Harlan – the key point – 694

Lemon v. Kurtzman 403 U.S 602. Burger - unanimous except White; Brennan dissent.

Two cases: R.I. & Pa

Rhode Island - supplements for all school teachers salaries by 15%
- limited Hwy teach only subjects offered in pub schools - 607, 608

Pa - has some but not all of R.I. features. State reimburses, under contracts bet. State & non-pub schools actual expenditures for salaries, secular courses, text books & instructional materials - 609

× × × ^

Summary of what has been provided - 616

Distinction bet. subsidizing teachers & books - 619

Dist. bet. aid to "directly to the school" & to the student or parent - 621

Excellent statement on divisive effect - quote - 622-(623)

Dissent

Wisely distinguished on long history - no such history to support Pa & R.I. laws - 624

Contribution

Tilton v. Richardson 403 U.S. 672 — Burger, Harlan, Stewart, Blackmun while concurred in result & dissented

Sustained Fed. Higher Ed. Facilities Act of 1963 except as to 20 yr. expiration period of limitations on use of facilities

Act applies to all colleges & universities - 676

In Walz & other cases "three main concerns" : "excessive financial support & active involvement" - 677. But no "single constant caliper" to measure the degree to which each of these factors exists - 677

Time Factor p. 19

Q re use in "primary or primary effect advances religion" - 679

Good ✓ Quite re dep. bet. primary & secondary religious role & aid at college level - 685, 686

lfp/ss 5/28/73

MEMORANDUM

TO: Mr. Larry A. Hammond DATE: May 28, 1973

FROM: Lewis F. Powell, Jr.

Nyquist

Here is your draft, in accordance with our talk.

Two points which I did not mention are as follows:

1. Either in this case or in the Pennsylvania case, or both, there was some emphasis - especially during oral argument - as to the analogy of the GI Bill of Rights under which the federal government provides "tuition grants" which are good for Catholic and other denominational educational institutions. There should certainly be a footnote on this argument in one of our cases.

The answers include: (i) as in Allen and Everson, the "aid" is all in the class - regardless of whether they attend state or private institutions; (ii) the standards are somewhat different with respect to higher or adult education than as to primary and secondary; and (iii) possibly, also, it is reasonable to argue that the danger of entanglement is less in the case of an act of Congress of national application than with respect to a state - although I would be inclined to use only the first two arguments.

2. I suggest that, at some appropriate place near the beginning of the opinion, you put in a footnote to the effect that we are concerned only with the effect of New York law on sectarian schools, as no question is raised as to the validity of the legislation with respect to nonsectarian private schools operated on a nondiscriminatory basis.

L. F. P., Jr.

ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

June 4, 1973

Dear Lewis:

Please join me in your opinions in 72-459, Sloan v. Lemon, 72-620, Crouter v. Lemon, and the Nyquist group, 72-694, 72-753, 72-791 and 72-929. Each is an excellent job.

William O. Douglas

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 4, 1973

RE: Nos. 72-459 & 72-620 Sloan & Crouter v. Lemon
Nos. 72-694, 72-753, 72-791 & 72-929 - Committee for Public Education, etc. v. Nyquist, etc.

Dear Lewis:

You have done a splendid job with these two opinions and I'm delighted to join both. I may add a word in concurrence but I'll defer decision on that until I've completed my dissent in Hunt v. McNair which I expect to do shortly.

Sincerely,

Bill

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 4, 1973

Re: Nos. 72-694, 72-753, 72-791 and 72-929,
Committee for Public Education v. Nyquist

Dear Lewis,

I think you have written a fine opinion in these cases, and I am glad to join it.

Sincerely yours,

P.S.

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 5, 1973

Re: Nos. 72-694, 72-753, 72-791; 72-729, 72-459, 72-620
Committee for Public Education v. Nyquist; Sloan
v. Lemon

Dear Lewis:

I definitely share your view that the New York statute is unconstitutional insofar as it provides direct grants to religious institutions for the maintenance of buildings utilized for religious purposes. However, I have not yet come to rest on the question of tuition aid given to the parents, either directly, or in the form of a tax credit, involved in both the New York and Pennsylvania cases.

I may write on both of these issues.

Sincerely,

T.M.

Mr. Justice Powell

cc: Conference

MEMORANDUM

TO: Mr. Larry A. Hammond DATE: June 5, 1973

FROM: Lewis F. Powell, Jr.

Religion Cases

Here is my copy of the first draft, with a number of corrections and minor editorial changes indicated.

These should be incorporated, together with others which you no doubt will have, in a subsequent circulation. I would defer this until other dissents and concurrence are in hand.

L. F. P., Jr.

ss

MEMORANDUM

TO: Mr. Larry A. Hammond DATE: June 5, 1973

FROM: Lewis F. Powell, Jr.

Religion Cases

Here is my copy of the first draft, with a number of corrections and minor editorial changes indicated.

These should be incorporated, together with others which you no doubt will have, in a subsequent circulation. I would defer this until other dissents and concurrence are in hand.

L. F. P., Jr.

ss

June 6, 1973

No. 72-694 Committee for Public Education v. Nyquist
No. 72-753 Anderson v. Committee for Public Education
No. 72-791 Nyquist v. Committee for Public Education
No. 72-929 Cherry v. Committee for Public Education

Dear Chief:

Thank you for your letter of this date commenting on Nyquist and Levitt. Your remarks prompt me to state in brief form my view on the question arising in connection with Nyquist of the constitutionality of genuine tax deductions. And, for whatever assistance it may provide, I will also outline my views in Levitt.

(1) Nyquist

First, I am glad to have you aboard as to Part II A of this opinion dealing with New York's maintenance and repair statute. As to Part II C -- the tax benefit program -- I endeavored to write the opinion in such a manner as to avoid specifically any negative inference as to the validity of genuine tax deductions for charitable contributions to churches or church schools. Indeed, I intended to indicate that such deductions would fit compatibly with my reading of Walz. To those ends, I stated (page 31 n. 39) that the New York law does not constitute a traditional tax deduction program and, therefore, that we do not decide whether such a deduction would withstand Walz analysis. Additionally, my treatment of Walz was designed to suggest that a deduction would survive scrutiny for at least two reasons: (1) charitable deductions enjoy the same sort of historical approval and widespread use as do property tax exemptions, see p. 33;

(ii) such deductions are available to a large class of taxpayers, including many who make contributions to charitable, nonreligious and noneducational organizations. See pp. 34-35. See also fn 28, pp. 23-24. Taken together, I think these factors suggest that, as in Walz, bona fide income tax deductions may properly be regarded as reflective of a state attitude of "benevolent neutrality" toward religious institutions.

(2) Levitt

In view of your remark re Levitt, it may prove helpful to you if I outline the view of this case I took at Conference. As you know, the New York law in question here makes lump sum, undifferentiated payments directly to nonpublic schools to pay for a number of services. Some of those services appear to be purely secular and clearly separate from the religious mission of nonpublic, sectarian schools, and their funding would be permissible under our cases, including Everson, Allan, Lemon and Tilton. Thus, I would not disapprove of payment for state-required, state-prepared tests such as the Regents' Tests. Their function is purely secular and their content is fixed in advance to assure no sectarian influence.

The remaining services, however, cannot pass a test of secularity. The bulk of the regular, periodic, teacher-prepared tests may be as much a part of the overall religious orientation and mission of a sectarian institution as are its teachers. Indeed, testing is an essential part of teaching itself. A state might just as well pay a part of teachers' salaries. I see no way to avoid here the prohibitions of effect and entanglement. Similarly, I would not approve general student attendance record keeping or general personnel qualification record keeping. These services are performed for religious classes and for teachers of religion, and indeed I do not see how the religious and secular can be divided here. This aspect of Levitt I think is controlled by our discussion of New York's maintenance and repair provisions in Nyquist. If the state may not finance the heating and lighting of classrooms in which the religious message is transmitted, it may not pay for the attendance records for those classes or for the qualification records of the instructor.

In summary, if the New York law were severable, I would strike down aid to general testing, general attendance record keeping

and teacher qualification record keeping. I would uphold, however, aid to state-prepared and state-mandated testing. My reading of the statute, however, inclines me to think it is not severable and that, as the DC concluded, the entire statute must fall. The $27 or $45 grants are not divided among the services for which they provide aid and I do not know how the District Court could arrive at an apportionment. Instead, I think the wiser course would be to state -- with some clarity -- in dictum in the opinion that the permissible forms of aid to state-required testing could be funded under a properly redrawn statute. For these reasons, and with these limitations in mind, I voted to affirm the District Court.

Sincerely,

The Chief Justice

LFP/gg

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 6, 1973

CONFIDENTIAL

Re: No. 72-694 - Committee for Public Education v. Nyquist
No. 72-753 - Anderson v. Committee for Public Education
No. 72-791 - Nyquist v. Committee for Public Education
No. 72-929 - Cherry v. Committee for Public Education

Dear Lewis:

I will join you in Part A and possibly in Part B of the above but I will dissent as to Part C -- assuming I have the parts correctly identified.

I regret I cannot agree with your reading of Walz or indeed of Lemon and Tilton. For me they are contrary, and Part C cuts a piece off each, particularly Walz. I suspect — indeed I would even predict -- that the "C" holding will lay the foundation to eliminate the deductibility of private contributions to churches. Under your opinion it would be difficult to sustain tax deductions for contributions to a church school. If so, what will happen to contributions to the church that sponsors that school. We know that all church schools receive large aid from the parent church and in many instances the school budget is simply a pocket of the church itself.

I suspect this holding means you will not vote for a disposition of Levitt that allows the state to pay for examination and record keeping the state requires. This may lead me to reassign Levitt. However, on this we can "have a word."

Regards,

WEB

Mr. Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 7, 1973

Re: No. 72-694 - Committee for Public Education v. Nyquist
No. 72-753 - Anderson v. Committee for Public Education
No. 72-791 - Nyquist v. Committee for Public Education
No. 72-929 - Cherry v. Committee for Public Education

Dear Lewis:

I cannot join your opinion beyond Part A and will perhaps write a dissent on at least Part C and probably B.

Regards,

WEB

Mr. Justice Powell

Copies to the Conference

6/14/73

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

Dear Lewis

There are several cases to which I would have been agreeable to reargument - Roeder was one until we found a "combination" that took care of both White + Rehnquist.

Hence I do not regard a suggestion to reargue as "subversive."

I do not suggest but

and even if correct, not fully articulated - I include my own Scott opinion in that, even though it is much easier than your several cases on the point

We have all had 14-15-16 opinions + that is just too many in one year.

Regards
Warren

I see some good reasons for reargueing the "church school aid" cases. Scott will now be only a plurality opinion. I would welcome a re-run next Term if all those cases went over. It has some advantages a man can begin in October with a headstart. Those cases trouble me + they fall in that category of May-June cases not fully thought through

MEMORANDUM

TO: Mr. Larry A. Hammond DATE: June 15, 1973

FROM: Lewis F. Powell, Jr.

Religion Cases

I see nothing in Bill Rehnquist's dissent (recirculated 6/14) that requires any response or change in our opinion.

What do you think?

L. F. P., Jr.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 18, 1973

Re: Nos. 72-694, 72-753, 72-791, 72-929 - Comm. for Public Education v. Nyquist, etc.

Dear Lewis:

You obviously have devoted much effort in the preparation of your opinion for these close and difficult cases. It is a good opinion.

I have finally reached the point where I wonder whether Allen was correctly decided. Perhaps it was, but I suspect now that it has suffered some erosion since it was handed down.

You asked me to let you know if I had any specific concern about the opinion, particularly in its relationship to Walz. I really have no suggestion. I wondered initially whether the paragraph beginning at the foot of page 34 might be omitted. I am not certain that the non-restriction factor is a significant one, but in any event you qualify it. I am content to have it in or out as you prefer.

Sincerely,

Harry

Mr. Justice Powell

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 18, 1973

Re: Nos. 72-694, 72-753, 72-791, 72-929 - Comm. for Public Education v. Nyquist, etc.

Dear Lewis:

Please join me in the opinion you have prepared for these cases.

I have one insignificant inquiry: inasmuch as Mr. Anderson has succeeded Mr. Brydges, as has been noted in the opinion, should the title in No. 72-753 be changed accordingly?

Sincerely,

Harry

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 19, 1973

Re: 72-694) - Comm. for Pub. Edu. v. Nyquist
72-753) - Anderson v. Comm. for Public Education
72-791) - Nyquist v. Comm. for Pub. Education
72-929) - Cherry v. Comm. for Pub. Edu.

72-459) - Sloan v. Lemon
72-620) - Crouter v. Lemon

Dear Byron:

Please join me in so much of your dissent as relates to the tuition grants and tax credits.

I am also joining with Bill Rehnquist's dissent on this basis.

Regards,

Warren

Mr. Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 19, 1973

Re: 72-694) - Comm. for Pub. Education v. Nyquist
72-753) - Anderson v. Comm. for Public Education
72-791) - Nyquist v. Comm. for Public Education
72-929) - Cherry v. Comm. for Public Education

Dear Bill:

Please join me in so much of your dissent as relates to the tuition grants and tax credits.

I am also joining with Byron's dissent on this basis.

Regards,

WEB

Mr. Justice Rehnquist

Copies to the Conference

June 19, 1973

Cases Held for No. 72-694 Committee for Public Education and Religious Liberty v. Nyquist; No. 72-753 Brydges v. Committee for Public Education and Religious Liberty; No. 72-791 Nyquist v. Committee for Public Education and Religious Liberty; and No. 72-929 Cherry v. Committee for Public Education and Religious Liberty

MEMORANDUM TO THE CONFERENCE:

The following cases are being held:

No. 72-1026 Durham v. McLeod (Appeal from South Carolina SC).

This case involves a challenge to the South Carolina Educational Assistance Act of 1971, which creates an Authority to issue bonds the proceeds of which will be available for loans to South Carolina residents to attend institutions of higher learning, both within and without the State. No restriction is placed on the type of higher educational institution attended or the courses studied, these decisions being left to the loan recipients. The loans may be guaranteed by the Authority to the extent of its resources (a revolving loan fund is created) but not by the State.

The statute was attacked on Establishment grounds because it contains no restrictions barring a student from attending a sectarian institution or pursuing a sectarian course of study. The State Supreme Court upheld the law and the appeal to this Court has been held for decision of the tuition grant issues in Nyquist and Sloan. The statute which appears to be closely analogous to the G. I. Bill, which we suggested in footnote 28, pp. 23-24 of Nyquist, is analytically distinct from the

grants in New York and Pennsylvania. Because of the breadth of the benefitted class, because of the fact that this case involves higher education, and because the statutory enactment holds no genuine prospect for political divisiveness, I think this case distinguishable and will vote either to dismiss or affirm.

No. 71-1864, Essex v. Wolman (Appeal from USDC SD Ohio).

This is a petition for rehearing from the State of Ohio in this case which the Court summarily affirmed last fall. The only ground for rehearing is the claim that it would be unfair to uphold Pennsylvania's and New York's tuition grant programs after having affirmed the District Court's decision holding unconstitutional Ohio's tuition grant scheme. In view of the disposition of Sloan and Nyquist, this petition for rehearing should now be denied.

No. 72-1139, Kosydar v. Wolman (USDC SD Ohio).

This is an appeal from a decision by a three-judge federal court in Ohio holding an Ohio tax credit program to be in violation of the Establishment Clause. This case has been held for Nyquist. Appellants rely on the District Court opinion in Nyquist, which our opinion reverses. I see no significant differences between Ohio's and New York's laws and will, therefore, vote to affirm this case. (It should be noted that no response was requested and none has been received. In view of my suggested disposition I do not regard this fact as significant.)

A-1164, Marlburger v. Public Funds for Public Schools of New Jersey (USDC D NJ)

On May 29, 1973, the Court granted a stay of a preliminary injunction issued by the USDC D NJ "pending further order of this Court." It was my understanding that the stay was, in effect, a means of "holding" this matter until the several religion cases were resolved. In light of Nyquist, Sloan and Levitt, I am now of the view that the stay should be vacated and the preliminary injunction reinstated.

The DC preliminarily enjoined State implementation of its 1971 Nonpublic Elementary and Secondary Education Act. The Act has two primary parts. Section 5 provides reimbursement to parents who send their children to nonpublic schools for "textbooks, instructional materials, and supplies." The grants are $10 for each elementary school child and $20 for each secondary school child. Section 6 provides that nonpublic schools may acquire secular "supplies, instructional materials, equipment and auxiliary services" from the State. The details of each program are discussed in Mr. Ripple's memorandum circulated prior to the initial consideration of this application.

The DC balanced the traditional factors in assessing whether a preliminary injunction should be granted: likelihood of success on the merits; irreparability of harm; potentiality of harm to the interests represented by plaintiffs; and assessment of the "public interest." Central to the DC's conclusion was its judgment that both sections of the Act would probably be held in violation of the Establishment Clause. Each section, in the DC's analysis, ran afoul of (1) the "effects" test, (2) the "administrative entanglements" test, and (3) the political divisiveness aspect of the entanglements inquiry. While I have little doubt about the bulk of the DC's conclusions, I do have some question about the constitutional propriety of the provision of "auxiliary services" such as nursing care and remedial assistance. If such services were provided for all school children under a narrowly defined and limited program, I think our cases might support a finding of constitutionality. However, as merely one segment of a larger aid program, and lacking sufficient detail to assure that it can be implemented entirely on the secular side of nonpublic schools without raising entanglements problems, I do not disagree with the DC's judgment of likely unconstitutionality. The stay should, in my view, be vacated.

L. F. P., Jr.

ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 20, 1973

Re: Nos. 72-694, 72-753, 72-791 & 72-929 - Committee for Public Education v. Nyquist, et al.

Nos. 72-459 & 72-620 - Sloan v. Lemon, et al.

Dear Chief:

Please join me in your circulation of June 19, in which you concur in part and dissent in part.

Sincerely,

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 20, 1973

Re: Nos. 72-694, 72-753, 72-791 & 72-929 - Committee for Public Education v. Nyquist, et al.

Nos. 72-459 & 72-620 - Sloan v. Lemon, et al.

Dear Byron:

Please join me in your dissent insofar as it relates to the tuition grants and tax credits.

Sincerely,

WHR

Mr. Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 20, 1973

Re: Nos. 72-694, 72-753, 72-791 & 72-929,
Committee for Public Education v.
Nyquist

Nos. 72-459 & 72-620, Sloan v. Lemon

Dear Chief:

Please join me in your opinion in these cases insofar as it dissents from the invalidation of the New York and Pennsylvania tuition grant and tax relief programs.

Sincerely,

The Chief Justice

Copies to Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 20, 1973

Re: Nos. 72-694, 72-753, 72-791 and 72-929,
Committee for Public Education v.
Nyquist

Dear Bill:

Please join me in your dissenting opinion in these cases.

Sincerely,

Mr. Justice Rehnquist

Copies to Conference

Tony

4/26/73

join Part A dissent in Part C & Majority in Part B dissent in 459 & 620 Concurring in part and dissenting in Part 1st draft 6/19/73	join 1st p 6/4/73	join 1st p 6/4/73 majority opinion	join 1st p 6/4/73	dissent typed draft 6/19/73 join CJ 6/20/73 join WHR 6/20/73 1st draft 6/21/73	join 1st 6/13/73	join ~~HAB~~ 6/18/73	dissent 1st draft typed draft 6/8/73 1st printed draft 6-5-73 2nd draft 6/14/73 join BJW 6/14/73 join CJ 6/20/73

join BJW 6/11/73

join WHR 6/11/73

1st proposed draft 6/6/73

Decided June 25, 1973

72-694, 72-753, 72-791, 72-929 Comm. Pub. Educ. v. Nyquist, Cherry, Anderson

72-459: 72-620 Sloan v. Lemon

Allen and Everson differ from the present case in a second important respect. In both cases the class of beneficiaries included all school children, those in public as well as those in private schools. See also Tilton v. Richardson, supra, in which federal aid was made available to all institutions of higher learning, and Walz v. Tax Commission, supra, in which tax exemptions were accorded to all charitable, nonprofit institutions. Because of the manner in which we have resolved the tuition-grant issue, we need not decide whether this factor might differentiate the present case from a case involving tuition vouchers or scholarships made available without regard to the public or nonpublic nature of the institution benefitted. See Wolman v. Essex, 342 F. Supp. 399, 412-413 (DCSD Ohio, 1972), aff'd, 409 U.S. 808 (1972).

Thus, our decision today does not compel, as appellees have contended, the conclusion that the educational assistance provisions of the "G.I. Bill," 38 U.S.C. § 1651, impermissibly advance religion in violation of the Establishment Clause. See also n. 23, supra.

any of the evils against which that Clause protects. Primary among those evils have been "sponsorship, financial support, and active involvement of the sovereign in religious activity." Walz v. Tax Commission, supra, at 668; Lemon v. Kurtzman, supra, at 612.

Like the case before us today, most of the cases coming to this Court raising Establishment Clause questions have involved the relationship between religion and education. Among these religion-education precedents two general categories of cases may be identified, those dealing with religious activities within the public schools,[15/] and those touching on matters of public aid to sectarian educational institutions.[16/] While the New York legislation places this case in the latter category, its resolution requires consideration not only of the several aid-to-sectarian-education cases but also of our other education precedents and of several important non-education cases. For the now well defined three-part test that has emerged from our decisions is a product considerations derived from

FOOTNOTES

1. Madison's Memorial and Remonstrance was the catalytic force occasioning the defeat in Virginia of an Assessment Bill designed to extract taxes in support of teachers of the Christian religion. See Everson v. Board of Educ., 330 U.S. 1, 28, 33-41 (1947) (Rutledge, J., dissenting).

2. Madison's often quoted declaration is reprinted as an appendix to the dissenting opinions of Mr. Justice Rutledge and MR. JUSTICE DOUGLAS in Everson v. Board of Educ., 330 U.S. at 63, 65; and Walz v. Tax Comm'n, 397 U.S. 664, 700, 719, 721 (1970), respectively.

2.a. Walz v. Tax Comm'n, supra, at 668.

3. The motion was granted in favor of Mr. Earl W. Brydges. Upon his retirement in December 1972, his successor, Mr. Warren M. Anderson, was substituted in his place.

4. N.Y. Laws 1972, Ch. 414, § 1, amending N.Y. Educ. Law, Art. 12, §§ 549-553 (McKinney 1972).

5. N.Y. Laws 1972 Ch. 414, § 2, amending N.Y. Educ. Law, Art. 12-A, §§ 559-563 (McKinney 1972)

6. N Y Laws 1972, ch. 414, §§ 3, 4 & 5, amending, N Y Tax Law, §§ 612(c), 612 (j) (McKinney 1972).

7. Section 5 contains the following table:

8. The following computations were submitted by Senator Brydges, who has been replaced as intervenor by his successor, Senator Anderson:

9. Comm. for Public Educ. & Religious Liberty v. Levitt, 342

10. In the fall of 1969, there were 2038 nonpublic schools in New York State; 1,415 Roman Catholic; 164 Jewish; 59 Lutheran; 49 Episcopal; 37 Seventh Day Adventist; 18 other church-affiliated; 296 without religious affiliation. N.Y. State Educ. Dep't, Financial Support -Nonpublic Schools 4 (1969).

11. No. 72-694, Committee for Public Education and Religious Liberty v. Nyquist.

12. No. 72-791, Nyquist v. Committee for Public Education and Religious Liberty.

13. No. 72-929, Cherry v. Committee for Public Education and Religious Liberty.

14. No. 72-753, Anderson v. Committee for Public Education and Religious Liberty.

15. McCollum v. Board of Educ., supra ("release time" from public education for religious education); Zorach v. Clauson, 343 U.S. 306 (1952) (also a "release time" case); Engel v. Vitale, 370 U.S. 421 (1962) (prayer reading in public schools); School Dist. of Abington v.

Epperson v. Arkansas, 393 U.S. 97 (1968) (anti-evolutionary limitation on public school study).

16. Everson v. Board of Educ., supra (bus transportation); Board of Educ v. Allen, 392 U.S. 236 (1968) (textbooks); Lemon v. Kurtzman, supra (teacher's salaries, textbooks, instructional materials); Earley v. ~~Dellmo~~ DiCarlo, 403 U.S. 602 (1971) (teachers' salaries); Tilton v. Richardson, 403 U.S. 672 (1971) (secular college facilities).

17. The plurality in Tilton was careful to point out that there are "significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools." Id. at 685. See Hunt v. McNair, ante.

18. The pertinent section reads as follows:

> "In order to meet proper health, welfare and safety standards in qualifying schools for the benefit of the pupils enrolled therein, there shall be apportioned health, welfare and safety grants by the commissioner to each qualifying school for the school years beginning on and after July first, nineteen hundred seventy-one, an amount equal to the product of thirty dollars multiplied by the average daily attendance of pupils receiving instruction in such school, to be applied for costs of maintenance and repair. Such apportionment shall be increased by ten dollars multiplied by the average daily attendance of pupils receiving instruction in a school building constructed prior to nineteen hundred forty-seven. In no even shall the per pupil annual allowance computed under this section exceed fifty per centum of the average per pupil cost of equivalent maintenance and repair in the public schools of the state on a state-wide basis, as determined by the commissioner, and in no event shall the apportionment to a qualifying school exceed the amount of expenditures for maintenance and repair of such school as reported pursuant to section five hundred fifty-two of this article." N. Y. Educ. Law, Art. 12, § 551 (McKinney 1972) (emphasis supplied).

19. Similarly, in Tilton federal construction grants were limited to paying 50% of the cost of erecting any secular facility.

In striking from the law the 20-year limitation the Court was

concerned lest any federally-financed facility be used for religious purposes at any time. It was plainly not concerned only that at least 50% of the facility, or 50% of its life, be devoted to secular activities. Had this been the test there can be little doubt that the 20-year restriction would have survived.

20. Allen and Everson differ from the present case in a second important respect. In both cases the class of beneficiaries include all school children, those in public as well as those in private schools. See also Tilton v. Richardson, supra, in which federal aid was made available to all institutions of higher learning, Walz v. Tax Commission, supra, in which tax exemptions were were accorded to all charitable, nonprofit institutions. Because of the manner in which we have resolved the tuition-grant issue, we need not decide whether this factor might differentiate the present case from a case involving tuition vouchers or scholarships made available without regard to the public or nonpublic nature of the institution benefitted. See Wolman v. Essex, 342 F. Supp. 399, 412-413 (DCSD Ohio, 1972), aff'd, 409 U.S. 808 (1972).

21. The forms of aid involved in Everson, Early v. DiCenso, and Lemon, were all given as "reimbursement" yet not one line in any of those cases suggests that this factor was of any constitutional significance.

22. Brief of Appellee Warren M. Anderson, at 25.

23. Id.

24. Id.

25. N. Y. Educ. Law, at 12-A, § 559(2) (McKinney 1972) (legislative finding supporting tuition reimbursement).

25a. "[T]he basic purpose of these provisions . . . is to insure that no religion is sponsored or favored, none commanded, and none inhibited." Walz v. Tax Commission, supra, at 669.

26. Again, as with the grants for maintenance and repair, our holding that this form of aid transcends the second part of the test because it has the effect of advancing religion, renders consideration of matters of entanglement unnecessary.

27. See n. ___ supra.

28. The estimated-benefit table is reprinted in n. ___, supra.

29. The New York program, therefore, is clearly not a program granting tax deductions, since the amount of the modification is unrelated to the amount actually paid, is given as aid to a class of persons who have expended funds to acquire a service - nonpublic education - rather than in recognition of a charitable donation made, and, indeed, is granted in addition to any such deductions for charitable contributions. We do not have before us in this case, then, the as yet undecided question whether genuine tax deductions offend the Establishment Clause.

30. Appellants conceded in their brief that "should the Court decide that Section 2 of the Act does not violate the Establishment Clause, we are unable to see how it could hold otherwise in respect to Sections 3, 4 and 5." Brief of Appellants, at 42-43. We agree that, under the facts of this case, the two are legally inseparable and that the affirmative of appellants' statement is also true, i.e. if section 2 does violate the Establishment Clause so, too, do the sections conferring tax benefits.

31. The separate opinions of Mr. Justice Harlandand

MR. JUSTICE BRENNAN also emphasized the historical acceptance

of tax-exempt status for religious institutions. See 397 U. S., at

680, 694.

No. 72-694, Committee For Public Education and Religious Liberty v. Nyquist

MR. JUSTICE POWELL delivered the opinion for the Court.

This case raises a challenge to the constitutionality under the Establishment Clause of the First Amendment of a recently promulgated New York law whose several provisions provide forms of financial assistance to elementary and secondary nonpublic schools in that State. Because the case involves an intertwining of societal and constitutional issues of great importance, our task is a delicate one and we approach it with circumspection.

James Madison, in his famous Memorial and Remonstrance Against Religious Assessments,[1] admonished that a "prudent jealousy" for religious freedoms required that [redacted] never [redacted] become "entangled . . . in precedents."[2] His strongly held convictions, coupled with the equally closely held beliefs of Thomas Jefferson and others among the Founders, are reflected in the first clauses of the First Amendment of the Bill of Rights, which

and the seemingly absolute language of the Clauses,[2a/] this Nation's history has not been one of entirely sanitized separation between Church and State. It has never been thought either possible or desirable to enforce a regime of total separation, and as a consequence, cases arising under these Clauses have [redacted] presented, especially in the last quarter century, some of the most far-reaching and complex questions to come before this Court. Those cases have occasioned the most eloquent and thoughtful scholarship of this Court's most respected former Justices, including Justices Black, Frankfurter, Harlan, Jackson, and Rutledge, and Chief Justice Warren.

As a result of these numerous decisions and opinions under the Religion Clauses it may no longer be said that they are free of "entangling" precedents. Neither, however, may it be said that Jefferson's metaphoric "wall of separation" between Church and State has [redacted] become "as winding as the famous serpentine wall" he designed for the University of [redacted]

and the contours of our inquiry are now clearly defined. Our task, then, becomes one of assessing New York's several forms of aid in the light of principles already delineated.

I

I

In may 1972, the Governor of New York signed into law several amendments to the State's Education and Tax Laws. The first five sections of these amendments established three distinct financial aid programs for nonpublic elementary and secondary schools. Almost immediately after the passage of these measures a complaint was filed in the United States District Court for the Southern District of New York challenging each of the three forms of aid as violative of the Establishment Clause. The plaintiffs were an unincorporated association, known as the Committee for Public Education and Religious Liberty (PEARL), and several individuals who were residents and taxpayers in New York, some of whom had children attending public schools. Named as defendants were the State Commissioner of Education, the Comptroller, and the Commissioner of Taxation and Finance. Motions to intervene on behalf of defendants were granted to a group of parents with children enrolled in nonpublic schools, and to the Majority Leader and President Pro Tem.

Court were resolved on the basis of the pleadings and the court's decision, however, turned on the constitutionality of the several provisions on their face.

The first section of the challenged enactment, entitled "Health and Safety Grants for Nonpublic School Children," provides for direct money grants from the State to "qualifying" nonpublic schools to be used for the "maintenance and repair of . . . school facilities and equipment to ensure the health, welfare and safety of enrolled pupils."[4/] A "qualifying" school is any nonpublic, nonprofit elementary or secondary school that "has been designated during the [immediately preceding] year as serving a high concentration of pupils from low-income families for purposes of Title IV of the Federal Higher Education Act of 1965 (20 U.S.C. § 425)." Such schools are entitled to receive a grant equalling $30 per pupil, per school year, and $40 per pupil if the facilities are more than 25 years old. Each school is required to submit to the Commissioner of Education an audited

maintenance and repair services in the public schools, and in no event may the grant to nonpublic qualifying schools exceed 50% of that figure.

"Maintenance and repair" is defined by the statute to include "the provision of heat, light, water, ventilation and sanitary facilities, cleaning, janitorial and custodial services; snow removal; necessary upkeep and renovation of buildings, grounds and equipment; fire and accident protection; and such other items as the commissioner may deem necessary to endsure the health, welfare and safety of enrolled pupils." This section is prefaced by a series of relevant legislative findings which shed light on the State's purpose in enacting the law. These findings conclude that the State "has a primary responsibility to ensure the health, welfare and safety of children attending . . . nonpublic schools," that the "fiscal crisis in nonpublic education . . . has caused a diminution of proper maintenance and repair programs, threatening the health, welfare and safety of nonpublic school children" in low-income urban areas

has the right to make grants for maintenance and repair expenditures which are clearly secular, neutral and non-ideological in nature."

The remainder of the challenged legislation--sections 2 through 5--is a single package captioned the "Elementary and Secondary Education Opportunity Program" and is composed, essentially, of two parts, a tuition grant program and a tax benefit program. Section 2 establishes a limited plan providing tuition reimbursements to parents of children attending elementary or secondary nonpublic schools. To qualify under this section the parent must have an annual taxable income of less than $5,000. The amount of reimbursement is limited to $50 per each grade school child and $100 for each child in high school. However, each parent is required to submit to the Commissioner of Education a verified statement containing a receipted tuition bill, and the amount of State reimbursement may not exceed 50% of that figure. No restrictions are imposed on the use of the funds by the reimbursed

dedication to the "vitality of our pluralistic society," the findings state that a "highly competitive and diverse alternative to public education is not only desirable but indeed vital to a state and nation that have continually reaffirmed the value of individual differences." The findings further emphasize that the right to select among alternative educational systems "is diminished or even denied to lower-income families, whose parents, of all groups, have the least options in determining where their children are to be educated." Turning to the public schools, the findings state that any "precipitous decline in the number of nonpublic school pupils will cause a massive increase in public school enrollment and costs," an increase that would "aggravate an already serious fiscal crisis in public education" and would "seriously jeopardize quality education for all children." Based on these premises, the statute asserts the State's right to relieve the financial burden of parents who send their children to nonpublic schools through this tuition reimbursement program.

The remainder of the "Elementary and Secondary Education Opportunity Program," contained in section 3, 4 and 5 of the challenged law,[6] is designed to provide a form of tax relief to those who fail to qualify for tuition reimbursement. These sections allow parents who have dependents attending nonpublic schools for whom they have paid at least $50 in tuition, to subtract designated amounts from their adjusted gross income for state income tax purposes. If the taxpayer's adjusted gross income is less than $9,000 he may subtract $1,000 per dependent, up to three. As the taxpayer's income approaches $25,000, the amount of the allowable exclusion diminishes. Thus, if a taxpayer has adjusted gross income of $23,000 he could subtract only $100 per dependent, and no exclusion is allowed to taxpayers whose income exceed $25,000.[7]

The amount of the exclusion is not dependent upon how much the taxpayer actually paid for nonpublic school tuition, and is given in addition to any deductions to which the taxpayer may be entitled for other religious or charitable contributions. As indicated in the memorandum from the Majority Leader and President Pro Tem of the Senate, submitted to each New York legislator during consideration of the bill, the actual tax benefits under these provisions were carefully calculated in advance.[8/] Thus, comparable tax benefits pick up at approximately the point at which tuition reimbursement benefits leave off.

~~tax provisions pick up at approximately the point at which tuition reimbursement benefits leave off~~ 8/

While the scheme of the enactment indicates that the purposes underlying the promulgation of the tuition reimbursement program should be regarded as pertinent as well to these tax law sections, section 3 does contain an additional listing of legislative findings. Those findings may be summarized as follows: contributions to religious, charitable and education institutions are already deductible from gross income; nonpublic educational institutions are accorded tax exempt status; such institutions provide educations for children attending them and also serve to relieve the public school system of the burden of providing for their education; and, therefore, the "legislature . . . finds and determines that similar modifications . . . should also be provided to parents for tuition paid to nonpublic elementary and secondary schools on behalf of their dependents."

Although no record was developed in this case,

in New York which would qualify for maintenance and repair grants under section 1 "all or practically all . . . are related to the Roman Catholic Church and teach Catholic religious doctrine to some degree." 350 F. Supp. 655, 661 The District court, relying on findings in a similar case recently decided by the same court, 9/ a profile of these sectarian, non-public schools similar to the one suggested in the plaintiffs' complaint. Qualifying institutions, under all three segments of the enactment, could be ones that

> "(a) impose religious restrictions on admissions; (b) require attendance of pupils at religious activities; (c) require obedience by students to the doctrines and dogmas of a particular faith; (d) require pupils to attend instruction in the theology or doctrine of a particular faith; (e) are an integral part of the religious mission of the church sponsoring it; (f) have as a substantial purpose the inculcation of religious values; (g) impose religious restrictions on faculty appointments; and (h) impose religious restrictions on what or how the faculty may teach." 350 F. Supp. at 663

Of course, the characteristics of individual schools

population, attend over 2,000 separate institutions, approximately 85% of which are church-affiliated. And while "all or practically all" of the 280 schools entitled to receive maintenance and repair grants "are related to the Roman Catholic Church and teach Catholic religious doctrine to some degree, id., at 661, institutions qualifying under the remainder of the statute include a substantial number of Jewish, Lutheran, Episcopal, Seventh Day Adventist, and other church-affiliated schools.[10/]

Plaintiffs argued below that because of the substantially religious character of the intended beneficiaries, each of the State's three enactments offended the Establishment Clause. The District Court, in an opinion carefully canvassing this Court's recent precedents, held unanimously that section 1 (maintenance and repair grants) and section 2 (tuition reimbursement grants) were invalid [illegible] As to the income tax provisions

Taken together these decisions dictate with some clarity that to pass muster under the Establishment Clause the state law in question, first, must reflect a clearly secular legislative purpose, e.g., Epperson v. Arkansas, 393 U.S. 97 (1968), second, must have a primary effect that neither advances nor inhibits religion, e.g., McGowan v. Maryland, supra; School District of Abington Township v. Schempp, 374 U.S. 203 (1963), and, third, must avoid excessive government entanglement with religion, e.g., Walz v. Tax Commission, supra. See Lemon v. Kurtzman, supra, at 612-613; Tilton v. Richardson, 403 U.S. 672, 678 (1971).

In applying these criteria to the three distinct forms of aid involved in this case, we need touch only briefly on the "secular legislative purpose" requirement. As the recitation of legislative purposes appended to New York's law indicates, each measure is adequately supported by legitimate, nonsectarian state interests. We do not question the propriety, and fully secular content, of New York's interest in preserving a healthy and safe educational environment for all of its school children. Nor do we have any reason either to doubt the validity of the State's interests in promoting a pluralism and diversity among its public and nonpublic schools, or to question the sincerity of its concern for an already overburdened public school system that might suffer in the event that any significant percentage of children presently attending nonpublic schools should abandon those schools in favor of the public schools.

challenged
if any of New York's/provisions are ~~##~~ inv. id,

it is because they offend either the second or third

of
criteria ~~##~~ effect and entanglement, and no amount

of laudable purpose is relevant on these aspects of the

test. Our focus, then, must be directed at each of

whether
the provisions separately to ascertain/~~#~~their

or the degree
necessary effects ~~###~~ of entanglement they

entail place them beyond the bounds of the First

Amendment.

The "maintenance and repair" provisions of section 1 authorize direct payments to nonpublic schools, virtually all of which are Roman Catholic schools in low income areas. The grants, totalling $30 or $40 per pupil depending on the age of the institution, are given largely without restriction on usage. So long as expenditures do not exceed 50% of comparable expenses in the public school system, it is possible for a sectarian elementary or secondary school to finance its entire "maintenance and repair" budget from State tax-raised funds. No attempt is made to restrict payments to these expenditures related to the upkeep of facilities used exclusively for secular purposes, nor do we think it possible within the context of these religion-oriented institutions to impose such restrictions. Nothing in the statute, for instance, bars a qualifying school from paying out of State funds the salary of its janitorial employees who maintain the school chapel, or the cost of repowering classrooms

PRINTER:

NOTE: This case covers the following numbers and should be styled accordingly: No. 72-694, 72-753, 72-791 and 72-929.

We not <u>not</u> wish our usual "Chambers Draft" but would prefer a first printed draft for circulation.

L. Hammond
#2485
#223

LAH/gg 5-25-73

No. 72-694, Committee For Public Education and Religious Liberty v. Nyquist

MR. JUSTICE POWELL delivered the opinion of the Court.

This case raises a challenge under the Establishment Clause of the First Amendment to the constitutionality of a recently enacted New York law which provides, in several ways, financial assistance to nonpublic elementary and secondary schools in that State. The case involves an intertwining of societal and constitutional issues of the greatest importance.

James Madison, in his Memorial and Remonstrance Against Religious Assessments,[1] admonished that a "prudent jealousy" for religious freedoms required that they never become "entangled . . . in precedents."[2] His strongly held convictions, coupled with those beliefs of Thomas Jefferson and

others among the Founders, are reflected in the first clauses of the First Amendment of the Bill of Rights, which ~~demand~~ state that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Yet, despite Madison's admonition and the ~~seemingly~~ absolute ~~language~~ "sweeps of they prohibition" of the Clauses, this Nation's history has not been one of entirely sanitized separation between Church and State. It has never been thought either possible or desirable to enforce a regime of total separation, and as a consequence, cases arising under these Clauses have presented ~~especially in the last quarter-century~~ some of the most ~~far-reaching and complex~~ perplexing questions to come before this Court. Those cases have occasioned ~~the~~ ~~finest eloquent~~ and thoughtful scholarship by several of this Court's most respected former Justices, including Justices Black, Frankfurter, Harlan, Jackson, Rutledge and Chief Justice Warren.

