

TUITION TAX RELIEF BILLS

HEARINGS

BEFORE THE

SUBCOMMITTEE ON TAXATION AND
DEBT MANAGEMENT GENERALLY

OF THE

COMMITTEE ON FINANCE

UNITED STATES SENATE

NINETY-FIFTH CONGRESS

SECOND SESSION

ON

S. 96, S. 311, S. 834, S. 954, S. 1570, S. 1781, S. 2142

VARIOUS TUITION TAX RELIEF BILLS

JANUARY 18, 19, AND 20 1978

PART 2 OF 2 PARTS

ORAL AND WRITTEN TESTIMONY

JANUARY 20, 1978

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TUITION TAX RELIEF BILLS

FRIDAY, JANUARY 20, 1978

U.S. SENATE,
SUBCOMMITTEE ON TAXATION AND DEBT
MANAGEMENT GENERALLY, COMMITTEE ON FINANCE,
Washington, D.C.

The subcommittee met, pursuant to recess, at 9:30 a.m., in room 2221, Dirksen Senate Office Building, the Honorable Bob Packwood presiding.

Present: Senators Packwood, Roth, Jr., and Moynihan.

Senator PACKWOOD. The hearing will come to order. At this point we will insert in the record a statement by Senator Roth.

[The prepared statement of Senator Roth follows:]

STATEMENT OF SENATOR WILLIAM V. ROTH, JR.

Mr. Chairman, I regret that transportation delays prevented me from being here yesterday to hear the testimony presented by the Administration in opposition to my college tuition tax credit proposal. However, I have studied the written testimony and would like to briefly comment.

Frankly, I am shocked at the Administration's insensitivity to the plight of middle-income taxpayers. The entire thrust of this Administration seems to be to soak the middle-class.

Both the Treasury Department and the HEW Department made much of the recent Congressional Budget Office report which said college costs have not risen as fast as family income. The CBO report said that from 1967 to 1976 college costs increased 75 percent but median family income increased 88 percent. The Administration is therefore taking the position that families are no worse off today than they were 10 years ago and thus a tax credit is not necessary.

But the Administration is totally ignoring an extremely important fact—that the tax burden on the average family has increased substantially over this same period and middle income taxpayers have less disposable income to spend on a college education for their children.

Between 1967 and 1976, the tax burden on the average family increased from \$1,214 to \$2,397, an increase of 97 percent.

These figures include only federal income and social security taxes, and do not include state, local, and property taxes, which have also increased substantially over the past 10 years.

The basic fact is that the federal government is taking more money away from the average family in this country through higher taxes and inflation. The college tax credit is designed to reduce the average tax burden and allow taxpayers to keep more of their own earnings to spend on a college education.

The Administration also promised to study ways to expand the existing grant and loan programs. I totally reject the Administration's philosophy, which presumes that people's earnings belong to the state. The Administration believes taxpayers should be required to come to Washington to beg for a government grant financed by their own taxes. The Administration wants taxpayers to fill out forms, reveal their personal finances to a government bureaucrat, and plead poverty and prove they are needy enough to receive a small portion of their own money back.

The Administration witnesses also discussed expanding the student loan an option I find incredible when they cannot even administer the existing loan program. In fiscal 1977, the federal government spent \$448 million in interest and default payments on \$1.5 billion in loans. One out of every six loan recipients defaulted on their loans, including 316 employees in the HEW Department. In fact, the New York Times recently reported that one of those who had defaulted was a \$33,000 a year executive in Secretary Califano's office.

Mr. Chairman, as I have said previously, the time has come for the enactment of college tax credits. The Administration's last minute attempts to head off the tax credit will not succeed and I am confident it will be enacted into law this year.

Senator PACKWOOD. Our first witness today is Senator Hayakawa. Senator?

Senator Hayakawa is, of course, I think, without equal, certainly the most well-known educator in the Congress, House or Senate, today. Sam, we are delighted to have you here testifying on an issue of great importance to education generally.

STATEMENT OF HON. S. I. HAYAKAWA, SENATOR FROM CALIFORNIA

Senator HAYAKAWA. Thank you, Mr. Chairman.

Mr. Chairman, I am delighted to testify here today in favor of proposals to provide tuition tax relief. As a former educator, I am interested in this approach to restoring consumer control over education. I must admit that I am more interested in supplying a tax break at the elementary and secondary levels of education, but there are certain aspects of college tuition tax relief which appeal to me as well. I would like to address these areas first, and then elaborate on the need for tuition tax relief for elementary and secondary education.

One of the major failings of our present system of financial assistance at the college level, as I see it, is its almost exclusive concentration on young, full-time students. The part-time student or the adult, evening student rarely receives any educational aid. But yet, as I look back over the best-remembered students in my years of teaching, those who remain most vivid in my mind are the adult, evening class students at Illinois Institute of Technology, the University of Chicago, and San Francisco State.

They were school teachers, firemen and policemen, business executives, nurses, at least two retired colonels, women starting a new life when their children were old enough to take care of themselves, men in their mid-thirties and forties contemplating a change of career. These mature adults have been my most exciting students. I've forgotten most of the kids. No doubt they have forgotten me.

Adult students are mature. They are, therefore, likely to be self-directing rather than dependent. They often have a reservoir of practical experience that is in itself a resource for further learning; and what they learn is not theory to be applied some day, but something to be used at once in their situations outside the classroom.

Today, there are in the United States more part-time college students than full-time students. That is a startling fact. This trend is likely to continue as more and more people discover that education is a life-long process. If we want to encourage this life-long learning, we should not provide assistance exclusively to young, fulltime students, but to students in all stages of life. We can do this by providing tuition

tax relief to all students, or, more precisely, to all who pay for their schooling. I therefore strongly recommend to this committee that any tax relief provided for tuition payments be extended to part-time, as well as full-time students.

A second area of education which interests me is vocational education. Until recently, vocational education has received little public attention. This is probably a consequence of the contempt with which our educational system views some kinds of work. It tends to overvalue white-collar work at the expense of other labor. Students believed to be low in academic talent are steered into "vocational" programs, while gifted students are steered away from them, as if they were too good to work with their hands or with machinery.

Such a distinction is arbitrary and invidious, inflicting an injustice both on the academically slow and on the academically gifted. Throughout all our high schools and colleges there should be maintained an active relationship between the academic world and the world in which people labor for a living.

I believe that our system of financial assistance for higher education should be neutral, biased in favor of neither academic nor vocational pursuits. Why should we encourage someone to study Latin and Greek as opposed to auto mechanics, typing, or shorthand? We shouldn't. We should let the individual make the choice independently of the availability of Government financial assistance. We can do this by providing tuition tax relief to both academically and vocationally oriented students.

Therefore, I think it is important that any tuition tax relief proposal reported from this committee apply equally to all types of education.

Finally, let me discuss what I believe to be the most important part of tuition tax relief—that provided for elementary and secondary education. I believe that public education at the elementary and secondary levels is approaching a crisis. Taxpayers have watched all levels of government quadruple the level of spending on education just since 1960. At the same time, the quality of education has shown no corresponding improvement. There is much public concern today about the deterioration of public education at the primary and secondary levels.

Parents seem helpless to control their children's education. Teachers and administrators are often more interested in pleasing government bureaucrats who control the funds, rather than parents who do not directly pay for their children's education. The structure of the system stands in the way of accountability to parents. There are instances where students receive their diplomas whether or not they can read or write, while their teachers and administrators receive their salaries and raises regardless of student performance.

I am particularly concerned about the quality of public education for the minorities and less fortunate in our country. It is widely recognized that the quality of public education available to blacks is inferior to that of the overall population. The typical bureaucratic reaction to this sad state of affairs is to recommend more school integration and busing, greater education budgets, and higher salaries for teachers.

I do not think more money and more busing are the answer. There is a great body of evidence that indicates that: (1) black students do not have to sit beside white students to learn, although it might be to the advantage of the white students to have that cultural exposure; and (2) high quality education is not necessarily dependent on large school budgets. There are better alternatives.

For instance, many black youths today have lower levels of academic skills than their parents who attended school when blacks were poorer and less free. It is also noteworthy that for years, many black parents have sent their children to Catholic and Black Muslim schools where per capita spending is much lower, but where the students achieve higher levels of academic skills than their counterparts in public schools.

Numerous specific examples of this phenomenon are documented in an article entitled "Patterns of Black Excellence," which appeared in the spring 1976 issue of the Public Interest. This article was written by a good friend of mine, Dr. Thomas Sowell, an economist now at Amherst College in Massachusetts, who, if it makes any difference happens to be black. I ask the committee to include this article as part of my testimony.

Senator PACKWOOD. It will be included.

Senator HAYAKAWA. Thank you.

Another enlightening article appeared recently in the Washington Post. This article focused on a Catholic school located in the Anacostia area of the District of Columbia. It is Our Lady of Perpetual Help Elementary School, which educates children from kindergarten through eighth grade. The school has 517 students, all of whom, except for 3, are black, and 42 percent of whom are Protestant. Annual tuition at the school is \$330 for parish members, and \$505 for nonmembers, who pay full cost. By comparison, the annual per pupil cost in the District of Columbia public schools is \$2,000.

When you compare the levels of academic achievement of the students at Our Lady of Perpetual Help School and the public school students, the results are astounding. Although Our Lady of Perpetual Help spends about one-fourth the amount per student as the public schools, its level of academic achievement is much higher. Its students score at almost the national average in reading according to standardized tests.

For instance, eighth grade students at Our Lady of Perpetual Help read only 7 months below the national average, whereas District of Columbia eighth-grade public school students read 2½ years below the national norm. The level of achievement of public school students in Anacostia is even lower. Mr. Chairman, I ask that this article also be included in the transcript as part of my testimony.

Senator PACKWOOD. It will also be included.

Senator HAYAKAWA. Mr. Chairman, national data show that it costs less to educate a student at a private school than at public schools. In 1974, private elementary and secondary students were educated at a per student cost of \$1,191, as opposed to \$1,281 in the public schools. In parochial schools, the average per pupil cost was \$310 for elementary and \$700 for secondary.

How can schools with a lower per pupil expenditure provide a better education? I think the examples cited above give us the answer to that

question. In all of the private and parochial schools where the students were performing better than their public school counterparts, there were several common characteristics in their approach to education: An emphasis on basic learning skills such as reading, spelling, and arithmetic; and insistence upon strict behavioral standards; and the consistent execution of disciplinary measures when necessary.

It is encouraging to me that so many parents have had the good sense to seek out a better education for their children. In Chicago, for instance, it has been estimated that 10 percent of all black children go to Catholic schools. I believe that to improve black education, as well as education in general, we need to restore parental control. As Dr. Walter Williams, a black economist at Temple University, writes:

To understand how blacks can be given more effective choice in education requires that we recognize that just because education is publicly financed does not require that it be publicly produced.

Mr. Chairman, today 5.3 million out of 49.5 million elementary and secondary school students attend private or parochial schools. Parents who send their children to these schools pay double for education, once through their taxes and once in the form of tuition payments. As the cost of education increases, fewer parents have the financial flexibility to shop outside the public school for an education for their children. Their plight is complicated as inflation has eaten away at real personal income by artificially pushing people into higher and higher tax brackets.

Unless some sort of financial relief is provided to parents, essentially all children but those of the very rich will be forced to find their education in the public school system. As more and more private schools are forced to close their doors, there will be less and less competition for the public schools, and the quality of public education will deteriorate even further.

The future of our country depends on the quality of education we provide. This in turn, in my opinion, depends upon the existence of independent schools competing with public schools, and upon our making it possible for parents to choose the kind of education they want for their children. There is no reason why only the wealthy should have this choice.

I think tuition tax relief is an excellent way to provide the financial flexibility for parents to have alternatives. I am encouraged at the interest that has developed in this concept in the past few years, and I hope that the committee reports some kind of tuition tax relief bill, covering elementary through college education, to the Senate for its consideration. I thank the committee for the opportunity to testify on these bills.

Senator PACKWOOD. Senator, two of the points you made have been well illustrated personally by two witnesses who appeared in the last few days. The Congress on Racial Equality testified in favor of the tuition tax credit approach and gave some evidence of a school they have taken over and are running in the South Bronx, a school that had closed. It had been a Catholic school, and the Catholic Church could not afford to keep it open. They were desperate for money, so they had to close it.

CORE was able to raise some private funds, has reopened the school, and most of the teachers who taught at the Catholic school stayed on and are teaching.

Senator HAYAKAWA. Where is this?

Senator PACKWOOD. South Bronx in New York, and what you indicated about test scores and performance has been proven very true, and this school has been very successful, and the Congress on Racial Equality strongly supports the concept for which you have spoken.

Yesterday we had four parents, four black women whose children go to Our Lady of Perpetual Help School. One was a Pentacostal, one a Lutheran, one a generic Protestant who goes from Protestant church to Protestant church, and one a Catholic, and each of them had had their children in one occasion or another in public schools. All of them, if they could, put them back in Our Lady of Perpetual Help.

One woman could not afford to have all of her children in Our Lady of Perpetual Help, and was very distressed about that, and indicated if the tax relief credit bill passed, she would put them all back in, and each of them by personal experience verified exactly what you said today about discipline and learning, and it was really a very revealing panel, because these were not teachers, these were not Sisters, they were not the people who raised the money for the school. They were mothers, only one of whom was Catholic.

Thank you very much for coming, Sam, and the statement that you have will be put in the record.

[The prepared statement of Senator Hayakawa and attachments follow. Oral testimony continues on p. 395.]

STATEMENT OF SENATOR S. I. HAYAKAWA

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A second area of education which interests me is vocational education. Until recently, vocational education has received little public attention. This is probably a consequence of the contempt with which our educational system views some kinds of work. It tends to overvalue white-collar work at the expense of other labor. Students believed to be low in academic talent are steered into "vocational" programs, while gifted students are steered away from them, as if they were too good to work with their hands or with machinery.

Such a distinction is arbitrary and invidious, inflicting an injustice both on the academically slow and on the academically gifted. Throughout all our high schools and colleges there should be maintained an active relationship between the academic world and the world in which people labor for a living.

I believe that our system of financial assistance for higher education should be neutral, biased in favor of neither academic nor vocational pursuits. Why should we encourage someone to study Latin and Greek as opposed to auto mechanics, typing, or shorthand? We shouldn't! We should let the individual make the choice independently of the availability of government financial assistance. We can do this by providing tuition tax relief to both academically and vocationally oriented students. Therefore, I think it is important that any tuition tax relief proposal reported from this Committee apply equally to all types of education.

Finally, let me discuss what I believe to be the most important part of tuition tax relief—that provided for elementary and secondary education. I believe that public education at the elementary and secondary levels is approaching a crisis. Taxpayers have watched all levels of government quadruple the level of spending on education just since 1960. At the same time, the quality of education has shown no corresponding improvement. There is much public concern today about the deterioration of public education at the primary and secondary levels.

Parents seem helpless to control their children's education. Teachers and administrators are often more interested in pleasing government bureaucrats who control the funds than parents who do not directly pay for their children's education. The structure of the system stands in the way of accountability to parents. There are instances where students receive their diplomas whether or not they can read or write, while their teachers and administrators receive their salaries and raises regardless of student performance.

I am particularly concerned about the quality of public education for the minorities and less fortunate in our country. It is widely recognized that the quality of public education available to blacks is inferior to that of the overall population. The typical bureaucratic reaction to this sad state of affairs is to recommend more school integration and busing, greater education budgets, and higher salaries for teachers. I do not think more money and more busing are the answer. There is a great body of evidence that indicates that: (1) black students do not have to set beside white students to learn, although it might be to the advantage of white students to have that cultural exposure; and (2) high quality education is not necessarily dependent on large school budgets. There are better alternatives.

For instance, many black youths today have lower levels of academic skills than their parents who attended school when blacks were poorer and less free. It is also noteworthy that for years, many black parents have sent their children to Catholic and Black Muslim schools where per capita spending is much lower, but where the students achieve higher levels of academic skills than their counter-parts in public schools. Numerous specific examples of this phenomenon are documented in an article entitled "Patterns of Black Excellence" which appeared in the Spring 1976 issue of *The Public Interest*. This article was written by a good friend of mine, Dr. Thomas Sowell, an economist now at Amherst College in Massachusetts, who, if it makes any difference, happens to be black. I ask the Committee to include this article as part of my testimony.

Another enlightening article appeared recently in the *Washington Post*. This article focused on a Catholic school located in the Anacostia area of the District of Columbia. It is Our Lady of Perpetual Help Elementary School, which educates children from kindergarten through eighth grade. The school has 517 students, all of whom, except for 3, are black, and 42 percent of whom are Protestant. Annual tuition at the school is \$330 for parish members, whose

education is subsidized by other church income, and \$505 for non-members, who pay full cost. By comparison, the annual per pupil cost in the D.C. public schools is \$2,000.

But when you compare the levels of academic achievement of the students at Our Lady of Perpetual Help school and the public school students, the results are astounding. Although Our Lady of Perpetual Help spends about one-fourth the amount per student as the public schools, its level of academic achievement is much higher. Its students score at almost the national average in reading according to standardized tests. For instance, eighth grade students at Our Lady of Perpetual Help read only seven months below the national average, whereas D.C. eighth grade public school students read 2½ years below the national norm. The level of achievement of public school students in Anacostia is even lower. Mr. Chairman, I ask that this article also be included in the transcript as part of my testimony.

Mr. Chairman, national data show that it costs less to educate a student at a private school than at public schools. In 1974, private elementary and secondary students were educated at a per student cost of \$1,191 as opposed to \$1,281 in the public schools. In parochial schools, the average per pupil cost was \$310 for elementary and \$700 for secondary.

How can schools with a lower per pupil expenditure provide a better education? I think the examples cited above give us the answer to that question. In all of the private and parochial schools where the students were performing better than their public school counterparts, there were several common characteristics in their approach to education—an emphasis on basic learning skills such as reading, spelling, and arithmetic; and insistence upon strict behavioral standards; and the consistent execution of disciplinary measures when necessary.

It is encouraging to me that so many parents have had the good sense to seek out a better education for their children. In Chicago, for instance, it has been estimated that 10 percent of all black children go to Catholic schools. I believe that to improve black education, as well as education in general, we need to restore parental control. As Dr. Walter Williams, a black economist at Temple University, writes, "To understand how Blacks can be given more effective choice in education requires that we recognize that just because education is publicly financed does not require that it be publicly produced."

Mr. Chairman, today 5.3 million out of 49.5 million elementary and secondary school students attend private or parochial schools. Parents who send their children to these schools pay double for education, once through their taxes and once in the form of tuition payments. And as the cost of education increases, fewer parents have the financial flexibility to shop outside the public schools for an education for their children. Their plight is complicated as inflation has eaten away at real personal income by artificially pushing people into higher and higher tax brackets. Unless some sort of financial relief is provided to parents, essentially all children but those of the very rich will be forced to find their education in the public school system. As more and more private schools are forced to close their doors, there will be less and less competition for the public schools, and the quality of public education will deteriorate even further.

The future of our country depends on the quality of education we provide today. This in turn, in my opinion, depends upon the existence of independent schools competing with public schools, and upon our making it possible for parents to choose the kind of education they want for their children. There is no reason why only the wealthy should have this choice.

I think tuition tax relief is an excellent way to provide the financial flexibility for parents to have alternatives. I am encouraged at the interest that has developed in this concept in the past few years, and I hope that the Committee reports some kind of tuition tax relief bill, covering elementary through college education, to the Senate for its consideration. I thank the Committee for the opportunity to testify on these bills.

EDUCATION AND THE "GHETTO" SCHOOL: I

PATTERNS OF BLACK EXCELLENCE

[By Thomas Sowell]

The history of the advancement of black Americans is almost a laboratory study of human achievement, for it extends back to slavery and was accomplished in the face of the strongest opposition confronting any American racial or ethnic group. Yet this mass advancement is little discussed and seldom researched, ex-

cept for lionizing some individuals or compiling a record of *political* milestones. But the story of how millions of people developed from the depths of slavery—acquired work skills, personal discipline, human ideals, and the whole complex of knowledge and values required for achievement in a modern society—is a largely untold story. A glance at the mass of human misery around the world shows that such development is by no means an automatic process. Yet how it was accomplished remains a matter of little concern—in contrast to the undying interest in social pathology.

One small, but important, part of the advancement of black Americans has been educational achievement. Here, as in other areas, the pathology is well known and extensively documented, while the healthy or outstanding functioning is almost totally unknown and unstudied. Yet educational excellence has been achieved by black Americans.¹ Current speculative discussions of the "prerequisites" for the quality education of black children proceed as if educational excellence were only a remote possibility, to be reached by futuristic experimental methods—indeed, as if black children were a special breed who could be "reached" only on special wave lengths. When quality education for black youngsters is seen, instead, as something that has *already* been achieved—that happened decades ago—then an attempt to understand the ingredients of such education can be made on the basis of that experience, rather than as a search for exotic revelations. The problem is to assess the nature of black excellence, its sources, and its wider implications for contemporary education and for social policy in general.

There are a number of successful black schools in various cities that exemplify this educational excellence—for the purposes of this study, six high schools and two elementary schools were selected. The high schools were chosen from a list, compiled by the late Horace Mann Bond, which shows those black high schools whose alumni included the most doctorates during the period from 1957 through 1962. The two elementary schools were added because of their outstanding performance by other indices. Some of the schools were once outstanding but are no longer, while others are currently academically successful. The schools were researched not only in terms of such "hard" data as test scores but also in terms of such intangibles as atmosphere and school/community relations, as these could be either observed or reconstructed from documents and from interviews with alumni, former teachers, and others. On the basis of this research, several questions were raised:

1. Is black "success" largely an individual phenomenon—simply "cream rising to the top"—or are the successes produced in such isolated concentrations as to suggest powerful forces at work in special social or institutional settings? Strong and clear patterns would indicate that there are things that can be done through social policy to create or enhance the prospect of individual development.

2. Does the environment for successful black education have to be a special "black" environment—either culturally, or in terms of the race of the principals and teachers, or in terms of the particular teaching methods used? Are such conventional indices as test scores more or less relevant to black students? For example, do these top black schools have average I.Q. scores higher than the average (around 85) for black youngsters in the country as a whole? Are their I.Q. scores as high as white schools of comparable performance by other criteria?

3. How much of the academic success of these schools can be explained as a product of the "middle-class" origins of its students? Have most of the children taught in these schools been the sons and daughters of doctors and lawyers, or have they represented a cross section of the black community?

4. How important was the surrounding community as an influence on the quality of education in these schools? Did this influence come through involvement in school decision-making or through moral support in other ways?

5. How many of the assumed "prerequisites" of quality education actually existed in these outstanding schools? Did they have good facilities, an adequate budget, innovative programs, internal harmony, etc.?

6. What kind of individual was shaped by these institutions? More bluntly, was the black excellence of the past an accommodationist or "Uncle Tom" success molded by meek or cautious educators, or the product of bold individuals with high personal and racial pride?

Although these questions will be treated in the course of this article, the first question is perhaps the easiest to answer immediately. Black successes—whether measured by academic degrees or by career achievement—have not occurred

¹ Thomas Sowell, "Black Excellence: The Case of Dunbar High School," *The Public Interest*, No. 35 (spring 1974), pp. 1-21.

randomly among the millions of black people scattered across the United States as might be expected if individual natural ability were the major factor. On the contrary, a very few institutions in a few urban centers with a special history have produced a disproportionate share of black pioneers and high achievers. In Horace Mann Bond's study, five percent of the high schools produced 21 percent of the later Ph. D.'s.¹ Four of the six high schools studied here—McDonough 35 High School, in New Orleans; Frederick Douglass High School, in Baltimore; Dunbar High School, in Washington, D.C.; and Booker T. Washington High School, in Atlanta—produced a long list of black breakthroughs, including the first black state superintendent of schools (Wilson Riles, from McDonough 35), the first black Supreme Court Justice (Thurgood Marshall, from Frederick Douglass), the first black general (Benjamin O. Davis, Sr., from Dunbar), the first black Cabinet member (Robert C. Weaver, from Dunbar), the discoverer of blood plasma (Charles R. Drew, from Dunbar), a Nobel Prize winner (Martin Luther King, Jr., from Booker T. Washington), and the only black Senator in this century (Edward W. Brooke, from Dunbar). From the same four schools, this list can be extended down to many regional and local "firsts," as well as such national "firsts" as the first black federal judge (William H. Hastie, from Dunbar), the first black professor at a major university (Allison Davis, from Dunbar, at the University of Chicago), and others. All of this from just four schools suggests some systematic social process at work, rather than anything as geographically random as outstanding individual ability—though these particular individuals had to be personally outstanding, besides being the products of special conditions.

The locations of these four schools are suggestive: Washington, D.C., Baltimore, New Orleans, and Atlanta. Baltimore, New Orleans, and Washington were the three largest communities of "free persons of color" in the Southern or border states in 1850.² None of these schools goes back to 1850, and some of them are relatively new; but the communities in which they developed had long traditions among the old families, and historical head starts apparently have enduring consequences. New Orleans had the most prosperous and culturally advanced community of "free persons of color" and the largest number of high schools on H. M. Bond's list—all three of which are still outstanding high schools today.

ATLANTA: BOOKER T. WASHINGTON HIGH SCHOOL

When Booker T. Washington High School was founded in 1924, it was the first public high school for Negroes in Atlanta and in the state of Georgia, and one of the first in the nation. However, the black community of Atlanta had had both primary and secondary education for its children long before that. In 1869, the American Missionary Society—which greatly influenced quality education for Southern blacks—established in Atlanta several "colleges" and "universities," whose initial enrollments were actually concentrated in elementary and secondary study, with only a few real college students.³ The first principal of Booker T. Washington High School was, in fact, a man who had been in charge of the high school program at Morris Brown College.

Professor Charles Lincoln Harper was principal of Booker T. Washington for its first 19 years, and a major influence on the shaping of the institution. By all accounts, he was a man of great courage, ability, and capacity for hard work. Far from being middle-class in origin, he came from a black farm family living on a white-owned plantation. As a child, he attended the only available school, which was 10 miles away and which held classes only three months of the year. Somehow Harper managed to educate himself and go on to college, and later do graduate work at the University of Chicago and Columbia. In addition to becoming a principal, Harper was a civil rights activist at a time when economic retaliation, lynchings, and Ku Klux Klan violence were an ever-present threat. The times were such that many blacks gave money to the NAACP *anonymously* through Harper, who bore the onus of converting it into checks to mail to the NAACP headquarters in New York. Thurgood Marshall said that Harper "stood

¹ Horace Mann Bond, "The Negro Scholar and Professional in America," *The American Negro Reference Book* (Englewood Cliffs, Prentice-Hall, 1970), p. 562.

² E. Franklin Frazier, "The Negro in the United States" (New York, Macmillan, 1971), p. 74.

³ Henry Reid Hunter, "The Development of the Public Secondary Schools of Atlanta, Georgia: 1845-1937" (Office of the School System Historian, Atlanta Public Schools, 1974), pp. 49-52.

out head and shoulders above many others because of his complete lack of fear of physical or economic repercussions."⁵

As principal, it was common for Harper to work Saturdays, and to spend part of his summer vacation taking promising students to various colleges and universities, trying to gain admission or scholarships for them. A contemporary described him as a man of "utter sincerity" who "lives on the job." Though he was a man who drove himself, with teachers he was "affable" and "easy to approach," and he showed "vast stores of patience" with students. A man of modest means—he owned only one suit—he nevertheless gave small sums of money to poor children in his school when they needed it. Yet for all his dedication to black people, he was not uncritical of black institutions. As late as 1950, he said, "There is not a single first-class, accredited college in the state for the education of Negro students."⁶ To say that must have required considerable courage in Atlanta, home of Morehouse, Spelman, and Morris Brown colleges, and of many proud alumni.

The cohesion of the Atlanta black community and the political sophistication of its leaders were directly responsible for the building of Booker T. Washington High School. A public high school for Negroes was unprecedented in the state of Georgia, and some members of the all-white school board considered it an outrageous demand. Black voters enforced their demand by turning out in sufficient numbers—in the heyday of the Ku Klux Klan—repeatedly to defeat school bond issues until it was agreed that the high school would be built. But the board of education did not go one step beyond its grudging agreement: The school building alone was built on bare land. Harper conducted a fund-raising campaign in the community to provide landscaping and to build a statue of the school's namesake in front of the entrance. The board of education's tightfistedness continued to be a problem for the school for decades. Classes were large in the early years: 45 to 50 pupils per class was not unusual. The students received hand-me-down textbooks discarded after years of use in white schools.

Extra efforts by Harper, the staff, and the community overcame these obstacles. The community contributed money for the building of an athletic stadium and helped support school athletics out of their own pockets. The board of education provided no money at all for athletic uniforms, or for athletes to travel. However, the coach obtained uniforms from a local sports store and drove the teams in his own car, with gas supplied free by a gas station in the community. The team ate hot dogs donated by a black drugstore. On their own time, teachers drove students to cultural events during the spring vacation. The teachers of this era also maintained closets full of second-hand clothing and shoes for needy pupils—all brought to school in paper bags, so that no one would ever know whose old clothes he was wearing.

The atmosphere in the school during this era was a blend of support, encouragement, and rigid standards. One alumnus described it as a "happy school" with "hard taskmasters." Of one teacher it was said: "She did not tolerate sloppy work any more than a Marine sergeant tolerates a coward on a battlefield." Another teacher "threw homework at you like you were in college instead of the sixth grade." Those who did not learn on the first try in school stayed after school for as many days as it took to learn. Yet the students found the teachers inspiring rather than oppressive. A sense of individual worth and pride of achievement were constantly sought. "You couldn't go wrong," an alumnus said: "The teachers wouldn't let you."

Racial and political awareness were part of the early curriculum but traditional subjects—including Latin—dominated. Racial pride was developed by example as well as by words. Many teachers refused the indignity of riding in the back of segregated buses, which meant that some of them had to walk during years when cars were rare.

In the 50 years of its existence, Booker T. Washington has had only five principals: C. L. Harper for 17 years (1924-1941), C. N. Cornell for 20 years (1941-1961), J. Y. Moreland for eight years (1961-1969), before being promoted to area superintendent, and A. A. Dawson for four years (1969-1973), also before being promoted to area superintendent. The present principal, Robert L. Collins, Jr., assumed the post in 1973. He is a graduate of the school, and his daughter is the third generation of his family to attend.

⁵ "They Knew Charles L. Harper," *The Herald* (October 1955), p. 19.

⁶ Quoted in V. W. Hodges, "Georgians Join Atlantans in Tribute to Mr. Harper," in *The Atlanta World* (June 14, 1950).

The school has undergone some metamorphoses in the half-century of its existence. It is no longer the only black high school in the city, and the neighborhood in which it is located is run down—both factors tending to lower academic performance—while there are such offsetting tendencies as better financial support and better physical equipment. The available records do not go back far enough to permit comparison with the performance of the early years, but the current academic performance of Booker T. Washington is far from that of an elite school. On a variety of tests, its students scored significantly below the national average, and below the average of other Atlanta high schools. The demeanor of its students also seems much more in keeping with that of a typical urban ghetto school than a school with a distinguished past. Black Atlantans seem defensive about discussing these changes, though one characterized the school as “a little thuggish” today. It is not unusual for a school which loses its monopoly of black high school students and is located in a declining neighborhood to have difficulties maintaining standards. Other schools in this study have suffered similar fates. But the justifiable pride of Atlantans in the school's past makes it difficult to trace the process by which the present uninspiring situation came about. Certainly it is clear that the present financial resources and political clout—a black superintendent of schools and a black mayor of the city—are no substitute for the human resources that enabled earlier generations to overcome heavy handicaps.

Interestingly enough, the current principal is not as defensive as other Atlantans inside or outside the school system. While he will not openly concede a decline in academic performance, he freely acknowledges a number of factors which make it a harder job to get good performance from students of a given level of ability. Chief among these is less parental support and cooperation: Parents may be more “involved” in school decisions today, but they are less cooperative than in earlier decades. In particular, parents are less willing to take the side of the school teacher or principal who wants an able student to take more demanding courses instead of following the path of least resistance. Even when the parents understand the long-run educational need, they are often not willing to risk immediate problems in relations with their children. Discipline problems are also more numerous and more difficult, and there are fewer methods available for dealing with them. Corporal punishment was still permissible in the mid-1940's, when Collins was a student, but it is no longer an option. Moreover, whatever discipline is imposed is less likely to have parental support or reinforcement, and more likely to provoke parental indignation. Still, Collins works at it—12 hours or more a day. It is too early to tell if he can turn the situation around, especially since the general problem extends well beyond Atlanta, is not limited to black schools, and has had a varying impact on schools across the country.

ATLANTA: ST. PAUL OF THE CROSS

A very different school in many ways is St. Paul of the Cross. Its openness was the first of many contrasts. Records just received from a testing organization were taken straight from the envelope and spread out on the table for inspection. This confidence was based on years of solid performance. A sample of I.Q. scores for this Catholic elementary school shows them consistently at or above the national norm of 100—which is to say, significantly above the national average of about 85 for other black children. This school came to our attention as a result of an earlier research project surveying I.Q. scores. The mean I.Q. of the St. Paul student body for the years surveyed (1960-1972) ranged from 89 to 107.

St. Paul is located in a middle-class black suburban area of Atlanta, but its students are drawn from various parts of the city. Of all the schools in this study for which we were able to obtain the data, St. Paul has the highest proportion of white-collar and professional occupations among its students' parents. For the period 1960-1972, 40 percent of the parents were either white-collar or professional. Our breakdown shows 33 percent white-collar and seven percent professional, but that is based on counting school teachers in the white-collar category, and the two categories are presented together simply to avoid needless (and endless) debate over where the line should be drawn. For the other schools in this study, this internal breakdown is of little significance, since the two categories together usually add up to no more than 10 percent. But although St. Paul has a substantial proportion of white-collar and professional parents for a black school, it is still not predominantly middle-class

in the usual sense of having children whose parents are doctors, engineers, or professors, or are in similar occupations.

Quite, calm, and orderliness prevail in St. Paul's modern building, even during the changing of class. Yet the students do not seem either repressed or apprehensive. There was talking during the change of classes, but no yelling or fighting. Corporal punishment is one of the disciplinary options, but it is seldom used. Discipline is usually maintained through individual discussions between the teachers—half nuns and half laity—and the children. For example, a little boy who had spilled his soda in the hall without cleaning it up was told that the cleaning woman works hard to keep the school nice, and it was suggested that he apologize to her for making her job harder—but all this was done very gently without burdening him with guilt. This calm, low-key approach is made possible by small classes (about 30), small student body (about 200), and an automatically self-selective admissions process, since hard-core troublemakers are unlikely to apply for admission to a private school.

Instruction is highly individualized. Instead of the classic picture of the teacher standing in front of the class lecturing, the more usual scene in the classroom at St. Paul was a teacher very much engaged with an individual student or a small group, while the other members of the class worked intently on their respective assignments. This individualized approach extended even to allowing students to go to the library on their own. The child's self-confidence is built up in subtle ways. However, there was no single teaching method or formula imposed from above. The usual bureaucratic paperwork was absent at St. Paul. Records were well kept and complete, but not cluttered with trivia. Administrators had time to circulate through the school and get to know the students, rather than being stuck at their desks behind piles of paper. Morale is high enough to attract lay teachers at lower salaries than they receive elsewhere.

St. Paul has had only four principals in its 21-year history. Three of these were nuns of the Sisters of St. Joseph, and the other was a black layman appointed in the 1960's at the height of the emphasis on "blackness." However, the initiative for a black lay principal came from whites in the religious order, rather than from either the black community or black parents. The current principal is a white nun.

The children are encouraged to take pride in their black heritage, but the curriculum is heavily oriented toward the basics of education—especially reading. There is also religious instruction, but the student body is about 70 percent non-Catholic, though it was initially predominantly Catholic. Black non-Catholic students in Catholic schools are common in cities around the country, as black parents seek the education, the discipline, and the sheer physical safety which the public schools often cannot offer. The tuition is modest—about \$450 per year for non-Catholics and \$360 for Catholics—and the school runs a deficit, which is made up from general church funds.

Though quite different from Booker T. Washington High School in many ways, St. Paul has one problem in common with it: Some parents think that the school is *too* intellectually challenging for their children. Interestingly, this view is more common among those parents who are public school teachers.

BALTIMORE: FREDERICK DOUGLASS HIGH SCHOOL

As of 1850, the 25,000 "free persons of color" in Baltimore were the largest number in any city in the United States, so it is not surprising that Baltimore's high school for black children was among the earliest founded, in 1892. Like many other black schools throughout the United States, Frederick Douglass High School survived for decades with inadequate financial support, was located in a succession of hand-me-down buildings that whites had discarded, and was stocked with old textbooks used for years before by white students, refinished desks from white schools, second-hand sports equipment, and so on. Douglass was for many years the only black high school in Baltimore. The school contained academic, vocational, commercial, and "general" programs. Because the surrounding communities had no high schools for Negro children, black students from outside Baltimore also came to Douglass—some legitimately, through stiff tests given to outsiders, and many others by the simple expedient of giving false addresses in Baltimore, often the addresses of relatives or friends.

Although pupils from Baltimore faced no tests for admission, there was a self-selection factor at work. Those without sufficient interest or skills would have

dropped out before high school, in an era when students left school at earlier ages and when substandard students repeated grades, instead of today's automatic promotion. In short, while Frederick Douglass in its early decades was formally an all-inclusive black high school serving Baltimore and vicinity, in practice there were automatic selection factors which screened out the wholly uninterested or negative student. These were not high academic admission standards, such as elite private schools imposed, but even this wholly informal screening was sufficient to keep the school free of "discipline problems."

The teachers included men and women trained at the leading colleges and universities in the country. An alumnus of the 1930's recalls that his principal, Mason Hawkins, had a Ph. D. from the University of Pennsylvania and his teachers included individuals with degrees from Harvard, Brown, Smith, and Cornell. They were trained in content rather than educational "methods"—and their teaching styles approximated those of rigorous colleges: discussions rather than lectures, reading lists rather than day-by-day assignments, papers rather than exclusive reliance on "objective" tests. But there was no single teaching method imposed from above. The teachers often put in extra time, without pay, especially to work with promising students from low socioeconomic backgrounds.

Students were given pride in their achievements as individuals, but no mystique of "blackness." Negro history week was observed, and there was an elective course in black history, but it was not a prominent element in the curriculum. Although formal guidance counselling was minimal, the individual teachers actively counselled students on their own. But the teachers' concern for the students took the form of getting them to meet standards, not of bringing the standards down to their level of preparation. In reminiscing about her 40 years as teacher and administrator at Douglass High School, former principal Mrs. Edna Campbell said of her students, "Even though you are pushing for them, and dying inside for them, you have to let them know that they have to produce."

The interest of the teachers in the students was reciprocated by the interest of the parents in supporting the teachers and the school. "The school could do no wrong" in the eyes of parents, according to alumni. Parental involvement was of this supportive nature rather than an actual involvement in school decision-making. "Parent power" or "community control" were unheard-of concepts then.

Most of the whites in Baltimore were relatively unaware of Frederick Douglass High School—they did not know or care whether it was good or bad—and this indifference extended to the board of education as well. Under the dual school system in the era of racial segregation, the lack of interest in black schools by the all-white board of education allowed wide latitude to black subordinates to run the black part of the system, so long as no problems became visible. "Benign neglect" is perhaps the most charitable characterization of this policy. In short, Douglass High Schools' achievements were not a result of white input, at either the administrative or the teaching levels.

Color differences within the black community were significant in the school as well. Light-skinned alumni tended to minimize this factor, but darker-skinned alumni sometimes still carry bitter memories. One man, now an official of the Baltimore school system, recalls being maneuvered out of the honor of being class valedictorian at Douglass, in favor of a lighter-skinned student from a socially prominent family.

Like several of the schools studied, Douglass' days of glory are past. A decline began with the building of other black high schools in Baltimore and became precipitous in the wake of the Supreme Court's desegregation decision in 1954. While the mean I.Q. in the academic program at Douglass ranged from 93 to 105 for the 20 years before the 1954 decision, it fell immediately below 90 in 1955 and remained in the 80's from February 1955 through February 1958. This reflected the exodus of more capable students to white high schools. A concerted effort was made to reverse this trend in the 1960's, especially from 1965 to 1973, when Mrs. Edna Campbell was the principal. Our sampling of test scores for this period indicates some success. I.Q. scores went back into the 90's from 1965 through 1971, the last year for which we have a sample of 20 or more scores.

Today, in its decline, Frederick Douglass High School has better physical facilities, some integration of the faculty, and more parental input into the decision-making process, as well as a Baltimore school system dominated by black officials. There is little evidence that this compensates for what it has lost. Indeed, some knowledgeable people in Baltimore believe that it is precisely the growth of "student rights" and "parent power" that is responsible for declining discipline in schools. There certainly was evidence of such discipline problems at Douglass.

A researcher collecting data for this study had her purse snatched in the school building itself, and some weeks earlier there had been a shooting there. This was a far cry from the school that had once been second in the nation in black Ph. D.'s among its alumni, and the only black school to produce a Supreme Court justice.

NEW ORLEANS: MCDONOUGH 35 HIGH SCHOOL

New Orleans has had a unique role in the history of American race relations, and so it is not surprising that the city has had not one, but three outstanding black high schools on Horace Mann Bond's list—and all three are *still* outstanding. Long before the Civil War, the free Negro community in New Orleans had rights, privileges, and economic success well in advance of its counterpart in any other American city. By 1850, "free persons of color" owned \$15 million worth of taxable property in New Orleans—one-fifth of the total taxable property in the city.

The pattern of race relations in New Orleans had been established before the city became a part of the United States as a result of the Louisiana Purchase in 1812, and it was—and largely remained—the pattern common to Latin America, rather than the pattern of Anglo-Saxon slave societies in the Western Hemisphere. For example, the "free colored" population of Latin America had a far wider range of occupations open to them than did American Negroes, and they often dominated the skilled artisan trades in Latin countries—simply because there were just not enough whites. The French, Spanish, and Portuguese who colonized the Western Hemisphere did not bring women, families, or a working class with them to the extent that the Anglo-Saxon did, and so were both economically and sexually more dependent upon the indigenous populations and those of African descent. This dependency led to a greater relaxation of racism in practice, even though the Latins subscribed in principle to the same "white supremacy" doctrines as the Anglo-Saxons.

New Orleans, as a former French (and Spanish) colony, reflected the Latin pattern in the skills of "free persons of color," few of whom were laborers, many of whom were small businessmen, some of whom were wealthy, and a few of whom were even commercial slave owners. New Orleans also reflected the multicolored caste system characteristic of Latin American countries, in contrast to the stark black/white dichotomy of Anglo-Saxon nations. The celebrated "quadroon balls" of antebellum New Orleans were but one aspect of this system.

Segments of the "free colored" population of New Orleans had been giving their children quality education (sometimes including college abroad) for more than a century before the first black public high school was founded in 1816. This school—McDonough 35 High School—was for many years the only public high school for New Orleans Negroes, but it was preceded by, and accompanied by, private black secondary schools, including Catholic schools—again, reflecting the Latin influence. Two Catholic high schools—St. Augustine and Xavier Preparatory—and McDonough 35 make up today's three outstanding black high schools in New Orleans.

So many schools in New Orleans are named for philanthropist John McDonough that numbers are added to distinguish them. McDonough 35 High School is outstanding among these. It has had only four principals in its nearly 50-year history. The first principal, John W. Hoffman, was a well-traveled man with a cosmopolitan outlook. The second principal, Lucien V. Alexis, was a graduate of Phillips Exeter Academy ('14) and Harvard ('18), and was an "iron-fisted" ex-Army officer. The third principal, Mack J. Spears, was a more diplomatic man with considerable political savvy—which proved to be decisive in saving the school from the physical or educational extinction which came upon other outstanding black high schools during the time when "integration" was regarded as an educational panacea. The current principal, Clifford J. Francis, is a quiet, thoughtful man who accepts overtime work as a normal part of his job. He runs a smoothly operating, high-quality school which, for the first time, has a good physical plant and a good racially-integrated staff.

When McDonough 35 was opened in 1917, it was housed in a building built in the 1830's. As late as 1954, this building was heated by potbellied stoves, with the students keeping the fires going by carrying coal. When a hurricane passed through New Orleans in 1905, the ancient building simply collapsed. At this point, the all-white board of education decided to disband the school and assign its pupils to other schools in New Orleans. But, unlike other out-

standing black schools which were destroyed by white officials who were unaware of their quality, McDonough 35 fought back. Principal Mack Spears organized community support to save the school, lobbied Congressmen, and ultimately obtained the use of an abandoned federal court house to house the institution until a new school building could be constructed.

The institution he saved was one which was an inspiration to its students, as well as a leading producer of later black Ph. D.'s. By chance, I happened to encounter Wilson Riles, the California State Superintendent of Schools, the day after my first visit to McDonough 35, and the very mention of the school's name caused his face to light up and provoked a flood of warm memories of his student days there. He credited the school with taking him and other black youngsters from an economically and culturally limited background, and giving them both the education and the self-confidence to advance in later life. Mack Spears, a student and later a principal at McDonough 35, told a very similar story. Spears was the son of a poor farmer, but he remembers vividly how his teachers promoted the idea of the worth of the individual—how they always called the boys "Mister" and the girls "Miss," emotionally important titles denied even adult Negroes throughout the South at that time.

Although the school had few counsellors in its earlier days, the teachers acted as counsellors, and as instructors and role models. But with all the psychological strengthening that was an integral part of the educational process, there was no parochial "blackness" in McDonough 35. Cultural expansion was the goal. Questions about "black English" in McDonough 35 brought a "hello no!" from Spears. The current principal more gently observed that this was a recent and minor matter, of interest to only a few young white teachers.

Like some other outstanding black high schools, McDonough 35 suffered a decline in quality as other black high schools were built in the same city and as neighborhood changes left it in a less desirable part of town. At one point in the 1950's, there was a controversy over the right of its teachers to carry guns for self-protection. The academic deterioration of this period matched the deterioration in social conditions and morale. The median I.Q. of the school population in the mid-1950's was in the low 80's; but under the new policies introduced when Spears became principal in 1954, I.Q.'s began to rise, to a peak of 99 in the 1965-1966 school year; and they have remained in the mid-to-upper 90's since then. Unfortunately, there are no I.Q. data available for the earlier period of the school's academic excellence—the period during which the Ph. D.'s studied by H. M. Bond would have been high school students there. The present I.Q. scores—at about the national average, and therefore significantly above the average for black students—must be interpreted in the context of a city where private Catholic schools attract large numbers of both white and black students with higher educational aspirations and achievements. McDonough 35 median I.Q.'s have consistently been above the citywide average for public school students—white and black—for the past decade.

The policies introduced in the mid-1950's which reversed McDonough 35's decline included keeping neighborhood derelicts out of the school, ability-grouping, or "tracking," to deal with the variation in student capabilities and interests, and a widening of school boundaries beyond the immediate neighborhood. Spears, a former football player, was perfect for keeping the derelicts out of the school—for even though he spoke softly, the big stick was implicit in his very presence. Instead of explaining away low test scores by "cultural deprivation" or dismissing them as "irrelevant," Spears used those scores to demonstrate to parents and to the black community the full depth of the problem and to get support for educational change, including ability-grouping to deal with the wide range of scores and a self-selection admissions system to supersede neighborhood boundaries.

All was not harmony in McDonough 35, even in its heyday. The internal class differences within the black community—which revolved around color differences going back to the era of slavery—were more pronounced in New Orleans, just as intra-group color differences in Latin cultures generally exceeded those in Anglo-Saxon cultures. However, light-skinned Negroes were *not* noticeably over-represented among students, faculty, or administrators. And darker Negroes, such as Riles and Spears, were nevertheless accepted by the school, even though the larger community was divided socially along internal color lines.

Whites were, at best, a negligible factor in the development of McDonough 35 High School. According to former principal Spears, the all-white board of education "did not give a damn—and we took *advantage* of that to build academic excellence."

NEW ORLEANS: ST. AUGUSTINE HIGH SCHOOL

St. Augustine High School is a school for boys founded in 1951 by the Josephite Fathers. Its first principal was a young priest, Father Matthew O'Rourke, with neither experience nor training in education. Keenly aware of these gaps in his preparation, Father O'Rourke began a crash program, taking education courses at a local university—but found them “empty” and “a big zero.” He and the other similarly inexperienced young priests and laymen on the faculty proceeded by trial and error—and dedication.

One of the first issues to arise came with the introduction of corporal punishment. In an era of growing racial sensitivities, some white priests outside the school were disturbed by the thought of white men (even in priestly garb) beating black youths. But Father O'Rourke and the other priests felt no guilt—the Josephite Order had been founded in the 19th century to serve blacks—and viewed the problem in purely pragmatic terms. Their options were to allow disruptive students to undo their work with others, to save the school by expelling such students, or to attempt to save both the students and the school by an occasional padding. They elected to try the last. Despite the misgivings of some outside priests, the black parents backed the teachers completely, and the system worked. It has remained a feature of St. Augustine to the present—strongly believed in, but infrequently used. The student/teacher relations in St. Augustine are more relaxed and warm than in most public schools, where corporal punishment is usually forbidden by law.

The school was neither wedded to tradition nor seeking to be in the vanguard of “innovation.” It did whatever worked educationally, and abandoned what did not. The wide range of student preparation led to ability-grouping, and to the jettisoning of the traditional English courses for the least prepared students in favor of an emphasis on reading, at virtually any cost. *Time* magazine was found to be an effective vocabulary tool for many students, and hundreds of St. Augustine students subscribed, at the urging of their teachers. A special summer course featured speed reading, with assignments of a novel per week, including reports.

The teachers' inexperience and lack of familiarity with educational fashions paid off handsomely. The first Southern Negro student to win a National Merit Scholarship came from St. Augustine. So did the first Presidential Scholar of any race from the state of Louisiana in 1964, and 10 years later, St. Augustine had produced 20 percent of all the Presidential Scholars in the history of the state. In the National Achievement Scholarship program for black students, St. Augustine has produced more finalists and semi-finalists than any other school in the nation. In 1964—before the big college drive to enroll black students—St. Augustine's students won more than \$100,000 in college scholarship money. This is all the more remarkable since the total enrollment is less than 700.

The pattern of I.Q. scores over time at St. Augustine shows a generally upward movement, beginning at a level very similar to the average for black students and reaching a level at or above that for the United States population as a whole. In its early years, St. Augustine had mean I.Q.'s as low as 86; but during the period from 1964 through 1972, I.Q.'s were just over 100 for every year except one.

The reasons for the rising I.Q.'s at St. Augustine cannot be easily determined. Father O'Rourke is reluctant to claim credit for the school itself. But in recalling his years as principal, he cited a number of instances where students with potential, but without cultural development, had improved after extra attention—improved not only on achievement tests, but also on I.Q. tests, “though that's not supposed to happen.” Test scores were never used as a rigid admissions cutoff at St. Augustine. Our sample includes individual I.Q.'s in the 60's, as well as many others more than twice as high.

Father O'Rourke was succeeded as principal in 1960 by Father Robert H. Grant, one of the other young priests teaching at St. Augustine. Where Father O'Rourke had been universally liked, Father Grant tended to have both enthusiasts and detractors. Under Father Grant's administration, a heavy emphasis on academic achievement and tighter discipline brought Merit and Presidential scholars, school-wide I.Q.'s averaging over 100—and murmurs of discontent in the community. The discontented usually were *not* parents of students at St. Augustine. The rise of racial militancy raised questions about a white principal of a black school and brought demands for a “black” orientation of the curriculum. In retrospect, Father Grant describes his administration as “benignly autocratic” and himself as “blunt.” “We didn't spend much time hassling, debating, or dialoguing.” The teachers and principal had their meetings, but once an agreement had been

reached, they did not "waste time" with "parent power" or "student rights," but relied instead on parental trust and on student achievement as a vindication of that trust. He met the demands for "black studies" by establishing an elective course on the subject—meeting at a time that was otherwise available as a study period. Only six students enrolled, out of more than 600 students in the school.

Although Father Grant fought a legal battle to integrate Louisiana's high school athletics, and was sympathetic to the civil rights movement in general, he was also opposed to the introduction of "extraneous elements, issues, and concerns" into the school itself. Keenly aware of both the students' cultural disadvantages and the need to overcome them, he felt that "we absolutely could not do the two things well," though both were important. It was a matter of time and priorities: "Don't consume my time with extraneous issues and then expect me to have enough time left over to dedicate myself to a strong academic program where I will turn out strong, intelligent, competent kids."

In 1969, Father Grant accepted a post in Switzerland and was replaced by a black lay principal—just what the doctor ordered politically, but apparently not administratively or educationally. He was replaced after a few years. The current principal, Leo A. Johnson, is also a black layman and, in addition, the first alumnus of St. Augustine to head the school. His term began in 1974, and it is too early to assess his impact on the school.

Teaching methods at St. Augustine are traditional, and both its academic and behavioral standards are strict. Students must wear "a dress shirt with a collar," and the shirttail "must be worn inside the trousers at all times." The general atmosphere at St. Augustine is relaxed, but serious. Its halls are quiet and its students are attentive and engrossed in what they are doing, as are the teachers. Yet it is not a wholly bookish place. Its athletic teams have won many local championships in football, basketball, and baseball. At lunch time, the students were as noisy as any other high school students, and the boys in the lunch room were visibly appreciative of a shapely young woman who was part of our research team. One of the real accomplishments of St. Augustine has been to give education a masculine image so that black youths need not consider intellectual activity "sissy."

The achievements of St. Augustine cannot be explained by the usual phrase of dismissal, "middle-class." Although it is a private school, its modest tuition (\$645 per year) does not require affluence, and about 15 percent of the students pay no tuition at all, while others pay reduced tuition because of their parents' low income. The school runs a chronic deficit, despite the low pay scale for those teachers who are clergy. Despite the color/caste history of New Orleans, the students at St. Augustine are physically indistinguishable from the students at any other black high school. Their demeanor and their work are *very* different, but their skin color is the same. Our statistical tabulation of parents' occupations covers only the years from 1951 through 1957, but in each year during that span more than half of the known parental occupations were in the "unskilled and semi-skilled" category, and the parents with professional or white-collar jobs added up to less than one-tenth as many. While the students are seldom from the lowest poverty level, there is only occasionally the son of a doctor. Many come from families where the father is a bricklayer, carpenter, or other artisan, and has only a modest educational background. They are not middle-class in income, career security, culture, or lifestyle. Many are ambitious for their children and send them to school with attitudes that allow the education to "take." But such attitudes are not a monopoly of the middle class, despite sociological stereotyping. If such attitudes were in fact a monopoly of the middle class, neither blacks nor other ethnic minorities could ever have risen.

NEW ORLEANS: XAVIER PREP

Xavier Prep is an all-girl Catholic school run by the Sisters of the Blessed Sacrament. It was founded in 1915, and was coeducational until 1970. It had 18 graduating seniors in 1918, and the enrollment increased to about 500 in 1940. It has about 350 students today, after the male students were phased out in the 1960's. Even when it was coeducational, it had more female than male students. One of the reasons for the difficulty of maintaining a masculine image for education among black youths is that, throughout the country and down through the years, Negro girls have out-performed Negro boys by a wide margin on grades, tests, and virtually every measure of intellectual ability. Studies of high I.Q. black students have consistently found the girls outnumbering the boys, by from two-to-one to more than five-to-one.

Over 90 percent of the graduates of Xavier Prep go on to college. Until the 1960's, almost all went to Xavier University in New Orleans, run by the same order of nuns. Today about 60 percent of the graduates go to either Xavier University, Loyola, or Tulane—all in New Orleans—even though their academic preparation would make them eligible for many other colleges and universities in other parts of the country.

I.Q. scores and other test scores vary considerably among Xavier students, but the average score of the school as a whole has fluctuated around the national norm—which is to say, higher than for Southerners of either race, higher than for black students nationally, and considerably higher than for black Southern children from the modest socioeconomic backgrounds of Xavier students. The mean I.Q. of the school as a whole ranged from 96 to 108 during the 1960's, and has been at or above 100 for each year surveyed during the 1970's.

In the earliest years of Xavier Prep, many of the students were from Creole backgrounds. But today the colors and conditions of the students represent a cross section of black America. Over the years, about 40 to 50 percent of the students have come from low-income families, many entering with serious educational deficiencies, requiring remedial work. More than 60 percent of its students are eligible for the free lunch program. While Xavier is a private school, its tuition is only \$35 a month. Our statistical tabulation of parental occupation shows that from one half to four fifths of the parents' occupations have been in the "unskilled or semi-skilled" category, in the period from 1949 to 1972 for which we have data. Parents in professional or white-collar occupations put together added up to only seven percent of the total during that same span. The principal, Sister Anne Louise Bechtold, recalls "one dentist" this year and "one lawyer last year" among the parents, but no engineers or college professors, and a small percentage of public school teachers—and otherwise parents of very modest socioeconomic backgrounds, with some of the mothers being domestics or store clerks and the fathers in similar occupations.

Unlike middle-class parents, the parents of Xavier students tend to be very cautious about their input into the school—even when invited and encouraged to participate. They seek discipline and an emphasis on basic education, and seem particularly pleased when their children's teachers are nuns. The caution of the parents is also a factor in the narrow range of colleges which most Xavier graduates attend. Ivy League and other Northern colleges attempt to recruit Xavier graduates, but the parents are reluctant to have their daughters exposed to strange influences in faraway colleges. In some cases, the teachers or counselors fight a losing battle to get a promising student to accept an offer from a top-level college or university. This is not all the result of the limited cultural horizons of the parents. Economic pressures make it difficult for many of the parents to finance the travel involved, much less the living expenses, even if the student has a full scholarship.

Classes at Xavier Prep in the past tended to be large (35-40 students), but since boys were phased out in the mid-1960's, classes have been reduced to about 25 to 30 students. These students are "tracked" by academic ability. The less prepared students are given intensive and imaginative remedial work. Unlike St. Augustine, Xavier Prep has neither corporal punishment nor an emphasis on athletics. But the general atmosphere—described by one nun as "reserved but informal"—is very similar. Nuns and lay teachers are about equally represented on its faculty, and its principal is a nun. It is a quiet, low-key place where the changing of classes produces swarms of black teenagers in the halls, but little noise. The classes in session have students and teachers absorbed in mutual endeavor, but with a certain relaxed geniality. Discussions with Xavier teachers indicate that they put much thought and work, on their own time, into the preparation of their classes. Although subject to the guidance of superiors both inside and outside the school, the teachers seem to have more scope for personal initiative than do public school teachers. Among alumni of the school, their teachers' personal interest in them is a factor often cited as having given them the inspiration and self-confidence that came before the educational achievements themselves.

BROOKLYN: P.S. 91

Perhaps the most remarkable of all the schools in this study is P.S. 91, an elementary school in a rundown neighborhood of Brooklyn. Here, where over half the students are eligible for the free lunch program and a significant proportion are on welfare, *every grade approximates or (usually) exceeds the national norms* in reading comprehension. A tour of the ancient school building is even more surprising than these statistics. Here, in class after class, the stu-

dents—overwhelmingly ghetto youngsters—work quietly, intently, and pleasantly under the direction of obviously intelligent and interested teachers and teacher aides who represent a wide range of ages, races, and personal styles. The sheer silence of the school was eerie to one who had attended elementary school in central Harlem and had recently researched similar schools elsewhere.

In class after class, discussion periods brought lively exchanges between teachers and pupils—the children speaking in complete sentences, grammatically and directly to the point, and returning to the subject if the teacher's response was not clear or satisfactory to them. To see this happening with children identical in appearance and dress to those who are dull, withdrawn, or hostile in untold other ghetto schools can only be described as an emotional experience. After leaving one classroom where a lively discussion was still in progress, the principal said matter-of-factly, "That was our slow learners' class. They are doing all right, but I think there is need for improvement."

That was the remarkable attitude of a remarkable man, Martin Shor, the principal, is white and was principal of the school when the school was white. As the Crown Heights section of Brooklyn changed its racial composition and the socioeconomic level fell, the school population reflected these changes. Now there are only a few white or oriental children in P.S. 91. But unlike other schools whose academic standards have fallen along with the socioeconomic level of their neighborhoods, P.S. 91 has had a *rising* proportion of its students scoring above the national norms in reading. In 1971, just over 49 percent of its students exceeded the national norms, in 1972 it was 51 percent, in 1973 it was 54 percent, and in 1974 it was 57 percent. To put these numbers in perspective, *none* of the 12 other schools in its district had even 40 percent of their students above the national norms, even though some of these other schools are in higher-socioeconomic-status neighborhoods. The highest percentage in the whole borough of Brooklyn—with more than 600 elementary schools—is 60 percent above the national norms.

The handicaps under which P.S. 91 operates include a very high turnover rate, characteristic of ghetto schools. There was a 34 percent turnover in just three months. This means that the school loses many of the good students it has prepared in the early grades and receives from other ghetto schools badly prepared youngsters whom it must reeducate in later grades. This is apparently a factor in the pattern of scores whereby the lower grades at P.S. 91 exceed the national norms by wider margins than the higher grades (see the table below). However, it should be noted that other black schools in other cities also tend to score relatively higher in their earlier grades—sometimes even exceeding the national norms in the early grades, in schools far below the national norms overall. How much of the later disastrous decline in scores in ghetto schools is the result of high turnover and how much is the result of the negative effects of the school itself, or the development of negative attitudes by the students toward the school (or life), is a subject which has scarcely been explored. Indeed, the phenomenon itself has hardly been recognized. It is well known that black children tend to fall progressively further behind as they go through school systems, but just how well they do in the first or second grades—even in school systems with dreadful overall results, such as in Chicago or Philadelphia—is a largely unrecognized phenomena.

Martin Shor puts heavy emphasis on teaching the P.S. 91 pupils to read well in the first grade. Indeed, half of the P.S. 91 children can read when they have finished kindergarten. While the school bears the imprint of his own special methods and approach, Shor argues that none of these methods would work unless the students first new how to read. A disproportionate amount of the school's money and teaching talent goes into preparing the first-graders to read, write, and express themselves orally.

READING SCORES, P.S. 91, BROOKLYN¹

Grade:	National norms	P.S. 91 median
2.....	2.7	3.5
3.....	3.7	4.1
4.....	4.7	4.5
5.....	5.7	6.3
6.....	6.7	6.7

¹ Source: Compilation from district 17, Brooklyn.

The higher grades use a variety of self-teaching materials, including programmed books, teaching machines, and tape recorders. Many of these materials are a year or more ahead of the "age" or "grade" level of the students using them. Students are separated into small groups by ability within each class as well as between classes, and each group has its own assignment. "This may look like and 'open' classroom," Shor said. "But it's not. Every group is working on its own assigned task." When asked if this "tracking" system did not originally lead to certain racial imbalances in classes within the school, Shor pointed out that initially disadvantaged students advanced enough to produce more racial balance eventually.

"But if other schools followed your system," I asked, "wouldn't that mean that, in the interim, a multi-racial school would have the appearance of internal segregation, which would lead to a lot of political flack?" "Then you just take the flack," he said. He had taken flack during the period of racial transition at P.S. 91, but the educational results silenced critics and gained parental support. How many other white principals in a ghetto neighborhood have that kind of courage is another question. A study of unusually successful ghetto schools by the Office of Educational Personnel Review in New York concluded that "the quality and attitude of the administrator seemed to be the only real difference" between these schools and less successful ones. A few hours with Martin Shor reinforce that conclusion. He is a quietly confident, forceful man, with an incisive mind, much experience and resourcefulness, and the implicit faith that the job can be done. His talk is free of the educational clichés and public relations smoothness normally associated with school administrators. He comes to the ghetto to do a job, does it well, and then goes home elsewhere—contrary to the emotional cries about the need for indigenous community leadership in the school.

P.S. 91 does not teach "black English" or black studies, though its many books and other materials do include a few items of special interest to black children. The school tries to *expand* the students' cultural horizons: Several hundred of these elementary school pupils study foreign languages. P.S. 91 students also read excerpts from translations of the classics of world literature, such as Cervantes or Aesop. They are constantly exposed to material that allows their minds to see beyond the drab school building, the decaying tenements, and the area that caused a friend to tell me, "You sure are brave to park a car in that neighborhood." The usual "middle-class" label used to dismiss black educational achievements is only a bad joke when applied to P.S. 91.

WASHINGTON, D.C.: DUNBAR HIGH SCHOOL

The oldest and most illustrious of the black elite schools was Dunbar High School in Washington, D.C., during the period from 1870 to 1955. Over the 85-year span, most of its graduates went to college—rare for white or blacks, then—and many went on to outstanding academic achievements and distinguished careers. Back at the turn of the century, Dunbar was sending students to Harvard, and in the period 1918–1923, Dunbar graduates earned 15 degrees from Ivy League colleges, and 10 degrees from Amherst, Williams, and Wesleyan. During World War II, Dunbar alumni in the Army included "nearly a score of Majors, nine Colonels and Lieutenant Colonels, and a Brigadier General"—a substantial percentage of all high-ranking black officers at that time.

Dunbar was the first black public high school in the United States. Its unique position allowed it to select some of the best of the educated blacks in the country for its teachers and principals. Of its first nine principals, seven had degrees from either Harvard, Oberlin, Dartmouth, or Amherst. Of the remaining two, one was educated in Glasgow and London, and the other was a Phi Beta Kappa from Western Reserve. The principals included the first black woman in the United States to receive a college degree (from Oberlin, 1862) and the first black man to graduate from Harvard (in 1870). Clearly they were remarkable people even to attempt what they did, when they did.

So too was the man who spearheaded the drive that led to the founding of the school which ultimately became Dunbar High School (after several changes of name and location). William Syphax was a "free person of color," born in 1828 and active in civic affairs and civil rights issues, "fearing no man regardless of position or color." As a trustee of the Negro schools in Washington, Syphax preferred to hire black teachers, but only when their qualifications were equal to those of white teachers—for the trustees "deem it a violation of our official oath to employ inferior teachers when superior teachers can be had for the same money." He addressed demands not only to whites in power, but also to his own

people, exhorting them to send their children to school with discipline, respect, and a willingness to work hard. These became hallmarks of Dunbar High School, as did the academic success that flowed from them. As early as 1899, Dunbar scored higher in city-wide tests than any of the white high schools in the District of Columbia. Down through the years its attendance records were generally better than those of the white high schools, and its rate of tardiness was lower. Dunbar meant business.

The teachers at Dunbar usually held degrees in liberal arts from top institutions, not education degrees from teachers colleges. The scarcity of alternative occupations for educated Negroes allowed Dunbar to pick the cream of the crop. As late as the 1920's, its staff included individuals with Ph. D.'s from leading universities, including the distinguished historian Carter G. Woodson. The teachers were as dedicated and demanding as they were qualified. Extra-curricular tutoring, securing scholarships for graduating seniors, getting parents of promising students to keep them in school despite desperate family finances—all these were part of the voluntary work load of Dunbar teachers and principals. In a city that remained racially segregated into the 1950's, there were also constant efforts to bring cultural attractions to the school that were unavailable to black youngsters in theaters, concert halls, or other cultural and entertainment centers. While individual pride and racial awareness were part of the atmosphere at Dunbar High School, cultural expansion was the educational goal. Latin was taught throughout the period from 1870 to 1955, and in the early decades, Greek was taught as well. In the 1940's, Dunbar fought a losing battle with the superintendent of schools to have calculus added.

