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### Burger Court and Parochial Schools

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## THE BURGER COURT & PAROCHIAL SCHOOLS: A STUDY IN LAW, POLITICS & EDUCATIONAL REALITY

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### INTRODUCTION

Few expected much from the Nixon appointees to the Supreme Court as far as expanding the protection of human liberties under the Bill of Rights' guarantees, and their record to date suggests that such expectations were not totally unfounded.<sup>1</sup> While this article is primarily devoted to church-state issues affecting the parochial elementary and secondary school, an overview of the Burger Court's views on civil liberties protection seems in order at the outset. At a minimum, this may reveal strands of consistency in the decision-making patterns and theories of jurisprudence within the Court as presently constituted.

In this respect, the field of church-state relations and the issues growing out of various attempts to provide governmental aid to parochial schools have provided some of the most vexatious problems confronting judicial and legislative policymakers since World War II. Indeed, Mr. Nixon and his supporters aimed some of their sharpest attacks upon the Warren Court's decisions in this area and related programs of prayer,<sup>2</sup> Bible reading in the public schools,<sup>3</sup> and similar attempts to retain the sanctity of the "Wall

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1. See Gerringer, *Burger Court and the Bill of Rights*, 8 *TRIAL LAWYER'S Q.* 29 (1972); Kurland, *Appointment and Disappointment of Supreme Court Justices*, 1972 *LAW AND SOCIAL ORDER* 183 (1972); Kurland, *1970 Term: Notes on the Emergence of the Burger Court*, 1971 *S. CT. REV.* 181 (1971); McGee, *Blacks, Due Process and Efficiency in the Clash of Values as the Supreme Court Moves to the Right*, 2 *BLACK L.J.* 220 (1972); *Nixon's Court*, *NATION* 213, 290-91 (Oct. 4, 1971); Reid, *Burger Court and the Civil Rights Movement: The Supreme Court Giveth and the Supreme Court Taketh Away*, 3 *RUTGERS CAMDEN L.J.* 410 (1972); *Remaking the Supreme Court, Nixon Sets a Pattern*, 71 *U.S. NEWS AND WORLD REPORT* 15-17 (Nov. 1, 1971); *Supreme Court: End of an Era*, 97 *TIME*, June 21, 1971, at 41-42.

2. *Engel v. Vitale*, 370 U.S. 421 (1962).

3. *School District v. Schempp*, 374 U.S. 203 (1963).

of Separation Between Church and State.”<sup>4</sup> Moreover, Mr. Nixon was to utilize aid to parochial schools (which he regularly referred to only as private schools) as an important ploy in his bid for reelection in 1972.<sup>5</sup> Thus, it should be especially interesting to view the attitude of the Nixon appointees on these precise issues.

Looking first at the disposition by the Supreme Court of cases generally where a person asserts a constitutional or civil right, one striking point emerges. In the last two decades, the Court had invariably decided more cases favorably to the person asserting a right until the Burger Court came into being and dramatically altered this pattern. In 1969-1970, the first year of Chief Justice Burger's tenure, the proportion of favorable votes dropped from the 81.2 percent it had been in the last year of the Warren Court to 55.8 percent. In the 1970-1971 term, the number dropped to 48 percent, marking the first time in years that the Supreme Court had decided more than half the cases heard unfavorably to the person asserting a constitutional right. In the 1971-1972 term, the number of cases decided favorably to an asserted right jumped to 60.2 percent; but in the 1972-1973 term, it dropped precipitously to only 43.5 percent supportive of a right asserted and in the 1973-1974 term, 47.4 percent of the cases were decided in favor of one asserting civil or constitutional rights.<sup>6</sup>

In short, during the five years of Chief Justice Burger's tenure, an average of 50.8 percent of the Supreme Court's decisions have

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4. An example of a legislative attack on the results of both *Schempp* and *Engel* was seen on November 8, 1971, when H.R.J. Res. 191, was voted upon. H.R.J. Res. 191 was a proposed Constitutional amendment which provided “[N]othing contained in this Constitution shall abridge the right of persons lawfully assembled, in any public building which is supported in whole or in part through the expenditure of public funds, to participate in voluntary prayer or meditation.” Although a majority of House members voted for the resolution, it failed to get the requisite two-thirds majority. 39 C.Q. WEEKLY REP. 2307 (1971).

5. See *Excerpts from the President's Special Message to Congress on Education Reform*, N.Y. Times, March 4, 1970, at 28; McWilliams, *The Church-State Issue*, 214 NATION 515-16 (1972) [hereinafter cited as McWilliams]; *Nixon's Views on Aid to Private Schools: Text of Address Given April 6, 1972*, 72 U.S. NEWS AND WORLD REPORT 97-98 (April 17, 1972) [hereinafter cited as *Nixon's Views*]; Shanahan, *Nixon Asks Tax Law Shift to Ease Filing on Income*, N.Y. Times, May 1, 1973, at 1, 35 [hereinafter cited as Shanahan]; Swomley, *Manipulating the Blocs: Church, State and Mr. Nixon*, 215 NATION 168-71 (Sept. 11, 1972) [hereinafter cited as Swomley].

6. For a detailed summary and analysis of the Court's voting behavior see Commission on Law, Social Action and Urban Affairs of the American Jewish Congress, *The Civil Rights and Civil Liberties Decisions of the United States Supreme Court for the 1973-74 Term: A Summary and Analysis* (1974) [hereinafter cited as *The Civil Rights and Civil Liberties Decisions*].

been supportive of asserted constitutional rights. In contrast, the Warren Court, in its last one and one-half decade, averaged 71.7 percent of its decisions in favor of an asserted right with the proportion of favorable decisions ranging from 51.2 percent to 82.5 percent during that period. Clearly, the anticipated swing away from a position strongly supportive of asserted constitutional rights by the Nixon appointees seems to be supported by the facts to date.

This data should not, however, obscure the fact that the Court, under the leadership of Chief Justice Burger, continues to devote a high proportion of its time to civil liberties decisions among the total number of decisions decided by the Court with written opinions. In the 1973-1974 term, which closely resembles the 1972-1973 term, of a total of 169 cases decided with a written opinion, 77 dealt with the general field of civil liberty rights. This amounted to 44.4 percent of the Court's workload. The Court has not turned its back on those looking to it for protection of basic liberties, as it might since the power to change exists by simple expedient of refusing to accept appeals in cases of this nature. But, it would be a mistake to immediately infer from this that a basic sympathy for asserted civil liberty rights exists among a majority, since the more conservative members may vote to take jurisdiction for the sole purpose of formalizing or nailing down a more restrictive view of human rights.

On the other hand, analysis of the opinions during the tenure of Chief Justice Burger suggests that though the Nixon appointees plus Justice White comprising the conservative bloc<sup>7</sup> on the Court constitute a majority, the Burger Court has not at this juncture embarked upon a systematic erasure of the Warren Court's libertarian rulings in areas such as racial segregation,<sup>8</sup> legislative mal-apportionment<sup>9</sup> or freedom of unpopular expression.<sup>10</sup> The steady broadening of the bounds of such constitutional guarantees of free-

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7. R.E. Morgan in *Establishment Clause and Sectarian Schools: A Final Installment?*, 1973 S. Ct. Rev. 57-97 (1973) [hereinafter cited as Morgan], presents the views of a number of the Court's critics with regard to blocs within the Court. The Court's disposition is 3 to 3 to 3: the Accommodationist bloc including White, Burger and Rehnquist; the Super-separationist bloc including Brennan, Douglas and Marshall; the Moderately-separationist bloc including Stewart, Blackmun and Powell.

8. *Milliken v. Bradley*, 418 U.S. 717 (1974); *Bradley v. School Board of Richmond*, 416 U.S. 696 (1974); *O'Shea v. Littleton*, 414 U.S. 488 (1974).

9. *American Party of Texas v. Wright*, 415 U.S. 767 (1974); *O'Brien v. Skinner*, 414 U.S. 524 (1974).

10. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Jenkins v.*

dom and equality which characterized the Warren Court, however, has ceased.

