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THE ENDURING CONTROVERSY: PAROCHIAL AND THE LAW

EDD DOERR*

INTRODUCTION

The most enduring, bitter and important controversy in the history of education and church-state relations concerns public funding for religious and other private schools. "Parochial"—defined as any form of direct or indirect public aid for parochial and other nonpublic elementary and secondary schools—became a household word after being coined by Michigan journalists during the struggles in that state in the late 1960's. Innumerable battles have taken place in Congress and state legislatures over proposals to provide tax aid in one form or another for parochial schools. Referenda have been held on the subject in recent years in New York, Michigan, Maryland, Nebraska, Oregon and Idaho. Rivers of ink and thousands of hours of radio and television time have been devoted to it. Federal and state courts have been blitzed with lawsuits challenging the various parochial plans which have gained legislative approval. The United States Supreme Court has handed down a series of rulings on the subject in recent years. The controversy continues with undiminished intensity.

This article will attempt to put the parochial controversy into perspective, summarize the arguments on both sides of the issue, trace the relevant court rulings and hazard some guesses as to the course of future developments.

EUROPEAN WAYS

The countries which sent the earlier streams of migrants to our shores (Britain, Ireland, Northern Ireland, The Netherlands, France and Germany) evolved school systems and church-state relationships quite different from those which developed in this country.

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In England, Adam Smith urged free, compulsory education for the "inferior ranks of the people" as a state function.¹ T. R. Malthus and Thomas Paine also urged the creation of public schools.² Public funds began flowing to private Church of England schools in 1833 and to Roman Catholic and Methodist schools after 1847. By 1870 the British government was supplying £500,000 annually to Anglican schools and £200,000 to Roman Catholic, Methodist and other voluntary schools.³ It was not until after 1870 that Britain established what Americans call public schools, a development long delayed by conservative and religious opposition.⁴ Today English and Welsh public or county schools enroll three-fourths of the eligible students while Anglican, Roman Catholic and dissenting church schools enroll nearly all the rest.⁵ The church schools are generously, though not quite totally, funded from tax sources.⁶

In Ireland virtually all education is operated by religious bodies and is tax supported, although rather niggardly.⁷ Most of the schools are Roman Catholic, but a few are Protestant and Jewish.⁸ In Northern Ireland a modified form of the British system is in operation, with nearly all Catholic children attending tax-supported Catholic schools and the remainder of the children attending public schools which are Protestant-oriented.⁹

Public education was well developed in the Netherlands by 1860, when 79 percent of the students attended public schools.¹⁰ However, Roman Catholic and Reformed Church leaders waged a long campaign to obtain public support for their parochial

1. E. CUBBERLEY, *THE HISTORY OF EDUCATION* 620-21 (1948) [hereinafter cited as CUBBERLEY].

2. *Id.* at 621-22.

3. *Id.* at 639.

4. *Id.* at 633-50.

5. See A. CLAYTON, *RELIGION AND SCHOOLING* 11-93 (1969) [hereinafter cited as CLAYTON]; White, *Catholic Education in England*, in *CATHOLIC EDUCATION IN THE WESTERN WORLD* 209-50 (J. Lee ed. 1967).

6. Public schools in Britain are required by law to provide "agreed syllabus" religious instruction and daily worship activities. See note 5 *supra*.

7. See A. MENENDEZ, *THE BITTER HARVEST* 69-119 (1973) [hereinafter cited as MENENDEZ].

8. *Id.*

9. The almost total religious segregation in Ulster education is regarded by many authorities as an important contributing factor to the bloody unrest there. See, e.g., MENENDEZ, *supra* note 7, at 69-119.

10. See CLAYTON, *supra* note 5, at 100-80; Gielan & Gielan, *Catholic Education in the Netherlands*, in *CATHOLIC EDUCATION IN THE WESTERN WORLD* 113-54 (J. Lee ed. 1967).

schools.¹¹ These political efforts succeeded, and today a mere one-fourth of Dutch children attend public schools. Nearly three-fourths are in religiously segregated Catholic and Protestant schools.¹²

In France, education was in the hands of the Roman Catholic Church until the Revolution.¹³ Napoleon restored education to the church, but stormy developments in the nineteenth century left education "public, free, compulsory, and secular" by the early 1900's.¹⁴ During World War II Petain's collaborationist government permitted religious teachers to return to private schools, and by the late 1950's the DeGaulle government began public subsidies for Catholic schools.¹⁵

The West German states (Länder) have developed a variety of ways for organizing and funding education. While the patterns of organization and funding are quite complex, two common features are denominational public schools and considerable state aid for private religious schools.¹⁶

Most Canadian provinces tend to imitate European models of education. Quebec and Newfoundland have only denominational schools, which are publicly supported.¹⁷ Ontario, Alberta and Saskatchewan have American-style public school systems with some publicly-supported sectarian schools, while only British Columbia has followed the United States' model closely.¹⁸ Substantial federal and state aid flows to Catholic and other parochial schools in Australia, although there have been divisive political struggles over the aid.¹⁹ A constitutional challenge is presently before the country's highest court.²⁰

11. See note 10 *supra*; see also Menendez, *Church and State in the Netherlands*, CHURCH & STATE, Nov. 1974, at 7.

12. Menendez, *Church and State in the Netherlands*, *supra* note 11, at 7.

13. See CUBBERLEY, *supra* note 1, at 588-603; Piveteau, *Catholic Education in France*, in CATHOLIC EDUCATION IN THE WESTERN WORLD 1-60 (J. Lee ed. 1967).

14. See note 13 *supra*.

15. See Menendez, *Church and State in France*, CHURCH & STATE, Jan. 1975, at 17.

16. See Pöggeler, *Catholic Education in Germany*, in CATHOLIC EDUCATION IN THE WESTERN WORLD 61-112 (J. Lee ed. 1967). Interestingly, a large and growing number of German Catholic parents express a preference for secular schooling over either parochial schools or confessional public schools. *Id.*

17. *Canadian, German experience supports U.S. system*, CHURCH & STATE, Sept. 1968, at 19.

18. *Id.*

19. See Graves, *Parochialism Down Under*, CHURCH & STATE, Sept. 1970, at 8-10.

20. CHURCH & STATE, June 1974, at 11.

THE AMERICAN EXPERIENCE

Beginning in 1607, an improbably diverse collection of people began settling on the eastern shore of North America. They came from England, Scotland, Ireland, France, Germany, Sweden, Holland, Africa and elsewhere. Among them were Congregationalists (Puritans and Pilgrims), Anglicans, Roman Catholics, Baptists, Methodists, Lutherans, Presbyterians, Jews, Quakers, Mennonites and Dutch Reformed. A very large number of them came here for greater religious freedom, although most of the colonies they set up practiced varying degrees of intolerance toward dissenters and generally provided tax support for religion.²¹

From humble beginnings these disparate people evolved the most prosperous, technologically advanced and free nation in the world. Central to this process was the development of nonsectarian public school systems and the generally accepted constitutional principle of separation of church and state.

