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New Trends in Education and the Future of Parochial Schools

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NEW TRENDS IN EDUCATION AND THE FUTURE OF PAROCHIAL SCHOOLS

The nation's parochial schools face an economic crisis that severely threatens their continued operation.[1] Recent Supreme Court decisions barring public aid to parochial schools have exacerbated that crisis. Moreover, the very structure of our educational system is the subject of increasing criticism, with many critics proposing radical innovation. These developments may drastically affect the role of private and parochial schools in our evolving educational system.

Conflict between public aid to parochial schools[2] and the constitutional barrier between church and state has generated continuous discussion. The social and economic aspects of the controversy, which are entwined with the constitutional issues, contribute to the debate.[3] The issue is urgently in need of resolution today. President Nixon has suggested that the demise of all private schools would cost United States

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1 "Private" schools, in effect, refers to Catholic schools since they enroll nearly 11% of the American elementary and secondary school population (Friedman & Bintzen, *Politics and Parochaid*, THE NEW REPUBLIC, Jan. 23, 1971, at 13), while all private schools account for only 12.3%. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1971, at 103 (1971).

2 *See* Friedman & Bintzen, *supra* note 1, at 12.

3 A report of the National Catholic Educational Association indicates that the annual cost of operating parochial schools has increased by $200 million in the last three years, while the number of Catholic schools has decreased by 7% and enrollment has decreased by 10%. Exemplifying this financial crisis is the recent announcement that 10 parochial schools in Buffalo would be closed. Currivan, *Catholic Schools Down 7% Since '67*, N.Y. Times, Dec. 13, 1970, at 60, col. 1.

A variety of factors has contributed to the financial dilemma of the parochial schools. Among these are a steady decline in enrollment, a startling decrease in the number of religious teachers (and a corresponding increase in the number of lay teachers who must be paid salaries commensurate with those offered in the public school system), and insufficient contributions from the Catholic laity. *See* E. BARTELL, COSTS AND BENEFITS OF CATHOLIC ELEMENTARY AND SECONDARY SCHOOLS 255-83 (1969); C. KOOB & R. SHAW, S.O.S. FOR CATHOLIC SCHOOLS: A STRATEGY FOR FUTURE SERVICE TO CHURCH AND NATION 61-69 (1970); New York State Council of Catholic School Superintendents, *Another Aspect of the Financial Crisis in Education: The Current Problem of Support for the Education of Catholic Elementary and Secondary School Children*, 16 CATH. LAW. 15 (1970); *see also* note 41 *infra*.

In addition to the current financial crisis, Catholic schools are experiencing other problems. *See* TRENDS AND ISSUES IN CATHOLIC EDUCATION (R. Hurley & R. Shaw eds. 1969); Huth, *Catholic Education: To Be or Not To Be?*, 97 SCHOOL & SOCIETY 101 (1969). Some current attitudes signify a marked shift from the status once enjoyed by Catholic schools:

> Not many years ago, the question that is now being asked—whether Catholic schools have a future—would have been unthinkable. Catholic schools occupied the same impregnable position as fish on Friday and the Latin Mass.

C. KOOB & R. SHAW, *supra* at 127.

citizens more than $4 billion annually in operating expenditures and an additional $5 billion for new educational facilities.[4]

Many state legislatures have enacted or proposed legislation which would extend public aid in some form to parochial schools.[5] The federal government has also taken steps to ascertain the most appropriate manner in which to give some support to private schools.[6] Opponents of such aid, however, argue that it is unconstitutional and that the needs of the public schools demand the immediate and primary attention of government at all levels. The Supreme Court has recently provided some guidance on the legal issues of the controversy by strik-

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4 *Educational Reform*, 6 WEEKLY COMP. PRES. DOCS. 304, 312 (March 3, 1970).

5 *See, e.g.*, CONN. GEN. STAT. REV. §§ 10-281a to -281v (Supp. 1971); OHIO REV. CODE ANN. § 3317.06(H) (Page 1971); PA. STAT. ANN. tit. 24, §§ 5601-09 (Supp. 1971); R.I. GEN. LAWS ANN. §§ 16-51-1 to -9 (Supp. 1970). *But see* Lemon v. Kurtzman, 403 U.S. 602 (1971) (Pennsylvania and Rhode Island statutes ruled unconstitutional).

For a summary of some of the recent proposals, see Cohen, *Public Aid to Non-Public Schools in 1969*, 98 SCHOOL & SOCIETY 300 (1970). *See also* CENTER FOR THE STUDY OF PUBLIC POLICY, EDUCATION VOUCHERS: A REPORT ON FINANCING ELEMENTARY EDUCATION BY GRANTS to PARENTS 317-39 (1970) (app. E) [hereinafter cited as EDUCATION VOUCHERS].

Public aid is intended to save the parochial schools from possible extinction and to spare the public schools the financial burden that would be thrust upon them in the event the private school system failed. Difficulties arise, however, with respect to the form such aid should take. The New York State Education Department made a study of the possible forms of aid and developed six proposals, varying from extension of textbook aid to direct financial assistance. Cohen, *supra* at 301. Although Governor Rockefeller has recognized that the cost of extending aid to private schools would be far less than the expense involved in transferring the private school enrollment to public schools, political and legal considerations have prevented affirmative action. *See* Lynn, *Religious Schools Win Pledge of Aid from Governor Rockefeller: Reversed Stand is Indicated By Promise to Help Solve Fiscal Crisis*, N.Y. Times, Feb. 23, 1971, at 1, col. 6; Lynn, *Parochial Schools: A Dispute with a New Twist Almost Every Day, id.*, Feb. 28, 1971, § 4, at 8, col. 1; *cf.* Committee for Pub. Educ. & Religious Liberty v. Rockefeller, 322 F. Supp. 678 (S.D.N.Y. 1971).

For an argnment that Connecticut's Nonpublic Secular Education Act was intended not only to relieve some of the financial burdens of private schools, but also to enable the state to gain greater control over education in the private sector, see Note, *Aid to Nonpublic Schools: The Power of the Purse in Public Act 791*, 2 CONN. L. REV. 427 (1969).

6 Partly in recognition of the special problems which beset parochial schools, the President has appointed a special commission to study school finances. Friedman & Bintzen, *supra* note 1.

Furthermore, the Elementary and Secondary Education Act of 1965 (20 U.S.C. §§ 236-44 (1970)) is applicable to private as well as public schools. Under this legislation, private schools may participate in certain programs which afford aid to deprived children. The participation of parochial schools has been challenged as a violation of first amendment gnarantees of separation of church and state. *See* D'Alessio, *ESEA and the Nonpublic School Administrator*, in TRENDS AND ISSUES IN CATHOLIC EDUCATION, *supra* note 3, at 197; La Noue, *Church-State Problems in New Jersey: The Implementation of Title I (ESEA) in Sixty Cities*, 22 RUTGERS L. REV. 219 (1968); Comment, *The Elementary and Secondary Education Act—The Implications of the Trust-Fund Theory for the Church-State Questions Raised by Title I*, 65 MICH. L. REV. 1184 (1967).

ing down the ambitious aid programs of Pennsylvania and Rhode Island.[7]

I

PUBLIC AID TO PAROCHIAL SCHOOLS AND THE CONSTITUTION

A. *General Constitutional Doctrine*

Language in early Supreme Court cases seemed to indicate that any government involvement in religious affairs was strictly prohibited as violative of the establishment clause of the first amendment.[8] In *Everson v. Board of Education*,[9] however, the Court, while repeating the "no-aid-to-religion" language,[10] upheld a program under which the government paid the costs of transporting both public and private school students. The Court reasoned that the program was enacted for the general welfare, analogized it to other governmental services such as police and fire protection,[11] and concluded that students attending sectarian schools could not be deprived of the benefits of such a program.[12] The primary effect of the aid was to benefit parochial school students and their parents, and any benefit derived by the institution was incidental.[13]

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7 Lemon v. Kurtzman, 403 U.S. 602 (1971).

