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January 19, 1973

No. 72-753

BRYDGES

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COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY

(See attached memo in No. 72-694)

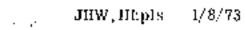
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DISCUSS



PRELIMINARY MEMO

January 19, 1973

No. 72-791

NYQUIST

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COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY

(See attached memo in No. 72-694)

Witkinson

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PRELEMINARY MEMO

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January 19, 1973

No. 72-929

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COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY

(See attached memo in No. 72-694)

Wilkinson

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DISCUSS

PRELIMINARY MEMO

No. 72-694

COMMITTEE FOR PUB. EDUCATION AND RELIGIOUS LIBERTY Tiniely

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NYQUIST

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

I. <u>Summation</u> - 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 **T** the parents whose children attend them.

<u>Facts</u> - 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 inereased 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 stale 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.

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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 altending elementary or secondary <u>non-public schools</u>. 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 <u>cannot exceed 50%</u> 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 nonpublic 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 for the subsection of th

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attending a non-profit, non-public school on a full-time basis, provided that be 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 fultion-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 **C**ourt; and (3) that similar modifications of federal adjusted gross income should also be provided to parents for turtion paid to non-public schools.

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

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and to teach Cathofic 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 janutor 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 <u>Lemon v. Kurtzman</u>, 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, the strictures of the First Amendment.

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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 recomponse 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

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other portions of the statute, <u>i.e.</u>, 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. <u>Contentions</u> - 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 <u>Tilton v. Richardson</u>, 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 <u>Wolman v. Essex</u>, 342 F. Supp. 399 which the Court affirmed at the October 10 Conference and <u>Lemon v. Sloan</u>, No. 72-459 which the Court has relisted for the Conference of January 12. The statutes of Ohio and Peonsylvania 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 Action equally offensive to the Establishment Clause,

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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 **Se** sophisticated devices such as tax credits are no less immune to judicial challenge than the more simplistic ones of satary supplements, maintenance payments, and tuition reimburse-

ments. The Committee further contends:

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"Even if it he assumed that tax deductions for contributions to churches are within the ambit of Walzand are constitutional, and even if it be assumed that fuition 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 contri-.... The antiquity and ubiquity of tax exempbutions, tion 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 fuilion grants."

5. <u>Discussion</u> - I do not see how the Court can avoid taking this case. Several states in the wake of <u>Lemon</u> have passed statutes providing direct tuition grants to parents to try to avoid the entanglement problem deemed fatat in <u>Lemon</u>. While three judge courts in New York, Ohio, and Penosylvania 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 <u>Sloan v. Lemon</u>, 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 goared 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 <u>Stoan v. Lemon</u>, 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

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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

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

a. Direct moncy grants to x non-public schools for "maintenancem and xxpsxi repair." This terms includes "heat, light water, ventilation and sanitary facilities; cleaning, janitorial and custodial xxrxixx services: snow removal; <u>necessary upkoep and renovation of buildings</u>, <u>grounds and equipment</u>; fire and accident protection; and such other itters as the commissioner may deem necessary to ensure the health, welfare and safety of engolied pupils." [Emphasis added.] The amount is \$30 to \$40 per pupil. XXMAXXXX "Non-public schools" are those tax-exempt schools serving high concentrations of low income students. (function growts) b. Direct money grants to parents of students attending non-public schools who have have taxable incomes (gershuident) of \$5.000 or less. Payments are \$50₄ a year for students ing 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 et 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/incomes between\$23,000 and \$24,999. The 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.

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

a. Secular purpose. Both N.Y. w and Pa. statutes pass this test. The legislatures have expressed an **just** 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.

byb. Rrinerxyxefferty Entanglement. Lemon seems to speak of two distinguishable types of entanglement to be entanglement to be entanglement. Uses avoided. The first is administrative antaggrimont. Uses the state remains 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 surking 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 **raive** calculated on the basis of a number of oupils formula. The fact that the other x types of aid under scrutiny are paid directly to parents instead of make much difference. the schools doesn't_Amako-the whee chieccienselc with regard to administrative estantion Even if . such payments were **direax** made directly to schools, the important point is that no allocation between socular and reg religious uses is required.

The other type of **x entangen** 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 **p** religious issues into the political appropriateons process.

c. <u>Primary effect</u>. Rather than try to define the term "primary," I will briefly <u>review some of the cases</u> to determine what sorts of aid constitute "law respecting an establishment of religion." In <u>Everson</u>, 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 of freeing other funds/parochial schools to or the parents involved to use for **rate** religious **astimizes** activities. But since the particular parment provided by the state was

for a secular service, the aid was permitted. Yet the majority said **inverse** the state was approaching the limits of its power to aid **reg** religiously affiliated schools. Allen apopted the <u>same reasoning</u> in allowing <u>free secular</u> **rest textbooks** to parochial school students. Both cases involved aid allocated to **students**. Both cases both involved no administrative entagglement (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 factor was not explicitly mentioned by the (see infra) Court, but it seems to me it must have had some influence.

In Walz the Court upheld tracements property tax exemptions on church property. Among the factors which the Court relied on were the overwhelming historical precedent for this sort of aidem (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 immune institutions were beneficiaries of the same exemption--charities. cultural, and educational groups. This last factor reduced the **immun** beneficiaries made it less likely that debates over the exemption would be reduced to debates over aiding religion.

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



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

The Rhode (s)and 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..." <u>Lemon</u>, 403 U.S. 602.619.

The recent N.Y. cases argued **HEREXERSE** during the March SESSion also, as I understand the Court's vote, make clear that the state cannot pay for teaching in **EXER** religiously **Effit** affiliated **SENN** 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.

In Tilton and Hunt **xed** 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 **x** 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 **xxxseix** 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, guite rational.

This brings us to the present cases. **XiXEExXiExis provide** for aid to <u>pre-college</u> 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.

(1) The payments for "maintenance and repair" do not pass this test. Such payments apparently contemplate state aid being used for any building emissions short of if (?) 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 activies as for strictly secular activities. They are one the same plane with state aid for construction. Even in Tilton, a college case, the Court unanimously struck down the provision that permitted the moulding to be used for reight religious perposes after 20 years. Using state money to operate and repair the buildings of pre-college parochial schools in effect permits state money to me building to permit the state state permits state building to be used for the state parochial schools in effect permits state money to me building to be used.

(2) The parent reinbursement payments in both states. This Court recently affirmed a three-judge court striking down an Ohio plan for parent reinbursement of tuition payments which weights my view, essentially similar to both plans here under consideration. Rs 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 am elements of parochial schools education.

N.Y. argues here that its plan is distinguishable because it imposes a **ink** limit of 50% of the school tuition of 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% cuition is all right, it will not be x feasible to say that 60 or 70 or 80%, erc. is not all right. Under N.Y.'s argument, even 100% built on 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 suise tuition will rise to take pressure off the **religious_**or<u>eanizations_now_pr</u>oviding_support.

In sum, the i effect of the reimbursement pr 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, Waix property tax exemptions on **ENYWER** church property have had a very long history. In Walz the Court had the benefit of hindsight; the exemption had not in a 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. imstiguging the 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 (or one purpose: To do what the Court has held it may not do directly, i.e., pay parachial schools tuition. The only groups beneficed by this tax wear 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 controversmy as a tax credit provision. But if the Court permits this sort of EixEMBAX circumvention, I would guess that both tax credits and permanent fund subsidies could beause 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--**the** 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 **Awak** Mr. Justice Frankfurter's <u>concurrence in</u> 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

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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...km in Virginia...appeared in various forms in taker ¥ 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 prokb hibition of furtherance by the State of religious instruction becauseth 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 Fourtmenth 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 Magaina Allen: Underlying those cases was the fact that not only did the state aid go to a me specific ex neutral, secular purpose, but the total axis effect of the aid, both direct and indirect, was small in comparison winks with the total (inancial burden of parochial schools. The plans here do not restrict state aid to neutral, But perhaps more important, they permit secular purposes. aid to a much greater extent was could ever be funneled through textbooks or transportation, xariwing Allowing these plans would remove any constitutional barrier that I can perceive tox total state financing of the cost of parochial school education. And this is true whether the payments are directly to schools, indistr to parents as subsidies, or as offsets to their state ingene 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, 1 don't see how rike we could permit religious restrictions si 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 **EKRNSKX** church and state will suffer.

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Argued 4/16/73 No. 72-694 Committee for Public Education and all of there were consoledated - involve validity of 3 promining N. Y Law prosiding and to private schoole. Religious Liberly v. Nyquist 72 - 753 72-791 72-924

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Pfeffer (cut). 93 To of famile schools in U. Y one Catholic - but when asked by CJ of her argument would be. defferent of only 10% work relegioner, Pfeffor sand this moder no defference. Can't allow for conditions to any prevents who sound children to relegiour school, If we uphald treating grants, tox coedits are also valid. Revence of their saw trad

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NYQUIST V. COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY CHERRY V. COMMITTEE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY

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[AFRIK IS, 1473] 72-694 n: 4. and to Religion School Cour_ -753 -791 ~ 929 <u>C.J.</u>.... Three separate insure 1st man toward - controlled by precedents affirm on # to thin - 2 - Turkingroubs - since class Q. goes my to unproversibled on Conveniences . Reserved Judgement on # 2. 3.2 Tax curity - no g on to high commentered ... of shate - 09 saw parelie bet, this tax evaluat & the Wolly tox examption a contribution could not different in newsit from tax readil (But I note that the controlution credit is post of a tax reliance which applies to wroke spectrum of of clounting & all advice bound with laborer, public + prevale.) September to this. afferre on # 1 4 Douglas J Rivers on #3. all these devices and uncourt. aqueen with Heyer in ali 3 concer. agrees with Dunglas. mennen There are all denier to subsiding veligion release. Then they violate 1st amend. teel there would be or an to non-neligiour salesle.

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itp/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 demoninational educational institutions. There should certainly be a footnote on this argument in one of our cases.

The answers include: (i) as in <u>Allen</u> and <u>Everson</u>, the "aid" is <u>ail</u> 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.

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Supreme Gourt of the United States Washington, A. C. 20,543

CHAMBERS OF JUSTICE WILLIAM O. DOUBLAS 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.

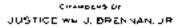
William 0 Douglas

Mr. Justice Powell

cc: The Conference

Supreme Court of the Muited States Washington, P. C. 20543

- - -



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,

Mr. Justice Powell cc: The Conference Ompreme Court of the United States Machington, D. C. 20543

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CHANGERS OF JUSTICE POTTLE 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,

Mr. Justice Powell

Copies to the Conference

Supreme Court of the United States

Baohington, B. C. 20549



USTICE 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; Slean y. 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. Nowever, 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, т.м.

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.

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MEMORANDUM

·· ____

TO: Mr. Larry A. Hammond DATE: June 5, 1973 FROM: Lawis F. Powell, Jr.

Religion Cases

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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.

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June 6, 1973

	Committee for Public Education v. Nygulat
	Anderson y. Committee for Public Education
No. 72-791	Nyquist v. Committee for Public Education
No. 72-929	Cherry v. Committee for Public Education

Dear Chief:

يات حر

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

(l) Nyqşist

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 gemuine 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 <u>Walz</u>. 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 <u>Walz</u> analysis. Additionally, my treatment of <u>Walz</u> was designed to suggest that a deduction would survive scrutiny (or 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 in 28, pp. 23-24. Taken together, I think these factors suggest that, as in Waiz, 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 balk 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

-2-

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

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Supreme Court of the Anited States Washington, B. C. 20543

CHANDERS OF

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 -	Charry v. Committee for Public Education

Dear Lewis:

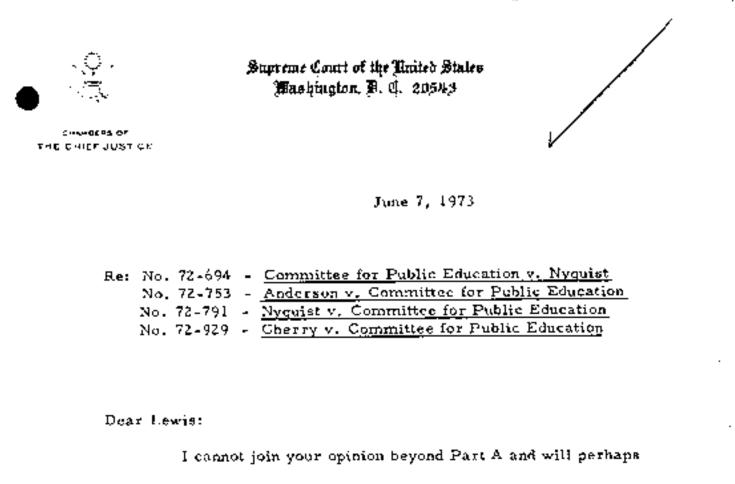
I will join you in Part A and possibly in Part B of the above but I will dissent as to Part C -- assuming I have the parts correctly identified.

I regret I cannot agree with your reading of <u>Walz</u> or indeed of <u>Lemon</u> and <u>Tilton</u>. For me they are contrary, and Part C cuts a piece off each, particularly <u>Walz</u>. 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 (or 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 thus holding means you will not vote for a disposition of <u>Levitt</u> that allows the state to pay for examination and record keeping the state requires. This may lead me to reassign <u>Levitt</u>. However, on this we can "have a word."

Regards, lasp

Mr. Justice Powell



write a dissent on at least Part C and probably B.

Mr. Justice Powell

Copies to the Conference

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6/14/73

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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 Anited States Washington, D. C. 20543

CHARGEDS OF JUSTICE MARRY 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 <u>Allen</u> 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 1 had any specific concern about the opinion, particularly in its relationship to <u>Walz</u>. 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,

Mr. Justice Powell

Supreme Court of the United States

Mashington, P. Q. 20543

CHAMBERS OF USTICK HARRY & BLACKMUN

June 18, 1973

Solur

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 propared for these cases,

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

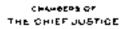
Sincerely.

dom

Mr. Justice Powell

cc: The Conference

Supreme Court of the United States Washington, D. C. 20549



June 19, 1973

Re: :72-694) - <u>Comm. for Pub. Edu. v. Nyadist</u> 72-753) - <u>Anderson v. Comm. for Public Education</u> 72-791) - <u>Nyquist v. Comm. for Pub. Education</u> 72-929) - <u>Cherry v. Comm. for Pub. Edu.</u> 72-459) - <u>Sloan v. Lemon</u>

72-620) - Crouter v. Lemon

Dear Byron:

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

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

Regards,

Mr. Justice White

Copies to the Conference

Supreme Court of the United States Washington, B. G. 20543

CHANGERS OF

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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) - Charry v. Comm. for Public Education

Dear Bill;

Please join the 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

Mr. Justice Rehnquist

Copies to the Conference

العقر والمراسح والاراب

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 ioans 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 <u>Nyquist</u> and <u>Sloan</u>. 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 benefited 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 <u>Sloan</u> and <u>Nyquist</u>, this petition for rehearing should now be denied.

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

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 <u>Nyquist</u>. Appellants rely on the District Court opinion in <u>Nyquist</u>, which our opinion reverses. I see no significant differences between Ohio's and New York's laws and will, therefore, vote to <u>affirm</u> 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 <u>Nyquist</u>, <u>Sican</u> and <u>Levitt</u>, I am now of the view that the stay should be vacated and the preliminary injunction reinstated. The DC pretiminarily 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.

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Supreme Court of the United States Washington, D. C. 20343

UNAPPEND OF

June 20, 1973

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

<u>Nos, 72-459 & 72-620 - Sloan v. Lemon, ct al.</u>

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 Machington, D. C. 20343

UPAHORAS OF

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,

Mr. Justice White

Copies to the Conference

Supreme Court of the United States Wastpington, D. G. 20543

CHAMBENG OF JUSTICE BERON D WHITE

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June 20, 1973

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

<u>Nos. 72-459 & 72-620, Sloan v. Lemon</u>

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

Hupreme Court of the United States Washington, Ø. C. 20,543

CHANNERS OF JUSTICE BYRCH R WHITE

June 20, 1973

÷.

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

Dear Bill:

Please join me in your dissenting opinion in these cases.

Sincerely,

žy. ...

Mr. Justice Rehnquist

Copies to Conference

Junion Part A Junion in Part C. Munder in Part B dearent in 151 7 970 Lepon L C 6/61/ (二十二) 20- 12 20- 12 20- 12 4 с, 24/14/1 50) 1000 cefert's Educ. 72-694 72-459: 12-620 Sloan v. Lemor. 12-753, Hyrpuist, Cherry, Anderson Ster. .hrho 12-791, 72-929 Comm. Pub. 4,26,73 close con apple apple Land and Land <u>22</u> 1913 hisem =7 <u>⊡</u> ...

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, and Walz v. Tax Commission, supra, in which tax exemptions were educational and where accorded to all charitable, nonprofit institutions. Because of the manner in which we have resolved the tuition-grant issue, we where - norpost need not decide whether this factor might differentiate the present some form of public anatome (e.g. case from a case involving)tuition-wouchersion scholarships)made exchange - nonserving, or generally available without regard to the public of 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. 8 1651, impermissibly advance religion in violation of the Establichsment Clause. See also n. 23, supra.

any of the evils against which that Clause protects. Primary among those ovils have been "sponsorship, financial support, and active involvement of the sovereign in religious activit##y." <u>Walz v. Tax Commission</u>, <u>auguar</u>, of 668 (1970) Logmon v. Kurtzman, Supra, at 612.

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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, and those touching on matters of public aid to sectarian educational institutions. While the New York legislation places this case in the latter category, its resolution requires consideration not only of the several aid-to-sectarianeducation 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 emeridged from our decisions is a product considerations derived from

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FOOTNOTES

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L. 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 <u>Everson v. Board of Educ.</u>, 330 U.S. 1, 28, 33-41 (1947) (Rutledge, J., diesenting).

 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 <u>Waiz</u>
 v. Tax Comm'n; 397 U.S. 664, 700, 719, 721 (1970), respectively.

2.a. Walz v. Tax Comm'n, supra, at 669.

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

N.Y. Laws 1972, Ch. 414, § 1, amending N.Y. Educ. Law,
 Art. 12, 46 549-553 (McKinney 1972).

5. N.Y. Laws 1972 Ch. 414, § 2, amending N.Y. Educ. Law,

<u>Art. 12-A, §§ 5</u>59<u>-563 (McKinnev 1972</u>).

N Y Laws 1972, ch. 414, 5\$ 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:

10. In teh 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).

No. 72-694, <u>Committee for Public Education and Religious</u>
 Liberty v. Nyquist.

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

 No. 72-929, <u>Cherry v. Committee for Public Education and</u> Religious Liberty.

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

15. <u>McCollum v. Board of Educ.</u>, <u>supra ("release time" from</u> *Zo zoch*public education for religious education); <u>Easeh v. Clauson</u>, 343 U.S.
306 (1952) (also a "release time" case); <u>Engel v. Vitale</u>, 370 U.S.

421 (1962) (prayer reading in public schools); School Dist. of Abington v.

- 3 -

Epperson v_7 Arkanses, 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.

<u>Kurtzman</u>, <u>supra</u> (teacher's salaries, textbooks, instructional materials); Earley v. Delamo, 403 U.S. 602 (1971) (teachers' salaries);

Tilton v. Richardson, 403 U.S. 672 (1971) (secular college facilities).

17. The plurality in <u>Tilton</u> 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 partment 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, we liare 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).

19.3" Similarly, in Tilton federal construction grants were

inited to paying 50% of the cost of erecting any secular facility.

2. . . . 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 ceneficiaries

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 fultion-grant issue, we

need not decide whether this factor might differentiate the present

. case from a case involving fuition vouchers on 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 (DESD Ohio, 1972) affid 409 II 8 Ros (10/2)

21. The forms of aid involved in Everson, Early v. Diffense, 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

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258.

25. N.Y. Educ: Law, at 12-A, 5 559(2) (McKinney 1972)

(legislative finding supporting tuition reimbursement).

The basic purpose of these provisions, is is to insure that he religion is sponsored or favored, none commanded, and none inhibited. Walz v. Dax Commission, supra, at 669.

26. Agan, 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.

The estimated benefit table is reprinted in n.

v28.

29. The New York program, therefore, is clearly not a

program granting tax deductions, since the amount of the modification

ris 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, " Bair 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

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

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No. 72-694, <u>Committee For Public Education and Religious</u> <u>Liberty v. Nyquist</u>

NR, JUSTICE POWELL delivered the opinion for the

Court.

es. This case# raising 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 the est 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, admonished that a "prudent jealousy" for religious freedoms +4 (Y become never 💽 required that **b** "entangled . . . in precedence." His strongly held conviction/ coupled with the equalkly closely held beliefs of Thomas Jefferson and others among the and Founders, were reflected in the first clauses of the First Amendment #dof the Bill of Rights, which

2a/ and the scemingly absolute language of the Clauses, this Nation's history has not been one of entirely sanitized separation between Church and State. ٦t has never been thought either possible or desirable to enforce a regime of total separatoion, and as a consequence cases arising under these Clauses have 5666 å#dd###d#dd#de 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 Justices, including Justices Black, Frankforter, Harlan, Jackson, and

Ruchedge, and chief Justice Warren.

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

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

In may 1972, the Governor of New York signed into law several amendments to the State's Education and of the considerants Tax Laws. The first five sections established three inner aid for nonpublic emementary and distinct 😋 🔤 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 faid 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 Motions to intervene on behalf of defendants Finance. Majority Leader and nonpublic schools and to the 📹 YPresident

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Court were resolved on the basis of the pleadings decision turned on the constitutionality A of the several provisions on their face.

The first section of the challenged enactment, entitled "Realth 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. "A "qualifying" school is any nonpublic, conprofit elementary or secondary school that "has been designated during the [immediately preceding year as serving a high confectution of pupils from lowf-income fafffmilies 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 to the Commissioner of Education old. Each school is required to submit/an audited

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maintenance and repair 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 opkeep and renovation of buildings, grounds and equipment; fire and accident protection: and such other items as the commissioner may deen 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 concubite school children" in low-loopto waber wares

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

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

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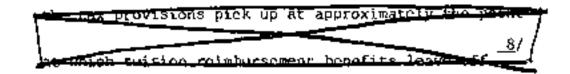
dedication **#** the "vitality of our pluralistic society," the findings state that a "highly competitive and diverse alternative to public education is not only desirable but indeed vital to a state and nation that have continually reaffirmed the value of individual differences.* The findings further 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 Heir where 🌇 children are to be educat#ed." 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 encollment and costs," an increase that would #"aggravate am already serious fiscal crisis in public education" and would "seriously jeon adize quality education for all children." Based on these premises, the statute assorts the State's right to relieve the financial burden of parents who send their children to nonpublic schools through this fuition reimbursement pressures.

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-6-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 These sections tuition reimbursement. allow parents Mo have dependents attending nonpublic schools for whom they have paid at least \$50 in tuition, disignated amounts from their adjusted gross to subtract 🙇 income for state income tax purposes. If the taxpayer's ğ**≓de⊎**adjusted gross income is less than \$9,000 he may \$1,000 subtract (1)000 per compublic cobool dependent, up to As the taxpayer's income approaches @\$25,880. three. amount of the the allowable exclusion diminishes. Thus, if a taxpayer has adjusted gross income of \$23,000 he could subtract only @\$100 per dependent only @\$100 per dependent

s <u>7/</u> is allowed to#raxnaver#s whose income/exceed \$25 000

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While the scheme of the enactment indicates that the purposes underlying the promulgation of the tuition reimbursement program should be regarded as pertiment as well to these tax law sections, section in additions 3 does contain **become be** 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 emixempt status: 🔁 such institutions provide educations for children accending them and also serve to relieve the public school system of the burden of providing f_{pr}^{pr} their education: and (+) the "legislature Λ . . 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.

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in New York which would qualify for maintenance and reapir grams under sections 1 and or practically all are related to the Roman Catholic Church and teach Catholic peligious doctrine to some degree." 350 a Pietrest court, relating lying on findings in a similar Supp 661 case recently decided by the same Difference Court, 9/ course adopted the profile of these sectarian, nonpublic schools, suggested in the plaintiffs' complaint. Qualifying institutions, under all three segments of the enactment, could be ones which

"(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 particulat 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 $\frac{4\pi d + 3}{14\pi d + 3}$ faculty may teach." population, attend over 2,000 separate institutions, approximately 85% of which are church-affiliated. 280 And while "all or practically all" of the/schools entitled to receive maintenance and repair grants "are related to the Roman Catholic Church and teach Catholic religious doctrine to some degree, <u>ifd</u>... at 661, institutions qualifying under the remainder of the statute include a substantial number of Jewish, Lutheran, Episocopal, Seventh Day Adventist, and other church-affiliated schools.

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Taken together these decisions dictate with some clarity that to pass muster under the Esgablishment Clause the state law in question, first, must reflect a clearly secular legislative purpose, <u>e.g.</u>, <u>Epperson v.</u> <u>Atkansas</u>, 393 U.S. 97 (1968), second, must have a primary effect that nuither advances nor inhibits toligion. <u>e.g.</u>, <u>McGowan v. Maryland</u>, <u>supras School</u> <u>District of Abineton Township v. Schempp</u>, 374 U.S. 203 (1963), and, third, must avoid excessive government entanglement with religion, <u>e.g.</u>, <u>Walz v. Tax Commission</u>, <u>supra</u>. See <u>Lemon v. Kurtzman</u>, supra, at 612-5613; <u>Tilton v. Richardson</u>, 403 U.S. 672, 678 (1971).

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1400 In applying there criteria to the three distinct need. forms of aid involved in this case, we way touch only briefly on the "secolar legislative purpose" require-As the recitation of 🛒 logislative purposes ment. appended to New York's law indicates, each measure is adequately supported by legitimate, nonsectarian stare interests. We do not question the propriety, and fully secular content, of New York's interest in preserving a healthy and safe education/environment for all of its school children. Not do we have any reason to doubt the validity of the State's interests in promoting & pluralis#≴&#and divers@ity its among **the** public and compublic schools, or to question the sincerity of its concern that an already overburdened that public school systemimight suffer in the event that any significant percentage of children presently actending nonpublic schools should abandon those schools in favor of the public schools.

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challenged if any of New York's/provisions are #8 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 the provisions separately to ascertain/ficheir necessary effects ###### of entanglement they entail place them beyond the bounds of the First

Amendment.

The maintenance and repair provisions of section l authorize direct payments to monpublic schools, virtually all of which are Roman Catholic schools in low income areas. The gradits, 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 taxraised funds. No attempt is made to restrict payments fo these exampletures schetch to the -for voo-in-the upkeep of facilities used exclusively

for secular purposes, nor do we think it possible within *cluse clugeon - minited* the context of cuep 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 repowaring classes

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.

> U. Hammond #24**8**5 #223

LAH/gg 5-25-73

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 neveral-provisions forms of a which provides , in science ways, (linancial 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, four task is a delicate

>-one-and we-approach it with circumsportion.

James Madison, in his famous Memorial and Remonstrance

Against Religious Assessments, ^{1,6} admonished that a "prudent

jealousy" for religious freedoms required that they never become

"entangled , , , in precedents." 2 His strongly held convictions,

(*Hose*), eld beliefs of Thomas Jefferson and coupled with the equa

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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, " $\overset{\sim}{\sim}$ Yet, despite Madison's admonition and the " sweeps of the perhabition" 20 (scenningly absolute integrange of the Clauses, this Nation's history has not been one of entirely sanifized 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, ospecially in the fast quarter-century, some of the most/far-reaching and complex questions to come before this thorough Court. Those cases have occasioned the midel eloquept and thoughtful by several scholarship of this Court's most respected former Justices, including Justices Black, Frankforter, Harlan, Jackson, Rutledge and Chief Justice Warren, As a result of these numerous decisions and opinions, under the the Robigson Claves -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. <u>McCollum v. Board of Education</u>, 333 U.S. 203, 232, 238 (1948) (Jackson, J., dissenting). Indeed, the controlling constitutional standards have become firmly rooted and the *thereatore contours of our inquiry are now clearly defined*. Our task, they become si*context formation*. Therefore for the tight of principles already delineated.

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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 process 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, - The second 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 26 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, 2 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. "qualifying" school is any nonpublic, nonprofit elementary or secondary which 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 1985 (20 U.S.C. §425)." Such schools are entitled to receive a grant equalling \$30 per pupil, per select 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 "bas a primary responsibility to ensure the health, welfare and safety of children attending . . . nonpublic schools "Athat 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

t4 the make grants for maintenance and repair expenditures which are clearly secular, neutral and non-ideological in nature." The remainder of the challenged legislation through 5 -- is a single package captioned the "Elementary and Secondary Education Opportunity Program" $\overset{I}{\underset{A}{\longrightarrow}}$ 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 To qualify under this section secondary nonpublic schools. the parent must have ang annual taxable income of less than \$5,000. each'grade school The amount of reimbursement is limited to \$50 child and \$100 for each child, Nowever .) Sach parent high schoo 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 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 opotions 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 those premises, the statute asserts the State's right to relieve

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the financial burden of parents who send their children to nonpublic schools through this tuition reimbursement program. Repeating sectors 1, the findings conclude that the declaration contained in. 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, primert for whom they have paid at least \$50 in tuition, to subtract designated amounts from their adjusted gross income for state income tax If the taxpayer's adjusted gross income is less than purposes. for each of as many as these dependents. \$9,000 he may subtract \$1,000.per each dependent, up to three. -14CC As the taxpayer's income approaches \$25,060, the amont crime the may subtract aikmanx allowable exclusion diminishes. Thus, if a taxpayer has 815,000 adjusted gross income of \$23, 860 he could subtract only \$100 her if his interne is \$35,000 or more no deduction dependent, and new tamanana mboco-incomos and the second of the second a llowed 10 deduction. exceed_\$35,-000. The amount of the exclusion is not dependent

assisting only the secular functions of sectarian schools, served

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indirectly to promote the religious function by rendering it more likely

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But an indirect or ##dincidental effect beneficial to roligious institutions has never been thought a sufficient deferent 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 A themselves. Also, in <u>Walz v. Tax Commission</u>, <u>supra</u>, 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.

<u>Tilton</u> 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. (Under that clouse,) the federal statute in question. (We a condition for any federal-grant-toa-sectarian-institution, the Government might recover a portion of its to a sectorian institution grant 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." But because the statute provided 403 U.S. at 683 (that the condition would expire at the end of 20 years and the facilities would thereafter be available for use by the in-الله المرا<u>لية في المراجع المراجع المراجع من المراجع من المراجع من المراجع من المراجع من المراجع من ا</u> sectaniam stitution for any nonsecular purpose. In striking down this provision, the plurality opinion emphasized that "[1] initing 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 602 (Douglas, J., dissenting), 659-661 (Breaman, J., dissenting), 665 n.t (White, J., concurring in the judgment). BAEHNAN, J. If tax-raised funds may not be granted to institutions of higher learning service and services and

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 2^3 schools 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 removate 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.