The separation principle, though articulated in the early seventeenth century by Roger Williams,²² had to wait for Thomas Jefferson, James Madison and other Virginians to be put into operation. In the same year that the Declaration of Independence was signed, the Virginia legislature took the first steps to disestablish the Anglican Church and expand religious freedom.²³ Since these steps did not go far enough, Jefferson, Madison and Baptist and Presbyterian leaders began a drive to completely separate church and state. Their efforts led to the passage in 1786 of Jefferson's Bill for Establishing Religious Freedom.²⁴ This Act ended legal compulsion to attend church and barred tax support for religious institutions. It also provided that:

no man . . . shall be enforced, restrained, molested, or burdened in his body or goods, nor shall otherwise suffer on account of his religious opinions or beliefs, but that all men shall be free to profess, and by argument to maintain, their opinions in matters of religion, and that the same shall in no wise diminish, enlarge or affect their civil capacities.²⁵

By the time the first amendment to the United States Con-

21. See L. PFEFFER, *CHURCH, STATE AND FREEDOM* 71-90 (1967) [hereinafter cited as PFEFFER].

22. *Id.* at 84-88.

23. *Id.* at 91-109.

24. *Id.* at 113.

25. *Id.* at 114.

stitution was adopted in 1791, all the states guaranteed religious liberty to a large extent and only four retained substantial vestiges of religious establishments.²⁶ Massachusetts finally gave up its establishment of religious in 1833.²⁷ As Leo Pfeffer²⁸ has pointed out, the movement toward separation of church and state began with gradual extensions of religious liberty, then saw single establishments give way to multiple establishments and ended with the cessation of all tax aid for religious institutions.²⁹ Pfeffer adds:

It is important to note that in no case did the development end until complete disestablishment was arrived at: no state stopped with according freedom of worship, or indeed with less than complete prohibition of tax support of any and all religions. Moreover, every state that entered the Union after the Constitution was adopted incorporated both prohibitions in its constitution or basic laws. In no case was there any attempt to establish any denomination or religion; on the contrary, in varying language but with a single spirit, all states expressly forbade such attempt. This deliberate decision was not motivated by indifference to religion: most of the states had been settled by deeply religious pioneers. Nor was it dictated by purely practical considerations; many of the states had a population far more homogeneous religiously than Canada, Holland, or even England The decision was in all cases voluntary; and it was made because the unitary principle of separation and freedom was as integral a part of American democracy as republicanism, representative government, and freedom of expression.³⁰

Not only did the first thirteen states all sooner or later follow the example set by Virginia and the first amendment, but "from 1876 onward all new states added to the Union were required by Congress to include in their basic laws an irrevocable ordinance guaranteeing religious freedom in line with the First Amendment."³¹

26. *Id.* at 115-21.

27. A. STOKES & L. PFEFFER, *CHURCH AND STATE IN THE UNITED STATES* 76-78 (1964).

28. Leo Pfeffer, professor of political science at Long Island University and special counsel to the American Jewish Congress, has argued numerous church-state cases before the Supreme Court.

29. See PFEFFER, *supra* note 21, at 140-42.

30. *Id.* at 142.

31. See R. BUTTS, *THE AMERICAN TRADITION IN RELIGION AND EDUCATION* 102-04 (1950).

While the Constitution drafted in 1787 did not grant the federal government power to deal with religion in any way and did proscribe religious tests for public office, the absence of a specific religious freedom guarantee bothered Jefferson and many other citizens.³² Six states ratified the Constitution but insisted on religious freedom amendments. Rhode Island and North Carolina even declined to ratify it until a bill of rights guaranteeing religious liberty was adopted.³³

Shortly after his election to the House of Representatives in 1789, Madison introduced a compilation of proposals for a bill of rights to be added to the Constitution by amendment.³⁴ Several versions of a religious liberty provision were debated before the following wording of what is now the first amendment was adopted: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."³⁵

What these sixteen words mean, of course, is what this article is all about. Jefferson, in a carefully considered 1802 letter to the Danbury Baptist Association, declared that these words built a "wall of separation between church and state."³⁶ Strong church-state separationists generally hold that the first amendment's "no establishment" clause was best and most succinctly interpreted by the Supreme Court in *Everson v. Board of Education*.³⁷ In *Everson*, the Court stated:

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 can force nor influence a person to go to or remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Gov-

32. See PFEFFER, *supra* note 21, at 125-26.

33. *Id.* at 125.

34. *Id.* at 126.

35. *Id.* at 126-27.

36. *Id.* at 133.

37. 330 U.S. 1 (1947).

ernment 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."³⁸

A contrasting point of view was expressed by the National Catholic Welfare Conference in a 1948 statement asserting that the "no establishment" clause was intended only to prevent the creation of a single established or preferred church.³⁹ Pfeffer, however, shows that the weight of evidence favors the Court's *Everson* interpretation.⁴⁰

The first amendment prohibition against laws respecting establishments of religion at first applied only to the federal government, but in 1940 the Supreme Court made it clear that "the Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws."⁴¹

THE AMERICAN PUBLIC SCHOOL

While it would be impossible to do justice to the complex history of public education in this country in anything less than a sizeable volume, a brief capsule treatment is necessary to put the parochialism controversy in perspective. During the colonial period, American education was almost entirely a religious and private affair. In Puritan New England, where church and state were often inextricably intertwined, education was a quasi-religious, quasi-public operation.⁴² In the middle colonies, with their greater religious diversity, parochial education was the rule.⁴³ In the Anglican south, what education there was was mainly private.⁴⁴ Pauper schools were developed for the poor who could not afford parochial or private schooling.⁴⁵ As religious tolerance and pluralism grew, the church gradually faded from the New England educational scene and the community-controlled public school evolved, setting the basic pattern for the rest of the country.⁴⁶ Following the political and economic upheavals of the late eighteenth and early

38. *Id.* at 15-16.

39. See PFEFFER, *supra* note 21, at 151.

40. *Id.* at 149-80.

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

42. See CUBBERLEY, *supra* note 1, at 356-75.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 519-27.

nineteenth centuries, parochial and private education gradually diminished as true public schools appeared, grew and proliferated.⁴⁷

Early nineteenth century public schools tended to be somewhat religious in orientation. Horace Mann and other leaders struggled successfully to move the schools to a position of non-denominationalism, at least vis-à-vis most Protestant denominations.⁴⁸ Protestant Bible reading and prayers, which discriminated against a growing number of Roman Catholic and Jewish children, were common and were generally upheld by state courts.⁴⁹ Catholic children were sometimes punished or expelled from school for refusing to participate in essentially Protestant exercises.⁵⁰ As early as 1872, the Ohio Supreme Court held, however, that a school board *could* exclude Bible reading.⁵¹ In 1910, the Illinois Supreme Court, in a case brought by Catholic parents of children in public schools, held that school-mandated or sponsored Bible reading was constitutionally prohibited religious instruction, even when dissenting children could opt out of participation.⁵² An increasingly pluralistic population not only exerted pressure on the schools to move closer and closer to religious neutrality, but also insured that the courts would eventually have to settle the continuing disputes.

