

1-1-1983

## Public Funding of Private Education: A Public Policy Analysis; Note

Shawn C. Conway

Ophelia S. Camiña

Michael J. Bettinger

Robert G. Casey

Follow this and additional works at: <http://scholarship.law.nd.edu/jleg>

---

### Recommended Citation

Conway, Shawn C.; Camiña, Ophelia S.; Bettinger, Michael J.; and Casey, Robert G. (1983) "Public Funding of Private Education: A Public Policy Analysis; Note," *Journal of Legislation*: Vol. 10: Iss. 1, Article 7.  
Available at: <http://scholarship.law.nd.edu/jleg/vol10/iss1/7>

This Note is brought to you for free and open access by the Journal of Legislation at NDLScholarship. It has been accepted for inclusion in Journal of Legislation by an authorized administrator of NDLScholarship. For more information, please contact [lawdr@nd.edu](mailto:lawdr@nd.edu).

# NOTES

## PUBLIC FUNDING OF PRIVATE EDUCATION: A PUBLIC POLICY ANALYSIS

The United States Congress has long placed a priority on the education of United States citizenry. Similarly, state legislators have long placed a priority on the education of state residents. Private elementary and secondary schools, however, have traditionally received little federal or state attention.<sup>1</sup> Only with the recent interest in public funding of private education, have Congress and state legislators begun to consider the plight of private elementary and secondary schools. At present, the National Center for Education Statistics has commissioned James Coleman, in a major longitudinal study, to compare public and private schools.<sup>2</sup> Finally, private education will gain a seat at federal and state governments' policy making tables.

Short- and long-term trends explain the increasing interest in private education within the United States. Important shifts in family size, composition, and income level impact upon family educational choices. Postponed childbearing and fewer family members result in more disposable income available for education. Moreover, an abiding belief in the importance of education motivates many parents to provide their children with a "good" education.

The principle form of public support for private education remains embedded in tax codes.<sup>3</sup> At the state and local levels, private schools

- 
1. For purposes of this note, the term private will include all non-public elementary and secondary schools which charge a tuition fee.
  2. The first Coleman report was authorized by Congress, in conjunction with the Civil Rights Act of 1964, as a survey of equality of educational opportunity. Released in 1966, the report offered no policy recommendations. Its findings, however, became the source of a number of important school policies. The report found that racial segregation was extensive; that the differences in resources between black schools and white schools were not as great as had been anticipated; that levels of achievement for minority pupils were lower at every level of schooling than those of white pupils; that schools are remarkably similar in the effect they have on the achievement of their pupils when the socioeconomic background of the students is taken into account; that variations in the facilities and curricula of the schools account for relatively little variation in pupil achievement; that quality of teachers had some relationship to pupil achievement, especially for minority pupils; and that the composition of the student body had a strong relationship to the achievement of minority pupils. J. COLEMAN, *EQUALITY OF EDUCATIONAL OPPORTUNITY* 21-23 (1966) [hereinafter cited as COLEMAN, 1966].  
The 1981 Coleman report, *PUBLIC AND PRIVATE SCHOOLS*, is part of a major longitudinal study called "High School and Beyond." The study was commissioned and financed by the National Center for Educational Statistics, an arm of the Department of Education. The new Coleman report dramatically reverses the pessimistic conclusions of the first Coleman report and finds instead that schools do make a difference. The Coleman report of 1981 finds that, after family background is taken into account, there remains significant variation in student achievement and that this variation is related to differing educational policies.
  3. The Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27 (1965) (codified as amended in scattered sections of 26 U.S.C.), does allow schools with concentrations of low-income students to obtain federal funding for compensatory education pro-

usually escape taxes on real property and improvements used for school purposes, and pay no income, use, or sales taxes.<sup>4</sup> Private schools also enjoy “negative” transfer payments from the state and federal government. Negative transfer payments stimulate school revenues by providing private schools the capacity to receive tax-free donations.<sup>5</sup>

Religious instruction poses the major hurdle to further support for private education. Most authorities on constitutional law agree that public money may not be spent for private sectarian education.<sup>6</sup> The conflict arises between the “free exercise” and “establishment” clauses of the first amendment of the United States Constitution. The former guarantees an individual’s right to the free exercise of religion, while the latter prohibits government action that might establish religion.<sup>7</sup> In a wide variety of cases, courts have determined that various forms of direct public aid violate the Constitution.<sup>8</sup> The courts have struck down direct payments to religious schools,<sup>9</sup> as well as time-shared facilities arrangements.<sup>10</sup>

This note will critically examine, from constitutional and public policy perspectives, the issue of public funding of private elementary and secondary education. This examination will be limited in scope to private schools at the elementary and secondary level.<sup>11</sup> The first part of this note analyzes constitutional considerations and reviews previous challenges to public funding of private education based on the establishment clause of the first amendment. The second part of this note analyzes the most prominent public policy arguments submitted for and against public funding of private elementary and secondary

---

grams. Pursuant to the Supreme Court’s decision in *Wheeler v. Barrera*, 417 U.S. 402 (1974), Title I of the amended Act requires that students attending private schools, who qualify for compensatory education, receive the same funding as their public school counterparts.

4. Although religious educational institutions enjoy no inherent exemption from taxation and their property is taxable except so far as it is specifically exempted by constitutional or statutory enactment, *Animal Rescue League v. Bourne’s Assessors*, 310 Mass. 330, 37 N.E.2d 1019 (1941), in a large number of states the property of religious institutions is exempted from taxation by statute. The fundamental ground upon which the exemption is based is the benefit conferred upon the public by such institutions and the consequent relief of the burden imposed on the state to care for and advance the interest of its citizens. *Congregational Sunday School & Publishing Soc. v. Board of Review*, 290 Ill. 108, 125 N.E. 7 (1919).
5. I.R.C. § 170 (West Supp. 1982).
6. See discussion on the cases constitutionally challenging the public funding of private schools, *infra* notes 16 to 59 and accompanying text.
7. U.S. CONST. amend. I.
8. *Lemon v. Kurtzman*, 403 U.S. 602 (1971); *Levitt v. Committee for Public Education and Religious Liberty*, 413 U.S. 472 (1973); *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Meek v. Pittenger*, 421 U.S. 349 (1975); *Wolman v. Walter*, 433 U.S. 229 (1977); *Committee for Public Education and Religious Liberty v. Regan*, 444 U.S. 646 (1980); *Walz v. Tax Commissioner*, 397 U.S. 664 (1970).
9. *Levitt* 413 U.S. 472 (1973); *Nyquist*, 413 U.S. 756 (1973). *Contra* *Everson v. Board of Education*, 330 U.S. 1 (1947) (reimbursement to parents for transportation costs to parochial schools upheld).
10. *Meek* 421 U.S. 349 (1976); *Wolman* 433 U.S. 229 (1977). *Contra* *Board of Education v. Allen*, 392 U.S. 236 (1968) (loaning of textbooks free of charge to students in all private schools upheld).
11. For purposes of this note, elementary education will include kindergarten and grades one through eight. Secondary education will include grades nine through twelve.

schools. The third part of this note will review various tuition-based funding proposals at the federal level, including the tuition tax credit proposal<sup>12</sup> and the "Baby" BEOG proposal.<sup>13</sup> The fourth part of this note will review the tuition-based funding proposals at the state level; including tax credit and deduction proposals<sup>14</sup> and the tuition voucher proposal.<sup>15</sup> The mechanics of each federal and state proposal will be critically analyzed to determine, first, whether it meets the constitutional hurdles and, second, whether it is good policy to promote these proposals.

### CONSTITUTIONAL CONSIDERATIONS

The initial inquiry in any consideration of the question of public funding at sectarian schools involves the constitutional aspects of the establishment clause of the United States Constitution.<sup>16</sup> The establishment clause of the first amendment<sup>17</sup> prohibits Congress as well as the states<sup>18</sup> from making any law respecting the establishment of religion. In recent years, the United States Supreme Court has been faced with the task of applying this prohibition to increasingly creative attempts by state legislatures to reduce the economic hardships of non-public schools. This task has become even more difficult with the erosion of the traditional distance between politics and religion.<sup>19</sup> Justice White, in *Committee for Public Education and Religious Liberty v. Regan*,<sup>20</sup> stated that:

Establishment clause cases are not easy; they stir deep feelings; and we are divided among ourselves, perhaps reflecting the different views on this subject of the people of this country.<sup>21</sup>

This observation explains the present state of constitutional law on this issue.

Through thirty-five years and almost a dozen case decisions the Court has chosen to sacrifice clarity and predictability for flexibility.<sup>22</sup> As Justice White concedes, *Regan* does not furnish a litmus paper test any more than past cases.<sup>23</sup> The Supreme Court has, however, estab-

12. H.R. 12050, 95th Cong., 2d Sess. (1978); S. 1095, 96th Cong. 1st Sess. (1979); S. 550, 97th Cong., 1st Sess. (1981).

13. S. 1101, 96th Cong., 1st Sess. (1979).

14. MINN. STAT. ANN. § 290.09(22) (West 1982); Washington, D.C. Initiative Measure No. 7, Title VIII A, Educational Tax Credit for the November 3, 1981 general election, *reprinted, infra* note 168.

15. *Infra* notes 180 to 199 and accompanying text.

16. The other religion clause of the first amendment, protecting the free exercise of religion, is not pertinent to this discussion. As noted in *Allen*, 392 U.S. at 248-49 state aid challenges based on the free exercise clause fail if they show no coercive effect of the law against an individual's religious practice. *See also Walz*, 397 U.S. at 668-69.

17. U.S. CONST. amend. 7 provides that "Congress shall make no law respecting the establishment of religion . . . ."

18. *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940).

19. *See, e.g., Once Again, School Prayer*, NEWSWEEK, Dec. 28, 1981, at 49.

20. 444 U.S. 646 (1980).

21. *Id.* at 662.

22. *Id.*

23. *Id.*

lished and continues to apply a tripartite test applicable to all establishment clause questions. The tripartite test requires that a challenged statute (1) have a secular legislative purpose, (2) have a principal or primary effect that neither advances nor inhibits religion, and (3) not foster an excessive government entanglement with religion.<sup>24</sup>

### Secular Legislative Purpose

*Everson v. Board of Education* laid the foundation for the first criterion in the establishment test.<sup>25</sup> *Everson* upheld public busing of parochial school students, concluding that such busing provided a legitimate safety measure similar to police and fire protection. The next state aid case, *Board of Education v. Allen*,<sup>26</sup> transformed the concept of a public welfare benefit into the secular legislative purpose criterion.<sup>27</sup> *Lemon v. Kurtzman*,<sup>28</sup> then confirmed this broad view of secular legislative purpose.<sup>29</sup> In applying the purpose criterion, the *Lemon* court simply accepted the stated legislative purpose "to enhance the quality of the secular education in all schools" and remarked that "[t]here is no reason to believe the legislatures meant anything else."<sup>30</sup> Later establishment clause cases have made similar cursory examinations reaffirming the states' legitimate legislative interest in the secular education function of private sectarian schools.<sup>31</sup> Since *Allen*, the secular purpose requirement has become a largely perfunctory inquiry easily satisfied by any legislative recitation of purpose.<sup>32</sup>

Since the court will essentially presume the requisite secular purpose for any legislative enactment, the first criterion of the tripartite test has become little more than a formality. The real test of establishment clause scrutiny is found in the effect and entanglement inquiries.

24. *Lemon*, 403 U.S. at 612-13. This tripartite test is commonly referred to as the *Lemon* test.