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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

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 enlanglement 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, <u>and could not</u>, provide state aid on the basis of a mere assumption that secular teachers under religious discipline can avoid conflicts. The State <u>must be certain</u>, <u>given the</u> <u>Religion Clauses</u>, that subsidized teachers do not inculcate religion . . . , ld, (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 exhous fing/ satisfying the State grant. It takes little is magination to perceive the extent to which States might openly subsidize parochial schools under such a loose standard of scrutiny. See Also <u>Tilton v. Richard</u>. 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 compublic schools. We have no occasion, therefore, to

consider the further question whether those provisions as presently

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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. P

Lemon v. Kortzman, <u>supra</u>.

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 \Box \leftarrow 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. 33000.5,

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 fuition actually paid) as reimbursement to parents in low income brackets who send their children to nonpublic schools. To qualify, a parent must have carned less than \$5,000 in taxable income and must present a receipted **me** tuition bill from a ponpublic school, unsededly 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 ing that the funds no system of su will be used exclusively for secular, neutral, and non-ideologicial

The controlling question here, then, is whether the fact

puedoses.

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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: I in Everson parents were reimbursed for bus in fares paid to send children to parochial schools, and in Allen textbooks were loaned directly to the children. But those decisions our discussion in Part IIA suora <u>oonna izo</u>e 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 <u>Everson</u>, 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 before the flourisk 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 20 ÊD 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 furction of New York's law to provide schooles, the guest magnets of which are provide general assistance to religious schools. By reimbursing methods.

parents for a portion of their twitten by

Ale 31. their financial burdens sufficiently to assure that they remain Her option to sand their children to religion - orcereted schools attached to the nonpublic system. And while the purposes for that aid - a desiration to perpetuate a pluralistic educational environment and to protect the fiscal integrity of overburdened public schools the effect of the will ! are certainly unexceptionable, its effect is unmistakably to provide desiredo financial support for nonpublic, sectarian institutions. Mr. Justice Black, diversity 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 crect religious school buildings or to crect the buildings themselves, to pay the salaries of the religious school teachers, and finally to have the **reigious** grass religious groups must cease to rely on voluntary contributions of members of their sects while waiting for the government to pick up all the bills for the reliatous schools, " 392 U.S., at 253. His fears regarding religious buildings and **xelgix** 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[ng] up . , the bills for the religious schools, " neither has his greatest fear materialized. > But the ingenvous plans for channeling state aid to sectarian schools

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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 a number of \underline{He} State of fields and interviews subsidiary arguments made by appelled 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 guix fuitions 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

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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 providez a basis for a claim under the Free Exercise Clause, it was not a necessary element of any claim under the Establishment **Onexe** Clause, Id., at 222-223. <u>Mr. Justice Brennan's concurring views</u> 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 **30**

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way into the sectarian institutions. & Whether the grant is labelled

a reimbursement, reward, or subsidy, its substantive impact is \sim

still gh 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, and intervenor Reethe 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, estimates that only 30% of the total cost of nonpublic education is covered by fuition payments with the remainder coming from "voluntary contributions, 3/ On the basis of these two statistics, endowments and the like. " 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 Z 2

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

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. <u>Pierce v. Society</u> 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

36. repartedly has recognized that inevertably exists this Court bas allow emphasized that there exists a tension between Evenen V Board of Elucation, super; the Free Exercise and the Establishment Clauses, e.g., <u>Walz</u> v. Tax Commission, supra, and that it may often not be possible to promote the former without offending the latter. As a repult of this tension, vt! our cases require the State to maintain an attitude of "neutrality," neither "advancing" nor "inhibiting" religion. In its handable enhance the opportunities of the pour to choose attempt to between public and nonpublic education ٤ However great can only be regarded as one "advancing" religion. Whatever our 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, mix Wisconsin v. Yoder, an evolving 406 U.S. 205, 214 (1972), neither may justify a slockening of the 36 £Ξ limitations of the Establishment Clause now firmly emplanted.

Ċ +0r Sections 3, 4 and 5 establish a system 😹 providing income tax benefits to parents of children attending New York's nonpublic schools. In this Court, the parties have engaged in a considerable what label best fits the debate over the wo New York law. Appellants insist that the law is, in effect, one establishing a system of tax "credits(), Sppellees- The State and the intervenors Freject 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 anthrow a 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 characterizati 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 describ MR. GARA JUSTICE BURGER'S Apinion for the Guit. the statutory system, As the Court's opinion in Lemon v. Kurtzman, notes smphasizes, constitutional analysis is not a "legalistic at 614.

Because of the peculiar nature of the benefit allowed. it is difficult to adopt any single traditional label lifted from the law of income caxation. It is, at least in its form, a tax deduction since it is an amount adjusted subtracted from/gross income, prior to computation of It's effect, as the District Court concluded. the tax due. 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 "forgeiveness" in exchange for performing a specific act which the State desires to encourage -- the usual attribute of a tax credit. We see no been in selection one label over the other as by the name when éus. aguernad ·SEALUEORY-SChemo the constitutionality of this hybrid benefit does not form in any event on the lobel we accord it.



"examine the form of the relationship for the light that it cases on

the substance."

The sections allow parents of children attending nonpublic

elementary and secondary schools, if they do not receive a fuition reindursement under section 2, and if they have an adjusted gross income of less than \$25,000, to subtract a specified amount f

Computing the interested in any Carpage of 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 not benefit, and that the tax benefits would be comparable to, and compatible with, the tuition grants for lower income families. Thus, a parent who carns 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 92.39

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religious institutions.

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In practical terms there would appear to be little difference, for purposes of determining whether such aid has the "effect of for benint 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 allowed by an arbitrary instructed to reduce a line 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 eved portion of New

directed to the parents rather than to the schools. This is the same argument made in support of the tuition reimbursements and rests m 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 AvAN 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-Indeed, its rutionale plainly compels Establishment Clause. Tax exemptions for church property **bed** 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 178.57 / for tax exemptions for places of worship, Congress has exempted

that it is of controlling significance that the grants or credits are

that 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 We know of <u>eccedent</u> New York's of New York has shown us no historical precents for jits recently promulgated tax relief program. Indeed, it seems clear that tax benefits. 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** with the recent decisions of this Court. See Kosydar v. Wolman, F. Supp. (DCSD Ohio, 1972), juris. state. pending, No. 72-1139.

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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. To the contrary, insofar as they render assistance to parents who eis and ineitable send their children to sectarian schools, effect are benefits is to aid and advance those religious institutions.

underlying that long bistory 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 "centrality" toward religion. Yet Covernments 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 **Xumbility**: "bostility" toward religion, "exemption constitute[d] a reasonable and balanced attempt to guard against those dangers, " Id., at 673 caunot similarly-be-justified-as-rooted-in-negative-potions lety established by the pression of ance-of-hostility toward religion. To the contrary, insofar aducate the State's children their very purpose is to aid as the 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 concroversy. (Maintenance-of-the-tax-exemption, from of the second to the tax-exemption, from of tax-exempt

>to be sure, conferred a benefit, albeit indirect and incidental. Yet

but of a fiscal relationship designed to minimize involvement and $\frac{1}{2}$ emphasized, "tends to complement and reinforce the desired tus the unargi separation insulating each from the other. " Id., at 676. An "[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 oredit unlike the extension of an exemption, would tend to increase rather than limit the involvement between Church and State. the stempted to evoid excessive. funds do One further difference between tax exemptions for churches benefits and tax oredits for parents should be noted. The challenged exemption cholleged in Wali 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 meausive the narrowness of the benefitted class would be an important factor.

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In conclusion, we find the <u>Walz</u> analogy unavailing, and in light of the practical similarity between New York's tax events 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.

ΙΪΪ. 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 "Lo] comprehensive, discriminating, teb wee stoul of and continuing state surveillance." Lemon u. Kurtzman, 403 4.5, at 619, But the importance of the competing societal interests implicated in ∖prompts∫ this case us to make the further observation that, apart from **Approximate** any specific entanglement of the State in particular religious programs, assistance. min of the sort involved in this case carries 45 grave potential for entanglement in the broader sense of continuing political strifes over aid to religion.

Few would question most of the legislative findings supporting this statute. We recognized in <u>Board of Education v. Allen, support</u>

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 -Soy-far-the-most-numerous-of-all-private-schools Thave contributed importantly to this role. Moreover, the failoring 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 42. educated is most appealing. $rak{V}$ 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 the procent in turn τ as this legislation recognizes τ exacerbates the problems State and set in the set

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 rearded 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, \angle ______

and the second second

As Mr. Justice Black's opinion in <u>Everson v. Board of</u> Education, supra, emphasizes, competition among [political and/ religious sects for religious supremacy has occasioned considerable civil strife, "generated in large,part" or maintain the by competing efforts to gain support of government. Id., at 8-9. As Mr. Justice Harlan put it, "[w hat Bis at stake as a magger 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 U.S. of the breaking point. Walz v. Tax Commission 694 (concurring opinion).

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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 43 - 343 - 3

The language of the Court applies with peculiar force to the

New York statute now before us. Section t (grants for maintenance) and Section 2 (figst 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 to exceed provides parents out more thanks.

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 accelemrated 44 increases. Howreever, the state itself, concededly anxious to avoid assuming the burden of educating children now in private and perochial schools, has a strong motivation for increasing this aid as 45 public school costs rise and population increases, 92 In this situation, where the underlying issue is the deeply emotional one of Church-State relationsips, the potential for serious divisive polictical

consequences needs no elaboration.

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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 i signal" not to be ignored. <u>Id.</u>, 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 beetiens 1 and 2, and reverse as to beetiened 3, 4 and 5.

It is so ordered.

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FOOTNOTES

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

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

The provisions of the First Amendment have been made hinding on the States through the due Process Clause of the Fourteenth Amendment. <u>See, c.g.</u>, <u>Everson</u> <u>v. Board of Education</u>, 330 U.S. 1, 8 (1947).

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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." I_{obs} , 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 i For it is evident from the numerous easy one. 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." <u>Lemon v. Kurtzman</u>, 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, indistminet, and variable barrier depending on all the circumstances of a particular relationship." Id., at 614.

B. 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.

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).

5. N.Y. Laws 1972, ch. 414, 583, 4 & 5, amending N.Y. Tax Law,

§§ 612(c), 612 (j) (McKinney 1972).

$= = = = \frac{1}{f_f} \nabla r_W \nabla orh$ adjusted gross income is:	The amount allowable for each dependent is: 5		
Less than S5,000	\$1,000		
9,999 -10,959	850		
11,09012,999	200		
13,996 - 14,999	550		
15,000 -16,000	400 -		
17,000-15,559	250		
$19_{2}900 - (20_{1}099)$	160		
21,00012,059	125		
23,900 - 24,999	160 J		
25.000 and over	_ <i>a</i>		
1. Tax Law, 5 612(j) (McKinney 1472).		

who has been replaced as intervenor by his successor. Senator Anderson:

· · · · · -		Antes	Estimated Net Heards to Family		
1	Lf Adjusted Gross Extense is	NV I	One shale	Two rNikireo	Three comments
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Comm. for Public Educ. & Religious Liberty v. Levitt, 342
 F. Supp. 439, 440-441 (SDNY 1972), aff'd. ____U.S. ____(1973).

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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 C.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."

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 V_{μ} . No. 72-694, Committee for Public Education and Religious

Liberty v. Nyquist, V. No, 72-791, <u>Nyquist</u> v. <u>Committee for Public Education and</u>

Religious Liberty,

No. 72-753, Anderson v. Committee for Public Education

and Religious Liberty.

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

that led to /۴۱ Virginia's experience)constitutes one of the greatest <u>the history of</u> adoption the essent chapters in this Country's accepted of addited at the second stated st the essentially revolutionary notion of almost complete separation of Church and State, During the Colonial Era and into the Everson 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, Presbycorians, and Lucherans, 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 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"

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

72-74, required all persons to pay an annual tax Deuteality "for the support of the Christian religion" in order that the teaching of religion might be promoted. Each caxpayor was permitted under the Bill to declare to C geveramonst 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 goardnifec penned his "Memorial and Remonstrance against Religious Assessments," outlining in fifteen numbered paragraphs toward religion the reasons for his opposition to the Assessments Bill. 1175 1014 The document was widely circulated and holpod such overwhelming opposition to the Bill that it died during the ensuing session without reaching a vore. 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 scaled

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in the Bill, is that "no man shall be compelled to frequent

the Declaration of Independence and founding of the A University of Virginia, that he wished to have inscribed on his tombstone. Report of the Comm's 4 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); Heach v. Clauson, 343 U.S. 306 (1952) (also a "release time" case): Engel v. Vitate, 370 U.S. 421 (1962) (prayer reading in public schools): School Dist. of Abington 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). Everson v. Board of Educ., supra (bus transportation); Board of Educ v, Alten, 392 U, S, 236 (1968) (textbooks); Lemon v. Kurtzman, supra (teacher's salaries, textbooks, instructional materials); Earley v. Blenoo, 403 U.S. 602 (1971) (teachers' sal aries); 徭 Tilton v. Richardson, 403 U.S. 672 (1971) (secular college (acilities). 22 35 In discussing the application of these "tests", 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 Kather, action under scrutiny. [These tests or citeria should /rather, be "viewed as guidelines" within which to consider "the comulative criteria developed over many years and applying to a wide range

55. The plurality in <u>Tilton</u> 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," <u>Id.</u> at 685. See <u>Hunt</u> v.

McNair, ante.

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Our Establishment Clause precedents have recognized the special relevance in this area of Nr Justice Holmes' comment that "a page of history is worth a volume of logic." See <u>Walz v. Tax Commission</u> <u>supra</u>, at 675=676# (citing <u>New York Trust Co. v. Eisner</u>, 256 U.S. 345, 349 (1921)). In <u>Everson</u>, Mr Justice Black surveyed the history during the pre-Revolumionary period of State involvement/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 <u>maintain</u> churches and church property ardWoused their indignation. It was these feelings which found expression in the First Amendment." 330 U.S., at 11(complement accepted).

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 (orty-seven. In no even shall the per pupil annual allowance computed under this section exceed fifty per centum of the average perpupil 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).

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the necessity for the States of Rhode Island and Pennsylvania to assure, through caroful regulation,

Elsewhere in the opinion, the Court emphasized

"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 risecular and religious educational functions and to ensure that State financial aid supports only the former. All these provisions are precautions taken in candid limited to paying 50% of the cost of creeting any secular facility.

In striking from the law the 20-year limitation, the Court was concerned <u>test</u> 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.

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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., <u>lemon v. Kurtzman</u>, <u>supra</u>, 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

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immune from further examination to ascertain whether (direct onch immudiate) it also has the effect of advancing religion. In <u>MeGowan v. Naryland</u>, 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, Jac. y. McGinley, 366 U.S. 582, 598 (1961). Likewaise, 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 trands 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 determinical which was primary as precedence over the direct religious benefits, with the Establishment Clause. See also 374 U.S., at 278-281 (Me Brennan, J., concurring) and discussing the ancerted secular purposes Any remaining question about the contours of the "effect." criteria should have been resolved after the Court's deligsion in <u>Tilton</u>, in which the Court found the mere #possibility that a federally-accord structure might be used for religious purposes 20 years hence was found unacceptable because the grant might "in part have the effect of advancing

religion." 403 U.S., at 683.

It may assist to 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, contained the following list of secular purposes:

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

Such secular objectives, no matter how desirable and

might irrespective whether judges/possess sufficiently senstive caliphers to separate the "primary" from the subordinant, cannot serve today any fore than they could 200 years and to achieve the advancement of one religion or all religions. See. i Prester, Church, State and Freedom 105-115 (1953). Asurtain whither the suidar affect orderight

sche sectarian benefits

The forms of aid involved in Everson, Early v. Diffenso, 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 42. Brief of Appellec Warren M. Anderson, at 25. 26. <u>Id</u>. 3324. Id. Ast. 37 25: N.Y. Educ. Law, 42 12-A, § 559(2) (McKinney 1972) (legislative finding supporting fuition reimbursement), A 54 . 2.2 15384. "[The 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. ريسموا 36 as with the grants for maintenance and repair, -fails to meet since we could our-holding that this form of aid transcends the second part of the л we need not test because it has the effect of advancing religion, rendersconsider the , inner, consideration-of-matters-of entanglement/unnouccourry, 37. See n. <u>10 supra</u>, $3l_{28}$. The estimated-benefit table is reprinted in n. \underline{ll}_{-} ,

supra,

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of a genuine tax deduction, such as for charicable contributions, we do not have before us, and do not decide, whether that form of tax benefit is constitotionally acceptable under the "neutrality" test in Walz.

Since the program here does not have the elements

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. " **Easir** 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, <u>i.e.</u> if section 2 <u>does</u> violate the Establishment Clause so, too, do the sections conferring tax benefits. 41 A. The separate opinions of Mr. Justice Harlandand

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MR. JUSTICE BRENNAN also emphasize ${\ensuremath{\vec{p}}}$ the historical acceptance

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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 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." 350 F. Base Accord 13
** 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)." $\frac{403US}{Supra}$

total

at 622.

The self-perpetuating tendencies of any form of Government aid to religion have been a matter of concern ronning 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 and rearry an of the strategy of tomorrow." 374 U.S., at 225. See also <u>Lemon v. Kurtzman</u>, supra, at 624-625. But, to borrow the words from Mr. Justice Rutledge's for#ceful dissent in Everson, it is not alone the potential expandability of Stare 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

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from Madison's Memorial and Remonstrance).

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LAH/gg 5-25-73

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

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 isolousy" 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

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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, 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. Naither, 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. <u>McCollum v. Board of Education</u>, 324 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, the, becomes one of assessing New York's several forms of ald in the light of principles already delineated.

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

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chailenging 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 Tazation 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 3 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. 55 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 "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 1985 (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 nompublic 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 crists 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 grante 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. 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 \$1000 or 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.

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This section, like section 1, as 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 up and

diverse alternative to public education is not only desirable but

indeed vital to a state and nationathat 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 opotions 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 teopardize quality education for all children." Based ...

on these premises, the statute asserts the State's right to relieve

the financial burden of parints 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 nonffeological. "

The remainder of the 'Elementary and Secondary Education

Opportunity Program, " contained in soction 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 \$5,000 per each dependent, up to three.

As the taxpayer's income approaches \$25,000, the amout of the

withermax 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 deducations to which the

taxpayer may be entitled for other religious or charitable contribu-

tions. 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.

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 reimburgement 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, 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 pathic 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 sponsoringk it;
(f) have as a substantial purpose the includation of religious values;
(g) impose religious restrictions on faculty appointments;

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 answer secondary school population, attendy

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 Exilities 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

precedute, held unanimously that section 1 (maintenance and repair

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As to the income tax provisions of sections 3, 4 and 5, however

a majority of the District Court, over the discent 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 3 but declared the

remainder of the law independently enforceable. The plainting

appealed directly to this Court, challenging the District Court's

adversa resolution of the third segment of the statute. The

defendant state officials have appealed so much of the court's

decision as invalidates the first and second portions of the 1972.

law, the treat intervenor Majority Leader and President Pro Tem

of the Senate also appeals from those aspects of the lower court's

opinion, and the intervening pacents of nonpuble school children

have appealed only from the decision as to section?. This Court

noted probable jurisdiction over each appeal and overed the

cases consolidated for oral argument. U.S. (1971). Thus,

ald provisions is squarely before us. We affirme the District Court

insofar as it struck down sections 1 and 2 and reverse its determina-

tion regarding sections.3, 4 and 5.

The history underlying the Establishment Clause has been

frequently recounted and need not be repeated here. See Everson v

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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, and 366 U.S. 420 (1961); Engeliv, 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 B does not

aid one religion more than another but merely benefits all religions

alike, Everson.v. Board of Educ., supra, at 15. h is shally well

established, however, that not every law that confere an lirect,

"remote," or "incidental" benefit upon religious institution for

that reason alone, constitutionally invalid. Id.; McGowan v

supra, at 450; Walz v. Tax Commission, 397 U.S. 684, 671 674-675

challenged on Establishment grounds with a view to ascertaining

whether it furthers any of the evils against which that Clause protecte.

Primary among those evils have been "sponsorship, financial support,

and active involvement of the sovereign in religious activity.

Welz v. Tax Commission, supra, at 668; Lamon v. Kurtzman, supra, at 612.

Like the case before us today, most the cases coming to

this Court raising Establishment Clause question have involved the relationship between religion and education 4000 these religion.

education precedents two general categories of may be

identified, those dealing with religious activitie ⁿ the public schools, and those touching on matters of publi

18 educational institutions, . While the New York is Maces

this case in the latter category, its resolution requiration

not only of the several aid-tosectarian-education ca

our, other education precedents and of several import

cases. Fortthe 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.

Khrtzman, supra, at 612-613; Tilton v. Richardson, 403 U.S. 872,

878 (1971).

In applying, these criteria to the three distinct forms of

ald 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.

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.

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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, <u>i.e.</u>, 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 undenlable 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 <u>Allen</u>, decided some twenty years later, the Court upheld a New York iaw authorizing the provision of <u>secular</u> textbooks for all children in grades 7 through 12 attending public and nonpublic schools. Finally, in <u>Tilton</u>, the Court upheld federal grants of funds for the construction of facilities to be used for clearly <u>secular</u> 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 Coust 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.

<u>Tilton</u> 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 "[1] shifting 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." <u>Id.</u>, 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), 659-66) (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, <u>a fortioni</u> they may not be distributed to elementary and secondary mectarian 17 schools for the maintenance and repair of facilities without any limitations on their use. If the State may not erect buildings in which meligious activities are to take place, it may not maintain such building or removate 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 18 Quite apart from the language of the statute, our cases budget. make clear that a more 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 819.

"The Rhode Island Legislature has not, <u>and could not</u>, provide state aid on the basis of a more assumption that secular teachers under religious discipline can avoid conflicts. The State <u>must be certain</u>, <u>given the</u> <u>Religion Clauses</u>, that subsidized teachers do not inculcate religion . . . <u>Id.</u> (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 immagination to perceive the extent to which States might openly subsidize parochial schools under such a loose standard of acrutiny.

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 enjurglements 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. New York's tuition reimbursement program also fails the

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"effects" test, for much the same reasons as govern its maintenance

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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

in must present a receipted tail 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 guaranteeting that the funds

will be used exclusively for secular, 'neutral, and non-idealogicial

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 a 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 III.

supra, emphasizes, did not rest alone on the channels theough which

state aid passes.

In Everson, Mr. Justice Black found the bie fare program

analagous 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 treepase 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 & 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 considera-

tion] 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

20 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." Lemm v. Kurtzman, supra,

at 613. Indeed, it is precisely the fur tion of New York's law to

provide general assistance to religious schools. By reimbursing

m of their, bullion hill, 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

ald - 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, discoutk discenting in Allen, warned that

"[14 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** religious groups **max** 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 metatic religious teachers

have not come to pass, Tilton v. Richardson, supra; Lemon v. Kurtzman;

supra, and insofar as tultion grants constitute a means of 'pick[ng] up

the bills for the religious schools," neither has his greatest

fear materialized.

Although we think it clear, for the reasons above stated,

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that New York's fultion 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 reimpursement for

get tuitions already paid rather than for direct contributions which

are merely routed through the parents to the schools, in advance of

or in Neu 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 reimburgement, 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 provides

a basis for a claim under the Free Exercise Clause, it was not a

necessary element of any claim under the Establishment Change

Clause. M., 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 sime. 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. " 1 Whether the grant is labelled

a reimbursement, reward, or subsidy, its substantive impact is

still ym the same. In sum, we agree with the conclusion of the

District Court that "[whether 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, appelles intervenor face the Majority Leader and

President Pro Temp of the State Senate, argues that it is significant

here that the tuition reimbursement grants pay onlyan 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." 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 it fares no better here.

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Obviously, if accepted this argument would provide the foundation

for massive, direct subsidigation of dectarian 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 Charybdie 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 cellgious 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 often emphasized that there exists a tension between

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the Free Exercise and the Establishment Clauses, e.g., Walz v. Tax

Commission, supra, and that if may often not be possible to promote

the former without offending the latter. As a rewalt of this tension,

our cases require the State to maintain an attitude of "neutrality,"

eeither "advancing" nor "inhibiting" religion. 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, sixx Wisconsin v. Yoder,

406 U.S. 208, 214 (1972), weither may justify a slackening of the

limitations of the Establishment Clause now firmly emplanted.

Sections 3, 4 and 5 establish a system of providing income

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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 cases on

the substance.

The sections allow parents of children attending nonpublic.

elementary and secondary schools, if they do not receive a tuition

reimpursement 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 deducation 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 fultionrreimbursement 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

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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 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' discenting statement below that "[1]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

is fully applicable here and requires rejection of this claim.

Second, appellees place their heaviest reliance on this Court's decision

in Walz v. Taz Commission, supra, in which New York's property tax

exemption for religious organizations was upheid. 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 congressions | enactments in 1802, 1813, and 1870

specifically exempted church property from taxation. In sum, the

Court concluded that "[1]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

thereages 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 Kusakiiking "hostility"

"toward religion, "exemption constitutele] a reasonable and balanced

attempt to guard against those dangers. " Id., at 673. Tax credits,

however, cannot similarly be justified as rooted in negative actions

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-

ald-to-religion controversy. Maintenance of the tax exemption,

to be sure, conferred a benefit, albeit indirect and incidental. Yet

but of a flecal 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 surch property,

tax liens, tax foreclosures; and the dires confruiations and conflicts

that follow in the train of those legal processes

granting of a tax credit, unlike the extension of un exc.

increase rather than limit the involvement between Churc State.

Of course, New York has attempted to avoid excessive invo

but it has done so only by failing to assure that credited thindy

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 infimating whether this factor slone 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

tultion reimbursement programs, we hold that seither 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.

For the reasons above stated, we hold each of New York's

aid provisions invalid. Each, as written, has a "primary effect

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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.

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 mimerous 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. " 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

Sub 1970 and forgers of you analyd broth word of public education at the same time that it weakens support for the said to stable and have notify three a public of creater to be for a first point of Table to fin the parochiairschools are acted as Stable Table to fin the parochiairschools are acted as Stable Table to find

These, in briefest summary, are the underlying reasons.....

for the New, York, and similar degislation; "They are substantial and

legitimate reasons . Xet, 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 from Reflects 19852 or 6 possible of a second of The offen of the second of th

regarded from the beginning as one of the most cherished features of of any ground form which a could us a provide of the groups of the groups of the b.

our constitutional system,

. .

In this process of weighing, our decisions emphasize that one

the solution 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 <u>Everson</u>, <u>supra</u>, at 8, 9, where

he described the civil strife, "generated in large part" by religious

south substantiate days in and religious supremacy. As Mr. Justice

(felende ferfel gert ynste Statiofel System fele 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 fultion 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

4. 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 primate 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 bealthy

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, j

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 antanglement lesue

(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.C. Revenued 6/1/73

1st DRAFT

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Appellants. 72-929 w., Connettee for Public Laturation and Religants Liberty et al.,

Committee for Public Education?

atel Religious faberty et al., Appellacts.

÷., Ewald B. Nyquist, as Commis-

sioner of Education of the State of New York of al Earl W. Brydges, as Majority Lunder and President progen-

> of the New York State Source Appellact.

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and Religious Liberty of all

Ewald B. Nyquist, as Commus-

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[10005 - 1973]

Mr. Justice Power, delivered the oppoies of the Court,

This case raises a challenge ander the Estatilishment Clause of the First Amendment to the constitutionality of a recently gracied New York law which provides fugu-

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bial assistance, in several ways, to computatio 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 Relations Assessments," accountshed that a "prodent jealousy" for religious freedoms required that they rever become "rectangled . . . in precisions "? His strongly held convictions, compled with those of Friedras 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 publishing the free exercise thereal," ? Yet, despite Mudisun's admonition and the "sweep of the absolute prohibition" of the Clauses," this Nation's firstory has not here one of en-

Matheories Mathematical and Reignmettersen was also entrywith to be preasinging the defect in Virgania of an Assessment Bill designed to even it takes on some on an Transiers of the Aspentic scaleging. See it — some as Sec. In Encoder, Record of Education and D. S. 1, 28, 33, 11 (2017) (Doubledge, J. off-scattage.

• All acts this often appendix sectors on the region exists appendix to the dissecting approximation of Mr. Unstage Ratio age and Min dissector Discours in *Excessive Boundool Eduction*, 2004, S. (2003) 65, 004 (Bull'), v. Far Commun. St. U.S. (2004) 705, 704 (17) to a spectrally

The provisions of the First Agenducent have been mide building on the States theory in the Dire Prozess fillows of the Fourierian Minetchieve. Some w_i , Freezow is Reacting Education (COP), S. 1, S. (1947),

Weight a Tage Connects to μ_{1} or 0.65. We Count dystroid Barroad withing for the Count total dust the purpose of the Causes twiss to state an adjustive, that is write a structure frond that [1] for Court has struggled to find a one trajectory. In two of the two releases charses, both of which are east in two days to reast in a class of which if expanded to μ least discussion and reach to class orthogonality which if expanded to μ least discussion and reach to class orthogonality which if expanded to μ least discussion and reach to class orthogonality when 2^{-1} (b) the one 2^{-1}

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tirely samilized separation between Course and State. It has never been thought either possible or descrable to enforce a regime of total separation, and as a consequence cases arising under these Chatses have presented some of the most perplexing questions to essae before this Cours. These cases have occasioned therough and thoughtful scholarship by second of this Court's most respected former Justices, including Justaces Black, Frankfurter, Har'an, Jackson Rudedge, and Chief Justice Warren.

As a result of these decisions and opinions, "Unity nolonger he said that the Religion Clauses are free of "certaingling" precedents. Norther, however, and at basaid that deficiences unstaphorie "worl of separation between Clauses and State has become "as whoting as the fathers separative wall" in designed for the University of Virginia. We Collinn v. *Bound of Education*, 323 L. S. 203–232–238 (1948) (darksin, J., dissecting). Incosel, the controlling reactitutional standards have become fitting roactitutional standards have become fitting roactitutions of aid in the light of principles already defined.