In 1948 the Supreme Court ruled in *McCullum v. Board of Education*⁵³ that voluntary "released time" religious instruction held in public schools violated the first amendment,⁵⁴ although four years later the Court would hold that such instruction held off public school premises was not constitutionally prohibited.⁵⁵ In 1962 the Court decided in *Engel v. Vitale*⁵⁶ that recitation in public schools of a prayer formulated by the New York State Board of Regents violated the first amendment.⁵⁷ In *Engel*, the Court emphasized that "it is no part of the business of government to compose official prayers for any group of American people to recite as part of a religious program carried on by the

47. *Id.* at 653-708.

48. See PFEFFER, *supra* note 21, at 436-66.

49. *Id.*

50. *Id.*

51. Board of Educ. of Cincinnati v. Minor, 23 Ohio St. 211 (1872).

52. People *ex rel.* Ring v. Board of Educ., 245 Ill. 234, 92 N.E. 251 (1910).

53. 333 U.S. 203 (1948).

54. *Id.* at 212.

55. Zorach v. Clausen, 343 U.S. 306 (1952).

56. 370 U.S. 421 (1962).

57. *Id.* at 436.

government.”⁵⁸ The following year the Court struck down state-mandated Bible reading and recitation of the Lord’s Prayer in *Abington School District v. Schempp*.⁵⁹ Vestiges of prohibited sectarian practices continue in some schools after the Supreme Court decisions, but such practices appear to be slowly waning.

The Court, in ruling unconstitutional religious instruction and devotional activities in public schools, asserted that it was neither exhibiting hostility toward religion nor prohibiting the public schools from dealing with it in ways which do not violate the first amendment. The Court pointed out in *Schempp*, for example, that the Bible may be used as a reference work or studied for its literary or historic qualities and that the schools may offer teaching *about* religion objectively and neutrally, as distinguished from the teaching *of* religion.⁶⁰ In *Engel* the Court noted that the recitation of historical documents containing references to a deity is permissible, as is the use of officially approved anthems which include some religious expressions by the composer.⁶¹

Attempts have been made since *Engel* and *Schempp* to persuade Congress to approve amendments to the Constitution that would permit voluntary or nondenominational prayer in public schools. Many responsible religious leaders have tended to oppose such amendments, and the amendments have failed to win approval in either house of Congress.⁶² One bizarre proposal to limit the jurisdiction of the federal courts over controversies involving voluntary prayer in public schools has been introduced in Congress by Senator Jesse Helms and Representative Daniel J. Flood. The bill would attempt, under the authority of article III, section 2 of the Constitution, to deny aggrieved parents and students access to federal courts to challenge possible first amendment violations.⁶³

58. *Id.* at 425.

59. 374 U.S. 203 (1963). Religious censorship of public school curriculum content, incidentally, was dealt a blow in 1968 when the Court struck down an Arkansas law designed to prevent the exposure of students to the theory of evolution. *Epperson v. Arkansas*, 393 U.S. 97 (1968).

60. 374 U.S. at 225.

61. 370 U.S. at 435 n.21.

62. See L. PFEFFER, *GOD, CAESAR, AND THE CONSTITUTION* 213-20 (1975). Those opposing such amendments have generally pointed out that truly voluntary prayer by students has never been prohibited by the courts, that any government-sponsored prayers will inevitably violate the rights of minorities and that no agreement is possible as to what constitutes a “nondenominational” prayer. See, e.g., AMERICANS UNITED FOR SEPERATION OF CHURCH & STATE, *WHY DO RELIGIOUS BODIES OPPOSE “PRAYER” AMENDMENTS* (1971).

63. S. 283, 94th Cong., 1st Sess. (1975); H.R. 1678, 94th Cong., 1st

Over the years, then, the American people have developed a host of local public school systems about which Justice William J. Brennan could write in his concurring opinion in *Schempp*:

The public schools are supported entirely, in most communities, by public funds—funds exacted not only from parents, nor alone from those who hold particular religious views, nor indeed from those who subscribe to any creed at all. It is implicit in the history and character of American public education that the public schools serve a uniquely public function: the training of American citizens in an atmosphere free of parochial, devious, or separatist influence of any sort—an atmosphere in which children may assimilate a heritage common to all American groups and religions. This is a heritage neither theistic nor atheistic, but simply civic and patriotic.⁶⁴

PAROCHIAL AND PRIVATE SCHOOLS

Understanding the controversy over public or tax aid for nonpublic schools requires some acquaintance with the nature of nonpublic education. The accompanying chart shows how elementary and secondary students in the United States were distributed among public, denominational and secular private schools during the 1974-75 school year.⁶⁵

Public and Nonpublic School Enrollment 1974-75

	1974-75	% of Total Enrollment	% of Nonpublic Enrollment
Total Enrollment	49,985,861		
Public Schools	45,486,292	90.9	
Total Nonpublic	4,499,569	9.1	
Roman Catholic	3,614,000	7.22	80.31
Nat'l Ass'n of Independent Schools	258,100	0.51	5.73
Lutheran	214,000	0.42	4.75
Jewish	89,700	0.17	1.99
Seventh-day Adventist	73,869	0.14	1.64
Episcopal	65,100	0.13	1.44
Nat'l Union of Christian Schools (Christian Reformed Church)	62,800	0.12	1.39
Nat'l Ass'n of Christian Schools	57,400	0.11	1.27
Friends (Quakers)	14,600	0.02	0.32
Misc. (Black Muslim, Hare Krishna, etc.)	50,000	0.10	1.11

Sess. (1975). See *Dangerous Bills*, CHURCH & STATE, April 1975, at 5, 15.

64. 374 U.S. at 241-42 (Brennan, J., concurring).

65. Enrollment data supplied orally in January 1975 by the National Education Association, the National Catholic Educational Association, the

Over 94 percent of the students in nonpublic schools in the United States attend religious schools.⁶⁶ While the term "parochial" does not accurately describe all religious schools, it is the most commonly used and convenient designation. These schools differ radically from the pluralistic, generally religiously neutral public schools enrolling nine out of ten American children. Otto Kraushaar, who is quite sympathetic to parochial and private schools and favors tax aid for them, observes that "Catholic, Protestant, and Jewish schools continue to conceive their religious mission as central, and as transcending even their growing commitment to academic learning."⁶⁷

The Reverend John L. McKenzie, professor of theology at the University of Notre Dame, describes Catholic school distinctiveness in this way:

The Roman Catholic schools have always placed religious education as the primary purpose of the schools with no attempt to mask this under some other purpose. . . .

