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The Supreme Court and the Establishment Clause: 
Back to Everson?†

by Paul G. Kauper*

Professor Kauper analyzes the four 1973 Supreme Court decisions concerning the constitutionality of state programs that aid church-affiliated educational institutions: Levitt v. Committee for Public Education & Religious Liberty, Hunt v. McNair, Committee for Public Education & Religious Liberty v. Nyquist, and Sloan v. Lemon. He concludes that the Court's holding that the states may not aid these schools in a manner that furnishes direct and immediate assistance to religion reflects an overly broad interpretation of the establishment clause and disregards not only the important policy considerations in favor of reducing the financial burden on religious schools but also the competing demands of the free exercise and equal protection clauses.

The decisions interpreting the establishment clause of the first amendment,† which culminated in the opinions handed down in June 1973² involving aid to private schools and colleges, give us an impressive body of learning and interpretation. Many ideas, not always compatible, have been generated and the variety of opinions adds to the complexity of the subject. The attempt is made in this article to survey the results of the most recent cases, and to appraise the significance of the opinions in their relation to basic ideas expressed by the Court over a period of years.

In looking at the 1973 cases it must be remembered that two years earlier the Court had invalidated the so-called parochial aid plans whereby states had undertaken to provide financial assistance to

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1. U.S. Const. amend. 1 provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

parochial schools by reimbursing them or their teachers for costs incurred in the teaching of secular subjects. The Court applied a three-pronged test: Was there a secular purpose? did the program have a primary effect that neither advanced nor inhibited religion? did it create a risk of excessive entanglements of government in religious affairs? Finding a secular purpose in the programs and bypassing the primary effect test, the Court said that the programs failed on the third count, since the surveillance that would be required to see to it that the moneys were spent only for secular purposes in a school program that had substantial sectarian objectives created a risk of excessive entanglement by government in the religious activities of these schools. However, in a case decided the same day, the Court upheld a capital grant by the federal government to church-related colleges on the ground that the secular character of the enterprises was such as to insure adherence to the condition of the grant that the facilities not be used for sectarian purposes, without the necessity for the kind of surveillance which had led the Court to condemn the parochial aid programs.

The 1971 decisions left unanswered questions respecting the validity of other types of programs for assisting parochial schools or the parents electing to send their children to these schools. More particularly, they kept the way open for plans to grant assistance, by means either of tuition reimbursement grants or income tax credits or deductions, to parents sending their children to parochial schools, since these means of assistance did not involve the entanglement factor which proved to be decisive in the 1971 decisions. Also, earlier decisions had suggested important constitutional distinctions between direct assistance to parochial schools and indirect assistance by aids furnished to the children or their parents.

I. THE 1973 DECISIONS

The Court came to grips with some of these questions in its 1973 decisions. In the central case, Committee for Public Educa-


5. Allen v. Board of Educ., 392 U.S. 236 (1968); Everson v. Board of Educ., 330 U.S. 1 (1947). These cases are discussed at note 31 infra and accompanying text.
tion & Religious Liberty v. Nyquist, the Court declared invalid under the establishment clause programs adopted by the New York legislature which (1) provided for direct money grants to qualifying private schools to be used for "maintenance and repair" of school facilities and equipment in order to insure the students' health, welfare and safety, (2) authorized a limited plan for providing tuition reimbursements to parents of children attending elementary or secondary nonpublic schools, and (3) authorized a limited tax deduction under the New York income tax law to parents who failed to qualify for tuition reimbursement for tuition costs incurred in sending their children to private schools.


7. A "qualifying" school was defined by the statute as a nonpublic, non-profit elementary or secondary school which "has been designated during the immediately preceding year as serving a high concentration of pupils from low-income families for purposes of Title IV of the Federal Higher Education Act of nineteen hundred sixty-five (20 U.S.C.A. § 425)." N.Y. Educ. Law §§ 550(2) (McKinney Supp. 1973). Such schools were entitled to receive a grant of $30 per pupil per year, or $40 per pupil per year if the facilities were more than 25 years old. Each school was required to submit to the Commissioner of Education an audited statement of its expenditures for maintenance and repair during the preceding year, and its grant could not exceed the total of such expenses. The Commissioner was also required to ascertain the average per-pupil cost for equivalent maintenance and repair services in the public schools, and in no event could the grant to nonpublic qualifying schools exceed 50 percent of that figure. Id. §§ 549-53.

8. This benefit was limited to parents with an annual taxable income of less than $5,000. The amount of reimbursement was limited to $50 for each grade school child and $100 for each high school child. Each parent was required, however, to submit to the Commissioner of Education a verified statement containing a receipted tuition bill, and the amount of state reimbursement could not exceed 50 percent of that figure. No restrictions were imposed on the use of the funds by the reimbursed parents. Id. §§ 559-63. This section, prefaced by legislative findings which expressed a dedication to the "vitality of our pluralistic society," stated that a "healthy competitive and diverse alternative to public education is not only desirable but indeed vital to a state and nation that have continually reaffirmed the value of individual differences," and emphasized that the right to select among alternative educational systems "is diminished or even denied to children of lower-income families, whose parents, of all groups, have the least options in determining where their children are to be educated." Id. § 559.