25. 330 U.S. 1 (1947). *Everson* was the first Supreme Court case to raise an establishment clause challenge of a statute providing state aid to religious schools. The challenged statute authorized reimbursement to parents for transportation costs of children attending both public and Catholic schools. The Court upheld the statute, concluding that it was a legitimate public safety measure analogous to ordinary police and fire protection.

26. 392 U.S. 236 (1968).

27. *Id.* at 243. This criterion had already undergone significant elaboration in *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963).

The *Allen* Court found a secular purpose in a challenged textbook loan program that "merely [made] available to all children the benefits of a general program," 392 U.S. at 243. The Court went on, however, to declare that states have "a proper interest in the manner in which [sectarian] schools perform their secular educational function," *Id.* at 247. By expanding the secular legislative purpose concept, the Court extended *Everson's* public welfare rationale far beyond its original bases.

28. 403 U.S. 602 (1971).

29. *Id.* at 613.

30. *Id.*

31. See, e.g., *Nyquist*, 413 U.S. at 773:

[W]e need touch only briefly on the requirement of a 'secular legislative purpose'. As the recitation of legislative purposes appended to New York's law indicates, each measure is adequately supported by legitimate, nonsectarian state interest. We do not question the propriety, and fully secular content, of New York's interest in preserving a healthy and safe educational environment for all its school children.

32. Indeed, the Court has invalidated no statute for lack of a secular purpose.

### Primary Effect

In *Everson*, the court also introduced the second requirement of the tripartite test, that the primary effect of legislation may neither advance nor inhibit religion. The Court stated that the first amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary."<sup>33</sup> This general neutrality concept soon developed into a general prohibition of the advancement or inhibition of religion.<sup>34</sup>

In three early cases decided on the basis of the primary effect criterion, the Court invalidated aid statutes that failed to assure that the aid would be limited to secular activities.<sup>35</sup> By 1975 the Court refused to allow direct aid, in the form of equipment and materials, to nonpublic schools which "from [their] nature . . . [could] be diverted to religious purposes."<sup>36</sup> Two years later, the Court retreated from this rule and allowed state authorities to administer state aid programs off nonpublic school sites.<sup>37</sup> The Court, however, struck down any scheme which left

33. 330 U.S. at 18.

34. *See Allen*, 392 U.S., at 242-43:

Based on *Everson*, *Zorach*, *McGowan*, and other cases, Abington School District v. Schempp, 374 U.S. 203 (1963), fashioned a test subscribed to by eight Justices for distinguishing between forbidden involvements of state with religion and those contacts which the Establishment Clause permits:

"The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. *Everson v. Board of Education* . . . ' 374 U.S. at 222.

35. In 1973, the Court decided three state aid cases all on the basis of the primary effect criterion. The first significant development of this inquiry came with *Levitt v. Committee for Public Education and Religious Liberty*, 413 U.S. 472 (1973), in which the Court invalidated a New York statute providing reimbursement to nonpublic schools for performing state-mandated tests. The statute neither attempted nor provided means to assure that teacher-prepared tests were free of religious instruction. Therefore, the Court found a potential for advancement of religion "because the aid that [would] be devoted to secular functions [was] not identifiable and separate from aid to sectarian activities." *Id.* at 480.

The Court found the same constitutional flaw in *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973), (decided the same day). The statute in *Nyquist* authorized state money grants to nonpublic schools for maintenance and repair of facilities and equipment. The statute's failure to differentiate between facilities devoted to religious activities and secular functions gave it the primary effect of advancing religion by subsidizing religious activities of sectarian schools.

The final state aid case of the 1973 trilogy involved a Pennsylvania statute providing funds to reimburse parents for tuition expenses of children in nonpublic schools, *Sloan v. Lemon*, 413 U.S. 825 (1973). The Court found no constitutional difference between this program and the reimbursement scheme in *Nyquist*. The statute was held to violate the establishment clause due to its effect of impermissibly advancing religion.

36. *Meek v. Pittenger*, 421 U.S. 349 (1975) (syllabus of the court). This flaw in the statute impermissibly advanced religion. In this case, the Court considered the secular educational function and religious mission of sectarian schools to be "inextricably intertwined." *Id.* at 366. For this reason, the program constituted "direct aid" which, as indicated in earlier cases, *see, e.g., Nyquist*, 413 U.S. at 780, results in an impermissible advancement of religion.

37. In *Wolman*, 433 U.S. 229, the Court upheld provisions of an Ohio statute authorizing the purchase of secular textbooks, the supply of standardized testing and scoring services, and the provision of diagnostic, therapeutic, guidance and other remedial service by public employees. These programs failed to advance religion because they were not administered on the nonpublic school site and state authorities retained control. This development suggests

significant control in private school officials.<sup>38</sup> The Court reasoned that such aid schemes contained the unacceptable risk of advancing religion.<sup>39</sup>

Most recently, the Court has rejected the "formalistic dichotomy" of direct and indirect aid.<sup>40</sup> In *Committee for Public Education and Religious Liberty v. Regan*,<sup>41</sup> the Court indicated that it would no longer invalidate a statute simply because the statute directed funding to schools, rather than pupils or their parents.<sup>42</sup> This dramatic rejection of prior dicta<sup>43</sup> not only suggests a more lenient future application of the effect criterion but also marks a much more permissive view of the establishment clause in general.

Thus, in interpreting the establishment clause, the Court first distilled a concept of neutrality from the first amendment's "high and impenetrable" wall between church and state. The Court then translated this neutrality as a prohibition of advancement of religion. Incidental benefits to religion were allowed, however, provided the aid remained "indirect." Gradually, the Court allowed more than "incidental" benefits as long as state authorities retained control. Now the Court has eroded the wall between church and state further by recanting its earlier statements condemning direct aid.

#### Excessive Government Entanglement

The third prong of the establishment clause test, requiring that a statute not result in excessive entanglement between government and religion, in *Walz v. Tax Commissioner* developed<sup>44</sup> as an offshoot of the secular purpose inquiry. The Court indicated that in addition to meeting the secular purpose and primary effect requirements, a statute must

---

that aid to the secular educational function is not *per se* unconstitutional as *Meek* had indicated.

38. *Id.*

39. Provisions for instructional materials, equipment, and field trip transportation within the same aid scheme did not withstand primary effect scrutiny. Although the statute limited materials and equipment to those "incapable of diversion to religious use," *Id.* at 248, the Court determined the primary effect to be a direct and substantial advancement of sectarian enterprises. The Court similarly indicated that "it would exalt form over substance if [the Ohio statute's distinction of issuing materials to the pupil rather than directly to the school] were found to justify a result different from that in *Meek*." *Id.* at 250. The field trip funding provision left the determination of timing, frequency, and destination of trips in the control of school officials. In the Court's view the nature of field trips and the integral role of the teacher in making a trip meaningful produced an unacceptable risk of advancing religion.

40. *Regan*, 444 U.S. at 658.

41. *Id.* at 646.

42. *Regan* upheld the New York legislature's statutory response to the *Levit* decision. The new version of the reimbursement program for state-mandated testing now provided for standardized state-prepared tests and required schools to submit vouchers recording teacher time spent.

43. *See supra* note 37.

44. 397 U.S. 664 (1970). *Walz* involved a New York property tax exemption for religious organizations. The statute was challenged for indirectly contributing to religious bodies. As an offshoot of its secular purpose inquiry, the *Walz* Court examined the government involvement in religion arising from the statute, particularly the administrative relationships necessary for enforcement.

not give rise to excessive governmental involvement through "continuing surveillance leading to an impermissible degree of entanglement."<sup>45</sup>

In *Lemon v. Kurtzman*,<sup>46</sup> the Court applied this "entanglement" requirement as a separate inquiry and developed its two components—government surveillance and political divisiveness.<sup>47</sup> While later cases have minimized the importance of the political divisiveness component,<sup>48</sup> government surveillance has remained vital. As formulated in *Lemon*, the government surveillance component focuses on three factors to determine whether entanglement becomes excessive: (1) the character and purposes of the institutions benefitted, (2) the nature of the aid provided, and (3) the resulting relationship between government and the religious authority.<sup>49</sup> The *Lemon* majority concluded that the religious character and purpose of sectarian schools generally gives rise to entanglement. Accordingly, the inevitable surveillance required to guard against mingling of religious activity and secular education, through a salary supplement program for nonpublic teachers, involved excessive and enduring entanglement.

Immediately after invalidating *Lemon*'s salary supplement program, the Court upheld a federal construction grant program for college facilities, observing that college students are less impressionable and less susceptible to religious indoctrination than elementary and secondary students.<sup>50</sup> The Court reasoned that because religious indoctrination did not constitute a substantial purpose of the church-related colleges, entanglement was minimal.<sup>51</sup>

45. *Id.* at 675. The property tax exemption was upheld since, if anything, it tended to eliminate the administrative relationships for tax violation, liens, and foreclosures.

46. 403 U.S. 602 (1971).

47. In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), a Rhode Island enactment providing a 15% salary supplement for nonpublic school teachers was held to foster "excessive government entanglement with religion." *Id.* at 613. In reaching this decision, the Court elaborated that entanglement's "line of separation, far from being a 'wall,' is a blurred, indistinct, variable barrier depending on all the circumstances of a particular relationship." *Id.* at 614.

48. The second component of *Lemon*'s entanglement analysis explored the potential for political divisiveness along religious lines. The Court emphasized that the threat of partisans voting their faith was one of the principal evils against which the First Amendment was intended to protect. *Id.* at 623. The Court recognized that particular religions often take strong stands on public issues. Nevertheless, it indicated that the Constitution prohibits laws benefitting relatively few religions when, as in the salary supplement program at issue, they increase the potential for political fragmentation through the need for annual appropriations decisions likely to demand increasingly greater subsidization.

Since *Lemon*, the political divisiveness question has been largely neglected by the Court in state aid cases. It was considered in *Nyquist*, where the Court observed in the tax benefit provisions a "grave potential for . . . continuing political strife over aid to religion." 413 U.S. at 794. Essentially, the Court regarded the provisions as "foot-in-the-door" legislation beginning at modest levels but subject to annual pressure for enlargement. Yet the Court didn't base its decision on this prospect of divisiveness; it merely viewed it as a "warning signal." *Id.* at 798. In *Meek*, the Pennsylvania statute "create[d] a serious potential for *divisive* conflict," 421 U.S. at 372 (emphasis added), but the Court did not fully discuss this point. Finally, the majority opinions in the two most recent cases, *Wolman* and *Regan*, have virtually ignored this aspect of the entanglement analysis.

49. 403 U.S. at 615.

50. *Tilton v. Richardson*, 403 U.S. 672 (1971).

51. *Id.* at 681.



The Court next invalidated a statute providing "auxiliary services,"<sup>52</sup> focusing on the "pervasively religious" atmosphere in which they were to be provided.<sup>53</sup> By contrast, in *Wolman v. Walter*,<sup>54</sup> the Court upheld an aid program that required supervision only in a neutral setting and granted no program control in nonpublic school personnel.<sup>55</sup>

The Court in *Regan*<sup>56</sup> found that state's control of test content and the objective nature of the state mandated testing and scoring provisions presented no difference of constitutional dimension from those tests upheld in *Meek v. Pittenger*.<sup>57</sup> In *Regan*, New York not only supplied the tests but also reimbursed nonpublic schools for time spent administering them. The Supreme Court agreed with the district court's determination that the reimbursable services were "discrete and clearly identifiable."<sup>58</sup> The Court also concluded that the auditing and reimbursement process, which were straightforward and susceptible to typical routinization, created no excessive entanglement.

