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THE CONSTITUTIONALITY OF FEDERAL AID TO PARENTS OF NONPUBLIC SCHOOLCHILDREN

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INTRODUCTION

The recent debate over tuition tax credits has highlighted the need for in-depth reflection on the issue of parental freedom of choice in education, especially with respect to its constitutional implications. Both supporters and opponents of state aid to parochial schools agree that the Supreme Court has done violence to the first amendment. According to state-aid proponents, this has resulted from denying certain types of benefits to parochial schoolchildren. In contrast, the critics contend that the first amendment has been violated by permitting any type of state subsidy to parochial schools. The general tenor of those who have commented on the public education-religion conundrum is well summarized in the following editorial comment:

> Two thousand years from now a team of archaeologists from an outer-space colony may excavate a kitchen midden on the site of the U.S. Supreme Court building amid the ruins of what had once been the city of Washington, D.C. If they came upon a collection of opinions in cases decided under the first section of the First Amendment, will these diggers be able to reconstruct that clause if its text is nowhere given in the bale of documents? Not in a millenium. From details of litigation dealing, for in-

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> stance, with bus rides for children in nonpublic schools or with the refusal of Jehovah's Witnesses to salute a classroom flag, those busy scholars of the future are not likely to distill these 16 words: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[1]

Because state aid to parochial schools is so emotionally charged, it is not an easy topic of study. Indeed, it is difficult to find dispassionate discussions on the matter even among scholars. Nevertheless, the approach taken by this Article is to examine the issue from four vantage points through reference to the relevant literature. The first segment traces the language and intent of the first amendment. The second phase of the analysis centers on the derivative doctrine of separation of church and state. The third matter of interest is the range of opinion on how the Court should handle conflicts between the free exercise and establishment clauses of the first amendment. The final line of investigation concerns how this nation has lived with the first amendment, especially with respect to Supreme Court treatment of educational freedom of choice for nonpublic school parents.

THE RELIGION CLAUSES OF THE FIRST AMENDMENT

The very essence of the debate over governmental assistance to nonpublic school parents revolves around the meaning assigned to the expression "establishment of religion." In many of the Supreme Court decisions, "establishment of religion" has been equated with "religious establishment."[2] Many legal scholars have taken serious exception to this interpretation of the establishment clause. For example, Kenealy declared that "an establishment of religion means the official erection of one religion into a preferred position by law."[3] In a similar vein, Coleman maintained that the establishment clause of the first amendment "reflects the feeling formed in this country that one of the important things was to avoid a situation in which one religion became a government-sponsored religion."[4]

In *Illinois ex rel. McCollum v. Board of Education,*[5] a case that dealt with religious instruction in public schools, the Supreme Court rejected

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[1] Current Comment, *Clerical Discounts,* 134 AMERICA 191, 193-94 (1976).

[2] *See, e.g.,* Bradfield v. Roberts, 175 U.S. 291, 297 (1899); Terret v. Taylor, 13 U.S. (9 Cranch) 43, 48 (1815). *But see* P. KAUPER, RELIGION AND THE CONSTITUTION 52 (1964) (noting the scarcity of Supreme Court decisions interpreting the establishment clause).

[3] Kenealy, *The Private School and Public Law,* in 2 INST. OF CHURCH AND STATE PROC. 65 (1959).

[4] Coleman, *The Private Trust and Public Law,* in 2 INST. OF CHURCH AND STATE PROC. 40-41 (1959).

[5] 333 U.S. 203 (1948).

these explanations of establishment.[6] O'Neill has observed, however, that the Court based its position exclusively on the notion that the first amendment means what Jefferson, Madison and the other founding fathers intended it to mean, and that this literalist interpretation "is given all the respect to which it is entitled when it is labeled semantic and historical nonsense."[7] An examination of the *Congressional Record* gives credence to O'Neill's position,[8] and also reveals Madison's personal understanding of the first amendment: "[t]hat Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience."[9]

Emerson, basing his opinion on these commentaries and the method of ascertaining intent prescribed by *McCollum*, remarked that "[t]he meaning and significance of the First Amendment to the people of the new nation is to be found in the existing law of England and the colonies."[10] Similarly, Howe has suggested that "the principal responsibility of judges is to carry out the 'intention' of those who framed the constitution."[11] Moreover, according to Sobran, the "[f]ramers were opening the way to multiple religious influences on the state, rather than prohibiting them all. The point was to prevent one church from having an automatic advantage over the others. This should increase, not diminish, the influ-

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[6] *Id.* at 210. The Court observed that the first amendment proscribed government attempts to " 'set up a church' " and enactments " 'which aid one religion, aid all religions, or prefer one religion over another.' " *Id.* (quoting Everson v. Board of Educ., 330 U.S. 1, 15 (1948)). It then dismissed the school board's argument that the establishment clause only prohibited "government preference of one religion over another," contending that "both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." 333 U.S. at 211-12.