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The existence of the state of the Church bistopy of goiding principles end of over principle difficult even $\frac{1}{2}$ on very doty 100 make near the reduction even one. For α is a significant to muture operate of the Church and of body α in construction on the row operate of the Church and of body α in construction on the row operate of the Church and of body α is a construction of body on the factory cases applying the body finder Church row as the factor of going one of the opplying the body of the factor of a factor principle of going on the opplying the body of the factor of a principle state of the going of the fourth has pregnated its inability to setwice with state $\frac{1}{2}$ of $\frac{1}{2}$ of $\frac{1}{2}$ of $\frac{1}{2}$ or $\frac{1}{2}$ or $\frac{1}{2}$ on $\frac{1}{2}$ of $\frac{1}{2}$ of $\frac{1}{2}$ or $\frac{1}{2}$ on $\frac{1}{2}$ of $\frac{1}{2}$ of $\frac{1}{2}$ of $\frac{1}{2}$ of $\frac{1}{2}$ of $\frac{1}{2}$ or $\frac{1}{2}$ or $\frac{1}{2}$ of \frac

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4. COMMETTER FOR PERIOR EDUCATION - SYQUEST

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In May 1972, the Governor of New York signed into law several unreadments to the State's Education and Tay Lows. The first five sections of these amonhumuts established three distance feature it aid programs for touronline elementary and secondary seconds. Alterst dumediately after the signing of Gase measures a complaint was filed in the United States District Court for the Southern District of New York challenging each of the share forms of add as violative of the Establishment Clause. The plaint is were an unitemporated association, known as the Concentres for Public Education and Religious Liberty (PEARL), and several holynduals were were residents and taxpavers in New York, some of whom had children attending public senools. Named as defephants were the State Commissioner of Education, the Comparaller, and the Compassioner of Taxatano and Finance - Motions to interview or behalf of defendants were grouped to a group of pacents with children enrolled in numpublic schools, and to the Majority Leader and President prostem of the New York Space Senate: 1455 consent of the parties is three-indge court was converted persuant to 28 U/S, C, 33 2286 and 2283, and the case was doubled without an evidentiary locaring - Becuiso the questions before the District Court were resolved on the basis of the idealings, that court's decising targed on the constantionality of each porvision or its face.

the transmission of the two the network of the lattice of the standard structure of the dependence of the presentation of $\beta = 100$, the standard structure of the structure of the standard structure of the standard structure of the standard structure of the struct

Silble method was granted in favor of Me, busi W. Brodges, Upon his religement to December 1972, proceeders Mr. Werege M. Anderson was offselength in his place.

72 MOUNTED OPINION

COMMETTER FOR PERCENDER FOR CAPPON A NUMBER 5

The first section of the challenged eractment, contles-"Health and Safety Grants for Nor-public School Children prevides for direct bookey grants from the State to "qualitying" nonpublic schools to be used for the "infantitenation and repear of a cost school farilities and equipment to ensure the localthe volume and safety of struthed multiplies A "qualifying" selocal is now nonpublic, nonprofit elementary or secondary second which This been designated during the "transcartely proceeding." year as serving a high concentration of papils from lowinteraction ficallies for purposes of Type IV of the Federal Higher Education Act of 1965 (20) U. S. C. §425.07 Such reduces are distilled to measure a grant of \$30 perpapil per year, or \$40 per pupil per y at if the facilities are more than 25 years old. Each school is required to submit to the Commissioner of Education an authori statement of its expenditures for resintenance and requir during the preceding year, and its grant may not exceed the total of such expenses. The Commissioner is also required to ascertain the average perspapil cost for equivalent registerance as the pair services in the autilie schools, and in no event new the grant to not public qualifying schools exceed 50% of that again,

"Mai the ance and repair its defined by the statute to include "the provision of heat light, water, ventilation and sanitary tarilities, cleaning undereal and unrochal services, snow recordal) recessary upkeep and removation of buildings, groups, and repuperious, fire and areident protection, and such other (tends as the commissioner may deem necessary to easure the builds, welfate and safety of enrolied pupils." This section is preduced by a series of relevant legislative findings which short light on the

¹ N , Y , (now 1972) = 194, 3 from a country N, A, Filter Jack Ars 12, §8 529 (253) (21-3) where (0,1)

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State's purpose in consting the law. These findings conclude that the State thas a printary responsibility to cosure the health, welfare as a safety of children attending . . . noncoffic schools": that the "fiscal crusis in nonpublic education . . . has chosen a document on of proper and demons and repair to optains. Constraining (acbenth, welfare and safety or nonpublic school to threa" in low-iscome groundreast, and that "a healthy and safe school covare mean areas, and that "a healthy and safe school covare mean areas, and that "a healthy and safe school covare mean areas, and that "a healthy and safe school covare mean areas, and that "a healthy and safe school covare mean areas, and that "a healthy and safe school covare mean areas, and that "a healthy and safe school covare mean" contraines "to the state to declares that " the state has the right to anothe grants for a diatematic and repair expenditures which are dearly secolar, neutral and nor openlogical in non-graft

The containder of the challenged legislation 83.2 through a six a single package experiment the the lengestary and Secondary Education Opportunity Program." It is composed essentially of two parts, a further grant program and a tax here fit program, - Section 2 establishes a limited plan models got ation republics ments to parents of children attending closer tary or securilary supplies who is ". To qualify under this section the parent must have an annual taxable income of less than \$5,000. The much of regularsement is inerted to \$50 for each grade school child and \$100 to case sigh second child. Each parent is required, however, to submit to the Compositions of Education a verified statement cartaining a receipted thir and all, and the amount of state reindoursement may not exceed 50% of that figure. No restructions are imposed on the use of the funds by the reindoursed parents

This section like § 1 is pretained by a series of legislative limbugs designed to explain the imputes for the state's action. Expressing a dodication to the "vitality of our phradistic sective," the fluoring state that a "nighty

^[18] N. Y. LEWER, 72 (1) 110, §2 (mond) (2) N. Y. 1998, Proc. Act. 12-A, 85 Key 508 (MI-KERROR (1979)).

72-061, 211, 64 (PINION)

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COMMETTER FOR PERFORMANCE STOLAR (* 7

competitive and diverse altereative to public education is not only desirable but indust vital reacstate and outloo that have continually readbrined its value of individual differences." The findings further explaisive that the right to select among alternative educational systems "is dimanished or even covied to lower-assome families, whose parerts, of all groups have the least options in determining where were ended are to be educated." Furning to the public seconds, the findings state that new "precipitors decline as the number of nonpublic school pupils. will cause a massive correspondent while school encollogent and costs' an increase that would "aggravate at already sorting fiscal cross in jugible education and would "seriausly geopartize the quality extremtion for all children." Basid on these principles the statute asserts the State's right to relieve the fightend burten of parents who send then children to compublic schools through this turbon reactor-symetric program. Repeating the deducation contained to §4. the fragmestranelace first (sorth assistance is clearly secular neutral and constealogical."

The convalider of the "Elementary and Secondary Education Opporton ity Program," contrained in [53/3] 4, and 5 of the challenged have is designed to provide a form of tax (thef to these who full to quality for further combarsement. Under these sections patients only subtract from their adjusted gross measure for state theory is tax purposes a designated amount for each dependent for whom they have paid at least \$50 in normalise setward function. If the traject's adjusted gross measure is have that \$9000 he may subtract \$1000 for each of a many as three dependents. As the taxpayer's summer uses, the araout he may subtract diminishes. Thus, if a taxputer has adjusted gross measure of \$15,000 he may subtract only \$400 per dependent and if his measure is \$25,000

^[5] N. Y. LONG 1972, while §§ 3.54, and or or ording N. Y. Theyl are §§ 012 or 0.042 (i) a MeKressey are 21.

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8 COMPTER FOR PRODUCTON CHANGEST

or more, as deduction is allowed 1. The amount of the distinction is not dependent upon how much the taxonyce actually paid for immutable school (taxie), and is given is addition to may deductions in which the taxpayer may be entitled for other religious in charactele contributions. As indicated in the metodrandom teory the Majority Leader and President projector of the Secare, solutated to each New York legislator during consideration of the ball, the actual tax breefits under these provisions were carefully exhibited in accurate, 1. Thus, comparable tax

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benefits pick up at approximately the point at which tuition reimburyenced benefits leave off.

While the scheme of the coactined indicates that the purposes underlying the propulgation of the textion reitabutsement program strongd be regarded as pertiqued as well to those tax law sections § 3 does nontatione rablitional series of logislative findings. Those findings may by summarized as follows: the contributions to religious, charitable and educational institutions are already dedurtible from gross meaner till nonpublic educational institutions are assored frax exampt status contains stitutions provide informations for cirthing attending them and also serve to reheve the public school systems of the but len of providing for their refurction; and, therefore, five the thegislature finds and determinant that sinnar modifications. should also be provided to parents for menors paid to nonpublic elementary and secondary seconds on brualf of their dependents,"

Although no record was developed in this case a number of pertonal generalizations may be hade about the nonpublic schools which would boucht how these enactionets. The District Court onlying on fiture gs in a similar case recently doesned by the same court it morphed a profile of these scattering, nonpublic schools similar m the one suggested in the plaintaffs' complanet. Qualifying instructions, under all three segments of the emptynent could be ones that:

"(a) mapping religious restrictions on accessions: (b) respire attendance of anjals at religious activities; to require obcherer by students to the dorthres one require obcherer by students to the structure of a particular tauth; set are so rotegial part

Comm. In: Partick Elim. A: Reduction Gaussians, Letter 342 (1) S1020, 489, 849-441 (SDNA, 2022), 2021, 2021, 2011, 2011.

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SECONDERFE FOR PUPILS INCAUSING AND

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of the religious mission of the courth sponsoring fit: (f) have as a substantial purpose the incidention of religious values: (g) impose religious restrictions on faculty apportments; and the impose religious restrictions on what or how the faculty may teach." 350 F. Supp., at 663.

Of course, the characteristics of locavidual schools may vary watchy from that profile. Some 7000000 to 800000 students, constituting almost 20% of the State's entire observating and secondary school population, attend over 2000 magnifile schools, approximately 85% of which are clusch-affiliated. And while fall or machenity all 1 of the 280 schools "controled to the Roman Catholic Church and teach Catholic religions mersing to some require grants that related to the Roman Catholic Church and teach Catholic religions mersing to some access," *al.* at 660 institutions qualifying under the trovaluler of the statistic include a substantial number of devisible Lathoran. Episcopal, Seventh Day Advecting, and other church-affiliated ischools."

Plaintiffs argued below that because of the substantially religious character of the intended benchmarns, each of the State's three enactments ofbuided the fixtule halmost Clause. The Distoict Court, is an opinion corefully carvassing this Court's togent precedents held anaremously that ξ 1 (menutements and report graves) and β 2 (runtion reardoursement gravity) were meanly. As to the means the provisions of $\xi \beta$ 3, 4 and 5 how-

^{2.3.8} indicated in the Descript Court's opinion, it has about estimated the S0 where's would qualify for such as a 126 relevant with a last determinant eligibility one set on the 2018 S, C 8 825, and the contrast restriction with the description of such as the contrast regulies.

¹⁰ In the full of 1908, there were 2408 magnificht should be New York States, 1.465 Roman vialholds, for desiche 2005, Phenary 49, hers oppler 67, Storen Day Advantist, 1.8 of each de soft is off 205 orthogonal States and the phenary 100 phenary - Not Stores I due 1 Npt. Function Support - Nonpublic Schools 3 (1969).

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tion a majority of the District Court, over the dissurof Creat Judge Hays, held that the Establishment Classe had not been violated. Finding the provisions of the law severable, it rejoured perconently any farther mighementation of §§ 1 give 2 but declared the firmainder of the law independently enforceable. The phentiffs appealed decertly to this Court, challenging the District Court's adverse decision as to the third segment of the statute." The defendant state officials have appealed so which of the court's decision as revalidates the first and serveri purtious of the 1972 law 2 the intervenor Majoraty Leader and Presented pro-tem of the Sounds also appeals from those aspects of the lower court's opinion," and the intercenting patents of neupublic school children have appealed unly from the decusice as to \$2.27. This Court noted mobile jurgenetion over each app at and onlines the cases canadidated for oral arguments $(x \in U, S) = -0.0545$. Thus, the constitutionality of each of New York's recently pro-the District Court insular as at struck cown 334 and 2 and receive its determination regarding XS 3, 4, and 5,

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The history of the lestablishment Clause has here reconsted respective and next not be repeated here. See Eucrom v. Board of Education, 330 C. S. L. Black, J., opinion of the Court (28) Claubelge, J. custoring (

¹ New Conjugation for Palmir Kataratian and Religious Laborty S. Nasjarit.

³⁵ Nuc 72-791, Numari a. Committee for Public Education and Relignor from C.

C.N. M. The-The Anderson & Committee for Patien Education and Religious Interaty.

¹⁴ Nucleo 120, (Decempty Comparison for Soldie Education and Dec Indian Intering)

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22 COMPTER DURING STEDE CONST. SOULSE

 (1947); C. McCallion V. Bound at Education, 333 (i. s. 203, 212) (1948). (Frankfurter J., separate opinion); McGowan V. Marghand, 306 (F. 8) 420 (1984); Eagel V.

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COMMETTE POR L'EBLIC EDUCATION -: NYQUET 13

Funds, 370 U. S. 421 (1952) - 4) is grouph to unite that it is now finally established that a law may be one "resporting the establishment of religious even though its consequence is not to promote a "state religion." Lemon v. Kurtzman, 403/U. 8, 602, 612 (1971), and even though it does not any one religion more than exother but merely benefits all religious alike a hyperone v. Reard of helpconversion, support at 15. It is equally well established, howeven that not every law that confers on fundment," "remoted or "methestal" benefit upon edigloas instructions is, for that reason along constructionally juxplid. Id : Mellionary V. Maryland Supra, at 450; Walt C. Tax Commun. 397 U. S. 864, 671-672, 674, 675 (1970). What our cases require is careful examination of any law coals in gev to established a ground's with a very to ascertaning whether it furthers any of the evily which that Chuise protects. Printary among those earls have been "sponsership financial support and active evolvement

Buth Maditati's Bill of Rights provided at the two expression reaction and deflect-rule 11.0 for (1), bits (12) R (grave Freedom bias) retained for the Vargin's fourther on a context the statistic, throughout that State's (Freez, See Var Const. Write), § 26 in which the two guarantees nove been browly together at a single provision. For confurcteers, we are such the perturbet Vargata bistory we have the relation of State at Freedom 104–115 (2003) 4, Brune James Madient Lie National of (286–1785, 31)-355, 2004)

could find for EFC-bitsting Religions Flowdom, which contracts Vagin is first relationship relation of the gravity of that is prepare of Chards and States. The control of principle, as sumed in the lift, is that shown is set for our diverse version of a position to figure worth is present of the out diverse version of the help is such perspective so with our first water version and in the perpetuation of democratic instruments that is weather bill, along with the automatic instruments that is was the Bill, along with the automatic instruments that is wishes that the bill forming of the University of Vagnum and the perpetuations in the prestriked on the number of Vagnum and the perpetuations.

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of the soverelge in seligious activity". Widg v. Tax Commun. supra in 608; Lemma v. Authorit, supra, at 612.

Most of the cases camping to this Court existing Establishment Cause questions have involved the relationship between religion and contration. Among these religioneducation provolents, two general caregoroes of researchy he adoptified, those dealing with religious activities within the public schools of and those involving principald in varying boths to sectional concarronal distributions of While the New York legislation places this case in the latter entegory, its resolution requires consideration not only of the several nucleoscetarial of conjour eases but also of our other education prevedents and of several important consolutation cases. For the new well defined three-part test that has energied from on decisions is a product of consumptions our year from the full sweep. of the Establishment Chause cases. Takes together these decisions dictate flat to pass number mater to Establishing a Clause the law of mession. Sistemast reflect a clearly secular logislative purpose, $c_{ij}y_{ij} E_{ij}g_{ij}c_{ij}$ stary - Izhanatz, 393 U. S. 97 (1968), second, mast have a primary spect that souther advances for admitts relegion, e. g. McGrown & Murgland, super: School Distrat of Alboytan Township v. Schenger, 374 15 S 203

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COMMETTER FOR PERSO DEPOSITON & NYQUET 15

(1963), and third must avoid excessive government one targement with religion, a_i g_i , $Walz \in Tax$ Commun. super See Lemma x_i , Kastzman, equal at 612-513; $Tdton x_i$, Richardson, 403 U, S_1672 , 678 (1971) \simeq

His

In applying these criteria (officer distance forms of aid produced in this case, we need touch only bright on the requirement of a "secular legislative" corpose. As the readjustion of degisiative purposes appended to New York's has judirates, each measure is adequately rapported by legitimate, consoctarian static interests. We do not quiestion the propriety, and fully secular content, of New York's interest in preserving a healthy and sale officiational instronument for all of its school antiducta. And we do not doubt--indeed, we fully non-goize - the valuation of the State's interests in promoting pluralism and disversity among its public and compublic schools/nor dowe bestate to acknowledge the reality of its concern for an already overlapslened public school system that might suffer in the event a significant percentage of cirilings presently attending nonpublic schools should abandon thuse schools in favor of the public schools.

But the promitival a legislature's parposes may notimmunize from further scripting a law which either has a prismary effect that advances religion, or which fosters excessive extraglements between Church and State. Accordingly, we must weigh each of the three aid provisions challenged here against these eriteria of officer and entanglement.

When decreasing the application of these matrix. Alter Carper does be a Briessen noted on Total C. Richardson expert that there is the single association is carped that can be need to get sure the protocodegree? So which any one of these best of get sure the ration analysis surrive. Bother, these rests of scattering double be two word as goodel tool within which its measurer table to the proprotrop devices of every flaming these rests of scattering double betrained as goodel tool within which its measurer table to the proproerror to device or have share to every and applying to a single targe of governmental action of decreed as you atop of the hypothesis Quark " $= M_{\odot}$ and 577-578.

42 oat, CTC, OPINION

IC COMMITTLE FOR PPELIC EDUCTION A. SYQUEST

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The "maintenance and repair" provisions of \$1 anthorage direct payments to coupablic schools, vertically all of which are Roman Catholic schools in few meeting The grants, totating \$30 or \$40 per pupil deanas pending or the age at the institution are given largely without restriction on usage. So long as expenditores as not exceed 30% of comparable expresses in the public second system, it is possible for a secondarian characterizer. secondary school to finance its outper "to aintenuouse and repar" higher from state toy-twised tunds. No attempt is purch to restrict payments to those expenditures related to the upkeep of raritras used evelopicity for secular parposes and do we think it possible within the context of these religions oriented instantions to impose such restrictions. Nothing in the stature, for instance bars a qualifying school more paying one of state funds the salary of coupleyees who matthen the selectionspej. or the cost of renovating classrootss is weigh religion is laught on the rost of beating and lighting those same facilities. Absent appropriate restructions on expensitures for time and similar composes of simply connot be devied that this section has a primary effort that rulvalues religion in that it subsplizes directly the educions artivities of sectarize charactery and secondary schools

The state officials invertibeless argue that these exption area to "inclutionance and tops of are studie to other financial experiments approved by this Court Primarily they rely on Elements' Board of Education, super, Board of Education (). If the superstand Tillion v. Reduction, super, in each of these cases it is tenther the Court opproved a torus of financial assistance which conferred undermode benefits, give private, surturant schools. But a close examination of these cases cluminates there disting using characteristics. In Elem-

CONVERTING FOR PUBLIC EDUCATION -: NYQUIST 17

son, the Const, in a five-ro-four decision approved a program of minima semicute to parents of gubble as well, parochial school children for bus rates paid in torotection with transportation to and from school in program which the Court characterized as approximating five thergell of importunable state aid. (330–1) S. at 10 – In Allien, decided some 20 years later, the Court upbeld a New York law authorizing the provision of size the textbooks for all children in grades severe through 12 attending public and non-public schools. Finally, in Tallien, the Court upbeld toderal gravity of forces for the construction of facilities to be used for chardy souther purposes by jublie and non-public instructions of higher learning

Preservates simply recognize that somerant schools perform secular reducative transitions as well as religious Innerious and that some forms of aid may be char celled to the secolar without providing direct aid to the sertatigat. But the charact is a narrow one, as the above cases illustrate. Of course it is true to each case that the provision of such neutral, non-neulogical aid, assisting unity the secular functions of sorthering schools, served indirectly to promote the religious function by readering it more likely that children would attend sector an schools and by freeing the budgets of those schools for use in other nonsecular areas. But an inducer ePlandenial ofeet beneficial to religants institutions has never been thought a sufficient detect to warrant the invalidation of a state law. An McGeneral & Murghand Sector, Sunday Closing have were sustained even though any of their undersable effects was to render it somewhat more the'v they drivers would respect religious restitutions and even attend religious services - Also, in Wals v. Tay Commission, supra, property tax everytices for courth property were held not vicilitize of the Establishment Clauge despite the fact that such exemptions relieves[churches of a financial implem-

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18 COMMETTER FOR 19 BLD, LDUCATION & NYQEIST

Tiltan draws the line most elearly. While a bare majurity aga there perstanled. In the parsons stated separately in the planning opmust and in Mr. Justice WRITE's concurrence that curefully fourier construction grants to colleges and in consitus could be sustained. the Court was upanimous in its renetion of one clause of the fieldeal statute in question. Under that clause, the Government was out their to recover a portion of its grant to a signation institution in the event that the constructed facilities was used to advance religion by for instruct, converting the building to a chapet or otherwise allowing it to be based to promote tolighets interests 1/403 U.S., at 683. But because the statute provided that the condition would expire it the end of 20 cases, the facilities would thereafter be available for use by its bisticities for any sectorary purpose. In striking down this provision the aburality opinion emphasized that "[Presiting the probabilition for religious use of the structure 6, 20 years obviously opens the facility to use the any purpose at the corl of that period " [[list - Ard in diat event. "The original tedently grain will as part face the effect of advancing religion?" Hold, Socialso id at 602 (DOUGLAS, J., dissenting), 659-661 (Br. 8 SAN, J., 66section (665) in 1 (Warma 4), concurring in the judge ment). If tax-raised funds may not be granted to institutions of higher learning where the possibility exists that those finds will be used to construct a factory attafixed for sectorian activities 20 years hence a formal three may not be distributed to elementary and secondary seeturan schools for the scatter and and repair of tarilitics without my finitutions on their use. If the State may not creet lutificage in which religious pertuities are

With plot fix half there is a constant to point not there do to are be 2006 and all forgeness. In we can the fixed point of a constant related beam discovery ingrated back (p and p constant commuters and so on have spherical P_{ij} and S_{ij} . See $H_{ij}(a)$ is $M_{ij}(A)$, and

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COMMITTEE FOR PUBLIC EDGCATION + NYQUIST (2)

to take place, it may not maintain such buildings or peopvate, there when they fall into disrepair."

It might be argued, however, that while the New York "maintenears and repair" gene(s lack specifically artitulated socialit restrictions, the strate does provale a surof statistical guarantee of separation by facility grants to 50% of the anomal experision for emparable services in the public schools. The legislature's supportion englit have been that at least 50% of the orthogry public school maintenance and repair budget would be devoted to purely scoular facility appendic to the schools. The shortest above to this argument is that the statute dist allows, as a reduce, grants satisfying the entire training of school providing only that it is inducer more than \$30 or \$40 per graph for more than 50% of the random the public school expectitures." Quite apart from the lan-

⁴ Our Estable-burnet further preselects have recognized to special television of a theorem of Mr. Discher Hatterich concerns m_{1}^{2} , p is the record as weith a relation strong of the formation m_{1}^{2} , p is the record is weith a relation strong of the Tree Gauge Test Commission manual at 055-base pring. And they Tree Gauge Essays (260 U, § 046, 359 (1921)). In *Environ* Alf Justice Ricek estimates the lister manual the production operation of state modes of states in a support of the interval and states in a strong the interval and states.

¹¹These processes because to computerplace its to shock the transhipforming excitated into a freeing of arbitraries. The frequentiation takes to prevations of subress at the build the *majorabile* chardles and black interprets between the high characterized as the subwhet to end expression in the First Acade (paper). Ref 1: 8, at 12 (1990) as any dool 6.

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The enternor mean proper weather welfage and solve standards in periods togother the term 20 of the perpassion of solves in the shall be apperticated multiple welfage and solves grants by the commission of the multiple solves for the solved perpendic product to part for the solves for the solved solves as stated to space to the product of the solves solved solves as solved to space to the product of purples with the solved solves as the solves of the solved solves of purples to solve 2 instruction in solve

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25 COMPUTER FOR PERIOD SPECTRON & NYQUEST

gauge of the statute, our cases wake clear that a spece statistical judgment will not suffice as a grantantee that state tunds will not be used to finance religious education. In *Earley v. DeCrosse*, the companion case to *Lemme v. Kurtzenne*, supra, the Court struck down a Rhode Island law authorizing galaxy supplements to teachers of some law authorizing galaxy. Supplements to teachers of some law configure. The grants were not to exceed 15% of any teacher's annual solary. Although the law was invalidated element groups the Court mole clear that the State could not have avoided coulding the localities ment Cause by mendy easting that its partners would specied in segregating "their religions heliefs from their sector elements of responsibilities. -403 by Suite 49.

"The Rudo Island begistered has not used could not provide state aid on the basis of a meter assumption what secular teachers under religious disciplineent avoid coefficies. The State mass be containgiven the Religion Clauses, that subsulized teachers do not but Acate beligion $z_{i,j} \in \mathbb{Z}^{n}$ (bid.) (Emphasis supplied.) :

2. Downey do the openion, the Court englished the network for the States of Bindle Land and Penaschy show assure through the full regulation, the sociality of its graph.

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The Label product (index) we can always a matrix of equal (Subscript) (100) for a set of the product start of the formation of the product start of the pro

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Nor could the State of Rhode Island have prevailed by simply relying of the assumption that, whatever a secular teacher's mabilities to refroid from r tong the relagions with the sociality he would surely devote at least 15% of its efforts to purely secular elecation, thus exhausting the state grant. It takes little magnation to perferve the exterior to which states might openly subsidize parochial sciences under such a local state day of granticity. See also Theory v. Richardson, sequent

What we have such demonstrates that New York's maintenance and tepair provisions violate the Establishmust Clause because they energy movimble is to subsituate and a batter the religious mission of sortarian schools. We have no occasion therefore to encoder the tather question whether those provisions as presently written would also fail to survive services as presently written would also fail to survive services as presently written would also fail to survive services as presently ing the socilar use of all funds requires for intrasive and rentangles in tasped of the three-part test because assuring the socilar use of all funds requires for intrasive and rentaning a relationship between Church and State Leman y, Kastzenne, super-

Contraries which contracts to have the end signal submitted in the set of second of the end of the substantial period of the end of

^{1.0.} CPut to other construction grants from 0.0063 to a ving 00% of the grant which for grant which for grant 0.006 of the grant which for a single first order to the formula the first start of the first of the first order of the formula to the first order of the formula to the first order of the first order

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27 COMMITTEE FOR PUBLIC EDUCATION OF SYQUIST

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New York's traition remains entered program also fails the "effect" test, for much the same reasons that govern its maniference and repair grants. The state program is designed to allow direct intrestricted grants of \$50 to \$100 per child that no more than 50° of runtion actually paids as reimbursement to parents in low-meene brackets who send their children to noopublic schools. To qualify a parent must have earned less than \$5,000 in taxable income and must pre-rest a accupted toption hill from a noopublic school, the tulk of which are concribedly sectariant in orientation.

There can be no question that these grants could not, questiontly with the Establishment Clause by given derectly to sectarian schools, since they would softer from the same defensive that condens revailed the grants for maintenative and repair. In the absence of an effective name of guaranteeing that the state gid derived from public fields will be used exclusively for sociliar, neutral, and condeplogical purposes, it is clear from our cases that direct and in whatever form is invalid. As Mr. Justive Black put it quite supply in *Election*.

"No fix in any amounts, large or small ran be levied to support any religious activities or institutions, whatever they may be ralled or whatever form they may adopt to teach or practice religion," -330^{+11} S₀ at 16.

The controlling question here, then, is whether the fact that this grouts are delivered to parents rather than schools is of such signification as to complet a contrary result. The State and intervenor-appellers rely on *Ever*son and diffes for their claim that grants to patients unilike grants to instantifing, respect the "wall of separation" exquired by the Constitution. It is time that in those cases the Court spheld laws that provided brachts to

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COMMUTERS FOR PERIODED UNDER A NYQUE? 23

children attending religious schools and to their parents: As noted above, in *Econom* parents were relinforesist for bus for s paid to send children to parochal schools, and in Allow restbooks were loaned directly to the children. But these decisions make chear that, for from providing a per semiminary from exaction that for 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 rotisidered.

In Errorson, the Court found for bus take program analogous to the provision of services stim as pelan and fire motortion, severe disposal, high-cass, and sidescalks for parochial schools, 330 U.S. of 17 18. Such services, provided to common to all estively, she use separate and so adisputably marked on from the religious function." as foundaded to prove a secondary provide the foundation of the second second second second second second second id, at 18, that they may fairly be viewed as reflections of a central posture toward religious institutions " Allow is totaded upon a studiar principle. The Court there repeatedly exophasized that upon the record in that case there was be indication that textionks would be provided for anything other then purely secular emuses. 200 course banks are different from finises. Most hus 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 religlous books, and the State chains to right to distribute religious literature Absent exilence we cannot assume that school authorities . . , are madde to disthrough between scenlar and religious hooks or that they will not homestly discharge their duties more the law." 362 印,朱正元 244-2457年

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³ Allow and Karazawaldow from the property associated second forperior in respect to the total ensemble class of resulting matching second children. Given a public as well as these in tervare schemes. See new T2000 C. Refere have second to work index at it was tracted.