8 Cantwell v. Connecticut, 310 U.S. 296, 303 (1939); Quick Bear v. Leupp, 210 U.S. 50, 79 (1907); Reynolds v. United States, 98 U.S. 145, 164 (1879).

9 330 U.S. 1 (1947).

10 The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . . Neither a state nor the Federal government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*. In the words of Jefferson, the clause against establishment of religion by law was intended to erect a "wall of separation between church and State."

Id. at 15-16, *quoting* Reynolds v. United States, 98 U.S. 145, 164 (1879).

11 *Id.* at 17-18.

12 Thus, it seemed that the Court was invoking the free exercise clause to sustain the legislation, rather than rigidly examining the enactment in order to determine if it met the standards of the establishment clause. *See* Note, *The New York and Federal Constitutional Standards in Relation to Government Aid to Private Education*, 18 BUFFALO L. REV. 526, 532 (1969).

13 This approach has been referred to as the "child benefit" theory. It is questionable whether direct aid to the child is not "support" of the parochial school, at least in an economic sense:

> If subsidies are granted to pupils for purposes such as non-religious education services not already being provided by the Catholic schools, e.g., for transportation or for textbooks, the assumed improvement in quality of the secular component of the Catholic education is likely to accentuate the influence of income effects in the determination of equilibrium levels of school activity by ecclesiastical decision-makers. . . . Thus, the voluntary character of financial support of all

In *School District v. Schempp*,[14] the Court stressed the necessity of government neutrality: "[T]here must be a secular legislative purpose and primary effect that neither advances nor inhibits religion."[15] This new test was applied by the Court in *Board of Education v. Allen*.[16] In *Allen*, the Court examined the validity of a New York statute which required school districts to purchase and loan textbooks to private as well as public school students. In spite of the secular nature of textbooks, especially as they might be used in the classroom, they are not so obviously neutral as bus transportation; nevertheless the Court held the statute constitutional based upon the dual test of *Schempp*.[17]

Constitutional doctrine in this area was further clarified in *Walz v. Tax Commission*[18] where the Court approved tax exemptions given to church owned property. Finding that "[t]he legislative purpose of the property tax exemption is neither the advancement nor inhibition of religion; it is neither sponsorship nor hostility,"[19] the Court implied that the first part of the *Schempp* test had been met. The opinion, however, emphasized for the first time the additional need to avoid "excessive entanglement"[20] of the state in church affairs. This requirement

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Church activities may bring about the paradoxical effect that state aid to the individual results in greater financial aid to religious activities than certain forms of restricted subsidies made directly to the Catholic schools.

E. BARTELL, *supra* note 3, at 278-79.

14 374 U.S. 203 (1963).

15 *Id.* at 222.

This was not a neutrality, however, that would prohibit government from *any* activity that might inhibit or advance religion. *See* P. KURLAND, RELIGION AND THE LAW 18 (1962). Such an interpretation would not be compatible with the Court's decision in Zorach v. Clauson, 343 U.S. 306 (1952), where it held that a state system of "released time" that allowed public school children to attend religious instruction during school hours but off the school premises was constitutionally permissible. *See* notes 90-91 and accompanying text *infra*. The Court ruled that the state may accommodate its school program to serve religious needs. *See also* Sherbert v. Verner, 374 U.S. 398 (1963); Valente, *Aid to Church Related Education—New Directions Without Dogma*, 55 VA. L. REV. 579, 585-94 (1969).

16 392 U.S. 236 (1968).

17 The law was found to have "a secular legislative purpose and a primary effect that neither advances nor inhibits religion." *Id.* at 243, *quoting* School Dist. v. Schempp, 374 U.S. 203, 222 (1963). "Although the books loaned are those required by the parochial school for use in specific courses, each book loaned must be approved by the public school authorities; only secular books may receive approval." *Id.* at 244-45. *Cf.* note 34 and accompanying text *infra*.

18 397 U.S. 664 (1970).

19 *Id.* at 672.

20 The court believed that the government's activity in administering taxes would involve excessive entanglement.

Determining that the legislative purpose of tax exemption is not aimed at establishing, sponsoring, or supporting religion does not end the inquiry, however.

initially appeared to be merely a modification of the "primary effect" part of the *Schempp* test.[21] The Court in *Walz* reiterated the difficulties involved in defining the boundaries of the establishment clause:

> Each value judgment under the Religion Clauses must . . . turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so.[22]

B. *The "Purchase-of-Secular-Services" Cases*

In response to the financial dilemma faced by parochial schools, many states enacted "purchase-of-secular-services" legislation.[23] This approach was designed to take advantage of the secular-sectarian distinction of *Everson* and *Allen*. Typical of these statutes were those enacted by Pennsylvania and Rhode Island which were successfully challenged in *Lemon v. Kurtzman*.[24]

The Pennsylvania statute authorized the Superintendent of Public Instruction to purchase specified secular educational services for nonpublic schools.[25] The state would reimburse nonpublic schools for teachers' salaries, textbooks, and materials for secular subjects. The Rhode Island act authorized the payment of a fifteen percent salary supplement to teachers in nonpublic schools where the average per pupil expenditure was below the public school average.[26] To qualify for

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> We must also be sure that the end result—the effect—is not an excessive government entanglement with religion.

Id at 674. *See* text accompanying notes 81-84 *infra*.

The line between constitutionally permissible and prohibited entanglements is "inescapably one of degree." 397 U.S. at 674.

21 Lower court cases decided after *Walz* seemed to treat the entanglement standard as a clarification of the primary effect test. *See, e.g.*, Committee for Pub. Educ. & Religious Liberty v. Rockefeller, 322 F. Supp. 678 (S.D.N.Y. 1971); Johnson v. Sanders, 319 F. Supp. 421 (D. Conn. 1970), *aff'd*, 403 U.S. 955 (1971); DiCenso v. Robinson, 316 F. Supp. 112 (D.R.I. 1970), *aff'd sub nom.* Lemon v. Kurtzman, 403 U.S. 602 (1971). The Court's decision in Lemon v. Kurtzman, 403 U.S. 602 (1971), however, indicated that the entanglement test is separate from the primary effect test. *See* note 31 and accompanying text *infra*. That decision did not, however, fully clarify the issue, which remains confused. *See generally* Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part II. The Nonestablishment Principle*, 81 HARV. L. REV. 513 (1968).

22 397 U.S. at 669. For a comprehensive discussion of the effects of the *Walz* decision, see Kauper, *The Walz Decision: More on the Religion Clauses of the First Amendment*, 69 MICH. L. REV. 179 (1970).

23 *See* note 5 *supra*.