[7] J. O'NEILL, RELIGION AND EDUCATION UNDER THE CONSTITUTION 11 (1949).

[8] *See* 124 CONG. REC. 25,662 (1978) (statement of Sen. Moynihan). A number of versions of the first amendment were proposed and debated in the first Congress:

> [*Committee:*] No religion shall be established by law . . . .
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> . . . .
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> [*House:*] Congress shall make no law establishing religion . . . .
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> . . . .
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> [*Senate:*] Congress shall make no law establishing articles of faith or a mode of worship.
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> . . . .
>
> [*Madison:*] . . . nor shall any national religion be established . . . .

See R. BUTTS, THE AMERICAN TRADITION IN RELIGION AND EDUCATION 79-90 (1950). For the official account of the congressional debate on the establishment clause, see 1 ANNALS OF CONG. 451, 757-60, 783-84, 796 (J. Gales ed. 1789).

[9] 1 ANNALS OF CONG. 758 (J. Gales ed. 1789).

[10] 1 T. EMERSON, D. HABER & N. DORSEN, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 20 (4th ed. 1976).

[11] Howe, *The Constitutional Question*, in RELIGION AND THE FREE SOCIETY 49 (1958).

ence of faith in our public life."[12]

There is, however, disagreement over the validity of determining the original intent of the framers. Black has noted that "the textual method, in some cases, forces us to blur the focus and talk evasively . . . ."[13] Kauper has argued that there are "difficulties in using Madison and Jefferson as authoritative interpreters of the . . . First Amendment."[14] In addition, Pfeffer asserts that "this sanctification for all ages of a specific desire of the original framers smacks of ancestor worship."[15]

The Supreme Court itself has not been helpful in this regard, vacillating between these two methods of interpretation. In *Quick Bear v. Leupp*,[16] a case that dealt with the use of Indian funds for parochial schools, the Supreme Court ruled that the first amendment by itself was insufficient to outlaw such use of funds.[17]

Similarly, Smith observed that, in *Everson v. Board of Education*,[18] the Court "found it impossible to answer the specific question put to it on the basis of the text of the first amendment alone, but made its judgment with the aid of the concept of separation of Church and State."[19] Furthermore, Freund observed that the first amendment analysis of Justice Rutledge, who dissented in *Everson*, "ha[s] been questioned by scholars, theologians, polemicists and judges."[20] Emphasizing that charge, Corwin

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[12] Sobran, *The Abortion Culture*, 7 HUMAN LIFE REV. 7, 19 (Spring 1981).

[13] C. BLACK, STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW 13 (1969).

[14] P. KAUPER, *supra* note 2, at 49-50.

[15] Pfeffer, *The Case for Separation*, in RELIGION IN AMERICA 53 (J. Cogley ed. 1958).

[16] 210 U.S. 50 (1908).

[17] *Id.* at 81-82. The Court determined that the money being used to support the sectarian schools was not from the public fisc, but rather belonged to the Indians and was merely being administered by the federal government. *Id.* at 80-81. Since the money belonged to the Indians, the Court reasoned, they had a right to use the money to provide the type of education they wanted for their children, even if that education was religious. *Id.* at 81-82. To deny the Indians the right to choose religious education for their children was viewed by the Court as tantamount to denying them the right to practice their religion freely. *Id.* at 82.

[18] 330 U.S. 1 (1947). In *Everson*, a New Jersey statute authorized reimbursement for the costs of transporting children to sectarian schools via the public transportation system. *Id.* at 3-4. Tracing the history of the first amendment, the Court noted that the persecution of religious nonconformists by European and the early colonial governments was the main reason for the religious freedom provisions in the Bill of Rights. *Id.* at 8-13. The Court then observed that these provisions were sufficiently broad to prohibit even the slightest governmental intrusions into the affairs of religious institutions. *Id.* at 15-16. Moreover, the Court rejected the creation of a rule that would prevent a state from extending "general state law benefits to all its citizens without regard to their religious belief." *Id.* at 16. Since the purpose of the New Jersey program was to insure the safe transportation of schoolchildren, it was held constitutional even though it benefited parochial school students. *See id.* at 18.

[19] E.A. SMITH, RELIGIOUS LIBERTY IN THE UNITED STATES 252 (1972).

[20] 2 P. FREUND, A. SUTHERLAND, M. HOWE & E. BROWN, CONSTITUTIONAL LAW CASES AND OTHER PROBLEMS 2098 (1967).

noted that "undoubtedly, the Court has the right to make history, as it has often done in the past, but it has no right to make it up."[21]

An additional question concerns the applicability of the establishment clause to the states. A careful reading of the amendment, in conjunction with a knowledge of colonial history, reveals that Congress is to make no law respecting an establishment of religion. The matter is thus not expressly addressed with respect to the states.[22] Accordingly, many states continued their established churches long after ratification of the first amendment.[23] Katz has remarked that this reduces considerably "the force of the textual argument for the broad 'no aid' interpretation."[24]

Although the first amendment, in its entirety, has been made applicable to the several states by judicial incorporation,[25] it has been recognized that this process is not a wholesale incorporation. Katz has asserted that "[t]he prevailing view is that the Bill of Rights is imposed on the states only to the extent of the essentials of a system of ordered liberty."[26] Likewise, Corwin observed that "[i]t is only *liberty* that the Fourteenth Amendment protects."[27]

Since the free exercise clause, unlike the establishment clause, protects an individual's liberty interest, arguably it is the free exercise clause that applies to the states.[28] Although this question is academic,[29] the individual states could legitimately establish churches, but remain precluded from infringing upon a citizen's right to the free exercise of religion.