Throughout the 85-year period of its academic ascendancy, Dunbar never had adequate financial support. At its founding it was allowed to draw only on taxes collected in the black community. While this arrangement eventually gave way to drawing on the general taxes of the city, so too did the separate administration of Negro schools by black trustees give way to city-wide administration by an all-white board of education, which never provided equal support. Large classes were the norm from the 1870's, when there more more than 40 students per teacher, to the 1950's, when Dunbar's student/teacher ratio exceeded that of any white high school in Washington. The school was in operation more than 40 years before it had a lunch room, which then was so small that many children had to eat lunch out on the street. Blackboards were "cracked with confusing lines resembling a map." It was 1950 before the school had a public address system.

The social origins of Dunbar students were diverse. For three decades, Dunbar was the only black high school in Washington, D.C., and for three more decades it was the only black academic high school in the city, so it drew on a broad cross section of students. At late as 1948, one third of all black high school students in Washington were enrolled in Dunbar. Nevertheless, the "middle-class" label has been stuck on Dunbar, and no amount of facts dispels it. According to a Washington Post reporter, the one word "Dunbar" will divide any room of middle-aged black Washingtonians into "outraged warring factions." Some are fiercely loyal to Dunbar as a monumental educational achievement, while others see it as snobbish elitism for middle-class mulattoes who either excluded poor blacks from the school or ostracized them if they attended. A look through old yearbook photographs will disprove the myth of mulatto predominance, and our statistical tabulation of parental occupations from 1938 through 1955 shows 38 percent of known parental occupations to have been "unskilled and semi-skilled" (including many maids), while "white-collar" and "professional" occupations together added up to only 17 percent.

Unquestionably, almost all middle-class Negroes in Washington sent their children to Dunbar during the period from 1870 to 1955, and for historical reasons, middle-class Negroes tended to be lighter in color—but that is very different from saying that most Dunbar students were either middle class or mulattoes. Former Dunbar Principal Charles Lofton calls it all "an old wives' tale." "If we took only the children of doctors and lawyers," he asked, "how could we have had 1400 black students at one time?" Yet the persistence and power of the myth suggests something of the depth of the hurt felt by those who either did not go to Dunbar because of fear of social rejection or did go and did not feel accepted. To this day, one Dunbar alumna has a policy at social gatherings in Washington of never mentioning where she went to high school.

Dunbar alumni claim that the school was at its academic peak in the 1920's or earlier—in particular that the "M Street School," which was the name prior to 1917, was superior to "Dunbar," which was the name attached to the building

constructed that year. There is some inconclusive evidence—graduation years of distinguished alumni, numbers of graduates attending top college, etc.—supporting this view, but no standard tests were given in both eras that would permit a direct comparison. The earliest I.Q. records available are for 1938, so that our data cover only its supposedly declining years. Nonetheless, for this 18-year period, the average I.Q. in the school was below 100 for only one year (when it was 99) and was as high as 111 (in 1939).

There is general agreement that Dunbar declined precipitously and catastrophically after the school reorganization of 1955 made it a neighborhood school for the first time in its history. Its neighborhood was one of the worst in the city, and as its new students entered, advanced elective courses gave way to remedial math and English, and its quiet building now became the scene of "discipline problems." The past excellence of the school had caused many teachers to stay on past the retirement age, and now many of them began to retire at once. By the 1960's a newspaper story on the school was titled "Black Elite Institution Now Typical Slum Facility." It remains a typical slum school today—its past recalled only in the heat of a bitter controversy over the tearing down of the old building standing alongside a modern school bearing the same name. One of several city councilmen who favored demolition said that Dunbar "represents a symbol of elitism among blacks that should never appear again." But a Dunbar alumnus wondered if the real problem was that the new school fears the "silent competition" of the old building and the achievement it represents.

EDUCATIONAL "LAW AND ORDER"

Contrary to current fashions, it has not been necessary (or usual to have a special method of teaching to "reach" black children in order to have high-quality education. Teaching methods used in the schools studied here have varied enormously from school to school, and even in particular schools the variation from teacher to teacher has been so great as to defy general characterization. Everything from religious principles to corporal punishment has been used to maintain order. The buildings have ranged from the most dilapidated wrecks to a sparkling plate-glass palace. The teachers and principals have been black and white, religious and secular, authoritarian and gentle, community leaders and visitors from another social world. Some have had a war "human touch" and others would have failed Public Relations I. Their only common denominators have been dedication to education, commitment to the children, and faith in what it was possible to achieve. The institutional common denominators of these schools are a larger and more complex question.

In general, test scores have been significantly higher at these schools than at blacks schools in general, and have been highest at the most elite and oldest—Dunbar High School in Washington, in its academic heyday. Yet their I.Q. scores have not been as high as those at white high schools of comparable achievement, and all of the schools studied have included students well below national test score norms. In short, test scores are not "irrelevant" for black achievement, but neither are they the be-all and end-all. One of the tragedies in the wake of the Jensen controversy is that many schools and school systems avoid giving I.Q. tests for fear of political repercussions, when in fact much useful information can be obtained from this imperfect instrument, once its limitations are understood. Even where I.Q. tests are used, the results are often handled in a politicized way. For example, the Austin (Texas) public school system refused to release data on a school being considered for inclusion in this study because of "legal" reasons—but only after a lengthy cross-examination on my personal beliefs about various issues involved in the I.Q. controversy. Sometimes the data are suppressed for more directly institutional political reasons—as in the case of a large metropolitan black school on the West Coast whose outstanding performance is kept quiet for fear of citizen demands to know why the other black schools in the same city cannot produce similar results.

Perhaps the most basic characteristic of all these schools could be called "law and order," if these had not become politically dirty words. Each of these schools currently maintaining high standards was a very quiet and orderly school, whether located in a middle-class suburb of Atlanta or in the heart of a deteriorating ghetto in Brooklyn. Schools formerly of high quality were repeatedly described by alumni, teachers, and others as places where "discipline problems" were virtually unheard-of. "Respect" was the word most used by those interviewed to describe the attitudes of students and parents toward these schools. "The teacher

was *always* right" was a phrase that was used again and again to describe the attitude of black parents of a generation or more ago. Most Negro students of that era would not have dreamed of complaining to their parents after being punished by a teacher, for that would have been likely to bring on a second—and worse—punishment at home. Even today, in those few instances where schools have the confidence of black parents, a wise student maintains a discreet silence at home about his difficulties with teachers, and hopes that the teachers do the same. The black culture is not a permissive culture. But in more and more cases, "student rights" activists among adults—particularly adults with an eye to political exposure—create a more contentious environment in which it is the teacher or the principal who maintains a discreet silence for fear of legal or physical retaliation. The sheer exhaustion of going through "due process" for every disruptive student who needs to be suspended is enough to discourage decisive action by many school officials.

The destruction of high-quality black schools has been associated with a breakdown in the basic framework of law and order. Nor did it require mass violence to destroy these or other black schools. Again and again those interviewed who were working in the field of education pointed out that only a fraction—perhaps no more than one tenth of the students—need to be hard-core troublemakers in order for good education to become impossible. Another way of looking at this is that only a small amount of initial selectivity (including student self-selection) or subsequent ability to suspend or expel is necessary to free a school of a major obstacle to education. At one time this small amount of selectivity was provided automatically for black and other) high schools, because most uninterested students did not go on to high school. Those whose educational performances were substandard in the lower grades were left back often enough to reach the age to leave school before reaching high school. Moreover, that legal age was lower then; and, in addition, those utterly uninterested in school were unlikely to be zealously pursued by attendance officers in the era before the "dropout" problem became an emotionally important political issue.

Formal selectivity, in terms of entrance examination cutoff scores, was the exception rather than the rule for the schools studied here. Most of these were public schools serving all students in a given area; and for some period of their history, that area has included all black children in the city, in the cases of Dunbar, Douglass, and Booker T. Washington High Schools. The private schools—St. Augustine, Xavier, and St. Paul—have entrance examinations, but these do not automatically admit or exclude, and the wide range of student test scores in these schools indicates that such scores are far from decisive in admissions. In short, no stringent "elitism" is necessary to achieve high-quality education. It is only necessary to select, or to have students self-select, in such a way as to exclude the tiny fraction who are troublemakers.

At one time, it was a relatively simple matter to suspend, expel, or transfer a disruptive student to some "special" class or "dumping ground" vocational school, allowing the rest of the educational system to proceed undisturbed. Now this has become more difficult with the growth of "student rights" and "parent power"—and, more generally, with an agonizing preoccupation with the question of what can be done for the disruptive student to "solve" his "problem." This mass projection of the academic paradigm of problem-solving to the whole society is part of the general spirit of the times, but it overlooks the vital question whether there is, in fact, a solution—whether we have it within our grasp today, and whether we shall allow the "problem" to take its fullest destructive toll before such indefinite time as we have it "solved." Recent campaigns to "get the drunk driver off the road" suggest that there are cases where the primary concern is to protect society, and where whatever remedies can be offered the individual are secondary. The enormous toll of a few destructive students on black education is one of the tragic untold stories of our time—perhaps because there is no political gain to be made by telling it, and much political capital to reap from championing "student rights."

RECOVERING THE PAST

While order and respect have been universal characteristics of the schools studied here, other ingredients have also been necessary to create academic excellence. Chief among these have been the character and ability of the principals. Some of these principals have been of heroic dimensions—fighters for civil rights at a time when that was a dangerous role—and others have been simply dedi-

cated educators. The number of these principals who have trained at top colleges and universities in the country suggests that investments made in promising Negro youths more than half a century ago have paid off large and continuing dividends.

Ability grouping has been a prominent feature of most of these schools during their periods of academic excellence—contrary to the “democratic” trends in contemporary education. For many reasons going back into history, there are very wide ranges of educational preparation and orientation among black children, and accommodating them all in one standard curriculum may often be impractical. Among Dunbar students in the period from 1938 to 1955, it was not uncommon to find individuals with I.Q.’s in the 80’s and individuals with I.Q.’s in the 140’s in the same grade. In P.S. 91 today, the ability-grouping principle includes not only several different classes in the same grade but also several different ability groupings within each class—all told, perhaps two dozen ability levels in a single grade. This may not sound plausible as an educational policy, but it works—and it works in an unpromising social setting where many more popular ideas fail to show any results.

Perhaps the most disturbing aspect of contemporary education is the extent to which the very process of testing ideas and procedures by their actual *results* has been superseded by a process of testing them by their consonance with existing *preconceptions* about education and society. Father Grant, even after his remarkable successes as principal of St. Augustine, found no receptivity at the Ford Foundation either to his appeals for money for the school or to his ideas about education. He was out of step with the rhetoric of his time and did not use the “innovative” methods that were preconceived to be necessary or beneficial to black students. Xavier Prep, even after more than half a century of demonstrable results, is still looking for a modest sum of money to improve its library, but libraries are not “exciting” or “imaginative”—as “black English” or “black studies” are.

The social settings of the schools studied here are also significant. Every one of them was an urban school. This is remarkable because during the academic heyday of most of these schools most American Negroes lived in rural and small-town settings. This suggests that the rise of such prominent blacks as those who came from these schools—which is to say, most of the top black pioneers in history of this country—seems a matter less of innate ability and more of special social settings in which individual ability could develop; and that the settings from which such black leadership arose were quite different from the social settings in which the mass of black population lived. The second point needs emphasis only because of the recent mystique surrounding “grass roots” origins and/or the faithful reflection of “grass roots” attitudes by leaders. Much of this is nothing more than brazen presumption and reckless semantics: No one ever applies labels like “middle-class” to Angela Davis or LeRoi Jones (or others of their persuasion), though that is in fact their origin, while those with a more moderate philosophy are often condemned as “middle-class”—no matter that they may actually have come from desperate poverty, and no matter how many polls show that their opinions are shared by the masses of black.

The particular cities in which the high-quality black schools arose were distinctive as centers of concentration for the “free persons of color” in the antebellum era. Except in the case of Dunbar High School in Washington, there was no unbroken historical line traceable back to the free Negroes of the early 19th century, but it seems more than coincidence that these schools took root in places where there had been schools for black children (usually private schools) 50 or 100 years earlier. That is, an old black community with a demand for good education existed even before good schools became an institutional reality. It is not that the bulk of the Negroes in these cities necessarily wanted quality education, but that there was an important nucleus that understood what was needed, and that the others recognized and respected good education when it appeared.

Apparently the great bulk of black children who benefited from these schools were *not* descendants of “free persons of color” or of middle-class Negroes in general. But the knowledge, experience, and values of the more fortunate segment of the race became their heritage. While the black educated classes were not angels—they could be as snobbish and insufferable as any other privileged group—they were a vital source of knowledge, discipline, and competence. They opened a window on a wider world of human history and culture. They did not glorify provincialism or tribalism, in the manner of some of today’s black

middle-class radicals who attempt to explate their own past by being "blacker-than-thou." Those white officials who have successfully run high-quality black schools have, without exception, been men and women who were neither impressed nor intimidated by the militant vogues of the 1960's.

Whatever is the objective importance of social history in any final assessment of black education, that history must be dealt with—if only to counter the *fictitious* history that has become part of current stereotypes. Messianic movements of whatever place or time tend to denigrate the past as a means of making themselves unique and their vision glorious. Recent black messianic movements, and white messianic movements speaking in the name of blacks, have been no exception. The picture that emerges from these visions is of an inert, fearful, and unconcerned black leadership in the past—leaders only recently superseded by bold men of vision, like themselves. This is a libel on the men and women who faced up to far more serious dangers than our generation will ever confront, who took the children of slaves and made them educated men and women, and who put in the long hours of hard work required to turn a despised mass into a cohesive community. In many ways, those communities had far more cohesion, stability, mutual respect, and plain humanity than the ghettos of today.

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STRICT SCHOOL PLEASES PARENTS, PUPILS

PAROCHIAL STUDENTS EXCEED CITY NORMS IN LEARNING

[By Lawrence Feinberg, Washington Post Staff Writer]

In a run-down neighborhood in Anacostia where apartment windows are often barred and yards have been trampled bare, there is a Catholic elementary school where dozens of rose bushes grow outside the front door. Both the roses and the school are thriving.

For the 517 students—all but three of them black—who attend Our Lady of Perpetual Help Elementary, there is homework every night—even for children in kindergarten. There are required uniforms with blue ties for boys and plaid jumpers for girls. There are prayers that must be recited at least three times a day, even through 42 percent of the students are Protestant.

Most of the teachers are strict. After school, students take turns sweeping classroom floors. Occasionally, there is a spanking if a youngster strays too far out of line.

But very few of the students at Our Lady of Perpetual Help miss their classes. Absenteeism at the school, which runs from kindergarten to eighth grade, averages only about 3 percent a day—compared to 8 percent absenteeism in Washington's public elementary schools and 18 percent in the public junior highs.

Most importantly, academic achievement at Our Lady of Perpetual Help is much higher than in Washington's public schools. Its students can read, according to standardized tests, at nearly the national standards for their grade levels, a relative rarity here.

The school's average achievement levels are still not as high as the principal, Sister Loretta Rosendale, would like them to be. Most of the school's grades are about a half year below national norms.

But in the eighth grade, for example, the students at Our Lady of Perpetual Help average only seven months below the national norm in reading. Eighth graders in D.C. public schools average 2½ years below the norm, and those in Anacostia scored even lower last year.

"Sometimes when we look at the test results, we get discouraged," Sister Loretta said. "In Montgomery County, you know, they're a year or more above the norms, and we want ours to be the best. But I think we can pat ourselves on the back a little when we compare ourselves with D.C., which is where most of our students live. (About 15 percent come from Prince George's County.) When our students go on to high school, they're prepared."

"I guess we have a reputation of being a traditional school," Sister Loretta continued. "I don't know exactly what a traditional school is, or whether I should be complimented or not. . . . We do expect the students to work here, and some things—like spelling words—the teachers just pound into them."

One Anacostia parent, Dorothy Nelson, whose son Wayne entered seventh grade at Our Lady of Perpetual Help this fall, said his grades are lower now than they used to be in public school. "But he doesn't mind going to school any more,"

she said. "There are no discipline problems, no bullies, and a lot more homework—about two hours a night."

"The kids are nicer here," said 12-year-old Wayne, who used to attend Moten Elementary School, which is across the street from Our Lady of Perpetual Help's upper school building on Morris Road SE. "They don't bully you or anything. Most of them do their homework."

But Sister Loretta stresses that Our Lady of Perpetual Help is "not just for the good kids."

"Sure we get kids who are scared of public school," she said. "But we also get some who are not achieving there and causing problems. It may not be the fault of the school or of the parents, but just that the kid needs change."

"Here they have to behave reasonably," she continued. "And we just don't have major problems. There's an atmosphere that's pounded into their heads . . . If they can't do it (remain well behaved), then we just have to tell the parents that Catholic school is not for everybody, and ask them to leave. That happens very rarely, but (the threat of expulsion) is there."

The school gives placement tests to youngsters applying after first grade, Sister Loretta said, and turns down those who score far below students already enrolled. But there are "no hard and fast cut-off points," she said, and sometimes low-scoring applicants are admitted if they seem well motivated.

With two buildings—one for kindergarten through fourth grade, the other for fifth through eighth—Our Lady of Perpetual Help is now the largest Catholic elementary school in Washington.

There are 24 others in the city, plus 12 Catholic high schools, with an overall enrollment this year of 12,120 students. The total is down just 59 students from a year ago—about one-half of 1 percent—compared to a 4.7 percent enrollment decline this fall in the city's public schools.

Since 1965, the number of students attending Catholic schools in both Washington and its suburbs has dropped by about a third, which is roughly the same as Catholic school enrollment trends nationwide. Over the past four years, however, the rate of decline has been rather slight, and the Catholic schools here, particularly those in the city, have attracted substantial numbers of Protestants most of them black.

This fall non-Catholics made up 35 percent of the enrollment in Washington's Catholic elementary schools, compared to 21 percent just four years ago and less than 5 percent in 1965. In the Maryland suburbs, which are also part of the Washington archdiocese, non-Catholics comprise 9 percent of the Catholic students this fall, compared to just 2 percent in 1973.

"The situation in our (Catholic) schools has stabilized," said Leonard De Fiore, the superintendent of schools for the Washington archdiocese, "and non-Catholics have become an important factor. It used to be that the idea of having many non-Catholics in the Catholic schools just wasn't a possibility. The Catholic Church didn't think about it. The parents didn't think about it. But now it exists in every metropolitan area, particularly among blacks. I always see it as a great compliment that (non-Catholics) are willing to send their children to Catholic schools."

All Catholic schools give preference to Catholics in admissions, De Fiore said, and all children attending Catholic schools, no matter what their faith, must take the same Catholic religion classes daily and attend mass, although Protestants do not take communion.

Every year, Our Lady of Perpetual Help School produces a trickle of converts—families as well as children, said the Rev. Peter J. Kenney, the pastor at Our Lady of Perpetual Help Church who has general authority over the school. But he explained: "We don't look at the school necessarily as an agency of proselytizing . . . we do want to expose people to a system of Christian values. We believe you can't compartmentalize religion and say it is just something you confine to 20 minutes a day."

Lillian Carter, who is a Methodist, has had two children in the school for the past seven years.

"At first it was very hard for me to explain to them about not being Catholic," she said. "They wanted to be confirmed in second grade like everyone else. I told them to wait until they turned 12 and then they could make up their own minds. . . . Now they've become very active in the Protestant church, and there's no pressure on them at the school to become Catholic."

Father Kenney said he is worried by the increase in the school's tuition, up by \$100 a child in the past two years. The rate now is \$330 a year for parish

members, whose education is subsidized by other church income, and \$505 for non-members, who pay full cost. There are discounts for families with more than one child in the school.

The charge for parishioners is about average for Catholic elementary schools in the city, but above 25 percent more than average fees in suburban Catholic schools, whose parishes can afford bigger subsidies.

The tuition still is much less, however, than in non-Catholic private schools, where charges often exceed \$2,000 a year. "We don't want to become an elite school," Father Kenney said. "But with costs ascending we are screening out low-income people."

Even so, slightly more than half of the children at the school are eligible for federal aid given to youngsters from poor families. About 15 percent of the students, Father Kenney said, come from families on welfare. They pay tuition, he said, but at a reduced rate of \$15 to \$25 a month. They are also expected to contribute personal service to the parish.

"I sacrifice. Believe me I do," said Victoria Davis, who lives in the Barry Farms public housing project and sends two sons to Our Lady of Perpetual Help. Mrs. Davis said she pays \$25 a month for tuition out of \$365 in income from welfare and child support. She said she works regularly as a volunteer in the church kitchen.

"The school is worth every penny I pay for it and all the time I spend too," she said. "You have to be willing to forfeit some of what you have to help your children.

"It's a very bad neighborhood out here, and when your children go to public school they're in the same environment. I send mine to Catholic school because I want them to get out of it even though I can't."

Inside the school's 68-year-old building at 1409 V Street SE, most of the rooms, which house kindergarten through fourth grade, have curtains on the windows, rocking chairs for teachers, and carpets in a corner for children to sprawl on. Last week they were decorated profusely for Christmas.

"The parents and the priests do all the painting and repairing," said Sister Jane Burke, the principal of the lower school. "They really work at trying to make it something nice."

The upper grade school, built 20 years ago, is located next to Our Lady of Perpetual Help Church, a circular modern building, on 16 acres on a hill that is the second highest point in Washington. It has a sweeping view of the capital's major buildings and monuments.

In both school buildings classes range from 28 to 38 students, far smaller than they were a decade ago when they sometimes reached 45, but considerably larger than the average class size of 25 in D.C. public schools.

Compared to the public schools, teachers' salaries are low—only \$4,325 a year for the six nuns and no more than \$11,000 a year for the 11 lay teachers. Teachers' salaries in the D.C. public schools range from \$11,824 a year up to about \$23,000.

"It's been pretty special teaching here," said Lucinda Jasper, a sixth grade teacher. "The pay has been low, but we don't have the problems the public schools have. We can spend our time on teaching."

Nuns and lay teachers now dress alike, except for one, Sister Kenneth Marie, who still wears a veil. Several of the parents interviewed for this article said they wished the nuns had stayed in their habits. All of them said they were glad their children had to come to school in uniform even though many of the older students said they don't like wearing the same clothes every day.

"The uniforms make all the children equal no matter what their parents earn," said Benjamin Contee, the PTA president. "All in all, I think they're slightly cheaper than having to buy different clothes. . . . The children can be individuals even when they're in uniform."

The school's policy of occasionally spanking children who misbehave also seems to have parental support.

"I want my son to go to Catholic school because he'll get discipline there," said Beverly Lucas. "They're not afraid to spank your child, and I say, 'Yes, if a child is bad in class, then you spank him.' But it's no way as strict as it used to be."

Supt. De Fiore said the Catholic school board has a policy against corporal punishment. "If there's a specific complaint," he said, "we investigate. But we have many other things to concern ourselves with."

Even though cost at Our Lady of Perpetual Help has risen to about \$500 per pupil a year, they are still far less than the \$2,000 a year per pupil cost in D.C. public schools.

Besides having relatively large classes, low-paid teachers, and low maintenance costs, the school keeps costs down by cutting back on what Father Kenney calls frills. Unlike public schools, Our Lady of Perpetual Help has no nonprofessional aides—parents volunteer instead. There are no special teachers for art, music, or physical education; these subjects are taught by regular classroom teachers. For children in the upper school, physical education classes are held in a park, except in bad weather when they switch to the church social hall.

The one thing the school doesn't skimp on is books. Every afternoon most children carry home big satchels of them to do their homework. By contrast, when children leave Moten, the public school across the street, few take books with them.

"I like to see them taking all those books home," Dorothy Nelson said. "That's the way a school ought to be."

Senator **PACKWOOD**. Our next witness today is Congressman James Delaney of New York, and I have to say in appreciation that if there is any single Member of Congress who has been more responsible for pushing, pursuing, nudging the idea along for tuition tax credits for public and private schools, it is Congressman Delaney.

Some of us come late to this field, but he was the initiator of this legislation. Congressman, I do not know how many years ago, but we are all indebted to the lead you took.

STATEMENT OF HON. JAMES J. DELANEY, CONGRESSMAN FROM NEW YORK

Mr. **DELANEY**. Thank you for your kind statement. I believe it was back around 1950 or thereabouts that I started campaigning, and I have a very brief statement to make here at this time.

Senator **PACKWOOD**. Go right ahead.

Mr. **DELANEY**. I will make this statement. It is very interesting. I was listening to the Senator's statement, and some very interesting facts about education which are not commonly known. The first public education in New York City was by one of the parochial schools down on Barkley Street. Its name escapes me. They had as many non-Catholics; they had colored; they had everything. It was open to the public, and it was not until the 1870's or so that we started to get public schools, any education outside of a private education. You had to go to a private institution, and of course this has grown.

We people take for granted the fact that we have public education. It has always been, and it always will be. Now, this is a very short statement, and as I say, I compliment you for taking the ball and carrying it. I have had it for 25 or 28 years, and I have not been very successful. You people come along and give a breath of fresh air to a subject which had practically died on the limb.

Senator **PACKWOOD**. Congressman, I think we are going to be successful in this Congress.

Mr. **DELANEY**. It is due to you and Mr. Moynihan and the members of your committee, because we were not very successful. We could not even get a hearing in the House over a long period of years, but today as the subcommittee considers legislation to provide tax credits for expenses incurred by those who send their children to nonpublic school, private, religious schools, you have an opportunity to help a taxpayer who needs it the most, and that is the hardworking middle-class Americans.

These people bear the heaviest burden of taxes. With education costs skyrocketing as they are, they are in desperate need of assistance.

I have worked long and hard to provide fair taxation for those who send their children to private or parochial schools, and I am gratified to see that you and our colleagues in the 95th Congress are taking an active interest in this issue.

The time has come for Congress to take meaningful steps to boost these most valuable elements of our education system. We should be proud of this Nation's commitment to quality education, quality education for all. Those of us who were in Congress when Federal aid to education was first enacted remember the long struggle to insure adequate aid for all parts of the educational community. I was proud to have played a part in that fight.

By approving the tuition tax credit, the subcommittee can take another long step in providing adequate aid to education.

Legislation I have sponsored will allow the taxpayer a tax credit of \$500 or a tax deduction of \$1,000 for each child entered in a private or public school. This credit or tax deduction will be a valuable aid for those who would like to utilize a private institution but feel costs are exorbitant.

One of the cornerstones of education policy in the United States has been the guaranteed freedom to educate our children in private and religious schools at the elementary, secondary, and college levels. The first Elementary and Secondary Education Act reinforced this guarantee by providing certain forms of aid to these institutions, that is, the time release and the textbooks and the construction of certain types in one or two other ways. So, aid has been granted to schools of all types.

In recent years, we have seen an erosion in the middle American family's ability to exercise the right to educate their children as they desire. The costs of textbooks, teachers' salaries, building maintenance, and administrative services have risen uncontrollably in recent years. The average taxpayer can no longer afford to send his children to private institutions for higher or even secondary education. By making it easier to afford education, we will strengthen the private and religious schools which are such an integral part of our educational system.

Mr. Chairman, it is my hope that the members of the subcommittee will join with me in supporting this tuition tax credit. This opportunity to aid the hardworking, middle-class American taxpayer is one we can ill afford to pass up.

Now, I have a statement here which I ask to be considered part of the record, and with your permission, I want to read what I had to say. It is just a short sentence. I realize that time is of the essence. This was made in July 1961. I made this point when I voted against President Kennedy's School Assistance Act, and I stated then:

If we are to give aid only to children who attend public school and exclude all others who also contribute to the making of our national life, we shall be taking the first long step in the direction of rigid uniformity, which is a thing we are striving to avoid. Democracy is predicated upon diversity. State monopoly in education is not desirable in a democracy.

Now, this viewpoint is just as valid today as it was then. The need is more desperate. If we are to maintain an independent and multifaceted system of educational opportunity for all Americans today,

and for future generations to come, we must act now to stave off the collapse of that system which would result from the future demise of our private institutions and the subsequent chaos which would occur in the private sector.

Again, I say to you and to your colleagues, I compliment you beyond words that I have for the work that you are doing and the effort you have made to provide middle-income people who need it so much with assistance, educational assistance.

Have you any questions I might be able to answer?

Senator PACKWOOD. Certainly. I know your interest will not flag. I think I can guarantee we can get this to the House, and we will need every ounce of energy you've got to get that through the Ways and Means Committee onto the floor.

Mr. DELANEY. I appreciate your optimism in hoping we can get it through the House. I remember years ago they would not hold hearings. I tried to have hearings time and time again over a period of 25 years or more, and that is a long, hard struggle. This thing had almost died a natural death, until Mr. Packwood and Mr. Moynihan came in and really put some life into it, and gave us an opportunity to be heard, and I think if this does make the floor in the House, we will be as successful as you are here in the Senate.

I cannot say enough to compliment you on the wonderful job you are doing.

Senator PACKWOOD. Thank you, sir.

Following the committee rule of first come, first served, on questions, we will turn to Senator Roth.

Senator ROTH. Mr. Delaney, I am delighted to have you here. I was particularly interested in your comments about the need to help the, and I quote, "to help the taxpayers who need help the most, hard-working, middle-class Americans."

Now, the Congressional Budget Office and HEW are taking the point of view that with respect to higher education, middle America is making more money and that their income has risen faster than the cost of education. I find this very hard to believe, and I think it is a deliberate effort to distort the facts. As far as I can tell, it is middle America which has been hit the hardest insofar as sending their children to school.

Would you agree with what CBO is saying? Have you seen their statement?

Mr. DELANEY. I have seen some statements. I have not studied them, but I would agree; I think it is the middle class, the middle class in everything that happens to bear the greatest burden. Even in our hospital situation, the very rich or the wealthy can take care of themselves, and those who have no means can go in the other ward, but any of us who have experienced hospital stays know that when the middle class gets into a hospital, it is just too much.

Now, if you have two or three children going to school, the cost of tuition is so great. I was talking to the dean of Georgetown University, the Medical School. He tells me the tuition there is \$12,500 a year, to the medical school, and this does not even support the school. It does not even partially support the school. You know how we need doctors all over. We need professional men of all types, but particularly doctors, and you know what we do to induce doctors to go into the armed services.

We provide them with a bonus and liberal living quarters, and liberal allowances, and then with a good pension, and they are permitted to take all of the courses on new discoveries of all types.

I have had some experience with them. As you know, at one time I could not walk. I used to waddle around more or less like a penguin, and I had two artificial hips put in, two total hip replacements. They take the femur and drill it out and put a prosthesis made of stainless steel in there, and use cement and wire, and then at the pelvis they so-call clean the streatus or scrape the calcium off and put plastic on that with an inverted hole and fit this thing in.

I couldn't sleep more than 15 minutes without changing positions. These things are costly, and they did not have them. They were developed in England, in Manchester. In the vernacular of the trade, they called them Manchester hips. I remember Mary Alaska invited me up to attend the honorarium for Dr. Shalony, who was the pioneer discovering this, and he had the premier dancer of the Metropolitan Opera who had an accident and who had one hip damaged, so she said, I want you two retreads to do a little dance here, and I refused to go on, because I had both hips done, and the star only had one, but she could take her leg, through study, and twist it all around.

I am going off the subject a little, but this is costly, and it is not available, and for years Food and Drug would not permit them to use this cement, and I am a trustee on one hospital and a director on another, and they sent a team, we sent a team over to England, and there they studied one for 3 or 4 months under Dr. Shalony, and they came back and they are performing in my county of Queens and my adjoining county of Brooklyn at the Wycoff Heights Hospital. They are doing these operations successfully, and age does not appear to have much to do with it, because they take people there who are in their seventies and eighties who were absolutely crippled, and they walk out of there.

I don't say they are doing any of the new dances, but they are able to live, and I can testify for myself where I could not sleep for more than 20 minutes without shifting position. I can sleep for hours at a time now, and I suffer no pain. I am not even conscious of these things. I had it done up at Columbia Presbyterian Hospital.

Senator ROTH. Mr. Delaney, my time is almost at an end. I would just like to in closing say that we are going to need your help on the House side, because that is where the problems are coming. With respect to the college tax credit, for example, we have been unable to get a direct vote because the leadership over there has prevented it. So, I will hope you will use your leadership and friendship to help us get a vote there.

MR. DELANEY. Whatever influence I have, I will use, I assure you. I will do all in my power.

Senator PACKWOOD. Senator Moynihan?

Senator MOYNIHAN. Mr. Chairman, it is a great honor for a New York Senator to welcome to this committee the distinguished chairman of the Rules Committee and the dean of our delegation, a man whose public career is singularly associated with the subject before us.

Congressman Delaney has espoused this cause for a generation in American politics and has done so without rancor, but also with no willingness to recede on what he has judged to be an issue of

right, an issue of fairness and entitlement, and I would like to bear witness to the sheer endurance that you have brought to this effort, and to suggest to you that in our hearings we have seen some change.

I thought one of the more remarkable little comments that we heard in these hearings was offered by Rabbi Goldenberg when he testified before us on behalf of Agudath Israel. He said, when I first came to Washington in 1961 and proposed this, my picture was on the first page of the New York Times, it was such an extraordinary event. I assume we will not even be on page 90 this time, he said, because this idea has come to the point where people understand it. It is no longer something extraordinary or shocking.

We have also heard from a series of constitutional lawyers and scholars of the first quality who absolutely assure us that we are doing something which is fully within the range of constitutional behavior, and encouraged us to proceed. These are men of the first rank of American legal and scholarly standing.

We have heard evidence that so clearly establishes the fact that the *Everson* case was really the *Plessy* versus *Ferguson* of this issue, that the court will in time reverse itself, and that when it does, the previous era will seem erratic and faintly incredible. But the one thing we have not heard, sir, is from our administration, and in the presence of my colleagues and in the honored presence of our very good friend, the junior Senator from California, I would like to suggest to you that our party, yours and mine, sir, has a problem here.

I helped draft the 1964 Democratic platform on this issue, and agreed with persons who took your side of the issue. In those days, and you remember them well, we were committed to seeing that any Federal aid to education include non-Government schools, not in some token way, but with some equity and full sharing. Your statement points out that the Elementary and Secondary Education Act did include some such aid, although not much.

This went by without protest from the parochial schools. The last time the Democratic platform was constructed, we renewed our commitment, and the Republican Party in its platform made a comparable commitment. But it was not hard for the Republican Party to do that, because already a Republican Secretary of the Treasury had come before the Ways and Means Committee and said, This is the way we will do it. That was Secretary George Shultz.

In this last campaign President Carter, then Governor Carter, in the closing hours of the campaign, which as I said are so productive of public policy initiatives, said, "Therefore I am firmly committed to finding constitutionally acceptable methods of providing aid to parents whose children attend parochial schools." I believe, and I would like anyone from the press present to hear me, I have not the slightest doubt that the President is as firm in that commitment as ever.

I have no reason in the world to think he does not hold to that commitment, but when we asked the representatives of his administration to come here, Treasury and HEW came up and said no, but the Department of HEW would not even send us an educational official. They have an Assistant Secretary of HEW for Education who has very little work. I put that to Secretary Califano last night, and he agreed. There is no work. They thought the position looked good about 10

years ago when they created it. It sounds like you are doing something for education. The person, whoever it is—there is a very fine person there now—has little else to do.

There is also a Commissioner of Education. He was not present yesterday, either. In the meantime, the Department has commissioned a study by five former Commissioners of Education about education in the United States in the last quarter of this century, and the five Commissioners met and in their report, did not even raise the subject of private education.

Senator PACKWOOD. If I might interrupt you, we do have a 5-minute rule as we go along, and as long as you are talking about the frailties of the Democratic Party, I will allow you to go on for another 2 minutes.

[General laughter.]

Senator MOYNIHAN. I mean this. Our party cannot go looking for votes from our people in October and then in December appoint persons to these positions whose real interest is to see that these schools cease to exist. They still think of them as foreign schools, and it is a scandal.

Mr. Chairman, I have never talked this long in your presence. Do you not feel that our party does have a responsibility?

Mr. DELANEY. Absolutely, committed to the policy, and under the leadership you have displayed here, now, in the last few moments, I feel that we can be successful and will be.

Senator MOYNIHAN. And support the President and keep his commitment in spite of the people he has appointed to the Department of Health, Education, and Welfare.

Mr. DELANEY. Difficult, but possible.

Senator MOYNIHAN. Difficult but possible. That is the spirit in which you have persisted, sir, for a quarter of a century, and I would like to pay tribute to it.

Senator PACKWOOD. Congressman, thank you very much.

Mr. DELANEY. Thank you.

[The prepared statement of Mr. Delaney follows:]

STATEMENT OF HON. JAMES J. DELANEY, U.S. REPRESENTATIVE FROM THE STATE OF NEW YORK

Mr. Chairman, today as the Subcommittee considers legislation to provide tax credits for expenses incurred by those who send their children to private or religious schools, you have an opportunity to help the taxpayers who need help the most—hard working middle-class Americans.

These people bear the heaviest burden of taxes. With education costs skyrocketing they are in desperate need of assistance.

I have worked long and hard to provide fair taxation for those who send their children to private and parochial schools. I am gratified to see my colleagues in the 95th Congress taking an active interest in this issue as well.

The time has come for the Congress to take meaningful steps to boost these most valuable elements of our education system.

We should be proud of this nation's commitment to quality education for all. Those of us who were in Congress when federal aid to education was first enacted remember the long struggle to insure adequate aid for all parts of the education community. I was proud to have played a role in that fight.

By approving the tuition tax credit the subcommittee can take another step in providing adequate aid to education.

Legislation I have sponsored will allow the taxpayer a tax credit of \$500 or a tax deduction of \$1,000 for each child entered in a private education institution.

This credit or tax deduction will be a valuable aid for those who would like to utilize a private institution but feel costs are exorbitant.

One of the cornerstones of education policy in the United States has been the guaranteed freedom to educate our children in private and religious schools at the elementary, secondary, and college levels. The first Elementary and Secondary Education Act reinforced this guarantee by providing certain forms of aid to these institutions.

In recent years we have seen an erosion in the middle American's ability to exercise the right to educate their children as they desire.

The costs of textbooks, teachers salaries, building maintenance, and administrative service have risen uncontrollably in recent years. The average taxpayer can no longer afford to send his children to private institutions for higher, or even secondary education.

By making it easier to afford education we will strengthen the private and religious schools which are such an integral part of our education system.

Mr. Chairman, it is my hope the members of the subcommittee will join with me in supporting the tuition tax credit. This opportunity to aid the hard working middle-class American taxpayer is one we can ill-afford to pass up.

Senator PACKWOOD. I see that our next witness, Congressman Mikva, has just arrived. Ab, you are just in time. I might say to the remainder of the witnesses that the policy of the committee has been to try to keep statements to 10 minutes in chief so that we have time for questions. I want to finish this entire list of questions before we break for lunch, because we have another subject to take up this afternoon, and I do not want to put that panel off, those witnesses, any later than necessary.

We will limit ourselves in our first round of questions to 5 minutes, and try to finish hopefully by 12 or 12:30 today. Congressman?

STATEMENT OF HON. ARNER J. MIKVA, CONGRESSMAN FROM ILLINOIS

Mr. MIKVA. Thank you. In light of that, I will ask that my statement be put in the record in full, and I will very briefly summarize it.

Senator PACKWOOD. All statements will be put in the record in full.

Mr. MIKVA. Thank you very much. I appreciate the opportunity to be here, and I very much appreciate these hearings. As the good Senator from Delaware and the good Senator from New York know, this is a subject on which we have gone around and around. We all have very strong views on it, and I think that this is perhaps the first time that we have had a chance to exchange our views in a non-crisis setting, where we are not pointing guns at each other's heads.

I commend all of you for holding these hearings. Not only have you done well by this body, but you have set a good example for our body. Chairman Ullman has announced hearings of the Ways and Means Committee on this subject later this month, and I really think that the perseverance and hard work of the Senate on this issue is finally going to pay off. I think we are going to get some kind of a measure through this Congress, and therefore the question now is how.

Senator PACKWOOD. Ab, there will be differences of opinion. You have an approach which is unique, slightly different than the tuition credit bill, but I hope that we can get something through the committees of conference onto the floor of the House and the floor of the Senate. The House can no longer, I think, in good conscience say we have not had time for hearings, or this subject has not had full and

fair discussion. It has been discussed and discussed and discussed, and written about and written about and written about, and it is time for a vote on something.

Mr. MIKVA. I think we are going to get it, Senator. I really think the time has come, and in a way it took the kind of catharsis we just went through on the conference on society security. It took the catharsis of a previous time when a tuition credit rider had been put onto a House bill, because some of us, and I include myself in this, do not feel comfortable about using the tax code even for good social purposes. If we are starting all over again, I would be opposed to most of the preferences now in the code. We are not starting over. That is really the problem. We are trying to do equity within the limits of an existing framework, and one of the reasons why I have come down so much in favor of some kind of relief is that paradoxically we provide all kinds of similar relief for taxpayers when they do not need it.

Now, if a company decides to send its executives back to college, they can deduct the full cost of that business training, tuition expenses and everything else, while he is on the job. If they want to send him out to a think tank in Aspen, in your neck of the woods, they can deduct that.

Senator PACKWOOD. You know, the irony of that is that you are probably right, but the IRS says only not taxable to the employee if it is related to the job, but for an executive almost any kind of training is related to your job, and if you take some poor devil who is making \$5,000 or \$6,000 a year with a company, in a very low-skilled job, and that person wants to upgrade himself and get some training that may not be related to the job, the IRS wants to tax him on it.

Mr. MIKVA. That is the paradox that leads me and, I suspect, some of you to the position that we really must do something by way of the tax code to try to balance these equities, and why I have come down in favor of a tax deferral scheme. I have described it in my statement. I will not go into details. Let me just spend a moment or two comparing it with the tax credit that you and Senator Roth and Senator Moynihan have put up.

The main problem we have with the credit is, in order for it to be meaningful, it runs into an awful lot of bread. I think, Senator Roth, that your \$250 tax credit, which is certainly a minimum—in fact, I think it is subminimum in terms of what the needs are—would be a revenue loss of perhaps \$1 billion. When you get up to \$500 it is double that, and as you extend it to beyond higher education, secondary education, as some of you have done, it gets to even more. There is no free lunch.

I don't suggest that my proposal won't cost some money, but because it is a deferral scheme—and because I have even pinned an interest factor to it—over a short period of time it does become self-sustaining. Indeed, the Government may even make a slight profit from it, depending on what interest rate is set, because basically a deferral scheme is a loan program for higher income taxpayers.

I have a daughter in law school at Northwestern. She is 25 years old. She has been emancipated for several years. She decided to go to law school. The tuition at Northwestern is approximately \$5,000. Not

only is she not eligible for any grant aid, she could not even get any of the loan programs we are talking about, because my income is too high.

She was outraged. She said, I have been independent of you for years. It is ridiculous that your income should be attributed to me. I said, unfortunately, that is the way the system is working. The advantage of a deferral scheme is, it makes a loan program available to taxpayers who otherwise would not have it available, and really, the loan is secured by future taxes.

Nothing could be more secure than that those taxpayers will be paying taxes in future years, and the whole idea of a deferral scheme is to provide loan assistance when it is needed at a low interest rate, and avoid any kind of major revenue loss to the country.

My proposal allows up to \$1,500 a year in tax deferral with repayments to start after the student is out of college and be paid over a 10-year period. It would have an initial startup cost which is very substantial, but by 1990 that would be recouped, and from there on in the program would operate at a modest profit. It is flexible. If 1990 is too far down the road to get current, you can reduce the amount of aid or increase the interest factor or reduce the level of repayments.

Two big advantages over the tax relief proposals you are considering are, one, you can provide more assistance. As I said, my proposal is for \$1,500. Some university officials I have talked to really think it should go up to \$2,500 to be a meaningful amount of help to people with one, two, or three people in college at the same time. And second, the revenue loss will be slight or nonexistent, depending upon the various ingredients you put in.

For those reasons, I heartily commend something like a tax deferral scheme. Although I have heard nothing directly from the administration; like most of you, I have heard some of the indirect assurances that something is going to be done.

Frankly, anything else that is going to be done will be more expensive and less targeted at the groups we are concerned about than something with the tax code. Grants—no one is really expecting any major increase in the amount available for grants to take in the group of taxpayers we are talking about. Even the existing loan program cannot receive the kind of money for increasing the loan programs over what we now have.

So, I think if there is going to be any relief, it is going to be through a measure within the tax code, and while I, too, am reluctant to see any additional preferences put in, I am also reluctant to see any additional complications put on the form. At a certain point, something as precious as a college education—which has been so valuable to this country—cannot be put out of reach of middle income taxpayers. For that reason I commend all of your efforts and I hope you will give serious consideration to what I have suggested.

Senator PACKWOOD. Congressman, thank you and let me congratulate you on your usual innovative and intelligent approach. You are one of the bright, bright Members of this Congress who come up with not ideological knee jerk answers all the time, but rational practical suggestions many of which are becoming law.

Mr. MIKVA. You are very kind.

Senator PACKWOOD. Senator Roth?

Senator ROTH. It is good to have you here today. I am delighted to have you testify as to the need for tax relief, even though we may not necessarily agree as to approach. I am going to be very brief, because we are trying to complete the hearing this morning. I do want to point out that the one thing we did accomplish in the House last year is to have some very extensive hearings before the House Budget Committee, and I wanted to make that clear.

There seems to be this opinion in HEW and even in our CBO office that the middle class does not need help, that their income is going up fast enough so they do not deserve any special attention at this time. I take it that you do not agree with that. Some people say that if we help anyone who earns in excess of \$15,000 or \$20,000, we are helping the rich. I wonder what your views are on this. What about the man who is making \$30,000, who is making even \$40,000, and has one or two children in college?

Mr. MIKVA. They are caught in the crack more than anyone else in our entire economic structure. If you are very poor and if the student is college oriented, there are programs available like private scholarships, Government scholarships, grants, loan programs, work programs. If you are very, very rich, possessing all kinds of wealth, so that you do not have a cash flow problem, you can make it. But, the people you are talking about are the ones who are really in the middle. They are ineligible for every one of the existing programs. They are ineligible for all of the private programs, and they just do not have enough aftertax dollars left to pay the current levels of tuition.

Senator ROTH. There are too many today who seem to have an attitude that we ought to penalize those who work and those who succeed. This is contrary to what this country has been all about, to have incentives to move up, and that is what education is about, and I am delighted to hear you make that statement.

There is something wrong when the head of education had to resign 3 years ago because he only made \$37,500, and he couldn't afford to send his children to college. Now, if he can't do it, what about the people in the private sector who are making \$25,000, \$30,000, or \$35,000?

Our final question. The experience with loans has not been particularly good. In a sense, we can equate what you are proposing here to a loan. We have not been very successful, for whatever reason, I am not certain, in securing repayment. We understand, according to the New York Times, they've even got a person working in the Secretary of HEW's Office who has not paid back his loan.

Are we just extending a program which is not succeeding very well?

Mr. MIKVA. The advantage of my program is that even though it looks like a loan program, it has the greatest security in the world, future taxes, and the IRS does a pretty good job in collecting taxes that are due. As I say, it looks like a loan program, but because it is secured by future taxes, I think the default rate would be pretty low.

Senator ROTH. One other aspect does give me some concern. Most people who have children in college are in their forties or fifties, so we would be imposing a tax upon them in many cases in a stage in life where their income is going down or they are beginning to reach the senior citizen stage, and that is an aspect which does give me some concern.

Mr. MIKVA. Except the rates will be lower. Actually, in some instances, the Government might make money, because the income or the loan will be repaid. Let's put it this way. The deferral would be recouped at a higher rate, because people would be in a higher tax bracket at that particular time. In some instances, as you suggest, they would be in a lower tax bracket. I have a feeling there would be an almost natural balance.

Senator ROTH. But the thrust of it would mean that people would be paying these taxes in a period when they are older, and many of them would be having serious financial problems as senior citizens.

Mr. MIKVA. I think if you look at the family profile of the kind of people we are talking about helping, you will find that those people, when they reach their sixties, have some of their best economic periods. Not that their earning power is necessarily higher, even though that is also sometimes true, but their responsibilities have eased, and they are still at a good earning curve. Most of them do not retire at 65. We are talking about professional people.

I think the burden at that age is not necessarily an unmanageable one, certainly, if we are talking just in equivalent amounts, I would have to agree with you that obviously a credit is better than a deferral, but I think if you ask the average parent which would you rather have, \$1,500 of deferral or \$250 of credit, he would take the \$1,500. I know that in my situation, where I am trying to help two others go through college, plus my eldest, if I did not need the \$250, I would turn it back to you, because it is almost embarrassingly low, given the size of tuition payments most parents have to pay.

Senator ROTH. While we were just sitting talking, a suggestion was made that perhaps there ought to be an option.

Mr. MIKVA. That is a possibility.

Senator ROTH. Thank you for your innovative suggestion.

Senator MOYNIHAN. I was going to suggest that a taxpayer's option might be a very useful thing, because it would address different circumstances. If you would consider that the legislation of Senator Packwood and myself and that which Senator Roth has certainly been interested in as well would provide assistance for elementary and secondary schools, now, there you have persons in a different stage in their income cycle.

I remember, I thought I was sort of rich when I was 33 and had three kids in school. When I got to be 45, I was poor again. I didn't understand how it happened. The kids grew up. That's how it happened.

Mr. MIKVA. You took a bad job, Senator.

Senator MOYNIHAN. Yes. [General laughter.]

But in that situation, a tax credit of \$400—we have heard witnesses, mothers who are sending children to schools, say that that would make all of the difference. That would be all they need. So, perhaps we could consider some kind of option here.

I just want to repeat what the chairman has said. It is such a pleasure to have you here and, of course, to have you over there, thinking and advising. You are also, of course, a very distinguished member of the bar, and you might be interested to know that one of the things that I think has characterized our hearings in the last couple of days is some very forceful and effectively presented constitutional cases.

We have heard the case of both sides, but I do not think we have heard anyone make a better case for the constitutionality of our proposal than Prof. Antonin Scalia, professor of law at the University of Chicago. He may be known to you as a member of the Illinois bar. I would take the liberty of sending over those briefs, as it were, because I think one does sense a very different climate of legal and scholarly opinion here with respect to the nature of the first amendment.

Particularly, we heard from Prof. Walter Berns.

Mr. MIKVA. He is known to me, a very distinguished scholar.

Senator MOYNIHAN. He quoted Calhoun, and said, you stand up and say what you think the Constitution is. The Congress must not be passive in the face of the court, and just let the court decide. The Congress has an obligation itself to state what it believes, and in the end we obey what the Court judges, but in the interim, we propound our own views.

I wonder if you do not share that view.

Mr. MIKVA. I do. The doctrine is known as interstitial filling of the constitutional cracks, as it were, and this is an area where I have been intrigued. As you know from our private discussion, I have wanted to see some kind of relief extended to taxpayers as well, assuming, and I believe this is a reasonable assumption, that we can do this without hurting the public school system or our commitment to the public school system. The pluralism of this country is not an accident. It is one which is cherished, and we ought to preserve it; the fact of the matter is, in any of the big cities of this country, that pluralism may be the only salvation of the public school system.

Without some kind of a model of a good private school system, the whole public school concept in the inner city may go down the drain, and I would like to see it extended. I would think there are some constitutional problems. I think they can be overcome, and I would welcome your sending me the briefs.

I have been struck by the idea as to why I don't think it is an impossible task. I heard the last statement our good chairman, Mr. Delaney, made. If you can take a contribution and give it to a parochial school, and deduct that contribution from your income tax, which you can do under existing law, it seems to me that you are stretching the notion of impossibility to say that you cannot constitutionally find a way of making a tuition payment to that school equally deductible, creditable, or deferrable.

Senator MOYNIHAN. One of the nice things you would have liked is that Walter Berns in his closing remarks said, you really must do this and get this over and spare those gentlemen on the Supreme Court the embarrassments to which they are now subjected. He said they have had to solemnly assert that it was constitutional to give a book to a parochial school but unconstitutional to give a globe.

[General laughter.]

Senator MOYNIHAN. Thank you so much.

Senator PACKWOOD. Ab, thank you.

Mr. MIKVA. Thank you.

[The prepared statement of Mr. Mikva follows:]

STATEMENT OF ABNER J. MIKVA, U.S. REPRESENTATIVE FROM THE STATE OF ILLINOIS

Mr. Chairman, thank you for inviting me to appear before the Subcommittee on Taxation and Debt Management to discuss tuition tax relief proposals. I think these hearings may be the signal that, at long last, relief is going to be provided to thousands of middle class students and their families.

For most Americans, no goal is more highly prized than a higher education degree or advanced vocational training. These postsecondary programs have been the key to both professional growth and personal satisfaction for individuals. And, for the country, an accessible higher education system has been the key to our national growth and progress.

Our educational system has had such a profound effect upon the country that it is impossible to cost out all the benefits. No one can put a dollar figure on the value of avoiding the type of rigid class structure which has afflicted so many other nations. And, no one can measure the obvious contributions that a low cost and accessible educational system has made to the United States' enjoyment of the highest standard of living in the world over the last forty years. Finally, no one can compute the effect of an education system that has kept our society vital and creative when others have slipped into stagnancy.

Paradoxically, an adult can deduct all kind of business expenses, from the cost of entertainment to the payment of country club dues. He or she can even deduct contributions to a higher education institution. But, even though a successful earning (and taxpaying) career is almost always enhanced by higher education, there is no tax sensitivity to the expenses of such higher education. When the student or the parents need help the most, they are faced with a stonewall.

The personal and national goals made possible by education have slipped farther and farther out of reach in recent years. During the last five years, the expense of attending college has risen 45 percent. Next year, some schools will charge more than \$5,000 per year for tuition. Unless that gap is narrowed substantially, the ripples of frustration caused by families unable to educate their children will develop into a tidal wave that strikes against our whole society.

To be effective, higher education policy should guarantee equal educational opportunities, financial stability for the educational institutions and financial relief for students and their families.

In order to assure all three functions, the federal government already spends \$14.3 billion on higher education—more than half of which is spent for equalizing opportunity. This reflects the impact that costs have had on the distribution of assistance among types of students. Since 1972, over 73 percent of all direct financial assistance has gone to families with incomes below \$15,000. In fact, among the grant programs, no family with income above \$15,000 receives anything. This targeting of funds has helped considerably to equalize access to college. By contrast, only 15 percent of federal assistance goes towards easing the financial burden of higher education costs for middle income people.

The effect of rising tuition costs and the unavailability of grant assistance has stretched the resources of the middle class to the breaking-point and threatened the stability of many institutions. It has meant that enrollments at public universities have nearly quadrupled while the more expensive private universities are unable to maintain full enrollment. The two major programs for helping the middle class, the National Direct Student Loan (NDSL) program and the Guaranteed Student Loan Program (GSLP) often have been characterized by quixotic determinations of eligibility.

Tax credits appear as an attractive solution to shortcomings of existing programs for middle income people because application procedures are eliminated, and defaults minimized. But, the type and size of the credit raise important policy considerations about the level of assistance to be provided students, the loss of revenue to the federal treasury, the impact of credits upon existing assistance programs, and the effect of the credit upon institutions.

Mr. Chairman, I suggest that the tuition tax credit proposals do not solve many problems. Tuition costs now average over \$3,300 per year at higher education institutions, and a \$500 credit is simply not adequate relief. The loss of revenue to the Federal Treasury, however, is very high—over \$2.3 billion per year—and that is only for higher education. These large numbers inevitably mean a trimming of other programs of education assistance, presenting the classic case of robbing Peter to pay Paul. The unfortunate result is that

universities will receive less money thereby lowering the general quality of the school's offerings, or that poor students will have their assistance cut back. Nor will making the tax credit refundable provide enough help, since it is netted against other assistance, and like the earned income tax credit, will be underutilized. Finally, the effect upon institutions could be damaging. Those schools in high demand will merely raise tuition costs and eliminate the advantage for students, but all other schools will not raise fees at all even though the impact of the credit program will probably reduce their direct assistance from the government.

Earlier this year, I proposed an alternative to the straight tax credit which would permit the student or the parents of the student to defer from taxes up to \$1,500 per year of eligible educational expenses, and to repay in full the deferred amount at a 3 percent interest rate beginning after completion of the educational program. The repayment provision protects the federal revenues in the long run, and allows for a larger annual deferred credit than can be provided under the straight credit.

While the initial revenue loss under the tax deferment concept is almost \$8 billion, as repayment begins, the annual costs decline until the repayments to the Treasury balance the annual amounts deferred. In the long run, therefore, more relief can be provided individuals with no revenue loss to the Treasury.

Moreover, the deferment concept is more flexible. If the early cost is too high, the period for repayment may be shortened to five years, or the maximum deferred amount phased in—\$750 for the first several years and then \$1,500 (or more) permanently.

For example, a program beginning in FY 1978 which permitted a taxpayer to defer \$1,500 per year at 3 percent interest to be repaid in 10 years would balance revenue loss with repayments in FY 1990. If repayment was required in five years, deferred amounts would balance repayments in FY 1987.

The tax deferment concept also enjoys the advantage of dovetailing with existing programs more neatly. Current programs for low income students and families would remain untouched, and recipients would continue to be eligible for grants because most of them have no tax liability against which to take deferments. However, the current loan programs—now costing over \$300 million per year—could be reduced or eliminated because of the high amount of taxes that can be deferred and then repaid at lower interest rates than current loan programs. And, the parental personal exemption for students over 19 might be reduced from current total exemptions of \$715 million to reflect the much greater value of the tax deferment. This two tier system of grants under existing program for low income families and tax deferments for middle income tax paying people also reduces the complexities of netting scholarships and grants against tax credits. All of these advantages, of course, hinge upon being able to provide more assistance to people at no long range loss to the Treasury. The tax credit must always be comparatively small, and therefore unhelpful to the taxpayer, in order to keep from busting the budget.

Mr. Chairman, I know how hard the Senate has worked on the issue of tuition tax credits, and we are all grateful for the attention which has been focused on the costs of education as a result of the Senate's work. However, I think the goals of the tax credit can be better met through a deferment program, without sacrificing our efforts to support other aspects of the educational system and without sacrificing our efforts to balance the budget. With deferment, equal educational opportunities can continue to be provided, and the financial stability of institutions and middle class students and their families can be assured. If educational policy does not move positively towards all these goals, then the problems of higher education are not being solved, they are merely being postponed.

Senator PACKWOOD. Our next witness is Melvin Eggers, chancellor and president of Syracuse University in New York.

Senator MOYNIHAN. May I take the privilege also of welcoming a good friend and a former colleague at the university and a very distinguished economist?

STATEMENT OF MELVIN EGGERS, COMMISSION ON INDEPENDENT COLLEGES AND UNIVERSITIES OF NEW YORK

Mr. EGGERS. I am here as a representative of Syracuse University, which I am privileged to serve, and also as a representative of the Independent Colleges and Universities. This is an association of institutions which has been formed to promote the welfare of independent colleges and universities in New York State.

Most of our efforts go to activities in Albany, but we have a number of concerns that center here in Washington as well. There is a national association, the National Association of Independent Colleges and Universities, but it has been in operation only a relatively short time in its present form. It will meet in early February, and has not yet worked out its formal position, although I believe it will support the statement which I submitted.

I have a relatively brief paper which I shall not read. I will rather make a few assertions which I think are next to self-evident. Perhaps I should say, having been raised in a Lutheran tradition, that I should like to nail a few more theses to some other door. I shall direct my remarks to higher education, and I support the Moynihan-Packwood proposal, although I would prefer a different schedule of tax credits. The complex set of programs that are all need-based, basic grants, supplementary grants, work-study, and loans have gone a long way to provide access. Clearly, that was the first priority, and I assume the tax credit program would not reduce the vitality of that set of programs. But now we should take on a second priority, which is to reduce the heavy burden on middle-income families who have dependents in college.

Others have spoken to the need. Others have spoken to the burdens borne by middle-income families who have two or three children at school, and I shall not belabor that point at this time.

The tax credit as a method of dealing with this simply extends the established practice of modifying the tax structure to take into account special burdens or to provide incentives. Some part of the burden of the expenditures of buying a home are borne through tax deduction on interest and taxes on houses. Some portion of the special burdens of medical bills are borne by having special deductions for medical bills. In the business field, there is a tax credit for investment.

So, the tax credit for tuition simply extends for those who have another special burden the same kind of privilege given to those who have a couple of other burdens. I would nevertheless prefer that the schedule be something like a 25-percent tax credit up to \$1,000 for college tuition, at least.

I think that the credit should be tuition sensitive, primarily because those who attend public institutions have in effect a scholarship for the tuition, or almost all of the tuition at their institutions as it is, because the payment for most of the costs of public institutions is obviously borne by tax revenues. It is those who attend independent institutions who have the special burden, and the tax credit ought to be sensitive to their burdens.

We would not raise tuition in response to a tuition tax credit. Tuition will indeed go up. Our tuition at Syracuse will go up approximately the Consumer Price Index percentage. That will go up whether we have a tuition tax credit or not. Tuition is sensitive to our costs. Our costs are sensitive to rates of compensation, and our rates of compensation are sensitive to the Consumer Price Index.

What we need is parents who are able to afford the tuition we necessarily charge. A tax credit program would not expend the bureaucracy, as some of the other programs, and it would not exacerbate the problem of student aid program administration.

Finally, with a tuition tax credit, the diversity of higher education, of our higher educational system, will be reinforced.

Mr. Chairman, I thank you for this opportunity.

Senator PACKWOOD. I am struck with something. Almost everyone who has appeared for higher education has said basically they like the idea of the tuition tax credit as long as it does not jeopardize either the aid institutions or the BEOG programs or something else. No real philosophical problems, just a fear that there may be a tradeoff.

Senator Moynihan and Senator Roth and I have indicated over and over that as far as we are concerned, we have no intention of this being a tradeoff. It is interesting that the only opposition that has come to this has come from those who want to centralize educational philosophy, not just in the State capitol but in Washington, D.C. They do not want to let go, but that has not been the attitude of those involved in education who administer it just from here, who run Government programs.

Senator MOYNIHAN. It is called the Thing, and it is over there [indicating]. It slouches. [General laughter.]

Senator PACKWOOD. We are all committed to no reduction in BEOG program, aid programs, or other institutional programs which go directly to universities and colleges, and we will continue to fight for that, and we will not let the bogeyman argument that is raised deter us.

Mr. EGGERS. It is important for me to hear that, so that I may say it to my colleagues in higher education, some of whom have the same fear. It is important to be able to reassure them that this is indeed not a program which is a tradeoff, but one which deals with a very special problem.

Senator PACKWOOD. Senator Roth?

Senator ROTH. I would like to thank you for coming before us in support of these proposals. I think it is an excellent statement. I might in the interest of saving time point out a couple of statements made by the president of the University of Delaware, Dr. Trabant, who unfortunately could not be here, nor could Dr. Myer, his assistant vice president for student services, because of transportation difficulties.

I would just like to mention two points along the lines you are talking about, Bob. In Dr. Trabant's letter of endorsement of my tax credit proposal, he said:

Tax credits offer a means to assist students without the imposition of additional controls and regulation. Congress is obligated to insure proper expenditure of public funds, and it is a necessary condition that there be rules and regulations and controls imposed upon the recipients of such funds. At the same time, American colleges and universities guard jealously their autonomy and prerogatives for self-control and government. Therefore, support in the form of

tax credit rather than governmental appropriations would be less likely to require controls which are increasingly seen by colleges and universities as interference in their internal affairs.

I think that is a very important point that has not been made, to my knowledge, either in these hearings or ever on the Senate floor.

As a matter of fact, there has been some argument made—I never could understand it—that a tax credit would be hard to administer. Actually, they are the simplest form of aid that can be secured, and here we have a well-known public educator, president of an outstanding public university, pointing out that this device will assure freedom of operation for colleges or help insure freedom of operation for colleges, and I think it is a splendid point that is made.

The only other point I would like to make from this letter, in keeping with the testimony, is that Dr. Trabant said, as president of a university:

We must recognize the increasing financial burden placed upon middle-income families by expenditures for higher education. Studies at our university have indicated that the proportion of disposable family income required of middle-income families for tuition and fees has increased sharply over the past year. A decision to increase tuition and fees has been among the most difficult faced by our board of trustees in recent years, not because of their impact on low-income families who are eligible for financial aid, but rather because of their impact on middle-income families who are afforded no such assistance.

Mr. EGGERS. Senator Packwood, I can confirm that the students from the lower income families and the students from the upper income families are over-represented in our student bodies. Those from the middle-income level are under-represented relative to their portion of the population.

Senator ROTH. Mr. Chairman, to save time I would ask that Dr. Trabant's letter be included in the record.

Senator PACKWOOD. The letter will be put in the record.

[The letter referred to follows:]

UNIVERSITY OF DELAWARE,
OFFICE OF THE PRESIDENT,
Newark, Del., January 6, 1978.

DEAR CONGRESSMAN/SENATOR: I am writing to indicate support for William V. Roth's proposal to establish a Tax Credit for higher education expenses. There has been much debate on this issue among our colleagues in other colleges and universities, but at the University of Delaware we have concluded that the merits of this proposal outweigh its alleged disadvantages.

Present financial aid programs supported by the Congress have made higher education accessible to thousands of students, and the continuation of these programs is essential if we are to continue to extend the opportunity for a college education to all those who can benefit from it. It is proper that these programs of grants, loans, and scholarships be directed toward those students from low-income families who otherwise could not attend college. It is equally important that these funds not be diluted by extending eligibility to middle-income levels.

Nevertheless, we must recognize the increasing financial burden placed on middle-income families by expenditures for higher education. Studies at our University have indicated that the proportion of disposable family income required of middle-income families to meet tuition and fees has increased sharply over the past ten years. Decisions to increase tuition and fees have been among the most difficult faced by our Board of Trustees in recent years, not because of their impact on low-income families who are eligible for financial aid, but rather because of their impact on middle-income families who are afforded no such assistance.

We believe that a Tax Credit offers the best means for providing relief to the middle-income family. This conclusion is supported by the following observations.

First, Tax Credits provide a direct and, therefore, less costly method for providing assistance to middle-income students. Colleges and universities have noted significant administrative costs associated with the present financial aid programs. Tax Credits would impose no such overhead costs, either in the Office of Education or in institutions of higher education.

Second, Tax Credits offer a means to assist students without the imposition of additional controls and regulations. Congress is obligated to insure a proper expenditure of public funds, and it is a necessary condition that there be rules, regulations, and controls imposed upon recipients of such funds. At the same time, American colleges and universities guard jealously their autonomy and prerogatives for self-control and governance. Therefore, support in the form of Tax Credits rather than Governmental appropriations would be less likely to require controls which are seen by colleges and universities as interference in internal matters.

I hope you will find these arguments persuasive and that you will consider giving your support the Senator Roth's Tax Credit proposal.

Sincerely,

E. A. TRABANT.

Senator ROTH. Thank you. We certainly thank you for your excellent testimony.

Senator MOYNIHAN. You are going to have difficulty holding me to 5 minutes, Mr. Chairman, because this is a great pleasure. Dr. Eggers is not just a distinguished educator, but an important scholar in the area of political economy, and when he says there is an underrepresentation of a stratum of the population, it should be attended to. He knows what he is talking about.

The variation you suggested on the Packwood-Moynihan bill is an interesting one. We will try to get it costed out, but I would like to speak to you on this point of the opposition from the Government bureaucracies. If I may refer to it as "The Thing," the Thing is against this legislation because the Thing would not control it.

I said 2 days ago that we would try to demystify some of these questions. The reason the Thing is against this is because it would not have a single bit of power. The Thing would get nothing from this program. Therefore, it would not want it, in the same way it does not want those other schools that it does not control. It has come to the point of being pathologic.

I spoke to the Secretary of HEW about this last night, and said, How could we have an education bill before the Senate, 50 Senators—well, with the death of Senator Humphrey, 49—and not even have a senior education official of the executive branch come to testify on it? One-half of the bill passed, what was it, 82 to 9?