24 403 U.S. 602 (1971). *See also* Johnson v. Sanders, 319 F. Supp. 421 (D. Conn. 1970), *aff'd*, 403 U.S. 955 (1971); Committee for Pub. Educ. & Religious Liberty v. Rockefeller, 322 F. Supp. 678 (S.D.N.Y. 1971).

25 PA. STAT. ANN. tit. 24, §§ 5601-09 (Supp. 1971). The act covered four secular subjects: physical sciences, physical education, modern foreign languages, and mathematics.

26 R.I. GEN. LAWS ANN. § 16-51-1 to -9 (Supp. 1970).

the supplement, the teacher had to teach only those courses offered in the public schools.[27] The Rhode Island statute had been held unconstitutional by the district court on the ground that it fostered excessive government entanglement with religious affairs.[28] The Pennsylvania statute, however, had been upheld.[29]

The Supreme Court found both statutes unconstitutional in a decision which will have an enormous effect on the future of parochial education.[30] The Court treated the *Walz* "entanglement" standard separately from the traditional "purpose and primary effect" test, thus creating a third test out of what appeared in *Walz* to be merely a refinement of the *Schempp* formula.[31] Both statutes were able to meet the secular purpose part of the test, since the stated legislative purpose was to enhance the quality of secular education in all schools.[32] Consideration of the primary effect part of the test was not necessary, however, as the statutes were found to involve excessive entanglement.[33]

With respect to the Rhode Island program, the Court recognized the difficulties in separating the secular and sectarian content of a particular course of instruction: "In terms of potential for involving some aspect of faith or morals in secular subjects, a textbook's content is ascertainable, but a teacher's handling of a subject is not."[34] The state

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27 Any teacher who applied for a salary supplement was required to sign a statement not to teach a course in religion during any period in which such supplements were received. R.I. GEN. LAWS ANN. § 16-51-3 (Supp. 1970). *See* note 35 *infra.*

28 "*Walz* thus makes it clear that the test of a statute's effect is . . . whether the degree of entanglement required by the statute is likely to promote the substantive evils against which the First Amendment guards." DiCenso v. Robinson, 316 F. Supp. 112, 120 (D.R.I. 1970).

29 Lemon v. Kurtzman, 310 F. Supp. 35 (E.D. Pa. 1969).

30 Lemon v. Kurtzman, 403 U.S. 602 (1971).

31 *Id.* at 612-13. *See* note 21 *supra.* By virtue of *Lemon* the establishment test now requires that the statute have a secular purpose, a primary effect that neither advances nor inhibits religion, and that it must not foster excessive government entanglement.

32 *Id.* at 612. The Court has traditionally been willing to accept the purpose as stated in the enabling legislation. *See* Valente, *supra* note 15, at 596-97.

33 403 U.S. at 613-14.

34 *Id.* at 617. Continuing, the Court stated:

> We cannot ignore the danger that a teacher under religious control and discipline poses to the separation of the religious from the purely secular aspects of pre-college education. The conflict of functions inheres in the situation.

Id.

It is curious to note that in a case decided the same day, Tilton v. Richardson, 403 U.S. 672 (1971), the Supreme Court held that the use of Title I funds under the Higher Education Facilities Act of 1963 (20 U.S.C. §§ 701-25, 751-58 (1970)) for church related colleges was not unconstitutional. The case was distingnished from *Lemon* on the ground that religious indoctrination is not a substantial purpose or activity in church related colleges. Moreover, the aid involved in *Tilton* was a one-time, single purpose construction grant. 403 U.S. at 684-90.

Arguments have been made that aid to church related colleges, as distinguished from

legislature had placed restrictions[35] on eligibility for aid in order more reasonably to ensure the maintenance of this separation. The Court held that the continuing state surveillance that would be necessary to ensure that the restrictions were obeyed would involve excessive entanglement of church and state.[36]

Similar reasoning was used to strike down the Pennsylvania statute. Disbursement of funds under its provisions would also require pervasive government surveillance.[37] Furthermore, unlike the programs upheld in *Everson* and *Allen,* the Pennsylvania statute provided for payment of money subsidies directly to the church related schools. The hazards[38] of such direct payments had been emphasized in *Walz.*[39]

The majority opinion indicated another base of entanglement in its decision. Both of these programs would necessarily involve political divisiveness.[40] Political division along religious lines would violate the spirit of the first amendment.

These decisions place parochial educational institutions in a precarious financial position. If they are to survive they—and state governments—must fully explore alternative formulas for public aid.[41]

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parochial elementary and secondary schools, involves different legal considerations. The maturity of college students, as well as the absence of a "close financial, legal, and pedagogical relationship to the Church," account for this distinction. DiCenso v. Robinson, 316 F. Supp. 112, 122 n.15 (D.R.I. 1970). *See also* P. KAUPER, RELIGION AND THE CONSTITUTION 114-16 (1964).

35 The recipient was required to teach only those courses offered in public schools, use only texts and materials used in public schools, and refrain from teaching any course in religion. R.I. GEN. LAWS ANN. § 16-51-3 (Supp. 1970). *See* note 27 and accompanying text *supra.*

36 403 U.S. at 619. Another area of entanglement involved in the Rhode Island program was isolated by the Court. Since only teachers employed by private schools, where the average per pupil expenditure on secular education was less than that of public schools, were eligible for salary supplements, the government would have the burden of examining the financial records of church related schools to determine allocation of expenditures between secular and sectarian subjects. *Id.* at 620.

37 *Id.* at 620-21.

38 The history of government grants of a continuing cash subsidy indicates that such programs have almost always been accompanied by varying measures of control and surveillance.
Id. at 621.

39 Walz v. Tax Comm'n, 397 U.S. 664, 675 (1970).

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

41 Catholic schools have been closing at the rate of one per day. In Pennsylvania, where it costs approximately $850 a year to educate a child in the public schools, parochial schools could keep their doors open with $37 per child in state aid. TIME, July 12, 1971, at 32. The complete failure of parochial schools could have crippling effects

II

ALTERNATIVES FOR PAROCHIAL SCHOOLS

Dissatisfaction with traditional educational structures has led to experimentation and innovation in existing systems.[42] Although most new approaches remain untested in the courts, some may prove to be constitutionally permissible methods for solving the financial problems of parochial schools.

A. *Voucher Plans*

A family voucher system, in which the parent exercises control in the selection of a school, is not a new proposal.[43] It has, however, recently received increased support.[44] Although promulgated in response to the broader ideological crisis in education, the family voucher program is regarded by many supporters of religious education as a valid alternative to the demise of their school systems.

Although a great number of voucher programs have been proposed,[45] only one that includes private schools has been set out in

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on public education. Whereas recent closings of parochial schools have sent approximately 1.2 million pupils into the public schools, complete failure could place the remaining 4.4 million in public school seats. *Id.*

42 *See* notes 92-96 and accompanying text *infra.*

43 Milton Friedman proposed an unregulated voucher scheme eight years ago. M. FRIEDMAN, CAPITALISM AND FREEDOM 85-107 (1963).

44 For a comprehensive discussion of the voucher plan, its implications and administration, see EDUCATION VOUCHERS, *reviewed in* Ross & Zeckhauser, Book Review, 80 YALE L.J. 451 (1970). *See also* C. Jencks, *Education Vouchers,* THE NEW REPUBLIC July 4, 1970, at 19.