A final consideration is whether the establishment clause categorically precludes governmental assistance to parochial schools. Katz has observed that "it is by no means clear that the 'no establishment' clause

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[21] E. CORWIN, A CONSTITUTION OF POWERS IN A SECULAR STATE 116 (1951).

[22] S. COBB, THE RISE OF RELIGIOUS LIBERTY IN AMERICA 510 (1968); *see* 1 ANNALS OF CONG. 757-58 (J. Gales ed. 1789) (debate over whether to forbid establishment of a *national* religion); Katz, *The Case for Religious Liberty*, in RELIGION IN AMERICA 95-97 (J. Cogley ed. 1958) (reasonable to interpret the establishment clause as relating only to congressional powers). *But see* 1 ANNALS OF CONG., *supra*, at 784 (Madison's opinion that states must be kept from infringing upon fundamental rights).

[23] *See* R. BUTTS, *supra* note 8, at 39-40; S. COBB, *supra* note 22, at 510-17.

[24] Katz, *supra* note 22, at 102.

[25] *E.g.*, Marsh v. Alabama, 326 U.S. 501, 508 (1946); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943); Murdock v. Pennsylvania, 319 U.S. 105, 108 (1943); Cantrell v. Connecticut, 310 U.S. 296, 303 (1940).

[26] W. KATZ, RELIGION AND AMERICAN CONSTITUTIONS 30 (1964).

[27] E. CORWIN, *supra* note 21, at 114.

[28] *See* W. KATZ, *supra* note 26, at 29-30.

[29] *See* P. KAUPER, *supra* note 2, at 55-57. Professor Kauper's position appears to be that, due to the Supreme Court decisions applying the establishment clause to the states, discussion of whether or not this should be done is academic. *Id.* at 57; *see* Abington School Dist. v. Schempp, 374 U.S. 203, 217 (1963).

forbids inclusion of religious schools in general aid programs."[30] Others sound a more forceful statement: "[T]he state . . . can comply with the First Amendment if it makes available funds for strictly secular purposes in *all* schools."[31] Further, Kauper has interpreted the situation as follows: "[T]he Court says that the legislature may take account of the religious interests of its people in its legislative program so long as it does not act with coercive effect upon dissenters and nonbelievers and no preference is given to any one religious group."[32]

The Supreme Court, in *Abington School District v. Schempp*,[33] appeared to have accepted the line of reasoning suggested above.[34] In *Committee for Public Education & Religious Liberty v. Nyquist*,[35] however, the Court took a more restrictive stance.[36] Justice White dissented, reminding his brethren that "the test is one of 'primary' effect, not *any* effect."[37] Pfeffer attacked any such attempt at a carefully nuanced interpretation of the first amendment by stating, "I have no doubt that most of the instances cited in support of a narrow interpretation of the establishment clause are inconsistent with its spirit and intent."[38]

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[30] W. KATZ, *supra* note 26, at 66.

[31] Drinan, *The Constitutionality of Public Aid to Parochial Schools*, in THE WALL BETWEEN CHURCH AND STATE 55, 62 (D. Oaks ed. 1963). Blum certainly would concur with the notion that funds for all schools, as long as for a secular purpose, would be legitimate: "[T]he decisive question is not, *who* is entrusted with the expenditure of public funds, but for *what* purpose are public funds expended. If the purpose is a *public* purpose, it matters not that the agency which spends the money is private or church-related." V. BLUM, FREEDOM IN EDUCATION 100 (1965).

[32] P. KAUPER, CIVIL LIBERTIES AND THE CONSTITUTION 18 (1962).

[33] 374 U.S. 203 (1963).

[34] *See id.* at 225. In *Schempp*, a Unitarian family challenged the constitutionality of a Pennsylvania law requiring Bible reading in public schools at the beginning of each schoolday. *Id.* at 205. After reviewing a number of its prior holdings, the Court focused upon the first amendment requirement of government neutrality in regard to religion, *id.* at 222, and enunciated a two-part test to determine whether a statute is properly neutral: "[T]o withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." *Id.* Since the Pennsylvania law mandated the performance of "religious ceremony," the law failed to meet both requirements, and the law was held unconstitutional. *Id.* at 223.

[35] 413 U.S. 756 (1973).