9. Under these sections parents could subtract from their adjusted gross income for state income tax purposes a designated amount for each dependent for whom they had paid at least $50 in nonpublic school tuition. If the taxpayer's adjusted gross income was less than $9,000 he could subtract $1,000 for each of as many as three dependents. As the taxpayer's income rose, the amount he could subtract diminished. Thus, if a taxpayer had adjusted gross income of $15,000, he could subtract only $400 per dependent, and if his income was $25,000 or more, no deduction was allowed. The amount of the
This decision was followed in *Sloan v. Lemon*\(^\text{10}\) where the Court invalidated the Pennsylvania plan for reimbursing parents for tuition paid in sending their children to nonpublic schools.\(^\text{11}\) In *Levitt v. Committee for Public Education & Religious Liberty,*\(^\text{12}\) the Court held invalid the New York statute which authorized the state to reimburse nonpublic schools for the expenses incurred for services for examination and inspection in connection with administration, grading, and computing and reporting of the results of tests and examinations, maintenance of records, and preparation of reports, all mandated by state law.\(^\text{13}\) But in *Hunt v. McNair,*\(^\text{14}\) the Court, following its 1971 decision in *Tilton v. Richards,*\(^\text{15}\) held valid a South Carolina program that gave private colleges the benefit of the state’s ability to borrow at lower interest rates through the use of tax-exempt bonds in financing projects such as buildings, facilities, and site purchases.\(^\text{16}\)

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\(^{10}\) 413 U.S. 825 (1973).

\(^{11}\) Qualifying parents were entitled to receive $75 for each dependent enrolled in an elementary school, and $150 for each dependent in a secondary school, unless that amount exceeded the amount of tuition actually paid. The statute imposed no restrictions or limitations on the uses to which the reimbursement allotments could be put by the qualifying parents. Pa. Stat. Ann. tit. 24, §§ 5701-09 (Supp. 1973).

\(^{12}\) 413 U.S. 472 (1973).


According to the findings by the federal district court, the most expensive mandated service included in the reimbursement scheme was the administration, grading, and computing and reporting of the results of tests and examinations. Committee for Pub. Educ. & Religious Liberty v. Levitt, 342 F. Supp. 439, 444 (S.D.N.Y. 1972). Such tests and examinations appeared to be of two kinds: (a) state-prepared examinations such as the “Regents Examinations” and the “Pupil Evaluation Program Tests” and (b) traditional teacher-prepared tests, which were drafted by the nonpublic school teachers for the purpose of measuring the pupils’ progress in subjects required to be taught, under state law. 413 U.S. at 474-75. The overwhelming majority of testing in nonpublic as well as public schools is of the latter variety. Id. at 475-76.

\(^{14}\) 413 U.S. 734 (1973).

\(^{15}\) 403 U.S. 672 (1971).

\(^{16}\) The South Carolina Educational Facilities Act, S.C. Code Ann. § 22-41.4 (Supp. 1971), established an Educational Facilities Authority, the purpose of which was to assist institutions for higher education in the construction, financing and refinancing of projects such as buildings, facilities, site preparations and related items, but could not include “any facility used or to be used for sectarian instruction or as a place of religious worship nor any facility which is used or to be used primarily in connection with any part of the program of a school or department of divinity for any religious denomination."
The impact of these decisions on the parochial school problem will be discussed later. The first concern is to examine the opinions to see what further contributions, if any, they make to the interpretation of the establishment clause.

A. Nyquist and Sloan

Principal attention will be devoted to Nyquist which, as previously pointed out, invalidated three separate features of the New York laws designed to give some assistance to private schools, including parochial schools, or to the parents who elected to send their children to these schools. Justice Powell wrote the opinion of the Court. Chief Justice Burger joined by Justice Rehnquist concurred in the part of the decision holding the grants for maintenance and repair invalid. Only Justice White dissented from this part. But the Chief Justice and Justice Rehnquist along with Justice White dissented from the parts of the decision holding invalid the tuition reimbursement and tax deduction plans.

While the statutes in question were tailored to provide benefits for all nonpublic schools, the Court's opinion deals only with the constitutional issues raised under the first amendment by the application of these provisions to parochial schools. These church-affiliated schools constitute by far the largest segment of the nonpublic schools in New York; about 75 percent of the nonpublic schools are Roman Catholic. The Court proceeded on the basis of a profile of the sectarian nonpublic schools that the district court had

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17. Some 700,000 to 800,000 students, constituting about 20 percent of the state's entire elementary and secondary school population, attend over 2,000 nonpublic schools, approximately 85 percent of which are church-affiliated. 413 U.S. 756, 768.

18. In the fall of 1968, there were 2,038 nonpublic schools in New York state: 1,415 Roman Catholic; 164 Jewish; 59 Lutheran; 49 Episcopal; 37 Seventh Day Adventist; 18 other church-affiliated; 296 without religious affiliation. Id. at 768 n.23.

Although "all or practically all" of the 280 schools entitled to receive "maintenance and repair grants" were related to the Roman Catholic Church and teach Catholic religious doctrine to some degree, institutions qualifying under the other two parts of the statute included a substantial number of Jewish,
fashioned from findings it had made in a similar recent case.\textsuperscript{19} It must be remembered, therefore, that throughout its opinion the Court was speaking of the validity of the statutes in relation to what it considered to be a typical sectarian school.

Justice Powell, who wrote the majority opinion, recognized at the outset the delicate character of the questions involved and the difficulty of attempting to steer a straight course on the basis of prior decisions. As the formal starting point in his analysis of the problems before the Court, he relied on the three-pronged test stated by Chief Justice Burger in the 1971 consolidated cases of \textit{Lemon v. Kurtzman},\textsuperscript{20} \textit{Early v. DiCenso},\textsuperscript{21} and \textit{Robinson v. DiCenso}:\textsuperscript{22} (1) Did the programs have a valid secular purpose? (2) did they have a primary effect that neither advanced nor inhibited religion? (3) did they result in excessive entanglements? On the first point he conceded without difficulty that the legislature had a valid secular purpose.\textsuperscript{23} But the three statutory programs failed the second part of the test: the requirement of a primary effect that neither ad-

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Lutheran, Episcopal, Seventh Day Adventist and other church-affiliated schools. \textit{Id.}

\textsuperscript{19} Proceeding on the basis of this profile, the Court said that the benefits under the statute could extend to institutions which:

"(a) impose religious restrictions on admissions; (b) require attendance of pupils at religious activities; (c) require obedience by students to the doctrines and dogmas of a particular faith; (d) require pupils to attend instruction in the theology or doctrine of a particular faith; (e) are an integral part of the religious mission of the church sponsoring it; (f) have as a substantial purpose the inculcation of religious values; (g) impose religious restrictions on faculty appointments; and (h) impose religious restrictions on what or how the faculty may teach."