In some areas, nonetheless, there have been reversals of direction. These include the rights of persons charged with crimes<sup>11</sup> and in the field of censorship of obscenity.<sup>12</sup> Even here the trend has not been uniform, and some have argued that the recent high proportion of unfavorable decisions should not be viewed as judicial action restricting basic rights but rather as an indication that the Burger Court has declined to extend guarantees beyond the point to which the Warren Court had established them.<sup>13</sup>

In only one area does the Burger Court appear to support a Bill of Rights guarantee more than did the Warren Court. That concerns the "establishment of religion" clause of the first amendment, particularly in litigation regarding governmental aid to parochial schools.<sup>14</sup> In the last two terms, the Supreme Court has handled five cases raising questions involving the "establishment of religion" clause as applied to parochial schools.<sup>15</sup>

#### THE COURT & RELIGION

The Supreme Court has invalidated tax credits, tuition reimbursements and related plans providing state aid to nonpublic schools in *Committee for Public Education v. Nyquist*,<sup>16</sup> *Sloan v.*

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*Georgia*, 418 U.S. 153 (1974); *Lewis v. City of New Orleans*, 415 U.S. 130 (1974); *Allee v. Medrano*, 416 U.S. 802 (1974); *Steffel v. Thompson*, 415 U.S. 452 (1974); *Plummer v. City of Columbus Ohio*, 414 U.S. 2 (1973).

11. *Ross v. Moffit*, 417 U.S. 600 (1974); *Michigan v. Tucker*, 417 U.S. 433 (1974); *United States v. Kahn*, 415 U.S. 143 (1974); *United States v. Colandra*, 414 U.S. 338 (1974); *United States v. Robinson*, 414 U.S. 218 (1973).

12. *Hamling v. United States*, 418 U.S. 87 (1974); *Kaplan v. California*, 413 U.S. 115 (1973); *Paris Adult Theatre v. Slaton*, 413 U.S. 49 (1973); *Miller v. California*, 413 U.S. 15 (1973).

13. See *The Civil Rights and Civil Liberties Decisions*, *supra* note 6, at 2.

14. Mott & Edelstein, *Church, State and Education: The Supreme Court and Its Critics*, 2 J. LAW & ED. 535 (1973) [hereinafter cited as Mott & Edelstein].

15. *Marburger v. Public Funds for Public Schools*, 94 S. Ct. 3163 (1974); *Wheeler v. Barrera*, 417 U.S. 402 (1974); *Sloan v. Lemon*, 413 U.S. 825 (1973); *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973); *Levitt v. Committee for Public Education*, 413 U.S. 472 (1973).

16. 413 U.S. 756 (1973). See Comment *Constitutional Law — Nonestablishment of Religion Grants to Low Income Area Parochial School for Certain Maintenance Costs and to Low Income Parochial School Parents as Partial Reimbursement for Tuition Expenditures Violates Establishment Clause, But Tax Credits for Tuition Payment to Such Schools are Constitutionally Permissible*, 86 HARV. L. REV. 1081 (1973) [hereinafter cited as *Grants to Low Income Area Parochial Schools*]; Kelley, *Tax Credits and the Tests of Estab-*

*Lemon*,<sup>17</sup> and *Levitt v. Committee for Public Education*<sup>18</sup> during the 1972-1973 term. In the 1973-1974 term, the Supreme Court in *Wheeler v. Barrera*,<sup>19</sup> approved a court of appeal's decision holding that a state board of education was not required to assign teachers to parochial schools even though board assignments of such special teachers to the public schools had been made under terms of the Elementary and Secondary Education Act of 1965. Then in *Marburger v. Public Funds for Public Schools*,<sup>20</sup> the Supreme Court affirmed, without hearing argument, a decision by a three-judge federal district court<sup>21</sup> invalidating a statute which: (a) reimbursed parents of students in private schools for money spent for secular textbooks and supplies; and (b) provided instructional material and auxiliary services upon request to non-public schools.

In these cases, as in the two parochial rulings in 1971,<sup>22</sup> the court reaffirmed a view of the establishment clause which has prevailed throughout most of our history and which generally prohibits governmental aid to private and parochial elementary and secondary schools.<sup>23</sup> Interestingly, the only decision on governmental aid to parochial schools during Chief Justice Warren's tenure, *Board of Education v. Allen*,<sup>24</sup> had gone the other way and was somewhat supportive of such aid.

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lishment, *Supreme Court Decisions*, 90 CHRISTIAN CENTURY 1024-28 (1973) [hereinafter cited as Kelley]; Whelan, *School Aid Decisions: Not Dead, But Sleeping*, 129 AMERICA 6-8 (July 7, 1973) [hereinafter cited as *School Aid Decisions*].

17. 413 U.S. 825 (1973). See Brickman, *The Supreme Court and the Sectarian School*, 102 INTELLECT 82-84 (1973) [hereinafter cited as Brickman].

18. 413 U.S. 472 (1973).

19. 417 U.S. 402 (1974).

20. 94 S. Ct. 3163 (1974).

21. The significance of this decision was assessed in Pfeffer, *Aid to Parochial Schools: The Verge and Beyond*, 3 J. LAW & ED. 115-21 (1974) [hereinafter cited as *The Verge and Beyond*].

22. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). This case was decided together with No. 569, *Early v. Di Censo*.

23. See Brickman, *supra* note 17, at 82-84; Giannella, *Lemon and Tilton: The Bitter and the Sweet of Church-State Entanglement*, 1971 S. CT. REV. 147 (1971) [hereinafter cited as Giannella]; Morgan, *supra* note 7, at 57-97; Note, *Aid to Parochial Schools—Income Tax Credits*, 56 MINN. L. REV. 189 (1971) (an evaluation of Minnesota's income tax credit after *Lemon*) [hereinafter cited as *Aid to Parochial Schools*]; Pfeffer, *The Parochial Decision*, 60 TODAY'S ED., 63-64 (Sept., 1971) [hereinafter cited as *The Parochial Decision*]; Whelan, *Lessons from the School Aid Decisions*, 125 AMERICA 32-33 (July 24, 1971) [hereinafter cited as *Lessons from the School Aid Decisions*].

24. 392 U.S. 236 (1968).

It is important to reiterate that aid to parochial elementary and secondary schools was a subject upon which President Nixon had taken a strong and consistent position.<sup>25</sup> He had, for example, urged that a way be found within the Constitution to provide governmental aid to parochial schools and had specifically endorsed a tax credit plan.<sup>26</sup> Nonetheless, two of the Nixon appointees, Justices Powell<sup>27</sup> and Blackmun, voted against tax credits and all four of his appointees condemned other forms of aid to parochial schools in these cases.

The traditional conservative personnel bloc on the Court, including Justices Powell, Blackmun, Burger, White and Rehnquist,<sup>28</sup> has typically broken down on church-state issues especially involving governmental aid to parochial schools.<sup>29</sup> Of this bloc, only Justices White and Rehnquist reveal a pattern of general support for such aid, with the Chief Justice on occasion, but not regularly, joining their position.<sup>30</sup> This is well illustrated by the 1972-1973 term, in which the Court handled an unusually large number of cases involving first amendment rights and elections. Of the thirty-four cases in this category, twenty-one were decided against the right asserted. In the area of church and state, however, of the five cases handled, only two were decided against the asserted right and one of these<sup>31</sup> dealt with a question of remedy rather than substance.<sup>32</sup>

Moreover, the other case involving a vote against the asserted "establishment" right did not uphold aid to parochial elementary and secondary schools, but rather sustained by a 6-3 vote the South Carolina Higher Education Facilities Authority aiding institutions

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25. See *McWilliams*, *supra* note 5, at 515-16; *Shanahan*, *supra* note 5, at 35; *Swomley*, *supra* note 5, at 168-71.

26. See *Excerpts from the President's Special Message to Congress on Education Reform*, N.Y. Times, March 4, 1970, at 28; *Nixon's Views*, *supra* note 5, at 97-98.

27. An analysis of Powell's stand is given in *School Aid Decisions*, *supra* note 16, at 6-8. See also *Kelley*, *supra* note 16, at 1024-28.

28. See COMMISSION ON LAW, SOCIAL ACTION AND URBAN AFFAIRS OF THE AMERICAN JEWISH CONGRESS, *THE CIVIL RIGHTS AND CIVIL LIBERTIES DECISIONS OF THE UNITED STATES SUPREME COURT FOR THE 1972-73 TERM: A SUMMARY AND ANALYSIS* (1973), at 99 [hereinafter cited as *A SUMMARY AND ANALYSIS*].

29. See *Lessons from the School Aid Decisions*, *supra* note 23, at 32-33.

30. See, e.g., *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973).

31. *Lemon v. Kurtzman*, 411 U.S. 192 (1973), where the Court ruled to grant only prospective effect to a judgment declaring unconstitutional a law providing aid to parochial schools.