The principle on which church education is conducted goes far beyond formal religious instruction. Children also learn the way of worship; they are taught respect and reverence for prelates, clergy, and religion. They are daily reminded of their identity as Catholics. They grow up in an atmosphere of Roman Catholic traditions and attitudes which are communicated not so much by instruction as by prolonged close association under the direction of professional religious persons.⁶⁸

The Reverend Neil G. McCluskey, Dean of Teacher Education at Lehman College of City University of New York, points out that religion pervades the parochial curriculum, "particularly in literature, history, and the social studies."⁶⁹ He adds that, "[t]he function of the Catholic school is not merely to teach the formulas of the Catholic religion but . . . 'to impart in a thousand ways, which defy formularization, the Catholic attitude toward life as a whole.'"⁷⁰

Council for American Private Education and the Seventh-day Adventist General Conference. The National Association of Independent Schools generally represents nonsectarian private schools.

66. See note 65 *supra*.

67. O. KRAUSHAAR, *AMERICAN NONPUBLIC SCHOOLS* 22 (1972) [hereinafter cited as *KRAUSHAAR*].

68. J. MCKENZIE, *THE ROMAN CATHOLIC CHURCH* 294-95 (1971).

69. N. McCLUSKEY, *CATHOLIC VIEWPOINT ON EDUCATION* 74 (1962).

70. *Id.* at 78.

That the Catholic school should be a pervasively religious institution was stressed by Pope Pius XI in his 1929 encyclical on the "Christian Education of Youth."⁷¹ It states:

The mere fact that a school gives some religious instruction (often extremely stunted) does not bring it into accord with the rights of the Church and the Christian (*i.e.*, Catholic) family, or make it a fit place for Catholic education. To be this it is necessary that all the teaching and the whole organization of the school, and its teachers, syllabus, and textbooks in every branch, be regulated by the Christian (*i.e.*, Catholic) Spirit, under the direction and maternal supervision of the Church; so that Religion may be in very truth the foundation and crown of the youth's entire training; and this in every grade of school, not only the elementary, but the intermediate and the higher institutions of learning as well. "For it is necessary," if we may use the words of Leo XIII (*Militantis Ecclesiae*, 1897), "not only at certain hours to teach Catholic religion to children but that all other subjects must also be made fragrant with the odor of piety. If this be not done, if this holy habit should not pervade and permeate the souls of both teachers and pupils, little benefit will accrue from any teaching but generally very great harm. . . ."⁷²

Protestant schools also emphasize the inculcation of religious values. Professor Harry C. Coiner of Concordia Theological Seminary describes Missouri Synod Lutheran schools as follows:

The church-related school, which does not face the problem of religious pluralism and is free to teach Biblical doctrines, can do much more specific work in Christian education. . . .

The [Lutheran] school enables the child to experience a totally Christ-centered program, a program which focuses the application of God's word on him and on all areas of his life. . . . The relationship of science, social studies, language, arithmetic, and other subjects to Biblical truth may be taught without limitation. . . .

Daily social contact between teachers and pupils of the same Christian faith reinforces learning by attitude and example. The absence of any formal educational in-

71. Pius XI, encyclical letter *Divini Illius Magistri*, Dec. 31, 1929.

72. *Id.*

fluence that is strange, foreign, or antagonistic in any way to the positive Christian educational process permits the building of one stone on another without destructive influence.⁷³

Other denominational schools are similarly religious in theory and practice.

Parents send children to parochial schools, then, primarily for religious reasons. Kraushaar concludes that parochial parents attach little importance to educational innovations, "social advantages," or "better educational buildings and equipment," but that "the typical nonpublic school is founded to serve and is supported by a cohesive ideological community based on religious, social, academic or racial interests, rather than to serve a neighborhood or district of the general community as the public school does."⁷⁴

Roman Catholic schools, by far the largest and most important sector of nonpublic education, grew until reaching a peak enrollment of about 5.6 million in 1965 and then, alone among nonpublic school systems, began a pronounced decline which reduced enrollment to about 3.6 million in 1974.⁷⁵ A Boston College study for former President Nixon's Commission on School Finance explains that the decline of anti-Catholic prejudice and social exclusion largely accounts for the shift from parochial to public schools.⁷⁶

THE GREAT DEBATE

Before looking at the ways in which the courts have dealt with various programs of public aid for nonpublic, primarily parochial, schools, it would be useful to scan the basic arguments advanced by the advocates and opponents of parochial aid.

Pros

Advocates of parochial aid point out that many parents prefer to send their children to parochial or private schools, generally for the purpose of receiving religious training not offered in public schools. Parochial aid advocates argue that excluding paro-

73. Coiner, *The Purposes and History of the Lutheran Elementary School*, in *LUTHERAN ELEMENTARY SCHOOLS IN ACTION 9* (V. Krause ed. 1963).

74. KRAUSHAAR, *supra* note 67, at 104, 106.

75. See CENTER FOR FIELD RESEARCH & SCHOOL SERVICES, *BOSTON COLLEGE ISSUES OF AID TO NON-PUBLIC SCHOOLS 16-23* (1971).

76. *Id.*

chial or private school students from the benefits of taxes raised for education interferes with the parents' and children's educational and religious freedom and discriminate against certain people because of their religion.⁷⁷

Another argument for parochial aid has been advanced in recent lawsuits filed in Pennsylvania and Missouri. It is that, since the public schools allegedly teach the religion of "secular humanism or agnosticism," confining public support to public schools and denying public educational benefits to patrons of so-called independent schools deprives certain parents of free exercise and equal protection rights under the first and fourteenth amendments.⁷⁸

The advocates further argue that aid to parochial and private schools would promote more diversity and pluralism in education; that nonpublic schools relieve taxpayers of the expense of educating a large number of children and therefore deserve some public aid; and that failure to provide public aid would mean the closing of many nonpublic schools and consequent shifting of heavy burdens to the public schools.⁷⁹

Cons

The arguments against parochial aid cannot be summarized so easily. The principle objections are listed below, in no particular order.

1. Since parochial schools are religious institutions and usually integral components of a church and its mission, direct or indirect public aid to them would violate the church-state separation principle embodied in the first amendment and similar provisions in state constitutions.⁸⁰

2. Public subsidies for nonpublic education would stimulate the growth of parochial and private education and reduce public schools to institutions serving mainly the poor, ethnic minorities and those not wanted by nonpublic schools.⁸¹

3. Parochial aid would be public subsidization for creedal, class, racial and other kinds of segregation, discrimination and imbalance which commonly characterize the operation of nonpublic

77. See, e.g., V. BLUM, FREEDOM IN EDUCATION 49-82 (1965).

78. See *Monachin v. Smith*, No. 42410 (Cir. Ct. Clay County, Mo., filed Mar. 14, 1972); *Allen v. Blackhawk School Dist.*, Civil No. — (W.D. Pa., dismissed Sept. 24, 1974).