As a result of these numerous decisions and opinions ~~under the Religion Clauses~~ in the Religion Clauses it may no longer be said that ~~they~~ are free of "entangling" precedents. Neither, however, may it be said that

Jefferson's metaphoric "wall of separation" between Church and State has become "as winding as the famous serpentine wall" he designed for the University of Virginia. McCollum v. Board of Education, 333 U.S. 203, 232, 238 (1948) (Jackson, J., dissenting). Indeed, the controlling constitutional standards have become firmly rooted and the contours of our inquiry are now clearly defined. Our task, therefore, is to assess New York's several forms of aid in the light of principles already delineated.

I.

In May, 1972, the Governor of New York signed into law several amendments to the State's Education and Tax Laws. The first five sections of these amendments established three distinct financial aid programs for nonpublic elementary and secondary schools. Almost immediately after the signing of these measures a complaint was filed in the United States District Court for the Southern District of New York

challenging each of the three forms of aid as violative of the Establishment Clause. The plaintiffs were an unincorporated association, known as the Committee for Public Education and Religious Liberty (PEARL), and several individuals who were residents and taxpayers in New York, some of whom had children attending public schools. Named as defendants were the State Commissioner of Education, the Comptroller, and the Commissioner of Taxation and Finance. Motions to intervene on behalf of defendants were granted to a group of parents with children enrolled in nonpublic schools, and to the Majority Leader and President Pro Tem. of the New York State Senate. 16

By consent of the parties, a three-judge court was convened pursuant to 28 U.S.C. §§ 2281 and 2283, and the case was decided without an evidentiary hearing. (Because) The questions before the District Court were resolved on the basis of the pleadings, that and the court's decision, therefore, 2 turned on the constitutionality of ~~the several~~ each provisions on ~~their~~ its face. 3

The first section of the challenged enactment, entitled "Health

and Safety Grants for Nonpublic School Children," provides for direct money grants from the State to "qualifying" nonpublic schools to be used for the "maintenance and repair of . . . school facilities and equipment to ensure the health, welfare and safety of enrolled pupils."[7] A "qualifying" school is any nonpublic, nonprofit elementary or secondary school which "has been designated during the [immediately preceding] year as serving a high concentration of pupils from low-income families for purposes of Title IV of the Federal Higher Education Act of 1965 (20 U.S.C. §425)." Such schools are entitled to receive a grant of equalling $30 per pupil, per year, or $40 per pupil per year if the facilities are more than 25 years old. Each school is required to submit to the Commissioner of Education an audited statement of its expenditures for maintenance and repairs during the preceding year, and its grant may not exceed the total of such expenses. The Commissioner is also required to ascertain the average per-pupil cost for equivalent maintenance and repair services in the public schools, and in no event may the grant to nonpublic qualifying schools exceed 50% of that figure.

"Maintenance and repair" is defined by the statute to include "the provision of heat, light, water, ventilation and sanitary facilities, cleaning, janitorial and custodial services; snow removal; necessary upkeep and renovation of buildings, grounds and equipment; fire and accident protection; and such other items as the commissioner may deem necessary to ensure the health, welfare and safety of enrolled pupils." This section is prefaced by a series of relevant legislative findings which shed light on the State's purpose in enacting the law. These findings conclude that the State "has a primary responsibility to ensure the health, welfare and safety of children attending . . . nonpublic schools," that the "fiscal crisis in nonpublic education . . . has caused a diminution of proper maintenance and repair programs, threatening the health, welfare and safety of nonpublic school children" in low-income urban areas, and that "a healthy and safe school environment" contributes "to the stability of urban neighborhoods." For these reasons, the statute declares that "the state has the right

to make grants for maintenance and repair expenditures which are clearly secular, neutral and non-ideological in nature."

The remainder of the challenged legislation -- sections 2 through 5 -- is a single package captioned the "Elementary and Secondary Education Opportunity Program" which is composed, essentially, of two parts, a tuition grant program and a tax benefit program. Section 2 establishes a limited plan providing tuition reimbursements to parents of children attending elementary or secondary nonpublic schools. To qualify under this section the parent must have an annual taxable income of less than $5,000. The amount of reimbursement is limited to $50 per each grade school child and $100 for each child in high school. However, each parent is required to submit to the Commissioner of Education a verified statement containing a receipted tuition bill, and the amount of State reimbursement may not exceed 50% of that figure. No restrictions are imposed on the use of the funds by the reimbursed parents.

This section, like ~~section~~ 5, is prefaced by a series of legislative findings designed to explain the impetus for the State's action. Expressing a dedication to the "vitality of our pluralistic society," the findings state that a "highly competitive ~~xp~~ and diverse alternative to public education is not only desirable but indeed vital to a state and nation that have continually reaffirmed the value of individual differences." The findings further emphasize that the right to select among alternative educational systems "is diminished or even denied to lower-income families, whose parents, of all groups, have the least options in determining where their children are to be educated." Turning to the public schools, the findings state that any "precipitous decline in the number of nonpublic school pupils will cause a massive increase in public school enrollment and costs," an increase that would "aggravate an already serious fiscal crisis in public education" and would "seriously jeopardize quality education for all children." Based on these premises, the statute asserts the State's right to relieve

the financial burden of parents who send their children to nonpublic schools through this tuition reimbursement program. Repeating the declaration contained in ~~section~~ 1, the findings conclude that

Under these sections parents may subtract from their adjusted gross income for state income tax purposes a designated amount for each dependent for whom they have paid at least $50 in nonpublic school tuition.

allow parents who have dependents attending nonpublic schools, for whom they have paid at least $50 in tuition, to subtract designated amounts from their adjusted gross income for state income tax purposes. If the taxpayer's adjusted gross income is less than $9,000 he may subtract $1,000 ~~per each dependent, up to three.~~ for each of as many as three dependents. As the taxpayer's income ~~approaches $25,000~~ rises, the amount ~~of the allowance~~ he may subtract ~~allowable exclusion~~ diminishes. Thus, if a taxpayer has adjusted gross income of ~~$23,000~~ $15,000 he ~~could~~ may subtract only ~~$100~~ $400 per dependent, and ~~no deduction is allowed for taxpayers whose incomes exceed $25,000.~~ if his income is $25,000 or more, no deduction is allowed. The amount of the exclusion is not dependent

assisting only the secular functions of sectarian schools, served indirectly to promote the religious function by rendering it more likely

But an indirect or ~~##~~incidental effect beneficial to religious institutions has never been thought a sufficient defect to warrant the invalidation of a state law.

undeniable effects was to render it somewhat more likely that citizens would respect religious institutions and even attend religious services ~~themselves~~. Also, in Walz v. Tax Commission, supra, property tax exemptions for church property were held not violative of the Establishment Clause despite the fact that such exemptions relieved churches of a financial burden.

Tilton draws the line most clearly. While a bare majority was there persuaded for the reasons stated separately in the plurality opinion and in MR. JUSTICE WHITE's concurrence, that carefully limited construction grants to colleges and universities could be

sustained, the Court was unanimous in its rejection of one clause of the federal statute in question. ~~As a condition for any federal grant to a sectarian institution~~, Under that clause, the Government ~~might~~ was entitled to recover a portion of its grant in the event that the constructed facility ~~were~~ was used to advance religion by, for instance, converting the building to a chapel or otherwise allowing it to be "used to promote religious interests." 403 U.S., at 683. ~~However, this condition expired at the end of~~ But because the statute provided that the condition would expire at the end of 20 years ~~and~~ the facilities would thereafter be available for use by the institution for any ~~nonsecular~~ sectarian purpose. In striking down this provision, the plurality opinion emphasized that "[l]imiting the prohibition for religious use of the structure to 20 years obviously opens the facility to use for any purpose at the end of that period." Id. And in that event, "the original federal grant will in part have the effect of advancing religion." Id. See also id., at 692 (~~Douglas, J.~~ Douglas, J., dissenting), 659-661 (~~Brennan, J.~~ Brennan, J., dissenting), 665 n.1 (~~White, J.~~ White, J., concurring in the judgment).

If tax-raised funds may not be granted to institutions of higher learning

where the possibility exists that those funds will be used to construct a facility utilized for sectarian activities 20 years hence, a fortiori they may not be distributed to elementary and secondary sectarian schools[23] for the maintenance and repair of facilities without any limitations on their use. If the State may not erect buildings in which religious activities are to take place, it may not maintain such buildings or renovate them when they fall into disrepair.[24]

It might be argued, however, that while the New York "maintenance and repair" grants lack specifically articulated secular restrictions, the statute does provide a sort of statistical guarantee of separation by limiting grants to 50% of the amount expended for comparable services in the public schools. The legislature's supposition might have been that at least 50% of the ordinary public school maintenance and repair budget would be devoted to purely secular facility upkeep in sectarian schools. The shortest answer to this argument is that the statute itself allows.

as a ceiling, grants satisfying the entire "amount of expenditures for maintenance and repair of such school" providing only that it is neither more than $30 or $40 per pupil nor more than 50% of the comparable public school ~~budget~~ expenditures. Quite apart from the language of the statute, our cases make clear that a mere statistical judgment will not suffice as a guarantee that state funds will not be used to finance religious education. In Earley v. DiCenso, the companion case ~~from Rhode Island~~ to Lemon v. Kurtzman, supra, the Court struck down a ~~state law~~ Rhode Island authorizing salary supplements to teachers of secular subjects. The grants were not to exceed 15% of any teacher's annual salary. Although the law was invalidated on entanglement grounds, the Court made clear that the State could not have avoided violating the Establishment Clause by merely assuming that its teachers would succeed in segregating "their religious beliefs from their secular educational responsibilities." 403 U.S., at 619.

> "The Rhode Island Legislature has not, and could not, provide state aid on the basis of a mere assumption that secular teachers under religious discipline can avoid conflicts. The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion . . . . Id. (emphasis supplied).

Nor could the State of Rhode Island have prevailed by simply relying on the assumption that, whatever a secular teacher's inabilities to refrain from mixing the religious with the secular, he would surely devote at least 15% of his efforts to purely secular education, thus exhausting satisfying the State grant. It takes little imagination to perceive the extent to which States might openly subsidize parochial schools under such a loose standard of scrutiny. See also Tilton v. Richardson, supra.

What we have said demonstrates that New York's maintenance and repair provisions violate the Establishment Clause because their effect, inevitably, is to subsidize and advance the religious mission of sectarian ~~compatible~~ schools. We have no occasion, therefore, to consider the further question whether those provisions as presently

written would also fail to survive scrutiny under the entanglement aspect of the three-part test because assuring the secular use of all funds requires too intrusive and continuing a relationship between Church and State. Lemon v. Kurtzman, supra.

In the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid. As Mr. Justice Black put it quite simply in Everson:

> "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." Supra, at 16.
>
> 330 U.S.,

B

New York's tuition reimbursement program also fails the "effects" test, for much the same reasons that govern its maintenance and repair grants. The State program is designed to allow direct, unrestricted grants of $50 to $100 per child (but no more than 50% of tuition actually paid) as reimbursement to parents in low income brackets who send their children to nonpublic schools. To qualify, a parent must have earned less than $5,000 in taxable income and must present a receipted tuition bill from a nonpublic school, the bulk of which concededly are sectarian in orientation.

There can be no question that these grants could not, consistently with the Establishment Clause, be given directly to sectarian schools, since they would suffer from the same deficiency that renders invalid the grants for maintenance and repair: there is no system of surveillance or regulation guaranteeing that the funds will be used exclusively for secular, neutral, and non-ideological purposes. The controlling question here, then, is whether the fact

that the grants are delivered to parents rather than schools is of such significance as to compel a contrary result. The State and intervenor-appellees rely on Everson and Allen for their claim that grants to parents, unlike grants to institutions, respect the "wall of separation" required by the Constitution. It is ~~certainly~~ true that in those cases the Court upheld laws that provided benefits to children attending religious schools and to their parents. As noted above, in Everson parents were reimbursed for bus fares paid to send children to parochial schools, and in Allen textbooks were loaned directly to the children. But those decisions, ~~as our discussion in Part IIA, supra, emphasizes,~~ make clear that, far from providing a per se immunity from examination of the substance of the State's program, the fact that aid is disbursed to parents rather than to the schools is only one among many to be considered.

In Everson, the Court found the bus fare program analogous to the provision of services such as police and fire protection, sewage disposal, highways, and

Allen is founded upon a similar principle. The Court there repeatedly emphasized that upon the record in that case before the Court there was no indication that textbooks would be provided for anything other than purely secular courses. "Of course books are different from buses. Most bus rides have no inherent religious significance, while religious books are common. However, the language of [the law under consideration] does not authorize the loan of religious books, and the State claims no right to distribute religious literature . . . Absent evidence we cannot assume that school authorities . . . are unable to distinguish between secular and religious books or that they will not honestly discharge their duties under the law." 392 U. S., at 244-245.

The tuition grants here are subject to no such restrictions. There has been no endeavor "to guarantee the separation between secular and religious educational functions and to ensure that State financial aid supports only the former." Lemon v. Kurtzman, supra, at 613. Indeed, it is precisely the function of New York's law to provide assistance to private schools, the great majority of which are sectarian, ~~general assistance to religious schools~~. By reimbursing parents for a portion of their tuition bill

their financial burdens sufficiently to assure that they ~~remain attached to the nonpublic system.~~ And while the purposes for that aid - ~~a desire~~ to perpetuate a pluralistic educational environment and to protect the fiscal integrity of overburdened public schools - are certainly unexceptionable, ~~its effect~~ is unmistakably to provide financial support for nonpublic, sectarian institutions. Mr. Justice Black, ~~dissenting~~ dissenting in Allen, warned that,

> "[i]t requires no prophet to foresee that on the argument used to support this law others could be upheld providing for state or federal government funds to buy property on which to erect religious school buildings or to erect the buildings themselves, to pay the salaries of the religious school teachers, and finally to have the religious groups cease to rely on voluntary contributions of members of their sects while waiting for the government to pick up all the bills for the religious schools." 392 U.S., at 253.

His fears regarding religious buildings and religious teachers have not come to pass, Tilton v. Richardson, supra; Lemon v. Kurtzman, supra, and insofar as tuition grants constitute a means of "pick[ing] up . . . the bills for the religious schools," neither has his greatest fear materialized.

But the ingenious plans for channeling state aid to sectarian schools

Although we think it clear, for the reasons above stated, that New York's tuition grant program fares no better than its maintenance and repair program under the "effect" test, in view of the novelty of the question we will address briefly the subsidiary arguments made by the State officials and intervenors in defense of this particular statutory program.

First, it has been suggested that it is of controlling significance that New York's program calls for reimbursement for tuitions already paid rather than for direct contributions which are merely routed through the parents to the schools, in advance of or in lieu of payments by the parents. The parent is not a mere conduit, we are told, but is absolutely free to spend the money he receives in any manner he wishes. There is no element of coercion attached to the reimbursement, and no assurance that the money will eventually end up in the hands of religious schools. The absence of any element of coercion, however, is irrelevant to questions arising under the Establishment Clause. In School District of Abington

Township v. Schempp, supra, it was contended that Bible recitations in public schools did not violate the Establishment Clause because participation in such exercises was not coerced. The Court rejected that argument, noting that while proof of coercion might provide a basis for a claim under the Free Exercise Clause, it was not a necessary element of any claim under the Establishment Clause. Id., at 222-223. Mr. Justice Brennan's concurring views reiterate the Court's conclusion:

> "Thus the short, and for me sufficient, answer is that the availability of excusal or exemption simply has no relevance to the establishment question, if it is once found that these practices are essentially religious exercises designed at least in part to achieve religious aims. . . ." Id., at 288.

A similar inquiry governs here: if the grants are offered as an incentive to parents to send their children to sectarian schools by making unrestricted cash payments to them, the Establishment Clause is violated whether or not the actual dollars given eventually find their way into the sectarian institutions.[30] Whether the grant is labelled a reimbursement, reward, or subsidy, its substantive impact is still the same. In sum, we agree with the conclusion of the

District Court that "[w]hether he gets it during the current year, or as reimbursement for the past year, is of no constitutional importance." 350 F. Supp., at 668.

Second, [redacted] intervenor Rice the Majority Leader and President Pro Tempe of the State Senate, argues that it is significant here that the tuition reimbursement grants pay only a portion of the tuition bill, and an even smaller portion of the religious school's total expenses. The New York statute limits reimbursement to 50% of any parent's actual outlay. Additionally, [redacted] estimates that only 30% of the total cost of nonpublic education is covered by tuition payments with the remainder coming from "voluntary contributions, endowments and the like." On the basis of these two statistics, appellee reasons that the "maximum tuition reimbursement by the State is thus only 15% of the educational costs in the nonpublic schools." And, "since compulsory education laws of the State, by necessity require significantly more than 15% of school time to be devoted to teaching secular courses," the New York statute provides "a statistical

simply another variant of the argument we have rejected as to maintenance and repair costs, and _, and it fares no better here. Obviously, if accepted this argument would provide the foundation for massive, direct subsidization of sectarian elementary and secondary schools. Our cases, however, have long since foreclosed the notion that mere statistical assurances will suffice to sail between the Scylla and Charybdis of "effect" and "entanglement."

Finally, the State argues that its program of tuition grants should survive scrutiny because it is designed to promote the free exercise of religion. The State notes that only "low-income parents" are aided by this law, and without state assistance their right to have their children educated in a religious environment "is diminished or even denied." It is true, of course, that this Court has recognized the right to choose nonpublic over public education, Pierce v. Society of Sisters, 268 U. S. 510 (1925). It is also true that a State law interfering with a parent's right to have his child educated in a sectarian school would run afoul of the Free Exercise Clause. But

this Court has repeatedly recognized that tension inevitably exists between the Free Exercise and the Establishment Clauses, e.g., Walz v. Tax Commission, supra, and that it may often not be possible to promote the former without offending the latter. As a result of this tension, our cases require the State to maintain an attitude of "neutrality," neither "advancing" nor "inhibiting" religion. In its attempt to enhance the opportunities of the poor to choose between public and nonpublic education, the State has taken a step which can only be regarded as one "advancing" religion. However great our sympathy, Everson v. Board of Education, supra, at 18, for the burdens experienced by those who must pay public school taxes at the same time that they support other schools because of the constraints of "conscience and discipline," id., and notwithstanding the "high social importance" of the States purposes, Wisconsin v. Yoder, 406 U. S. 205, 214 (1972), neither may justify one eroding a slackening of the limitations of the Establishment Clause now firmly emplanted.

C

Sections 3, 4 and 5 establish a system for providing income tax benefits to parents of children attending New York's nonpublic schools. In this Court, the parties have engaged in a considerable debate over the what label best fits the New York law. Appellants insist that the law is, in effect, one establishing a system of tax "credits." Appellees—The State and the intervenors—reject that characterization and contend, instead, would label it that it is a system of income tax "modifications." The Solicitor General, in an amicus curiae brief filed in this Court, has referred throughout to the New York law as one authorizing tax "deductions." The District Court majority found that the aid was "in effect a tax credit," 350 F. Supp., at 672 (emphasis in original), and while we agree with this characterization and will refer to it as such in our ensuing discussion, it should be emphasized that this case is not governed by the label used to describe the statutory system. As the Court's opinion in Lemon v. Kurtzman, supra, at 614, Mr. Chief Justice Burger's opinion for the Court notes, constitutional analysis is not a "legalistic

Because of the peculiar nature of the benefit allowed, it is difficult to adopt any single traditional label lifted from the law of income taxation. It is, at least in its form, a tax deduction since it is an amount subtracted from adjusted gross income, prior to computation of the tax due. It's effect, as the District Court concluded, is more like that of a tax credit since the deduction is not related to the amount actually spent for tuition and is apparently designed to yield a predetermined amount of tax "forgiveness" in exchange for performing a specific act which the State desires to encourage--the usual attribute of a tax credit. We see no reason to ~~benefit.~~ ~~In~~ selecting one label over the other as ~~the case must not be governed by the name given to describe the statutory scheme.~~ the constitutionality of this hybrid benefit does not turn in any event on the label we accord it.

"examine the form of the relationship for the light that it casts on the substance."

These sections allow parents of children attending nonpublic elementary and secondary schools, if they do not receive a tuition reimbursement under section 2, and if they have an adjusted gross income of less than $25,000, to subtract from adjusted gross income a specified amount ~~in computing their taxable income for state income tax purposes~~. The amount of the deduction is unrelated to the amount of money actually expended by any parent on tuition, but is calculated on the basis of a formula contained in the statute. The formula is apparently the ~~direct~~ product of a legislative attempt to assure that each family would receive a ~~precisely determined~~ carefully estimated net benefit, and that the tax benefits would be comparable to, and compatible with, the tuition grants for lower income families. Thus, a parent who earns less than $5,000 is entitled to a tuition reimbursement of $50 if he has one child attending an elementary, nonpublic school, while a parent who earns ~~slightly~~ more (but less than $9,000) is entitled to have a

precisely equal amount taken off his tax bill. Additionally, a taxpayer's benefit under these sections is unrelated to, and not reduced by, any deductions to which he may be entitled for charitable contributions to religious institutions.

In practical terms there would appear to be little difference, for purposes of determining whether such aid has the "effect of advancing" religion, between the tax benefit allowed here and the tuition grant allowed under section 2. The qualifying parent under either program receives the same form of encouragement and reward for sending his children to nonpublic schools. The only difference is that one parent receives an actual cash payment while the other is allowed to reduce by an arbitrary amount the sum he would otherwise be obliged to pay over to the State. We have found no answer to Judge Hays' dissenting statement below that "[i]n both instances the money involved represents a charge made upon the state for the purpose of religious education." 350 F. Supp., at 675.

Appellees have sought to defend the tax credit portion of New

that it is of controlling significance that the grants or credits are directed to the parents rather than to the schools. This is the same argument made in support of the tuition reimbursements and rests on the same reading of the same precedents of this Court, primarily Everson and Allen. Our treatment of this issue in Part IIB, supra, at ___, is fully applicable here and requires rejection of this claim.

Second, appellees place their strongest reliance on Walz v. Tax Commission, supra, in which New York's property tax exemption for religious organizations was upheld. We think that Walz provides no support for appellees' position. Indeed, its rationale plainly compels the conclusion that New York's tax package violates the Establishment Clause.

Tax exemptions for church property have enjoyed an apparently universal approval in this country both before and after the adoption of the First Amendment. The Court in Walz surveyed the history of tax exemptions and found that each of the 50 states has long provided for tax exemptions for places of worship, and Congress has exempted

century, and congressional enactments in 1802, 1813, and 1870 specifically exempted church property from taxation. In sum, the Court concluded that "[f]ew concepts are more deeply embedded in the fabric of our national life, beginning with pre-Revolutionary colonial times, than for the government to exercise at the very least this kind of benevolent neutrality toward churches and religious exercise generally." Id., at 670-677. ~~By sharp contrast the State of New York has shown us~~ We know of no historical precedent for New York's recently promulgated tax relief program. Indeed, it seems clear that tax credits for parents whose children attend parochial schools are a recent innovation, occasioned by the growing financial plight of such nonpublic institutions and designed to provide aid in a manner not ~~incompatible~~ incompatible with the recent decisions of this Court. See Kosydar v. Wolman, ___ F. Supp. ___ (DCSD Ohio, 1972), juris. state. pending, No. 72-1139.

But historical acceptance without more would not ~~have~~ alone have sufficed as "no one acquires a vested or protected right in violation

Special tax benefits, however, cannot be squared with the principle of neutrality established by the decisions of this Court.

(A)

To the contrary, insofar as ~~they~~ such benefits render assistance to parents who send their children to sectarian schools, ~~the very~~ their and inevitable purpose ~~of such~~ effect are ~~benefits is~~ to aid and advance those religious institutions.

underlying that long history of tolerance of tax exemptions for religion that proved controlling. ~~As we have said repeatedly,~~ A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of "neutrality" toward religion. Yet Governments have not always pursued such a course and oppression has taken many forms, one of which has been taxation of religion. Thus, if taxation was regarded as a form of ~~hostility~~ "hostility" toward religion, "exemption constitute[d] a reasonable and balanced attempt to guard against those dangers." Id., at 673. Tax-credits, however, cannot similarly be justified as rooted in negative notions of avoidance of hostility toward religion. To the contrary, insofar as they educate the State's children, their very purpose is to aid and advance those religious institutions.

Apart from its historical foundations, Walz is a product of the same dilemma and inherent tension found in every government-aid-to-religion controversy. Maintenance of the tax exemption, to be sure, conferred a benefit, albeit indirect and incidental. Yet

but of a fiscal relationship designed to minimize involvement and entanglement between church and state. "The exemption," the Court emphasized, "tends to complement and reinforce the desired separation insulating each from the other." Id., at 676. Furthermore, And "[e]limination of the exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes." Id., at 674. The granting of a tax credit, unlike the extension of an exemption, would tend to increase rather than limit the involvement between Church and State.

~~Of course, New York has attempted to avoid excessive involvement but it has done so only by failing to ensure that credited funds do not become resources for the advancement of religion.~~

One further difference between tax exemptions for churches properties and tax credits benefits for parents should be noted. The challenged exemption challenged in Walz was not restricted to a class composed exclusively or even predominantly of religious institutions. Instead the exemption covered

As the parties here must concede, tax reductions authorized by this law flow primarily to the parents of children attending sectarian, nonpublic schools. Without intimating whether this factor alone might have controlling significance in another context in some future case, it should be apparent that in terms of the potential divisiveness of any legislative measure the narrowness of the benefitted class would be an important factor.

In conclusion, we find the Walz analogy unavailing, and in light of the practical similarity between New York's tax ~~credit~~ and tuition reimbursement programs, we hold that neither form of aid is sufficiently restricted to assure that it will not have the impermissible effect of advancing the sectarian activities of religious schools.

III.

Because we have found that the challenged sections have the impermissible effect of advancing religion, we need not consider whether such aid would yield an entanglement of the State with religion in the sense of "[a] comprehensive, discriminating, and continuing state surveillance." Lemon v. Kurtzman, 403 U.S. at 619. But the importance of the competing societal interests implicated in this case prompts us to make the further observation that, apart from any specific entanglement of the State in particular religious programs, assistance of the sort involved in this case carries grave potential for entanglement in the broader sense of continuing political strife over aid to religion.

Few would question most of the legislative findings supporting this statute. We recognized in Board of Education v. Allen, supra, 392 U.S., at 247, that "private education has played and is

playing a significant and valuable role in raising levels of knowledge, competency, and experience," and certainly private parochial schools ~~by far the most numerous of all private schools~~ have contributed importantly to this role. Moreover, the tailoring of the New York statute to channel the aid provided primarily to afford low income families the option of determining where their children are to be educated is most appealing.[42] There is no doubt that the private schools are confronted with increasingly grave fiscal ~~and funding~~ problems, and that ~~the~~ solving ~~of~~ these problems by increasing tuition charges forces parents to turn to the public schools, and this in turn as this legislation recognizes exacerbates the problems

of public education at the same time that it weakens support for the parochial schools.

These, in briefest summary, are the underlying reasons for the New York legislation and for similar legislation in other States. They are substantial reasons. Yet they must be weighed against the relevant provisions and purposes of the First Amendment, which safeguard the separation of Church from State and which have been regarded from the beginning as one of the most cherished features of our constitutional system.

One factor of recurring significance in this weighing process is the potentially divisive political effect of an aid program.

As Mr. Justice Black's opinion in Everson v. Board of Education, supra, emphasizes, competition among religious sects for political and religious supremacy has occasioned considerable civil strife, "generated in large part" by competing efforts to gain or maintain the support of government. Id., at 8-9. As Mr. Justice Harlan put it, "[w]hat is at stake as a matter of policy in Establishment Clause cases is preventing that kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point." Walz v. Tax Commission, 397 U.S., at 694 (concurring opinion).

The Court recently addressed this issue specifically and fully in Lemon v. Kurtzman. After describing the political activity and bitter differences likely to result from the state programs there involved, the Court said:

> "The potential for political divisiveness related to religious belief and practice is aggravated in these two statutory programs by the need for continuing annual appropriations and the likelihood of larger and larger demands as costs and population grow." ~~Supra, at 622~~ 403 U.S., at 623.

The language of the Court applies with peculiar force to the New York statute now before us. Section 1 (grants for maintenance) and Section 2 (~~Not~~ tuition grants) will require continuing annual appropriations. Sections 3, 4 and 5 (income tax relief) will not necessarily require annual reexamination, but the pressure for frequent enlargement of the relief is predictable. All three of these programs start out at modest levels: the maintenance grant is not to exceed $40 per pupil per year in approved schools; the tuition grant ~~is~~ provides parents not more

than $50 a year for each child in the first eight grades and $100 for each child in the high school grades; and the tax benefit, though more difficult to compute, is equally modest. But we know from long experience with both federal and state government that aid programs of any kind tend to become entrenched, to escalate in cost, and to generate their own aggressive constituencies. And the larger the class of recipients, the greater the pressure for accelerated increases.[44] Moreover, the state itself, concededly anxious to avoid assuming the burden of educating children now in private and parochial schools, has a strong motivation for increasing this aid as public school costs rise and population increases.[45] In this situation, where the underlying issue is the deeply emotional one of Church-State relationships, the potential for serious divisive political consequences needs no elaboration.

And while the prospect of such divisiveness may not alone warrant the invalidation of State laws that otherwise survive the careful scrutiny required by the decisions of this Court, it is certainly a "warning signal" not to be ignored. Id., at 625.

Our examination of New York's aid provisions, in light of all relevant considerations, compels the judgment that each, as written, has a "primary effect that advances religion" and offends the Constitutional prohibition against laws "respecting the establishment of religion." We, therefore, affirm the three-judge court's holding as to ~~sections~~ §§ 1 and 2, and reverse as to ~~sections~~ §§ 3, 4 and 5.

It is so ordered.

FOOTNOTES

1. Madison's Memorial and Remonstrance was the catalytic force occasioning the defeat in Virginia of an Assessment Bill designed to extract taxes in support of teachers of the Christian religion. See n. ___ supra. See also Everson v. Board of Educ., 330 U.S. 1, 28, 33-41 (1947) (Rutledge, J., dissenting).

2. Madison's often quoted declaration is reprinted as an appendix to the dissenting opinions of Mr. Justice Rutledge and MR. JUSTICE DOUGLAS in Everson v. Board of Educ., 330 U.S. at 63, 65, and Walz v. Tax Comm'n, 397 U.S. 664, 700, 719, 721 (1970), respectively.

3/ The provisions of the First Amendment have been made binding on the States through the Due Process Clause of the Fourteenth Amendment. See, e.g., Everson v. Board of Education, 330 U.S. 1, 8 (1947).

Walz v. Tax Comm'n, supra, at 668. Mr. CHIEF JUSTICE BURGER, writing for the Court, noted that

the purpose of the Clauses "was to state an objective, not to write a statute," and that "[t]he Court has struggled to find a neutral course between the two religion clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other." Id., ~~Supra~~ at 668, 669.

The existence, at this stage of the Court's history, of guiding principles etched over years of difficult cases, however, does not make our task today an easy one. For it is evident from the numerous opinions of the Court and of Justices in concurrence and dissent in the leading cases applying the Establishment Clause, that no "bright line" guidance is afforded. Instead, while there has been general agreement upon the applicable principles and upon the framework of analysis, the Court has recognized its inability to perceive with absolute clarity the "lines of demarcation in this extraordinarily sensitive area of constitutional law." Lemon v. Kurtzman, 403 U.S. 602, 612 (1971). And, at least insofar as questions of entanglements are involved, the Court has acknowledged that, as of necessity, the "wall" is not without bends and may constitute a "blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." Id., at 614.

6. The motion was granted in favor of Mr. Earl W. Brydges. Upon his retirement in December 1972, his successor, Mr. Warren M. Anderson, was substituted in his place.

7. N.Y. Laws 1972, Ch. 414, § 1, amending N.Y. Educ. Law, Art. 12, §§ 549-553 (McKinney 1972).

8. N.Y. Laws 1972, Ch. 414, § 2, amending N.Y. Educ. Law, Art. 12-A, §§ 559-563 (McKinney 1972).

9/ 6. N.Y. Laws 1972, ch. 414, §§ 3, 4 & 5, amending N.Y. Tax Law, §§ 612(c), 612 (j) (McKinney 1972).

7. Section 5 contains the following table:

If New York adjusted gross income is:	*The amount allowable for each dependent is:*
Less than $9,000	*$1,000*
9,000 -10,999	*850*
11,000—12,999	*700*
13,000—14,999	*550*
15,000 -16,999	*400*
17,000—18,999	*250*
19,000—20,999	*160*
21,000—22,999	*120*
23,000 24,999	*100*
25,000 and over	*—0—*

N.Y. Tax Law, § 612(j) (McKinney 1972).

11/ 8. The following computations were submitted by Senator Brydges, who has been replaced as intervenor by his successor, Senator Anderson:

If Adjusted Gross Income is	[illegible]	Estimated Net Benefit to Family		
		One child	Two children	Three or more
less than $ 9,000	$1[illegible]	$50.00	$100.00	$150.00
$ 9,000 - 10,999	[illegible]0	42.50	85.00	127.50
11,000 - 12,999	[illegible]	42.00	84.00	126.00
13,000 - 14,999	[illegible]	38.50	77.00	115.50
15,000 - 16,999	[illegible]	32.00	64.00	96.00
17,000 - 18,999	[illegible]	22.50	45.00	67.50
19,000 - 20,999	[illegible]0	15.00	30.00	45.00
21,000 - 22,999	[illegible]5	13.75	27.50	41.25
23,000 - 24,999	[illegible]0	12.00	24.00	36.00
25,000 and over	0	0	0	0

12/ 9. Comm. for Public Educ. & Religious Liberty v. Levitt, 342 F. Supp. 439, 440-441 (SDNY 1972), aff'd, _____ U.S. _____ (1973).

As indicated in the District Court's opinion, it has been estimated that 280 schools would qualify for such grants. The relevant criteria for determining eligibility are set out in 20 U.S.C. § 425, and the central test is whether the school is one "in which there is a high concentration of students from low-income families."

14 In the fall of 1968, there were 2038 nonpublic schools in New York State: 1,415 Roman Catholic; 164 Jewish; 59 Lutheran; 49 Episcopal; 37 Seventh Day Adventist; 18 other church-affiliated; 296 without religious affiliation. N.Y. State Educ. Dep't, Financial Support -Nonpublic Schools 4 (1969).

15 No. 72-694, Committee for Public Education and Religious Liberty v. Nyquist,

16 No. 72-791, Nyquist v. Committee for Public Education and Religious Liberty,

17 No. 72-753, Anderson v. Committee for Public Education and Religious Liberty,

18 No. 72-929, Cherry v. Committee for Public Education and

I examined at length in the majority and dissenting opinions in Everson

that led to

19/ Virginia's experience constitutes one of the greatest chapters in the history of this Country's adoption the essentially revolutionary notion of ~~almost complete~~ separation between Church and State. During the Colonial Era and into the late 1700's, the Anglican Church appeared firmly seated as the established church of Virginia. But in 1776, assisted by the persistent efforts of Baptists, Presbyterians, and Lutherans, the Virginia Convention approved a provision for its first constitution's Bill of Rights calling for the ~~full~~ free exercise of religion. The provision, drafted by George Mason and substantially amended by James Madison, stated "[t]hat religion . . . . and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore, all men are equally entitled to the free exercise of religion according to the dictates of conscience . . . ."

But the Virginia Bill of Rights contained no prohibition against the Establishment of Religion, and the next eight years were consumed in debate over the relationship between Church and State. In 1784, a bill, sponsored principally

72-74, required all persons to pay an annual tax "for the support of the Christian religion" in order that the teaching of religion might be promoted. Each taxpayer was permitted under the Bill to declare ~~to~~ which church he desired his share of the tax to receive. The Bill was not voted on during the 1784 session, and prior to the convening of the 1785 session Madison penned his "Memorial and Remonstrance against Religious Assessments," outlining in fifteen numbered paragraphs the reasons for his opposition to the Assessments Bill. The document was widely circulated and ~~helped create~~ inspired such overwhelming opposition to the Bill that it died during the ensuing session without reaching a vote. Madison's Memorial and Remonstrance also provided the necessary foundation for the immediate consideration and adoption of Thomas Jefferson's "Bill for Establishing Religious Freedom," which contained Virginia's first acknowledgement of the principle of total separation of Church and State. The core of that principle, as stated in the Bill, is that "no man shall be compelled to frequent

Memorial and Remonstrance guarantee of government neutrality toward religion recognized today as one of the cornerstones of the First

the Declaration of Independence and the founding of the University of Virginia, that he wished to have inscribed on his tombstone. Report of the Comm'n on Constitutional Revision, The Constitution of Virginia 100-101 (1969).

Both Madison's Bill of Rights provision on the free exercise of religion and Jefferson's Bill for Establishing Religious Freedom have remained in the Virginia Constitution, unaltered in substance, throughout that State's history. See Va. Const. Art. I, § 16, in which the two guarantees have been brought together in a single provision. For comprehensive discussions of the pertinent Virginia history, see L. Pfeffer, Church, State and Freedom 105-115 (1953); I. Brant, James Madison The Nationalist 1780-1787, 343-355 (1948).

public education for religious education); Zorach v. Clauson, 343 U.S. 306 (1952) (also a "release time" case); Engel v. Vitale, 370 U.S. 421 (1962) (prayer reading in public schools); School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963) (Bible reading in public schools); Epperson v. Arkansas, 393 U.S. 97 (1968) (anti-evolutionary limitation on public school study).

21 Everson v. Board of Educ., supra (bus transportation); Board of Educ v. Allen, 392 U.S. 236 (1968) (textbooks); Lemon v. Kurtzman, supra (teachers' salaries, textbooks, instructional materials); Earley v. DiCenso, 403 U.S. 602 (1971) (teachers' salaries); Tilton v. Richardson, 403 U.S. 672 (1971) (secular college facilities).

22 In discussing the application of these "tests", Mr. Chief Justice Burger noted in Tilton v. Richardson, supra, that "there is no single constitutional caliper that can be used to measure the precise degree" to which any one of them is applicable to the state action under scrutiny. Rather, these tests or criteria should be "viewed as guidelines" within which to consider "the cumulative criteria developed over many years and applying to a wide range

~~55~~. The plurality in Tilton was careful to point out that there are "significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools." Id, at 685. See Hunt v. McNair, ante.

24
~~23~~/ Our Establishment Clause precedents have recognized the special relevance in this area of Mr Justice Holmes' comment that "a page of history is worth a volume of logic." See Walz v. Tax Commission, supra, at 675-676 (citing New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921)). In Everson, Mr Justice Black surveyed the history during the pre-Revolutionary period of State involvement in, and support of, religion and concluded:

> "These practices became so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence. The imposition of taxes to pay ministers' salaries and to build and maintain churches and church property aroused their indignation. It was these feelings which found expression in the First Amendment." 330 U.S., at 11 (emphasis supplied).

The pertinent section reads as follows:

> "In order to meet proper health, welfare and safety standards in qualifying schools for the benefit of the pupils enrolled therein, there shall be apportioned health, welfare and safety grants by the commissioner to each qualifying school for the school years beginning on and after July first, nineteen hundred seventy-one, an amount equal to the product of thirty dollars multiplied by the average daily attendance of pupils receiving instruction in such school, to be applied for costs of maintenance and repair. Such apportionment shall be increased by ten dollars multiplied by the average daily attendance of pupils receiving instruction in a school building constructed prior to nineteen hundred forty-seven. In no event shall the per pupil annual allowance computed under this section exceed fifty per centum of the average per pupil cost of equivalent maintenance and repair in the public schools of the state on a state-wide basis, as determined by the commissioner, and in no event shall the apportionment to a qualifying school exceed the amount of expenditures for maintenance and repair of such school as reported pursuant to section five hundred fifty-two of this article." N. Y. Educ. Law, Art. 12, § 551 (McKinney 1972) (emphasis supplied).

26

Elsewhere in the opinion, the Court emphasized the necessity for the States of Rhode Island and Pennsylvania to assure, through careful regulation, the secularity of its grants:

> "The two legislatures . . . have also recognized that church-related elementary and secondary schools have a significant religious mission and that a substantial portion of their activities is religiously oriented. They have therefore sought to create statutory restrictions designed to guarantee the separation between secular and religious educational functions and to ensure that State financial aid supports only the former. All these provisions are precautions taken in candid recognition that these programs approved must be

limited to paying 50% of the cost of erecting any secular facility. In striking from the law the 20-year limitation, the Court was concerned lest any federally-financed facility be used for religious purposes at any time. It was plainly not concerned only that at least 50% of the facility, or 50% of its life, be devoted to secular activities. Had this been the test there can be little doubt that the 20-year restriction would have survived.

29/ Appellees, focusing on the term "principal or primary effect" which this Court has utilized in expressing the second prong of the three-part test, e.g., Lemon v. Kurtzman, supra, at 612, have argued that the Court must decide in this case whether the "primary" effect of New York's tuition grant program is to subsidize religion or to promote these legitimate secular objectives. We do not think that such metaphysical judgments are either possible or necessary. Our cases simply do not support the notion that a law found to have a "primary" effect to promote some legitimate end under the State's police power is immune from further examination to ascertain whether it also has the direct and immediate effect of advancing religion. In McGowan v. Maryland, supra, Sunday Closing Laws were upheld not because their effect was, first, to promote the legitimate interest in a universal day of rest and recreation and only secondarily to assist religious interests. Instead, approval flowed from the finding, based upon a close examination of the history of such

Allentown, Inc. v. McGinley, 366 U.S. 582, 598 (1961). Likewise, in Schempp the school authorities argued that Bible-reading and other religious recitations in public schools served, primarily, ~~the~~ secular purposes, including "the promotion of moral values, the contradiction to the material trends of the times, and the perpetuation of our institutions and the teaching of literature." 374 U.S., at 223. Yet, without discrediting these ends and without determining ~~which was primary and~~ whether they took precedence over the direct religious benefits, ~~which secondary,~~ the Court held such exercises incompatible with the Establishment Clause. See also 374 U.S., at 278-281 (Brennan, J., concurring) ~~and discussing the asserted secular purposes~~. Any remaining question about the contours of the "effect" criteria should have been resolved after the Court's decision in Tilton, in which the Court found the mere possibility that a federally-financed structure might be used for religious purposes 20 years hence was ~~found~~ unacceptable because constitutionally the grant might "in part have the effect of advancing religion." 403 U.S., at 683.