This examination of recent Supreme Court decisions provides the framework within which to analyze a public funding of private elementary and secondary education proposal. Though the Supreme Court appears to have broadly interpreted the tripartite test set forth in *Lemon*, any state or federal funding proposal must satisfy, at least, the test as interpreted in *Regan*.<sup>59</sup>

#### PUBLIC POLICY CONSIDERATIONS

The cost of education has increased drastically in the last decade.<sup>60</sup> Private elementary and secondary schools have responded by turning to the public sector for financial assistance. As pressure builds for in-

52. "Auxiliary Services" means remedial and accelerated instruction, guidance counseling and testing, and speech and hearing services.

53. In *Meek*, 421 U.S. 349, the degree of prophylactic contact necessary to ensure that subsidized teachers did not inculcate religion gave rise to excessive entanglement. Although the need for continuing surveillance was reduced by the fact that the auxiliary service teachers and counselors were to be public employees, since the services were to be performed in the pervasively religious atmosphere of the sectarian schools, the resulting entanglement remained excessive.

54. 433 U.S. 229 (1977).

55. The *Wolman* aid scheme tailored its diagnostic services provision to respond to the *Meek* decision. The Ohio program authorized these services to be administered by public employees off the premises of the nonpublic school. This was not objectionable on entanglement grounds since any supervision would occur only in a neutral setting. The Court reasoned that: "It can hardly be said that supervision of public employees performing public functions on public property creates an excessive entanglement between church and state." *Wolman*, 433 U.S. at 248. *Wolman's* testing and scoring program similarly entailed no need for supervision since nonpublic school personnel could control neither the content nor the result of the standardized tests.

56. 444 U.S. 646 (1980).

57. *Id.* at 661.

58. *Id.* at 660.

59. *Id.* at 646.

60. PRIVATE SCHOOLS AND THE PUBLIC GOOD 3 (E. Gaffney ed. 1981).

creased public support of private schools, congressmen and state legislators will encounter difficult public policy questions. The impassioned debate over public funding of private elementary and secondary education centers upon claims and counterclaims of church/state separation, racial and social class isolation, and academic elitism.

This section will analyze the four principle policy arguments in the debate over public funding of private elementary and secondary schools from both the proponents' and opponents' perspectives. The first policy argument discusses whether parents of private school children who directly support public education experience an unfair tax burden. The second policy argument discusses whether private schools perform a public function. The third policy argument discusses whether private schools promote pluralism within student bodies or whether they promote social, religious, and economical divisiveness. The fourth policy argument discusses whether private schools provide a better quality education than public schools.

When used in this section, the terms proponent and opponent will include the following: A proponent of public funding of private elementary and secondary education believes that more students should have the opportunity to attend private schools. This position may stem from a belief that private schools offer an alternative to public education or that elementary and secondary education should include religious training. An opponent believes that the federal and state governments should not increase present levels of funding to private elementary and secondary schools. This position may stem from a strict interpretation of the constitutional mandate of separation of church and state; a belief in the government's responsibility to only provide an education for the masses; or the position may stem from an elitist conviction that private elementary and secondary schools must maintain small class size in order to offer students a quality education.

#### Do Private School Patrons Suffer an Unfair Tax Burden?

Local property taxes provide the largest source of funds for public elementary and secondary education.<sup>61</sup> Proponents of public funding of private elementary and secondary education emphasize that all land owners, including parents of children in private schools, must pay these property taxes. Proponents of public aid to private education argue that the mandatory property tax which supports public education places an unfair and inequitable burden upon the parents of private school children. This tax burden is compounded when little of this tax money filters back to the private schools supported through tuition payments.<sup>62</sup>

---

61. See, e.g., N.Y. REAL PROPERTY TAX LAW § 1300 et seq. (McKINNEY 1981); ILL. REV. STAT. ch. 122, § 17-2 et seq. (1962); CAL. REV. & TAX § 95 et seq. (West 1982 Supp.).

62. See discussion of the effects of tax credits, *infra* notes 96 to 122 and accompanying text.

Opponents to public funding of private elementary and secondary education respond to the unfair tax burden argument in two ways. First, the taxpaying parents who send their children to private schools make a voluntary choice not to send them to public schools. This choice evidences the parents conscious decision not to take advantage of the public education which they support through property taxes. Second, opponents contend that taxpayers without school children also support public education through their property tax dollars. In effect, these taxpayers support a system from which they receive no direct benefit.

The rationale underlying the proponents' position on the unfair tax burden argument is that the payment of taxes should be directly proportional to the receipt of public services supported by these taxes. Conversely, the basic tenet underlying the opponents' position is that the payment of taxes represents a payment for the public good and not a payment for a specific government service. Opponents contend that the commitment to public education has become a responsibility to be shared by all citizens regardless of whether their children attend public elementary or secondary school.

#### **Should Private Schools be Compensated Because They Perform a Public Function in Educating Citizens?**

The United States Supreme Court has held that education is not a fundamental right guaranteed by the United States Constitution.<sup>63</sup> State legislators, however, as a manifestation of the state's responsibility to provide an equal opportunity for all residents,<sup>64</sup> traditionally provide education subject to state regulation. Proponents of public funding of private elementary and secondary education argue that when private schools provide this service, they should be compensated for their performance of a public function.

Opponents of public funding admit that private elementary and secondary schools perform a secular educational function but also emphasize that private schools perform non-public and non-secular functions. According to James Coleman's study, sixty-six percent of all private elementary and secondary school students attend Catholic schools.<sup>65</sup> The majority of private elementary and secondary students, therefore,

---

63. In *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), the United States Supreme Court held that publicly financed primary and secondary education is not a fundamental right. Thus, there appears to be no fundamental right by any student, public or private, to receive an education.

64. *See, e.g., Brown v. Board of Education*, 347 U.S. 483 (1954).

65. J. COLEMAN, *PUBLIC AND PRIVATE SCHOOLS* 30 (1981) [hereinafter cited as COLEMAN, 1981]. *See also supra* note 2 and accompanying text. Coleman's new study was commissioned and financed by the National Center for Education Statistics, an arm of the Department of Education. In the planning stages since 1978, the Center began a group-administered survey, *High School and Beyond (HS&B)*, in the spring of 1980 and will include follow-up surveys of the same sample in 1982 and 1984. The survey includes 58,728 high school sophomores and seniors in 1,016 schools, as well as their principals and teachers. When HS & B is com-

receive not only training in secular subjects but also religious instruction. While the Supreme Court appears to have recently lowered the wall of separation between church and state,<sup>66</sup> the practical problem of distinguishing where secular subjects end and religious subjects begin continues to cause unwillingness among state legislators to financially support the educational services provided by private elementary and secondary schools.<sup>67</sup> Opponents also note that the federal government<sup>68</sup> already offers ample financial assistance to private elementary and secondary schools by providing textbooks in secular subjects, visual aid equipment, buses, and various secular teaching aids.<sup>69</sup>

Proponents respond with the argument that, by reducing the number of elementary and secondary students that public schools must educate, private schools provide a public function which qualifies for some type of compensation. Opponents rely upon David Sullivan's research which indicates that no direct relationship exists between the increase in the number of students in public schools and the total educational expenditures needed to accommodate this increase.<sup>70</sup> Sullivan concludes that an assimilation of private elementary and secondary school students into public schools would not place a heavy burden on public elementary and secondary schools.<sup>71</sup> Opponents conclude that the savings enjoyed by public schools when private schools provide an alternative education is minimal. To support their view, opponents refer to other institutions that perform public services and do not receive direct public financial support. For example, organizations such as the Boy Scouts of America contribute great public service to the development of youth in a totally secular fashion but do not receive a government subsidy.<sup>72</sup>

Finally, the opponents recognize that public funding would entail extensive government regulation. Governments have a fiduciary responsibility to their taxpayers to account for use of government funds.<sup>73</sup> Public funding would require governmental regulation to intrude into the educational philosophy of each funded school, to dictate the secular curriculum, and to control the distribution of public funds within the

---

pleted it will provide a wealth of information about schools, students, teachers, educational policies and postsecondary outcomes.

Coleman's new report should be viewed from two distinct perspectives. One is political, the other educational. The study seeks to examine the political question of the role of private schools in U.S. education, and it also presents descriptive analysis of educational practices in public and private high schools.

66. See *supra* notes 16 to 59 and accompanying text.

67. See Note, *Education Vouchers and Tuition Tax Credits: In Search of Viable Public Aid to Private Education*, 10 J. LEGIS. 178, 191-96 (1983) [hereinafter cited as *Viable Public Aid*].

68. The Elementary and Secondary Education Act of 1965, as amended in 1978, 20 U.S.C. §§ 236, 241, 331, 821, 1801 (1974). See *supra* note 3.

69. See *supra* notes 33 to 43 and accompanying text.

70. D. SULLIVAN, PUBLIC AID TO NON-PUBLIC SCHOOLS 63-67 (1974).

71. *Id.*

72. *Id.* at 47.

73. *Id.*

schools. Constitutional considerations aside, opponents and proponents alike often find this entanglement unacceptable.

#### **Do Private Schools Promote Pluralism or Divisiveness?**

Proponents of public funding of private elementary and secondary education claim that private schools maintain pluralism within the student body. Private schools, they argue, reach beyond traditional school district borders to select a balanced cross-section of the community through their admissions program.<sup>74</sup> To substantiate this claim, proponents rely upon Coleman's study which concludes that private secondary schools experience less racial segregation than public school counterparts.<sup>75</sup> Coleman concedes, however, that overall, private secondary schools enroll a smaller proportion of blacks than do their public school counterparts.<sup>76</sup>

Opponents of public funding of private elementary and secondary education also rely upon Coleman's study. Opponents contend that the study documents private schools' contribution to religious segregation.<sup>77</sup> Coleman's data reveals that sixty-six percent of all private elementary and secondary school students attend Catholic schools, and of the students in Catholic schools, more than ninety percent are Catholic.<sup>78</sup> Opponents claim that, while religious concentration does not constitute an inherent evil, it certainly demonstrates that private elementary and secondary schools are not pluralistic in religious terms.

Proponents argue that public funding of private elementary and secondary education will give more low-income students an opportunity to attend private school. This will result, they argue, in a more diverse student body. Opponents respond that a private school's ability to engage in selective admissions enables it to discriminately accept only those elements found "desirable." Such subjectivity, opponents argue, inevitably results in some degree of elitism. Private elementary and secondary schools will determine the student body based upon such factors as a student's intellectual capacity, economic status, or social qualities. Opponents contend that by increasing the number of private school applicants, private schools will be forced to draw sharper lines of distinction for their admission standards.

#### **Do Private Schools Provide a Higher Quality of Education than do Their Public School Counterparts?**

To examine the issue of quality, one must ask why parents are willing to pay for an education which otherwise would be provided tuition-free. The answer, according to private school proponents, lies in the

---

74. This is a right not enjoyed by public schools which are limited to school districting lines.

75. COLEMAN, 1981, *supra* note 65, at 30.

76. *Id.*

77. *Id.*

78. *Id.*

degree to which the public and private school services differ. Parents of children in private elementary and secondary schools, from the least expensive to the most expensive, sacrifice personal resources for their vision of a quality differential. The subjective determination of what constitutes "quality" makes the questions of whether or not private schools provide a "better" education than their public school counterparts a difficult one to resolve. No "objective" criteria exist for determining what constitutes a "good" school or what creates a "better" education. Quality decisions are necessarily subjective. While a variety of factors influence the private school patron's decision, in the final analysis the chosen mode of education reflects a statement of values.