32. See *A SUMMARY AND ANALYSIS*, *supra* note 28.

of higher learning.<sup>33</sup> Furthermore, Justice Brennan's dissent, concurred in by Justices Douglas and Marshall, did not view the program so much as a prohibited establishment of religion, but rather as an infringement of the college's freedom to engage in religious activities and to offer religious instruction if it was to qualify for assistance under the law. Indeed, Brennan argued, "the college turns over to the state authority control of substantial parts of the fiscal operation of the school—its very lifeblood." Later, however, he also concluded that the statute in question violated the establishment clause as well.<sup>34</sup>

#### LEGAL DISTINCTIONS BETWEEN ELEMENTARY SCHOOLS AND COLLEGES

In a discussion of the Burger Court's application of the establishment clause, it is important to recognize a difference in approach depending on whether or not the Court is dealing with elementary and secondary schools or institutions of higher learning. In 1973, the Court in *Hunt v. McNair*,<sup>35</sup> accepted the constitutional distinction between elementary and secondary schools on the one hand, and colleges and universities on the other hand,<sup>36</sup> which a majority of the Warren Court had found invalid in *Board of Education v. Allen*<sup>37</sup> (decided in 1968), and again in *Tilton v. Richardson*<sup>38</sup> (decided in 1971). In *Tilton*, Justice White speaking for the five-man majority, with Justices Black, Douglas, Brennan and Marshall dissenting, found no constitutionally significant difference between college and elementary or secondary schools.<sup>39</sup> Thus, Justice White upheld federal grants for sectarian college buildings because he deemed them to be within the range of permissibility under the establishment clause when measured by a single standard equally applicable to both types of private educational institutions.<sup>40</sup> On the face of things, the liberal bloc of dissenters in *Tilton* gathered support from several of the Nixon appointees, while Justice White persisted in his dissent in *McNair* with the views he expressed for the majority in *Tilton* two years earlier.

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33. *Hunt v. McNair*, 413 U.S. 734 (1973).

34. *Id.* at 751.

35. 413 U.S. 734 (1973).

36. See Brickman, *supra* note 17, at 82-84.

37. 392 U.S. 236 (1968).

38. 403 U.S. 672 (1971). See Giannella, *supra* note 23, at 147.

39. *Id.*

40. For an excellent analysis of this point, see *The Verge and Beyond*, *supra* note 21, at 115-21.



In the last decade, the Court has not only developed a rather consistent format of distinguishing between aid to parochial schools and aid to church-supported colleges, but has also formulated a view of general applicability involving constitutional principles for such elementary and secondary schools.<sup>41</sup> In 1968, the Court in *Allen*,<sup>42</sup> refused to take judicial notice of the nature, functions and operations of parochial schools other than to acknowledge that they serve the dual functions of secular and religious instruction. These functions, the Court felt, in the absence of contrary proof regarding specific schools, are separable. Since then, however, in all but two cases<sup>43</sup> the Court has invalidated parochial school aid statutes without the benefit of a trial record. It is difficult to escape the conclusion that the Court is now acting upon the assumption that there are not sufficient differences between parochial schools in the same or different states to require case-by-case adjudication.<sup>44</sup>

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41. The historical development of these applications of constitutional principles is enumerated in Brickman, *supra* note 17, at 82-84; Giannella, *supra* note 23, at 147; *Grants to Low Income Area Parochial Schools*, *supra* note 16, at 1081-102; Haskell, *The Prospects for Public Aid to Parochial Schools*, 56 MINN. L. REV. 159 (1971) [hereinafter cited as Haskell]; Kelley, *supra* note 16, at 1024-28; Morgan, *supra* note 7, at 57-97; Mott, *supra* note 14, at 535-91; Pollack, *Parochial Aid: End of the Line?*, 62 TODAY'S ED. 77-79, 96 (1973) [hereinafter cited as Pollack]; *School Aid Decisions*, *supra* note 16, at 6-8; Whelan, *School Aid Decisions*, 125 AMERICA 8-11 (July 10, 1971) [hereinafter cited as Whelan].

42. 392 U.S. 236 (1968).

43. *Levitt v. Committee for Public Education and Religious Liberty*, 413 U.S. 472 (1973); *Early v. DiCenso*, 403 U.S. 602 (1971).

44. This point is also persuasively argued by Leo Pfeffer in *The Verge and Beyond*, *supra* note 21, at 115-21. "[T]he Court correctly perceived that the narrow interpretation of *Lemon* would effectively permit a state to finance a system of church-related schools; that is, excessive entanglement." *Grants to Low Income Area Parochial Schools*, *supra* note 16, at 1081-02.

Donald A. Giannella believes that the Court went beyond the bounds of constitutionality by sanctioning the free loan of textbooks. That is, in *Everson*, the Court stated that it had gone to the edge of constitutionality in upholding busing for parochial school students. Giannella contends that in *Lemon* the Court sought to scramble back, reaching out for any support it could find on the constitutional landscape by adopting the "excessive entanglement" notion. Giannella, *supra* note 23, at 147. Contrast these points with the statement of William R. Considine, General Counsel, at the U.S. Catholic Conference in 1971: "Our job is to find out what else is permissible besides buses, textbooks, tax-exemptions and college buildings." See also Whelan, *supra* note 41, at 8-11.

[The] Court has not only taken a case-by-case approach to the question of religion in the schools, but it has developed a more muddled *Lemon*, the Court sought to scramble back reaching out for any support it could position over the years in regard to setting a standard for measuring

A very different course of action was followed by the Court during this period regarding church-related colleges. For example, in *Tilton*, *Lemon*, and *Early v. DiCenso*,<sup>45</sup> the Court, in refusing to invalidate the Higher Education Facilities Act of 1963, required a trial record establishing in each case that the grant to each specific college would have as its primary effect the advancement of religion or would involve excessive church-state entanglement. Moreover, the same day that the Court struck down several attempts to aid parochial elementary and secondary schools in *Nyquist*, *Sloan*, and *Levitt*, it upheld a state statute authorizing the issuance of bonds benefitting a Baptist-controlled college on the grounds that the college had no significant sectarian orientation.<sup>46</sup> The Court arrived at this conclusion partly because only sixty percent of the student body were Baptists and the record did not demonstrate that religion so permeated the college that excessive entanglement would result from efforts to assure that the facilities financed by the bonds would not be used for sectarian purposes.

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the amount and kind of permissible aid to religion. If one reads the principles derived by Justice Black from the establishment structures set forth in *Everson* alongside those suggested by Chief Justice Burger in *Walz* and *Lemon*, it is apparent that some backsliding has taken place. The Court seems determined to allow greater freedom of association between government and religion and in this sense, it is responding to increased complexities and costs in education. That it does so by sacrificing clarity becomes evident when one notes that in *Nyquist* Justice Powell states and applies the test set forth by the Chief Justice in *Lemon*, but the Chief Justice himself dissents in *Nyquist*. Unfortunately, as the barrier between church and state becomes more vague, the decisions are less useful as predictive devices for the lower courts and legislatures.

Mott & Edelstein, *supra* note 14, at 535. It has also been stated by S. H. Pollack that,

[The] Court took pains to point out that the manner in which it resolved the tuition grant issue made it unnecessary to decide whether the significantly religious character of the statute's beneficiaries might differentiate the *Nyquist* and *Lemon* cases from a case involving some form of public assistance made available generally without regard to the sectarian-nonsectarian or public-nonpublic nature of the institution benefitted.

Pollack, *supra* note 41, at 96. See also Brickman, *supra* note 17, at 82-84; Haskell, *supra* note 41, at 159; Kelley, *supra* note 16, at 1024-28; *Legal Opinions on Parochial Aid*, 38 EDUCATION DIGEST 33 (Jan. 1973) [hereinafter cited as *Legal Opinions on Parochial Aid*]; Morgan, *supra* note 7, at 57-97; *School Aid Decisions*, *supra* note 16, at 6-8.

45. 403 U.S. 602 (1971).

46. *Hunt v. McNair*, 413 U.S. 734 (1973). See *The Verge and Beyond*, *supra* note 21, at 115-21. Compare Whelan, *supra* note 41, at 8-11, wherein

This dichotomy in judicial treatment of colleges as contrasted to secondary and elementary schools should not go unrecognized by legislative and educational policymakers. It has prompted Leo Pfeffer to conclude that unless

there is a radical change in personnel, the Court is likely to strike down on its face a statute providing aid to parochial elementary and secondary schools beyond the narrow confines of bus transportation and strictly limited textbook loans, but it will require a factual record to justify invalidation of a law to aid church-related colleges and universities.<sup>47</sup>

The exquisite imaginativeness of legislative attempts to circumvent the Court's rubrics against aid to parochial schools can be seen by surveying the cases involving such programs to come before the Court in the five years since *Allen*. In that time span, the Court was confronted by a dozen statutory variations of the same parochial school aid theme in ten different cases. The Court, in each of the cases, either definitively rejected the variations on a theme, or in two cases indicated probable rejection. For example, in *Lemon v. Kurtzman*,<sup>48</sup> *DiCenso*, and *Sanders v. Johnson*,<sup>49</sup>

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the *Tilton* Court was viewed as holding that "small violations of the First Amendment over a period of years are unconstitutional while a huge violation occurring only once is *de minimis*." This contrast is the most dramatic and revealing aspect of the school aid decisions.