Senator ROTH. The college tax credit has passed the Senate three times in the last 18 months, most recently by a 61-11 vote.

Senator MOYNIHAN. We had the whole social security system held up on this matter. It is clearly something the Senate intends to do. The House has said it would do it, that it would respond somehow, and yet "The Thing" could not even send an educational officer, those idle educational officers who have nothing to do themselves, to come to testify, because it hates this. It moves away from its increasing control in what Schumpeter called the conquest of the private sector by the public sector.

Do you recognize what I am talking about, sir?

Mr. EGGERS. I have lived with it.

Senator MOYNIHAN. You are one of the few remaining unconquered enclaves, and you must be hateful to their sight.

[General laughter.]

Senator ROTH. Will the Senator yield?

Senator MOYNIHAN. Certainly.

Senator ROTH. One of the things that concerns me about this proposal of a new Department of Education, and I have not yet taken a position on it, is that I can see where that new bureaucracy is going to strongly oppose this approach, this concept, because then they would have less to do. There will not be any of these GS-15's, 16's or whatever else you have in the Civil Service to administer it. That is what bothers me about so many of these other programs. They are eaten up in the redtape of the bureaucracy.

What all of us here are trying to do is to find a means of giving help to those whom these programs are not assisting, and to give some aid to those we have forgotten in the past.

Senator MOYNIHAN. I think the President is going to have to pay very close attention. If he wants to create a department that will wind up being comprised of persons whose institutional interest is to destroy the private sector of American education, I say the hell with it, and you don't have to get yourself too far out on that, sir. I wanted to confirm your view about whether this initiative would diminish support for the earlier programs for which the main thrust has been equalizing opportunity.

We have said it over and again. "The Thing" will always deny it, but the fact is, the three of us here and the people who have joined with us have a record in this matter. We are not new to the subject. Senator Packwood and Senator Roth have supported these measures from the beginning. I drafted the message of the President of the United States which proposed the basic grants program. This was the first priority, but we met it, and now we are dealing with something—Chancellor Eggers comes along and says to us, there is now a clear inequity. The children of middle-income families do not get to Syracuse University.

Well, Syracuse University was founded for such children.

Mr. EGGERS. The mayor of our city was a graduate of our university, and he feels great difficulty being able to send his children to our school, because he has two or three children in school at the same time.

Senator MOYNIHAN. You do not perhaps know that he is the victim of that dread middle class affliction. The one thing we did learn from HEW, "The Thing" told us that is called sibling overlap.

Mr. EGGERS. I am sorry about that. [General laughter.]

Senator MOYNIHAN. It is one of the few afflictions known to the American people which HEW feels those involved brought upon themselves. [General laughter.]

Mr. EGGERS. Their burdens are nevertheless very real.

Senator MOYNIHAN. But Mayor Alexander, who is chairman of the U. S. Conference of Mayors, has difficulty sending his children to that great university to which he himself went.

Mr. EGGERS. He is also a trustee.

Senator MOYNIHAN. That is marvelous, marvelous. Thank you very much. It was a pleasure to have you here.

Mr. EGGERS. Thank you very much.

[The prepared statement of Mr. Eggers follows:]

STATEMENT OF MELVIN A. EGGERS, CHANCELLOR AND PRESIDENT, SYRACUSE UNIVERSITY, AND CHAIRMAN, LONG RANGE FINANCE COMMITTEE, NEW YORK STATE COMMISSION ON INDEPENDENT COLLEGES AND UNIVERSITIES

Mr. Chairman and Members of the Committee: As the Chancellor and President of Syracuse University, and as the representative of New York State's Commission on Independent Colleges and Universities, an organization of more than 100 independent institutions of higher learning, I am pleased to submit this testimony in support of the Moynihan-Packwood proposal for limited tax credit for tuition. That proposal deals with tax credit for tuition at all school levels; my testimony applies only to tuition at postsecondary institutions. My testimony also proposes a refinement of the Moynihan-Packwood proposal, but my support for the principle that tuition tax credit must be incorporated into our tax structure is unequivocal.

I am convinced that tuition tax credit is an idea whose time has come. It is the right public policy at the right time.

A HIGHER PRIORITY HAS NOW BEEN MET

We have succeeded as a nation in extending opportunity for post-secondary education to growing numbers of young people from the lower economic segments and ethnic minorities of our society. That was our highest priority, and we can be proud of what has been achieved.

This achievement has resulted from the use of a complex set of student assistance programs, including basic grants, supplementary grants, state incentive grants, direct and guaranteed loans, and work-study programs—all based on need, for which the cut-off point is at a relatively low income level. These programs, designed to increase access are overburdened even for the purpose for which they were designed. They have presented problems both for applicants and administrators. They have yielded a "crazy quilt" of application and eligibility procedures which is bewildering to potential applicants, have defied the ability of our bureaucracies to administer them, and have resulted in a labyrinth of disconnected, over-lapping and uncoordinated parts that must be brought into better order.

These programs can no doubt be improved but they will continue to be directed toward the goal of access for which they were designed. They are simply not suitable for the quite different purpose of easing the burden of the cost of higher education to middle income families. For that goal, there must be a new program, not simply an extension of a much-too-complicated set of programs designed for a different purpose.

THE NEED FOR A NEW PROGRAM

It is important to recognize that in achieving greatly increased access to higher education no small part has been played by middle income families. They pay for programs which enable others to attend college, even though they receive almost no relief from the burdens they experience in covering the cost of education for members of their own families. On our own campus, we find that students from lower income families are over-represented relative to their share of the population. Students from middle income families are clearly under-represented. It has been said, and with some good evidence, that to attend an independent university one must come from a very poor family or a very rich one.

I am sure that all of you have heard from middle class constituents about their difficulties in meeting the cost of higher education. Nearly one-half of the students entering independent colleges and universities must borrow to cover a portion or all of their college expenses. We have all heard about the societal ramifications of an "indentured" class ("Students: The New Debtor Class" by Michael Jensen, Winter Survey of Education, Section 13, New York Times, January 8, 1978). Clearly, loans do not offer a complete solution.

The legitimate college aspirations of some middle income families are being frustrated. There is evidence of decline in college attendance rates of the children from families in the middle income bracket. It is not surprising that, lacking access to aid that will diminish net tuition price, some students turn away from a college education. Meanwhile, their families are being asked to help provide relatively generous support to enable others to go to institutions which they cannot afford to attend. The Moynihan-Packwood program of tuition tax credit will help to correct this situation and strengthen the right of all students to decide

on a college education on the basis of academic, rather than economic considerations.

THE EXTENSION OF AN ESTABLISHED PRACTICE

The basic practice of modifying the tax structure as a means of financing a public good for middle income citizens is clearly well established. Tuition tax credit may be likened to other middle income tax incentives such as the deduction of interest payments on home mortgages and the deduction of extraordinary health costs. Tax breaks for health care and home mortgages are in recognition of their disproportionate claim against family resources. Higher education also has a high social value and it, too, makes a disproportionate claim against family resources. For many families the cost of educating two or three children exceeds the cost of a home. Moreover, educational costs are often concentrated into a short period of time.

Tax credit for business firm investment in physical capital also has wide support as a public policy. The tax rebate covers a fraction of the total cost of new capital, in order to provide the optimum stimulus per dollar of revenue loss. In encouraging new capital formation, the tax credit has the important advantage of not otherwise distorting economic decision making. The use of tuition tax credit in supporting education, i.e., human capital formation, is an appropriate and consistent element of the tax structure.

Tuition tax credit offers an equitable and simple method of extending education opportunities.

A REFINEMENT OF THE MOYNIHAN-PACKWOOD PROPOSAL

As currently proposed, the Moynihan-Packwood Program would offer a refundable tax credit against net tuition paid (i.e., after grants, scholarships, etc.) for any part-time or full-time student who attends an elementary, secondary, or post-secondary education institution. The amount of this tax credit would be 50 percent of such tuition payments up to a maximum of \$500 per student.

The refinement I propose is that the tax credit eligibility cover 25 percent of tuition payments up to a maximum of \$1,000, at least for college students. To show the significance of this refinement, suppose one family pays \$1,000 tuition for a student to attend a public institution, that is, one where most of the cost is already being paid by taxpayers; and another family with similar economic circumstances pays \$3,000 tuition for a student to attend an independent institution where the tuition is \$3,000, that is, where relatively little of the cost is being paid by taxpayers. There is a \$2,000 difference in tuition, and one family pays three times as much as the other.

According to the Moynihan-Packwood proposal both families would receive a \$500 tax credit making the net tuition \$500 for one family and \$2,500 (five times as much) for another. I suggest that a more equitable schedule would be a tax credit of 25 percent of tuition for each family. For the family of the student at a public institution, the net tuition would be \$750 and for the other family the net tuition would be \$2,250. The second family would still be paying three times the net amount of tuition just as it would without the tax credit.

This proposal better serves the criterion of maximum stimulus with the least revenue loss. It does so by meeting a lower fraction of the parental expense at every college or university but also by recognizing that parents whose children attend independent institutions pay higher tuition because those institutions do not have the same benefit from state support.

Some who oppose the tuition tax credit proposal have suggested that college and universities might increase tuition in an amount equal to the tax credit. There is a built-in safeguard against this in that the tax credit is designed to cover only a fraction of each family's actual tuition costs and the program provides a cutoff ceiling. This is true for both the Moynihan-Packwood plan and for the refinement I have suggested. Most, if not all, if any increase in tuition would still have to be paid on the basis of cost increases.

CONCLUSION

The Moynihan-Packwood approach offers a direct mechanism to relieve the financial burden on the middle income family with dependents in college. The need for relief is clearly evident. The proposed method of providing relief is already public policy for similar burdens and for similar situations calling for

incentives. As families move out of income brackets where they are eligible for student grants, they should become eligible for tuition tax credits. There is an attractive logic to such a program. It would not expend the federal bureaucracy nor would it exacerbate the present problems of student aid program administration. It will, in fact, complement existing aid programs.

The refinement I have proposed retains the basic approach of the Moynihan-Packwood proposal but, in my judgment, increases its equity.

Tuition tax credit would salvage, in Senator Moynihan's words, "the world's most variegated and pluralistic system of education in existence."

Senator PACKWOOD. We will next take both Dr. Wallin and Mr. Fuller, representing the Great Lakes Colleges Association, and then we will skip to Dr. Lubbers, who has to catch a plane, and if I keep him any longer he will not be able to catch his plane. If he does not get out soon, he will not perhaps get out at all.

Mr. FULLER. Thank you very much. We thought that it might be useful if a college president who has to deal regularly with the parents who pay tuitions at our colleges meet with you. We were able to arrange for Dr. Wallin to be here. He will present our statement.

Senator PACKWOOD. We are delighted to have you.

STATEMENT OF DR. JON W. FULLER AND DR. FRANKLIN W. WALLIN, GREAT LAKES COLLEGES ASSOCIATION

Mr. WALLIN. Mr. Chairman, members of the committee, it is a real pleasure to be here to offer testimony on this tax credit. I am here representing the collective position of 12 private independent liberal arts colleges called the Great Lakes Colleges Association, and we favor an income contingent tuition tax credit.

We are, as you are, well aware that the college education constitutes a significant and sometimes unusual burden for many American families and students. We are also aware, as you are, that the combination of Federal and State institutional scholarships and loans has kept college education within the reach of many talented young people from lower income families. But we are also aware, and particularly aware, I think, that the existing student aid programs do not significantly help middle income families who find college tuition bills a serious and often unusual strain on their family budgets, sibling overlap included.

We believe there is a need for further assistance with these educational costs. It is also clear that many in the higher educational community might prefer other means than tax credits for this assistance, but I am aware and I think many of my colleagues are aware that the political realities are that the Senate and Congress see in the tax credit method an effective way, a desirable way of realizing the benefits we desire for the middle-income families. Tax creditors are obvious attractive because of their administrative simplicity. None of us, I think, is anxious to add employees to HEW. We feel, though, that the tax credits are important as a matter of public philosophy, because they directly recognize the family's contribution to their own children's education. The principle is an important principle to preserve, relating the level of effort in the family to supporting their own children's education. It follows a general principle which is observed in other legislation supporting students who are going to institutions of higher education of relating aid to need. We believe that tax credit for tuition

and fees should be available only when those tuition and fees exceed a percentage of the taxpayer's gross income for any tax year.

As a specific example, and it is an example only, we would suggest a credit be applicable to one-half of those tuition and fees which exceed 5 percent of a taxpayer's annual income and that the maximum tuition tax credit for any year be \$500.

Gentlemen, this is a slight variation on the proposal before you. We have written this to you as an option which should be considered during the preparation of the legislation you are considering. This approach to tuition tax credits would help middle-income taxpayers whose incomes are too high for existing grant subsidies and loans, but for whom college tuitions constitute a severe dislocation of the family budget.

You will recognize the model for this proposal as the existing deduction for medical expenses. We believe that just as medical expenses are sometimes an unusual burden, for which there ought to be a tax credit, there is also a time when educational expenditures may be an abnormal part of the family's expenses, imposing a heavy burden on a family's income.

I will speak now directly from my own personal experience in an institution of higher education. The tuition for colleges in our association this year averages \$3,600. Families with incomes of \$25,000 to \$30,000 a year may think of themselves as financially comfortable until they face such annual tuition bills. The tuition burden can become really severe. Incidentally, Senator Roth, I often have an opportunity to deal with parents rather than statistics about the feeling of the impact of our tuition bills on their family income. I would observe that the experience of many of our parents is one of feeling increasing difficulty in meeting costs, whatever the national statistics may be about their available or disposable income.

I hear that complaint more frequently each year, but as educators we are particularly proud that many families are still willing to make such sacrifices to educate their children. We are aware of the burdens they are bearing. It is appropriate for families to invest in their children's education, their children's future, by paying for a college education. It is also appropriate that families for whom this investment constitutes an unusual burden should have some help.

Tax credits should be income contingent and bear a relationship to a family's level of effort. Some examples might be helpful, showing how a tax credit of up to \$500 for those tuitions and fees exceeding 5 percent of the family's gross income would work in practice. Under our suggested plans a family whose income was \$20,000 with one child attending a public university outside their own State would receive a tax credit of about \$250.

The average public institution tuition across the country is \$1,519 this year. A family with an income of \$25,000 living in Michigan and sending two children to Wayne State University in Detroit, where I taught for a good many years, would be entitled to a tax credit of \$370. Wayne State tuition fees are \$977 this year.

A family with an income of \$30,000 sending a child to one of the independent colleges in our association would be eligible for a \$500 tax credit to help them with \$3,600 in tuition and fees.

Even a family with an income of \$57,500 sending a child to one of our GLCA colleges could receive a tax credit of \$360. Under our suggested formula, the forgone tax revenues would be significantly different than they would under some of the proposals you have considered. We estimate, and we do not have as good a source for estimating this as you do, but we estimate it would be approximately \$1 billion annually in foregone tax revenues.

In contrast to other proposals, it would all go to help families already making a significant investment for a substantial part of their income in the education of their children.

If the Congress is willing to provide substantial additional money for student aid for higher education, we believe that a stronger case can be made for putting those additional resources directly to the existing student aid programs. The main problem with those programs now is that their funding levels do not allow them to be fully effective, particularly for middle-income families.

However, we recognize that there are political and administrative arguments which favor providing further aid through tax credits rather than through direct grants. In that case, we urge very strongly that the Congress not abandon the basic principle that Federal student assistance should be related to need.

We believe our proposal, which would make a tax credit available for those tuition and fees exceeding a percentage of the family's gross income, represents a tuition tax credit formula which is compatible to that important principle. Thank you very much.

Senator PACKWOOD. Doctor, I will emphasize again that on behalf of all of us we have no intention of backing away or eliminating the present student financial aid programs. Your statement indicates again the value of these hearings. I think all of us spent hours and hours drafting the bills, but you have thought of a number of suggestions we never thought of, and they are good suggestions.

For anyone who thinks that hearings are a sham, to make a record and to say, let's go ahead with what we had planned, this is good evidence that that is not so. The administration was here. The Department of the Treasury particularly opposes tuition grants, because they say it is more complex to administer tuition tax credits than the present student aid, BEOG's and other types of programs.

Would you address yourself to the relative complexity of the two?

Mr. WALLIN. It is hard for me to imagine programs more complex to administer than the one you have just described. The BEOG program.

Senator PACKWOOD. Could you give some experience you have had at the school with the BEOG program?

Mr. WALLIN. We are appreciative that Congressman Sharp from our district last year was able to help Earlham College specifically obtain loan funds which were being held in the Office of HEW. We believe the funds were held up over various bureaucratic irregularities. Only after going through our Congressman and getting our Congressman to intervene did we finally receive the loan funds on time. We had to pay \$5,000 or \$6,000 in interest payments because we were at that time borrowing money for our operations in the summertime. The Federal Government was not paying us what they owed us.

Senator PACKWOOD. In the last analysis, they considered they owed it, and finally paid you, but it did you no good until you went to your Congressman?

Mr. WALLIN. That is right. We had great difficulty finding out where the person was who was supposed to be answering our mail. Indeed, we have never really found him.

[General laughter.]

Mr. FULLER. Senator, I might add one comment to that I spent 3 years in "The Thing" as an assistant to the first Assistant Secretary of Education, Dr. Marland. I recall an experience at that time when a college came to us with a problem about their allocation for student aid money. It was my job to look into the matter on behalf of the Assistant Secretary. What we found was that the college had made its plans thinking that its past allocations somehow reflected a formula the Federal Government was using and they planned accordingly. They were very shocked when they came in to find that their allocation for next year was lower than the previous year, even though their need was greater.

What we found was that there was no formula at all. HEW staff were simply taking the money, and dividing it up according to who was asking first. I don't think they have made very many changes in that process. They have tried, but it is a terribly complex matter to try to get that machinery over there to work.

Senator MOYNIHAN. Mr. Chairman, I feel obligated to warn the witness that persons who reveal the secrets of "The Thing" have been known to disappear in this country.

[General laughter.]

Senator PACKWOOD. Senator Roth?

Senator ROTH. I can assure you gentleman that I am very much interested in your proposal and will make a careful study of it. I thought that your testimony about the perceptions of the middle-income family are very true. I have had people come in my office literally in tears who were working hard to try to send their children to school, and their children were working as well and they are just finding the burden too much.

So, I don't think there is any question about need in this area, and as the chairman has pointed out, your testimony has some very excellent suggestions and I assure you we will take a careful look at them.

Mr. WALLIN. Thank you very much.

Senator MOYNIHAN. I would like to note that you have proposed an approach which Senator Ribicoff has found attractive, and it is a variation on the theme and none of us are committed to all the particulars of our formula. We are committed to the idea, however and we will listen to suggestions very carefully. There is a case to be made, and we are, as the chairman said, trying to hear of the alternatives, and it is always possible we will devise a program which gives options to the persons involved, and we could maximize our interests there.

Could I ask, what did you teach at Wayne State?

Mr. WALLIN. I am a French historian, sir.

Senator MOYNIHAN. A French historian. Then I offer you a line of la Roche Faucault who said that, "Centralization produces hysteria at the center and anemia at the extremities," and that is what we are trying to get rid of.

[General Laughter.]

Mr. WALLIN. Thank you.

Senator PACKWOOD. Gentlemen, thank you.

[The prepared statement of Dr. Wallin follows:]

STATEMENT OF DR. FRANKLIN W. WALLIN, PRESIDENT, EARLIHAM COLLEGE, ON
BEHALF OF THE GREAT LAKES COLLEGES ASSOCIATION

Mr. Chairman and Members of the Committee, thank you for the opportunity to testify during these hearings when you are considering proposals for tuition tax credits. I appear here representing the collective position of the twelve member colleges of the Great Lakes Colleges Association.¹

The cost of a college education constitutes a significant burden for many American families and students. The combination of Federal, State and institutional scholarships and loans has kept college education within the reach of many talented young people from lower income families, but existing student aid programs do not significantly help middle income families who find college tuition bills a serious strain on their family budgets.

We believe that there is a need for further assistance with these education costs. We also believe that the guiding principle of Federal student assistance programs, relating the level of assistance to the level of need, should be maintained. Because existing Federal student aid programs are designed specifically to carry out this principle, we would prefer that additional assistance come through substantially increased appropriations for these programs. However, we realize that many Members of Congress prefer tuition tax credits as the means for providing any substantial new help for education costs. Tax credits are attractive because of their administrative simplicity. No additional employees would be required at HEW, no significant part of the aid would be absorbed by administrative costs, and they directly recognize the family's contribution to their children's education.

To preserve the principle of relating aid to need, we believe that tax credits for tuition and fees should be available only when those exceed a percentage of a taxpayer's gross income for any tax year. As a specific example, we suggest that a credit be applicable to one-half of those tuition and fees which exceed five percent of a taxpayer's annual income, and that the maximum tuition tax credit for any year be \$500.

This approach to tuition tax credits would help middle income taxpayers whose incomes are too high for existing grants and subsidized loans, but for whom college tuitions constitute a severe dislocation of their family budget. The model for this proposal is the existing deduction for medical expenses. Some medical expenses are considered a part of normal living expenses, and tax relief is offered only when they constitute an unusual burden for any given year. Likewise we believe that educational expenditures are a normal part of living, but they, too, may impose a real financial burden.

This year, tuition and fees at the colleges of our Association average \$3,600. Families with incomes of \$25,000 or \$30,000 a year may think of themselves as financially comfortable until they face such annual tuition bills. It is not unusual for a family to have more than one child in college at the same time. Then the tuition burden becomes really severe. Such families may receive some help from institutional funds, primarily loans, but they still must make serious sacrifices for their children's education.

As educators, we are proud that so many families still are willing to make such sacrifices to educate their children, but we are also aware that the burdens are substantial and growing. Many families are frustrated, because they have too much money to qualify for student assistance, but not enough to pay the cost of education at the college of their choice.

It is appropriate for families to invest in their children's future by paying for their college educations. It is also appropriate that families for whom this investment constitutes an unusual burden should have some help.

¹ The Great Lakes Colleges Association members are: Albion College, Albion, Mich.; Antioch University, Yellow Springs, Ohio; Denison University, Granville, Ohio; DePauw University, Greencastle, Ind.; Earlham College, Richmond, Ind.; Hope College, Holland, Mich.; Kalamazoo College, Kalamazoo, Mich.; Kenyon College, Gambier, Ohio; Oberlin College, Oberlin, Ohio; Ohio Wesleyan University, Delaware, Ohio; Wabash College, Crawfordsville, Ind.; The College of Wooster, Wooster, Ohio.

Let me offer a few examples of how our suggestion for a tax credit of up to \$500 for those tuition and fees exceeding five percent of a family's gross income would work in practice. A family whose income was \$20,000, with one child attending a public university outside their own state would receive a tax credit of \$250 (average out-of-state tuitions across the country are \$1,519 this year). A family with an income of \$25,000, living in Michigan and sending two children to Wayne State University in Detroit (where I taught for many years), would be entitled to a tax credit of \$375 (Wayne State tuition and fees are \$977 this year). A family with an income of \$30,000, sending a child to one of the independent colleges in our Association—ideally to Earlham—would be eligible for a \$500 tax credit to help them with the \$3,600 in tuition and fees. Even a family with an income of \$57,500, sending a child to one of our GLCA colleges could receive a tax credit of \$300.

Under our suggested formula, the foregone tax revenues would be approximately one billion dollars annually. In contrast to other proposals, it would all go to help families already investing a substantial part of their incomes in the education of their children.

If the Congress is willing to provide substantial additional money for student aid for higher education, we believe that a stronger case can be made for putting those additional resources directly into the existing Federal student aid programs. The main problem with those programs now is that their funding levels do not allow them to be fully effective, particularly for middle income families. However, we recognize that there are political and administrative arguments which favor providing further aid through tax credits rather than direct grants. In that case, we urge very strongly that the Congress not abandon the basic principle that Federal student assistance should be related to need. We believe that our proposal, which would make a tax credit available for those tuition and fees which exceed a percentage of a family's gross income, represents a tuition tax credit formula which is compatible with that important principle.

Senator PACKWOOD. Next, as I indicated, we will take Dr. Lubbers, representing the Grand Valley State Colleges.

STATEMENT OF AREND LUBBERS, PRESIDENT, GRAND VALLEY STATE COLLEGES, ON BEHALF OF THE AMERICAN ASSOCIATION OF STATE COLLEGES AND UNIVERSITIES

Mr. LUBBERS. Good morning, Mr. Chairman.

I believe I was selected for this task because I am a father of one son who graduated from a public institution and is now enrolled in graduate studies in a private one. I have a second son who is enrolled in a public institution, and a daughter who is enrolled in a private institution. When Secretary Califano was quoted in one of our provincial newspapers as saying this was an idea only for the wealthy, I wondered who he considered wealthy.

Senator MOYNIHAN. It made you feel good, did it not?

Mr. LUBBERS. I really feel rich.

[General laughter.]

Mr. LUBBERS. Another thing that has struck me as I have been listening for the last hour to the testimony, my colleagues from the private sector have been putting forward their case, and I represent the public sector, 80 percent of the students in higher education, and although I do not concur with all of the formula, I think perhaps we have an issue here in which the private and public sectors can come together, and I think as formula finally is worked out, I am hopeful we can find one that both sectors can support with great enthusiasm.

I think it is possible. The idea has been in back for some time. Now that I think it is an idea, perhaps its time has now come, and I think we in higher education appreciate the fact that you are pushing hard

for it now, and we wish you success. I would like to make six brief points for my association.

First, we believe that the living expenses as well as tuition, books, and fees should be included in the educational expenses to which the credit applies. It is interesting. We have been talking about the expenses in private education. I think it is a fallacy to think that public education is inexpensive. The public education tuitions have gone up, and the living expenses, the eating and the room and all other contingent expenses, are just as high in the public sector as they are in the private sector.

Therefore, the cost of the middle-income family continues to rise.

We also believe that the tax credit plan should not be a graduated benefit based on tuition alone, as in S. 2142, which pays half of tuition up to the maximum of \$500. This might not be received well by those States who have really put money into higher education in an attempt to keep the tuitions down.

I do think, however, that if living expenses were included as well as tuition and fees, that would take care of the problems of a graduated tax.

We would also like you to consider, if you would, including graduate and professional students. Earlier, there was some testimony about the person who is struggling to improve himself or herself, and many people who are employed and who are college graduates are taking graduate programs in order to improve themselves, and hopefully make a greater contribution in society and pay more taxes.

So, this group of people, many of whom are supporting themselves, or many of whom want to support themselves, might be discriminated against if they are not included in this bill, and for the same reason we would like for you to consider including part-time, at least those who are enrolled one-half to three-quarters time.

We find this phenomenon developing in education. Increasing numbers of people have family obligations, economic obligations that require them to take part-time work rather than full-time, and I hope you will consider that point.

The fifth point, it would probably be better not to deduct Federal, State, and nongovernmental student aid or the GI bill from the proposed tax credit, as in S. 311. This opens up a bureaucratic maze, I think. It is just too difficult, and when you put these packages together of all the aids, you still may have a student falling short of what his real need is.

The institution may not be able to provide that. Even if he is middle income, let's say his parents could pick up the difference, but as so many middle-income people are faced with two and three children in colleges, I think it would be better to leave that one alone, and I do not think the Government will be shortchanged that much.

Finally, and this is really not as much a solution as a request for you to think about, and I know we should think about it. As far as possible colleges, boards, and States in both private and public sectors should be discouraged from raising tuition or other charges to capture the tax credit. How you do that, I don't know. Tuitions are going up, but I still think in the long run the kinds of aid that can allow the institutions to keep their tuitions at reasonable levels is the best kind of aid.

Thank you.

Senator **PACKWOOD**. We have had testimony from any number of educators who indicated they did not think per se the tuition tax credit would result in increased tuition because they will do everything possible before they raise tuition. That is the last thing they will do. They will do everything to keep tuition down. Is that a fair statement?

Mr. **LUBBERS**. I think it is a fair statement for a large majority of institutions of higher education. Something is happening in institutions of higher education, not necessarily in the better known institutions in the Nation, but those institutions which serve the largest number of students are faced with enrollment declines, so you have an interesting competitive situation developing.

So, that is why this idea is a good idea now, because institutions have pressures on them not to raise tuition, because they want to be more competitive in the marketplace, too. That is a factor, and I think that will mean that most institutions will not try to capture this money just because they see it available.

Senator **PACKWOOD**. Senator Roth?

Senator **ROTH**. I will defer for the moment to the Senator from New York.

Senator **MOYNIHAN**. I would just like to confirm the point that you were raising. We do face the prospect of declining enrollments in higher education. It is demographically there, and it may be it is there in consequence of the kinds of pressure. Dr. Eggers spoke of on this middle stratum of citizenry who will normally do all in their power to get their children into college. But there is a question of opportunity costs, and the opportunity costs of higher education, particularly in the private institutions, are getting to be considerable.

Opportunity cost is an economists' term, as I am sure the chairman knows. You capitalize the foregone income and the expended income, and you find that you may have dropped \$100,000 or whatever in the course of 4 years of education, and the question is, will your extra income subsequently surpass the equivalent of that money capitalized and paid back with interest, and you had better be a doctor, you know. But we would like to point out again on this question of graduate and professional schools, we have differences in our bills.

The chairman's and my bill would automatically extend benefits to any level of education and part-time students because it is a simple problem if you are paying tuition, to claim a credit. That is it.

It seems to me it is also useful to note that this is a concern of public institutions as well. I mean, none of them are so well endowed as not to be costly to the students.

Mr. **LUBBERS**. Senator, I would like to see a survey of students who drop out of institutions because of financial need, and again, I am very much for the private sector, and a graduate of private institutions, as I think they should make their case. We can agree with them on much of it, but I would wager that people are dropping out of State institutions for cost factors, too, and I do not think it should be overlooked in your considerations.

Senator **MOYNIHAN**. It is a fair point. If we could get anyone from the Department of Health, Education, and Welfare to come here, we could ask them, but every other subject we ask them about, they have no answers for.

Mr. LUBBERS. Well, we have not had quite the same horror stories that I have heard this morning, but we have had our share, too. We were talking about the desire of the private sector to remain free. Well, for the hundreds of thousands or millions of us who are in public education, we also like our freedom, and we do not care to have Washington bureaucracy dictate to us and control our education any more than the people in the private sector do.

Senator MOYNIHAN. A very fine point. The diversity of the system is only crudely described as public-private. The systems of all 50 States are both public and private, but mostly public. This is true even in irascible jurisdictions such as my own city of New York, which insists upon having its own university, and indeed having the first public tuition-free college in the world, not just in this country, but in the world.

In the City College, which I first entered, there is a diversity that does not want to be dominated by that awful "thing" over there, and we are with you, sir, and we thank you for coming.

Mr. LUBBERS. I was very interested when yesterday, I boarded the plane in Grand Rapids, I picked up a copy of the Detroit Free Press, and I see on the front page, four Senators urge tax credits for tuition. So, even out in the States they decided to put it on the front page, at least of our leading Detroit newspapers. I should say one of our leading Detroit newspapers.

[General laughter.]

Mr. LUBBERS. You are making the news even in our country.

Senator MOYNIHAN. Mr. Chairman, I wonder if I could extend my remarks for 1 minute to show you a different perspective. Out in Detroit they tell you the news is that the Senators want to give some deductions to the citizenry. The Washington Post story has an entirely different approach. It says, "tax officials are critical of tuition credit." We are going to give up some of their money, and increasingly their money consists of all that you earn save that which they have agreed to give up.

Senator PACKWOOD. Which we used to call feudalism.

[General laughter.]

Senator PACKWOOD. Senator Roth?

Senator ROTH. I might suggest to the Senator from New York that maybe we could finance these college tax and other credits by getting rid of some of the bureaucracy. I do not think it would be very popular, but it is discouraging that we can get no answers from the very agency that is supposed to have the prime responsibility for education policy.

I would like to say with respect to your testimony that I, too, agree it would be desirable to extend those benefits or credits to graduate education. As one who has been leading the fight for higher education, there has been a series of compromises over trying to get something done in this area at all. But it does seem to me, as you point out, that it is in our national interest to encourage people to obtain not only college degrees but professional degrees, and I have a lot of sympathy with what you are saying.

I have just one quick question. You have heard the testimony of the HEW as they view college tax credits for the middle class, and I wonder if you would like to make any comments on that.

Mr. LUBBERS. HEW's opposition to the tax credit program?
 Senator ROTH. Yes.

Mr. LUBBERS. I do not know where they are coming from. I have no idea that HEW would necessarily want to protect the Federal Treasury. That has not necessarily been their desire in the past. They like to get into the Federal Treasury and we in education have supported that. I am at a loss to know why they are not supporting this particularly when the higher education community itself is beginning to come together. We are not together, as the testimony indicates, but we are coming together, and I would think that HEW would take that opportunity to work with us on this issue, and be for it. I don't understand.

Senator PACKWOOD. HEW has no hesitancy to spend the Public Treasury if they control it.

Senator ROTH. It is a difference of approach.

Senator PACKWOOD. But if they do not control it, they want to keep it. The Treasury, of course, just does not want to let you keep any money. They have a different philosophy. They don't like to spend it. They like to collect it.

Mr. LUBBERS. I guess, then, it is just a matter of control, and they seem to have enough control over most of our lives. Perhaps we can find some aid that will free us from that control, and it would be to all of our advantages.

Senator ROTH. You indicated in your testimony that ASCU is working separately on proposals to make sure that colleges do not raise tuition to capture the tax credit. You say it is a difficult problem, but if you come up with any constructive, innovative ideas, I urge you to let the members of this committee hear them.

Mr. LUBBERS. One of the most constructive is the one I mentioned. The competition in our society does sometimes come about, and I think that will keep that from happening in many schools, particularly the State schools.

Senator ROTH. Is it not also true that for every \$100 colleges raise their tuitions, there is a drop in the number of students who enroll, so there is that restraining pressure?

Mr. LUBBERS. Definitely. Definitely.

Senator PACKWOOD. It is a pleasure to hear you talk about competition, coming from the public sector. Of course, the bill that we had before, Senator Moynihan's and mine and Senator Roth's, applies to primary and secondary schools, public and private, and we had grave fear expressed by the public sector of primary and secondary education. If 10 percent of the people who now go to private schools would by chance go to 12 percent, it is a threat to the public school system, and we cannot for the life of us grasp how 88 percent can be threatened by the 12 percent.

Mr. LUBBERS. My only response to that is personal. I am not speaking for my association at all, but I welcome the competition. I like to have the ground rules fair, and I come from a State, the State of Michigan, which has done a great deal to assist the private institutions, and which has considerable autonomy amongst the public institutions, so we compete. Now, how to keep that competition healthy rather than unhealthy is our problem, but that is the kind of problem under which it is fun to work.

Senator PACKWOOD. Thank you very much. I hope you can get your plane out.

Mr. LUBBERS. Thank you very much.

[The prepared statement of Mr. Lubbers follows. Oral testimony continues on p. 452.]

STATEMENT OF PRESIDENT AREND D. LUBBERS, GRAND VALLEY STATE COLLEGES, ALLENDALE, MICH., ON BEHALF OF THE AMERICAN ASSOCIATION OF STATE COLLEGES AND UNIVERSITIES (AASCU)

SUMMARY

1. AASCU believes that the most important single way to provide access to the approximately 80 percent of college students who attend public colleges and universities is to keep tuition as low as possible.

2. We are concerned that present federal student aid strategies may encourage tuition increases at both public and private colleges.

3. If Congress adopts a tax credit plan, we feel it should include the following points. Some are in either S. 311 or S. 2142.

a. Living expenses as well as tuition, books, and fees should be included in determining the credit.

b. A tax credit plan should not be graduated related to tuition. It should recognize the needs of the 80 percent of students at public colleges, while not taking anything away from the 20 percent at private colleges.

c. Graduate and professional students should be included.

d. Those enrolled one-half or three-quarters time should be included.

e. It would probably be better not to deduct federal, state, and non-governmental student aid (including discounted tuition at private colleges) from the proposed tax credit. Such a deduction would hurt many students, and adds to paperwork and bureaucracy for both students and the government.

f. As far as possible, colleges and states should be discouraged from raising tuition to take advantage of a tax credit.

g. Congress should be aware that under present federal student aid programs, "needs analysis" systems would deduct about one-half the tax credit received from student aid awards for many working-class and middle-class families. This is a serious problem which must be addressed as part of any tax credit plan.

STATEMENT

I am President Arend D. Lubbers of Grand Valley State Colleges, appearing on behalf of AASCU. This is an association of 325 public four-year colleges and universities enrolling approximately 2,250,000 students—about one-third of all four-year college and university students in the country.

We have been asked to testify on tax credit legislation and particularly on S. 311, filed by Senator William Roth of Delaware and many of his colleagues, and S. 2142, filed by Senators Daniel P. Moynihan of New York, Robert Packwood of Oregon, and many of their colleagues.

Let me sum up some of the concerns about tax credits and financing higher education which our members, and I believe spokesmen for many other higher educational institutions, have voiced during recent years:

1. We believe that the most important single way to provide access to the approximately 80 percent of college students attending public colleges and community colleges—a still larger percentage in many states—is to keep tuition as low as possible. We feel that this is extremely important for lower-income students but also for working-class and middle-class students—those whose incomes are too high to qualify for much if any student aid, but who do not have the resources to provide the \$3,000 a year or more required for many public college students today.

2. We are concerned that the student aid strategies now pursued by the federal government and some state governments do nothing to help hold tuition down, and may indeed result in tuition increases. By giving money to students which can meet only a fraction of their instructional costs in either public or private colleges, the federal government does nothing to help colleges provide services at reasonable costs to all students. Indeed, as Edward Hollander, former Commissioner of Higher Education in New York, said at a seminar sponsored by the American Council on Education, the availability of federal student aid helped

make possible massive increases in tuition in New York—increases which, Hollander says, would otherwise not have been "politically feasible." More than 50,000 students—many of them poor and minority—have had to leave the City University of New York since tuition was imposed. Student aid alone has not been enough to meet their needs.

3. We believe that a tax credit program may well be justified to give assistance to working-class and middle-class taxpayers who receive little or no help from student aid programs. If Congress passes such a law, we believe it should include the following components, most of what are not part of S. 311 and/or S. 2142.

a. *Living expenses as well as tuition, books, and fees should be included in the education expenses to which the credit applies, as proposed in H.R. 127 of 1977, filed by Rep. Jerome A. Ambro of New York.*—The reason is that living expenses are just as essential for students as tuition and fees, if a student of lower-income or middle-income is to attend college. This is fully recognized in all federal student aid programs, all of which include funds for living costs as well as tuition, up to a maximum.

b. *A tax credit plan should not pay a graduated benefit based on tuition alone, as in S. 2142, which pays half of tuition (alone) up to a maximum of \$500.*—This discriminates against the almost 80 percent of all students attending public colleges and community colleges where tuition is less than \$1,000, but all of whom also have living costs to meet to attend college. It also penalizes the taxpayers in the great majority of states which have kept public college tuition below \$1,000, by not recognizing the effort they have made to provide educational opportunities for their students. Otherwise these taxpayers are paying twice—to support opportunity to their own states, and to pay for higher costs in other states.

The problem of graduated benefits can be resolved simply by including living costs as well as tuition up to a reasonable maximum like the proposed \$500. This would mean that the 80 percent of students at public colleges would receive help as well as the 20 percent at higher-tuition private colleges. The latter group would not be penalized in any way.

c. *Graduate and professional students as well as undergraduate students would be included.*—Many of these students face especially difficult economic problems. They are more likely to be self-supporting and living on limited means than many undergraduates.

d. *Part-time students—at least those enrolled one-half or three quarters time—should be included, with a pro-rated benefit.*—These students are often older people working at low salaries and trying to manage college on a less than full-time basis. Many are older women and men seeking new skills or better jobs, but with major family and other financial commitments. They too need the tax credit.

e. *It would probably be better not to deduct federal, state, and non-governmental student aid or the G.I. Bill from a proposed credit, as in S. 311.*—This would lead to tremendous bureaucracy and paperwork in an attempt to determine for every individual and institution what forms of aid he or she might be receiving (including the reduced or discounted tuition often offered at private colleges). Both IRS and the colleges would be tied up in endless problems. Since most such students are poor, receiving needs-based aid, most of them need the proposed credit as well as the aid they now get.

f. *As far as possible, colleges, boards, and states in both the private and public sectors should be discouraged from raising tuition or other charges to "capture" the tax credit.*—AASCU is working separately on proposals to help achieve this purpose.

4. The last point requires some amplification. AASCU has been very concerned that present student aid programs can lead to tuition and fee increases at both public and private colleges, as well as profit-making institutions. To the extent that this happens with either student aid or tax credits, it can have the following undesirable consequences:

Rising tuition will simply take away the aid provided to students and taxpayers, who will be no better off than before.

Lower-income students will be in need of much more aid, or will have to drop out of college.

Middle-class and working-class students who did not previously need aid will now require it, or be in great trouble.

Federal money will simply be substituted for state or private money. Some states and colleges will spend less and let the federal government spend more. Those who charge the most will get the most federal aid, and those who try to hold the line and help their students will be penalized.

In general, AASCU believes that some way is needed to discourage rising student charges, whether Congress chooses to increase student aid or to add a tax credit program.

We hope that as Congress considers both tax credit and student aid proposals in 1978, all of these ideas will be given consideration. We will be happy to work with you in any way we can.

We are submitting along with our testimony two AASCU publications which may be helpful to you—The Low Tuition Fact Book, and The Public College Fact Book. These help to document some of the concerns we have expressed in this statement.

Enclosures (2).

ADDENDUM

1. *Needs analysis systems and tax credits.*—We believe Congress should be very concerned about the fact that the various "needs analysis" systems used to determine the amounts of federal student aid awards are based in part on the income received by the family. If a family or individual receives an additional \$250 as a result of a tax credit law, for many families almost half of this \$250 could be deducted from student aid they would otherwise receive. This is particularly true for families in the approximately \$9,000–\$18,000 category, most working-class and middle-class families, according to needs analysis specialists.

It may be possible to design legislation to take care of this very serious problem.

2. *Discouraging tuition increases.*—It may be possible to devise a legislative "carrot" to discourage tuition increases. This could be done, for example, by funding the "cost of education" program, part of the Higher Education Act, to discourage public and private colleges from raising tuition, or by creating a new program. Possibly a bonus could be given to institutions which do not raise tuition or fees at all in a given year or at least by no more than the Higher Education Price Index. This would reward the states and colleges which have made a special effort to keep tuition and fees low.

THE PUBLIC COLLEGE FACT BOOK

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PUBLIC COLLEGES AND UNIVERSITIES AS A NATIONAL RESOURCE

One of the best investments the American people ever made was to establish public colleges and universities — supported by the public, responsive to the public, and governed by boards responsible to the public.

There are more than 1800 public institutions in the U.S. Together they provide a diversity and freedom of choice unmatched in the world: distinguished research universities, colleges and universities emphasizing quality undergraduates teaching, and community colleges offering a wide range of academic and occupational programs. All share a commitment to provide educational opportunity for all people of all ages and backgrounds and to offer public service programs to the people in the states and communities.

All receive a significant part of their operating budgets from taxes. This is the price Americans pay to insure that everyone will have the opportunity for an education commensurate with ability and ambition. In return, all Americans receive the benefits that only an educated country can provide.

Public universities, colleges, and community colleges are a priceless national resource.

In the fall of 1976, they provided education and training for four-fifths of all those in college, about 8,800,000 people.¹ In 30 states, more than 80 percent of two-year and four-year college students attended public colleges; in most other states, a majority of students did so.²

Public colleges educate especially large numbers of working-class and lower-income students. Eighty percent of all minority students are enrolled in public institutions.

They also educate a great many middle-income students. A large proportion of "first-generation" students — the first members of their families to attend college — go to public institutions.³ Public colleges also provide education for about 80 percent of all Vietnam era veterans in college.⁴

In many parts of the country, public two-year and four-year colleges provide almost the only opportunity for commuting to a low-cost college.

Their adult and extension programs may be the only way in which many older and part-time students can attend college at all. Today a great many students are older — 25 to 35 or older — for whom a low-tuition college is the only chance to continue their education or seek new training.⁵

In many fields of study in many states, public colleges predominate.

Over two million students at two-year and four-year colleges are enrolled in less-than-baccalaureate occupational and technical programs leading to immediate employment.⁶ Public institutions also provide many of the technical and specialized courses available at the baccalaureate and higher levels, as well as a wide variety of liberal arts and professional programs.



American Association of State Colleges and Universities
One Dupont Circle - Suite 700 - Washington, D.C. 20036 (202) 293-7070
Alan W. Ostar
Executive Director

THE CHALLENGE TO PUBLIC HIGHER EDUCATION

Despite the amazing success of American public higher education, the system faces problems — both financial, and in terms of public opinion.

OPPORTUNITY DECLINING

Enrollments are decreasing or staying the same in some colleges while the potential college-age population continues to increase. The rate of college-going, measured in terms of the percentage of the college-age population going on to any post-secondary institution, has been falling since 1966. This is especially true for families with incomes between \$1,000 and \$18,000 a year — which includes a great many middle-income and lower-income families. There has also been a decline in college attendance among families with incomes over \$15,000.⁷

COLLEGE COSTS INCREASING

Rising student charges and larger numbers of college-age children in many families, are among the reasons fewer people are going on to any college.⁸

FINANCIAL SUPPORT DECLINING

In an alarming number of states, state support of public higher education is declining, in terms of constant dollars per student. Fewer dollars, in terms of purchasing power, are being appropriated by many state and local governments.

The national inflation-recession cycle since about 1970 has hit higher education especially hard, in a number of states. So has the energy crisis. Studies of state budgeting show that higher education may get the 'residue' or 'left-overs' in the state appropriations process.⁹ States which are hard-pressed financially may first take care of needs related to unemployment, welfare, health, and other services and allow higher education only a fraction of what remains. A number of states have made up deficits by forcing colleges to raise tuition, place limits on enrollment, or cut back essential services.¹⁰

QUALITY JEOPARDIZED

The decline in appropriations per student can mean less services to students and lower-quality education at some colleges: larger classes, larger student-teacher ratios, less time for individual students, sometimes faculty and staff layoffs. The decline can also mean less funding for laboratories, libraries, and other essential services.¹¹



PUBLIC OPINION THREATENED

Part of the higher education problem is the widespread publication of misleading or inaccurate reports to the effect that 'college isn't worth it any more,' or that students aren't going to college because they feel they can't get better jobs, rather than because they can't afford college.¹² AASCU and others have criticized these attacks on the value of college, but the critics have nevertheless had an influence on public opinion, despite the fact that most Americans feel that a college education is highly desirable.¹³

FEDERAL AID PROBLEMS

The federal government's so-called 'student aid strategy' means that Washington provides some funds for students — though not enough even to really help the poor, much less working-class and middle-class students. But such policies mean little aid for institutions, especially for undergraduate and graduate instruction. As a result, federal programs do nothing to help colleges hold tuition down, and may even encourage some states and institutions to increase it.¹⁴

Moves in some states toward expanded state student aid programs are accompanied by recommendations which could mean increased tuition and less state support for public colleges.¹⁵ Some spokesmen are supporting explicit proposals to raise tuition, cut back public college support, and force many students to long-term, expensive loans if they attend college at all.¹⁶

PUBLIC FUNDING NEEDS

The federal government and private foundations have provided large sums of money to study the problems of private colleges. Similarly the media have concentrated much attention on the plight of the private sector. Some spokesmen have recommended special programs of massive aid to private colleges, on the grounds that there is unique financial distress at those institutions.¹⁷ But there have been few studies supported by the federal government, foundations, or even the states, on the special problems and needs of the public sector. The irony is that institutions which serve 80 percent of Americans, including many who would have no other chance for college, are getting very little attention.

WHAT NEEDS TO BE DONE?

If public colleges and universities are to continue to meet their responsibilities to the people who support them, a series of actions must be taken.

State appropriations must be increased. Keeping pace with the rise in inflation lessens the chances that institutions will have to raise needed revenue through increased tuition. Appropriations beyond that point keep the quality of education from falling behind.

States should examine how financing policies of the state affect educational opportunity for the state's citizens.

Private foundations and the federal government should conduct studies to determine how current federal and state student aid and institutional aid policies affect access to public institutions. Alternative approaches should be explored to see if federal and state policy can be more effective in advancing educational quality. And halting the decline in educational opportunity, particularly for those from lower- and middle-income families.

Citizen groups should consider carefully how a decline in educational opportunity and quality would affect the quality of life and economic development in the state, and take appropriate action. This may include forming coalitions to support public colleges and universities and their students. A coalition of labor groups, faculty organizations, educational associations, veterans and student groups already exists at the national level—the National Coalition for Lower Tuition in Higher Education.

Corporations, alumni, and concerned individuals should increase the level of their voluntary contributions to public institutions. Tax support provides the basic necessities for public colleges. Voluntary support provides that "margin for excellence" which enables public college graduates entering the world of work to receive the best education possible.



FOOTNOTES

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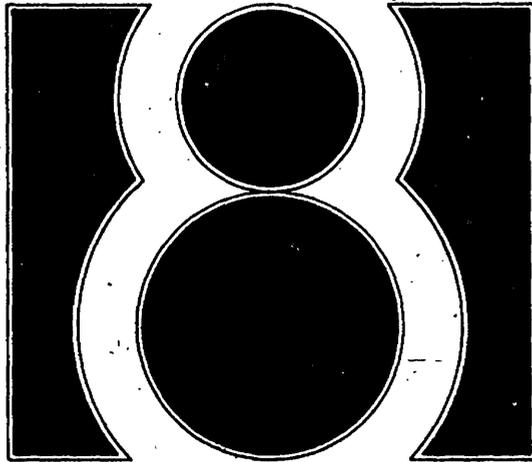


SUPPORT

What can you and your organization do to help work for the principle of low tuition and the adequate appropriations for higher education which make low tuition possible? For details, contact the National Coalition for Lower Tuition in Higher Education, One Dupont Circle, Suite 700, Washington, D. C. 20036, Telephone: (202) 293-7070.



Low Tuition Fact Book



BASIC FACTS
about
TUITION
and
EDUCATIONAL
OPPORTUNITY

nasu

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The rate of full-time college attendance among 18 to 24 year old students has declined precipitously in recent years, particularly among students from low- and middle-income families.

The percentage of high school graduates going to college is especially low in states with high tuition.

The percentage of Vietnam veterans going to college is generally low in states with high tuition.

A University of Wisconsin study found that lowering tuition increases the number of students going on to college.

A recent Stanford Research Institute study shows that students from low income families would be extremely responsive to a reduction in tuition rates.

U. S. Census data shows that families are especially hard hit right now because an unusually large number have more than one dependent in college at the same time.

Bureau of Labor Statistics' calculations of family budgets indicate that very few families have adequate funds to meet college costs.

Current student aid programs are not adequate to meet the needs of most students, even the poor. They are particularly inadequate for working-class and middle-income students, and for older and part-time students.

Each of the above facts will be documented in this pamphlet. Each shows why there is a growing concern across the nation that tuition and other student charges are too high for many American students and families.

INTRODUCTION

For over 150 years, the American people have accepted the principle that tuition should be kept as low as possible at public institutions: state universities and colleges, teachers' colleges, community colleges, and postsecondary vocational schools.

The reasons are obvious. Most Americans have seen low-tuition higher education as an extension of the free public elementary and secondary school system; an extension that becomes more logical and more necessary as the complexity of modern society increases. This system has resulted in an extremely well-educated population which has made the United States the most productive and the most technologically advanced country in the world. Universal free or low-cost education is seen by most Americans as one of the most fundamental safeguards of our democratic way of life.

Through low-tuition colleges, millions of Americans have risen occupationally and financially, made a greater contribution to our society, and also paid much higher federal, state, and local taxes. Research also shows far more individual and social stability among the college educated: lower rates of family instability, poverty, unemployment, and crime, and far less dependence on costly government social services.

Unfortunately, even today many qualified people are excluded from the benefits of higher education; by the costs of college in most cases, sometimes because of their sex (historically, fewer women than men have had the chance to go to college), or because of race or religion. But the G.I. Bills after World War II, the widespread growth of public as well as private college education, and the beginnings of a national student aid system have shown promise that these shortcomings can be overcome.

Yet today, Americans seeking a college education are in real trouble. More high school students are graduating each year, but fewer of them are going on to any college. Rates of college-going and full-time attendance are falling precipitously among dependent students from families with incomes under \$15,000 and even among those with higher incomes.

What is more, college-going varies greatly according to the state and locality in which a person lives.

The most important single reason for this decline in higher educational opportunity since about 1968 is student charges. Hard-pressed governors and state legislators have raised tuition and other charges as a way of balancing state budgets, sometimes with the mistaken belief that "there is enough student aid to take care of anyone who wants to go to college," or that "fewer people want to go, anyway."

The overwhelming majority of Americans—working-class, lower-income and middle-income people, whites and nonwhites—still want themselves and their children to have education and training for which they are qualified and in which they are interested. *Yet this great majority is not organized in any state to work effectively for low tuition*, to make possible educational opportunity for all, or to fight for the adequate appropriations for higher education which are necessary in order to make low tuition and quality education possible.

This pamphlet brings together data from many governmental and non-governmental sources to make the overwhelming case that many people now are kept out of college because of student charges, especially tuition; and that a major effort is needed to help reverse the trend toward higher student charges and lower enrollment rates. America's third century holds serious challenges and great promise. It is no time for Americans to turn their backs on over 150 years of progress toward universal opportunity for education beyond the high school level.

1

The rate of full-time college-going is declining precipitously, especially among low- and middle-income families. This is true even though the number of college age students is increasing each year.

Data collected by the United States Census show that between 1969 and 1973 there has been about a 20 percent drop in the percentage of 18 to 24 year old dependents from families earning less than \$15,000 going on to any college on a full-time basis. There has been an 8 percent drop in the percentage of students from families over \$15,000 in the same period.

These figures include not only poor and disadvantaged families but also lower- and middle-income families making up to \$15,000 a year. (Median family income is about \$13,000, so that more than half of all American families are affected.)

A careful examination of all factors which affect this drop in college-going reveals that *cost to the student is one of the most significant factors*. Data showing high enrollments for the 1975-76 academic year at many colleges are probably misleading. The 1969-1974 enrollment data indicate a serious, long-term enrollment problem.

The overall decline in full-time attendance rate—13.8 percent—corresponds with the results of another survey conducted in 1975. A First National City Bank of New York study found that 12.8 percent of Americans indicated that someone in

SOURCE: N. Schiller, "College Education Seen Necessary but Parents Wince at High Cost" First National City Bank of New York (Citicorp). June 1975.

SOURCE: U. S. Bureau of the Census, "Characteristics of American Youth: 1974." (U. S. Government Printing Office, Washington, D. C., 1975). Current Population Reports Series P-23, No. 51.

Percent of 18-24 Year Old Family Dependents Enrolled Full Time in College by Family Income

1973 Constant Dollars			
	1969	1973	% Change
Under \$3,000	16.4	12.7	-22.6
\$3,000-4,999	22.5	18.0	-20.0
\$5,000-7,499	29.4	23.7	-19.4
\$7,500-9,999	36.0	28.9	-19.7
\$10,000-14,999	45.3	36.3	-19.9
\$15,000 and Over	58.5	53.7	-8.2
Total	42.0	36.2	-13.8

their family had been prevented from going to college during the past five or six years because of cost. The same study indicated that 30 percent of the families experienced "extreme hardship" in meeting college costs. Another 30 percent reported "moderate hardship."

SOURCES: U. S. Department of Labor, Bureau of Labor Statistics, "Employment of High School Graduates and Dropouts" Special Labor Force Report 169, 1974.

D. Kent Holstead, Higher Education Prices and Price Indexes. Department of Health, Education and Welfare, 1976.

A Bureau of Labor Statistics study shows that the percentage of high school graduates going on to any college increased sharply from 1962 to 1968 and then declined sharply to 1962 levels again by 1974. One of the reasons underlying the fluctuation in attendance was rising tuition. Between 1961 and 1974 tuitions increased much faster than the Consumer Price Index, according to a recent Department of Health, Education and Welfare study.

2

The percentage of high school graduates going directly on to any college is generally low in states with high tuition.

SOURCE: Calculations based on U. S. Office of Education data, made by the American Council on Education.

Most Americans are unaware that a person's chances of going to any college vary enormously depending on the state and locality in which he or she lives. The percentage of high school graduates going directly on to any college is generally low in states with high tuition and a lack of opportunities to attend geographically convenient, open access institutions. High-tuition states tend also to be states with limited geographic access. In the last year for which nationwide data are available, for example, about 75 percent of all graduates in California and 70 percent of all New York high school graduates went on to college.

On the other hand, only about 35 percent of high school graduates in Maine and Vermont—states with very high tuitions—went on to any college! Again, a principal reason for these differences is tuition and the geographic availability of low-tuition colleges and community colleges.

3

The percentage of Vietnam veterans going to any college is generally low in states with high tuition.

SOURCE: Report of Educational Testing Service, Princeton University, on Educational Assistance Programs for Veterans, U. S. House Committee on Veterans Affairs, September 1973.

Data for Vietnam veterans attending any college by state are especially revealing. Generally, their attendance rates follow the same pattern as that for high school graduates. In states with low tuition and geographic accessibility to college, such as California and Arizona, a very high percentage of Vietnam veterans have gone to college. In high-tuition states, such as Vermont, and those without easy geographic access to a low-tuition college, a relatively smaller percentage of veterans have attended.

The Educational Testing Service, a highly respected research group, studied this issue in depth, and came to the conclusion that access to low-tuition colleges is the principal reason why many more veterans go on to college in some states than in others.

The veterans' experience also throws some doubt on the value of student aid, as opposed to low tuition, as the principal way to help students attend college. The basic G.I. Bill allotment of \$270 a month, supplemented by family allowances for many veterans, is far more generous than any federal or state student aid program. But even this aid is not enough to encourage veterans to attend college in many high-tuition states.

4

A Wisconsin study shows that lowering tuition increases college attendance.

SOURCE: University of Wisconsin System, Office of Special Projects, April 1974.

The University of Wisconsin system in 1973-74 carried out one of the few experiments ever made in this country to actually study the effect of tuition changes on enrollment. The state lowered tuition sharply at two of the two-year centers of the Wisconsin system (from \$429 a year to \$80 a year) while holding tuition constant at all other two-year centers, colleges, and universities. The result: a remarkable enrollment increase of 47 percent at one center and 23 percent at the other! *For every one percent reduction in the total cost of attending the low-fee centers there was a 1.3 percent increase in enrollment!*

Further, studies of the additional students attending these centers revealed that for the most part they would not have attended any other college. In other words, the centers were not "taking away" students from any other college, but enrolling those who otherwise could not have attended at all.

5

A recent Stanford Research Institute study shows that students from low-income families would be extremely responsive to reduction in tuition rates.

SOURCE: Dr. Daryl E. Carlson, "A Flow of Funds Model for Assessing the Impact of Alternative Student Aid Programs," Educational Policy Research Center, Stanford Research Institute, November, 1975.

SOURCE: Financing Postsecondary Education in the United States, The National Commission on the Financing of Postsecondary Education, U. S. Government Printing Office, 1973.

The Institute found that for every \$100 decrease in tuition, institutional enrollments would increase more than *one percent* among students from families earning more than \$12,000 annually, and more than *seven percent* among students from families earning less than \$6,000 annually.

Other studies by economists and social scientists have come to similar conclusions: that reduced tuition increases college-going, and increased tuition has the opposite effect. Some of these studies were summarized in the reports of the blue-ribbon National Commission on the Financing of Postsecondary Education, which included presidential appointees, members of Congress, and educators. Students from low- and middle-income families would, of course, be hardest hit.

6

U. S. Census data show that families are especially hard hit right now because many of them have more than one child of college age at the same time.

SOURCE: David Goldberg and Albert Anderson, *Projections of Population and College Enrollment in Michigan, 1970-2000*. University of Michigan Population Studies Center, 1974.

A recent study by two University of Michigan demographers, David Goldberg and Albert Anderson, confirms what many American families know from painful first-hand experience: there is now a great deal of "sibling overlap" because so many young families in the 1950's had three or more children spaced two or three years apart.

As a result, a great many families now face the problem of educating three children over an eight- or nine-year period. At a residential public college or university, this could mean a total annual cost of about \$4,500 a year for several years—at a time when median family income is about \$13,000!

Moreover, this "overlap" phenomenon will continue to be a severe problem until the early 1980's, according to Goldberg and Anderson.

This fact alone helps explain falling college enrollment rates and increasing family anxiety about the cost of college. Added to rising college tuition and other charges, the problem is almost overwhelming even for middle-income families.

7

Bureau of Labor Statistics' calculations of family budgets show that very few families have adequate funds to meet college costs.

Bureau of Labor Statistics' calculations made in 1974 showed that at that time families on "lower budgets," estimated at about \$9,000 per year, and "intermediate budgets," estimated at about \$14,000, had very little so-called "miscellaneous consumption" income left over to pay for college or other needs, after meeting their living expenses. As the median American family income is now less than \$13,000 a year, it is clear that most such families will have great difficulty in affording college.

BLS estimated that a four-person family with a \$9,198 income in fall 1974 would have about \$415 a year in "miscellaneous" funds left over for education *and other expenditures* such as recreation, reading material, alcohol, tobacco, etc!

A four-person family with an income of \$14,333 would have about \$662 a year left over for education, recreation, and other purposes.

Because living costs have risen since 1973 at a faster rate than salaries and wages, most families, of course, are relatively worse off in terms of available income to pay for a college education.

The BLS data follows:

SOURCE: U. S. Department
of Labor, Bureau of Labor
Statistics, April 9, 1975.

**Summary of Annual Budgets
for a Four-Person Family
at Two Levels of Living,
Urban United States, Autumn 1974**

	Lower Budget	Intermediate Budget
Total budget	\$9,198	\$14,333
Total family consumption	7,318	10,880
Food	2,763	3,548
Housing	1,758	3,236
Transportation	643	1,171
Clothing	759	1,085
Personal care	231	310
Medical care	738	742
Other family consumption	423	786
Taxes and deductions	1,463	2,790
Social security and disability	553	780
Personal income taxes	910	2,010
Other items (including education)	415	662

8

Current federal and state student aid programs are not adequate to meet the needs of most students, even the poor. They are particularly inadequate for lower- and middle-income students, and for older and part-time students.

SOURCE: One of many studies indicating that present student aid funds are far below the level of need—and also very much affected by one's state of residence and the type of college attended—is Stanford Research Institute: *Student Aid: Description and Options*, Research Memorandum EPRC 2158-27, 1975.

Some spokesmen have urged that student financial problems be resolved, not by keeping tuition down, but by raising federal and state student aid. Unfortunately, every study of student aid finds that the need for student aid is far greater than the likelihood that hard-pressed federal or state governments will find the necessary funds. What is more, G. I. Bill experience indicates that even very generous student aid is not enough to help veterans attend colleges in high-tuition states.

There are further problems with student aid, *essential as it is for many students*. One problem is that many lower- and middle-income families receive very little aid, sometimes none. Most aid programs properly are concentrated on the poor. If tuition is increased to "capture federal and state student aid dollars," as is happening in some states, a few of the poor may gain more than they lose, but most working-class, middle-income families simply will be hit with higher charges.

Further, student aid is subject to annual political and economic pressures. The formulas, the available funds, and the application procedures tend to change each year as new forces struggle for control of student aid policy in both

houses of Congress, the federal bureaucracy, state governments, and among private bankers. There are possibilities of major changes in student aid which may or may not benefit particular groups and particular institutions.

In each recent year, there has been an actual or potential "short fall" of hundreds of millions of dollars in unmet need for federal student financial aid. A combination of political and economic factors has led to this situation, and there is every reason to believe that it will recur in the future.

Further, state student aid is falling or is threatened in some states—in some cases at the same time that tuition is rising at public colleges. Again, a combination of political and economic factors in particular states is responsible.

Political leaders—governors, legislators, members of governing boards—need to be made aware that student aid alone is not and cannot be a "substitute" for low tuition. It is only a valuable supplement.

A few spokesmen for high tuition have suggested that by raising tuition more funds can be "generated" or "made available" for student aid for the poor. Unfortunately, there is little reason to believe that states would reappropriate increased tuition revenues in the form of student aid, or that adequate student aid could be "generated" in this way from moderate-income students.

What is more, some "student aid" spokesmen are trying to emphasize *very expensive, long-term loans* as the *principal* way to finance student aid, except for the

very poor. Some of these same leaders are working hard to raise tuition. If you oppose young people taking on debts of many thousands of dollars as the price of a college education, you have an additional reason for not relying too much on student aid, especially loans.

There is a further problem with over-reliance on student aid. Much of the recent growth in higher education has been among *older* and often *part-time* students. For example, between 1970 and 1974, student enrollments in the 30-34 age group increased 30 percent, those in the 25-29 age group by 16 percent, but those in the 18-24 group only by about 4 percent.

Most student aid programs, inadequate to meet the needs of younger students, are not designed to serve older adults, including working men and women who wish to continue their education or learn new skills. Many state student aid programs exclude part-time students, and indeed in many states they also are forced to pay much higher tuition. In other states, colleges have chosen to exclude part-time students from some federal student aid programs because of a shortage of funds. In many cases their family income levels—while moderate—are high enough so that they do not qualify for the low-income-oriented aid programs now available.

Everyone in higher education has expressed a growing interest in reaching older students, working men and women, housewives, and others who wish to return to school. Low tuition is an invaluable way to help these people, while student aid—at least in its present forms and at present funding levels—is not.

Senator PACKWOOD: Next we will take John E. Tirrell, vice president for governmental affairs, American Association of Community and Junior Colleges.

STATEMENT OF JOHN E. TIRRELL, VICE PRESIDENT FOR GOVERNMENTAL AFFAIRS, AMERICAN ASSOCIATION OF COMMUNITY AND JUNIOR COLLEGES, ACCOMPANIED BY DR. BETTE HAMILTON, ASSOCIATE, AND MICHAEL EDWARDS, DIRECTOR OF FEDERAL RELATIONS, ASSOCIATION OF COMMUNITY COLLEGE TRUSTEES

Mr. TIRRELL. I want to say, Mr. Chairman, it was a pleasure to do that. Don and I went to the same high school together and also to the same undergraduate school together. I am not sure two witnesses in a row often have that much in common, but as a part of the quid pro quo, though, he was talking about his children in college, he was supposed to raise making this retroactive to 1974 when I had four children in college, and of the four, two were in public and two were in private, and one of the four in a community college.

Well, Mr. Chairman and members of the subcommittee, I have submitted a statement, and I would like to request that it be placed in the record.

Senator PACKWOOD. The entire statement will be placed in the record.

Mr. TIRRELL. I am fortunate to have with me Dr. Bette Hamilton, my associate, and Michael Edwards, who is the director of Federal relations for the Association of Community College Trustees, and if you do have some questions, I would like the privilege of asking them to help me.

Rather than review the statement that I assume, and I know it is correct, that all of you have digested carefully, I would like to think aloud for a few minutes.

As I got ready for the testimony over the holidays, I went back and got out Higher Education for American Democracy the so-called Truman Commission of 1946 to 1948, which was probably one of the most voluminous and careful studies. They concluded that one-half of our populace could benefit by 2 years beyond high school and a third of our populace by 4 years or more beyond high school.

They went on to recommend, if you will recall, that the first 2 years after high school be made without tuition and the last 2 years be reduced. As the years went on, those were not directly done, but in the 1960's across the country local citizens voted support for community colleges, and we had during the sixties 1 a week built, or 500 in the 1960's. The population took it upon themselves to vote in most instances by local taxes to bring that recommendation about.