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24 COMMETTER FOR PLUGD, FIRSCORDY & NYQUIST

The futtion grants here are subject to us such restrictions. There has been no endeavor the granuitee the separation between secular and religious relucational functions and to ensure that State finatenal and supports only the former," Jamma & Kartzmin, saper, at 613, Indeed at is precisely the function of New York's law to provide assistance to private schools, the great ranjority of which are sectariate. By reizotorsing parents for a portion of their tration fall, the State socks to reflece their fraterial buildens sufficiently to assume that they continue to have the option to send their children to religion-oriented schools. And while the other purposes for that ad--to perpetuate a placifistic obligational resvirunment and to protect the fiscal integrity of overburdened public schools care certainly unexceptionalize the effect of the aid is unnestakably to proceed desired fuantial support for nonquility sortanion institutions, "

as a reference of a structure to highly be out in an Highly of Genetic on the solar integration for which they assumptions in the new point from the structure in which two large resolation for the new point form the point integration which we have resolation for the new point form the point of the device about which is a man for ER of the first of the point of the first device about which is a man for ER of the first of the point of the the device about which is a man for ER of the first of the point of the structure in which we have the form of the first of the point of the structure as which is generally when a regard to the structure is a structure of public distribution of the first of the structure is first in Sec. We can be the first of the structure of the first of the structure of public distribution of the structure of the first the structure of public distribution of the structure of the first in Sec. We can be the structure of the structure of the first in the structure of public distribution of the structure of the scheme of the structure of the structure of the structure of the scheme of the structure of the structure of the structure of the scheme of the structure of the structure of the structure of the structure scheme of the structure of the structure of the structure of the structure scheme of the structure of the structure of the structure of the structure scheme of the structure of the scheme of the structure of the structure of the structure of the structure of the scheme of the structure of the structure of the structure of the scheme of the structure of the structure of the structure of the structure of the scheme of the structure of the structure of the structure of the structure of the scheme of the structure of the structure of the structure of the structure of the scheme of the struc

Where the state of the state of the term of primery is on primer workford" which the Court has replaced in expressing the second vertice of the temperature of K_{12} which the Court must decide in the one whether the primer vector K_{22} represented of 2 have a given in the term of the Court must decide in the one whether the primer vector K_{22} represented to the term of term of the term of term of the term of term of term of the term of term o

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COMMUTTER FOR CURLETEDO ATION & NYQUIST 25

Mr. Justice Black, disserving it. Here, warned that,

(i) i) requires no prophet to for-see that on the argument used to support this investibles would be anentities.

a "printery" effect to teraticate some highlighter end tipler the State's policy hower is unitable (man pathler examination as as erable whether it is so has the direct and innie have offs in of advancing telapara din McGamus ya Monshinat, sayan Sunday Cherry Laws webs upheld and "measure that a tweet as so that, to program the legitation interest in a stressers. Esting of motional tressections are only a ordettly to associatization transition historic approximition woll from the triding thread spore edges examination of the history or and if we that they had only a tremony and methodally declarscontagrees to regular autobiology of fat at 150 Section Ralingher Contr. Koslav, Super. Mar.Get. 466, 17, 88 (1961); Proc. Genes Index Hardworks Wienfiners, Inc. 80, Methowski, 200, U. S. 582. 208 (1991) - Usewor, an Schenger für sind der Mischler ergent that 1967, trading and other relegions, near these an public secondserved, programs secondar purposed unchanged the promotion of pord where the contradict in or the material treats of the turner and that poppedant in of our institutions and the teaching of initiature 1, 574 Jul 8, 17, 23 (April with other soliting in seconds, and without determining worth pathons are adead and data pices religious remeans the Court and such exercises increased in our the Establishment of the conclusion of the Source 28 (28) (Balas-SUS in concernance. Any teaching operator along the concernof the leftest emerger doubt have been resolved aner the Contrisde termine. Obset in which the California definition providility raise required and simplify most largest for regions proposes 20 years have we constitutionally concentrated being supported by might for grant have the effect or judy or big rolig r_{0} (103 C) S_{0} at use.

It may really be providing an instance of each offset was determined by experiments of the Parisick Mentyls (MULLET, durbace) is Provision for Theorem to Parisick Mentyls (MULLET, durbace) Provision for Theorem to poly these the observations with the each durbace responsed Varguments for poly these the experimentations conducted when the exception the top of a Mullesson's (Mullesson's Mullesson's Mu

The water that the most three that, we consider the transmit the dataset to contrast the most that some company is in which, and preserve its second seco

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25. COMMETTER FOR PUBLIC EDUCATION -> NYQUST

held providing for state or fisheral government turds to fully property on which to error religious school buildings or the error tine hubblings then school teachers, to pay the salaries of the religious school teachers, and finally to have the religious groups case to rely on voluntary contributions of tactables of their sects while waiting for the government to pick up all the bills for the religious schools 7-3.02 U, 8-34-253.

His fears regarding religious buildings and religious teachers have not come to pass. Tallor & Rechardson, supra-Lenson v. Kartzman, supra and inschar as further gravits constitute a means of "pick itig] $[0, e_{\pm}]$ the falls for the religious schools." or ther has his greatest fear in aternalized. But the ingenious plans for charactering state aid to section an schools that period cally rough this Court abundantly support the wiscide of disting Black's scophery.

Although we thick it clear, for the reasons above stated, that New York's rultion grain program force to better more the "leffort" rest than its traintenance and repair program, so view of the novelty of the question we will address briefly the subsidence arguments made by the state offends and intervenors in defende of this particular statutory program.

First at has been suggested that it is of centrollang significance that New York's program calls for workbursement for tuition already paid rather than for direct contributions which are averally routed through the par-

General Suberson, C. Screen & Honeyer Killerton, 1003, Sci 7 72, 08 operating Appendix realisient of Receiving data.

Some sold of skylet was the first of have more bloching of the second of whether the 200 might process such part whether independent as a first whether the locality offs to octave the first solution in burnets contractive factor and proceedings to be a first 200 versus to consists static, differential of solution to back solutions of other on the Solution (the State of the solution 105 (15) (15)).

52-96, ETC LOPINGON,

COMPLETED FOR DUPING DESCRIPTION - NAMES, 52,

ents to the schools in advance of or policy of phytocol by the parents. The parent is not a more conduit, we are told, hut is absolutely free to speed the non-cybe receives in any manner he wasness. There is no eletactif of governmentations to the retributions of an hard assurance that the money will eventually end up to the bands of religious schools. The absence of any element of correction however, as predevasit to questions arising under the Establishment Churse - D. School District of Abiogtrac Tanastop v. Schroup, supra, it was contended that Bide sectritions in public schools and not violate the Establishment Ulause because participation to such exerases was not coercide. The Court releated that arguings to noting that while proof of coercion toight provide a basis for a claim actor fac. Free Exceedse Classe at was not a necessary connect of any quite noder the fistnic adment Clause 49 at 222 (223) Mr. 10stary BEENNAN's concurring views repeated the Centris combision;

"Thus the short and for our sufficient answer is that the availability of excusal or even one (standy has to relevance to the establishment question if it is more found that these practices are essentially religious eventies are gractices are essentially religious eventies are gractices are part to achieve religious arms. π_{i} , T_{i} , Id_{i} at 288.

A similar inquiry governs here, if the gravits are offered as a -incrnitive to parents to send their children to sees turnor schools by making une-structed each payments to them, the Establishment Chause is variated whether or not the actual dollars given eventually find there way into the sectarian institutions. Whether the grant is labeled a remain sector of a paymenty its spla-

The fights of aid a volved in *Receiver*, *Radial in Diffusion* and *Lengen* were adjudged by a real attraction of both soft of a latent apof the set of sector against a finite factor, and only extremely and dignificance.

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28 COMMUTTIC FOR PUBLIC TOTO CODA + NYQUEY.

stantive impact is still the same. In sum, we agree with the coordination of the Distort Court that "I withother hegets it during the energiest year, or as remained for the past year as of no constitutional importance," -350F. Supplus t 688.

Second, https://www.gon. Minformy Leader and President provident of the State Securit are as that it is significant here that the tailion reimburscale t grants pay only a portion of the rutio chall, and an even smaller portion of the religious school's total expenses. The New York statute lands reinformers to 50% of any parent's actual outlay – Additionally, he estimates that only 30% of the total cost of compublic encoding is covered by futtion payments with the remainder communities twoluntary contributions, endowments and the like it in the the basis of these two statistics, appelled receives that the "maximum nuttion regularisement by the State is that only 15% of the charactonal costs in the nonuclin schools "11. And "since compulsery education have of the State, by necessity require significantly core than 15% of school time to be decoted to teaching secolic courses." the New York statute prevides its statistical managers. of neutrality, 12. It should readily be seen that this is simply a other variant of the argument we have rejected as to maintenance and repair rosts, and e. - and it ranfait to better here. Obviously, if excepted, this argument would provide the formation for massive, direct subsidization of scetarian elementary and secondary sebools. Our cases, however, have long since foreclosed the notion that mere statistical assurances will suffer to sail between the Soylla and Clauyhors of "effort" and "Encangér nore 4,"

¹⁰ Sciebor, Appello, Warnen M., Arderson im 25.

^{1 1985.}

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COMMITTEE FOR CUBERCHOLOGYDON - NYQU'S (C29)

Finally, the State argues that its program of thitran grants should survive scratting because it is designed to promote the free exercise of religion. The State poles that only "law-moone parents" are noted by this law, and without state assistance their right to have their children educated in a religious environmental fus dimunished or even densed "12. It is true, at source that this Court has long recognized and man tailed the right to choose nonpublic over patche solucation. Pierce X, Socherg of Sisters (268 17) S. 510 (1925). It is also true that a state law interfering with a patcht's right to have his child equeated in a sectorial school would ture afoul of the Free Exercise Choise - But these or an acpeate fly has recognized that tension previously estate between the Free Exercise and the listablishment Chauses in g. Everson v. Bound of Education, supra: Watz v. Tax Canonissome supra, and that it may other not be possible to promote the former without offering the latter. As a result of this renshing our cases require the State to maintate an attitude of "neutrality," outline "advancing" me-"inhibiting" religions." In its attempt to endernee the opportunities of the peak to measure between yields and populate education, the State has taken writep which cate only be regarded as much advancing bridging. However great our sympathy, Everyoney, Board of Education, supra at 18 for the burdens experienced by those who must pay public school taxes of the same time that they support other schools because of the constraints of fromscience and discipling. Fort, and individuation the "Fight social exportative" of the State's purposes, Wiscon-

^[25] N. Y. Lebre, Low, Yu. D. A. & South Yu. M. Kamey, (1972), "hegical Utive finding superscripting function to principal metric."

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sin c. Yoder, 405 U. S. 205 (214) (1972), and ther may justify an easing of the braitations of the Establishment. Charge now firmly encodering.)

C,

Sections 3, 4, and 5 establish a system for providing Income tax beingits to correct- all children attending New York's compable schools. In this Court, he parties have edgagod is a considerable denate over what hand bust fits the New York law, Appellants losist that the law is in offset one establishing a system of tax "groups," The State and the pre-yenors based that characterization and would label it instead, a system of income tax "modifications." The Soberton General on an anomaly carear brack filed the this Court, has befored, throughout to the New York has an authorizing thy medicitions " The District Court parenty found that the no was the effect a tax crean [350 b) Supplier 672 compliance unghals. Because of the pendiar same ef the becent allowed, it is deficult to adopt any single traditional block litted from the give or burane taxetion. It is, at least in us form a tax dediction state it is an unactif subtract of from adjusted gross income, paper to computation of the tax due. Its effect, as the District Court correction, is more like that of a tax mean since the following is not related to the atmostic actually specific region and is approvedly designed to yould a predetensioned annum of tax "forgoveness" in exchange for performing a speedge set which the State degrees to succurage, the asiaattribute of a bix credit. We see no grason to search one label over the other as the constitutionality of this hybrid benefit does not turin in any event or the label we award

 $^{^{10}}$ A2 theorem 1 - 10 constant operation of the transfer of the resolution operators are the resolution operators are

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it. As Mid Chang Justice, B) goards apinimit of the Court in Lemma v. Kurtzman, supra, at 614 metes constitutional mulyis is not a "legalistic moment in which precise rules and forms governed. Instead we must becamere the form of the relationship for the light that it easts on the substance."

These sections allow parents of children attending conspublic deticatory and smoothey smooth to subtract from adjusted gross income a specified annual, if they do not meetics a torgon minibursement under 3.2 and n they have acculuisted gross process of less than \$2500.0 The amount of the deduction is unrelated to the amount of movey actually expended by any prior transformation and is calculated on the basis of a formula containes, in the The formula is apparently the product of a Statigue legislative arrange to assure that each tanaly works petrive a carefully estimated net benefit, and that the tax benefit would be compacable to, and compatible with the thitten grant for lower means families. Thus a parent who carus less than \$5,000 is consticut to a traition reinty barsement of \$50. The has one could arreading a new mentaty, nonpublic sensoi, while a parent who same none that less than \$9,000 as sufficient on avera processly. squid amoval taken of his tay bill. Auditionally, a toxpayer's benefit under these sections is intrelated to, and not reduced by any deductions to which he may be entitled for charmaide ecotributions to religious institutions, 1

In practical terms there would appear to be little difference, he paraosistical determining whether such all

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to The contraction benefits under the records of the state of the second

There the program can does not base discriminations, genuine the deduction and has for contrastic contrasticity on domark inclubetory is that does do should written it is form of raw Asserting possibilities dynamic product index the constrainty is set in these

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has the fufficer of advancing" teligion between the tax bencht allowed here and the further grant allowed tender § 2. The qualifying parent concernship program reretices the same form of encouragement and reward for sending his children to non-public schools. The only difference is there one parent receives an actual case payment while the other is allowed to connect by no relation y amotion the sum he would otherwise by adding to pay over to the state. We see no a ower to fudge flays' dissolving statement orders is a charge reack upon the state for the purpose of a lighted entry and 250 F. Supplicat 675.

Appellecs defend the try particulat New York's legislative package or two grounds. First, they contend that it is of controlling significance that the grants or crodits are directed to the prosition utilize that to the schools, This is the same argument made in support of the rution reinforments and tests on the same reaching of the same precisents of this Court, printarily Energies and Allow. Our treatment of this issue in Part IIB supreat costs applicable here and require registron of this rbate? Swood appellers place men strongest reliance on Walt v. The Commission, supra, in which New York's property tax exemption for religious organizations was upheld. We think that Walz provides no support for oppelies position Indeed, its rationale plandy comjuds the conclusion that New York's tax parkage violates the Establishment Clause,

This polaries consider in the norm that the data in the training of the Qar. Sector 2 for the Armonic and violate the hydroid graph of the Qar. Sector 2 for the Armonic and violate the hydroid graph Charles we do not denote the evolution of the the fermion in response to Sectors of 4 and 5 = 10.6 for Appendicum, of 0.2 for Weington the Sectors of 4 and 5 = 10.6 for Appendicum, of 0.2 for Weington the Sectors of 4 and 5 = 10.6 for Appendicum, of 0.2 for Weington the Sectors of 4 and 5 = 10.6 for the two are equilibrium operations of the the distribution of the two are equilibrium operations of g_{2} does visible the distribution of the sectors of the society of an period the hereit of

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Thy exemptions for church projectly enjoyed an apparently universal approval in this country both before and after the adoption of the First Amendment. The Court of Walk surveyed the listory of thy exemptions and found that each of the 50 States has long provided for tax exemptions for places of worship, that Courses has exempted religious organizations from anaton for over three-quarters of a contain, and that cangressional guardments in 1802, 1813 and 1876 specifically exampled church preserve from taxation. The sum the Court conchild that "I forw cocepts are more deeply embedded in the tables of our paramid life, leginning with pre-Revolutonory colonial times, that for the governmentto exercise at the very least this kind of brancolent name trality toward chatteles and religious everese generally," Ed., at 676-6772. We know of no historical precident for New York's recently protonlynted tax relief program. Indeed, it seems done that tay henefits for parents of owchildren attendi parochial schools are a resear annovation oreasioned by the growing functial plight of such nonpublic institutions and designed a ben manecessfully, to tailor state aid to a manther not incompatible with the recent decisions of this Court. See Kosydon v. Walman, -- , F. Supp. -, - (SD Ohio 1972), juris state, profiling, No. 72-1139.

But historical acceptance without non-would for alone have sufficient as four our imprines a vester or protected right in violators of the Constitution by long use 1-307U. S. at 678. It was the teasion qualerlying that long history of tolerance of tax examplifies for tribgion that proved two fields. A proper respect for both the Free Exercise and the Establishment Charses compels the State to pursue a course of "neutrality" toward reaging. Are

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governments for their always presteries of the average and oppressive has taken annex totals over of which his been taxation of religion. Thus, if taxation was regarded as a new of the title bound religion beyong too good sphere is the class of toward religion beyong too good against describing with held or 0.73. Special tay beins first back to associate sequenciable at the priority of contractive expression be squared with the priority of a number of a special bunches of the form. To the contract, a solar as such benefits reader assistance to path as who should be children to set area seconds then primes and a cyntable effect are not at a gor beyong thus religions met buttons.

Aport from its bistorical boundations. If of a is a product of the same calcumation inferent termion topolitic must government-accelered give controversity. The behavior the everytranot churcle property train taxation conferred a tendity a becauding thread incidental of Yer that and was a product and of an V purpose to support of to subsumer high of polished relationships designed to committee involvement and cotal gammat, between Clouch and States "The comptons" are then emphasized fromto complement and remforce the orspect separation insubtrage each more the science of the provide Fourierconductly longer end the polyphic would be a reequilibrium of government by giving rise to tax valuation of church property, tax hear, tax forechemics, and the line tradition to the sub-providents that tollow as the future of those legal processor [1] Dilling 674. The granting of the tax benefits under the New York statute archite the extension of a more price would totel to a sense cuts or time linear the more comparing tween Church and State

One faither of Second Petroven by exemptions for source property as for when etc. For reactive should be total. The group toos of fitness to their was not opstructed to a class computer contrastaly or source products.

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COMMITTEE FOR POBLIC EDUCATION 7 (NAQUEST) 35

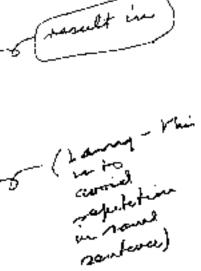
nantly of religious institutions. Instead, the eventpoint reversed all property devoted to religious, educational encharitable purposes. As the parties here must consider the reductions authorized by this law flow premarily to the parents of children attending scenaria , nonpublic schools. Without intimating whether this factor above 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 preasure the controlling benefited class would be up deportant factor.

In conclusion we find the Wedz goology respective and to light of the practical similarity between New Vork's tax and tration roundursement programs, we hold that betwee form of and is sufficiently restricted to assure that it will but have the impervisedble effect of advancing the sectorian activities of religious schools.

111

Because we have found (io) the challenged sections have the impermissible effect of advancing orligion, we need that consider whether such aid would <u>which an</u> entroglement of the State with religion in the sense of "[4] comprehensive, discriminating and continuous state surveillance." *Lemma v. Kartzman*, 403–10, S. at 619. But the importance of the competing social interests inglicated in this case prompts as to make the further observation that, apart from one specific entanglement of the surthered in the lemma carries grave potential for extanglement in the broader sense of continuous pathical strife over aid to religion.

Few would question mest in the logislative findings supporting this statute. We terograded a Board of Eduvation v. Allen, 392 G. S., as 247 that "prevate education has played and is playing a significant and valuable role in taising levels of knowledge, competency, and experi-





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ence," and certainly private parechial schools have contributed importantly to this role. Moreover, the tailoring of the New York statute to choosed the act provided privately to affind low-amount families the oction of determining where their children are to be equated is most appealing ". There is an doubt that the private schools are readound with increasingly grave fiscal problems, that resulving these problems by more sing tailing charges forces parents to two to the gubdic schools and that this in turn cas the present legislation recomines -exace bates the problems of public education at the sume time that it weakens support for the parechial schools,

These, in briefest summary, are the underlying reasons for the New York legislation and for studiar legislation in other States. They are substantial trace s. Yet they uses be weighted against the relevant provisions and purposes of the First Amendment <u>overhice</u> sateguard the separation of Charlen from State and which have here usgarded from the beginning as **use of** the most cherished features of our constitutional system.

One factor of occurring significance is, this weight g process is the potentially divisive polatical enert of an add program. As Mr. Justice Black's option in *Eccasion v. Bound of Education supra*, coupt asizes competitions among religious seets for polatical and religious separately has occasioned to siderable civit state, reported by competing efforts to gai vior teamtaic the support of government, Id, at 8-9. As Mr. Justice

A let noted in the residual to be a TERS [1, 5, [1, 1, 5, [1, 5, [1, 5, [1, 5,

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Harken put it. "[without is at stake as a matter of pubry in Establishment Clause cases is previouing that kind and degree of government involvement in religious life that, as history togenes us, is aprillo field to struct and frequently strain a political system to the breaking politi." Wale v. The Commission, 397 U. S. at 694 (concurring opinion).

The Court recently addressed this issue specifically and fully in *Lemma v. Kartziona*. After descripting the political activity and latter differences likely to result from the state programs there involved the Court said:

"The potential for political cavisiveness related to relations belief and practice is oppravated to these two statutory programs by the need for contraving annual oppropriations and the likelihood of larger and larger demands as costs and population grow 1 403 17 S. at 623."

The language of the Court applies with prediat force to the New York statute now before us. Section 7 (grants for manuferance) and 32 (thinks, grants, will require controuting annual appropriations. Sections 3, 4 and 5 circume (as relact; will not necessarily require about resexamination, but the pressure for frequent culargement of the relief is producable. All three of these programs start out at modest levels; the maintenative grant is not to exceed \$40 per pupil per year of approved scheeds; the fuition grant procedus parents (at

⁴ The Court for Lewiss further can be sold that reduced its simulating follows have as to be contrasted with the political diversity expected in a contrast a second of the reductive political stellar protores at how you way to be of the even of generic transformer that political stellar protores at how you way to be of the equivalent transformer that political formation datasets at our demonstratic system of generics of the political affect datasets at our demonstratic system of generics of the political affect datasets at our demonstratic system of generics of the political affect datasets at our demonstratic system of generics of the political affect datasets at our demonstratic system of the politic politics of system array relation intersives consolid to protocol. Free real Comnegative Tubble And to Prove high Schools (S) Parsy for Rect (Section 2002) (2000) That U.S., $\sigma \approx 202$

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more than 850 a year for each child in the first eight grades and \$100 for each child in the high school grades; and the fax benefit, though more difficult to compute, is equally modest. But we know from long experience with both Federal and State Government, that and programs of any kind total to become cutrenched, to escalate at cost, and to generate their own aggressive constituencies. And the larger the class of recipients, the greater the pressure for accelerated hereases?" Moreover, the State itself, concredelly attaious to avoid assuming the burder of educating ehildren now in private and gamelout schools, has a strong unification for mercasing this gin as public school costs rise and population increases.¹¹ D: this subtation where the underlying usage is the deeply emotional one of church-state relationships, the potenthat for sorrous, living or polatical consequences needs no obboration. And while the prospect of such divides tess may out alone warrant the invalidation of state laws that otherwase survivo the careful southry remained for the decisions of this Court, it is certainly a "warring signal" but to be ignored. 14, 15 625.

¹⁵ As since \$0°, of the total school propertition in Now York as heads attracte and periodical schools the constituent two supporting these program is not asignific at.

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The adisperpendence tendences of any form of generalized of the relation from the matter of constant through the eigenout localithermal Characteristic the Schwapp. On the method is start that it was a node force to tright that the relations produces for may be relatively index to exact matter is the non-tendence for may be relatively index to exact matter is the non-tendence for our what relatively index to exact matter is the non-tendence for the what relatively index to exact matter is the non-tendence of the or what relatively index to exact matter is the non-tendence of the what relatively index to exact matter is the non-tendence of the Weither relatively index to the formation K is the tendence of the Photo borrow the words from Min discrete Real for the product disrest in K-reases of based power the potential expectability of state reak and that tendence such wide rewards. Not a new three potential is availed that tendence such wide rewards. The connection of the availed that tendence such wide rewards. The connection of the availed that tendence such wide rewards. The connection of the availed that tendence such wide rewards. The connection of the availed that tendence such wide rewards the tendence of the state of the availed the tendence such wide rewards. The connection of the availed the tendence the potential base the connection of the availed the tendence of the state of the tendence of the availed tendence of the state of the tendence of the tendence of the availed tendence of the state of the tendence of the tendence of the availed tendence of the state of the tendence of the tendence of the availed tendence of the state of the tendence of the tendence of the availed tendence of the state of the tendence of tendence of the availed tendence of the tendence of the tendence of tendence of tendence of tendence of tendence of the state of tendence of the state of tendence of

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Our examination of New York's oil provisions, in light of all relevant considerations, compels the parameter that each, as written, has a "primacy effect that advances teleptor," and offends the constitutional prohibition against laws "respective the establishment of religion." We therefore affirm the three-budge court's holding as to $\xi |1|$ and 2, and reverse as to $\xi |\xi |3|$ and 5.

It is so undered.

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Pror; Thite, J.

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

and.

Nos, <u>72-459 and 72-620</u>, Slean V. Lemon

Lecan V. Lenon Justice White, dissenting. Each of the States regards the education of its annual to be a critical matter, so much so that it come? attendance and provides an education ixpense. Any otherwise e elem young to be a critical matter, so much so that it compals \mathcal{R} 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 mave 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 outling about contributed is employed at 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.

. ات light of thes Free Exercise Clause of the Mirst 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); Walk V. Yax Commission, 397 U.S. 664, 476 (1970). Positing an obligation on the State to educate its children, which every Siste acknowledges, it should be wholly acceptable for the State to contribute to the secular education of children going to sectorian 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

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school system, hos encountered financial difficulties, with many schools being closed and rany 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 parachial schools for the purchase of secular educational services furnished by these schools. $\frac{1}{2}$ others provided tuition grants to parents sending their children to private schools, permitted dual enrolments or shared time errangements or extended substantial tax benefits in some form. $\frac{2}{2}$

The dimensions of the situation are not difficult to outline, $\frac{3}{2}$. The 5.2 million private elementary and secondary school students in 1972 attended some 3200 non-secular private schools and some 18,000 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 nonpublic school students are concentrated in eight industrialized, urbanized States: New York, Pennsylvania, Illinois, California, Ohio, New Jersey, Michigan and Massachusetts. Sighty 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.

Non-public school enrollment has dropped at the rate of 6% per year for the nust five wears. ISimme 1965 per

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that seven States (the eight mentioned in the text less Massachusetts) will lose 1,415,129 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 attock and with the States and cities that are primarily involved already focing 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 southle 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 <u>Lemon v. Kurtzman</u>, 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

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actual repair and maintenance cost in connection with the secular education services performed for the State in parochial schools. But accepting <u>Lemon</u> 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 whatspever 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 unequivecal 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 curved 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 and 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

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wholly consistent with the First Amendment. Sum transportation may be furnished to students attending parochial schools as well as to these going to public schools. <u>Everson v. Board of Education</u>, 300 U.S. 1 (1947). So too the State may furnish school books to such students, <u>board</u> of <u>Education</u> v. <u>Allen</u>, 392 U.S. 236 (1968), although in doing so they "relieve[d] those churches of an endrous uggregate cost for those books." <u>Walz</u>, <u>supra</u>, 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 substantia) sayings to the sectorian institution. <u>Hunt</u> v. <u>MoNair</u>, <u>U.S.</u>.

The Court thus has not barred all did to religion or in religious institutions. Rather, it has attempted to devise a formule that would help identify the kind and degree of aid that is permitted or forbidden by the Establishment Chause. Until 1970, the test for compliance with the Chause 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 ensethent"; <u>Abingtor, School</u> <u>District v. Schoop</u>, 375 U.S. 203, 222 (1965); Board of <u>Eduration</u> v. Allen, 392 U.S. 236, 243 (1966). In 1970, a third element surfaced -- whether there is "an excessive government entenglement with religion." <u>Saiz</u> v. <u>Tax</u> Commission, 397 U.S. 669, 674 (1970). That element was

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the efforts by the States of Pennsylvania and Rhode Island to shave off financial disector for their parochial school. system, the saving of which each of these States deemed important to the public interest. In secondance 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 oppeared to be an insoluable dilemma for the States, however, proved no insuperable barrier to the Federal Government in siding sectarian institutions of higher learning by direct grants for specified facilities, <u>Tilton</u> 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 criterior, it is of remote relevance in the case before us with respect to the validity of fultion 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 pripary effect that meither advances for invibits

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the religious mission of sectarian schools." See ante, p. ____. But the test is one of "primary" effect not mere "effect"; the Court rakes no attempt at that ultimate judgment inherent in the standard heretofore fashioned in the relevant cases. Indeed, the Court merely invokes the statement in Sverson 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 <u>Tilton</u>, 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 ald to the school could fairly be characterized as supporting the secular educational functions of the school, whatever support to religion resulted from this direct, <u>Tilton</u> v. <u>Richardson</u>, supra, or indirect, Everson v. School District, supra; Board of Education v. Alken, supra; Weln 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,

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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. Pootnoses 72-59% etc.

<u>1</u>/ This kind of program was adopted by Pennsylvania and Shope TalanJ and was declared invalid in <u>Lemon</u> v. Kurtzman, 403 U.S. 602 (1971).

P/ Pased on <u>State Aid_to_Non-Public_Schools</u>, a publication of the Department of Special Projects, National Catholic Education Association, the following summarizes, as of February 1, 1973, the various types of wid to non-public schools available in the various States, exclusive of those types of support finally declared unconstitutional by this Court:

Direct Aid Programs:

Porental Grants or Reimbursement Schemos: 5 States (including New York and Pennsylvania).

Ducl Enrollment (Shored Time): 9 States.

Tex Credits: 5 States (including New York).

Lessing of Non-Fublic School Facilities by Public School Systems: // States.

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

Innovative Programs: 1 State (Illinois).

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

Auxiliary Services or Renefits:

Transportation: 24 States plus District of Columbia. Textbooks and Instructional Materials: 14 States. Health and Welfare Services (i.e., school physician,

nurse, dental services, hygiunist, psychologist, speech

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

School lunches: 2 States (New York and Louisiand). Released Time: 2 States (Michigan and South Dokota). Vocational Education: 2 States (Ohio and California). Central Furchasing of Supplies: 2 States (Oregon and Washington).

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

A total of 16 States now extend one or more types of 33direct aid. \cong States, including almost all of the fore- $\frac{1}{2} \int \frac{1}{2} \frac{1}{2} \frac{1}{2} \frac{1}{2} \frac{1}{2} \frac{1}{2} \frac{1}{2} \frac{1}{2} \frac{1}{2}$ States have constitutional or statutory barriers to any kind of direct aid to parachial schools.

<u>3/</u> The data in this and the following paragraph of the text are taken from <u>Pinal Report</u>, President's Punel on Nonpublic Education, 1972, pp. 5-5, 15-19. See also Hearings on H.R. 16,141 and other pending proposals, Committee on Ways and Moans, House of Representatives, 92d Cong., 24 Suss., pp. 118-119, 128-131.

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<u>5</u>/ Enrollments in non-public Schools in the cities country's 15 largest States are as follows:

. . . .

<u>C</u> it <u>y</u>	Non-public enrollment	Percontage _of_total
New York City	358,594	24.3
Chicago	208,174	27.3
Philodelphis	146,298	33.6
Detroit	58,228	16.5
Los Angeles	43,601	6.3
New Crleans	42,938	27,2
Cleveland	36,922	19.4
Fittsburgh	36,561	19,4
Buffalo	36,623	33.8
Boston	35,237	27,1
Beltiscre	33,833	15.C
Cincinnati	32,653	27.4
Milwaukee	32,256	. 19.8
San Francisco	29,582	23.9
St Paul	22,267	30.3

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

New York.

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

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

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

D. Omnibus Education Act

 Health and safety grants for non-public schools qualifying under Title (7 of the Higher Education Act of 1965 as sorving press with high concentrations of poverty families.

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

Tax credit assistance for parents with incomes
 from \$9,000 - \$25,000.

¹ E. Mondated Services Acc

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

Pennbylvenis.

A. Dual enrogiment

B. Parent Reinbursement Act.

 Reimburgement of parents for actual costs of non-public education of their children up to \$75 for elementary school students and \$150 for secondary school [lllinci:

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 sensel.