The proposal developed by the Center for the Study of Public Policy has received the approval of the Administration and the Office of Economic Opportunity (OEO), which plans to fund an experimental project to determine the effectiveness of such an approach. James E. Allen, Jr., then United States Commissioner of Education, said in an interview that "[t]here are pitfalls in this [voucher system] we must try to avoid, but I am supporting the feasibility study on vouchers being financed by the Office of Economic Opportunity." *USOE: Plans, Priorities for the 70's,* NATION'S SCHOOLS, May 1970, at 49, 52. *See* N.Y. Times, Sept. 24, 1970, at 27, col. 1.

45 EDUCATION VOUCHERS identifies no less than seven alternative economic models, ranging from completely unregulated schemes to the highly regulated one supported by the Administration.

One of these approaches is the "effort voucher," set forth in J. COONS, W. CLUNE & S. SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION (1970). Under this model, each school is categorized into one of four levels of expenditure. Schools at the lowest level of expenditure would be heavily subsidized by the state. The amount contributed by the parents would be based upon their ability to pay and their choice as to how much of their income they wished to allocate to education. Theoretically this would eliminate wealth as a criterion for edncational quality. A model statute for California, based upon this approach, was developed. *Id. See also* Coons, Clune & Sugarman, *Educational Oppor-*

sufficient detail to permit a meaningful analysis of its first amendment implications. The voucher plan prepared by the Center for the Study of Public Policy for the Office of Economic Opportunity[46] would call for the creation of an Educational Voucher Agency (EVA)[47] that would issue vouchers to every family in its district. The value of the voucher would approximate the per pupil expenditure of public schools in the area, with compensatory awards added to vouchers presented to educationally disadvantaged students. The schools receiving the vouchers would then exchange them with the government for operating funds.[48] For a school to become eligible to cash vouchers, it must satisfy certain criteria: (*1*) it must accept the voucher as full payment of tuition; (*2*) it must accept any student without regard to race and, in the event there are more applicants than vacancies, it must admit at least half of the students by random selection; (*3*) it must maintain accurate records of money received and spent; (*4*) it must make available a wide variety of information to the public; and (*5*) it must meet state educational standards.[49] This regulated system is intended to provide equal access to educational resources to advantaged and disadvantaged students and to comply with the equal education mandates of *Brown v. Board of Education*.[50] It would theoretically provide parents with sufficient information to make an intelligent choice among competing schools, and provide an incentive for innovation and reform.[51]

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tunity: A Workable Constitutional Test for State Financial Structures, 57 CALIF. L. REV. 305, 321 (1969).

A recent California decision, Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971), gave some indication that an alternative such as the "effort voucher" may be constitutionally permissible. In *Serrano* the California Supreme Court held that state funding of schools through local property taxes violated the fourteenth amendment's equal protection clause. The court noted that basing the quality of education on the wealth of the parent is unwarranted discrimination.

46 EDUCATION VOUCHERS 13-17.

47 This agency could be elected or appointed. It might be an existing board of education or a new body with greater or smaller geographic jurisdiction. *Id.* at 14.

48 The EVA would receive the funds from local, state, and federal governments. *Id.*

49 This model is a highly regulated and complex system. There remain, however, a great many more simple variations which may be implemented at the local level. *See* Areen, *Education Vouchers*, 6 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 466, 474-75 (1971).

50 347 U.S. 483 (1954).

51 The voucher system outlined above is quite different from other systems now being advocated. It regulates the educational marketplace more than most conservatives would like, and contains far more safeguards for the interests of disadvantaged children. We recognize that such restrictions will be considered undesirable by some people. But we believe that a voucher system which does not include these or equally effective safeguards would be worse than no voucher system at all. Indeed, an unregulated voucher system could be the most serious setback for the education of disadvantaged children in the history of the United

A major objection to a voucher scheme is that, insofar as parochial schools participate, it would violate the constitutional guarantee of separation of church and state. Other objections are that it would legitimize and encourage racial segregation,[52] that it would result in a proliferation of profit making organizations, some of questionable quality, competing for student vouchers,[53] that it would create difficult administrative burdens, and that parents are not best qualified to determine their children's educational needs.[54]

Implementation of the voucher plan might avoid constitutional infirmity[55] and meet less resistance[56] if parochial schools were eliminated from participation. This, however, would be inconsistent with the

States. A properly regulated system, on the other hand, could inaugurate a new era of innovation and reform in American schools.

EDUCATION VOUCHERS 17.

52 *See* McCann & Areen, *Vouchers and the Citizen—Some Legal Questions*, 72 TEACHERS COLLEGE RECORD 389, 391-95 (1971).

53 That each participating school would have to satisfy certain government imposed criteria (*e.g.*, facilities and faculty), would tend to mitigate the chances that "fly-by-night" schools would evolve throughout the nation, competing for tuition stipends. *See id.* at 402-03.

54 *See* EDUCATION VOUCHERS 4-5. *See also* McCann & Areen, *supra* note 52, at 402-04; *Reactions to Vouchers: Hostility, Scepticism*, NATION'S SCHOOLS, Jan. 1971, at 89.

55 First amendment considerations are not the ouly potential constitutional barriers to implementation of tuition voucher experiments. Fourteenth amendment prohibitions may prove fatal to proposed voucher plans before a consideration of first amendment guarantees is necessary. For an excellent discussion of the legal questions involved, see Areen, *supra* note 49. *See also* McCann & Areen, *supra* note 52.

56 A great deal of opposition comes from school administrators and teachers. A recent poll showed that 80% of school administrators responding expressed strong opposition to the proposed voucher experiment. A similar poll one year earlier had shown 43% approval whereas only 20% expressed approval in the recent poll). *Reactions to Vouchers: Hostility, Scepticism, supra* note 54. The National Parent and Teachers' Association has voiced similar disapproval of the OEO experiment, contending that it would be detrimental to the public school system. Ryan, *Public Aid for Nonpublic Schools? PTA Votes No*, PTA MAGAZINE, Oct. 1970, at 16, 17. *See also Jencks Education Plan: Sure To Backfire*, 87 CHRISTIAN CENTURY 1176 (1970); Shanker, *The Voucher Plan Strikes a Blow at the Public Schools*, N.Y. Times, July 11, 1971, § 4, at 7, cols. 7-8; Shanker, *The Educational Voucher Idea: A Present Danger*, N.Y. Times, July 4, 1971, § 4, at 7, col. 6.

Although proponents of various voucher schemes span the political spectrum, support for the OEO project has come from many who have a direct interest in the preservation of parochial schools. A Jesuit magazine reported, for example, that "[e]xperiments are necessary, and Professor Jencks and his associates have designed one of the best we have seen in a long time." *The Jencks Tuition Voucher Plan*, 122 AMERICA 644, 645 (1970). The United States Chamber of Commerce issued a task force report in 1966 which proposed a somewhat similar approach to education. Blum, *Freedom and Competition*, in TRENDS AND ISSUES IN CATHOLIC EDUCATION, *supra* note 3, at 209. Furthermore, although a conference of Jewish community relations leaders stated its opposition to schemes such as vouchers, the Union of Orthodox Jewish Congregations of America, which operates a growing network of all day schools, dissented from this position. N.Y. Times, June 26, 1971, at 34, cols. 5-7; *see also id.*, May 9, 1971, at 58, cols. 4-8.

stated purpose of the scheme, that is, to encourage free choice and to increase competition among all schools in a particular locale.[57] The Supreme Court's decisions in the "purchase-of-secular-services" cases do not squarely confront the issues presented by education voucher schemes. They do, however, provide some insight into the probable nature of future litigation in this area.