Proponents of public funding of private elementary and secondary education suggest that private schools provide a higher quality education due to a superior academic curriculum, higher academic demands and expectations, and a disciplinary climate. They rely on James Coleman's report to support these contentions. According to Coleman, private secondary schools generate higher achievement among students than do public secondary schools.<sup>79</sup> Coleman attributes this difference to private secondary school student's "higher rates of engagement in academic activities. School attendance is better, students do more homework, and students generally take more rigorous subjects."<sup>80</sup> In addition, Coleman concludes that the disciplinary climate of private schools improves student achievement.<sup>81</sup>

Opponents, on the other hand, contend that the higher academic achievements demonstrated by students in private schools stem from two qualities unique to private elementary and secondary schools. First, private elementary and secondary schools, unlike their public school counterparts, generally use a selective admissions program. Second, and related to the selective admissions program, private schools can offer a variety of advanced academic courses.

Private elementary and secondary schools' ability to discriminately select their enrollment, presumably based upon academic achievement and entrance examinations, allows private schools to choose achievers. Therefore, to the extent private elementary and secondary schools select achievers, this uncontrolled factor distorts conclusions which indicate the educational superiority of private schools. Also, one cannot disregard parental influence. The payment of tuition by parents of children in private elementary and secondary schools instills greater academic expectations in private school students.

Coleman also concludes that, when comparing students of similar backgrounds, the enrollment in advanced academic courses "brings

---

79. *Id.* at 152.

80. *Id.* at 223. Coleman's original report, COLEMAN, 1966 *supra* note 2, at 21-23, concluded that family background heavily determined educational achievement. Coleman's new report, however, dramatically reverses this pessimistic conclusion and confirms the importance and efficacy of private school educational policies.

81. COLEMAN, 1981 *supra* note 65, at 223.

substantially greater achievement."<sup>82</sup> In sum, students learn more from taking rigorous courses, a conclusion which contradicts the notion that only high achievers elect to take rigorous courses. Opponents rely upon Coleman's study to argue that the higher academic achievement of private school students results from the advanced curricula fostered in private schools. They note that, although public elementary and secondary schools provide advanced academic courses, the curricula of public schools must reflect the wider spectrum of academic abilities. Opponents contend that the advanced academic courses, which provide private school students with a higher quality of education, would be reduced if a broader range of students attended private elementary and secondary schools.

These four policy considerations along with the constitutional requirements provide the framework for analyzing various proposals for public funding of private elementary and secondary education.

## FEDERAL TUITION FUNDING PROPOSALS

### Recent Federal Proposals

Historically, the federal government has assumed a limited role in providing aid for elementary and secondary education. This policy stems, in large part, from the federal Constitution's failure to expressly provide for the education of United States citizens. Pursuant to the power reserved in the states under the residuary clause of Amendment X, state governments have assumed the responsibility of providing education for citizens within state borders. The federal government has intervened only when necessary to assure that these state programs provide a minimal level of equal opportunity to all students.

Federal involvement in elementary and secondary education presently consists of the Elementary and Secondary Education Act, as amended, and the recently formed Department of Education. Though primarily designed to assist public education, both forms of involvement do provide federal aid to private schools at the elementary and secondary level.

The Elementary and Secondary Education Act of 1965,<sup>83</sup> as amended in 1978,<sup>84</sup> (amended Act), allows local school districts with concentrations of low-income families to obtain federal funding for compensatory education programs.<sup>85</sup> In compliance with *Wheeler v. Barrera*,<sup>86</sup> Title I of the amended Act requires that students attending private schools, who qualify for compensatory education, receive the

---

82. *Id.*

83. Pub. L. 89-10, 79 Stat. 27 (1965) (codified as amended at 20 U.S.C. §§ 236, 241a, 242, 331, 821, 1801 (1976)).

84. 20 U.S.C.A. §§ 2701-3389 (West Supp. 1982).

85. 20 U.S.C. § 241a (1976).

86. 417 U.S. 402 (1974).

same funding as their public school counterparts.<sup>87</sup> Title IV of the amended Act contains a special provision for private schools with qualifying students, allowing them to obtain federal funding even though the encompassing school district does not meet the funding requirements.<sup>88</sup>

The Department of Education, established in 1979,<sup>89</sup> includes an office to oversee education at the elementary and secondary level<sup>90</sup> and a separate office to supervise private education.<sup>91</sup> These offices administer indirect federal aid programs<sup>92</sup> and determine federal policy for private elementary and secondary education. Due to an increase in educational costs and a growing disparity in the quality of educational programs, this latter task has become a highly controversial issue.<sup>93</sup>

The surging cost of tuition at private elementary and secondary schools has prompted parents, educators, lobbyists, and members of Congress to call upon the federal government for assistance. The proponents of increased federal aid to private schools claim that the educational process, in which private schools participate, produces intelligent, concerned citizens who benefit society. Because private schools contribute this societal benefit, proponents argue that the federal government has a responsibility to provide assistance to private education.<sup>94</sup> To further this argument, proponents emphasize the diversity and freedom of choice offered by private elementary and secondary schools.

Proponents have embodied these ideals in two separate pieces of legislation recently introduced into Congress. The first, tuition tax credits, would afford parents of students attending private elementary and secondary schools a tax credit for a portion of the tuition paid for

---

87. 20 U.S.C.A. § 2740 (West Supp. 1982) Subsection (b) allows the Commissioner to go beyond equal funding and offer non-public students an opportunity to participate in the programs provided for similarly deprived public students.

88. 20 U.S.C.A. § 3086 (West Supp. 1982). Pursuant to the amended act, Federal funds are appropriated directly to school districts consisting of low income families. To qualify, 50% of the families with school-aged children, within the school district, must be below the median income level for a family of four. Once a school district qualifies, the federal funds are distributed to schools in proportion to the number of students in need of compensatory education, as determined through testing. Pursuant to 20 U.S.C.A. §§ 3801-3876 (West Supp. 1982), Congress established a supplemental elementary and secondary education block grant, effective October 1, 1982.

89. Pub. L. 96-88, Department of Education Organization Act, 20 U.S.C. 93 Stat. 668 (1979). 20 U.S.C. §§ 3401-3510 (Cumm. Supp. 1980).

90. Congress established the office of Elementary and Secondary Education to administer functions of both public and private schools. 20 U.S.C.A. § 3414 (West Supp. 1982).

91. Pursuant to the Department of Education Organization Act, *supra* note 89, the Office of Private Education was given an assistant secretary status. For legislative history of the Act, see 1979 U.S. CODE CONG. & ADM. NEWS 1514.

92. The indirect programs include instructional materials, supplementary educational centers and services, education of handicapped, bilingual education, and school nutrition. See 20 U.S.C. §§ 821, *et seq.* (1976).

93. Congressional awareness of the problem is evidenced by the Education Consolidation and Improvement Act of 1981, Pub. L. No. 97-35, tit. V., § § 551-596, 95 Stat. 463-82 (1981) (to be codified in scattered sections of 20 U.S.C.).

94. See *supra* notes 63 to 73 and accompanying text.



each child. The second, Basic Education Opportunity Grants for elementary and secondary education ("Baby" BEOG's), would allow qualifying parents to receive a grant from the federal government to defray the cost of tuition and expenses. Because these proposals represent the most recent development in federal aid to private education, this section will review the mechanics, analyze the constitutional issues, and critique the policy of tuition tax credits and "Baby" BEOG's.

### Tuition Tax Credits

Tuition tax credit proposals, sponsored by Senators Daniel P. Moynihan (D-N.Y.) and Robert Packwood (R-Or.), have received the greatest amount of congressional consideration over the past five years. Although details change from year to year,<sup>95</sup> the basic tuition tax credit proposal allows parents of private elementary and secondary school students to subtract a percentage of the tuition paid for private education from their federal tax.<sup>96</sup> The sponsors reason that a tax credit would reduce the cost of private education thereby placing lower and middle income parents in a financial position to choose their child's education. Congress, however, has been influenced by the fact that a substantial number of upper-middle and higher income parents, who can already afford tuition payments, would also receive a tax credit.

In 1977, Senators Moynihan and Packwood, introduced a proposal which would have allowed a tax credit limit to the lesser of fifty percent of tuition or \$500 per student.<sup>97</sup> Even with a \$500 per student limit, Senator Moynihan estimated this proposal to cost \$4.7 billion.<sup>98</sup> The tax credit would have applied to taxpayers who paid tuition at post-secondary, vocational, secondary, and elementary schools. If the credit exceeded the amount of tax liability, however, the taxpayer was to have received a refund for the amount of the difference. This proposal, which died in committee,<sup>99</sup> laid the groundwork for a more refined proposal the following year.

In 1978, the House of Representatives approved a non-refundable tuition tax credit for parents of students attending private post-secondary, vocational, secondary, and elementary schools.<sup>100</sup> The Senate Finance Committee approved the House version,<sup>101</sup> but the Senate voted

---

95. The most notable changes include:

- 1) the amount of credit each parent is to receive;
- 2) whether parents whose tax liability is less than the amount of credit will receive a refund.

96. Tax credits are subtracted from the actual tax owed. I.R.C. Part IV.

97. S. 2142, 95th Cong., 1st Sess., 123 CONG. REC. 30,831 (1977).

98. 123 CONG. REC. 30,832 (1977).

99. The bill was referred to the Senate Finance Committee.

100. The vote on H.R. 12050 was 237 to 158, 124 CONG. REC. 15,931 (1978). H.R. 12050 would have allowed for a non-refundable credit, limited to 25% of tuition or \$100 in year one, \$150 in year two, and \$250 in year three, 124 CONG. REC. 15,865 (1978).

101. Approved in August by the Senate Finance Committee by a vote of fifteen to one. See 124 CONG. REC. 24,412 (1978).

to delete parents of elementary and secondary students from the recipient list.<sup>102</sup> In conference, the House rejected a Senate proposal to allow tax credits only at the post-secondary and vocational level and the Senate rejected a House proposal that would include tuition tax credits at the secondary level.<sup>103</sup> Congress' inability to reach a compromise resulted in the eventual failure of this proposal. Senators Moynihan's and Packwood's follow-up attempt to pass similar legislation in 1979 received no consideration from Congress.<sup>104</sup>

Encouraged by the Reagan Administration's support of public funding for private education,<sup>105</sup> Senators Moynihan and Packwood introduced another tuition tax credit proposal in 1981.<sup>106</sup> The 1981 proposal provided for a refundable tax credit limited to the lesser of fifty percent of tuition or \$500 per student, until July 31, 1983, when the limit would be increased to \$1,000 per student. The Reagan Administration recently introduced its own tuition tax credit proposal.<sup>107</sup> However, with current attention focused primarily on the economy, the tuition tax credit proposals have become a secondary issue.<sup>108</sup>

From a constitutional standpoint, Senator Moynihan's proposals would apparently violate the establishment clause's prohibition under the primary effect criterion.<sup>109</sup> As the Court emphasized in *Levitt v. Committee for Public Education*,<sup>110</sup> such aid schemes constitute an impermissible advancement of religion "because the aid that will be devoted to secular functions is not identifiable and separable from aid to sectarian activities."<sup>111</sup> Moreover, by its nature tuition aid is capable of diversion to religious uses. While government employees can administer "services" on off-school sites,<sup>112</sup> such separation and identification of tuition aid appears impractical. Indeed, it would be futile to break down the educational process into sectarian and secular activities, so as

102. By a vote of 56 to 41, the Senate voted in favor of Senator Hollings' (D-S.C.) amendment that the bill apply only to post-secondary and vocational schools. 124 CONG. REC. 26,095 (1978). The Senate version of H.R. 12050 was then passed 65 to 27. 124 CONG. REC. 26,123 (1978).