[36] *See id.* at 788-89. *Nyquist* dealt with a constitutional challenge to a New York statute that provided for maintenance and repair grants to nonpublic schools, and tuition reimbursements and tax benefits to parents of nonpublic school students. *Id.* at 761-67. The Court struck down these provisions because their effect was to subsidize sectarian schools. *Id.* at 779-80, 788-89, 794.

[37] *Id.* at 823 (White, J., dissenting).

[38] Pfeffer, *supra* note 15, at 79. The thrust of Pfeffer's argument is that it is impractical to look to the specific intent of the framers in order to interpret the religious clauses of the first amendment. *Id.* at 52-53. It is sufficient, he contends, to interpret these clauses in conformity with the framers' general interest; that is, to prevent the government from estab-

As can be seen from the foregoing discussion, the establishment clause has evoked considerable scholarly and judicial commentary. This has stemmed not only from the varying theories of constitutional interpretation but also from the sensitive nature of the church-state question. The following section examines the church-state relationship in somewhat more detail, still utilizing the contributions of constitutional scholars.

SEPARATION OF CHURCH AND STATE

The "wall of separation between Church and State" had its origin in a letter from Thomas Jefferson to the Danbury Baptist Association. In that letter, Jefferson denied the Association's petition for a national day of prayer and fasting.[39] Since the case of *Everson v. Board of Education*,[40] the wall metaphor has played a major role in many cases relating to church-state relations. The position of "absolute separatists" is well known[41] and needs no further documentation or elucidation. There is, however, a group of scholars who analyze the "separation" doctrine differently and whose views have not as yet been sufficiently heard.[42] For ex-

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lishing a church or interfering with the affairs of religious institutions. *Id.* at 74-77, 92. The Friedmans, however, regard the failure to give state aid to families of parochial schoolchildren as a penalty and as violative of "the spirit of the first amendment, whatever lawyers and judges may decide about the letter." M. FRIEDMAN & R. FRIEDMAN, FREE TO CHOOSE 154 (1981).

[39] *See* C. ANTIEAU, A. DOWNEY & E. ROBERTS, FREEDOM FROM FEDERAL ESTABLISHMENT (1964). Thomas Jefferson is regarded as one of the strongest opponents of government aid. *See* D. MALONE, JEFFERSON AND HIS TIME: THE SAGE OF MONTICELLO 199, 270 (1981). For this reason, Senator Packwood, during the tuition tax credit debate of the 95th Congress, presented what he considered to be evidence of Jefferson's support of his proposed legislation:

> Let the record show that when Thomas Jefferson was President, he submitted to the Senate in 1803 a treaty concluded with the Kaskaskia Indians, and a part of that treaty read as follows:
>
> And whereas the greater part of said tribe have been baptized and received into the Catholic Church to which they are attached, the United States will give annually, for seven years one hundred dollars toward the support of a priest of that religion, who will engage to perform for said tribe the duties of his office, and also to instruct as many of their Children as possible, in the rudiments of literature, and the United States will further give the sum of three hundred dollars, to assist the said tribe in the erection of a church.
>
> Mr. President, those are not the writings and that is not the treaty of a man who says that you cannot use public funds for private sectarian education.

124 CONG. REC. 25,812 (1978).

[40] 330 U.S. 1 (1947).

[41] Among the ranks of the "absolute separatists" are Paul Blanshard, Leo Pfeffer, and John Swomley. *See* P. BLANSHARD, AMERICAN FREEDOM AND CATHOLIC POWER 103-04 (1959); L. PFEFFER, GOD, CAESAR AND THE CONSTITUTION 343-58 (1975); J. SWOMLEY, RELIGION THE STATE AND THE SCHOOLS 17-26 (1968).

[42] *See infra* notes 43-44 and accompanying text.

ample, O'Neill raised questions concerning Jefferson's true intentions:

> [W]e know conclusively, if we know Jefferson, that he could not possibly have been thinking of a wall so high, so impregnable, so absolute, so completely without gates, or stiles, or friendly openings, as forever to prohibit any intercourse, neighborly help, or cooperation of any kind between government and religion.[43]

O'Neill's conclusion finds support in a 1948 editorial in the *American Bar Association Journal.*[44]

As an alternative, Hutchins has argued emphatically against even the mere use of the wall metaphor: "The wall has done what walls usually do: it has obscured the view. . . . The wall is offered as a reason. It is not a reason; it is a figure of speech."[45] He declared further that "[t]hat wall has no future because it cannot help us to learn."[46] Similarly, Abraham counselled against reliance on this image because "the doctrine of the 'wall' is no solution *per se.* It fails because the necessary line depends overridingly on public policy considerations . . . and on the interests of contending groups . . . ."[47] Clancy has argued against the concept from yet another point of reference:

> [T]he "wall of separation" metaphor is an unfortunate and inexact description of the American Church-State situation. What we have constitutionally is not a "wall" but a logical distinction between two orders of competence.
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> . . . .
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> The "wall" of separation between Church and State, as it is conceived by most "absolute separationists" in America, is not really a constitutional concept. It is rather a private doctrine.[48]

Kurland wrote that the principle of separation "is meant to provide a starting point for solutions to problems brought before the Court, not a

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[43] J. O'NEILL, *supra* note 7, at 83.