It seems clear that Black, Douglas, Brennan and Marshall have taken the position that all direct aid to church-related schools, at whatever level and in whatever form, is unconstitutional. No other member of the Court was willing to adopt this simple but extreme position.

*Id.*

47. *The Verge and Beyond*, *supra* note 21, at 121.

48. 403 U.S. 602 (1971). See *Lessons From the School Aid Decisions*, *supra* note 23, at 32-33; *The Parochial Decision*, *supra* note 23, at 63-64; Whelan, *supra* note 41, at 8-11. According to Whelan, both Douglas' and Black's attitudes toward church-related schools are hostile, maintaining that they exist for purpose of religious indoctrination and therefore cannot receive government subsidy. Further, Whelan believes that the excessive entanglement argument carried the day, and that the very restrictions on which the states relied to guarantee the secularity of the program proved to be their undoing. Whelan, *Supreme Court Cases: Questions and Answers*, 124 AMERICA 372-75 (1971) [hereinafter cited as *Supreme Court Cases*].

Donald A. Giannella believes that the Court in *Lemon* has come up with a set of opinions that lack cogency and rationality. Although a majority of the Court is not willing to make a clear commitment, the Court may be, in effect, staking out a limited cluster of child-benefit aids on a case-by-case basis without attempting to delineate boundaries under that logically suspect theory. Giannella's basic theory is that in the *Allen* case, the Court went over

different types of aid in the form of salary payments to parochial school teachers were struck down. Next, in *Nyquist*,<sup>50</sup> *Sloan*,<sup>51</sup> and *Essex v. Wolman*,<sup>52</sup> the Court did the same thing to varying forms of tuition grants for parochial school pupils. Moreover, in *Nyquist*, and *Grit v. Wolman*,<sup>53</sup> it ruled as unconstitutional laws providing tax benefits and tax credits for parochial school tuition. *Nyquist* and *Grit v. Wolman*,<sup>53</sup> it ruled as unconstitutional laws pro-repair grants to parochial elementary and secondary schools,<sup>54</sup> while in *Levitt*, it nullified grants to pay for legally mandated services performed in such parochial schools. In *Wheeler v. Barrera*,<sup>55</sup> the Supreme Court affirmed a lower federal court's action holding that a state was not required to assign teachers to parochial schools under terms of the federal Elementary and Secondary Edu-

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the verge of constitutionality and sanctioned the free loan of textbooks. See note 44, *supra*.

The author of *Aid to Parochial Schools*, *supra* note 23, at 189, analyzes the 1971 Minnesota legislature's enactment of a bill allowing parents of children attending nonpublic elementary and secondary schools during the tax year to credit a portion of these educational costs against their state income tax. The attempt to formulate standards such that the extent and intent of the aid was well defined lead the author to conclude that such rigorous definition, albeit well intended, would possibly render the plan unconstitutional.

Brickman sees in *Lemon v. Kurtzman*, one prophecy not explicitly stated in the decision but clearly visible within the lines of the text: eventual disappearance of sectarian schools, the monolithization of the United States educational system and demise of divisiveness over public support to church-related schools. Brickman, *supra* note 17, at 82-84. See also *Schools Make News; Parochial School Tangle; Supreme Court Decisions*, 54 SATURDAY REVIEW 48 (Aug. 21, 1971).

49. *Sanders v. Johnson*, 403 U.S. 955 (1971). See *Supreme Court Cases*, *supra* note 52, at 372-75.

50. *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973). See *Grants to Low Income Area Parochial Schools*, *supra* note 16, at 1081-02. The author notes that the *Nyquist* Court used the diversion of funds argument to strike down direct aid to parochial schools although the Supreme Court has never accepted this argument as a readily-identifiable indicator of an establishment clause violation.

51. *Sloan v. Lemon*, 413 U.S. 825 (1973). See Brickman, *supra* note 17, at 82-84. In *Sloan*, according to Brickman, the Court attributes the difficulties faced by sectarian schools to virtual rigidity of the official interpretation of the establishment clause which orders that Congress and the states by reason of the fourteenth amendment, "shall make no law respecting an establishment of religion." It may be inferred that the Court is calling attention to the process of amending the Constitution.

52. 409 U.S. 808 (1973).

53. 413 U.S. 901 (1973).

54. The *Nyquist* Court emphasized that maintenance services, although they are secular by nature, nonetheless contribute to the religious mission of the schools.

55. 417 U.S. 402 (1974).

cation Act even if it assigned them to public schools, since the requirement of comparable programs did not mean identical ones.

The Court has suggested that even governmental programs providing textbooks to parochial schools are not totally above reproach, despite *Allen*, as indicated by two procedural moves recently taken. In *Donahey v. Protestants and others*,<sup>56</sup> it denied a petition for certiorari to review a court of appeals' decision<sup>57</sup> holding that a substantial federal question requiring the convening of a three-judge court was presented in an attack upon Title II (the textbook section) of the Elementary and Secondary Education Act of 1965. Of even greater potential significance was the Court's action last term in the *Marburger* case, where it affirmed, without hearing argument, a federal district court's decision invalidating a New Jersey statute authorizing funding for textbooks, "supplies, instructional materials, equipment and auxiliary services" to parochial schools as they requested them.

The procedures leading to the Supreme Court's final disposition of the case are themselves instructive. In May of 1973, one month after the action of the federal district court invalidating the law, New Jersey filed a notice of appeal and obtained a stay of the injunction from the Supreme Court. On June 25, 1973, the same day that the Court decided *Nyquist*, *Sloan*, and *Levitt*, the Court vacated the stay and reinstated the injunction.<sup>58</sup>

#### STATE EVASIVE ACTIONS

The significance of this unusual move has been examined by at least one writer. Shortly after the Court's action, Leo Pfeffer observed that this was not an ordinary vacatur.<sup>59</sup> In earlier cases, such as *DiCenso*, the Court did not vacate the stay until it affirmed the judgment. In *Marburger*, however, the appeal was at that time still pending and undetermined, and the vacatur was *sua sponte*, itself a rare practice. Moreover, the three dissenting Justices in *Marburger*, Burger, White and Rehnquist, also dissented in *Nyquist* and *Sloan*, and gave as their reasons for objecting to the vacatur the "reasons stated in the dissenting opinions" in *Nyquist* and *Sloan*. Thus, there appears to be a more substantive quality to the Court's action than such superficially procedural action might suggest. The message which the Court may very well be attempting

56. 403 U.S. 955 (1971).

57. *P.O.A.U.C.S. v. United States*, 435 F.2d 627 (6th Cir. 1971).

58. 93 S. Ct. 3024 (1973).

59. See *The Verge and Beyond*, *supra* note 21, at 117-18.

to convey by this action is that the New Jersey statute was unconstitutional on its face for the reasons noted in *Nyquist* and *Sloan*.

If this is, in fact, what the Court was attempting, it is an approach likely brought on by the political and religious stratagems that have developed in some states as a subterfuge to avert the thrust of the Supreme Court's decisions effectively rejecting governmental aid to parochial schools. The pattern of state action easily observable is this:

Pass a law aiding parochial schools and fund it as soon as possible. When the law is declared unconstitutional, enact a new one with some variation and again begin immediate funding. The same basic plan can thus continue indefinitely so long as the ingenuity of legislatures and church lobbyists hold out and recoupment of state funds already expended is not energetically sought by the governments who had illegally expended them.<sup>60</sup>

Examples of states subverting the Supreme Court decisions invalidating laws supporting parochial education are the rule rather than the exception.<sup>61</sup> After the Court had struck down the Rhode Island and Connecticut statutes in *DiCenso* and *Sanders*, the Attorneys General of the two states gave up, as not worthwhile, any attempt to recoup payments made under the invalidated laws. In Pennsylvania, the state itself obtained from the federal district court a ruling to the effect that the *Lemon* decision was not to be applied retroactively; therefore, funds already appropriated could be paid to the parochial schools. This order was later affirmed by the Supreme Court.<sup>62</sup> Even in *Marburger*, the Supreme Court, by granting the stay originally, allowed the states to resume funding under the law in question.

It is in this context one must view the importance of the *sua sponte* vacatur of the Court's stay in *Marburger*. To at least one

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60. *Id.* at 116.