103. 124 CONG. REC. 33,232 (1978). H. REP. NO. 1682, 124 CONG. REC. 16,874 (1978); S. REP. NO. 1265, 124 CONG. REC. 33,068 (1978).

104. The bill, S. 1095, 96th Cong., 1st Sess. (1979), provided for a tax credit limited to 50% of tuition or \$100 at the elementary level and \$500 at the secondary level. 125 CONG. REC. S5500 (daily ed. May 8, 1979) (remarks by Sen. Moynihan).

105. Washington Post, Oct. 27, 1981, at 134, col. 2.

106. The bill, S. 550, 96th Cong., 1st Sess. (1981), provided for a tax credit limited to 50% of tuition or \$500 until July 31, 1983 when it becomes \$1,000. 127 CONG. REC. S1505. (daily ed. Feb. 24, 1981) (remarks by Sen. Moynihan).

107. S. 2673, 97th Cong., 2d Sess. (1982) (introduced by Senators Dole (R-Kan.), Roth (R-Del.), and D'Amato (R-N.Y.)), allows a family to take a credit for 50% of tuition. Maximum levels would be \$100 in 1983, \$300 in 1984, \$500 after 1985. Credits would be phased out for income levels from \$50,000 to \$75,000.

108. The Reagan administration's proposed budget cuts would affect education from the elementary level, see N.Y. Times, Dec. 31, 1981, at A22, col. 1, to the guaranteed Student Loan program at the post-secondary level, see NEWSWEEK, Feb. 22, 1982, at 63.

109. See *supra* notes 33 to 43 and accompanying text.

110. 413 U.S. 472 (1973).

111. *Id.* at 480.

112. *Wolman*, 433 U.S. 229.

to limit aid to the latter, since the Court has cogently recognized the two remain "inextricably intertwined."<sup>113</sup> The complexity of regulations to promulgate such a policy and the government surveillance required to enforce them would most likely foster excessive government entanglement. Finally, although arranging this aid at the taxation rather than the appropriations end of the legislative fiscal process may avoid the annual debate problem,<sup>114</sup> these proposals still invite political division along religious lines.<sup>115</sup>

The appropriateness of tuition tax credits for private schools must, in addition to the constitutional considerations discussed, be examined from the perspective of whether it represents sound public policy to institute such a proposal. The tuition tax credit proposal will be analyzed within two public policy arguments: first, whether tuition tax credits are economically divisive; and second, whether tuition tax credits would diminish the purported superiority of private schools.

Proponents of tuition tax credits claim that such a proposal provides equal treatment for families at all socio-economic levels.<sup>116</sup> A non-refundable tax credit, as in the 1978 House proposal, would effectively deny the intended full benefit of the credit to a family whose tax liability amounts to less than the actual credit.<sup>117</sup> In contrast, if the credit is refundable, as in the 1981 Senate proposal, the government would, in effect, pay parents with low tax liabilities to send their children to a private school.<sup>118</sup> In either case, the tuition tax credit would foster economic divisiveness by allowing high-income families, who could afford tuition payments without a credit, to recoup a substantial sum of money.<sup>119</sup>

---

113. See *supra* note 36.

114. See *Lemon*, 403 U.S. at 623. After observing the aid in question presented "successive and very likely permanent annual appropriations," the Court stated, "[t]he potential for political divisiveness related to religious belief and practice is aggravated . . . by the need for continuing annual appropriations and the likelihood of larger and larger demands as costs and populations grow."

115. In defense of federal tuition tax credit bills, at least one commentator has contended that Congress, by virtue of its federal character, is entitled to greater deference from the Court than a state legislature is in constitutional challenges to statutes. See Scalia, *On Making it Look Easy by Doing it Wrong: A Critical View of the Justice Department*, in *PRIVATE SCHOOLS AND THE PUBLIC GOOD* 173 (E. Gaffney ed. 1981). However, Professor Scalia is unable to cite any authority for this proposition. Instead, he relies on a similar theory in the equal protection area which he concedes is based on the Federal Government's exclusive power over foreign affairs, immigration, and naturalization. No such justification is present in the establishment clause area. Indeed, the establishment clause reads "Congress shall make no law respecting the establishment of religion . . ." U.S. CONST. amend. 1. Not until 1940 was this prohibition first applied against a state. If anything Congress has a higher standard of scrutiny.

116. Tax credits are subtracted from the actual tax owed. I.R.C. Part IV (1976). Tax deductions must be itemized and are subtracted from the adjusted gross income only if itemized deductions exceed the zero bracket amount. I.R.C. § 63 (1976).

117. The credit would only amount to the actual tax imposed, if less than the credit.

118. If the proposal contained a refund, then the taxpayer with a tax less than the credit would receive from the federal government the difference between the tax and the amount of the credit.

119. Granting a tax credit to families who can already afford tuition payments would draw funds

Tuition tax credits will increase the cost of tuition at private elementary and secondary schools. The tax credit proposals invite private schools to increase tuition to a level which will afford these schools the greatest amount of capital, and taxpaying parents the greatest available credit. Increasing tuition, however, means that before parents can take advantage of tuition tax credits, they must have the capital available to pay an increased tuition. If parents are unable to meet the increased costs, the tuition tax credit proposal would effectively deny lower and middle income families access to private schools.<sup>120</sup>

The second policy argument against adopting tuition tax credits maintains that these credits would diminish the quality of education at private schools, thereby reducing the choices in the type of education available.<sup>121</sup> Tuition tax credits would result in an increase in the number of students financially able to attend private schools. An increase in the student population of private elementary and secondary schools would result in larger classes and an increase in the student-teacher ratio; a curriculum to provide for a wider academic range of students with particular emphasis on providing for the special needs of some students; and an increase in the number of teachers.

In his report, James Coleman concludes that the individualized attention and the advanced curriculum offered by private schools constitute the significant factors of a quality education.<sup>122</sup> An erosion of these factors would result in a uniformity of education among public and private schools. Such a uniformity would effectively reduce parents' opportunity to choose the type of education for their children. The opportunity to choose the school and the education, cited as a significant value to proponents of public funding of private education, would then be meaningless.

### "Baby" BEOG's

In addition to tuition tax credit proposals, Senator Moynihan has formulated a Basic Education Opportunity Grant for elementary and secondary education ("Baby" BEOG's).<sup>123</sup> This proposal would simply extend the BEOG's presently provided at the post-secondary level<sup>124</sup> to the elementary and secondary levels. The amount of family contribu-

---

from the federal budget. This action, without a simultaneous cut in expenditures, would contradict congressional intent to balance the budget. See 31 U.S.C. § 27 (West Supp. 1982).

120. The parents must first have funds available to pay the tuition before they qualify for the credit.

121. There are a percentage of parents who would send their children to private schools for religious purposes.

122. COLEMAN, 1981, *supra* note 65, at 224-25.

123. The bill, S.1101, 96th Cong., 1st Sess. (1979) was introduced May 9, 1979. 125 CONG. REC. S5595 (daily ed. May 9, 1979) (remarks by Sen. Moynihan). Baby BEOG's would be an amendment to the BEOG provision contained within the Higher Education Act of 1965. See 20 U.S.C. § 1070a (1976).

124. 20 U.S.C. § 1070a (1976). The BEOG program was reauthorized in 1980 as the Pell Grant program. Education Amendments of 1980, Pub. L. No. 96-374, 94 Stat. 1367 (1980).

tion would be calculated by a predetermined BEOG formula and subtracted from a maximum amount of "eligible" costs.<sup>125</sup> The "Baby" BEOG proposal, unlike tuition tax credits, would aid only needy families and not those already able to afford tuition payments at private elementary and secondary schools.<sup>126</sup> Congress, however, has been influenced by the fact that "Baby" BEOG's would draw funds from the fixed account appropriated for post-secondary BEOG's.<sup>127</sup>

In 1979, Senator Moynihan introduced a proposal which allowed federal grants of up to \$1,800 per student at the elementary and secondary level.<sup>128</sup> In contrast to tax credit proposals, which applied only to tuition, this "Baby" BEOG proposal applied to tuition and expenses.<sup>129</sup> Parents would have qualified for the grant by filling out extensive forms, similar to those now required for post-secondary BEOG's.<sup>130</sup> This proposal, which died in committee, set the stage for a heated policy debate the following year.

In 1980, during Congress' consideration of a bill to extend the Higher Education Act of 1965, Senator Moynihan introduced a proposal to include elementary and secondary students in the BEOG program.<sup>131</sup> Under this proposal, the "eligible" costs of attending an elementary or secondary school could not exceed \$1,500 and the maximum grant could not exceed \$750.<sup>132</sup> Additionally, if the grant yielded by the formula did not exceed \$100, no grant would be made. In a lengthy floor debate, Senator Ernest Hollings (D-S.C.) argued that "Baby" BEOG's, cloaked in language of aid to the poor, represented the least intrusive means of increasing federal aid to private elementary and secondary education.<sup>133</sup> Once passed, this "foot in the door legislation"<sup>134</sup> would provide a foundation for introducing the more expan-

125. For the various ways in which grant allotments are calculated, see 34 C.F.R. pt. 690, subpt. F (1981).

126. Senator Moynihan claims that of the 1.2 million students who would benefit from this program, 234,000 are Black or Hispanic. 126 CONG. REC. S7840 (daily ed. June 23, 1980) (remarks by Sen. Moynihan).

127. 125 CONG. REC. S5595 (daily ed. May 9, 1979).

128. As amended by the Middle Income Student Assistance Act of 1978, the basic grants program covers students from families with a maximum income of \$25,000. 125 CONG. REC. S5595 (daily ed. May 9, 1979) (remarks by Sen. Moynihan).

129. *Id.* at S5596.

130. The form must include those items listed in 20 U.S.C. § 1070b-2 (1978).

131. 126 CONG. REC. S7840 (daily ed. June 23, 1980) (remarks by Sen. Moynihan). The amendment 1914 was defeated 7 to 5 in Committee. 126 CONG. REC. S7965 (daily ed. June 24, 1980) (remarks by Sen. Moynihan).

132. A formula is used to determine the amount of family contribution from those families with an income up to \$25,000. This contribution is then subtracted from \$1,500 and the difference is the amount of the grant. This formula is subject to three limitations:

- (1) The grant cannot exceed one-half the cost of attendance (\$750);
- (2) Family contribution plus grant cannot exceed the cost of attendance;
- (3) If the grant is less than \$100, no grant will be made.

126 CONG. REC. S7840 (daily ed. June 23, 1980) (remarks by Sen. Moynihan). In calculating the formula, the factors considered include family's income, cost of attendance, family size, the number of students for whom tuition is being paid.

133. 126 CONG. REC. S7840 (daily ed. June 23, 1980) (remarks by Sen. Hollings).

134. According to Senator Hollings, "although this legislation would offer limited assistance to a relatively small number of students, it would establish a precedent for comprehensive Fed-

sive program of tuition tax credits. The Senate heeded Senator Hollings admonition and defeated the "Baby" BEOG amendment to the Higher Education Act of 1967.<sup>135</sup>

From a legal viewpoint, these proposals generally entail the same constitutional flaws as the tuition tax credit proposals.<sup>136</sup> Without restating these points entirely, let it suffice to say that even under the most lenient application of the establishment clause's tripartite test these proposals have the primary effect of advancing religion.