Since tuition had not been eliminated in the first 2 years or reduced in the last 2 years of college, the Congress in the 1960's, although we must admit probably stimulated by Sputnik to some extent, started to provide access to post-secondary education through Federal student aid programs.

During the late 1960's, the Senate started to hear that most of these programs were for the low-income families. The middle-income families were starting to get pressed. Thus the Senate, I believe, as

I read the record, passed Senator Ribicoff's bill in 1967, and Senator Hollings' bill in 1971, on tax credits for college expenses.

It seems to me, as I review it, that possibly these programs were too pioneering for that day, and more importantly, the programs for the low incomes were not completed. With the basic educational opportunity grant in 1972, that was finally fully funded in 1976, we had the continued expansion along with that of the other need based programs and loan programs, and the plea of the middle-income citizens became very much easier for you and your colleagues in the House to hear.

Thus, three of the six passages by the Senate of tuition tax credits for college expenses have come in the last 2 years. The time may have come for the idea, but what shape will it take?

It appears, and we are strictly representatives of postsecondary, so our comments will be directed that way, it appears that S. 311 may be closer to what we view as good public policy. S. 96 in essence has also been passed earlier, as I said, by Senator Ribicoff's sponsorship 10 years ago, and Senator Hollings' 7 years ago. Since we hear that one of the loudest criticisms from our friends in HEW, in the second part of December when Senator Roth had it on the social security bill, was it was going to help all of the high-income people, we might look at this Ribicoff-Hollings S. 96 bill, which reduces the tax credit over \$25,000 gross income and phases it out as you get to approximately \$60,000. It may be something, because that is the strongest criticism that we hear, that 5 to 10 percent of the people may be high income.

Let me just mention four specifics, if I could, before I conclude: First, it does not seem wise to us to include living expenses in the tax credit, so you see Don Lubbers and I are not together on everything; second, any tax credit should be excluded by law from the family assets and the need-based student programs, or some of the people you are trying to aid will suffer, if the tax credit is counted by those people in BEOG and so forth.

Third, deferral proposals exempting some part of the tuition from credit or only counting costs over some minimum, as our colleagues from the Great Lakes Association suggested, and I attended an institution that belongs to the Great Lakes Association, will not assist many of the citizens you are hearing from back home. I think their motivation is excellent. I just remind you, and I would be happy to provide figures for the record, that private colleges in the last 15 years have gone from 1 million students to 2 million students. Between 1970 and 1976, there were 136 more private institutions. So, much of the feeling that private education is going down the tube or no one is attending it is not documented by the facts. But to end on a more positive note, the recommendation of the American Council on Education to include at least half-time students is desirable, we believe.

The greatest educational investments this Government has made in its most important resource, human capital, brainpower, has been the three GI bills since World War II. It is clear from the simplest projection, however, that the number of citizens having the availability of a GI bill is decreasing drastically each month. The tuition tax credit might be seen, and there certainly are funds that have supported that program now, as continuing this very wise public policy in a somewhat different manner.

If I could just digress for a moment, around town they like to talk about a zero sum game, and Senator Roth, I think I have seen figures that your bill would cost \$1.7 billion. In the last 2 years, and your staff could check it, the GI bill benefits have decreased over \$2 billion. So, if you want to play zero sum—and it is down every month over the next 3 to 5 years.

Finally, in our 1,000 institutions, we have a very high percentage of minorities. For example, 75 percent of the Chicanos in postsecondary education are in our institutions. Large numbers of women, many employed. That is why I plead for the halftime consideration, and through CETA and other programs, many are employed. The year 1975 was the 75th anniversary of the 2-year college in this country.

As you may well know, William Raney Harper, in 1901, suggested the junior college, and got it started in Joliet, but we use "toward universal opportunity." This brings me, Senator Moynihan, to tell you where the Commissioner and the Assistant Secretary of Education were yesterday. We were invited to a White House briefing on the President's budget, and my colleague, Dr. Hamilton, attended, and during that morning's briefing, two of the three people you were looking for showed up to help brief me here and about 50 people from the media.

During that briefing, a member of the Domestic Council's staff went through the 11 points that the chap from Treasury did with you yesterday. I was here listening. I am sorry I did not get to see the Commissioner and the Assistant Secretary. I always enjoy it, but this member listed that it was complex for IRS. The colleges would have to go through all this paperwork, but had a new point, not realizing, I guess, that Dr. Hamilton was in the audience. "The reason the community colleges were supporting this was that we were going down the tubes, losing students, and we were trying to grab all of the enrollments from other institutions."

Well, again, statistics prove exactly the opposite, but let me just say, beyond the statistics and the rhetoric, the major reason for our support, regardless of where a taxpayer might use the tuition tax credit, in a public or private, 2-year or 4-year college or university, is because we really believe in universal opportunity, and we will continue to work for it, as we did in 1972.

We were the only association in 1972 that stood up and worked for BEOG that now everyone loves.

Mr. Chairman, members of the committee, we would be willing to try to answer questions you might have.

Senator PACKWOOD. Would you address yourself to just one question? On page 7 of your statement, you say:

Tax credits have advantages that student aid mechanisms cannot claim. First, benefits are provided directly without a complex and expensive Federal administrative bureaucracy; and second, they accomplish their purpose without cumbersome Federal rules and regulations.

Could you expand on that a bit, and give us some of your experience in administering the BEOG or other student loan grant programs?

Mr. TIRRELL. Many, many of our students come from minorities. They have a great deal of difficulty, for instance, with a BEOG form. Have you ever looked at one? Have you ever had to fill one out? And they do not have banking relationships as many others do; and when

they see a little box that says, any wrong information is a \$10,000 fine or incarceration, it scares them terrifically. We have had to move in institution after institution, and as you know, many of those 500 built in the sixties were built in the urban areas, in or near the ghettos, to have other students, peers, or counselors fill out that form for them, and with them.

The second part of it, sir, some of these regulations are beyond belief, and again, to try to interpret these to people, as I told you, 75 percent of the Chicanos, who may have a very great difficulty in English, is especially difficult for many of our students, and as I indicated, I think, in my statement, our average student age is 27, so these are not just all 17- and 18-year-olds. These are people who have bumped their heads at their jobs, don't want to sweep floors the rest of their lives, and come to us, and they also have difficulties in languages, and these complexities and warnings that you are going to be incarcerated if you give a wrong answer scare many off!

Senator PACKWOOD. Senator Roth?

Senator ROTH. Dr. Tirrell, I want to express my appreciation of your coming here today, and for your continued support of this concept. One of the things that concerns me, if we should move in the direction of some kind of a percentage, is the fact that people today that we think are relatively well off will not be doing that well 3 or 4 years off. You can make a guesstimate that a person roughly 3 or 4 years from now will have to have roughly 25 percent more income to just stay even, if you have inflation of 6 percent, and an increase in both State and local as well as Federal taxes.

So, one of my concerns is that today we have figures showing that a person making roughly \$23,000 has a minimum income, that they are not affluent. Frankly, 5 or 10 years ago we would have thought a person with \$20,000, \$25,000 was well to do.

Now, I don't want to have to have this fight every year. I want to make sure we are maximizing the opportunity of young people to go to college. You must look down the road during an inflationary period.

Mr. TIRRELL. I hope I made it clear that I was not necessarily recommending that, but I have a constituency, too, of about 1,000 institutions, and the one kind of reservation is, as was voiced vociferously by Secretary Califano, was that some of this was going to go to high income, so if, as you and your colleagues in the House get that push, that might be a consideration. It is not a recommendation. It is something for my constituents, that goes to their concerns.

If I could, Mr. Chairman, hopefully these will go together with the need based programs up through \$10,000 or \$12,000, with college work-study pick up with the tuition tax credit at some point, then, mainly loan programs will be helpful to people with "sibling overlap," spreading it out over some years, which is what I personally had to do loan programs.

Senator ROTH. I think your testimony is very helpful in answer to the allegation, charge, or claim made by CBO and the administration that middle America does not need help, and since you didn't read it, I would like to point out that you say, "Evidence of the burden on middle America is data from the American Council of Education study of college freshmen. It shows that middle-income students pay a

greater net cost in order to attend college than do either the wealthy or the poor. After contributions from their family and student assistance, middle incomes paid 41.6 percent of their college expenses compared to 32.2 for the poor and 29.6 for the wealthy. Middle-income students do not react to this inequity, only by finding the necessary money. Some go to less expensive institutions," but what I thought particularly distressing was, "others do not go to college."

Mr. TIRRELL. Senator Roth, that was taken—I think there is a footnote—from a very fine paper from Professor Leslie, who was then at Penn State and is now at the University of Arizona. I would provide it to your staff if you would like to include it in the record.

Senator ROTH. Thank you very much. It is an excellent statement, and I think it is about time some of the people in the ivory towers of Washington get out among the people and find out what the facts are. Again, thank you for your most helpful testimony.

[The material referred to follows:]

TAX CREDITS FOR POSTSECONDARY EDUCATION

Larry L. Leslie, the University of Arizona

SUMMARY

Tax credits for postsecondary education expenses have been proposed as a means of alleviating the financial difficulties of middle-income youth. Cited as evidence of these difficulties are the following:

1. Enrollments of middle-income youth have declined markedly in recent years, especially in more expensive, independent and four-year institutions.

2. Eighty percent of the overall decline can be associated with factors related to increasing college costs and reduced "discretionary" income among middle-class families.

3. The result is that middle-income youth must pay a larger share of their total college costs than do youth from other income brackets.

Extension of federal need-based student aid programs is considered a plausible solution to the problem. Such an approach—

1. avoids further complications in the tax code.

2. subsidizes students rather than parents.

3. potentially targets resources on those in greatest need.

However, extension of student aid programs—

1. is based upon needs analyses, which have not proven to be valid in the case of middle-income youth.

2. may result directly in inter-class competition for funds.

3. would be difficult to administer.

Tax credits are the favored strategy because—

1. no expensive bureaucratic machinery would be required.

2. the federal budget would not increase.

3. default rates on guaranteed student loans would be reduced.

4. they are consistent with the viewing of expenditures for higher education as an investment in human capital.

5. the precedent of making transfer payments to the middle class would be avoided.

In response to criticisms of the tax credit strategy, the following are offered:

1. Regressivity can be avoided as desired by carefully structuring the legislation.

2. Independent institutions would gain somewhat more than public institutions, but all would gain in absolute terms.

3. No additional money for higher education would be required because of present and projected reductions in GI Bill expenditures.

4. Tuitions would *not* be increased directly in accordance with the amount of the credit.

Mr. Chairman and Members of the Committee: My name is Larry L. Leslie and I am Professor of Higher Education at the University of Arizona, where I teach the Economics and Financing of Higher Education. As I understand it, the Committee has invited my testimony as an independent scholar who labors in this field. I wish to make it clear that I do not speak for any organization or institution. Though it is impossible to be totally value-free, my aim is to present the most accurate and objective information that I can. This is not to say that I am without opinions; in my view, the best available evidence does argue for the adoption of educational tax credits.

My work over the past decade has centered almost exclusively on the effects of emerging public policy in the area of postsecondary finance. Assessing the outcomes of federal and state student aid programs has been a primary activity of mine since about 1972. More recently, I have given major attention to tax credits for postsecondary education. I have done this merely as analyst, first for the American Association of Universities, and then for an NIE-funded project. My assignment has been, in each case, to identify the pros and cons, strengths and weaknesses of alternative funding strategies; and I have sought diligently to minimize the role of my personal values in this analytical exercise, in large part because that was my specific charge from those who commissioned my work. Apparently, I have been successful in this, as the only specific criticism of my work of which I am aware was a comment to a journal editor that my analysis favored the private sector. Since I have worked in public universities all my life, I take this as high praise. The goal of any scholar is to be as objective as possible.

In the preparation of this statement, the approach taken was to summarize findings that already have become broadly known and to focus instead upon issues that remain in question in the minds of many. Thus, I mention only in passing such matters as the recent decline in enrollments among youth of middle-income families, the rise in college costs during the past decade, and the relationship of the enrollment decline to the relatively higher net costs of postsecondary attendance of middle-income youth. More attention is paid to such issues as whether tax credits are effective and efficient, whether they are regressive, whether they will indirectly take needed funds from the poor, whether middle class families really have experienced a reduction in their ability to pay, and whether tax credits would cause tuitions to be raised.

BACKGROUND: THE MIDDLE-INCOME CONDITION

In 1975, I set out to assess the effects of the tremendous growth in student aid programs upon student access, choice, and retention and completion—the official goals of student aid programs. The resulting volume, *Higher Education Opportunity: A Decade of Progress*, which was published by the American Association for Higher Education, reported optimistically on the substantial gains shown by low-income and minority youth in attaining equality of postsecondary opportunity and the apparent connection of these gains to student aid programs. The alarming and largely unexpected secondary finding was that on these important goals of student aid programs, middle-income youth had experienced major losses. Adjusting for growth in the college-age population, enrollments among these youth were down by 13.5 percent between 1967 and 1975. From the peak year of 1969 to the apparent bottom of the trough in 1974, the adjusted decline was 21.5 percent. My estimate was that in the year of 1973 alone, 435,000 more middle-income youth would have been enrolled in college if the conditions of 1969 had continued to prevail. A less often quoted finding was that college choice was reduced, too, as middle class enrollment shares were down markedly in more expensive, four-year colleges and universities and in private institutions as well, much more so than should have resulted from the decline overall.

The evidence was both direct and indirect that higher student charges and reduced ability to pay—especially in the relative sense—was, in large part, responsible for this decline. Statistical analyses yielded the estimate that over 20 percent of the decline in middle-income enrollment rates was associated with factors related to increasing college costs. From 1964-65 through 1976-77, postsecondary costs for tuition, room, and board had increased by over 100 percent. Even after adjusting for inflation, the increase was substantial; when one focuses on tuition alone it is evident that the rise has been, in constant dollars, one-third. Incidentally, all these figures are from reputable sources, most originating in the

Census Bureau, National Center for Educational Statistics, the Labor Department, and the American Council on Education.

So, I think there is little doubt that middle-income youth are attending college in fewer numbers, and that inability to pay is a major factor. Further, my analysis shows that the declines would have been considerably more severe if it had not been for the recession of the mid-70's, which reduced the foregone-income-costs-of-attendance because fewer youth could find jobs.

Allow me now to digress for a moment on an important issue that has drawn considerable attention in these halls and in the media. This is the matter of the middle-income family's true ability to pay. As you know, it is widely held that although the costs of college have risen, the ability of the middle-income family to meet these costs has not diminished. This, in my opinion erroneous view, has caused me great consternation, because if it is accurate, certain principles of economics are being violated; i.e., demand for college is decreasing even though net ability to pay supposedly is not. In an attempt to reconcile these facts, I took a closer look at the specific statements being made and at the economic status of the family. Here is what I found. The (erroneous) authorities base their conclusion in this regard upon the fact that tuition and fees composed in 1975 roughly the same portion of U.S. median family income as they did in 1970. Quite aside from the question of the self-serving time frame selected, it occurred to me that perhaps a closer look at family economics was in order. This I proceeded to do.

The first obvious flaw in the cited approach is that the median income of U.S. families is largely irrelevant, if not misleading. Rather, we are concerned with the earnings of those we classify as middle-income. It may well be—indeed, I suspect it is—that due to income transfer programs from the middle class to the poor and the rising prosperity of upper-income families, much of the increase in U.S. median income has resulted not from increases for the middle class, but from increases for the relatively poor and perhaps even for the relatively rich. Whether this is really so or not, I do not know; but I do know that the use of the median income figure in the discussion at hand is at best inappropriate. The point is that reference to U.S. median income may say nothing at all about the income of those in the middle.

The second and related issue is even more compelling. The implicit, though clear assumption in the "median income approach," is that the demands upon the middle-income family budget have remained essentially constant over the time period in question. Thus, in sought to identify, from government sources, statistics that would more precisely reflect true changes in middle-income ability to pay, and found what I think is the best available answer in figures compiled by the Bureau of Labor Statistics. The Bureau keeps data on low, middle, and high "Budgets for an Urban Family of Four." In other words, the Bureau's data take into account how much money a family needs to maintain a certain level of existence, and thus how much money is left for postsecondary expenses. By viewing these figures over time one can get an excellent idea of the "discretionary" income available to a family for postsecondary education after all the costs of housing, food, clothing, taxes, and so forth have been subtracted. I submit that this yields the appropriate data for answering the question of middle-income ability to pay for postsecondary education.

Using the "Intermediate Budget for a Family of Four," it is seen that from 1970-75, middle-family costs increased by 43.6 percent, while the (disputable) U.S. median income rose by 38.5 percent. In other words, the family in the middle had less discretionary income in 1975 than it had in 1970 to pay college tuitions that were over 50 percent higher. Looked at another way, the middle family's "deficit budget" was 4.2 percent more than the median income in 1970, and was almost twice as large, or 8.1 percent, in 1975.

As compelling as these data may be, they still provide only background information. One could well argue that the middle-income family continues somehow to find a way of supporting their college-going offspring. (This is, after all, the cardinal assumption of the need-based student aid programs.) The truth, however, would appear to be that they do not.

American Council on Education data show that middle-income parents are not supporting their children as federal needs analyses say they should. The shortfall in parental contributions means that middle-income youth must, on their own, find about one-third more of the costs of college than most low- and upper-income youth. Specifically, the "net cost" of college left to the

student to account for through his or her own means is 32.2, 41.6, and 29.6 percent for low, middle, and high income youth, respectively.

This disparate pattern is supported by some work I did at the request of the House Special Subcommittee on Education a few years ago. A survey of students, who had applied for but had been denied aid, revealed a major disparity between actual parental contributions and government projections. On the average, the needs analyses had calculated that these aid nonrecipients should receive from their parents \$1,729. They received an average of \$753, which was about \$150 more than was received by aid recipients, and about \$1,000 less than federal need analyses had projected. Roughly 50 percent of the nonrecipients received from their parents nothing at all.

Having shown the special problem of the middle class, let us turn now to the plausible remedies. I submit that there are two: an expansion of existing student aid programs and the adoption of postsecondary tax credits.

THE SOLUTIONS

A. Student aid

There is much to speak for the strategy of extending student aid entitlements to middle-income youth. One advantage is that the student aid strategy avoids further complications of the tax system. Clearly, the overall desire of Congress is for a simpler tax code, not a more complicated one. Tax credits, however, would add yet another chapter to the already complex tax code.

The foremost advantage of the student aid strategy is the potential for better targeting of resources upon those students in greatest need. Tax credits "entitle" all youth whose families have an income below a certain level, whereas needs analyses can take into account numerous other economic factors that may vary markedly within a given income class. Further, student aid programs subsidize students, whereas tax credits subsidize parents—who may or may not pass the subsidy on to their children. However, since needs analyses are based upon the assumption of parental contributions to their children, it would seem inconsistent to argue for the extension of student aid and against tax credits on these grounds. Either approach assumes a central parental role.

Unfortunately, needs analyses specify what parents *should* contribute to their children, not what they do contribute. As indicated earlier, this disparity is very large. As a result, under needs analyses, many students are penalized when their parents are unwilling or unable to contribute as much as government agencies suggest. It is clear that although aid programs make awards to students (and not to parents), these programs generally are based upon parental income or wealth, not the student's.

A major unresolved issue, it seems to me, is how a program for middle-income youth could or should be employed through a need-based program. The raising of BEOG award maximums from \$1,400 to \$1,800 was widely publicized as a step in this direction, but this approach should have the opposite effect because larger awards means less money, not more, for expansion of eligibilities to new income groups. Perhaps one approach is to reserve certain amounts for each income group. This, however, places income classes in direct competition for funds, an occurrence that would seem to be undesirable on many counts. Further, during periods of financial retrenchment, it might be feared that the truly poor would suffer from the necessity to reserve legislated amounts or shares for the middle income. On the whole, I fear that there exist very grave problems in administering this approach. Unless very explicit legislation were to be passed, I doubt that much money would end up in the hands of the middle class, and if it did, I would anticipate considerable inter-class conflicts.

B. Tax Credits

The signal advantage of the tax credit approach is its simplicity. No costly bureaucratic machinery would be required, and this would not only keep down the size of government, but would save money as well. The fact that the size of the federal budget is not increased is an extra dividend, politically.

A related advantage concerns the Guaranteed Student Loan program. In recent years, loans have become a major funding vehicle for the middle class, while the poor receive grants from government and the wealthy receive gifts from parents. This not only raises questions of equity, but undoubtedly has led indirectly to growing loan default rates. Tax credits would allow less reliance upon loans, thus reduced default rates, and a fairer treatment of all concerned.

Tax credits are consistent with historic approaches to providing incentives rather than income transfers to those who invest in the future. Investment in human capital (higher education) is analogous to investment in physical capital and is not consistent with the aims of social welfare programs. Persons who invest in their own higher education are investing in their future and in that of the entire nation; to turn such efforts into government income transfer programs, such as student aid, would undermine the very nature of the investment philosophy. Additionally, the precedent of extending such transfer programs to the middle class could have serious future implications for other government transfer programs.

CRITICISMS OF TAX CREDITS

Now allow me to address the criticisms of tax credits referred to earlier. A frequent and serious charge made against postsecondary tax credits is that they are inherently regressive. This charge is a "straw man" argument; tax credits can, like any other strategy, be structured to entitle or exclude any group. Congressman Coughlin's measure, for example, would progressively reduce the amount of the credit as incomes surpassed \$22,500. Some measures incorporate a "positive check-off feature" for those without any tax liability due to low earnings. Finally on this point, it is worth stating that if the postsecondary tax credit is viewed as it correctly is, as an investment in human capital, on grounds of taxpayer equity one could argue that no group should be excluded from receiving a credit for this investment.

Another issue concerns how tax credits would affect the balance between the public and the independent sector. There is no question that student aid, as it is presently conceived, is more beneficial to independent institutions than are tax credits—again as presently conceived. This is because the amount of student aid awards tend to be tied much more closely to the costs of attendance than tax credits normally are. However, there are four relevant points to be made on this issue: (1) If Congress desires to target assistance on the independent institutions, it should adjust tax credit formulae accordingly. (2) Contrary to the views of many, tax credits will aid independent colleges relatively more than public colleges. Some organizational spokesmen—many of whom should know better—argue that a \$500 tax credit will redistribute students to the public sector because the amount is a much larger portion of public than it is of private college tuitions. This reasoning belies proven economic theory. When buyers effectively experience an increase in money income, they substitute more expensive goods for less expensive ones, not the opposite. Increases in wealth witness the substitution of butter for margarine and Cadillacs for Chevrolets, not vice versa. If one wishes to argue that the tax credit should be viewed instead as a reduction in net price, I venture to say that the results would still be the same. (3) Amounts appropriated for tax credits represent new money for higher education, not as money being taken from student aid programs. The view that funds for tax credits will be taken from student aid appropriations or from deductions for gifts to colleges and universities is not given much credence by any serious political theorist. (4) Both public and independent institutions would gain in absolute terms, as many new students would be brought into the system.

The third major reservation surrounding tax credits concerns the revenue loss to the Treasury. There is no disputing that tax credits initially, at least, will cost a considerable sum of money. However, if viewed as a national investment in human capital, the longer-term outcome will be a net gain for government. We are today, in each tax collection period, reaping the benefits of earlier investments in higher education, including most notably the direct federal investment through the GI Bill. Even with the reduced rate of return from higher education anticipated for the future by some, the yield will still clearly justify the expenditure.

Further, even in the short term, it is possible to find the funds for postsecondary tax credits in the present education budget, broadly defined. In 1976, we were spending over three billion dollars on postsecondary educational benefits for GIs. This spending is now on the decline and total V.A. spending is expected to be down by 1.4 billion dollars over 1976 for the next academic year. As the eligibility of Vietnam-era veterans continues to expire, there will be enough funds freed to meet even the most liberal estimates of the costs of postsecondary tax credits.

The final major reservation concerning postsecondary tax credits is that institutions might seek to capture the amount of the credit by raising tuitions accord-

ingly. Such a view, in my opinion, demonstrates a remarkable ignorance of campus politics and decision making. As I stated in "Higher Education Tax Allowances: An Analysis," published in the *Journal of Higher Education*:

"Boards of trustees raise tuitions and fees reluctantly. Although awareness of tax allowances to parents undoubtedly would make raising tuitions less difficult, it seems clear that trustees agree to such increases as a last resort. Institutions of higher education do not act as businesses, raising their prices in order to maximize profits as market conditions permit. For the most part, trustees increase tuitions when they are forced to—when the quality of the educational program is believed to be threatened and when alternative income sources (e.g., state appropriations) have been exhausted. Further, when tuition increases appear imminent, student groups may become potent political forces. Finally, competition always acts to retard tuition increases. If tuitions are raised too high, too rapidly, potential students will attend elsewhere, or not at all."

CONCLUSION

There are few people today who question seriously that middle-income youth face serious financial problems in attending college. The rumored support of the Carter Administration for expanding the BEOG program tacitly acknowledges that a problem exists. Clearly, middle-income enrollments are down, middle-income ability to pay is reduced, and middle-income net costs of postsecondary attendance are up.

Expansion of the BEOG program shows considerable promise in meeting the middle-income need and may, for political reasons, turn out to be the chosen vehicle, although the analysis herein argues for the tax credit approach. The BEOG strategy allows direct targeting upon those in greatest need, and thus potentially could save money by excluding those who are judged to be less needy. However, the record of needs analyses in the case of middle-income youth is rather dismal, and it is difficult to conceive of a workable extension of existing entitlements, that would not at the same time pit class against class and in the long run jeopardize the BEOG entitlements of the poor. Although reliance upon the BEOG program, as opposed to tax credits, would avoid the necessity for further complications of tax laws, the latter would be eminently more simple, administratively.

The major challenges to tax credits appear to be largely without merit. There is no reason why tax credits need to be regressive if it is the desire of Congress not to make them so. Under a tax credit approach, independent institutions will not lose ground to the public sector in their struggle for students and the resources they represent. It is worth stating that the idea of tax credits originated in the 1960's within the private sector and that spokesmen for the public sector were then the chief detractors. Finally, admittedly tax credits will cost money, but the funds can be found in the shrinking GI Bill program, and in the long run, the money will be returned severalfold through taxes on the higher earnings of those assisted.

In sum, tax credit legislation promises to be good public policy. A few years ago, when I was first asked to consider postsecondary tax credits, I began with no opinion and an open mind. As I have studied and learned more about them, I have grown progressively more enthusiastic. Tax credits for postsecondary education expenses will, in my view, be good in the final analysis for postsecondary education and good for America.

Senator MOYNIHAN. As is always the case here in Washington, you have got to be very up to date on the gobbledy-gook. You referred to the "zero sum game" going around. I think, sir, you are referring to "zero based budgeting."

Mr. TIRRELL. No; I mean that there is only a certain pot of money, and if you want something else you have got to take something else out.

Senator MOYNIHAN. Well, that is exactly so. At HEW they think that this relationship is indeed a sum zero game. Anything we gain, they lose, and there is no way to maximize any relationship. The bureaucracy is acting like a 4-year-old boy who has broken something

and thinks his parents don't know it. It is just so transparent, this behavior.

Mr. TIRRELL. If my memory is correct, Senator Moynihan, you were not in the Senate in 1972, but you probably know that the argument then was, you could not have BEOG because you will lose money in the college based programs, work-study and so on. What has happened is, they have expanded and we have \$1.7 to \$1.9 billion in BEOG because they are very good social services.

Senator MOYNIHAN. I think it is worth pointing out that the American Association of Community and Junior Colleges was in here testifying for BEOG when it came forward.

Mr. TIRRELL. It was not me then, but my predecessor was then.

Senator MOYNIHAN. It is a good record. You should be proud of it. One of the most depressing things is the sort of institutional fearfulness that we encountered. What you have suggested is that we are finishing up a spectrum of aid of one form or another that began with need-based aid for levels of income, work-study, and then tax relief, so that you have a somewhat whole program.

We have supported all of those programs that came earlier. There is no one here who has not been for those things, but the time has come for this, and it would be kind of completing the system. And one of the nice things about President Truman's Commission's report, is that, with respect to the proportion of students going to institutions beyond high school, the goals, those wildly visionary goals, are now largely achieved, are they not?

Mr. TIRRELL. They are coming very close.

Senator MOYNIHAN. We are just about exactly where he thought we would be. It took a generation to do it, but there is something unworthy about this argument that if we extend this final range of assistance, why, it will be detrimental to earlier forms.

I must say, I have been pretty upset with respect to our proposal on elementary and secondary schools.

Mr. TIRRELL. I didn't notice yesterday you were upset.

Senator MOYNIHAN. I am more upset today. The way those folks come in with that dirty little argument that this will help segregation. They don't have any right to talk to us like that. We have spent our whole adult lives in opposition to any such thing, and to come here with that sort of talk—it really does make you wish you could start that bureaucracy over again. It is the necessary behavior of bureaucracy, but it is dirty.

So, you have been splendid, and you have a record of being brave about the future, and welcoming these things, and we thank you for welcoming this proposal.

Mr. TIRRELL. Mr. Chairman, may I make one last comment? Certainly over these last few months Bruce Thompson on Senator Roth's staff has been very helpful, and I would like to thank him, and I notice over your shoulder, Checker Finn, who is an old friend, and if the committee has any concern that we are not correct on excluding some of the tuition, Checker Finn, when he was at Brookings, did a study, and has a paper that the one-half cost in BEOG, the limitation hurts only the low incomes, going to low tuition institutions. If that is what you want to do, that is the way to do it. But I don't think after you read Checker's paper that you would want to do that.

Last, I cannot help but say that I went to the American Council on Education's library to check out that Truman Commission study. You might have noticed my quote from Alice Rivlin. It was called the Zook Commission, because George Zook chaired it, and when I got it home I noticed that it was his personally embossed copy. So, I wanted to have it on the table today, when I noticed you were implementing some of those policies.

Senator PACKWOOD. Thank you for telling us the whereabouts of the educational establishment yesterday.

[The prepared statement of Dr. Tirrell follows:]

STATEMENT OF DR. JOHN E. TIRRELL,¹ VICE PRESIDENT FOR GOVERNMENTAL AFFAIRS, AMERICAN ASSOCIATION OF COMMUNITY AND JUNIOR COLLEGES, WASHINGTON, D.C.

Mr. Chairman and Members of the Subcommittee, My name is John E. Tirrell, Vice President for Governmental Affairs of the American Association of Community and Junior Colleges, representing about 1,000 institutions located in 426 of the 435 congressional districts who last fall enrolled over 4,000,000 credit students. In 1975, AACJC in celebrating the 75th anniversary of the two-year college used the phrase "Toward Universal Opportunity"—so we have concern for the topic of your hearings. Official positions on policy matters are decided by our Board of Directors. While Association's Commission on Governmental Affairs has a recommendation on tuition tax credits for postsecondary education (Attachment A), our Board has not had an opportunity to act on this recommendation. Thus, AACJC does not, at this time, have an official position.

SUMMARY

Tax credits are advocated, by some, to assist middle-income families in paying for tuition in postsecondary education.

A brief historical perspective is provided by reference to the 1946 Truman Commission, the 1955 White House Conference on Education and some developments in the 1960's and early 1970's.

We attempt to show that:

1. The cost of college is rising faster than the cost of living;
2. Middle-income students pay a greater net cost to go to college than do the poor or wealthy; and
3. The percentage of middle-income students enrolling in college is declining. A portion of that decline is attributable to rising costs.

Two alternatives for reducing the net cost of college for middle-income families are examined:

Two alternatives for reducing the net cost of college for middle-income families are examined:

1. The extension of need-based aid, and
2. Tax credit for postsecondary tuition.

It is suggested that tax credits for middle-income parents are feasible since they would (1) be an entitlement in keeping with the values of most middle-income citizens who seek equality of opportunity for all, (2) be less costly to administer, (3) be an investment credit in "brainpower", and (4) not jeopardize the allocations of student monies which go to low income families.

BACKGROUND

The objective we have under discussion today—providing equity in access to higher education for all our citizens—is not a new topic. President Truman in 1946 appointed a Commission that produced a report Higher Education for American Democracy. In the concluding paragraphs of the very extensive report the Commission recommended:

"* * * a role commensurate with the responsibilities of higher education in a democracy; a role which, when accepted in full, will make college and university education equally available to all Americans without regard to race, creed, sex, national origin or economic status."

¹ While the author takes complete responsibility for this paper, the assistance of others must be acknowledged. My colleague, Dr. Bette E. Hamilton, has been of considerable assistance in refining the thought—and many members of the AACJC staff and Commission on Governmental Affairs over the past 5 years.

In a later publication, *The Role of the Federal Government in Financing Higher Education* (page 70), Alice Rivlin (then at the Brookings Institution) summarized the critical concern of that report (referred to as the Zook Commission) as follows:

"In its lengthy report the Zook Commission estimated that about half of all American young people had the ability to complete 14 years of schooling and about a third could complete 'an advanced liberal or specialized professional education' involving four or more years of college training. The fact that many able students were dropping out of school, for financial and other reasons, before completing this much education was regarded by the Commission as a *waste of human resources resulting in serious loss both to the individuals and to the nation.*" (Italics mine.)

The crucial recommendations of that Commission appointed by President Truman were:

"This Commission recommends the elimination of tuition and other required fees in all publicly controlled colleges and universities for the thirteenth and fourteenth year; and a reduction beyond the fourteenth year * * *"

"This Commission recommends, as an important element in equalization, the establishment of free, public, community colleges which would offer courses in general education both terminal and having transfer value, vocational courses suitably related to local needs, and adult education programs of varied character."

We will come back to these two recommendations but, first, consider an excerpt from the 1955 White House Conference on Education.

"One fundamental fact merges, schools now affect the welfare of the United States more than a generation ago, and an uneducated populace is a greater handicap to a nation. This trend is obviously going to continue and quicken." (Page 126.)

How prophetic this statement turned out to be. With the launching of Sputnik, it was obvious that one of our greatest national resources was "brainpower" and federal programs were initiated to develop this most important American resource.

Social historians tell us it takes some years for a new concept to actually be accepted and cause change in the "real world."

In the 1960's, the two recommendations of the Truman Commission quoted above were acted upon—although not in the exact manner suggested.

First, in the late 1960's and early 1970's, instead of reducing tuition, need-based federal financial aid was established—mainly to assure access for students from families with incomes under \$10,000.

Second, for the decade almost 500 new community colleges were founded, about "one a week," although only those in California, Chicago and New York City were without tuition (Chicago and New York City have instituted tuition in the last two years).

THE CURRENT SITUATION

It is ironic that federal student assistance programs, instituted by the national government at the urging of organized "blue collar" groups are largely unavailable to these middle-income men and women, who pay the majority of taxes, and wish to send their children to college.

Equal educational opportunity for America's poor started in 1965, expanded in 1972 and finally was achieved in 1976 when the Basic Education Opportunity Grants were fully funded. Coincidentally, 1976 was the year that the average annual income for AFL-CIO members reached \$14,000, out of range of need-based student assistance. While middle-income families pay their taxes to provide educational opportunity for the poor, their only recourse in meeting ever-rising college costs is guaranteed student loans, low cost institutions or opting for no help for their children to obtain a college education.

That college costs have risen will come as no surprise to anyone. College costs have, in fact, risen a great deal faster than the cost of most goods and services. Between 1964 and 1977, in constant dollars (adjusted according to the rise in the Consumer Price Index), tuition and required fees rose by 33.3 percent in public institutions and by 26.6 percent in non-public institutions. (In public two-year colleges, the increase was 130 percent between 1970 and 1976!) The discretionary income of most Americans did not increase at that rate. The heaviest burden of college costs falls on middle-income families. (See the Congressional Budget Office report, *Postsecondary Education: The Current Federal Role and Alternative Approaches*, February 1977, page 26.)

THE FLIGHT OF MIDDLE-INCOME FAMILIES

College tuition is a user tax which is even more regressive than the uniform sales tax.¹ Regardless of income, everyone must pay essentially the same tuition for four years. Thus, the effective tax—or tuition—rate is higher for lower-income groups than it is for higher-income groups.

But tuition affects middle-income citizens most severely because while the poor qualify for aid and thereby avoid some of the user tax, middle-income families qualify for little or no aid while paying full tuition for college.

Evidence of the burden on middle America is data from the American Council on Education Study of College Freshmen. It shows that middle-income students pay a greater net cost in order to attend college than do either the wealthy or the poor. After contributions from their families and student assistance, middle-income students pay 41.6 percent of their college expenses compared to 32.2 percent for the poor and 29.6 percent for the wealthy. Middle-income students do not react to this inequity only by "finding" the necessary money. Some go to less expensive institutions—but others do not go to college.

Recent data show that children of upper-lower and middle-income families are not attending college today as they did in earlier years when college costs were less. Those with annual incomes of \$10-20,000 declined in their rate of college-going by 8.8 percent between 1969 and 1974. This is a percentage decline of 22.4 percent in total numbers.

Analysis of Census data indicates that in round numbers, there are 1,300,000 young people in this income bracket who did not go to college in 1974 who may have, had the year been 1969. During the same years, the rate of college-going was essentially stable for the poor. The data on the wealthy are unclear, but their rate of decline was substantially less than that of middle-income families. The end of the draft and decreasing financial utility of college explain some of the declining rates of attendance. But the wealthy also used college attendance as an excuse from the draft and their rate of decline does not equal that of the middle class.

There is some direct evidence of the impact of cost on college-going. At the City University of New York, full-time enrollment dropped by 20 percent with the initiation of tuition. On the other hand, enrollment increased in Wisconsin's branch campuses when tuition was lowered * * * especially among middle-income students.

Relief for students in middle-income families is needed. Two forms of relief could be made available by Congress: (1) expanded need-based aid, and (2) tax credits.

NEED-BASED AID FOR MIDDLE-INCOME FAMILIES

The extension of need-based aid to families in the \$10-25,000 range is a possible mechanism for providing relief. The program would have the advantage of being under the jurisdiction of the education committees of the House and Senate. Hopefully, aid for middle-income Americans would become part of a coherent national education policy.

It certainly is an alternative that should be considered, although there are certain disadvantages—such as:

1. Need-based aid is viewed by most people as a program for the poor. An attempt to extend such aid to middle-income families could be viewed as a "raid on the money of the poor". When funds are limited, as education appropriations usually are, the extension of those funds to a new clientele will benefit, in the minds of many, at the expense of the poor.

2. To reduce the "net cost" of college-going for middle-income families, the education and appropriations committees would have to provide more grants and work-study. Loans do not reduce net cost and would not return the middle-class to college in great numbers.

3. The definition of "need" is troublesome when applied to the middle class. Middle-income families have a commitment to a way of life that requires that limited resources be spent on a number of family needs which include housing, health care, other family member needs in addition to education.

¹ This and subsequent analysis of the burden of college costs on middle-income families is taken from an unpublished monograph, "Higher Education Opportunity: A Decade of Progress," Dr. Larry L. Leslie, Feb. 1, 1977. Data in the document are from the Bureau of Census, the American Council on Education, and the National Center for Education Statistics.

4. Philosophically, a poverty oath is repugnant. It is especially so for families who must swear poverty in order to obtain a college education for their children that they and their forbearers received for free—or at nominal cost.

TAX CREDITS

Tax credits for postsecondary education would enable middle-income families to retain a portion of the money they would ordinarily pay in federal income tax. The amount retained would depend on the terms of the legislation.

Tax credits are criticized on a number of bases:

1. Depending upon the legislation itself, tax credits will reduce the income to the U.S. Treasury. (Although the President indicates he is looking for tax reductions to offset some new costs for social security.)

2. "Tax credits are back-door financing." When it is considered as aid to college attendance then, it is said, it should be the responsibility of the education and appropriations committees * * * not the tax writing, Ways and Means and Finance Committees.

3. "Tax credits are a tax expenditure that could be charged against education." Congress might reduce other education commitments such as student assistance for the poor and tax law provisions that encourage charitable giving to colleges and universities.

4. "Tax credits will drive tuition rates even higher." But, tuition rates are going to rise irrespective of Congressional action on tax credits. College administrators and boards of trustees are reluctant to raise tuitions at any time * * * and they do it, not when they believe students have a new source of funds, but when the financial condition of the institution requires additional income. If there is an element of credibility to the tuition inflation argument, it must be said that the argument applies equally to all forms of student financial aid—not just to tax credits.

THE CASE FOR TAX CREDITS

On the other hand, it may be argued that tax credits are the better strategy to relieve the middle-income taxpayer. If tax credits are perceived as relief for middle-income Americans, instead of aid to education, there is ample precedent for action by the Finance Committee in the Senate and the Ways and Means Committee in the House—investment tax credits, child care tax credits, etc.

1. Tax laws are perceived universally as a means for fairly distributing the wealth of the country among the various income groups.

2. There is legislative precedent for supporting the "common good" through tax relief.

(In the budget documents for FY 1978, I have counted almost 90 different tax expenditures in effect in the last three fiscal years—63 of benefit to individuals and 31 for corporations. For individuals in FY 1977, these totaled \$77 billion, for corporations over \$25 billion. See Attachment B.)

For example:

a—Tax relief is provided for interest in home mortgages.

b—Tax relief is provided for individuals with very large medical expenses.

c—Tax credits are being considered to help Americans insulate their homes.

A tax credit to help Americans provide their children with an opportunity for a college education does not differ in kind from other uses of tax credits and would aid in the continued development of the "brainpower" our nation needs in the years ahead.

3. Whereas need-based aid almost requires a "poverty oath", tax credits give access for Americans to an opportunity for a college education irrespective of their particular circumstance. (It might be seen as the implementation of the recommendation of the Truman Commission of 1946 of extending education to provide access for all to two or four years of postsecondary education.)

4. Tax credits have advantages that student aid mechanisms cannot claim. First, benefits are provided directly without a complex and expensive federal administrative bureaucracy and, second, they accomplish their purpose without cumbersome federal rules and regulations.

5. The tax credits also may be "fine-tuned" to accomplish the purposes of the Congress.

For example:

The dollar amount of the credit can be adjusted to meet the desired purpose. A small credit of \$100 will affect the college decision of a few families, but a \$500 credit will affect the decision of many more.

The credit may be targeted narrowly on families with \$10,000 to \$25,000 incomes who want a full-time accredited college degree program for their children. Or the credit may be granted to all Americans (like the benefits of medicare) for all postsecondary programs—full-time or part-time, for degree credit or otherwise.

The provisions of any tax credit legislation may be just as sharply tuned as the provisions of other authorizing legislation. Once in place, tax credits are not subject to the fluctuations of the appropriation process. This has an important advantage for middle-income families could make definite plans knowing exactly how much tax credit would be available each year. This is often not the case with need-based student financial aid to date administered by federal, regional, state or institutional procedures.

CONCLUSION

It appears that upper-lower and middle-income families are denied equal access if they wish to send their children to college.

Expanding need-based aid to middle-income citizens raises many difficult problems. Tuition tax credits for middle-income citizens, on the other hand, has historical precedents in similar Congressional actions to relieve the taxpayer and to stimulate the public good. Legislation can be targeted to achieve the objective of assistance to middle-income families assuming the costs of post-secondary education for their children. In addition, tax credits are more in tune with the middle-class values of providing for equal opportunity for all.

It would appear that S. 311 fulfills many of these objectives and would be of great assistance to millions of middle-income citizens across the country struggling to give an opportunity to their children for postsecondary education.

ATTACHMENT A.—AACJC COMMISSION ON GOVERNMENTAL AFFAIRS

TAX CREDITS FOR POSTSECONDARY EDUCATION TUITION

The AACJC Commission on Governmental Affairs is deeply concerned about the present financial plight of our Nation's middle-income families. These families—dedicated to the benefits of higher education for their children—today find themselves on a seemingly endless economic treadmill. Inasmuch as their dependents are generally ineligible for significant amounts of federal or state student financial support, they watch their tax dollars provide needed student assistance to the more economically disadvantaged, while they themselves are unable to find the necessary resources to meet their own children's rising college costs. The Commission believes that an equitable system of federal income tax credits for tuition for postsecondary education can provide meaningful relief for these families. Moreover, it is the view of the Commission that such a program is a necessary complement to our present programs of financial support to economically disadvantaged students; will increase educational opportunities for the people of our Nation; will help maintain family relationships; and will provide a stable system of educational funding for postsecondary students.

Therefore, the AACJC Commission on Governmental Affairs supports prompt Congressional action to establish an equitable system of tuition tax credits for postsecondary education for upper-lower and middle income families.

ATTACHMENT B.—THE BUDGET FOR FISCAL YEAR 1978 (SPECIAL ANALYSIS F)

TABLE F-1.—TAX EXPENDITURES ESTIMATES BY FUNCTION

[Examples excerpted]

Number	Description	For individuals (millions)		
		1976	1977	1978
1	Exclusion of benefits and allowances to armed services personnel.....	\$1,020	\$1,095	\$1,260
7	Expensing of certain agricultural capital outlay.....	455	370	440
29	Exclusion of employer contributions to medical premiums and medical care.....	4,490	5,195	5,840
31	Deductibility of medical expenses.....	2,315	2,585	2,870
42	Premiums on group life insurance.....	768	800	835
56	Exclusion of GI bill benefits.....	305	255	200
69	Investment credit.....	1,870	1,970	2,205
72	Exclusion of interest on life insurance savings.....	1,655	1,815	1,995
79	Interest on consumer credit.....	2,105	2,310	2,565

Senator PACKWOOD. Next is Thomas J. Reese, legislative director of Taxation with Representation.

Senator ROTH. Mr. Chairman, I do have a statement here by Dr. Mayer, who was supposed to be here, but because of the weather and transportation problem is not here. I would request that his statement be included.

[The prepared statement of Mr. Mayer follows:]

STATEMENT OF DR. ROBERT W. MAYER, ASSISTANT VICE PRESIDENT FOR STUDENT SERVICES

In the last Congress, the Senate approved an amendment to the Tax Reform Bill to provide tax credits for higher education expenses. The legislation would have allowed tax credits of \$100 in 1977, with an annual increase of \$50 per year to a maximum of \$250 in 1980 for each student enrolled full-time at colleges and post-secondary vocational schools. Those eligible would have included the individual taxpayer, the taxpayer's spouse, and dependents.

In the final revisions to the Tax Reform Bill, the House-Senate Conference Committee deleted this amendment from the Bill, but it is understood that there was an agreement to introduce the same or a similar proposal early in the next session of Congress. Proponents of this legislation believe that it has a good chance for passage, so it would seem proper that the higher education community determine its position relative to tax credits for higher educational expenses.

In the early 1960's the National Association of State Universities and Land Grant Colleges opposed tax credits as a means for subsidization of higher education expenses. The primary argument for that position was that tax credits would benefit middle and upper-income families, but would have little impact on low-income families, the segment of the population which at that time had limited access to higher education because of inability to meet college expenses. Two circumstances substantially weakened that position. First, massive financial aid programs supported by state and federal governments have effectively eliminated the barriers which prevented low-income students from access to higher education. Second, colleges and universities has found it necessary to make significant increases in tuition and fees, not only because of inflation in the general economy, but also because, in many cases, subsidization from government and private gifts and benefactions support a smaller proportion of operating expenses, thus shifting a higher proportion of these costs to the student. The higher cost of tuition and fees has had greatest impact on the middle-income family which is not eligible for direct financial assistance provided by financial aid programs.

There are a number of arguments to support a change in the NASULGC position, assuming that future proposals are similar to one that was presented in the last session of Congress.

1. The plight of the middle-income family in meeting higher education costs has been of increasing concern to the educational community. Whether, as proponents of tax credit legislation have claimed, the decrease in the proportion of college-age students enrolled in higher education is primarily a function of the increasing inability of middle-income families to meet educational costs, it certainly has some impact and probably is a major factor in the selection of colleges and universities, reflected in the increasing number of students enrolled in lower-cost, public institutions. A study at the University of Delaware, for example, indicated that the proportion of disposable family income required of middle-income families to meet tuition and fees has increased sharply. So long as state and federal financial aid programs which provide access to higher education for low-income students are continued (and this must be a contingency in the consideration of tax credits), then the proposed tax credit for educational expenses is a viable means to insure middle-income students the same access and options for higher education that are available to more affluent students and students from lower-income families who receive financial aid subsidization.

2. The utilization of tax credits provides a more direct and therefore, less costly method for providing assistance to middle-income students than would an extension and enlargement of present financial aid programs. Colleges and universities have noted the significant administrative costs associated with present financial aid programs. Were Congress simply to raise the eligibility requirements for participation in existing programs and to increase funding so as to include middle-income students, obviously there would be proportionate increases

in the overhead costs for administration and management of these programs. Tax credits would impose no such overhead costs, and the full dollar value of the credits would apply toward educational expenses.

3. Tax credits offer a means to assist students and, indirectly, institutions of higher education without the imposition of additional controls and regulations. Congress is obligated to insure a proper expenditure of public funds. It is a necessary condition that there be rules, regulations, and controls imposed upon the recipients of such funds. At the same time, American colleges and universities guard jealously their autonomy and prerogatives for self-control and governance. Support in the form of tax credits rather than governmental appropriations is less likely to require controls which are seen by colleges and universities as interference in internal matters.

4. Public policy as reflected in congressional action which is supportive of higher education has a positive effect on public opinion. For example, the National Defense Education Act was successful in focusing the attention of the American people on the benefits of higher education and undoubtedly contributed to the high percentage of college-age population that enrolled in colleges and universities in the 1960's. In recent years the American public seems to have lost confidence in colleges and universities. Moreover, it has appeared at times as though public policy was directed against higher education. Tax credits to assist middle-income families in meeting college expenses would, therefore, serve as a positive way for Congress to reaffirm its support for higher education.

5. Governments at all levels are faced with serious budget problems, and higher education finds it increasingly difficult to compete with other public services for funding from governmental sources. Many observers have noted the need for the federal government to underwrite a larger share of higher education costs because of the inability of state governments to do so. Realistically, the probability of increased support for higher education from either state or federal governments who direct appropriation is, at best, uncertain. If educational costs continue to increase, even at the rate of general inflation, then the only alternative may be for colleges and universities to shift an even higher proportion of this cost to the student. The support which has been generated in Congress for the tax credit proposal seems to indicate that this may be more acceptable than would direct appropriations as a means for increased support to higher education. It has been estimated that the cost of the tax credit proposal through loss of revenue when fully implemented would range between 1.1 and 2 billion dollars annually. When placed in the context of other federal appropriations, such as those for foreign aid, defense, and other domestic programs, the cost is comparatively small. It also is less than the 3.2 billion dollar cost of the Basic Opportunity Grant Program which impacts on a much smaller proportion of the college-age population.

Opponents of the tax credit proposal have raised arguments that seem less substantial than those favoring the enactment of this legislation. For example, it has been suggested that colleges and universities would be encouraged to raise tuition, thereby offsetting whatever gains might be achieved for the middle-income family in meeting college costs. As the college-age population decreases, competition for students may have a more important effect on tuition pricing policies than would a perceived windfall from tax credits. Opponents also have suggested that Congress, faced with the loss of revenue from tax credits, may reduce appropriations for higher education or might eliminate existing tax credits for charitable contributions to colleges and universities. Aside from the danger of self-fulfilling prophecies, nothing in the proposed legislation seems to suggest an intent to substitute tax credits for existing appropriations or to make up the revenue loss by elimination of existing credits for such contributions. In fact, those who have supported the tax credit proposal have presented it as a means for extending financial assistance from existing programs which aid low-income students to those from middle-income families. Finally, there are those who argue that tax credits would benefit high-income families who need no assistance, but it is obvious that a \$250 credit would have a greater impact on a middle-income family than it would for a high-income family.

It would appear, then, that the higher education community would benefit from tax credits for educational expenses and that support for this legislation would be in the interests, not only of students, but of colleges and universities themselves.

(Prepared as position paper for the 1977 meeting of the National Association of State Universities and Land-Grant Colleges.)

**STATEMENT OF THOMAS J. REESE, LEGISLATIVE DIRECTOR,
TAXATION WITH REPRESENTATION**

Mr. REESE. Good morning and thank you, Mr. Chairman.

Mr. Chairman and members of the committee, I am Thomas Reese, legislative director of Taxation With Representation, a public interest taxpayers' lobby, and I am here to testify in opposition to the college tuition tax credit proposals.

The proposals of tax allowance for college education expenses seem to be motivated by a desire to alleviate the financial burden of middle-income families who must bear the high cost of putting their children through college without either the resources of the rich or the aid programs available to the poor. In fact, however, the credit is nothing but a placebo. It will not help the middle class for which it is designed. Nor will it help private higher education. This is so for a number of reasons.

Tuition costs have not risen dramatically. A presupposition in all of the arguments in favor of the college tuition tax credit is that educational expenses have risen dramatically. This is simply not true when compared with the relative increase in median-family income. Between 1967 and 1976, college charges for tuition, fees, room and board, rose about 75 percent, but at the same time, median income has increased almost 89 percent.

As a result, the relative financial burden for putting a student through college is actually less than it was 10 years ago. This does not mean that some families might not need help, but it does show that a general tax subsidy to everyone is no more necessary today than it was 10 years ago.

AID TO MIDDLE-INCOME FAMILIES

Another fallacy supporting the credit is the argument that middle-income families are not helped by the current programs. Again, this is not true. In fiscal 1977, the Federal Government provided \$8.5 billion in student aid in the form of direct outlays and tax expenditures. Students from families with incomes between \$10,000 and \$20,000, who account for 33 percent of all students, receive 36 percent of this total, although they received a smaller share, 21 percent, of the \$2.3 billion provided under programs based on need. Middle-income families are, therefore, already getting their fair share of Federal education aid.

Credit helps the wealthy. From the statements of the proponents of the tax credit for college expenses, one would think that the credit will only help middle-income families, but in fact 54 percent of the benefits of a \$250 nonrefundable credit will go to taxpayers with incomes in excess of \$20,000, who make up the richest third of the population.

Middle-income families, those with incomes between \$10,000 and \$20,000, receive only 34 percent of the benefits from the credit. If the college tuition tax credit is aimed at middle-income families, it misses its target.

Senator PACKWOOD. What is your source for those figures?

Mr. REESE. The Congressional Budget Office.

Senator PACKWOOD. That is for a \$250 nonrefundable credit?

Mr. REESE. Yes.

Senator PACKWOOD. The bill we are sponsoring is a \$500 refundable credit. What are the percentages on that?

Mr. REESE. I have no computer resources to do those kinds of studies. I presume the Congressional Budget Office could do that kind of thing for you.

Senator PACKWOOD. Do you have access to the figures of the Bureau of Census.

Mr. REESE. Yes, but you have got to deal with those. I don't have the statistics.

Senator PACKWOOD. You picked the worst case. The Congressional Budget Office doesn't like our bill, and they took a \$250 nonrefundable tax credit and tried to show it would not benefit the middle-income taxpayer, which is not even what we are talking about. Go ahead.

Mr. REESE. Well, sir, I think that a \$250 nonrefundable credit is more likely to pass this Congress than any other bill.

Senator PACKWOOD. Your figure is accurate, but do not use it today on the bill that Senator Moynihan and I are the principal sponsors of, because they are not the same thing.

Mr. REESE. I have not mentioned your bill.

Senator PACKWOOD. Go right ahead.

Mr. REESE. Some supporters of the college tuition tax credit favor any tax credit or deduction which will lower taxes for the middle class because they feel that those taxes are too high. This approach is simplistic. The tax system will raise as much money as Congress determines is necessary, no matter how many credits, deductions, and exclusions are available.

What these gimmicks mean is that tax rates must be higher than necessary. If Congress adopts a college tuition tax credit costing approximately \$2 billion in revenue each year, that will be \$2 billion that will be unavailable for general tax cuts for all taxpayers. Thus, this credit means higher taxes for the elderly, for people who have already put their children through college, for childless couples, for single persons, for people in vocational schools, for everyone who does not qualify for the credit.

One of the major uncertainties of the credit is its effect on tuition costs. Some people argue that the credit will allow colleges to raise their tuitions at a faster rate than they would have otherwise. To the extent that tuition costs are increased, the credit's benefits for taxpayers are reduced as the colleges capture some or all of the benefits through higher charges. If this happens, the tax credit will be an aid to colleges and not to taxpayers.

On the other hand, if one argues that the colleges will not be able to raise their tuitions, then one must also recognize that they will receive no benefits from the credit. Both the colleges and the students cannot enjoy the same benefits. To the extent that one gets the benefits, the other does not.

Many people believe that the college tuition credit is especially helpful to private institutions. This is not the case. In fact, a flat credit will hurt private institutions. Although the credit will reduce the absolute cost of attending a private or public institution by an equal amount, the relative price of attending a private institution will be increased.

For example, if it costs \$2,000 to attend a private college and \$1,000 to attend a public institution, the absolute cost difference is \$1,000, and in relative terms, the private school costs twice as much. A \$500 tax credit would reduce the net price of attending these schools to \$1,500 and \$500 respectively. While the subsidy would not change the absolute cost difference, it would raise the relative price of attending the private institution to three times the price of attending the public institution.

If the goal of the tax credit supporters is to aid the independent colleges and universities, the credit does not do it.

Tax credits for college educational expenses, it has been argued, are simpler and less complex than other proposals. However, it would provide new regulations, new forms, new requirements that students and their families will have to be familiar with in order to benefit from the program. This credit is not being offered in place of any other educational program, so as a result it adds another layer of things they must know about.

Many people claim that the redtape involved in tax gimmicks is less than that involved in direct expenditures. This is only true if the requirements for qualifying for the credit are simpler than those for the spending program.

In addition, the administrative costs of the program for the Government is less only because the Internal Revenue Service audits less than 3 percent of tax returns. If IHEW only checked 3 percent of the students who apply for educational aid, its administrative costs would also be lower.

Finally, Mr. Chairman, the college tuition tax credit is supposed to help families who are burdened with college expenses. They will be more than happy, I am sure, to receive \$250 in credits, but it will not help very much those who are really burdened with the cost of education. A credit of \$250 provides little relief to students or their families who now face average tuition costs of approximately \$3,300. College expenses cause a short-term cash flow problem to students and their families which will be followed by higher earnings of the students, or with lower expenses for their families. The best way to deal with the short-term cash flow problem is a loan.

Loans provide a subsidy larger than can be provided through tax credits at the same cost to the Government. Some of the costs of these loans can be borne by the students when they are earning more after their education is completed, or their costs can be borne by the parents whose expenses are reduced when the student is out of school and independent.

Mr. Chairman, Taxation with Representation urges Congress not to adopt the college tuition tax credit. Such a program would benefit the rich more than the middle class or the poor. It will require that tax rates be kept artificially high in order to raise the money needed to fund the program. It is questionable if the credit will even benefit families with college students, since colleges may be able to raise their tuition charges, and thus wipe out the savings to the taxpayers.

In addition, it is likely the credit will upset the current balance between public and private higher education in favor of public higher education.

Finally, the credit will add new complexity to an already complex area of educational aid, when more help could be given through a fuller funding of already existing programs. Thank you, Mr. Chairman.

Senator PACKWOOD. Senator Roth?

Senator ROTH. Mr. Chairman your statement, of course, characterizes all of the old arguments that have been made against trying to give any relief to middle America. It is just a difference in approach. I happen to be a strong supporter of the various grants and loans for those in the low end of the economic scale, but I have to take strong exception to your argument that people who are earning more than \$20,000 don't need some assistance in sending their children to college.

I would like to make two or three points. No. 1, your statement says that, "If one argues that the colleges will not be able to raise their tuitions, then one must also recognize that they will receive no benefits from the credit." Hogwash. The way the colleges will be benefited is by more students. That is what they want. That is what they are trying to do. They are trying to educate people. That is the objective and goal of our legislation.

It is a well-known fact that for every \$100 tuition increase, there is a drop off in the number of students that enroll. Second, a great deal has been made about the distribution of benefits under my college tax credit bill.

ACE, the American Council of Education, has made a study that says nearly 90 percent would go to those earning less than \$25,000 a year, and Mr. Chairman, I will request that a breakdown be included as a part of the record.

Senator PACKWOOD. It will be in the record.

[The material referred to follows:]

Benefit distribution of college tax credit

Income:	Percent
0 to \$6,000.....	9.7
\$6,000 to \$7,500.....	7.6
\$7,500 to \$10,000.....	14.7
\$10,000 to \$15,000.....	31.4
\$15,000 to \$25,000.....	25.2
\$25,000-plus.....	11.4

Source: American Council on Education, based on U.S. Internal Revenue Service, "1975 Preliminary Statistics for Individual Income Tax Returns," Publication No. 198.

Senator ROTH. I want to emphasize again, I do not think those who are making \$25,000, \$30,000, or even \$35,000 a year are rich. In fact, it is to the contrary. The Department of Labor for over 1 year has indicated that a family of four making \$20,000 has a minimum standard of living. Now, you cannot have it both ways. You cannot one day claim that people are rich and the next day, when it benefits the bureaucrats, the big spenders, argue to the contrary, and I take strong exception to that.

Mr. Chairman, we have all heard about the CBO report that said, from 1967 to 1976, college costs increased 70 percent, but median family income increased 88 percent. The administration argued from there that therefore families are no worse off and a tax credit is not necessary.

Well, it reminds me a little bit of the President's message last night, when he claimed there was tax relief as a result of his proposed bill. The fact of the matter, if you take the social security tax increases and the energy taxes and the taxes that result from inflation for the average citizen, there is no tax relief in that message last night.

The average American is going to pay higher taxes, and that is what has happened in the last 10 years, between 1967 and 1976. The tax burden on the average family has increased from \$1,214 to \$2,397, an increase of 97 percent. That does not consider your increase in the State and local and property taxes.

The fact of the matter is, even though in overall income it appears that middle America is moving up, when you bring into target all the various factors, the cost of living and the higher taxes, he is worse off in terms of disposable income.

I would just like to point out in closing, Mr. Chairman, that New Republic, hardly a conservative magazine promoting the ideals of the rich, last year had a major article saying that for the first time middle America is facing downward mobility, and that if we are not careful, there will be a tax revolt. We had better do something about it.

They said we had better get over the idea that it is wrong to help some of these people, and New Republic argued that we ought to help those making \$20,000 and \$30,000, and all I can say is, Washington, wake up.

Senator PACKWOOD. Thank you, Mr. Chairman.

Mr. REESE. Could I respond to that, Mr. Chairman?

Senator PACKWOOD. Yes.

Mr. REESE. First of all, Senator Roth, I certainly would support any decreases in taxes on middle America. I would prefer to see the costs of this college tuition tax credit used in order to cut taxes across the board for middle America.

Senator ROTH. May I?

Mr. REESE. Sure.

Senator ROTH. Do you support the Roth-Kemp bill which would reduce tax rates by 33 percent across the board?

Mr. REESE. I am trying to remember if our program is that much. We wanted to reduce tax rates down to 50 percent, and proportionally, all the way down the tax brackets, so that is two-sevenths. Let's see. Is that more or less than one-third? It is pretty close. So, we would support something very similar.

Senator ROTH. We might ask you to come back to testify.

Senator MOYNIHAN. Two-sevenths is less than one-third.

Mr. REESE. I would like to make a couple of points. It is my understanding that the American Council on Education is in the process of redoing its study on the college tuition tax credit, and it is my impression that those statistics will be closer to the CBO after they have redone their study. I understand that it will be released some time next month.

Senator MOYNIHAN. If the Senator will yield, two-sevenths is 28.57142857 percent.

Mr. REESE. I guess we are a little less than you are. If the Congress does want to key its aid into the middle class, and I did skip over some of this in my testimony to save time, then the proper way to do it would be through loans. The 1976 amendment to the education bill

lifted the ceiling for guaranteed student loans to \$25,000, and I would be happy to see that raised even higher, to \$30,000 or \$40,000, as you suggested, if it is felt that these people need assistance.

Senator ROTH. If the gentleman will yield, that is a difference of approach, and many people do feel that working America ought to come down, and as I have said before, fill out forms, disclose their family background, prove need, to get back some of the dollars they are paying to the Federal Treasury. Others of us feel very strongly that it is about time that working America be allowed to keep its money, the money they are earning, to send their children to college.

The fact that you raise the loan limits up to \$30,000 or \$40,000, in my judgment, is not the answer.

I might also point out that despite these recent increases up to \$25,000, the benefits are not going to any large proportion of those people.

Senator PACKWOOD. Senator Moynihan?

Senator MOYNIHAN. Well, I would like to congratulate Mr. Reese for his phrase, "a short-term cash flow problem." You could have a career in bureaucracy ahead of you.

Mr. REESE. I hope not.

Senator MOYNIHAN. One question to you, sir, about which I am very serious. I was once an Assistant Secretary of Labor under Presidents Kennedy and Johnson. I spent a lot of time with this data, trying to sort out where people are statistically in terms of these generalized categories, rich, middle class, or poor. Senator Roth has been mentioning—I believe you have reference there to the BLS high family budget. They have low, middle, and high, and \$23,000 is their moderate.

Now, Mr. Reese, one question. You said that such a program would benefit the rich more than the middle class or the poor. How much money makes you rich? How much income or capital?

Mr. REESE. Senator Moynihan, as a political scientist, you know the definition of what is middle class is a very wiggly definition, depending upon whether you are talking about the sociological category or an economic category. If you split the country into equal thirds, it breaks down approximately one-third under \$10,000, one-third between \$10,000 and \$20,000, and one-third over \$20,000. If you want to call those low, middle, and high income people, then families earning over \$20,000 a year are high income people.

Senator MOYNIHAN. You did not refer to high income people or the upper third. You referred to "rich." What do you mean by rich?

Mr. REESE. Well, I would be happy to correct my statement on that.

Senator MOYNIHAN. Well, sir, I really must ask you not to come in and throw those words around. We look to you young fellows to be more exact in these matters. We are getting old and fuzzy, and talk too much. When the word "rich" is used in testimony before the Senate Finance Committee, I assume that there is a reasonably precise statistical category of income or wealth to which it refers.

May I ask of all those persons in this room above age 25, how many are rich? Would the rich raise their hands?

[General laughter.]

Senator MOYNIHAN. All right, all of those above age 25 with earned incomes above \$20,000, would you raise your hands?

[A show of hands.]

Senator MOYNIHAN. It suggests that the rich don't know how well off they are. We have a very great many rich people in this room. Maybe they are concealing the fact. Maybe they sense the proximity of the Internal Revenue Service.

[General laughter.]

Senator MOYNIHAN. There may be informants in this very room. Sir, if your statement is that persons with incomes of \$20,000 will benefit from this program, they will. I hope they will. It is intended that they should, sir. Come back some time to this committee and say what you mean by rich. What do you mean and how do you know? Let's bring the same kind of rigor to your language that you bring to your principles, which are very attractive to us, as you know.

My golly, \$20,000 and five kids, rich?

Mr. REESE. My only response, Senator, can be that the wealthiest one-third, the high income one-third, the richest one-third of the population is in the category of \$20,000 and higher.

Senator MOYNIHAN. Well, refer to those under \$10,000 as the least rich, and the others as the least poor. [General laughter.]

Mr. REESE. As far as I am aware, there is no economic definition of what is rich.

Senator MOYNIHAN. Then have a care about using the term in front of us, and just say what you mean. The thing is, there is not a man in that bureaucracy who is not rich these days, and they have set out to discredit this program because they think it will make them less rich or whatever. But my goodness, there would be some use to getting our terms straight. Thank you, sir.

Senator PACKWOOD. As you asked for the raising of hands, I recalled 15 or 20 years ago there was a debate going on in Portland, Oreg., between two contestants for an election, and one kept saying he was for the common man, and finally the opponent said, will all those in this room who are common men raise your hands? Of course, no hands went up, and he said, well, he is for someone else, and I am for you.