\textsuperscript{20} 403 U.S. 602 (1971).

\textsuperscript{21} \textit{Id.}

\textsuperscript{22} \textit{Id.}

\textsuperscript{23} Justice Powell stated:

As the recitation of legislative purposes appended to New York's law indicates, each measure is adequately supported by legitimate, nonsectarian state interests. We do not question the propriety, and fully secular content, of New York's interest in preserving a healthy and safe educational environment for all of its school children. And we do not doubt—indeed, we fully recognize—the validity of the State's interest in promoting pluralism and diversity among its public and nonpublic schools. Nor do we hesitate to acknowledge the reality of its concern for an already overburdened public school system that might suffer in the event that a significant percentage of children presently attending nonpublic schools should abandon those schools in favor of the public schools.

413 U.S. 756, 773.
vanced nor inhibited religion. Since this was enough to dispose of the cases, the majority opinion did not deal with the entanglements issue.

The Court in thus concentrating on the primary effect test dealt with the question left unanswered in Lemon and DiCenso, where it had bypassed this problem by resting its holding on the excessive entanglements factor. But Justice Powell did build on the parts of the Lemon and DiCenso opinions which emphasize the sectarian character of the parochial schools and the difficulty of disengaging the secular from the sectarian aspects. According to Justice Powell any aid given to these schools, whether directly or indirectly, which helps to support the total program, has a primary effect that advances religion.

The payment to parochial schools to help defray "maintenance and repair" costs was held to be invalid since the facilities supported both secular and religious education. The Court said it was possible for a sectarian elementary or secondary school to use state funds to finance its entire "maintenance and repair" budget. The state had made no attempt to restrict payments to those expenditures involving upkeep of facilities used exclusively for secular purposes, and the Court did not "think it possible within the context of these religion-oriented institutions to impose such restrictions."24 Mr. Justice Powell pointed out that "[nothing] in the statute . . . bars a qualifying school from paying out of state funds the salaries of employees who maintained the school chapel, or the cost of renovating classrooms in which religion is taught, or the cost of heating and lighting these same facilities."25 The fact that the state had placed a per pupil limit on the amount for this purpose and had limited the total amount to 50 percent of the amount expended for comparable services in public schools did not alter this conclusion, since it was still possible to use these funds for the maintenance and repair of facilities used for religious purposes.26

Turning then to the tuition reimbursement program under the New York statute, the Court held that it, too, failed the "effect" test for much the same reason that governed the decision on the maintenance and repair grants. Justice Powell opened this part of the opinion by saying:

There can be no question that these grants could not con-

24. Id. at 774.
25. Id.
26. Id. at 778.
sistently with the Establishment Clause, be given directly to sectarian schools, since they would suffer from the same deficiency that rendered invalid the grants for maintenance and repair. In the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral, and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid.\textsuperscript{27}

At this point he quoted Justice Black's famous statement in \textit{Everson v. Board of Education}\textsuperscript{28} that "[n]o tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, whatever form they may adopt to teach or practice religion."\textsuperscript{29}

For Justice Powell, the decisive question here was whether the fact that the grants were delivered to parents rather than to schools was of such significance as to compel contrary results. The state had relied upon \textit{Everson} and \textit{Allen v. Board of Education}\textsuperscript{30} to support the claim that grants to parents, unlike grants to institutions, respected the "wall of separation" required by the Constitution.\textsuperscript{31} However, Justice Powell said that in those cases the fact that aid was disbursed to parents rather than to the schools was only one among many factors to be considered. \textit{Everson} was distinguished on the ground that the bus fare program was analogous to the provision of social services such as police and fire protection, which are provided in common to all citizens and are "so separate and so indisputably marked off from the religious function . . . that they may fairly be viewed as reflections of a neutral posture toward religious institutions."\textsuperscript{32} It distinguished \textit{Allen} on the ground that the record in that case gave no indication that textbooks would be provided for anything other than purely secular purposes.\textsuperscript{33}

Proceeding further with the analysis of the tuition grants, Justice Powell said it was the function of the New York law to provide

\textsuperscript{27} \textit{Id.} at 780.
\textsuperscript{28} 330 U.S. 1 (1947).
\textsuperscript{29} \textit{Id.} at 16. Since the Court in \textit{Everson} upheld the state program under consideration, see note 31 \textit{infra}, this statement is technically dictum. Nevertheless it retains vitality as a clear articulation of the no-aid-to-religion view.
\textsuperscript{30} 392 U.S. 236 (1968).
\textsuperscript{31} In \textit{Everson} the Court upheld the constitutionality of a school board's action in reimbursing parents for the cost of busing children to parochial schools, and in \textit{Allen} the Court upheld the constitutionality of free distribution of secular textbooks to parochial school children.
\textsuperscript{32} 413 U.S. 756, 782.
\textsuperscript{33} \textit{Id.}
assistance to private schools, the great majority of which are sectarian. The state, by relieving parents from a portion of their tuition bill, was seeking to alleviate the parents' financial burden so that they would continue to have the option of sending their children to religion-oriented schools. The Court concluded that "while the other purposes for that aid—to perpetuate a pluralistic educational environment and to protect the fiscal integrity of over-burdened public schools—are certainly unexceptionable, the effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions."  