[44] Editorial, *No Law But Our Own Prepossessions,* 34 A.B.A. J. 482, 482 (1948). This editorial reviewed the case of Illinois *ex rel* McCollum v. Board of Educ., 330 U.S. 203 (1947), criticizing the holding for being an extreme interpretation of the first amendment. Editorial, *supra,* at 483. In support of its conclusion that the first amendment did not forbid all state acts of assistance to religion, the editorial set forth a number of historical examples of mutually beneficial interaction between church and state. *Id.* at 484-85. For example, "[a]s President of the United States, Jefferson used public funds and government properties in aid of religion and religious education in various ways . . . ." *Id.* at 484. This was precisely Senator Packwood's conclusion. *See supra* note 39.

[45] Hutchins, *The Future of the Wall,* in THE WALL BETWEEN CHURCH AND STATE 19 (D. Oaks ed. 1963).

[46] *Id.* at 25.

[47] H. ABRAHAM, FREEDOM AND THE COURT 296 (3d ed. 1977).

[48] Clancy, *Religion as a Source of Tension,* in RELIGION AND THE FREE SOCIETY 27-28 (1958).

mechanical answer to them,"[49] and Kauper advocated an understanding of this principle as deriving from the first amendment and, consequently, dependent upon that amendment for its meaning.[50]

Katz also discussed the separation concept. Recalling its purpose, Katz stated that "[s]eparation ordinarily promotes religious freedom; it is defensible so long as it does so, and only so long."[51] Additionally, he delineated an important implication of a policy of absolute separation, admonishing that such a rule "would mean outlawing provisions designed to implement religious freedom, as in the armed forces."[52] Littell asserted that "religious liberty and a 'wall of separation' are not identical."[53] Moreover, Blanshard, an inveterate opponent of parochial school aid, conceded: "Our country did not formally establish separation of church and state in educational matters until the nineteenth century. . . . [U]ntil about 1825 the religious domination of elementary schools was taken for granted by the majority of Americans. Most schools before 1825 were Protestant."[54] The inconsistencies in the application of the separation doctrine prompted Brickman to observe: "When a principle, such as that of Church-State separation, has been consistently violated with common consent over the years, it is reasonable to inquire if it has not been downgraded to an 'unprinciple' or 'anti-principle.' "[55]

Although the expression "separation of Church and State" has assumed an air of unchangeable doctrine and immutable truth, Marnell has

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[49] P. KURLAND, RELIGION AND THE LAW 18 (1962).

[50] P. KAUPER, *supra* note 2, at 18. Apparently viewing the separation doctrine as of limited importance, Kauper stated:

> The *Zorach* opinion recognizes that the First Amendment itself says nothing about the separation of Church and State. Separation is not in itself a starting point in constitutional thinking. It follows and is required only to the extent that it flows from the clauses related to nonestablishment and the free exercise of religion.

Id.; *see* Zorach v. Clauson, 343 U.S. 306, 312-13 (1952). The *Zorach* case involved a taxpayer's challenge of a "released time" program authorized by a New York statute. *Id.* at 308 & n.1, 309. Under the program, children whose parents signed a release card were permitted to leave school grounds during school hours to attend religious instruction; children without such permission remained in the classroom. *Id.* at 308. Upholding the constitutionality of the program, the Court observed that, while church and state must be separated under the dictates of the first amendment, separation need not be absolute. *Id.* at 312-13. The "released time" program involved in *McCollum* was distinguished on factual grounds. *Id.* at 315. That program required the religious teachers to use public school property, whereas in *Zorach* the public schools merely "accommodate[d] their schedules to a program of outside religious instruction." *Id.* The Court believed such accommodation was not only constitutional, but was in keeping with "the best of our traditions." *Id.* at 314.

[51] Katz, *supra* note 22, at 97.

[52] W. KATZ, *supra* note 26, at 13.

[53] F. LITTELL, FROM STATE CHURCH TO PLURALISM 100 (1962).

[54] P. BLANSHARD, AMERICAN FREEDOM AND CATHOLIC POWER 84 (1960).