79. See, e.g., H. BUETOW, OF SINGULAR BENEFIT 386-88 (1970).

80. See, e.g., PFEFFER, *supra* note 21, at 524.

81. *Id.* at 525.

schools. In addition, parochialism would tend to promote social division and conflict along creedal, racial, class and other lines.⁸²

4. Parochialism would be quite costly. Any savings to the taxpayers resulting from the operation of nonpublic schools would evaporate if those schools were to become publicly supported. Further, attempting to support a growing proliferation of balkanized school systems would undoubtedly mean higher educational costs for lower educational quality.⁸³

5. Acceptance of public aid could and should cost nonpublic schools much of their independence with regard to admissions, faculty hiring and curriculum design.⁸⁴

6. Parochialism plans cannot be administered without a serious and objectionable entanglement between religion and government.⁸⁵

7. Opponents of parochialism further point out that public schools are available for every child, regardless of creed, and that denial of public educational benefits to certain children is a decision made by parochial or private school parents and not by government; that placing children in nonpublic schools which tend to be homogeneous creedally and in other ways is less promotive of educational pluralism and diversity than sending children to public schools which draw upon the whole community for students; that "secular humanism or agnosticism" can in no way be identified with neutrality vis-à-vis our various religious tradi-

82. The National Catholic Education Association (NCEA) reported in 1970 that enrollment in Catholic schools was 97.3 percent Catholic. NAT'L CATHOLIC EDUC. ASS'N, A STATISTICAL REPORT ON CATHOLIC ELEMENTARY AND SECONDARY SCHOOLS FOR THE YEARS 1967-68 to 1969-70 (1970) [hereinafter cited as STATISTICAL REPORT]. Kraushaar points out that nonpublic schools are by nature homogeneous and that they serve only about one-fourth as many Census Bureau-defined impoverished children as the public schools. KRAUSHAAR, *supra* note 67, at 93-95, 104. The NCEA also has reported that Catholic schools enroll proportionately only about one-third as many black children as the public schools. STATISTICAL REPORT. Other studies show that nonpublic schools are not only out of balance racially, but also worsen racial imbalance in public schools. *See* COMM. TO STUDY AID TO NONPUBLIC EDUC., REPORT TO THE GOVERNOR AND GENERAL ASSEMBLY OF MARYLAND (1971); THE FLEISHMANN REPORT ON THE QUALITY, COST, AND FINANCING OF ELEMENTARY AND SECONDARY EDUCATION IN NEW YORK STATE, vol. 1 (1973); N.Y. DEP'T OF CITY PLANNING, THREE OUT OF TEN: THE NONPUBLIC SCHOOLS OF NEW YORK CITY (1972); U.S. COMM'N ON CIVIL RIGHTS, RACIAL ISOLATION IN THE PUBLIC SCHOOLS (1967).

83. *See, e.g.,* Doerr, *Public Funds and Nonpublic Schools*, in SCHOOL FINANCE IN TRANSITION 153-54 (Nat'l Educ. Finance Project 1973).

84. *See, e.g.,* G. COGDELL, WHAT PRICE PAROCHIALISM? 81-88 (1970).

85. *See* notes 131-69 *infra* and accompanying text.

tions; and that the charge that the more than two million Protestants, Catholics, and Jews teaching in and running public schools are promoting "secular humanism" is absurd.⁸⁶

This sketchy summary of the parochial pros and cons obviously is not comprehensive, but it does highlight the importance, scope and intensity of the controversy.

A THUMBNAIL HISTORY

Before reviewing the relevant court rulings on parochial aid, it might be appropriate to touch briefly upon some of the highlights of the history of the controversy. New York State was the locus of the earliest battles over tax aid for parochial schools. Requests for aid to Baptist schools led to action by the New York City Common Council in 1825 to bar such aid.⁸⁷ Requests for aid to Catholic schools in the early 1840's led to a prolonged political donnybrook which resulted in passage of state legislation in 1844 barring aid to all schools "in which the religious sectarian doctrine or tenet of any particular Christian or other religious sect shall be taught, inculcated or practiced."⁸⁸ The battle was renewed in the 1890's and led to the inclusion of a strong provision in the state constitution barring all aid to religious schools.⁸⁹

Lowell, Massachusetts, maintained two Catholic schools as public schools until 1855, when the state constitution was amended to block tax aid to church schools.⁹⁰ A similar plan for providing public aid to parochial schools begun in the late nineteenth century was the Faribault Plan, named for the Minnesota town in which it originated. The plan, also called the "captive school" plan by its opponents, involves the incorporation of parochial schools into public school systems.⁹¹ This arrangement led to bitter controversies in Ohio and other states and to state supreme court rulings against the plan in Missouri in 1942⁹² and in New Mexico in 1951.⁹³ The practice continues in a few communities around the country.

86. See notes 80-85 *supra*.

87. See E. DOERR, *THE CONSPIRACY THAT FAILED 17-27* (1968); PFEFFER, *supra* note 21, at 530-33.

88. N.Y. LAWS ch. 320, § 12 (1844).

89. N.Y. CONST. art. XI, § 3.

90. CUBBERLEY, *supra* note 1, at 694-95.

91. See PFEFFER, *supra* note 21, at 537-54.

92. *Harfst v. Hoegen*, 349 Mo. 808, 163 S.W.2d 609 (1942).

93. *Zellers v. Huff*, 55 N.M. 501, 236 P.2d 949 (1951).

PAROCHIAL AND THE COURTS

Cases challenging the constitutionality of tax aid for parochial education are brought in both federal and state court and involve both federal and state constitutional provisions. Before 1968, when the Supreme Court ruled that taxpayers have standing to sue in federal courts to challenge government expenditures alleged to violate the first amendment's establishment clause,⁹⁴ suits attacking parochial aid measures had to be brought in state courts. Since 1968 the federal courts have been frequently chosen for attacks on state parochial plans because they provide faster relief and earlier access to the Supreme Court. What has emerged is a crazy-quilt pattern of Supreme Court and state court decisions on parochial aid. At times the federal courts appear to take the harder line against such aid, while at other times the state courts have been more strongly opposed to parochial aid. What becomes obvious from the cases is that no judicial *deus ex machina* is likely to drop onto the stage and settle the parochial controversy simply and clearly in one stroke.