Just for the record, Mr. Reese, you have been here before on a variety of tax reform issues. Is it fair to say as a rule of thumb that Taxation with Representation is opposed to most tax expenditures and the philosophical preference would be close to a gross income tax, and programs the Government wants to support should be done via the appropriations process?

Mr. REESE. That is a fair statement.

Senator PACKWOOD. So your opposition to this particular program is not necessarily that you don't want to help education. You are just philosophically opposed to the concept of doing it this way, and that philosophy extends to a variety of other programs?

Mr. REESE. Yes, sir.

Senator PACKWOOD. As usual, you are a good witness. You and I disagree totally philosophically about how we want to achieve something, but you do bring a consistent principle and one that is respectfully held. I hope soon it will be one that is totally useless. [General laughter.]

Mr. REESE. Thank you.

Senator PACKWOOD. Thank you very much, Tom.

[The prepared statement of Mr. Reese follows:]

STATEMENT OF THOMAS J. REESE, LEGISLATIVE DIRECTOR OF TAXATION WITH REPRESENTATION

Mr. Chairman and members of the Committee, my name is Thomas J. Reese Legislative Director of Taxation with Representation, a public interest taxpayers' lobby. I am testifying in opposition to the college tuition tax credit proposals which are being considered by Congress and your committee.

The proposals of tax allowances for college education expenses seem to be motivated by a desire to alleviate the financial burden on middle-income families who must bear the high costs of putting their children through college, without either the resources of the rich or the aid program available to the poor. In fact, however, the credit is nothing but a placebo. It will not help the middle class for which it is designed. This is so for a number of reasons.

Tuition costs have not risen dramatically.—A presupposition in all of the arguments in favor of the college tuition tax credit is that educational expenses have risen dramatically. This is simply not true when compared with the relative increase in median family income. Between 1967 and 1976, college charges for tuition, fees, room and board, rose about 75 percent. But at the same time, median income has increased almost 89 percent. As a result, the relative financial burden for putting a student through college is actually less than it was 10 years ago. This does not mean that some families might not need help, but it does show that a general tax subsidy to everyone is no more necessary today than it was 10 years ago.

Aid to middle income families.—Another fallacy supporting the credit is the argument that middle-income families are not helped by the current programs. Again, this is not true. In fiscal 1977, the federal government provided \$8.5 billion in student aid in the form of direct outlays and tax expenditures. Students from families with incomes between \$10,000 and \$20,000, who account for 33 percent of all students, received 36 percent of this total, although they received a smaller share (21 percent) of the \$2.3 billion provided under programs based on need. Middle-income families are, therefore, already getting their fair share of federal educational aid.

Credit helps wealthy.—From the statements of the proponents of the tax credit for college expenses, one would think that the credit will only help middle-income families. But, in fact, 54 percent of the benefits of a \$250 nonrefundable credit will go to taxpayers with incomes in excess of \$20,000, who make up the richest third of the population. Middle-income families, those with incomes between \$10,000 and \$20,000, receive only 34 percent of the benefits from the credit. If the college tuition tax credit is aimed at middle income families, it misses its target.

Credit means higher tax rates.—Some supporters of the college tuition tax credit favor any tax credit or deduction which lowers taxes for the middle class because they feel that those taxes are too high. This approach is simplistic. The tax system will raise as much money as Congress determines is necessary no matter how many credits, deductions and exclusions are available. What these gimmicks mean is that tax rates must be higher than necessary. If Congress adopts a college tuition tax credit costing approximately \$2 billion in revenue each year, that will be \$2 billion that will be unavailable for general tax cuts for all taxpayers. Thus, this credit means higher taxes for the elderly, for people who have already put their children through college, for childless couples, for single persons, for people in vocational schools, for everyone who does not qualify for the credit.

Credit means higher tuition?—One of the major uncertainties of the credit is its effect on tuition costs. Some people argue that the credit will allow colleges to raise their tuitions at a faster rate than they would have otherwise. To the extent that tuition costs are increased, the credit's benefits for taxpayers are reduced as the colleges capture some or all of the benefits through higher charges. If this happens, the tax credit will be an aid to colleges and not to taxpayers.

On the other hand, if one argues that the colleges will not be able to raise their tuitions, then one must also recognize that they will receive no benefits from the credit. Both the colleges and the students cannot enjoy the same benefits. To the extent that one gets the benefits, the other does not.

Credit hurts private institutions.—Many people believe that the college tuition credit is especially helpful to private institutions. This is not the case. In fact, a flat credit will hurt private institutions. Although the credit will reduce the absolute cost of attending a private or public institution by an equal amount, the relative price of attending a private institution will be increased.

For example, if it costs \$2,000 to attend a private college and \$1,000 to attend a public institution, the absolute cost difference is \$1,000, and in relative terms, the private school costs twice as much. A \$500 tax credit would reduce the net price of attending these schools to \$1,500 and \$500 respectively. While the subsidy would not change the absolute cost difference, it would raise the relative price of attending the private institution to three times the price of attending the public institution. This increase in the relative price of education at private institutions will induce some students to attend the public institution whose relative price has fallen. This is why the Coalition of Independent College and University Students (COPUS) has called the tuition tax credit the Trojan Horse of independent higher education.

If the goal of the tax credit supporters is to aid the independent colleges and universities, the credit does not do it. As HEW Secretary Joseph A. Califano Jr. pointed out in analyzing the tax credit proposal, "only 30 percent of the benefits would go to families sending their children to private colleges, although they have almost 50 percent of the financial need * * *." Why should a millionaire sending his or her child to a low tuition institution get the same credit as a worker whose child attends an expensive independent college?

Tax credits add complexity.—Tax credits for college educational expenses will complicate the lives of students and their families. It will provide new regulations, new forms, new requirements that they will have to be familiar with in order to benefit from the program. In addition, they will have to figure out how the credit relates to other educational aid programs. Will it reduce their scholarships? Will it reduce their eligibility for loans?

Many people claim that the red tape involved in tax gimmicks is less than that involved in direct expenditure programs. This is only true if the requirements for qualifying for the credit are simpler than for the spending program. In addition, the administrative cost of the program for the government is less only because the Internal Revenue Service audits less than 3 percent of tax returns. If HEW only checked on less than 3 percent of the students who applied for educational aid, its administrative costs would also be low.

Loans help more than credits.—The college tuition tax credit is supposed to help families who are burdened by college expenses. They will be more than happy to receive a \$250 credit, but it will not help very much those who are really burdened by the cost of education. A credit of \$250 provides little real relief to students or their families, who now face average tuition costs of \$3,300.

College expenses cause a short-term cash flow problem to students and their families which will be followed with higher earnings by the students or with lower expenses for the family. The best way to deal with a short-term cash flow problem is with a loan. Loans provide a subsidy larger than could be provided through a tax credit at the same cost to the government. Some of the cost of these loans can be borne by students when they are earning more after their education is completed; or the cost can be borne by parents whose expenses are reduced when the student is out of school and independent.

Before 1976, eligibility for federal interest subsidies on Guaranteed Student Loans (GSLP) was lost when family income reached \$15,000. The 1976 Amendments lifted this ceiling to \$25,000 (equal to about \$31,000 of adjusted gross income) and thus expanded the eligibility to about 85 percent of all students. The 1976 Amendments also raised from \$10,000 to \$15,000 the total amount that a student can borrow for undergraduate and graduate training. The 7 percent interest on the GSLP loans is not payable until a year after the student finishes his education. In addition, there is a National Direct Student Loan (NDSL) program for which the interest rate is only 3 percent payable beginning nine months after the student finishes school. An expansion of these programs would make much more sense than a new college tuition tax credit program.

Conclusion.—TWR urges the Congress not to adopt a college tuition tax credit. Such a program would benefit the rich more than the middle class or the poor. It will require that tax rates be kept artificially high in order to raise the \$2 billion needed to fund the program. It is questionable if the credit will even benefit families with college students, since colleges may be able to raise tuition charges and thus wipe out any savings to taxpayers. In addition, it is likely that the credit will upset the current balance between private and public higher education in favor of public education. Finally, the credit will add new complexity to an already complex area of educational aid when more help could be given through a fuller funding of already existing programs.

Senator PACKWOOD. Has Professor Davidson arrived yet?
 All right, then, we will take a panel of concerned students.
 Then we will take the panel of concerned students, Mr. Barry, Mr. Brady, and Mr. Zaglaniczny.

PANEL OF CONCERNED UNIVERSITY STUDENTS: GAINES CLEVELAND, COLLEGE REPUBLICAN NATIONAL COMMITTEE, ON BEHALF OF JOHN BRADY; LAWRENCE S. ZAGLANICZNY, NATIONAL DIRECTOR, COALITION OF INDEPENDENT COLLEGE AND UNIVERSITY STUDENTS; KENT L. BARRY, PRESIDENT, ASSOCIATED STUDENTS OF MICHIGAN STATE UNIVERSITY, ACCOMPANIED BY COREY BINGER, VICE PRESIDENT OF ASSOCIATED STUDENTS OF MICHIGAN STATE UNIVERSITY, AND MICHAEL McCANDLESS, LEGISLATIVE REPRESENTATIVE OF ASSOCIATED STUDENTS OF MICHIGAN STATE UNIVERSITY

Senator PACKWOOD. I want you gentlemen to decide who speaks first and what order you want to go in. Would you go from one to the other, identify yourselves for the reporter, so that they know who will be talking, starting over here.

Mr. CLEVELAND. Yes; I am Gaines Cleveland of College Republican National Committee. I am speaking in behalf of John Brady, chairman of the committee, who was unable to attend.

Mr. ZAGLANICZNY. I am Lawrence Zaglaniczny, national director, Coalition of Independent College and University Students.

Mr. BARRY. I am Kent Barry. I am president of the Associated Students of Michigan State University.

Mr. BINGER. I am Corey Binger. I am vice president of Associated Students of Michigan State University.

Mr. McCANDLESS. I am Mike McCandless. I am legislative representative of Associated Students of Michigan State University.

Senator PACKWOOD. Gentlemen, go ahead.

STATEMENT OF LAWRENCE S. ZAGLANICZNY, NATIONAL DIRECTOR, COALITION OF INDEPENDENT COLLEGE AND UNIVERSITY STUDENTS

Mr. ZAGLANICZNY. Mr. Chairman and members of the committee. We thank you for the opportunity to testify on the utilization of the tax system for relief of the high cost of tuition and related college expenses.

I have prepared a statement which I would like entered in the record at this time.

Senator PACKWOOD. It will be entered in full.

Mr. ZAGLANICZNY. I have to apologize for not getting here on time. Our Xerox broke down and when your Xerox breaks that is it. As I say, we seek Federal student assistance programs that will allow needy and middle-income students to select a college based on their ability to achieve and not based on their ability to pay.

Consequently, we welcome these hearings and an opportunity to comment on the various proposals under consideration to institute a system of tax relief for parents and students. I think it is most im-

portant to bring out, Senators, and especially Mr. Moynihan, Mr. Packwood, and Mr. Roth, that you have done the Nation a real service.

I should mention Mr. Mikva and Mr. Corcoran in the House by raising the whole problem of needing to aid middle-income students and their parents and that is a whole broader question of financing education, especially in our case, financing education which has been selected since campus cooldowns, since the riots of the late sixties and seventies.

I have to commend you Senators upon bringing this whole question to the forefront and it is a real service. Our organization has traditionally been opposed to tuition tax credits, but we are willing to, if our suggested amendments are adopted, reconsider our position, perhaps, and support the whole idea of tuition tax credits.

We testified on the Budget Committee last year and I will provide you with that testimony. That goes into our objections since we do not have too much time today.

Let me say that in that statement, we pointed out that public and independent high education in their friendly competition for students' tuition tax credits will upset that balance, it is our belief.

The issue of tuition tax credits has created a national debate on the financing of higher education. And it is timely that the Executive, the Congress, and the American people consider the state of educational finance, since higher education has been neglected in the past few years after the campus disruptions of the late sixties and early seventies subsided.

Frankly, inflation, the high cost of energy, mandated social programs and years of underfunded Federal student assistance programs have made it more difficult to pay for a college education because these factors have driven tuition costs higher and higher. Especially for the coalition's constituency, higher tuition bills and related expenses have forced some students to drop out or transfer from their private schools.

And many prospective students do not even consider going to a college in the independent sector because of their high costs. It is for these reasons that we commend the sponsors of this type of legislation in their recognition of the financing problems of higher education and for beginning a national dialog seeking answers.

Our testimony is in two parts. First, we again state our opposition to the utilization of the tax system as a means of financing individual's costs of attending college. However, we do support reform of the current system of student aid and increased funding of the programs so that more students are eligible for assistance and we call for an increase of at least \$1 billion in the current programs so that they better serve needy and middle-income students. Such a targeted increase in appropriations will better meet the goals of the proponents of tuition tax credits, at a substantially reduced cost and with less constitutional controversy.

Second, while the coalition opposes tuition tax credits, we do realize there is great support for the concept in the Congress. Therefore, we will suggest changes in the already introduced tax credit proposals, which if adopted, would allow the organization to reconsider the tax credit idea and perhaps come to support it.

Since I have very little time to testify, I recommend the committee examine our testimony before the House Budget Committee on May 12, 1977, with copies of which we will be happy to provide you. In that statement, we pointed out that tuition tax credits will upset the already tenuous balance between public and independent higher education in their friendly competition for students.

For example, if a tax credit and refund policy were adopted, we believe the Federal Government would be establishing a free tuition policy for many institutions and if there were a half-cost provision, then many public colleges would in effect have their tuition charges reduced by 50 percent to the detriment of the independent sector.

We have done some research on it surveying colleges, using Federal data. In the year in which the data was taken, there were 947 public and 22 private institutions that charged less than \$500 in tuition and required fees. The number of students enrolled in colleges for the public, 4,987,461 students, and the independents enroll 15,675 students.

We cannot see how some people can claim tuition tax credit, aid public higher education and it is just going to upset the balance between the two sectors. If we look at tuition under between \$901 and \$1,000, we find similar figures, 3.6 million, in the public sector, and only 81,000 in the independent sector.

The effect of the credit if we consider tuition under \$1,000 will be that 1,046 public schools and 1,300 private schools will have either free tuition or have tuition charges halved. Those students enrolling for the public are 8.6 million students and for independents 97,000 students.

Finally, these figures mean that approximately 97 percent of the public college and university students will by instituting a tax credit of all or one-half of their tuitions paid by the U.S. Government as compared to only 4 percent of those students enrolled at institutions of higher learning.

We have done some research to focus our arguments. Table I at the end of this statement indicates the undergraduate tuition and fees charged in academic year 1976-77. These figures are broken down in \$500 tuition and fee ranges by the number and control of institutions in each dollar range and by the number of students enrolled broken down in the same fashion.

It is claimed by some advocates of tuition tax credits and in the press that a system of tuition tax credits will aid private higher education. This is not true and, in fact, private higher education and their students will not receive benefits proportionately equal to those received by students attending public schools.

In our survey of the Nation's colleges and universities, we found that there were 1,450 public schools and 1,391 independent colleges for a total sample of 2,841. The publics enrolled 8,883,353 students and the independents enrolled 2,281,933 students.

In the year for which the data is given, 947 public and 22 private institutions charged \$500 or less in tuition and required fees. The public schools enrolled 4,987,461 students and the independents enrolled 15,676 students. A tax credit and refund would mean that the Government will give a free tuition education to 56 percent of all students enrolled in public higher education institutions.

On the other hand, less than 1 percent of the students enrolled in private schools will benefit from a free tuition policy as instituted by a tax credit.

In the year in which the data is based 459 public and 96 private institutions charged between \$501 and \$1,000 in tuition and required fees. The public schools enrolled 3,695,283 students and the independents enrolled 81,941 students in that tuition range. The effect of the credit is, when combined with those institutions charging less than \$500 in tuition, that 1,406 public schools and 118 private schools will have either free tuition or will have their tuition charges halved.

Those schools enroll, for the publics, 8,682,744 students and for the independents, 97,616 students. Finally, these figures mean that approximately 97 percent of the public college and university students will, by instituting a tax credit, have all or one-half of their tuitions paid for by the U.S. Government as compared to only 4 percent of those students enrolled in independent institutions of higher learning.

We cannot understand how some people believe private higher education will be assisted through a tax credit system, when it is absolutely clear that public college students will pay no tuition or have their current tuition cut by one-half. The effect of the credit on private higher education would be simply a disaster.

How could our institutions compete with schools whose cost is free? As responsible students, we cannot allow the institutions that educate us so well to be ruined in the future by a misguided Federal tax policy.

The coalition disputes claim institutions will not capture these funds. We keep hearing from our administrators and they make valiant efforts to keep our tuition down but I think it is just some of revenue sharing and I think from administrators, especially with refund provision, they say everybody will get some benefit, can raise tuition fairly painlessly that makes raising tuition fairly easy.

What would we consider as an amendment that would be acceptable as the problems we have are income distribution tuition levels? Simply stated, we recommend the credit be tied to family income in the amount of tuition paid for each child. We believe the program should be progressive. In other words, the higher a family's income is the less the credit would be and the higher the tuition paid by the family the greater the credit received would be.

It is our contention that the greater a family's income, the greater is their responsibility to pay for their children's education. Those who can afford to pay for education should. Also by tying the credit to tuition actually paid, we solve the imbalance of benefits between those attending public versus independent institutions of higher education.

We will be sending to you within a week or more complex proposals. We do not think necessarily under our proposal, given the problems you see in terms of people making \$30,000 or \$40,000 there is a credit and it should be progressive. We do not see \$500 adding much. There was recommended \$1,000 credit and if it is a progressive tax, that is the conclusion of my statement there. But I want to mention two things.

The first is that I have to commend President Carter for his State of the Union address yesterday, where he came out in favor of the Department of Education. Our organization got on the bandwagon fairly early on this and I think if we had a Department of Education

then the state of American financing of higher education would not be where it is today.

So we are looking forward to the new Department and Secretary of Education plan. I am sorry Mr. Mahon is not here because I wanted to thank him for his efforts on behalf of independent colleges and universities and I do not remember you gentlemen's voting records. But if you voted for the Chaffee amendment and the social security bill, we appreciate that in our organization.

Thank you.

Senator PACKWOOD. Thank you.

Whoever is next, take the microphone so the people in the back can hear you.

STATEMENT OF GAINES CLEVELAND, COLLEGE REPUBLICAN NATIONAL COMMITTEE

Mr. CLEVELAND. The College Republican National Committee, the Nation's largest student political organization, wholeheartedly supports the concept of tuition tax credits. None of the many pieces of introduced legislation, however, has all the specific features we would like to see included.

Initially any tax credits bill must have an earnings limitation. Since the basic thrust of this legislation is to ease the financial plight of the middle class, those who do not need this support should not receive it. Congressman Coughlin's proposal which calls for a gradually diminishing credit as income increases above \$22,500, is an intelligent way to reduce the program's cost without enforcing an arbitrary line above that which no credit is provided. Of course, the more students a family has covered under this legislation, the higher the point is drawn at which credits begin to diminish.

Second, any tax credits bill must include refundability. This means a student entitled to a \$500 credit for higher education expenses, but who only pays say \$200 in taxes because his income is so low, would receive a \$300 refund from the Federal Government. For lower income students and their families, this refund allows them to finance more of their own education.

Using refundability would also mean a corresponding reduction in basic equal opportunity grants. This is a positive step toward reducing Government control over American education.

Third, any tax credits bill must require that the student support part of his own education. A bill which will cover all of the student's expenses up to a specified amount could potentially pay for all his educational costs. The Packwood-Moynihan bill, which covers only 50 percent of tuition up to \$500, insures that the Government encourages a degree of self-reliance instead of dependency.

Fourth, any tax credits bill must not overly favor inexpensive State supported colleges and universities at the expense of private schools. The Packwood-Moynihan bill adequately fulfills this goal. Bills which cover 100 percent of tuition or costs up to a certain amount encourage students to go to inexpensive schools where the credit will cover a greater percentage of their costs. By covering only 50 percent up to \$500, the Packwood-Moynihan bill requires that students pay for at least half of their education. This bill takes a step toward protecting our system of private higher education.

In light of these four points, the Packwood-Moynihan bill comes the closest to our conception of what tax credits should accomplish. We give it our foremost support.

Speculating for a moment, extending the concept of refundability permits the Federal Government to implement a much more rational system for funding education.

For lower- and middle-income students and families, tax credits could completely supplant the basic equal opportunity grants. Through refundability and the income tax system, students could receive the same amount of financial aid as they now receive in grants. Tax credits have two fundamental advantages.

First, tax credits can be distributed through a much simpler system than grants. Once the specific socioeconomic determinants have been chosen statistical charts can be provided to each college and university in the Nation. It is a simple matter of cross-referencing to determine how much a particular student deserves. He can then be issued a certificate for that amount which must be attached to his IRS form.

Savings result all the way around. Government bureaucracy and its control over education are both reduced. Students escape those complex HEW forms. And colleges and universities cut back on the amount of paperwork they must churn out to apply for grants for their students. With reduced costs more money can directly go to benefit the student rather than lose itself in the bureaucratic shuffle.

Second, grants appropriate citizens' money and then return it with strings attached. Tax credits cut those strings. Students, not Government, decide how their money will be spent. Students can develop self-reliance because they control their own finances instead of depending upon a Government handout. Greater efficiency and greater freedom: Those are two reasons to support tuition tax credits over Federal grants.

Supplementing this base would be the present national direct student loan and Federal guaranteed student loan programs.

Our major criticism of these programs is the massive number of bankruptcy claims which allow students to slip away from paying their debts. We encourage the Government to enforce a stricter collection procedure. In addition, bankruptcy laws should be tightened up—making it more difficult for students paying back Government loans to duck repayment.

Senator PACKWOOD. Let me stop you if I can here, because your time has run out.

Mr. CLEVELAND. OK.

Senator PACKWOOD. I can put the whole statement in the record: only a few paragraphs to go.

Mr. CLEVELAND. I just have two paragraphs.

Senator PACKWOOD. We will put them all in the record.

Mr. CLEVELAND. Thank you.

Senator PACKWOOD. Just for the record, what school do you go to?

Mr. CLEVELAND. Georgetown.

Mr. ZAGLANICZNY. I went to State University of New York.

Senator PACKWOOD. Are you still a student?

Mr. ZAGLANICZNY. No. Well, I will be if I can get enough money to pay the tuition.

Senator PACKWOOD. If the tuition bill passes.

Senator MOYNIHAN. Where did you go?

Mr. ZAGLANICZNY. Went to Empire State Sarasota Springs, and finished at Binghampton.

Senator PACKWOOD. Mr. Barry.

STATEMENT OF KENT L. BARRY, PRESIDENT OF THE ASSOCIATED STUDENTS OF MICHIGAN STATE UNIVERSITY, ACCOMPANIED BY COREY BINGER AND MICHAEL McCANDLESS, MEMBERS OF THE PRESIDENT'S STAFF

Mr. BARRY. Mr. Chairman, honorable committee members, I am pleased to appear before you this morning in support of the tuition tax credit bill. Accompanying me today are Mr. Corey Binger and Mr. Michael McCandless; both members of my staff. Our testimony is representative of the major universities and colleges—public and private—in the state of Michigan, comprising a student population of well over 350,000.

As the president of the student body at Michigan State University, I am well aware of the problems in attaining a place in the world of higher education. This awareness has been manifest throughout our student community and, as a result, has prompted the formation of a fact-finding task force whose job it has been to prepare a detailed analysis of the problems as we have seen them.

The value of our testimony, however, does not lie in the statistical and graphic analyses that our research has led us through; but rather, in the expression of the effects felt by the "average" Michigan college student in his or her attempts to deal with rising tuition costs.

The cost of tuition at Michigan State University, recently cited as one of the ten most expensive public institutions of higher learning, has risen by some 28 percent in the last 2 years.

Even with our own limited knowledge of the variegated factors which make up the entire economic picture, it is readily apparent that the increases are not in line with the growth of the economy as a whole; and this trend is certainly not unique to Michigan State University. We believe a tuition tax credit would provide reasonable financial assistance to those families and/or individuals who would not otherwise be eligible for grants or scholarships. We have determined, through our research, that institutions throughout the country are suffering from a characteristically similar fate; to wit, they have seen a reduction in the numbers of students enrolled from economic backgrounds traditionally regarded as the middle class.

We strongly support financial assistance programs for lower income families, and we do not regard the support of Congress for a tuition tax credit as being in any way indicative of a diminution of support for the needy. Rather, we feel that such legislation will serve to guarantee that no person be denied a college education on economic grounds alone. This is a crucial point, and one which we cannot stress too strongly. There have been some who would urge that we turn our efforts in the direction of direct aid from the Federal Government for students in financial need.

We believe that the tax credit for tuition would more properly address the problem by allowing taxpayers to keep more of their earnings, instead of waiting in line for Federal "aid."

Enrollments are down at most of the colleges and universities in the State of Michigan, and this is indicative of a national phenomenon. Part of this problem can be attributed directly to the fact that the "baby boom" years have reached their zenith. Another part of the problem can be traced directly to the rising costs of obtaining a college education. We believe that this second factor is one which should concern all Americans.

A tax credit for tuition would certainly go a long way toward giving further incentives for individuals to pursue their educational aspirations, without undue regard for the limitations imposed by economic barriers. Such incentives are especially significant in instances where an individual would be unable to attend college without the credit. Typically, these persons are to be found in the middle class, where they are regarded as too affluent for Federal or State scholarship aid.

One of the most far-reaching and significant aspects of the proposed legislation is that this policy would encourage a freedom of choice. Senator Moynihan has correctly reminded us that :

As the "tuition gap" between public and private colleges has widened, the proportion of college students choosing private campuses has shrunk : from 50 percent in the 1950's to less than 25 percent today.

The ever-expanding space between the cost of a private college and a school subsidized by the Government, has meant that the freedom of choice and opportunity has been denied to many persons as to where they will pursue their educational ambitions.

As rising costs and decreasing enrollments force more and more private institutions to close their doors, the diversity of choice, and indeed freedom of choice, is similarly reduced. Again, I would agree with Senator Moynihan's assessment that :

Diversity and pluralism are values too, and perhaps nowhere more valuable than in the experiences that our children have in their early years, when their beliefs and attitudes are formed, their minds awakened, and their friendships formed * * * I do not believe it excessive to ask that they be embodied in our national policies for the betterment of American education.

A society that wishes to remain forever free must concern itself with the proper development of its succeeding generation and allow them their own freedom of choice and will for the determination of their own future.

Finally, we believe that the tuition tax credit will help promote the kind of diversity and pluralism which have marked the United States for greatness. We sincerely think that it is essential for the individual to have such choices available in decisions of educational pursuits so that he is not relegated, by economic necessity, to one alternative.

Mr. Chairman and honorable members of this committee, we are convinced that a situation approaches rapidly where only the very affluent and the very poor will be able to attend college, and we are convinced that what action must be taken to ease the financial plight of the middle-income families is appropriately being taken here.

In the words of the late distinguished Senator Humphrey, "A college education has become almost a necessity for children to have opportunities." As a representative of the student community in the State of Michigan, I see the tuition tax credit as an outstanding example of progressive legislation aimed at attaining a high level of

excellence in education for many who would not otherwise be participants. The opportunities spoken of by Senator Humphrey can, in fact, be realized, but not without your help. I respectfully urge your support for the Tuition Tax Credit Act; and Mr. Chairman, with your permission, I would like to add one thing and that is why we are here. I am here with nine members of my staff, and we drove all the way out from Michigan, and we have been here the last 3 days meeting with Senators and Members of the House where apparently the problem is trying to lobby for this legislation, and believe me we are going to return when it goes over to the House side, as I am hoping it will.

The reason we are here is that I was, our legislative relations staff informed me that the National Student Lobby was taking a position against this particular legislation, and I just want to assure you that they do not speak for Michigan State University, they do not speak for the students of Michigan, and I don't know that they speak for anyone. Because the National Student Lobby has given testimony extensively pretty much supporting the line that we are getting from HEW, and I want to tell you that we have tossed this around in public forum at Michigan State University, this has been vigorously debated and it is supported overwhelmingly, both by the polls we have taken of our students and students around the State as well as student governments.

This has overwhelming support, and I would urge you as a committee to get in touch probably with more student populations, either by polls or however you do it, because I can tell you the support is overwhelming. The reason it hasn't literally run through the Congress, as far as I am concerned, is that more people—that is, parents and students—aren't really aware that this is pending right now.

Senator PACKWOOD. Well, let me thank you. This panel and the ladies we had yesterday are the only real people we've had, who didn't represent some association. The only ones who were actually involved in being potential recipients of this bill, and I have noticed this on other occasions, not necessarily in this bill, the difference with what we might feel as we go out in the public and talk with people, as opposed to what the representatives of groups say when they come in, and it doesn't sometimes square with what we seem to sense, and if we in politics are good at anything, it may be sensing what the public feels or thinks. And I am intrigued to hear you say that about the National Student Lobby, because when this bill was introduced, we subscribed to the National Clipping Service to see what evidence around the Nation there would be, the editorials are running about 5 to 1 in favor of the bill, and a great cross section, from big papers to small papers. But the interesting thing is the student editorials that we have received from student papers; every single one has been in favor of the bill.

Now, our clipping service may have missed some, I am not saying there isn't one someplace, but I have always found student newspapers to be reasonably reflective of student opinions. I would like to quote something. I will have to beg your forgiveness on this. It is from the University of Michigan, and they endorse the bill and they said the following: Some opponents of the tuition tax credit say that Congress could aid financially strapped students more directly—not through the tax credit system—but through an already existing program of grants from the Department of Health, Education, and Welfare

(HEW). Instead of initiating an entirely new program, it is argued, Congress could simply raise the number and level of the HEW grants, which are based on family income. But as is now a common view, HEW is already bogged down with bureaucratic paperwork. A new influx of grant applications would simply create a mountainous overload for the department. Imagine the backup there would be if everyone who would have been eligible for the tax credit program applied for a basic educational opportunity grant (BEOG). The tuition tax credit plan would relieve the bureaucracy in that portion of our Government, allowing HEW to concentrate on matters more basic to human survival. The BEOG program is not made to serve the volume of people who would otherwise benefit from a tuition reimbursement plan.

Now, we are looking at this opportunity again to talk to students. Can you state from a student's standpoint any experience you have with BEOG or from experiences of other students who have had administrative difficulties or frustrations in dealing with it?

Mr. BARRY. Yes; I can, Mr. Chairman. I sit on numerous boards at our university, in an advisory capacity. One of the boards I sit on is the financial aid advisory board for the university. This is the board actually advises the vice president's office that is responsible for sending out the various forms and what not. I would like to speak both from that standpoint and from a personal standpoint that the first part it is unbelievable the amount of redtape that the financial aid group goes through to process forms. We have a staff of probably 50 people at Michigan State University, and that is all they do, full time.

We have tremendous problems dealing with the Federal Government and with the State government also, although the Federal Government is the real problem, because I think the items, the way it is set up, the itemization is constantly changing. As far as my own personal experience, I am not independently wealthy. I am working my own way through school. My parents have not been assisting me in my education. I am a senior now. My sophomore year, when I came in to apply for a guaranteed student loan—and that is part of the way I am putting myself through school—they sent the forms to Washington and they were lost. The forms, you know, so I was planning on going based on that money. To make a long story short, I missed a term of school because of that—I simply couldn't go.

I was chuckling to myself when I heard you say that there are students who actually had to drop out of school for financial reasons. I had to do that for an entire term of school. And it is ever so difficult when you are on a loan or a grant program. Another problem that we experienced with the financial aids committee, it is very difficult for students to really plan out what they know they are going to be getting. It is one thing to apply, and it is another thing to actually have that money right there for your use. And there are many, many instances where through my own personal experience in cases that we hear about that come to the committee where students have literally, you know, they say we turned it in and somehow it gets lost in Washington, and then those people are out. So that the redtape involved with all of this is unbearable and I see this additional piece of legislation, just one of the side benefits of it, is the fact that it is going to

get away from that, and that students can plan long in advance for their financial obligations for their education.

Mr. ZAGLANICZNY. Mr. Chairman, I don't think we should go away with the impression that student aid—who can defend our bureaucracy. Nobody can. Everybody abhors it. Students, you know, have to fill out those forms. They don't like to fill out those forms, but we have to keep in mind that those student financial aid programs that Senators and Congressmen have voted for need some reform, they need to be better turned, but in the past those students aid programs have served millions of American students who might not have otherwise got an education or might not have otherwise gone to private education, go to their first choice.

I think we have to keep that in mind. Mr. Packwood, you made the point if I had a tuition tax credit I would be able to go to graduate school but graduate school in terms of Federal financing is a sham. There is nothing. If you want to go to graduate school, you have to take out a loan or work part-time, and do that. Well, that is fine.

But it is also true with undergraduates if you don't have money to pay tuition, the tuition tax credit is no benefit and I think that is—

Senator PACKWOOD. I want to ask Mr. Barry that figure again. You have 50 people, 50 employees at Michigan State, involved in the student loan or student grant program?

Mr. BARRY. Don't quote me on that. I will get you the actual figure. I will call you when we get home Sunday. It is unbelievable.

[CLERK'S NOTE: Mr. Barry informed Senator Packwood that 90 employees at Michigan State University worked full-time at processing Federal student grant and loan applications.]

Senator PACKWOOD. Well, you know, if it were even just 10, or 15, it is a striking figure and that is not, in HEW, we're talking about employees at the university.

Mr. BARRY. We are talking about Michigan State University, just processing those.

Senator PACKWOOD. Senator.

Mr. BARRY. But I would add, and I agree with the gentlemen to my right, the basic educational opportunity grants, I am a direct recipient of guaranteed student loans, those programs are or have helped a great many students.

Senator ROTH. Well, I have been a supporter of these programs, because I do think we need to help those on the low end of the economic scale. But I think it is an interesting figure that you brought up Mr. Barry. You say that there are something like 50 administrators at the University. What would they roughly earn? What would their salary be? Do you have any idea what that would be?

Senator MOYNIHAN. All be "rich."

Mr. BARRY. I have, as a matter of fact, gone through the salary figures on the Vice President's staff. But I don't know whether it would really be appropriate to—

Senator MOYNIHAN. Well, would it be high to say that they average \$10,000 per year?

Mr. BARRY. You could count on double that.

Senator ROTH. Well, if you double that and assume \$20,000 that means that the salary cost is roughly \$1 million. If you used that money for a college tax credit of \$500, over 2,000 students at Michigan

could benefit from that program. Now, I am not suggesting that the college tax credit is a total substitute for the other programs. But it seems to me that that is one of the most striking illustrations that we have of showing how the direct grant and loan approach costs so much in the administration of the program. Over 2,000 students could be getting \$500, by that rough estimate.

Now, I admit that this is not the total answer, but I think that is one reason why we are so concerned about the bureaucracy. I was very much interested in your remarks about the national student lobby, because they have been very active in the past opposing my efforts at putting through a college tax credit. One thing I would ask you to do. It would be helpful if you could contact as many student bodies and student groups who support the college tax credit. If you are correct in saying that the majority of students feel very much like the students do at Michigan.

Mr. BARRY. Michigan State, Senator.

Senator ROTH. Michigan State, I apologize.

Mr. BARRY. Michigan is a smaller school to the south of us.

Senator ROTH. That is a serious error, and I withdraw that remark. Nevertheless it would be most helpful if you could contact some of these other campuses in promoting this concept. Let me say that last December when Pat Moynihan and others were fighting with me to get a college tax credit through in a conference that a tremendous lobbying effort was launched, a well-organized, well-structured lobbying effort, led by HEW. They went to the colleges, and after all if HEW gives you grants and call you up and say oppose this proposal, it takes a pretty brave man to be on the other side of the question.

And much was done the same way with the student groups. So you could be most helpful if you could to promote this concept. I want to say, Mr. Chairman, that I thought all the testimony from this panel was excellent and I strongly agree with you that too many of the groups that we talk to are not the beneficiaries, but others who have vested interests of one sort or another.

Mr. ZAGLANICZNY. Senator Roth, we are a vested interest, we are a student lobby, and I have to say you are a worthy opponent, because when this was going on I was scurrying around the halls of the Dirksen and Russell and who knows where else, trying to oppose it and I just want to reiterate if it is amended we will reconsider our position, but in the present form we can't. Sorry.

Senator ROTH. I would make one further observation, and ask you to please be sure to come when the House takes this up, because it has used parliamentary maneuvering and tactics to block a direct vote.

Mr. BARRY. Senator, I would like to thank you for the help Mr. Bruce Thompson of your staff has given us. It has been unbelievably helpful.

Senator ROTH. Thank you.

Senator MOYNIHAN. I would like to join in thanking the witnesses and Mr. Barry's staff. You gave us a touch of reality and that makes a difference. I would like to speak up for Mr. Zaglaniczny. Is that the way you say it?

Mr. ZAGLANICZNY. Very close to the Polish.

Senator MOYNIHAN. Very well educated, Empire State College, obviously. Bureaucracies are very good institutions and they are great inventions and they are one of the achievements of modern society. But the problem is to know when you need one and when you don't. It is inevitable that when the Government is to dispense a certain kind of benefit that in order to be equitable, the same rules apply like rules to like conditions. And all the things that we have come to understand as the characteristics of bureaucracy, that they are necessary and they will be difficult, but in the end it is a difficulty that is better than the alternative, and they achieve a purpose.

But part of the art of government in our time is to know when a bureaucracy isn't necessary. And a bureaucracy isn't necessary to achieve the purposes we have here. Now, obviously the problem with bureaucracies is that they create an interest in their own growth, and that is something you have to be careful about. I mean they have an interest regardless of any external purpose. They acquire the internal purpose of the survival of the institution.

I don't want to take up your time, but you are familiar with that wonderful little book that was published by a scholar at Brookings earlier this year called "Are Government Agencies Immortal?" A small eloquent book.

The answer is evidently so. He took a group of Government agencies that existed in 1920 and he said all right, we have had 35 years and a lot of changes, are they still there? They were all still there. Names had changed, locations changed, but they had not. Now, we as legislators have to be aware that this is part of it, you know, that this is how they will behave. And right now they wanted to kill Senator Roth's bill.

Not because—well, I shouldn't say that they didn't think the educational aspects weren't important to them. But if they would have wanted to kill your bill in any way because it doesn't do anything for the bureaucracy, that is normal. You don't have to be mad at them, but don't be deceived by them. That is our point, and know when they have a useful role and indispensable one, and know when it is unsatisfactory. And I think you gentlemen feel that way.

Mr. ZAGLANICZNY. Well, Senator Moynihan, we met with the Office of Education officials and others, and one of the rolls I see as a lobbyist and in our contacts is to light fires under their fannies, as you do so well on the floor of the Senate, and I think you are absolutely correct, that the bureaucracies are necessary, but they do have to be moved and they do have to be responsive to the American people, and they have to be responsive to the people they serve, of course.

Senator MOYNIHAN. I thank you all for very refreshing and candid testimony from the real world, which we don't see often out here.

Senator PACKWOOD. We look forward to seeing you again when this is on the floor and in the House. Thank you for coming. I hope you are able to drive back.

Senator MOYNIHAN. If you live in northern Michigan, you can drive in anything.

Mr. BARRY. Thank you.

[The prepared statements of the preceding panel follow:]

STATEMENT OF THE COALITION OF INDEPENDENT COLLEGE AND UNIVERSITY STUDENTS

SUMMARY

The Coalition of Independent College and University Students (COPUS) stated the organization's continued opposition to tuition tax credits, unless current legislation is modified to meet the Coalition's objections. Their testimony focuses on the harm that credits would do to independent institutions of higher education, the likely increases in tuition because of the credit and the fact that the credit is merely a subtle means of institutional aid.

The Coalition would reconsider their opposition to tuition tax credits if the measure was based on the level of family income and the amount of tuition a student pays. Finally, COPUS recommends that a reformed and more fully funded program of Federal student assistance will more adequately target funds to those in the low and middle-income groups and will deliver more money to pay the costs of tuition than a tax credit would. To that end the Coalition calls for an increase of at least one billion dollars in student aid for the next fiscal year.

Mr. Chairman and Members of the Committee, we thank you for the opportunity to testify on the utilization of the tax system for relief of the high cost of tuition and related college expenses.

I am Lawrence S. Zaglaniczny, National Director of the Coalition of Independent College and University Students, also known as COPUS. The Coalition is a nationwide organization representing students who attend independent colleges and universities. Our primary concern is working for an adequate and balanced system of Federal student financial assistance so that students may attend the higher educational institution that best suits their needs, talents and aspirations. We seek Federal student assistance programs that will allow needy and middle-income students to select a college based on their ability to achieve and not based on their ability to pay. Consequently, we welcome these hearings and an opportunity to comment on the various proposals under consideration to institute a system of tax relief for parents and students.

The issue of tuition tax credits has created a national debate on the financing of higher education. And, it is timely that the Executive, the Congress and the American people consider the state of educational finance, since higher education has been neglected in the past few years after the campus disruptions of the late Sixties and early Seventies subsided. Frankly, inflation, the high cost of energy, mandated social programs and years of underfunded Federal student assistance programs have made it more difficult to pay for a college education because these factors have driven tuition costs higher and higher. Especially for the Coalition's constituency, higher tuition bills and related expenses have forced some students to drop out or transfer from their private school. And, many prospective students do not even consider going to a college in the independent sector because of their high costs. It is for these reasons that we commend the sponsors of this type of legislation in their recognition of the financing problems of higher education and for beginning a national dialogue seeking answers.

Our testimony is in two parts. First, we again state our opposition to the utilization of the tax system as a means of financing individual's costs of attending college. However, we do support reform of the current system of student aid and increased funding of the programs so that more students are eligible for assistance; and we call for an increase of at least one billion dollars in the current programs so that they better serve needy and middle-income students. Such a targeted increase in appropriations will better meet the goals of the proponents of tuition tax credits, at a substantially reduced cost and with less constitutional controversy. Second, while the Coalition opposes tuition tax credits, we do realize there is great support for the concept in the Congress. Therefore, we will suggest changes in the already introduced tax credit proposals, which if adopted, would allow the organization to reconsider the tax credit idea and, perhaps, come to support it.

Since I have very little time to testify, I recommend the Committee examine our testimony before the House Budget Committee on May 12, 1977—with copies of which we will be happy to provide you. In that statement, we pointed out that tuition tax credits will upset the already tenuous balance between public and independent higher education in their friendly competition for students. For example, if a tax credit and refund policy were adopted, we believe the Federal government would be establishing a "free tuition" policy for many institutions, and if there were a "half cost" provision, then many public colleges would effec-

tively have their tuition charges reduced by 50 percent—to the detriment of the independent sector.

We have done some research to focus our arguments. Table I at the end of this statement indicates the undergraduate tuition and fees charged in academic year 1976-77. These figures are broken down in \$500 tuition and fee ranges, by the number and control of institutions in each dollar range, and by the number of students enrolled broken down in the same fashion.

It is claimed by some advocates of tuition tax credits, and in the press, that a system of tuition tax credits will aid private higher education. This is not true and, in fact, private higher education and their students will not receive benefits proportionately equal to those received by students attending public schools.

In our survey of the nation's colleges and universities we found that there were 1,450 public schools and 1,391 independent colleges for a total sample of 2,841. The publics enrolled 8,863,353 students and the independents enrolled 2,281,933 students. In the year for which the data is given 947 public and 22 private institutions charged \$500 or less in tuition and required fees. The public schools enrolled 4,987,461 students and the independents enrolled 15,675 students. A tuition tax credit and refund would mean that the government will give a "free tuition" education to 56 percent of all students enrolled in public higher education institutions. On the other hand, less than one percent of the students enrolled in private schools will benefit from a "free tuition" policy as instituted by a tax credit.

In the year in which the data is based 459 public and 96 private institutions charged between \$501 and \$1,000 in tuition and required fees. The public schools enrolled 3,695,283 students and the independents enrolled 81,941 students in that tuition range. The effect of the credit is, when combined with those institutions charging less than \$500 in tuition, that 1,406 public schools and 118 private schools will have either free tuition or will have their tuition charges halved. Those schools enroll, for the publics, 8,682,744 students and, for the independents, 97,616 students. Finally, these figures mean that approximately 97 percent of the public college and university students will, by instituting a tax credit, have all or one-half of their tuitions paid for by the U.S. government as compared to only four (4) percent of those students enrolled in independent institutions of higher learning.

We cannot understand how some people believe private higher education will be assisted through a tax credit system, when it is absolutely clear that public college students will pay no tuition or have their current tuition cut by one-half. The effect of the credit on private higher education would be simply a disaster. How could our institutions compete with schools whose cost is free? As responsible students, we cannot allow the institutions that educate us so well to be ruined in the future by a misguided Federal tax policy.

The Coalition opposes tuition tax credits because they will increase tuition costs. In fact, as students we are aware that institutions make strenuous efforts to keep tuition rises down. Tuitions, however, continue their alarmingly rapid rise. Considering all the factors that cause increases we are most concerned that a credit will be just another form of institutional aid. Trustees and State Legislatures are under great pressure to provide education at a reasonable cost in order to provide students with an education. Yet, many institutions try to save money for education by cutting corners on maintenance, paying low salaries to employees and through other means that normally they might not use.

A tax credit going to every student will result in increased tuitions because institutions know that their students will not be affected in a relative sense. Consequently, colleges can raise tuitions knowing the credit will not substantially affect their students in a relative economic sense, thereby, allowing the school to capture the monies. The same is true for State Legislatures in the public sector. The credit would be a subtle form of revenue sharing.

It is for these two primary reasons among our other objections that our organization of students who attend independent institutions of higher education oppose the idea of tuition tax credits.

We do suggest that current bills can be amended to meet, at least, our problem with the benefits flowing to the public sector in an unfair fashion. If such a credit were introduced, with our recommended changes, then the Coalition would reassess its position of opposition. While we have not yet worked out all the details regarding income levels, tuition levels and the credit benefits, we recommend any credit be geared to income and tuition levels.

Simply stated we recommend the credit be tied to family income and the amount of tuition paid for each child. We believe the program should be progressive. In other words, the higher a family's income is the less the credit would be, and, the higher the tuition paid by the family the greater the credit received would be.

It is our contention that the greater a family's income, the greater is their responsibility to pay for their children's education. Those who can afford to pay for education should. Also, by tying the credit to tuition actually paid we solve the imbalance of benefits between those attending public vs. independent institutions of higher education.

Naturally, we will consider other reasonable amendments to the credits bill such as a floor, an across-the-board percentage credit or tax deferments.

The most effective public policy solution to the whole question of financing an individual's postsecondary education, especially for the low and middle-income student is through a reformed and fully funded system of Federal student assistance. This is the path we prefer, rather than tax credits.

TABLE I.—NUMBER OF INSTITUTIONS AND ENROLLMENTS

[Undergraduate tuition and required fees broken down in \$500 increments, and broken down by numbers and control of institutions and respective enrollments]

Tuition	Number of institutions		Enrollments	
	Public	Private	Public	Private
0 to \$500.....	947	22	4,987,461	15,675
\$501 to \$1,000.....	459	96	3,695,283	81,941
\$1,001 to \$1,500.....	40	277	185,641	187,155
\$1,501 to \$2,000.....	4	317	14,967	318,757
\$2,001 to \$2,500.....	0	303	0	491,074
\$2,501 to \$3,000.....	0	198	0	525,404
\$3,001 to \$3,500.....	0	101	0	322,146
\$3,501 to \$4,000.....	0	56	0	198,438
\$4,001 and up.....	0	21	0	141,343
Total.....	1,450	1,391	8,883,352	2,281,933
Combined total.....	2,841		11,165,285	

PROPOSAL OF THE COALITION OF INDEPENDENT COLLEGE AND UNIVERSITY STUDENTS
FOR AN EQUITABLE TUITION TAX CREDIT RESPONSIVE TO INCOME

We do suggest that current bills can at least be amended to more appropriately distribute benefits between the public and private sector students. If such a credit were introduced with necessary changes, then the Coalition would reassess its position of opposition.

Our tuition tax credit proposal gears the benefit to income and tuition levels. Simply stated we recommend the credit be tied to family income and the amount of tuition paid for each child. We believe that the credit should be progressive after a certain point of income.

We propose a refundable tuition tax credit that would give every student or their family a benefit as follows: For those with incomes between \$0 and \$25,000 per year the credit would amount to 25 percent of paid tuition and required fees; for those with incomes between \$26,000 and \$45,000 per year the credit received would be reduced by one percent per every \$1,000 of additional income of paid tuition and required fees. For those with incomes of \$45,000 or more the credit received would be 5 percent of paid tuition and required fees.

The interesting and favorable aspect of this proposal is that no matter what type of college one goes to, public or private, one receives an equal percentage of one's tuition costs depending on one's income. For example, let us take one family whose income is \$14,000. Thus, according to the formula, that family would be eligible for a credit amounting to 25 percent of tuition paid. If their dependent went to a college that charges tuition at a level of \$500 per year, then that family or student would receive a tuition tax credit of \$1,000 which is 25 percent of tuition paid.

As another example, let us take a family that made \$40,000 per year. Thus, according to our formula that family would be eligible for a credit amounting to 10 percent of tuition paid. If their dependent went to a college that charges tuition at a level of \$500 per year, then that family would receive a tuition tax credit of \$50 which is 10 percent of tuition paid. Or, if their dependent went to

a college that charges tuition at a level of \$4,000 per year, then that family or student would receive a tuition tax credit of \$400 which is 10 percent of tuition paid. As one can observe the credit received is equal according to a percentage of tuition paid that is determined by a family's income.

In sum, it is this type of tuition tax credit that the Coalition might accept, however, we cannot accept any of the current bills on this subject that are before the Congress. Naturally, we are interested in other reasonable amendments to this legislation such as a floor, an across-the-board credit or tax deferments as embodied in the Mikva bill.

TABLE V.—*Coalition of Independent College and University Students (COPUS) proposal for an equitable tuition tax credits responsive to income*

[Tax credit received as a percentage of tuition paid]			
0 to \$25,000.....	25	\$38,000.....	14
\$26,000.....	24	\$37,000.....	13
\$27,000.....	23	\$38,000.....	12
\$28,000.....	22	\$39,000.....	11
\$29,000.....	21	\$40,000.....	10
\$30,000.....	20	\$41,000.....	9
\$31,000.....	19	\$42,000.....	8
\$32,000.....	18	\$43,000.....	7
\$33,000.....	17	\$44,000.....	6
\$34,000.....	16	\$45,000 and above.....	5
\$35,000.....	15		

STATEMENT OF KENT L. BARRY, PRESIDENT OF THE ASSOCIATED STUDENTS OF MICHIGAN STATE UNIVERSITY

Mr. Chairman, honorable committee members, I am pleased to appear before you this morning in support of the Tuition Tax Credit Bill. Accompanying me today are Mr. Corey Binger and Mr. Michael McCandless; both members of my staff. Our testimony is representative of the major universities and colleges (public and private) in the state of Michigan, comprising a student population of over 350,000.

As President of the student body, at Michigan State University, I am well aware of the problems in attaining a place in the world of higher education. This awareness has been manifest throughout our student community and, as a result, has prompted the formation of a fact-finding task force whose job it has been to prepare a detailed analysis of the problems as we see them.

The value of our testimony, however, does not lie in the statistical and graphic analyses that our research has led us through; but rather, in the expression of the effects felt by the "average" Michigan college student in his or her attempts to deal with rising tuition costs.

The cost of tuition at Michigan State University, recently cited as one of the ten most expensive public institutions of higher learning, has risen by some 28 percent in the last two years.

Even with our own limited knowledge of the variegated factors which make up the entire economic picture, it is readily apparent that the increases are not in line with the growth of the economy as a whole; and this trend is certainly not unique to Michigan State University. We believe a tuition tax credit would provide a reasonable financial assistance to those families and/or individuals who would not otherwise be eligible for grants or scholarships. We have determined, through our research, that institutions throughout the country are suffering from a characteristically similar fate; to wit, they have seen a reduction in the numbers of students enrolled from economic backgrounds traditionally regarded as the middle class.

We strongly support financial assistance programs for lower income families, and we do not regard the support of Congress for a tuition tax credit as being in any way indicative of a diminution of support for the needy. Rather, we feel that such legislation will serve to guarantee that no person be denied a college education on economic grounds alone. This is a crucial point, and one which we cannot stress too strongly. There have been some who would urge that we turn our efforts in the direction of direct aid from the federal government for students in financial need. We believe that the tax credit for tuition would more properly address the problem by allowing taxpayers to keep more of their earnings, instead of waiting in line for federal "aid".

Enrollments are down at most of the colleges and universities in the state of Michigan and this is indicative of a national phenomenon. Part of this problem can be attributed directly to the fact that the "baby boom" years have reached their zenith. Another part of the problem can be traced directly to the rising cost of obtaining a college education. We believe that this second factor is one which should concern all Americans.

A tax credit for tuition would certainly go a long way toward giving further incentives for individuals to pursue their educational aspirations, without undue regard for the limitations imposed by economic barriers. Such incentives are especially significant in instances where an individual would be unable to attend college without the credit. Typically, these persons are to be found in the middle class, where they are regarded as too affluent for federal or state scholarship aid.

One of the most far-reaching and significant aspects of the proposed legislation is that this policy would encourage a freedom of choice. Senator Moynihan has correctly reminded us that "as the 'tuition gap' between public and private colleges has widened, the proportion of college students choosing private campuses has shrunk: from 50 percent in the 1950's to less than 25 percent today". The ever-expanding space between the cost of a private college and a school subsidized by the government, has meant that the freedom of choice and opportunity has been denied to many persons as to where they will pursue their educational ambitions.

As rising costs and decreasing enrollments force more and more private institutions to close their doors, the diversity of choice, and indeed freedom of choice is similarly reduced. Again, I would agree with Senator Moynihan's assessment that "diversity and pluralism are values too, and perhaps nowhere more valuable than in the experiences that our children have in their early years, when their beliefs and attitudes are formed, their minds awakened and their friendships formed * * * I do not believe it excessive to ask that they be embodied in our national policies for the betterment of American education". A society that wishes to remain forever free must concern itself with the proper development of its succeeding generation and allow them their own freedom of choice and will for the determination of their own future.

We believe that the tuition tax credit will help promote the kind of diversity and pluralism which have marked the United States for greatness. We sincerely think that it is essential for the individual to have such choices available in decisions of educational pursuits so that he is not relegated, by economic necessity, to one alternative.

Mr. Chairman and honorable members of this committee we are convinced that a situation approaches rapidly where only the very affluent and the very poor will be able to attend college, and we are convinced that action must be taken to ease the financial plight of the middle-income families.

In the words of the late distinguished Senator Humphrey, "a college education has become almost a necessity for children to have opportunities". As a representative of the student community in the state of Michigan, I see the tuition tax credit as an outstanding example of progressive legislation aimed at attaining a high level of excellence in education for many who would not otherwise be participants. The opportunities spoken of by Senator Humphrey can, in fact be realized; but not without your help. I respectfully urge your support for the Tuition Tax Credit Act.

Thank you for your time and patience.

STATEMENT OF JOHN BRADY, CHAIRMAN, COLLEGE REPUBLICAN NATIONAL COMMITTEE; PREPARED BY STEPHEN FACKLER, RESEARCH DIRECTOR FOR THE COLLEGE REPUBLICAN NATIONAL COMMITTEE

Income tax credits for college tuition is the Republican solution for lessening the impact of spiraling education costs for all Americans. In providing direct tax relief, preventing expensive administrative costs, and allowing college students and their parents to finance their own education, it presents an intelligent modification of the current system of relying on a mix of government grants and loans. The average young American is finding it increasingly difficult to afford the costs of a college education. And since college is not necessarily the instant key to employment and security it once was, more and more Americans see it as an unnecessary luxury and go without it.

The basic premise of the present system is that grants will serve primarily low-income students, loans will aid middle income students, and the high income families in our society don't need any assistance.

This is a false assumption, collapsing right in the center. The present government loan program offers insufficient aid to the middle income student. A variety of disturbing statistics point this out. The College Entrance Examination Board has shown that the cost of attending a public college has risen 40 percent in the last five years, from \$1,782 to \$2,790. Private college costs have jumped 35 percent in the same time, from \$2,793 to \$4,668.

Meanwhile, as of January, 1975 only 4 percent of all the Basic Educational Opportunity Grants went to students whose families had incomes over \$12,000. For the class of students entering college in 1975, all federal grants paid only 8.4 percent of their total expenses.

The record for loans is even worse. The two government loan programs, National Direct Student Loans and Federal Guaranteed Student Loans, covered only a small 6.2 percent of the college costs for the class entering in 1975. The program that supposedly offers adequate support for the middle class is obviously failing.

The repercussions are significant. While lower-income students only have to cover 32.2 percent of their total costs, and upper-income students pay an even smaller 29.6 percent, a middle income student must personally raise 41.6 percent of his costs. (These figures have taken into account grants, scholarships and family assistance.) A student's only recourse is a loan, and we've seen how effective that has been in the past.

So while enrollment for lower and upper income students has remained fairly stable, college entrance from middle income families had plunged 22 percent from 1969 to 1974, a numerical decline of 1,310,000.

We are worried that too many deserving students are barred from the benefits of higher education because they cannot afford it. Tuition tax credits are our only way of moving to solve this dilemma. And it has a number of advantages over the ineffective loan program.

First, tax credits give money directly back to the deserving taxpayer. With loans, interest must be paid once the student graduates, in addition to paying off the principal. Instead of branding students as debtors just as they are trying to get on their feet financially, tax credits help to develop self-supporting and self-reliant students by returning tax dollars.

Second, unlike loans, tax credits require no burgeoning bureaucracy to administer the program. Students can forget about hassling with confusing and probing financial questionnaires. Colleges can reduce the amount of paperwork churned out. Both can escape, to some extent, from the web of externally imposed government regulations. The size of government can be cut back. A measure of freedom can return to our colleges and universities.

Third, tax credits do not disturb our economy. While present government aid to education goes through the college to the students, tax credits go directly to the students or their families. Instead of having to depend on which college offers the best financial aid package, students can use the money from their tax credits at the college of their choice. Instead of the government deciding which colleges "pay out or perish", students make that decision.

Increased freedom of choice and reduced costs. These are the benefits tax credits would bring.

The College Republican National Committee, the nation's largest student political organization, wholeheartedly supports the concept of tuition tax credits. None of the many pieces of introduced legislation, however, has all the specific features we would like to see included.

(1) Any tax credits bill must have an earnings limitation. Since the basic thrust of this legislation is to ease the financial plight of the middle class, those who do not need this support should not receive it. Congressman Coughlin's proposal which calls for a gradually diminishing credit as income increases above \$22,500, is an intelligent way to reduce the program's cost without enforcing an arbitrary line above which no credit is provided. Of course, the more students a family has covered under this legislation, the higher the point is drawn at which credits begin to diminish.

(2) Any tax credits bill must include refundability. This means a student entitled to a \$500 credit for higher education expenses, but who only pays say \$200 in taxes because his income is so low, would receive a \$300 refund from the federal government. For lower income students and their families, this refund allows them to finance more of their own education.

Using refundability would also mean a corresponding reduction in Basic Equal Opportunity Grants. This is a positive step toward reducing government control over American education.

(3) Any tax credits bill must require that the student support part of his own education. A bill which will cover all of the student's expenses up to a specified amount could potentially pay for all his educational costs. The Packwood-Moynihan bill, which covers only 50 percent of tuition up to \$500, insures that the government encourages a degree of self-reliance instead of dependency.

(4) Any tax credits bill must not overly favor inexpensive state supported colleges and universities at the expense of private schools. The Packwood-Moynihan bill adequately fulfills this goal. Bills which cover 100 percent of tuition or costs up to a certain amount encourage students to go to inexpensive schools where the credit will cover a greater percentage of their costs. By covering only 50 percent of tuition up to \$500, the Packwood-Moynihan bill requires that students pay for at least half of their education. This bill takes a step toward protecting our system of private higher education.

In light of these four points, the Packwood-Moynihan bill comes the closest to our conception of what tax credits should accomplish. We give it our foremost support.

Speculating for a moment, extending the concept of refundability permits the federal government to implement a much more rational system for funding education.

For lower and middle-income students and families, tax credits could completely supplant the Basic Equal Opportunity Grants. Through refundability and the income tax system, students could receive the same amount of financial aid as they now receive in grants. Tax credits have two fundamental advantages.

First, tax credits can be distributed through a much simpler system than grants. Once the specific socio-economic determinants have been chosen statistical charts can be provided to each college and university in the nation. It is a simple matter of cross-referencing to determine how much a particular student deserves. He can then be issued a certificate for that amount which must be attached to his IRS form.

Savings result all the way around. Government bureaucracy and its control over education are both reduced. Students escape those complex HEW forms. And colleges and universities cut back on the amount of paperwork they must churn out to apply for grants for their students. With reduced costs more money can directly go to benefit the student rather than lose itself in the bureaucratic shuffle.

Second, grants appropriate citizens' money and then return it with strings attached. Tax credits cut those strings. Students, not government, decide how their money will be spent. Students can develop self-reliance because they control their own finances instead of depending upon a government handout. Greater efficiency and greater freedom: those are two reasons to support tuition tax credits over federal grants.

Supplementing this base would be the present National Direct Student Loan and Federal Guaranteed Student Loan programs.

Our major criticism of these programs is the massive number of bankruptcy claims which allow students to slip away from paying their debts. We encourage the government to enforce a stricter collection procedure. In addition, bankruptcy laws should be tightened up—making it more difficult for students paying back government loans to duck repayment.

On the other hand, we recognize the real burden of debt which many students must bear. Government loan provisions could be relaxed further, allowing for longer repayment periods and reduced interest rates. Hopefully, these various mild changes, taken as a single measure, will make loans a more attractive way for students to supplement their financial aid packages.

For this committee is dealing with more than a single bill, it must decide how tax credits will have the optimal effect on secondary and higher education. We all recognize the obvious merits of tax credits. Students want to support more of their own education. They want to decide themselves where their money will go. And we all want efficient operation of government. The passage of a tuition tax credits bill, like the slightly modified version of the Packwood-Moynihan bill which we support, will have these positive results for American education.

Senator Packwood. Next we will take Rockne McCarthy.

Has Professor Davidson arrived?

I would like to announce to the audience that we will have to take up at 2 this afternoon.

**STATEMENT OF DR. ROCKNE McCARTHY, VICE PRESIDENT,
ASSOCIATION FOR PUBLIC JUSTICE**

Mr. McCARTHY. Mr. Chairman, members of the committee—

Senator PACKWOOD. Hold the mike right up to your mouth and speak right into it. It is not a good mike.

Mr. McCARTHY [continuing]. Thank you very much for this opportunity to testify.

The Association for Public Justice affirms that the cultural freedom of every citizen, group, and institution in our country is only possible in a pluralistic society. The association supports the Tuition Tax Credit Act of 1977 because the bill is an example of a public policy that will help to make a more just society for all Americans.

In my written testimony, I have covered four points that I would like to briefly summarize. Point 1 is the responsibility to educate. Education is the right and responsibility of parents. This fundamental right has been forcefully stated in the United Nations' Universal Declaration of Human Rights, article 26, 1948, and the Declaration of the Rights of a Child, Principle 7, 1959.

Point 2 is the freedom of education. Most democratic states acknowledge the fundamental right of parents to choose the kind of education they desire for their children and do not discriminate in the allocation of public funds between individuals, groups, or institutions. This non-discriminatory policy of public support for education is not the case in the United States. The United States has only a limited form of educational pluralism.

Point 3 is the present structure of public education. In the United States the present nonpluralistic, public funding policy for education is a relatively recent development. It emerged in the 19th century not by accident but as the conscious choice of individuals who wanted to use public funds to support their view of life and value system and denied public funds to individuals and groups they judged unworthy of support.

The historical record in such cases in New York State make this quite clear. In my written testimony I tried to point out that in our democratic society in the United States we have appropriately disestablished churches. But entering the vacuum left by that what history has developed is an establishment of a monopolistic public school system which like the old church-state establishment, I would want to argue, is fundamentally injustice.

And then point four is the nature of education and the task of the Government. The Association for Public Justice affirms that education is more than the conveyance of factual knowledge. Education implies training the powers of interpretation and judgment in the perspective of a philosophy of life or value system. Good education can never be neutral because only the most shallow scholarship fails to reflect the commitment of the scholar and teacher.

But even if this belief concerning the meaning of education is not shared by the majority of citizens, politicians, or judges in the United States, the principles of public justice demand that the Government take tax moneys which have been collected from every citizen and distribute them without penalty or special advantage to any person, group, or institution. To do otherwise would involve the Government in a form of discrimination in the allocation of public funds.

And in a real sense that brings me back to my first point in the question of human rights. This is an issue of human rights, of group rights in terms of how the Government allocates equitably funds to all citizens, institutions, and groups in the United States.

Senator Packwood, you mentioned the other day what you could take to the Senate floor in terms of speaking to your colleagues. It seems to me that we have to be realistic in terms of the economics we listened to during the last few days. How much is it going to cost?

The fundamental issue, it seems to me, is one of equity and fair play. And in that regard it is a basic issue of human rights and group rights. It is in that contention then that the economic argument has to be performed.

The overriding issue, it seems to me, is fairness and equity. It is in terms of that, it seems to me, that we can appeal to the best in our democratic conditions. Unfortunately, in the 19th century that did not occur. What happened was that a group of people, for example New York State, who held the power purposefully designed a system to serve their best interest, not the interests of everyone.

We have an opportunity today, the Congress has an opportunity, the President has an opportunity, to attempt to redress that injustice and to bring a more equitable system in terms of education to all citizens of this country.

Thank you.

Senator PACKWOOD. Your statements are very cogent, especially about money. We may amend this bill. It may cost as much or more, but in the last analysis this country is not going to flounder on lack of money. It is going to flounder on other feelings money has nothing to do with.

You have been very patient. I noticed you in the audience and I appreciate your staying so long to testify, Pat.

Senator MOYNIHAN. Now, I do thank you, Mr. Chairman.

Mr. McCarthy, I am obviously more than a little happy to have your testimony because of the dimension of historical perspective that you bring to it. I mean, as the long-suffering chairman of these hearings is aware, that with respect to the question of elementary and secondary schools, it just seems to me that this is a question of civil rights and human rights. And the notion that our opponents' arguments are a pristine inheritance from the Founding Fathers is just not right, it is historical, and if you believe that, you believe anything.

The present arguments arise from the distress occasioned in the American Protestant community by the arrival of large numbers of Catholic Irish in the 1830's in New York State. I mean there is a historical beginning to these things.

It is not enough that they came when the majority of the Oregon Legislature were members of the Ku Klux Klan. But that experience is now receding and I believe we can see it in its perspective for what it was. It is time we got rid of the legal presumption on behalf of the not especially attractive religious prejudices of the 19th century.

Mr. McCARTHY. What is particularly interesting in that New York case, Senator Moynihan, is the subtleness of changes and of definitions that developed. You have made a reference on a number of occasions to the development of public school. What you had in New York State first was the New York Free Society.

Senator MOYNIHAN. That is right.

Mr. McCARTHY. That was a private board or association which was running its schools alongside of other denominational schools. You came up to the depression, 1819, and there was the question of how to distribute money again. What happened was that the Baptists and others began to challenge an extra element that the New York Free Society had, and that was funding for their schools. The others wanted in on that. You had an economic situation about who is going to get the money. You have to recognize that the New York Free Society was supported by the leading elites in New York State.

Senator MOYNIHAN. Yes, yes.

Mr. McCARTHY. What happened was—

Senator MOYNIHAN. They would not have been Baptists, for example?

Mr. McCARTHY. That is right.

Senator MOYNIHAN. I mean Baptists would have been a very lesser sect, Episcopalian, maybe.