B. Special grants for innovative programs.

Californio

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

Ohio

A. Dual corollment with respect to vocational training.

B. Wax credit assistance for parents of non-public school students up in \$90 per child per year.

New Jersey

No direct aid. Pareniel 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 sid.

Massachusetts

Direct aid is barred by state constitutional providion.

As of February 1972, the estimated Subsclip population in epen of these 2 States was as follows:

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	Estimated 1970 Peoplation (in themsends)			
	Total Population	lstimated <u>Cateolics</u>	<u>Catho</u> lig <u>/A</u> ptat	
Ressectusouls	5,241	2,947	56.2%	
New Jersey	7,332	2,898	39,5%	
New York	18,360	6,668	35.7%	
Pennsylvasis	11,871	3,698	30182	
illind p	10,751	3,455	32.1%	
Michigan	9,435	2,383	25.3%	
Chic	10,612	2,265	21.3%	
California	20,250	4,093	20.0%	

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

Pri-

trange	1 pp 13, 23, 24.25, 29, 34 and rechnical choice	h .		
- -	To: The Chief Justice Mr. Justice Delgies Mr. Justice Delgies Mr. Justice Brennan Mr. Justice Stewart Notified to a school of the school of the school of the school of the International to the school of the school of the school of the school of the International to the school of the school of the school of the school of the International to the school of the school of the school of the school of the International to the school of the school of the school of the school of the International to the school of the school of the school of the school of the International to the school of the school of the school of the school of the International provides the school of the school of the school of the school of the International provides the school of the s	_		
	SUPREME COURT OF THE UNITED STATES			
	Nos. 72-604, 72-753, 72-791, AND 72-929 Bitculated:			
	 Committee for Public Education and Religious Liberty et al., Appellants, 72-694 b. Ewald B. Nyenist as Commissioner of Education of the State of New York, et al. Warren M. Ardieson, as Majority Lender and President pro tem of the New York State Senate, Appellant, 72 753 b. Committee for Public Education and Religions Liberty et al. Evald B. Nyquist, as Commissioner of Education of the State of New York, et al. Appellants, 72-791 b. Committee for Public Education and Religious Liberty et al. Priscilla L. Cherry et al., Appellants, 72-921 b. Committee for Public Education and Religious Liberty et al. Priscilla L. Cherry et al., Appellants, 72-921 b. Committee for Public Education and Religious Liberty et al. 	•		
(June 25, 1973)				

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Mn. JUSTICE PROVED, delivered the opinion of the Court.

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

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72-694, ETC.-OPINION

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2 COMMITTEE FOR PERIC EDUCATION & NYQUET

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

James Medeon, in his Memorial and Remonstrance Against Religious Assessments," admonished that a "prudeut judousy" for religious freedones required that they never become "entangled . . . in precedents" - His strongly held conductions coupled with those of Thomas Jefferson and others among the Poin dess are reflected in the first Chouses of the First Amendment of the Bulof Rights, which state that "Congress shall make no law respecting an establishment of religious or prohibiting the free exercise thereof." Then despite Madison's admonition and the "sweep of the absolute prohibition" of the Clauses." This Nation's history has not been one of en-

³ Muthando electropatical production is represented to an appendix to the descentral opposition of Michaelectropatical Michaelectrop Datasets in *Research Bread of Education* COUUS and CR 65, and Walk v. *The Computer* 107447 Science 700, 700, 721 (2070), respectively.

The provision of the First Association have been added and any on the Sones Correction for the Process Choice of the Fragmenth Montheast $-Sone (g_{1}, Mardiael)$, Procession (1994) = 8 (105)(1945).

While V. The Controls, super at 1985. More fractional distance Booston writing for the Control needs that the proposed the Charas-"was to state on the first needs of the control is trate," as that n[r] be Control of structure of the needs of the control is twen the two field con-Characteristics for a logical control needs to the control is the first of the con-Characteristics for all velocities of the absolute terms and ender of which is expended to a logical extration, would term to chash with the other $1 - hd_{1}$ at 505 2020.

⁴ Madeore's Mericulated R monitories with the entity of force accessing the order of Mini at a first of the Associated BS diserted for extent takes to superior of terrb is of the Chapter (replaced Sector 10, super Sector 1), Extension (Effective) Results of Education, 200 U.S. 1, 28, 30–11 (10)70 (10) helps, J. (diserting).

72-611 (CIC - 40PIXION)

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COMMUTELS, FOR PERSON EDSUATION & NYQUEST 3

tirely strictized separation between Caurch and State. It has never been thought either possible or descrable to enforce a regime of total separation, and as a consequence cases arising under these Chapters have presented some of the most perpicting questions to cone before this Court. These cases have recasinged through and thoughtful scholarship by several of the Court's most respected former dustries including dustries Black Frankfurter, Undan, Jackson, Rottedge, and Chief Justeer Warren.

As a result of these decisions and opinious, it may nolarger be said that the Religion Clauses are free of "cotanging" percedents. Norther, however, may it be said that defersion's tretaphorie "wall of separatica" between Clurch and State has become "as winding as the functus surpervice wall" he designed for the University of Virginia – McColline v. Bourd of Education, 333 U.S. 203, 232, 238 (1918) (Jackson J. Separate opinion). Infleed, the controlling constitutional standards have becume firmly rooted and the broad contours of our requiry are new well defined. Our task, therefore, is to averse New York's several forms of aid in the light of principles already defined.

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The existence of this stope of the Court's hencers, of poisting principles (teled court the stars in difficult pases does not, however, make our task today on easy one. For this evident from the nometors opticlars of the Court and of Paraces in concattering and downers in the loading cases applying the heistful latent Clause, that not bright the gappione is the lost infiscent, while there has been general correlation again the applicable principles and signs the framework of atoms so the Court has recognized as anis for to principle with mount the darmy the three of decographic in the extraordinarily countries are found that the dark where the Keylesson, CS IC S 102, 012 (1971). And at her where the transport of entry for the Court has been down to be there of entry here the stars of decographic test.

72-991, ETC-OPINION

4 COMMITTEE FOR POBLIC EDUCATION & NYQGEST

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In May 1972, the Governm of New York signed into law several amendments to the State's Education and Tax Lows. The first five sections of these amendments established three distinct financial aid programs for nonpublic elementary and recordary schools. Majort immediately after the signing of these becasures a complaint was filed in the United States District Court for the Southern District of New York ebullenging each of the three forms of aid as violative of the Establishment Chuse. The planners were an unincorporated assesstion, known as the Committee for Public Education and Religious Liberty (PEARL), and several individuals who were residents and theory ors in New York, some of whom had challen attending public schools. Named as defondants were the State Commissioner of Education, the Comptroller, and the Construction of Taxation and Finance - Motions to intervene on behalf of defendants were granted to a protp of parents with children woralled in norpublic schools, and to the Majority Leader and President pro-tem of the New York State Secure 5 By consent of the partice, a three-judge court was converted pursuant to 28 U. S. C. \$\$ 2281 and 2283, and the case was decided without an exidentiary bearing. Because the questions before the District Court were resolved on the basis of the pleadings, that court's decision furned on the constitutionality of each provision on its face.

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

that, as of a so-sets, the "wall" is menoritanic bonds and any constitute a "bluered, induction, and canadds harrier depending on all site spectroses of a particular relationship." $Rd_{\rm e}$ at 014.

SThe motion was grouted to favor to Mr. Cull W. Drydzes, Open hyperstructure in Documber 1972, in successor, Mr. Warren, M. Amberson, was substructed to his glace.

72-694, ISPC -- OFSNIGN |

COMMETTIC FOR PERSON EDUCATION & NYQUIST 5

dress?") provides for direct miney gas is from the State to "qualifying" no-qualite schools to be used for the "maintena see and repair of the school facilities and entrument to ensure the Lealth, welfare and safety of corolled population A "qualifying" school is any nonpublic, numprotit elementary or secondary school which thas here designated during the [nonocliately preceding]. year as serving a high concentration of pupils from lowincome families for purposes of Title IV of the Federal Higher Education Act of 1995 (20 U. S. C. §425), 22 Such schools are entitled to receive a gratit of \$30 perpapil per year, or \$10 per pupil per year if the forbities are more that, 25 years old. Each school is required to subait to the Commission of Education as autoled statement of its expenditures for manutenance and arpair during the proceeding year, and its grant may but exceedthe total of such expresses. The Commissioner is also required to associatin the average pre-pupil cost for equivalent inmetengace and repair services in the public schools, and in our event may the grant to compublic qualifying schools exceed 50% of that figure.

"Maintenance and separt" is defined by the statute to instade "the provision of heat light water ventelation and sanitary facilities, cleaning is worted and custofied services; sume ormital: secretary sphere and renevation of buildings, group is and equipment; free and accident protection; and such other items as the commissioner may drem necessary to cusare the health, welfare and safety of corolled pupels." ¹⁶ This section is prefaced by a series of legislative findings which should light on the State's purpose in execting the law. These findings com-

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⁴ N. Y. Lows 1972, e. 414, §4, concerding N. Y. Ding, Low, Art. 12, §§ 549-557, MelKenny Supp. 2972).

 ^{14., § 550 (6).}

P MU § 550 (2)

P 1d , § 555 (5).

72-694, ETC - OPINION

6 COMMITTEE FOR PUBLIC FOUCATION # NYQUIST

clude that the State "has a primary responsibility to ensure the health, wilfare and safety of children attending . . . nonpublic schools") that the "fiscal crisis in nonpublic education . . . has caused a domination of proper maintenance and repair programs threatening the health, welfare and safety of nonpublic school children" in low-income orban areas; and that "a healthy and safe school environment" contributes "to the stability of acban neighborhoods." For these reaso is, the statute declares that "the state has the right to make grants for maintenance and repair expenditores which are then by secular, neutral and non-ideological in nature.""

The manipular of the shallenged legislation -\$\$2 through 5--is a single package captioned the "Elementtary and Secondary Education Opportunity Program." It is composed essentially of two parts, a tuition grant program and a tax bracht program. Sociion 2 establishes a limited plan providing turtion tembursements to pareats of daldres attending elementary or secondary nonpublic schools 9. To qualify under this section the parent must have an annual taxable income of less than (\$5,000) The amound of reholoursement is hunited to \$50. for each gende school child and \$100 for each high school child. Each parent is required, however, to submit to the Commission of of Education a verified statement containing a receipted turnor full and the anomit of state reitabarsement may not exceed 50% of that figure . No restrictions are imposed on the use of the funds by the reicologised principality.

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

^{1936 (§ 519)}

¹⁵ N. Y. Lows 1972, e. 414, §22 concoding N. Y. Dine Line Art. 12-A, §§ 559-563 (McKenny Supp. 1972).

72-69), 371C.--001NCON

COMMUTATION REPORTED TO COCCATION & NYQUIST 7.

our pluralistic sectory," the findings state that a "bealthy competitive and diverse after sative to public education is not only descable bat indeed would to a state and cotion that have containably reallymed the value of individual differences," ¹¹ The featings further emphasize that the right to select among alternative colorational systems "is diminished or even derived to children of lowersr come families, whose parents, of all groots, have the least options in determining where their elabless are to be educated "10. Turning to the public schools, the findings state that any "precipitors decline in the toucher of nonpublic school couples would be use a matrixe increase in public school cumlhood and costs," on increase that would taggravate an already serious fiscal crisis in public education" and would "seconds'y junpactize the quality education for all children," 1 Based on these prenders, the statute asserts the State's right to relieve the financial builden of parents who send then children to compublic schools through this tertion trimburscoept program. Repeating the dedocation contained in §1, the findings combulic that "such association is clearly secular controlaaid muudeologaegt^{araa}

The rescalades of the "Elementary and Secondary Education Opportunity Program," costained in §3.3, 4, and 5 of the challenged low," 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 means for state income tax purposes a designated anomic for each dependent for whom they have paid at least \$50 in compablic school

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 $P(H) \in SM(1)$

[•] H. § 556 (2).

^{**} Adu § 559 (C)

¹⁹ Id., \$ 549 (1)

¹⁶ S. Y. Lowe 1972, e. 414, 58 3, 11, not 5, annealing N. Y. Tax Luer, §§ 912 (ef., 642 Q1) (MeKnosey Supp. 1972).

524693, FTC+OPINION

8 COMMITTEE FOR PUBLIC EDUCATION & NYQUIST

tuition. If the taxpayer's adjusted gross meane is less than \$9,000 he may subtract \$1,000 for each of as many as these dependents. As the taxpaver's income rises, the appoint he may subtract diminishes. Thus, if a faxpayer has adjusted gross income of \$15,000, he may subtract only \$400 per dependent and if his moniters \$25,000 or mare on distantant is allowed ". The august of the deduction is out dependent upon low much the taxpayer actually paid for occoublic school twittion, and is given in addition to any definetions to which the taxpayer may be outitled for other religious or charachly contributions. As indicated in the memorphylum from the Majority Lender and President prostem of the Senate gubinitied to each New York legislator during consideration of the bill, the actual tax bettefits under these provisions were woofully calculated is advance." Thus, comparable tax benefits pick up at approximately the point at which tuition remnonreactor henefits leave off.

While the solution of the constructed indicates that the purposed underlying the proceedingtion of the thiting reimbustment program should be regarded as perturbed as well to these tax has sections \$3 mers contain an admitional secies of legislative findings. These findings may

¹⁰ Section 5 continue the following tables:

If New York adjusted	The antisant allowable
press data de las	for each dependent with
Less Corp. \$9,000	\$1,000
9.000-10°C0	\$50
11,000-10,009	600
53000-14(X))	550
25,000 (63,009)	400
17,000+18,000	250
20.0KX (+20.0K)*	150
31.000-22,909	125
23,000,24,009	200
25,000 and away	-6-
$M = \{602, i_{1}\}(1)$.	. *

[Footbole 12 is on p. 27]

52-601 ETC+OPINION.

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COMMUTTEE FOR POBLIC EDUCATION & NYQUIST 9.

be summarized as follows: (i) contributions to religious, charetable and educational institutions are already deductible from gross income; (ii) not public educational institutions are accorded tax exempt status; (iii) 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, (iv) the 'legislation, ..., finds and determines that similar medifications ..., should also be provided to parents for unition paid to competitic elementary and sexuadary schools on behalf of their dependents...?

Although the record was developed in this case, a number of pertunent generalizations near be made about the normality schools which would benefit from these enactocents. The District Court, relying on findings in a similar case repeatly decided by the same court," adopted a profile of these scenarios, manpublic schools similar to the one suggested in the plaint. Second on plaint. Qualify-

³¹The following competent was were submitted by Serieur Brydges, who has been replaced as intervenial by the survessor, Senatar Anderson.

-	Estimated	Net Beach;	to Decily
If Adjusted Grass	One	Two	Thure
Income a	obijki	chlaren	417 1036712
lesa (haar \$19,000	\$50,00	\$100.00	\$150 (s)
§ 9,000 10,900	42.79	55.00	:27 50
11,000+12,060	42.00	84 00	126.00
(3.000+73.009	38.50	71 (K)	115.50
25,000-10,000	32,00	64.00	96.00
17/00-15:000	22.50	+5.00	67.59
290800-20200	15,90	30,90	45.00
21.009-22.900	13.73	25 50	41.25
23 000+24 999	12,90	24.60	36.00
25,000 and ever	a	Û	0

 $\mathcal{T}(\mathbf{N},|Y|)$ For L we \$662 (p) (52) Kiney Supp. 1972) (or comparing note ().

²⁹ Comm. In: Public Educ, & Reliming Libertu & Levell, 042 F. Supp. 330 (19) 711 (SDNY 1977), arXiv page at +-s.

72-60, ETC-0198308

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COMMETTER FOR PERIOR ODJCATION & NYQUIST.

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

"(a) impose deligious restrictions on admissions: (b) require attentions of papils at religious activisties; (c) require declicate by surfacts to the doctraces and dogmas of a particular faith. (d) require pupils to arread instruction in the theology or doctring of a particular faith; (e) are at integral part of the religious mission of the clutch sponsoring it; (f) have as a substantial perpose the inculation of religious values. (g) impose religious restrictions on faculty appendiments; 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 800,009 stations, constituting above 20% of the State's entire elementary and secondary school population, attend over 2,000 nonpublic schools approximately 85% of which are church-aRdiated. And while [53] or practically all of the 280 whoels received to corrive "maintename and repus" grouts their related to corrive "maintename and repus" grouts their related to the itanian Cathulae Church and trach Cathulic religions doct on to some degree," of, at 601 institutions qualifying moder the remember of the statete mellide a substantial cambes of Jewish, Lutheran, Episcopal Seventh Day Adventist, and other church-addiated schools."

A As univerted in the Distort Criticial primor of this isomestic mated that 280 schools would opticify for such grants. The relevant efficient for determining charloters are set and in 2014. S. C. § 425, and the cone dataset is whether the school is only in which there is a high randomization of students from how operate families."

¹⁹ In the fift of 2008 these were 2008 insequility schools in New York State, 1405 Bound Catholic, 165 hourshold 20 km/linear 40 Uppersph.) 37 Second Day Advancet 18 when chardwalldrared, 296 without a Sproy a Williamor (N. Y. State Filter Dept.) Furtheral Support - Nergalitic Schools 3 (1968).

79-694 LUC | OMNION |

COMMITTAL FOR "GOLIC EDGCATION : NYQUEST 44

Plaintiffs argoni below that because of the substantially religious character of the intended beacheranes. each of the State's three courture its opended the Establishment Clause. The District Court, in an option? carefully convesting this Court's recomproceedents, held unanimously that x4 tinantenences and repair gravits). and §2 (untran reimbrasement grouts) were invalid. As to the invene tax provisions of \$8.3, 4, and 5, howeven a majority of the District Court, over the descotof Circuit Judge Plays, held that the Establishment Clause and not been violated. Finding the provisions of the law severable, it injuited permanently any further toplanes fation of 384 and 2 but declared the resmainder of the law independently enforceable. The plaintiffs appealed dioathy to this Court, challenging the District Court's advecse decision as to the third segment. of the statute ". The defendant state officials have ap- . pealed so range of the court's decision as invaluants, the first and second portions of the 1972 hours' the intervenue Majority Leader and President pro-tem of the Senate also appeals from those aspects of the lower court's opinious' and the intervening parents of nanpublic school clubbers have appealed only from the deeising as to \$2%. This Court noted probable autisatetion aver each appeal and unless! the raises consolidated for and argument, (440 F. S. 967 (1973)). This, the constitutionality of each of New York's recently proundgated ald provisions is squarely before as. We affern

¹⁹ No. 72-979; Charry & Committee for Public Education and Re-Agains Inherity.

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⁴ No. 72 (194) Committee for Public Education and Religious July erty 5, Nyapist.

¹⁵ No. 52-591, Nuclear transmitter for Public Education and Heligious Liberty.

^[78] Nucl. 72-753. Anderson & Control for Public Education and R-linear Laberty.

72-691, ETC +OPINION

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12 COMMITTUE FOR PERIO EDUCATION + NYQGIST

the District Court insofar as it struck down \$\$1 and 2 and reverse its determination regarding §§3, 4, and 5.

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The history of the Establishment Chase has been recounted frequently and need not be repeated here. See Everson v. Bound of Education, 339 U.S. 1 (Black, J., opinion of the Court), 28 (Butledge J., dissenting) (1947)) \simeq McCollans v. Bound of Education, 353 D.S.

25 Virgini 1/2 experience, examined at details in the payerity, and discussion optional in Economic metallicity one of the gardeer endpoters in the history of this Country's adoption of the essentially revolutioners, action of reputation between Church and States. Data ing the Colocal Frequed into the last 1700's also Angle to Gate hi approved from source as the established church of Virginia . But in 1776, resulted by the producer of fitters Reputs, Productings, and Justic tass, the Vagina's Convention approach a provision for its first constitutions Bill of Rights calling for the face exercise of ubgate. The proceeds of first by George Meson red scheme tally arecaded by Junes Madisan surved "Inflam religion and the manuer of the larging is, can be differed only by season and convertised not by force of violence, and therefore all more are equally coulded to the iner exercise of religion according to the distates of consumer-- 11

But the Virginia Balf of Rights contained no problem in decides the Raddh-Jozha of Relegion and the next eight verse were marked by default over the relationship between Chardy and State In 1784, a full quartered principality by Partick Theory, explicit) A Bill Establishing a Provision for Teachery of the Christian Religion was brought before the Virginia Versables. The Bull represent in full as an Appendix to Mr. Justice Replicipation of opposition in Excession williand of Education increases of 72–74, respired all persons 10 pay an annual tax this the support of the Caristian selector in order their the teaching of religion mode he promoted. Each take poyer was personnel under the Rel to dockne which there's ha desired to resolve his shorts of the tax. The Bill was not would on during the 1781 season and prior to the conversing of the 1785 session Might so periods his Meanard and Remonstrator against Religious. As estimate, on the may an 15 must a reflecting right the movers for his opposition to the Assessmenty Bill. The document

22-601, ETC.--OPINION.

COMMITTEE FOR PUBLIC EDECATION & NYQUEST 43.

203. 212 (1948) (Frankfurger, J., separate operioe); McGoneau X, Marghand, 306 U.S. 420 (1961), Engel V, Vitale, 370 U.S. 421 (1962) – It is enough to note that it is now fronty established that a law may be one "respecting the establishment of religion" even thereful its consequence is not to promote a "state religion," Lemma V, Kurtzmon, 403 U.S. 602–612 (1971), and even though it does not not religion, more than another but merely benefits all religions while. Everyon V, Board of Education, sequer, at 15. It is equally well established, howèver, that not every law that confers an "indirect," "remote," of "condental" benefit upon religious institutions

was widely carollated and aspand such overwhelting opposition to the Bal Gan is dood during the ensuing second without proching a vote: Mathemas Memorial and Itera astranen, recognized today as ame of the conversiones of the Pirge Amondmont's guarantee of govemment neuror bet ressard primare des principal de necessary fonne dation for the anarchete consideration, on unignor of Three's defterson's Bill for Letable-barg Refigienty Presidents, which enabled Vagora's first - knowledgement of the joint iple of the Lyapuration of Church and States. The case of this principle, as stated in the Ball, is that the manufall be compelled to frequent or support any relations would be place as non-network to some roles. The other sends persperated to that was they "wall of separatess" in the preparation of decomption of many first processing the Bill along with his so that by of the Dechmanics of Enderschere and the founduig of the Fanctiony of Virginia, this dependent to leave his scribed on his roubstrate. Replet of the Control on Constitutional Revision, May Castring and Vagran 106 101 (1989).

Both Madeon's Different Sixlers provision on the free exercise of refigient and defensions. Off for List blocking Refigiers Freedom base remarked in the Virginia Constitution another shows a substance, throughout that States business. See V: Construct 1, §16 on which the two guarantees have been (rescalar regeller at a single provision). For excepts behavior discontants of the pertinent Virginia bistory are S. Calde The Reach Responsibility of the version 74-015, 460-409 (He) must 1970 at a result Science (at Refigure Scientific in Virginia (1960). It Basin Januar Madison Thy Nationales 1780 1787, 343-356 (1948)

72-60, ITTC=0198308

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14 COMMETTER FOR PUBLIC LDECATION & NYQUIST

is, for 4brt reason alone, constitutionally lovalid. M (means v, Maryland super, at 450; Walz v, Tax-Connulus, 307 V, S, 664–671–672, 674-675 (1970). What our cases require is careful evanitation of any law challonged an establishment grounds with a view to ascertaining whether a facthers v by of the evils against which that Clause protects. Primary among these evals have bere "spansmither, finance support, and active incolvement of the severeign to religious activity." Walz v Tax-Commuta, super, 51–668; Lemon V, Kurtzman, super, 51–612.

Most of the cases coming to this Coart raising Establishment Clause questions have involved the relationship between religion and education. Among these religioneducation precedes is, two general categories of cases may be identified: these dealerg with religious activities within the public scheeoly: (and these involving public aid in varying forms to sectaman educational institutions." While the New York legislation places this case in the latter category, its resolution requires consideration not only of the several quil-to-sectarian-scheration cases but also of our other reflection precidents and of several important correlation cases. For the new well defined three-part test that has runeiged from our decisions

A Weibeliam vertices of Educe, says a structure space (non-probavelocities) for exignore inference (Z_{0} and $x \in Changen, 363 \in S$ 305 (1952) (also a strictly space ($axy) \in Eugle x \in V_{0}$ also ($z \in S_{0}$ and $(z \in V_{0})$). So 421 (1952) (μ get (color) in public schools): Solvet Post, of Albungton Transkip v. Schwapp 574 46, S (201 (1963) (Bilde reading en jublic schools), E_{0} are so ($x \in A_{0}$ areas (205 U, S (97 (1953) (milved anomaly line more en public school (μ)).

[:] Kommun M. Road at Fales, some C_{22} (norsportation). Road of Educ C. Adva, 302 U.S. 236 (1908). (exclusions): Learner Knotzban, 4046, (1909). Solars- textbroke resonational materials): Earley v. Different 400 U.S. 062 (1953). (context solares). Thus v. Ratherdon, 403 U.S. 052 (1954). (southers) solares).

72-694, UTC+-OPINION

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COMMETTER FOR PERSON COUCATION & NYQUIST 15.

is a product of considerations derived from the full sweep of the Establishment Choice cases. Taken together these decisions diotate that to pass moster under the Establishment Clause die law is question first most reflect a clearly social legislative purpose, c. g., Epperson v. Arkansus, 303 U. S. 97 (1998), second, must have a primary effect that neither advances nor infidets religion, e. g., McGorenn v. Maryland supra, School Dustrier of Aldington Towarkip V. Schwapp, 374 U. S. 203 (1963), and thead, must avoid excessive government entinglement with religion, e. g. Wale V. Tax Commun, supra See Leman V. Kuetzman, supra, at 612-613). Tiltion V. Richardson, 403 U. S. 672, 678 (1971).

In applying these e-iteria to the taxy distinct focus of aid involved in this case, we need totely only briefly on the requirement of a "socialize legislative purpose," As the recitation of ingisiative purposes apparallel to New York's' have indicates, each regarding such quartely supported by legitimate, nonsectarion state interests. We do not question the propriety, and fully secular content, of New York's interest in preserving a localthy and safe educational communication all of its wheat children And we do not doubt -takeed, we fully recognize--the validity of the State's interests in homoticg plantlish, and diversity accord its justific and computatic velocate. - Nor do we besitute to acknowledge the reality of its concern for as alwasy comparement public school system that might

If the shear energy the apple theor of the sections of Mor. Concern has then Brachen and the Tairan K. Robards on rapparities there is no single constructional colliger that may be used to measure the precise degree? To which approximal theory is apple-able to the state action model is only. Rother, these tests of collection should be "viewed as generative," with a which to consider "the random seentropy developed point could precise and epidemic to a whe range of governmental action challenged as without of the Fitchlasholant Charge "Tair, or (77-8)%.

72 694, 17IC +-0P/N1ON

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suffer in the event that a significant presentage of children presently attaching normalize schools should abandon these schools to favor of the public schools.

But the propriety of a high-future's proposes may notimmunize from further scruttery a law which either has a primary effect that advances religion or which fosters excessive extanglements between Church and State. Acconfergiv, we must weigh each of the three aid provisions challenged here against these criteria of effect and entanglement.

The "indultenance and repair" previsions of \$1 autherize direct payments to noncohlic schools, virtually, all of which we Roman Catholic schools in low income areas. The learnes totaling \$30 or \$40 per pupil depearling on the age of the bistitution, are given largely. without restriction on insign. So long as expenditures do not expect 50% of comparable expenses in the public school system, it is possible for a sectarian eletoextary or secondary school to finance its entire "maintenance and repair" ludget from state tax-raised funds. No attempt is made to restrict payments to those expenditures related to the typheon of facilities used exclusively for secolar purposes, our do we think it possible within the context of these religion-ordented institutions to impose such restrictions. Nothing in the statute, for assignce, bars a qualifying school from paying out of state funds the salary of employees who maintain the school chapel. or the cost of reproviding classreaus a which religion is taught, or the cost of heating and lighting those same facilities. Absent appropriate restructions on expenditures for these and stoular purposes, it simply end of be denied that this section has a principly effect that anvalues religion in that it subscines directly the religious octivities of sectarian elementary and secondary schools,

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The state officials nevertheless argue that these exproduces for "manarcipace and repurt" are smiller to other linearial especiatures approved by this Court Prisonally they roly on Everson v. Board of Education, supra; Board of Education v. Allen, supra; and Villon v. Richardson, supra. In cash of those cases of is true that the Coert approved a form of furnicial assistance which conformal underliable benefits upon provide, seetarian schools. But a close examination of those cases alluminates their distinguishing characterities. In Eurison, the Court and five-to-four decision, approved a program of rembusionents to presult of public is well as paracheal school children for bus fares paid to connection with transportation, to and forse velocity a program which the Court characterized as approaching the "verge" of impermissible state and 330 U.S. of 16 In Allow, depided some 20 years fatter, the Coart upheld a New York law authorizing the provision of secular lextbooks for all children in marine seven through 12 attending public and not-public schools. Finally, in Tillion, the Court upheld federal grants of funcis for the construction of facilities to be used for eleady soudar jurgeses by publie and numpublic 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 secolar without providing direct and to the sectarion. But the channel is a narrow one, as the above cases illustrate. Of many it is true in each case that the prevision of such neutral nonderingical and, assisting only the secolar functions of sectorian tehnols, second inducedly and meridentially to primate the adiation tracetion by readering it more fixedy that children winds attion by readering it more fixedy that children winds attion by readering it more fixedy that children winds attion by readering it more fixedy that children winds attion by readering it more fixedy that children winds at-

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and incidental effect beneficial to religious institutions has never been thought a subment defect to wave at the invalidation of a state law. In *McGrana & Marqhead*, supra, Sunday Closing Unversion submender is somewhat more filter invalentable effects was to moder is somewhat more likely that entrans would respect religious tostitutions and even attend religious services. Also, in Wotz y, *Tur Commession, supra*, respect years for church property were held not violative of the Establishment Clause despite the fact that such exemptions relieved churches of a linguear border.

Tillion degwy the line must clearly . While a bare may jorny was there be against for the reasons stated in the plurably opinion and in Mit JUSTON WHITES concursions, that carefully busited construction grants to colleges and aniversities could be sustained, the Court was manufaces in its rejection of one choice of the federal statute in question . Fuder that clause, the Government was initially to recover a portion of its grant to a security institution in the every that the constructed facility was used to advance religion by, for instance, converting the building to a chand or otherwise allowing it to be "used to promote religious interests." 403 U.S., at 683. But been we the statute provided () at the readuon would express the end of 20 years, the facilities would thereafter be available for use by the instrumian for any scenarion junpose. In striking down this provision, the plucifity opinion cuples-ind that "11 muting the probabition for religious use of the structure to 20 years doviously opens the facility to use for new purpose at the end of that period " Hild, And in that event. "The original federal good will in part have the effort of advancing religion 1. *Hold.* See also id., at 692 (DOTGLAS, J., dissolving), 659-661 (Browskie, J., disstating), 665 a. 1 (Warris, J., concurring in the indement). If fax-faised fluids may but be granted to ju-

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statetio, s of higher hearing where the possibility exists that those funds will be used to construct a facility utilized for sectorion activities 20 years have on for four they may not be distributed to elementary and secondary strtarials schools of for the ordereconce and report 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 and, furthers are be take place, it may not maintain and, furthers or reutvate them when they fall into disception?