It may assist in providing an historical perspective

would have required Virginians to pay taxes to support religious teachers and which became the focal point of Madison's Memorial and Remonstrance, (see n. 19, supra,) contained the following list of secular purposes:

> "The general diffusion of Christian knowledge hath a natural tendency to correct the morals of men, restrain their vices, and preserve the peace of society . . . ." Everson v. Board of Education, 330 U.S. at 72 (Supplemental Appendix to dissent of Rutledge, J.)

Such secular objectives, no matter how desirable and irrespective whether judges might possess sufficiently sensitive calipers to ~~separate the "primary" from the subordinate~~, cannot serve today any more than they could 200 years ago to justify such direct and substantial ~~achieve the~~ advancement of ~~one~~ religion ~~or all religions~~. See, 1 Pfeffer, Church, State and Freedom 105-115 (1953).

ascertain whether the secular effects outweigh the sectarian benefit

[redacted]

39 27. The forms of aid involved in Everson, Early v. DiCenso, and Lemon, were all given as "reimbursement" yet not one line in any of those cases suggests that this factor was of any constitutional significance.

31 28. Brief of Appellee Warren M. Anderson, at 25.

32 29. Id.

33 30. Id.

34 31. N. Y. Educ. Law, Art. 12-A, § 559(2) (McKinney 1972) (legislative finding supporting tuition reimbursement).

35 32. "[T]he basic purpose of these provisions . . . is to insure that no religion is sponsored or favored, none commanded, and none inhibited." Walz v. Tax Commission, supra, at 669.

36 33. Again, supra, at [redacted], ~~Again, as with the grants for maintenance and repair,~~ since we conclude fails to meet our holding that this form of aid transcends the second part of the test because it has the effect of advancing religion, we need not renders consideration of matters of entanglement unnecessary.

37 34. See n. 10 supra.

38 35. The estimated-benefit table is reprinted in n. 11, supra.

39

Since the program here does not have the elements of a genuine tax deduction, such as for charitable contributions, we do not have before us, and do not decide, whether that form of tax benefit is constitutionally acceptable under the "neutrality" test in Walz.

40

Appellants conceded in their brief that "should the Court decide that Section 2 of the Act does not violate the Establishment Clause, we are unable to see how it could hold otherwise in respect to Sections 3, 4 and 5." Brief of Appellants, at 42-43. We agree that, under the facts of this case, the two are legally inseparable and that the affirmative of appellants' statement is also true, i.e. if section 2 does violate the Establishment Clause so, too, do the sections conferring tax benefits.

41

11. The separate opinions of Mr. Justice Harlan and MR. JUSTICE BRENNAN also emphasize the historical acceptance of tax-exempt status for religious institutions. See 397 U. S., at 680, 694.

42

As noted in the opinion below: "This [case] is, in essence, a conflict between two groups of extraordinary good will and civic responsibility. One group fears the diminution of parochial religious education which is thought to be an integral part of their right to the free exercise of religion. The other group, equally dedicated, believes that encroachment of government in aid of religion is as dangerous to the secular state as encroachment of government to restrict religion would be to its fee exercise." 350 F. Supp., at 660. ~~Appendix~~

43

The Court in Lemon further emphasized that political division along religious lines is to be contrasted with the political diversity expected in a democratic society: "Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect. Freund, Comment, Public Aid to Parochial Schools, 82 Harv. L. Rev. 1680, 1692 (1969)." 403 U.S., Supra, at 622.

44 total

45
56/ The self-perpetuating tendencies of any form of Government aid to religion have been a matter of concern running throughout our Establishment Clause cases. In Schempp, the Court emphasized that it was "no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment," for what today is a "trickling stream may be a torrent tomorrow." 374 U.S., at 225. See also Lemon v. Kurtzman, supra, at 624-625. But, to borrow the words from Mr. Justice Rutledge's forceful dissent in Everson, it is not alone the potential expandability of State tax aid that renders such aid invalid. Not even "three pence" could be assessed: "Not the amount but 'the principle of assessment was wrong.'" 330 U.S., at 40 39-40 (quoting from Madison's Memorial and Remonstrance).

No. 72-694, Committee For Public Education and Religious Liberty v. Nyquist

MR. JUSTICE POWELL delivered the opinion for the Court.

This case raises a challenge under the Establishment Clause of the First Amendment to the constitutionality of a recently promulgated New York law whose several provisions provide forms of financial assistance to nonpublic elementary and secondary schools in that State. Because the case involves an intertwining of societal and constitutional issues of the greatest importance, our task is a delicate one and we approach it with circumspection.

James Madison, in his famous Memorial and Remonstrance Against Religious Assessments, [1] admonished that a "prudent jealousy" for religious freedoms required that they never become "entangled . . . in precedents." [2] His strongly held convictions, coupled with the equally closely held beliefs of Thomas Jefferson and

others among the Founders, are reflected in the first clauses of the First Amendment of the Bill of Rights, which demand that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Yet, despite Madison's admonition and the seemingly absolute language of the Clauses,[2a] this Nation's history has not been one of entirely sanitized separation between Church and State. It has never been thought either possible or desirable to enforce a regime of total separation, and as a consequence, cases arising under these Clauses have presented, especially in the last quarter century, some of the most far-reaching and complex questions to come before this Court. Those cases have occasioned the most eloquent and thoughtful scholarship of this Court's most respected former Justices, including Justices Black, Frankfurter, Harlan, Jackson, Rutledge and Chief Justice Warren.

As a result of these numerous decisions and opinions under the Religion Clauses it may no longer be said that they are free of "entangling" precedents. Neither, however, may it be said that

Jefferson's metaphoric "wall of separation" between Church and State has become "as winding as the famous serpentine wall" he designed for the University of Virginia. McCollum v. Board of Education, 333 U.S. 203, 232, 238 (1948) (Jackson, J., dissenting). Indeed, the controlling constitutional standards have become firmly rooted and the contours of our inquiry are now clearly defined. Our task, then, becomes one of assessing New York's several forms of aid in the light of principles already delineated.

I.

In May, 1972, the Governor of New York signed into law several amendments to the State's Education and Tax Laws. The first five sections of these amendments established three distinct financial aid programs for nonpublic elementary and secondary schools. Almost immediately after the passage of these measures a complaint was filed in the United States District Court for the Southern District of New York

challenging each of the three forms of aid as violative of the Establishment Clause. The plaintiffs were an unincorporated association, known as the Committee for Public Education and Religious Liberty (PEARL), and several individuals who were residents and taxpayers in New York, some of whom had children attending public schools. Named as defendants were the State Commissioner of Education, the Comptroller, and the Commissioner of Taxation and Finance. Motions to intervene on behalf of defendants were granted to a group of parents with children enrolled in nonpublic schools, and to the Majority Leader and President Pro Tem. of the New York State Senate.[3] By consent of the parties, a three-judge court was convened pursuant to 28 U.S.C. §§ 2281 and 2283 and the case was decided without an evidentiary hearing. The questions before the District Court were resolved on the basis of the pleadings and the court's decision, therefore, turned on the constitutionality of the several provisions on their face.

The first section of the challenged enactment, entitled "Health

and Safety Grants for Nonpublic School Children," provides for direct money grants from the State to "qualifying" nonpublic schools to be used for the "maintenance and repair of . . . school facilities and equipment to ensure the health, welfare and safety of enrolled pupils."[4] A "qualifying" school is any nonpublic, nonprofit elementary or secondary school that "has been designated during the [immediately preceding] year as serving a high concentration of pupils from low-income families for purposes of Title IV of the Federal Higher Education Act of 1965 (20 U.S.C. §425)." Such schools are entitled to receive a grant equalling $30 per pupil, per school year, and $40 per pupil if the facilities are more than 25 years old. Each school is required to submit to the Commissioner of Education an audited statement of its expenditures for maintenance and repairs during the preceding year, and its grant may not exceed the total of such expenses. The Commissioner is also required to ascertain the average per pupil cost for equivalent maintenance and repair services in the public schools, and in no event may the grant to nonpublic qualifying schools exceed 50% of that figure.

"Maintenance and repair" is defined by the statute to include "the provision of heat, light, water, ventilation and sanitary facilities, cleaning, janitorial and custodial services; snow removal; necessary upkeep and renovation of buildings, grounds and equipment; fire and accident protection; and such other items as the commissioner may deem necessary to ensure the health, welfare and safety of enrolled pupils." This section is prefaced by a series of relevant legislative findings which shed light on the State's purpose in enacting the law. These findings conclude that the State "has a primary responsibility to ensure the health, welfare and safety of children attending . . . nonpublic schools," that the "fiscal crisis in nonpublic education . . . has caused a diminution of proper maintenance and repair programs, threatening the health, welfare and safety of nonpublic school children" in low-income urban areas, and that "a healthy and safe school environment" contributes "to the stability of urban neighborhoods." For these reasons, the statute declares that "the state has the right

the make grants for maintenance and repair expenditures which are clearly secular, neutral and non-ideological in nature."

The remainder of the challenged legislation 0-- sections 2 through 5 -- is a single package captioned the "Elementary and Secondary Education Opportunity Program" and is composed, essentially, of two parts, a tuition grant program and a tax benefit program. Section 2 establishes a limited plan providing tuition reimbursements to parents of children attending elementary or secondary nonpublic schools.[5] To qualify under this section the parent must have ann annual taxable income of less than $5,000. The amount of reimbursement is limited to $50 per each grade school child and $100 for each child in high school. However, each parent is required to submit to the Commissioner of Education a verified statement containing a receipted tuition bill, and the amount of State reimbursement may not exceed 50% of that figure. No restrictions are imposed on the use of the funds by the reimbursed parents.

This section, like section 1, is prefaced by a series of legislative findings designed to explain the impetus for the State's action. Expressing a dedication to the "vitality of our pluralistic society," the findings state that "a highly competitive and diverse alternative to public education is not only desirable but indeed vital to a state and nationthat have continually reaffirmed the value of individual differences." The findings further emphasize that the right to select among alternative educational systems "is diminished or even denied to lower-income families, whose parents, of all groups, have the least options in determining where their children are to be educated." Turning to the public schools, the findings state that any "precipitous decline in the number of nonpublic school pupils will cause a massive increase in public school enrollment and costs," an increase that would "aggravate an already serious fiscal crisis in public education" and would "seriously jeopardize quality education for all children." Based on these premises, the statute asserts the State's right to relieve

the financial burden of parents who send their children to nonpublic schools through this tuition reimbursement program. Repeating the declaration contained in section 1, the findings conclude that "such assistance is clearly secular, neutral and nonideological."

The remainder of the "Elementary and Secondary Education Opportunity Program," contained in section 3, 4 and 5 of the challenged law, is designed to provide a form of tax relief to those who fail to qualify for tuition reimbursement. These sections allow parents who have dependents attending nonpublic schools for whom they have paid at least $50 in tuition, to subtract designated amounts from their adjusted gross income for state income tax purposes. If the taxpayer's adjusted gross income is less than $9,000 he may subtract $50 per each dependent, up to three. As the taxpayer's income approaches $25,000, the amount of the allowable exclusion diminishes. Thus, if a taxpayer has adjusted gross income of $23,000 he could subtract only $100 per dependent, and no exclusion is allowed to taxpayers whose incomes exceed $25,000. The amount of the exclusion is not dependent

upon how much the taxpayer actually paid for nonpublic school tuition, and is given in addition to any deductions to which the taxpayer may be entitled for other religious or charitable contributions. As indicated in the memorandum from the Majority Leader and President Pro Tem of the Senate, submitted to each New York legislator during consideration of the bill, the actual tax benefits under these provisions were carefully calculated in advance.[5] Thus, comparable tax benefits pick up at approximately the point at which tuition reimbursement benefits leave off.

While the scheme of the enactment indicates that the purposes underlying the promulgation of the tuition reimbursement program should be regarded as pertinent as well to these tax law sections, section 3 does contain an additional listing of legislative findings. Those findings may be summarized as follows: contributions to religious, charitable and educational institutions are already dedictible from gross income; nonpublic educational institutions are accorded tax exempt status; such institutions provide educations

for children attending them and also serve to relieve the public school systems of the burden of providing for their education; and, therefore, the "legislature . . . finds and determines that similar modifications . . . should also be provided to parents for tuition paid to nonpublic elementary and secondary schools on behalf of their dependents."

Although no record was developed in this case, a number of pertinent generalizations may be made about the nonpublic schools which would benefit from these enactments. The District Court, relying on findings in a similar case recently decided by the same court,[9] adopted a profile of these sectarian, nonpublic schools similar to the one suggested in the plaintiffs' complaint. Qualifying institutions, under all three segments of the enactment, could be ones that:

> "(a) impose religious restrictions or admissions; (b) require attendance of ~~public~~ pupils at religious activities; (c) require obedience by students to the doctrines and dogmas of a particular faith; (d) require pupils to attend instruction in the theology or doctrine of a particular faith; (e) are an integral part of the religious mission of the church sponsoring it; (f) have as a substantial purpose the inculcation of religious values; (g) impose religious restrictions on faculty appointments; [illegible] religious restrictions on what or how

Of course, the characteristics of individual schools may vary widely from that profile. New York's 700,000 to 800,000 nonpublic school students, constituting almost 20% of the State's entire elementary and [redacted] secondary school population, attend over 2,000 separate institutions, approximately 85% of which are church-affiliated. And while "all or practically all" of the 280 schools entitled to receive maintenance and repair grants "are related to the Roman Catholic Church and teach [redacted] Catholic religious doctrine to some degree, id., at 661, institutions qualifying under the remainder of the statute include a substantial number of Jewish, Lutheran, Episcopal, Seventh Day Adventist, and other church-affiliated schools.

Plaintiffs argued below that because of the substantially religious character of the intended beneficiaries, each of the State's three enactments offended the Establishment Clause. The District Court, in an opinion carefully canvassing this Court's recent precednts, held unanimously that section 1 (maintenance and repair

grants) and section 2 (tuition reimbursement grants) were invalid. As to the income tax provisions of sections 3, 4 and 5, however, a majority of the District Court, over the dissent of Circuit Judge Hays, held that the Establishment Clause had not been violated. Finding the provisions of the law severable, it enjoined permanently any further implementation of sections 1 and 2 but declared the remainder of the law independently enforceable. The plaintiffs appealed directly to this Court, challenging the District Court's adverse resolution of the third segment of the statute.[11] The defendant state officials have appealed so much of the court's decision as invalidates the first and second portions of the 1972 law,[12] the intervenor Majority Leader and President Pro Tem of the Senate also appeals from those aspects of the lower court's opinion,[13] and the intervening parents of nonpublic school children have appealed only from the decision as to section 2.[14] This Court noted probable jurisdiction over each appeal and ordered the cases consolidated for oral argument. ___ U. S. ___ (1971). Thus,

of New York's recently stimulated

aid provisions is squarely before us. We affirm the District Court insofar as it struck down sections 1 and 2 and reverse its determination regarding sections 3, 4 and 5.

II

The history underlying the Establishment Clause has been frequently recounted and need not be repeated here. See Everson v. Board of Educ., 330 U. S. 1 (Black, J., opinion for the Court), 28 (Rutledge, J., dissenting (1947)); McCollum v. Board of Educ., 333 U. S. 203, 212 (1948); (Frankfurter, J., separate opinion); McGowan v. Maryland, 366 U. S. 420 (1961); Engel v. Vitale, 370 U. S. 421 (1962). It is enough to note that it is now firmly established that a law may be one "respecting the establishment of religion" even though its consequences is not to promote a "state religion," Lemon v. Kurtzman, 403 U. S. 602, 612 (1971), and even though it does not aid one religion more than another but merely benefits all religions alike. Everson v. Board of Educ., supra, at 15. It is equally well established, however, that not every law that confers an indirect, "remote," or "incidental" benefit upon religious institutions is, for that reason alone, constitutionally invalid. Id.; McGowan v. Maryland, supra, at 450; Walz v. Tax Commission, 397 U. S. 664, 671, 674-675

[illegible] of any

challenged on Establishment grounds with a view to ascertaining whether it furthers any of the evils against which that Clause protects. Primary among those evils have been "sponsorship, financial support, and active involvement of the sovereign in religious activity." Walz v. Tax Commission, supra, at 668; Lemon v. Kurtzman, supra, at 612.

Like the case before us today, most the cases coming to this Court raising Establishment Clause questio have involved the relationship between religion and educatio Among these religion-education precedents two general categories a s may be identified, those dealing with religious activitie n the public schools, and those touching on matters of publi t to sectarian educational institutions. While the New York l places this case in the latter category, its resolution req eration not only of the several aid-to-sectarian-education ca our other education precedents and of several impor cases. For the now well defined three-part test that

from our decisions is a product consideration derived from the full sweep of the Establishment Clause cases. Taken together these decisions dictate with some clarity that to pass muster under the Establishment Clause the state law in question, first, must reflect a clearly secular legislative purpose, e. g., Epperson v. Arkansas, 393 U. S. 97 (1968), second, must have a primary effect that neither advances nor inhibits religion, e. g., McGowan v. Maryland, supra; School District of Abington Township v. Schempp, 374 U. S. 203 (1963), and, third, must avoid excessive government entanglement with religion, e. g., Walz v. Tax Commission, supra. See Lemon v. Kurtzman, supra, at 612-613; Tilton v. Richardson, 403 U. S. 672, 678 (1971).

In applying these criteria to the three distinct forms of aid involved in this case, we need touch only briefly on the "secular legislative purpose" requirement. As the recitation of legislative purposes appended to New York's law indicates, each measure is adequately supported by legitimate, nonsectarian state interests.

[illegible] content of New

York's interest in preserving a healthy and safe educational environment for all of its school children. Nor do we have any reason either to doubt the validity of the State's interests in promoting pluralism and diversity among its public and nonpublic schools, or to question the sincerity of its concern for an already overburdened public school system that might suffer in the event that any significant percentage of children presently attending nonpublic schools should abandon those schools in favor of the public schools.

If any of New York's challenged provisions are invalid, it is because they offend either the second or the third criteria of effect and entanglement, and no amount of laudable purpose is relevant on these aspects of the test. Our focus, then, must be directed at each of the provisions separately to ascertain whether their necessary effects or the degree of entanglement they entail place them beyond the bounds of the First Amendment.

A.

The "maintenance and repair" provisions of section 1 authorize direct payments to nonpublic schools, virtually all of which are Roman Catholic schools in low income areas. The grants, totalling $30 or $40 per pupil depending on the age of the institution, are given largely without restriction on usage. So long as expenditures do not exceed 50% of comparable expenses in the public school system, it is possible for a sectarian elementary or secondary school to finance its entire "maintenance and repair" budget from State tax-raised funds. No attempt is made to restrict payments to those expenditures related to the upkeep of facilities used exclusively for secular purposes, nor do we think it possible within the context of these religion-oriented institutions to impose such restrictions. Nothing in the statute, for instance, bars a qualifying school from paying out of State funds the salary of its janitorial employees who maintain the school chapel, or the cost of renovating classrooms in which religion is taught, or the

cost of heating and lighting those same facilities. Absent restrictions on expenditures for these and similar purposes, we do think it may be gainsaid that the State's aid constitutes the direct subsidization or sponsorship of the non-secular activities of sectarian elementary and secondary schools, i.e., that this section has a primary effect that advances religion.

Appellees (State officials and intervenor President Pro Tem of the Senate) argue that these expenditures for "maintenance and repair" are similar to other financial expenditures approved by this Court. Primarily, they rely on Everson v. Board of Education, supra, Board of Education v. Allen, supra, and Tilton v. Richardson, supra, (plurality opinion). In each of those cases it is surely true that the Court approved a form of financial assistance conferring undeniable indirect benefits upon private, sectarian schools. But a close examination of those cases illuminates their distinguishing characteristics. In Everson, the Court, in a 5 to 4 opinion by Mr. Justice Black in which he emphasized that the decision there approached the "verge" of permissible State aid, approved a program

of reimbursements to parents of public as well as parochial school children for bus fares paid in connection with transportation to and from school. In Allen, decided some twenty years later, the Court upheld a New York law authorizing the provision of secular textbooks for all children in grades 7 through 12 attending public and nonpublic schools. Finally, in Tilton, the Court upheld federal grants of funds for the construction of facilities to be used for clearly secular purposes by public and nonpublic institutions of higher learning.

These cases simply recognize that sectarian schools perform secular, educative functions as well as religious functions, and that some forms of aid may be channelled to the secular without providing direct aid to the sectarian. But the channel is a narrow one. Bus transportation, so long as the buses themselves do not become the vehicles for teaching religious doctrine, may be provided. Likewise, clearly secular textbooks have been sustained. Of course it is true in each case that the provision of such neutral, idealogical aid,

assisting only the secular functions of sectarian schools, served indirectly to promote the religious function by rendering it more likely that children will attend sectarian schools, and by freeing their budgets for use in other nonsecular areas. But this Court has never thought it sufficient to strike down a state law that it has an indirect or incidental effect beneficial to religious institutions. In McGowan v. Maryland, supra, Sunday Blue Laws were sustained even though one of their undeniable effects was to render it somewhat more likely that citizens would respect religious institutions and even attend religious services themselves. Also, in Walz v. Tax Commission, supra, property tax exemptions for church property were held not violative of the Establishment Clause despite the fact that such exemptions relieved churches of a financial burden.

Tilton draws the line most clearly. While a bare majority was there persuaded for the reasons stated separately in the plurality opinion and in MR. JUSTICE WHITE's concurrence that carefully limited construction grants to colleges and universities could be

sustained, the Court was unanimous in its rejection of one clause of the federal statute in question. As a condition for any federal grant to a sectarian institution, the Government might recover a portion of its grant in the event that the constructed facility were used to advance religion by, for instance, converting the building to a chapel or otherwise allowing it to be "used to promote religious interests." 403 U.S., at 683. However, this condition expired at the end of 20 years and the facilities would thereafter be available for use by the institution for any nonsecular purpose. In striking down this provision the plurality opinion emphasized that "[l]imiting the prohibition for religious use of the structure to 20 years obviously opens the facility to use for any purpose at the end of that period." Id., and in that event, "the original federal grant will in part have the effect of advancing religion." Id. See also id., at 692 (Douglas, J., dissenting), 659-661 (Brennan, J., dissenting), 665 n.1 (White, J., concurring in the judgment). If tax-raised funds may not be granted to institutions of higher learning

where the possibility exists that those funds will be used to construct a facility utilized for sectarian activities 20 years hence, a fortiori they may not be distributed to elementary and secondary sectarian schools[17] for the maintenance and repair of facilities without any limitations on their use. If the State may not erect buildings in which religious activities are to take place, it may not maintain such building or renovate them when they fall into disrepair.

It might be argued, however, that while the New York "maintenance and repair" grants lack specifically articulated secular restrictions, the statute does provide a sort of statistical guarantee of separation by limiting grants to 50% of the amount expended for comparable services in the public schools. The legislature's supposition might have been that at least 50% of the ordinary public school maintenance and repair budget would be devoted to purely secular facility upkeep in sectarian schools. The shortest answer to this argument is that the statute itself allows,

as a ceiling, grants satisfying the entire "amount of expenditures for maintenance and repair of such school" providing only that it is neither more than $30 or $40 per pupil nor more than 50% of the public school budget.[18] Quite apart from the language of the statute, our cases make clear that a mere statistical judgment will not suffice as a guarantee that state funds will not be used to finance religious education. In Earley v. DiCenso, the companion case from Rhode Island to Lemon v. Kurtzman, supra, the Court struck down a state law authorizing salary supplements to teachers of secular subjects. The grants were not to exceed 15% of any teacher's annual salary. Although the law was invalidated on entanglement grounds, the Court made clear that the State could not have avoided violating the Establishment Clause by merely assuming that its teachers would succeed in segregating "their religious beliefs from their secular educational responsibilities." 403 U.S., at 619.

> "The Rhode Island Legislature has not, and could not, provide state aid on the basis of a mere assumption that secular teachers under religious discipline can avoid conflicts. The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion . . . . Id. (emphasis supplied).

Nor could the State of Rhode Island have prevailed by simply relying on the assumption that, whatever a secular teacher's inabilities to refrain from mixing the religious with the secular, he would surely devote at least 15% of his efforts to purely secular education, thus satisfying the State grant.[19] It takes little imagination to perceive the extent to which States might openly subsidize parochial schools under such a loose standard of scrutiny.

What we have said demonstrates that New York's maintenance and repair provisions violate the Establishment Clause because their effect, inevitably, is to subsidize and advance the religious mission of sectarian, nonpublic schools. We have no occasion, therefore, to consider the further question whether those provisions as presently

written would also fail to survive scrutiny under the entanglements aspect of the three-part test, either because it requires too intrusive and perpetual a relationship between Church and State necessary to assure the secular use of all funds, or because it portends a serious threat of significant "fragmentation and divisiveness on religious lines." Lemon v. Kurtzman, supra, at 623.

B

New York's tuition reimbursement program also fails the "effects" test, for much the same reasons as govern its maintenance and repair grants. The State program is designed to allow direct, unrestricted grants of $50 to $100 per child (but no more than 50% of tuition actually paid) as reimbursement to parents in low income brackets who send their children to nonpublic schools. To qualify, a parent must have earned less than $5,000 in taxable income and must present a receipted ~~and~~ tuition bill from a nonpublic school, the bulk of which it is conceded are sectarian in orientation.

There can be no question that these grants could not, consistently with the Establishment Clause, be given directly to sectarian schools, since they would suffer from the same deficiency that renders invalid the grants for maintenance and repair - there is no system of surveillance or regulation guaranteeing that the funds will be used exclusively for secular, neutral, and non-ideological purposes. The controlling question here, then, is whether the fact

that the grants are delivered to parents rather than schools is of such significance as to compel a contrary result. The State and intervenor-appellees rely on Everson and Allen for their claim that grants to parents, unlike grants to institutions, respect the "wall of separation" required by the Constitution. It is certainly true that in those cases the Court upheld laws that provided benefits to children attending religious schools and to their parents: In Everson parents were reimbursed for bus fares paid to send children to parochial schools, and in Allen textbooks were loaned directly to the children. But those decisions, as discussion in Part IIIA, supra, emphasizes, did not rest alone on the channels through which state aid passes.

In Everson, Mr. Justice Black found the bus fare program analogous to the provision of police and fire protection, sewage disposal, highways, and sidewalks in common to all citizens. 330 U.S., at 17-18. Such services do not trespass the line of state neutrality toward religious institutions because they are "so separate and so indisputably marked off from the religious function." Id., at 18.

Allen is founded upon a similar principle. The Court there repeatedly emphasized that upon the record before the Court it there was no indication that textbooks would be provided for anything other than purely secular courses. "Of course books are different from buses. Most bus rides have no inherent religious significance, while religious books are common. However, the language of [the law under consideration] does not authorize the loan of religious books, and the State claims no right to distribute religious literature . . . Absent evidence we cannot assume that school authorities . . . are unable to distinguish between secular and religious books or that they will not honestly discharge their duties under the law." 392 U. S., at 244-245.[20]

The tuition grants here are subject to no such restrictions. There has been no endeavor "to guarantee the separation between secular and religious educational functions and to ensure that State financial aid supports only the former." Lemon v. Kurtzman, supra, at 613. Indeed, it is precisely the function of New York's law to provide general assistance to religious schools. By reimbursing [illegible] portion of their tuition bill, the State seeks to relieve

their financial burdens sufficiently to assure that they remain attached to the nonpublic system. And while the purposes for that aid - a desire to perpetuate a pluralistic educational environment and to protect the fiscal integrity of overburdened public schools - are certainly unexceptionable, its effect is unmistakably to provide financial support for nonpublic, sectarian institutions. Mr. Justice Black, ~~dissenting~~ dissenting in Allen, warned that,

> "[i]t requires no prophet to foresee that on the argument used to support this law others could be upheld providing for state or federal government funds to buy property on which to erect religious school buildings or to erect the buildings themselves, to pay the salaries of the religious school teachers, and finally to have the ~~religious groups~~ religious groups cease to rely on voluntary contributions of members of their sects while waiting for the government to pick up all the bills for the religious schools." 392 U. S., at 253.

His fears regarding religious buildings and ~~salaries~~ religious teachers have not come to pass, Tilton v. Richardson, supra; Lemon v. Kurtzman, supra, and insofar as tuition grants constitute a means of "pick[ing] up . . . the bills for the religious schools," neither has his greatest fear materialized.

Although we think it clear, for the reasons above stated, that New York's tuition grant program fares no better than its maintenance and repair program under the "effects" test, in view of the novelty of the question we will address briefly a number of subsidiary arguments made by appellees in defense of this particular statutory program.

First, it has been suggested that it is of controlling significance that New York's program calls for reimbursement for tuitions already paid rather than for direct contributions which are merely routed through the parents to the schools, in advance of or in lieu of payments by the parents. The parent is not a mere conduit, we are told, but is absolutely free to spend the money he receives in any manner he wishes. There is no element of coercion attached to the reimbursement, and no assurance that the money will eventually end up in the hands of religious schools. The absence of any element of coercion, however, is irrelevant to questions arising under the Establishment Clause. In School District of Abington

Township v. Schempp, it was contended that Bible recitations in public schools did not violate the Establishment Clause because participation in such exercises was not coerced. The Court rejected that argument, noting that while proof of coercion might provide a basis for a claim under the Free Exercise Clause, it was not a necessary element of any claim under the Establishment ~~Clause~~ Clause. Id., at 222-223. Mr. Justice Brennan's concurring views reiterate the Court's conclusion:

> "Thus the short, and for me sufficient, answer is that the availability of excusal or exemption simply has no relevance to the establishment question, if it is once found that these practices are essentially religious exercises designed at least in part to achieve religious aims. . . ." Id., at 288.

A similar inquiry govers here: if the grants are offered as an incentive to parents to send their children to sectarian schools by making unrestricted cash payments to them, the Establishment Clause is violated whether or not the actual dollars given eventually find their way into the sectarian institutions. 21 Whether the grant is labelled a reimbursement, reward, or subsidy, its substantive impact is still ~~is~~ the same. In sum, we agree with the conclusion of the

District Court that "[w]hether he gets it during the current year, or as reimbursement for the past year, is of no constitutional importance." 350 F. Supp., at 868.

Second, appellee-intervenor the Majority Leader and President Pro Temp of the State Senate, argues that it is significant here that the tuition reimbursement grants pay only a portion of the tuition bill, and an even smaller portion of the religious school's total expenses. The New York statute limits reimbursement to 50% of any parent's actual outlay. Additionally, appellee estimates that only 30% of the total cost of nonpublic education is covered by tuition payments with the remainder coming from "voluntary contributions, endowments and the like." [22] On the basis of these two statistics, appellee reasons that the "maximum tuition reimbursement by the State is thus only 15% of the educational costs in the nonpublic schools." [23] And, "since compulsory education laws of the State, by necessity require significantly more than 15% of school time to be devoted to teaching secular courses," the New York statute provides "a statistical

simply another variant of the argument we have rejected as to maintenance and repair costs, ante ___, and it fares no better here. Obviously, if accepted this argument would provide the foundation for massive, direct subsidization of sectarian elementary and secondary schools. Our cases, however, have long since foreclosed the notion that mere statistical assurances will suffice to sail between the Scylla and Charybdis of "effect" and entanglement."

Finally, the State argues that its program of tuition grants should survive scrutiny because it is designed to promote the free exercise of religion. The State notes that only "low-income parents" are aided by this law, and without state assistance their rights to have their children educated in a religious environment "is diminished or even denied."[25] It is true, of course, that this Court has recognized the right to choose nonpublic over public education. Pierce v. Society of Sisters, 268 U. S. 510 (1925). It is also true that a State law interfering with a parent's right to have his child educated in a sectarian school would run afoul of the Free Exercise Clause. But

this Court has often emphasized that there exists a tension between the Free Exercise and the Establishment Clauses, e.g., Walz v. Tax Commission, supra, and that it may often not be possible to promote the former without offending the latter. As a result of this tension, our cases require the State to maintain an attitude of "neutrality," neither "advancing" nor "inhibiting" religion. 25a in its laudable attempt to diminish the financial inhibitions on the free exercise of religion experienced by the poor, the State has taken a step which can only be regarded as one "advancing" religion. Whatever our "sympathy," Everson v. Board of Education, supra, at 18, for the burdens experienced by those who must pay public school taxes at the same time that they support other schools because of the constraints of "conscience and discipline," id., and notwithstanding the "high social importance" of the States purposes, ~~xxx~~ Wisconsin v. Yoder, 406 U.S. 205, 214 (1972), neither may justify a slackening of the limitations of the Establishment Clause now firmly emplanted. 26

C

Sections 3, 4 and 5 establish a system of providing income tax benefits to parents of children attending New York's nonpublic schools. In this Court, the parties have engaged in a considerable debate over the various labels that might be used to describe the New York law. Appellants insist that the law is, in effect, one establishing a system of tax "credits". Appellees - the State and the intervenors - reject that characterization and contend, instead, that it is a system of income tax "modifications." The Solicitor General, in an Amicus curiae brief filed in this Court, has referred throughout to the New York law as one approving tax "deductions." The District Court majority found that the aid was "in effect a tax credit," 350 F. Supp. at 672 (emphasis in original), and while we agree with this characterizatio and will refer to it as such in our ensuing discussion, it should be emphasized that this case is not governed by the label used to describe the statutory system. As the Court's opinion in Lemon v. Kurtzman, supra, at 614, emphasizes, constitutional analysis is not a "legalistic

"examine the form of the relationship for the light that it casts on the substance."

The sections allow parents of children attending nonpublic elementary and secondary schools, if they do not receive a tuition reimbursement under section 2, and if they have an adjusted gross income of less than $25,000, to subtract a specified amount in computing their taxable income for state income tax purposes. The amount of the deduction is unrelated to the amount of money actually expended by any parent on tuition, but is calculated on the basis of a formula contained in the statute. The formula is apparently the direct product of a legislative attempt to assure that each family would receive a precisely-determined net benefit, and that the tax benefits would be comparable to, and compatible with, the tuition grants for lower income families. Thus, a parent who earns less than $5,000 is entitled to a tuition reimbursement of $50 if he has one child attending an elementary, nonpublic school, while a parent who earns slightly more (but less than $9,000) is entitled to have a

precisely equal amount taken off his tax bill.[28] Additionally, a taxpayer's benefit under these sections is unrelated to, and not reduced by, any deductions to which he may be entitled for charitable contributions to religious institutions.[29]

In practical terms there would appear to be little difference, for purposes of determining whether such aid has the "effect of advancing" religion, between the credit allowed here and the tuition grant allowed under section 2. The qualifying parent under either program receives the same form of encouragement and reward for sending his children to nonpublic schools. The only difference is that one parent receives an actual cash payment while the other is instructed to reduce a like amount from the sum he would otherwise be obliged to pay over to the State. We have found no answer to Judge Hays' dissenting statement below that "[i]n both instances the money involved represents a charge made upon the state for the purpose of religious education." 350 F. Supp. at 675.

Appellees have sought to defend the tax credit portion of New

that it is of controlling significance that the grants or credits are directed to the parents rather than to the schools. This is the same argument made in support of the tuition reimbursements and rests of the same reading of the same precedents of this Court, primarily Everson and Allen. Our treatment of this issue in Part IIB supra, at 30 ____, is fully applicable here and requires rejection of this claim.

Second, appellees place their heaviest reliance on this Court's decision in Walz v. Tax Commission, supra, in which New York's property tax exemption for religious organizations was upheld. We think that Walz provides no support for appellees' position, and to the contrary dictates the conclusion that New York's tax package does violate the Establishment Clause.

Tax exemptions for church property had enjoyed an apparently universal approval in this country both before and after the adoption of the First Amendment. The Court in Walz surveyed the history of tax exemptions and found that each of the 50 states have long provided for tax exemptions for places of worship. Congress has exempted

century, and congressional enactments in 1802, 1813, and 1870 specifically exempted church property from taxation. In sum, the Court concluded that "[f]ew concepts are more deeply embedded in the fabric of our national life, beginning with pre-Revolutionary colonial times, than for the government to exercise at the very least this kind of benevolent neutrality toward churches and religious exercise generally." Id., at 676-677. By sharp contrast the State of New York has shown us no historical precents for its recently promulgated tax relief program. Indeed, it seems clear that tax credits for parents whose children attend parochial schools are a recent innovation, occasioned by the growing financial plight of such nonpublic institutions and designed to provide aid in a manner not ~~inconsistent~~ incompatible with the recent decisions of this Court. See Kosydar v. Wolman, ___ F. Supp. ___ (DCSD Ohio, 1972), juris. state. pending, No. 72-1139.

But historical acceptance without more would not have alone sufficed as "no one acquires a vested or protected right in violation

underlying that long history of tolerance of tax exemptions for religion that proved controlling. As we have said repeatedly, a proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of "neutrality" toward religion. Yet Governments have not always pursued such a course and oppression has taken many forms, one of which has been taxation of religion. Thus, if taxation was regarded as a form of ~~hostility~~ "hostility" toward religion, "exemption constitute[d] a reasonable and balanced attempt to guard against those dangers." Id., at 673. Tax credits, however, cannot similarly be justified as rooted in negative notions of avoidance of hostility toward religion. To the contrary, insofar as they educate the State's children, their very purpose is to aid and advance those religious institutions.

Apart from its historical foundations, Walz is a product of the same dilemma and inherent tension found in every government-aid-to-religion controversy. Maintenance of the tax exemption, to be sure, conferred a benefit, albeit indirect and incidental. Yet

subsidize

but of a fiscal relationship designed to minimize involvement and contact between church and state. "The exemption," the Court emphasized, "tends to complement and reinforce the desired separation insulating each from the other." Id., at 676. And, "[e]limination of the exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes." Id., at 674. The granting of a tax credit, unlike the extension of an exemption, would increase rather than limit the involvement between Church and State. Of course, New York has attempted to avoid excessive involvement, but it has done so only by failing to assure that credited funds not become resources for the advancement of religion.

One further difference between tax exemptions for churches and tax credits for parents should be noted. The challenged exemption was not restricted to a class composed exclusively or even predominantly of religious institutions. Instead the exemption covered

As the parties here must concede, tax credits authorized by this law flow primarily to the parents of children attending sectarian, nonpublic schools. Without intimating whether this factor alone might have controlling significance in another context in some future case, it should be apparent that in terms of the potential divisiveness of any legislative measure the narrowness of the benefitted class would be an important factor.

In conclusion, we find the Walz-analogy unavailing; and in light of the practical similarity between New York's tax credit and tuition reimbursement programs, we hold that neither form of aid is sufficiently restricted to assure that it will not have the impermissible effect of advancing the sectarian activities of religious schools. Whether the State could provide such aid under more protecting circumstances without running afoul of the "entanglement" limitations developed in Walz and Lemon, is a question we have no occasion to address.

III

For the reasons above stated, we hold each of New York's aid provisions invalid. Each, as written, has a "primary effect that advances religion" and offends the Constitutional prohibition against laws "respecting the establishment of religion." We, therefore, affirm the three-judge court's judgment regarding sections 1 and 2 and reverse as to sections 3, 4 and 5.

It is so ordered.

D

In many respects this is a deeply perplexing case, implicating competing societal interests of great importance. Few would question most of the legislative findings supporting this statute. We recognized in Allen, supra at 247, that "private education has played and is playing a significant and valuable role in raising levels of knowledge, competency, and experience," and certainly private parochial schools - by far the most numerous of all private schools - have contributed importantly to this role. Moreover, the tailoring of the New York statute to channel the aid provided primarily to afford low income families the option of determining where their children are to be educated is most appealing.[a.] There is no doubt that the private schools are confronted with increasingly grave fiscal and funding problems, and that the solving of these problems by increasing tuition charges forces parents to turn to the public schools, and this in turn - as this legislation recognizes - exacerbates the problems

of public education at the same time that it weakens support for the parochial schools.

These, in briefest summary, are the underlying reasons for the New York and similar legislation. They are substantial and legitimate reasons. Yet, as we have attempted to do, they must be weighed against the relevant provisions and purposes of the First Amendment which safeguard the separation of church from state - regarded from the beginning as one of the most cherished features of our constitutional system.

In this process of weighing, our decisions emphasize that one of the decisive elements has been the potentially divisive political effect of the state program in question. Concern as to divisiveness over religious issues is rooted deeply in our history. This was summarized by Mr. Justice Black in Everson, supra, at 8, 9, where he described the civil strife, "generated in large part" by religious sects competing for political and religious supremacy. As Mr. Justice Harlan put it:

> that kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point." Walz v. Tax Commissioner, supra at 694 (concurring opinion).

The Court recently addressed this issue specifically and fully in Lemon v. Kurtzman. After describing the political activity and bitter differences likely to result from the state programs there involved, the Court said:

> "The potential for political divisiveness related to religious belief and practice is aggravated in these two statutory programs by the need for continuing annual appropriations and the likelihood of larger and larger demands as costs and population grow." Supra, at 623, b.