The Court went on to say that it was immaterial that under the New York plan the reimbursement was for tuition already paid, a feature of the plan designed to assure that the parent was not a mere conduit, but was absolutely free to spend the money received in any manner he wished. If the unrestricted cash grants were offered as an incentive to parents to send their children to sectarian schools, the establishment clause would be violated whether or not the actual dollars given eventually found their way into the sectarian institutions. Moreover, the Court said that the contention that the tuition reimbursement went to only a part of the educational cost and therefore could be considered limited entirely for teaching secular courses was simply another variant to the argument it had previously rejected as to maintenance and repair costs. Moreover, the Court stated that if the argument were accepted, it would provide the foundation for a massive, direct subsidization of sectarian elementary and secondary schools. In the end the decision rested on the idea that, since the tuition reimbursement was designed to encourage parents to send their children to parochial schools and since the educational program of these schools advanced religion, the reimbursement scheme was invalid as a means of direct support of religious activities. In reaching this result the Court clearly repudiated the difference between direct and indirect forms of assistance, which had been emphasized so much since the time of Everson.

Having held the New York tuition reimbursement plan unconstitutional, the Court had no difficulty invalidating the tuition reimbursement plan under Pennsylvania law in the Sloan case. It proceeded again on the basis of the profile of the typical sectarian school as determined by the lower court and the finding that more than 90

34. Id. at 783.
35. Id. at 785-86.
36. Id. at 787.
percent of the children attending nonpublic schools in Pennsylvania were enrolled in schools that were either controlled by religious organizations or had the purpose of propagating and promoting religious faith.37 As in the Nyquist case the Court held that the tuition reimbursement program had the impermissible effect of advancing religion. It could find no constitutionally significant distinction between the Pennsylvania statute and the one declared invalid in Nyquist.

Justice Powell did go into the argument made on behalf of Pennsylvania that the New York law could be differentiated on the ground that the New York tuition grants were available only to parents in extremely low income groups, and it would therefore be reasonable to predict that the grant would in fact be used to pay tuition. Thus, under the New York scheme, the parent would be likely to be a mere "conduit" for public aid to religious schools, while Pennsylvania authorized grants to all parents of children in nonpublic schools regardless of their income level so that no such assumption could be made as to how individual parents would spend their grants. But Justice Powell said that the Nyquist opinion was not dependent upon any such speculation; rather the Court looked to the substance of the program. Viewed in this light, the effect remained the same: the state had singled out a class of its citizens for a special economic benefit, and "[w]hether it be viewed as a simple tuition subsidy, as an incentive to parents to send their children to sectarian schools, or as a reward for having done so, at bottom its intended consequence is to preserve and support religion-oriented institutions."38 Again the Court said that this was quite unlike the benefits involved in the Everson and Allen cases, where such benefits were carefully restricted to the purely secular side of church-affiliated institutions and provided no special aid for those who had chosen to support religious schools.

The invalidation in Nyquist of the tax deduction factor of the New York statute brought Walz v. Tax Commission39 into the picture. In Walz the Court had upheld the exemption from real property taxes of property used for religious purposes.40 The argument was made in Nyquist that if a state may aid religion by granting a prop-

38. Id. at 832.
erty exemption, why may it not authorize a taxpayer to take a deduction against his state income tax for tuition charges incurred in sending his children to a parochial school? Chief Justice Burger and Justices White and Rehnquist in dissent thought this was a valid argument and could see no substantial distinctions between the two types of tax benefits for purposes of the establishment clause.

But Justice Powell, after finding that the effect of the tax deduction like that of the tuition reimbursement plan was to encourage parents to send their children to parochial schools and that it therefore furnished a direct and immediate aid to religion, said that Walz was distinguishable on several grounds. In the first place, tax exemptions had a long history of "apparently universal approval in this country both before and after the adoption of the First Amendment." Secondly, they reflected a policy of the state's avoiding a posture of hostility to churches in contravention of the free exercise guarantee. Thirdly, the tax exemption in New York was part of a general pattern of tax exemptions for all nonprofit organizations and thereby reflected a neutral stance toward religion, while the tuition deduction plan before the Court in Nyquist was limited only to parents sending their children to private schools. Fourthly, a policy of tax exemption, as in Walz reduced the risk of excessive entanglements.

The Chief Justice and Justice Rehnquist, who concurred in the holding that the grants in aid of maintenance and repair costs were invalid but dissented from the holdings on the tuition reimbursement and tax deduction schemes, made clear that they could distinguish between direct and indirect assistance to public schools: direct grants were invalid unless it could be demonstrated that they gave no support to religious functions, but indirect assistance in aid of a secular purpose was valid. Because they were willing to uphold programs in the latter category even though the programs furnished a direct benefit to religious-affiliated schools, it is evident that the dissenters regarded the risk of excessive entanglements rather than the primary effect test as the decisive factor in the Lemon and Di-Censo cases. By contrast to the direct grants involved in those cases, the tuition reimbursement and tax deduction plans raised no substantial entanglement problems.

41. 413 U.S. 756, 805-10 (Rehnquist, J., dissenting in part).
42. Id. at 791-94.
43. Id. at 792.
B. Levitt

Having disposed of the maintenance and repair, tuition reimbursement, and tax deduction plans in *Nyquist*, the Court, this time speaking through Chief Justice Burger, and with only Justice White dissenting, did not spend much time in its opinion in *Levitt* invalidating the reimbursement to parochial schools for costs incurred in providing services mandated by state law, notably the giving and reporting of the regents examination and the giving and reporting of internal tests which were prepared by the school's teachers.⁴⁴ While the regents examinations were conceded to be secular in character, the internal tests given by teachers in parochial schools had the potential of aiding religious instruction, and since no attempt was made to limit the state's assistance to tests wholly secular in character, the program had the impermissible effect of advancing religion. The fact that all these activities of the schools were mandated by the state was immaterial.⁴⁵ The Chief Justice's opinion clearly implied that the state might grant direct assistance to parochial schools in aid of a clearly identifiable secular purpose, provided it is separable from aid to sectarian activities.⁴⁶

C. Hunt

Justice Powell wrote the opinion for the majority in *Hunt v. McNair*,⁴⁷ where the Court upheld, as applied to a church college, the South Carolina program for assisting in the financing of college fa-

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⁴⁴ Justices Douglas, Brennan, and Marshall filed a brief statement declaring that the result here reached was compelled by the decisions in *Nyquist* and *Sloan*. Justice White dissented.