The appropriateness of tuition tax credits for private schools must in addition to the constitutional problems, be examined from the perspective of whether it represents sound public policy to institute such a proposal. The "Baby" BEOG proposal will be analyzed within two arguments: first, whether the "Baby" BEOG program would be economically divisive; and second, the impact that the "Baby" BEOG program will have on the BEOG program already instituted at the post-secondary level.

As discussed in the public policy critiques of tuition tax credits, "Baby" BEOG's would increase tuition at private elementary and secondary schools. Because the proposal provides, as a minimum, a half tuition grant, private schools would be more inclined to raise tuition knowing that "Baby" BEOG recipients would only have to pay half the cost. Attempting to capture additional revenue, private schools could easily continue to increase their tuition. Increased tuition would, in turn, require additional grant money for a program already projected to cost \$149 million in 1980.<sup>137</sup>

The "Baby" BEOG program will have a severe impact upon the present BEOG program now offered at the post-secondary level. The "Baby" BEOG proposal, as designed, would drain funds from the present BEOG program without increasing the BEOG budget.<sup>138</sup> The grants available to students at the post-secondary level will either be diminished in amount or be available to a smaller number of students. According to Congressional statistics, only one percent of the students presently enrolled in elementary and secondary schools would qualify for "Baby" BEOG grants.<sup>139</sup> In effect, the "Baby" BEOG would have a noticeable impact on the present BEOG program, while only benefiting a limited number of parents with children at the elementary and secondary levels.

Considering the potential for government intermeddling, the strains on the quality of private education, and the denial of admission to the

---

eral assistance to private education." 126 CONG. REC. S7850 (daily ed. June 23, 1980) (remarks by Sen. Hollings).

135. The vote on amendment 1914 was 71-24. 126 CONG. REC. S7974 (daily ed. June 24, 1980).

136. *Supra* notes 109 to 115 and accompanying text.

137. 126 CONG. REC. S7843 (daily ed. June 24, 1980)

138. *Id.* This is five percent of the projected \$2.9 billion budget for BEOG's.

139. *Id.* at S7848. For this reason, the Department of Education opposes Baby BEOG's. *See* 126 CONG. REC. S7970 (daily ed. June 24, 1980).

very students that federal aid is designed to assist, tuition tax credits and "Baby" BEOG's represent poor federal policy. Aside from the constitutional implications of these proposals, an increase in federal aid to private education will widen the gap between "haves" and "have nots." A tax credit which results in increased tuition costs and stricter admissions standards will effectively deny access to those who cannot afford the pre-credit costs or meet the admission requirements. "Baby" BEOG's will greatly affect the present BEOG program while only quieting a small percentage of the parents who cry educational inequality. Once the federal government expands the scope of "Baby" BEOG's, increased tuition costs and stricter admission standards will be the only means of controlling increasing admissions demands. The net effect of both proposals will be to widen the gap between the "haves" who can afford pre-credit costs and meet strict admission requirements and the "have nots" who will continue to complain of educational inequality.

### STATE TUITION FUNDING PROPOSALS

Several state legislative initiatives parallel the recent Federal proposals aimed at reducing private school parents' tuition burden. As the case law history examined previously indicates, successful state aid schemes have provided bus transportation,<sup>140</sup> secular textbooks,<sup>141</sup> "auxiliary services",<sup>142</sup> and testing and scoring services.<sup>143</sup> In the wake of their most recent successes, state aid proponents have now decided to focus their energies on the heart of the public funding issue—tuition. This section will test these recent state initiatives which have taken two general courses: tuition tax benefits and tuition voucher plans.

#### Tuition Tax Benefits

Proposed tax relief programs for parents with students in private elementary and secondary schools can generally include credits and deductions.<sup>144</sup> The tax credit programs, of course, offer the most direct relief to the taxpayer in that the legislatively determined amount of the credit is subtracted, dollar for dollar, from a parent's state income tax liability.<sup>145</sup> By contrast, under a tax deduction program, a parent's gross income is reduced by the allowable amount before computing the tax liability.<sup>146</sup>

---

140. *Everson*, 330 U.S. 1. See also Annot., 41 A.L.R. 3d 344 (1972).

141. *Allen*, 392 U.S. 236; Annot., 93 A.L.R. 2d 986 (1964).

142. *Meek*, 421 U.S. 349.

143. *Wolman*, 433 U.S. 229; *Regan*, 444 U.S. 646.

144. See generally *Nyquist*, 413 U.S. 756, which demonstrates the difficulty, at times, of distinguishing tax credits and tax deductions. In *Nyquist*, New York termed its tax relief program for private school expenses a deduction, but the Supreme Court construed it to be a tax credit.

145. For example, if a taxpayer's income is \$25,000, and the state income tax on that amount is \$1,200, if the state allowed parents with children in private schools a \$300 credit, the parents' tax liability to the state is reduced to \$900.

146. For example, the taxpayer with \$25,000 in income, and a \$500 allowable deduction will have

Two tuition tax benefit programs have drawn considerable public attention in recent months: a Minnesota statute allowing a deduction for private education expenses and a tuition<sup>147</sup> tax credit initiative in Washington, D.C.

*Minnesota Deduction Statute.* Minnesota has the longest standing state statute allowing tax deductions for private school expenses.<sup>148</sup> The Minnesota deduction statute,<sup>149</sup> first enacted in 1955, allows parents of private school students to deduct amounts paid toward tuition, textbooks, and transportation from their taxable income. The statute allows deductions up to \$500 for each dependent in kindergarten through sixth grade, and up to \$700 for each dependent in grades seven through twelve.<sup>150</sup> The statute includes deductions for expenses incurred in sending children to public schools. However, parents with children in private schools remain the primary beneficiaries of the statute.

Parents may also claim the deduction if their children attend school out of state, though the statute applies only in states contiguous with Minnesota.<sup>151</sup> Further, the statute requires that the schools attended must not discriminate on racial grounds, and that the costs of religious materials are not deductible. The state loses an estimated two million dollars a year in revenues because of these deductions.<sup>152</sup>

The Minnesota deduction statute is currently undergoing its second constitutional challenge in four years.<sup>153</sup> In the first challenge, a Min-

---

a taxable income of \$24,500. If the state income tax rate is five percent on both \$25,000 and \$24,500, the parents would see an actual savings, as a result of the education deduction, of only \$25. Also, if the state requires itemized deductions to reach a certain amount before any deductions are allowed, parents with a small amount of deductions might reap no benefits from the allowable deduction.

147. The District of Columbia proposal would allow a credit for all educational expenses, not just tuition. However, tax credit for private school tuition is the primary purpose of the initiative.

148. Washington Post, Oct. 22, 1981, at B1.

149. MINN. STAT. ANN. § 290.09(22) (West 1982):

[The following amounts are deductible from gross income:]

Tuition and transportation expense. The amount he has paid to others, not to exceed \$500 for each dependent in grades K to 6 and \$700 for each dependent in grades 7 to 12, for tuition, textbooks and transportation of each dependent in attending an elementary or secondary school situated in Minnesota, North Dakota, South Dakota, Iowa, or Wisconsin, wherein a resident of this state may legally fulfill the state's compulsory attendance laws, which is not operated for profit, and which adheres to the provision of the Civil Rights Act of 1964 and chapter 363. As used in this subdivision, "textbooks" shall mean and include books and other instructional materials and equipment used in elementary and secondary schools in teaching only those subjects legally and commonly taught in public elementary and secondary schools in this state and shall not include instructional books and materials used in the teaching of religious tenets, doctrines or worship, nor shall it include such books or materials for, or transportation to, extracurricular activities including sporting events, musical or dramatic events, speech activities, driver's education, or programs of a similar nature.

150. *Id.*

151. North Dakota, South Dakota, Iowa, and Wisconsin.

152. Washington Post, Oct. 22, 1981, at B21.

153. Minnesota Civil Liberties Union v. Roemer, 452 F. Supp. 1316 (D. Minn. 1978), and Mueller v. Allen, 514 F. Supp. 998 (D. Minn. 1981), *aff'd* 676 F.2d 1195 (8th Cir. 1982), *cert. granted*, 51 U.S.L.W. 3253 (U.S. Oct. 4, 1982) (No. 82-195).



nesota district court found that the statute passed establishment clause muster.<sup>154</sup> In the second challenge to the statute both the district court and Court of Appeals for the Eighth Circuit upheld the statute.<sup>155</sup>

In the period between the first and second challenge to the Minnesota statute, the United States Court of Appeals for the First Circuit found a virtually identical Rhode Island deduction statute<sup>156</sup> in violation of the establishment clause.<sup>157</sup> The First Circuit held that the "primary effect" of the Rhode Island statute was to confer a benefit on parents who send their children to private religious schools.<sup>158</sup> To support this conclusion, the First Circuit relied on facts found by the district court indicating that ninety-four percent of the private school students in Rhode Island attend religious schools.<sup>159</sup>

This decision, invalidating the Rhode Island statute, appeared to suggest the Minnesota statute also violated the establishment clause. The Eighth Circuit nevertheless rejected the First Circuit's reasoning and upheld the Minnesota statute.<sup>160</sup> In support of its decision the Eighth Circuit noted: (1) that the Minnesota statute is neutral on its face;<sup>161</sup> (2) that it does not have the primary effect of benefitting only parents of private school students since it allows deductions for public school expenses as well;<sup>162</sup> and (3) that the Supreme Court has explicitly reserved judgment on the constitutionality of deductions.<sup>163</sup> The United States Supreme Court has granted certiorari to review the Eighth Circuit decision.<sup>164</sup>

A tax deduction differs from a tax credit in that a deduction reduces

154. Minnesota Civil Liberties Union v. Roemer, 452 F. Supp. 1316 (D. Minn. 1978).

155. Mueller v. Allen, 514 F. Supp. 998 (D. Minn. 1981), *aff'd* 676 F.2d 1195 (8th Cir. 1982), *cert. granted*, 51 U.S.L.W. 3253 (1982) (No. 82-195).

156. R.I. GEN. LAWS § 44-30-12(c)(2) (1980) provided:

The following amounts are deductible from gross income:

[A]mounts paid to others, not to exceed five hundred dollars (\$500) for each dependent in kindergarten through sixth (6th) grade and seven hundred dollars (\$700) for each dependent in grades seven (7) through twelve (12) inclusive, for tuition, textbooks, and transportation of each such dependent attending an elementary or secondary school situated in Rhode Island, Massachusetts, Connecticut, Vermont, New Hampshire or Maine, wherein a resident of this state may legally fulfill the state's compulsory attendance laws, which is not operated for profit, and which adheres to the provisions of the Civil Rights Act of 1964. As used in this section, "textbooks" shall mean and include books and other instructional materials and equipment used in elementary and secondary schools in teaching only those subjects legally and commonly taught in public elementary and secondary schools in this state and shall not include instructional books and materials used in the teaching of religious tenets, doctrines or worship, the purpose of which is to inculcate such tenets, doctrines or worship.

157. Rhode Island Federation of Teachers v. Nolberg, 630 F.2d 855 (1980).

158. *See id.* at 858-61.

159. *See id.* at 859.

160. Mueller v. Allen, 676 F.2d 1195, 1201 (8th Cir. 1982).

161. *See id.* at 1204.