The language of the Court applies with peculiar force to the New York statute now before us. Section 1 (grants for maintenance) and Section 2 (flat tuition grants) will require continuing annual appropriations. Sections 3, 4 and 5 (income tax relief) will not necessarily require annual reexamination, but the pressure for frequent enlargement of the relief is predictable. All three of these programs start out at modest levels: the maintenance grant is not to exceed $40 per pupil per year in approved schools; the tuition grant is not more

than $50 a year for children in the first eight grades and $100 per child for the high school grades, not exceeding in either case 50% of the actual tuition paid by the parent; and the tax benefit, though more difficult to compute, is equally modest and is inverse to the parent's income. The program also is focused to benefit low income families. But we know from long experience, both with the federal and state governments, that aid programs of any kind tend to entrench and to escalate, to generate their own base of adherents and constituents (indeed, their own lobbies), and the larger the base of recipients the greater the pressure for accelerated increases. [c] Moreover, the state itself - concededly anxious to avoid assuming the burden of educating children now in private and parochial schools - has a strong motivation for increasing this aid as costs rise and population increases. In this situation, where the underlying issue is the deeply emotional one of state-church relationships, the potential for serious divisive political consequences needs no elaboration. [d]

a. As noted in the opinion below: "This [case] is, in essence, a conflict between two groups of extraordinary good will and civic responsibility. One group fears the dimunition of parochial religious education which is thought to be an integral part of their right to the free exercise of religion. The other group, equally dedicated, believes that encroachment of government in aid of religion is as dangerous to the secular state as encroachment of government to restrict religion would be to its fee exercise." ____F. 2d at _____.

b. The Court in Lemon further emphasized that political division along religious lines is to be contrasted with the political diversity expected in a democratic society: "Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect. Freund, Comment, Public Aid to Parochial Schools, 82 Harv. L. Rev. 1680, 1692 (1969)." Supra at 622.

c. As some 20% of the toal school population in New York attends

d. Although the divisive political potential of a state-aid program is, in a sense, an element of the entanglement issue (which we do not reach), it has a broader base than the conventional entanglement analysis and goes to the heart of church-state relationships. In the words of Mr. Justice Harlan, strife over this relationship could "strain a political system to the breaking point." Walz, supra at 694.

L.F.P.
Revised
6/1/73

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist

1st DRAFT

From: Powell, J.

Circulated: JUN 1 1973

SUPREME COURT OF THE UNITED STATES

Recirculated: _____

Nos. 72-694, 72-753, 72-701 AND 72-929

Committee for Public Education and Religious Liberty et al., Appellants,
72-694 v.
Ewald B. Nyquist, as Commissioner of Education of the State of New York et al.

Earl W. Brydges, as Majority Leader and President pro tem of the New York State Senate, Appellant,
72-753 v.
Committee for Public Education and Religious Liberty et al.

Ewald B. Nyquist, as Commissioner of Education of the State of New York et al., Appellants,
72-701 v.
Committee for Public Education and Religious Liberty et al.

Priscilla L. Cherry et al., Appellants,
72-929 v.
Committee for Public Education and Religious Liberty et al.

On Appeals from the United States District Court for the Southern District of New York.

[June — 1973]

MR. JUSTICE POWELL delivered the opinion of the Court.

This case raises a challenge under the Establishment Clause of the First Amendment to the constitutionality of a recently enacted New York law which provides finan-

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cial assistance in several ways to nonpublic elementary and secondary schools in that State. The case involves an intertwining of societal and constitutional issues of the greatest importance.

James Madison, in his Memorial and Remonstrance Against Religious Assessments,[1] admonished that a "prudent jealousy" for religious freedoms required that they never become "entangled . . . in precedents."[2] His strongly held convictions, coupled with those of Thomas Jefferson and others among the Founders, are reflected in the first clauses of the First Amendment of the Bill of Rights, which state that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[3] Yet, despite Madison's admonition and the "sweep of the absolute prohibitions" of the Clauses,[4] this Nation's history has not been one of en-

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[1] Madison's Memorial and Remonstrance was instrumental in occasioning the defeat in Virginia of an Assessment Bill designed to exact taxes in support of Teachers of the Christian religion. See n. —, infra. See also *Everson v. Board of Education*, 330 U. S. 1, 28, 33–41 (1947) (Rutledge, J., dissenting).

[2] Madison's often quoted statement is reprinted as an appendix to the dissenting opinions of Mr. Justice Rutledge and Mr. Justice Douglas in *Everson v. Board of Education*, 330 U. S., at 63, 65, and *Walz v. Tax Comm'n*, 397 U. S. 664, 719–720 (1970), respectively.

[3] The provisions of the First Amendment have been made binding on the States through the Due Process Clause of the Fourteenth Amendment. See, e. g., *Everson v. Board of Education*, 330 U. S. 1 (1947).

[4] *Walz v. Tax Comm'n*, supra, at 668. Mr. Chief Justice Burger, writing for the Court, noted that the purpose of the Clauses "was to state an objective, not to write a statute," and that "[t]he Court has struggled to find a neutral course between the two religion clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other." *Id.*, at 668–669.

tirely sanitized separation between Church and State. It has never been thought either possible or desirable to enforce a regime of total separation, and as a consequence cases arising under these Clauses have presented some of the most perplexing questions to come before this Court. Those cases have occasioned thorough and thoughtful scholarship by several of this Court's most respected former Justices, including Justices Black, Frankfurter, Harlan, Jackson, Rutledge, and Chief Justice Warren.

As a result of these decisions and opinions, it may no longer be said that the Religion Clauses are free of "entangling" precedents. Neither, however, may it be said that Jefferson's metaphoric "wall of separation" between Church and State has become "as winding as the famous serpentine wall" he designed for the University of Virginia. *McCollum* v. *Board of Education*, 333 U. S. 203, 232, 238 (1948) (Jackson, J., dissenting). Indeed, the controlling constitutional standards have become firmly rooted and the broad contours of our inquiry are now well defined. Our task, therefore, is to assess New York's several forms of aid in the light of principles already delineated.[5]

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[5] The existence, at this stage of the Court's history, of guiding principles etched over years of difficult cases [illegible] does not make [illegible] task today an easy one. For it is evident from the numerous opinions of the Court, and of Justices in concurrence and dissent in the leading cases applying the Establishment Clause, that no "bright line" guidance is afforded. Instead, while there has been general agreement upon the applicable principles and upon the framework of analysis, the Court has recognized its inability to perceive with ~~absolute~~ clarity the "lines of demarcation in this extraordinarily sensitive area of constitutional law." *Lemon* v. *Kurtzman*, 403 U. S. 602, 612 (1971). And, [illegible] questions of entanglement [illegible]

I

In May 1972, the Governor of New York signed into law several amendments to the State's Education and Tax Laws. The first five sections of these amendments established three distinct financial aid programs for nonpublic elementary and secondary schools. Almost immediately after the signing of these measures a complaint was filed in the United States District Court for the Southern District of New York challenging each of the three forms of aid as violative of the Establishment Clause. The plaintiffs were an unincorporated association, known as the Committee for Public Education and Religious Liberty (PEARL), and several individuals who were residents and taxpayers in New York, some of whom had children attending public schools. Named as defendants were the State Commissioner of Education, the Comptroller, and the Commissioner of Taxation and Finance. Motions to intervene on behalf of defendants were granted to a group of parents with children enrolled in nonpublic schools, and to the Majority Leader and President pro tem of the New York State Senate. By consent of the parties, a three-judge court was convened pursuant to 28 U. S. C. §§ 2281 and 2283, and the case was decided without an evidentiary hearing. Because the questions before the District Court were resolved on the basis of the pleadings, that court's decision turned on the constitutionality of each provision on its face.

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lines of necessity, the wall is not without bends and may constitute a "blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." *Id.*, at 614.

[5] The motion was granted in favor of Mr. Earl W. Brydges. Upon his retirement in December 1972, his successor, Mr. Warren M. Anderson, was substituted in his place.

The first section of the challenged enactment, entitled "Health and Safety Grants for Non-public School Children," provides for direct money grants from the State to "qualifying" nonpublic schools to be used for the "maintenance and repair of . . . school facilities and equipment to ensure the health, welfare and safety of enrolled pupils."[1] A "qualifying" school is any nonpublic, nonprofit elementary or secondary school which "has been designated during the [immediately] preceding year as serving a high concentration of pupils from low-income families for purposes of Title IV of the Federal Higher Education Act of 1965 (20 U. S. C. § 425)." Such schools are entitled to receive a grant of $30 per pupil per year, or $40 per pupil per year if the facilities are more than 25 years old. Each school is required to submit to the Commissioner of Education an annual statement of its expenditures for maintenance and repair during the preceding year, and its grant may not exceed the total of such expenses. The Commissioner is also required to ascertain the average per-pupil cost for equivalent maintenance and repair services in the public schools, and in no event may the grant to nonpublic qualifying schools exceed 50% of that figure.

"Maintenance and repair" as defined by the statute to include "the provision of heat, light, water, ventilation and sanitary facilities, cleaning, janitorial and custodial services, snow removal; necessary upkeep and renovation of buildings, grounds and equipment; fire and accident protection; and such other items as the commissioner may deem necessary to ensure the health, welfare and safety of enrolled pupils." This section is preceded by a series of relevant legislative findings which shed light on the

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[1] N. Y. Laws 1972, ch. 414, § 1, codified as N. Y. Educ. Law Art. 12, §§ 549–553 (McKinney Supp. 1972).

State's purpose in enacting the law. These findings conclude that the State "has a primary responsibility to ensure the health, welfare and safety of children attending . . . nonpublic schools"; that the "fiscal crisis in nonpublic education . . . has caused a diminution of proper maintenance and repair programs, threatening the health, welfare and safety of nonpublic school children" in low-income urban areas; and that "a healthy and safe school environment" contributes "to the stability of urban neighborhoods." For these reasons, the statute declares that "the state has the right to make grants for maintenance and repair expenditures which are clearly secular, neutral and non-ideological in nature."

The remainder of the challenged legislation—§§ 2 through 5—is a single package captioned the "Elementary and Secondary Education Opportunity Program." It is composed, essentially, of two parts, a tuition grant program and a tax benefit program. Section 2 establishes a limited plan providing tuition reimbursements to parents of children attending elementary or secondary nonpublic schools.[6] To qualify under this section the parent must have an annual taxable income of less than $5,000. The amount of reimbursement is limited to $50 for each grade school child and $100 for each high school child. Each parent is required, however, to submit to the Commissioner of Education a verified statement containing a receipted tuition bill, and the amount of state reimbursement may not exceed 50% of that figure. No restrictions are imposed on the use of the funds by the reimbursed parents.

This section, like § 1, is prefaced by a series of legislative findings designed to explain the impetus for the State's action. Expressing a dedication to the "vitality of our pluralistic society," the findings state that a "healthy

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[6] N. Y. Laws 1972, c. 414, § 2, amending N. Y. Educ. Law, Art. 12-A, §§ 550-558 (McKinney 1972).

remunerative and diverse alternative to public education is not only desirable but indeed vital to a state and nation that have continually reaffirmed the value of individual differences." The findings further emphasize that the right to select among alternative educational systems "is diminished or even denied to lower-income families, whose parents, of all groups have the least options in determining where their children are to be educated." Turning to the public schools, the findings state that any "precipitous decline in the number of nonpublic school pupils will cause a massive increase in public school enrollment and costs" an increase that would "aggravate an already serious fiscal crisis in public education" and would "seriously jeopardize the quality of education for all children." Based on these premises, the statute asserts the State's right to relieve the financial burden of parents who send their children to nonpublic schools through the tuition reimbursement program. Repeating the declaration contained in § 1, the findings conclude that "such assistance is clearly secular, neutral and non-ideological."

The remainder of the "Elementary and Secondary Education Opportunity Program," contained in §§ 3, 4, and 5 of the challenged law,[1] is designed to provide a form of tax relief to those who fail to qualify for tuition reimbursement. Under these sections parents may subtract from their adjusted gross income for state income tax purposes a designated amount for each dependent for whom they have paid at least $50 in nonpublic school tuition. If the taxpayer's adjusted gross income is less than $9,000 he may subtract $1,000 for each of as many as three dependents. As the taxpayer's income rises, the amount he may subtract diminishes. Thus, if a taxpayer has adjusted gross income of $15,000 he may subtract only $400 per dependent, and if his income is $25,000

[1] N. Y. Laws 1972, c. 414, §§ 3, 4, 5, adding N. Y. Tax Law §§ 612 (cc), 612 (dd), 658 (McKinney 1972).

or more, no deduction is allowed.[49] The amount of the deduction is not dependent upon how much the taxpayer actually paid for nonpublic school tuition, and is given in addition to any deductions to which the taxpayer may be entitled for other religious or charitable contributions. As indicated in the memorandum from the Majority Leader and President pro tem of the Senate, submitted to each New York legislator during consideration of the bill, the actual tax benefits under these provisions were carefully calculated in advance.[50] Thus, comparable tax

[49] Section 612 (c) provides the following table:

If New York adjusted gross income is:	The amount of the deduction for each dependent is:
Less than $9,000	$1,000
9,000–10,999	850
11,000–12,999	700
13,000–14,999	550
15,000–16,999	400
17,000–18,999	250
19,000–20,999	150
21,000–22,999	125
23,000–24,999	100
25,000 and over	-----

N. Y. Tax Law § 612 (c) (McKinney Supp. 1972).

[50] The following computations were submitted by Senator Brydges, who has since been replaced as Majority Leader by Senator Anderson.

If Adjusted Gross Income is	Estimated Net Benefit to Family: One child	Two children	Three or more
Less than $9,000	$50.00	$100.00	$150.00
$ 9,000–10,999	42.50	85.00	127.50
11,000–12,999	42.00	84.00	126.00
13,000–14,999	38.50	77.00	115.50
15,000–16,999	32.00	64.00	96.00
17,000–18,999	22.50	45.00	67.50
19,000–20,999	15.00	30.00	45.00
21,000–22,999	13.75	27.50	41.25
23,000–24,999	12.00	24.00	36.00
25,000 and over	0	0	0

benefits pick up at approximately the point at which tuition reimbursement benefits have off.

While the scheme of the enactment indicates that the purposes underlying the promulgation of the tuition reimbursement program should be regarded as pertinent as well to those tax law sections § 3 does contain an additional series of legislative findings. Those findings may be summarized as follows: (1) contributions to religious, charitable and educational institutions are allegedly deductible from gross income; (2) nonpublic educational institutions presently have exempt status; and (3) such institutions provide educations for children attending them and also serve to relieve the public school systems of the burden of providing for their education; and, therefore, "[i]t [is] the legislature's finds and determines that similar justifications . . . should also be provided to parents for monies paid to nonpublic elementary and secondary schools on behalf of their dependents."

Although no record was developed in this case a number of pertinent generalizations may be made about the nonpublic schools which would benefit from these enactments. The District Court, relying on findings in a similar case previously decided by the same court, proposed a profile of those sectarian, nonpublic schools similar to the one suggested in the plaintiffs' complaint. Qualifying institutions, under all three segments of the enactment, could be ones that:

> "(a) impose religious restrictions on admissions; (b) require attendance of pupils at religious activities; (c) require obedience by students to the doctrines and dogmas of a particular faith; (d) require pupils to attend instruction in the theology or doctrine of a particular faith; (e) are an integral part

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1 *Committee for Public Educ. & Religious Liberty v. Levitt*, 342 F. Supp. 439, 444-445 (SDNY 1972), vac'd, — U. S. —, — (1973).

Of course, the characteristics of [nonpublic] schools may vary widely from that profile. Some 700 000 to 800 000 students, constituting almost 20% of the State's entire elementary and secondary school population, attend over 2000 nonpublic schools, approximately 85% of which are church-affiliated. And while "all or practically all" of the 280 schools "entitled to receive maintenance and repair grants are related to the Roman Catholic Church and teach Catholic religious doctrine to some degree," *id.*, at 661, institutions qualifying under the remainder of the statute include a substantial number of Jewish, Lutheran, Episcopal, Seventh Day Adventist, and other church-affiliated schools.[9]

Plaintiffs argued below that because of the substantially religious character of the intended beneficiaries, each of the State's three enactments offended the Establishment Clause. The District Court, in an opinion carefully canvassing this Court's recent precedents, held unanimously that § 1 (maintenance and repair grants) and § 2 (tuition reimbursement grants) were invalid. As to the income tax provisions of §§ 3, 4, and 5, how-

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[9] As indicated in the District Court's opinion, it has been estimated that 580 schools would qualify for such grants. The relevant rules for determining eligibility are set out in 20 U. S. C. § 425, and the controversy as to whether the school system is one in which there is a high concentration of students from low-income families.

[10] In the fall of 1968, there were 2185 nonpublic schools in New York State, 1,473 Roman Catholic, 501 Jewish, 90 Lutheran, 46 Episcopal, 47 Seventh Day Adventist, 28 other, 6 of unknown affiliation, and 200 without religious affiliation. N. Y. State Educ. Dept. Financial Support—Nonpublic Schools 1 (1968).

ized a majority of the District Court, over the dissent of Circuit Judge Hays, held that the Establishment Clause had not been violated. Finding the provisions of the law severable, it enjoined permanently any further implementation of §§ 1 and 2 but declared the remainder of the law independently enforceable. The plaintiffs appealed directly to this Court, challenging the District Court's adverse decision as to the third segment of the statute.[7] The defendant state officials have appealed as well, as the court's decision invalidates the first and second portions of the 1972 law.[8] The intervenor Majority Leader and President pro tem of the Senate also appeals from those aspects of the lower court's opinion,[9] and the intervening parents of non-public school children have appealed only from the order as to § 2.[10] This Court noted probable jurisdiction over each appeal and ordered the cases consolidated for oral argument. — U. S. —— (1973). Thus, the constitutionality of each of New York's recently promulgated aid provisions is squarely before us. We affirm the District Court insofar as it struck down §§ 1 and 2 and reverse its determination regarding §§ 3, 4, and 5.

II

The history of the Establishment Clause has been recounted frequently and need not be repeated here. See *Everson* v. *Board of Education*, 330 U. S. 1 (Black, J., opinion of the Court); 28 (Rutledge, J., dissenting).

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[7] No. 72-694, *Committee for Public Education and Religious Liberty* v. *Nyquist*.

[8] No. 72-791, *Nyquist* v. *Committee for Public Education and Religious Liberty*.

[9] No. 72-753, *Anderson* v. *Committee for Public Education and Religious Liberty*.

[10] No. 72-729, *Cleary* v. *Committee for Public Education and Religious Liberty*.

(1947); McCollum v. *Board of Education*, 333 U. S. 203, 212 (1948) (Frankfurter, J., separate opinion); *McGowan v. Maryland*, 366 U. S. 420 (1961); *Engel v.*

[illegible] Virginia's experience, as related at length in the majority and dissenting opinions in *Everson*, supplies the greatest illumination in the history of this Court's adoption of the essentially Jeffersonian view of separation between Church and State. During the Colonial Era and until the late 1700's the Anglican Church enjoyed a privileged status as the established church of Virginia. But in 1776 assisted by the concerted efforts of Baptists, Presbyterians, and Lutherans the Virginia Convention approved a provision in its first constitution's Bill of Rights calling for the free exercise of religion. The provision, as drafted by George Mason and substantially amended by James Madison, stated: "... [illegible] the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience . . . ."

But the Virginia Bill of Rights contained no prohibition against the Establishment of Religion and the next eight years were spent in debate over the relationship between Church and State. In 1784 a bill sponsored principally by Patrick Henry, entitled "A Bill Establishing a Provision for Teachers of the Christian Religion," was brought before the Virginia Assembly. The Bill, reprinted in full as Appendix to Mr. Justice Rutledge's dissenting opinion in *Everson v. Board of Education*, *supra*, at 72, [illegible] required all persons to pay an annual tax for the support of the Christian ministry or for the teaching of religion [illegible] generally. Each taxpayer was permitted to designate the church he wished to receive his share of the tax. The Bill was not voted on during the 1784 session and prior to the convening of the 1785 session Madison penned his Memorial and Remonstrance against Religious Assessments, setting forth in fifteen paragraphs the reasons for his opposition to the Assessment Bill. The document was widely circulated and produced such overwhelming opposition to the bill that it was allowed to die in committee without a formal vote. Madison's Memorial and Remonstrance, recognized today as one of the cornerstones of the First Amendment's guarantee of government neutrality towards religion, [illegible] the necessary political climate for the enactment of [illegible] Thomas Jeffer-

Dodge, 370 U. S. 421, 436 (1962). It is enough to note that it is now firmly established that a law may be one "respecting the establishment of religion" even though its consequence or its end is to promote a "state religion." *Lemon v. Kurtzman*, 403 U. S. 602, 612 (1971), and even though it does not aid one religion more than another but merely benefits all religions alike. *Epperson v. Board of Education*, *supra*, at 15. It is equally well established, however, that not every law that confers an "indirect," "remote," or "incidental" benefit upon religious institutions is, for that reason alone, constitutionally invalid. *Id.*; *McGowan v. Maryland*, *supra*, at 450; *Walz v. Tax Comm'n*, 397 U. S. 664, 671–672, 674–675 (1970). What our cases require is careful examination of any law to ascertain whether it furthers any of the evils which that Clause protects. Primary among those evils have been "sponsorship, financial support, and active involvement

against

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sion's Bill for Establishing Religious Freedom, which contrasted Virginia's tradition of the separation of church and state. The core of that principle is stated in the bill, in that section of it "declar[ing] that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors is sinful and tyrannical . . . ." In Jefferson's perspective, the vital step was the "wall of separation" to the perpetuation of democratic institutions that it was the Bill, along with the authorship of the Declaration of Independence and the founding of the University of Virginia, that he selected to be remembered for in his epitaph. Report of the Commission on Constitutional Revision, The Constitution of Virginia 206–208 (1969).

Both Madison's Bill of Rights provision on the free exercise of religion and Jefferson's Bill for Establishing Religious Freedom were retained in the Virginia Constitution without substantive change throughout that State's history. *See* Va. Const., Art. I, § 16, in which the two guarantees were first joined together in a single provision. For comprehensive discussions of the pertinent Virginia history, see L. Pfeffer, Church, State, and Freedom 103–115 (1953); 1, Brant, James Madison: The Nationalist 1780–1787, 311–333 (1948).

of the sovereign in religious activity." *Walz* v. *Tax Comm'n*, *supra*, at 668; *Lemon* v. *Kurtzman*, *supra*, at 612.

Most of the cases coming to this Court raising Establishment Clause questions have involved the relationship between religion and education. Among those religion-education precedents two general categories of cases may be identified, those dealing with religious activities within the public schools,[7] and those providing public aid in varying forms to sectarian educational institutions.[8] While the New York legislation places this case in the latter category, its resolution requires consideration not only of the several state-to-sectarian education cases but also of our other education precedents and of several important non-education cases. For the now well defined three-part test that has emerged from our decisions is a product of considerations not only from the full sweep of the Establishment Clause cases. Taken together these decisions dictate that to pass muster under the Establishment Clause the law in question must first reflect a clearly secular legislative purpose, *e. g.*, *Epperson* v. *Arkansas*, 393 U. S. 97 (1968), second, must have a primary effect that neither advances nor inhibits religion, *e. g.*, *McGowan* v. *Maryland*, *supra*; *School Dist. of Abington Township* v. *Schempp*, 374 U. S. 203

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[7] *Meek* v. *Pittenger*, *supra*; *Board of Ed.* v. *Allen*, *supra*; *Everson* v. *Board of Ed.*, *supra*; *Wolman* v. *Walter*, *supra*; *Committee for Public Ed.* v. *Nyquist*, *supra*; *Levitt* v. *Committee for Public Ed.*, *supra*; *Board of Ed.* v. *Allen*, *supra*; *Engel* v. *Vitale*, 370 U. S. 421 (1962); *Abington School Dist.* v. *Schempp*, 374 U. S. 203 (1963); *Epperson* v. *Arkansas*, 393 U. S. 97 (1968); *Stone* v. *Graham*, 449 U. S. 39 (1980) (*per curiam*); *Wallace* v. *Jaffree*, 472 U. S. 38 (1985); *Edwards* v. *Aguillard*, 482 U. S. 578 (1987); *Lee* v. *Weisman*, 505 U. S. 577 (1992); *Santa Fe Independent School Dist.* v. *Doe*, 530 U. S. 290 (2000); *Elk Grove Unified School Dist.* v. *Newdow*, 542 U. S. 1 (2004); *Cutter* v. *Wilkinson*, 544 U. S. 709 (2005); *Zelman* v. *Simmons-Harris*, 536 U. S. 639 (2002); *Agostini* v. *Felton*, 521 U. S. 203 (1997); *Mitchell* v. *Helms*, 530 U. S. 793 (2000); *Zobrest* v. *Catalina Foothills School Dist.*, 509 U. S. 1 (1993); *Lamb's Chapel* v. *Center Moriches Union Free School Dist.*, 508 U. S. 384 (1993); *Rosenberger* v. *Rector and Visitors of Univ. of Va.*, 515 U. S. 819 (1995); *Good News Club* v. *Milford Central School*, 533 U. S. 98 (2001); *Mergens* v. *Board of Education*, 496 U. S. 226 (1990); *Widmar* v. *Vincent*, 454 U. S. 263 (1981); *Tilton* v. *Richardson*, 403 U. S. 672 (1971); *Lemon* v. *Kurtzman*, *supra*; *Walz* v. *Tax Comm'n*, *supra*; *Board of Ed.* v. *Allen*, *supra*; *Everson* v. *Board of Ed.*, *supra*; *Committee for Public Ed.* v. *Nyquist*, *supra*; *Levitt* v. *Committee for Public Ed.*, *supra*; *Meek* v. *Pittenger*, *supra*; *Wolman* v. *Walter*, *supra*; *Mueller* v. *Allen*, 463 U. S. 388 (1983); *Witters* v. *Washington Dept. of Services for Blind*, 474 U. S. 481 (1986); *Zobrest* v. *Catalina Foothills School Dist.*, *supra*; *Agostini* v. *Felton*, *supra*; *Mitchell* v. *Helms*, *supra*.

(1963), and third must avoid excessive government entanglement with religion. e. g., *Walz* v. *Tax Comm'n*, *supra*. See *Lemon* v. *Kurtzman*, *supra*, at 612–613; *Tilton* v. *Richardson*, 403 U. S. 672, 678 (1971).

In applying these criteria to the three distinct forms of aid involved in this case we need touch only briefly on the requirement of a "secular legislative purpose." As the recitation of legislative purposes appended to New York's law indicates, each measure is adequately supported by legitimate, nonsectarian state interests. We do not question the propriety, and fully secular content, of New York's interest in preserving a healthy and safe educational environment for all of its school children. And we do not doubt—indeed, we fully recognize—the validity of the State's interests in promoting pluralism and diversity among its public and nonpublic schools. Nor do we hesitate to acknowledge the reality of its concern for an already overburdened public school system that might suffer in the event a significant percentage of children presently attending nonpublic schools should abandon those schools in favor of the public schools.

But the propriety of a legislature's purposes may not immunize from further scrutiny a law which either has a primary effect that advances religion, or which fosters excessive entanglements between Church and State. Accordingly, we must weigh each of the three aid provisions challenged here against these criteria of effect as of entanglement.

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[1] In discussing the application of these tests, Mr. Chief Justice Burger noted in *Tilton* v. *Richardson*, *supra*, that "there is no single constitutional standard that can be used to measure the precise degree" to which any aid or data is applicable to the state action under scrutiny. Rather, these tests or criteria should be viewed as guidelines within which to consider the particular criteria developed over many years and applicable to a wide range of governmental actions challenged as violative of the Establishment Clause." *Id.*, at 677–678.

A

The "maintenance and repair" provisions of § 4 authorize direct payments to nonpublic schools, virtually all of which are Roman Catholic schools in low-income areas. The grants, totaling $30 or $40 per pupil depending on the age of the institution, are given largely without restriction on usage. So long as expenditures do not exceed 5% of nonpayable expenses in the public school system, it is possible for a sectarian elementary or secondary school to finance its entire "maintenance and repair" budget from state-raised funds. No attempt is made to restrict payments to those expenditures related to the upkeep of facilities used exclusively for secular purposes, nor do we think it possible within the context of these religion-oriented institutions to impose such restrictions. Nothing in the statute, for instance, bars a qualifying school from paying out of state funds the salary of employees who maintain the sets of chapels, or the cost of renovating classrooms in which religion is taught, or the cost of heating and lighting those same facilities. Absent appropriate restrictions on expenditures for those nonsecular purposes, it simply cannot be denied that this section has a primary effect that advances religion in that it subsidizes directly the religious activities of sectarian elementary and secondary schools.

The state officials nevertheless argue that these expenditures for "maintenance and repair" are similar to other financial expenditures approved by this Court. Primarily they rely on *Everson* v. *Board of Education*, *supra*, *Board of Education* v. *Allen*, *supra*, and *Wolman* v. *Walter*, *supra*. In each of those cases it is true that the Court approved a form of financial assistance which conferred undeniable benefits upon private, sectarian schools. But a close examination of those cases illuminates many distinguishing relevant characteristics. In *Ever-*

son, the Court, in a five-to-four decision approved a program of reimbursements to parents of public as well parochial school children for bus rates paid in connection with transportation to and from school—a program which the Court characterizes as approaching the "verge" of impermissible state aid. 330 U. S., at 16. In *Allen*, decided some 20 years later, the Court upheld a New York law authorizing the provision of secular textbooks for all children in grades seven through 12 attending public and nonpublic schools. Finally, in *Tilton*, the Court upheld federal grants of funds for the construction of facilities to be used for clearly secular purposes by public and nonpublic institutions of higher learning.

Lemon does simply recognize that sectarian schools perform secular educational functions as well as religious functions and that some forms of aid may be characterized as secular without providing direct aid to the sectarian. But the channel is a narrow one, as the above cases illustrate. Of course it is true, in each case that the provision of such neutral, nonideological aid, assisting only the secular functions of sectarian schools, served indirectly to promote the religious function by rendering it more likely that children would attend sectarian schools and by freeing the budgets of those schools for use in other nonsecular areas. But an indirect or incidental effect beneficial to religious institutions has never been thought a sufficient defect to warrant the invalidation of a state law. In *McGowan v. Maryland*, *supra*, Sunday Closing Laws were sustained even though one of their undeniable effects was to render it somewhat more likely that citizens would respect religious restrictions and even attend religious services. Also, in *Walz v. Tax Commission*, *supra*, property tax exemptions for church property were held not violative of the Establishment Clause despite the fact that such exemptions relieved churches of a financial burden.

Tilton draws the line most clearly. Wade a bare majority was there persuaded for the reasons stated separately in the plurality opinion and in Mr. Justice White's concurrence that currently limited construction grants to colleges on the premises could be sustained, the Court was unanimous in its rejection of one clause of the federal statute in question. Under that clause, the Government was entitled to recover a portion of its grant to a sectarian institution in the event that the constructed facility was used to advance religion by, for instance, recovering the building to a chapel or otherwise allowing it to be "used to promote religious interests." 403 U. S., at 683. But because the statute provided that the condition would expire at the end of 20 years, the facilities would thereafter be available for use or hypothecation for any sectarian purpose. In striking down this provision, the plurality opinion emphasized that "[l]imiting the prohibition for religious use of the structure to 20 years obviously opens the facility to use for any purpose at the end of that period." *Ibid.* And in that event, "[t]he original federal grant will in part have the effect of advancing religion." *Ibid.* *See also id.* at 690 (Douglas, J., dissenting); 699–700 (Brennan, J., dissenting); 685 n. 1 (Warren, C. J., concurring in the judgment). If tax-raised funds may not be granted to institutions of higher learning where the possibility exists that those funds will be used to construct a facility utilized for sectarian activities 20 years hence, *a fortiori* they may not be distributed to elementary and secondary sectarian schools[2] for the maintenance and repair of facilities without any limitations on their use. If the State may not erect buildings in which religious activities are

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[2] The plurality in *Tilton* was careful to point out that there are "significant differences between the religious activities of church-related institutions of higher learning and parochial elementary and secondary schools." *Id.*, at 685. *See Hunt* v. *McNair*, *ante*.

to take place, it may not maintain such buildings or renovate them when they fall into disrepair.[26]

It might be argued, however, that while the New York "maintenance and repair" grants lack specifically articulated secular restrictions, the statute does provide a sort of statistical guarantee of separation by limiting grants to 50% of the amount expended for comparable services in the public schools. The legislature's supposition might have been that at least 50% of the ordinary public school maintenance and repair budget would be devoted to purely secular facility upkeep in sectarian schools. The shortest answer to this argument is that the statute itself allows, as a ceiling, grants satisfying the entire "amount of expenditures for maintenance and repair of such school" providing only that it is neither more than $30 or $40 per pupil nor more than 50% of the comparable public school expenditures.[28] Quite apart from the lan-

[26] Our Establishment Clause precedents have recognized the special relevance in this area of Mr. Justice Holmes' comment that "a page of history is worth a volume of logic." See Walz v. Tax Commission, *supra*, at 675-676, quoting *New York Trust Co. v. Eisner*, 256 U. S. 345, 349 (1921). In *Everson* Mr. Justice Black [illegible] the history [illegible] the pre-Revolutionary [illegible] of state establishment [illegible] support of religion and churches:

"These practices became so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence. The imposition of taxes to pay ministers' salaries and to build and maintain churches and church property aroused their indignation. It was these feelings which found expression in the First Amendment." 330 U. S., at 11 (emphasis supplied).

[28] The pertinent section reads as follows:

"In order to meet proper health, welfare and safety standards in qualifying schools for the benefit of the pupils enrolled therein, there shall be apportioned health, welfare and safety grants by the commissioner to each qualifying school for the school year beginning on and after July first, nineteen hundred seventy-two, in an amount equal to the product of thirty dollars multiplied by the average daily attendance of pupils receiving instruction in such

guage of the statute, our cases make clear that a mere statistical judgment will not suffice as a guarantee that state funds will not be used to finance religious education. In *Earley* v. *DiCenso*, the companion case to *Lemon* v. *Kurtzman*, *supra*, the Court struck down a Rhode Island law authorizing salary supplements to teachers of secular subjects. The grants were not to exceed 15% of any teacher's annual salary. Although the law was invalidated on entanglement grounds, the Court made clear that the State could not have avoided violating the Establishment Clause by merely assuming that its teachers would succeed in segregating "their religious beliefs from their secular educational responsibilities." 403 U. S., at 619.

> "The Rhode Island Legislature has not, and *could not*, provide state aid on the basis of a mere assumption that secular teachers under religious discipline can avoid conflicts. The State *must be certain, given the Religion Clauses*, that subsidized teachers do not inculcate religion . . . ." *Ibid.* (Emphasis supplied.)[24]

[illegible] *It is hereby found and declared that the per pupil amount allocated under this section shall not exceed fifty per centum of the average per pupil cost of equivalent maintenance and repair to the public schools of the state on a statewide basis as determined by the commissioner, and in no event shall the amount received by a qualifying school exceed the amount of expenditures for maintenance and repair of such school as reported pursuant to section five hundred fifty-nine of this article.*" N. Y. Educ. Law Art. 12 § 550 (McKinney 1972) (emphasis supplied).

[24] Elsewhere in the opinion, the Court emphasized the necessity for the States of Rhode Island and Pennsylvania to ensure, through careful regulation, the secularity of the grants:

"The two legislatures . . . have . . . recognized that church-related

Nor could the State of Rhode Island have prevailed by simply relying on the assumption that, whatever a secular teacher's inabilities to refrain from mixing the religious with the secular, he would surely devote at least 15% of his efforts to purely secular education, thus exhausting the state grant. It takes little imagination to perceive the extent to which States might openly subsidize parochial schools under such a loose standard of scrutiny. See also *Tilton* v. *Richardson*, *supra*.[2]

What we have said demonstrates that New York's maintenance and repair provisions violate the Establishment Clause because their effect, inevitably, is to subsidize and advance the religious mission of sectarian schools. We have no occasion, therefore, to consider the further question whether those provisions as presently written would also fail to survive scrutiny under the entanglement aspect of the three-part test because assuring the secular use of all funds requires too intrusive and continuing a relationship between Church and State. *Lemon* v. *Kurtzman*, *supra*.

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[1] Seminaries and secondary schools have a significant religious mission and that a substantial portion of their activities is religiously oriented. They [illegible] designed to maintain the separation between secular and religious [illegible] the State [illegible] As these [illegible] in [illegible] program approved [illegible] the Religion Clauses. 403 U. S., at [illegible].

[2] In *Tilton* [illegible] limited to covering 50% of the cost [illegible]. It is clear from the [illegible] the Court was concerned [illegible] federally financed facilities [illegible] religious purposes [illegible] or 20% [illegible] used for secular activities [illegible] the 20-year restriction would have survived.

B

New York's tuition reimbursement program also fails the "effect" test, for much the same reasons that govern its maintenance and repair grants. The state program is designed to allow direct unrestricted grants of $50 to $100 per child (but no more than 50% of tuition actually paid) as reimbursement to parents in "low-income brackets who send their children to nonpublic schools." To qualify a parent must have earned less than $5,000 in taxable income and must present a receipted tuition bill from a nonpublic school, the bulk of which are concededly sectarian in orientation.

There can be no question that these grants could not, consistently with the Establishment Clause be given directly to sectarian schools since they would suffer from the same defects that renders invalid the grants for maintenance and repair. In the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid. As Mr. Justice Black put it quite simply in *Everson*,

> "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." 330 U. S., at 16.

The controlling question here, then, is whether the fact that the grants are delivered to parents rather than schools is of such significance as to compel a contrary result. The State and intervenor-appellees rely on *Everson* and *Allen* for their claim that grants to parents are like grants to institutions, respect the "wall of separation" required by the Constitution. It is true that in those cases the Court upheld laws that provided benefits to

children attending religious schools and to their parents. As noted above, in *Everson* parents were reimbursed for bus fares paid to send children to parochial schools, and in *Allen* textbooks were loaned directly to the children. But those decisions make clear that, far from providing a *per se* immunity from examination of the substance of the State's program, the fact that aid is disbursed to parents rather than to the schools is only one among many to be considered.

In *Everson*, the Court found the bus fare program analogous to the provision of services such as police and fire protection, sewage disposal, highways, and sidewalks for parochial schools. 330 U. S., at 17-18. Such services, provided in common to all citizens, are "so separate and so indisputably marked off from the religious function," ~~is founded upon a similar principle. The Court there~~ *id.*, at 18, that they may fairly be viewed as reflections of a neutral posture toward religious institutions. *Allen* is founded upon a similar principle. The Court there repeatedly emphasized that upon the record in that case there was no indication that textbooks would be provided for anything other than purely secular courses. "Of course books are different from buses. Most bus rides have no inherent religious significance, while religious books are common. However, the language of [the law under consideration] does not authorize the loan of religious books, and the State claims no right to distribute religious literature. . . . Absent evidence we cannot assume that school authorities . . . are unable to distinguish between secular and religious books or that they will not honestly discharge their duties under the law." 392 U. S., at 244-245.[illegible]

[illegible] *Allen* and *Everson* differ from the present case in a second important respect. In both cases the class of beneficiaries included all schoolchildren, those in public as well as those in private schools. See also *Tilton* v. *Richardson*, *supra*, in which federal aid was made

The tuition grants here are subject to no such restrictions. There has been no endeavor "to guarantee the separation between secular and religious educational functions and to ensure that State financial aid supports only the former." *Lemon v. Kurtzman*, *supra*, at 613. Indeed, it is precisely the function of New York's law to provide assistance to private schools, the great majority of which are sectarian. By reimbursing parents for a portion of their tuition bill, the State seeks to relieve their financial burdens sufficiently to assure that they continue to have the option to send their children to religion-oriented schools. And while the other purposes for that aid—to perpetuate a pluralistic educational environment and to protect the fiscal integrity of overburdened public schools—are certainly unexceptionable, the effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions.[39]

as a whole to all [illegible] *Walz v. Tax Commission*, *supra*, in which tax exemptions were accorded to all educational and charitable nonprofit institutions. Because of the manner in which we have resolved the tuition grant issue, we need not decide whether the significantly religious character of the statute's beneficiaries might differentiate the present cases from a case involving some form of public assistance (e.g., scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited. See *Wolman v. Essex*, 342 F. Supp. 399, 412-413 (SD Ohio 1972), aff'd, 409 U. S. 808 (1972). Thus, our decision today does not compel, as appellees have contended, the conclusion that the educational assistance provisions of the "G. I. Bill," 38 U. S. C. § 1651, impermissibly advance religion in violation of the Establishment Clause. See also n. 28, *supra*. alone

[39] Appellees, focusing on the term "principal or primary effect" which this Court has utilized in expressing the second prong of the three-part test, e. g., *Lemon v. Kurtzman*, *supra*, at 612, have argued that the Court must decide in these cases whether the "primary" effect of New York's tuition grant program is to subsidize religion or to promote these legitimate secular objectives. We do not think that such metaphysical judgments are either possible or necessary. Our cases simply do not support the notion that a law found to have

Mr. Justice Black, dissenting in *Allen*, warned that:

> "[I]t requires no prophet to foresee that on the argument used to support this law others could be up-

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a "primary" effect to promote some legitimate end under the State's police power is immune from further examination to ascertain whether it also has the direct and immediate effect of advancing religion. In *McGowan* v. *Maryland*, supra, Sunday Closing Laws were upheld not because their effect was, first, to promote the legitimate interest in a universal day of rest and recreation and only secondarily to assist religious interests; instead, approval flowed from the finding, based upon a close examination of the history of such laws, that they had only a "remote and incidental" effect advantageous to religious institutions. *Id.*, at 450. See also *Gallagher* v. *Crown Kosher Super Market*, 366 U.S. 617, 630 (1961); *Two Guys from Harrison-Allentown, Inc.* v. *McGinley*, 366 U.S. 582, 598 (1961). Likewise, in *Schempp*, the State of Pennsylvania argued that Bible reading and other religious exercises in public schools served "primary" secular purposes, including "the promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature." 374 U.S., at 223. Yet, without discrediting those ends and without determining whether they were more or less important than the religious aims, the Court held such exercises incompatible with the Establishment Clause. See also 374 U.S., at 278 (BRENNAN, J., concurring). Any remaining question about the contours of the "effect" criterion should have been resolved after the Court's decision in *Tilton* in which the Court found the mere possibility that a federally financed structure might be used for religious purposes 20 years hence was constitutionally impermissible because the grant might "in part have the effect of advancing religion." 403 U.S., at 683.