⁴⁵ Chief Justice Burger wrote:

To the extent that appellants argue that the State should be permitted to pay for any activity "mandated" by state law or regulation, we must reject the contention. State or local law might, for example, "mandate" minimum lighting or sanitary facilities for all school buildings, but such commands would not authorize a State to provide support for these facilities in church-sponsored schools. The essential inquiry in each case, as expressed in our prior decisions, is whether the challenged state aid has the primary purpose or effect of advancing religion or religious education or whether it leads to excessive entanglement by the State in the affairs of the religious institution. . . . That inquiry would be irreversibly frustrated if the Establishment Clause were read as permitting a State to pay for whatever it requires a private school to do.

⁴⁶ It is probably for this reason that Justices Douglas, Brennan, and Marshall, while concurring in the result, did not concur in the opinion. See note 44 supra.

facilities. The net effect of the plan was to give colleges the benefit of a lower interest rate on obligations incurred for capital facilities by making the interest nontaxable under the Internal Revenue Code. The Court's analysis in Hunt followed that of its 1971 decision in Tilton v. Richardson. The secular purpose of the assistance was acknowledged. The Court concluded that, absent a showing that the college was so sectarian that any benefit to it from the borrowing scheme necessarily advanced a religious function, the plan met the primary effect test: "Aid normally may be thought to have a primary effect of advancing religion when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission or when it funds a specifically religious activity in an otherwise substantially secular setting. Moreover, the Court believed that the absence of a showing that advancement of religion was a principal purpose negatived any need for the kind of surveillance leading to excessive entanglement.

To be sure there were some entanglements. The dissenting justices in Hunt made much of the idea that not only did the college consent to see to it that no religion was taught in any facility financed by the bonds which the state helped to float, but also the state, in order to carry out the financing scheme, undertook to conduct investigations and to exercise managerial controls, both of which would mark an undue intrusion. Mr. Justice Powell summarily disposed of these arguments by saying that it was unlikely that this intrusion would happen and that actually the college would continue to be in control.

Finally, with respect to the criteria used to determine whether a college was so "pervasively sectarian" as to require the conclusion that the aid had a primary effect of advancing religion, the Court's opinion adds nothing to that supplied in Tilton. It noted that appellant had introduced no evidence in the case placing the college in this category. The facts that the Baptist college was controlled by a church body and that this body elected the officers of the college, taken alone, were no more material here than in Tilton. What little there was in the record established that there were no religious qualifications for faculty membership or student admissions and that only 60 percent of the college student body was Baptist, a percentage roughly equivalent to the percentage of Baptists in that part of South Carolina. There was no basis in the rec-

49. 413 U.S. 734, 743.
ord, therefore, to conclude that the college's operations were "oriented significantly towards sectarian rather than secular education."50

II. DOCTRINAL DEVELOPMENT

A. Primary Effect Test

It is readily seen that the most important doctrinal aspect of the recent cases is a further emphasis on the primary effect aspect of the three-pronged test stated in DiCenso and Lemon, but with a considerable clarification (if not a complete restatement) of this part of the test. Earlier cases could be interpreted to mean that a law or program was valid if it had a secular purpose and if a primary effect was to achieve this purpose. But in a key footnote in Nyquist Justice Powell has now said that it was a misconstruction of earlier cases to interpret them to mean that if a secular purpose is achieved by legislation, the legislation is valid even though it provides aid to religion.51 In every case the inquiry must be whether the program advances and supports religion and more particularly whether it is "a direct and immediate aid to religion."52 So stated it is no longer material to inquire whether there can be more than one primary effect, or whether "primary" is to be equated with "principal" or "substantial," nor is it a question of weighing the religious effect against the secular effect. Certainly the Nyquist opinion does much to remove the ambiguity which clouded the primary effect test. In essence it makes the issue turn on whether the law or program is a direct and immediate aid to religion as opposed to an indirect and incidental aid. Indeed, it may be asked whether the Court has not scuttled the primary effect test by substituting the direct-and-immediate-indirect-and INCIDENTAL dichotomy.

50. Id. at 744.

51. Appellees, focusing on the term "principal or primary effect" which this Court has utilized in expressing the second prong of the three-part test, e.g., Lemon v. Kurtzman, [403 U.S.] at 612, have argued that the Court must decide in these cases whether the "primary" effect of New York's tuition grant program is to subsidize religion or to promote these legitimate secular objectives. Mr. Justice White's dissenting opinion, [413 U.S.] at 823, similarly suggests that the Court today fails to make this "ultimate judgment." We do not think that such metaphysical judgments are either possible or necessary. Our cases simply do not support the notion that a law found to have a "primary" effect to promote some legitimate end under the State's police power is immune from further examination to ascertain whether it also has the direct and immediate effect of advancing religion.