162. *See id.* at 1205.

163. *See id.* at 1199. In *Nyquist*, 413 U.S. 756, the Supreme Court found tax credits for private school expenses unconstitutional, but it explicitly reserved judgment on deductions. 413 U.S. at 790, n.49.

164. 51 U.S.L.W. 3253 (1982).

taxable income, while a credit reduces tax paid.<sup>165</sup> Because a deduction reduces the pre-tax amount rather than the actual tax amount, a deduction results in less savings to the taxpayer.<sup>166</sup> Despite this minor difference, the same policy arguments which applied to tuition tax credits<sup>167</sup> would apply to the tuition tax deduction proposal.

*Washington, D.C. Tax Credit Initiative.* The Washington, D.C. Initiative of 1981,<sup>168</sup> represents the tax credit initiative Washington, D.C.

165. Unlike the federal income tax system which requires that a taxpayer have a certain level of deductions before he may use them, I.R.C. § 63 (1976), many state income tax systems allow any deduction to be taken from taxable income. A credit is subtracted from the actual tax owed.

166. A deduction basically reduces the amount of taxable income which is subject to tax. A credit reduces the tax due. For example:

(1) Gross income	10,000
Deduction	<u>500</u>
Taxable Income	9,500
1983 Federal Tax Rate	\$504 plus 15% of the excess over \$7,600
Amount Due	<u>\$ 789</u>
(2) Taxable Income	10,000
1983 Federal Tax Rate	\$504 plus 15% of the excess over \$7,600
Pre-credit amt. due	900
Credit	<u>500</u>
Amount Due	\$ 400

167. *Supra* notes 116 to 122 and accompanying text.

168. Washington, D.C. Initiative Measure No. 7, Title VIII A Educational Tax Credit, for the November 3, 1981 general election. The initiative provided as follows:

Title VIII A Educational Tax Credit

Sec. 1(a) GENERAL RULE.—For the purpose of providing better and expanded educational opportunities for children and to improve the quality and efficiency of all schools, public and private, there shall be allowed to every taxpayer a credit against the tax imposed by this Act for the taxable year an amount equal to the qualified educational expenses incurred or actually paid during the applicable taxable year.

(b) MAXIMUM CREDIT PER PUPIL.—For taxable years ending on or before December 31, 1982, the maximum dollar amount allowable to the taxpayer as a tax credit for qualified educational expenses incurred or actually paid shall not exceed \$1,200 for each eligible pupil. This maximum dollar amount shall be increased by ten percent of the previous year's maximum for each taxable year; provided, however, that the Council of the District of Columbia may each year specify a smaller or larger percentage increase upon a finding by two-thirds of all members elected to the Council of the District of Columbia that such percentage increase is equal to the rate of inflation for the preceding calendar year.

(c) MAXIMUM CREDIT PER INDIVIDUAL TAXPAYER.—In the case of an individual taxpayer, the maximum dollar amount allowable as tax credits for qualified educational expenses incurred or actually paid for all pupils supported shall not exceed the amount of income tax payable for the taxable year.

(d) MAXIMUM CREDIT FOR OTHER TAXPAYERS.—In the case of a partnership, association, corporation, unincorporated business or any other taxpayer not an individual taxpayer, the maximum dollar amount allowable as tax credits for qualified educational expenses incurred or paid for all pupils shall not exceed 50% of the income or franchise tax payable for the taxable year.

Sec. 2. DEFINITION OF TERMS

For purposes of this title:

(a) The term "educational institution" shall mean any institution, public or private, providing instruction at the kindergarten, elementary school, junior high school, or high school level, enrollment at which constitutes compliance with the Compulsory

officials placed on the November 1981 ballot. The initiative became the subject of wide public debate before being overwhelmingly rejected by the electorate.<sup>169</sup> Operation of the initiative would have allowed any taxpayer, including businesses and corporations, to pay tuition and educational expenses for children in private schools and to claim a de-

School Attendance Law of the District of Columbia, and which maintains racially non-discriminatory policies as required by law.

(b) The term "eligible pupil" shall mean any District of Columbia resident who is enrolled on a full-time basis in an educational institution.

(c) The words "fiscal year" mean an accounting period of twelve months ending on the last day of any month other than December.

(d) The term "income and franchise taxes" means any taxes imposed upon a taxpayer pursuant to this Act, or similar taxes upon income of the taxpayer, regardless of the authority for their enactment.

(e) The word "individual" means all natural persons, whether married or unmarried.

(f) The word "person" means an individual, a partnership (other than an unincorporated business), an association, an unincorporated business, and a corporation.

(g) The term "qualified educational expenses" means sums paid by a taxpayer on behalf of eligible pupils for tuition and other educational fees actually charged by educational institutions in which such pupils are enrolled, and for incidental expenses incurred for and in connection with attendance by the eligible pupils in such institutions. For other than individual taxpayers, educational expenses must qualify in accordance with the requirements of Section 2(g) and be provided directly or indirectly to pupils who demonstrate financial need in accordance with standards which shall be enacted by the Council of the District of Columbia.

(h) The words "taxable year" mean the calendar year or the fiscal year upon the basis of which the net income of the taxpayer is computed under this Act; if no fiscal year has been established by the taxpayer, the taxpayer has elected the calendar year. The phrase "taxable year" includes, in the case of a return made for a fractional part of a calendar or fiscal year, under the provisions of this Act or under regulations prescribed by the Mayor, the period for which such return is made.

(i) The word "taxpayer" means any person required by this Act to pay a tax or file a return or report in the District of Columbia.

### Sec. 3. STANDARDS FOR PRIVATE EDUCATIONAL INSTITUTION.

Private institutions shall be presumed to meet the minimum standards required by law concerning instruction, quality of education, ethics, health and safety, and fiscal responsibility, provided the instruction, quality of education, ethics, health and safety, and fiscal responsibility are substantially equivalent to the standard maintained in public schools in the District of Columbia.

### Sec. 4. TAX CREDIT NOT TO BE CONSIDERED AS GOVERNMENT ASSISTANCE TO INSTITUTION.

No educational institution shall, on account of enrolling an eligible pupil for whom a tax credit is claimed under this title, be considered a recipient of government financial assistance for the purpose of imposing any legal rule, guideline, order, requirement, or regulation upon such institution or for any other purpose.

### Sec. 5. SEVERABILITY AND SAVINGS.

The provisions of this measure are severable, and if any provision, sentence, clause, section or part is held illegal, invalid, unconstitutional or inapplicable to any person or circumstances, such illegality, invalidity, unconstitutionality or inapplicability shall not affect or impair any of the remaining provisions, sentences, clauses, sections or parts of the act or their application. Any act, statute or law inconsistent with the provisions of this measure is hereby repealed to the extent of such inconsistency.

### Sec. 6. EFFECTIVE DATE.

This measure shall become effective in accordance with Section 5 of Public Law 95-526, Sec. 1(3), amending the Initiative, Referendum, and Recall Charter Amendment Act of 1977 (D.C. Law 2-46), and Section 602(c) of the District of Columbia Self-Government and Governmental Reorganization Act," and shall apply to qualified educational expenses incurred or actually paid on or after January 1, 1982.

169. Washington Post, Nov. 5, 1981, at B1. The initiative was soundly defeated with 73,829 voting against and 8,904 in favor—an 8 to 1 margin.

duction up to \$1,200 per child.<sup>170</sup> Businesses and corporations, however, could have claimed tax credits for expenditures only up to fifty percent of their total tax liability.<sup>171</sup>

It is difficult to surmise the possible effect this initiative would have had on the Washington, D.C. public school system and the city's tax revenues. According to proponents, the measure would have actually saved money for the District of Columbia.<sup>172</sup> These savings, however, would have only occurred if eight percent of the students in public schools transferred to private schools.<sup>173</sup> An eight percent transfer of public school students, however, would have increased private school population by fifty percent.<sup>174</sup> The proponents presumed that new schools would be started as the demand for private schools increased.<sup>175</sup> Even accepting these questionable assumptions, the D.C. public school system would certainly have suffered a loss of revenues during the intervening years.

A family of four in the District of Columbia would have had to make at least \$21,500 a year to owe \$1,200 in D.C. income taxes, and thereby be in a position to take full advantage of the \$1,200 educational credit.<sup>176</sup> According to the initiative's proponents, low income families without sufficient tax liability to take advantage of the allowable credit could still have gained access to the private schools through the tax deductible donations of businesses and other individuals.<sup>177</sup> Proponents err, however, in believing this plan offered an incentive for non-parent taxpayers to make such tax deductible donations for the benefit of poor children. While such donation would reduce, dollar for dollar, the taxpayers' D.C. tax liability,<sup>178</sup> they would also increase taxpayers' federal income tax since the federal deductions for local taxes would be lost. Non-parent taxpayers thus would have ended up paying more in federal taxes if they made the donation. The prospect of the poor benefiting from this proposal seems, at best, slight. In light of the negative response this initiative received at the D.C. polls in November 1981, it is doubtful it will be a model for the states.

### Tuition Voucher Plans

Educational vouchers represent a second form that state legislative initiatives have taken to aid in the financing of private school tuition. Various researchers have proposed many types of voucher plans in the

---

170. Initiative Measure No. 7, § 1(b), *supra* note 168.

171. *Id.* § 1(d).

172. West, *An Analysis of the District of Columbia Tax Credit Initiative*, CATO INSTITUTE POLICY ANALYSIS, Oct. 27, 1981, at 10.

173. *Id.* at 13.

174. *Id.* at 14.

175. *Id.* at 3.

176. Washington Post, Oct. 21, 1981, at C3.

177. *Id.*

178. The nonparent taxpayer's out-of-pocket payment is the same, but is merely redirected from the government to the private school.

past twenty years, but none of these plans have as yet been implemented.<sup>179</sup> The leading advocates of educational vouchers at this time are John Coons and Stephen Sugarman, professors of law at the University of California, Berkeley. Professors Coons and Sugarman have developed proposals for a legislative bill<sup>180</sup> and a state constitutional amendment<sup>181</sup> aimed at creating a system of educational vouchers in California. The voucher bills failed to gain much popular support in the state legislature, and the initiative to amend the state constitution has not yet been placed on the state ballot.

The proposed constitutional amendment would radically change California's method of school financing. Under the amendment, the California state government would totally support California schools, thus eliminating local funding based on property taxes.<sup>182</sup> The new educational program would establish three types of schools supported by the state: public schools, public scholarship schools, and private scholarship schools.<sup>183</sup> The public schools would not redeem vouchers but would essentially be a traditional public school, except that all funding would come directly from the state rather than local property taxes.<sup>184</sup> The public and private scholarship schools, however, would receive vouchers as their sole source of income.<sup>185</sup>

179. *But cf.* Alum Rock Union School District, Transition Model Voucher Proposal, Office of Economic Opportunity, April 12, 1972. The Alum Rock school district in San Jose, California ran an experimental voucher program solely with public schools for a few years in the early seventies.

180. Coons & Sugarman, *Family Choice in Education: A Model State System for Vouchers*, 59 CAL. L. REV. 321 (1971) [hereinafter cited as Coons & Sugarman, *Family Choice*].

181. COONS & SUGARMAN, EDUCATION BY CHOICE: THE CASE FOR FAMILY CONTROL 1978. The authors' proposal for an amendment to the California Constitution as found in this book, failed to receive enough ratifying signatures to be included on the June 1980 California ballot [hereinafter cited as COONS & SUGARMAN, EDUCATION BY CHOICE].