It may also be revealing in this connection to note that the argument here is not a new one. The "Preamble" to Patrick Henry's Bill Establishing a Provision for Teachers of the Christian Religion which would have required Virginians to pay taxes to support religious teachers and which became the focal point of Madison's Memorial and Remonstrance, supra, n. 29, contained the following recital of secular purposes:

"The general diffusion of Christian knowledge hath a natural tendency to correct the morals of men, restrain their vices, and preserve the

> held providing for state or federal government funds to buy property on which to erect religious school buildings or to erect the buildings themselves, to pay the salaries of the religious school teachers, and finally to have the religious groups cease to rely on voluntary contributions of members of their sects while waiting for the government to pick up all the bills for the religious schools." 392 U. S., at 253.

His fears regarding religious buildings and religious teachers have not come to pass, *Tilton* v. *Richardson, supra*; *Lemon* v. *Kurtzman, supra*, and insofar as tuition grants constitute a means of "pick[ing] up . . . the bills for the religious schools," neither has his greatest fear materialized. But the ingenious plans for channeling state aid to sectarian schools that periodically reach this Court abundantly support the wisdom of Mr. Justice Black's prophecy.

Although we think it clear, for the reasons above stated, that New York's tuition grant program fares no better under the "effect" test than its maintenance and repair program, in view of the novelty of the question we will address briefly the subsidiary arguments made by the state officials and intervenors in its defense of this particular statutory program.

First, it has been suggested that it is of controlling significance that New York's program calls for *reimbursement* for tuition already paid rather than for direct contributions which are merely routed through the parents

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peace of society. . . ." *Everson* v. *Board of Education*, 330 U. S., at 72 (dissenting opinion, Appendix to dissent of Rutledge, J.).

Some scholars of Madison's era have noted how little [illegible] whether taxes might possess sufficiently coercive religious [illegible] whether the secular effects of aid to [illegible] might serve today any [illegible] 200 years ago to justify state direct and obvious [illegible] of religion. See L. Pfeffer, Church, State and Freedom 105, 115 (1953).

ents to the schools in advance of or in lieu of payment by the parents. The parent is not a mere conduit, we are told, but is absolutely free to spend the money he receives in any manner he wishes. There is no element of coercion attached to the reimbursement, and no assurance that the money will eventually end up in the hands of religious schools. The absence of any element of coercion, however, is irrelevant to questions arising under the Establishment Clause. In *School District of Abington Township v. Schempp*, *supra*, it was contended that Bible recitations in public schools did not violate the Establishment Clause because participation in such exercises was not coerced. The Court rejected that argument, noting that while proof of coercion might provide a basis for a claim under the Free Exercise Clause, it was not a necessary element of any claim under the Establishment Clause. *Id.*, at 222-223. MR. JUSTICE BRENNAN's concurring views reiterated the Court's conclusion:

> "Thus the short, and for me sufficient, answer is that the availability of excusal or exemption simply has no relevance to the establishment question, if it is once found that these practices are essentially religious exercises designed at least in part to achieve religious aims . . . ." *Id.*, at 288.

A similar inquiry governs here: if the grants are offered as an incentive to parents to send their children to sectarian schools by making unrestricted cash payments to them, the Establishment Clause is violated whether or not the actual dollars given eventually find their way into the sectarian institutions. Whether the grant is labeled a reimbursement, a reward or a subsidy, its sub-

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The forms of aid involved in *Everson*, *Board v. Allen*, and *Lemon* were all given as reimbursement, but not one of these cases suggests that this is of any constitutional significance.

statutive import is still the same. In sum, we agree with the conclusion of the District Court that "[w]hether he gets it during the current year, or as reimbursement for the past year, is of no constitutional importance." 350 F. Supp., at 668.

Second, [illegible], the Majority Leader and President pro tem of the State Senate [illegible] argues that "it is significant" here that the tuition reimbursement grants pay only a portion of the private child and an even smaller portion of the religious school's total expenses. The New York statute limits reimbursement to 50% of any parent's actual outlay. Additionally, he reiterates that only 30% of the total cost of nonpublic education is covered by tuition payments with the remainder coming from "voluntary contributions, either known or unknown." On the basis of these two statistics, appellee reasons that the "maximum tuition reimbursement by the State is thus only 15% of the educational costs in the nonpublic schools." And "since compulsory education laws of the State, by necessity, require significantly more than 15% of school time to be devoted to teaching secular courses," the New York statute provides "no statistical guarantee of neutrality." It should readily be seen that this is simply another variant of the argument we have rejected as to maintenance and repair costs, *ante*, — — and it can fare no better here. Obviously, if accepted, this argument would preclude the formulation for massive, direct subsidization of sectarian elementary and secondary schools. Our cases, however, have long since interpreted the notion that mere statistical assurances will suffice to sail between the Scylla and Charybdis of "either" and "entanglement."

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[1] Brief of Appellee Warren M. Anderson, p. 28.
[2] *Ibid.*
[3] *Ibid.*

Finally, the State argues that its program of tuition grants should survive scrutiny because it is designed to promote the free exercise of religion. The State notes that only "low-income parents" are aided by this law, and without state assistance their right to have their children educated in a religious environment is diminished or even denied.[24] It is true, of course, that this Court has long recognized and maintained the right to choose nonpublic over public education. *Pierce v. Society of Sisters*, 268 U. S. 510 (1925). It is also true that a state law interfering with a parent's right to have his child educated in a sectarian school would run afoul of the Free Exercise Clause. But this Court repeatedly has recognized that tension inevitably exists between the Free Exercise and the Establishment Clauses, *e. g. Everson v. Board of Education*, *supra*; *Walz v. Tax Commission*, *supra*, and that it may often not be possible to promote the former without affecting the latter. As a result of this tension, our cases require the State to maintain an attitude of "neutrality," neither "advancing" nor "inhibiting" religion.[25] In its attempt to enhance the opportunities of the poor to choose between public and nonpublic education, the State has taken a step which can only be regarded as one "advancing" religion. However great our sympathy, *Everson v. Board of Education*, *supra*, at 18, for the burdens experienced by those who must pay public school taxes at the same time that they support other schools because of the constraints of "conscience and discipline," *ibid.*, and notwithstanding the "high social importance" of the State's purposes, *Wisconsin*

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[24] N. Y. Educ. Law, Art. 12A, § 5-c (c) (McKinney 1972 Supp.) (legislative finding concerning tuition grant program).

[25] "[T]he basic purpose of this provision . . . is to insure that no religion is favored or disfavored, none commended or condemned." *Walz v. Tax Commission*, *supra*, at 669.

sin v. *Yoder*, 406 U. S. 205, 214 (1972), neither may justify an eroding of the limitations of the Establishment Clause now firmly emplanted.[?]

C

Sections 3, 4, and 5 establish a system for providing income tax benefits to parents of children attending New York's nonpublic schools. In this Court, the parties have engaged in a considerable debate over what label best fits the New York law. Appellants insist that the law is, in effect, one establishing a system of tax "credits." The State and the intervenors reject that characterization and would label it, instead, a system of income tax "modifications." The Solicitor General, in an *amicus curiae* brief filed in this Court, has referred throughout to the New York law as one authorizing tax "deductions." The District Court majority found that the aid was "in effect a tax credit," 350 F. Supp., at 672 (emphasis in original). Because of the peculiar nature of the benefit allowed, it is difficult to adopt any single traditional label lifted from the law of income taxation. It is, at least in its form, a tax deduction since it is an amount subtracted from adjusted gross income, prior to computation of the tax due. Its effect, as the District Court concluded, is more like that of a tax credit since the deduction is not related to the amount actually spent for tuition and is apparently designed to yield a predetermined amount of tax "forgiveness" in exchange for performing a specific act which the State desires to encourage—the usual attribute of a tax credit. We see no reason to select one label over the other as the constitutionality of this hybrid benefit does not turn in any event on the label we accord

[?] As [illegible] the second part of the test [illegible] the effect of advancing religion, we need not consider the entanglement issue.

it. As MR. CHIEF JUSTICE BURGER's opinion for the Court in *Lemon* v. *Kurtzman*, *supra*, at 614, notes, constitutional analysis is not a "legalistic minuet in which precise rules and forms govern." Instead we must "examine the form of the relationship for the light that it casts on the substance."

These sections allow parents of children attending nonpublic elementary and secondary schools to subtract from adjusted gross income a specified amount if they do not receive a tuition reimbursement under § 2, and if they have an adjusted gross income of less than $25,000. The amount of the deduction is unrelated to the amount of money actually expended by any parent on tuition, but is calculated on the basis of a formula contained in the statute. The formula is apparently the product of a legislative attempt to assure that each family would receive a carefully estimated net benefit, and that the tax benefit would be comparable to, and compatible with, the tuition grant for lower income families. Thus a parent who earns less than $5,000 is entitled to a tuition reimbursement of $50 if he has one child attending an elementary, nonpublic school, while a parent who earns more (but less than $9,000) is entitled to have a precisely equal amount taken off his tax bill. Additionally, a taxpayer's benefit under these sections is unrelated to, and not reduced by, any deductions to which he may be entitled for charitable contributions to religious institutions.

In practical terms there would appear to be little difference, for purposes of determining whether such aid

See n. 11, supra.

The [illegible] is reproduced in n. 11, supra.

Since the program here does not have the elements of a genuine tax deduction, such as for charitable contributions, we do not have before us, and do not decide, whether that form of tax benefit is constitutionally acceptable under the "neutrality" test in Walz.

has the "effect of advancing" religion. Between the tax benefit allowed here and the tuition grant allowed under § 2. The qualifying parent under either program receives the same form of encouragement and reward for sending his children to nonpublic schools. The only difference is that one parent receives an actual cash payment while the other is allowed to reduce by an arbitrary amount the sum he would otherwise be obliged to pay over to the State. We see no answer to Judge Hays' dissenting statement below that "[i]n both instances the money involved represents a charge made upon the state for the purpose of religious education." 350 F. Supp., at 675.

Appellees defend the tax portion of New York's legislative package on two grounds. First, they contend that it is of controlling significance that the grants or credits are directed to the parents rather than to the schools. This is the same argument made in support of the tuition reimbursements and rests on the same reading of the same precedents of this Court, primarily *Everson* and *Allen*. Our treatment of this issue in Part II-B, *supra*, at —, is applicable here and requires rejection of this claim.[illegible] Second, appellees place their strongest reliance on *Walz* v. *Tax Commission*, *supra*, in which New York's property tax exemption for religious organizations was upheld. We think that *Walz* provides no support for appellees' position. Indeed, its rationale plainly compels the conclusion that New York's tax package violates the Establishment Clause.

[illegible] Appellants contend in their brief [illegible] the Court [illegible] rule that Section 2 of the Act does not violate the Establishment Clause [illegible] to Sections 3 and 5 [illegible] Appellants, at 12 [illegible]. We agree [illegible] and that [illegible] § 2 does violate the Establishment Clause [illegible] the sections [illegible] benefits.

Tax exemptions for church property enjoyed an apparently universal approval in this country both before and after the adoption of the First Amendment. The Court in *Walz* surveyed the history of tax exemptions and found that each of the 50 States has long provided for tax exemptions for places of worship, that Congress has exempted religious organizations from taxation for over three-quarters of a century, and that congressional enactments in 1802, 1813, and 1870 specifically exempted church property from taxation. In sum, the Court concluded that "[f]ew concepts are more deeply embedded in the fabric of our national life, beginning with pre-Revolutionary colonial times, than for the government to exercise at the very least this kind of benevolent neutrality toward churches and religious exercise generally." *Id.*, at 676-677.[illegible] We know of no historical precedent for New York's recently promulgated tax relief program. Indeed, it seems clear that tax benefits for parents whose children attend parochial schools are a recent innovation, occasioned by the growing financial plight of such nonpublic institutions and designed, albeit unsuccessfully, to tailor state aid in a manner not incompatible with the recent decisions of this Court. See *Kosydar* v. *Wolman*, — F. Supp. — (SD Ohio 1972), juris. statement pending, No. 72-1139.

But historical acceptance without more would not alone have sufficed, as "no one acquires a vested or protected right in violation of the Constitution by long use." 397 U. S., at 678. It was the reason underlying that long history of tolerance of tax exemptions for religion that proved controlling. A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of "neutrality" toward religion. Yet

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[illegible] The separate opinions of Mr. Justice Harlan and Mr. Justice Brennan also emphasize the historical acceptance of tax exemptions for religious institutions. See 397 U. S., at [illegible].

governments [illegible] not always [illegible] and oppression has taken many forms, one of which has been taxation of religion. Thus, if taxation was regarded as a form of "hostility" toward religion, "exemption constitute[d] a reasonable and balanced attempt to guard against those dangers." *Id.*, at 673. Special tax benefits, however, cannot be squared with the principle of neutrality established by the decisions of this Court. To the contrary, insofar as such benefits render assistance to parents who send their children to sectarian schools, their purpose and inevitable effect are to aid and advance those religious institutions.

Apart from its historical foundations, *Walz* is a product of the same dilemma and inherent tension found in most government-aid-to-religion controversies. To be sure, the exemption of church property from taxation conferred a benefit, albeit indirect and incidental. Yet that "aid" was a product not of any purpose to support or to subsidize, but of a fiscal relationship designed to minimize involvement and entanglement between Church and State. "The exemption," the Court emphasized, "tends to complement and reinforce the desired separation insulating each from the other." *Id.*, at 676. Furthermore, "[e]limination of the exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes." *Id.*, at 674. The granting of the tax benefits under the New York statute, unlike the extension of an exemption, would tend to increase rather than limit the involvement between Church and State.

One further difference between tax exemptions for church property and tax benefits for parents should be noted. The exemption challenged in *Walz* was not restricted to a class composed exclusively or even predominantly

mainly of religious institutions. Instead, the exemption covered all property devoted to religious, educational or charitable purposes. As the parties here must concede, tax reductions authorized by this law flow primarily to the parents of children attending sectarian, nonpublic schools. Without intimating whether the factor alone might have controlling significance in another context or some future case, it should be apparent that in terms of the potential divisiveness of any legislative measure the narrowness of the benefited class would be an important factor.

In conclusion, we find the *Walz* analogy unpersuasive and in light of the practical similarity between New York's tax and tuition reimbursement programs, we hold that neither form of aid is sufficiently restricted to assure that it will not have the impermissible effect of advancing the sectarian activities of religious schools.

III

Because we have found that the challenged sections have the impermissible effect of advancing religion, we need not reconsider whether such aid would yield an entanglement of the State with religion in the sense of "[a] comprehensive, discriminating, and continuing state surveillance." *Lemon* v. *Kurtzman*, 403 U. S., at 619. But the importance of the competing societal interests implicated in this case prompts us to make the further observation that, apart from any specific entanglement of the State in particular religious programs, assistance of the sort involved here carries grave potential for entanglement in the broader sense of continuing political strife over aid to religion.

Few would question most of the legislative findings supporting this statute. We recognized in *Board of Education* v. *Allen*, 392 U. S., at 247 that "private education has played and is playing a significant and valuable role in raising levels of knowledge, competence, and experi-

ence," and certainly private parochial schools have contributed importantly to this role. Moreover, the tailoring of the New York statute to channel the aid provided primarily to afford low-income families the option of determining where their children are to be educated is most appealing.[illegible] There is no doubt that the private schools are confronted with increasingly grave fiscal problems, that resolving these problems by increasing tuition charges forces parents to turn to the public schools, and that this in turn—as the present legislation recognizes—exacerbates the problems of public education at the same time that it weakens support for the parochial schools.

These, in briefest summary, are the underlying reasons for the New York legislation and for similar legislation in other States. They are substantial reasons. Yet they must be weighed against the relevant provisions and purposes of the First Amendment, which safeguard the separation of Church from State and which have been regarded from the beginning as one of the most cherished features of our constitutional system.

One factor of recurring significance in this weighing process is the potentially divisive political effect of an aid program. As Mr. Justice Black's opinion in *Everson v. Board of Education*, *supra*, emphasizes, competition among religious sects for political and religious supremacy has occasioned considerable civil strife, "generated in large part" by competing efforts to gain or maintain the support of government. *Id.*, at 8-9. As Mr. Justice

[illegible] As noted in the majority below, "This [illegible] is, in essence, a conflict between two [illegible] of extraordinary [illegible] and civic responsibility. One group [illegible] the financing of [illegible] and religious education which is thought to be an integral part of their right to the free exercise of religion. The other [illegible] equally dedicated [illegible] that encroachment of government in aid of religion is as dangerous to the secular state as encroachment of government to restrict religion would be to its free exercise." [illegible] F. Supp., at [illegible].

Harlan put it: "[W]hat is at stake as a matter of policy in Establishment Clause cases is preventing that kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point." Walz v. *Tax Commission*, 397 U. S., at 694 (concurring opinion).

The Court recently addressed this issue specifically and fully in *Lemon* v. *Kurtzman*. After describing the political activity and bitter differences likely to result from the state programs there involved, the Court said:

> "The potential for political conflictiveness related to religious belief and practice is aggravated in these two statutory programs by the need for continuing annual appropriations and the likelihood of larger and larger demands as costs and population grow." 403 U. S., at 623.[4]

The language of the Court applies with peculiar force to the New York statute now before us. Section 1 (grants for maintenance and § 2 (tuition grants) will require continuing annual appropriations. Sections 3, 4 and 5 (income tax relief) will not necessarily require annual reconsideration, but the pressure for frequent enlargement of the relief is predictable. All three of these programs start out at modest levels: the maintenance grant is not to exceed $50 per pupil per year in approved schools; the tuition grant provides parents not

[4] The Court in *Lemon* further emphasized that political divisiveness along religious lines was to be considered with the political divisiveness typical of any controversial issue. "Ordinary political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect." [Several Citations] Public Aid to Parochial Schools, 82 Harv. L. Rev. 1496, 1502 (1969)." 403 U. S., at 622.

more than $50 a year for each child in the first eight grades and $100 for each child in the high school grades; and the tax benefit, though more difficult to compute, is equally modest. But we know from long experience with both Federal and State Governments that aid programs of any kind tend to become entrenched, to escalate in cost, and to generate their own aggressive constituencies. And the larger the class of recipients, the greater the pressure for accelerated increases.[illegible] Moreover, the State itself, concededly anxious to avoid assuming the burden of educating children now in private and parochial schools, has a strong motivation for increasing this aid as public school costs rise and population increases.[illegible] In this situation, where the underlying issue is the deeply emotional one of church-state relationships, the potential for seriously divisive political consequences needs no elaboration. And while the prospect of such divisiveness may not alone warrant the invalidation of state laws that otherwise survive the careful scrutiny required by the decisions of this Court, it is certainly a "warning signal" not to be ignored. *Id.*, at 625.

[illegible] As some 20% of the total school population in New York attends private and parochial schools, the constituency supporting these programs is not insignificant.

[illegible] The self-perpetuating tendencies of any form of government aid to religion have been a matter of concern running throughout our Establishment Clause cases. In *Schempp*, the Court emphasized that it was "no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment," for "what today is a trickling stream may all too soon become a raging torrent." 374 U. S., at 225. See also *Lemon v. Kurtzman*, supra, at 624-625. But to borrow the words from Mr. Justice Rutledge's forceful dissent in *Everson*, it is not just the potential expandability of state tax aid that renders such aid invalid. Not even "three pence" could be assessed: "Not the amount but the principle of assessment was wrong." 330 U. S., at 40 (quoting from Madison's Memorial and Remonstrance).

Our examination of New York's aid provisions, in light of all relevant considerations, compels the judgment that each, as written, has a "primary effect that advances religion," and offends the constitutional prohibition against laws "respecting the establishment of religion." We therefore affirm the three-judge court's holding as to §§ 1 and 2, and reverse as to §§ 3, 4, and 5.

It is so ordered.

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: White, J.

Circulated: 6-12-73

Recirculated: _____

Re: Nos. 72-694, 72-753, 72-791 and 72-929, Committee for Public Education and Religious Liberty v. Nyquist

and

Nos. 72-459 and 72-620, Sloan v. Lemon

Reversed

No specific answer Required

Mr. Justice White, dissenting.

Each of the States regards the education of its young to be a critical matter, so much so that it compels school attendance and provides an educational system at public expense. Any otherwise qualified child is entitled to a free elementary and secondary school education, or at least an education that costs him very little as compared with its cost to the State.

This Court has held, however, that the Due Process Clause of the Constitution entitles parents to send their children to non-public schools, secular or sectarian, if those schools are sufficiently competent to educate the child in the necessary secular subjects. Pierce v. Society of Sisters, 268 U.S. 510 (1925). About 10% of the Nation's children, approximately 5.2 million students, now take this option and are not being educated in public schools at public expense. Under state law these children have a right to a free public education and it would not appear unreasonable if the State, relieved of the expense of educating a child in the public school, contributed the expense of his

a free education in the public schools. They prefer to send their children, as they have the right to do, to non-public schools that furnish the satisfactory equivalent of a public school education but also offer subjects or other assumed advantages not available in public schools. Constitutional considerations aside, it would be understandable if a State gave such parents a call on the public treasury up to the amount it would have cost the State to educate the child in public school, or to put it another way, up to the amount the parents save the State by not sending their children to public school.

In light of the Free Exercise Clause of the First Amendment, this would seem particularly the case where the parent desires his child to attend a school that offers not only secular subjects but religious training as well. A State should put no unnecessary obstacles in the way of religious training for the young. "When the State encourages religious instruction . . . it follows the best of our traditions." Zorach v. Clauson, 343 U.S. 306, 313-314 (1952); Walz v. Tax Commission, 397 U.S. 664, 676 (1970). Positing an obligation on the State to educate its children, which every State acknowledges, it should be wholly acceptable for the State to contribute to the secular education of children going to sectarian schools rather than to insist that if parents want to provide their children with religious as well as secular education, the State will refuse to contribute anything to their secular training.

Historically the States of the Union have not furnished

school system, has encountered financial difficulties, with many schools being closed and many more apparently headed in that direction, there has developed a variety of programs seeking to extend at least some aid to private educational institutions. Some States have provided only fringe benefits or auxiliary services. Others attempted more extensive efforts to keep the private school system alive. Some made direct arrangements with private and parochial schools for the purchase of secular educational services furnished by those schools.[1/] Others provided tuition grants to parents sending their children to private schools, permitted dual enrollments or shared time arrangements or extended substantial tax benefits in some form.[2/]

The dimensions of the situation are not difficult to outline.[3/] The 5.2 million private elementary and secondary school students in 1972 attended some 3200 non-secular private schools and some 10,000 schools that are church related. Twelve thousand of the latter were Roman Catholic schools and enrolled 4.37 million pupils or 83% of the total non-public school membership. Sixty four percent of non-public school students are concentrated in eight industrialized, urbanized States: New York, Pennsylvania, Illinois, California, Ohio, New Jersey, Michigan and Massachusetts.[4/] Eighty three percent of the non-public school enrollment is to be found in large metropolitan areas. Nearly two out of five students in each of the Nation's largest cities are enrolled in non-public schools.[5/]

Non-public school enrollment has dropped at the rate of 6% per year for the past five years. Since 1965 non-

that seven States (the eight mentioned in the text less Massachusetts) will lose 1,416,129 non-public school students. Whatever the reasons, there has been, and there probably will be, a movement to the public schools, with the prospect of substantial increases in public school budgets that are already under intense attack and with the States and cities that are primarily involved already facing severe financial crises. It is this prospect that has prompted some of these States to attempt a variety of devices to save or slow the demise of the non-public school system, an educational resource that could deliver quality education at a cost to the public substantially below the per pupil cost of the public schools.[6/]

There are, then, the most profound reasons, in addition to those normally attending the question of the constitutionality of a state statute, for this Court to proceed with the utmost care in deciding these cases. It should not, absent clear mandate in the Constitution, invalidate these New York and Pennsylvania statutes and thereby not only scuttle state efforts to hold off serious financial problems in their public schools but also make it more difficult, if not impossible, for parents to follow the dictates of their conscience and seek a religious as well as secular education for their children.

I am quite unreconciled to the Court's decision in Lemon v. Kurtzman, 403 U.S. 602 (1971). I thought then, and I think now, that the Court's conclusion there was not required by the First Amendment and is contrary to the long

actual repair and maintenance cost in connection with the secular education services performed for the State in parochial schools. But accepting Lemon and the invalidation of the New York maintenance grant, I would, with Mr. Justice Rehnquist, sustain the New York and Pennsylvania tuition grant statutes and the New York tax credit provisions.

No one contends that he can discern from the sparse language of the Establishment Clause that a State is forbidden to aid religion in any manner whatsoever or, if it does not mean that, what kind of or how much aid is permissible. And one cannot seriously believe that the history of the First Amendment furnishes unequivocal answers to many of the fundamental issues of church-state relationships. In the end the courts have fashioned answers to these questions as best they can, the language of the Constitution and its history having left them a wide range of choice among many alternatives. But decision has been unavoidable; and, in choosing, the courts necessarily have carved out what they deemed to be the most desirable national policy governing various aspects of church-state relationships.

The course of these decisions has made it clear that the First Amendment does not bar all state aid to religion, of whatever kind or extent. States do, and they may, furnish churches and parochial schools with police and fire protection as well as water and sewage facilities. Also, "all of the 50 States provide for tax exemption of places

wholly consistent with the First Amendment. Bus transportation may be furnished to students attending parochial schools as well as to those going to public schools. Everson v. Board of Education, 330 U.S. 1 (1947). So too the State may furnish school books to such students, Board of Education v. Allen, 392 U.S. 236 (1968), although in doing so they "relieve[d] those churches of an enormous aggregate cost for those books." Walz, supra, 397 U.S., at 671-672. A State may also become the owner of the property of a church-sponsored college and lease it back to the college, all with the purpose and effect of permitting revenue bonds issued in connection with the college's operation to be tax exempt and working a lower rate of interest and substantial) savings to the sectarian institution. Hunt v. McNair, ___ U.S. ___.

The Court thus has not barred all aid to religion or to religious institutions. Rather, it has attempted to devise a formula that would help identify the kind and degree of aid that is permitted or forbidden by the Establishment Clause. Until 1970, the test for compliance with the Clause was whether there "was a secular legislative purpose and primary effect that neither advances nor inhibits religion . . ."; given a secular purpose, what is "the primary effect of the enactment"; Abington School District v. Schempp, 374 U.S. 203, 222 (1963); Board of Education v. Allen, 392 U.S. 236, 243 (1968). In 1970, a third element surfaced -- whether there is "an excessive government entanglement with religion." Walz v. Tax Commission, 397 U.S. 664, 674 (1970). That element was

the efforts by the States of Pennsylvania and Rhode Island to stave off financial disaster for their parochial school system, the saving of which each of those States deemed important to the public interest. In accordance with one formula or the other, the laws in question furnished part of the cost incurred by private schools in furnishing secular education to substantial segments of the children in those States. Conceding a valid secular purpose and not reaching the question of primary effect, the Court concluded that the laws excessively, and therefore fatally, entangled the State with religion. What appeared to be an insoluable dilemma for the States, however, proved no insuperable barrier to the Federal Government in aiding sectarian institutions of higher learning by direct grants for specified facilities, Tilton v. Richardson, 403 U.S. 672 (1971). And Hunt v. McNair, decided this day, see post ___, evidences the difficulty in perceiving when the State's involvement with religion passes the peril point.

But whatever may be the weight and contours of entanglement as a separate constitutional criterion, it is of remote relevance in the case before us with respect to the validity of tuition grants or tax credits involving or requiring no relationships whatsoever between the State and any church or any church school. So also the Court concedes the State's genuine secular purpose underlying these statutes. It therefore necessarily arrives at the remaining consideration in the three-fold test which is apparently accepted from prior cases: Whether the law in question has "a primary effect that neither advances nor inhibits

the religious mission of sectarian schools." See ante, p. ___. But the test is one of "primary" effect not mere "effect"; the Court makes no attempt at that ultimate judgment inherent in the standard heretofore fashioned in the relevant cases. Indeed, the Court merely invokes the statement in Everson v. Board of Education, 330 U.S. 1, 16 (1947), that no tax can be levied "to support any religious activities . . . ." But admittedly there was no tax levied here for the purpose of supporting religious activities; and the Court appears to accept those cases, including Tilton, that inevitably involved aid of some sort or in some amount to the religious activities of parochial schools. In those cases the judgment was that as long as the aid to the school could fairly be characterized as supporting the secular educational functions of the school, whatever support to religion resulted from this direct, Tilton v. Richardson, supra, or indirect, Everson v. School District, supra; Board of Education v. Allen, supra; Walz v. Tax Commission, supra; Hunt v. McNair, ___ U.S. ___, contribution to the school's overall budget was not violative of the primary effect test nor of the Establishment Clause.

There is no doubt here that Pennsylvania and New York have sought in the challenged laws to keep their parochial school systems alive and capable of providing adequate secular education to substantial numbers of students. This purpose satisfies the Court, even though to rescue schools that would otherwise fail will inevitably enable those schools to continue whatever religious functions they perform. By the same token, it seems to me,

At the very least I would not strike down these statutes on their face. The Court's opinion emphasizes a particular kind of a parochial school, one restricted to students of particular religious beliefs and conditioning attendance on religious study. Concededly, there are many parochial schools that do not impose such restrictions. Where they do not, it is even more difficult for me to understand why the primary effect of these statutes is to advance religion. I do not think it is and therefore dissent from the Court's judgment invalidating the challenged New York and Pennsylvania statutes.

1/ This kind of program was adopted by Pennsylvania and Rhode Island and was declared invalid in Lemon v. Kurtzman, 403 U.S. 602 (1971).

2/ Based on State Aid to Non-Public Schools, a publication of the Department of Special Projects, National Catholic Education Association, the following summarizes, as of February 1, 1973, the various types of aid to non-public schools available in the various States, exclusive of those types of support finally declared unconstitutional by this Court:

Direct Aid Programs:

Parental Grants or Reimbursement Schemes: 5 States (including New York and Pennsylvania).

Dual Enrollment (Shared Time): 9 States.

Tax Credits: 5 States (including New York).

Leasing of Non-Public School Facilities by Public School Systems: 4 States.

Educational Opportunities for Rural Students: 1 State (Alaska).

Innovative Programs: 1 State (Illinois).

Exemption from State Sales Tax for Educational and Janitorial Supplies: 1 State (North Dakota).

Auxiliary Services or Benefits:

Transportation: 24 States plus District of Columbia.

Textbooks and Instructional Materials: 14 States.

Health and Welfare Services (i.e., school physician, nurse, dental services, hygienist, psychologist, speech

Services for Educationally Disadvantaged Children, Educational Testing, and Miscellaneous (Principally aid services for deaf, blind, handicapped, or retarded children; educational testing; remedial programs, etc.): 11 States.

School Lunches: 2 States (New York and Louisiana).

Released Time: 2 States (Michigan and South Dakota).

Vocational Education: 2 States (Ohio and California).

Central Purchasing of Supplies: 2 States (Oregon and Washington).

Participation of Lay Teachers in Non-Public Schools in Public School Teachers Retirement Fund Scheme: 1 State (North Dakota).

A total of 16 States now extend one or more types of direct aid. 33 States, including almost all of the foregoing 16, offer auxiliary services or benefits. 3/ 4/ 17 States have constitutional or statutory barriers to any kind of direct aid to parochial schools.

3/ The data in this and the following paragraph of the text are taken from Final Report, President's Panel on Nonpublic Education, 1972, pp. 5-6, 15-19. See also Hearings on H.R. 16,141 and other pending proposals, Committee on Ways and Means, House of Representatives, 92d Cong., 2d Sess., pp. 118-119, 128-131.

4/ Non-public enrollments in these States are as follows: New York, 789,110; Pennsylvania, 518,435; Illinois, 451,724; California, 398,961; Ohio, 339,435; New Jersey, 298,548; Michigan, 264,089; and Massachusetts,

5/ Enrollments in non-public schools in the country's 15 largest cities are as follows:

City	Non-public enrollment	Percentage of total
New York City	358,594	24.3
Chicago	208,174	27.3
Philadelphia	146,298	33.6
Detroit	58,228	16.5
Los Angeles	43,601	6.3
New Orleans	41,938	27.2
Cleveland	36,922	19.4
Pittsburgh	36,561	19.4
Buffalo	36,623	33.8
Boston	35,237	27.1
Baltimore	33,833	15.0
Cincinnati	32,655	27.4
Milwaukee	32,256	19.8
San Francisco	29,582	23.9
St Paul	22,267	30.3

6/ The direct aid programs for non-public schools available in the 6 principally affected States listed in n. 4 are as follows:

New York

A. Full tuition and board for deaf and blind children educated at state-approved non-public schools.

B. Tuition (up to $2,000) for handicapped children educated at non-public schools.

C. Teacher salary payments to non-public schools operated by incorporated orphan asylum societies.

D. Omnibus Education Act

1. Health and safety grants for non-public schools qualifying under Title II of the Higher Education Act of 1965 as serving areas with high concentrations of poverty families.

2. Tuition assistance grants for parents with taxable incomes under $5,000.

3. Tax credit assistance for parents with incomes from $5,000 - $25,000.

E. Mandated Services Act

1. Reimbursement of non-public schools for costs of fulfilling state administrative requirements.

Pennsylvania

A. Dual enrollment

B. Parent Reimbursement Act

1. Reimbursement of parents for actual costs of non-public education of their children up to $75 for elementary school students and $150 for secondary school

Illinois

A. Grants to children from poverty families for actual costs of non-public education up to amount of state aid child would receive if attending public school.

B. Special grants for innovative programs.

California

A. Tax credit assistance for parents with incomes ranging to $19,000. Maximum credit is $125 per child per year in non-public school.

Ohio

A. Dual enrollment with respect to vocational training.

B. Tax credit assistance for parents of non-public school students up to $90 per child per year.

New Jersey

No direct aid. Parental grant bill evidently tabled pending outcome of Pennsylvania case.

Michigan

A. Released time.

B. Dual enrollment.

Recent state constitutional amendment precludes all other forms of direct aid.

Massachusetts

Direct aid is barred by state constitutional provision.

As of February 1977, the estimated Catholic population in each of these 8 States was as follows:

Estimated 1970 Population (in thousands)

	Total Population	Estimated Catholics	Catholic/Total
Massachusetts	5,841	2,947	56.2%
New Jersey	7,33[illegible]	2,898	39.5%
New York	18,36[illegible]	6,556	35.7%
Pennsylvania	11,67[illegible]	3,608	30.8%
Illinois	10,751	3,455	32.1%
Michigan	9,435	2,383	25.3%
Ohio	10,612	2,205	21.3%
California	20,250	4,053	20.0%

Source: State Aid to Non-public Schools, see n. 2.

changes pp 13, 23, 24-25, 29, 34 and technical changes.

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Rehnquist

SUPREME COURT OF THE UNITED STATES

From: Powell, J.

Nos. 72-694, 72-753, 72-791, AND 72-929

Circulated: _____

Recirculated: JUN 26 1973

Committee for Public Education and Religious Liberty et al., Appellants,
72-694 v.
Ewald B. Nyquist, as Commissioner of Education of the State of New York, et al.

Warren M. Anderson, as Majority Leader and President pro tem of the New York State Senate, Appellant,
72-753 v.
Committee for Public Education and Religious Liberty et al.

Ewald B. Nyquist, as Commissioner of Education of the State of New York, et al., Appellants,
72-791 v.
Committee for Public Education and Religious Liberty et al.

Priscilla L. Cheny et al., Appellants,
72-929 v.
Committee for Public Education and Religious Liberty et al.

On Appeals from the United States District Court for the Southern District of New York.

[June 25, 1973]

MR. JUSTICE POWELL delivered the opinion of the Court.

This case raises a challenge under the Establishment Clause of the First Amendment to the constitutionality of a recently enacted New York law which provides finan-

cial assistance, in several ways, to nonpublic elementary and secondary schools in that State. The case involves an intertwining of societal and constitutional issues of the greatest importance.

James Madison, in his Memorial and Remonstrance Against Religious Assessments,[2] admonished that a "prudent jealousy" for religious freedoms required that they never become "entangled . . . in precedents."[3] His strongly held convictions, coupled with those of Thomas Jefferson and others among the Founders, are reflected in the first Clauses of the First Amendment of the Bill of Rights, which state that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[4] Yet, despite Madison's admonition and the "sweep of the absolute prohibitions" of the Clauses,[5] this Nation's history has not been one of en-

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[2] Madison's Memorial and Remonstrance was the catalytic force occasioning the defeat in Virginia of an Assessment Bill designed to extract taxes in support of teachers of the Christian religion. See n. 11, *supra*. See also *Everson* v. *Board of Education*, 330 U. S. 1, 28, 33–41 (1947) (Rutledge, J., dissenting).

[3] Madison's oft-quoted Remonstrance is reprinted as an appendix to the dissenting opinions of Mr. Justice Rutledge and Mr. Justice Douglas in *Everson* v. *Board of Education*, 330 U. S., at 63, 65, and *Walz* v. *Tax Comm'n*, 397 U. S. 664, 700, 719, 721 (1970), respectively.

[4] The provisions of the First Amendment have been made binding on the States through the Due Process Clause of the Fourteenth Amendment. See, *e. g.*, *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943).

[5] *Walz* v. *Tax Comm'n*, *supra*, at 668. Mr. Chief Justice Burger, writing for the Court, noted that the purpose of the Clauses "was to state an objective, not to write a statute," and that "[t]he Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other." *Id.*, at 668–669.

tirely sanitized separation between Church and State. It has never been thought either possible or desirable to enforce a regime of total separation, and as a consequence cases arising under these Clauses have presented some of the most perplexing questions to come before this Court. Those cases have occasioned thorough and thoughtful scholarship by several of this Court's most respected former Justices, including Justices Black, Frankfurter, Harlan, Jackson, Rutledge, and Chief Justice Warren.

As a result of these decisions and opinions, it may no longer be said that the Religion Clauses are free of "entangling" precedents. Neither, however, may it be said that Jefferson's metaphoric "wall of separation" between Church and State has become "as winding as the famous serpentine wall" he designed for the University of Virginia. *McCollum v. Board of Education*, 333 U. S. 203, 232, 238 (1948) (Jackson, J., separate opinion). Indeed, the controlling constitutional standards have become firmly rooted and the broad contours of our inquiry are now well defined. Our task, therefore, is to assess New York's several forms of aid in the light of principles already delineated.[5]

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[5] The existence, at this stage of the Court's history, of guiding principles etched over the years in difficult cases does not, however, make our task today an easy one. For it is evident from the numerous opinions of the Court, and of Justices in concurrence and dissent in the leading cases applying the Establishment Clause, that no "bright line" guidance is afforded. Instead, while there has been general agreement upon the applicable principles and upon the framework of analysis, the Court has recognized its inability to perceive with invariable clarity the "lines of demarcation in this extraordinarily sensitive area of constitutional law." *Lemon v. Kurtzman*, 403 U. S. 602, 612 (1971). And in cases where questions of entanglements are involved the Court has acknowledged

I

In May 1972, the Governor of New York signed into law several amendments to the State's Education and Tax Laws. The first five sections of these amendments established three distinct financial aid programs for nonpublic elementary and secondary schools. Almost immediately after the signing of these measures a complaint was filed in the United States District Court for the Southern District of New York challenging each of the three forms of aid as violative of the Establishment Clause. The plaintiffs were an unincorporated association, known as the Committee for Public Education and Religious Liberty (PEARL), and several individuals who were residents and taxpayers in New York, some of whom had children attending public schools. Named as defendants were the State Commissioner of Education, the Comptroller, and the Commissioner of Taxation and Finance. Motions to intervene on behalf of defendants were granted to a group of parents with children enrolled in nonpublic schools, and to the Majority Leader and President pro tem of the New York State Senate.[5] By consent of the parties, a three-judge court was convened pursuant to 28 U. S. C. §§ 2281 and 2283, and the case was decided without an evidentiary hearing. Because the questions before the District Court were resolved on the basis of the pleadings, that court's decision turned on the constitutionality of each provision on its face.

The first section of the challenged enactment, entitled "Health and Safety Grants for Nonpublic School Chil-

that, as of necessity, the "wall" is not without bends and may constitute a "blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." *Id.*, at 614.