Mr. McCARTHY. In that battle definitions for the first time emerged, definitions for example between secondary and nonsecondary, more fundamentally between private and public education. To get funds to continue to their school system, the New York Free Society changed their name to the New York Public School Society.

Senator MOYNIHAN. That is where PS comes from?

Mr. McCARTHY. There is still a private board.

Senator MOYNIHAN. It is a private board?

Mr. McCARTHY. But they use the law for their own self-interests to deny it to the other groups. I think it is clearly a case of religious intolerance. The situation then later on is going to develop in terms of the Catholic situation. But in terms of the legal argument which is very interesting is that in 1831 a law school committee reported this kind of argument. That is, that funds cannot go to the nonpublic schools, remember they have used those self-serving definitions, because those are religious schools.

The point was that both their schools and other schools were religious schools, but that is the legal argument that they hid behind. They really did. And what is interesting in that sense is that the legal argument did not really get into constitutional law until the 20th century in terms of this whole concept of neutrality.

I came out of a school or tradition, for example, which believes education can never be neutral and that it always reflects basic values and assumptions. The point that I would like to make in terms of the Court is that the Court cannot decide in terms of allocation of public money, whether my position is right or another position is right.

To be fair, the Court would have to, it seems to me, have all different positions and treat all different positions in society equitably and fairly. It developed in Europe that that is the case. In the Netherlands, Austria, and Switzerland you have total funding across the board.

Senator MOYNIHAN. Yes; we are singular and persist in this battle of the 1830's, with which we have retrospectively endowed with constitutional origins which it does not have.

Mr. McCarthy, would you have the kindness to send us a letter giving us references to workings of Professors Katz and Smith?

Mr. McCARTHY. Yes, sir.

Senator MOYNIHAN. I would like to see those.

Mr. McCARTHY. I might say also, that the Association for Public Justice is sponsoring its own research program and is just about to complete a book which deals with philosophies and origins of public school systems. The other argument that should be made is the kind of argument that emerged in the 19th century and heard in this room several times in terms of States when they appealed to Jefferson.

They were correct in appealing to Jefferson for that homogeneous society, but what I would argue is a secondary view. They argued that the kind of position that I hold is secondary. It is the same kind of thing that was going on in the 19th century. The Catholics said to the Protestants, "You are secondary." The Protestants looked at the Catholics and said, "You are secondary." The difference is that the Protestants had the power and the Protestants won.

Senator MOYNIHAN. Well, I would like to see that manuscript when you are ready. We do thank you for clearing up an old professor and coming in with some historical references, Mr. McCarthy. Thank you for coming in.

Mr. McCARTHY. Thank you very much.

Senator PACKWOOD. You were an excellent witness, thank you.

Mr. McCARTHY. Thank you.

[The prepared statement of Dr. McCarthy follows:]

STATEMENT OF DR. ROCKNE McCARTHY, VICE PRESIDENT, ASSOCIATION FOR PUBLIC JUSTICE

Mr. Chairman, on behalf of the Association for Public Justice I want to thank the Senate Finance Committee for this opportunity to testify in support of the Tuition Tax Credit Act (Bill S. 2142) of 1977. Public Justice is a non-denominational association of Christian citizens which endeavors to foster governmental policies that promote the understanding and achievement of justice in the United States. The Association affirms that the cultural freedom of every citizen, group and institution in our country is only possible in a pluralistic society. The principles of public justice oppose all attempts of government to create a homogenous mass of citizens or a non-differentiated society. A truly just government must encourage, protect and make room for the development and expression of the cultural freedom of individuals, groups and institutions in our society. This task is one of the primary responsibilities of government.

THE RESPONSIBILITY TO EDUCATE

The Association for Public Justice supports the Tuition Tax Act of 1977 because the Bill is an example of a public policy that will help to make a more just society for all Americans. By supporting the freedom of choice in education the Bill recognizes the legitimate right of parents to select the kind of education they desire for their children. This fundamental right has been forcefully stated in the United Nations' Universal Declaration of Human Rights (Article 26, 1948) and the Declaration of the Rights of a Child (Principle 7, 1959). Scholars in such fields as comparative government and education have increasingly been pointing out that most democratic states throughout the world recognize this prior right of parents. Although the particular form and extent of an equitable, pluralistic system of education varies in these states, most democratic states acknowledge the fundamental right of parents to choose the kind of education they desire for their children and do not discriminate in the allocation of public funds between individuals, groups or institutions.

FREEDOM OF EDUCATION AND THE TASK OF GOVERNMENT

This non-discriminatory policy of public support for education is not the case in the United States. The United States has only a limited form of educational pluralism. As a democratic society we can be thankful that the 1925

Supreme Court decision in *Pierce v. Society of Sisters* guaranteed the right of parents to send their children to non-public schools. But the principles of public justice demand of a democratic state far more than this simple freedom. While parents are not forced to send their children to public schools they must "pay" extra in the form of tuition for this freedom of choice. This freedom comes, quite literally then, at a very high price. It is a price completely beyond the reach of the poor and also an increasing number of the middle class.

For many parents the decision, to send their children to schools which teach a world and life view consistent with the values of the home, is one of conscience and religious conviction. The basic question before the Senate Finance Committee is whether only the parents who send their children to public schools should receive financial support, or should parents who send their children to non-public schools also receive some financial assistance since they to pay taxes for education.

The Association for Public Justice affirms that in a pluralistic society the principles of public justice require of government an equitable handling of the goods, services, welfare, protection, and opportunity that it controls, without penalty or specific advantage to any person, group or institution due to religious, racial, linguistic, sexual, economic or other social and individual differences. The present public funding policy of the Federal government, states and local communities does not measure up to this test of a truly democratic-pluralistic, governmental policy. Passage of the Tax Credit Act of 1977 will help to alleviate this injustice by allowing every parent and child to choose, without economic discrimination, the kind of education they desire.

PRESENT STRUCTURE OF PUBLIC EDUCATION

The present non-pluralistic, public funding policy for education is a relatively recent development in the United States. In *Education in the Forming of American Society*, Bernard Bailyn points out that in the early history of the country there was no clear line of separation between private and public schools. Most of the colonists—whether in the middle colonies, the South, or New England—were familiar with the English practice of multiple sources of financial support for schools. The actual colonial practice of school financing was usually a combination of private donations, student tuition, and, in some cases, public funding in the form of land grants and taxes. Schools receiving money from the government were considered "public" schools even though they were managed by private individuals or religious groups acting, not as officers and agencies of the government, but as trustees responsible for the preservation of their institution's educational program and goals. The reason was simple enough. Such schools were considered "public" schools because their education was providing a public service.

The story of the emergence of the distinction between private and public education is elaborately woven into the fabric of the religious, political and educational struggle in such states as New York in the early nineteenth century. Although the history is complex the records are clear that the distinction between private and public schools went hand in hand with the emergence of a monopolistic, governmental funding policy for education.

In New York City, for example, Professors John Webb Pratt, Michael B. Katz and Timothy L. Smith have written how after a history of pluralism in government support for education, the political and legal position that public funds could only go to public, non-sectarian schools emerged. It is important to note that the distinctions between private and public schools, sectarian and non-sectarian education, were self-serving definitions made by Protestants at a time when they felt threatened by the rising tide of Irish Catholic immigration.

Just how these self-serving definitions were employed is made clear by the report of a Law Committee set up by the New York City Council in 1831 to determine whether public funds could go to Catholic schools. The Law Committee concluded that Catholic schools were not entitled to public funds because they were private, sectarian schools. Since the Law Committee decided that public funds could continue to go to the schools of the New York School Society, even though they were run by a private board of trustees and reflected a Protestant world and life view complete with scripture readings from the King James Bible. It is clear that what was at stake was not the issue of whether or not to fund religious schools but whether or not minorities had a right to public educational funds. The educational struggle was finally decided in favor of a monopolistic

school system where everyone's taxes were used to support schools which reinforced the world and life view of the majority. Today this is the structure for public education throughout our country.

The un-democratic development in the United States of a non-pluralistic, governmental funding policy for primary and secondary education should be contrasted with the democratic disestablishment of churches. Whereas in some European states a monopolistic, ecclesiastical establishment continues, with other churches being tolerated, in the United States a monopolistic public school establishment exists which tolerates other schools only if they are privately supported. In America a monopolistic church is not allowed, but in its place a monopolistic, public school system has been established in the several states. In the sphere of public funding for education the United States is not a pluralistic state.

THE NATURE OF EDUCATION

The Association for Public Justice affirms that education is more than the conveyance of factual knowledge. Education implies training the powers of interpretation and judgment in the perspective of a philosophy of life or value system. Good education can never be neutral because only the most shallow scholarship fails to reflect the commitment of the scholar and teacher. But even if this belief concerning the meaning of education is not shared by the majority of citizens, politicians or judges in the United States, the principles of public justice demand that the government take tax monies which have been collected from every citizen and distribute them without penalty or special advantage to any person, in a form of discrimination in the allocation of public funds.

PUBLIC JUSTICE SUPPORTS ENACTMENT OF SENATE BILL 2142

The Association for Public Justice's support of the Tuition Tax Credit Act of 1977 should not be viewed as a kind of special pleading for one particular group of citizens. Our aim is liberty and justice, a measure of equity and fair-play for every individual and group in the United States. Every individual and group in society deserves impartial treatment as a basic civil right, not only politically and economically but also in education. Failure to honor the principles of liberty and justice for all is a form of discrimination unworthy of a democratic state. Honoring liberty and justice in deed as well as in word will produce a healthy, pluralistic society and common loyalty to law.

Senator Packwood. We will now adjourn this hearing.

[Whereupon at 1 p.m. this hearing was adjourned.]

[By direction of the chairman the following communications were made a part of the record:]

STATEMENT OF HON. BILL FRENZEL, A REPRESENTATIVE FROM THE STATE OF MINNESOTA

Mr. Chairman and Members of the Committee, I am pleased to have the opportunity to present my statement to this distinguished Committee. As the prime House sponsor of the identical Tuition Tax Credit Act (S. 2142), I can't tell you more about the bill than its distinguished sponsors, Senators Packwood and Moynihan, can, but I am pleased to lend my enthusiastic support.

The skyrocketing cost of education is rapidly becoming an intolerable burden to all but the very rich, the very poor and the very brilliant. There have been a number of approaches designed to solve this problem in the past. What makes this bill different is that any part-time or full-time student who attends an elementary or secondary school, a vocational or business school or a college, university or graduate school is eligible for the credit. It therefore applies to the total universe of students. The student in the land grant college is eligible for the same credit as the student in the private sectarian school.

Because tax credits do not add significantly to the heavy burden of bureaucratic redtape, I believe they are the most effective way to provide taxpayers with financial relief from the skyrocketing costs of education. Unlike our present federal student assistance programs, tax credits will not stimulate further expansion of the already massive federal bureaucracy.

More importantly, tax credits will help to provide the educational consumer with freedom of choice. Educational choice has been a popular and successful

tradition in America, but inflation has robbed the middle-income American of any real choice.

The need for Congress to act is well demonstrated by the decline in middle-class enrollments which has spread to every level of non-public education. The U.S. Commerce Department statistics indicate that private elementary schools have lost 35 percent of their enrollment in the last 10 years. Private high school enrollment also has dropped 13 percent even though total secondary enrollment around the country rose by 18 percent. The College Entrance Examination Board found that over the past five years the average tuition and fees at private four-year institutions rose by 54 percent, at public four-year institutions by 57 percent, at private two-year institutions by 52 percent and at public two-year institutions by 130 percent. Higher education costs average \$2,790 per year for public colleges, and \$4,568 for private colleges. These costs are well beyond the means of middle-class incomes, especially when more than one person in the family is in college.

Tuition tax credits are not new to Congress. The Senate has passed such legislation in four out of the past five Congresses. I only wish the House had been as responsive as the Senate. The House, however, was provided with the first opportunity to vote on education tax credits just this past September. The House strongly supported an amendment to the FY 78 Second Concurrent Budget Resolution to ensure the availability of \$175 million for higher education tax credits. This vote demonstrated a strong bi-partisan approval of the House for this very worthwhile and long overdue tax relief. This is legislation whose time has come and I hope that it will be passed. I will do everything I can to encourage such action on the part of the House.

STATEMENT OF U.S. REPRESENTATIVE LAWRENCE COUGHLIN OF PENNSYLVANIA

I am very pleased to testify in support of legislation that would provide a measure of long overdue relief for Americans who are finding it more difficult each year to provide higher education for their children because of escalating costs of tuition and other fees.

The concept of tuition tax credits is not new and has broad, bipartisan support. In this Congress, 252 Representatives and 57 Senators have sponsored over 90 bills which would create a system of tax credits, tax deductions or other forms of tuition relief. It is very interesting to note that since 1967 the Senate has approved some form of educating tax relief six times, while the House of Representatives has not been permitted a direct vote on the merits of this concept.

More and more low- and middle-income families are discovering that higher education is unaffordable because inflation is reducing household spending power, forcing schools to charge increased tuition and fees, and minimizing the benefits of dwindling scholarship and loan sources.

In our desire to help the poor, we have initiated programs and authorized funds for needy scholars. Student aid programs have firmly met the needs of low-income youth. The twin student aid goals of equal choice and education access for the needy students have largely been achieved.

But, somehow we have taken for granted middle-class America and virtually ignored these citizens who are the backbone of our society, the great stable base of our population who carry the greatest tax burden. I think in our failure to recognize the situation of middle Americans, we have inferentially installed a reverse caste system.

Are middle-income American families being priced out of higher education?

Yes.

1. The cost of college is rising faster than the rise in the cost of most other goods and services.

2. Middle-income students, from families earning between \$10,000 and \$20,000 annually, pay a greater net cost to attend college than do either the poor or the wealthy: 41.6 percent for the middle-income versus 32.2 percent for the low income and 29.6 percent for the high income.

3. The percentage of middle-class students, compared to low and high income students, is declining at a rapid rate. In 1974, there were roughly 22 percent or 1.3 million fewer middle-income students in college than if the conditions of 1969 continued.

As direct analysis of the Bureau of Labor statistics "Intermediate Budget for an Urban Family of Four"—which reflects accurately the full range of increasing demands upon the family income—illustrates the plight of the middle income family. During the 1970-1975 period, middle-income family costs increased by 43.6 percent while the U.S. median income grew by only 38.5 percent. In other words, the family "in the middle" had less real money or discretionary income in 1975 than it had in 1970. But the costs of college were much more: tuition in public colleges, alone, was 55 percent higher in 1975 than it had been in 1970.

In the legislation others and I have proposed, tax credits would be permitted for universities and colleges, and accredited technical, business, vocational and trade schools.

I think it is important to understand that what we propose is not the expansion of an elite system restricted to colleges and universities, but a reasonable and flexible system that also will encourage higher education in important trade, technical and vocational fields.

Not every student of college age wishes to attend a structured academic environment nor should he be encouraged if he is not equipped to do so. This is why it is essential that the trade and vocational aspects of this legislation be recognized.

While the formulas for tax credits or deductions vary, I am convinced that a responsible and fair approach can easily be reached. For instance, my measure would authorize a maximum yearly tax credit of \$325 per student to offset income tax payments for those with \$1,500 or more in higher education expenses.

The bill would permit a tax credit of 100 percent for the first \$200 spent on higher education; 25 percent of expenses from \$200 to \$500, and 5 percent of expenses from \$500 but not to exceed \$1,500.

Those earning \$22,500 or more yearly would be eligible for a gradually diminishing credit as their income goes higher. While the figure is not a large amount today, I think it comes remarkably close to the \$10,000 to \$20,000—the middle income—bracket which has been so devastatingly affected.

I might point out also that my work on tax credits for higher education has been a continuing effort and, each time more facts are revealed, I find more compelling reasons for the legislation.

Back in the 93d Congress, I checked the figures for what college graduates earned in a lifetime. The latest figures available showed that college graduates received \$243,145 more in lifetime earnings than high school graduates. They earned \$343,111 more than those with eight years of education or less.

These figures have no doubt changed somewhat; however, on an average college graduates earn over \$5,000 per year more in taxable income than those with only a high school education. I also note that these figures do not include the higher earnings of trained technical, vocational and trade school graduates who would be covered under the provisions of my bill.

The implications are clear: the higher educated earn more money. Those who earn more money pay more taxes. The more taxes that are paid the more revenue Federal, state and local governments obtain.

In short, it is a wise and prudent investment.

I want it understood, in stating this, that my support for tax credits for higher education goes beyond mere dollars and cents. I know the main opposition has been based on the so-called revenue loss to the government.

But for a Nation which aspires to a richer and fuller life for all of its citizens, to base the concept of higher education on how much or how little goes into the Federal Treasury, is demeaning and unworthy of its people and even more so of its elected Representatives.

Putting aside the increase in tax revenue from higher earnings of the more educated, I believe that legislation I propose would benefit the country culturally, socially and intellectually. For the millions that are expended by the Federal Government in encouraging the arts and funding a variety of cultural projects, I am convinced that tax credits for higher education would help accomplish these ends directly.

Rather than funneling tax dollars through the Federal Government and having them come out the other end in a much reduced state, this legislation would permit the people to use their money directly. We, in the Congress, must recognize that this is one of the most effective ways to use earned income.

In setting tax policy in this vital field, I think it should be recognized that we are providing tax credits for use for a limited period of time—a time when the drain on the family income is the greatest.

The tax credit for higher education thus effectively is passed on from family to family as children reach college age when the assistance is most critical. It is eminently just since, unlike most of our tax shelters or havens, it provides no permanent tax credit for the family or individual.

Earlier, I referred to the revenue loss aspect of this legislation. It is fascinating to note that the Treasury Department uses this scare word every time a program or project to which it objects is proposed. On the other hand, there is no such thing as a revenue loss when the Administration in power, through the Treasury Department, proposes such wonderful things as tax incentives or tax investments.

Revenue loss estimates are not sacrosanct and several Treasury estimates are conflicting. Some five years ago, I was advised that the anticipated revenue loss for my bill would be more than \$3 billion annually. Subsequently, the figure was reduced by \$50 million. This estimate was also based on the unlikely assumption that every single family eligible would take maximum advantage of the tax credit.

I submit that the revenue loss argument is specious at its best and pitiful at its worst. The Federal budget as proposed by President Carter for FY 1979 totals \$500.2 billion. Giving Treasury the benefit of the doubt, a \$2.5 billion revenue loss would account for .0049 percent of the entire Federal budget.

As legislators, we create or encourage policies both by the tax legislation we enact and by the tax subjects we ignore. Whether or not we like it, we are shaping a variety of business, municipal, educational, charitable, cultural and social policies by our action and inaction.

I am almost embarrassed to think that, as Federal legislators, we have viewed so narrowly and so devoid of forethought the path of higher education for millions of Americans.

If we are to pay more than lip service to the great middle America for which we so often speak and just as infrequently act, I think we should provide a measure of tax justice by making it possible through government action to educate their children in colleges, universities and trade, technical or vocational schools.

In short, I believe it is time for the elected representatives of the people—the Senators and Representatives—to exercise the policy-making function which is not just their prerogative but their duty. I contend that Health, Education, and Welfare Secretary Joseph Califano, in his opposition to the concept of tax credits for higher education, is usurping the authority of the Congress.

Nowhere is it stated in the Constitution or in the law that the Department of Health, Education, and Welfare has the authority to write or change the tax laws. Nor is its amorphous mandate, granted by legislation adopted by the Congress and signed by the President, so broad as to dictate policy for millions of American citizens too well-off to take advantage of government largesse designed for the poor, yet not so affluent, as the wealthy who need not worry about the escalating costs of higher education.

This is the job of the Congress in conjunction with the President.

For example, let's take the case of tax-exempt bonds. To use Treasury's favorite catch-all, the revenue loss to the Federal Government is estimated at \$6 billion for 1978. As a revenue loss, that—in Treasury's terms—is a horrendous figure.

Yet, is there one among us who would challenge the logic and result of that so-called revenue loss? Without this provision for tax-exempt bonds the chaos that would result for many cities and other municipalities would be tremendous. The good that is accomplished by tax-exempt bonds far outweighs the revenue loss.

In addition to the municipalities, this tax provision is used by investors throughout the country. The multimillionaire can take advantage of it as well as the small investor.

Thus, the validity of the argument that the rich would benefit, too, from the tax credits for higher education amounts to nothing since the wealthy always benefit more than the less affluent. My legislation's gradually-diminishing scale of tax credits as incomes rise also undercuts this argument.

I must also point out, that this legislation is not a "rich man's bill," as Administration spokesmen have said. This is a proposal for the American taxpayer.

According to the October 1977 American Council on Education study, most of the benefits of college tuition tax credits would go to families earning between \$10,000 and \$25,000; while 32 percent of the dollar value would go to families

earning up to \$10,000 annually, and only 11.4 percent would go to families earning more than \$25,000.

President Carter has sent his tax reform package to Congress and calls for a \$24.5 billion net tax cut. Americans on an average pay 10.7 percent of their total personal income in Federal Income taxes. Mr. Carter's recommendations would reduce this to 10.3 percent this year. However, under the pressure of inflation this could rise to 10.5 percent in 1979.

But these income tax cuts would be offset, particularly for the higher income families, by scheduled increases in the Social Security tax. With Social Security tax increases taken into account, the tax reductions become minimal for taxpayers in upper-middle income brackets. A family of four earning \$25,000 annually, for example, would see its total tax bill cut by only \$22.

At the same time, the President also conceded that the cuts would not be large enough to offset higher energy taxes, if Congress passed the proposed energy legislation. The Social Security increases which have already been scheduled, coupled with the rising energy prices and cost-of-living expenses, further erode the family's dwindling discretionary income available for education expenses.

The recognition that relief must be made available for middle-Americans, and even the more affluent, though not wealthy, can be seen in a new phenomenon. Private colleges are entering the loan field.

In my Congressional District, Bryn Mawr College has created a loan program. Basically, these are long-term loans at reasonable interest rates which enable parents to stretch out payments for a number of years.

Other private institutions initiating loan programs include: Cornell University, Ithaca, N.Y.; Yale University, New Haven, Conn.; Amherst College, Amherst, Mass.; Massachusetts Institute of Technology (MIT), Cambridge, Mass.; and Stanford University, Stanford, Calif.

I suppose it's easy to say that private institutions have a vested interest in continuing in business. Yet, both the private colleges and public institutions have served this Nation remarkably well.

To aid both the aspiring student and the worthy institution is not to be lightly dismissed as vested interests. It, in fact, is a dual purpose which our tax laws should be encouraging.

After all, we are talking about jobs in the short run at colleges and universities, and higher earnings for people and more taxes in the long run for government at all levels. I cannot conceive of a better nor more just application of the tax laws.

The Administration has stated its preference for increased student grant and loan programs. As worthy as these programs are, I must point out that there has been considerable publicity about the large number and dollar amounts of these defaults. To use the Treasury Department's favorite expression, the "revenue loss" already has climbed to some \$752 million and no doubt will increase from defaults on guaranteed student loans. Yet, we cannot dismiss these programs solely on this basis.

Nor can any valid claim be advanced that these grant programs will aid the millions of hard-pressed middle income taxpayers. Increasing these loan and grant programs, without education tax credits, would continue the discrimination apparent in Federal educational policies against the middle income.

If this Administration is insistent on redistributing income, I submit it is wrong in insisting on this dubious approach in the educational field. It is also misreading the mood of the great majority of Americans.

In fact, we need a reasonable blend of grants and education tax credits.

I think this Committee can reassure the Congress that:

1. We can afford to provide this important relief for our middle-income constituents. It is their taxes that do, in fact, pay for the education of the poor. It would be unfair if we do not assist these families with a small portion of the costs of higher education.

2. If we provide for middle-income families, we will not be decreasing our commitment to the provisions of equal education opportunity for the poor. None of the sponsors of this legislation would, directly or indirectly, do anything to deprive poor families of the opportunity to educate their children further.

I know there has been an argument for extending need-based aid to the middle-income families. Applying the legal definition of need to middle income Americans for purposes of education is to complicate a problem that can be relieved by new tax laws. Middle income citizens are committed to a way of life (by the tax laws, too) that requires their limited resources be spent on a number of family needs which include, but are not limited, to education.

I believe most Members of the Congress think that all Americans must sacrifice to provide higher educations for their children. The truth is, however, that we are already limiting the sacrifices. The rich obviously don't have to worry. The poor are being aided by the rest of the taxpayers. An the middle-income taxpayer is carrying most of the burden.

By changing our tax laws to create benefits to the people and to the government, we are accomplishing goals which will enrich the country as a whole. Tax credits for higher education serve that purpose and provide a measure of relief during that period of a family's life in which it is most financially hard-pressed.

STATEMENT OF THE HONORABLE TOM CORCORAN, A REPRESENTATIVE FROM THE
STATE OF ILLINOIS

Mr. Chairman: I appreciate the opportunity to speak to you today regarding tax credits for post-secondary education. As I told the House Budget Committee's Task Force last year, I think this is an idea which has been neglected too long.

I applaud the efforts of the Senate with regard to tax credits for post-secondary education costs. 1977 marked the sixth time that the Senate had approved some form of education expense tax break since 1967. Unfortunately, the House has not been so responsive to this proposal, at least until last year. During 1977, for the first time, hearings were held on this credit before the House Budget Committee. On September 8, the House accepted the Coughlin amendment to reduce revenues in the Second Concurrent Resolution on the Budget for Fiscal Year 1978, by \$175 million to provide tax credits of up to \$250 per year taken against tuition of full-time college and vocational students. This was adopted by an overwhelming vote of 311-76. In addition, more than 210 Members have either sponsored or co-sponsored tax credits or deductions for education expenses. Clearly, this is an indication that the question of tax credits for higher education should, at least, be brought before the full House of Representatives for a vote on its merits. I also understand that Chairman Al Ullman of the House Ways and Means Committee, a consistent critic of tax credits, will initiate hearings on this subject during mid-February. These are certainly positive signs. I believe that we are moving in the right direction.

Before I review the arguments for the tax credit proposal, I would like to spend just a few moments talking about the problem which gave rise to the idea of tax credits for post-secondary education. That problem, of course, is the rising cost of sending a student to a college, vocational school or community college. I'd also like to discuss two related problems: the rising operating costs of these institutions and decreased enrollment.

I don't think I need to spend a great deal of time talking about the rising cost of post-secondary education. Today, the average cost of a four-year college education is \$17,500 at a public university. Since 1970, the cost of tuition alone has increased more than 57 percent. The costs at private schools have increased just as relentlessly.

According to the National Association of Independent Colleges and Universities, 113 private colleges closed during the period between the spring of 1970 and the fall of 1976, and 15 shifted to public control. Community colleges and vocational schools have experienced an even more alarming increase. In the same period (from 1970 to 1977), costs at these two-year schools have increased one hundred and thirty percent. It now costs nearly as much to attend a two-year school as it did to attend a four-year college not long ago.

I wish I could tell you that things will get better, but I can't. Things are going to get worse, as far as increased costs for post-secondary education are concerned. By 1990, a student entering a four-year, public college or university will be facing expenses of over \$35,000 before he or she gets a degree. By 1995 that figure will be \$47,330.

To meet this expense, you would have to save \$1,570 every year, beginning now, for each student you plan to send to college. Very few families have that kind of discretionary income.

I mentioned the related problems of increased operating costs and decreased enrollments. Between 1960 and 1970, per capita disposable income in the United States increased by 64 percent. During that same period, tuition at private colleges increased 93 percent, while expenditures rose 237 percent!! Expenditures for student aid increased nearly 500 percent during that ten-year period. While

increases at public schools were not so drastic, they, too, faced rapidly escalating operating costs.

This problem was exacerbated during the early '70's, when enrollment began to level off or decline. Slower enrollment meant slower increases in tuition income to cover burgeoning costs of financial aid and new programs.

What this all boils down to is that there are two parts to the problem of educational costs. First is the increased cost to individual students, and second is the increased financial squeeze faced by the institutions. I believe the tuition tax credit idea is one solution which can be applied to both parts of this problem.

First, the tax credit is aid directly to the student, or his parents. It can be used together with other types of financial aid to form a comprehensive package of assistance, or it can be used alone to provide that last little bit of help.

Some critics of this plan have said that a tax credit of \$250 wouldn't be much help. I disagree. According to the American Association of State Colleges and Universities, the average cost of tuition and fees for a resident undergraduate at a state school is \$587. A credit of \$250 is equal to nearly half that amount. The average cost for a non-resident student is \$1,519. A \$250 credit amounts to about 16 per cent of that—not just a drop in the bucket.

Of course, since private schools have expenses about double the rate of public institutions, the credit makes up a smaller part of the total cost. However, even at private schools, the credit would still cover most expenses for books, lab fees or other special charges—charges that are often not included in scholarships.

The House Budget Committee has confirmed our argument that middle-income college enrollment has declined. It reported in November 1977 that enrollment of children from families with earnings between \$10,000 and \$15,000 had declined 16 per cent since 1969, compared to a 15 per cent decline for families earning less than \$10,000, and a 9 per cent drop for families with incomes above \$15,000.

I think the legislation Senator Roth and I have introduced—an income tax credit for post-secondary education expenses—can be a viable solution.

This legislation provides a meaningful incentive for parents to continue the education of their children beyond elementary and secondary levels. Known as "The College Tuition Tax Relief Act of 1977", this bill would provide tax credits for college education expenses paid by an individual for himself, his spouse, or his dependents. The amount of tax credit is an incremental progression: \$250 in 1977; \$300 in 1978; \$400 in 1979; and \$500 in 1980 and thereafter.

These credits would apply to tuition, fees, books, supplies and equipment required for courses of instruction of eligible institutions. Only full-time students are eligible for this credit who are above the secondary education level and attend an institution of higher education (including community colleges) or a vocational school.

Such a tax credit would have two advantages: first and foremost, it is aid directly to those who bear the brunt of college costs, especially the middle class, which has financed most student aid programs while being denied the benefits of those programs. Every student, or the parent of a student who is not self-supporting, can take advantage of the credit. It is a form of aid with few strings attached.

Secondly, the tax credit is simple and inexpensive from an administrative point of view.

The tax credit idea is like a life preserver. A drowning man may prefer a boat, but he's still not going to refuse a life preserver. The average American may prefer a little more help, but he certainly will not turn down any help.

Basically, this tax credit is encouragement for the middle-income taxpayer. It says to him, "We recognize you are having a hard time meeting college expenses, and we want to help."

This tax credit may provide the needed impetus to send some students to college who might not otherwise go. It is important that we do this, not only to reverse the trend toward declining enrollments I mentioned earlier, but to make sure that every American who has the desire and the ability to further his education is given the opportunity and the *encouragement* by the government to do so.

The other criticism of the tuition tax credit is that it would benefit the "rich" more than the middle-income American. According to the American Council on Education, 32 per cent, or nearly one-third, of the credits provided under the tax bill which I have introduced would go to families with yearly incomes of less than \$10,000.

Fifty-seven per cent would go to families in the \$10,000 to \$25,000 bracket. That means that 89 per cent of the benefits of the bill would go to families earning less than \$25,000 a year. It's true that this bill will benefit the President of General Motors, but it will also benefit the hundreds of thousands of people who work for GM.

The tax credit proposed by Senator Roth and me would amount to \$1.2 billion in lost revenue for fiscal year 1979, according to the Joint Committee on Taxation. This compares to nearly \$133.9 billion in exemptions, preferential tax rates, credits, and deferrals which exist at this time.

I believe that this tuition tax credit is not an excessive one as far as depleting the national treasury is concerned. What we are talking about is increasing the chances for our young people to acquire a quality education in our post-secondary institutions.

I am pleased to learn that the Carter Administration is considering a proposal to boost by between \$500 and \$700 million contingency funds in the fiscal year 1979 budget for enlarging current student grant programs. The proposals that are being considered would liberalize the existing basic educational opportunity grants and could enlarge the work-study program, state scholarship program and supplemental grants program. However, the problem still remains that most middle-income taxpayers would not be assisted by this plan, in its present form. Tax credits put money back into the pockets of the taxpayers directly.

In conclusion, Mr. Chairman, I think the tuition tax credit proposal is one which deserves your continued support. I, for my part, will press for support of this legislation in the House. Thank you, and I would be happy to answer any questions.

THE SECRETARY OF HEALTH, EDUCATION, AND WELFARE,

Washington, D.C., January 18, 1978.

HON. HARRY F. BYRD, JR.,

Chairman, Subcommittee on Taxation and Debt Management Generally, Committee on Finance, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: As you know, there has been considerable discussion of tuition tax credit proposals in this Congress. I would like to take this opportunity to share with you the Department's views on this important issue. Our Assistant Secretary for Legislation is prepared to outline the Department's position on tuition tax credits in more detail.

Tuition tax credit proposals would affect both tax and education policy and, therefore, should be evaluated with respect to both of these considerations. We firmly believe that tuition tax credits do not represent good education policy. This Administration is concerned about the financial problems facing middle income families, including middle income families with children in college. While recognizing the problem, however, we believe that the tax credit approach to this problem is so seriously flawed that it should be rejected.

Many middle income families are encountering serious financial problems caused by a failure of their income levels to keep pace with the increasing costs of some institutions. However, many other families have enjoyed increases in income which are greater than average increases in college costs. A serious flaw of many tax credit proposals is that the benefits would not be targeted appropriately on those families with the most serious needs. Direct student assistance programs can be so targeted, resulting in better use of Federal dollars.

As a part of our development of postsecondary reauthorization measures, HEW is currently engaged in an exhaustive review of the entire Federal effort in post-secondary education and is analyzing a wide variety of modifications in current student assistance programs. Included in this review is an analysis of how we may be able to extend more effectively some of our existing student assistance programs, not only to low and moderate income students, but to students from middle income families as well.

We anticipate that some of these changes might be made administratively and, therefore, quickly. Some may require changes in the regulations currently governing the operation of the Department's student financial aid programs. And some may require legislative action by Congress if they are to take effect.

This Administration is serious about taking prompt and effective action to relieve the real financial problems facing families with students in college. We firmly believe, however, that the most effective way to provide such aid is through direct expenditures for student financial aid programs.

We recognize that meeting the needs of many of these families will entail additional costs. Although the Department's plans are not yet complete, I will outline briefly some of the types of changes we have under consideration.

The Basic Educational Opportunity Grants Program now provides the cornerstone of Federal aid to low and moderate income students. We are considering expanding the program to provide grant aid to students further up the income scale by making it easier for middle income students to qualify. Members of Congress have also suggested changes to make the Basic Grants program more responsive to middle income families in need. For example, Senator Pell, Chairman of the Subcommittee on Education of the Human Resources Committee, just last week made recommendations as to the expansion of the BEOG program.

For many middle and upper-middle income families the main financial problem is liquidity or cash flow. Here, where the issue is not the ability to pay over time but difficulty in paying large, lump-sum education costs, a loan program may be the appropriate response. With this objective in mind, we are reviewing several options to make loan programs more responsive to the needs of middle income families. For example, we will be investigating ways to increase the number of middle income students eligible for subsidized Guaranteed Student Loans, as well as ways to increase the amount of capital that banks are willing to make available to these students.

We are also investigating the effectiveness and probable impact of increased funding of the other aid programs—including the Supplemental Opportunity Grant Program, the State Student Incentive Grant Program and the College Work-Study Program. In addition, we are reviewing the analysis and suggestions the Congressional Budget Office released today.

At the elementary and secondary level, the primary focus of Federal aid is to assist states in providing public education. The elementary-secondary budget increased from \$2.54 billion in 1969 to \$3.02 billion in fiscal 1978.

While we strongly support public elementary and secondary education with Federal funds, we also provide some support to pupils in private schools. Under Titles I and IV of the Elementary and Secondary Education Act, we provide compensatory programs, diagnostic services, books, and other instructional materials to private schools. We are taking steps to assure that eligible private school children have full access to these Federally financed services within the constraints imposed by the Constitution.

The reasons for the Department's opposition to tuition tax credits are many. Briefly stated, our opposition is based on the following points:

Tax credits provide the most benefits to those who need them the least.

Tax credit proposals would further fragment Federal education policy.

Tax credits are expensive.

Tax credits could make other education funds more scarce.

Tax credits would add to the administrative burden of, and increase paperwork by, institutions, the IRS and the taxpayer.

There are no easy answers to the financial problems facing middle income families, especially middle income families with one or more children in college. But we believe that a tuition tax credit would be both ineffective and inequitable when compared with other alternatives. Direct aid programs which take into account family need and the actual costs of education are a much more desirable way of helping students and their families. We will work quickly to develop these alternatives, and look forward to working with the Congress towards this end.

OMB advises that enactment of these tuition tax credit proposals would not be consistent with the Administration's objectives.

Sincerely,

JOSEPH A. CALIFANO, JR.

STATEMENT OF STEPHEN ARONS, PROFESSOR OF LEGAL STUDIES, UNIVERSITY OF MASSACHUSETTS, AMHERST, REGARDING: CONSTITUTIONALITY OF S. 2142, TUITION TAX RELIEF BILL

SUMMARY

The question of the constitutionality of Senate 2142 and other forms of tuition tax relief should be approached from an analysis of the constitutional flaws in the present financial structure of American elementary and secondary education. Such an analysis indicates that state education financing schemes discriminate heavily against the poor in matters affecting the civil liberty of school choice

first enunciated by the Supreme Court in 1925. Tuition tax relief can therefore be seen as a remedy for Equal Protection inequities, and might be passed by the Congress pursuant to the enforcement clause (section 5) of the Fourteenth Amendment. In order for this approach to have a chance of succeeding in litigation, several structural changes in S. 2142 are suggested. The analysis below proceeds in three parts and does not concern itself with tax relief for college tuition.

I. TUITION TAX RELIEF LEGISLATION COULD REMEDY SIGNIFICANT ECONOMIC DISCRIMINATION PROBLEMS IN THE EXISTING FINANCIAL STRUCTURE OF AMERICAN ELEMENTARY AND SECONDARY EDUCATION

The constitutional right of families to choose education for their children in schools other than those operated by the political majority ("public schools") was secured by the United States Supreme Court in 1925 (*Pierce v. Society of Sisters*, 268 U.S. 510 (1925)). This case and the many later cases reaffirming the right of school choice, can be read as concerning a civil rather than merely religious liberty. Perceiving the civil liberties nature of the right of school choice is not only consistent with the cases, it sheds substantial light on what is at stake in any Congressional consideration of tuition tax relief. In fact, protecting the school choice rights of poor and low income persons and racial minorities may depend upon seeing beyond the religious self-interest of groups which have been most vocal in calling for tuition relief.

To perceive the First Amendment civil liberties which are at stake in the financial structure of schooling it is necessary to recognize at the outset that all schooling is value-laden—that there is no such thing in reality as value-neutral education. The laudable and constitutionally required drive to insure that public schools remain secular has often left the impression that secular schools are neutral schools. A review of the educational, anthropological, psychological and sociological literature will indicate, however, that although specific religious or theological values may be eliminated from schooling, basic values are inevitably taught. This can be confirmed by any parent, teacher, or observer of schooling. Values are communicated not didactically, but through school structure, content of textbooks, and attitudes and role models provided by teachers.

Many families find themselves at odds with values imbedded in the schools their children attend. The classroom may be organized in a more or less authoritarian way than the family, competitiveness may be emphasized over cooperation, texts may include traditional sex roles which the family finds disagreeable and does not wish to pass on to its children. Materialism may be given too much or too little sway in school. Various cultural, economic or political views will be preferred over others. Even those "free exercise" decisions which protect basic parental values against government sponsored inculcation enumerate values which are deeply offensive to the consciences of some non-religious families (see *Yoder v. Wisconsin*, 406 U.S. 205 (1972) at 210-211).

What is being protected, then, in securing the right of educational choice through the constitution, then, in securing the right of educational choice and basic values, whether religiously based or not, without coercion from the government through schooling. This freedom of belief—the freedom of conscience and consciousness from the pressure of government sponsored orthodoxy—is at the core of the First Amendment. All the enumerated and implied freedoms of the First Amendment providing for a system of freedom of expression and essential to maintaining the individual as the primary unit of political sovereignty under the Constitution are based upon maintaining freedom of belief. If the political majority can determine basic values to be taught to children, the system of freedom of expression becomes hollow and useless. It is these interests in preserving the health of the political system and the individual's right of belief formation that motivated the Court to declare in 1925 (see *Pierce, supra*) that "the child is not the mere creature of the state" and to find the elimination of parental choice in schooling "beyond the power of the state" and offensive to the "fundamental liberties" upon which the nation rests. These statements, and the basis of First Amendment freedoms taken as a whole, relate to the political rights of all persons to participate in public discourse and decision (see Melkijohn "The First Amendment Is Absolute," 1961 Sup. Ct. Rev. 245).

The protection of rights of conscience and consciousness which are at stake in schooling decisions by parents is also consistent with fundamental policy considerations related to the enactment and current vitality of the First Amend-

ment, The strife experienced over the past decade or more about what schools shall teach and how they shall teach has nearly immobilized the system of education through unresolvable strife over issues which cannot be resolved politically. It is the protection of the political system (including the schools) from such factionalism and paralysis that lies at the base of the First Amendment, as witness the following statement by Justice Jackson, in *West Virginia v. Barnette* (319 U.S. 624 (1943)): "Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson of every such effort. . . . Compulsory unification of opinion achieves only the unanimity of the graveyard."—319 U.S. at 642.

Any attempt to compel all youth to attend public schools at this time would therefore pose a severe threat to First Amendment civil liberties and to the health of the political process. Although such compulsion has been prohibited by the Supreme Court, it remains in effect for those whose poverty or lack of religious affiliations prohibit them from following their own basic family values when those lead outside the public school system. The financial structure of schooling distinguishes between rich and poor in the matter of school choice.

The economic discrimination resulting from the present financial structure of schooling may be viewed in two ways. First, provision of a government benefit ("free" public education) is conditioned upon the sacrifice of First Amendment freedoms by parents whose deeply held values differ from those fostered by the local public school. Such conditioning of government benefits upon sacrifice of fundamental rights is plainly contrary to the Constitution (see e.g. *Sherbert v. Verner*, 374 U.S. 398). Because the states have adopted a method of financing education which taxes all persons but pays for only government-operated schools, a "dissenting" parent is faced with the choice of either doing violence to the family's values in order to get a "free" education or paying twice (non-public school tuition plus state and local taxes supporting government schools) as a premium for avoiding unwanted value inculcation.

Second, economic discrimination in school choice can be viewed as a violation of the Equal Protection Clause of the Fourteenth Amendment. The financing of education at present creates a category of parents who cannot exercise the right of school choice solely because of their economic status. If the right of school choice is properly characterized as a First Amendment right of belief formation essential of other First Amendment freedoms and the health of the political process, then this right is "fundamental" (see *Rodriguez v. Texas*, 411 U.S. 1 (1973)), is totally denied to the poor and working class, and could only be justified by some compelling interest in allowing wealthy parents to choose their schools while denying the right to low income persons. A state may not create a system of compulsory schooling and school expenditures which denies fundamental rights on the basis of economic status.

In view of either of the above arguments, the right of school choice guaranteed by the Court over fifty years ago has been rendered a nullity for persons of low income. Tuition tax credit legislation, therefore, should be viewed as correcting a basic injustice in the availability of a constitutional right rather than merely as a means to encourage diversity or preserve non-public schools. The importance of correcting this inequity, moreover, is not only for low income persons who are effectively denied First Amendment rights. The proper functioning of a political process based upon individual expressions of opinion, the just consent of the governed, and the free creation and exchange of views is also protected by correcting an unequal distribution of liberty.

II. TUITION TAX RELIEF LEGISLATION COULD BE ENACTED PURSUANT TO SECTION 5 OF THE FOURTEENTH AMENDMENT SINCE IT COULD CORRECT SUBSTANTIAL EQUAL PROTECTION PROBLEMS

Under Section 5 of the Fourteenth Amendment, Congress has the power to pass legislation to "enforce the provisions" of the Amendment. A number of cases (see *Katzenbach v. Morgan*, 384 U.S. 691 (1966) and *Oregon v. Mitchell*, 400 U.S. 248 (1970)) have indicated that this procedure is one in which the Congress finds the existence of an impermissible discrimination or an insufficient reason for discrimination in a state legislative scheme and then enacts legislation reasonably designed to remedy the problem. The argument in Section I above could form the beginning of a finding that present state education finance and expenditure systems in schooling pose substantial equal protection

problems and effectively deny First Amendment civil liberties on the basis of economic status. The fact that this discrimination has a deleterious effect on individual political liberties (see *Katzenbach v. Morgan*, 384 U.S. at 652) should strengthen such a finding. Congress might reasonably determine then that tuition tax relief is a suitable means of eliminating these inequities and insuring a more even-handed operation of school systems across the country.

“ . . . The *MuOulock v. Maryland* standard is the measure of what constitutes ‘appropriate’ legislation under § 5 of the Fourteenth Amendment. Correctly viewed, § 5 is a positive grant of legislative power authorizing Congress to exercise its discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment.”—*Katzenbach v. Morgan* 384 U.S. at 651.

Typical Section 5 legislation overrides state legislation (for example state voting requirements for federal elections, see *Oregon v. Mitchell*) and raises questions about whether the Congress must use the same standards of constitutionality as the Supreme Court would in judging the lack of equity in present school financing laws. The tuition tax credit relief legislation, however, is not an override of state legislation but merely a corrective supplement to federal tax policy designed to work in conjunction with state laws. Arguably, then, the Congress might find substantial equal protection problems exist even though the Supreme Court might not make such a finding in an affirmative challenge to state education finance laws. Were it otherwise, Section 5 might have no meaning at all.

Suggestions have also been made that Section 5 applies only to matters of racial discrimination (see for example 85 *Harvard Law Review* 152). Whether or not this is accurate, it remains that a disproportionate number of the poor and working class are minority group members and the tuition relief legislation could be viewed as relieving a situation which disproportionately discriminates against minorities as well as other poor persons.

Of course Section 5 legislation must also be consistent with the other requirements of the Constitution, most pertinently here the Establishment Clause of the First Amendment. While the rationale stated in Section I and the passage of this legislation pursuant to Section 5 of the Fourteenth Amendment will not, therefore, eliminate the Establishment problem, it will make clear the secular purpose and effect of the legislation and provide the Court with a Congressional finding and statement of policy to weigh against any degree of violation of the Establishment Clause. This problem is treated in more detail below.

III. PROPOSED CHANGES IN S. 2142 ARE DESIGNED TO MAKE IT MORE CONSISTENT WITH THE NEED TO ELIMINATE ECONOMIC DISCRIMINATION IN AVAILABILITY OF FIRST AMENDMENT RIGHTS TO SCHOOL CHOICE, AND REDUCING ESTABLISHMENT CLAUSE PROBLEMS

The proposed changes, enumerated below, are offered to make the legislation more consistent with its civil liberties purpose. They also have the effect of helping to bring the legislation more in line with the Supreme Court's test for constitutionality under the Establishment Clause.

Under the Establishment Clause the Court has articulated a well-known three-part test for constitutionality: “First, the statute must have a secular legislative purpose; second its principal or primary effect must be one that neither advances nor inhibits religion . . . , finally, the statute must not foster ‘an excessive government entanglement with religion.’”—*Lemon v. Kurtzman* 403 U.S. 602 at 612 (1971).

It is not the purpose of this testimony to review Supreme Court decisions in the church state area, one of the most complex, written-about, and inconsistent areas of constitutional law. A few comments about the application of the current Court test to Tuition Tax Relief legislation will be made:

Entanglement.—By using revisions in the tax code instead of any form of direct aid the legislation avoids almost all the pitfalls in the entanglement area. There is no supervision of schools required for tax relief, no grant making, no factional debate over which schools will be aided or how much aid will be forthcoming, no attempted distinctions between religious and secular expenditure.

Purpose.—The legislative purpose is dealt with in Section I above and is clearly secular. It should be noted, however, that the Court inevitably reads some of the purpose from the actual effect of the legislation. Making the structure of the bill comply with the stated purposes, especially if passed pursuant to Section 5

of the Fourteenth Amendment, is therefore of great importance. (See proposed changes below.)

Effect.—This will be the most significant hurdle for the legislation. Any substantial (non-incidental) aid to religion resulting from the legislation will result in its being invalidated. The legislation seeks to take advantage of the argument that since (as with the G.I. Bill) it is the private citizen who decides where the tuition money goes, the government is not involved in making decisions aiding or inhibiting religion; there is no state action. But the Court has indicated that this is "only one among many factors to be considered" (see *PERL v. Nyquist*, 413 U.S. 756, 781). The so-called "child benefit" theory will not therefore suffice. The legislation also seeks by combining elementary and secondary school tuition relief with college tuition relief to reduce the percentage of those receiving tax benefits and attending religious schools from 85 percent to 24 percent. This will undoubtedly be brought to the Court's attention as a sleight-of-hand which could be remedied by severing the college relief and declaring the rest in violation of the Establishment Clause. Such a development would be furthered by the Court's tendency to view the minds of younger children as more susceptible of religious influence than those of college students. The resulting decision could not only strike down an important section of the proposed legislation, but create legal principles which would further sandbag attempts to provide relief even to parents of children in secular non-public schools.

The Court has also observed that, where it has approved tax legislation benefiting religious institutions, it has done so in part because the tax benefits were available to all regardless of religious or non-religious affiliation; that is, that the recipients were not a "special category" of taxpayers but, for example, all property tax payers who are non-profit, charitable or educational institutions. (See *Waltz v. Tax Comm.* 397 U.S. 664 (1970) and see *Nyquist*, *supra* at 783.) This may be a substantial problem with the Tuition Tax relief legislation at the elementary and secondary levels since it is here that only parents of non-public school children are eligible for tax credits (unlike college level tuition). The only reliable way of remedying this would be to make tax relief available to all parents for educational expenses whether paid as tuition or as property tax. While the computation of such tax relief eligibility would be complex, especially for those who rent, and while the bill for such relief might be staggering, this may be the only reliable means of providing relief. (On this question the Committee might wish to consult present efforts in Michigan to create a statewide voucher system at the elementary and secondary levels.)

Finally, in considering the "effect" test the court has recently observed that legislation may have an impermissible effect if it acts as an "incentive" or "reward" for parents spending tuition money at religious schools (see *Nyquist*, *supra*, note 38 at 782). Since *Nyquist* struck down, among other things, tax exemptions for non-public school tuition, this "incentive and reward" theory could be problematic for the tuition tax relief bills under consideration. Needless to say, such a problem would dissolve if the tax relief were available to all property taxpayers with children in school. Short of such a radical reconception of the legislation, however, a suggestion for improving the bill's chances of passing constitutional muster under the effect test is found below, with comments. The best which can be done is to insure that the bill's purpose and effect are overwhelmingly secular in their protection of the civil liberty of educational choice for low income persons.

PROPOSED CHANGES IN S. 2142

1. *The amount of the tax exemption should be increased from 500 to about 1000 dollars.*—This will much more nearly reflect an average cost of non-public school tuition, thereby enabling the poor or working class family to send children to non-public schools without supplements which may be (a) realistically unavailable from low family income regardless of sacrifices made, or (b) unavailable except from religiously oriented schools which can supplement tax exemptions. The latter point is crucial. If the amount of tax relief must be supplemented by most families seeking to attend non-public schools, and if religious schools are more able to provide such supplements than others, the effect will clearly be for tax relief to be an "incentive" to attend religious schools. While partial aid may be economically attractive, if it is insufficient the Court is given a reason to find that the primary effect of the relief is to aid religion by favoring those who make religious choices. The most realistic and convincing way to set the amount of tax relief would be to compile economic statistics on school tuitions, amounts by which

a family in any one income bracket could supplement the tax relief under reasonable conditions of sacrifice, and the amount of supplement provided by religious schools charging reduced tuition. A level of exemption might then be set which would insure that a family could as easily choose a secular as a sectarian school and would reasonably have in hand at least enough for a minimal school choice outside the public sector.

2. *Limit the income levels at which parents could receive tax relief, perhaps in a graduated form, to a maximum of \$20,000.*—This would reduce the overall cost of the legislation and would make its purpose and effect of undoing Equal Protection violations indelibly clear. The basic purpose of the bill as outlined in sections I and II above would otherwise be undercut by its structure and effect.

3. *Provide stringent protections against racial discrimination in any form by any school defined as "eligible" under the proposed legislation.*—The absence of such protections in the bill (in spite of any other federal laws which might be applied in cases of schools receiving federal aid or tax exempt status) substantially weakens the legislation to Equal Protection attack, undermines the avowed purpose of the legislation, and might result in an intolerable aggravation of racial inequalities in areas where desegregation is still incomplete. Although non-public schools may at present be better integrated than many public schools, protection must be provided against government encouragement of private segregatory decisions.

4. *Provide for the severability of the legislation* in a way which preserves tax relief for parents of secular non-public school children if the Court finds that those making religious choices may not participate. This preserves an important principle of the bill, might convince the Court of the secular purposes of the legislation, and does not close the door on revised legislation aiding the excluded parents once the Court has ruled.

The above analysis has attempted to provide a clear secular rationale for tuition tax relief, a tactic for giving this rationale its greatest legal impact, and some suggested structural changes in the legislation designed to most accurately reflect the rationale and simultaneously meet the Establishment Clause restrictions as enunciated by the Supreme Court. Even with all the suggestions it is impossible to predict what the Court will do. The most legally satisfactory answer would be to provide across the board education tax relief; but this suggestion seems too complicated for the present. I believe I would rather predict the weather in New England than the Courts decisions in an area such as church-state relations. This statement has suggested a substantial revision of the rationale of the bill and the general understanding of what the public has to lose by sticking to the present structure of school finance. What is clear is that without these changes the legislation is in for an extremely hard time in the courts.

BALL & SKELLY,
ATTORNEYS AT LAW,

Harrisburg, Pa., November 30, 1977.

Re Tuition Tax Credit Act Testimony.

HON. DANIEL P. MOYNIHAN, —

HON. BOB PACKWOOD,

Senate of the United States,
Washington, D.C.

Dear SENATORS MOYNIHAN and PACKWOOD: Thank you for your letter of November 18.

I will be happy to provide you with an essay, analysis or brief on the Bill from the point of view of constitutionality. Should you desire me to testify, and I have no conflict in schedule on the date selected, I shall likewise be willing to testify.

As a constitutional lawyer, it is my opinion that S. 2142 is constitutional. However there is one feature of it which, it is now clear, will raise a major problem for parents of children attending nonpublic schools. This matter goes to the very point made by you, Senator Moynihan, in your September 26 statement: "Diversity. Pluralism. Variety." The point is: that to have the benefits of the Tuition Tax Credit Act, the parent of a private school child must have his child enrolled in a school which is "accredited or approved under State law." On its face, this sounds quite simple and reasonable. But in actual fact, it can result in further enormous leverage to convert private schools into public schools—that is, to make financially hard pressed private schools pay the ex-

treme penalty of submitting to saturating control by the state as the price for their parents getting the tax credit break. This is no mere speculation, as the recent decisions of the Supreme Court of Ohio and Vermont in, respectively, *State of Ohio v. Whitner* and *State of Vermont v. La Barge* show.

If I deal, in part, with this most serious problem and suggest amendatory language to the "accredited or approved" wording, do you still invite me to testify?

Very truly yours,

WILLIAM B. BALL.

P.S.—I enclose, for your scrutiny, a copy of an address which I gave to a group of lawyers (plus Steve Arons, whom I think you know) last year.

Enclosure.

Litigation in Education: In Defense of Freedom

William B. Ball

Studies in Education No. 5



1977

CENTER FOR INDEPENDENT EDUCATION
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William B. Ball is a partner in the law firm of Ball & Skelly, Harrisburg, Pennsylvania. He is a member of the New York, Pennsylvania, and United States Supreme Court bars. Mr. Ball is a constitutional lawyer who has appeared in numerous litigations throughout the United States, several of which produced landmark decisions related to education and schooling.

Litigation in Education: In Defense of Freedom

Where benevolent planning, armed with political and economic power, becomes wicked is when it tramples on people's rights for the sake of their own good.

C. S. Lewis

Looked at in one way, our people may be divided into those who fear 1984, those who ardently want 1984, and those who don't care about 1984. Of course, 1984 won't come in that specific year; it will arrive in separate parts; and only when those parts are all assembled and working together, will most people realize that 1984 has arrived.

A good many of the shipments have already arrived. One container, marked "The New Family," is now being uncrated. It proves to be no family at all, but merely individuals, bound to nothing but self, who (only with the permission of the state) will breed occasionally, their offspring then belonging more to the state than to the parents.

The very use of the doublethink term, "family," brings to mind another of those containers, one called "Communication." It is not used to communicate—that is, to impart ideas—but rather to obliterate ideas and to engender instead emotions. This box has been around for a while. We are all familiar with its extravagant employment in Communist and Nazi slogans like "Democratic Centralism" and "Strength Through Joy." Such slogans aim by symbols and sounds to evoke an emotion. Don't imagine that those million demonstrators in China who hanged Madame Chiang Ching in effigy were individuals who, having studied the issues, made decisions to demonstrate. Indeed our own television networks have long been dabbling in the magic of propaganda.

A good many more packages have been shipped in. Read

Catherine Roberts's *The Scientific Conscience*¹ with its comments on animal and human experimentation or the recent statement of Jesuit Father Robert Brungs in which he speaks of the practice of cloning—"the fertilization of a reproductive cell with a different type of cell . . . with social implications beyond our imagination."

As we watch the machinery of the future being assembled, we see the immense pressure to move all control of life out of the hands of individuals and to establish that control totally in the State. Those mountains of totalitarianism rising on East and West bring to mind too vividly Spengler's terrible prediction of the sure recurrence of the Age of the Dictators. At the same time the so-called free world becomes more and more fatally addicted to the very materialism and hedonism that Spengler, looking at the society of late Rome—its theatre, its armaments, its violence, and its corruption—stated were the very conditions necessary for its ultimate prostration and death.

But the largest and most significant assemblage of machinery that has been set up is the one that controls all the others. The other assemblages depend on how people act, what they believe, and whether they can reason. The family, sex, communications, politics, government, the workings of science and technology, law, violence, decency, peace, wars—all of these depend on what will be in the minds and spirits of the millions of our children as a result of their educational process.

Education, then, is critical to the defense of freedom. In our society, however, *law* is intimately related to education. Judicial decision is the final and supreme stage of lawmaking in our country. Thus, I want to explore litigation related to education.

In the educational field there are four areas in which I have been involved in the courts, with both successes and failures. It is probably correct to describe them as the four principal areas of struggle today.

They are:

1. Compulsory attendance

2. State control of private education
3. Rights of conscience in public education (including the problem of value impositions)
4. Denial of distributive justice in the use of tax funds (including enforced contribution to programs insupportable in conscience)

Compulsory Attendance

When we read the compulsory attendance cases decided by many of our state courts over the past century, we find ourselves bombarded with predictions of horrors by the proponents of state schooling and control. A frightful picture is consistently painted of the perils of destruction that seem to perpetually face public education. That heroine of the silent movies, Pearl White, never faced such constant threats of calamity. Years ago I heard it solemnly stated that to afford a public bus ride to a nonpublic schoolchild would surely spell the doom of public education—that statement was accompanied by fervent recalling of Madison's remark that we must beware of the "first experiment with our liberties." The Imperial Council, A.A.O. Nobles Mystic Shrine (the people who gave us the public school monopoly statute made famous in *Pierce v. Society of Sisters*) did not think they were talking through their fezzes when they said in their brief to the Supreme Court of the United States in that case:

Moreover, if the new Oregon School Law is declared to be in violation of the Constitution of the United States there is no legal principle upon which any existing public school in the United States can be upheld.²

There is great variety in the compulsory attendance laws of this country. Each particular compulsory attendance law is contended to represent an absolutely unchallengeable expression of public wisdom. Yet age requirements under these statutes vary considerably—so that in one state the public wisdom dictates that a child be formally educated until age fourteen, while in another it is accepted as fact that he needs education until he is eighteen. Then there is the whole ques-

tion of what a child must attend in order to be "in attendance." Some statutes require that the child attend a school, while others speak merely of his attending a public school or receiving "equivalent education"—which latter term does not even refer to a school. Then again, a question arises as to when a school is a school or when equivalent education is equivalent. Who shall say, and according to what standards? The public wisdom is unclear on these matters.

Perhaps too little attention has been given to the question of whether a particular compulsory attendance law is constitutional—or at least whether it is constitutional in a particular application—and indeed whether compulsory attendance is itself constitutional. In the past few years such questions have been posed in cases in a number of states. Most questions arose from criminal prosecutions of parents. A few observations respecting them may be of interest. In each case with which I was associated, negotiation was attempted with the state authorities in order to save the parents the costs, burdens, and notoriety of a criminal prosecution. In each of these cases the negotiations failed.

In *Wisconsin v. Yoder*³ before the appearance of counsel for the defense was ever filed in court, we wrote the Superintendent of Public Instruction a temperate letter. Following a careful exploration of the Wisconsin Compulsory Attendance Law, we were able to point out that the Amish parents in question could indeed be exempted. This plea was stiff-armed, but came to have great value later when the defense was able to place it in the record, along with the curt response received, to be viewed by the Supreme Courts of Wisconsin and the United States (and it was referred to in the opinion of the latter).

In *Eberly v. Rockingham County Schools*⁴ we were able to hold off prosecution for a year with such a letter. However, after that, the Department of Education had to yield to the vehement desire of local officials to prosecute those splendid people. In *Vermont v. LaBarge*⁵ the state had brought a prosecution several years before, nolle prossed, then brought another one and dropped that, brought a third and dropped

that, and finally brought the present prosecution. The state, in spite of what ought to have been its total embarrassment, adamantly refused to drop the matter and indeed pursued it with great enthusiasm. In *Ohio v. Whisner*⁶ defense counsel made a trip to Columbus to meet with high officials of the Department of Education, who, after a courteous reception, gladly supplied the local prosecutor with his star witness, in the form of the Director of Elementary and Secondary Education. (I should add at once that he did not become the star witness—Dr. Donald Erickson and Mr. Ralph O’Neal West filled those roles.)

In any problem arising under the compulsory attendance statutes it is extremely important, however, to think first not of constitutional litigation, but of the involved statute itself. As I have mentioned, these statutes are of great variety and dissimilarity in language. It is always most worthwhile to examine that language very thoughtfully in order to try to negotiate the difficulty, provided, of course, that this can be done without any loss of principle. Looking upon the statutes in terms of constitutional litigation, I mention only the obvious when I speak of such matters as vagueness, unconstitutional delegation of legislative power, and—importantly—*comparing* various state statutes in order to point up lack of compelling state interest.

To add some brief thoughts in the wake of these four cases:

I quite agree with Gerrit Wormhoudt⁷ that *Yoder* may be given a very narrow reading in the future, in an attempt to confine it to an isolated situation regarding an ancient peasant people in our midst. Seen thus, the decision would not be an amplification of *Pierce*, but a constitutional curio. Professor Philip Kurland, in his article in *75 West Virginia Law Review*,⁸ bearing down on his theme of “validly imposed state duties” appears to bemoan *Yoder*, saying that in that case “for the first time in our history the Supreme Court made substantial constitutional inroads on the power of the states to compel formal schooling beyond primary grades.” He finds no precedent for *Yoder* in *Pierce* and states that: “For our purposes . . . the important point to be made about *Pierce* is that exemp-

tion from attendance at public schools was not grounded on a concept of conscience or religious freedom." This, of course, flies in the face of what Chief Justice Burger had to say about *Pierce*—that the decision recognized "the traditional interest of parents with respect to the religious upbringing of their children." Kurland states critically that "the Court made no mention of the public school systems as a means of integrating a larger community." And he invokes *Prince v. Massachusetts*⁹ (as do all absolutist advocates of compulsory attendance) as containing properly applicable doctrine.

We can predict, too, that those interested in separating children from parents, in the name of "child rights," will want to constrict or downgrade *Yoder*. We had foreseen the likelihood that church and parental roles in *Yoder* could be readily portrayed as a situation in which mute children were held in thralldom by selfish parents and hard-faced bishops. With that in mind we put Frieda Yoder, one of the Amish children, on the stand, being quite confident that she could declare her own mind even under cross examination by the state prosecutor. Our belief proved correct, and the testimony of Frieda was well viewed by Chief Justice Burger. In each succeeding case where there has been a trial, we have felt it most desirable to let children take the witness stand.

Regardless of how public educationists, state prosecutors, and certain pressure groups regard *Yoder*, thus far the case has been largely treated by the courts as bedrock constitutional doctrine on religious liberty and parental rights. In *Vermont v. LaBarge* the legitimacy of Life in Holiness Christian School, a small fundamentalist school founded by parents, came into question. The state criminally prosecuted the parents under the compulsory attendance statute, which says that every child has to attend public school unless "otherwise being furnished with equivalent education." The statute goes on to say that "the determination of equivalency . . . shall be made by the state department of education. . . ." Note that well and let me now turn to the state's complaint and argument. The state said that the children were not re-

ceiving an equivalent education, because they did not attend an "approved" school. Now there is another section of Vermont education statutes that says that every school (public or nonpublic) must be "approved" by the state. That statute, by the way, is a sort of legal cul-de-sac, because it contains no enforcement provisions. It merely pronounces a principle.

We defended, first, on the ground that the school approval section could not be read into the "equivalency" section and had nothing whatever to do with the compulsory attendance law. That, it seemed to me, was obvious. Secondly, we stated that (limiting ourselves to the "equivalency" section of the statute) it was not up to the *parents* to prove whether the education in question was "equivalent" or not; the statute said that this determination was to be made by the state—and the state had never bothered to make such a determination. Then we went to the necessary third step and argued that in no event could the state, by utilizing the device of "equivalency" determination, obliterate the religious, parental, and educational rights involved. The Supreme Court of Vermont unanimously agreed with our position and wrote the following excellent passage in the course of its opinion:

The United States Supreme Court, in *Pierce v. Society of Sisters*, . . . long ago decided that a state could not compel all students to be educated in public schools. As recently as *Wisconsin v. Yoder* . . . that court has also stated that compulsory school attendance, even in an equivalency basis, must yield to First Amendment concerns. In the light of what is involved in 'approval' the state would be hard put to constitutionally justify limiting the right of normal, unhandicapped youngsters to attendance at 'approved' institutions.

State Control of Private Education

We are being overrun by a lava of governmental regulation, which, in every area of our lives, is becoming hard-set. I keep asking myself why this should be so. In part, it is due simply to the desire of American individuals for lawfulness, the desire to be regular and correct in their affairs—and thus to comply with what appears to be "the law." In part, it is the profound effect of advertising upon the American conscious-

ness—the desire of Americans to have the “standard brand”—so that only that which government certifies, or licenses, can really be relied upon. It is also due to the attitudes that one sees in Kafka, the desire of the slave to exceed the master’s wishes. After the unfortunate, partly unlawful, Title IX regulations on sex discrimination were issued by HEW, I beheld a group of private school educators enthusiastically compiling a huge book of their own guidelines, which *exceeded* the intolerable demands of HEW. They did this with a fervent zeal to be “in compliance.” So much for the consumers in the matter of regulation. At the producers’ end, there are two obvious dynamics. One is that of the elite of administrators who plainly desire either to impose their own ideology—whether in commerce, health care, education, or any other area—upon others, and the other is the very central dynamic of government-as-enterprise. We have three vast areas of enterprise now in the United States, each of which operates on the principle of “expand or die.” One is business, another is unionism, and the third is government. Under this view, the reason for government is government.