Before the major parochial rulings of the Supreme Court beginning in 1971, the parochial controversy swirled around indirect aids, such as transportation and textbook loans. The growing use of busing to enable public schools in rural and suburban areas to gather students from greater than walking distances led to demands for similar service for parochial schools. Before the Supreme Court considered this issue in *Everson v. Board of Education*⁹⁵ in 1947, a number of parochial transportation measures were struck down by state supreme courts.⁹⁶ *Everson* involved Ewing Township, New Jersey, a small community near Trenton which was too small to operate its own high school and therefore reimbursed parents for public bus transportation to schools in Trenton.⁹⁷ Since parents who sent their children to parochial schools were reimbursed as well, the constitutionality of the state law which permitted reimbursement for nonpublic school transportation was challenged.⁹⁸ Although the Court stated, "No tax in any amount, large or small, can be levied to sup-

94. *Flast v. Cohen*, 392 U.S. 83 (1968).

95. 330 U.S. 1 (1947).

96. *State ex rel. Traub v. Brown*, 36 Del. 181, 172 A. 835 (1934); *Judd v. Board of Educ.*, 278 N.Y. 200, 15 N.E.2d 576 (1938); *Gurney v. Ferguson*, 190 Okla. 254, 122 P.2d 1002 (1941); *Mitchell v. Consolidated School Dist.*, 17 Wash. 2d 61, 135 P.2d 79 (1943).

97. 330 U.S. at 3.

98. *Id.* at 3-4.

port any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion,"⁹⁹ it upheld the reimbursement plan by a 5-4 margin. The majority reasoned that the expenditure of public funds was primarily for the public purpose of helping children get to school safely and expeditiously, even though there was some indirect benefit for the parochial school.¹⁰⁰ For the majority Justice Black asserted that the plan approached the verge of the state's power but did not exceed it.¹⁰¹ Justices Rutledge and Jackson, dissenting, argued that the plan crossed over the verge since it applied only to public and Catholic schools and not to other private schools or to children going elsewhere than to full-time day schools.¹⁰²

The *Everson* ruling upheld one state's transportation aid plan and indicated that such aid is discretionary, not mandatory. Since *Everson*, transportation aid has been considered by a number of state supreme courts. It has been found to be in violation of state constitutional provisions in Washington,¹⁰³ New Mexico,¹⁰⁴ Missouri,¹⁰⁵ Alaska,¹⁰⁶ Wisconsin,¹⁰⁷ Iowa,¹⁰⁸ Oklahoma,¹⁰⁹ Oregon,¹¹⁰ and Hawaii.¹¹¹ It has been upheld in Connecticut,¹¹² Maine,¹¹³ West Virginia¹¹⁴ and Pennsylvania.¹¹⁵ Constitutional amendments to permit busing were approved in Wisconsin in 1966¹¹⁶ and in Delaware in 1967,¹¹⁷ but defeated in referenda in

99. *Id.* at 16.

100. *Id.* at 17-18.

101. *Id.*

102. *Id.* at 18-28 (Jackson, J., dissenting), 28-74 (Rutledge, J., dissenting).

103. *Visser v. Nooksack Valley School Dist.*, 33 Wash. 2d 699, 207 P.2d 198 (1949).

104. *Zellers v. Huff*, 55 N.M. 501, 236 P.2d 949 (1951).

105. *McVey v. Hawkins*, 364 Mo. 44, 258 S.W.2d 927 (1953).

106. *Matthews v. Quinton*, 362 P.2d 932 (Alas. 1961).

107. *Reynolds v. Nussbaum*, 17 Wis. 2d 148, 115 N.W.2d 761 (1962).

108. *Silver Lake School Dist. v. Barker*, 238 Iowa 984, 29 N.W.2d 214 (1947).

109. *Board of Educ. v. Antone*, 384 P.2d 911 (Okla. 1963).

110. *Dickman v. Oregon School Dist.*, 232 Ore. 238, 366 P.2d 533 (1961), *cert. denied*, 371 U.S. 823 (1962).

111. *Spears v. Honda*, 51 Hawaii 1, 449 P.2d 130 (1968).

112. *Snyder v. Newton*, 147 Conn. 374, 161 A.2d 770 (1961).

113. *Squires v. City of Augusta*, 155 Me. 151, 153 A.2d 80 (1959).

114. *Hughes v. Board of Educ. of the County of Kanawha*, 154 W. Va. 107, 174 S.E.2d 711 (1970).

115. *Rhoades v. School Dist. of Abington County*, 424 Pa. 202, 226 A.2d 53 (1967).

116. CHURCH & STATE, June 1967, at 4-5.

117. CHURCH & STATE, April 1968, at 10.

Nebraska in 1966,¹¹⁸ in Idaho in 1972,¹¹⁹ and in Maryland in 1974.¹²⁰ A transportation bill was before the Nebraska legislature as this article was written, while just recently a New York appellate court ruled against the provision of public school buses for parochial school field trips.¹²¹

The lending of secular textbooks to parochial students has also been a troublesome issue for the courts. A Louisiana textbook loan program was upheld by the Supreme Court in 1930, but the statute was not challenged on first amendment grounds.¹²² Similar programs were found by state courts to violate state constitutions in New Mexico in 1951¹²³ and Oregon in 1962.¹²⁴ In 1968 the Supreme Court upheld New York's textbook loan program in *Board of Education v. Allen*,¹²⁵ holding that the program benefitted children and not schools, that a loaned book is constitutionally the same as a bus ride and that the statute setting up the plan had a secular purpose and a secular effect.¹²⁶ *Allen* may not have settled the issue, however. In 1973, in *Norwood v. Harrison*,¹²⁷ the Supreme Court examined a Mississippi textbook loan plan and found neither *Allen* nor *Everson* dispositive.¹²⁸ Since textbook loans "are a form of financial assistance inuring to the benefit of the private schools themselves," the Court found it to be a violation of equal protection for the state to furnish textbooks to students in private schools that had racially discriminatory admissions policies.¹²⁹ The Court stated: "A State's constitutional obligation requires it to steer clear, not only of operating the old dual system of racially segregated schools, but also of giving significant aid to institutions that practice racial or other invidious discrimination."¹³⁰ Since parochial schools tend to approach total creedal homogeneity in their student bodies and faculties, are often segregated by sex and are frequently out of balance racially when compared with neighboring public schools,

118. CHURCH & STATE, Jan. 1967, at 8.

119. CHURCH & STATE, Dec. 1972, at 3.

120. CHURCH & STATE, Dec. 1974, at 3.

121. *Cook v. Griffin*, —App. Div. 2d —, 364 N.Y.S.2d 632 (1975).

122. *Cochran v. Louisiana State Bd. of Educ.*, 281 U.S. 370 (1930).

123. *Zellers v. Huff*, 55 N.M. 501, 236 P.2d 949 (1951).

124. *Dickman v. Oregon School Dist.*, 232 Ore. 238, 366 P.2d 533 (1961), *cert. denied*, 371 U.S. 823 (1962).

125. 392 U.S. 236 (1968).

126. *Id.* at 243-44.