Proponents of parochial school participation in voucher schemes advance two theories which distinguish these plans from the purchase of services approach and which, arguably, may surmount constitutional barriers.[58] The first view stresses the plan's reliance on individual freedom of choice.[59] Under the plan, vouchers restricted to educational use would be given to parents who would determine whether to present these vouchers to a religious or to a secular school. The vouchers would, in turn, be redeemed by the EVA. Such an administrative scheme has been analogized to tax deductions for charitable contributions, welfare payments, and veterans' benefits.[60] This approach theo-

[57] The temptation is strong to avoid the issue by excluding parochial schools entirely from at least the first voucher programs. Yet it is conceptually and constitutionally difficult to justify their exclusion from a plan which is based on the policy of allowing parents more choice in the education of their children.

Areen, *supra* note 49, at 492 (footnote omitted). Furthermore, it is highly likely that a voucher system confined to the public sector would prove far less successful than a complete one. *See* EDUCATION VOUCHERS 132-36.

One of the praiseworthy attributes of the private school system has been that it offers an alternative to public school education, thus preserving a degree of free choice and social pluralism in the academic marketplace and, to a certain extent, fostering competition to produce a better product. The private schools, however, have not been competitive, as the costs involved in attending a private school are far above the average citizen's resources. Other factors which have prevented parochial schools from competing on an equal level are lack of funds, shortage of qualified educators, and, perhaps, an ideological stance that may be out of step with the educational needs of modern society. *See* note 3 *supra*. Hopefully, a voucher system would create an educational structure in which competition is extensive. *See* O'Neill, *The Parochial School Question*, in TRENDS AND ISSUES IN CATHOLIC EDUCATION, *supra* note 3, at 36, 46-47.

[58] *See* EDUCATION VOUCHERS 221-41; Areen, *supra* note 50, at 492-500; McCann & Areen, *supra* note 54, at 395-402.

[59] This argument is based largely on the Supreme Court's decision in Quick Bear v. Leupp, 210 U.S. 50 (1908). A treaty between the United States aud the Sioux Indians required the federal government to provide funds for each group of 300 Indians who wished to be educated. Pursuaut to this treaty, the Commissioner of Indian Affairs entered into a contract with the Bureau of Catholic Indian Missions. The Bureau received funds with which to compensate teachers and maintain facilities in a Catholic school. The Court held the expenditures constitutional on the grounds that the government merely administered the funds and disposition was determined by the Indians' choice of schools.

[60] Veterans are able to use government funds to attend church related schools, presumably because the individual veteran makes the choice as to whom the recipient will be. 38 U.S.C. § 1670 (1970). Likewise, no restrictions are placed on Social Security or welfare payments; these also may find their way to church related institutions at the choice of the recipient.

retically maintains the government neutrality and lack of entanglement called for by the first amendment.[61] Any aid to religion would be the result of a private individual's decision to spend his award on religious education. The "purchase-of-secular-services" statutes recently struck down by the Court involved payment of direct money subsidies to either the religious schools themselves or teachers of secular subjects in sectarian schools.[62] Furthermore, those statutes provided for payments only to private schools, whereas a voucher scheme would make no distinction between private and public school recipients.[63] The purported purpose of payments directly to parents would be to enhance the quality of education within the state or area, as it was in the Pennsylvania and Rhode Island statutes. This purpose should satisfy the first part of the *Schempp* test. Unlike the Pennsylvania and Rhode Island statutes, however, and unlike those approved by the Supreme Court in *Everson* and *Allen*, the support is not confined to secular activities. Thus, the "primary effect" portion of the *Schempp* test might constitute a greater barrier to a voucher approach advanced solely under the freedom of choice rationale than the "excessive entanglement" standard of *Walz*, which proved fatal to "purchase-of-secular-services" legislation.[64]

It would be impossible to maintain that the financial aid extended supports only the secular education functions of the recipient school.[65] It is arguable that the primary effect of such payments to religious schools would be, in fact, to advance religion.[66] Considering the Court's caution in establishing conclusive rules with respect to the establishment clause,[67] it may be that the mere form of transferring funds to

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61 In order for the freedom of choice theory to be persuasive, there must be freedom of choice in fact as well as theory. In other words, every student in attendance at a church related school must have access to a secular institution. *See* EDUCATION VOUCHERS 229.

62 *See* text accompanying notes 25-27 *supra*.

63 In the voucher system all participating schools would be quasi-public in the sense that they would be financed by public funds and would be snbject to government imposed regulations.

64 *See* notes 30-40 and accompanying text *supra*.

65 The alternative "no prescribed benefit" theory provides a more plausible response to this argument. *See* text accompanying notes 69-75 *infra*.

66 The Court has not made entirely clear the extent of benefit that can be enjoyed by religious institutions as a result of aid extended for a secular purpose before the legislation would have a primary effect which advances religion. *See* notes 13-22 and accompanying text *supra*. However, since *Lemon* illustrates that the surveillance necessary to ensure that secular courses in nonpublic schools are not permeated with religion would constitute government entanglement, a voucher program would at least have to avoid government allocation of funds between secular and sectarian objectives.

67 Even the Court's most recent pronouncement leaves room for a great deal of debate concerning the constitutional validity of various approaches to parochaid. The Court

parents before they reach religious institutions could not, in and of itself, remedy any substantive constitutional defects.[68]

A second theory, however, speculates that voucher funds intended to compensate church schools only for secular instruction would be constitutionally valid. This is the "no proscribed benefit theory."[69] The secular purpose test would be satisfied in the same manner as with the "purchase-of-secular-services" statutes. Unfortunately, the purchase of services cases provide little guidance regarding the application of the "primary effect" portion of the first amendment test in this context.[70] Moreover, the cases that struck down education laws or practices on the ground that they had a primary religious effect have all involved religious exercises conducted in the public schools.[71] Because of the hazy nature of the "primary effect" standard, the issue of whether disbursements earmarked for secular activities in a parochial school will have a primary effect of aiding religion may in fact be subsumed under the "entanglement" standard since government efforts would be required to ensure that funding has been limited to secular activities.[72] The voucher plan would fail owing to the inevitable government entanglement with religious institutions inherent in its administration.

There would be no need, however, to make a daily allocation between secular and sectarian activities if a "no proscribed benefit" voucher system might proceed under the "secular value" theory.[73] In

realized the difficulty in formulating broad principles to deal with such problems: "Candor compels acknowledgment, moreover, that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law." Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

68 *Cf.* note 13 *supra.*

69 *See* EDUCATION VOUCHERS 229-39; Areen, *supra* note 49, at 496-500.

70 *See* notes 33 & 66 *supra.*

71 School Dist. v. Schempp, 374 U.S. 203 (1963); Engle v. Vitale, 370 U.S. 421 (1962); Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (1948). In those cases where appropriations have been upheld, no such involvement was present. *See, e.g.*, Board of Educ. v. Allen, 392 U.S. 236 (1968); Everson v. Board of Educ., 330 U.S. I (1947); Cochran v. Louisiana, 281 U.S. 370 (1930).