[55] W. BRICKMAN, SUBSIDIZED PLURALISM IN AMERICA 115 (1959).

challenged the Supreme Court's reliance upon this approach:

> It is one of the curious anomalies of the recent history of the Supreme Court that a Court whose membership has shown a vigorous readiness to apply new viewpoints to certain ancient problems of society should view the American relationship of Church and State as if it had been from the beginning and was as the law of the Medes and the Persians, which altereth not.[56]

THE ESTABLISHMENT AND FREE EXERCISE CLAUSES IN CONFLICT

If the constitutional provisions forbidding governmental establishment of religion and guaranteeing the free exercise of religion conflict, which takes precedence? Both scholarly and judicial opinion on the matter is varied. Byrnes' reading of history led him to maintain that "when the two clauses conflict, the Free Exercise Clause has generally been held to rule."[57] In Kauper's analysis, the reason for this occurrence is that the Supreme Court has "elevated religious liberty to the position of a preferred freedom . . . ."[58] Tribe has asserted: "[T]he free exercise principle should be dominant in any conflict with the anti-establishment principle. Such dominance is the natural result of tolerating religion as broadly as possible rather than thwarting at all costs even the faintest appearance of establishment."[59] Furthermore, many constitutional experts believe there is a direct link between religious liberty in the context of the educational scene and government subsidy. For example, Fritz-Nova declared:

> We might very well reason that there is an unreasonable interference with education if there is no assistance given for non-public or sectarian schools. Very plausibly you might say there is a violation of the Fourteenth Amendment where certain types of parents and guardians are prevented from sending their children to private schools for various reasons.[60]

John Stuart Mill, discussing a tax on stimulants, remarked that "every increase of cost is a prohibition to those whose means do not come up to the augmented price; and to those who do, it is a penalty laid on them for gratifying a particular taste."[61] A clear analogy can be drawn between the situation described by Mill and the predicament of parents desirous of a parochial school education for their children.

A philosophical justification for state aid can be found in Maritain's position: "[I]f education is not outside [the state's] sphere, [state aid] is

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[56] W. MARNELL, THE FIRST AMENDMENT 114 (1964).
[57] L. BYRNES, RELIGION AND PUBLIC EDUCATION 64 (1975).
[58] P. KAUPER, *supra* note 2, at 43.
[59] L. TRIBE, AMERICAN CONSTITUTIONAL LAW 833 (1978).
[60] Fritz-Nova, *The Private School and Public Law*, in 2 INST. OF CHURCH AND STATE PROC. 94 (1959).
[61] J.S. MILL, ON LIBERTY 178 (1898).

to help the family fulfill its mission, and to complement this mission . . . ."[62] Similar logic led Tribe to state that the requirements of the free exercise clause of the first amendment "demand that government pursue the least drastic means to a compelling secular end . . . ."[63] Katz argued that the government's position vis-a-vis religion should be neutral, and perceived this neutrality as requiring state aid to parochial schools.[64] Powell suggested that the Supreme Court's difficulty with the area of parochial school aid centered on the free exercise clause: "[The Supreme Court] conceives free exercise of religion in such narrow terms, i.e., within the walls of the church or the home, it is not really cognizant of violations of the rights of others for whom religion and education are much more intimately joined."[65]

While suggesting that state aid may be unconstitutional since it would force the general populace to aid religion, Pie raised the following objection: "[T]o insist that a man must spend his money to support an irreligious system of education, such as is contained in the public system, is equally unfair."[66] The same logic was operative in Parson's intriguing observation: "No Catholic parent has yet sued to show that his religious liberty is violated by using his taxes exclusively for only one kind of school, a school to which his church and religious conscience forbids him to send his children."[67] Such thinking, however, is by no means universal. For instance, Archer remarked that "[a] devoutly religious parent . . . should be willing to sacrifice to insure [parochial] education for his or her children."[68] Is the right of religious liberty then restricted to the affluent? Archer responded, "I don't think so. . . . Where there's a will, there's a way."[69] Gordon, on the other hand, has dismissed the entire argument since he perceives tuition costs as a mere side effect of the prior choice of private education.[70] In a brilliant analysis, Sobran links the establishment

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[62] J. MARITAIN, THE RIGHTS OF MAN AND NATURAL LAW 79 (1943).

[63] L. TRIBE, *supra* note 59, at 847.

[64] Katz, *supra* note 22, at 109. In a later work, Professor Katz reiterated the principle that neutrality required state aid to parochial schools:

> While the government should not promote religion, it not only may, but should, try to avoid restraining or burdening religious choices. And if groups wish to have parish schools, there seems to me a presumption in favor of so molding government fiscal policies as not to handicap that choice.

W. KATZ, *supra* note 26, at 77.

[65] Powell, *Public Schools and the First Amendment*, 139 AMERICA 8 (1978).

[66] Pie, *The Private School and Public Law*, in 2 INST. OF CHURCH AND STATE PROC. 112 (1959).

[67] W. PARSONS, THE FIRST FREEDOM 121 (1948).

[68] Menendez, *An Interview with Glen L. Archer*, 29 CHURCH & STATE 15 (1976).