127. 413 U.S. 455 (1973).

128. *Id.* at 468.

129. *Id.* at 464.

130. *Id.* at 467.

Norwood may have paved the way for new and more sophisticated challenges to public aid for nonpublic schools.

The Major Cases

Advocates of parochial aid developed great political "clout" by the mid-1960's and succeeded in obtaining substantial benefits for parochial schools. Federal funding for some parochial school programs was included in the Elementary and Secondary Education Act passed by Congress in 1965.¹³¹ In the states, the *Allen* textbook ruling, with its approval of the "child benefit" theory, opened the way for imaginative new parochial schemes. Pennsylvania began to "purchase secular educational services" from parochial and private schools. Rhode Island authorized state-paid supplements to the salaries of parochial teachers of secular subjects.

Taxpayers brought suits in both states. The Pennsylvania and Rhode Island suits, *Lemon v. Kurtzman*¹³² and *Earley v. Dicenso*,¹³³ were decided by the Supreme Court in a single opinion in 1971.¹³⁴ Instead of following *Allen*, the Court relied on *Walz v. Tax Commission*,¹³⁵ a case dealing with property tax exemptions for church properties used for worship, and concluded that both the Rhode Island and Pennsylvania acts fostered an impermissible degree of entanglement between government and religion.¹³⁶ The Court agreed with the Rhode Island federal district court decision that parochial schools constitute "an integral part of the religious mission of the Catholic Church" and that the schools are "a powerful vehicle for transmitting the Catholic faith to the next generation."¹³⁷ Both state legislatures, the Court said, had "recognized that church-related elementary and secondary schools have a religious mission and that a substantial portion of their activities are religiously oriented."¹³⁸ While the legislatures "sought to create statutory restrictions designed to guarantee the separa-

131. Church-state separationists have yet to bring to the federal courts an effective challenge to applications of the Elementary and Secondary Education Act, believed to violate the first amendment. For a discussion of the constitutionality of various provisions of the Act, see Calhoun, *The Elementary and Secondary Education Act and the Establishment Clause*, 9 VAL. U.L. REV. 487 (1975).

132. 310 F. Supp. 35 (E.D. Pa. 1969).

133. 316 F. Supp. 112 (D.R.I. 1970).

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

135. 397 U.S. 664 (1970).

136. 403 U.S. at 611-25.

137. *Id.* at 616.

138. *Id.* at 613.

tion between secular and religious educational functions and to insure that State financial aid supports only the former," the Court concluded that "the cumulative impact of the entire relationship arising under the statutes in each state involves excessive entanglement between government and religion."¹³⁹

One form of entanglement specifically feared by the Court in *Lemon* was the possibility that the state, in seeking to ensure that its funds would only be used for secular educational functions, would interfere too greatly in the operation of parochial schools. The Court recognized that "comprehensive, discriminating and continuing state surveillance" would be required to restrict state aid to purely secular functions and concluded that "these prophylactic contacts will involve excessive and enduring entanglement between church and state."¹⁴⁰

The Court also referred in *Lemon* to another type of entanglement which the first amendment was intended to prevent:

In a community where such a large number of pupils are served by church-related schools, it can be assumed that state assistance will entail considerable political activity. Partisans of parochial schools, understandably concerned with rising costs and sincerely dedicated to both the religious and secular educational missions of their schools, will inevitably champion this cause and promote political action to achieve their goals. Those who oppose state aid, whether for constitutional, religious, or fiscal reasons, will inevitably respond and employ all of the usual political campaign techniques to prevail. . . .

Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect.¹⁴¹

Two days after the *Lemon* decision the Court affirmed a federal district court decision striking down a similar Connecticut plan.¹⁴²

After *Lemon*, new aid plans continued to move from the

139. *Id.* at 613-14.

140. *Id.* at 619.

141. *Id.* at 622.

142. *Sanders v. Johnson*, 403 U.S. 955 (1971).

drawing boards, through state legislatures, across governors' desks and finally into the courts. In 1970 the New York legislature enacted a program in which the state paid nonpublic schools for "mandated services," services such as keeping records and conducting examinations which are required by the state of all schools.¹⁴³ In 1972 New York passed another act to assist parochial and private schools through "health and safety" grants for building repair and maintenance, tuition reimbursement grants to low-income parents and a type of state income tax credit for parochial parents of moderate income.¹⁴⁴ In 1971 Ohio and Pennsylvania passed tuition reimbursement plans.¹⁴⁵ After a federal district court struck down the Ohio reimbursement plan in April 1972, the legislature enacted a tax credit tuition reimbursement plan in June 1972, which in turn was challenged in federal court.¹⁴⁶ The Supreme Court handed down a brace of rulings on these plans on June 25, 1973.

In *Committee for Public Education and Religious Liberty v. Nyquist*,¹⁴⁷ the Supreme Court held that the New York "health and safety" grants violated the establishment clause because their effect was to subsidize "directly the religious activities of sectarian elementary and secondary schools."¹⁴⁸ Similarly, both the New York tuition reimbursement grants and tax credit tuition reimbursements were held to "have the impermissible effect of advancing the sectarian activities of religious schools."¹⁴⁹ In *Levitt v. Committee for Public Education and Religious Liberty*,¹⁵⁰ New York's "mandated services" funding program was found to be unconstitutional because the law provided no means to assure that aid would not go to sectarian activities.¹⁵¹ In *Sloan v. Lemon*,¹⁵² the Court struck down Pennsylvania's tuition reimbursement plan as being constitutionally indistinguishable from the New York plan.¹⁵³

Ohio's tuition reimbursement and tax credit plans were found

143. CHURCH & STATE, July-Aug. 1970, at 7.

144. CHURCH & STATE, July-Aug. 1972, at 3.

145. CHURCH & STATE, Feb. 1972, at 3; CHURCH & STATE, Oct. 1971, at 3.

146. CHURCH & STATE, Sept. 1972, at 11.

147. 413 U.S. 756 (1973).

148. *Id.* at 774.

149. *Id.* at 794.

150. 413 U.S. 472 (1973).

151. *Id.* at 482.

152. 413 U.S. 825 (1973).

153. *Id.* at 831-33.

to be unconstitutional by a federal district court in 1972,¹⁵⁴ and the rulings were affirmed by the Supreme Court.¹⁵⁵ Subsequently, a California federal court¹⁵⁶ and the Minnesota Supreme Court¹⁵⁷ struck down those states' tax credit parochial plans. Ambitious plans to have Congress enact a \$1 billion federal tax credit tuition reimbursement program died quietly after the Supreme Court's 1973 rulings.