It might be argued, however, that while the New York "manotenance and requir" grants lack specifically ortholated secular restrictions, the statute does provide a sort of statistical grantice of separation by litering grants to 50% of the above t expended for comparable structers in the public schools. The legislature's supposition neight share been that at least 50% of the orderary public school maintenance and repair budget would be devoted to purely secular facility upkeep in securian tehnols. The shortest answer to this argument is that the statute itself allows, as a reliang grants satisfying the entire "mooth of expenditures for manatenance and repair of such are been that at here the manatenance and repair of such

³² The planches: (*TPhenomes a solut* to press out that these are "significant differences between the relations appress of characterizations of higher featuring and periodical decompany and semiclary solutions of higher featuring and periodical decompany and semiclary solutions. Id. 2, 385 (See Hawke)), MeXabi period.

¹⁰ Out batable line of Chitor presidents have recognized the specrial televation in dissipate of Mr. distinct the function opportunity of the property best as a worst to volume of these to See Walgey. Find Commission import of 675–676 for ang New Find Trans Const Energy 256 for \$3.345, 349 (1992) (i) the England Mr. Datie 15 wk strengy 256 for a strength of state transfer methods for the support of the light during the transfer of state transfer methods of the property of the during the transfer batteries of a state transfer.

¹⁴ Theory path is a bacadar or constantly be a stard of a dark the freedom bound color (ds into a tracking of about reas). The imposition of these to poly remediate constants and to built and constants of probability of a dark start of a built and constants of probability of the start of the poly of the start o

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school" previding only that it is britten tonic than \$30 or \$40 par papel not trace that 50% of the comparable multic school expenditores. * Quite apart from the langauge of the statute, our cases induction flat a more statistical judgment will not suffice as a genrautice that state funds will not be used to finance seligious education. In Earley v. DeCrosse, the committion case to Learner v. Kurtman, uppo, the Court struck down a Rhode Island law authorizing subary supplements to reachers of scenhr subjects. The grants were not to exceed 15% of any teacher's auctual salary. Although the law was involuonusion entanglement grounds, the Court manipulant that the State rould out have avoided violating the Establishment Clause by merely assuming that its teachers would succeed in segregating "their religious behefs from their secular infractional responsibilities," 493 U.S., 51 619.1

"The Rhole Island Legislatore has net and could and, provide state and on the basis of a case assump-

the order to a cost proper twitte preffere and suffery structures as qualify (see schools, for the bettef), of the pupils consider through there shall be upper non-differently we upon any software group. By the courter-note a to each quality as wheat for the vehicle years beground on and after July 6131 monstreat hundred screenge-acts, apsuccess optication the product of theory deflats are triplication the overage datay attendances of pagely receiving instruction in such edual, to be optimizing costs of magnetization and report. So it go permonental shell be restensed by ter dolute prelimination the scoregised obtained, and of pupils over any instruction of a school building constructed prior to concentrations, of furtherways. Journal creat shall the per graph control allowance computed under this sertime execute filter pre-contains of the second pre-couple case of equals. plent interferences and research the public schools of the state on a state-wide base, at determined for the comparisonner, and in ma treat that the accordance of to a gradifying which zeroed the numbed of expendences for maintenance and expension such school as reported parameters contain has baseled fituation of this schele." N. Y. Effer, Line, Mt. 12, § 551 (McKottav, Supp. 1912) (employs suppled).

²⁰ The particular to non-realizing follower.

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tion that secular teachers under religious disciplingene avoid conflicts. The State must be certain, given the Religion Choices, that subsidized teachers do not checkete religion ..., P. Tout. (Couplesis supplied.) ⁶

Nor resuld the State of Rhode Island have prevailed by simply relying on the assumption that, whetever a secular teacher's mubilities to refutio from mixing the religions with the secular, he would surely devote at least 15% of his efforts to purely secular estimation, thus exhausting the state grant. It takes have imagination to perceive the extent to which States might openly subsidize protocold schools under each a loose standard of struction. Size also Tillian v. Richardson, superc

What we have said doministrates that New York's maintenance and repressions violate for Establishment Churse because three creet, inevitably, is to subsidize and advance the volugious mission of sectarian

The two egos noses is force also non-poind that elements where elementary and secondary schembles on a significant selegions mission and that a orbst or of point once their action is in edge attended. They have therefore outgle to respond that we we trantions decigned to go a trace the eigenstic a between seedle and religants of a transition mean and non-contraction. State for mean and supports only the former which have provided out State for mean and supports only the former which have provided out previously, keep in conditions the former which have programs approaches, even if they the conditions are shown be forbed on areas under the 15 (by) out the structure of the former of the forbed on areas under the 15 (by) out the structure of the former of the forbed on areas under the 15 (by) out the structure of the former of the forbed on areas under the 15 (by) out the structure of the former of the forbed on areas under the 15 (by) out the structure of the former of the forbed on areas under the 15 (by) out the structure of the forbed on areas under the 15 (by) out the structure of the forbed on areas under the 15 (by) of the structure of the forbed of the structure of the 15 (by) of the structure of the forbed of the structure of the 15 (by) of the structure of the forbed of the structure of the 15 (by) of the structure of the structure

25 In Tylew, force the matrix of a grants were finited to previous S055 of the event of an energy of view of finite boundary of an energy of the theory was converted by the order that a transform the first set of the first set of the set of the set of the set of the first set of the set

⁽²⁾ Elsewhere on the opposite the Court couple-sized the non-strugfur the States of Black Is and any Jonary summation assume frintingly characteristic of Black of the graphs.

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schools. We have no accusion, therefore, to consider the further question whether those provisions as presently written would also fail to survive scruticy under the administrative entronglement aspect of the three-part test because assuring the scendar use of all funds requires too intrasive and continuing a relationship between Church and State, Lemon v. Kurtaman, supra.

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New York's toilion reinflursement program also fails the "effect" test for much the same reasons that governits maintenance and repair grants. The state program is designed to allow direct, unrestricted grants of \$50 to \$100 per civild (but no more than 50% of thitron actually paid) as reinflursement to parents in low-income brackets who seed then children to unrepublic scincely. To qualify, a parent must have carried less than \$5,000 in teachle income and must present a receipted tuition bill from a nonpublic school, the balk of which are conceduly sectarian an orientation.

Three can be to question that these grants could net, consistently with the Establishmoot Chause, be given directly to contactors schools, since they would refer from the same deficiency that readers invalid the grants for maintenance and repair. In the absence of an effective means of guarantening that the state and derived from public funds will be used exclusively for secular, neutral, and nondeological (nepaies, it is clear from der cases that direct and in whatever form is cavalid. As Mr. Justice Black (s); it quite samply is *Fuerson*:

"No tax is any areas it, large or small, call be levied to support only religious activities (or institutions, whatever they may be salled for whisever form they may adopt to track or practice religion." S30 U.S., at 16.

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COMMUTTLE FOR PUPILSC UDDENTION & NYQUIST 23.

The controlling question here, then, is whether the fact that the grants are delivered to parents rather than schools is of such agadhesize as to comprish contrary result. The State and interviewer-republies rely on Erersno and (Illen for their claim that grants to parents, anhise gene is to institutions, respect the "wall of separation" required by the Constitution." It is true that so those cases the Court uphetd laws that provided benefits to children att soling religious schools and to their parents: As poted above in *Econom* pure its were reindorsed for bus fares paid in send children to parachial schools, and in Affect textbooks were low of directly to the children But those decisions nucleiclear that the from providing a perior incrudity from exampletion of the substance of the State's program, the fact that aid is disbursed to parents rather that to the schools is only one innong many factors to be considered.

In Everson, the Court found the bus fare program analogous to the provision of services such as police and fare protection sewage disposal, highways, and solewalks for purochial schools - 330 U.S., at 17–18 - Such services,

¹⁰ In a Minimum Key way, and Allow Concerning and the first structure in the second seco discators option relation Quark Reach Learny 210 E, S. 20 (1908). for the propertion that generations to independent generally stands on an entrols of Bernel to any from dependent of to religion. nothingsond. Post of A. Quick Real invesses, dot not may ve the expend to a new provide 2 more control surgesting external schedule The Anderthan were striked by the highling to provide sections education were treats real to so funds which the Constreaply and he used in the hold on as personal for the resonance hold at adand other orgins. Int. of 85 SE, the way three on the und the Court held that for Congress to have profile and along from expanding these 6800 to the length a religion exhibition would have reasonated a probabilities of the five exercise of the figure $-D^2$, as $\delta 2$. The present A solve path traffice Querk Represented in mose did not involve the distribution of public foods. Denotic or and service to comparish parents who zero? their children to religions whose-

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provaled as solution to all citizens, are two separate and so just spin bly worked off from the orligious function." 6L at 18, that they may finily he viewed as reflections of a motical posture toward religious instantitus. Aftea is founded upon a smillar prioriple. The Court there repeatedly conferred that upon the record in that case there was no industrion that resubouks would be provided for anything other than purely seetlar courses. POI course bodes are different from bases. Most bus rides have no inferent roligious signification while religious hooks are company. However, the hoggage of [the law under recruiting and does not any horize the loan of religious heads, and the State claims no right to distribute religious Ateration. . Absent evidence, we cannot assume that select authorities i. . are unable to distinguish between secular and religion; books or that they will not honesity discharge their dirties under the law?" 392 U. S. at 244-245.1

Bost the of the factor provided we be a product the testion grant of result, we are data denote whether the significantly religions character

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³⁵ Ados and Known article from the present case in a second important respect. In both cases the class of benche provincialed all selical electrical datas in refolie as well as these in private schools. See also 777 an al Richardson, supervisit wordt, bylend and was mote available to all monthlaws of legher learning, and Welg's (Tax Correthe of broches apprenticed the event processing and do to all educational of characterization engines, and to bars. We do not serve with the suggestion in the discent of Tim. Crime to sites that further plants in the second contract reaction of the basis of all parents of a boot children whether incollection subtle or something stheols. Post, at 3-4. The grades to private of private phase clobbed and gwas is a blocke tangelant. It they have be seed than Address to particle where the distribution state expressed. And an error event, the regular of power transpole for st would also provide a been for appricable through because we are the compact, solve degrand of all columns schools on the ground that such action is measured of the State is fully the scalar violation of parents when being such schools—a result whether at contraste optimate. Parable interna-Chiner

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The tration grants here are subject to to such restrictions. There has been no endeavor "to guarantee the separation between secular and religious educational functions and to ensure that State forworld hid supports only the former," Lemma v. Kurtzman, super, at 613. Indeed, it is precisely the function of New York's low to provide assistance to percate vehicole, the great majority of which are sectorized. By returbursing primary for a pertien of their tration bill, the State seeks to relieve their funnerial burdens sufficiently to assure that they continue to have the option to year their children to religion-oriented schools. And while the other purposes for that aid—to periodicate a pluralistic educational gevironment and to protect the lised integrity of overburdened public schools—are certainly mis-resptionable. the effect of the aid is meastabably to provide desired. financial support for coopyfille sectarion institutions "

Mr. Justice Black, dissenting in Allew, warned that,

"[i]) regulates on prophet to foresee that on the argument used to support this law others could be up-

"Appelled, four-size on the first superconduct process of fact which due Centralized an expressing the second proof of the three-point form in *Kennen C.K. without superconductory* at this three-point device in this case, whereas the "process" which due Centralized device in this case, whereas the "process" effect of New Yorks turbed grant profit in a tasule size religion of the posterior these beginners are the observes. The dissues Witten's discriming optimal poster i_{1} with hit superconduct the Court red solution on the Case affine to pulse at i_{1} . We done that i_{2}

of the statistic is estimated might define in a the present case **proton** is not involving come form of polyher as interesting statistics, ships have a variable gravitation of polyher ingoin a the sector proton of polyher equivalence of the postation of polyher equivalence of the postation of polyher equivalence of the postation of the latter of the postation of the postation

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held providing for state or federal government funds to buy property on which to exist religious school buildings or to creet the buildings theory ives, to pay

It was easies to providely on historical perspective correctlight the engineers factor of the grow on a final Proventies of the Charting Herewise bits for distance a Provence for Teachers of the Charting Belgion, which is odd in we could which be the the factor prover was to support a lagrangian distance with the star the fact property was to support a lagrangian distance and which be star the fact property Mathsuch Merican and Remonstrations are to 48 wegles, continued the following the result of each propose.

"The general policy and Charleson Boostedge both and on air tend size to concern the initially of reactions that there are spaced policy of the

that such metaphysical prize into are other yourlds or necessary Our cases supply do not support the notion that all to found to have a "propare" effective presidence one log, far we call and other § rates police power is instatue from higher evical days to porchain whether it also has the direct and indirection effect of advancing réagion. In McGaussie : Mandard, supre Surday Cischy U.V.s. were uphild and became their other way first, to prepare the legities re-interest at a conversal downed real and remaining only. second tils, te assistion fur as intervision fastendo, pprovid cloved from the fundamentation of the and on example as a solution justices of such law other they had only a transfer and another, to effect advant protecto felippore presidence - bland 45%. See the Calibration Course Kinders Super-Market (166-19) S. 617, 600 (1961); Two Gray from Research Martineous Inc. 1. Methodoly 306 15 8 582 898 (1981) Tabayas and Solveys the solution glassics arguest that Bible trashoff, ad other religious rectarians in public editions second, principly evolve preposes training other the option of mond while the sourchear to the order datands of the mass, and the perpetation of our instation is and the twohing of bieses 10607 054 D. S. (2020). Yet without listed and descends and without determining which in they total providences over the dimenreligions. I no 5% the Court hilds such exercises aneony adde walk the Retailedential Control of Statistical Gradient Statistics and Statistics SAN, J. Konstmany). Any proporting operation (loop) the constraints of the "SECT" effected west isobard for the Courts decision in When magnetic form from the more productly that that the financed structure in the historic for religions terryican 21 years have We associately support the description and the start methy way have the effect of tobale eigenflaters" of G.D. Strat 183 (anglusis Վերին վե

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the salaries of the religious school teachers, and finally to have the sector is religious groups rease to rely on volustory costributions of toerabers of their sects while we may for the gave meant to pick up all the bills for the religious schools.¹⁰ – 302 15–85, at 253.

His fears regarding religious buildings and religious teachers have not come to pass. *Filton* v. *Richardson*, *supra*; *Lemon* v. *Karlanno*, *supra*, and insolar as thiting grants constitute a means of "pick[10g] up . . , the bills for the religious schools ' neither has his greatest from conterialized. But the ingenous plans for chaoneling state aid in sectorian schools that periodically reach this Court atomicantly support the wisdom of Justice Black's prophery.

Although we chuck it clear, for the reasons above stated, that New York's thitton priori program faces no better inder the "effect" test than its maniforms of and repair program, in view of the overfly of the question we welladdress minfly the subsatiary arguments made by the state officials and intervenues in its defense.

First, it has been suggested that it is of counciling significance that New York's program calls for reinbarsement for tention already paid rather than for direct contributions which are nearly routed through the parents to the schools in advance of at or how of payment by the parents. The parent is not a more routed, we are take but is absolutely from to specifi the money be receives in any mercirc he wakes. There is no element of encience attached to the reinflargement, and an assist-

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⁽proce of society 1, 1) " Encoded v. Randon' Electrics (20) [1, S., et 72 (Stightermutal Appendix to descar of Dialedge 1.)

Such service the dependence of means have described and anosys free whether pulges might possess officerally services independences that whether the solution for solution weight the solution framefory mean not serve usely new operations that they call 1.200 years again provide such a described selectment as the service of prigons.

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ance that the money will eventually evolupin the bands of religious schools. The absence of any element of coercion, however, is brelevant to questions a isog under the Establishment Clause. In School District of Abington Township v. Schempp, sugar, it was contended that Bible recitations in public schools did not violate the Establishment Clause breaks participation in such exercises was not correct. The Court reported that argument, noting that while proof of coerciect night provide a basis for a claim under the Free Exercise Clause, it was not a necessary element of any claim under the Datablishment Clause. Id., at 222–223. Mis Justice Barts such schocorring views restorated the Court's corelision:

"Time the share, and for me sufficient, answer is that the availability of eventsal or exception simply has no relevance on the establishment question of it is once found that these practices are essentially selfgious exercises designed of least in part to achieve religious aims. 1.17 Id., at 288.

A similar ineprity gover is here, if the grants are offered as an incentive to parents to send their children to sectation schools by making man-tracted rash payments to them, the Establishment Clause is violated whether or not the actual dollars given eventually find their way into the sectarian institutions.¹¹ Whether the grant is labeled a reindoursement a reward or a subsidy its substantive impact is still the same. In survive agree with the combusion of the District Court that "I'w Jbether be gets it during the current year, or as triadoussement for the past year, is of no constitutional importance.¹¹ – 350 F. Sopp., at C68.

¹⁰ The future of the mechanical function, *Eastern C. D'Const.* and *Lenom*, were digenerated interchargement, we not one have in any of these cours suggests that these factor way of any constitutional significance.

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COMMETTER FOR PUBLIC EDUCATION & NYQGIST 29

Second the Majority Lerdes and President pro tera of the State Secure asgres that it is significant here that the nation coul usement graces pay only a portion of the turtion bill, and an even smaller partian of the religious school's total expresses. The New York statute line its minibursement to 50% of any parent's actual outlay. Additionally interview estimates that only 30% of the total cost of nonpablic education is covered by turtion payments, with the remaining sources from "voluntary contributions, endowments and the like," 21. On the basis of these two statistics, appelled masons that the "maximum furtion reiraburgement by the State is thus only 15% of the educational costs in the propublic schools 1991 And, "since computiony education have, of the State by necessity require significantly more than 15% of school time to be devoted to teaching mental causes," the New York statute provides "a 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 remain costs, nute, at 25-21 and it can faits no better hare. Obviously, if accepted, this argument would provide the foundation for massive, direct subsidization of so-tarial classicalary and secondary schools." Our cases, however, have long since fusedosed the future that more statistical assurances will suffice to still between the Soylla and Charybdis of "effect" and "entanglement "

Finally, the State acques that its program of fuition grands should survivo scruting because it is designed to

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¹⁰ Note of the three dosentory moments first for purport to rely on any such statistical contractors of sections. Indeed, under the nut make at these operations in the fideball supercoverance of a numtation on the approximation state and that sound be approved on the form of target groups.

²² Brief of Appello, Warren M. Anheson, at 25-

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prenints the free evenues of whigh-The State potes that only "low-more payents" are aided by this law, and without state as-estance their right to have their children, educated in a religious environment."Is diminished or even deried. To it is true of conese, that this Court has long recognized and coprationed the right to choose normable avec sublicaduration. Picture v. Sodely of Sames, 208 U. S. 510 (1925) - 1) is also true that a state law interfering with a quarant's right to have his child educated in a sectorian priord would run afail of the Free Even ise Clause - But this Court repeatedly has reeignized that tension meyitably exists between the Free Everrise and the Establishment Clauses, e. u. Eversure v. Bourd of Education, super; Watz v. Tax Commission, supra and that it may often not be possible to promore the furgher without offensling the latter. As a result of this tension, one cases toquire the State to maintoo at attitude of "realishing," norder the second one "inhibiting religion," In its strengt to enhance the opport datas of the pape to effects, between public and nonpublic estimation, the State has taken a step which conjudy be regering as one "advanting" religion. However great our sympothy. Everyoux, Bourd of Education support at 18 (Carleson, J. descutting), for the landess experienced by those who must pay public school taxes at the same time that if by support other schools because of the constraints of "conscience and discipline " dudy and networkstanding the thigh social importance? of the State's proposes, Westman v., Voder, 406 17, 8, 205, 214

¹⁹ N. Y. Libor, J. S. Att. 12-A, § 570 (2) (M5 Knows Supp. 1972) (hyperbolic fielding exponenting matter resolution (processing)).

For [11] by local proposition to the end to serve the state to the two structures $G_{\rm eff}$ is relation as spectrum both for only more contraction, and more influence in Hade so, That Conversional support, or 1000

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(1972) neither may instity an moding of the bailtations of the Establishment Cleave new timely explanated

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Sections 3, 4, and 5 establish a system for providing jurcore tax henefits to parents of children attending New York's compublic schools. In this Court, the parties have engaged in a roasiderable debate over what label lost fits the New York law. Appellepts insist that fac law is, in effect, one establishing a system of tax "coulds" The State and the intervences (meet that characterization and would label it instead in vestion of meonic tax "modifications," The Solicitor General in an annian game brief fied in this Court, has referred throughout to the New York law as one antionning fax "deductions" The District Court majority found that the aid was 'm effect a tay could." 350 F. Surm, at 672 (erophosis to original). Because of the prouffir native of the benefit allowed, it is official to adopt any single traditional lebel lifted from the law of memory treation. It is at least in its form, a tay dedection since it is an around subtracted from adjusted gress involue, prior to enoprotunit of the tax due . Its effect, us the District Cours concluded, is more like that of a tax excilit since the doduction is out related to the automatic actually spent for tration and is appropriate designed to visid a production amount of this "forgiven -- its exchange for partors ing a specific activities the State desires to encourage-the Usual attribute of a tax cordit. We see no reason to solvet and label over the other, as the constitutionality of this hybrid brucht does ont turn in noy event or the label we arean? it. As MR Current server: Benden's opinion for the Court in Lemon v. Kniftman, supra, at 614, notes, constitutional analysis is not a "legalistic rainfield in which pre-

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pise rules and forms govern." Instead we must "evaluine the form of the relationship for the light that it easis on the substance."

These sortions allow practice of children attending buts public elementary and secondary schools in subtrast from adjusted gross measure a specified amount of they do tratreceive a justim roundance can under \$2, and if they have an adjusted gross because of her than \$25,000 - The amount of the deduction is unrelated to the proceed of manage actually expended by new person or triffion, but is calculated on the basis of a Southuin contained in the statute 6. The formula is apparently the product of a legislative attempt to assume that each fatally would receive a currently estimated on benefit, and that the tax benefit would be excipately to, and compatible wate the turtion gravat for lower involve families. Thus, a parent who erros less than \$5,000 is entitled to a trition roomhursement of \$30 if he has one child strending an elementary noticility wheels while a parent who came more that loss than \$9,090 (is carached to have a processly equal should take off firs test bill. "Addamonable a taxpayor's benefit under these sections is unrelated to, and not reduced by, any distortions to which he may be entitled for combable contributions to religious institutions

In practical terms there would appear to be lettle difference, for purposes of determining whether such adhas the effort of advancing religion between the taxbevefit allowed beer and the tuition generallowed under § 2. The qualifying parent under either program re-

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¹⁵Sum the program benefities and have the dometric of a computex dods not, such as for all and the contributions are dometricate before any and do not density which is the force on $i \in X$ builds a sub-theorem by receptable probability incompany. These in $W_{2/2}$

⁴ Stern 18, segment

⁽²⁾ The second subbrack to be reprinted in the By super-

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COMMITTER FOR ISBNIC ADJCATION & NYQUIST 33

ceives the same form of reconceptent and reward for sending his children to not public schools. The only difference is that one parent acceives an actual cash payment while the other is allowed to reduce by an arbitrary amount the same he would otherwise be obliged to pay over to the State. We see no resourt to Judge Mays' discerting statement below that "[i'm both instances the money involved separately a charge table upon the state for the purpose of religious chication." [350 F. Sappi, at 675.

Appellars defend the fax portion of New York's legisfative package on two grounds . First, they contend that it is of controlling significance that the grants or credits are furgeted to the parents rather than to the schools. This is the sum organient made it support of the referenrenabersements and tests on the same reading of the same precolutes of this Court, printerly Everane and Allow. Our treatment of this estus in Part HB, moraat 22-26, is applicable line and requires rejection of this chain." Steer if appelies place their strangest rehation on Walz v. Tag Comonissian, super, in which New York s property tax exemption for religings organizations was upheld. We throw that Walz provides no support for appellees' position. Indeed, its rationale plainly campoly the conclusion that New York's tax package violates the Establisht and Cause.

Tax exceptions for church property enjoyed on apparently universal approval in this rectarry, beth hafere

¹⁶ Appell of sources is to the table interval day of the Country of the four Section 2 of the Act does not value, the H-table-forem Country, we get and 5.1 Burf of Appel acts of 12.13. We spread to Sections 1.4 and 5.1 Burf of Appel acts of 12.13. We spread the model the facts of this case, the two are regular respectively under the facts of appel acts' story and respectively of appel acts' story and respectively of appel acts' story and respectively of the facts of Country's story and respectively of appel acts' story and respectively of the facts of the facts of Country's table acts of the sections of the facts of th

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and after the adoption of the First Apparent. The Court in Walz survived the history of tax excuptions 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 inaugments to 1802, 1813, and 1870 specifically escupted charge property from taxation. In sum, the Court concluded that "lifew concepts are a one deeply endedded in the fabric of our pational life Leginning with pre-Revelutionary role al times, that for the government to exercise at the very least this kind of henevolent acutrafity toward churches and religious express generally? 1d., at 676-677.1. We know of no historical precedent for New York's eccently promolected tax relief mogram Indeed at scenes right that the henefits for parents whose children attend providual schools are a recent uncovation. occasioned by the growing financial plight of such nonpublic is stitutions, and designed, efficit unsuccessfully, to tailor state aid in a manner not incompatible with the recent decisions of thes Court. See Kongdar x. Wolower γ = F. Supp. = (SD Ohio 1972) aff d_{γ} = -U.S. ++ (1973).

But historical acceptance without more would not alone have sufficed, as it as only any a estimation by long use 3, 307 right in violation of the Constitution by long use 3, 307 U. S., et 678. It was the reason utderlying that long history of tuberance of tax exemptions for religion that proved cantrolling. A proper respect for both the Free Exercise and the Establishment Changes compels the State to pursue a course of "neutrality" toward religion. Yet governments have not always present such a mapper and

³⁵ The optimity optimity of Mit Justice Harlow, and Mit Justice & BuoNS CV, does to physical the instance? Completion of the second for infigure co-contained. Sec. 397 41, Sp. 44 (685), 694.

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COMMETTER FOR PERSE EDUCATION & NYQUIST 35.

oppression has taken many forms, one of which has been taxation of religion. Thus, if taxation was organized as a form of "hostility" toward religion. "exemption constitute[it] a reasonable and balanced attenuat to grandagainst those dangers." Id, at 673. Special tax benefits, however, cannot be squared with the principle of mentrality established by the decisions of this Court. To the contrary, insofar as such besedits centler assistance to parents who send their children to sectarian schools, their purpose and mentrable effect are to aid and advance those religious institutions.

Apart from its historical foculations, Write is a product of the same different and inherent tension found in most government and-tu-religion costructures. To the sure, the exemption of church property from taxation conferred a benefit, albeit an induced and it either tallone. They that "gid" was a product not all as y propose to support or to solvidize, but of a liscal relationship designed to minimum involvement and entroglopest between Charch and State. "The exemption 1 the Court emphasized, "touds to complete of and semiforce the desired separation insulating each from the other." Id., at 676 Furthermore, "[a]limination of the examption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax hens, 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 becefits under the New York statute, unlike the extension of an exemption, would tend to increase rather than limit the involvement between Church and States

One further difference between tax exceptions for church property and tax benefits for parents should be noted. The excuption challenged in *Walz* was not restructed to a class composed exclusively or even predomi-

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namily of religious institutions. Instead the excluption enversed all property devoted to religious educational or charmable purposes. As the parties here must concerle, tax reductions authorized by this law flow primarily to the parents of children attending sectorion, nonpublic schools. Without latingaring whether this factor alone angle have controlling significance in another context in some factore area at should be apparent that in terms of the potential divergements of any legislative measure the narrowness of the benefited class would be an important factor of

In canclusion we find the Walz analogy imperiousive, and in light of the practical similarity between New York's ray and furtion termborsonient programs, we hold that neither form of and is sufficiently restricted to assure that it will not have the imperiarisible effect of advancing the segmentian perivities of religious schools.

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Because we have found that the challenged sections have the impremissible effect of advancing religion, we need not consider whether such and would result in entanglement of the State with religion to the sense of "[a] comprehensive distributating, and continuing state surveillance." *Lemon v. Kartzman*, 403–10. S. at 610, But the imprefaces of the compring societal laterests implicated in this case process us to make the further observation that, apart from any specific entanglement of the State to particular religions programs assistance of the southere involved curves grave potential for entanglement in the located score of continuing political strift over aid to religion.

Few would question must of the legislative findings supporting the source. We recognized in *Board of Edu-*

Acceleration Systems

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COMMUTTLE FOR FURIDE LDLCATION - XYOUST 57

cation v. Allow 302 W. S., at 247 that "private clusation has played and is played a significant and valuable role in raising levels of knowledge, competency, and experience," and certainly private periodial schools have contributed importantly to this role. Moreover, the fadoring of the New York statute to close of the aid provided primarily to afford low-income families the option of determining where their children are to be obtained is need appealing. There is no doubt that the grin deschools are confronted with biccoursingly grave faced probtems, that resolving these problems by increasing tuition charges forces parents to turn to the public schools, and that this in turn has the present legislation receptives exace bates the problems of public education at the some time (ha) it weakens support for the periodial schools.

These, in brief st sciencery, are the ne bright reasons for the New York legislation and for similar legislation in other States. They are substantial reasons. Yet they must be weighted against the relevant provisions and purpuses of the Fast Amendment, which safeguard the sepatation of Church from State and which have been regarded from the beginning as among the most characteristic features of our constitutional system.

One factor of recurring significance in this weighing process is the potentially devisive political effect of an aid program. As Mr. Justice Black's opinion in *Econom* v. *Board of Education, supura*, emphasizes, compatition among religious sects for political and ecligious supremecy.

We noted to the opinion below of Table is, so it, an economy coefficient between two groups of extraordinary gradinality and envirresponsible to the group forth the disate two of pressingly observe edge dues which is thought to be an integral part of the register the free events of religion. The other group can be defined at believed that energication of gravitient of an ani of religion is as dangeto is to the gradue state as energical mean of gravitication (corriecting an world is to us free even prefigure 1, 550). Support 600,

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has eccasioned considerable eivil strife. "generated in large part" by competing efforts to gain or omittails the support of government. *Id.*, at 8.9. As Mr. Justice Harlan put a, "[without is at stoke as a matter of policy in Establishment Clause cases is preventing that kind and degree of government in religious hie that, as bising teaches us is apt to lead to strife and feequently strain a political system to the breaking point." [Wide v. Two Commission, 397 M. S. at 694 constructing opinion].