413 U.S. 756, 783-84 n.39.

52. Id.
The Nyquist opinion shores up the no-aid-to-religion limitation stated in Everson. To be sure the Court emphasized that in order to be held unconstitutional, the aid to religion must be direct and immediate and not simply incidental, and on this ground it distinguished the holdings in Everson and Allen. Admittedly the distinction between “direct and immediate” aid on the one hand, and “indirect and incidental” aid on the other still poses difficult questions of application. When does a program provide “direct and immediate aid” to religion if a secular purpose is acknowledged and a substantial secular effect is recognized? Without attempting to explore this question in detail, it is clear that: (1) a secular purpose must be identified; (2) the program must be so tailored as to achieve the secular purpose without at the same time giving direct and immediate aid to religion; and (3) the fact that there is a spill-over of aid to religion is inconsequential if this is viewed as indirect or incidental.

B. Excessive Entanglements

The “excessive entanglements” factor which loomed so large in DiCenso and Lemon did not play a prominent part in the recent cases. It was unnecessary for the Court to reach this issue in Nyquist. Justice White took note of it in his dissenting opinion and said that the entanglement criterion was “of remote relevance ... with respect to the validity of tuition grants or tax credits involving or requiring no relationships whatsoever between the State and any church or any church school.” The Court did discuss the problem in Hunt, but found no risk of excessive entanglements present. But the three dissenters in Hunt rested their case primarily on the risk of excessive entanglements.

C. Neutrality

The cases afford an interesting commentary on the idea of neutrality. Much talk appears in the Court’s past opinions and in the literature on “neutrality” as furnishing the key to the interpretation of

53. Note 19 supra and accompanying text.
54. The Court did note, however, that apart from any specific entanglement of the state in particular religious programs, assistance of the kind provided by the New York law “carries grave potential for entanglement in the broader sense of continuing political strife over aid to religion.” 413 U.S. 736, 794.
55. Id. at 822.
56. 413 U.S. 734, 749 (Brennan, J., dissenting).
the twin religion clauses of the first amendment. But it is obvious that neutrality carries a variety of meanings. Professor Kurland has advanced a theory of neutrality which is based on an equal protection analysis of the establishment and free exercise limitations. In his view the religious factor may not be used as a basis for classification so as to benefit or hinder religious institutions or principles vis-à-vis nonreligious institutions or principles in the same general class. This kind of neutrality means evenhandedness in the application of the law. Carried to its logical conclusion this means that a state not only may but must support parochial schools in the same manner it supports other schools. Professor Katz, who sees religious liberty as the ultimate principle served by the religion clauses, has advanced a theory of neutrality as a means of reconciling the establishment and free exercise limitation. In other words, government may in some instances employ so-called neutralizing aids as a means of balancing the free exercise claims against the no-establishment proscription. According to this view a program of supporting parochial schools would be appropriate as a neutralizing measure, since the state should be free to adopt such a program in order to conserve free exercise values. But it is evident also that others, including members of the Supreme Court, have used "neutrality" in a much more ambiguous way to restate the idea that the government can do nothing to support or hinder religion in the absolute, a point of view which is a far departure from Kurland's "evenhandedness" neutrality and Katz's conception of neutralizing aids.

These conflicting views of neutrality help to explain the differences among the various opinions in Nyquist and Hunt. The South Carolina program before the Court in Hunt met a strict test of


61. See sources cited in note 57 supra.
neutrality since the state was extending the benefit of financing at lower interest rates to all higher education institutions in the state, whether public or private and whether church-related or not. Like the federal program before the Court in *Tilton*, the South Carolina statute was a perfect and classic specimen of strict evenhanded neutrality. In contrast, the cases involving support for repair and maintenance of schools, for reimbursement for mandated services, for tuition reimbursement, and for deduction from income tax of amounts paid for tuition were on their face not neutral since the benefits were limited to private schools and to the parents sending their children to those schools, most of which were sectarian. Justice Powell pointed this distinction out in *Nyquist*, and perhaps the results in the three 1973 cases can in the end be best supported on the theory that no programs which call peculiarly for benefits to private schools, including parochial schools, are valid since they fail the strict evenhanded neutrality test. It may well be argued, on the other hand, that despite the lack of strict neutrality the laws met the evenhandedness neutrality concept, as pointed out in Chief Justice Burger's and Justice Rehnquist's dissenting opinions. The state was trying in a limited way to equalize the support of children in parochial schools with those in public schools. Thus, according to the dissenters, this equalization program had an aspect of neutrality; what appeared to be favored treatment of children attending private private schools could be viewed in the larger context as an attempt at neutrality. Justice Powell summarily dismissed this idea in a footnote when he said that the parochial school children receive not only the subsidy but also the right to attend public schools. One might, however, argue the converse proposition: that public school children not only receive a general subsidy but also enjoy the privilege, if they wish, of going to parochial schools. Given this argument, there is an even balancing out.

In view of the main thrust of Justice Powell's opinion, namely

62. 413 U.S. 756, 782 n.38. He pointed out that the benefits upheld in *Everson* and *Allen* were parts of a program designed to benefit all school children, that the capital grant to the Catholic colleges upheld in *Tilton* were part of a program to aid all institutions of higher learning, and that the exemption for church property upheld in *Walz* was included in a statute extending the exemption to a whole series of nonprofit corporations.

63. See *id.* at 803 (Burger, C.J., concurring in part, dissenting in part); *id.* at 812-13 (Rehnquist, J., dissenting in part).

64. *Id.* at 782 n.38.
that government may not engage in a program that has the effect of directly and immediately aiding religion, it seems quite clear that the Court continues to reject even the strict evenhandedness concept of neutrality as a basis for upholding aid to religious schools. Strict evenhandedness may remain useful to shore up the result where the aid to religion is only incidental as in _Hunt_, or where benefits are extended directly to students under a statute which is neutral on its face, or where other considerations are present as in _Walz_. But according to _Nyquist_ a direct and immediate aid to religion cannot be justified simply because it is part of a legislative policy of evenhandedness. Evenhanded neutrality must yield to what the Court regards as an imperative of the no-establishment limitation. If, however, neutrality does not mean evenhandedness, but simply means that the state may not give direct and immediate aid to religion, it is simply another way of stating the no-aid test and adds nothing useful to the discussion.