61. See *Latest Blow to Tax Support for Private Schools*, 73 U.S. NEWS AND WORLD REPORT 83 (Oct. 23, 1972). Latest ruling of the Court in an Ohio case providing reimbursement for tuition outlays was ruled unconstitutional. This was the third time within a year the Supreme Court turned down plans by states to aid parochial schools. The Ohio court decision was made without written decision and under the rationale that "one may not do by indirection what is forbidden directly" in regard to application of the establishment of religion.

62. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). See *The Verge and Beyond*, *supra* note 21, at 116-21.

observer, the action constituted an emphatic declaration that the Court would no longer acquiesce in this game of not too subtle subversion of constitutional principles.<sup>63</sup> Additional evidence is found in subsequent action involving *Marburger*; for when New Jersey filed an appeal for a stay from the district court's refusal to permit continued payment to vendors for supplies, instructional material and equipment pending appeal, it was directed first to Justice Brennan and later to the Chief Justice. Both Justices denied the application for a stay, thereby requiring the immediate transfer back to the state of all supplies, instructional material and equipment delivered to the parochial schools even before the suit was started and forbidding the state to pay for supplies, equipment and the like, while the preliminary injunction was stayed.

Today, if one approaches the problem of governmental aid to parochial schools strictly from a legal or procedural standpoint, it seems such programs aimed at elementary and secondary schools have just about exhausted constitutional alternatives, so far as the Court is concerned. Justice White, of course, continues to dissent from the general principle announced in recent years; and the Chief Justice and Justice Rehnquist continue in their enchantment with attempts to draw a line between direct and indirect benefits to parochial schools. The Chief Justice, however, insisted in his opinion for the Court in *Levitt*, that all of the principles of *Nyquist*<sup>64</sup> and *Sloan* are binding upon the Court. Thus, for the foreseeable future, a significant majority of the Court appears committed to a constitutional interpretation that prohibits aid to parochial elementary and secondary schools going beyond the precise confines of *Everson v. Board of Education*<sup>65</sup> and *Allen*. From a practical standpoint, this means that there is little likelihood that the Court will uphold any one of several voucher system plans (intellectually

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63. *The Verge and Beyond*, *supra* note 21, at 118-19.

64. *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973). See *School Aid Decisions*, *supra* note 16, at 6-8. *Nyquist*, *Sloan* and *Levitt*, saw the Court add five more programs to the casualty list including: tax credits, cash reimbursements, and direct payment for mandated services and maintenance of health and safety facilities. The primary argument on which the Court has rested the invalidation is the primary effect of aiding religion. Justice Powell explicitly and repeatedly rejects the contention that any law whatsoever that results in aid to church-related schools is automatically unconstitutional. He states that there is a "narrow channel" between the Scylla and Charybdis of effect and entanglement. Mutch, *Crucial Juncture for Parochial Aid*, 90 CHRISTIAN CENTURY 454 (April 18, 1973); Morgan, *supra* note 7, at 57-97.

65. 330 U.S. 1 (1947). See *Supreme Court Cases*, *supra* note 52, at 372-75.

fashionable in some circles) under which vouchers could be used for parochial school attendance.<sup>66</sup> The fact that under some proposals the vouchers would also be available for public and non-sectarian private schools, would not help clear the constitutional hurdles established by the Court in *Sloan* or *Levitt*, let alone the technique utilized to dispose of the maintenance and repair provisions of the New York law in *Nyquist*.<sup>67</sup>

#### THE POLITICS OF THE CONTROVERSY

This does not mean that proponents of parochial school aid will cease their efforts within the political arena to find a flaw in the

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66. C.M. Whelan, in *School Aid Decisions*, *supra* note 16, at 8-11, sees comfort in the fact that five justices of the Court have deliberately left the door open for further consideration of the constitutionality of many other types of public assistance programs. He suggests that four criteria delineate potentially acceptable types of public assistance to parochial schools. They are: (1) all school children must participate, (2) aid must be in the form of secular services or materials, (3) no day-to-day decisions between secular and religious educators are required, and (4) there is no need for the school to sacrifice independence in religious matters. Under Whelan's criteria, vouchers might pass as constitutional. Cf. Maurice R. Berube, *The Trouble with Vouchers*, 93 COMMONWEAL 414-17 (Jan. 29, 1971). Berube feels that vouchers are based on a remarkably naive strategy of the assessment of educational politics, which sees that there are no irreconcilable forces in American education. This simply is not true according to Berube. Rather, there are many problems that prevent vouchers from being an easily and readily accepted option. See also Bartell, *Pro and Con of Public Funding for Catholic Schools*, 63 CURRENT HISTORY 62-67, 87-88 (Aug. 1972) [hereinafter cited as Bartell]; Frey, *Parochialism: Economic Tales and Realities*, 90 CHRISTIAN CENTURY 366-88 (1973) [hereinafter cited as Frey].

Irving Spiegel states that the National Jewish Community Relations Advisory Council sees purchase of secular services via vouchers as incompatible with the oft-repeated argument of parochial school advocates in support of their refusal to send their children to public schools, that religion is imminent in life and cannot be divorced from education. Spiegel, *Jewish Group Sees a Drive for Public Aid to Church Schools*, N.Y. Times, June 29, 1970, at 29. Francis S. Overlan has written,

With regard to any new and imaginative proposals that would bring public money to large numbers of privately managed schools, one can almost predict that solutions that have political attractiveness will be constitutionally flawed and that those solutions that are constitutionally acceptable will be politically unattractive.

Overlan, *Our Public School Monopoly*, 169 NEW REPUBLIC 14-18 (Sept. 15, 1973) [hereinafter cited as *Our Public School Monopoly*].

67. *Sloan v. Lemon*, 413 U.S. 825 (1973); *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Levitt v. Committee for Public Education and Religious Liberty*, 413 U.S. 472 (1973).



Court's constitutional armor.<sup>68</sup> Indeed, one of the problems has been that some politicians believe that total and unquestioning sponsorship and support of broad programs of aid to parochial schools is such good politics that their public pronouncements go much further than thoughtful and realistic parochial educational administrators would ever go. Indeed, in their fervor, some political types have pushed programs that parochial school administrators felt were counter-productive to their own system. For example, President Nixon in August of 1971, in a speech to the Knights of Columbus, departed from his prepared text to pledge support for Roman Catholic schools since he viewed it as a "tragedy" that one Catholic school closes down each day. "We must," said Nixon,

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68. See *Current Comments: NCEA on Supreme Court Decisions*, 129 AMERICA 79 (Aug. 18, 1973). CREDIT (Citizens Relief for Education by Income Tax) has been shaken but not shattered and will continue the organization for some time. The president of CREDIT remarks,

[I]f the short term goal of CREDIT to secure a federal tax credit bill is somewhat set back by the decision [*Nyquist*], the long-range goal of equitable treatment for nonpublic school parents continues undaunted. CREDIT will continue to explore every avenue of assistance to parents and children in nonpublic schools and will not rest until a reversal of this odious decision is achieved either *de jure* in the courts or *de facto* in the legislature.

*Id.*; Mott & Edelstein, *supra* note 14, at 535-91. See also Buder, *School Board Candidates Stress Need for Change*, N.Y. Times, March 14, 1970, at 16; Buder, *Voter Turnout is 14.5 Percent for City School Election*, N.Y. Times, March 23, 1970, at 1; Lyman, *Maintaining a Pluralistic Society*, 184 SCIENCE 855 (May 24, 1974) [hereinafter cited as *Maintaining a Pluralistic Society*]; Overlan, *Why Are Parochial Schools Closing*, 131 AMERICA 111-13 (Sept. 14, 1974).

W.W. Brickman infers from the Court's decision in *Sloan v. Lemon* that a campaign might be undertaken to clarify the wording of the first amendment so as to ensure the existence of sectarian schools, along with definite safeguards of the freedom of religion such that "excessive entanglement" would be eliminated as a judicial argument. This inference followed the Court's attribution (in *Sloan*) of difficulties faced by sectarian schools to virtual rigidity of the official interpretation of the establishment clause which orders that Congress and the states by reason of the fourteenth amendment "shall make no law respecting an establishment of religion." Brickman, *supra* note 17, at 82-84.

T.R. Mulaney thinks that political realities suggest that pressure by Catholics upon politicians in predominantly Catholic areas with the backing of candidates who support parochial aid could have a significant effect on government support of such a program. Catholics feel that they can muster support behind the tax credit scheme since the political support of candidates in predominantly Catholic areas will aid them through willingness of Congressmen to see their cause in return for support. Mulaney, *Tax Credits and Parochial Schools*, 98 COMMONWEAL 185-88 (April 27, 1973) [hereinafter cited as *Mulaney*].