Now, the lava has not quite set hard in the area of education. But can we see what is in the making? At worst, it is a *criminally enforced* institutionalizing of every child in the public educational system, which will be the domain of unions, whose interests may run counter to those of the child, his parents, and the taxpayers. The citizenry will be forced, under criminal sanction, to support government schooling at financial levels set by the unions. The values inculcated in these schools will be dictated by elites who intend to mold a secular humanist society. However, it has been my hope, and it is beginning to be my belief, that this whole program is extremely vulnerable. Much of the legislation pushing toward the universal public school establishment has been sloppily drafted, especially at the state level. Much of the regulatory matter—rules, regulations, guidelines, norms, forms—is incredibly poor stuff, embracing leaking definitions, internal contradictions, resolute departures from statutory authority, vagueness, all manner of unenforceable precatory

language, and, withal, greedy, unconstitutional overreaching in every direction. Let me briefly put on the stand the state's chief witness in *Ohio v. Whisner*, Mr. Jack E. Brown, Director of Elementary and Secondary Education of Ohio, under cross-examination by defense counsel:

Q. The minimum standard on page 22 states: 'educational facilities, pupil-teacher ratio, instructional materials, and services at the elementary level are comparable to those of the upper levels'. Now is that a standard which governs elementary schools? What does that provision mean to you, Mr. Brown?

A. It means that the elementary and secondary should be a comparable school system; that the secondary should not assume and take away all the money and infringe upon the elementary. There should be an equality of the money, staff, and so forth.

Q. Now, Mr. Brown, take as an example the administrator of Tabernacle Christian School. He reads this statement and he is saying, 'What does the state want of me? What does it require of us?' And he reads, my educational facilities, our pupil-teacher ratio, our instructional materials and our services at this elementary level must be comparable to those of the upper levels. What do the words, 'upper levels,' mean? Does it mean high school?

A. Comparing between elementary and secondary.

Q. 'Upper levels' refers to secondary—what part of a secondary level is referred to? What grade of high school is referred to?

A. Normally . . . ninth through twelfth.

Q. Normally ninth through twelfth. Are you telling me the elementary school must then be comparable to grades nine through twelve, all four grades of high school, in ratio, services, facilities, and materials?

A. The comparability there would be as far as one school handling elementary and secondary. There would be equitable expenditures between the two.

Q. The regulation speaks of educational facilities. What is an educational facility, Mr. Brown?

A. It is a school building.

Q. It is a school building. It is not an expenditure, it is a school building, and my elementary school building must then be comparable to a high school building. Is that what you told us this means?

A. If you have a high school.

Q. What if you don't have one?

A. Then you can't compare it.

Q. Mr. Brown, do you understand what this provision means?

A. Yes.

As the above testimony suggests, I believe the educational monopolists, with that large mass of patently unconstitutional regulation, have given us the very instruments we need to make breakthroughs for educational freedom. To assure that these are utilized in the struggle for freedom, however, we need perceptiveness and an aggressive spirit of challenge. I salute Pastor Whisner and his associates on both counts. I believe they could have made, in the long run, some sort of dishonest peace with the state. They could have agreed to go along, and the state would have been willing to temporize, undoubtedly, in leading them through the endless maze of the chartering process. Pastor Whisner refused to make a corrupt bargain. Without understanding all of the legal ramifications of the 600 "Minimum Standards" of the State Board of Education, he was perceptive enough to realize that these impinged upon the religious, educational, parental, and economic liberties of his people. He did not, therefore, quail at being presented with the state's "standard brand" of regulation. He did not knuckle under, sighing, "Well, it's the law." And so he successfully resisted.

There are now hosts of useful precedents in the major civil liberties and civil rights cases that can serve us exceedingly well in a countermarch against the state in the courts, if we will but utilize these precedents aggressively and perceptively.

The opportunities for resistance are increasing, but in most cases we do not avail ourselves of them. There can be important advantages in being the objective of governmental attack. When First Amendment values in education are put in jeopardy by various kinds of governmental procedures under education regulations, health regulations, environment regulations, land use regulations, etc., people have the opportunity to place themselves before the courts and the public as the conscientious and responsible citizens they are. They can show that the existence of private entities and limited re-

sources is threatened by a government gorged with what are treated as limitless resources. They have the opportunity to show their reasonableness and their equities to the fullest extent. And they can make it clear (in a proper case) that government is in the role of aggressor.

But there are also advantages in initiating litigation. For the past three years, the National Labor Relations Board, acting under the National Labor Relations Act, which was supposedly designed for the resolution of industrial strife in interstate commerce, has ruled in case after case against religious entities. The American Federation of Teachers petitioned the NLRB two years ago in representation proceedings to unionize the schools of the Catholic Archdiocese of Baltimore—and succeeded. The religious liberty claim of the schools to be free from NLRB jurisdiction was completely ignored. Now a number of church schools, faced with this threat, have decided to seize the initiative and to sue NLRB. Recently some of them obtained an injunction against the National Labor Relations Board prohibiting any further exercise of its jurisdiction with respect to these religious schools. Since the Act gives the Labor Board power to enforce its orders with respect to “terms and conditions of employment,” the question is raised whether the Board would not have power to deal with every aspect of the ongoing life of a school that would not exist except for its religious mission—namely, such things as salary, tenure, hours, curriculum, moral disciplining of students and faculty, religious observances—virtually anything. The court order just handed down, granting the injunction, goes directly to the issues that the schools raised under the religion clauses of the First Amendment—free exercise, governmental entanglement with religion, governmental surveillance of religious entities, the determination by government of religious doctrine, ecclesiastical procedures, church practice, and discipline under such decisions as *Lemon v. Kurtzman*¹⁰ and *Mary Elizabeth Blue Hull*.¹¹

I do not believe that we are going to turn the corner for educational freedom in the United States until we have vigorously pursued cases as plaintiffs challenging governmental imposition.

Rights of Conscience in Public Education

This is the least and most poorly litigated of the four areas to which I have referred. It is easy enough to generalize about two things that are very current in the discussions of people who believe in freedom in education—"parents" and "secular humanism."

There are indeed great numbers of parents who are vastly offended by the use of public power to inculcate values and by the attacks being made upon the morals and attitudes of their children. But there is also widespread apathy.

There are millions of parents who do not correspond to the image of "parent" so dear to those who fight for "parental rights." We are living in a time when many people *desire* to have the state take over formation of their children and when others do not in the least care. "Parents," as a class, are not somehow immune to the materialism, hedonism, and carelessness of the age. So when we are speaking of defending the rights of "parents," we are speaking only of *some* parents, and we must expect the opposition of some parents. But for the parents who assert their rights the fight is well worth fighting.

There are serious problems in bringing an attack upon secular humanism on religious grounds under the Establishment Clause. One problem is that of proof, and another is that of separating out acceptable elements of secular humanism from offensive elements.

The problem of proof is by no means insurmountable, but it depends upon the most exhaustive use of discovery proceedings and expert testimony. The problem of separating out "bad" secular humanist elements from "acceptable" secular humanist elements is also difficult. A given program may, for example, state that man must have great regard for the ecology, the care and proper use of the resources of nature. That is undoubtedly secular humanist teaching, but it is also a teaching that is embraced wholeheartedly by the Amish, for example, and all religious groups.

I believe that it is possible, not only theoretically, but

practically, to offer proof of the establishment of secular humanism in given public schools, but I perceive the problem of rights of conscience in the public schools as being broader than the scope of secular humanism. There are many practices in public schools that are offensive, not because they are identifiable as a part of a secular humanist program, but because they directly offend beliefs and attitudes of given children and parents. We must not be led into the trap of believing that we can challenge offensive practices in the public schools only if they constitute an "establishment of religion." This is the legal posture to which, by design or accident, *Engel v. Vitale*¹² and *Schempp v. Abington Township School District*¹³ have led us.

In the case of *Engel* a twenty-two-word interdenominational prayer expressing dependence upon God and thankfulness to Him was struck down. The record in the case shows that the decision was due to the fact that the prayer offended the plaintiffs who brought the court action. The Supreme Court decided the case on *Establishment Clause* grounds. So, too, the Court decided *Schempp* on *Establishment Clause* grounds, in spite of its interesting essay, near the beginning of its opinion, on free exercise considerations.

Look again at *Engel*. The prayer was the merest expression of theistic sentiment, which, even if persisted in, was not going to radically alter any child's life. Yet that twenty-two-word prayer is now unconstitutional. Compare that with such programs as MACOS or HEW's latest job, "The New Model Me." These latter programs go to the very vitals of a child's existence, probe into his family relationships, directly attack Christian values pertaining to many areas of morality, and are capable of severely disorienting a child psychologically. These programs have innumerable ramifications respecting a child's own privacy and familial privacy. Can we venture to say that a handful of people who didn't like Bible reading and praying have rights superior to other people who do not want their children's moral structure destroyed? And if, in *Griswold v. Connecticut*¹⁴ the Supreme Court held that marriage is a thing "intimate to the degree of being sacred,"

by what right do federal and state government officials now arrogate to themselves the power to explore with children—with or without parental consent—matters plainly within the ambit of their sexual privacy?

Denial of Distributive Justice in Use of Tax Funds

Distribution of tax funds has been widely discussed in the United States over the past twenty years. Unfortunately, it has been seen very largely in terms of Establishment Clause considerations rather than in terms of Free Exercise considerations. Possibly because Catholics have the largest number of religious schools in the United States, they have been the group most prominent in seeking programs of public aid to education in those schools. Supporters of the public school monopoly have managed, with great adroitness, to play up the "Catholic" aspect of the question, thus causing many Americans to feel that support of even a voucher program would somehow be supporting aid to someone else's church, a matter, of course, not to their liking.

I believe it is essential, at the outset, to disregard the *dramatis personae* in this question (the Catholics, Missouri Synod Lutherans, Orthodox Jews, Dutch Reformed, and other religious groups supporting publicly financed arrangements to aid private education) and concentrate on the more basic elements involved.

First, it is obvious that parents—and other men and women—who attempt to support private schooling are faced with what can only become a growing economic burden. At the present inflation is galloping, and there is no sign that it will slow down. Taxation of individuals—in some states by four or five different levels of government—is likewise continuing to grow. Finally, under pressure from certain groups, state education departments are continuing to widen so-called "standards" that they desire to have become the very definition of "education." The "standards" contemplate a level of expense that only public schools will be able to afford. If parents and other supporters of freedom in education can continue to resist the

imposition of unreasonable "standards," it may be that they can head off the shift in the whole base of the definition of education from one of "basics" to one of behavior-shaping nonbasics, which will be impossibly costly. But no number of Yoders or Whisners is going to be able to reverse inflation, and it is simply going to be more and more expensive to maintain private education.

It is well, however, that administrators of fundamentalist Christian schools take a firm stand against public funding of their schools and call upon their people to *sacrifice* for Christian education. Probably that form of witness, which calls for real personal sacrifice, is going to be the answer to the financial problem of the private religious school. That was always so with the Catholic schools, which were built and maintained out of the very substance of poor immigrant families and which are maintained today out of substantial personal sacrifices.

At the same time, the idea of witness-through-sacrifice should take hold for perhaps an additional reason: it will spur better-off people to lend more help to their fellows in faith. And it will help Christian people to be willing to be a "people apart" from the society of the world—even to the point of being a deliberately *poorer* "people apart" out of their resolve to sacrifice for their faith. Christians are indeed being gradually forced to choose between an illusory "mainstream" America with its cult of material success and something quite different indeed—perhaps something better.

It is well, finally, that most educators who consider themselves religious be firmly resolved not to follow the unfortunate example of many Catholic and Protestant colleges and universities that have essentially secularized in exchange for governmental money.

Nevertheless, the question of constitutional rights of parents remains. Should those parents and others who have the intelligence, courage, and dedication to found private schools be able to receive no return from tax moneys in aid of that effort? They have a constitutional right, long since established in the *Pierce* decision, to operate nonpublic

schools (including religious schools). Such schools absorb a burden that would otherwise have to be carried by other taxpayers. In *Allen*¹⁵ the Supreme Court testified to the important role that private schools play in our society.

Is it really fair that those who help maintain private schools, in which a child can obtain an education that satisfies reasonable requirements of the state, should then have to pay taxes to support an additional school system—the public school system? I believe that such double payment is totally wrong.

It is clear to me that, directly or indirectly, there should be recognition in our tax laws or our educational funding statutes to enable people to exercise an economically free choice in education. As the Chief Justice of the Supreme Court of the United States has made plain in *Meek v. Pittenger*,¹⁶ the latest Supreme Court decision in this area, to deny a child the benefits of general public welfare legislation merely because he achieves his education in a religious school in which he is enrolled due to the twin impact of the compulsory attendance law and the demands of his parents' religious conscience, is plainly denying him the equal protection of the laws. And there is no reason that a free choice should be hobbled with regulatory controls.

There is still a further aspect to the question. To what extent should citizens be forced to contribute to maintaining a system of education that, in conscience, they most decline to support? Public education is widely becoming low quality education. The extravagance of its aims, its yielding to powerful pressure groups in terms of spending, and its politicization are rendering it the most extravagant of all enterprises in this country. Its supporters constantly play up the problems with which they say it must grapple and point to public schools as victimized by ungrateful legislatures and an uncomprehending public. On the contrary, it is gorged with public funds. In states such as Pennsylvania public schools absorb fifty percent of the entire state budget. Ours is the most expensive schooling the world has ever known, and its incompetence is rapidly becoming worse. Many people there-

fore may feel that on purely secular grounds, they ought not be required to contribute to the support of bad education.

But there are many other persons who are now actively fearful of what they see in public education—principally, its attempt to take over, in toto, the entire domain that once belonged to religion and parents and to act as a re-creator of young citizens. The question, however, that must now be clearly raised is whether, on the basis of conscientious objection, parents ought not be relieved of the burden of supporting programs in public education that they deem to be plainly evil.

If parents are given some form of tax relief to aid an economically free choice in education, must that be accompanied by burdensome regulatory controls? The insatiable appetite of politicians to create bureaus, the compulsion of elites to manage other people's lives, and the desire of incompetents to create reporting forms and paperwork are all surely obstacles to be met. But to be *met*—not to be bowed to. Meaningful aid to parents may in fact be accomplished without undue regulation.

We must get ourselves better in hand: we are not yet slaves of a People's Republic. We ought not cringe in hopes of keeping a residue of freedom. We have a great measure of freedom: let us utilize that boldly in order to get whatever proper freedoms we now lack.

NOTES

1. Catherine Roberts, *The Scientific Conscience* (New York: George Braziller, 1967).
 2. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). Prohibited the state from compelling all children to attend public schools.
 3. *Wisconsin v. Yoder*, 406 U.S. 205 (1972). Compulsory secondary schooling for Amish.
 4. *Eberly v. Rockingham County Schools* (Unreported decision, Rockingham Circuit Court, Virginia, Nov. 17, 1970). The Old Order Mennonite truancy case.
 5. *Vermont v. LaBarge*, 357 A. 2d. 121 (1976). Truancy charges for enrollment in "unimproved" fundamentalist school.
 6. *Ohio v. Whisner*, 47 Ohio St. 2d. 181 (1976). Truancy prosecution. Children enrolled in nonchartered fundamentalist school.
 7. Gerrit Wormhoudt, "Supreme Court Decisions," in *The Twelve Year Sentence*, ed. William F. Rickenbacker (New York: Dell, 1975).
 8. Philip Kurland, "The Supreme Court, Compulsory Education and the First Amendment's Religious Clauses," 75 *West Virginia Law Review* 213 (1973).
 9. *Prince v. Massachusetts*, 321 U.S. 158 (1944). Child labor in distributing religious tracts.
 10. *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Pennsylvania's "purchase of service" program for nonpublic schools.
 11. *Presbyterian Church v. Mary Elizabeth Blue Hull Presbyterian Church*, 393 U.S. 440 (1969). Property rights as between church factions.
 12. *Engel v. Vitale*, 370 U.S. 421 (1962). New York "Regents' prayer."
 13. *Schempp v. Abington Township School District*, 374 U.S. 203 (1963). Bible reading and Lord's prayer in public schools.
 14. *Griswold v. Connecticut*, 381 U.S. 479 (1965). Connecticut ban on use of contraceptives.
 15. *Board of Education v. Allen*, 392 U.S. 236 (1967), New York textbook loans to nonpublic school pupils.
 16. *Meek v. Pittenger*, 421 U.S. 349 (1975). Pennsylvania programs of aid to nonpublic schools.
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STATEMENT OF JACK B. CRITCHFIELD, PRESIDENT, ROLLINS COLLEGE

Mr. Chairman and Members of the Subcommittee: Thank you for the opportunity to discuss with you briefly some of my concerns about tuition tax credit proposals. All these proposals acknowledge the financial duress among middle income families who want to send children through postsecondary education. This clearly is a matter of legitimate national concern. These hearings are yet another sign that such distress is not going unnoticed, and we all hope that something positive and constructive may result.

I am the president of a small independent college in Florida, where I have served for 9 years. In one of my earlier incarnations, I served as the director of financial aid in a large institution. Thus I have a kind of dual perspective on tuition tax credit proposals, and I hope that broader perspective may be helpful to me in these remarks. For while many of the issues may seem at first glance to be straightforward and simple, I think we must go slowly enough to make sure we implement effectively our real concerns.

The idea of tax credits to offset tuition costs is attractive and apparently easily understood. The possibility of using the tax structure is appealing because our tax system has moved toward the use of dependable (and auditable) data, and incorporates orderly procedures. I think most people believe our tax system provides the most dependable information about family financial circumstances. For that reason financial aid administrators rely more and more on income tax returns to verify family reports about income. This attitude of trusting the accuracy and fairness of the tax procedures is important to all our citizens.

With your permission, I would like to ask four questions that try to look beyond the appearance and to ask about the reality of tax credit proposals. Naturally I am interested in who gets helped, and in what procedures will be set in place to assure that those whom we intend are in fact the ones who receive the assistance.

(1) My first question: who will get helped? I think we all agree that our concern is with the middle income families, however that range may be defined. Many of these families already qualify for some kind of federal financial assistance (perhaps an SEOG award, or Work-Study, or a subsidy under the GSL Program). They have already filed documents to apply for financial aid, and are receiving awards based on the amount of their family resources. If their income increases, they are expected to contribute more. Since a tax credit would represent additional disposable income, the financial needs analysis system now in place in this country would tax that additional income. For many middle income families, the tax rate on this additional income would be 40-47 percent, so that the real additional advantage to the family would be only a little more than half the amount of the tax credit. For students in independent schools, families so affected would earn as much as \$20,000-\$25,000.

On the other hand, families not eligible for financial aid would not suffer a similar reduction, and they will be in a position to receive the full amount of the tax credit. Thus the effect of our policy will be to reduce the relative advantage of many middle income families and to maximize it for upper middle and upper income families. I think we should make sure that this is the policy consequence that we intend.

The financial aid calculations, of course, are regulated by the Office of Education under the Uniform Methodology. What apparently will happen under a tuition tax credit plan, therefore, is that one office of government—the tax office—will say to families eligible for financial aid that they can expect a tax break if their children are in college. But another office—the Office of Education—will insist that the same families contribute a larger amount toward the expenses of their children. I submit that while this may look like a simple benefit to families in the beginning, when they learn how the system is going to work, there is going to be grumbling and gnashing of teeth. It is not a simple and straightforward way of providing maximum help to families most in need of relief for college expenses.

(2) My second question is not unrelated: are questions about the amount of a tax credit appropriate to tax calculations? It does make sense, under different proposals, to subtract from tuition costs any scholarship that students are presently receiving. Of course, it would be hard to monitor such subtractions. However, none of the federal scholarship programs, and few other programs that I know, make any distinction between amounts that are to be dedicated to tuition support and amounts available for living expenses. Thus an SEOG award

is made to a student, but there is no indication that one amount is available for tuition support and another amount for living expenses. Nor do institutional scholarships and state programs make such a distinction. For the tax credit proposal to work, however, each scholarship will have to be broken into its component parts: tuition and living expenses. If a student were not eligible for a full BEOG award, then his partial award would have to undergo the same break-down, and the proportions may well be different for every school. The number of intricate calculations that would ensue, and our inability to monitor most of them, would make the orderly calculation of the amount of the tax credit almost a nightmare. Such ensuing confusion seems particularly inappropriate within an otherwise orderly tax structure.

(3) My third question has more immediate concern for people in positions such as mine: if we enact tuition tax credits, how closely will follow some attempt by Congress to regulate the amount of tuition an institution may charge? You will quickly see my concern here. General inflationary pressures will make it unavoidable that institutions—certainly independent ones, and probably public ones as well—continue to raise their tuitions to cover costs. That will happen whether or not we have tuition tax credit legislation. If we do have tuition tax credits, some institutions may be tempted to raise their tuitions a little more, while others will want to make sure that parents get the benefits intended for them. But it will not be easy, given the fact of different cost structures, to know which institutions are doing what.

If tuition tax credit legislation is passed, and if tuitions increase for whatever reason, families will complain that they are not getting the advantage they expected. Congress will undoubtedly frown and repeat again its opposition to institutional support. I can almost hear the indignant speeches that institutions are diverting tax credits to their own advantage. And following close behind will come demands for some kind of control over the amount of tuition increases. That, indeed, is a disturbing prospect for any college administrator, for in that delicate balance between income and expense lies the viability of many of our institutions. If we try to insert the heavy hand of government, we shall surely work havoc which we do not intend and do not want.

(4) My final question is somewhat different: what will be the effect of tuition tax credits on the tax system itself? Obviously it is to all our advantages to maintain the integrity of that system as best we can. What we are in danger of doing is to introduce a number of elements which cannot be verified, or can only be verified at great additional administrative cost. Consider just the question of eligible institutions. The Office of Education has a separate section just for evaluating eligible institutions. How will the parent know whether this or that institution is an eligible one? Will there be a list (a formidable prospect if it is to be available to every parent), or will the IRS ask for and check the status of each institution; and if it is not eligible, IRS will recalculate the tax and ask the parent for an added tax payment? How will such a list be maintained within the IRS, and will it be coordinated with the one in the Office of Education? Or will parents be trusted to make their best judgments about whether the school they are patronizing is an eligible institution? On this simple question, we confront a thicket of difficult questions. We get into the same problems when we consider scholarship amounts. Which scholarships, how do we verify data, who does it? Or when we consider eligible expenses: is it tuition or tuition and fees? If fees, which fees? How are any amounts to be verified? Will IRS have a schedule of tuition and fees for every eligible school; if so, how will it be updated each year?

What we have in this area, unfortunately, is a bad choice: either we load the tax system with a lot of information which cannot be verified, and so run the risk of undermining a lot of confidence in the fairness of the tax system. Or we face the prospect of developing a substantial and comprehensive administrative capacity in the IRS to monitor tax credits. Such administrative machinery would probably duplicate much that is already being done in the Office of Education, and there would be inevitable problems of coordination. Such an effort would draw off valuable dollars which could be better spent in financial aid itself. Either way we stand to lose: it would be an enormous loss to undermine confidence in our tax system, and in fact to introduce palpable unfairness, and it would be equally serious to try to implement sufficient administrative machinery to try to prevent abuse.

From these few remarks, you can see that I am hesitant to support any tax credit proposals until we have done more homework. I would feel better about

It all if we were also exploring the possibility of helping these families through existing financial aid procedures rather than attempting to devise new ones to accomplish similar purposes. Financial aid programs now in place are far from perfect, but at least we have worked with them long enough to have set right the most serious distortions and unexpected consequences. If our experience with existing programs is any guide, good administration takes time to develop, and many of the problems already confronted by financial aid officers will have to be encountered all over again by those responsible for implementing tax credit proposals. Is this our most farsighted public policy?

Thus tuition tax credit proposals are attractive and apparently simple, but there are dramatic differences between appearance and reality. The administration of current proposals would bring consequences which are not intended, and administrative problems vastly more complex than seems possible at first or second glance. I earnestly hope these hearings may help us to work through difficult problems before we are thrust into the midst of tuition tax credits. I heartily applaud the committee for its concern for middle income families; I hope its effort to ease the burden will reflect the same kind of understanding and good judgment.

Thank you.

CALIFORNIA STATE UNIVERSITY,
OFFICE OF THE PRESIDENT,
Long Beach, Calif., January 19, 1978.

HON. WILLIAM V. ROTH, JR.
U.S. Senate, Dirksen Senate Office Building, Washington, D.C.
(Attention of Mr. Bruce Thompson, Legislation Assistant)

DEAR SENATOR ROTH: I commend you for the leadership you have demonstrated in assuring that the issue of providing tax relief for persons paying tuition in colleges and universities is carefully considered by the United States Senate. I would hope that out of these hearings a proposal might evolve which would meet the very real needs felt by middle-income families.

I will address my comments only to the need for a tax credit at the college and university level. Personally, I believe that it would be poor public policy to grant such a credit at the elementary and secondary school levels where it might encourage the creation of private academies which would undermine the public school systems of the country, especially as they undergo desegregation.

There is no question but that your proposal, S. 311, would be helpful in alleviating some of the pressure on hard-pressed, middle-income taxpayers as they seek to scrape together sufficient funds to meet the seemingly sky-rocketing costs of higher education. If enacted, your legislation would permit a credit against federal income tax for tuition and fees, books, supplies, and equipment utilized by the full-time student of not to exceed \$250 the first year and ultimately, by 1980, of \$500. In this respect it would be of great benefit to the parents whose daughters and sons attend California State University, Long Beach.

Although Long Beach, as part of the nineteen-campus California State University and Colleges system, is among the last free-tuition institutions in the United States, it is still relatively expensive to attend the University once the total living costs and expenses are taken into account. For example, although the mandatory student services and related fees total only \$196 for the academic year of two semesters, room and board in campus residence halls approximates \$1700 for the nine-month period. Related expenses, such as books etc., would bring the total cost of education for the dormitory student who is a single California resident to \$2500. If that student were a nonresident of California, then the tuition for two semesters of \$1575 would have to be added for a total of at least \$4075.

The combination of Basic Educational Opportunity Grant, National Direct Student Loan, Supplementary Educational Grant, and Work-Study which is made available by our Financial Aid Center, covers three-fourths of those expenses for the students from families which have gross income of \$16,000 or less.

The Problem, however, as you correctly perceive it, is the inability of families who gross between \$16,000 and \$36,000/year to cover these expenses even at Long Beach where education remains one of the "best bargains" left in America. If

a family were to send one or more of its children to a private institution, the cost, largely due to tuition, would be perhaps twice as much.

As your legislation is presently drafted, it will be of great help to the parents of students attending California State University, Long Beach, and similarly priced institutions. But for an institution, such as Stanford University where the undergraduate tuition alone is now \$5,130 an academic year, such a limited tax credit would be of marginal benefit to the parents involved.

In the drafting of tax credit legislation, I believe there should be a maintenance of effort or cost-of-living increase limitation which would prevent either public or private institutions—primarily the State Legislatures and Board of Trustees which govern them—from using the federal tax credit to escalate tuition and fees and then ultimately shift the burden of that increase to the federal government. If such actions should occur, there would be a tragic setback for the access to education now provided by many no- or low-tuition institutions such as Long Beach. All the federal aid in the form of grants, loans, and tax credits does not overcome the psychological barriers to access which highly priced tuition and fees pose to prospective students and their parents. Perhaps only making the tax credit available to parents if their children are attending public or private institutions where tuition and fee increases do not exceed a "cost of living" guideline would build in some consumer pressure against the unreasonable escalation of tuition.

I would hope that great care would be given to the definition of a "full-time student." Increasingly, more and more students are married and work half- or full-time in order to secure a college education. To pay the bills, they stretch out their attendance and take one, two, or three courses rather than four or five during a semester. By and large, because of cost, the traditional "residential and full-time" student will become largely a memory. Consequently, there is a need to explore the ramifications of "full-time" before locking in a particular definition.

For more than a decade I have been thoroughly convinced that perhaps the most useful policy to spread out the burden posed by the high costs of a college and university education would be a deferred loan system. This would permit the taxpayer to spread the costs, whether \$10,000 or \$30,000, over a ten to fifteen year period through the use of the federal income tax system as a collection device. Such an approach would recognize that the nation has a responsibility to utilize its tax system and the incentives it can provide to invest in its people as well as in its machines. As with the impact of the G.I. Bill, such a human investment would be more than repaid by the enhanced productivity and personal growth of the citizenry. I do hope that you and your colleagues will explore this approach in the months ahead. Again, my congratulations on undertaking this effort.

With kindest regards,
Sincerely yours,

STEPHEN HORN.

TAX RELIEF FOR COLLEGE EXPENSES

C. Lowell Harriss, Professor of Economics, Columbia University; Economic Consultant, Tax Foundation, Inc.; Associate Lincoln Institute of Land Policy. Views expressed are my own and not necessarily those of any organization with which I am associated.

Statement for Subcommittee on Taxation and Debt Management Generally, Committee on Finance, United States Senate, January 19, 1978.

Convincing arguments support the proposals for tax credits for higher education, including vocational schools. The case for tax credits for tuition in non-governmental elementary and secondary schools also seems to me highly impressive, but my comments will focus on higher education.

My personal interest—bias—should be noted. My own children have completed college and graduate education (except for essentially one year), and I could not expect direct personal benefit in this respect. As a faculty member of a university I do have personal interest in the future of the institution. Moreover, I see many students and identify emotionally with them; the relief which would benefit them—including, among other things, improving the conditions under which they take advantage of the opportunity to study—unquestionably appeals to me. Recognising, therefore, some possible lack of objectivity, a lack for which I make no apology, I hope that my conclusions rest upon a solid basis of reasoned concern for a large portion of the public, today and in the years ahead.

**BUNCHING OF EXPENSES: NEED FOR RECOGNITION OF "LUMPINESS" OF EXPENDITURE
AS BASIS FOR INCOME TAX ADJUSTMENT**

Averaging has a recognized place in an income tax imposed at graduated rates. Expenditures as well as receipts can vary significantly from year to year—the expenditures which should be recognized in measuring "ability to pay" for government. Equity and fairness in taxation can be achieved only if allowance is made for differences in economic position. The personal exemption and credit for dependents make some adjustment. But the economic positions of families differ for compelling reasons which grow out of variations in conditions.

Expenses of higher education are "lumpy." They appear in rather few of the total years of a normal family history. But these expenses are for large numbers of families necessary—essential—by a reasonable definition of those concepts. The role of higher education in upward mobility is familiar. Its place in preparing for personal development needs no comment here.

What does deserve recognition is this reality: In the years in which children are in college the family has exceptional expenses of a compelling nature. During these years the family's ability to pay taxes will be materially less in a meaningful sense than it will be in other years (per dollar of receipts).

Just as unevenness in the flow of receipts justifies tax relief in the form of averaging—when tax rates are as steeply graduated as they are today—the unevenness of spending (which cannot possibly be considered to be adequately recognized by a dependent credit of \$750 or some such amount) calls for adjustment in taxation.

In this sense the proposal advances a defensible concept of equity and fairness in taxation.

THE TAX OF INFLATION

Should not families with children save in advance to pay for higher education? We head—but not correctly, according to the figures—that a big fraction of beneficiaries would be in "higher" income families. Those that are more prosperous might properly be expected to have saved in advance to pay for a "lumpy" and large expenditure known to lie ahead, the years of college. Some have tried to do so.

What has inflation done to the worth of past saving? Half or one-third or one-fourth of the real worth has been confiscated by inflation. This unhappy story requires no underscoring here. Whether or not "government" has been the confiscator can be debated. Family situations differ enormously as regards the effects of inflation. One generalization, however, does seem to me directly relevant to proposals for relief for higher education. The prudent, those who took forethought and tried to prepare by having, these have suffered real deprivation because of inflation.

TAXATION AS A CAUSE OF NEED

The proposal would offer a tax (partial) "solution" to a problem growing in part out of high taxes. Critics of the tax credit can rightly say that it will not "solve" all the problems and that because the problems are varied in nature and amount the tax credit would not be ideal.

Each of us can always find ways to use the other fellow's funds better than we think he will use them. Advocates of redistribution feel convinced that they can allocate the use of earnings (from effort and thrift) better than can the owner. Opponents of the tax credit cite "better ways" to use the tax relief proposed. In effect, I submit, some arguments imply that if Congress decided that some marginal tax rate is to go into the law, Congress should not alter the rate to reduce the burden.

What the bills before you would do would be to use a tax device—a tax credit—to help deal with a problem growing out of high tax rates. The taxes reduced disposable income. As a result the ability to finance education suffers. Families which do not pay the tax do not suffer from a tax-created deprivation. Governmental policy to deal with one problem will not deal with all others. But there are families for which the income tax in years when higher education must be paid for imposes exceptionally disabling effects.

The tax credit would mitigate the effects which grow out of taxes that are unquestionably major sources of need.

CONSUMER CHOICE

The tax credit would provide more in consumer choice than would some other proposed forms of aid. As an employee of a university a professor will be expected to look with favor upon governmental funds to support the institutions as such. This focus certainly has attractions in a world of inflation. Be that as it may however, the aid—or may I say, not “aid but reduction of tax-created obstacle”—which rests at the student level offers him or her freedom of choice.

Over the years the net benefits per dollar of tax relief can be expected to be greater when students have some “consumer sovereignty.” The whole question of student capacity to select colleges wisely involves unknowns. On balance, however, I believe that the processes of choice will operate more effectively in a more constructive sense if the “buyers”—students—have the freedom and power which would result from the tax credit.

May I depart here from the earlier self-limitation and note that for elementary and secondary education the scope for selection ought to work to improve the quality of education. The beneficiaries would be, not only those electing to go to non-governmental schools but perhaps many in those schools as a result of vigor and strength in the private sector.

OTHER BENEFITS

Space limits preclude discussion of other aspects. It should be clear that some of the arguments are complex and that objections raised, notably last year by the Treasury, deserve respectful attention. Do they not, however, often boil down to this conclusion, “Let us (government officials) direct the use of your earnings”? In response, does not one affirm a fundamental of outstanding importance in asserting, “Equity and efficiency and constructive incentive will be advanced by tax relief which gives taxpayers power to dispose of more of their own earnings as used for higher education.”

BEMIS COMPANY, INC.,
Minneapolis, Minn., January 20, 1978.

Mr. MICHAEL STERN,
Staff Director, Senate Committee on Finance,
Dirksen Senate Office Building, Washington, D.C.

DEAR MR. STERN: I understand the Senate Committee on Finance is soliciting views in regards to the need for tuition aid exemption from employee tax obligation.

Twenty years experience of assisting the vocationally disadvantaged select, prepare for, enter into employment, and strive for optimal vocational development, leads me to believe lack of such a provision would seriously curtail employee education assistance and affirmative action programs.

In light of public and private sector interest to promote additional employment opportunities for minority group members, females, veterans and the handicapped, I urge the Committee to recommend a tuition aid exemption.

Sincerely,

PAUL R. BARRINGTON,
Corporate Manager, EEO and Training.

NATIONAL UNIVERSITY EXTENSION ASSOCIATION,
OFFICE OF THE EXECUTIVE DIRECTOR,
Washington, D.C., January 13, 1978.

Senator HARRY F. BYRD, Jr.,
Chairman, Subcommittee on Taxation and Debt Management Generally, Senate Committee on Finance, Dirksen Senate Office Building, Washington, D.C.

DEAR SENATOR BYRD: The National University Extension Association respectfully submits the following information for the record of your hearing January 18, 19, 20 on proposed legislation that would provide tax credits for educational expenses.

The National University Extension Association is an organization of 265 colleges and universities that conduct extension and continuing education programs. These are programs that serve people who are part-time students at these institutions.

Traditionally, college students have been people 18 to 22 years of age. The situation has changed drastically in recent years. Today over half the people studying at our colleges and universities are older than this traditional age group and are part-time students. These are adults, mostly working people, trying to acquire knowledge to get ahead in the world. They are beyond the stage in life where they are supported by their parents. Many are studying to obtain college degrees. Others seek certification for employment, or just seek knowledge they need.

The trend continues. Each year brings an increasing number of adult part-time students to college and university programs. Colleges and universities are responding to these needs by providing instruction at times and places accessible for these adult part-time students.

Federal legislation and programs are just beginning to recognize this new majority in higher education. We strongly urge the Congress to consider the financial problems and needs of these adult part-time students as you consider the tax credits as a means of helping people pay costs of education.

Let me illustrate the problems and needs. Take the case of a young man from a low income family who after graduation from high school was not motivated for higher education but had other more pressing goals. He got married, took a job pumping gas at his neighborhood gas station. Now at age 25 he has two children, is still pumping gas, scarcely able to make ends met and sees a drab future ahead. He decides that his best way out is to study at night at his local community college or university to prepare for a better job, but he is broke every payday, now. He sees his 18 year old brother leaving high school, going on to college and receiving from the government a Basic Educational Opportunity Grant to pay for part of his education. He rightfully wonders "Is this just and equitable treatment." Can anyone say the need of one brother is any more a public concern than the other? Can anyone say the needs of one has a higher priority for spending federal money than the other? If now the Congress passes new legislation giving this boy's father a tax break for the educational expenses he pays for the younger brother but not a tax break for the older brother who would take one course per quarter at night, you will only compound the injustice.

There are millions of people in situations like this older brother. This is not an unrealistic example. I cite below some real world examples. The University of Minnesota has a very small fund from which it helps needy part-time adult students. Here is a brief description of a number of people who applied for help to take one course per quarter but whom the university could not help because of a lack of funds:

P.M. is 33, divorced, female, has 4 children (ages 10, 11, 13, 15). She is employed as a secretary. Gross income=\$800/mo. (\$9,600/yr.); net income=\$765/mo. (\$9,180/yr.). Her income includes her salary, plus child support. Medical/dental=\$20/mo.

W.A. is 25, single male, employed as a school bus driver. Gross income=\$500/mo. (\$6,000/yr.); net income=\$325/mo. (\$3,900/yr.). Student loan=\$30/mo., personal loans=\$66/mo.

D.L. is 24, married, female, has 1 child (age 5). She is employed as a book-keeper; her husband is employed as a school bus driver. Gross income=\$900/mo. (\$10,800/yr.); net income=\$70/mo. (\$8,400/yr.). Medical/dental=\$15/mo., daycare=\$140/mo.

P.O. is 36, female, divorced, has 2 children (age 5 and 18). She is employed as a senior clerk. Gross income=\$876/mo. (\$10,512/yr.); net income=\$600/mo. (\$7,200/yr.). Medical/dental=\$30/mo., daycare=\$50/mo.

J.G. is 32, married, female, has 2 children (ages 11 and 15). She is employed as a sales clerk; her husband is self-employed as an architectural draftsman. Gross income=\$1,050/mo. (\$12,600/yr.); net income=\$800/mo. (\$9,600/yr.). Dental=\$25/mo., health insurance=\$68/mo., medical=\$20/mo.

L.H. is 30, separated, female, has 2 children (ages 7 and 10). She is employed. Her income is derived from employment and child support. Gross income=\$950/mo. (\$11,400/yr.) net income=\$795/mo. (\$9,540/yr.) Medical=\$10-15/mo., health insurance=\$10/mo., daycare=\$100/mo.

W.H. is 26, married, male, has 2 children (ages 5 months and 2 years). He is employed as an electronic technician; his wife is a homemaker. Gross income=\$900/mo. (\$10,800/yr.); net income=\$696/mo. (\$8,352/yr.). Medical=\$25/mo., health insurance=\$8/mo.

T.N. is 32, divorced, female, has 2 children (ages 9 and 12). She is employed as a clerk and as a caretaker in her apartment building. Gross income=\$707/mo.

(\$8,484/yr.); net income=\$650/mo. \$7,800/yr.). Her income includes her salary, plus child support. Medical=\$20/mo., dental=\$15/mo., health insurance=\$25/mo., legal fees=\$50/mo.

L.S. is 39, married, female, has 3 children (ages 8, 15, 17). She is a homemaker; her husband is employed as a research agronomist. Gross income=\$970/mo. (\$11,640/yr.); net income=\$729/mo. (\$8,748/yr.). Medical=\$70/mo.

O.W. is 22, single, female. She is employed as a fashion consultant. Gross income=\$500/mo. (\$6,000/yr.); net income=\$400/mo. (\$4,800/yr.). Medical/dental=\$20-30/mo.

These are real people. They will not speak at a congressional hearing because they are working and couldn't pay the cost anyway. They are not organized and so have no one to speak for them. The National University Extension Association speaks for university personnel that are trying to serve their needs.

We urge you, if you pass a bill that provides tax credits for educational expenses, don't limit the benefits to parents of "traditional" students. Help these hardworking, dedicated, deserving and needy people too. They are just as needy. Just as deserving, and their education is as much in the public interest as the full-time "traditional students" and their parents. If you limit the benefits to full-time students, to those who are full-time students part of the year, or to better-than-half-time students, these hardworking part-time students will be dished out another injustice.

Sincerely,

LLOYD H. DAVIS,
Executive Director.

STATEMENT OF BETTY LEA BROUT, PRESIDENT, NATIONAL WOMEN'S CONFERENCE
OF THE AMERICAN ETHICAL UNION

My name is Betty Lea Brout. I am President of the National Women's Conference of the American Ethical Union. The American Ethical Union is a federation of national Ethical-Humanist Societies and Fellowships across the country and includes hundreds of members-at-large who share with us our religious ethical-humanist philosophy. The National Women's Conference of the American Ethical Union is, in turn, a federation of women's groups within our local Ethical-Humanist Societies and of members-at-large who are at one with us in our commitment to religious humanism as a way of life.

I intend to limit my statement in opposition to this single point: the controversy between those who believe that the universal availability of sound public education in the United States is one of our most precious "goods" and those who in their support of the concept of public support of nonpublic education, would weaken our public school system by causing the majority of us to agree to divert public funds for the educational support of the few.

We believe that the present public school system in this country is the focal point of our unceasing efforts to develop and maintain a free and strong society. Any proposal to give public funds to sectarian parochial and private schools diverts attention and strength from that focus. Indeed, such an attempt raises issues that extend even beyond the principle of separation of church and state. It forces us to confront the violation of other freedoms, other of our historic American values, for parochial and private schools, in fact, foster and encourage segregation: segregation not only by religion, but by nationality, economic level and class as well. It is when children from the rich cultural segments of our society come together in the public school classroom that they may learn and benefit from every other segment. To limit that exposure, and to encourage its dissipation by using public monies to support a segregated system of private education is to weaken the fabric of a democratic America.

The public schools in this country offer our children the hope of a better life, not only in terms of personal growth and development, but also in terms of a keener understanding of the principles that guide the mainstream of life in these United States. Public schools are, in fact, a microcosm of American life. In their classrooms, where children are integrated by color, creed and class, youngsters learn early in life a most valuable lesson. They learn about cooperation with and acceptance of others who are different, and it is that lesson that is essential to a successful and productive adulthood.

This is a time to give public schools more, not less, in the way of public monies. Life in this country is in a constant state of change, flux, movement, all of which mandate reforms in both urban and rural schools, reforms that require person-

nel, material and money. This is a time to broaden and strengthen our public school system, not to weaken it.

When private independent and parochial schools are made possible by voluntary tuition, the number of segregated children who attend those schools is and will remain small. But if the 10% of the nation's children who attend nonpublic schools are to be subsidized by the parents of the 90% who go to public schools, we as a nation actually sanction and encourage this most harmful form of segregation at the same time that we permit ourselves to divert desperately needed monies from public education. So to do—to encourage proliferation of nonpublic schools—surely spells the eventual demise of effective public education.

We cannot afford to do that. We cannot afford it financially, nor can we, ethically or morally, impose so vast a financial burden upon the majority of Americans. The sponsors of S. 2142, themselves, have estimated that the cost to government of this bill, should it become law, will be \$4.7 billion. Others have estimated the dollar amount as nearer \$6 billion as an initial cost, with that amount increasing over the years as tuition rises and there is continuing pressure to raise the reimbursement rate (from its proposed 50% of tuition up to \$500 per year per student) to full tuition costs.

It is, of course, understandable that the parents of those who attend nonpublic schools are concerned about escalating costs, just as it is understandable that those who favor the concept of nonpublic education are concerned with the ongoing decrease in enrollment. But for the majority of Americans to be called upon to solve these problems, and to pay substantial sums of money for the educational exclusiveness of a few, is, quite simply, wrong.

We have a tradition in this country that is precious and dear to all of us. That is, majority rule. We abide by this rule, and we are peacefully guided by it in all ways and at all times, to the extent that even when a presidential election is won or lost by a fraction of a single percentile, we accept that result without argument. The majority rule, however small that majority way in this instance have been, has prevailed.

Here, however, faced with a legislative proposal designed to benefit the very small number of children in the United States who attend nonpublic schools at the expense of the overwhelming majority of those who attend public schools, we must acknowledge that this most basic principle of majority rule is placed in the gravest jeopardy. The proposed Tuition Tax Credit Bill is, in fact, designed principally for the benefit of Catholic parochial schools, the class of school largest in number among nonpublic schools. Of the total of 10% of children who attend nonpublic schools, 90% of that number attend such Catholic parochial schools, with the remainder of that 10% attending, in about equal numbers, other sectarian and private independent institutions.

Surely those who choose the route of nonpublic education are entitled to do so. They have that right, as an inviolable absolute, but the concomitant of that right is the obligation to pay for it without requiring a subsidy from the rest of us. In today's economy, the nonpublic school is certainly costly, but those who would use them must support that choice with personal effort and private funds. It cannot reasonably be expected that the great mass of American citizens can or should approve the use of tax monies for the support of sectarian religious or private schools, particularly when the use of that money for such purpose is detrimental to the strengthening of public education. It is no more reasonable for parents of children in nonpublic schools to expect others to endow their children's private education than it is for any of us to expect another involuntarily to support our church. We are, each of us, free in this country to "tax" ourselves, and to pledge ourselves to the financial support of the private institutions we cherish. But none has the right to anticipate that those who do not share our values or our beliefs will be forced to contribute to our personal interests.

And just as those who would support nonpublic education are and must remain free to continue that support, so do the rest of us have rights. We have the right to expect that public monies will be used for public education. We have the right to work toward the improvement of that education. We have the right to reject any and all efforts to impose upon the many the private education of the few. We have the right to anticipate that our federal legislators will uphold our traditions of separation of church and state.

The bill here under discussion, S. 2142, is neither more nor less than a tuition grant to a small number of persons who would, by its enactment, be uniquely privileged by its benefits, benefits paid for by the majority, who will

not so benefit, at a time when public schools are laboring under severe financial pressures. Proponents of tax credits, tuition grants and other forms of government aid to nonpublic schools argue that religious schools are in a state of economic disarray and are in danger of collapse, and should they, in fact, close their doors, the burden on public schools would be intolerable. This is not true. In fact, largely because of our declining birth rate, public school enrollment is declining annually, and the public school system in this country can readily absorb the enrollment of any private school that might close.

Added to this, of course, is the critical importance and wisdom of the numerous Supreme Court decisions that have addressed two important aspects of the issues affecting the use of public funds for nonpublic schools: separation of church and state, and the mandate for integration of public schools. The Supreme Court has consistently prohibited aid to religious schools, either by direct funding or by indirection, as in this case. And it has mandated full integration of all public schools. The recent and sharp proliferation of nonpublic schools all over the country surely reflects, at least in part, an effort to circumvent that mandate. We would hope that this Congress will not lend itself to that effort at circumvention by agreeing to divert public monies for the support of private schools.

The National Women's Conference of the American Ethical Union would take this opportunity to reiterate one of the most important statements of principle upon which this nation was founded, a principle that grew out of a painful awareness of the value of individual freedoms and the importance of religious liberty. This awareness was, we believe, the basis of Thomas Jefferson's reasoning when he said, in 1786: "... to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical; ... it tends also to corrupt the principles of that very religion it is meant to encourage; ... our civil rights have no dependence on our religious opinions."

That statement is as valid today as it was then. It is the bulwark of American democracy.

We in the National Women's Conference believe that tax credits for tuition paid to nonpublic schools would foster racial segregation and religious divisiveness. We believe that S. 2142 would weaken our public school system at a time when it needs reinforcement. We believe this bill to be an overwhelming threat to the constitutional mandate for separation of church and state.

We urge you to deny enactment of S. 2142. We ask that you encourage growth of our system of universal public education, a system that permits our children to learn together and grow together so that they will, as adults, be prepared to contribute to our society what that public school education will have made available to them: an awareness of the value of our personal freedoms and an understanding of the true meaning of religious liberty.

STATEMENT OF ROBERT LEIDER, PRESIDENT, OCTAMERON ASSOCIATES,
ALEXANDRIA, VA.

Our company publishes the financial aid guide, "Don't Miss Out: The Ambitious Student's Guide to Scholarships and Loans," (copy attached). The guide is an annual publication with new editions appearing every August. Our sales experience indicates the great middle-class concern with college costs. Approximately 2000 schools and school systems have purchased the guide, with sales per school or system ranging from 1 to 4000 copies. We estimate that 1900 of these or school systems serve a primarily middle-income student body; only 100 schools and school systems are located in their entirety or partially in lower-income neighborhoods or communities. Moreover, the schools and school systems which purchased 25 copies or more are entirely middle-income systems.

We noted a similar pattern in response to recommendations. Our guide has been recommended by a great number of publications. Reader response has always been the highest from publications which claim middle-income or higher incomes for their readership.

So far we have not advertised our guide. But were we to adopt an advertising policy, our campaign would center on the Wall Street Journal, Fortune, Forbes, and Business Week.

Despite the intense middle-income interest in seeking assistance with college expenses, I am at this time opposed to the legislation pending before your subcommittee.

In my view, two "relief" alternatives should be explored first before you consider the various forms of tuition tax relief before you.

1. I believe the formulas used by the College Scholarship Service to determine the family contribution to college expenses should be re-evaluated. At present, these formulas exact a penalty for accumulating assets. Two families, of like income, with the like number of college-bound or in-college students, would be assessed differently if one were thrifty and accumulated assets while the other proved spent-thrift and saved nothing for later needs. The thrifty folks, under the present formula, would be asked to pay more. I believe that a long-range savings program, perhaps patterned after IRA, should be authorized that provides tax advantages for accumulating funds for higher education.

2. I also believe that there should be an increase in occupational scholarships offered by the Federal Government. I find that while the Labor Development develops an excellent occupational outlook document which indicates future needs, there is no incentive program to attract people to major in the fields in which shortages are expected, I think scholarships based on the country's needs (like ROTC), as projected by Labor, and offered on the basis of satisfactory completion of course work rather than financial need might be of major help to middle-income families and to the country.

Respectfully submitted.

[Memorandum]

SUPERINTENDENT OF PUBLIC INSTRUCTION,
Olympia, Wash., January 5, 1978.

To: Senator Harry F. Byrd, Jr., Chairman, Subcommittee on Taxation and Debt Management of the Senate Finance Committee.

From: Frank B. Brouillet.

Re Packwood-Moynihan Tuition Tax Credit Act.

I want to thank the Committee for providing me this opportunity to submit a statement for the record in support of the Packwood-Moynihan Tuition Tax Credit Act. While the bill has many merits, I will restrict myself to two main concerns.

Socio-Economic Integration.—The high cost of private education for low-income families is causing a change in the socio-economic status of private elementary and secondary schools. If the trend is not reversed, private schools increasingly will become havens for those who wish to escape the social problems associated with inner-city public schools and those whose main concern is a form of class exclusion or elitism. The tuition tax credit, with the provision for refundability, should stimulate cultural diversity in our private elementary and secondary schools.

And Without Control.—As a chief state school officer, I am deeply and increasingly concerned about the federal and state control associated with aid to public schools. These controls generally have a meritorious public policy goal. However, the uniqueness of private education would be substantially harmed by similar controls. Therefore, I favor tax credits as the least destructive form of public aid to private schools.

I am aware that some versions of this proposal would make credits available for higher education purposes only. It is extremely important that elementary and secondary level students be eligible for the very social reasons already mentioned. The ability of private education to maintain integrated programs necessitates comprehensive legislation.

Again, thank you for this opportunity to provide the Committee a written statement.

STATEMENT OF DAVID A. STUART, ROCHESTER, N.Y.

I oppose the passage of this bill on the grounds that, if passed, the bill would:

1. Divert tax funds from support of public schools to support of a duplicate system, thus creating inefficiencies which would undermine the proper support of our public school system, and place an unreasonable burden on the taxpayers.
2. Advance the cause of certain religions which maintain private schools, in part for this purpose (i.e. to advance the cause of their religious faith). A similar New York State law has already been declared unconstitutional by the United States Supreme Court (*Pearl vs. Nyquist*, 1973).
3. Acceptance of tax aid would endanger the independence of non-public schools, and interfere with the religious mission of those which are sectarian institutions.

DUNBAR, KIENZLE & MURPHY,
ATTORNEYS AT LAW,
Columbus, Ohio, January 12, 1978.

Re Constitutionality of Tuition Tax Credit Act of 1977, S. 2142.

HON. DANIEL PATRICK MOYNIHAN,
HON. BOB PACKWOOD,
U.S. Senate, Washington, D.C.

DEAR SENATORS MOYNIHAN AND PACKWOOD: In view of the fact that I served as lead trial counsel in the most recent United States Supreme Court case wherein the constitutionality of tax assistance to pupils at independent schools was challenged, you have requested my legal opinion in regard to the constitutionality of S. 2142. This letter presents a statement of the question presented, my conclusion, and a legal analysis in support of that conclusion.

QUESTION PRESENTED

If the Tuition Tax Credit Act of 1977 (S. 2142) is enacted by Congress, would it survive a First Amendment Establishment Clause challenge to its constitutionality?

CONCLUSION

The Tuition-Tax Credit Act would provide tax relief to a broad class of beneficiaries, including students at independent and public educational institutions. Thus, it would not result in a predominance of benefits to a religious group. Tax relief would be made available without regard to the sectarian-nonsectarian or public-independent nature of institutions attended. The program would be part and parcel of tax legislation; and the United States Congress has the constitutionally delegated power to levy and regulate taxes.

The legislative purpose and principal effect of this tax credit legislation would be secular and neither advance nor inhibit religion. Its implementation would not foster an excessive government entanglement with religion.

It is my opinion that the United States Supreme Court would declare the proposed Tuition Tax Credit Act to be constitutional.

LEGAL DISCUSSION

INTRODUCTION

During the past 30 years, the United States Supreme Court has decided 13 major cases presenting the recurrent issue of the Establishment Clause limitations on programs of aid to pupils at independent educational institutions. Although that Court has not yet addressed itself to a tax relief package such as that reflected in S. 2142, it has considered almost every other conceivable program of aid to nonpublic school pupils.

The constitutionality of many programs has been upheld; others have failed the Establishment Clause test. A tally reflecting the outcome of the most significant cases is attached as Exhibit A to this opinion letter.

These United States Supreme Court decisions reflect considerable inconsistency; but this is most probably attributable to the Court's struggle to find "a neutral course between the two Religion Clauses (Establishment and Free Exercise), both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other." *Wolz v. Tax Commission*, 397 U.S. 664, 668-69 (1970). Before determining whether a law should be stricken for failure to meet Establishment Clause strictures, the Court must determine whether the resultant exclusion of children attending church-related schools from the benefits of general welfare legislation diminishes the attractiveness of a free-exercise-of-religion choice, and thereby infringes upon rights protected by the Free Exercise Clause. For example, the Supreme Court in *Sherbert v. Verner*, 374 U.S. 398 (1963), concluded: "This holding but reaffirms a principle that we announced a decade and a half ago, namely that no State may 'exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public-welfare legislation.'" [374 U.S. at 410.]

THE TRIPARTITE TEST

In spite of inconsistency resulting from internal tensions between the Free Exercise and Establishment Clauses, the Court has developed a mode of analysis

in these cases which utilizes a three-part test: "In order to pass muster, a statute must have a secular legislative purpose, must have a principal or primary effect that neither advances nor inhibits religion, and must not foster an excessive government entanglement with religion." [*Woiman v. Walter*, 53 L.Ed.2d 714, 725.]

This three-part test applied by the Court now seems to be firmly rooted: "So the slate we write on is anything but clean. Instead, there is little room for further refinement of the principles governing public aid to church-affiliated private schools. Our purpose is not to unsettle those principles, so recently reaffirmed, see *Meek v. Pittenger*, *supra*, or to expand upon them substantially, but merely to insure that they are faithfully applied in this case." [*Roemer v. Board of Public Works*, 428 U.S. 730, 754 (1976).]

The U.S. Supreme Court's decisions which have evaluated programs of government aid to children in church-related schools have "presented some of the most perplexing questions to come before this Court," and such cases have "occasioned thorough and thoughtful scholarship by several of this Court's most respected former Justices." *Committee for Public Education v. Nyquist*, 413 U.S. 758, 761-62 (1973).

NYQUIST SPECIFICALLY RESERVED THIS QUESTION

It may be asserted by some that the constitutional validity of legislation such as S. 2142 has already been decided in *Nyquist*. One of the sections of the New York legislation challenged in *Nyquist* called for tax relief benefits for nonpublic school children. The U.S. Supreme Court declared the program violative of the Establishment Clause; however, a significant factor in *Nyquist* was the fact that 85% of the non-public schools were church-affiliated, and that a high percentage of these schools was Roman Catholic. As a matter of fact, the Court in footnote 38 specifically distinguished such a state program from a program of assistance made available without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution: "Because of the manner in which we have resolved the tuition grant issue, we need not decide whether the significantly religious character of the statute's beneficiaries might differentiate the present cases from a case involving some form of public assistance (e.g., scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited. [cite omitted.] Thus, our decision today does not compel, as appellees have contended, the conclusion that the educational assistance provisions of the 'G.I. Bill,' [cite omitted] impermissibly advance religion in violation of the Establishment Clause."

It therefore appears that the "breadth of the class of beneficiaries" is of crucial importance in tax relief cases. This conclusion is confirmed by the fact that the U.S. Supreme Court in *Nyquist* footnote 38 referred specifically to *Woiman v. Essex*, 342 F. Supp. 399 (S.D. Ohio), Sum. Aff., 409 U.S. 808 (1972). The Three-Judge Federal Court in that case made similar reference to the breadth of class criteria: "The reimbursement grant aspects of Section 3317.062 are directed only toward the parents of children who attend non-public schools. The limited nature of the class affected by the legislation, and the fact that one religious group so predominates within the class, makes suspect the constitutional validity of the statute. All the cases in which the Court has upheld legislation attacked on Establishment Clause grounds, the affected class has been substantially broader than the class affected by the Ohio Statute." [342 F. Supp. at 412.]

THE BLANTON CASE

The significance of footnote 38 in *Nyquist* was confirmed in the recent case of *Americans United for Separation of Church and State v. Blanton*, 433 F. Supp. 97, Sum. Aff., 46 U.S.L.W. at 3187 (October 4, 1977). The Three-Judge Federal Court, whose decision was affirmed by the Supreme Court of the United States in that case, was considering the constitutionality of a higher education, student assistance grant program, but the rationale would apply to S. 2142. In distinguishing *Nyquist*, the Court in *Blanton* stressed the broad base of beneficiaries affected by the Tennessee legislation: "The question here in is one which the Supreme Court specifically left open in *Nyquist*. Here, as in the child benefit cases and contrary to *Nyquist*, state funds are provided to students regardless of whether they attend a private or public school. Here, contrary to *Nyquist*, there is no proof showing the predominance of benefits to one religious group." [433 F. Supp. at 108.]

In affirming the constitutionality of the Tennessee student assistance grant program, the *Blanton* Court referred to a South Carolina Supreme Court case that was dismissed for lack of substantial federal question (*Durham v. McLeod*, 413 U.S. 902 (1973)), on the same date that *Nyquist* and the block of related cases were decided by the U.S. Supreme Court: "Even if the footnote in *Nyquist* and the cases cited therein are viewed merely as a reservation of a particular question by the Supreme Court and not a forecast of the probable result, action by the Court on a case from the Supreme Court of South Carolina appears to lend further support to the constitutionality of the Tennessee program. In *Durham v. McLeod*, [cite omitted] the South Carolina court determined that a statute which authorized a state agency to make, insure, or guarantee loans to students, regardless of the institution of higher education which they attended, did not violate either the Constitution of the United States or the Constitution of South Carolina." [433 F. Supp. at 104.]

The *Blanton* court concluded its reliance on *Durham* by stating: "In the instant case, as in *Durham*, the emphasis of the aid program is on the student rather than the institution, and the institutions are free to compete for the students who have money provided by the program. No one religion is favored by the program, nor are private or religious institutions favored over public institutions." [433 F. Supp. at 104.]

CHIEF JUSTICE BURGER DISSENT IN NYQUIST

Chief Justice Burger, who dissented in *Nyquist*, felt that the majority had failed to take sufficient cognizance of the Free Exercise Clause. Chief Justice Burger's comments with respect to balancing the Free Exercise and Establishment Clauses appear at page 802 of his dissenting opinion. "The answer, I believe, lies in the experienced judgment of various members of this Court over the years that the balance between the policies of free exercise and establishment of religion tips in favor of the former when the legislation moves away from direct aid to religious institutions and takes on the character of general aid to individual families. This judgment reflects the caution with which we scrutinize any effort to give official support to religion and the tolerance with which we treat general welfare legislation." [413 U.S. at 802.]

Justice Burger also compared this tax relief and reimbursement legislation to the prior child benefit cases (*Everson v. Board of Education*, 330 U.S. 1 (1947) [bus transportation of children at church-related schools upheld], and *Board of Education v. Allen*, 392 U.S. 236 (1968) [textbooks at church-related schools upheld]) as follows: "The tuition grant and tax relief programs now before us are, in my view, indistinguishable in principle purpose, and effect from the statutes in *Everson* and *Allen*. In the instant cases as in *Everson* and *Allen*, the States have merely attempted to equalize the costs incurred by parents in obtaining an education for their children. The only discernible difference between the programs in *Everson* and *Allen* and these cases is in the method of the distribution of benefits: here the particular benefits of the Pennsylvania and New York statutes are given only to parents of private schoolchildren, while in *Everson* and *Allen* the statutory benefits were made available to parents of both public and private schoolchildren. But to regard that difference as constitutionally meaningful is to exalt form over substance. It is beyond dispute that the parents of public schoolchildren in New York and Pennsylvania presently receive the "benefit" of having their children educated totally at state expense; the statutes enacted in those States and at issue here merely attempt to equalize that "benefit" by giving to parents of private schoolchildren, in the form of dollars or tax deductions, what the parents of public schoolchildren receive in kind. It is no more than simple equity to grant partial relief to parents who support the public schools they do not use." [*Nyquist*, 413 U.S. at 803.]

PRECEDENT FOR 8. 2142

Chief Justice Burger quite properly referred to *Quick Bear v. Leupp*, 210 U.S. 50 (1906), in his dissenting opinion in *Nyquist*. In that case, the Supreme Court of the United States had occasion to respond to a complaint concerning the use of treaty funds provided by Congress for the purpose of paying for sectarian education of Indian children. The plaintiffs apparently made an indirect reference to constitutional restrictions without specifically claiming the contracts were unconstitutional. In referring to such, the Supreme Court noted: "Some reference is made to the Constitution, in respect to this contract with the Bureau of Catholic Indian Missions. It is not contended that it is unconstitutional, and it would not be. *Roberts v. Bradfield*, 12 App. D.C. 475; *Bradfield v. Roberts*, 175 U.S. 291." [210 U.S. at 81.]

The Supreme Court of the United States not only affirmed the constitutionality of education grants to the Indians for approved education in sectarian schools, but also indicated its belief that a denial of such grants would violate the Free Exercise "rights" of the Indians. The Court approved the following extract from the Court of Appeals' opinion: "The 'Treaty' and 'Trust' moneys are the only moneys that the Indians can lay claim to as matter of right; the only sums on which they are entitled to rely as theirs for education; and while these moneys are not delivered to them in hand, yet the money must not only be provided, but be expended, for their benefit and in part for their education; it seems inconceivable that Congress should have intended to prohibit them for from receiving religious education at their own cost if they so desired it; such an intent would be one 'to prohibit the free exercise of religion' amongst the Indians, and such would be the effect of the construction for which the complainants contend." [210 U.S. at 81.]

One would not have to search far to find congressional precedent for legislation such as that reflected in S. 2142. In 1943 President Roosevelt sent two messages to Congress urging the development of legislation aimed at easing the burdens of returning servicemen. On June 22, 1944, Congress responded by enacting the first so-called "G.I. Bill." Among other things, this bill provided for educational assistance payments to veterans who wished to complete or continue their education. The current legislation providing educational assistance benefits for veterans and their families is embodied in Chapters 34 and 35 of Title 38 of the United States Code, 38 U.S.C.A. §§ 1651, *et seq.*

Section 1681 of 38 U.S.C.A. provides for the payment of a specified amount each month to any qualified veteran "to meet, in part, the expenses of his subsistence, tuition, fees, supplies, books, equipment and other educational costs." Moreover, Congress has authorized payments to educationally disadvantaged veterans who desire to complete high school or who need tutorial or other remedial assistance in order to begin college. Sections 1691 and 1692 of 38 U.S.C.A. provide for monthly payments to such veterans in an amount equal to that paid under 38 U.S.C.A. §§ 1681 and 1682.

Nor has Congress ignored the educational needs of families of dead or disabled veterans. Section 1731, *et seq.* of 38 U.S.C.A. calls for monthly payments to parents or guardians of children whose fathers were killed or disabled in the military service of our country. Such payments are "to meet, in part, the expenses of the eligible person's subsistence, tuition, fees, supplies, books, equipment, and other educational costs."

Each of these provisions for educational assistance payments to individuals apply with equal force in the instance of attendance at church-related schools. The surviving war orphan, who attends St. Joseph's School, receives precisely the same check each month from the Federal government as the war orphan who attends Walnut Ridge Public School. Indeed, literally thousands of checks have been sent by "Uncle Sam" to persons and parents of persons who attend church-related schools pursuant to these federal programs. No court has ever condemned Congress for trying to "establish" a church by making such payments to individuals.

Another indication of Congressional thinking about the validity of educational assistance payments to parochial school children appears in 2 U.S.C.A. §§ 88a and 88b which provide for reimbursement to the District of Columbia public school system for its costs in providing a high school education to pages of the United States Supreme Court and Congress and for all other minors who are Congressional employees. The statute further provides (in subsection "(c)") appropriate reimbursement when such youngsters elect to attend private or parochial high schools.

The Federal government also makes direct educational assistance payments each month to senior R.O.T.C. students and even pays the full tuition of selected four-year R.O.T.C. students. 37 U.S.C.A. § 209 and 10 USCA § 2107. The R.O.T.C. cadet at Notre Dame receives the same check as his counterpart at Ohio State. No one has ever labeled this an "establishment" of religion.

A credit comparable to that reflected in S. 2142 is that available under § 39 of the Internal Revenue Code. A primary purpose for the imposition of the gasoline tax is construction and maintenance of highways. A purchaser of fuel (e.g., a farmer) pays the gasoline tax regardless of whether his vehicle is or is not going to be used on the highway. This is just like the parent who pays education taxes even though his child doesn't receive a free education at a public school. I.R.C. § 39 provides tax credits to taxpayers who pay the tax on their gasoline purchase but consume the fuel in vehicles which do not use the highways. The United States Congress could undoubtedly impose taxes

upon all for the purpose of maintaining highways; however, it obviously saw the equity in providing such a credit for those who paid the tax but didn't use the facilities for which the tax was adopted. We don't assert that this tax credit was mandated by constitutional protections; however, there is rational basis for its enactment. The same is true with regard to tax credits for parents who pay education taxes but educate their children pursuant to minimum standards without burdening the public school tax funds.

Another precedent, of course, lies in the federal government's exemption of religious organizations from income tax (I.R.C. § 501(C)(3)) and in the deduction treatment given to charitable contributions under the Internal Revenue Code (I.R.C. § 170). The history of these exemptions and deductions reveals a legislative conviction that the loss of revenue is more than offset by the relief from financial burdens which the government otherwise would have to meet by appropriations from public funds: "The government is compensated for its loss of revenue by its relief from financial burdens which would otherwise have to be met by appropriations from public funds." [H. Rep. No. 1860, 75th Congress, 3d Session, 19 (1938).]