D. Free Exercise and Equal Protection

_Nyquist_ is also a definite repudiation of the Katz neutrality concept which permits a state to provide neutralizing aids in order to preserve free exercise values. Indeed, the Court emphatically rejected the idea that states may accommodate their aid programs to implement the free exercise guarantee or to implement the equal protection guarantee by mitigating discrimination based on religious grounds. While paying verbal service to the right of parents to send their children to parochial schools, the Court rejected the idea that this right implied either any obligation or freedom of the state at its discretion to make the right meaningful by extending some financial benefits to the parents who elect to exercise this right. Moreover, the Court rejected the idea that if the state as-

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65. The Court was careful to note in the last paragraph of footnote 38, 413 U.S. 756, 782-83, that its decision did not compel, as appellees had contended, the conclusion that the educational assistance provision of the "G.I. Bill," 38 U.S.C. § 1651 (1970), impermissibly advances religion in violation of the establishment clause.

66. Speaking to the equal treatment argument, Justice Powell said: And in any event, the argument proves too much, for it would also provide a basis for approving through tuition grants the complete subsidization of all religious schools on the ground that such action is necessary if the State is fully to equalize the position of parents who elect such schools—a result wholly at variance with the Establishment Clause. 413 U.S. 756, 782 n.38 (emphasis added).

67. Justice Powell stated: Finally, the State argues that its program of tuition grants should
sists private schools that are nonsectarian while denying this assistance to parochial schools, this violates the equal protection clause. It regarded this argument as "thoroughly spurious." In short, the competing demands of the free exercise and equal protection guarantees are minimized by the Court in order to fortify what it considers to be the strong policy of the establishment clause. The dissenters on the other hand make a strong point of the legislative power to promote an individual's freedom of choice as secured by the free exercise clause and to maintain the system of educational pluralism. Indeed, the Chief Justice, who, like Justice Rehnquist, survive scrutiny because it is designed to promote the free exercise of religion. The State notes that only "low-income parents" are aided by this law, and without state assistance their right to have their children educated in a religious environment "is diminished or even denied." It is true, of course, that this Court has long recognized and maintained the right to choose nonpublic over public education. Pierce v. Society of Sisters, 268 U.S. 510 (1925). It is also true that a state law interfering with a parent's right to have his child educated in a sectarian school would run afoul of the Free Exercise Clause. But this Court repeatedly has recognized that tension inevitably exists between the Free Exercise and the Establishment Clauses, e.g., Everson v. Board of Educ., [330 U.S. 1 (1947)]; Walz v. Tax Comm'n, [397 U.S. 664 (1970)], and that it may often not be possible to promote the former without offending the latter. As a result of this tension, our cases require the State to maintain an attitude of "neutrality," neither "advancing" nor "inhibiting" religion. In its attempt to enhance the opportunities of the poor to choose between public and nonpublic education, the State has taken a step which can only be regarded as one "advancing" religion.

413 U.S. 756, 788.

68. Appellants ask this Court to declare the provisions severable and thereby to allow tuition reimbursement for parents of children attending schools that are not church-related. If the parents of children who attend nonsectarian schools receive assistance, their argument continues, parents of children who attend sectarian schools are entitled to the same aid as a matter of equal protection. The argument is thoroughly spurious. In the first place, we have been shown no reason to upset the District Court's conclusion that aid to the nonsectarian school could not be severed from aid to the sectarian. The statute nowhere sets up this suggested dichotomy between sectarian and nonsectarian schools, and to approve such a distinction here would be to create a program quite different from the one the legislature actually adopted. Even if the Act were clearly severable, valid aid to nonpublic, nonsectarian schools would provide no lever for aid to their sectarian counterparts. The Equal Protection Clause has never been regarded as a bludgeon with which to compel a state to violate other provisions of the Constitution. Having held that tuition reimbursements for the benefit of sectarian schools violate the Establishment Clause, nothing in the Equal Protection Clause will suffice to revive that program.


distinguished between direct grants to parochial schools and a program of benefits for parents sending their children to parochial schools, did so on the ground that the latter type of benefit enhances the constitutional freedom of choice and should therefore be upheld. 70

What emerges then from these recent opinions is an emphasis on the idea that if any state program provides direct and immediate assistance in aid of religious education, whether by direct or indirect means, it violates the primary effect test and is invalid. Entanglements continue to be a relevant factor. The Court continues to speak of neutrality, but it uses the term to mean that the state can do nothing to advance or hinder religion, and it thereby denies the neutrality concept any significant content. The free exercise and freedom of choice arguments are irrelevant when direct aid to religion is involved, and the equal protection clause is no barrier to discrimination on religious grounds that the Court finds compelled by the establishment clause.

III. IMPACT OF DECISIONS

The practical result of these decisions is to reduce to a minimum the types of programs that states may adopt to assist parochial schools or the children attending them. They may not subsidize the salaries of parochial school teachers by one form or another of parochial aid; they may not make direct grants to parochial schools to help meet maintenance and repair costs; they may not pay parochial schools for costs in supplying educational services mandated by state law unless it is clear that no sectarian influence intrudes into these services; they may not grant limited tuition reimbursement or limited income tax deductions for tuition costs to parents sending their children to parochial schools. They may, however, provide bus transportation to children attending parochial schools and supply them with secular textbooks. The status of dual enrollment plans and auxiliary benefit programs remains uncertain. Likewise the validity of a general voucher plan for financing education is not necessarily foreclosed by these cases. 71