“resolve to stop that trend and turn it around. You can count on my support to do that.”<sup>69</sup> This rhetoric not only astonished the Knights of Columbus, but unsettled his staff, including U.S. Commissioner of Education, Sidney Marland, who observed that he knew of no legal way to allocate public funds directly to parochial schools or to the parents of pupils who attend them.<sup>70</sup>

Undaunted by law, fact or educational reality, President Nixon renewed his pledge for such aid on April 6, 1972, to the National Catholic Education Association, although there he acknowledged that finding the constitutional means to accomplish this goal would take time. Speaking in terms more in keeping with a convention of the National Association of Manufacturers than of an educational association, he attacked the public school philosophy by noting that, “No single school system . . . must ever gain an absolute monopoly . . . it would lack altogether the essential spur of *competition* to innovate, grow and reform.”<sup>71</sup> Leaving aside for a moment the fact that competition may not be the central concern for an educational system, Nixon continued to contribute to the myth that federal funds will solve all the problems of parochial schools and even more unfortunately, that such money can be delivered.

Although President Nixon was bewailing the “tragedy” that one Catholic school closes each day, Louis R. Gary, former Chairman of Cardinal Spellman’s Committee on Educational Research and a Consultant to President Nixon’s Commission on School Finance and his colleague, K. C. Cole, author of the Fleischman Commission Report on Education in New York State, point out the fact that enrollment in Roman Catholic parochial schools will drop forty-two percent this decade whether or not new money is found. “In fact,” they write, “the consolidation program needed to keep the Catholic school system alive would involve closing two or three schools a day,” not one as Nixon found upsetting.<sup>72</sup> Indeed, Gary and Cole argue that many Catholic bishops would welcome a government order to consolidate their schools since they have agreed privately that consolidation is necessary, but they are reluctant to initiate it themselves. Their reluctance stems from the bishops’ belief that “many parishioners simply would ignore any church order to close their beloved—and inefficient—schools. . . .”

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69. Gary and Cole, *Politics of Aid—and a Proposal for Reform*, 55 SATURDAY REV. 31-33 (July 22, 1972) [hereinafter cited as Gary and Cole].

70. *Id.*

71. *Nixon’s Views*, *supra* note 5, at 97-98 (emphasis added). See *Nixon Rapped for Parochial Stand*, 89 CHRISTIAN CENTURY 507 (1972) [hereinafter cited as *Nixon Rapped*].

72. Gary and Cole, *supra* note 69, at 33.

President Nixon and a host of other politicians have been ensnared in a web of false and mischievous assumptions regarding the realities of parochial elementary and secondary education, as a variety of writers both within and outside the parochial school establishment have demonstrated.<sup>73</sup> Moreover, such politicians have acted on these inaccuracies to seek to enhance their political fortunes, thereby, giving false strength to a variety of myths that continue to persist. The underlying assumption causing an array of mischievous misconceptions runs that if the government can give aid to Catholic parochial elementary and secondary schools, tuition will stop rising and if tuition stops rising, enrollment will stop falling. This is a seductive proposition which is, by and large, untrue.

#### ECONOMICS & PAROCHIAL SCHOOL ENROLLMENT

In fact, tuition in most Catholic schools has been so low—in 1970, the average yearly tuition in U.S. Catholic elementary schools was only \$42—that it could not be a significant cause for enrollment decline. While the average tuition cost jumped to \$120 in 1971, enrollments had been dropping for more than a decade.<sup>74</sup> Some might argue that even a modest tuition could prove unbearable for families in the inner-city, thus forcing such families to withdraw their children from parochial schools. In fact, however, Catholic parochial school enrollment is dropping even faster in the affluent suburbs. Thus, the very families who can most afford the tuition are the ones most rapidly shifting their children out of the church schools. A further dramatization of this verity is the startling fact that in New York State fully one-third of the Catholic elementary schools that closed within the last five years charged no tuition at all.<sup>75</sup> To put these matters in perhaps even a sharper perspective, the New York study found that Roman Catholics there contributed only 2.5 percent of their income to their parish including all school tuition and fees.<sup>76</sup>

It seems obvious that a key reason for the drop in Catholic parochial school enrollment is that parents, for a variety of reasons not including tuition costs, are choosing not to send their children to church-supported schools. Catholic schools are caught in the

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73. See, e.g., McWilliams, *supra* note 5, at 515-16; Swomley, *supra* note 5, at 168-71.

74. Gary and Cole, *supra* note 69, at 32.

75. *Id.* at 33.

76. Swomley, *supra* note 5, at 168-71.

ideological conflicts found within the church itself. Thus, liberal parents believe that Catholic school teaching is too restrictive,<sup>77</sup> while conservative parents are upset with what they regard as the new permissiveness and lack of fidelity to classic Roman Catholic dogma.<sup>78</sup>

One writer in a Roman Catholic periodical argues that much of the legal and political resistance to governmental aid to Catholic parochial schools arises because of their totalitarian, as well as sectarian, image. This image conflicts with the historically professed desire of the American society for not only secular but "liberative" schools. He suggests that if Catholic schools were more directly controlled by parents through elective trustees and more responsive to students' needs and goals, the secular state would have less reason to fear the spectre of a creeping church state.<sup>79</sup> This emphasizes the quixotic quality of a phenomenon of the last decade where writers in some traditionally chic liberal periodicals have argued nostalgically for greater support for Catholic parochial schools because of some mistily perceived libertarianism which pervaded them.<sup>80</sup>

Of course, conservative Roman Catholics are quick to point out that if their schools become largely secular to meet the requirements of law or political and educational theory, there is little or no reason to distinguish them from the public schools, or to justify their separate existence.<sup>81</sup> It cannot be denied that many Catholic schools are, in fact, losing their distinctiveness because of the increasing number of lay teachers replacing the traditional nuns or brothers. The classroom clearly has a less religious aura. Beside the obvious problem of psychological distinctiveness, the development entails an economic problem of at least equal importance. The presence of

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77. Note examples of liberal Catholic thought, i.e., Luetzgen, *Church Schools in the American Secular State*, 126 AMERICA 567-69 (1972) [hereinafter cited as Luetzgen].

78. *Id.*

79. *Id.* at 168-69.

80. See, e.g., C. GREER, COBWEB ATTITUDES: ESSAYS IN AMERICAN EDUCATION AND CULTURE (1970); Arons, *The Joker in Private School Aid*, 54 SATURDAY REV. 45-47 (Jan. 16, 1971); Greer, *Public Schools: The Myth of the Melting Pot*, SATURDAY REV. 84 (Nov. 15, 1969); Levin, *Aid to Parochial Schools: The Case for Tax Credits*, 167 NEW REPUBLIC 16-19 (Oct. 21, 1972); Walinsky, *Aid to Parochial Schools: Liberating Ourselves from Deadly Dogma*, 167 NEW REPUBLIC 18-21 (Oct. 7, 1972) [hereinafter cited as Walinsky].

81. See *Current Comment: High Price of Free Exercises*, 125 AMERICA 360-61 (Nov. 6, 1971); *Maintaining a Pluralistic Society*, *supra* note 68, at 855; Mott & Edelstein, *supra* note 14, at 535-91; *Lessons from the School Aid Decisions*, *supra* note 23, at 32-33.

religious-order teachers represents a major subsidy to the school since, on a national average, religious-order teachers receive stipends and room and board worth \$2,550 for teaching in Catholic schools as contrasted with the average salary of \$5,597 paid to laymen in the same schools.<sup>82</sup>

Even at the highest point of Catholic school enrollment in 1962, these schools only educated one-half of America's school-age Catholic population. In 1970, less than thirty-three percent of that group was enrolled in parochial schools, while estimates for 1975-1976 suggest this number will drop to twenty-two percent.<sup>83</sup> Yet, despite the often voiced concern about the spiritual well-being of Catholic children not attending parochial schools, the Roman Catholic church's financial priorities have not been altered to take into account the spiritual educational problems of the approximately two-thirds Catholic school population attending the public schools. For example, the Jesuit journal AMERICA pointed out that only four percent of the Catholic church's educational funds go to the 7.6 million Catholic children attending public schools, while ninety-six percent of these funds go to the less than 4.4 million children in parochial schools.<sup>84</sup> Referring to the Report of the Catholic Church's National Association of Laity, which concluded that the church's educational resources of manpower and dollars are badly, if not to say unjustly, distributed, AMERICA's point suggests that a national program to provide parochial schools for all Roman Catholics is neither realistic nor economically feasible, even if tax supported. This, it is argued, is especially true in rural areas.<sup>85</sup>

In some semi-rural areas with substantial Protestant populations, such as Iowa, Catholic parochial school systems have begun to place advertisements in the local mass media in the hopes of attracting new students.<sup>86</sup> The advertising effort is being aimed at both Catholic families and the much larger number of Protestant families with students presently attending the public schools. As James B. Schneider, administrator of the Keokuk, Iowa, Roman Catholic school system, explains the advertising campaign, "We

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82. Gary and Cole, *supra* note 69, at 32.