72 *See* note 66 and accompanying text *supra.*

73 *See* EDUCATION VOUCHERS 233-37. This must be distinguished from the "secular cost" approach to the "no proscribed benefit" theory, which would require continuous state surveillance of private school expenditures and records. *Id.* at 237-39.

A variation on the secular value theory is suggested by Professor Choper. Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 CALIF. L. REV. 260, 287-90 (1968). In considering governmental financial assistance to parochial schools, he suggests that it is

> constitutional to the extent that it does not exceed the value of their secular services. Whatever the incidental benefits to religious insitutions, the establishment clause should be satisfied by ensuring that government receive secular returns from those institutions commensurate with its financial expenditure.

Id. at 340.

other words, if it could be determined, perhaps by standardized tests in secular subjects, that a religious school was providing secular education equal to that of the public schools, then payments could be said to have only a secular effect.[74] This would involve far less policing on the part of the government, and might avoid the excessive entanglement proscribed in *Walz* and *Lemon*. However, even if the entanglement standard were met, in light of the Court's evasive language in *Lemon*, it is by no means certain that such a plan would be able to meet the primary effect test.[75]

Once the legislature distinguishes between secular and sectarian functions, and aid is directed only towards secular functions, the policing required to maintain the separation threatens to entangle the government excessively in religious affairs. Yet a program making no distinction between the secular and sectarian activities of a church related institution might well have a primary effect violative of the first amendment. For private schools to survive, legislatures must break this impasse and ensure that aid is channelled into secular activities without necessitating extensive governmental surveillance. Tuition voucher schemes attempt to avoid the "entanglement" of government surveillance by relying on parental choice to channel block grants to private schools, and to avoid a primary effect of aiding religion by relying on the secular value theory. Before the system can pass constitutional muster the Court must accept this theory without requiring the type of extensive proof that would again create excessive government entanglement with religion. It remains for future court tests to determine the validity of this alternative.[76]

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74 *See, e.g.*, Areen, *Public Aid to Non-Public Schools: A Breach in the Sacred Wall?*, 22 CASE W. RES. L. REV. 230, 252-53 (1971).

75 The two legislatures [by passing "purchase-of-secular-services" legislation rather than providing aid in another form], however, have also recognized that church-related elementary and secondary schools have a significant religious mission and that a substantial portion of their activities is religiously oriented. They have therefore sought to create statutory restrictions designed to gnarantee the separation between secular and religious educational functions and to ensure that State financial aid supports only the former. . . . We need not decide whether these legislative precautions restrict the principal or primary effect of the programs to the point where they do not offend the Religion Clauses. . . .

Lemon v. Kurtzman, 403 U.S. 602, 613-14 (1971).

76 A review of some of the legal aspects of voucher systems may soon occur, as it is reported that the American Civil Liberties Union has begnn proceedings to attack a Minnesota tax credit plan. N.Y. Times, Aug. 26, 1971, at 17, col. 2. *See* text accompanying note 82 *infra*.

B. *Private Enterprise and Education*

Another educational trend which has been gaining attention is "performance contracting."[77] Under this system, local schools contract part of their teaching responsibilities to private companies. These companies are paid according to the quality of the results they achieve, as determined by the student's quantitative scores on tests. The system is designed to overcome stagnation in the educational system by going outside traditional structures. It is hoped that the introduction of the profit motive into the classroom will give rise to a competitive educational structure that will in turn improve the quality of student performance. In the sense that performance contracting provides for competition for the student's tuition, it is similar to the education voucher scheme. At the present time experiments in performance contracting are being conducted on a local level, sometimes aided by federal subsidies.[78] If, in fact, such a scheme proves successful and further efforts are made in this direction, the place of parochial schools in a private, competitive system must be determined.

Ultimately, a system could be envisioned in which all educational institutions are private, subject only to government certification of minimum standards, and compete for the tuition payments of students. If one accepts the role played by the parochial school system in the realm of private and, indeed, secular education—as the Court did in *Allen*—and the right of a parent to have his child attend a parochial

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77 Although this approach to education is relatively undeveloped, a number of large firms such as RCA and McGraw-Hill have begun work on such contracts. N.Y. Times, Jan. 11, 1971, at 68, col. 5. On the whole, however, reaction from industry is mixed. Schwartz, *Performance Contracting: Industry's Reaction*, NATION'S SCHOOLS, Sept. 1970, at 53.

The world of private enterprise may not only provide the public school system with innovative teaching techniques, but with managers as well. The U.S. Office of Education has funded a project called National Program of Education Leadership. This program seeks to bring noneducators into the field of education at the executive level, in order to effect changes in the public school system. Jenkins, *Schools Look Afield for Fresh Managers*, N.Y. Times, Jan. 11, 1971, at 69, col. 1.

78 The Office of Economic Opportunity plans to test the program with a $6.5 million contract involving 21 school districts. Schwartz, *Performance Contracts Catch On*, NATION'S SCHOOLS, Aug. 1970, at 31.

In Gary, Indiana, for example, a private firm has contracted with the public school system to operate an elementary school for four years. The company receives from the city the annual cost of educating these students ($800 per pupil per year). Under the agreement, the company agrees to "bring the students' achievement scores up to or above the national grade level norms in all basic curriculum areas or refund to the city the fees paid for each child who does not attain those levels." N.Y. Times, Jan. 11, 1971, at 68, cols. 6-7. For the results of this experiment, see note 100 *infra*.

school—as the Court did in *Pierce v. Society of Sisters*[79]—then parochial schools should have a place in such a system. Considering the negligible government entanglement, constitutional barriers similar to those potentially involved within tuition voucher schemes may not arise, even though some government funds would inevitably end up aiding religious educational activities in parochial schools.[80]

C. *Tax Aid to Families with Parochial School Students*

An approach that would eliminate cash payments, denounced in *Lemon*, and take advantage of the Supreme Court's approval of tax exemptions in *Walz*, is the tax credit plan. This approach would grant tax benefits to parents of private school children.[81] Such a plan has been enacted in Minnesota, where parents of private school students can deduct educational expenses from their state income taxes. If their

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[79] 268 U.S. 510 (1925). In striking down a statute which made attendance in public schools compulsory, and upholding the right of a parent to send his child to a private or parochial school, the Court stated that "the power of the State to provide public schools carries with it no power to prohibit and suppress private schools and colleges *which are competent and qualified to afford what the State wants, namely, education.*" *Id.* at 519 (emphasis added). The Court restated its position with respect to parochial schools in *Allen*: "[T]he continued willingness to rely on private school systems, including parochial systems, strongly suggests that a wide segment of informed opinion, legislative and otherwise, has found that those schools do an acceptable job of providing secular education to their students." Board of Educ. v. Allen, 392 U.S. 236, 247-48 (1968) (footuotes omitted). *See also*, State v. Yoder, 49 Wis. 2d 430, 182 N.W.2d 539 (1971), *cert. granted*, 402 U.S. 994 (1971) (No. 70-110).