[69] *Id.*

[70] Gordon, *The Unconstitutionality of Public Aid to Parochial Schools*, in THE WALL BETWEEN CHURCH AND STATE 89 (D. Oaks ed. 1963).

of religion question with the establishment of a unitary school system.[71]

It has become commonplace to assert that the rights of the majority are as safe as the rights of any given minority. Swomley attacked Roman Catholics for being more concerned with themselves than with the general public. In apparent rejection of the above axiom, he stated that "the weight of Roman Catholic thinking on elementary and secondary education seems more concerned with 'justice' or 'freedom of choice' for Roman Catholics than with religious liberty for the entire community."[72] Tribe, however, did not accept such thinking. He admonished that we ask "whether, in the present age, religious tolerance must cease to be simply a negative principle and must become a positive commitment that encourages the flourishing of conscience."[73]

TWO CENTURIES OF LIVING UNDER THE FIRST AMENDMENT

The current ban on state aid to nonpublic school parents is not as deeply rooted in our historical framework as some would surmise. Kraushaur put it rather bluntly when he stated, "[p]ublic support for various types of denominational schools, as well as religious instruction in the public common schools where they existed, were the rule rather than the exception."[74] Lachman further delineated the nature of the public schools of New York when he decribed them as "Protestant sectarian schools maintained by private associations."[75] Kienel referred to these schools as "an extension of the Protestant Church. So much so that the Catholic Church established its own Catholic schools in protest to the 'Protestant' public schools."[76] Religious control of schools has been so much a fact of life that in 1889 Montana, the Dakotas, Wyoming and Washington had to adopt ordinances forbidding such control, in order to

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[71] Sobran, *supra* note 12, at 12. In a novel, as well as logical approach to the issue, Sobran stated:

> Let us spell out the analogy of this culture to an established church. When the state has an official religion, it may, as in England, tolerate others. But the established church is paid for out of public monies taken compulsorily, as all taxes are, from all citizens. You have to pay for it whether you belong or not. If you want another church in keeping with your own beliefs, you pay for it out of the money the state has left you.
>
> That is how our educational system now works: you pay for the schools from which religion is banned whether your children attend them or not, whether you agree with them or not, whether you think them good influences or not.

Id.

[72] J. SWOMLEY, *supra* note 41, at 48.

[73] L. TRIBE, *supra* note 59, at 834 (footnote omitted).

[74] O. KRAUSHAUR, AMERICAN NONPUBLIC SCHOOLS 20 (1972).

[75] Lachman, *Public Schools and the American Reality*, in GOVERNMENT AID TO NONPUBLIC SCHOOLS: YES OR NO? 24 (G. Kelly ed. 1972).

[76] P. KIENEL, THE CHRISTIAN SCHOOL 71 (1974).

qualify for statehood.[77] It is important to note that the fourteenth amendment, which presently forbids the individual states from providing substantial financial support to denominational schools,[78] was passed in 1868. The early history of the first amendment thus reveals that (1) denominational schools received government support; and (2) public schools were effectively Protestant schools. Completely different conclusions, however, are drawn from an examination of this century's treatment of the religion clauses of the first amendment.

In *Pierce v. Society of Sisters*,[79] the Court followed the trajectory of earlier approaches to pluralism in education.[80] According to Drinan, the Court "recognized the right of the private school to exist as a substitute for the public school, thereby giving private schools a judicial status."[81] Drinan further observed: "*Everson* follows from *Pierce*. Public money, in other words, cannot logically be withheld from the private school if it is publicly accredited as an institution where children may fulfill their legal

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[77] *See* A. STOKES & L. PFEFFER, CHURCH AND STATE IN THE UNITED STATES 435 (1964). O'Neill provided a list of states and the latest known year they granted aid to religious schools:

California	1870
Indiana	1855
Maryland	1818
Mississippi	1878
New Hampshire	1845
New Jersey	1846
New Mexico	1897
New York	1871
Pennsylvania	1838
Texas	1874

J. O'NEILL, *supra* note 7, at 143.

[78] *See* Lemon v. Kurtzman, 403 U.S. 602, 606-09 (1971). In *Lemon*, the Court examined the constitutionality of a Pennsylvania program that reimbursed nonpublic schools for costs of teachers' salaries, textbooks, and other educational materials. *Id.* at 606-07. A Rhode Island statute that mandated salary supplements for elementary schoolteachers at nonpublic schools was also in question. *Id.* The Court held both statutes unconstitutional on the ground that the administrative procedures necessary to prevent both programs from evolving into pure subsidies to religious schools would "involve excessive and enduring entanglement between state and church." *Id.* at 619.

[79] 268 U.S. 510 (1925).

[80] *Id.* at 534-35. In *Pierce*, a religious order operating a number of private schools challenged an Oregon law that required children between 8 and 16 years of age to attend public school. *Id.* at 530-31. Holding the statute unconstitutional, the Court reasoned that enforcement of the statute effectively would destroy private schooling in Oregon, and thereby "unreasonably interfer[e] with the liberty of parents and guardians to direct the upbringing and education of children under their control," a liberty guaranteed by the fourteenth amendment. *Id.* at 534-35.