83. *Id.* See *Our Public School Monopoly*, *supra* note 66, at 14-18. See also Bartell, *supra* note 66, at 62.

84. *Current Comment: Parochial Schools Challenged Again*, 126 AMERICA 275-76 (March 18, 1972) [hereinafter cited as *Current Comment*].

85. This point is enlarged upon in FR. O'NEALL, *NEW SCHOOLS IN A NEW CHURCH* (1971). See *Current Comment*, *supra* note 95, at 275-76.

86. See, e.g., *Parochial Schools Advertise for Pupils*, Des Moines Register, Jan. 26, 1975.

are . . . extending the private school advantage to the people of Keokuk and of the tri-state area, and are telling them their children are welcome here." One of the advertisements approaches the subject in this way:

The purpose of the Catholic school system is not to convert non-Catholics. And the advantages of learning in a Christian atmosphere are not limited to Catholic children. The philosophy is one of striving to educate the whole individual, incorporating the most important training—religious and moral—with the intellectual, social, emotional and physical.<sup>87</sup>

While the response to the ads has been "good," Mr. Schneider said that no new students have yet been enrolled. The rates for Catholic families range from a low of \$75 a year for one elementary student, to a maximum of \$325 a year for three or more high school students. Non-Catholic families are charged an additional \$50 a year in this parochial school system.

There is an important parallel development occurring in the United States alongside the well-recognized drop in enrollment in Roman Catholic parochial schools. Although seldom recognized, it is the sharp increase in the enrollment in non-Catholic, church-related schools.<sup>88</sup> A contemporary study reveals that during a recent period, enrollment in Catholic schools decreased by seventeen percent. At the same time, other church-related schools were experiencing an increase of sixty-six percent in enrollment.<sup>89</sup> Part of this growth is explained by the desire of the middle class white Protestant parents to remove their children from the effects of racial mixing in the public schools in the South and elsewhere.

Thus, it is erroneous to refer to attempts by Mr. Nixon, and others of a similar stripe, to push aid to private schools prior to the elections of 1972 as "the Catholic strategy."<sup>90</sup> It must be more accurately seen as a Catholic-Southern strategy in which he sought capture of the electoral votes of the South in addition to 202 elec-

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87. *Id.* See *Schools Make News: Church and State United*, 54 *SATURDAY REV.* 52 (Jan. 16, 1971).

88. See *Boom in Protestant Schools: Reasons for a Sudden, Nationwide Rise*, 75 *U.S. NEWS AND WORLD REPORT* 44-66 (Oct. 8, 1973).

89. Mulaney, *supra* note 68, at 185-88.

90. *Nixon Rapped*, *supra* note 71, at 507; Swomley, *supra* note 5, at 168-71.

toral votes of the seven states<sup>91</sup> where Nixon claimed seventy percent of the financial burden would fall if Catholic schools would close. As W. Barry Garrett, Head of the Washington Bureau of the Baptist Press explained, "With political support for the President running strong in non-Catholic states, it is little wonder he is focusing major attention on capturing Catholic support this year."<sup>92</sup>

One Black leader saw through Nixon's tactic and commented bitterly that "rather than using these (federal) funds for desegregation achieved through bussing . . . he has subtly joined Catholic aspirations with his own political ambitions of satisfying racist, white Americans."<sup>93</sup> Carey McWilliams was also to observe that direct federal aid to nonpublic schools is now deeply colored by racial bias in the South and class bias generally, since the tax credit plan will prove advantageous to the well-to-do and of little benefit to poor families.<sup>94</sup>

#### THE POLITICS OF UNREALITY

There certainly seems ample grounds to question the intentions of President Nixon and other officials such as then-Governor Rockefeller<sup>95</sup> to search for objective answers to the constitutional and economic problems confronting parochial schools during this time. Both Nixon and Rockefeller ignored the findings of Rockefeller's own Fleischman Report on Education in New York which showed that only a few Catholic parochial schools closed for lack of funds, and that the decline in enrollment in Catholic elementary

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91. These states are California, New York, Ohio, Pennsylvania, Illinois, New Jersey and Michigan. For the need of Catholics to become politically active on the subject, see *School Aid: Shift to Politics*, 124 AMERICA 364-65 (April 10, 1971).

92. *Nixon Rapped*, *supra* note 71, at 507.

93. Swomley, *supra* note 5, at 170.

94. McWilliams, *supra* note 5, at 515-16. See Walinsky, *supra* note 80, at 18-21.

95. For a discussion of Rockefeller's contribution to the rhetoric obscuring the real solutions to the problems of Catholic schools in the future, see Gary and Cole, *supra* note 69, at 33, explaining how he told Catholic leaders his Commission would come out in support of aid. The majority report came out against such aid. See Maskowitz, *Public Funds and Private Schools*, 68 PTA MAGAZINE 16-19 (May, 1974). "As to public support, a gently public school monopoly is welcome by almost all American parents as verified by Gallup in 1969 and by Harris in 1970." Obviously this conclusion does not square with rhetoric of school reformers who build their proposals for educational improvement on the presumption of general citizen content with public education.

schools was also not primarily traceable to rising costs.<sup>96</sup> Indeed, some studies showed that at best 25 percent of the enrollment decline could be traced to cost.<sup>97</sup>

At this time, Governor Ray of Iowa, a Republican, was also campaigning for more assistance to parochial schools on the grounds that if they closed, the public schools would be overcrowded, despite the findings of his own Office of Planning and Programming. This Iowa study notes:

[The] impact on the (public school) facilities of additional students from closed nonpublic schools would be a temporary one and would require additional school construction in only those districts with extremely high, 20 percent or more, numbers of nonpublic school students. The long-run effect would be absorbed in the natural replacement of school facilities.<sup>98</sup>

This study demonstrated the fallacy of providing services such as transportation, shared time, and auxiliary services to parochial schools to relieve excessive burdens on the public schools, since in fact the existing public school facilities were under-utilized.

That the political rhetoric of unreality continues is revealed by comments in U.S. NEWS AND WORLD REPORT following the decisions of the Supreme Court in 1973 unfavorable to aid to parochial schools. The comment deplors the Court's action because the impact will be to cause sharp cutbacks in Catholic education with a big shift of students to the "already overcrowded public schools." The sharp declines in public school enrollment resulting from declining birthrates is completely ignored here as it is by Governor Gilligan of Ohio who saw the Court's action as causing a "hardship, not only for private schools, their students and families, but for the whole public education system as well."<sup>99</sup>

Even more disturbing than this rather casual attitude of brushing aside demographic and economic facts is the almost systematic attempt to expunge research findings by President Nixon's Commission on School Finance or at least by the President's speech writers. For example, a research report compiled by faculty mem-

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96. Swomley, *supra* note 5, at 170.

97. See Bartell, *supra* note 66, at 67.

98. Hullander, *Marginal Cost Analysis of Selected Plans for State Aid to Nonpublic Schools* (State of Iowa, Office of Planning and Programming, Mimeo, Aug., 1971).

99. *Aid to Parochial Schools Coming to a Halt?*, 75 U.S. NEWS AND WORLD REPORT, 27-28 (July 9, 1973).



bers of Boston College and the University of Chicago was submitted to the Commission. The Commission concluded that not one of the recent analyses of the relationship between enrollment and tuition levels has produced evidence that parents are taking their children from nonpublic schools primarily because of increased costs. The Commission did not, however, include the study or its findings in its report.<sup>100</sup>

Moreover, at the request of the President's Commission, legal memorandums were prepared for it by the eminent constitutional authority, Paul A. Freund of Harvard and the Catholic legal scholar, Charles M. Whelan of Fordham. Both memos, which were denied general circulation, expressed the view that virtually all discernible proposals for governmental aid to church schools are probably unconstitutional. These included purchases of secular services, salary supplements to parochial school teachers, vouchers, tuition reimbursement and tax credits to parents of parochial school students.<sup>101</sup>

Moreover, Freund posed an additional constitutional problem confronting such programs growing out of a potential application of the fifth and fourteenth amendments. That is, if a church school receives some public aid, does this not convert it to a publicly-supported institution subject to the same standards and requirements, such as the equal protection clause of the fourteenth amendment, as other public institutions? Freund finally called attention to Justice Brennan's concurring opinion in *DiCenso* where he stressed that if governmental aid to parochial schools were permitted, "At some point the (church) school becomes public for more purposes than the church could wish."<sup>102</sup> This prompted Justice Brennan to observe, "The church may justifiably feel that its victory on the Establishment Clause has meant abandonment of the Free Exercise Clause."<sup>103</sup>

One of the more significant phenomenons of the last decade has been the wide disparity between what many American elected officials think their constituents want and what, in fact, the people truly want. The Watergate-impeachment-pardon syn-

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100. Swomley, *supra* note 5, at 170.