70. Id. at 802 (Burger, C.J., concurring in part, dissenting in part).

71. A general voucher plan may be likened to the program of benefit to veterans under the G.I. Bill—a program resting on freedom of choice. This plan would be available to all parents, unlike the benefits under the New York statute before the Court in *Nyquist* which were available only to parents sending their children to private schools. See notes 65-66 *supra* and accompanying text.
As to church-related colleges, the situation is more ambiguous. Assistance may be extended to these institutions under general laws applicable to all colleges, provided that the college’s program is viewed as substantially secular in character and that appropriate safeguards are employed to prevent the use of public funds to support distinctively sectarian practices. Whether government may continue to make scholarship or tuition grants or loans directly to students, regardless of the sectarian aspects of the college they attend, may now possibly be questioned in view of the holdings in Nyquist and Sloan invalidating tuition reimbursement schemes for parents sending their children to parochial schools. But the even-handed neutrality concept and the importance of preserving freedom of choice may be determinative where benefits go directly to college students under programs extended to students attending public and private institutions alike. Moreover, it is clear that the Court’s thinking tilts in favor of church-related colleges, whereas its thinking tilts against parochial schools. It seems unlikely, therefore, that programs like the G.I. program at end of World War II or other current programs of a similar character will be held invalid even though a student in exercising his freedom of choice elects to go to a distinctively sectarian college.

IV. Appraisal and Conclusion

It appears to this writer that, as suggested by the title of this article, the Court may be boxing the compass and coming back to the broad sweep of Everson and the no-aid doctrine even though it continues to adhere to Everson, Allen and Waiz. The surfacing of the “wall of separation” terminology in Justice Powell’s opinion in Nyquist gives support to this conclusion. Justice Powell’s emphasis on whether a program gives direct and immediate aid to religion results in a rigid application of the establishment idea, even though he recognizes that absolute separation is not possible and that aid incidental to a secular purpose is still permissible. The Court purports to rest its case entirely on what it considers to be the proper doctrine distilled from prior cases. While recognizing the constitutional right of parents to send their children to a nonpublic

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72. The Court in its Nyquist opinion noted that the plurality opinion in Tilton was careful to point out that there were “significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools.” 413 U.S. 756, 777 n.32.

73. See note 65 supra and accompanying text.

74. 413 U.S. 756, 761.
school, the burden placed upon them in supporting two school sys-
tems, and the "high social importance" of the state's purposes, the Court nevertheless denies the relevancy of these considerations in
the construction of the establishment clause. It displays an indiffer-
tence to the policy considerations mentioned in Justice White's opin-
ion, which have to do not only with the place of private schools in
our system and the problem they face in attempting to stay alive fi-
nancially, but also the larger question of maintaining a pluralistic
society and preserving freedom of choice, important points made
also in the Chief Justice's dissenting and concurring opinion. These
competing considerations are deemed unimportant to the construc-
tion of the establishment clause.

A distressing feature of the Court's approach to the establish-
ment clause is its unwillingness to recognize that it does have op-
tions in its interpretation of the establishment clause, that the
results are by no means dictated, and that policy considerations
consciously or unconsciously play a part. It is somewhat trite, bland,
and self-serving for the Court to say that while it recognizes the im-
portant place of parochial schools, nothing can be done to change
the result in these cases since these results are required by the es-
tablishment clause. The policy of the establishment clause is what
the Court has made it to be. It is clear from the dissents that other options were available to the Court and that the results were
not dictated by the text of the Constitution or even by the results
reached in prior cases. Despite the Court's self-assurance in dis-
tinguishing Everson, Allen and Walz, the dissenting justices were not
persuaded, much less convinced, that the distinctions were well
founded.

Justice White's observations are worth quoting:

No one contends that he can discern from the sparse lan-
guage of the Establishment Clause that a State is forbidden
to aid religion in any manner whatsoever or, if it does
not mean that, what kind of or how much aid is permis-
sible. And one cannot seriously believe that the history
of the First Amendment furnishes unequivocal answers

75. Id. at 788-89.
76. Id. at 813-20, White, J., dissenting. Justice White, it should be noted,
dissented not only in Nyquist but also in Levitt. He was the only dissenter
in DiCenso and Lemon and concurred specially in Tilton. The views ex-
pressed in his extended dissenting opinion in Nyquist are in accord with his
DiCenso-Lemon dissent.
77. See note 70 supra and accompanying text.
78. 413 U.S. 756, 788-89, 795.
to many of the fundamental issues of church-state relations. In the end the courts have fashioned answers to these questions as best they can, the language of the Constitution and its history having left them a wide range of choice among many alternatives. But decision has been unavoidable; and, in choosing, the courts necessarily have carved out what they deemed to be the most desirable national policy governing various aspects of church-state relationships. 79

The Court's opinion in Nyquist is respectable, scholarly, and plausible. It finds support in prior utterances by members of the Court. But in sweeping with a wide brush and categorically rejecting every argument made in support of the programs before it, the opinion reveals a dogmatic and authoritarian quality which comes as a surprise at this stage in the interpretation of the establishment clause. It seems evident that while the Court displays a benevolent attitude or at least benign indifference toward plans to give some assistance to church colleges, it also displays a strong bias against attempts to give direct or indirect assistance to parochial schools, which are identified as chiefly Roman Catholic schools. It may well be that the Court is impatient with efforts to aid parochial schools in one way or another and that the sweeping language in Nyquist is meant to serve notice that the Court is intent on discouraging further litigation in this area.

In these cases the Court had the opportunity to mould the interpretation of the establishment language in order to accommodate the pluralistic character of the American educational pattern and the corresponding freedom of choice—important values cherished in our system—and thereby fit constitutional interpretation to contemporary thought and movement. It chose instead to face backwards and to be guided by policy consideration rooted in the presuppositions and prejudices of an earlier day.

79. Id. at 820 (White, J., dissenting).