182. Coons and Sugarman were counsel for the appellant in *Serrano v. Priest*, 18 Cal. 3rd 728, 557 P.2d 929 (1976). *Serrano* was a landmark decision by the California Supreme Court which found the discrepancies in educational opportunities, as a result of local property tax funding, unconstitutional under the California Constitution.

183. COONS & SUGARMAN, EDUCATION BY CHOICE, *supra* note 181, at 225. Family Choice Education Initiative:

5b. *Definitions*

Three classes of common schools for grades kindergarten through twelve are hereby established, namely public schools, public scholarship schools, and private scholarship schools. Public schools are those publicly owned, funded, and administered and not certified to redeem scholarships. Public scholarship schools are those publicly owned and administered and certified under this section to redeem scholarships provided to children of school age. Private scholarship schools are those privately owned and administered and certified to redeem scholarships provided to children of school age.

184. *Id.*

185. *Id.* at 227-28.

5i. *Scholarships*

Every child of school age is entitled to a scholarship redeemable only for education in public and private scholarship schools. Scholarships shall be in an amount adequate for a thorough education and equal for every child of similar grade level and circumstance. Each scholarship shall be augmented by the cost of the transportation required by section 5c. The redeemable amount may also differ by pupil age, curriculum, bilingualism, special needs, variations in local cost, need to encourage integrated schools, and other circumstances deemed appropriate by the Legislature.

The educational voucher program would entitle every resident child in the state to a state-issued voucher.<sup>186</sup> These vouchers would be redeemed only at the public and private scholarship schools.<sup>187</sup> The scholarship schools would then turn these vouchers in to the state for direct financial reimbursement.<sup>188</sup> For each voucher redeemed by the state, the scholarship schools would receive an amount equivalent to ninety percent of the average per pupil cost at public schools.<sup>189</sup>

Participating schools, however, would be greatly restricted in their receipt of income from sources other than vouchers, thus barring one school from gaining a monetary advantage over another school.<sup>190</sup> Ac-

Where pupils transfer during a school year, an appropriate division shall be made of the scholarship.

The Legislature shall authorize parents to purchase supplementary scholarships from the state within such limits as it deems appropriate. The price charged for such supplementary scholarships shall reflect the family's capacity to pay and the number of its school age children, so that families making equivalent financial effort shall receive supplementary scholarships of equal value for all their school age children. The price of supplementary scholarships may be less than or exceed their redeemable value. Other than scholarships and supplementary scholarships provided for herein public and private scholarship schools shall accept no consideration, charge, or fee, and public and private scholarship schools requiring a supplementary scholarship for admission shall require the same of all pupils.

186. *Id.*

187. *Id.*

188. *Id.* at 226.

5e. *Regulation of Scholarship Schools*

The Superintendent shall certify public and private schools entitled to redeem scholarships. He shall certify any applicant public or private school which meets the curricular standards imposed by law upon private schools on July 1, 1979, so long as such public or private school is in compliance with this section, neither advocates unlawful behavior nor discriminates unlawfully in hiring, and discloses annually the qualifications of its teachers and its financial condition in such detail regarding the extent and deployment of its resources as the Legislature deems helpful to an informed judgment by parents concerning the education provided. The Legislature may also require standardized testing and the disclosure of results therefrom to the extent it determines that such information discloses differences in quality of instruction apart from the characteristics of the children instructed.

Private scholarship schools shall be organized as California corporations; they shall determine the qualifications of their own teachers except that the Legislature may require a baccalaureate degree or its equivalent for full time teaching employees. No school shall be ineligible to redeem scholarships because it teaches moral values, philosophy, or religion, but religion may not be taught in public schools or public scholarship schools. The Legislature shall encourage diversity and experimentation in content, style, and environment of education. The Legislature shall establish health and safety standards applicable to public and private scholarship schools; such standards shall promote prompt approval of diverse facilities and shall not be more restrictive than the standards imposed upon facilities of private schools on July 1, 1979.

189. *Id.* at 228-29.

5l. *Average Cost Per Scholarship Pupil*

The average public cost per scholarship pupil shall approximate ninety percent of the average public cost in the same year of similar pupils enrolled in public schools, and scholarships shall be adjusted accordingly. Public cost here and in section 5m shall mean and include every direct and indirect cost to the public of education in the relevant year whether that cost is current, deferred, or pro-rated. It shall include the costs of providing, maintaining, and replacing facilities; at the discretion of the Legislature it may include the costs of teacher retirement.

190. *Id.* at 228:

5k. *Assistance from Non-State Sources*

The Legislature may regulate private grants to public and private scholarship

ording to Coons and Sugarman, the laudable goals of the educational voucher plan<sup>191</sup> include an attempt to remove "the influence of household income on the quality of educational opportunity and [to offer] notably greater freedom of choice in the selection of educational programs . . . ."<sup>192</sup> The voucher program would also insure that scholarship schools receive the same per pupil funding.<sup>193</sup> Parents, therefore, could send their children to any scholarship school they wanted, and all schools would compete for the same pupil "market." Supporters of the voucher plan contend that competition for students would challenge schools to be innovative and be more fiscally responsible.<sup>194</sup>

The Coons and Sugarman voucher program would also allow parents to choose to enroll their children in any scholarship school, subject only to the school's right to set a maximum enrollment.<sup>195</sup> If a particular scholarship school became oversubscribed, then applicants would be chosen by lot.<sup>196</sup> Applicants with brothers and sisters in a certain school would also be given priority in enrollment.<sup>197</sup>

Under the Coons and Sugarman proposal, the California legislature would restrict scholarship schools in their religious instruction.<sup>198</sup> They would allow these schools to teach religion and to hold religious activities. However, the schools could not compel students to participate in religious rituals.<sup>199</sup> Similar to other private schools, religious schools,

---

schools and shall ensure that Federal aid, within the limits of Federal law, advances the objectives of this Article.

191. *Id.* at 225.

5a. *Purpose*

It is the purpose of the people hereby to enlarge parental control over the education of children; to make every pupil eligible for a scholarship redeemable in certified schools; to assure that public spending for a child's education may not be a function of wealth; to empower families, regardless of income, to choose among common schools on an equal basis; to assure that thereby the state aids no institution, religious or secular; to protect freedom of religion but aid no religion; to protect pupils from unfair discipline or dismissal; to control spending by limits and competition; to increase the variety of schools, improve their quality, and promote their racial integration.

192. Coons & Sugarman, *Family Choice*, *supra* note 180, at 324.

193. COONS & SUGARMAN, *EDUCATION BY CHOICE*, *supra* note 181.

194. *Id.* at 160.

195. *Id.* at 225.

5c. *Admissions and Transportation*

Parents or guardians may enroll their children of school age in any public or private scholarship school subject to the right of every such school to set its total capacity and to limit applications to children of either sex. Where applications to any public or private scholarship school exceed capacity the Superintendent of Public Instruction shall regulate selection among applicants by lot. However, pupils who, after July 1, 1981, are enrolled in and attend any school which is or becomes a public or private scholarship school shall have priority therein. Siblings of pupils with priority shall enjoy similar priority. With reasonable notice a child may be transferred during the school year from any common school to any public or private scholarship school with space. Public and private scholarship schools shall transport pupils within minimum and maximum distances fixed by the Superintendent of Public Instruction according to standards set by the Legislature.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

under the voucher program requirements, would have to give up some of the independence they enjoy today to participate in the voucher program. Of course, these private schools could choose not to participate in the voucher program if they find the open admissions requirements and restrictions on religious education too high a price to pay for vouchers.

Whether the voucher plans will withstand a challenge under the Establishment Clause of the First Amendment remains questionable. The Supreme Court has drawn fine lines in deciding what types of state aid to private elementary and secondary schools are permissible. The Court has invalidated state programs to reimburse schools for teacher salaries,<sup>200</sup> to maintain and repair school buildings,<sup>201</sup> to provide instructional materials,<sup>202</sup> and to reimburse parents for tuition expenses.<sup>203</sup> Because the voucher plans would accomplish these very functions, the plans, as presently drafted, appear constitutionally impermissible.

From a policy standpoint, vouchers deserve serious public consideration. The three factors which favor implementation of a voucher system include: elimination of the inequitable local property tax as the main source of elementary and secondary school financing; increased competition for students which would challenge schools to be innovative and more fiscally responsible; and a greater freedom of choice for parents as to what schools their children will attend.

The main policy consideration against implementation of a voucher system, other than its probable unconstitutionality,<sup>204</sup> is a lack of tested data. One can only project the impact that a voucher system will have upon racial and economic integration within elementary and secondary schools. Before adopting a voucher system, researchers must conduct isolated experiments to answer some of these serious questions.<sup>205</sup>

## CONCLUSION

At federal and state levels of government, proponents of public funding for private elementary and secondary schools have begun to focus their efforts on legislative tuition aid proposals. The initial inquiry in assessing federal and state proposals is, of course, their constitutionality under the establishment clause. As the Supreme Court has interpreted this prohibition in state aid cases, a three part test has evolved which considers the legislative purpose, the primary effect, and any government entanglement of the challenged statute. Although the

---

200. *Lemon*, 403 U.S. 602.

201. *Nyquist*, 413 U.S. 756.

202. *Wolman*, 433 U.S. 229; *Meek*, 421 U.S. 349.

203. *Sloan*, 413 U.S. 825.

204. See *supra* text accompanying text to notes 16 to 59; *Viable Public Aid*, *supra* note 67, at 191-96.

205. See *supra* note 176; *Viable Public Aid*, *supra* note 67, at 180-85.



latter two aspects of this test remain vital, the Court has been tending to give ground in recent cases. Nevertheless, even under the least restrictive application of the Establishment test tuition aid appears unconstitutional.

Constitutional considerations aside, equally important policy matters are presented in public funding proposals. These include arguments that private schools (1) are unfairly denied property tax revenues paid by parents of private school children; (2) promote pluralism, rather than diversity; (3) serve a public function; and (4) provide a better education than their public counterparts. Critical analysis reveals, however, that public funds ought better be directed to improving the existing public elementary and secondary schools, rather than adopting the private schools as wards of the state.

Neither constitutional nor policy concerns support the specific tuition aid proposals based on tax benefits of the federal and state level. Legally, the absence of any provision to limit funding to the secular activities of sectarian schools runs headlong into the primary effect prohibition of the establishment clause. Moreover, solely as a matter of public policy these tax benefit schemes would widen the gap between "haves" who itemize deductions, can afford pre-credit costs, and meet strict admission standards and the have-nots who will continue to complain of educational inequality.

The Coons and Sugarman voucher proposal, which disassociates the funding of elementary and secondary education from local property tax, appears to promote educational opportunity and freedom of choice. From a constitutional perspective, however, the voucher proposal fails to adequately address its establishment clause implications. As with the tax based tuition aid proposals, unconditionally funding tuition through a voucher by its nature impermissibly advances the religious as well as secular educational function of private elementary and secondary schools.

*Shawn C. Conway\**

*Ophelia S. Camiña\*\**

*Michael J. Bettinger\*\*\**

*Robert G. Casey\*\*\*\**

---

\* B.A., Northern Illinois University, 1979; J.D., Notre Dame Law School, 1982.

\*\* B.A., St. Mary's College, 1979; J.D., Notre Dame Law School, 1982.

\*\*\* B.S., St. Joseph's College, 1980; J.D. Candidate, Notre Dame Law School, 1983.

\*\*\*\* B.A., Seattle University, 1977; J.D. Candidate, Notre Dame Law School, 1983.