One argument, which has thus far been omitted from this discussion, is that *denial* of financial aid to parochial schools is a violation of the equal protection clause. This could be based on the Supreme Court's opinion in *Pierce* that parents have the right to send their children to a parochial school that meets state standards. "According to this argument, parochial schools are in a different category from any other function of a church because of the fact that the church has been allocated a public duty to perform in the area of primary education." Kurland, *Politics and the Constitution: Federal Aid to Parochial Schools*, 1 LAND & WATER L. REV. 475, 491 (1966). *See* Drinan, *The Constitutionality of Public Aid to Parochial Schools*, in THE WALL BETWEEN CHURCH AND STATE 55 (D. Oaks ed. 1963). *Compare* Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680 (1969) *with* Valente & Stanmeyer, *Public Aid to Parochial Schools—A Reply to Professor Freund*, 59 GEO. L.J. 59 (1970).

[80] *See* notes 67-76 and accompanying text *supra*. A tuition voucher system involving private, profit making schools might strengthen the constitutional merits of the secular value theory. However, if each school is required to provide a certain minimum amount of secular education, any funds remaining above the cost to the institution of secular education would constitute profit, to be used in any manner the school considers desirable. Theoretically, a parochial school would be able to devote this money to religious instruction. *See* EDUCATION VOUCHERS 233-34. Such a benefit to the church schools, however, would go far beyond the "incidental benefit" realized in *Everson* and *Allen*.

[81] The President's Panel on Non-Public Education is considering such an approach. N.Y. Times, Aug. 26, 1971, at 1, col. 7.

school bills exceed their tax bills, the state will issue a rebate up to a maximum of one hundred dollars.[82]

In *Walz*, the Supreme Court held that tax exemptions for church owned property were constitutionally permissible. Such exemptions were intended to ". . . confine rather than enlarge the area of permissible state involvement with religious institutions,"[83] and to foster government neutrality towards religion. The government's involvement in *Walz*—the continuing burden of ensuring that tax exempt property is used for religious worship—was considered less entangling than administration of taxes.

Here, however, the choice for states would be between extending a tax deduction or rebate to parents of parochial school children or maintaining the status quo which involves no entanglement with church schools. Since nonpublic schools would have to be brought into the administrative processes of government in order to validate the tax deductions claimed by parents of parochial school students, the scheme may foster excessive government entanglement with religious affairs. In addition, these benefits are extended solely to taxpayers with private school expenditures, thereby raising doubts as to whether the legislation has a primary effect which neither advances nor inhibits religion. Such a system would not be analogous to tax deductions for charitable contributions, where the donor has complete freedom of choice as to the recipient of his funds, secular or religious, educational or otherwise.[84]

D. *Government Scholarships for Private School Students*

Another proposal, recently adopted in Maryland, provides for scholarship grants to children in nonpublic schools.[85] Like the "purchase-of-secular-services" statutes, this proposal only involves private schools and, indeed, can be thought of as a voucher program confined to the private sector. A similar plan has recently been enacted in Pennsylvania to replace the "purchase-of-secular-services" plan ruled unconstitutional in *Lemon*.[86]

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82 Act of June 7, 1971, ch. 944, [1971] Minn. Laws 1596; *see* N.Y. Times, Aug. 26, 1971, at 17, col. 1.

83 Lemon v. Kurtzman, 403 U.S. 602, 614 (1971).

84 *See* Areen, *supra* note 49, at 494. *See generally* Note, *Public Aid to Private Education*, 20 CATH. U.L. REV. 528, 533 (1971).

85 The scholarships range in value from $75 to $200, depending upon family income. MD. ANN. CODE art. 77, §§ 213-70 (Supp. 1971).

86 N.Y. Times, Aug. 28, 1971, at 27, col. 1. Under the Pennsylvania plan, parents of private school students receive payments of $75 for an elementary school pupil and $150 for a secondary school student.

"Government scholarship" plans are designed to keep the doors of parochial schools open while avoiding the excessive entanglement between government and religion condemned in *Lemon*. With respect to the latter objective, these plans appear to be successful. Payment of funds to parochial school parents involves none of the surveillance required in the "purchase-of-secular-services" programs. As with the tax credit plans, however, the parochial schools might be brought into the administrative process insofar as to validate the scholarship claims of parents. The first part of the Court's three-part test would be satisfied since the stated objective of such a plan would be to improve the secular education generally, a purpose validated in *Lemon*.[87] However, these plans may fall prey to the second test; they may have a primary effect which advances religion. Scholarship funds paid only to parochial school families would produce more than an incidental benefit to church related institutions.

A modification of the traditional effect test, proscribing only those activities which clearly tend to establish a religious belief and not those which merely have the primary effect of advancing it, might neutralize the threat the test poses to all the schemes heretofore discussed.[88] Since the *Lemon* case was resolved on the entanglement issue, the Court did not have an opportunity to deal with such a modified approach. The Court should explore the manner in which the *Allen* decision, which suggests that aid to secular activities might be constitutional, may be accommodated with the *Walz* decision, which proscribes excessive entanglement.

E. *Shared Time*

One approach to the problem of public aid to private schools, although by no means of recent origin, is the "shared time" program. Under such a system, private school students would attend public schools for part of the day in order to obtain instruction in one or more secular courses. This approach has not been tested in the Supreme Court,[89] nor does it provide a complete solution to the financial

87 403 U.S. 602, 613 (1971).

88 "This modification of the *Allen* test proscribes not government acts which 'advance' but only those which 'establish' religious belief, a more pragmatic and seemingly less onerous standard." Areen, *supra* note 74, at 240.

89 The Michigan Supreme Court recently considered the constitutionality of shared time programs. An amendment to the Michigan constitution prohibited the use of public monies for any school which offered instruction to nonpublic school students. This clause was held violative of the equal protection clause of the fourteenth amendment and in contravention of the free exercise clause of the first amendment. Although shared time programs were upheld, the court emphasized the need for strict controls in the imple-

problems of the parochial schools. Programs such as this, however, do provide the parochial schools with a method whereby they may maintain an input into the educational process while remaining within first amendment confines.

The Supreme Court, in *Zorach v. Clauson*,[90] found a New York "released time" program constitutional. Under this plan, students were allowed to leave public schools and attend sectarian institutions for religious instruction. The Court based its decision on the grounds that neither public funds nor public schools were used in the program, and that the purpose was merely to accommodate the schools' schedule to the religious needs of the populace.[91] A "shared time" approach, in which private school students receive some secular instruction, would greatly burden the public schools. However, the burdens that will be placed upon public schools if parochial schools cease to function entirely would be considerably greater. Such an approach provides a realistic alternative for religious schools at a time when hard economics threaten their continued operation.

III

Reform in Public Schools

Many difficulties that plague parochial schools are not unique, and apply to the public school system as well. The crisis in education presents financial, ideological, administrative, and legal problems. Funds for education have become more difficult to obtain, and the very structure of public school finance has been challenged as inadequate.[92] Perhaps most important, however, has been the growth of a

mentation of such plans. *In re* Proposal C, 384 Mich. 390, 185 N.W.2d 9 (1971); 49 J. Urb. L. 175 (1971).

In Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (1948), the Court examined a statute which presented a related issue. The statute allowed public school pupils to be released with parental consent from secular education classes in order to attend religious classes on the school premises. The Court held the statute unconstitutional as violative of the establishment clause of the first amendment. Since the state required attendance in either secular or religious classes, the state was compelling religious instruction in the public schools.

90 343 U.S. 306 (1952).