In other developments, a Vermont federal court in 1972 ruled that a state law under which teachers and educational materials were "lent" to parochial and private schools was unconstitutional.¹⁵⁸ The plan was held to create both excessive entanglement between religion and government and a potential for the impermissible fostering of religion.¹⁵⁹ In 1973 a New Hampshire federal court ruled against a parochial plan sometimes called "reverse shared time."¹⁶⁰ The district court held that the plan went beyond mere "excessive entanglement" to become a merger of church and state.¹⁶¹ A similar Kentucky plan was found unconstitutional in 1974.¹⁶²

New Jersey enacted a plan to reimburse parochial and private school parents for the cost of secular textbooks, instructional materials and supplies, with any money left over from the program to be assigned to nonpublic schools for the acquisition of secular supplies, equipment and auxiliary services. Since the pro-

154. *Kosydar v. Wolman*, 353 F. Supp. 744 (S.D. Ohio 1972); *Wolman v. Essex*, 342 F. Supp. 399 (S.D. Ohio 1972).

155. *Grit v. Wolman*, 413 U.S. 901 (1973); *Essex v. Wolman*, 409 U.S. 808 (1972).

156. *United Americans v. Franchise Tax Board*, Civil No. — (N.D. Cal. 1974), *aff'd*, 95 S. Ct. 166 (1974).

157. *Minnesota Civil Liberties Union v. Minnesota*, — Minn. —, 224 N.W.2d 344 (Minn. 1974), *cert. denied*, — U.S. — (1975).

158. *Americans United v. Oakey*, 339 F. Supp. 545, 553 (D. Vt. 1972).
159. *Id.* at 551-53.

160. *Americans United v. Paire*, 359 F. Supp. 505 (D.N.H. 1973). Under a "reverse shared time" plan a public school district leases or rents classrooms in a parochial school and staffs them with public school teachers. The students involved thus take some regular parochial school classes, such as religion or social studies, and some public school classes, such as mathematics or science, in the same parochial school building and setting. Conventional "shared time" or "dual enrollment" plans are cooperative ventures between public and parochial schools in which parochial students or classes are brought into public schools for instruction in certain courses. *See Shared-Time: Alternative to Parochial*, CHURCH & STATE, July-Aug. 1972, at 9-10.

161. 359 F. Supp. at 510.

162. *American United v. Board of Educ.*, 369 F. Supp. 1059 (E.D. Ky. 1974).

gram was limited to parents of children attending only predominantly sectarian private schools and excluded public school parents, a federal court in 1973 held that it had the unconstitutional primary effect of advancing religion.¹⁶³ In addition, lending equipment and providing auxiliary services personnel to parochial schools was held to create the potential for excessive church-state entanglement.¹⁶⁴ The ruling was affirmed by the Supreme Court in 1974.¹⁶⁵

Both Pennsylvania and Ohio recently enacted programs for lending books and equipment and providing auxiliary services to parochial and private schools. Lower federal courts upheld the plans in 1974.¹⁶⁶ In *Meek v. Pittenger*,¹⁶⁷ the Supreme Court ruled unconstitutional Pennsylvania's program for providing equipment and auxiliary services to parochial and private schools.¹⁶⁸ In the same decision, the Court upheld Pennsylvania's program of lending textbooks to parochial students.¹⁶⁹

A novel approach to the parochial problem was taken in Missouri by parochial school parents who asked the federal courts to rule that their rights under the first and fourteenth amendments were violated by provisions of the Missouri constitution strictly forbidding public aid for nonpublic schools. A lower federal court ruled against the plaintiffs,¹⁷⁰ and the Supreme Court affirmed the decision without opinion in 1972.¹⁷¹

CONCLUSION

The opponents of tax aid for parochial and private education have enjoyed considerable success in the courts. In addition, they have won a series of significant referendum victories in such disparate states as New York, Maryland, Michigan, Nebraska, Oregon and Idaho.¹⁷² But the parochial wars are by no means over. The whole structure of federal aid for parochial education

163. *Public Funds for Public Schools v. Marburger*, 358 F. Supp. 29 (D.N.J. 1973).

164. *Id.* at 42.

165. *Marburger v. Public Funds for Public Schools*, 94 S. Ct. 3163 (1974).

166. *Meek v. Pittenger*, 374 F. Supp. 639 (E.D. Pa. 1974); *Wolman v. Essex*, 342 F. Supp. 399 (S.D. Ohio 1972).

167. 95 S. Ct. 1753 (1975).

168. *Id.* at 1764.

169. *Id.* at 1761.

170. *Brusca v. State of Missouri ex rel. State Bd. of Educ.*, 332 F. Supp. 275 (E.D. Mo. 1971).

171. *Brusca v. State Bd. of Educ.*, 405 U.S. 1050 (1972).

172. See A. MENENDEZ, *THE PEOPLE SPEAK: THE SEVEN PAROCHIAL REFERENDA, 1967-1974* (1975).

under the 1965 Elementary and Secondary Education Act remains to be effectively challenged. It will surely be challenged in the aftermath of the 1975 *Pittenger* ruling against equipment loan and auxiliary services programs. Assorted minor state aid plans also remain to be challenged. Washington State will conduct a referendum in November 1975 on a proposed state constitutional amendment to permit as much tax aid to parochial schools as any future United States Supreme Court might permit.¹⁷³ As recently as February 1975, the National Institute of Education of the United States Office of Education granted \$597,000 to school districts in Connecticut and New Hampshire¹⁷⁴ to plan demonstrations of the "voucher" plan for providing full public funding for parochial and private schools.¹⁷⁵ Finally, there is a possibility that changes in the composition of the Supreme Court in the future could change the constitutional status of various forms of parochial aid.

The advocates of public support for parochial and private education have by no means given up their campaign. Since they are able to focus their concern on politicians with more intensity than the more numerous though widely disparate opponents of such support, parochial plans will continue to be considered by Congress and state legislatures. However, public aid to private schools has received prominent opposition. New York's Fleischmann Commission concluded, "The principle of separation of church and state should not be abrogated: public funds or tax revenues ought not to be used in support of the attendance of students at sectarian schools."¹⁷⁶ It appears that the late President John F. Kennedy spoke for most Americans when he declared, "I believe in an America where the separation of church and state is absolute . . . where no church or church school is granted any public funds or political preference."¹⁷⁷

173. See *Washington's Coming Religious Liberty Referendum*, CHURCH & STATE, April 1975, at 3.

174. See *You Paid For It, III*, CHURCH & STATE, April 1975, at 5.

175. For a discussion of voucher plans, see *Everything you've always wanted to know about the voucher plan but were afraid to ask*, CHURCH & STATE, July-Aug. 1973, at 9-10. See also EDUCATIONAL VOUCHERS: CONCEPTS AND CONTROVERSIES (G. LaNoue ed. 1972).

176. EDUCATIONAL VOUCHERS: CONCEPTS AND CONTROVERSIES 389 (G. LaNoue ed. 1972).

177. Address by President John F. Kennedy, Houston, Texas, Sept. 15, 1960.