[5] The motion was granted in favor of Mr. Earl W. Brydges. Upon his retirement in December 1972, his successor, Mr. Warren M. Anderson, was substituted in his place.

dren."[1] provides for direct money grants from the State to "qualifying" nonpublic schools to be used for the "maintenance and repair of . . . school facilities and equipment to assure the health, welfare and safety of enrolled pupils."[2] A "qualifying" school is any nonpublic, nonprofit elementary or secondary school which "has been designated during the [immediately preceding] year as serving a high concentration of pupils from low-income families for purposes of Title IV of the Federal Higher Education Act of 1965 (20 U. S. C. § 1251)."[3] Such schools are entitled to receive a grant of $30 per pupil per year, or $10 per pupil per year if the facilities are more than 25 years old. Each school is required to submit to the Commissioner of Education an audited statement of its expenditures for maintenance and repair during the preceding year, and its grant may not exceed the total of such expenses. The Commissioner is also required to ascertain the average per-pupil cost for equivalent maintenance and repair services in the public schools, and in no event may the grant to nonpublic qualifying schools exceed 50% of that figure.

"Maintenance and repair" is defined by the statute to include "the provision of heat, light, water, ventilation and sanitary facilities, cleaning, janitorial and custodial services; snow removal; necessary upkeep and renovation of buildings, grounds and equipment; fire and accident protection; and such other items as the commissioner may deem necessary to ensure the health, welfare and safety of enrolled pupils."[4] This section is prefaced by a series of legislative findings which shed light on the State's purpose in enacting the law. These findings con-

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[1] N. Y. Laws 1972, c. 414, § 1, preceding N. Y. Educ. Law, Art. 12, §§ 549–557 (McKinney Supp. 1972).

[2] *Id.*, § 550 (5).

[3] *Id.*, § 550 (2).

[4] *Id.*, § 550 (5).

clude that the State "has a primary responsibility to ensure the health, welfare and safety of children attending . . . nonpublic schools"; that the "fiscal crisis in nonpublic education . . . has caused a diminution of proper maintenance and repair programs threatening the health, welfare and safety of nonpublic school children" in low-income urban areas; and that "a healthy and safe school environment" contributes "to the stability of urban neighborhoods." For these reasons, the statute declares that "the state has the right to make grants for maintenance and repair expenditures which are clearly secular, neutral and non-ideological in nature."[9]

The remainder of the challenged legislation—§§ 2 through 5—is a single package captioned the "Elementary and Secondary Education Opportunity Program." It is composed essentially of two parts, a tuition grant program and a tax benefit program. Section 2 establishes a limited plan providing tuition reimbursements to parents of children attending elementary or secondary nonpublic schools.[10] To qualify under this section the parent must have an annual taxable income of less than $5,000. The amount of reimbursement is limited to $50 for each grade school child and $100 for each high school child. Each parent is required, however, to submit to the Commissioner of Education a verified statement containing a receipted tuition bill, and the amount of state reimbursement may not exceed 50% of that figure. No restrictions are imposed on the use of the funds by the reimbursed parents.

This section, like § 1, is prefaced by a series of legislative findings designed to explain the impetus for the State's action. Expressing a dedication to the "vitality of

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[9] *Id.*, § 549.

[10] N. Y. Laws 1972, c. 414, § 2, amending N. Y. Educ. Law Art. 12-A, §§ 549-565 (McKinney Supp. 1972).

our pluralistic society," the findings state that a "healthy competitive and diverse alternative to public education is not only desirable but indeed vital to a state and nation that have continually reaffirmed the value of individual differences."[31] The findings further emphasize that the right to select among alternative educational systems "is diminished or even denied to children of lowest income families, whose parents, of all groups, have the least options in determining where their children are to be educated."[32] Turning to the public schools, the findings state that any "precipitous decline in the number of non-public school pupils would cause a massive increase in public school enrollment and costs," an increase that would "aggravate an already serious fiscal crisis in public education" and would "seriously jeopardize the quality education for all children."[33] Based on these premises, the statute asserts the State's right to relieve the financial burden of parents who send their children to nonpublic schools through this tuition reimbursement program. Repeating the declaration contained in § 1, the findings conclude that "such assistance is clearly secular, neutral and nonideological."[34]

The remainder of the "Elementary and Secondary Education Opportunity Program," contained in §§ 3, 4, and 5 of the challenged law,[35] is designed to provide a form of tax relief to those who fail to qualify for tuition reimbursement. Under these sections parents may subtract from their adjusted gross income for state income tax purposes a designated amount for each dependent for whom they have paid at least $50 in nonpublic school

[31] *Id.*, § 550 (1).
[32] *Id.*, § 550 (2).
[33] *Id.*, § 550 (3).
[34] *Id.*, § 550 (4).
[35] N. Y. Laws 1972, c. 414, §§ 3, 4, and 5, amending N. Y. Tax Law, §§ 612 (c), 612 (1) (McKinney Supp. 1972).

tuition. If the taxpayer's adjusted gross income is less than $9,000 he may subtract $1,000 for each of as many as three dependents. As the taxpayer's income rises, the amount he may subtract diminishes. Thus, if a taxpayer has adjusted gross income of $15,000, he may subtract only $400 per dependent, and if his income is $25,000 or more no deduction is allowed.[7] The amount of the deduction is not dependent upon how much the taxpayer actually paid for nonpublic school tuition, and is given in addition to any deductions to which the taxpayer may be entitled for other religious or charitable contributions. As indicated in the memorandum from the Majority Leader and President pro tem of the Senate submitted to each New York legislator during consideration of the bill, the actual tax benefits under these provisions were carefully refined in advance.[8] Thus, comparable tax benefits pick up at approximately the point at which tuition reimbursement benefits leave off.

While the structure of the enactment indicates that the purposes underlying the promulgation of the tuition reimbursement program should be regarded as pertinent as well to those tax law sections, §3 does contain an additional series of legislative findings. Those findings may

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[7] Section 5 contains the following table:

If New York adjusted gross income is:	The amount allowable for each dependent is:
Less than $9,000	$1,000
9,000–10,000	850
11,000–12,000	700
13,000–14,000	550
15,000–16,000	400
17,000–18,000	250
19,000–20,000	150
21,000–22,000	125
23,000–24,000	100
25,000 and over	—0—

Id., §612 (c)(1).

[*Footnote 10 is on p. 9*]

be summarized as follows: (i) contributions to religious, charitable and educational institutions are already deductible from gross income; (ii) non-public educational institutions are accorded tax exempt status; (iii) such institutions provide education for children attending them and also serve to relieve the public school systems of the burden of providing for their education; and, therefore, (iv) the "legislature . . . finds and determines that similar qualifications . . . should also be provided to parents for tuition paid to nonpublic elementary and secondary schools on behalf of their dependents."[7]

Although no record was developed in this case, a number of pertinent generalizations may be made about the nonpublic schools which would benefit from these enactments. The District Court, relying on findings in a similar case recently decided by the same court,[8] adopted a profile of these sectarian, nonpublic schools similar to the one suggested in the plaintiffs complaint. Qualify-

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[7] The following report was prepared by Senator Byrne, who has been replaced as intervenor by his successor, Senator Anderson:

If Adjusted Gross Income is	Estimated Net Benefit to Family: One child	Two children	Three or more
less than $ 9,000	$60.00	$100.00	$150.00
$ 9,000-10,999	42.00	85.00	127.50
11,000-12,999	42.00	84.00	126.00
13,000-14,999	38.50	77.00	115.50
15,000-16,999	32.00	64.00	96.00
17,000-18,999	22.50	45.00	67.50
19,000-20,999	15.00	30.00	45.00
21,000-22,999	13.75	27.50	41.25
23,000-24,999	12.00	24.00	36.00
25,000 and over	0	0	0

[8] N. Y. Pub. L. v. § 612 (1) (33-Grey Sup. 1972) (accompanying notes).

[9] *Citizens for Public Educ. & Religious Liberty v. Lewis*, 342 F. Supp. 830 (E.D.N.Y. 1972), aff'd, *post*, at —.

ing institutions, under all three segments of the enactment, could be ones that:

> "(a) impose religious restrictions on admissions; (b) require attendance of pupils at religious activities; (c) require obedience by students to the doctrines and dogmas of a particular faith; (d) require pupils to attend instruction in the theology or doctrine of a particular faith; (e) are an integral part of the religious mission of the church sponsoring it; (f) have as a substantial purpose the inculcation of religious values; (g) impose religious restrictions on faculty appointments; and (h) impose religious restrictions on what or how the faculty may teach." 350 F. Supp., at 663.

Of course, the characteristics of individual schools may vary widely from that profile. Some 700,000 to 800,000 students, constituting almost 20% of the State's entire elementary and secondary school population, attend over 2,000 nonpublic schools, approximately 85% of which are church-affiliated. And while "all or practically all" of the 280 schools[8] entitled to receive "maintenance and repair" grants "are related to the Roman Catholic Church and teach Catholic religious doctrine to some degree," *id.*, at 661, institutions qualifying under the remainder of the statute include a substantial number of Jewish, Lutheran, Episcopal, Seventh Day Adventist, and other church-affiliated schools.[9]

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[8] As indicated in the District Court's opinion, it has been estimated that 280 schools would qualify for such grants. The relevant criteria for determining eligibility are set out in 20 U. S. C. § 425, and the principal test is whether the school is one "in which there is a high concentration of students from low-income families."

[9] In the fall of 1968, there were 2,038 nonpublic schools in New York State; 1,415 Roman Catholic; 164 Jewish; 54 Lutheran; 49 Episcopal; 37 Seventh Day Adventist; 18 other church-affiliated; 290 without religious affiliation. N. Y. State Educ. Dept., Financial Support—Nonpublic Schools 3 (1969).

Plaintiffs argued below that because of the substantially religious character of the intended beneficiaries, each of the State's three enactments offended the Establishment Clause. The District Court, in an opinion carefully canvassing this Court's recent precedents, held unanimously that §1 (maintenance and repair grants) and §2 (tuition reimbursement grants) were invalid. As to the income tax provisions of §§3, 4 and 5, however, a majority of the District Court, over the dissent of Circuit Judge Hays, held that the Establishment Clause had not been violated. Finding the provisions of the law severable, it enjoined permanently any further implementation of §§1 and 2 but declared the remainder of the law independently enforceable. The plaintiffs appealed directly to this Court, challenging the District Court's adverse decision as to the third segment of the statute.[7] The defendant state officials have appealed so much of the court's decision as invalidates the first and second portions of the 1972 law;[8] the intervenor Majority Leader and President pro tem of the Senate also appeals from those aspects of the lower court's opinion;[9] and the intervening parents of non-public school children have appealed only from the decision as to §2.[10] This Court noted probable jurisdiction over each appeal and ordered the cases consolidated for oral argument. 410 U. S. 907 (1973). Thus, the constitutionality of each of New York's recently promulgated aid provisions is squarely before us. We affirm

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[7] No. 72-694, *Committee for Public Education and Religious Liberty v. Nyquist*.

[8] No. 72-791, *Nyquist v. Committee for Public Education and Religious Liberty*.

[9] No. 72-724, *Anderson v. Committee for Public Education and Religious Liberty*.

[10] No. 72-975, *Cleary v. Committee for Public Education and Religious Liberty*.

the District Court insofar as it struck down §§ 1 and 2 and reverse its determination regarding §§ 3, 4, and 5.

II

The history of the Establishment Clause has been recounted frequently and need not be repeated here. *See Everson v. Board of Education*, 330 U. S. 1 (Black, J., opinion of the Court), 28 (Rutledge, J., dissenting) (1947); *McCollum v. Board of Education*, 333 U. S.

[8] Virginia's experience is examined at length in the opinions and dissenting opinions in *Everson*, centering on one of the greatest statesmen in the history of this Country's adoption of the essentially revolutionary notion of separation between Church and State. During the Colonial Era and into the late 1700's the Anglican Church appeared firmly rooted as the established church of Virginia. But in 1776, asserted by the persistent efforts of Baptists, Presbyterians and Lutherans, the Virginia Convention appended a provision for its first constitution—its Bill of Rights calling for the free exercise of religion. The provision, drafted by George Mason and reluctantly accepted by James Madison stated: "[t]hat religion . . . and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion according to the dictates of conscience . . ."

But the Virginia Bill of Rights contained no prohibition against the Establishment of Religion and the next eight years were marked by debate over the relationship between Church and State. In 1781, a Bill—conceived principally by Patrick Henry, entitled "A Bill Establishing a Provision for Teachers of the Christian Religion" was brought before the Virginia Assembly. The Bill appeared in full as an Appendix to Mr. Justice Rutledge's dissenting opinion in *Everson v. Board of Education*, *supra*, at 72–74 required all persons to pay an annual tax for the support of the Christian religion in order that the teaching of religion might be promoted. Each taxpayer was permitted under the Bill to declare which church he desired to receive his share of the tax. The Bill was not voted on during the 1781 session and prior to the convening of the 1785 session Madison penned his Memorial and Remonstrance against Religious Assessments, setting up 15 numbered paragraphs the reasons for his opposition to the Assessments Bill. The document

203, 212 (1948) (Frankfurter, J., separate opinion); *McGowan* v. *Maryland*, 366 U. S. 420 (1961); *Engel* v. *Vitale*, 370 U. S. 421 (1962). It is enough to note that it is now firmly established that a law may be one "respecting the establishment of religion" even though its consequences is not to promote a "state religion," *Lemon* v. *Kurtzman*, 403 U. S. 602, 612 (1971), and even though it *does not* aid one religion more than another but merely benefits all religions alike. *Everson* v. *Board of Education*, *supra*, at 15. It is equally well established, however, that not every law that confers an "indirect," "remote," or "incidental" benefit upon religious institutions

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was widely circulated and inspired such overwhelming opposition to the Bill that it died during the ensuing recess without reaching a vote. Madison's Memorial and Remonstrance, recognized today as one of the cornerstones of the First Amendment's guarantee of governmental neutrality toward religion, also provided the necessary foundation for the unanimous consideration and adoption of Thomas Jefferson's Bill for Establishing Religious Freedom, which contained Virginia's first formal acknowledgment of the principle of the Separation of Church and State. The crux of that principle, as stated in the Bill, is that "no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever . . . ." In Jefferson's perspective, as well as the "wall of separation" to the perpetuation of distinctions the enactment of the Bill along with his authorship of the Declaration of Independence and the founding of the University of Virginia, that he wished to have inscribed on his tombstone. Report of the Committee on Current and Revised Code, The Code of Virginia 103 (rev. ed. 1950).

Both Madison's Bill of Rights provision on the free exercise of religion and Jefferson's Bill for Establishing Religious Freedom have remained in the Virginia Constitution and statutes, throughout that State's history. See Va. Const. art. I, § 16 in which the two guarantees have been treated together in a single provision. For comprehensive discussions of the pertinent Virginia history, see S. Cobb, The Rise of Religious Liberty in America 74–315, 480–499 (Burt ed. 1970); L. Lowe, The Struggle for Religious Liberty in Virginia (1960); 1 Brant, James Madison The Nationalist 1780–1787, 343–356 (1948).

is, for that reason alone, constitutionally invalid. *Id.*; *McGowan* v. *Maryland*, *supra*, at 450; *Walz* v. *Tax Comm'n*, 397 U. S. 664, 671–672, 674–675 (1970). What our cases require is careful examination of any law challenged on establishment grounds with a view to ascertaining whether it furthers any of the evils against which that Clause protects. Primary among those evils have been "sponsorship, financial support and active involvement of the sovereign in religious activity." *Walz* v. *Tax Comm'n*, *supra*, at 668; *Lemon* v. *Kurtzman*, *supra*, at 612.

Most of the cases coming to this Court raising Establishment Clause questions have involved the relationship between religion and education. Among these religion-education precedents, at two general categories of cases may be identified: those dealing with religious activities within the public schools,[a] and those involving public aid in varying forms to sectarian educational institutions.[b] While the New York legislation places this case in the latter category, its resolution requires consideration not only of the several aid-to-sectarian-education cases but also of our other education precedents and of several important nonestablishment cases. For the now well defined three-part test that has emerged from our decisions

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[a] *McCollum* v. *Board of Educ.*, 333 U. S. 203 (1948) (religious classes in public schools); *Zorach* v. *Clauson*, 343 U. S. 306 (1952) (release time for religious instruction); *Engel* v. *Vitale*, 370 U. S. 421 (1962) (prayer recited in public schools); *School Dist. of Abington Township* v. *Schempp*, 374 U. S. 203 (1963) (Bible reading in public schools); *Epperson* v. *Arkansas*, 393 U. S. 97 (1968) (anti-evolution statute on public school study).

[b] *Everson* v. *Board of Educ.*, *supra* (bus transportation); *Board of Educ.* v. *Allen*, 392 U. S. 236 (1968) (textbooks); *Lemon* v. *Kurtzman*, *supra* (teachers' salaries, textbooks, instructional materials); *Earley* v. *DiCenso*, 403 U. S. 602 (1971) (teachers' salaries); *Tilton* v. *Richardson*, 403 U. S. 672 (1971) (secular college facilities).

is a product of considerations derived from the full sweep of the Establishment Clause cases. Taken together these decisions dictate that to pass muster under the Establishment Clause the law in question, first, must reflect a clearly secular legislative purpose, *e. g., Epperson* v. *Arkansas*, 393 U. S. 97 (1968), second, must have a primary effect that neither advances nor inhibits religion, *e. g., McGowan* v. *Maryland, supra*; *School District of Abington Township* v. *Schempp*, 374 U. S. 203 (1963), and, third, must avoid excessive government entanglement with religion, *e. g., Walz* v. *Tax Comm'n, supra*. See *Lemon* v. *Kurtzman, supra*, at 612-613; *Tilton* v. *Richardson*, 403 U. S. 672, 678 (1971).

In applying these criteria to the three distinct forms of aid involved in this case, we need touch only briefly on the requirement of a "secular legislative purpose." As the recitation of legislative purposes appended to New York's law indicates, each measure is adequately supported by legitimate, nonsectarian state interests. We do not question the propriety, and fully secular content, of New York's interest in preserving a healthy and safe educational environment for all of its school children. And we do not doubt—indeed, we fully recognize—the validity of the State's interests in promoting pluralism and diversity among its public and nonpublic schools. Nor do we hesitate to acknowledge the reality of its concern for an already overburdened public school system that might

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In discussing the application of these "tests," Mr. Chief Justice Burger noted in *Tilton* v. *Richardson, supra*, that "there is no single constitutional caliper that can be used to measure the precise degree" to which any one of them is applicable to the state action under scrutiny. Rather, these tests or criteria should be "viewed as guidelines" within which to consider "the cumulative criteria developed over many years and applying to a wide range of governmental action challenged as violative of the Establishment Clause." *Id.*, at 677-678.

staffs in the event that a significant percentage of children presently attending nonpublic schools should abandon those schools in favor of the public schools.

But the propriety of a legislature's purposes may not immunize from further scrutiny a law which either has a primary effect that advances religion, or which fosters excessive entanglements between Church and State. Accordingly, we must weigh each of the three aid provisions challenged here against these criteria of effect and entanglement.

A

The "maintenance and repair" provisions of § 1 authorize direct payments to nonpublic schools, virtually all of which are Roman Catholic schools in low income areas. The grants, totaling $30 or $40 per pupil, depending on the age of the institution, are given largely without restriction on usage. So long as expenditures do not exceed 50% of comparable expenses in the public school system, it is possible for a sectarian elementary or secondary school to finance its entire "maintenance and repair" budget from state tax-raised funds. No attempt is made to restrict payments to those expenditures related to the upkeep of facilities used exclusively for secular purposes, nor do we think it possible within the context of these religion-oriented institutions to impose such restrictions. Nothing in the statute, for instance, bars a qualifying school from paying out of state funds the salary of employees who maintain the school chapel, or the cost of repainting classrooms in which religion is taught, or the cost of heating and lighting those same facilities. Absent appropriate restrictions on expenditures for these and similar purposes, it simply cannot be denied that this section has a primary effect that advances religion in that it subsidizes directly the religious activities of sectarian elementary and secondary schools,

The state officials nevertheless argue that these expenditures for "maintenance and repair" are similar to other financial expenditures approved by this Court. Primarily they rely on *Everson* v. *Board of Education*, *supra*; *Board of Education* v. *Allen*, *supra*; and *Tilton* v. *Richardson*, *supra*. In each of those cases it is true that the Court approved a form of financial assistance which conferred undeniable benefits upon private, sectarian schools. But a close examination of those cases illuminates their distinguishing characteristics. In *Everson*, the Court in a five-to-four decision, approved a program of reimbursements to parents of pupils as well as parochial school children for bus fares paid in connection with transportation to and from school, a program which the Court characterized as approaching the "verge" of impermissible state aid. 330 U. S., at 16. In *Allen*, decided some 20 years later, the Court upheld a New York law authorizing the provision of *secular* textbooks for all children in grades seven through 12 attending public and nonpublic schools. Finally, in *Tilton*, the Court upheld federal grants of funds for the construction of facilities to be used for clearly *secular* purposes by public and nonpublic institutions of higher learning.

These cases simply recognize that sectarian schools perform secular educative functions as well as religious functions, and that some forms of aid may be channelled to the secular without providing direct aid to the sectarian. But the channel is a narrow one, as the above cases illustrate. Of course it is true in each case that the provision of such neutral, nonideological aid, assisting only the *secular* functions of sectarian schools, served indirectly and incidentally to promote the religious function by rendering it more likely that children would attend sectarian schools and by freeing the budgets of those schools for use in other nonsecular areas. But an indirect

and incidental effect beneficial to religious institutions has never been thought a sufficient object to warrant the invalidation of a state law. In *McGowan* v. *Maryland*, *supra*, Sunday Closing Laws were sustained even though one of their undeniable effects was to render it somewhat more likely that citizens would respect religious institutions and even attend religious services. Also, in *Walz* v. *Tax Commission*, *supra*, property tax exemptions for church property were held not violative of the Establishment Clause despite the fact that such exemptions relieved churches of a financial burden.

Tilton draws the line most clearly. While a bare majority was there persuaded for the reasons stated in the plurality opinion and in MR. JUSTICE WHITE'S concurrence, that carefully limited construction grants to colleges and universities could be sustained, the Court was unanimous in its rejection of one clause of the federal statute in question. Under that clause, the Government was entitled to recover a portion of its grant to a sectarian institution in the event that the constructed facility was used to advance religion by, for instance, converting the building to a chapel or otherwise allowing it to be "used to promote religious interests." 403 U. S., at 683. But because the statute provided that the condition would expire at the end of 20 years, the facilities would thereafter be available for use by the institution for any sectarian purpose. In striking down this provision, the plurality opinion emphasized that "[l]imiting the prohibition for religious use of the statute to 20 years obviously opens the facility to use for any purpose at the end of that period." *Ibid.* And in that event, "the original federal grant will in fact have the effect of advancing religion." *Ibid.* See also *id.*, at 692 (DOUGLAS, J., dissenting), 670–681 (BRENNAN, J., dissenting), 666 n. 1 (WHITE, J., concurring in the judgment). If tax-exempt funds may not be granted to in-

stitutions of higher learning where the possibility exists that those funds will be used to construct a facility utilized for sectarian activities 20 years hence, a fortiori they may not be distributed to elementary and secondary sectarian schools[22] for the maintenance and repair of facilities without any limitations on their use. If the State may not erect buildings in which religious activities are to take place, it may not maintain such buildings or renovate them when they fall into disrepair.[23]

It might be argued, however, that while the New York "maintenance and repair" grants lack specifically articulated secular restrictions, the statute does provide a sort of statistical guarantee of separation by limiting grants to 50% of the amount expended for comparable services in the public schools. The legislature's supposition might have been that at least 50% of the ordinary public school maintenance and repair budget would be devoted to purely secular facility upkeep in sectarian schools. The shortest answer to this argument is that the statute itself allows, as a ceiling, grants satisfying the entire "amount of expenditures for maintenance and repair of such

[22] The plurality in Tilton was careful to point out that there are "significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools." *Id.*, at 685. See *Hunt* v. *McNair*, *post*.

[23] Our Establishment Clause precedents have recognized the special relevance in this area of Mr. Justice Holmes' comment that "a page of history is worth a volume of logic." See *Walz* v. *Tax Commission*, *supra*, at 675-676, quoting *New York Trust Co.* v. *Eisner*, 256 U. S. 345, 349 (1921). In *Everson*, Mr. Justice Black surveyed the history of state taxation for and support of religion during the pre-Revolutionary period and concluded:

"These practices became so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence. The imposition of taxes to pay ministers' salaries and to build and maintain churches and church property aroused their indignation. It was these feelings which found expression in the First Amendment." 330 U. S., at 11 (emphasis supplied).

school" providing only that it is "either more than $30 or $40 per pupil not more than 50% of the comparable public school expenditures." Quite apart from the language of the statute, our cases make plain that a mere statistical judgment will not suffice as a guarantee that state funds will not be used to finance religious education. In *Earley v. DiCenso*, the companion case to *Lemon v. Kurtzman*, *supra*, the Court struck down a Rhode Island law authorizing salary supplements to teachers of secular subjects. The grants were not to exceed 15% of any teacher's annual salary. Although the law was invalidated on entanglement grounds the Court made clear that the State could not have avoided violating the Establishment Clause by merely assuming that its teachers would succeed in segregating "their religious beliefs from their secular educational responsibilities." 403 U. S., at 619:

> "The Rhode Island Legislature has not *and could not*, provide state aid on the basis of a mere assump-

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"The pertinent section provides:

"In order to assist pupils in both public and private schools to qualify as qualifying schools for the benefit of the pupils enrolled therein, there shall be apportioned by the commissioner, subject to the provisions of this section, to each qualifying school for the school year beginning on and after July first nineteen hundred seventy-two, an amount equal to the product of forty dollars multiplied by the average daily attendance of pupils receiving instruction at such school, to be applied for the purpose of maintenance and support. Such apportionment shall be reduced by the dollar multiplied by the average daily attendance of pupils over age twenty receiving instruction at a school building constructed prior to the school year beginning July first, nineteen hundred sixty-seven. *In no event shall the per pupil annual allowance computed under this section exceed fifty per centum of the average per pupil cost of equivalent maintenance and upkeep in the public schools of the state on a statewide basis, as determined by the commissioner, and in no event shall the appropriation set to a qualifying school exceed the amount of expenditures for maintenance and upkeep of such school as reported pursuant to section two hundred forty-two of this article.*" N. Y. Educ. Law Art. 12 § 651 (McKinney Supp. 1971) (emphasis supplied).

> tion that secular teachers under religious discipline can avoid conflicts. The State *must be certain, given the Religion Clauses,* that subsidized teachers do not inculcate religion . . . .' *Ibid.* (Emphasis supplied.)[26]

Nor could the State of Rhode Island have prevailed by simply relying on the assumption that, whatever a secular teacher's inabilities to refrain from mixing the religious with the secular, he would surely devote at least 15% of his efforts to purely secular education, thus exhausting the state grant. It takes little imagination to perceive the extent to which States might openly subsidize parochial schools under such a loose standard of scrutiny. See also *Tilton* v. *Richardson, supra.*[27]

What we have said demonstrates that New York's maintenance and repair provisions violate the Establishment Clause because their effect, inevitably, is to subsidize and advance the religious mission of sectarian

[26] Elsewhere in the opinion, the Court emphasized the necessity for the States of Rhode Island and Pennsylvania to assure, through careful regulation, the secularity of their grants:

"The two legislatures . . . have also recognized that church-related elementary and secondary schools have a significant religious mission and that a substantial portion of their activities is religiously oriented. They have therefore sought to create statutory restrictions designed to guarantee the separation between secular and religious educational functions and to ensure that State financial aid supports only the former. All these provisions are precautions taken in candid recognition that these programs approached, even if they did not intrude upon, the forbidden areas under the Religion Clauses." 403 U. S., at 613.

[28] In *Tilton,* federal construction grants were limited to paying 50% of the cost of erecting any section facility. In striking from the law the 20-year limitation, the Court was concerned lest *any* federally financed facility be used for religious purposes *at any time.* It was plainly not concerned only that at least 50% of the facility, or 50% of its life, be devoted to secular purposes. Had this been the test there can be little doubt that the 20-year restriction would have been adequate.

schools. We have no occasion, therefore, to consider the further question whether those provisions as presently written would also fail to survive scrutiny under the administrative entanglement aspect of the three-part test because assuring the secular use of all funds requires too intrusive and continuing a relationship between Church and State. *Lemon* v. *Kurtzman*, *supra*.

B

New York's tuition reimbursement program also fails the "effect" test for much the same reasons that govern its maintenance and repair grants. The state program is designed to allow direct, unrestricted grants of $50 to $100 per child (but no more than 50% of tuition actually paid) as reimbursement to parents in low-income brackets who send their children to nonpublic schools. To qualify, a parent must have earned less than $5,000 in taxable income and must present a receipted tuition bill from a nonpublic school, the bulk of which are concededly sectarian in orientation.

There can be no question that these grants could not, consistently with the Establishment Clause, be given directly to sectarian schools, since they would suffer from the same deficiency that renders invalid the grants for maintenance and repair. In the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid. As Mr. Justice Black put it quite simply in *Everson*:

> "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." 330 U. S., at 16.

The controlling question here, then, is whether the fact that the grants are delivered to parents rather than schools is of such significance as to compel a contrary result. The State and intervenor-appellees rely on *Everson* and *Allen* for their claim that grants to parents, unlike grants to institutions, respect the "wall of separation" required by the Constitution.[27] It is true that in those cases the Court upheld laws that provided benefits to children attending religious schools and to their parents: As noted above, in *Everson* parents were reimbursed for bus fares paid to send children to parochial schools, and in *Allen* textbooks were loaned directly to the children. But those decisions make clear that far from providing a *per se* immunity from examination of the substance of the State's program, the fact that aid is disbursed to parents rather than to the schools is only one among many factors to be considered.

In *Everson*, the Court found the bus fare program analogous to the provision of services such as police and fire protection, sewage disposal, highways, and sidewalks for parochial schools. 330 U. S., at 17–18. Such services,

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[27] In addition to *Everson* and *Allen*, the Court's opinion in the dissenting opinion relies on *Quick Bear v. Leupp*, 210 U. S. 50 (1908), for the proposition that "government aid to schools generally stands on an entirely different footing from direct aid to religious institutions." *Post*, at 41. *Quick Bear*, however, did not involve the expenditure of tax-raised funds to support sectarian schools. The funds that were utilized by the Indians to provide sectarian education were tribal trust funds which the Court regarded as belonging to the Indians as payment for the cession of Indian land and other rights. *Id.*, at 80–85. It was thus unclear, and the Court held that for Congress to have prohibited them from spending their own money to support a religious education would have constituted a prohibition of the free exercise of religion. *Id.*, at 82. The present case is quite unlike *Quick Bear*, since it does not involve the distribution of public funds, directly or indirectly, to compensate parents who send their children to religious schools.

provided in common to all citizens, are "so separate and so indisputably marked off from the religious function," *id.*, at 18, that they may fairly be viewed as reflections of a neutral posture toward religious institutions. *Allen* is founded upon a similar principle. The Court there repeatedly emphasized that upon the record in that case there was no indication that textbooks would be provided for anything other than purely secular courses. "Of course books are different from buses. Most bus rides have no inherent religious significance, while religious books are common. However, the language of [the law under consideration] does not authorize the loan of religious books, and the State claims no right to distribute religious literature. . . . Absent evidence, we cannot assume that school authorities . . . are unable to distinguish between secular and religious books or that they will not honestly discharge their duties under the law." 392 U. S., at 244-245.

Allen and *Everson* differ from the present case in a second important respect. In both cases the class of beneficiaries included *all* schoolchildren, those in public as well as those in private schools. See also *Tilton* v. *Richardson*, supra, in which federal aid was made available to *all* institutions of higher learning, and *Walz* v. *Tax Commission*, supra, in which tax exemptions were accorded to *all* educational and charitable nonprofit institutions. We do not agree with the suggestion in the dissent of THE CHIEF JUSTICE that tuition grants are an analogous endeavor to provide comparable benefits to all parents of schoolchildren whether enrolled in public or nonpublic schools. *Post*, at [illegible]. The grants to parents of private school children are given in addition to the right that they have to send their children to public schools "totally at state expense." And in any event, the argument proves too much, for it would also provide a basis for approving through tuition grants the complete subsidization of all religious schools on the ground that such action is necessary if the State is fully to equalize the position of parents who elect such schools—a result wholly at variance with the Establishment Clause.

Because of the manner in which we have resolved the tuition grant issue, we need not decide whether the significantly religious character

The tuition grants here are subject to no such restrictions. There has been no endeavor "to guarantee the separation between secular and religious educational functions and to ensure that State financial aid supports only the former." *Lemon* v. *Kurtzman*, *supra*, at 613. Indeed, it is precisely the function of New York's law to provide assistance to private schools, the great majority of which are sectarian. By reimbursing parents for a portion of their tuition bill, the State seeks to relieve their financial burdens sufficiently to assure that they continue to have the option to send their children to religion-oriented schools. And while the other purposes for that aid—to perpetuate a pluralistic educational environment and to protect the fiscal integrity of overburdened public schools—are certainly unexceptionable, the effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions.[39]

MR. JUSTICE BLACK, dissenting in *Allen*, warned that,

> "[i]t requires no prophet to foresee that on the argument used to support this law others could be up-

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of the statute's beneficiaries might differentiate the present case from a case involving some form of public assistance (e. g., scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited. See *Wolman* v. *Essex*, 342 F. Supp. 399, 412–413 (SD Ohio 1972), aff'd, 409 U. S. 808 (1972). Thus, our decision today does not compel, as appellees have contended, the conclusion that the educational assistance provisions of the "G. I. Bill," 38 U. S. C. § 1651, impermissibly advance religion in violation of the Establishment Clause. See also n. 32, *supra*.

[39] Appellees, focusing on the term "principal or primary effect" which this Court has utilized in expressing the second prong of the three-part test, e. g., *Lemon* v. *Kurtzman*, *supra*, at 612, have argued that the Court must decide in this case whether the "primary" effect of New York's tuition grant program is to subsidize religion or to promote these legitimate secular objectives. MR. JUSTICE WHITE's dissenting opinion, *post*, at —, similarly suggests that the Court today fails to make this "ultimate judgment." We do not think

held providing for state or federal government funds to buy property on which to erect religious school buildings or to erect the buildings themselves, to pay

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that such metaphysical judgments are either possible or necessary. Our cases simply do not support the notion that a law found to have a "primary" effect to promote some legitimate end under the State's police power is immune from further examination to ascertain whether it also has the direct and immediate effect of advancing religion. In *McGowan* v. *Maryland*, supra, Sunday Closing Laws were upheld not because their effect was, first, to promote the legitimate interest in a universal day of rest and recreation and only secondarily to assist religious interests; instead, approval flowed from the finding, based upon a close examination of the history of such laws, that they had only a remote and incidental effect advantageous to religious institutions. *Id.*, at 450. See also *Gallagher* v. *Crown Kosher Super Market*, 366 U. S. 617, 630 (1961); *Two Guys from Harrison-Allentown, Inc.* v. *McGinley*, 366 U. S. 582, 598 (1961). Likewise, in *Schempp*, the school authorities argued that Bible-reading and other religious recitations in public schools served "secular purposes, including the promotion of moral values, the contradiction to the materialistic trends of our times, and the perpetuation of our institutions and the teaching of literature." 374 U. S., at 223. Nevertheless, without determining whether these secular purposes overcame the direct religious benefit, the Court held such exercises incompatible with the Establishment Clause. See also, 374 U. S., at 278–281 (BRENNAN, J., concurring). Any remaining question about the contours of the "effect" criterion were resolved by the Court's decision in *Tilton* in which the Court found the recapture provision of the Act which permitted the financed structure to be used for religious purposes 20 years later was constitutionally suspect "because the grant might in part have the effect of advancing religion." 403 U. S., at 683 (emphasis supplied).

It may be useful in providing an historical perspective to recall that the argument that secular purposes are served is not a new one. The Preamble to Patrick Henry's Bill "Establishing a Provision for Teachers of the Christian Religion," which would have required Virginians to pay taxes to support religious teachers and which led to the drafting of Madison's Memorial and Remonstrance, see n. 18 supra, contained the following litany of secular purposes:

"The general diffusion of Christian knowledge hath a natural tendency to correct the morals of men, restrain their vices, and preserve the

> the salaries of the religious school teachers, and finally to have the sectarian religious groups cease to rely on voluntary contributions of members of their sects while waiting for the government to pick up all the bills for the religious schools." 392 U. S., at 253.

His fears regarding religious buildings and religious teachers have not come to pass, *Tilton* v. *Richardson*, *supra*; *Lemon* v. *Kurtzman*, *supra*, and insofar as tuition grants constitute a means of "pick[ing] up . . . the bills for the religious schools," neither has his greatest fear materialized. But the ingenious plans for channeling state aid to sectarian schools that periodically reach this Court abundantly support the wisdom of Justice Black's prophecy.

Although we think it clear, for the reasons above stated, that New York's tuition grant program fares no better under the "effect" test than its maintenance and repair program, in view of the novelty of the question we will address briefly the subsidiary arguments made by the state officials and intervenors in its defense.

First, it has been suggested that it is of controlling significance that New York's program calls for *reimbursement* for tuition already paid rather than for direct contributions which are merely routed through the parents to the schools, in advance of or in lieu of, payment by the parents. The parent is not a mere conduit, we are told, but is absolutely free to spend the money he receives in any manner he wishes. There is no element of coercion attached to the reimbursement, and no assur-

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peace of society. . . ." *Everson* v. *Board of Education*, 330 U. S., at 72 (Supplemental Appendix to dissent of Rutledge, J.)

Such secular objectives, no matter how desirable and irrespective whether judges might possess sufficiently sure techniques to ascertain whether the secular effects outweigh the sectarian benefits, cannot serve today any more than they could 200 years ago to justify such a direct and substantial advancement of religion.

ance that the money will eventually end up in the hands of religious schools. The absence of any element of coercion, however, is irrelevant to questions arising under the Establishment Clause. In *School District of Abington Township* v. *Schempp*, *supra*, it was contended that Bible recitations in public schools did not violate the Establishment Clause because participation in such exercises was not coerced. The Court rejected that argument, noting that while proof of coercion might provide a basis for a claim under the Free Exercise Clause, it was not a necessary element of any claim under the Establishment Clause. *Id.*, at 222–223. Mr. Justice Brennan's concurring views reiterated the Court's conclusion:

> "Thus the short, and for me sufficient, answer is that the availability of excusal or exemption simply has no relevance to the establishment question if it is once found that these practices are essentially religious exercises designed at least in part to achieve religious aims. . . ." *Id.*, at 288.

A similar inquiry governs here. If the grants are offered as an incentive to parents to send their children to sectarian schools by making more-than-token cash payments to them, the Establishment Clause is violated whether or not the actual dollars given eventually find their way into the sectarian institutions.[37] Whether the grant is labeled a reimbursement, a reward or a subsidy, its substantive impact is still the same. In sum, we agree with the conclusion of the District Court that "[w]hether he gets it during the current year, or as reimbursement for the past year, is of no constitutional importance." 350 F. Supp., at 668.

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[37] The forms of aid involved in *Everson*, *Board of Ed.* v. *Allen*, and *Lemon* were likewise characterized as "reimbursement" yet not one line in any of those cases suggests that the label was of any constitutional significance.

Second, the Majority Leader and President pro tem of the State Senate argues that it is significant here that the tuition reimbursement grants pay only a portion of the tuition bill, and an even smaller portion of the religious school's total expenses. The New York statute limits reimbursement to 50% of any parent's actual outlay. Additionally, intervenor estimates that only 30% of the total cost of nonpublic education is covered by tuition payments, with the remaining coming from "voluntary contributions, endowments and the like."[41] On the basis of these two statistics, appellee reasons that the "maximum tuition reimbursement by the State is thus only 15% of the educational costs in the nonpublic schools."[42] And, "since compulsory education laws of the State, by necessity require significantly more than 15% of school time to be devoted to teaching secular courses," the New York statute provides "a statistical guarantee of neutrality."[43] It should readily be seen that this is simply another variant of the argument we have rejected as to maintenance and repair costs, *supra*, at 19–21, and it can fare no better here. Obviously, if accepted, this argument would provide the foundation for massive, direct subsidization of sectarian elementary and secondary schools.[44] Our cases, however, have long since foreclosed the notion that mere statistical assurances will suffice to sail between the Scylla and Charybdis of "effect" and "entanglement."

Finally, the State argues that its program of tuition grants should survive scrutiny because it is designed to

[41] Brief of Appellee Warren M. Anderson, at 25.

[42] *Ibid.*

[43] *Ibid.*

[44] None of the three dissenting opinions filed today purports to rely on any such statistical assurances of neutrality. Indeed, under the rationale of those opinions it is difficult to perceive any limitations on the amount of state aid that would be approved in the form of tuition grants.

penalize the free exercise of religion. The State notes that only "low-income parents" are aided by this law, and without state assistance their right to have their children educated in a religious environment "is diminished or even denied." [illegible] It is true, of course, that this Court has long recognized and maintained the right to choose nonpublic over public education. *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925). It is also true that a state law interfering with a parent's right to have his child educated in a sectarian school would run afoul of the Free Exercise Clause. But this Court repeatedly has recognized that tension inevitably exists between the Free Exercise and the Establishment Clauses, *e. g.*, *Everson* v. *Board of Education*, *supra*; *Walz* v. *Tax Commission*, *supra*, and that it may often not be possible to promote the former without offending the latter. As a result of this tension our cases require the State to maintain an attitude of "neutrality," neither "advancing" nor "inhibiting" religion. In its attempt to enhance the opportunities of the poor to choose between public and nonpublic education, the State has taken a step which can only be regarded as one "advancing" religion. However great our sympathy, *Everson* v. *Board of Education*, *supra*, at 18 (Jackson, J., dissenting), for the burdens experienced by those who must pay public school taxes at the same time that they support other schools because of the constraints of "conscience and discipline," *ibid.*, and notwithstanding the "high social importance" of the State's purposes, *Wisconsin* v. *Yoder*, 406 U. S. 205, 214

[illegible] N. Y. Educ. Law, Art. 12-A, § 570 (2) (McKinney Supp. 1972) (legislative findings supporting tuition reimbursement).