The Court recently addressed this issue specifically and fully in *Leason x*, *Kartzwara*. After describing the palitical activity and bitter differences likely to result from the state programs there involved, the Court suffi-

"The potnetical for political devisiveness related to religious order and practice is aggregated in these two statutory programs by the joyed for contrasting annual appropriations and the likelihood of larger and larger drugends as costs and population grow." 403 U.S. at 623.9

The bargarge of the Court applies with peculiar foreto the New York statute new before us. Section 1 (grants for nonutrisseer) and 3.2 ((nition grants) will require continuous annual appropriations. Sections 3, 4, and 5 (interact tex relief) will not necessarily require annual re-examination, but the pressure for frequent colorgement of the relief is predictable. All three of

³⁴ The Cotter to Action further emphasized that political division along of zeros lines is to be contrasted with the political division exponent in a density to success 1. Order the political division division theorem exponence of even posterior events and heading to affect these of our densities section of governor in brin political dynamic along relations have one of the principal cyber against which the first theorem of the principal cyber against which the first theorem of the matching potent. From all Corrment, Public Action Provide 18 facilities 2 lines 1. From all Corrment, Public Action Provide 18 facilities 2 lines 1. Inc. (368) 1692-(1993) ⁴⁴ - 403–6, S. an 622

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COMPLETE LOS ASSELUCIORCAMOS - NAÚRIST 32

these programs stars out at modest levels, the mainteman regard is out to exceed \$40 per pupil per year in approved schools: the (union grant provides parents but 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 henefit, though more difficult to compute, is equally product. But we know from for greenering with both Federal and State Covernments that aid programs of any kind tend to become entremeted, to escalate in cost, and to generate their own approxive consultationity. And the larger the class of recipients, the greater the pressure for avoid or too horenois? Moresover, the State itself, concededly envious to evoid assuming the barden of educating children now in private and precedual schools, has a strong motivation for mercasing this aidas public school ends use and prombitum mercages " Inthis struction, where the underlying issue is the deeply. entotional one of Church-State relationships, the potenand for serious devisive political consequences needs no elaboration. And while the prospect of such divisiveness may not alone warmot the invalidation of state laws that otherwise survive the sareful scott, or required by

¹⁶The a fabric through value as all low form of generalization (Gynenic Contention) and the Gate states of a second structure (Lee Gate states) in Scheropping the Cate states that it was to defense to sign that the effects practice has been been to the state of a second structure of the first Amendment, ' for what taking is a "tracking structure and by a "arrest bologous" for the taken of the work of the work from Mathematical transformers, ' and ' 25. See the tensor of Keytennia report at 625-625. First to be reacted the process of the process of structure and the structure of structure and the structure of structure and the second structure of the process of structure and the structure of structure of the process of the process of structure was a structure of the process of structure was a structure of the process of structure was a structure of the process of structure was structure of the process of the proces of the process of th

¹⁵ As some 20% of the solid school possible area New York attends provide as I per third schools, the constration these supporting these programs is not integrable ().

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the decisions of this Coart, it is rectandy a "warning signal" but to be ignored. *Id.*, or 625.

Our examination of New York's aid provisions, in light of all relevant considerations, compete the judgment that each as written has a "primary effect that advances religion" and offends the constitutional probabilition against basis "responsing the establishment of religion." We therefore affine the three judge court's hukling as to §§ 1 and 2, and reverse as to §§ 3, 4, and 5.

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It is so ordered

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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 <u>aid</u> 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 sfallis a valid secular purpose - as is true here - the 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 \underline{does} with respect to each of the three types of aid.

The first provider

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 <u>direct tuition reimbursement</u> 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 <u>tax benefit</u>, 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 parparo kial to our society/by private education, including the parochial schools. Nor are we unaware of the fiscal problems which

conformet many private subools,

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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 public. With tax revenues - against the First Amendment prohibtion.

Separation of church from state has been/cherished feature of our constitutional system. And, As Mr. Justice And, As Mr. Justice Harlan noted: 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.

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NOTE: Where it is fromble, a splitbue (broducter will be preiented, or is bolay during in connection with this case, at the lime the optimum is backet the sylinbue constitutes to part of the uplation of the Court but has been prepared by the Scienter of Decisions for the four-splitbue of the reader. See Child Signer V. Jeffmul Auguste Co. 200 U.S. 321, 317.

SUPREME COURT OF THE UNITED STATES

Syllabar-

COMMUTTLE FOR PUBLIC EDUCATION & RELIGIOUS LIBERTY at al. 9. NYQUIST MY AL.

APPEAL FROM THE UNITED STATUS DISTRUCT COUNT FOR THE SOUTHERN DISTORT OF NEW YORK

No. 52-094 Argued April 16 (1973) Decided Jane 25, 19735.

Amendments to New York's Pilicettion and Thy Lows established three furthers, and programs for nonpublic elementary and seeorderwisehools. The first section provides for direct managegrams to "qualifying" nonpublic schools to be used for na outermane and repair" of the fines and equipment to choose the students "thenith, welfare and safety." A opening og selnod is a norspublis manprofit dependents or secondary school serving a high randomization of pupils train lower more facelies. The annual grain is \$30 per pupil, or \$40 if the tarchive are more price 25 years old, which any list exceed 50% of the average per-pagel even for equivalent services in the public schools. Regidation field is concluded that the State (here a primary responsibility to ensure the finality welfate and safety of children arrenting. nonpulzie schools", that the "list of errors at compublic relation to a low managed in dimpation of project mobilement and report programs, theorem its the beath, welfare and safety of destrubble school children?" in fine moonie subon areas, and that it , healthy, and safe sening suvaranmean" countributes into the stability of colour as grifterloads? Section 2 secold due to the constitution entering of in the pareness of chebitons sciending theorythic discountant of secondary schools. To quittify, the potential monoil toxable pressive goat he less that \$5,000 . The atmospheric religious end at a \$50 per grade

^{*}Tegether with Na 72-753 Acderson & Committee for Public Education & Heliopeus Inbetty et al., No. 725725, Nappast, Commerstance of Education of New York, et al., v. Committee for Public, Education & Religious Inducty et al., et al. No. 72 929, Charge et al., v. Committee for Public Education & Religious Infortu-et al., abor 90 append from the same matt.

0 COMMETTER FOR PUBLIC FDUCATION & NYQUIST

Syllabas:

school cheft and \$100 per bight of not steelent to long as these anaround do not exceed 2007 or second furnion prof. The legistaone fored that the right to select among alternative educational systems should be considered a situal time scenery, and that any shotp doding in computing child pagal, would apply on previou public school enrollinger and costs seriest-by jopparitizing capture solution for all address. Benericuting a deduction contained in the first perturn the findings conducted that top has stoned is dearly soular, neutral and not idealogued. The Onel program, emploring in §8.4. and it of the chillengest use is measured to give tax relef to points follow to quality for minast sense hursement. Each oligible taxpaser parent is omrided to distinct a stipulated stars for a his objected gross meaning for each child attending a computation school . The amount of the distinction is states to be mount of turner accords, poil at 1 document as the anatom of trachle about a metroses. These optimal areals prefaced for a series of legislative fuelings shall of the those accouspuriving the previous sectores. Alternational states states are dents, some 2000000 to \$100000, afterni acceptible schools, approvitantely NGC of which are currelyadia rol. While proto fix all the schools entitled to receive mental-game just repair grants have related to the Remon Catholic Creately and reach Catholic religious dontrian to some degree dimension one including 90der the remainder of the statuto methole a sub-carried number of other church albhand schools. The District Court held ther § I the contractor and region graphs, the \$2, the tration regulation four-could grants, we associable but this the normal tax provisions of \$5.3. A and 5 did not violate the Establishment (Janse - 16-60

1. The propriety of a logi-lattice's purpose they not iteracilize from further sentitive a logi that with a failed primery effect that advances thigher out that fost is excessive functions taken an angle. Dents 19(1):14-15.

2. The months are and repair providers of the New York statute view of the hybridistic error Charse because their investibile effect a to sub-triate and advance the religious reasons of scenarion schools. This section does not properly guarantee the secolarity of state and by littling the projectly guarantee the secolarity of non-periods of the littling the projectly guarantee the secolarity of non-periods at along to guarantee the solution by sourcess that the provide on along to guarantee the solution resulting to solve at the religions privates of century relations. Pp. 16-21 is The tection remains control of given directly to secturate schools would support to the K-tablishment Charse and the fact that they are dely error to the percurbation relations

COMMUTTEE FOR PUBLIC EDUCATION # NYQUIST in

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schools does not complet a contract result, as the effect of the add as unconstack bly the provide financial support has nongeninher seethence means above 195, 22–30

(a) The fact that the grant is given as reinforseeved for twitten already puck and that the recipient is not required to spire? On another received on education, does not alter the effect of the law -129/25/28

(b) The ergonant that the statute provides to statistical gravitative of n and by? since the tobical tobels to part is only 15% of the educational costs to contribute tobels, of the educational costs to contribute the line to the statistical to so due corrections than 15% of school time to be devoted to so due corrections is matched another containt of the argument reaction is to occurrentiate and report costs = 12.25.

(ii) The State must maintain an attitude of "metrolicy," testion to bounding," not "adulating," religion, and it counts for designing a program to promote the free exercise of religion erade the juniquipues of the Steahlo-branet Churse. Pp. 29-30.

4 The system of providing mental too benefat to potents of children attenting. New Yorks morphile is bads also yiel results fistally shared Charse between the theory reinduction reinduction and programs, it is not sufficiently reprinted to assure that a will not have the important-side effect of potentially the sectorian activities of religious scheds. This is Tax Contrologies, 397 C S 1964, distinguished in Pp. 39 35.

5. Because the challenged actions have the importaneshie effect of advancing relegion, it is not necessary to some let whether such field would yield an entanglement with religion. But it should be noted that, appen from our admonistrative entanglement of the State in particular religious programs, associated of the out invalved have carries grown potential for entanglement in the broader servers of commoning and expending political strift over and to religion. The 55-35,

350 F. Sopp. 655, all quest in your stal reserved in part.

Proved 1.1, definered the optimal of the Court, in which Donorise, Howney, Forward, Massity is and Brackstein 4.0, panel Brackie C. J. field an optimum endowing in Part II-A of the Court's optimum in which References 1.1, panel, and described from Parts II-B and II-C, in which Warrie and Registers 1.1, primed (Witter, J., field a describing optimion in these controls of which relating to Plats II-B and II-C) of the Court's optimum Register C. J. and References 1.4, panel (References of Reference). References 0.1, and References 1.4, panel (Reference), J. field a disconting optimum which Reference C. J. and Witter J. panel. $0047\,(11)$. This optical is a subject to thread matrice before publication. In the preliminary prior of the ζ pixed States Reports theorem are requested to excite the Hepperty of the colores. Supports the dust of the Lutice States, Washington, $\beta \in C(2000)$, of any hyperbolic of the formal errors, it order that eachers to any herrowise before the previous state gravity (first game to previous state).

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SUPREME COUBT OF THE UNITED STATES

Nos. 72 694 72 753, 72 791, and 72 929

(June 25, 1973)

MR. JUSTICE POWELE delivered the opicion of the Court.

This case raises a challenge under the Establishmeet Chuse 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 competitive elementary and secondary schools in that State. The rase involves an intertwining of second and constitutional issues of the greatest importance.

James Madison in his Memorial and Remonstrate Against Religious Assessments - advantshed that a "prudent jealonsy" for religious freedoms required that they never become "cutangled . . . to precodents," - His strongly held convections, complet with those of Thomas Jefferson and others among the Founders, are reflected in the first Clauses of the First Aradisiner t of the Bill of Rights, which state that "Congress shall make no law respecting an establishment of religion, or prohibiting the first exercise thereof." — Yet despite Madison's adminition and the "sweep of the absolute prohibition" of the Clauses ' this Nation's history has not been one of en-

³ Michaels after quicked dielaration is reprinted as an appendix to the direction equation of Michaelsee Ruthense and Michaelsee Detries in *Encoders Journal of Ecologies* 30(1), S. at 63(65, and 10 algorithm for a large box 50(3), 70(7)(2), (2070), respectively.

The previous of the Euclidean large large have under highing on the states directly disclosed Process Connected the Fourier-sphtracepting $t = g_{SC} + c_{SC} + M_{SC} here the Process Records (also <math>W = S = 165$ 0.004

While $v \in Toy.$ Consider operation of QNN, Mor. FULLER descript Between writing for the Court, we self that the purpose of the Charses twist to state an objective, non-reconstruction sources hand. Char $\mathbb{N}[1]$ he Court has struggled to find a neutral course detween the form Refigion Charses there of which the court in absolute maps, and ember of which, disspected to a lagical expresses would read to closh with the other of $[M_{12}, v]$ is solved.

³ Modework Monoroid and Remonstrance was the catalytic force or assuming the drawith of Vergen and an Assessment's [11] designed to exist at these in a provided tractices in the Classical religion. Such as 20 segment Survivo Freedow V Remonstrat Remonstrant, 230 [118], 4, 28, 30-44 (1997) (Derived generation).

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COMMUTTLE FOR PERLIC FUELSTION & NYQUIST 3

tirely santuard separation between Church and State. It has never been thought either possible or desirable to reaforme a regrae of total separation, and as a consequence takes arising accore these Clauses have presented some of the cost perplexing questions to come before this Court. Thuse cases have occasioned through and throughtful scholarship by several of this Court's most respected foreter bestives, carbinlag fustices Black. Frankforter Harlan, Jackson Rutledge, and Chief Justice Warren.

As a result of these decisions and opinions, it may nolarger be said that the Religion Ulauses are free of "entaughog" procedents. Neither, however, may it be said that defensions recemplorie "wall of separation" hetween Gaurch and State has become "as wearing as the famous scripentice wall" be designed for the University of Verginia. MicCollane v Board of Education, 333 U.S. 203, 232, 238 (1948) (Jackson, J., separate opinion). Indeed, the controlling constitutional standards have become family moted and the broad contours of our implify are now well defined. Our task, therefore is to assess New York's several forms of and in the light of principles already delineated."

Whe evolution of a this stage of the Court's history, of guiding principles of the larger the value of the Court's history does not, however, make out task togy of cases and . For it is explore from the number of the Court's and all hostors at construction and discrete a the leading cases applying the backbildment Clarge, that no theight from the afforded - fusical while there has been ecceral agreement upon the applicable principles with the backbild of the Court has recognized its caddling to the their the principles with the court of the Court has recognized its caddling to the court of the c

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In May 1972, the Goverson of New York signal into law several amendments to the State's Education and Tay Lows — The first five sections of these amendments established three district finaberal and programs for nonpublic elementary and secondary schools. Almost imanalytely after the signing of these measures a complaint was filed in the United States District Court for the Southern District of New York chillenging each of the three barns of aid as violative of the Estiblishment Clause. The plan offs were as a minisorporated association, knows as the Committee for Palific Education and Religious Enterry (PEARL) and several individuals who were residents and taxpayers to New York, some of whom and enfldeer attenting paidly schools. Natural as de-Je sharts were the State Commissioner of Education, the Comptralier and the Canonissioner of Taxation and Finance - Motoms to intervote on beleff of defe, dants wave granted to a group of purents with children carolled in nonpublic schools, and to the Manority Leader and President process of the New York State Science," By conjent of the parties in theorytake court was tobactual parsuals) to 28 17 8 (C) 33 (228) and (2283, and the ease was detailed without an evidentiary hearing. Because the questions before the District Court were resolved on the basis of the pleadings, that court's decision furned on the constitutionality of each processor on its face,

The first section of the challenged enactment isotried "Health and Safety Grants for Nunpuble School Chil-

Can be observed with the model is not without bonds out into constatistic is "Worned undertands and contains barrier depending on all the arronaus agrees of a periodial independent $\hat{\mu}^{(1)} = \hat{\mu}^{(2)}$ or 623.

¹ The function was ground in form of Mr. Dath W. Boydges, I not us refinement at Dissinder 2072 to succession Mr. Warnett M. Anderson, was substituted in its place.

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dree,"11 provides for direct noney grants from the State to "qualifying" nonpublic schools to be used for the "maintenance and repair of . . , school facilities and communent to ensure the health, welfare and safety of corolled pupils 11. A "qualifying sebool is any nonpublic, comprofit elementary or secondary school which "has been designated during the Jummeriately preceding] year as serving a high concentration of pupils from lowincome families for ourposes of Title IV of the Federal Higher Education Act of 1965 (20/10/8) C [§425).77 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 proceeding year, and its grant may not exceed the total of such expenses. The Commissioner is sistrequired 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

"Matcheonice and repair" is defined by the statule to include "the provision of heat light, water, vontilation and sanitary farilities, cleaning guaitorial and custodial services; snow tenoval, meessary upkeep and renovation of buildings, grounds and equipment: fire and accident protection; and such other items as the commissioner reay derm necessary to ensure the health, weifare and safety of enrolled pupils" "This section is prefaced by a series of legislative findings which should held; on the State's purpose in enacting the law. These findings con-

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14, \$350(2),

³ N. Y. Lows 1972, e. 414, §4, amending N. Y. Eluc, Low, Att. 12, §5 549-554 (McKupacy Supp. 1972).

^{2.67. \$ 550 (57)}

¹⁰ *Ed.*, § 550 (6).

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clude that the State "bas a primary responsibility to easure the health, welfare and safety of children attending . . . nonpublic schools": that the "fiscal crisis in nonpublic education . . . has caused a diminution of proper nannetacase and repair programs threatining the health, welfare and valety of norpublic school childree" in low-income urban areas; and that "a healthy and safe school environment" contributes "to the stability of orban neighborhoods." For these reasons the statute declares that "the state has the right to make grants for minetensine and repair expenditures which are clearly secular, neutral and non-adeological to nature."

through 5- is a single package captioned the "Elementtary and Secondary Education Opportunity Program," It is composed, associably, of two parts, a fuition grant programmed a tax brocht program. Sochos 2 establishes a librated plan providing furtion remainsements to parents of children attending elementary or secondary compublic schools . To qualify under this section the parent must have as anothel taxable increme of less than \$5,000. The atomat of read-unsement is **insited to \$50**. for each grade solue) whild and \$100 for each high school child. Each parent is required, however, to submit to the Commissioner of Education a verified statement contaioing a recepted furtion bill, and the amount of state reinformerment may not exceed 50% of that ligare - No restrictions are imposed on the use of the funds by the reimbursed parents.

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

^{1.10 \$5.00}

 $^{^{+1}}$ N, Y (Lows 1972) \approx 113 § 2, an adapt N, Y (Educ, Low, Act 12-A, §§ 559-568 (M. Knoney Super 1972).

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our pluralistic society " the findings state that a "healthy compositive 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 duanished or even demot to children of lower-meaning families, whose parents, of all groups, have the least options as determining where their children are to be educated." " "Turning to the public schools, the findings state that any "precipitous declate in the number of nonpublic school populs wonthl cause a massive increase in public school coroliment and costs." an increase that would haggeavate at already serious fiscal crisis in public education" and woold "seriously jeopardize the quality education for all children," 22 Based on these premises, the statute asserts the State's right to relieve the financial burden of parents who send their children to compublic schools through this fuition reinfoursement program. Repeating the declaration contained in ± 1 , the fixdings combude that "such assistance is clearly secular, neutral and nondeological." "

The remainder of the "Elementary and Secondary Education Opportunity Program." cuntained in §§ 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 reimbarsement. 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 paul at least \$50 in nonpublic school

^{29.14., § 530 (1).}

^{24.78 . \$ 349.421.}

²⁵ Id., \$ 359 42 C

²⁹ *Id., §* 559 (4).

¹³ N. Y. Lews 1972, v. 414, §§ 3, 4, and 5, one-toking N. Y. Tax Liw, §§ 612 (c), 612 (r), (McKinney Supp. 1972).

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builtion. 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, to deduction is allowed." The abound of the deduction is not dependent upon how much the taxpayer actually paid for appropriate school tuition, and is given in addition to any disfuctions to which the taxpayer may he entitled for other religious or charitable contributions. As indicated in the momoranium 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 catefully calculated in advance." Thus, comparable tax benefits pick up at approximately the point at which untion reindursement benefits leave off.

While the scheme of the conclusion indicates that the purposes underlying the proconligation of the future reimbursement program should be regarded as pertinent as well to these tax law sections, § 3 does contain an additional series of legislative findings. These findings may

¹⁴ Section 6	i contanos	1 he	following	table:

If New York adjacted	The smoont allowable		
gross income is:	for each 46 pendent is .		
Less than \$9.000	\$1,000		
9,000-10,469	\$30		
31,000年12,909	700		
05.000-14.999	550		
(5.000+10.990)	400		
17.000-18.999	250		
15.000 (20,999)	15/1		
21,000 (22,999	125		
23 000-24,909	[00]		
25,000 and over	- 0		
Id. \$012 (p. 1).			

Firstinge 19 (comp. 9)

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by summarized as follows: (2) coefficients to religious, charitable and educational distributions are already dedoctible from gross income: (in anomable calacational isstitutions are accorded tay exempt status; (iii) such institutions provide relications for stablace attending them and also serve to relieve the public school systems of the burdler of providing for their education; and, therefore, (iv) the "legislature — grain and determines that similar modifications . — should also be provided to parents for turbica paid to according the provided to parents for turbica paid to according the educatory and secondary schools on behalf of their dependences."

Although on money was developed in this case, a number of particlect generalizations may be made about the nonpublic schools which would bracfit from these enactments. The District Court relying on findings in a similar case correctly decided by the same court – adopted a profile of these sectaman, compuble schools similar to the one suggested in the plantiffs' complaint. Qualify-

¹ The following completeness over submitted by Sensitive Readers which is shown replaced as intervenier by his an essent, Senaler Anderson:

	Estimated	Net Correfit	to Family
If Adjusted Gross	1 lupe	Two	Three
Henrie i-	child	a lald regi	of more
les- if an § 9,000	± 50.00	5 (CH) (#)	\$150.00
§ 10,000 10,9200	42,50	85.00	127,50
11,000-12,909	42.00	\$4,001	126.00
19.000±3.0,009	35.59	72,00	105.50
15,000 - 10,990	32.60	64.08	96400
17,006-18,920	22.50	45.00	67 50
19,000-20,050	15,09	SAF10F	45,00
21,0.0442,090	13.75	27.50	47 25
23,000-24,009	13.00	24.00	26.00
250K0 and over	û	a	D
$-\sigma X_{\rm e} X_{\rm e}$ this find $E GP$	Contractive Neuron	State 157.54	The observations

[5] N. Y. Taxallow § 012 [94] (MelSine Supp. 1972) the origing ing metrol.

¹¹ Consider for Public Relation & Relations Information Learning 342 F. Support 439, 140-441 (pdf2NA) 10520, arXiv prost are see.

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

"(a) impose religious costrictions on admissions; (b) require attendance of papils at religious activitics; (c) require obvious 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 religions emission of the church sponsoring it; (f) have as a substantial purpose the inculation of religious values; (g) impose religious restrictions on faculty appointments; and (h) impose religious restrictions or what or how the faculty may teach." 360 F. Supp., at 063

Of course, the characteristics of individual schools may vary widely from that profile. Some 700,000 to \$00,000 students, constituting almost 20% of the State's entire elementary and secondary school population, attend over 2,000 compublic schools, approximately \$5% of which are churrin affiliated. And while "af, or practically all" of the 280 schools d'entitled to receive 'mantenance and repart" grants there related to the Roman Catholic Church and teach Catholic religious doctring to some degree," *et al.* at 661, testimions qualifying order the remainder of the statute include a substantial rapider of Jewish, Lutheran Episcopal Seventh Day Adventist, and other church-athliated schools."

¹³ As inducted up the District Court's open on at his been estimated that 250 seconds would obtainly for such grants. The constant structure for determining eligibility are set over a 20 U. S. C. § 425 yild the court of test α , whether the school is one. In which there is a bigh constant of structure from low-means families."

 ¹⁰ In the full of 1998, G error error 2008 norphilas schools in New York State (1.415) Raman Cotholia, 163 Jewish, 50 Littlerian, 19 Epi-sepal. (F. Seventh, Day Adventist, 18 adver Gorreboldinnes); 299 without religious all Lonin (N. Y. State Edui, Dopi, Financy, Supports-Norphilas Schools 4 (1969).

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COMMUTTLE FOR PUBLIC EDUCATION & NYQUIST (1)

Plaintiffs argued below that because of the substantually robgious character of the intended beneficiaries. each of the State's three enactments offended the Estab-Schment Chase. The District Court in an opinion carefully canvassing this Court's record procedents, held (0) uninously that $\xi \in \{maintenance and regain grants\}$ and \$2 (Gaition 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 at enjoyned pertomography 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." The defendant state officials have appealed so much of the court's derision as invalidates the first and second portions of the 1972 law?" the intervenor Majority Leader and President pro-tem of the Senate also appeals from those aspects of the lower coart's opinion," and the intervening parents of nonpublic school children have appealed only from the decision as to § 2.5. 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 somerely before us. We affirm

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¹⁹ Nu. 7250.00, Control for Public Education and Religious Liberty v. Nucleust. (hep-ph/99007), pp. (hep-ph/98007).

²⁵ Nuc. 73-291, Nucleus V. Committee for Public Education and Inducate Liberty (hereinsfeer happelless).

¹⁰ Nucl. 72-753 Anneson v. Consultier for Public Education and Religious Inherty (Internality Ages)[ev] or Casteremori's.

C No. 72-929. Cherry v. Committee for Public Education and Relighters. Lifetty. (hereinster: "appelled", et "intervenor").

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the District Court insolar as it struck down \$\$1 and 2 and reverse its determination regarding \$\$3, 4 and 5.

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The Eistory of the Establishment Clause has been reconcted frequently and newl not be repeated here. See Etrisson v. Board of Education, 330 U.S. 1 (Black, J., opinion of the Coart), 28 (Ruffedge, J., dissenting) (1947); 5 McCollum v. Board of Education, 333 U.S.

¹² Virginials experience exercises of longth to the majorite and dissenting opinions in *Electron*, constitutes one of the greatest chapters in the history of this Country's adoption of the essentially reconditionary ration of separation between Courds and State. During the Volumet Era of Lectorite has 1500s, the Asgreac Citarch approach fittal at Lector the late 1500s, the Asgreac Citarch approach fittal station is the established church of Virginia. But in 1576 assisted by the per-open effects of Repuerts. Producerians and Letherans, the Virginia Convertion approved a provision for its fitter rote-fituation's Bill of Region ending for the free exercise of religion. The growston, drafted for George Mason, and substantially suicided by dones Madison, stated of the religion is and the manner of discharging its conduct and the religion is and conviented, and by force or violation, and therefore, all mean are regularly ended to the tree exercise of religion around up to the dutarially statement of the tree exercise of religion around the during and the transment of the tree exercise of religion arounding to the dutary of constraints and the tree exercises of religion arounding to the du-

But the Virginia Bill of Rights extrained to proliphtion against the Establishment of Religion, and the text on the owner were marked by debate over the relationship between thurshing state In 1780, a bill sponsored principally by Potzick Henry, entitled A bili Establishing a Provision for Te cherk of the Christian Religion, was brought before the Virgin. Assentation. The Bill, reprinted in Gill se en Appendix to Mr. Justice Builedge's discouring opinion (it Economy Report of Education super- at 72-74, required all personto provide annual tax. For the support is: the Christian religion? in arder that the reveloping relaxing neight he proceeded. Each raxpayer was getterized to det the Bull to describe which charries he district to previou blo share of the tax. The 101 was not voted on during the 1784 session and prior to the converting of the 1785 sussion Madron (stand day Mennaid and Remonstration against Brighols Assessments, onlying in 15 minimusl paragraphs the reasons for its apposition to the Assessments Bill. The document

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203. 212 (1948) (Frankfurter, J., separate opinion): McGowan v. Margland, 366 U. S. 420 (1961); Engel v. Vitale, 370 U. S. 421 (1962). It is enough to note that it is now fituly 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. Kurtzann, 403 U. S. 602–612 (1971), and even though it does not ad one religion more than another but merely benefits all religions alike. Everyon v. Bourd of Education, supro, at 15 – It is equally well established, however, that not every law that confers an "induced," "remote," or "incidental" benefit upon religious institutions

Both Madron's Käl of Rights provision on the free exercise of religion and Jefferson's Bill for Establishing Religions Freedom have remained in the Virgion Constitution machined in substance throughout that State's before Ser Ve Const. are 1, § 96 m which the two galaxities have been brought together in a single provision. For encoprehensive discussions of the pertitent Vorginia bistory, see S. Colds. The Rescond Religions Laborty in America 74-145, 400-499 (Reprinted 1970); James The Stringle for Religions Liberty in Virginia (1960). The Rescond Religions The Netwools, 1780-1785, 343-355 (1948).

was widely constants) and inspired such averaginetizing orthogenion to the Hill that it deal aloring the ensuing session without reaching a proto - Mathson's Memorial and Remonstration, recognized riskly, as one of the extensions of the First Anaradusen's gastance of gaserone at renerality reward tel gion, also provided the necessary formdetails for the numericate consideration and adoption of Thomas deflerson's Del fait Establishing Religious Fromtion, which mutsured Virginia's first acknowledgement of the principle of tartal separation of Chutch and State. The enveloping provipie, as stand in the Bill, a that the man shall be compelled to frequent of support any religious worship place or measury whensiever (1), 2°. In defletsop's perspective, so vital was due twoll of separatour' to the properties of democratic destinations that a way the Hall, along with his mathem-hap of the Declaration of Delegandonce and the founding of the University of Virginia, that he washed to have inseglesitan his routowase. Report of the Contrain on Constitutional. Revision. The Constantion of Virgense 100-101 (1969).

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is, for that reason above, constitutionally invalid. Id.; McGowan V. Maryland, supra, at 450; Walz V. Tar-Commun. 397 U. S. 664, 671-672, 674-675 (1970). What our cases require is careful examination of any law chalbinged 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-Commun. supra, at 668; Lemon V. Kurizman, 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 religioneducation precedents, two general categories of cases may be identified: those dealing with religious activities within the public schools," and those involving public aid in varying forms to secturian educational institutions." While the New York legislation places this case in the latter category, its resolution requires consideration not only of the several ani-to-sectament-education cases but also of our other education precedents and of several important monitoration cases. For the now well defined three-part test that has emerged from our decisions

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²⁹ McCollow v. Bound of Educ. super ("relevant (00)" (rom public education for religious education). Zotech v. Chasse, 313 U. S. 306 (1952) (also a "release time" case). Empt v. Vitale, 370 U. S. 421 (1962) (prover reading in public schools). School Dist of Abington Theoretic, v. School-p., 374 W. S. 203 (1963) (1964) (abing the schools). Expressive Actionary, 893 U. S. 97 (1968) (1994) evolutionary Journation on public school study).