101. Professor Whelan suggested that programs providing busing, textbooks, health services and lunches might be upheld. He also listed record-keeping functions and testing services required by statute which might be acceptable, but these have recently been invalidated by a federal district court. See *Legal Opinions on Parochial Aid*, *supra* note 44, at 33.

102. 403 U.S. at 652, citing *Early v. DiCenso*, 316 F. Supp. at 121-22.

103. *Id.* See also *Legal Opinions on Parochial Aid*, *supra* note 44, at 33.

drome with the subsequent reaction in the polls and the elections of 1972 is but one of the more obvious examples. Many politicians entertain similar misconceptions regarding the people's opposition to the public schools and their support of aid to parochial schools. Here, as in other areas, President Nixon misread the American mind and failed to recognize that a gentle public school monopoly is welcomed by most American parents, as verified by a Gallup poll in 1969 and by a similar poll by Harris in 1970.<sup>104</sup> Moreover, these surveys reveal that when children do poorly in the public schools, it is the home conditions and general environment that is blamed by the respondents rather than the public school system.

That such support existed during the last decade is, in itself, a mark of the basic support for the public schools, since the climate has seldom been more ripe for such attack upon public education. Certainly there was no shortage of criticism coming from such diverse forces as right-wing conservatives on the one extreme and the new left on the other. It came also from segregationists and at the same time from racial minorities and the poor, in addition to some supporters of Catholic parochial schools.<sup>105</sup> Yet, the percentage of American youngsters enrolled in the public school continued to grow. In 1960, 86 out of every 100 children attended the public schools; in 1970, this number had grown to 89 students out of 100; and the U.S. Office of Education projects that by 1980, 91 out of 100 students will be in the public schools. This trend has prompted one writer to conclude that "private schools are an endangered species."<sup>106</sup>

Thus, we are dealing with the fundamental relationship of public schools to private and parochial schools, not just with the use of public funds for private schools. Only recently have the realities inherent in the knotty questions been faced by educators, lawyers and policymakers.<sup>107</sup> This is why it is essential to move beyond the sometimes sterile legal arena and to consider questions involving the very practical economic and social effects of programs designed to provide public funds for private education. The enormity of the American educational enterprise, both public and

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104. For a more detailed analysis of these polls see *Our Public School Monopoly*, *supra* note 66, at 14-18.

105. For a discussion of the diversity of the attacks on the public schools see Frey, *supra* note 66, at 366-68.

106. *Our Public School Monopoly*, *supra* note 66, at 15.

107. See, e.g., Address by Herman Goldman, Associate Commissioner for Equal Educational Opportunities, U.S. Office of Education and the National Education Association.

private, can only be appreciated if it is understood that in 1971, more than sixty-three million Americans were full-time students, teachers or administrators in the nation's educational superstructure.<sup>108</sup> In addition, 137,000 persons made education a time-consuming avocation as trustees of local school systems, state boards of education, or institutions of higher learning.

While opponents from both the right and left political wings may appear to be making short-range political capital by attacking the foundations of the American educational system, they are striking at a formidable force. This in no way implies that the American public educational system is or should be above criticism, deserved or otherwise. What it is meant to suggest is that politicians and others, when attacking the system of democratic public education, do so at considerable long-run political peril. This also helps explain why, despite the hue and cry for a constitutional amendment to permit parochial programs after the Supreme Court laid them to rest in its 1973 decisions, some scientifically-sampled public opinion polls revealed opposition to parochial aid by a ratio of sixty percent opposed to forty percent in favor.<sup>109</sup>

### CONCLUSION

It is, of course, impossible to formulate a conclusion for such a volatile problem, involving as it does the seamless web of law, politics, religious and educational philosophy and economics. At best one can merely note where things appear to stand, and what may be some of the more obvious future trends. It would be, however, blindly optimistic to expect any quick or totally harmonious solutions to a debate as fundamental as this.

It does seem relatively safe to suggest that, so far as the constitutional aspect of the controversy is concerned, the Supreme Court for the foreseeable future will probably invalidate on its face any statute providing aid to parochial elementary and secondary schools which goes beyond the tightly circumscribed areas of bus transportation and restricted textbook loans. Such a strict constitutional approach will probably not be applied to colleges and universities, however. This is, of course, predicated on the assumption that there will be no major change in Court personnel and that no stark change in judicial attitude occurs. Moreover,

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108. For a detailed breakdown see SATURDAY REV. 68 (Dec. 8, 1971).

109. For a discussion of this and related matters see Doerr, *Parochial aid in the Courts Today*, 38 EDUCATION DIGEST 33 (March, 1973).

a survey of the literature suggests a grudging acceptance of the fundamental unconstitutionality of general parochial programs by many supporters of the parochial school system.

This in no way is meant to suggest a disappearance or even a diminution of fundamental theoretical debates in the area. It should be stressed that the philosophical differences between the various groups involved in this dispute are of such magnitude that often no amount of goodwill can compromise them so long as the parties continue to take their traditional ideology seriously. No matter how one faces the situation or how carefully it is analyzed, one thing remains clear: Roman Catholics generally take a favorable view of cooperative relations between government and religious institutions, whereas Protestants and secularists do not. This is illustrated by the Roman Catholic legal theologian Norman St. John-Stevas, who demonstrates beyond a doubt the contradictions between the Roman Catholic and Protestant position concerning the nature of the state, when he writes:

The Catholic starts with the conception of the good but damaged natural man; the Protestant with an idea of man utterly corrupted by the Fall. For the Catholic the state would have been necessary for man had he remained a perfect being; for the Protestant it is the direct result of original sin. For Luther the world was sin and the devil its landlord. The employment of (state) power to further social and religious ends seems reasonable to Catholics, but Protestants, at least in theory, are distrustful of all worldly power, as contaminated by sin.<sup>110</sup>

A more immediate reason for much of the heat in contemporary debates over aid to private schools has been the actions of some politicians who have sought to utilize the controversy for what appears to be their private political ends. In so doing, they have ignored the economic and educational realities, frequently pushing the cause of parochial schools far beyond a point that would be acceptable even to the administrators of such programs themselves. In so doing, these politicians not infrequently play upon some of the less noble spirits of their constituents of all persuasions, and make rational decision-making leading to an equitable settlement of some of these problems more difficult. Such political stratagems are likely to continue until intellectual leaders on all sides of the issue openly reject the emotionalism inherent in such appeals.

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110. N. ST. JOHN STEVAS, *LIFE, DEATH AND THE LAW* 31 (1964).

Demographic trends suggest that the decline in public school enrollment will continue at an accelerated pace. This means, of course, that there will be more space in the public schools for any parochial students who wish to enroll. This coupled with the fact that space-cost studies in several states indicate there is now enough space in the public schools to accommodate parochial school students certainly blunts the argument of many proponents of church-related schools that such schools are bailing out the state's taxpayers and the public schools and thus should receive some public financial support.

It should also be recognized that the Supreme Court has removed most of the practices in the public schools such as state-sponsored prayers, Bible reading and related practices, that Roman Catholics and others legitimately objected to as doctrinal vestiges of Protestantism. If any remain in a particular school, protesters should have little difficulty in seeing that they are removed. Thus, bona fide religious objections to public school programs, which were largely responsible for the Roman Catholic parochial school system in the United States, have become minimal or nonexistent.

Finally, if there are other religious reasons why sects wish to maintain parochial schools, of course, this is their constitutional right, so long as other constitutional requirements, such as the equal protection clause guarantees and general state standards, are met. But there are fewer controlling reasons why taxpayers who do not share these religious convictions should be called upon to foot part of the bill. Certainly, if upper and middle class Protestants wish to use the parochial or private school systems as a vehicle for their children to avoid children of ethnic minorities or children of lower socio-economic parents, they should pay the real cost of such an education and should not expect tax support in their efforts to skirt the equal protection clause of the fourteenth amendment.