[illegible] "[T]he basic purpose of these provisions . . . is to insure that no religion is sponsored or favored, none commanded, and none inhibited." *Walz* v. *Tax Commission*, *supra*, at 669.

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(1972) neither may justify an eroding of the limitations of the Establishment Clause now firmly established.

C

Sections 3, 4, and 5 establish a system for providing income tax benefits to parents of children attending New York's nonpublic schools. In this Court, the parties have engaged in a considerable debate over what label best fits the New York law. Appellants insist that the law is, in effect, one establishing a system of tax "credits." The State and the intervenors resist that characterization and would label it instead a system of income tax "modifications." The Solicitor General in an *amicus curiae* brief filed in this Court, has referred throughout to the New York law as one authorizing tax "deductions." The District Court majority found that the aid was "in effect a tax *credit*." 350 F. Supp. at 672 (emphasis in original). Because of the peculiar nature of the benefit allowed, it is difficult to adopt any single traditional label lifted from the law of income taxation. It is, at least in its form, a tax deduction since it is an amount subtracted from adjusted gross income prior to computation of the tax due. Its effect, as the District Court concluded, is more like that of a tax credit since the deduction is not related to the amount actually spent for tuition and is apparently designed to yield a predetermined amount of tax "forgiven"—in exchange for performing a specific act which the State desires to encourage—the usual attribute of a tax credit. We see no reason to select one label over the other, as the constitutionality of this hybrid benefit does not turn in any event on the label we accord it. As Mr. Chief Justice Burger's opinion for the Court in *Lemon v. Kurtzman*, *supra*, at 614, notes, constitutional analysis is not a "legislative mimicry in which pre-

cise rules and forms govern." Instead we must "examine the form of the relationship for the light that it casts on the substance."

These sections allow parents of children attending non-public elementary and secondary schools to subtract from adjusted gross income a specified amount if they do not receive a tuition reimbursement under § 2, and if they have an adjusted gross income of less than $25,000. The amount of the deduction is unrelated to the amount of money actually expended by any parent on tuition, but is calculated on the basis of a formula contained in the statute.[38] The formula is apparently the product of a legislative attempt to assure that each family would receive a mythically estimated net benefit, and that the tax benefit would be comparable to, and compatible with, the tuition grant for lower income families. Thus, a parent who earns less than $5,000 is entitled to a tuition reimbursement of $50 if he has one child attending an elementary or non-public school, while a parent who earns more than less than $9,000 is entitled to have precisely equal amount "taken off his tax bill".[39] Additionally a taxpayer's benefit under these sections is unrelated to, and not reduced by, any deductions to which he may be entitled for charitable contributions to religious institutions.

In practical terms there would appear to be little difference, for purposes of determining whether such aid has the effect of advancing religion, between the tax benefit allowed here and the tuition grant allowed under § 2. The qualifying parent under either program re-

[38] See n. 18, supra.

[39] The statute's deduction is explained in n. 19, supra.

[40] Since the present law does not have the elements of a current tax deduction, such as the charitable contribution, we do not have before us, and do not decide, whether the present tax benefit is constitutionally acceptable under the "neutrality" test in Walz

ceives the same form of encouragement and reward for sending his children to nonpublic schools. The only difference is that one parent receives an actual cash payment while the other is allowed to reduce by an arbitrary amount the sum he would otherwise be obliged to pay over to the State. We see no answer to Judge Hays' dissenting statement below that "[i]n both instances the money involved represents a charge made upon the state for the purpose of religious education." 350 F. Supp., at 675.

Appellees defend the tax portion of New York's legislative package on two grounds. First, they contend that it is of controlling significance that the grants or credits are directed to the parents rather than to the schools. This is the same argument made in support of the tuition reimbursements and rests on the same reading of the same precedents of this Court, primarily *Everson* and *Allen*. Our treatment of this issue in Part IIB, *supra*, at 22–26, is applicable here and requires rejection of this claim.[illegible] Second, appellees place their strongest reliance on *Walz* v. *Tax Commission*, *supra*, in which New York's property tax exemption for religious organizations was upheld. We think that *Walz* provides no support for appellees' position. Indeed, its rationale plainly compels the conclusion that New York's tax package violates the Establishment Clause.

Tax exemptions for church property enjoyed an apparently universal approval in this country both before

[illegible] Appellants assert that "if the Court should decide that Section 2 of the Act does not violate the Establishment Clause, we are unable to see how it could hold otherwise with respect to Sections 3, 4 and 5." Brief of Appellants, at 12–13. We agree that, under the facts of this case, the two are legally inseparable and that the alternative of appellants' statement is also true, i. e., if § 2 does violate the Establishment Clause, so, too, do the sections conferring tax benefits.

and after the adoption of the First Amendment. The Court in *Walz* surveyed the history of tax exemptions and found that each of the 50 States has long provided for tax exemptions for places of worship, that Congress has exempted religious organizations from taxation for over three-quarters of a century, and that congressional enactments in 1802, 1813 and 1870 specifically exempted church property from taxation. In sum, the Court concluded that "[f]ew concepts are more deeply embedded in the fabric of our national life, beginning with pre-Revolutionary colonial times, than for the government to exercise at the very least this kind of benevolent neutrality toward churches and religious exercise generally." *Id.*, at 676-677.[55] We know of no historical precedent for New York's recently promulgated tax relief program. Indeed, it seems clear that tax benefits for parents whose children attend parochial schools are a recent innovation, occasioned by the growing financial plight of such nonpublic institutions and designed, albeit unsuccessfully, to tailor state aid in a manner not incompatible with the recent decisions of this Court. See *Kosydar* v. *Wolman*, — F. Supp. — (SD Ohio 1972), *aff'd*, — U. S. — (1973).

But historical acceptance without more would not alone have sufficed, as "no one acquires a vested or protected right in violation of the Constitution by long use." 397 U. S., at 678. It was the reason underlying that long history of tolerance of tax exemptions for religion that proved controlling. A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of "neutrality" toward religion. Yet governments have not always pursued such a course, and

[55] The separate opinions of Mr. Justice Harlan and Mr. Justice Brennan also emphasize the historical acceptance of tax-exempt status for religious institutions. See 397 U. S., at 680, 681.

oppression has taken many forms, one of which has been taxation of religion. Thus, if taxation was regarded as a form of "hostility" toward religion, "exemption constitute[d] a reasonable and balanced attempt to guard against those dangers." *Id.*, at 673. Special tax benefits, however, cannot be squared with the principle of neutrality established by the decisions of this Court. To the contrary, insofar as such benefits confer assistance to parents who send their children to sectarian schools, their purpose and inevitable effect are to aid and advance those religious institutions.

Apart from its historical foundations, *Walz* is a product of the same dilemma and inherent tension found in most government-aid-to-religion controversies. To be sure, the exemption of church property from taxation conferred a benefit, albeit an indirect and incidental one. Yet that "aid" was a product not of any purpose to support or to subsidize, but of a fiscal relationship designed to minimize involvement and entanglement between Church and State. "The exemption," the Court emphasized, "tends to complement and reinforce the desired separation insulating each from the other." *Id.*, at 676. Furthermore, "[e]limination of the exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes." *Id.*, at 674. The granting of the tax benefits under the New York statute, unlike the extension of an exemption, would tend to increase rather than limit the involvement between Church and State.

One further difference between tax exemptions for church property and tax benefits for parents should be noted. The exemption challenged in *Walz* was not restricted to a class composed exclusively or even predomi-

nantly of religious institutions. Instead the exemption covered all property devoted to religious, educational or charitable purposes. As the parties here must concede, tax reductions authorized by this law flow primarily to the parents of children attending sectarian, nonpublic schools. Without enumerating whether this factor alone might have controlling significance in another context in some future case it should be apparent that in terms of the potential divisiveness of any legislative measure the narrowness of the benefited class would be an important factor.[4]

In conclusion we find the *Walz* analogy unpersuasive, and in light of the practical similarity between New York's tax and tuition reimbursement programs, we hold that neither form of aid is sufficiently restricted to assure that it will not have the impermissible effect of advancing the sectarian activities of religious schools.

III

Because we have found that the challenged sections have the impermissible effect of advancing religion, we need not consider whether such aid would result in entanglement of the State with religion in the sense of "[a] comprehensive, discriminating, and continuing state surveillance." *Lemon* v. *Kurtzman*, 403 U. S., at 619. But the importance of the competing societal interests implicated in this case prompts us to make the further observation that, apart from any specific entanglement of the State in particular religious programs, assistance of the sort here involved carries grave potential for entanglement in the broader sense of recurring political strife over aid to religion.

Few would question most of the legislative findings supporting this statute. We recognized in *Board of Edu-*

[4] See also n. 38, *infra*.

cation v. *Allen*, 392 U. S., at 247, that "private education has played and is playing a significant and valuable role in raising levels of knowledge, competency, and experience,"[illegible] and certainly private parochial schools have contributed importantly to this role. Moreover, the tailoring of the New York statute to channel the aid provided primarily to afford low-income families the option of determining where their children are to be educated is most appealing.[illegible] There is no doubt that the private schools are confronted with increasingly grave fiscal problems, that resolving these problems by increasing tuition charges forces parents to turn to the public schools, and that this in turn—as the present legislation recognizes—exacerbates the problems of public education at the same time that it weakens support for the parochial schools.

These, in briefest summary, are the underlying reasons for the New York legislation and for similar legislation in other States. They are substantial reasons. Yet they must be weighed against the relevant provisions and purposes of the First Amendment, which safeguard the separation of Church from State and which have been regarded from the beginning as among the most cherished features of our constitutional system.

One factor of recurring significance in this weighing process is the potentially divisive political effect of an aid program. As Mr. Justice Black's opinion in *Everson* v. *Board of Education*, *supra*, emphasizes, competition among religious sects for political and religious supremacy

[illegible] As noted by the opinion below, "This case is, in essence, a conflict between two groups of extraordinary good will and civic responsibility. One group feels the disadvantages of parents to choose a religious education which is thought to be an integral part of their right to the free exercise of religion. The other group equally dedicated believes that encroachment of government in aid of religion is as dangerous to the secular state as encroachment of government to restrict religion would be to its free exercise." 350 F. Supp., at 660.

has occasioned considerable civil strife, "generated in large part" by competing efforts to gain or maintain the support of government. *Id.*, at 8–9. As Mr. Justice Harlan put it, "[w]hat is at stake as a matter of policy in Establishment Clause cases is preventing that kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point." *Walz* v. *Tax Commission*, 397 U. S., at 694 (concurring opinion).

The Court recently addressed this issue specifically and fully in *Lemon* v. *Kurtzman*. After describing the political activity and bitter differences likely to result from the state programs there involved, the Court said:

> "The potential for political divisiveness related to religious belief and practice is aggravated in these two statutory programs by the need for continuing annual appropriations and the likelihood of larger and larger demands as costs and populations grow." 403 U. S., at 623.[illegible]

The language of the Court applies with peculiar force to the New York statute now before us. Section 1 (grants for maintenance) and § 2 (tuition grants) will require continuing annual appropriations. Sections 3, 4, and 5 (income tax relief) will not necessarily require annual re-examination, but the pressure for frequent enlargement of the relief is predictable. All three of

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[illegible] The Court in *Lemon* further emphasized that political division along religious lines is to be contrasted with the political diversity expected in a democratic society: "Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect. Freund, Comment, Public Aid to Parochial Schools, 82 Harv. L. Rev. 1680, 1692 (1969)." 403 U. S., at 622.

these programs start out at modest levels: the maintenance grant is not to exceed $30 per pupil per year in approved schools; the tuition grant provides parents not more than $50 a year for each child in the first eight grades and $100 for each child in the high school grades; and the tax benefit, though more difficult to compute, is equally modest. But we know from long experience with both Federal and State Governments that aid programs of any kind tend to become entrenched, to escalate in cost, and to generate their own aggressive constituencies. And the larger the class of recipients, the greater the pressure for accelerated increases.[55] Moreover, the State itself, concededly anxious to avoid assuming the burden of educating children now in private and parochial schools, has a strong motivation for increasing this aid as public school costs rise and population increases.[56] In this situation, where the underlying issue is the deeply emotional one of Church-State relationships, the potential for seriously divisive political consequences needs no elaboration. And while the prospect of such divisiveness may not alone warrant the invalidation of state laws that otherwise survive the careful scrutiny required by

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[55] As some 20% of the total school population in New York attends private and parochial schools, the constituent base supporting these programs is not insignificant.

[56] The self-perpetuating tendencies of any form of government aid to religion have been a matter of concern running throughout our Establishment Clause cases. In *Schempp*, the Court emphasized that it was "no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment," for what today is a "trickling stream may all too soon become a raging torrent." 374 U. S., at 225. See also *Lemon* v. *Kurtzman*, *supra*, at 624-625. But, to borrow the words from Mr. Justice Rutledge's forceful dissent in *Everson*, it is not alone the potential expandability of state tax aid that renders such aid invalid. "Not even 'three pence' could be assessed. Not the amount but the principle of assessment was wrong." 330 U. S., at 40 (quoting from Madison's Memorial and Remonstrance).

the decisions of this Court, it is certainly a "warning signal" not to be ignored. *Id.*, at 625.

Our examination of New York's aid provisions, in light of all relevant considerations, compels the judgment that each, as written, has a "primary effect that advances religion" and offends the constitutional prohibition against laws "respecting the establishment of religion." We therefore affirm the three-judge court's holding as to §§ 1 and 2, and reverse as to §§ 3, 4, and 5.

It is so ordered.

No. 72-694, 72-753, 72-791 and 72-929
Nyquist, Commissioner of Education of
N. Y. (several suits against him)

These cases, on appeal from a three-judge district Court in New York, involve the validity of a New York program of aid to nonpublic schools. About 20% of the state's elementary and secondary school population attends some 2,000 such schools, approximately 85% of which are church affiliated.

The issue presented is whether the statute authorizing three types of aid violates the Establishment of Religion Clause of the First Amendment. Our prior cases hold that even if there is a valid secular purpose - as is true here - the state aid must (i) neither advance nor inhibit religion, and (ii) it must not result in excessive governmental entanglement with religion.

In applying these criteria in these cases, we need address only the question whether a primary effect of the statute is to advance religious education.

We hold that it does with respect to each of the three types of aid.

The first provides

The first provides for direct money grants for the maintenance and repair of school facilities, without any effective safeguards against the maintenance of facilities for religious instruction or purposes.

A second provision authorizes direct tuition reimbursement grants to parents who send their children to nonpublic schools. Although the law itself does not require that the grants be paid over to the schools, its purpose is to reimburse parents partially for private tuition fees - thereby helping to sustain the religious schools.

The final provision authorizes a tax benefit, allowing parents with children in nonpublic schools to deduct - for state income tax purposes - specified amounts from their gross taxable income. As is true of the tuition grants, the inevitable effect of the tax benefit is to aid such schools.

We are not unmindful of the important contributions made to our society by private education, including the parochial schools. Nor are we unaware of the fiscal problems which

confront many private schools, and of the increasing tuition which limits the choice of parents as to where they send their children. Yet, we must test religious aid programs - financed with public tax revenues - against the First Amendment prohbition.

Separation of church from state has been a cherished feature of our constitutional system. And, as Mr. Justice Harlan noted some years ago: The underlying policy of the Establishment Clause is to prevent involvement by government in religious life - an involvement - as history teaches us - which is likely to lead to strife and even to strain "a political system to the breaking point".

In holding the New York statute invalid, we affirm the district court in part and reverse it in part.

The Chief Justice and Mr. Justice Rehnquist have filed opinions concurring in part and dissenting in part, and Mr. Justice White has filed a dissenting opinion.

NOTE: Where it is feasible, a syllabus (headnote) will be prepared, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY ET AL. v. NYQUIST ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

No. 72-694. Argued April 16, 1973.—Decided June 25, 1973*

Amendments to New York's Education and Tax Laws established three interrelated programs for nonpublic elementary and secondary schools. The first section provides for direct money grants to "qualifying" nonpublic schools to be used for "maintenance and repair" of facilities and equipment to preserve the "student's health, welfare and safety." A "qualifying" school is a nonpublic nonprofit elementary or secondary school serving a high concentration of pupils from low-income families. The annual grant is $30 per pupil, or $40 if the facilities are more than 25 years old, which may not exceed 50% of the average per-pupil cost for equivalent services in the public schools. Legislature findings recited that the State has a primary responsibility to ensure the health, welfare and safety of children attending "nonpublic schools", that the "fiscal crisis in nonpublic education . . . has caused a disruption of proper maintenance and repair programs, thereby imperiling the health, welfare and safety of nonpublic school children" in low-income urban areas, and that "a healthy and safe school environment" contributes "to the stability of urban neighborhoods." Section 2 established a tax-benefit-reimbursement plan for parents of children attending nonpublic elementary or secondary schools. To qualify, the parent's annual taxable income must be less than $25,000. The amount of reimbursement is $50 per grade

*Together with No. 72-771, *Sloan et al. v. Committee for Public Education & Religious Liberty et al.*, No. 72-772, *Nyquist, Commissioner of Education of New York, et al. v. Committee for Public Education & Religious Liberty et al.*, and No. 72-928, *Cherry et al. v. Committee for Public Education & Religious Liberty et al.*, also on appeal from the same court.

Syllabus

school child and $100 per high school student so long as those amounts do not exceed 50% of actual tuition paid. The legislature found that the right to select among alternative educational systems should be available in a pluralistic society, and that any sharp decline in nonpublic school pupils would massively increase public school enrollment and costs, seriously jeopardizing quality education for all children. Reiterating a declaration contained in the first section, the findings concluded that "such assistance is clearly secular, neutral and nonideological." The third program, contained in §§ 3, 4, and 5 of the challenged law, is designed to give tax relief to parents failing to qualify for tuition reimbursement. Each eligible taxpayer-parent is entitled to deduct a stipulated sum from his adjusted gross income for each child attending a nonpublic school. The amount of the deduction is unrelated to the amount of tuition actually paid and decreases as the amount of taxable income increases. These sections are also prefaced by a series of legislative findings similar to those accompanying the previous sections. Almost 20% of the State's students, some 700,000 to 800,000, attend nonpublic schools, approximately 85% of which are church-affiliated. While practically all the schools entitled to receive maintenance and repair grants "are related to the Roman Catholic Church and teach Catholic religious doctrine to some degree," institutions qualifying under the remainder of the statute include a substantial number of other church-affiliated schools. The District Court held that § 1, the maintenance and repair grants, and § 2, the tuition reimbursement grants, were invalid, but that the income tax provisions of §§ 3, 4, and 5 did not violate the Establishment Clause. *Held*:

1. The propriety of a legislature's purpose may not immunize from further scrutiny a law that either has a primary effect that advances religion or that fosters excessive church-state entanglements. Pp. 14-15.

2. The maintenance and repair provisions of the New York statute violate the Establishment Clause because their inevitable effect is to subsidize and advance the religious mission of sectarian schools. This section does not properly guarantee the secularity of state aid by limiting the percentage of assistance to 50% of comparable aid to public schools. Such statistical assurances fail to provide an adequate guarantee that aid will not be utilized to advance the religious activities of sectarian schools. Pp. 16-21.

3. The tuition reimbursement grants, if given directly to sectarian schools, would similarly violate the Establishment Clause, and the fact that they are delivered to the parents rather than the

schools does not compel a sectarian result, as the effect of the aid is unrestrictedly to provide financial support for nonpublic sectarian institutions. Pp. 22–30.

(c) The fact that the grant is given as reimbursement for tuition already paid, and that the recipient is not required to spend the amount received on education, does not alter the effect of the law. Pp. 26–28.

(d) The argument that the statute provides "a reasonable guarantee of a nonreligious" since the tuition reimbursement is only 15% of the educational costs in nonpublic schools, and the comparable subsystem here require more than 15% of school time to be devoted to secular matters, is merely another variant of the argument rejected as to tax exemptions and repair costs. P. 28.

(e) The State must maintain an attitude of "neutrality" neither "benevolent" nor "inhibiting" religion, and it cannot by deserting a program to promote the free exercise of religion evade the limitations of the Establishment Clause. Pp. 29–30.

4. The section of providing tuition benefits to parents of children attending New York's nonpublic schools also violates the Establishment Clause because like the tuition reimbursement programs, it is not sufficiently restricted to assure that it will not have the impermissible effect of advancing the sectarian activities of religious schools. *Tilton v. Tax Commissioner*, 397 U. S. 664, distinguished. Pp. 30–33.

5. Because the challenged sections have the impermissible effect of advancing religion, it is not necessary to vote for whether such aid would yield an entanglement with religion. But it should be noted that, apart from any administrative entanglement of the State in particular religious programs, assurance of the sort involved here carries grave potential for entanglement in the broader sense of continuing and expanding political strife over aid to religion. Pp. 33–38.

350 F. Supp. 655, affirmed in part and reversed in part.

POWELL, J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, STEWART, MARSHALL and BLACKMUN, JJ., joined. BURGER, C. J., filed an opinion concurring in Part II–A of the Court's opinion, in which REHNQUIST, J., joined, and dissenting from Parts II–B and II–C, in which WHITE and BLACKMUN, JJ., joined. WHITE, J., filed a dissenting opinion, in those portions of which relating to Parts II–B and II–C of the Court's opinion, BURGER, C. J., and REHNQUIST, J., joined. REHNQUIST, J., filed a dissenting opinion, in which BURGER, C. J., and WHITE, J., joined.

SUPREME COURT OF THE UNITED STATES

Nos. 72-694, 72-753, 72-791, AND 72-929

Committee for Public Education and Religious Liberty et al., Appellants, 72-694 v. Ewald B. Nyquist, as Commissioner of Education of the State of New York, et al.	On Appeals from the United States District Court for the Southern District of New York.
Warren M. Anderson, as Majority Leader and President pro tem of the New York State Senate, Appellant, 72-753 v. Committee for Public Education and Religious Liberty et al.	
Ewald B. Nyquist, as Commissioner of Education of the State of New York, et al., Appellants, 72-791 v. Committee for Public Education and Religious Liberty et al.	
Priscilla L. Cherry et al., Appellants, 72-929 v. Committee for Public Education and Religious Liberty et al.	

[June 25, 1973]

MR. JUSTICE POWELL delivered the opinion of the Court.

This case raises a challenge under the Establishment Clause of the First Amendment to the constitutionality of a recently enacted New York law which provides finan-

cial assistance, in several ways, to nonpublic elementary and secondary schools in that State. The case involves an intertwining of societal and constitutional issues of the greatest importance.

James Madison, in his Memorial and Remonstrance Against Religious Assessments,[3] admonished that a "prudent jealousy" for religious freedoms required that they never become "entangled . . . in precedents."[2] His strongly held convictions, coupled with those of Thomas Jefferson and others among the Founders, are reflected in the first Clauses of the First Amendment of the Bill of Rights, which state that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[4] Yet, despite Madison's admonition and the "sweep of the absolute prohibitions" of the Clauses,[5] this Nation's history has not been one of en-

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[2] Madison's Memorial and Remonstrance was the catalytic force occasioning the defeat in Virginia of an Assessment Bill designed to extract taxes in support of teachers of the Christian religion. See n. 24 infra. See also Everson v. Board of Education, 330 U. S. 1, 28, 33–34 (1947) (Rutledge, J., dissenting).

[3] Madison's often quoted declaration is reprinted as an appendix to the dissenting opinions of Mr. Justice Rutledge and Mr. Justice Douglas in *Everson v. Board of Education*, 330 U. S., at 63–65, and *Walz v. Tax Comm'n*, 397 U. S. 664, 700, 719, 721 (1970), respectively.

[4] The provisions of the First Amendment have been made binding on the States through the Due Process Clause of the Fourteenth Amendment. See, e. g., *Murdock v. Pennsylvania*, 319 U. S. 105 (1943).

[5] *Walz v. Tax Comm'n*, supra, at 668. Mr. Chief Justice Burger, writing for the Court, noted that the purpose of the Clauses "was to state an objective, not to write a statute," and that "[t]he Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other." *Id.*, at 668–669.

tinely structured separation between Church and State. It has never been thought either possible or desirable to enforce a regime of total separation, and as a consequence cases arising under these Clauses have presented some of the most perplexing questions to come before this Court. These cases have occasioned thorough and thoughtful scholarship by several of this Court's most respected former Justices, including Justices Black, Frankfurter, Harlan, Jackson, Rutledge, and Chief Justice Warren.

As a result of these decisions and opinions, it may no longer be said that the Religion Clauses are free of "entangling" precedents. Neither, however, may it be said that Jefferson's metaphoric "wall of separation" between Church and State has become "as winding as the famous serpentine wall" he designed for the University of Virginia. *McCollum v. Board of Education*, 333 U. S. 203, 232, 238 (1948) (Jackson, J., separate opinion). Indeed, the controlling constitutional standards have become firmly rooted and the broad contours of our inquiry are now well defined. Our task, therefore, is to assess New York's several forms of aid in the light of principles already delineated.[*]

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[*] The existence at this stage of the Court's history, of guiding principles evolved over the years in different cases does not, however, make our task today an easy one. For it is evident from the numerous opinions of the Court, out of Justices at considerable and diverse in the leading cases applying the Establishment Clause, that no bright line guidance is afforded. Instead, while there has been general agreement upon the applicable principles and upon the framework of analysis, the Court has recognized its inability to provide with accurate clarity the "lines of demarcation in this extraordinarily sensitive area of constitutional law." *Lemon v. Kurtzman*, 403 U. S. 602, 612 (1971). And at least where questions of entanglement are involved, the Court has acknowledged

I

In May 1972, the Governor of New York signed into law several amendments to the State's Education and Tax Laws. The first five sections of these amendments established three distinct financial aid programs for nonpublic elementary and secondary schools. Almost immediately after the signing of these measures a complaint was filed in the United States District Court for the Southern District of New York challenging each of the three forms of aid as violative of the Establishment Clause. The plaintiffs were an unincorporated association, known as the Committee for Public Education and Religious Liberty (PEARL), and several individuals who were residents and taxpayers in New York, some of whom had children attending public schools. Named as defendants were the State Commissioner of Education, the Comptroller, and the Commissioner of Taxation and Finance. Motions to intervene on behalf of defendants were granted to a group of parents with children enrolled in nonpublic schools, and to the Majority Leader and President pro tem of the New York State Senate.[5] By consent of the parties, a three-judge court was convened pursuant to 28 U. S. C. §§ 2281 and 2283, and the case was decided without an evidentiary hearing. Because the questions before the District Court were resolved on the basis of the pleadings, that court's decision turned on the constitutionality of each provision on its face.

The first section of the challenged enactment, entitled "Health and Safety Grants for Nonpublic School Chil-

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[illegible] may constitute a "blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." *Id.*, at 625.

[5] The motion was granted in favor of Mr. Earl W. Brydges. Upon his retirement in December 1972 his successor, Mr. Warren M. Anderson, was substituted in his place.

direct"[3] provides for direct money grants from the State to "qualifying" nonpublic schools to be used for the "maintenance and repair of . . . school facilities and equipment to ensure the health, welfare and safety of enrolled pupils."[4] A "qualifying" school is any nonpublic, nonprofit elementary or secondary school which "has been designated during the [immediately preceding] year as serving a high concentration of pupils from low-income families for purposes of Title IV of the Federal Higher Education Act of 1965 [20 U. S. C. § 425]."[5] Such schools are entitled to receive a grant of $30 per pupil per year or $40 per pupil per year if the facilities are more than 25 years old. Each school is required to submit to the Commissioner of Education an audited statement of its expenditures for maintenance and repair during the preceding year and its grant may not exceed the total of such expenses. The Commissioner is also required to ascertain the average per-pupil cost for equivalent maintenance and repair services in the public schools, and in no event may the grant to nonpublic qualifying schools exceed 50% of that figure.

"Maintenance and repair" is defined by the statute to include "the provision of heat, light, water, ventilation and sanitary facilities, cleaning, janitorial and custodial services, snow removal, necessary upkeep and renovation of buildings, grounds and equipment; fire and accident protection; and such other items as the commissioner may deem necessary to assure the health, welfare and safety of enrolled pupils."[6] This section is preceded by a series of legislative findings which shed light on the State's purpose in enacting the law. These findings con-

[3] N. Y. Laws 1972, c. 414, § 1, amending N. Y. Educ. Law, Art. 12, §§ 549–553 (McKinney Supp. 1972).

[4] *Id.*, § 550 (5).

[5] *Id.*, § 550 (2).

[6] *Id.*, § 550 (5).

clude that the State "has a primary responsibility to ensure the health, welfare and safety of children attending . . . nonpublic schools"; that the "fiscal crisis in nonpublic education . . . has caused a diminution of proper maintenance and repair programs threatening the health, welfare and safety of nonpublic school children" in low-income urban areas; and that "a healthy and safe school environment" contributes "to the stability of urban neighborhoods." For these reasons the statute declares that "the state has the right to make grants for maintenance and repair expenditures which are clearly secular, neutral and nonideological in nature."[5]

The remainder of the challenged legislation—§§ 2 through 5—is a single package captioned the "Elementary and Secondary Education Opportunity Program." It is composed, essentially, of two parts, a tuition grant program and a tax benefit program. Section 2 establishes a limited plan providing tuition reimbursements to parents of children attending elementary or secondary nonpublic schools.[6] To qualify under this section the parent must have an annual taxable income of less than $5,000. The amount of reimbursement is limited to $50 for each grade school child and $100 for each high school child. Each parent is required, however, to submit to the Commissioner of Education a verified statement containing a receipted tuition bill, and the amount of state reimbursement may not exceed 50% of that figure. No restrictions are imposed on the use of the funds by the reimbursed parents.

This section, like § 1, is prefaced by a series of legislative findings designed to explain the impetus for the State's action. Expressing a determination to the "vitality of

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[5] *Id.* § 549.

[6] N. Y. Laws 1972, c. 414, § 2, amending N. Y. Educ. Law, Art. 12-A, §§ 559-563 (McKinney Supp. 1972).

our pluralistic society" the findings state that a "healthy competitive and diverse alternative to public education is not only desirable but indeed vital to a state and nation that have continually reaffirmed the value of individual differences." [23] The findings further emphasize that the right to select among alternative educational systems "is diminished or even denied to children of low-economic families, whose parents, of all groups, have the least options as determining where their children are to be educated." [24] Turning to the public schools, the findings state that any "precipitous decline in the number of non-public school pupils would cause a massive increase in public school enrollment and costs," an increase that would "aggravate an already serious fiscal crisis in public education" and would "seriously jeopardize the quality education for all children." [25] Based on these premises, the statute asserts the State's right to relieve the financial burden of parents who send their children to nonpublic schools through this tuition reimbursement program. Rejecting the declaration contained in § 1, the findings conclude that "such assistance is clearly secular, neutral and nonideological." [26]

The remainder of the "Elementary and Secondary Education Opportunity Program," contained in §§ 3, 4, and 5 of the challenged law,[27] is designed to provide a form of tax relief to those who fail to qualify for tuition reimbursement. Under these sections parents may subtract from their adjusted gross income for state income tax purposes a designated amount for each dependent for whom they have paid at least $50 in nonpublic school

[23] *Id.*, § 550 (1).
[24] *Id.*, § 550 (2).
[25] *Id.*, § 550 (3).
[26] *Id.*, § 550 (4).
[27] N. Y. Laws 1972, c. 414, §§ 3, 4, and 5, amending N. Y. Tax Law, §§ 612 (c), 612 (t) (McKinney Supp. 1972).

tuition. If the taxpayer's adjusted gross income is less than $9,000 he may subtract $1,000 for each of as many as three dependents. As the taxpayer's income rises, the amount he may subtract diminishes. Thus, if a taxpayer has adjusted gross income of $15,000, he may subtract only $400 per dependent, and if his income is $25,000 or more, no deduction is allowed.[9] The amount of the deduction is not dependent upon how much the taxpayer actually paid for nonpublic school tuition, and is given in addition to any deductions to which the taxpayer may be entitled for other religious or charitable contributions. As indicated in the memorandum from the Majority Leader and President pro tem of the Senate, submitted to each New York legislator during consideration of the bill, the actual tax benefits under these provisions were carefully calculated in advance.[10] Thus, comparable tax benefits pick up at approximately the point at which tuition reimbursement benefits leave off.

While the scheme of the enactment indicates that the purposes underlying the promulgation of the tuition reimbursement program should be regarded as pertinent as well to these tax law sections, § 3 does contain an additional series of legislative findings. Those findings may

[9] Section 4 contains the following table:

If New York adjusted gross income is:	The amount allowable for each dependent is:
Less than $9,000	$1,000
9,000–10,999	850
11,000–12,999	700
13,000–14,999	550
15,000–16,999	400
17,000–18,999	250
19,000–20,999	150
21,000–22,999	125
23,000–24,999	100
25,000 and over	—0—

Id., § 612 (p)(1).

(*Footnote 10 is on p. 9*)

be summarized as follows: (1) contributions to religious, charitable and educational institutions are already deductible from gross income; (2) nonpublic educational institutions are accorded tax exempt status; (3) such institutions provide education for children attending them and also serve to relieve the public school systems of the burden of providing for their education; and, therefore, (4) the Legislature finds and determines that similar modifications . . . should also be provided to parents for tuition paid to nonpublic elementary and secondary schools on behalf of their dependents."[7]

Although no model was developed in this case, a number of pertinent generalizations may be made about the nonpublic schools which would benefit from these enactments. The District Court, relying on findings in a similar case recently decided by the same court, adopted a profile of these sectarian, nonpublic schools similar to the one suggested in the plaintiffs' complaint. Qualify-

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[7] The schedule of computations was adopted by Senator Readpo who had been replaced as governor by his successor, Senator Anderson:

If Adjusted Gross Income is—	Estimated Net Benefit to Family: One child	Two children	Three or more
less than $ 9,000	$60.00	$90.00	$150.00
$ 9,000–10,999	42.50	85.00	127.50
11,000–12,999	42.00	84.00	126.00
13,000–14,999	38.50	77.00	115.50
15,000–16,999	32.00	64.00	96.00
17,000–18,999	22.50	45.00	67.50
19,000–20,999	15.00	30.00	45.00
21,000–22,999	10.75	27.50	41.25
23,000–24,999	12.00	24.00	36.00
25,000 and over	0	0	0

[8] N. Y. Tax Law, § 612 (21) (McKinney Supp. 1972) (as originally enacted).

[9] *Committee for Public Educ. & Religious Liberty v. Levitt*, 342 F. Supp. 439, 440–441 (S.D.N.Y. 1972), aff'd *post*, at —.

ing institutions under all three segments of the enactment, could be ones that:

> "(a) impose religious restrictions on admissions; (b) require attendance of pupils at religious activities; (c) require obedience by students to the doctrines and dogmas of a particular faith; (d) require pupils to attend instruction in the theology or doctrine of a particular faith; (e) are an integral part of the religious mission of the church sponsoring it; (f) have as a substantial purpose the inculcation of religious values; (g) impose religious restrictions on faculty appointments; and (h) impose religious restrictions on what or how the faculty may teach." 350 F. Supp., at 663

Of course, the characteristics of individual schools may vary widely from that profile. Some 700,000 to 800,000 students, constituting almost 20% of the State's entire elementary and secondary school population, attend over 2,000 nonpublic schools, approximately 85% of which are church-affiliated. And while "all, or practically all" of the 280 schools[7] entitled to receive "maintenance and repair" grants "are related to the Roman Catholic Church and teach Catholic religious doctrine to some degree," *id.*, at 661, institutions qualifying under the remainder of the statute include a substantial number of Jewish, Lutheran, Episcopal, Seventh Day Adventist, and other church-affiliated schools.[8]

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[7] As indicated in the District Court's opinion, it has been estimated that 280 schools would qualify for such grants. The relevant criteria for designating eligibility are set out in 20 U. S. C. § 425 and the central test is whether the school is one "in which there is a high concentration of students from low-income families."

[8] In the fall of 1968 there were 2,108 nonpublic schools in New York State: 1,413 Roman Catholic, 104 Jewish, 80 Lutheran, 19 Episcopal, 17 Seventh Day Adventist, 18 other Church-affiliated; 206 without religious affiliation. N. Y. State Educ. Dept., Financial Support—Nonpublic Schools 4 (1969).

Plaintiffs argued below that because of the substantially religious character of the intended beneficiaries, each of the State's three enactments offended the Establishment Clause. The District Court in an opinion carefully canvassing this Court's recent precedents, held unanimously that § 1 (maintenance and repair grants) and § 2 (tuition reimbursement grants) were invalid. As to the income tax provisions of §§ 3, 4, and 5, however a majority of the District Court, over the dissent of Circuit Judge Hays, held that the Establishment Clause had not been violated. Finding the provisions of the law severable it enjoined permanently any further implementation of §§ 1 and 2 but declared the remainder of the law independently enforceable. The plaintiffs appealed directly to this Court, challenging the District Court's adverse decision as to the third segment of the statute.[7] The defendant state officials have appealed so much of the court's decision as invalidates the first and second portions of the 1972 law,[8] the intervenor Majority Leader and President pro tem of the Senate also appeals from those aspects of the lower court's opinion,[9] and the intervening parents of nonpublic school children have appealed only from the decision as to § 2.[10] This Court noted probable jurisdiction over each appeal and ordered the cases consolidated for oral argument. 410 U. S. 907 (1973). Thus, the constitutionality of each of New York's recently promulgated aid provisions is squarely before us. We affirm

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[7] No. 72-694, *Committee for Public Education and Religious Liberty v. Nyquist* (hereinafter "appellees").

[8] No. 72-791, *Nyquist v. Committee for Public Education and Religious Liberty* (hereinafter "appellees").

[9] No. 72-753, *Anderson v. Committee for Public Education and Religious Liberty* (hereinafter "appellees" or "intervenor").

[10] No. 72-929, *Cherry v. Committee for Public Education and Religious Liberty* (hereinafter "appellees" or "intervenor").

the District Court insofar as it struck down §§ 1 and 2 and reverse its determination regarding §§ 3, 4 and 5.

II

The History of the Establishment Clause has been recounted frequently and need not be repeated here. See *Everson v. Board of Education*, 330 U. S. 1 (Black, J., opinion of the Court), 28 (Rutledge, J., dissenting) (1947);[7] *McCollum v. Board of Education*, 333 U. S.

[7] Virginia's experience examined at length in the majority and dissenting opinions in *Everson*, constitutes one of the greatest chapters in the history of this Country's adoption of the essentially revolutionary notion of separation between Church and State. During the Colonial Era of Anglican establishment, the Anglican Church appeared firmly seated as the established church of Virginia. But in 1776, assisted by the persistent efforts of Baptists, Presbyterians, and Lutherans, the Virginia Convention approved a provision for its first constitution's Bill of Rights calling for the free exercise of religion. The provision, drafted by George Mason, and subsequently amended by James Madison, stated: "[n]ot religion . . . and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore, all men are equally entitled to the free exercise of religion, according to the dictates of conscience . . . ."

But the Virginia Bill of Rights contained no prohibition against the Establishment of Religion, and the next eight years were marked by debate over the relationship between Church and state. In 1784, a bill sponsored primarily by Patrick Henry, entitled A Bill Establishing a Provision for Teachers of the Christian Religion, was brought before the Virginia Assembly. The Bill, reprinted as full text in Appendix to Mr. Justice Rutledge's dissenting opinion in *Everson v. Board of Education*, *supra*, at 72–74, required all persons to pay an annual tax "for the support of the Christian religion" in order that the teaching of religion might be promoted. Each taxpayer was permitted under the Bill to designate which church he desired to receive his share of the tax. The Bill was not voted on during the 1784 session, and prior to the convening of the 1785 session Madison penned his Memorial and Remonstrance against Religious Assessments, outlining in 15 numbered paragraphs the reasons for his opposition to the Assessments Bill. The Document

203, 212 (1948) (Frankfurter, J., separate opinion); *McGowan* v. *Maryland*, 366 U. S. 420 (1961); *Engel* v. *Vitale*, 370 U. S. 421 (1962). It is enough to note that it is now firmly established that a law may be one "respecting the establishment of religion" even though its consequence is not to promote a "state religion," *Lemon* v. *Kurtzman*, 403 U. S. 602, 612 (1971), and even though it does not aid one religion more than another but merely benefits all religions alike. *Everson* v. *Board of Education*, *supra*, at 15. It is equally well established, however, that not every law that confers an "indirect," "remote," or "incidental" benefit upon religious institutions

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was widely circulated and inspired such overwhelming opposition to the Bill that it died during the ensuing session without reaching a vote. Madison's Memorial and Remonstrance, recognized today as one of the cornerstones of the First Amendment's guarantee of governmental neutrality toward religion, also provided the necessary foundation for the immediate consideration and adoption of Thomas Jefferson's Bill for Establishing Religious Freedom, which contained Virginia's first acknowledgment of the principle of total separation of Church and State. The core of that principle, as stated in the Bill, is that "no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever . . ." In Jefferson's perspective, so vital was this "wall of separation" to the perpetuation of democratic principles that a way for Bill, along with his authorship of the Declaration of Independence and the founding of the University of Virginia, that he wished to have inscribed on his tombstone. Report of the Commission on Constitutional Revision, The Constitution of Virginia 100-101 (1969).