Excession & Robot of Edge super (los (zon-poziation)) Robot of Edge v. Allen, 392 U.S. 236 (1968) (regulardes), Lemon v. Kuztzmail, super (teachers) solaries, textbooks, 050 (nervous) (nervoide)); Earling v. DeCenno, 403 U.S. 602 (1971) (nordners) solaries); Tilton v. Richardson, 403 1, S. 672 (1971) (southers) solaries);

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is a product of considerations derived from the full sweep of the Establishment Ulause cases. Takes together these derisions dictate that to pass muster under the Establishment Clause the low in question, first, must reflect a clearly secular legislative purpose, e. g., Epperion 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 Distriet of Abington Township v. Schempp, 374 U. S. 203 (1963), and, third, neust avoid excessive government entanglement with religion, e. g., Walz v. Tax Comm'n, supra. See Leacon 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 in 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 do 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 heating overbardened public school system that might

In discussing the applic tion of these "tests." Mix Cernor disrule: Descent acted in *Theory v. Richardson*, super that "there is to single outstational enhance that can be used to recussive abprocess degree" to which any one of them is applicable to the space action under sendery. Rather, these resistor criteria should be "volwed as good-times" within which to consider "the membric criteria developed over many years and applying to a wide range of governmental action rhallenged as vederage of the Estal Sylucial Clause." *Id.*, at 677-678.

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soffer in the event that a significant percentage of children presently attending non-public schools should abandon those schools in favor of the public schools.

But the propriety of a legislature's purposes may not immunate from forther 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.

The "maintenance and repair" provisions of §1 authorase direct payments to normulate 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 our do we thank 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 rost of recovering classrooms in which religion is taught, of the cost of heating and lighting those same facilities. Absent appropriate restrictions on expendiforce for these and similar purposes, it simply cannot be denied that this section has a printary effect that advalues religion in that it substitues directly the religious activities of sectaman elementary and secondary schools,

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The state officials unvertheless argue that these expenditures for "maintenance and repair" are similar to other financial expenditures approved by this Court. Primarily they rely on Eperson 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 undenjable benefits upon private, sectarian schools. But a close examination of those cases illuminates their distinguishing characteristics - In Euroson, 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 imperiousable state and 330 U.S. at 16. In Allon, decided some 20 years later, the Court upheld a New York law authorizing the provision of scentar 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 electiv secolor purposes by pablie and nonpublic institutions of higher learning.

These cases simply recognize that sectarian schools perform secular, circultive 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 woutral, nonideological aid, assisting only the secular functions of securian schools, served indirectly and incidentally to promore the migicus function by rendering it more Ekely that children would attend sectarian schools and by freeing the hudgets of those schools for use in other moscendar areas. But an indirect

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and iscidental effect beneficial to religious institutions has never been thought a sufficient defect to warrant the invalidation of a state law. In Millionan v. Maryland, supra, Sumlay Closing Laws were sustained even though one of their tooleneable effects was to render it somewhat more likely that citizens would respect religious institutions and even attend religious services. Also, in Wolz v. Tax Commission, supra, property tax estimptions for church property were hold out violative of the Establishment Clause despite the fact that such even priors relieved churches of a financial burden.

Tilton draws the line most clearly. While a bare majurity was there persuaded, for the reasons stated in the plurality opinion and in MR. JUSTICE WITTE's concurrence, that carefully innoted construction grants to colleges and universities would be sustained, the Court was unsubnous in its rejection of one chuse of the folleral 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 1/ S., at 683. But breases 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 pharabity opinion emphasized that "[1]imiting the prohibition for religious use of the structure to 20 years obviously opens the facility to use for any purpose at the ord of that period." Ibid. And in that event, "the original federal grant will as part have the effect of advancing religion." Hold, See also id., at 692 (DOUGLAS, J., dissenting), 659–664 (BRENNAN, J., dissouting), 665 n. I (WHITE, J., concurring in the judgment). If tax-raised funds may not be granted to in-

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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 fortuni they may not be distributed to elementary and secondary sectarian schools " for the maintenance and repair of facilities without any hunitations on their use. If the State may not erect buildings in which religious activities are to take place, it may not maintain such huildings 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 abount expanded 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 secolar facility upkeep in secturian schools. The shortest answer to this argument is that the statute itself allows, as a ceiling, grants satisfying the entire "amount of expenditores for maintenance and repair of such

"These processes because so communificer us to shock the freedomlowing encloseds into a feeding of abhormore. The imposition of times to pay numbers' subtres and to build and *countryin* churches and church property around their indepration. It was abese feelings which found expression on the First Amendment. 330 U.S., at 11 (employed subplied).

³² The plurality in *Tribut* was excelled to point out that there are "segnificant differences between the relations asymptets of shurehrelated institutions of higher learning and purochast elementary and zerondary schools," *Id.*, at 685. See Hant v. McNair, port

¹⁹ Our Exclusioneral Choice precisions have recognized the special relevance in this area of Mr. Justice Holmes' continent that ' a gage of history is worth a volume of logic." See Hall v. Tax Communical, rappe, at 677–676 (ching New York Trait Co. v. Euner, 256 U.S. 345, 349 (1921)). In Electron, Mr. Justice Eleck surveyed the Listery of state a volument in and support of, teligion during the pre-Revolutionary period and concluded.

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school" providing only that it is neither more than \$30 or \$40 per pupil nor more than 50% of the comparable public school 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. DeCenso, 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 success in segregating "their relignous behefs 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-

²⁰ The permanent section reads as follows:

[&]quot;In order to meet proper be 55, welfore and safety standards in qualifying whools for the benefit of the papils enrolled therein, there shall be apportunied health, we have and safery grants by the commissioner to cards qualifying school for the school years beguinning on and after July first, inneteen landred seventy-one, an pression equal to the product of thirty dollars reactiplied by the sverage darb attendance of pupils receiving instructure in such school, to be applied for maste of maniferance and repair. Such upperconnect shall be costeased by the dollars multiplied by the average duity attendence of papels receiving instruction in a school hulding constructed prior to practices hundred forty-severy. In no event shall the per pupil natural allongance computed poder this section exceed fifty per contain of the average per paper out of equivalerst mountenance and repair in the public schools of the state at a Mate-while basis, as determined by the communistance, and in naevent that the apportionment to a qualifying school extend the animum of expenditures for ambitenance and repair of such school as reported pursuant to writion firs hundred fifty-two of this article." N. Y. Line, Law, Mt. 12, § 551 (MelCanny Supp. 1972) (compliasis) արթիզի,

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tion that secular trachers under religious discipline can avoid conflicts. The State must be certain, given the Religion Chauses, 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 secuiar teacher's imbilities 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 bitle imagination to perceive the extent to which States might openly subsidize particular schools ander such a loose standard of secular. See also Talton v. Ruhardson, supra."

What we have said demonstrates that New York's maintenance and repair provisions violate the Establishment Cause because their effect, inevitably, is to sub-sidize and advance the religious mission of sectarian

²⁴ In Tuiton federal continuation groups were learned to paying 50°C of the cost of creating any semilar facility. In striking from the fact the 20-year innearon, the Court was concerned less gay federally-franced facility be used for religion paymess at any fractility was definity not concerned only that at least 50% of the facility, or 50% of the facility, be devoted to secular artivities. Had this been the test there can be lette doubt that the 20-year restruction would have been altograte.

¹² El-collecte in the optition, the Court couplestized the meressity for the States of Rhode Bland and Pennsylvania to assure, through coreful regulation, the sevalation of every grants.

[&]quot;The ave legislatures — have also receiptized that characherized elementary and secondary schools have a significant relicents inssion and that a substantial partient of their activities is religiously ariented. They have therefore sought to create stationary restrictions designed to guarantice the soparation between secular and religious elementarial functions of 4 to create the State fractical and religious elementarial functions of 4 to create the State fractical and religious elementarial functions of 4 to create the State fractical and supports only the former. All those provisions are presented taken in randid reception that takes programs approached even if they did not unitable upon, the forbidden areas under the Religion Charges." 403-15 S. or 403

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schools. We have no occasion, therefore, to consider the further question whether those provisions as presently written would also fail to survive scruttiny under the administrative entangloment aspect of the three-part test because assuring the secular use of all funds requires to intrusive and continuing a relationship between Church and State, Lemon v. Kurtzman, supra.

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New York's tuition reinforcement program also fails the "effect" test, for much the same reasons that governits maintenance and repair grants. The state program is designed to allow direct, intrestricted grants of \$60 to \$100 per child (but no more than 50% of tuition actually paid) as reinforcement 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 conceiledly sectarian in orientation.

There can be no question that these grants could not, consistently with the Establishment Clause, he 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 scendar, 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 tay in any amount, large or small, can be levied to support any religions activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." 330 U, S_n at 16.

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The controlling question here, then, is whether the fact that the grants are delivered to corrects rather than schools is of such significance as to compella contrary result. The State and intervenor-appellees rely on Everson and Affon for their claim that grants to parents, unlike grants to institutions, respect the "wall of separation" required by the Constitution." It is true that in these cases the Court upheld laws that provided benefits to children attending religious schools and to their parents; As noted above, in Keyroov parents were reacharsed for hus faces paid to send children to parochial schools, and in Allow textbooks were longed directly to the children. But those decisions make clear that, far from providing a per se invanity from examination of the substance of the State's program, the fact that and is disjoursed to parents rather than to the schools is only one among many factors to be considered.

In Electron, the Court found the bas face program analogous to the provision of services such as police and five protection sewage disposal, highways, and salewalks for parechial schools. 330 U.S., at 17-18 – Such services.

[&]quot; In a Mitabal to Revision and Admin Time Citation Arstack of Jus descention operation in the one Quick Beam y, Letting, 545 U, 8, 56 (1998). for the propertion can igovernment and to ashardness generally should up an ensurely different forting from the tool of to reagang institutions," Post, or 4. Quark Real, however, defined involve the expenditure of tax-raised boileys to support sectorian schools. The true's that were induced by the behavior to provide secturing education were relative end trast funds was le the Court emphasized becauged to the field on as performit for the ression of Influm Junfand other pights of Monte 80-81. There there manay and the Court hold that for Cooptres to have prolatered them from expending their work to be a computer a rought respectively would have exact mind a probabilitation of the free exercise of religion (151 or 82). The present con it quite unlike Quick Bear on a that ease did not monitor the distribution of performances, directly or indirectly, the company-astroperoles whereas their children to reignors schools

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provided in common to all citizens, are "so separate and so indisputably marked off from the religious function," id, at 15, 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 or that case there was no indication that textbooks would be provided for anything other than purely socilar courses. "Of course hooks are different from bases. Must bas rates have to 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 evulptore, we eachout assume that school authorities ... are unable to distraguish between secular and religious books or that they will not honestly discharge their duties under the law." 392 D. S., at 244-245.55

Because of the parameter is which we have resolved the function grantissue, we used for decide obether the significantly religious character-

^{. *} Allow and Economy differ from the present more in a second important respect. In both cases the class of beneficiaries included all school children, these in public as well as these in private schools. Sec also Tilton v. Rechardson, supra, in which federal and was many available to all next through of higher featuring, and it for r. The Conreasons again in which the exemptions were accorded to all educational and charitable nopprate matrix mass. We do not gree with the suggestion to the dissert of Tory Chage dissing, they ration grants are an analogous enders or to gravide comparable benefits to of parents of sensil clashing schedure enrolled in public or nargabar schools. Post, at 5-6. The grants to parents of provide school children are given us addaton to right that they have to send their cloldren to public schools. Soundly at state expense?. And in any ment the argument provide the much for it would also procede a basis for approval g through brianal grants the consulete stellard patient of all relignors sensoria on the granted that such action is menosity of the State is fully to operate the postop of patents wherefer such echods—a result wholly of variance with the Establishment Charles,

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The tuition grants here are subject to no such restrictions. There has been no end-avor "to guarantee the separation between secular and religious educational functions and to cosure that State funneral 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 impority of which are sectarian. By rembursing parents for a portion of their fution 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 perpendate 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 hospitalic, sectamin institutions "

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

"[i]I requires no prophet to foresce that on the argument used to support this law others could be ap-

Appellors, focusing on the term principal of principal of principal distributions for an interval principal distribution of the second principal the three-part test, c(g). Leave v, Kietleman, angen, at (12, have argued that the Coart mast decide in this case whether the "princip" effect of New York's three grant program is to subshift the "princip" of the total chart there beginning contain abjectives. More Exercise the Weiter's the second principal distribution of the Coart mast decide in this case whether the "princip" effect of New York's three legitimeter conduct abjectives. More Exercise Weiter's case whether the "princip" of the total distribution of the principal distribution of the Coart terms of the "informatic program." We ment the Coart terms fully a set of the "informatic program." We ment the total distribution of the terms of the "princip" of the terms of the "principal distribution of the terms of terms of the terms of terms of the terms of the terms of the terms of the terms of terms of terms of the terms of t

of the statute's beneficiance might differentiate the present case (zon a case uncolving sense form of public constance (e.g., scholardrips) made available generally without regard to the sentationmassectation, or public-momphilic nature of the usymptotic matefitted. See Wolman v. *Every* 342 F. Supp 359 412-413 (SD Ohin 1972), aEd, 409 H. S 808 (1972). Thus, our decision roday does not complete as a public layer contended the conclusion data the educational as quarks have contended the conclusion data the educational as quarks provisions of the (G, 1) Hall' 35 U. S. C. § 1651, independently advance religion in visionics of the Establishrism Castor. See also to 32, signal

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held providing for state or federal government funds to buy property on which to erect religious school buildings or to creet the buildings themselves, to pay

It may asset in providing on historical perspective to recall that the organism here is may a new one. The creanble to Patrick Henry's 160 file, blishing a Processon for Teachers of the Christian Helgies achief would have required Virginians to pay cases to support reingers conducts and which because the feed point of Medison's Memory and Remonstration associal 38 support contained the following forming of actual wirehows:

"The general diffusion of Christian Knowledge holds a natural tendency to enserve the generate of ment rests of their views, and greeces of by

the same neighboried judgments are other possible or more-saryly Our cases singly do not support the nation that a law found to have a "princate" effect to promote some legaturate end under the State's pairs power is hoppoper transferriter examination to pererhan whether a also has the dates and immediate effect of advanting religion. In McCourses, Marghand, supra, Souday Closing Laws were upheld not because their offset way. First, to promote the logitimate magnetic to a universal day of rest and reproduct wellowly. sexual value to assist beligions attension. Instead, approval, flowed from the finding based open a close examination of the history of such have that they lead only a "remate and maidental" effect outvantageous to religious accutations. Id. at 450 Secular Gallopher y. Crown Koslaw Super Market, 366 U. S. 447, 630 (1951); Two Guye Janua Rueman Mentonia, Inc. v. McCondeg. 366, U.S. 582. 398 (1964). Likewise, in Schenger the school authorates argued then Risheweding and other religious mentations in public schools served principle, avalar purposes, areholding the promotion of more values, the constantion to the nuterial trends of the trans, and the perpendition of correlations and the teaching of brenznore 1. 474 to 8. in 23. Yes, without dos relating these ends still without determining whether they took procedence over the direct religners becally the Court held such two stress to subject ble with the Extended enternal Chaose (See also 374 to S. at 278-78) (Buox-", concorrange." Any pre-onling question about the contexity NAN. al the effect" entenant error resolved by On Contrib decision in Totale, in which the Court for all the mess passibility that a federallylinensed structure taight benefits for recignous particles, 20 years benefit was constructionally involved blocks on a the group night for rest have the effect of advatiency reagion = 404/15/82 as 683 (emphasiz an shelf.

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the subaries of the religious school teachers, and finally to have the sectarian religious groups rease to ady an voluntary contributions of members of their sects while wanting for the government to pick up all the hills for the religious schools," – 322 U.S., at 253

The fears regarding religious hubbings and teligious teachers have not none to pass. Tillion v. Richardson, super, Learns v. Kartzman, super, and insofar as futtion grants constitute a means of "pickking" up . . , the bills for the religious schools " neither has his greatest fear ingterialized. But the togenious plans for channeling state aid to sertain schools that periodically reach this Court abpodently support the wisdom of Justice Black's prophene.

Although we think it clear, for the reasons above stated, that New York's ruition grant program faces no better under the "effect" test than its maintenance and repair program, in view of the uncelty of the question we will address briefly the subsidiary arguments mode by the state officials and intervences to its defense

First it has been suggested that it is of controlling significance that New York's program calls for remabarrament for turtion siready paid rather than for direct contributions which are merely moted through the parcets to the schools, in advance of or in lieu of payment by the parents. The parent is not a more combit we are tobil but is absolutely free to speed the namey he receives in any member in wishes. There is no element of corrected attached to the reindurschiest and ne assign-

prove of scorety z_{i+1} = Encode z_i Based of Education, 356 U, S , at 72 (S represented Appendix in descer of Cardedge J.).

Such sector objectives, no meter have desirable and graspective whether gadges toucht pressess sufficiently sonsitive calibers to aspectain wheth in the south officers are weight the sector caliberships can not serve tasky are more than they avoid 200 years are to pastify such a single and substantial advance applied of polyng.

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ance that the money will eventually end up in the backs of religions schools. The absence of law element of correbot however, is irrelevant to questions arising under the Establishment Clause. In School District of Abington Tranship v. Schempt, supra, it was contended that Bible relations is public schools did not violate the Establishment Clause because particulation is such exercises was not correct. The Corat rejected that argument, noting that while proof of encreton 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. Min Juscier Backwards concurring views reiterated the Coart's reactional.

Thus the short, and for the subfield, answer is that the availability of excitcal or excitation 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 relignous situs, $z = bL_c$ at 288.

A similar imputy governs here of the grants are offered as an incentive to parents to send their children to sectarian schools by making parentriced cash payments to them, the Establishment Clause is violated whether or not the actual dollars given eventually find their way into the sectation institutions.¹¹ Whether the grant is labeled a reinforcement a reward or a subsoly, its substantive impact is still the same. In sum, we agree with the combision of the District Court that "[w]hether he gets it during the current year or as reinforcement for the past year, is of no constitutional importance.²¹ – 350 F. Supp. 43–663.

[&]quot;The torus of add avoided as *Freezone*, *Earling v. Dellawo*, and Lawon were all given as "reactionservert" yet not concline in any of these cases suggests that this factor was of any constitutional significance.

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Second, the Majority Leader and President pro-temof the State Seaate argues that it is significant here that the tration retrahensement grants pay only a particle of the taition bill, and an even studiler portion of the religious school's total expenses. The New York statute limits reimbursciout to 50% of any parent's actual outlay. Additionally, intervenor extrontes 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," ^{an}. On the basis of these two statistics, appelled reasons that the "maximum unition reindorsement by the State is thus only 15% of the educational costs in the compublic schools," 22 And, "since compulsory inflication laws of the State, by meessity 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 (1). It should readily be seen that this is simply another variant of the argument we have rejected as to maintenance and repair costs m/c, at 19-21, and it ion fate to better here. Obviously, if accepted, this argument would provide the foundation for massive, direct subsidization of sectanan elementary and secondary schools." Out esses, however, have long since forcelosed the potion that more statistical assurances will suffice to sail between the Sovila and Charybdis of "effect" and "entanglement."

Finally, the State argues that its program of tuition gravits should survive scruting because it is designed to

¹⁹ Brief of Appello, Warren M. Amierson, at 25

 $[\]in$ Hod.

Hid.

⁴⁹ Note of the three discreting opioiots filed to be garperts to selective any such statistical assumations of secolarity phylocol nuclei the returned of these opicions in its dataset to persons any logtestanes on the personal of sizes and their world be approved in the form of return grants.

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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 joligious environment "is diminished or even deute l." It is true, of course, that this Court has long recognized and maintained the right to choose coupable over public education. Pierce v. Socherg of Sisters, 268 U.S. 510 (1925). He is also true that a state law interfering with a naront's right to have his child optimated in a scenarian school would run afoul of the Free Exercise Chause - But this Court repeatedly has recognized that tension mevitably exists between the Free Excreme and the Establishment Clauses, v, y, Everson v. Board of Education, supra, Walz v. Tax Commission, sayra, and that it may often not be possible to promore the former without offerding the latter. As a result of this tension may cases require the State to maintate an att-task of "controbty," a either "advancing" nor "inhibiting" religionary in its attempt to enhance the opportunities of the point to choose between public and nonpublic education, the State lies taken a step which cap only be regarded as ene "advancang" religion. However great our sympathy, Everson v. Board of Education, store, at 18 Chickson J., dissenting), for the bourdens experienced by three who trust pay public school taxes. at the same time that they support other schools because of the constraints of "conservery and discipline," dud, and potwithstanding the "high social unifortance" of the State's purposes, Wisconson v. Yoger, 406 U. S. 205, 214

^[25] N. Y. J. D. Jow, MP 12 A. & 559 (2) (Melfan, v. Sopp. 2072) (hep-fitty) holids: a providing the original transmission).

We define the perpendicular data providers the relation of the method of the point of the second structure is not a comparable to the noise is defined. The data we have the comparable structures, suppose of the second structures is a second structure of the second structures of the second struc

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(1972), without may justify an eroding of the limitations of the listablishment Chause cow family combanted.

C.

Sections 3, 4, and 5 establish a system for providing income tax hencifies to parents of children attending New Yorx's compublic schools. In this Court, the particy have engaged in a considerable debate over what label best fits the New York law. Appullants 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 (astead, a system of income tog "modifications". The Solicitor General, b. an annual carrier brief filed in this Coart, has referred throughout to the New York iaw as one authorizing tay "deductions." The District Court majority found that the aid was "in effect a tay condition 350 F. Supply at 672 temphasis its original). Because of the proultar nature of the benefit, allowed, it is difficult to adopt any single traditional label lifted from the law of excome taxation. It is, at least m its form a tax deduction since it is an annualit subtracted from adjusted gross income, prior to computation of the tax due - Its effort, 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 taction and is apparently designed to yield a predetermined amount of tax "forgevences" in exercising for performing a speefficiant which the State desires to encourage-othe 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 then in any event or the label we accord it. As Mn/CHIEF JUSTICE BURGER's opinion for the Court in Lemon v. Kurtzman, supra, 51-614, notes, constitu-'tional applysis is but a "legalistic minuet in which pre-

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cise rules and forms govern." Instead we totast "existing the form of the relationship for the light that it easts on the substance."

These sections allow parents of children attending nonpublic elementary and seem-lary schools to subtract from adjusted gross involue a specified amount if they do not seegive a futtion reinbarsement 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 lasis of a formula contained in the statute ". The formula is improverly the product of a logislative attempt to assure that each family would retreive a catefully estimated net benefit, and that the tax benefit would be comparable to, and comparable with, the totion grant for lower become families. Thus, a parent who caros less than \$5,000 is entitled to a fultion remiburseline I of \$30 if he has use child attending an elementary, nonpublic school, while a parent who carns more routless then \$9,000 is entitled to have a precisely equal amount taken of his tax bill? Add tionally, a taxpayor's penefit under these sections is unrelated to and not reduced by, any deductions to which be 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 trix benefit allowed here and the tuition grant allowed under \$2. The qualifying parent under either program re-

¹² Since the program here does not been the elements of a genumetax deduction stick as for characterize contributions, we do not have before us and do not decide, whether their form of tax. Scrieft is reastributionally is equivalent to be incortality "next in Walk,

⁴³ See to 18 (acrow)

¹⁵The estimated familia trial is reprinted in a 19, organ

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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 Rays' dissenting statement below that "lifth both instances the money involved represents a charge mode 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 ingument made in support of the tuition reinbursements and rests on the same reading of the same procedents of this Court, primarily Everson and Allen. Our treatment of this issue in Part IIB, supraat 22-26, is applicable new and requires rejection of this claim ** Second, appelloes place their strongest reliance on Walz v. Taz Commission, supra, in which New York's property tax exemption for religious organizations was upheld. We think that Walz provides on support for appellers' position. Indeed, its rationale plainty compris 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

If Appellants controlled in their brief that "shaket the Court deends that Section 2 of the Act does not value the E-rable-linear Clause, are are mathe to see how a could build otherwise in respecto Sections 3. 4 and 5." Brief of Appellants, at 42.43. We agree that under the facts of this case, the two are legally asseptiable and that the advantation of appellents' statement is also true, $i \in [n]$ [3.2 above violate the D-table-linear. Clause so, two, do the sections conferring tax factories.

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and after the adoption of the First Amondment. The Court in Walz surveyed the history of tax exemptions and found that each of the 50 States has long provided for tag exemptions for places of worship, that Congress has exempted religious organizations from manipal 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 Coart concladed 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." 16., at 676-677.11 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 parocheal 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 operations of this Court. See Kosydar v. Walmay, F Supp. (SD Ohio 1972), aff.d. — $U_{c}(S_{c} + -)(1973).$

But historical acceptance without more would not alone have sufficed, as "no one sequires a vested or protected right is 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 compals the State to pursue a course of "neutrality" toward religion. Yet governments have not always pursued such a course, and

¹⁰ The separate options of Mr district Raylin and Mn destrict BSENNAN also supposed the historical acceptation of tax-exemption states for reference material Sec 0.0 U, S., et 600 (64)

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oppression has taken many forms, one of which has been taxation of religion. Thus, if taxation was regarded as a form of "bostility" toward religion. "excluption constitute[d] a reasonable and balanced attempt to guard against these dangers." \vec{Id}_{ij} at 673. Special tax benefits however, cannot be squared with the principle of contrality established by the decisions of this Court. To the contrary, insofar as such benefits render assistance to parents who send their children to sectorian schools, their purpose and inevitable effect are to aid and advance those religious institutions.

Anart from its historical foundations, Walz is a product of the same difference 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 infirmet and inmightal one. Yet that "and" was a product not of any jurpose to support or to subsulize but of a fiscal relationship designed to non-mize involvement and estanglement 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, "Jellimination of the evenption would tend to expand the production of government by giving rise to tax valuation of church property, tax heas, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes, $1 - Id_{10}$ at 674. The granting of the tax benefits under the New York statute, utilike the extension of an exemption would stend to parease rather than limit the involvement between Courd) and State.

One forther difference between rax exceptions for charge property and tax herefits for parents should be noted. The exception challenged in Watz was not restricted to a class composed exclusively or even produm-

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numbly of religious institutions. Instead the exemption covered all property devoted to religious, educational or tharitable purposes. As the parties here must concede, tax reductions suthorized by this law flow primarily to the parents of children attending scetarion, hoppible schools. Without intinating whether this factor alone might have controlling significance in another context in some future case, it should be apparent that in terms of the patential divisivences of any legislative measure the narrowness of the benefited class would be an important factor 12

in conclusion we find the Walz analogy unpersuasive, and an light of the practical similarity between New York's tax and toition reinfoursement programs , we hold that aeather form of sid is sufficiently restricted to assure that it will not have the impermissible effect of advaning the sectarian activities of religious schools.

III

Because we have found that the challenged sections have the impermissible effect of advancing religion, we used not consider whether such aid would result in cutanglement of the State with religion in the sense of "[a] comprehensive discriminating, and continuing state surveillance" *Lemma* v Kartzman, 403 U.S. at 649. But the importance of the competing societal interests implicated in this case prompts us to make the further observation that, apart from any specific entranglement of the State in particular religious programs, assistance of the sort incretovolved carries grave potential for ertanglement in the broader sense of contuning political strife over and to religion.

Few would question most of the legislative findings supporting this statute. We recognized in *Board of Edu*-

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cation v. Alien, 392 4i. S. at 247, that "private education has played and is tribying a significant and valuable role in raising levels of knowledge, competency, and experiente." and certainly private parochial schools have contributed importantly to this role. Moreover, the tailoring of the New York statute to channel the aid provided principly to afford low-income families the option of determining where their children are to be educated is most appealing." There is no doubt that the private schools are confronted with mercasingly 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 recognizesexacerbates 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 somelar 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 Eperson v. Board of Education, supra emphasizes, competition among religious seets for political and religious supremacy.

¹⁵ As parted in the options below. (The Gost Justice escapes in coefficients between two groups of extraordinary good well and environ responsibility. The group leave the formation of partschaft subgroup extraording which is thought to be no integral part of their right to the free exercise of religion. The other group, equally dedicated, believes that energy dimension of government is aid of religion is as dollgenous to fiber semilar state as thereaching it differentiations would be to be free exercise in 1350 F. Support 660

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has occasioned considerable civil strate. "generated in large part" by competing efforts to gain or maintain the support of government. (d), at 8-9. As Met 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 religions life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point." Walz v. The Commission, 397 W. S., at 694 (concurring opinion).

The Court recently addressed this issue specifically and fully in *Lemma v. Kartzman*. 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 autual appropriations and the likelihood of larger

- and larger demands as costs and population grow,"

403 U. S. at 623.⁹

The language of the Court applies with peculiar force to the New York statute new before us. Section t (gratus for conject-same) and \$2 (function 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

⁴ The Court in Lewise further emphasized that polyheld dresses doing religious lines is to be contrasted with the polyheld diversity expected in a decourter of contrast of Dishnar is polyheld delete and division however eigeness of even partials are normal and boddle manifestations of estimated vector system of polyheld eveloped eveloped

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these programs start out at modest levels, the maintenance grant is not to exceed \$40 per pupil per year its approved schools, the tuylos grapt 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 is pually modest. But we know from long experience with both Federal and State Governments that aid programs of my 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." Moreover, the State itself, concededly appious 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 moreness." 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 thay not alone warrant the invalidation of state laws that otherwise survive the careful scruttery required by

¹⁵ As some 29% of the total school population in New York attends private and parachard schools, the constituent base apporting these programs is not inequalized.

⁵ The self-perpetuant grandencies of some form of governorithm and the religion have been a marter of constant running throughout nur Establishment Clauss cases. In Schempte, the Court emphasized that it was the defense to organize the religious practices into may be relatively monor encombination on the First Americaneou," for what index is a "uncelling spectra may be a termed termore" " 374 U.S. at 225. See also Lemon V. Kurtzman, super, at 524–525. But, to bettow the words from Mr. fastice Burbelev's forceful deserve in Electron in solutions the patential expandability of spectra widthet milders such and invested. Not even three pages" could be assessed: "Not the amount but the principle of assessment was wrong," (130) U.S. at 38-40 (quaring from Madison's Mergarial and Remonstrance).

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the decisions of this Court, it is certainly a "warning signal" not to be ignored. Id_n 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 affective the constitutional prohibition against laws "respecting the establishment of religion." We therefore allign the three-judge court's holding as to \$\$1 and 2 and reverse as to \$\$3,4 and 5.

It is so ordered.