91 This approach has gained added strength through its inclusion in the Elementary and Secondary Education Act of 1965, § 205(a)(2), 20 U.S.C. § 241e(a)(2) (1970). Its continued use has met with some success. *See, e.g.*, Byrne, *A Report on Shared Time*, in Trends and Issues in Catholic Education, *supra* note 3, at 220, 220-31; Choper, *supra* note 73, at 335-37; Note, *Shared Time: Indirect Aid to Parochial Schools*, 65 Mich. L. Rev. 1224 (1967).

92 Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971); note 46 *supra*. *See* Malcolm, *Shift of Tax Burden Sought*, N.Y. Times, Jan. 11, 1971, at 67, col. 5.

"full-bodied movement for the reform and restructuring of education in the United States."[93] Arguments that American schools bore and stifle students and fail to educate them adequately are being voiced by parents, students, and educators alike.[94] The movement for educational reform is somewhat unique, however, in that it is not burdened with an attitude of despair. On the contrary, the majority of critics, while recoguizing that there are tremendous inadequacies in the present approach to education, agree that effective reform is both practical and possible, and are excited by the potential offered by America's educational resources.[95] It is this attitude that has led to proposals and experiments, some of which have been discussed herein, which seek to improve the quality of education offered by American schools.[96]

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93 Stevens, *Reform Drive Now Key Issue in Education*, N.Y. Times, Jan. 11, 1971, at 47, col. 3.

94 Dr. Harvey Scribner, Chancellor of the public school system of New York City, recognized the almost universal acceptance of a need for education reform when he remarked:

> [M]any other troubles—of an educational nature—will remain until the schools begin to reshape themselves in a number of fundamental ways.
>
> Basic change in the style and content of the schools—in the way education is defined, measured and packaged—is imperative. On that, there is relatively little disagreement.

Scribner, *Restructuring Deemed an Urban "Imperative," id.* at col. 4. *See* A. EURICH, REFORMING AMERICAN EDUCATION: THE INNOVATIVE APPROACH TO IMPROVING OUR SCHOOLS AND COLLEGES (1969); C. SILBERMAN, CRISIS IN THE CLASSROOM: THE REMAKING OF AMERICAN EDUCATION (1970). For an excellent study of the current "academic revolution" in higher education, see C. JENCKS & D. RIESMAN, THE ACADEMIC REVOLUTION (1968).

95 The potential for effective reform is evident in the following remarks:

> Because adults take the schools so much for granted, they fail to appreciate what grim, joyless places most American schools are, how oppressive and petty are the rules by which they are governed, how intellectually sterile and esthetically barren the atmosphere, what an appalling lack of civility obtains on the part of teachers and principals, what contempt they unconsciously display for children as children.
>
> And it need not be! Public schools *can* be organized to facilitate joy in learning and esthetic expression and to develop character—in the rural and urban slums no less than in the prosperous suburbs. This is no utopian hope; . . . there are models now in existence that can be followed.

C. SILBERMAN, *supra* note 94, at 10 (emphasis in original).

Speaking of reform in higher education, Jencks and Riesman conclude:

> Aside from nuclear war or a wave of national repression brought on by racial conflict or the defeat of imperial ambitions, generational conflict seems to be the major threat to the stability and growth of the academic system. Whether such conflict will lead to short-run reforms is doubtful. But in the long run the young always displace the old, and they seldom completely resemble them. If they are a different breed, and if they want to build a different world . . . they can do so.

C. JENCKS & D. RIESMAN, *supra* note 94, at 543.

96 The real difficulty lies in the need to overcome traditional opposition to change, and to create an innovative atmosphere.

> The key to reforming American education is new ideas: new ideas to challenge educational dogmas; new ideas to stimulate change; new ideas to suggest lines of

CONCLUSION

Although the financial consequences of the elimination of parochial schools are awesome, these fiscal considerations cannot serve to justify a violation of first amendment prohibitions. The Supreme Court will undoubtedly be afforded an opportunity to examine the proposals being advanced as constitutional alternatives for parochial schools, and thus to supply some answers as to the future viability of a religious school system.[97] But the parochial schools themselves must reevaluate their role in our educational system. Future court decisions may so severely and unequivocally restrict public aid that parochial schools will have to seek alternative methods of contributing to the educational process. "Shared" and "released time" programs are such alternatives.[98] The churches should examine others so that they may be able to adjust to possible hard times.

Perhaps the greatest burden rests with American educators in the public sector. It will be their responsibility to develop new and innovative reforms in education. The demise of the parochial school system would eliminate a source of cultural diversity and competition. Many alternatives which have been advanced to revive the parochial schools, such as the tuition voucher scheme, may offer vast improve-

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research and development. And back of these new ideas a total *innovative approach* which asks constantly: Why? . . .

New ideas are the key to educational reform. But public policy for education in the United States has not developed in such a way as to support innovation and change. We have simply not organized our educational enterprise to encourage rapid progress. This failure must be examined if we are to present an honest picture of the obstacles to reform.

A. EURICH, *supra* note 94, at 18. (emphasis in original).

97 Although litigation concerning public aid to parochial schools has traditionally focused on the establishment clause, the potential elimination of parochial schools may shift the emphasis to the free exercise clause. It may be argued that, in order to accommodate the religious needs of society, a church school system is constitutionally required as a form of free exercise of religious beliefs. *See* note 79 *supra*.

There is evidence of this trend in a recent decision construing Missouri law. Parents of private school children argued that the Missouri constitutional ban on the use of public funds for sectarian purposes rendered the choice between private and public schools meaningless and therefore violated the free exercise clause of the first amendment. The court, relying in part on the recent Supreme Court decision in *Lemon*, held that a parent's right to send his children to a private school cannot be equated with a right to obtain financial assistance from the state for private religious education. Brusca v. Missouri, 332 F. Supp. 275 (E.D. Mo. 1971).

98 The closing of the parochial high school in Bennington, Vermont, led to such a program. An ecumenical group of clergymen took advantage of a released time program to offer elective courses on topical issues with a religious emphasis to high school students. Such an approach constitutes a refreshing and potentially successful source of religious input into traditional secular education. TIME, July 12, 1971, at 37.

ments over present policies even without parochial school participation.[99] These programs are certainly worthy of testing,[100] and the first amendment should not constitute a barrier to such experimentation. Successful resolution of the crisis in education requires that educators look beyond the confines of traditional structures and search for new and better ways in which to allocate our educational resources.

Thomas E. Willett

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99 *See* EDUCATION VOUCHERS 136.

100 Testing with respect to performance contracting may have pointed out some of the deficiencies connected with such an approach. A publication of the New York State Teachers' Association reports that an experiment with performance contracting in Virginia brought rather poor results. An independent contractor undertook to teach reading skills to some 2400 Virginia school children in grades two through seven. Studies conducted after the course was completed revealed that one-third of the children either slipped backward or made no gain in achievement. Based on these scores, Virginia paid the contractor $35 per pupil less than the firm would have received in the event of successful completion of the program. THE CHALLENGER, Sept. 3, 1971, at 3, col. 1.

The results in Gary, Indiana were more promising. Recent test scores showed that almost 73% of students participating in the performance contracting program had reached or exceeded national levels in reading or math. Prior to the program, ouly one out of four students was reading at the national level. Although many questions remained, school officials thought the initial results were encouraging. TIME, Oct. 11, 1971, at 78.