Both Madison's Bill of Rights provision on the free exercise of religion and Jefferson's Bill for Establishing Religious Freedom have remained in the Virginia Constitution, unaltered in substance, throughout that State's history. See Va. Const., art. I, § 16, in which the two guarantees have been brought together in a single provision. For comprehensive discussions of the pertinent Virginia history, see 2 Cobb, The Rise of Religious Liberty in America 74–135, 466–490 (Reprinted 1970); James, The Struggle for Religious Liberty in Virginia (1901); 2 Brant, James Madison: The Nationalist 1780–1787, 343–358 (1948).

is, for that reason alone, constitutionally invalid. *Id.*; *McGowan* v. *Maryland*, *supra*, at 430; *Walz* v. *Tax Comm'n*, 397 U. S. 664, 671–672, 674–675 (1970). What our cases require is careful examination of any law challenged on establishment grounds with a view to ascertaining whether it furthers any of the evils against which that Clause protects. Primary among those evils have been "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz* v. *Tax Comm'n*, *supra*, at 668; *Lemon* v. *Kurtzman*, *supra*, at 612.

Most of the cases coming to this Court raising Establishment Clause questions have involved the relationship between religion and education. Among these religion-education precedents, two general categories of cases may be identified: those dealing with religious activities within the public schools,[7] and those involving public aid in varying forms to sectarian educational institutions.[8] While the New York legislation places this case in the latter category, its resolution requires consideration not only of the several aid-to-sectarian-education cases but also of our other education precedents and of several important nonestablishment cases. For the now well defined three-part test that has emerged from our decisions

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[7] *McCollum* v. *Board of Educ.*, *supra* ("release time" from public education for religious education); *Zorach* v. *Clauson*, 343 U. S. 306 (1952) (also a "release time" case); *Engel* v. *Vitale*, 370 U. S. 421 (1962) (prayer reading in public schools); *School Dist. of Abington Township* v. *Schempp*, 374 U. S. 203 (1963) (Bible reading in public schools); *Epperson* v. *Arkansas*, 393 U. S. 97 (1968) (anti-evolutionary limitation on public school study).

[8] *Everson* v. *Board of Educ.*, *supra* (bus transportation); *Board of Educ.* v. *Allen*, 392 U. S. 236 (1968) (textbooks); *Lemon* v. *Kurtzman*, *supra* (teachers' salaries, textbooks, instructional materials); *Earley* v. *DiCenso*, 403 U. S. 602 (1971) (teachers' salaries); *Tilton* v. *Richardson*, 403 U. S. 672 (1971) (secular college facilities).

is a product of considerations derived from the full sweep of the Establishment Clause cases. Taken together those decisions dictate that to pass muster under the Establishment Clause the law in question, first, must reflect a clearly secular legislative purpose, *e. g., Epperson v. Arkansas*, 393 U. S. 97 (1968); second, must have a primary effect that neither advances nor inhibits religion, *e. g., McGowan v. Maryland*, *supra*; *School District of Abington Township v. Schempp*, 374 U. S. 203 (1963); and, third, must avoid excessive government entanglement with religion, *e. g., Walz v. Tax Comm'n*, *supra*. See *Lemon v. Kurtzman*, *supra*, at 612–613; *Tilton v. Richardson*, 403 U. S. 672, 678 (1971).[7]

In applying these criteria to the three distinct forms of aid involved in this case we need touch only briefly on the requirement of a "secular legislative purpose." As the recitation of legislative purposes appended to New York's law indicates, each measure is adequately supported by legitimate, nonsectarian state interests. We do not question the propriety, and fully secular content, of New York's interest in preserving a healthy and safe educational environment for all of its school children. And we do not doubt—indeed, we fully recognize—the validity of the State's interests in promoting pluralism and diversity among its public and nonpublic schools. Nor do we hesitate to acknowledge the reality of its concern for an already overburdened public school system that might

[7] In discussing the application of these "tests," Mr. Chief Justice Burger noted in *Tilton v. Richardson*, *supra*, that "There is no single constitutional talisman that can be used to measure the precise degree" to which any one of them is applicable to the state action under scrutiny. Rather, these tests or criteria should be "viewed as guidelines" within which to consider "the cumulative criteria developed over many years and applying to a wide range of governmental action challenged as violative of the Establishment Clause." *Id.*, at 677–678.

suffer in the event that a significant percentage of children presently attending nonpublic schools should abandon those schools in favor of the public schools.

But the propriety of a legislature's purposes may not immunize from further scrutiny a law which either has a primary effect that advances religion, or which fosters excessive entanglements between Church and State. Accordingly, we must weigh each of the three aid provisions challenged here against these criteria of effect and entanglement.

A

The "maintenance and repair" provisions of § 1 authorize direct payments to nonpublic schools, virtually all of which are Roman Catholic schools in low income areas. The grants, totaling $30 or $40 per pupil depending on the age of the institution, are given largely without restriction on usage. So long as expenditures do not exceed 50% of comparable expenses in the public school system, it is possible for a sectarian elementary or secondary school to finance its entire "maintenance and repair" budget from state tax-raised funds. No attempt is made to restrict payments to those expenditures related to the upkeep of facilities used exclusively for secular purposes, nor do we think it possible within the context of these religion-oriented institutions to impose such restrictions. Nothing in the statute, for instance, bars a qualifying school from paying out of state funds the salary of employees who maintain the school chapel, or the cost of renovating classrooms in which religion is taught, or the cost of heating and lighting those same facilities. Absent appropriate restrictions on expenditures for these and similar purposes, it simply cannot be denied that this section has a primary effect that advances religion in that it subsidizes directly the religious activities of sectarian elementary and secondary schools.

The state officials nevertheless argue that these expenditures for "maintenance and repair" are similar to other financial expenditures approved by this Court. Primarily they rely on *Everson v. Board of Education*, *supra*; *Board of Education v. Allen*, *supra*; and *Tilton v. Richardson*, *supra*. In each of those cases it is true that the Court approved a form of financial assistance which conferred undeniable benefits upon private, sectarian schools. But a close examination of those cases illuminates their distinguishing characteristics. In *Everson*, the Court, in a five-to-four decision, approved a program of reimbursements to parents of public as well as parochial school children for bus fares paid in connection with transportation to and from school, a program which the Court characterized as approaching the "verge" of impermissible state aid. 330 U. S., at 16. In *Allen*, decided some 20 years later, the Court upheld a New York law authorizing the provision of *secular* textbooks for all children in grades seven through 12 attending public and nonpublic schools. Finally, in *Tilton*, the Court upheld federal grants of funds for the construction of facilities to be used for clearly *secular* purposes by public and nonpublic institutions of higher learning.

These cases simply recognize that sectarian schools perform secular, educative functions as well as religious functions, and that some forms of aid may be channelled to the secular without providing *direct* aid to the sectarian. But the channel is a narrow one, as the above cases illustrate. Of course it is true in each case that the provision of such neutral, nonideological aid, assisting only the secular functions of sectarian schools, served indirectly and incidentally to promote the religious function by rendering it more likely that children would attend sectarian schools and by freeing the budgets of those schools for use in other nonsecular areas. But an indirect

and incidental effect beneficial to religious institutions has never been thought a sufficient defect to warrant the invalidation of a state law. In *McGowan* v. *Maryland*, *supra*, Sunday Closing Laws were sustained even though one of their undeniable effects was to render it somewhat more likely that citizens would respect religious institutions and even attend religious services. Also, in *Walz* v. *Tax Commission*, *supra*, property tax exemptions for church property were held not violative of the Establishment Clause despite the fact that such exemptions relieved churches of a financial burden.

Tilton draws the line most clearly. While a bare majority was there persuaded, for the reasons stated in the plurality opinion and in MR. JUSTICE WHITE'S concurrence, that carefully limited construction grants to colleges and universities would be sustained, the Court was unanimous in its rejection of one clause of the federal statute in question. Under that clause, the Government was entitled to recover a portion of its grant to a sectarian institution in the event that the constructed facility was used to advance religion by, for instance, converting the building to a chapel or otherwise allowing it to be "used to promote religious interests." 403 U. S., at 683. But because the statute provided that the condition would expire at the end of 20 years, the facilities would thereafter be available for use by the institution for any sectarian purpose. In striking down this provision, the plurality opinion emphasized that "[l]imiting the prohibition for religious use of the structure to 20 years obviously opens the facility to use for any purpose at the end of that period." *Ibid.* And in that event, "the original federal grant will in part have the effect of advancing religion." *Ibid.* See also *id.*, at 692 (DOUGLAS, J., dissenting), 650 (BRENNAN, J., dissenting), 685 n. 1 (WHITE, J., concurring in the judgment). If tax-raised funds may not be granted to in-

stitutions of higher learning where the possibility exists that those funds will be used to construct a facility utilized for sectarian activities 20 years hence, *a fortiori* they may not be distributed to elementary and secondary sectarian schools.[37] for the maintenance and repair of facilities without any limitations on their use. If the State may not erect buildings in which religious activities are to take place, it may not maintain such buildings or renovate them when they fall into disrepair.[38]

It might be argued, however, that while the New York "maintenance and repair" grants lack specifically articulated secular restrictions, the statute does provide a sort of statistical guarantee of separation by limiting grants to 50% of the amount expended for comparable services in the public schools. The legislature's supposition might have been that at least 50% of the ordinary public school maintenance and repair budget would be devoted to purely secular facility upkeep in sectarian schools. The shortest answer to this argument is that the statute itself allows, as a ceiling, grants satisfying the entire "amount of expenditures for maintenance and repair of such

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[37] The plurality in *Tilton* was careful to point out that there are "significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools." *Id.*, at 685. *See Hunt* v. *McNair*, *post*.

[38] Our Establishment Clause precedents have recognized the special relevance in this area of Mr. Justice Holmes' statement that "a page of history is worth a volume of logic." *See Walz* v. *Tax Commission*, *supra*, at 671–678 (citing *New York Trust Co.* v. *Eisner*, 256 U. S. 345, 349 (1921)). In *Everson*, Mr. Justice Black surveyed the history of state assistance to, and support of, religion during the pre-Revolutionary period and concluded:

"These practices became so commonplace as to shock the freedom loving colonials into a feeling of abhorrence. The imposition of taxes to pay ministers' salaries and to build and *maintain* churches and church property aroused their indignation. It was these feelings which found expression in the First Amendment." 330 U. S., at 11 (emphasis supplied).

school" providing only that it is neither more than $30 or $40 per pupil nor more than 50% of the comparable public school expenditures.[39] Quite apart from the language of the statute, our cases make clear that a mere statistical judgment will not suffice as a guarantee that state funds will not be used to finance religious education. In *Earley* v. *DiCenso*, the companion case to *Lemon* v. *Kurtzman*, *supra*, the Court struck down a Rhode Island law authorizing salary supplements to teachers of secular subjects. The grants were not to exceed 15% of any teacher's annual salary. Although the law was invalidated on entanglement grounds, the Court made clear that the State could not have avoided violating the Establishment Clause by merely assuming that its teachers would succeed in segregating "their religious beliefs from their secular educational responsibilities." 403 U. S., at 619.

> "The Rhode Island Legislature has not, *and could not*, provide state aid on the basis of a mere assump-

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[39] The pertinent section reads as follows:

"In order to meet proper health, welfare and safety standards in qualifying schools for the benefit of the pupils enrolled therein, there shall be apportioned health, welfare and safety grants by the commissioner to each qualifying school for the school years beginning on and after July first, nineteen hundred seventy-one, an amount equal to the product of thirty dollars multiplied by the average daily attendance of pupils receiving instruction in such school, to be applied for costs of maintenance and repair. Such apportionment shall be increased by ten dollars multiplied by the average daily attendance of pupils receiving instruction in a school building constructed prior to nineteen hundred forty-seven. *In no event shall the per pupil annual allowance computed under this section exceed fifty per centum of the average per pupil cost of equivalent maintenance and repair in the public schools of the state on a state-wide basis, as determined by the commissioner, and in no event shall the apportionment to a qualifying school exceed the amount of expenditures for maintenance and repair of such school as reported pursuant to section five hundred fifty-two of this article.*" N. Y. Educ. Law, Art. 12, § 551 (McKinney Supp. 1972) (emphasis supplied).

> tion that secular teachers under religious discipline can avoid conflicts. The State *must be certain, given the Religion Clauses*, that subsidized teachers do not inculcate religion . . . ." *Ibid.* (Emphasis supplied.) [35]

Nor could the State of Rhode Island have prevailed by simply relying on the assumption that, whatever a secular teacher's inhibitions to refrain from mixing the religious with the secular, he would surely devote at least 15% of his efforts to purely secular education, thus exhausting the state grant. It takes little imagination to perceive the extent to which States might openly subsidize parochial schools under such a loose standard of scrutiny. See also *Tilton* v. *Richardson*, *supra*.[36]

What we have said demonstrates that New York's maintenance and repair provisions violate the Establishment Clause because their effect, inevitably, is to subsidize and advance the religious mission of sectarian

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[35] Elsewhere in the opinion, the Court emphasized the necessity for the States of Rhode Island and Pennsylvania to assure, through careful regulation, the secularity of their grants:

"The two legislatures . . . have also recognized that church-related elementary and secondary schools have a significant religious mission and that a substantial portion of their activities is religiously oriented. They have therefore sought to create statutory restrictions designed to guarantee the separation between secular and religious educational functions and to ensure that State financial aid supports only the former. All these provisions are precautions taken in candid recognition that those programs approached, even if they did not intrude upon, the forbidden areas under the Religion Clauses." 403 U. S., at 613.

[36] In *Tilton* federal construction grants were limited to paying 50% of the cost of erecting any secular facility. In striking from the law the 20-year limitation, the Court was concerned lest any federally-financed facility be used for religious purposes at any time. It was plainly not concerned only that at least 50% of the facility, or 50% of its life, be devoted to secular activities. Had this been the test there can be little doubt that the 20-year restriction would have been adequate.

schools. We have no occasion, therefore, to consider the further question whether those provisions as presently written would also fail to survive scrutiny under the administrative entanglement aspect of the three-part test because assuring the secular use of all funds requires too intrusive and continuing a relationship between Church and State, *Lemon* v. *Kurtzman*, *supra*.

B

New York's tuition reimbursement program also fails the "effect" test, for much the same reasons that govern its maintenance and repair grants. The state program is designed to allow direct, unrestricted grants of $50 to $100 per child (but no more than 50% of tuition actually paid) as reimbursement to parents in low-income brackets who send their children to nonpublic schools. To qualify, a parent must have earned less than $5,000 in taxable income and must present a receipted tuition bill from a nonpublic school, the bulk of which are concededly sectarian in orientation.

There can be no question that these grants could not, consistently with the Establishment Clause, be given directly to sectarian schools, since they would suffer from the same deficiency that renders invalid the grants for maintenance and repair. In the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid. As Mr. Justice Black put it quite simply in *Everson*:

> "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." 330 U. S., at 16.

The controlling question here, then, is whether the fact that the grants are delivered to parents rather than schools is of such significance as to compel a contrary result. The State and intervenor-appellees rely on *Everson* and *Allen* for their claim that grants to parents, unlike grants to institutions, respect the "wall of separation" required by the Constitution.[7] It is true that in those cases the Court upheld laws that provided benefits to children attending religious schools and to their parents: As noted above, in *Everson* parents were reimbursed for bus fares paid to send children to parochial schools, and in *Allen* textbooks were loaned directly to the children. But those decisions make clear that, far from providing a *per se* immunity from examination of the substance of the State's program, the fact that aid is disbursed to parents rather than to the schools is only one among many factors to be considered.

In *Everson*, the Court found the bus fare program analogous to the provision of services such as police and fire protection, sewage disposal, highways, and sidewalks for parochial schools. 330 U. S., at 17–18. Such services,

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[7] In addition to *Everson* and *Allen*, The Chief Justice in his dissenting opinion relies on *Quick Bear* v. *Leupp*, 210 U. S. 50 (1908), for the proposition that "government aid to individuals generally stands on an entirely different footing from direct aid to religious institutions." *Post*, at 4. *Quick Bear*, however, did not involve the expenditure of tax-raised money to support sectarian schools. The funds that were utilized by the Indians to provide sectarian education were treaty and trust funds which the Court emphasized belonged to the Indians as payment for the cession of Indian land and other rights. *Id.*, at 80–81. They were their money and the Court held that for Congress to have prohibited them from expending their own money to acquire religious education would have constituted a prohibition of the free exercise of religion. *Id.*, at 82. The present case is quite unlike *Quick Bear* since that case did not involve the distribution of public funds, directly or indirectly, to sectarian schools or parents who send their children to religious schools.

provided in common to all citizens, are "so separate and so indisputably marked off from the religious function," *id.*, at 18, that they may fairly be viewed as reflections of a neutral posture toward religious institutions. *Allen* is founded upon a similar principle. The Court there repeatedly emphasized that upon the record in that case there was no indication that textbooks would be provided for anything other than purely secular courses. "Of course books are different from buses. Most bus rides have no inherent religious significance, while religious books are common. However, the language of [the law under consideration] does not authorize the loan of religious books, and the State claims no right to distribute religious literature . . . . Absent evidence, we cannot assume that school authorities . . . are unable to distinguish between secular and religious books or that they will not honestly discharge their duties under the law." 392 U. S., at 244–247.[28]

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[28] *Allen* and *Everson* differ from the present case in a second important respect. In both cases the class of beneficiaries included *all* school children, those in public as well as those in private schools. *See also Tilton* v. *Richardson*, *supra*, in which federal aid was made available to *all* institutions of higher learning, and *Walz* v. *Tax Commission*, *supra*, in which tax exemptions were accorded to *all* educational and charitable nonprofit institutions. We do not agree with the suggestion in the dissent of THE CHIEF JUSTICE that tuition grants are an unobtrusive endeavor to provide comparable benefits to all parents of school children whether enrolled in public or nonpublic schools. *Post*, at 5–6. The grants to parents of private school children are given no choice or right that they have to send their children to public schools "totally at state expense." And in any event the argument proves too much for it would also provide a basis for approving through tuition grants the *complete subsidization* of all religious schools on the ground that each student is necessary if the State is fully to capitalize the position of parents who elect such schools—a result wholly at variance with the Establishment Clause.

Because of the manner in which we have resolved the tuition grant issue, we need not decide whether the significantly religious character

The tuition grants here are subject to no such restrictions. There has been no endeavor "to guarantee the separation between secular and religious educational functions and to ensure that State financial aid supports only the former." *Lemon* v. *Kurtzman*, *supra*, at 613. Indeed, it is precisely the function of New York's law to provide assistance to private schools, the great majority of which are sectarian. By reimbursing parents for a portion of their tuition bill, the State seeks to relieve their financial burdens sufficiently to assure that they continue to have the option to send their children to religion-oriented schools. And while the other purposes for that aid—to perpetuate a pluralistic educational environment and to protect the fiscal integrity of overburdened public schools—are certainly unexceptionable, the effect of the aid is unmistakably to provide desired financial support for nonpublic sectarian institutions.[33]

Mr. Justice Black, dissenting in *Allen*, warned that,

> "[i]t requires no prophet to foresee that on the argument used to support this law others could be up-

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of the statute's beneficiaries might differentiate the present case from a case involving some form of public assistance (*e. g.*, scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited. See *Walz* v. *Tax* 342 F. Supp. 350, 422–423 (SD Ohio 1972), aff'd, 409 U. S. 808 (1972). Thus, our decision today does not compel, as appellees have contended, the conclusion that the educational assistance provisions of the "G. I. Bill," 38 U. S. C. § 1651, unconstitutionally advance religion in violation of the Establishment Clause. See also n. 32, *supra*.

[33] Appellees, focusing on the term "primary effect" which this Court has utilized in expressing the second prong of the three-part test, *e. g.*, *Lemon* v. *Kurtzman*, *supra*, at 612, have argued that the Court must decide in this case whether the "primary" effect of New York's tuition grant program is to subsidize religion or to promote those legitimate secular objectives. Mr. Justice White's concurring opinion, *post*, at —, similarly suggests that the Court today fails to make the "ultimate judgment." We do not think

held providing for state or federal government funds to buy property on which to erect religious school buildings or to erect the buildings themselves, to pay

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that such metaphysical judgments are either possible or necessary. Our cases simply do not support the notion that a law found to have a "primary" effect to promote some legitimate end under the State's police power is immune from further examination to ascertain whether it also has the direct and immediate effect of advancing religion. In *McGowan* v. *Maryland*, *supra*, Sunday Closing Laws were upheld not because their effect was, first, to promote the legitimate interest in a universal day of rest and recreation and only secondarily to assist religious interests; instead, approval flowed from the finding, based upon a close examination of the history of such laws, that they had only a "remote and incidental" effect advantageous to religious institutions. *Id.*, at 450. See also *Gallagher* v. *Crown Kosher Super Market*, 366 U. S. 617, 630 (1961); *Two Guys from Harrison-Allentown, Inc.* v. *McGinley*, 366 U. S. 582, 598 (1961). Likewise, in *Schempp* the school authorities argued that Bible-reading and other religious recitations in public schools served primarily secular purposes, including "the promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature." 374 U. S., at 223. Yet, without discrediting these ends and without determining whether they took precedence over the direct religious benefit, the Court held such exercises incompatible with the Establishment Clause. See also 374 U. S., at 278-281 (BRENNAN, J., concurring). Any remaining question about the contours of the "effect" criterion were resolved by the Court's decision in *Tilton*, in which the Court found the mere possibility that a federally-financed structure might be used for religious purposes 20 years hence was constitutionally unacceptable because the grant might "in part have the effect of advancing religion." 403 U. S., at 683 (emphasis supplied).

It may assist in providing an historical perspective to recall that the argument here is not a new one. The Preamble to Patrick Henry's bill "Establishing a Provision for Teachers of the Christian Religion," which would have required Virginians to pay taxes to support religious teachers and which became the focal point of Madison's Memorial and Remonstrance, see n. 38, *supra*, contained the following listing of secular purposes:

"The general diffusion of Christian knowledge hath a natural tendency to correct the morals of men, restrain their vices, and preserve the

> the salaries of the religious school teachers, and finally to have the sectarian religious groups cease to rely on voluntary contributions of members of their sects while waiting for the government to pick up all the bills for the religious schools." 392 U. S., at 253.

His fears regarding religious buildings and religious teachers have not come to pass, *Tilton v. Richardson*, *supra*; *Lemon v. Kurtzman*, *supra*, and insofar as tuition grants constitute a means of "pick[ing] up . . . the bills for the religious schools," neither has his greatest fear materialized. But the ingenious plans for channeling state aid to sectarian schools that periodically reach this Court abundantly support the wisdom of Justice Black's prophecy.

Although we think it clear, for the reasons above stated, that New York's tuition grant program fares no better under the "effect" test than its maintenance and repair program, in view of the novelty of the question we will address briefly the subsidiary arguments made by the state officials and intervenors in its defense.

First, it has been suggested that it is of controlling significance that New York's program calls for *reimbursement* for tuition already paid rather than for direct contributions which are merely routed through the parents to the schools, in advance of or in lieu of payment by the parents. The parent is not a mere conduit, we are told, but is absolutely free to spend the money he receives in any manner he wishes. There is no element of coercion attached to the reimbursement, and no assur-

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peace of society . . . ." *Everson v. Board of Education*, 330 U. S., at 72 (Supplemental Appendix to dissent of Rutledge, J.).

Such secular objectives, no matter how desirable and irrespective whether judges might possess sufficiently sensitive calipers to ascertain whether the secular effects outweigh the sectarian benefits, cannot serve today any more than they could 200 years ago to justify such a direct and substantial advancement of religion.

ance that the money will eventually end up in the hands of religious schools. The absence of any element of coercion, however, is irrelevant to questions arising under the Establishment Clause. In *School District of Abington Township* v. *Schempp*, *supra*, it was contended that Bible recitations in public schools did not violate the Establishment Clause because participation in such exercises was not coerced. The Court rejected that argument, noting that while proof of coercion might provide a basis for a claim under the Free Exercise Clause, it was not a necessary element of any claim under the Establishment Clause. *Id.* at 222-223. MR. JUSTICE BRENNAN's concurring views reiterated the Court's conclusion.

> "Thus the short, and for the purposes, answer is that the availability of excusal or exemption simply has no relevance to the establishment question, if it is once found that these practices are essentially religious exercises designed at least in part to achieve religious aims. . . ." *Id.*, at 288.

A similar inquiry governs here. If the grants are offered as an incentive to parents to send their children to sectarian schools by making unrestricted cash payments to them, the Establishment Clause is violated whether or not the actual dollars given eventually find their way into the sectarian institutions.[9] Whether the grant is labeled a reimbursement, a reward or a subsidy, its substantive impact is still the same. In sum, we agree with the conclusion of the District Court that "[w]hether he gets it during the current year or as reimbursement for the past year, is of no constitutional importance." 350 F. Supp. at 668.

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[9] The terms of aid involved in *Everson*, *Engel* v. *Vitale*, and *Lemon* were all given as "reimbursement" yet no one line in any of those cases suggests that this factor was of any constitutional significance.

Second, the Majority Leader and President pro tem of the State Senate argues that it is significant here that the tuition reimbursement grants pay only a portion of the tuition bill, and an even smaller portion of the religious school's total expenses. The New York statute limits reimbursement to 50% of any parent's actual outlay. Additionally, intervenor estimates that only 30% of the total cost of nonpublic education is covered by tuition payments, with the remaining coming from "voluntary contributions, endowments and the like." [44] On the basis of these two statistics, appellee reasons that the "maximum tuition reimbursement by the State is thus only 15% of the educational costs in the nonpublic schools." [45] And, "since compulsory education laws of the State, by necessity require significantly more than 15% of school time to be devoted to teaching secular courses," the New York statute provides "a statistical guarantee of neutrality." [46] It should readily be seen that this is simply another variant of the argument we have rejected as to maintenance and repair costs *ante*, at 19–21, and it can fare no better here. Obviously, if accepted, this argument would provide the foundation for massive, direct subsidization of sectarian elementary and secondary schools.[47] Our cases, however, have long since foreclosed the notion that mere statistical assurances will suffice to sail between the Scylla and Charybdis of "effect" and "entanglement."

Finally, the State argues that its program of tuition grants should survive scrutiny because it is designed to

[44] Brief of Appellee Warren M. Anderson, at 25.

[45] *Ibid.*

[46] *Ibid.*

[47] None of the three dissenting opinions filed today purports to rely on any such statistical assurances of secularity. Indeed, under the rationale of those opinions, it is difficult to perceive any limitations on the amount of state aid that would be approved in the form of tuition grants.

promote the free exercise of religion. The State notes that only "low-income parents" are aided by this law, and without state assistance their right to have their children educated in a religious environment "is diminished or even denied."[47] It is true, of course, that this Court has long recognized and maintained the right to choose nonpublic over public education. *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925). It is also true that a state law interfering with a parent's right to have his child educated in a sectarian school would run afoul of the Free Exercise Clause. But this Court repeatedly has recognized that tension inevitably exists between the Free Exercise and the Establishment Clauses, *e. g.*, *Everson* v. *Board of Education*, *supra*; *Walz* v. *Tax Commission*, *supra*, and that it may often not be possible to promote the former without offending the latter. As a result of this tension our cases require the State to maintain an attitude of "neutrality," neither "advancing" nor "inhibiting" religion.[48] In its attempt to enhance the opportunities of the poor to choose between public and nonpublic education, the State has taken a step which can only be regarded as one "advancing" religion. However great our sympathy, *Everson* v. *Board of Education*, *supra*, at 18 (Jackson, J., dissenting), for the burdens experienced by those who must pay public school taxes at the same time that they support other schools because of the constraints of "conscience and discipline," *ibid.*, and notwithstanding the "high social importance" of the State's purposes, *Wisconsin* v. *Yoder*, 406 U. S. 205, 214

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[47] N. Y. Educ. Law, Art. 12-A, § 559 (2) (McKinney Supp. 1972) (legislative findings supporting tuition reimbursement).

[48] "[T]he basic purpose of these provisions . . . is to insure that no religion be sponsored or favored, none commanded, and none inhibited." *Walz* v. *Tax Commission*, *supra*, at 669.

(1972), neither may justify an eroding of the limitations of the Establishment Clause now firmly implanted.

C

Sections 3, 4, and 5 establish a system for providing income tax benefits to parents of children attending New York's nonpublic schools. In this Court, the parties have engaged in a considerable debate over what label best fits the New York law. Appellants insist that the law is, in effect, one establishing a system of tax "credits." The State and the intervenors reject that characterization and would label it instead a system of income tax "modifications." The Solicitor General, in an *amicus curiae* brief filed in this Court, has referred throughout to the New York law as one authorizing tax "deductions." The District Court majority found that the aid was "in effect a tax *credit*." 350 F. Supp., at 672 (emphasis in original). Because of the peculiar nature of the benefit allowed, it is difficult to pigeon any single traditional label lifted from the law of income taxation. It is, at least in its form, a tax deduction since it is an amount subtracted from adjusted gross income, prior to computation of the tax due. Its effect, as the District Court concluded, is more like that of a tax credit since the deduction is not related to the amount actually spent for tuition and is apparently designed to yield a predetermined amount of tax "forgiveness" in exchange for performing a specific act which the State desires to encourage—the usual attribute of a tax credit. We see no reason to select one label over the other, as the constitutionality of this hybrid benefit does not turn in any event on the label we accord it. As MR. CHIEF JUSTICE BURGER's opinion for the Court in *Lemon* v. *Kurtzman*, *supra*, at 614, notes, constitutional analysis is not a "legalistic minuet in which pre-

cise rules and forms govern." Instead we must "examine the form of the relationship for the light that it casts on the substance."

These sections allow parents of children attending nonpublic elementary and secondary schools to subtract from adjusted gross income a specified amount if they do not receive a tuition reimbursement under § 2 and if they have an adjusted gross income of less than $25,000. The amount of the deduction is unrelated to the amount of money actually expended by any parent on tuition, but is calculated on the basis of a formula contained in the statute.[37] The formula is apparently the product of a legislative attempt to assure that each family would receive a carefully estimated net benefit, and "that the tax benefit would be comparable to, and compatible with, the tuition grant for lower income families. Thus, a parent who earns less than $5,000 is entitled to a tuition reimbursement of $50 if he has one child attending an elementary, nonpublic school, while a parent who earns more (but less than $9,000) is entitled to have a precisely equal amount taken off his tax bill."[38] Additionally, a taxpayer's benefit under these sections is unrelated to and not reduced by, any deductions to which he may be entitled for charitable contributions to religious institutions."[39]

In practical terms there would appear to be little difference for purposes of determining whether such aid has the effect of advancing religion, between the tax benefit allowed here and the tuition grant allowed under § 2. The qualifying parent under either program re-

[37] See n. 18, *supra*.

[38] The tax benefit table is reproduced in n. 19, *supra*.

[39] Since the program here does not have the elements of a genuine tax deduction and as for charitable contributions, we do not have before us and do not decide, whether that form of tax benefit is constitutionally acceptable under the "neutrality" test in *Walz*,

ceives the same form of encouragement and reward for sending his children to nonpublic schools. The only difference is that one parent receives an actual cash payment while the other is allowed to reduce by an arbitrary amount the sum he would otherwise be obliged to pay over to the State. We see no answer to Judge Hays' dissenting statement below that "[i]n both instances the money involved represents a charge made upon the state for the purpose of religious education." 350 F. Supp., at 675.

Appellees defend the tax portion of New York's legislative package on two grounds. First, they contend that it is of controlling significance that the grants or credits are directed to the parents rather than to the schools. This is the same argument made in support of the tuition reimbursements and rests on the same reading of the same precedents of this Court, primarily *Everson* and *Allen*. Our treatment of this issue in Part IIB, *supra*, at 22–26, is applicable here and requires rejection of this claim.[39] Second, appellees place their strongest reliance on *Walz v. Tax Commission*, *supra*, in which New York's property tax exemption for religious organizations was upheld. We think that *Walz* provides no support for appellees' position. Indeed, its rationale plainly compels the conclusion that New York's tax package violates the Establishment Clause.

Tax exemptions for church property enjoyed an apparently universal approval in this country both before

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[39] Appellants contended in their brief that "should the Court decide that Section 2 of the Act does not violate the Establishment Clause, we are unable to see how it could hold otherwise in respect to Sections 3, 4 and 5." Brief of Appellants, at 42–43. We agree that under the facts of this case the two are legally inseparable and that the alternative of appellants' statement is also true, *i. e.*, if § 2 does violate the Establishment Clause so, too, do the sections conferring tax benefits.

and after the adoption of the First Amendment. The Court in *Walz* surveyed the history of tax exemptions and found that each of the 50 States has long provided for tax exemptions for places of worship, that Congress has exempted religious organizations from taxation for over three-quarters of a century, and that congressional enactments in 1802, 1813, and 1870 specifically exempted church property from taxation. In sum, the Court concluded that "[f]ew concepts are more deeply embedded in the fabric of our national life, beginning with pre-Revolutionary colonial times, than for the government to exercise at the very least this kind of benevolent neutrality toward churches and religious exercise generally." *Id.*, at 676–677.[33] We know of no historical precedent for New York's recently promulgated tax relief program. Indeed it seems clear that tax benefits for parents whose children attend parochial schools are a recent innovation, occasioned by the growing financial plight of such non-public institutions and designed albeit unsuccessfully, to tailor state aid in a manner not incompatible with the recent decisions of this Court. *See Kosydar v. Wolman*, — F. Supp. — (SD Ohio 1972), *aff'd.* — U. S. — — (1973).

But historical acceptance without more would not alone have sufficed, as "no one acquires a vested or protected right in violation of the Constitution by long use." 397 U. S. at 678. It was the reason underlying that long history of tolerance of tax exemptions for religion that proved controlling. A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of "neutrality" toward religion. Yet governments have not always pursued such a course, and

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[33] The separate opinions of Mr. Justice Harlan and Mr. Justice Brennan also emphasize the historical acceptance of tax-exempt status for religious institutions. See 397 U. S., at 690–691.

oppression has taken many forms, one of which has been taxation of religion. Thus, if taxation was regarded as a form of "hostility" toward religion, "exemption constitute[d] a reasonable and balanced attempt to guard against those dangers." *Id.*, at 673. Special tax benefits, however, cannot be squared with the principle of neutrality established by the decisions of this Court. To the contrary, insofar as such benefits render assistance to parents who send their children to sectarian schools, their purpose and inevitable effect are to aid and advance those religious institutions.

Apart from its historical foundations, *Walz* is a product of the same dilemma and inherent tension found in most government-aid-to-religion controversies. To be sure, the exemption of church property from taxation conferred a benefit, albeit an indirect and incidental one. Yet that "aid" was a product not of any purpose to support or to subsidize but of a fiscal relationship designed to minimize involvement and entanglement between Church and State. "The exemption," the Court emphasized, "tends to complement and reinforce the desired separation insulating each from the other." *Id.*, at 676. Furthermore, "[e]limination of the exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes." *Id.*, at 674. The granting of the tax benefits under the New York statute, unlike the extension of an exemption, would tend to increase rather than limit the involvement between Church and State.

One further difference between tax exemptions for church property and tax benefits for parents should be noted. The exemption challenged in *Walz* was not restricted to a class composed exclusively or even predomi-

nantly of religious institutions. Instead the exemption covered all property devoted to religious, educational or charitable purposes. As the parties here must concede, tax reductions authorized by this law flow primarily to the parents of children attending sectarian, nonpublic schools. Without intimating whether this factor alone might have controlling significance in another context in some future case, it should be apparent that in terms of the potential divisiveness of any legislative measure the narrowness of the benefited class would be an important factor.[54]

In conclusion, we find the *Walz* analogy unpersuasive, and in light of the practical similarity between New York's tax and tuition reimbursement programs we hold that neither form of aid is sufficiently restricted to assure that it will not have the impermissible effect of advancing the sectarian activities of religious schools.

III

Because we have found that the challenged sections have the impermissible effect of advancing religion, we need not consider whether such aid would result in entanglement of the State with religion in the sense of "[a] comprehensive, discriminating, and continuing state surveillance." *Lemon* v. *Kurtzman*, 403 U. S., at 619. But the importance of the competing societal interests implicated in this case prompts us to make the further observation that, apart from any specific entanglement of the State in particular religious programs, assistance of the sort here involved carries grave potential for entanglement in the broader sense of continuing political strife over aid to religion.

Few would question most of the legislative findings supporting this statute. We recognized in *Board of Edu-*

[54] See also n. 48, *supra*.

cation v. *Allen*, 392 U. S. at 247, that "private education has played and is playing a significant and valuable role in raising levels of knowledge, competency, and experience," and certainly private parochial schools have contributed importantly to this role. Moreover, the tailoring of the New York statute to channel the aid provided primarily to afford low-income families the option of determining where their children are to be educated is most appealing.[3] There is no doubt that the private schools are confronted with increasingly grave fiscal problems, that resolving these problems by increasing tuition charges forces parents to turn to the public schools, and that this in turn—as the present legislation recognizes—exacerbates the problems of public education at the same time that it weakens support for the parochial schools.

These, in briefest summary, are the underlying reasons for the New York legislation and for similar legislation in other States. They are substantial reasons.[3] Yet they must be weighed against the relevant provisions and purposes of the First Amendment, which safeguard the separation of Church from State and which have been regarded from the beginning as among the most cherished features of our constitutional system.

One factor of recurring significance in this weighing process is the potentially divisive political effect of an aid program. As Mr. Justice Black's opinion in *Everson* v. *Board of Education*, *supra*, emphasizes, competition among religious sects for political and religious supremacy

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[3] As noted in the opinion below, "The [New York] is in essence a conflict between two groups of extraordinary good will and civic responsibility. One group fears the diminution of parochial religious education which it thought to be an integral part of their right to the free exercise of religion. The other group, equally dedicated, believes that encroachment of government aid of religion is as dangerous to the secular state as encroachment of government to restrict religion would be to the free exercise." 350 F. Supp. at 660.

has occasioned considerable civil strife, "generated in large part" by competing efforts to gain or maintain the support of government. *Id.*, at 8–9. As Mr. Justice Harlan put it, "[w]hat is at stake as a matter of policy in Establishment Clause cases is preventing that kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point." *Walz* v. *Tax Commission*, 397 U. S., at 694 (concurring opinion).

The Court recently addressed this issue specifically and fully in *Lemon* v. *Kurtzman*. After describing the political activity and bitter differences likely to result from the state programs there involved, the Court said:

> "The potential for political divisiveness related to religious belief and practice is aggravated in these two statutory programs by the need for continuing annual appropriations and the likelihood of larger and larger demands as costs and population grow." 403 U. S., at 623.[*]

The language of the Court applies with peculiar force to the New York statute now before us. Section 1 (grants for maintenance) and §2 (tuition grants) will require continuing annual appropriations. Sections 3, 4, and 5 (income tax relief) will not necessarily require annual re-examination, but the pressure for frequent enlargement of the relief is predictable. All three of

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[*] The Court in *Lemon* further emphasized that political division along religious lines is to be contrasted with the political diversity expected in a democratic society. "Ordinary political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect." Freund, Comment, Public Aid to Parochial Schools, 82 Harv. L. Rev. 1680, 1692 (1969)." 403 U. S., at 622.

these programs start out at modest levels, the maintenance grant is not to exceed $40 per pupil per year in approved schools, the tuition grant provides parents not more than $50 a year for each child in the first eight grades and $100 for each child in the high school grades; and the tax benefit, though more difficult to compute, is equally modest. But we know from long experience with both Federal and State Governments that aid programs of any kind tend to become entrenched, to escalate in cost, and to generate their own aggressive constituencies. And the larger the class of recipients, the greater the pressure for accelerated increases.[39] Moreover, the State itself, concededly anxious to avoid assuming the burden of educating children now in private and parochial schools, has a strong motivation for increasing this aid as public school costs rise and population increases.[40] In this situation, where the underlying issue is the deeply emotional one of Church-State relationships, the potential for serious divisive political consequences needs no elaboration. And while the prospect of such divisiveness may not alone warrant the invalidation of state laws that otherwise survive the careful scrutiny required by

[39] As some 20% of the total school population in New York attends private and parochial schools, the constituency base supporting these programs is not insignificant.

[40] "The self-perpetuating tendencies of any form of government and its religion have been a matter of cogent comment throughout our Establishment Clause cases. In *Schempp*, the Court emphasized that it was 'no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment,' for what today is a 'trickling stream may be a torrent tomorrow.' 374 U. S., at 225. *See also Lemon* v. *Kurtzman*, *supra*, at 624–625. But, to borrow the words from Mr. Justice Rutledge's forceful dissent in *Everson* it is not alone the potential expandability of state tax aid that renders such aid invalid. Not even 'three pence' could be assessed: 'Not the amount but the principle of assessment was wrong.' 330 U. S., at 48–49 (quoting from Madison's Memorial and Remonstrance).

the decisions of this Court, it is certainly a "warning signal" not to be ignored. *Id.*, at 625.

Our examination of New York's aid provisions, in light of all relevant considerations, compels the judgment that each, as written, has a "primary effect that advances religion" and offends the constitutional prohibition against laws "respecting the establishment of religion." We therefore affirm the three-judge court's holding as to §§ 1 and 2 and reverse as to §§ 3, 4 and 5.

It is so ordered.