[81] Drinan, *supra* note 31, at 55.

duty to attend school."[82]

Continuing historically where Drinan left off, Pfeffer admitted: "When the *Everson* decision is coupled with the *Allen* decision they lead logically to the conclusion that States may, notwithstanding the First Amendment, finance practically every aspect of parochial education."[83] The *Allen* decision,[84] however, was followed in quick succession by nearly a dozen other cases, most of which had disastrous consequences for non-public school parents.[85]

Adamo offered one reason for the Court's decided change in attitude, perhaps simplistically but not fully unfounded: "Pfeffer has been brilliantly successful in persuading the Supreme Court that anything which is good for the Catholic Church must be bad for the nation as a whole."[86] Rhodes reported that Mark DeWolfe Howe, a non-Catholic, rendered a similar evaluation of the situation: "One day, in the middle of taking up the then-current crop of church-state cases . . . , [Howe] said that what you think of all these questions depends on what you think of the Catholic Church."[87]

The confusion surrounding the constitutionality of this issue is nothing less than astounding, so much so that Senator Packwood, during the tax credit debate, proclaimed: "There is a complete split in the authorities. There is a split in the courts. For every constitutional expert the

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[82] *Id.* at 60; *see* Everson v. Board of Educ., 330 U.S. 1, 18 (1946); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925).

[83] L. PFEFFER, *supra* note 41, at 269; *see* Board of Educ. v. Allen, 392 U.S. 236, 247-48 (1967); Everson v. Board of Educ., 330 U.S. 1, 17-18 (1947).

[84] Board of Educ. v. Allen, 392 U.S. 236 (1967). In *Allen*, a school board challenged the constitutionality of a New York law requiring public school officials to lend, free of charge, secular textbooks to junior high school and high school students in both public and private schools. *Id.* at 238, 240. The Court observed that the purpose of the statute was to foster secular, not religious education. *Id.* at 243. Since the Court found no evidence that "the processes of secular and religious training are so intertwined that secular textbooks . . . are . . . instrumental in the teaching of religion," the effect of the act is likewise secular. *See id.* at 247-48. The purpose and effects test of constitutionality was therefore met. *See id.* at 243, 248.

[85] *See, e.g.*, Wolman v. Walter, 433 U.S. 229, 255 (1977) (upheld provisions for loaning textbooks and paying for auxiliary services; overturned provisions for supplying other instructional materials and paying for field trip transportation); Meek v. Pittenger, 421 U.S. 349, 372 (1975) (program involving textbook loans and provisions of "auxiliary" services to nonpublic schools held unconstitutional); Sloan v. Lemon, 413 U.S. 825, 835 (1973) (statute providing partial tuition reimbursement for parents of private school students invalidated); Lemon v. Kurtzman, 403 U.S. 602, 607 (1971) (statutes partially reimbursing nonpublic schools for maintenance, teaching materials, and teachers' salary costs declared unconstitutional).

[86] Adamo, *Can Catholics, Jews Unite?* 14 NAT'L CATH. REP. 11 (1978).

[87] Rhodes, *From* Pierce *to* Nyquist: *A Free Church in an Expensive State*, in FREEDOM AND EDUCATION 48 (1978).

opponents of this bill can cite saying it is unconstitutional, we can cite one saying it is constitutional."[88]

Some members of the Senate used the doubtful state of the question to argue that Congress had no right to enact legislation of questionable constitutionality. Both Packwood and Ribicoff denied the validity of that position,[89] while Moynihan argued:

> [H]owever the Court does rule, the important consideration is that its ruling will be accepted. Nobody associated with this legislation intends anything but the absolute acceptance of whatever the court hands down. But given that acceptance, and pending any decision, we must not be expected to yield up our own analytic abilities, our own sense of historic reality, our own disposition to state what we feel the outcome ought to be.[90]

Tortora picked up on this line of reasoning but did not exhibit a very hopeful attitude or outlook:

> Similarly, the gathering support for tuition tax credits may, in due course, founder on the shoals of a Court decision that they violate the "separation of church and state." That such a ruling would be a preposterous misreading of the First Amendment's reference to "establishment of religion" doesn't give us any less reason to predict it. It would just represent (to paraphrase Raoul Berger's indictment in *Government by Judiciary*) "another of the usurpations that bestrew the path of the Court."[91]

CONCLUSION

This Article presented historical and constitutional analysis through reference to relevant judicial and scholarly commentary. This commentary has importance in underscoring two significant aspects of the constitutional decision-making process. On the one hand, the Court, when addressing the constitutionality of tuition tax credit legislation or similar programs, must confront the conflict between the facts of history and the Court's past opinions on the question of governmental assistance to nonpublic school parents. On the other hand, commentary of the legal community retains a rightful and deserved place within our constitutional process. The approach of this Article therefore seems cogent, for the Court must heed and confront past and present insights, lest the Justices decide magnanimous cases in a vacuum.

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[88] 124 CONG. REC. 26,046 (1978).
[89] *Id.* at 25,860.
[90] *Id.* at 25,805.
[91] Tortora, Ex Parte McCardle, 32 NAT'L REV. 1140, 1140 (1980).