The U.S. Supreme Court spoke of the valid objective of tax deduction for gifts to religious, educational, and other charitable objects in *Helvering v. Bliss*, 293 U.S. 143 (1934): "In the Act of October 3, 1917, Congress, in order to encourage gifts to religious, educational and other charitable objects, granted the privilege of deducting such gifts from gross income, but limited the total deduction to 15 percent of the taxpayer's net income, calculated in the first instance without reference to the amount of such contributions. All of the later Acts have contained a like provision." [293 U.S. at 147.]

The Federal government, through the Internal Revenue Code, has historically provided tax credit incentives for individual accomplishment of public purposes; and the U.S. Supreme Court has reflected an extreme reluctance to interfere with legislative decisions concerning subjects of taxation and tax exemptions and credits. For example, even when referring to state legislative flexibility with respect to tax decisions, the U.S. Supreme Court in *Carmichael v. Southern Coke & Coke Co.*, 301 U.S. 494 (1937) stated:

"It is inherent in the exercise of the power to tax that a state be free to select the subjects of taxation and to grant exemptions. Neither due process nor equal protection imposes upon a state any rigid rule of equality of taxation. [Cite omitted.] This Court has repeatedly held that inequalities which result from a singling out of one particular class for taxation or exemption infringe no constitutional limitation. [Cite omitted.]

"Like considerations govern exemptions from the operation of a tax imposed on the members of a class. A legislature is not bound to tax every member of a class or none. It may make distinctions of degree having a rational basis, and when subjected to judicial scrutiny they must be presumed to rest on that basis if there is any conceivable state of facts which would support it. [Cite omitted.]" [301 U.S. at 500-510 (emphasis added).]

Congressional discretion in levying and collecting taxes (conferred by Article I, Section 8 of the Constitution) is subject to even fewer restraints than the decisions of state legislatures. *Steward Machine Co. v. Davis*, 301 U.S. 579, 581 (1937).

A CURRENT VIEW

The enlightened view expressed by Chief Justice Burger in his Nyquist dissent seemed to prevail in *Wolman v. Walter*, where in the Supreme Court permitted continued implementation of an \$88 million state program of assistance to children at church-related schools. The Court in *Wolman* noted the constitutional distinction between child aid and church aid. "The danger perceived in *Meek* arose from the nature of the institution, not from the nature of the pupils." 53 L.Ed.2d at 732.

Inasmuch as the Supreme Court has not yet had occasion to consider the constitutionality of federal tax relief legislation such as S. 2142, we must look to other Establishment Clause decisions for guidance. The most recent statement by Justice Powell in his separate opinion in *Wolman v. Walter* suggests that the Court is prepared to approve secular assistance to pupils and parents rather than to institutions:

"The persistent desire of a number of States to find proper means of helping sectarian education to survive would be doomed. This Court has not yet thought that such a harsh result is required by the Establishment Clause. Certainly few would consider it in the public interest. Parochial schools, quite apart from their sectarian purpose, have provided an educational alternative for millions of young Americans; they often afford wholesome competition with our public schools;

and in some States they relieve substantially the tax burden incident to the operation of public schools. The State has, moreover, a legitimate interest in facilitating education of the highest quality for all children within its boundaries, whatever school their parents have chosen for them.

"It is important to keep these issues in perspective. At this point in the 20th century we are quite far removed from the dangers that prompted the framers to include the Establishment Clause in the Bill of Rights. See *Waltz v. Tax Commission* [cite omitted]. The risk of significant religious or denominational control over our democratic processes—or even of deep political division along religious lines—is remote, and when viewed against the positive contributions of sectarian schools, any such risk seems entirely tolerable in light of the continuing oversight of this Court. Our decisions have sought to establish principles that preserve the cherished safeguard of the Establishment Clause without resort to blind absolutism. If this endeavor means a loss of some analytical tidiness, then that too is entirely tolerable. Most of the Court's decision today follows in this tradition, and I join Parts I through VI of its opinion." [53 L.Ed.2d at 741-742.]

It is my opinion, based upon a careful analysis of the recent *Wolman v. Walter* opinion and the other Establishment Clause cases decided in the last 30 years, that the constitutionality of S. 2142 would be sustained by the United States Supreme Court.

Very truly yours,

DAVID J. YOUNG.

[Attachment to opinion letter]

TALLY AFTER 30 YEARS OF NONPUBLIC STUDENT ASSISTANCE LITIGATION
PROGRAMS IN CONFORMITY WITH THE FIRST AMENDMENT

School Bus Transportation.¹
Textbooks.²
Standardized Tests and Scoring Services.³
Speech and Hearing Diagnosis Services.³
Physician, Dental and Optometric Services.³
Neutral-Site Therapeutic Services.³
Neutral-Site Remedial Education Services.³
Programs for Handicapped.³
Neutral-Site Guidance and Counseling.³
Real Property Tax Exemption of Religious Organization.⁴
Tax-Exempt Bond Construction Assistance to Church-Related Colleges.⁵
Direct Money Grants to Church-Related Colleges.⁷
Federal Construction Grants to Church-Related Colleges.⁶
Assistance Grants for Students Attending Church-Related Colleges.⁸

PROGRAMS VIOLATIVE OF THE FIRST AMENDMENT

Salary Supplements for Lay Teachers.⁹
Secular Education Service Contracts Calling for State to Pay Nonpublic School for Providing Secular Education.¹⁰
Low-Income Parental Grants.¹¹
Grants to Schools for Cost of General Testing and Record-Keeping.¹²
Parental Reimbursement Grants.¹³
Parental Tax Credits.¹¹
Grants to Schools for Maintenance and Repair.¹¹
Instructional Equipment and Material Loaned to Schools.¹⁴
On-Premise Education Services.¹⁴
Instructional Equipment and Material Loaned to Pupil.⁸
Field Trip Transportation.³

A Program That Hopefully Will Be Found to Be in Conformity With First Amendment

- ¹ *Everson v. Board of Education*, 330 U.S. 1 (1947).
- ² *Board of Education v. Allen*, 392 U.S. 236 (1968).
- ³ *Wolman v. Walter*, — U.S. —, 53 L.Ed.2d 714 (1977).
- ⁴ *Waltz v. Tax Commission*, 397 U.S. 664 (1970).
- ⁵ *Tilton v. Richardson*, 403 U.S. 672 (1971).
- ⁶ *Hunt v. McNair*, 413 U.S. 734 (1973).
- ⁷ *Roemer v. Maryland Public Works Board*, 426 U.S. 736 (1976).
- ⁸ *Americans United for Separation of Church and State v. Blanton*, 433 F. Supp. 97 (M.D. Tenn. Nashville Div. 1977) (per curiam affirmed, Supreme Court #77-250).
- ⁹ *Earley v. DiCenso*, 403 U.S. 602 (1971).
- ¹⁰ *Lemon v. Kurzman*, 403 U.S. 602 (1971).
- ¹¹ *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973).
- ¹² *Levitt v. Committee for Public Education*, 413 U.S. 472 (1973).
- ¹³ *Sloan v. Lemon*, 413 U.S. 825 (1973).
- ¹⁴ *Meek v. Pittenger*, 421 U.S. 349 (1975).

HARVARD LAW SCHOOL,
Cambridge, Mass., December 21, 1977.

HON. ROBERT PACKWOOD,
HON. DANIEL PATRICK MOYNIHAN,
U.S. Senate,
Washington, D.C.

DEAR SENATORS PACKWOOD AND MOYNIHAN: I am pleased to respond to your invitation to comment on the constitutional validity of your bill to provide a limited income-tax credit for tuition payments to nonpublic elementary and high schools as well as colleges and universities. The constitutional issue relates, of course, to credits for tuition at church-related institutions.

On the basis of judicial authority, as you are quite aware, the credit for payments to church-related elementary and high schools is deemed to violate the First Amendment guarantee against establishment of religion. In 1971 the Supreme Court held that state reimbursement to such schools for the cost of teachers' salaries, textbooks and instructional materials in certain "secular" subjects was an infringement of the guarantee. *Lemon v. Kurtzman*, 403 U.S. 602. A primary purpose of the plan was necessarily to aid religion, in view of the permeating nature of the religious component in those schools; and an effort to separate the secular and religious components for the purpose of assessing the aid would only aggravate the constitutional problem by involving ("entangling") the state in the monitoring and classifying of instruction on religious lines. The decision was by an 8-1 majority, with Justice White dissenting. At the same time, the Court distinguished the case of state aid to church-related universities (apart from theological studies), on the ground that typically and presumptively institutions of higher learning were not engaged in religious indoctrination: their curriculum, faculty and students were less oriented in that direction and the institutions were generally indistinguishable from public and private non-church-affiliated universities. *Tilton v. Richardson*, 403 U.S. 672.

In an effort to escape from the condemnation of the *Kurtzman* decision, New York and other states devised a plan of reimbursement or tax deductions to parents, instead of payments to the schools themselves. It was thought that thereby the objection of "entanglement" would be avoided, and the considerations of pluralism in education and economic fairness to parochial-school families were spelled out in the statute and earnestly argued to the Court. The Court saw no persuasive reason to distinguish its earlier decision, and held the parental reimbursement and tax deduction provisions invalid. The purpose and effect remained the same; and while administrative supervision was avoided in the new law, the prospect of political entanglement of church and state persisted, in that the program was open-ended and would invite an ongoing political struggle for tax benefits along lines of proprietary and institutional claims of religious societies, a kind of church-state involvement that would be at odds with the First Amendment. The decision was 8 to 1 (White, J. dissenting) on reimbursement to low-income parents, and 6 to 3 on tuition deductions for more affluent parents, scaled inversely to the gross income of the taxpayer. (White and Rehnquist, JJ., and Burger, C.J., dissented.) *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973). To the same effect is *Sloan v. Lemon*, 418 U.S. 825 (1973) (Pennsylvania Parent Reimbursement Act).

In the light of these decisions, reached after full argument and a rich outpouring of scholarly writing on the subject, it is difficult to see how a federal tax credit could survive. Indeed, the more unstable position appears to be the distinction in favor of institutions of higher learning. In a recent decision the distinction was maintained only by a 5-4 vote, with Justices Brennan, Marshall, Stewart and Stevens dissenting. *Roemer v. Maryland Public Works Bd.*, 426 U.S. 738 (1976) (grants to colleges and universities for non-sectarian purposes). While it may be true that a question of constitutional law is never settled until it is settled right, the conferring of a tax benefit that is interdicted by recent controlling decisions would seem to present a trap for taxpayers, who would be subject to deficiency assessments upon the invalidation of the credits.

I confess that as an original question I support the Court's decisions in the cases cited above. I argued to that effect in an article published before the decisions of 1971. "Public Aid to Parochial Schools", 82 *Harvard Law Review* 1660 (1969), a copy of which is enclosed.

A brief look at certain counter-arguments may be useful. On the historical side, the argument that the non-establishment guarantee prohibits only preferential

aid has been consistently rejected. Madison's Remonstrance against the Virginia Assesment Bill was not muted because the Bill would have allowed each taxpayer to designate the religious society he wished to aid; whether the Remonstrance furnished the philosophical basis for the First Amendment, and whether the non-establishment clause is incorporated in the Fourteenth, are questions on which it is unlikely that further light can be shed.

On the practical side, it is argued that it is unfair to tax parochial-school families for the support of facilities they do not use, on religious grounds. But if religious indoctrination is indeed a main reason for choosing these schools, then public aid for this aspect of their mission would in fairness entail public aid for, say, Baptist Sunday school education, which corresponds to an inseparable part of parochial-school education.

To be sure, churches are validly given an exemption from local property taxes. *Walz v. Tax Commission*, 397 U.S. 664 (1970). But symbolically, this is an affirmation that just as the state may not support the church, so the church may not be made to support the state. And practically, the property-tax exemption has a fixed ceiling and is not the subject of open-ended conflict or bargaining between church and state, but is on the contrary a principle of peace.

Finally, it is true that tax-deductible charitable contributions may include gifts to churches. But here the class of deductions is an extensive one, so that the focus is not on religious charities. By diffusing the benefit, there is a de-fusing of the church-state involvement. If this is to furnish a precedent, it would be a tax deduction or credit for all forms of parental expenses to further a child's education: music lessons, foreign-language instruction, athletic coaching, etc. This presents an open question, unlike a credit limited to tuition. Whether it would in any event be too great a drain on the revenues, and whether it would predominantly benefit the more affluent, are issues that would have to be faced apart from the constitutional one.

Sincerely,

PAUL A. FREUND.

PUBLIC AID TO PAROCHIAL SCHOOLS

by

PAUL A. FREUND

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COMMENTS

PUBLIC AID TO PAROCHIAL SCHOOLS

Paul A. Freund *

Taking the recent Supreme Court decision in Board of Education v. Allen as his starting point, Professor Freund examines the constitutionality of state support for church-related schools in light of three policies behind the first amendment's religious guarantees: voluntarism, mutual abstention, and governmental neutrality. He concludes that the interests of both Church and State would best be served were the Court to constrict the future operation of Allen.

SINCE June 10, 1968, a discussion of state aid to parochial schools can profitably start with the Supreme Court decision of that date in *Board of Education v. Allen*.¹ The case was brought by members of a local school board to enjoin the Commissioner from enforcing a law of New York, enacted in 1965 and amended in 1966, that requires them to lend textbooks, under stated conditions, to students enrolled in grades seven to twelve of parochial and private, as well as public schools.² The statutory conditions are that the book be required for use as a text for a semester or more in the particular school and that it be approved by a board of education or similar body, whether or not designated for use in any public school. By judicial interpretation in New York, this duty embraces the loan of "secular," not "religious" textbooks. On cross-motions for summary judgment on the pleadings the trial court held the statute unconstitutional under the first and fourteenth amendments; the appellate division reversed on the ground that the complainants had no standing to raise the question.³

The New York Court of Appeals, differing from both courts below, held, in a four-to-three decision, Judges Van Voorhis, Fuld and Breitel dissenting, that the law does not contravene either the state or federal constitution, "merely making available

* Carl M. Loeb University Professor, Harvard University. A.B., Washington University, 1928; LL.B., Harvard, 1931, S.J.D., 1932.

This article is based on a paper read before the Section on Individual Rights and Responsibilities, American Bar Association, August 4, 1968.

¹ 392 U.S. 236.

² N.Y. EDUC. LAW § 701 (McKinney Supp. 1968).

³ 51 Misc. 2d 297, 273 N.Y.S.2d 239 (Sup. Ct.), *rev'd*, 27 App. Div. 2d 69, 276 N.Y.S.2d 234 (1966).

secular textbooks at the request of the individual student and asking no question about what school he attends.”⁴ It is hard to accept this bland description literally since under the law a loan is limited to books prescribed as texts in the school attended by the borrowing student. Moreover, pursuant to its statutory authority, the state Department of Education has provided forms for textbook requisition, to be filled out on behalf of students and sent to the local school board by an official of a parochial or private school.

On appeal to the Supreme Court, the decision was affirmed, Justice White writing for the majority, with a concurring opinion by Justice Harlan and dissenting opinions by Justices Black, Douglas, and Fortas.⁵ The majority opinion is in terms a guarded one. There is repeated reference to the lack of a factual record. As there was no evidence concerning the nature of the books requested or concerning the character and practices of the parochial schools involved, these matters were taken most favorably to the defense. The opinion is a narrow one, too, in its stress on the formal aspects of the arrangements, namely, that the books were loaned, with title remaining in the state, and that the requests were made by and on behalf of the students, not the school. “So construing the statute,” said Justice White, “we find it in conformity with the Constitution, for the books are furnished for the use of individual students and at their request.”⁶

How crucial were these limiting factors? The case is obviously the beginning, not the end, of constitutional litigation — now fostered in the case of federal programs by the decision in *Flast v. Cohen*,⁷ recognizing federal taxpayers’ suits — to determine the bounds of public aid to parochial schools. Suppose, for example, that the Court is ready to pursue its negative pregnant and to inquire into the nature of textbooks and the character of teaching in parochial schools. That prospect might understandably offend parochial school authorities, and pressures would mount for unconditional grants of funds, free from the textbook strings, for certain curricular fields. This is precisely what has occurred in Pennsylvania, where a statute was recently enacted appropriating a fixed annual amount, to be derived so far as possible from the public proceeds of horseracing, for the support of the teaching in parochial schools of mathematics, modern

⁴ 20 N.Y.2d 109, 117, 228 N.E.2d 791, 794, 281 N.Y.S.2d 799, 805 (1967).

⁵ Board of Educ. v. Allen, 392 U.S. 236 (1968).

⁶ *Id.* at 244 n.6. The unsatisfactory abstractness of the record for purposes of a definitive decision is reminiscent of *Times Film Corp. v. Chicago*, 363 U.S. 43 (1961), which has become a derelict in the field of motion picture censorship.

⁷ 392 U.S. 83 (1968).

foreign languages (Latin is evidently too obsolete or too explosive), and physical training.⁸ The funds could presumably be used for books, equipment, buildings, or teachers' salaries, in the discretion of the schools. Gone is the elaborate minuet of the individual student's request for specific books and its approval by the public school board; all is now modern ballet, bold and muscular.

Will the Court re-score its composition to accommodate the new movement? Indeed, the movement may develop even more vigorously. Arguing that the aid in the New York case was sustained because it was available neutrally to pupils in all accredited schools, the proponents are likely to insist that such aid is not merely permissible, but is mandatory, since the first amendment enforces just this standard of neutrality among religions and between a religious and a secular promotion of a common public purpose. Later I will turn to this question of mandatory aid as an issue of principle. Meanwhile it can be said that whatever the force of this logic, to make public aid mandatory would seem as a matter of prediction to call for more than a re-scoring of the Court's composition; it would, more probably, require a re-composition of the Court itself.

The decision in the New York case purported to rest on the principle of *Everson v. Board of Education*,⁹ a 1947 decision upholding state reimbursement of bus fares for school children regardless of the school they attend. *Everson* was a five-to-four decision, which Justice Black, writing the majority opinion, was at pains to say went to "the verge."¹⁰ It in turn rested on the analogy of police and fire protection for church buildings: a general safety measure could be applied for the benefit of the community — indeed might have to be so applied — irrespective of the religious or non-religious character of the beneficiaries. Thus it could be said that an ordinance permitting schoolchildren to ride for half fare might (or must) encompass all, whatever school they attend. The same principle would, in my view, support free medical examinations or hot lunches for all schoolchildren, wherever they might be found. It is true that buses and nurses and lunches may well benefit the parochial school by making it more attractive to parents or less expensive for the church; the sharp dichotomy between pupil benefit and benefit to the school seems to me a chimerical constitutional criterion. It is akin to the ineffectual effort in the mid-nineteenth century to classify such local measures as pilotage laws as either regu-

⁸ PA. STAT. ANN. tit. 24, §§ 5601-09 (Supp. 1969).

⁹ 330 U.S. 1 (1947).

¹⁰ *Id.* at 15.

lations of safety or regulations of commerce, and to make their validity turn on the classification. It was the beginning of wisdom when the Court candidly recognized that such measures were regulations of both safety and commerce, and that before a sensible judgment could be made, a closer look had to be taken at their consequences for both, as well as their exigency, in light of the policies underlying the commerce clause.

Now buses and nurses and lunches are not ideological; they are atmospherically indifferent on the score of religion. Can the same be said of textbooks chosen by a parochial school for compulsory use, interpreted with the authority of teachers selected by that school, and employed in an atmosphere deliberately designed through sacred symbol to maintain a religiously reverent attitude? Perhaps if the atmosphere had been so delineated in the record, the result would have been different. If so, as I have suggested, either the actual significance of the decision for parochial schools is very limited or on a case-by-case basis such schools will confront what they would regard as a highly unwelcome and impertinent secular intrusion into their internal affairs.

In the realm of books, the apt analogy to bus fares would be the public library, accessible to every schoolchild, aiding the pupils and no doubt the schools themselves, but managed by public authorities not delegating responsibility for selection of books or personnel or symbolic decor to any religious group, and certainly not engaged in the business of supplying instructional materials, the staple requirements of denominational schools. It is hardly surprising that Justice Black, the author of the bus decision, was a fierce dissenter in the textbook case. Of course a bridge that carries you to the verge is apt to be burned behind when you discover that the verge is farther ahead after all. The judicial process resembles the episode that began when the King of England visited the White House during World War II. Both the Chief Justice and the senior member of the foreign diplomatic corps, then the British Ambassador, were invited to a state dinner for His Majesty. There had long been an unresolved issue of precedence as between those two offices, and the matter was put before President Roosevelt. Displaying more of his Columbia Law School training than was his wont, the President reasoned that the Ambassador's claim rested on his representing his sovereign; and since the sovereign himself was to be present, the Ambassador should be subordinated to the Chief Justice. Thereafter, when the same issue of precedence again arose (the sovereign being present) the protocol officer was able to announce happily that President Roosevelt had determined that the

Chief Justice outranks the head of the diplomatic corps, and so the rule of law was settled — by precedent.

It is not enough, to be sure, to maintain that precedent was reinterpreted in the New York case. After all, the newer majority may have read the Constitution more recently, or they may have read further in Robert Frost than “Good fences make good neighbors” — may in fact have reached the lines:

*Why do they make good neighbors? Isn't it
Where there are cows? But here there are no cows.
Before I built a wall I'd ask to know
What I was walling in or walling out,
And to whom I was like to give offense.
Something there is that doesn't love a wall,
That wants it down.*

To translate Frost into legal prose, why does observance of the ancient religious guarantees of the first amendment continue to be important? Beyond ancestral voices, are there now any grounds of policy or polity that are threatened? Three such grounds need to be considered: voluntarism in matters of religion, mutual abstention of the political and the religious caretakers, and governmental neutrality toward religions and between religion and non-religion. In a large sense, both of the guarantees of the first amendment — the free-exercise and the non-establishment clauses — are directed harmoniously toward these purposes, though in the context of specific governmental measures the two guarantees may point in different directions and the purposes themselves may be discordant.

The policy of voluntarism generates least tension between the free-exercise and non-establishment clauses. Religion must not be coerced or dominated by the state, and individuals must not be coerced into or away from the exercise or support of religion. The school-prayer decisions¹¹ reflected the principle of voluntarism on both counts: taxpaying families could not be required to support a conceded religious activity; nor could pupils, by the psychological coercion of the schoolroom, be compelled to participate in devotional exercises. When the state provides textbooks, taxpayers are forced to finance books selected by sectarian authorities for instruction in denominational schools maintained at considerable expense to preserve and strengthen the faith. Of course those schools serve a public purpose; that is why the loan of textbooks was held valid in the early *Cochran*

¹¹ *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

case,¹² before the religious guarantees were thought to be embodied in the fourteenth amendment.

It will be argued that if the general taxpayer is coerced for an improper purpose where public funds buy parochial school books, the parochial school families are similarly coerced into paying taxes to support public schools, which, to be sure, their children are legally free to attend but which they regard either as an enemy of all religion, or, if "secularism" itself be deemed a form of religion, then as a friend of a repellent kind of religion. Note that this argument does not deny that the principle of voluntarism is violated by aid to parochial schools; the argument pleads rather by confession and avoidance, relying on an argument of reciprocity or fairness or neutrality. Note too that if it is indeed the case that public schools are an enemy of religion, or a fountainhead of an obnoxious kind of religion, then the argument, it seems, should call for the abolition of the public schools as being themselves in violation of the first amendment. I will return presently to these arguments of avoidance on the score of governmental reciprocity.

If textbooks were selected by the public school authorities to be used in public and parochial schools alike, the problem of voluntariness for the taxpayer might be mitigated somewhat, but by no means removed. It was this aspect of the New York case — the selection of books by the parochial schools — that particularly troubled Justice Fortas, who, like Justices Black and Douglas, dissented. But consider the position if the selections were in fact to be made by the public authorities. The parochial schools might well consider their own autonomy — their voluntarism — compromised. In certain school districts the reverse might obtain: for the sake of uniformity the school authorities would be pressured into selecting books for the public schools

¹² *Cochran v. Louisiana State Bd. of Educ.*, 281 U.S. 370 (1930). The decision in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), though it involved a parochial school, was placed on the ground of liberty to direct the upbringing of children and to pursue a lawful occupation; the opinion also encompassed a companion case involving a private military academy not church-related. *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948), was the first application of the non-establishment clause to the states, although a dictum in *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940), had stated the proposition. It has been argued with much cogency that the first amendment guarantee against a federal law "respecting an establishment of religion" was essentially a shield of federalism, and that neither historically nor textually does it lend itself (as contrasted with "free exercise of religion") to absorption into the guarantees of liberty and property in the fourteenth amendment. See Corwin, *The Supreme Court as a National School Board*, 14 *LAW & CONTEMP. PROB.* 3 (1949). Since, however, the Court has continued to treat the non-establishment guarantee as embracing both federal and state laws, the present discussion does not differentiate the sources of public aid.

that were particularly desired by the parochial schools. In that event there would be a double loss of voluntariness by the general taxpayer.

This risk of intrusion from one side or the other points up a second policy embodied in the religious guarantees — mutual abstention — keeping politics out of religion and religion out of politics. The choice of textbooks in any school is apt to be a thorny subject; witness the current agitation over the recognition of the Negro, his contributions and his interests, in the books assigned in public schools. For the identity and integrity of religion, separateness stands as an ultimate safeguard. And on the secular side, to link responsibility for parochial and public school texts is greatly to intensify sectarian influences in local politics at one of its most sensitive points.

The third policy — in addition to voluntarism and mutual abstention — is governmental neutrality, among religions and between religion and non-religion. It is this policy that is chiefly relied on by proponents of public aid. The concept of neutrality is an extremely elusive one, generally raising as many questions as it answers, because it depends on sub-concepts like comparability and on definitions (whose?) of religious and non-religious activities, on a determination whether it overrides the policies of voluntarism and mutual abstention, and on a decision whether in any event it requires or only permits public aid. Let me illustrate one difficulty of definition. One might suppose that “neutrality” requires the law to deal even-handedly with Jehovah’s Witnesses and Unitarians. Yet in the school prayer cases Unitarians (speaking generally) succeeded in eliminating all ceremonial prayers from the public schools, while in the flag-salute case Jehovah’s Witnesses succeeded only in getting themselves excused from a ceremony that to them was at least as unacceptable and religious in nature as the prayers were to the Unitarians.¹³ In fact, the Witnesses regard the flag-salute as the profanation of a religious gesture, a bowing before idols, a Black Mass in the schoolroom. And yet their claim was recognized only to the extent of excusal, exposing them to the repugnant ceremony. Why? Because the prevailing, dominant view of religion classifies the flag salute as secular, in contravention of the heterodox definition devoutly held by the Witnesses. Neutrality, that is, does not assure equal weight to differing denominational views as to what constitutes a religious practice.¹⁴

¹³ Compare *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) with *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963).

¹⁴ It may be suggested that a conventional definition of religion or religious practice is controlling in applying the non-establishment clause, while a heterodox

Nor is there any general principle that requires the state to compensate those who out of religious conviction incur a handicap under law. Pupils in public schools may (perhaps must) be excused on their religious holidays; but it scarcely follows that those pupils are not responsible for the work they miss, even if they must resort to the expense of private tutoring. Businesses that close on Saturday as a religious observance and must close on Sunday under the law are disadvantaged materially because of religious faith; but exemption from the Sunday laws is not required.¹⁵ The state requires a certain formal ceremony to render a marriage valid in law, and provides magistrates at public expense who are available to satisfy this requirement. For those couples, however, whose religious faith compels them to hold an ecclesiastical ceremony, additional expense is involved, either to the couple or to their church or both. Must the state therefore compensate the minister or the bridegroom and bride? Would it help their case to insist that no true marriage can be celebrated without churchly blessing and that a ceremony before a judge is anti-religious, a profanation subsidized with public money? Would not the answer be: If your religion prevents you from availing yourself of the public facility and impels you to make a financial sacrifice for the sake of your faith, surely the spirit of religion is the better served by your act.¹⁶

At this point account must be taken of *Sherbert v. Verner*,¹⁷ which held that eligibility for unemployment benefits cannot be denied to a man who is not willing to accept a job calling for Saturday work, where his refusal is based on religious conviction. Proponents of public aid would generalize this holding to

version is entitled to protection under the free-exercise clause, which safeguards the nonconformist conscience. This analysis is indeed useful, and indicates that the apparent discrepancy in definition is not unprincipled; but from the point of view of an idiosyncratic sect the sense of non-neutrality cannot but remain.

¹⁵ See, e.g., *Gallagher v. Crown Kasher Super Market*, 366 U.S. 617 (1961).

¹⁶ A realistic appraisal of financial burdens from the standpoint of neutrality would have to take into account tax exemptions for the property of church-related and other private schools, including an inquiry into the correlation between the extent of property holdings by the respective churches and their maintenance of separate schools.

The traditional tax exemption of church-related property is sometimes advanced as a legal argument for subsidies, which are viewed as an economic equivalent. The argument, however, proves too much, since church buildings themselves are exempted, and it would hardly be argued that therefore subsidies for the building of churches would be valid. Moreover, the symbolism of tax exemption is significant as a manifestation that organized religion is not expected to support the state; by the same token the state is not expected to support the church. Psychologically, too, the exemption differs from subsidy; the former is viewed as an entrenched status, the latter as a recurring political issue.

¹⁷ 374 U.S. 398 (1963).

establish the principle that a public benefit (unemployment compensation or subsidized secular education) cannot be withheld where the claimant's ineligibility derives from his pursuit of a religious calling (refraining from work on Saturday or attending parochial school). Several points should be made in response to such a proposition. First, it is entirely too broad, as the *Sherbert* opinion indicates. Suppose the claimant's religious belief required him to abstain from all work, or to work only one day a week, or only in a church. The opinion points out that in the case before them, to recognize the claim would not materially affect the working of the secular program; only two of the more than 150 Seventh Day Adventists in the area had been unable to obtain suitable employment. On this ground the case was distinguished from the question of exemption from Sunday closing laws.¹⁸ Moreover, the case did not involve subsidy to a religious institution, but dispensation from a general regulatory law or condition. Dispensation granted under the free-exercise clause is quite distinct from disbursement challenged under the non-establishment clause, the very kind of measure that precipitated the historic struggle for religious liberty and disestablishment in Virginia. Finally, the *Sherbert* case at most would relate to a shared time arrangement, that is, to a plan making the public educational program available to those whose religious convictions inhibit them from full-time attendance at a public school. Whether such an arrangement can be maintained without detriment to the concept of a unified school day, like that of a unitary day of rest, would seem to lie in the judgment of those administering the secular program. I do not argue at all that shared time is unconstitutional, but only suggest that it is the limit, under precedent and principle, to which the policy of neutrality carries us; and at present the parochial school authorities do not seem, on their part, to regard it as an acceptable solution.

Their reluctance may stem from a rejection of the premise of separability of education into a religious and a non-religious component. That premise clearly underlies the Court's thinking in *Allen*, and it has been presupposed thus far in this discussion. Ironically, the premise is incompatible with the philosophy that largely fosters the maintenance of parochial schools.¹⁹ They do,

¹⁸ *Id.* at 399 n. 2, 408-09.

¹⁹ See, e.g., Drinan, *Does State Aid to Church Related Colleges Constitute an Establishment of Religion? — Reflections on the Maryland College Cases, 1967* UTAH L. REV. 491, 510:

The exclusion of nonsecular ideas and forces from education, even if it were possible, is absurd. Neither the secular nor the sacred is comprehensible if one is isolated from the other; for the state to try to isolate them in its

to be sure, perform a public function and satisfy state-imposed standards for compulsory education; but, their proponents insist, they do so with a difference that is of central importance for religion. Suppose a state were to require bus transportation of school pupils over long distances and made buses available to all. If a church-related school chose to maintain its own bus in order to conduct religious services during the journey, the secular interest in safety would be satisfied perfectly, and yet a serious question would surely remain whether the transportation could be publicly subsidized.

We turn, then, to this alternative thesis of public aid: that there is a religious element in education that is pervasive, inescapable, and inseparable. This position, in turn, may take either of two forms — that public school education is empty of religious content and therefore not genuine education at all, or that it inculcates a religion of its own, secularism, and hence the parochial schools are entitled to equal support for their brand of religious education.

Consider now each of these positions and its consequences — first, that public school education is not true education. If it is deficient because under the Constitution public schools cannot impart religion (as they cannot provide devotional prayers), then the argument is simply that since by reason of the first amendment the state cannot subsidize religion in common schools, it must by reason of the first amendment subsidize religion in church schools — surely an incongruous result. Or the meaning may be that the public schools are wanting in a religious atmosphere that they could constitutionally create but that they fail to provide. Here the concept of “religious” is being employed in a different and non-constitutional sense, to mean what I have described on another occasion as concern for moral reasoning and a quality of teaching that conveys a sense of reverence for knowledge, humility in the face of the unknown, and awe in the face of the unknowable.²⁰ To these attributes of an educational process the Constitution sets no barriers, and I earnestly trust that they are embodied in public school teaching, as I am sure they are in the classrooms of the best teachers. But if parents

schools is to attempt a task which educators, believers, and nonbelievers must all agree is impossible.

The crucial question, therefore, is this: what is the state to do with those individuals and groups whose basic religious convictions forbid them to separate the “secular” and “sacred” in education?

A valuable compendium of views on the issue of public aid is *THE WALL BETWEEN CHURCH AND STATE* 55-116 (D. Oaks ed. 1963).

²⁰ P. FREUND & R. ULICH, *RELIGION AND THE PUBLIC SCHOOLS* 19-22 (1965).

find these attributes lacking, their first recourse is to seek to improve the quality of education offered in their school, or seek a transfer to another school, or move to another district. Failing that, they may be so dissatisfied that they will send their children to a school of better quality outside the public school system, whether it be a private non-church school or a parochial school. But in seeking this superior quality of inspiration they surely lay no basis for a constitutional claim to be reimbursed by the state, any more than in the case of an ecclesiastical wedding. And so I conclude, taking the ambiguous premise that education without religion (whether in the constitutional or non-constitutional sense) is not true education, it by no means follows that education in parochial schools must or may be subsidized by the state.

Now we are ready to consider the alternative view of inseparability — that public school education is itself necessarily religious, but in a perverse sense, as so-called secularism is itself a form of religion, however degraded a form. If a state school worships the Anti-Christ, equal support is due to a school that worships Christ. But we must be careful not to construct a syllogism out of a metaphor of this kind, any more than out of the countervailing metaphor, “wall of separation.” To say that Americans worship what William James called the bitch-goddess, Success, is not to assert anything relevant to the usage of “religion” in the first amendment. To say that the absence of Crucifixes or Torahs in a public school is itself a religious statement is either a play on words or an idiosyncratic characterization, like the Jehovah’s Witnesses’ view of the flag salute, which is not controlling as a definition of religion. To say that moral training cannot be separated from religious training in a constitutional sense is to contradict the judgment underlying the one reference to religion in the constitutional text prior to the Bill of Rights — that no religious test “shall ever be required” for “any Office or public Trust under the United States.”²¹ For if good moral character is relevant to holding a position of public trust, and if religious training is essential to sound morality, it would have been reasonable to allow a religious test as at least a presumptive assurance of moral qualification.

Actually the confrontation between so-called secularism and the religion of parochial schools is not as stark as I have here assumed in order to meet the proponents of public aid on their own ground. In point of fact most parents who avail themselves of the public schools are anxious that their children shall receive

²¹ U.S. Const. art. VI.

religious training, but outside the community of the school, in the home and the church or in an after-hours church school or a Sunday school. Taking this into account, the idea of reciprocity or neutrality becomes more complex. Public aid to parochial schools maintained by Catholics or Lutherans or Orthodox Jews would in some measure benefit the religious mission of these faiths, because religion, on our present hypothesis, permeates all their instruction. As a counterpart, the Baptists and other separationists could fairly insist that equalization would require some contribution by the state to their own churches or Sunday schools which perform the same mission that would be subsidized in the parochial schools of other denominations. It would be ironic if the Baptist separationists, who triumphed over the Anglican theocrats in the historic struggle against establishment in Virginia, should find themselves disadvantaged in the name of a Constitution that repudiated establishment.

Are there, then, any forms of public aid to parochial schools that should be sustained? I would enumerate the following, which are general non-religious state activities that operate in effect to mitigate certain costs borne by parochial schools or their patrons:

1. General welfare services for children, wherever they may be located, including medical examinations and hot lunches.
2. Prizes and awards in general academic competition, usable by the recipients as they please, like veterans' benefits that constitute deferred compensation.
3. Shared time instruction in the public schools, treating participating parochial school children as part-time public school children.

Institutions of higher learning present quite a different question, mainly because church support is less likely to involve indoctrination and conformity at that level of instruction.

One final observation. In facing the issues that will soon be raised — provision of textbooks not on loan or not in form requested by pupils, or books of a character or for use in schools different from the circumstantial presumptions in the New York case; unconditional grants for specified areas of learning; lump-sum grants — three courses are open constitutionally: to hold the aid mandatory, to hold it permissible, and to hold it impermissible. The mandatory result seems least pre-figured, notwithstanding the logical course of the argument from "neutrality." A choice between the permissible and the forbidden is in essence a choice whether to leave the issue to the political process in each state or locality, or to defuse the political issue. Ordinarily I am disposed, in grey-area cases of constitutional law, to let the political

process function. Even in dealing with basic guarantees I would eschew a single form of compliance and leave room for different methods of implementation, whether in pre-trial interrogation under the privilege against self-incrimination, or libel of public figures under freedom of the press, or exclusion of evidence under the search and seizure guarantee. The religious guarantees, however, are of a different order. While political debate and division is normally a wholesome process for reaching viable accommodations, political division on religious lines is one of the principal evils that the first amendment sought to forestall. It was healthy when President Kennedy, as a candidate, was able to turn off some of the questions addressed to him on church-state relations by pointing to binding Supreme Court decisions. Although great issues of constitutional law are never settled until they are settled right, still as between open-ended, ongoing political warfare and such binding quality as judicial decisions possess, I would choose the latter in the field of God and Caesar and the public treasury. This basic preference may help to account for what otherwise may seem a too rigid, and not sufficiently permissive, view of constitutional commands.

STATEMENT BY MAUREEN GILLESPIE, LEGISLATIVE COMMITTEE, DISTRICT No. 2
PARENTS' COUNCIL

Mr. Chairman, and members of the Committee, my name is Maureen Gillespie. I make this statement both as a parent of two New York City public-school children, and as a spokesperson for Parents' Council, Community School District No. 2, located in the borough of Manhattan. The largest of Manhattan's six community school districts, District No. 2's boundaries include 28 schools that service approximately 20,000 children who attend grades K through nine. The number of public school pupils under the jurisdiction of District No. 2 exceeds the total number of elementary and secondary nonpublic-school children in at least a dozen individual states.

Parents' Council is made up of at least one parent delegate from each elementary and junior high school in our district. Members of the Council are very much involved in relevant political decision-making processes regarding the educational well-being of their children. We are individuals who are committed to the belief that all the nation's children are entitled to a first-rate public education. And, we have earned the respect of legislators at all levels of government.

I wish to express the Council's opposition to Senate Bill No. 2142, the Packwood-Moynihan Tuition Tax Credit Act of 1977. If passed, this legislation would only serve to further undermine public education systems that are already fighting for survival. With all the recent crises befalling public schools around the country, and the present nationwide state of emergency facing public education, Parents' Council is offended and outraged by elected officials who voice their deep concern for the future of private schools.

Proponents of the Packwood-Moynihan Bill claim that the government would have to annually spend an additional \$17 billion if the 7.7 million nonpublic school children in the country suddenly opted for public education. We are therefore to infer from this line of reasoning that the resulting estimated \$4.7 billion depletion of the United States Treasury should not be deemed a loss, but a blessing in disguise!

Is it possible that the Senators, in their routine dealings with ten-digit figures, have lost sight of what \$4.7 billion can buy? According to a recently published list of some recommendations made by President Carter's Urban and Regional Policy Task Force, that exact amount could provide this nation, still suffering from a 6.4 percent unemployment rate, with 450,000 jobs under the Comprehensive Employment and Training Act.

All citizens who would stand to gain from the use of general revenues would feel the loss to the Treasury, while an elite group who choose to send their children to private schools reap the benefits.

In addition, S. 2142 could not reach the truly disadvantaged who pay no taxes at all, while at the same time, it would give the more affluent further advantage. We maintain that the majority of those in the latter category who are inclined toward a private education would enroll and/or remain in private institutions of learning with or without tax credit incentive. Therefore, the \$4.7 billion penalty imposed on all for the benefit of a particular segment of society is improper and renders this legislation discriminatory.

We also find the proposed legislation unconstitutional on the grounds that it violates the First Amendment principle of separation of church and state. The greatest impact of this bill would be felt at the elementary and secondary levels of education where the great majority of private academic institutions are parochial. Stressing a goal of providing financial assistance to those attending all types of private schools masks the identity of the major beneficiaries of the tax credit—parents of children enrolled in nonpublic schools sponsored and operated by religious denominations.

In this case, the tax credit is being used to unconstitutionally advance religion and is a device that enables private and parochial schools to benefit from a \$4.7 billion loss of tax funds while still remaining exempt from any federal interference in the setting of academic and admissions policies.

It is also the belief of Parents' Council that the enactment of S. 2142 would accelerate a current trend of common interest groups to create their own learning facilities; the ultimate result being a more segregated school situation. (e.g. The Congress on Racial Equality subsidizes a community school in The Bronx, New York.) The Council is not opposed to specific groups forming their own institutions—indeed, it is their right to do so. However, the reasons why they are formed disturb us. Just as Catholic education in New York grew from

negative reaction to public schooling, so other independent schools are springing up now in response to the reputed inefficacies of public education.

If the Senators wish to help the middle class and the cities of the United States, they should turn their attention away from the problems of private and parochial schools and direct their efforts toward the plight of public education.

To attract and hold taxpayers, our cities must provide safe and quality public schools for all their children. To quote the 105th Mayor of the City of New York, former Congressman Edward I. Koch, who stated in the *New York Daily News* on the day of his Inaugural: "Our school system is where the future of this city is being decided. If we can't make our schools produce for the children that need them, then the city can't be saved. It's as simple as that."

Implicit in this act is a lack of faith in the potential of public education. Its passage could be interpreted as an admission that a "wondrous supermarket" of learning opportunities could never exist solely within a public school system. Indeed, there are public schools throughout the country that are in serious trouble. But would it not be more appropriate to find ways to save and improve them than to enact unconstitutional laws that could only speed up their decay and destruction? Putting this or similar legislation into effect would help to create an academic wasteland by further draining the public school of parents and students who will be lured away by the monetary incentive provided by a tuition tax credit.

Just as the principal sets the tone for an individual school, the Federal Government sets the tone for the individual states and the nation as a whole. Washington must not indicate to the country that public education is a choice of poorer quality, particularly at a time when our public schools need all the moral and financial support they can muster. A true and healthy pluralistic approach requires an equality of academic options. Therefore, we insist that public education be raised to the status presently enjoyed by private institutions of learning. The Senate must lead the way in helping public education assume its proper place, high on the list of the nation's priorities.

If public schools are allowed to die, then we are all in danger of losing our freedom.

UNIVERSITY OF ILLINOIS AT URBANA-CHAMPAIGN,
COLLEGE OF LAW,
Champaign, Ill., January 18, 1978.

Mr. MICHAEL STERN,
Staff Director, Committee on Finance, U.S. Senate, Dirksen Senate Office Building, Washington, D.C.

DEAR MR. STERN: At the request of Senators Moynihan and Packwood I have prepared written testimony regarding the proposals for tax relief for persons paying tuition to elementary and secondary schools and colleges. Mr. Elliott Abrams, Special Counsel, forwarded to me a copy of the press release of the Committee on Finance, Subcommittee on Taxation and Debt Management Generally, regarding the hearings on the tuition tax relief bills. In accordance with that press release I am submitting five copies of written testimony to you. You will note that my submission consists of two parts: (1) written testimony concerning the constitutional issues regarding the tax relief proposals; (2) a reprint of an article which I published in the *Northwestern University Law Review* analyzing the Supreme Court decisions on aid to parochial schools in terms of economic theory as well as First Amendment values. As the two part submission exceeds the 25 page limitation referred to in the press release, you may wish to treat my memorandum to the Committee as my entire testimony and exclude the submission of the article. If you choose to exclude the articles from the formal submission, I would appreciate it if you would note at the end of my submission that you have received copies of the article. I do believe that the article adds some insights into the problem (especially in terms of economic analysis) that I was unable to include in the memorandum for the Committee. You may also wish to note that a complete discussion of all of the decisions of the Supreme Court of the United States concerning the freedom of religion may be found in J. Nowak, R. Rotunda, and J. Young, *Handbook on Constitutional Law* (West Hornbook Series, 1978). Copies of that one volume treatise should be available from West Publishing or the Library of Congress in early February.

Mr. Joseph Ross, Chief of the Law Division of the Congressional Research Service, also had inquired as to my views regarding the proposed tax relief measures. Therefore I have forwarded a copy of my written submissions to him. I assume that you will wish to contact Mr. Ross and David M. Ackerman of his staff, who has prepared several excellent memoranda on Supreme Court decisions in this area, concerning the constitutional issues presented by the proposed legislation.

Thank you for your time and cooperation in this matter. If you have any questions regarding my testimony please do not hesitate to contact me.

Sincerely,

JOHN E. NOWAK,
Associate Professor of Law.

STATEMENT OF JOHN E. NOWAK, ASSOCIATE PROFESSOR OF LAW, UNIVERSITY OF ILLINOIS COLLEGE OF LAW

At the request of Senators Moynihan and Packwood, I have prepared a written statement regarding the constitutionality of federal tuition tax relief for persons paying tuition to private schools. Because the proposed tax credit measures would allow relief for persons paying tuition to religiously affiliated schools, such proposals present serious problems in terms of the establishment clause of the First Amendment to the Constitution of the United States. There is no other significant constitutional issue regarding the ability of the federal government to provide tax relief or subsidies to persons paying tuition to private schools that do not discriminate on the basis of race. This written submission is addressed solely to the First Amendment problems raised by the proposals. I am submitting as an appendix to this memorandum a reprint of an article in which I have analyzed the decisions of the Supreme Court on the issue of aid to parochial education in terms of classical economic theory as well as the values of the First Amendment. (Novak, *The Supreme Court, The Religion Clauses and the Nationalization of Education*, Volume 70 *Northwestern University Law Review* 883-909, 1976.) A more detailed analysis of the decisions of the Supreme Court regarding the freedom of religion and aid to religious institutions may be found in the one volume treatise on *Constitution Law of which I am a coauthor: J. Nowak, R. Rotunda, and J. Young, "Handbook on Constitutional Law" (West Hornbook Series, 1978).*

This written memorandum on the constitutional problems regarding tuition tax relief for those attending parochial schools is divided into the following substantive sections: (1) a summary of the points that should be kept in mind when drafting legislation in this area; (2) a statement of my opinion regarding tuition tax relief and values inherent in the First Amendment; (3) a brief statement regarding the current tests employed by the Supreme Court to determine the compatibility of programs that might aid religious institutions with the establishment clause of the First Amendment; (4) my conclusions regarding the problems presented by the tax relief measures in terms of each of the specific tests used by the Supreme Court and suggestions for drafting the legislation so that it will meet those tests; and (5) a statement regarding aid to religiously affiliated colleges and the advisability of having separate provisions regarding tax relief for college tuition payments.

I. SUMMARY

It is my opinion that the establishment clause of the First Amendment would not void all programs of tax relief for families paying tuition to private schools even though that relief is granted to persons paying tuition to religiously affiliated schools. I would not support any proposals for legislation that in fact allowed government aid to the religious function of parochial schools or any other government subsidy of religious sects. However, I believe that a tax relief system for those paying tuition to private schools can be designed in a way that does not advance or inhibit religion. The drafting of legislation which is compatible with the First Amendment and with the tests which the court uses to determine the constitutionality of such legislation will not be easy. In drafting the legislation the committee should keep in mind the following points, each of which will be explained in slightly greater detail in the body of this memorandum.

First, the statute should include a Congressional finding that, because the federal government, unlike the states, cannot provide a full range of educational

services in kind by establishing government operated schools, the federal government cannot effectively aid education without some form of general tax relief measure.

Second, the legislation should include a statement of purpose specifying that Congress is attempting to aid the secular education of all children through this tax relief measure.

Third, the legislation cannot allow tax relief for those paying tuition to schools that discriminate in admission on the basis of race.

Fourth, the legislation must provide tax relief in a manner that cannot aid the sectarian functions of any institution. This will be the most difficult challenge the Committee faces in drafting appropriate legislation.

Fifth, the legislation must avoid excessive entanglement between government agencies and religious institutions or authorities. There should be a specific finding in the legislation regarding the absence of any sectarian debate concerning the proposals at the federal level.

Sixth, it would be advisable to draft legislation that has separate provisions relating to tuition paid to private colleges and universities.

II. TUITION TAX RELIEF AND FIRST AMENDMENT VALUES

Finance Committee testimony

Tax provisions which granted a tax credit (or other form of tax relief) for all persons who pay tuition to private schools, including religiously affiliated schools, should be upheld under the First Amendment if its provisions insure that the tax relief will not result in a subsidy for religious activities or religious teachings.

Initially it must be noted that no tax relief or aid should be granted to any institution which discriminates in its admissions on the basis of race. The Internal Revenue Service has previously ruled that such institutions are not eligible for tax exempt status. Exclusion of these schools under this act will require no new administrative systems but merely will require a statement of non-eligibility for racially discriminatory institutions. It should be noted that under recent Supreme Court rulings private schools that have generally open admissions except for racial restrictions are in violation of the Civil Rights Act. [*Runyon v. McCrary*, 427 U.S. 160 (1968)] Although the Supreme Court has not determined whether there should be an exception from civil rights acts for schools which are required to engage in racial discrimination because of the tenets of their religious beliefs, there would seem to be no basis for offering any form of indirect aid to students attending such schools. The Supreme Court has already ruled that programs which aid students attending parochial schools are invalid insofar as they aid students attending racially discriminatory schools. [*Norwood v. Harrison*, 413 U.S. 455 (1973)]

I am of the opinion that the First Amendment offers no basis for aiding racially discriminatory institutions because their practices conflict with the most basic principle of the Civil War Amendments. It may be that the free exercise clause of the First Amendment grants such institutions the right to exist so that religious sects cannot be punished for establishing racially discriminatory schools when those practices are required by the religious beliefs of that group. However, there is no need or right for government agencies to help them promote their beliefs, which are totally opposed to the basic tenets of our society in general and the Thirteenth, Fourteenth, and Fifteenth Amendments in particular. Federal aid to any racially segregated institutions should be held to violate the equal protection guarantee implicit in the due process clause of the Fifth Amendment.

Let me briefly state why I feel that a tax relief provision for tuition payments could withstand constitutional review. There are two clauses of the First Amendment that deal with the subject of religion—the establishment clause and the free exercise clause. There is a natural antagonism between a command not to establish religion and a command not to inhibit its practice. This tension between the clauses indicates that the framers were seeking to keep the federal government on a narrow path of neutrality in religious matters. These sometimes conflicting commands require that the government act to achieve only secular goals and that it achieve them in a religiously neutral manner.

There is a seemingly irresistible impulse to appeal to history when analyzing issues under these religion clauses. This tendency is unfortunate because there simply is no clear history as to the meaning of the clauses. When discussing First Amendment issues, it is common to refer to the Virginia experience where Jeffer-

son and Madison led a continuing battle for religious freedom and an end to government aid to religion. However, in many states close ties existed between the church and the state until well after the time of the Revolution. Indeed as Professor Choper has noted, even states with strict provisions in their state constitutions against aid to religions provided some form of assistance or aid to religious societies or religiously operated schools. [See, Choper, "The Establishment Clause and Aid to Parochial Schools," 56 California L. Rev. 260, 263 (1969).] Because history provides us with no clear answer to particular problems under the First Amendment, we must ask how proposed legislation seems to advance or inhibit what the Supreme Court has determined are the fundamental values of the religion clauses.

If we focus on the concept of neutrality in religious matters as the basic value of the First Amendment religion clauses, we can see why the Supreme Court has had such difficulty in interpreting those clauses. In insuring that the conscience of individual citizens is not violated by government programs that burden their religious practices the Court has sometimes had to give what might be termed aid to religious sects by exempting them from government regulation. Similarly, in protecting against the entanglement between government agencies and religious authorities the Court has sometimes had to invalidate the granting of aid to religious institutions, which resulted in placing the institutions under serious economic burdens. When we review the tax credit suggestion we must ask whether it is able to achieve the secular goal of improving the non-religious education of students without either subsidizing religious activities or entangling the government with religion.

A program of general tax relief for those paying tuition to private schools will achieve important secular ends which are totally compatible with the religion clauses. State governments have historically provided education subsidies "in kind" through publicly operated schools. This has resulted in the development of an immense network of public schools and an interest in their maintenance. It is unrealistic to suggest that the states will be able to provide meaningful educational subsidies outside of the public school system. This has placed severe hardships on children from low income families who seek a superior education. If the local public school system seems insufficient for developing the abilities of the children of higher income families, the parents may move to a place where the public school system is superior or simply withdraw their child from the public school system and provide the child with a privately financed education. Neither of these options is available to low income families. Indeed, when we refer to low income families in this regard we should include all those persons who cannot afford to pay the full cost of tuition at private schools—a group that will include most of what are popularly known as "middle income" families. These lower income parents may be equally desirous of improving the education of their children. However, because subsidized education is provided only in kind, they can only change the quality of their child's education with a massive dollar supplement which is beyond their means. If the federal government were willing to grant some sort of tax relief to those paying tuition to private schools, it would increase the number of families who would have the opportunity to improve the education of their children.

Not only would tuition tax relief help lower income families secure increased educational opportunities, it would also enhance the quality of education in many state operated schools. Perhaps the major impediment to an improved system of education is the schools of our great metropolises is the overcrowded condition of those schools. This is the direct result of the failure to adjust our tax system so as to decrease the financial burden on those families who wish to withdraw their children from the public school system. Currently, state and federal tax systems function as a barrier to the transfer of students from overcrowded public schools to private schools.

If the tax relief legislation has a formula for tax credits or deductions which insures that the funds are not going to religious activities, then the legislation does not truly aid religion. To the extent that the program allows some persons to exercise their right to send children to parochial schools, some may say that the program has a religious effect. Even if one were to categorize the effect as religious, it should not mean that the tax relief provision would be invalid. The Supreme Court has found that families have a right to withdraw their children from the public school system and to educate them in a manner more acceptable to their own philosophical or religious principles. But this right is a hollow one for those families who have moderate incomes and who are burdened with tax

liabilities that make it impossible for them to send their children to private schools.

You will note that in these comments I have referred to a hypothetical statute that had provisions preventing the tax dollar from directly benefiting religious activities and that avoided an excessive entanglement between government and religion. In order to demonstrate how such legislation can be fashioned, we must turn to the tests employed by the Supreme Court to determine the validity of government programs under the establishment clause of the First Amendment.

III. SUPREME COURT TESTS—IN GENERAL

An outline of the history of the establishment clause test may give the committee some added perspective to consider when it drafts its final proposals. There were only two significant decisions under the establishment clause prior to 1947. In that year the Supreme Court of the United States held the clause applicable to the states while approving the reimbursement of bus fees for all students, including those attending parochial schools. It did so without a clear standard; a majority of the Court simply found no prohibition form of aid involved in that program. In cases dealing with prayers in public schools the court created a "secular purpose and primary effect" test. This two part test was the sole standard for a time.

In 1977, the Court upheld tax exemptions for churches. In doing so, the Court developed a three part test which focused on the entanglement between government and religion as well as on the purpose and effect of the legislation. Today when a law is challenged under the establishment clause, it must pass a three part test. First, it must have a secular purpose. Second, it must have a primary secular effect. Third, it must not involve the government in an extensive entanglement with religion. Another three part test is employed to determine the potential for excessive entanglement. The degree of entanglement is estimated by evaluating: (1) the character and purpose of the religious institution to be benefited; (2) the nature of the aid; and (3) the resulting relationship between the government and religious authorities. Additionally, (although this may be considered a part of the entanglement test) the law must not create an excessive degree of political division along religious lines.

Very little state aid may go to religious primary and secondary schools without violating the establishment clause. Because the Supreme Court has held these schools are "permeated" by religious teaching, any significant aid will have a high potential to have the effect of aiding religion. The only way that state governments have found to avoid such an effect is through the imposition of so many procedural checks that the resulting programs were invalidated for creating an extensive entanglement between governmental and religious entities. The Court has applied strictly the purpose, effect, and entanglement tests to state program relating to primary and secondary schools because these programs have a history of causing serious religious and political divisions at the state level. In the following sections I will mention how tax relief legislation might be tailored to comply with each of these tests. I will consider the proposed legislation as it relates to tuition paid to parochial elementary or secondary schools. Because the court applies the test most strictly in this area, this must be the central concern of the legislative draftsman.

Aid to non-public institutions of higher education has been the subject of only a few Supreme Court decisions. It is clear the government programs aiding these schools must be tested under the same test as those employed in the primary school cases. However, the Court has not been as strict in striking down programs aiding religiously affiliated institutions of higher education. For this reason I will conclude with a brief section specifying why the tax relief legislation should have separate provisions relating to tuition relief for those attending private colleges and universities.

IV. THE COMPATIBILITY OF TUITION TAX RELIEF WITH THE PURPOSE, EFFECT, AND ENTANGLEMENT TESTS

A. *The secular purpose test*

The legislation should include a specific statement that it is the purpose of Congress to aid the secular education of all students by granting tax relief to those who pay tuition to schools in the private sector. This secular purpose—the improvement of educational opportunities for all children—has sufficed in every case relating to aid for religious schools. The question of whether or not

any individual legislator voted for these programs because of a religious motivation is irrelevant because there are significant secular ends which are advanced by programs designed to aid the students attending schools in the private sector.

B. The primary effect test

No government program may have a primary effect which either advances or inhibits religion. The Supreme Court is justified in employing this test because "neutrality" necessarily implies the proscription of government programs designed to aid or burden religious activities or beliefs. The Supreme Court has in recent years been very strict in determining what constitutes a religious effect; it will be most difficult for the tax relief legislation to pass muster under this test. Indeed, I believe that the present proposal which would grant a tax credit of one-half the tuition paid up to \$500 would fail this test and be invalidated by the Supreme Court as a violation of the First Amendment.

The Supreme Court has held that government programs which have the direct effect of increasing the financial resources of religious primary schools violate the establishment clause. Thus the Court has invalidated state programs which would have paid for some physical repair and maintenance of parochial schools; such programs relieve the schools of basic expenses and allow them to put more resources into their religious functions. Similarly, the Supreme Court has stricken grants of instructional materials, such as maps and charts, to religious schools because that aid would free resources within the parochial school enterprise for the furtherance of its religious mission. The current proposals for tax relief do not include any guaranty that the additional funds left with the taxpayer will not constitute a direct subsidy of religious activities. For example, let us assume that taxpayer X sends his child to a parochial elementary school that has a yearly tuition of \$500. That \$500 must be used to provide both secular and religious training in the parochial school. If the parochial school did not raise its tuition, the granting of a tax credit of only one half of the tuition (\$250) might be said to constitute only relief to the taxpayer of some of the burden of paying for the secular component of the education. However, under the proposed tax credit legislation, the parochial school would be foolish if it did not double its tuition to \$1,000. Taxpayer X would still send his child to school as he need pay no more than the original \$500 charge; he now receives a tax credit that will increase his resources by \$500 so that the higher tuition is no greater burden to him. The direct and primary effect to the federal legislation in this situation is to subsidize religious activity. The Supreme Court would surely invalidate this program because it fails to guarantee that the increased funds left with the taxpayer will not be manipulated by parochial schools in this manner.

I would suggest that the committee alter the basis for the granting of the tax credit to give some assurance that the direct and primary effect of the legislation is to subsidize the secular education at all schools, even for students attending parochial elementary schools. This can be done through a formula that insures taxpayer cannot receive a credit for more than the cost of the secular educational component of the religious school. The Committee should take testimony regarding the amount of money spent per pupil by each state government and the cost of educating children at a representative sample of private, nonprofit schools. The legislation then should include a finding that the minimum cost of granting a child a basic secular education is an amount less than the maximum credit allowable under the act. For example, if the Committee and Congress determines that it is virtually impossible to provide a secular education in a manner that would satisfy state accreditation standards for less than \$600 per child, then a credit of \$500 or less should be permissible. Even here, however, one must be careful to guard against the unusually inexpensive school. This can be taken care of by allowing a credit for no more than one-half the tuition paid. You will note that this may result in the same formula as in the proposed legislation: a maximum credit of the lesser of one-half the tuition or \$500. The specific evidence and finding regarding the fact that it costs more than \$500 to provide a secular education is crucial. In our example, taxpayer X had been paying \$500 per year and the tuition was raised to \$1,000 per year following the passage of the federal act. If the congressional testimony and findings are accurate, this would mean that the tax relief money was not funding religious activities. Prior to the time of the federal act the church must have been using its own funds to provide the services such as religious instruction which went beyond basic secular education. Now when the federal government allows the credit for one-half of the tuition it is helping the taxpayer fund only the secular portion of the child's education.

Taxpayers now reimburse the school for some of the additional costs of religious instruction, but this should be irrelevant.

The Supreme Court might strike down even this form of tax relief because it would enable more people to give money to religious activities. In fact, the Court has invalidated two state taxation systems that provided tax relief for those who sent their children to private schools. In *Committee for Public Education v. Nyquist*, 413 U.S. 756 (1973), and *Sloan v. Lemon*, 413 U.S. 825 (1973), the Supreme Court invalidated state systems which attempted to reimburse the parents of students attending nonpublic schools for a small portion of the tuition that they paid to those schools. The *Nyquist* case gave rise to the more significant opinion. In that case the Court reviewed a New York program that attempted to insure the secular effect of its program by making payments directly to parents, by limiting the amounts to no more than one-half the tuition paid, and by excluding high income families. A majority of the Supreme Court, in an opinion by Justice Powell, found these restrictions irrelevant. The state's attempt to enable these families to exercise freedom of choice in religious or educational matters was deemed insufficient to justify a deviation from strict application of the establishment clause tests. The form of payment was held to be irrelevant because the majority perceived a benefit going to the religious schools from the dollar subsidy of the family unit because of the parochial schools' increased attractiveness as an alternative to publicly operated education. The majority found no relevant distinction between grants to schools, grants to parents, or tax credits for parents. The majority dismissed in a footnote Chief Justice Burger's argument that this involved no more than a general welfare payment to all children because it was the equivalent of providing public education subsidies and was paid directly to the family. The majority specifically found that the religious effect could not be offset by statistical guarantees. It may well be that the current makeup of the Supreme Court makes it impossible for any government entity, state or federal, to grant any relief to those paying tuition to religiously affiliated primary or secondary schools. However, I am of the opinion that a federal tax program with the statistical guarantee that I outlined can be differentiated from the state programs.

The states that have enacted various aid to private education programs were clearly concerned with Catholic education in their states. The federal tax relief will include citizens in states with low concentrations of religious schools as well as those in states where parochial schools constitute virtually the only alternative to publicly operated education. The greater diversity of those receiving the benefit goes not only to the purpose of the legislation but also to its effect. Federal tax relief legislation is much more likely to have the effect of producing a variety of alternative school systems rather than merely to help support specific parochial school systems facing financial problems in certain industrial states.

The federal government has no capability for providing meaningful forms of educational benefits "in kind" by operating its own school system. Nevertheless, the federal government has a clear interest in insuring that the students of all states received the best possible secular education. Our social and economic relations have become so complex in this country that the educational level of citizens in one state affects the well being of those in other states. Basic education prepares each of our fellow citizens to better participate in and contribute to society. Necessity does not provide a constitutional basis for federal tax relief, but it is much easier to demonstrate the strong secular effect of a federal tax relief system. Finally (and with no intent to insult those who have drafted various provisions of the Internal Revenue Code), the system of federal taxation is so complex that it is foolish to try to trace the dollars a taxpayer uses for religious purposes because he has gotten a particular deduction or credit on his federal income tax. Thus I would suggest that the Committee go ahead and attempt to draft legislation with a statistical guarantee against aid to religion. We can only hope that the Justices of the Supreme Court are not simply prohibiting all forms of aid to those families who seek to send their children to religiously affiliated schools.

C. The entanglement test

There are two forms of entanglement which must be avoided in the tax relief program: (1) administrative entanglement between the taxing authority and religious institutions; (2) political division along religious lines.

The concept of administrative entanglement has been most ably examined by Chief Justice Burger. [See *Lemon v. Kuntzman*, 403 U.S. 602, 618-19, 621-22 (1971) (majority opinion by Burger, C. J.); *Tilton v. Richardson*, 403 U.S. 672, 685-87 (1971) (plurality opinion by Burger, C. J.); *Committee for Public Education v. Nyquist*, 413 U.S. 756, 801-4 (1973) (Burger, C. J., dissenting).] He would confine the concept to a requirement to government programs provide aid to parents and students rather than directly to schools and that these programs avoid excessive administrative relationships between religious and secular authorities. Chief Justice Burger is quite correct in his concerns; he has fashioned an important principle. Programs which call for a high degree of administrative contact and regulation might leave the impression that those groups which survive the regulation are governmentally approved. Such regulation also endangers the freedom of religious societies by requiring them to be responsive to government administrators in order to maintain a flow of benefits. Additionally, this type of involvement may undermine the neutrality of government itself. A high degree of regulation will require formal administration to assure that the day to day regulations are followed and that reporting requirements are met. However in the long run administrators and those who are being regulated frequently develop a mutuality of interest. This can lead to "capture" of administrative agencies by those whom they are supposed to regulate and make it difficult to determine whether such agencies are acting on behalf of the public or the regulated entity. However, so long as the aid program does not involve a substantial probability that benefits could be used for sectarian functions, there is no need for a reporting and regulation system which would lead to administrative entanglement. For example, if the Committee and Congress employ a formula which gives assurance that no aid will be provided to sectarian activities there is no need for further regulation of this type.

The Committee and the Congress should be careful to draft eligibility requirements that do not require religious institutions to make separate filings with the federal government or federal agencies to engage in new detailed evaluations of private schools. In this regard I think that the legislation proposed by Senators Packwood and Moynihan has taken the proper approach in defining "eligible institution." The proposed legislation defines as eligible those institutions which are referred to in the Elementary and Secondary Education Acts. This means that there will be no new regulation or supervision of the religious schools which results from the tax credit legislation. I do not believe that there is a need to explicitly state that racially discriminatory institutions are ineligible because they would fail to qualify under the Packwood-Moynihan bill; the Internal Revenue Service will not find an organization exempt from taxation under Section 501 if it engages in racial discrimination in its admissions. The Committee may wish to insert a separate provision which states that no educational institution which discriminates by race in its admissions will be termed an eligible institution.

The excessive entanglement test also requires that programs not lead to political divisions along religious lines. The Supreme Court used this test to invalidate some programs, and this test has been given as the reason why the Court must be so strict in its application of the other tests. If the political divisiveness test is used by the Court to ban religious conflict in society, the attempt would appear to be futile at best. However, there is a clear history of serious religious division and political conflict over state government programs designed to aid primary and secondary schools. No amount of theory or rhetoric can obscure the fact that proposals for specific aid programs at the state level have arisen in certain industrial states with an extremely high percentage of Catholic schools. These proposals bring to the state capitol persons who are opposed to the programs based solely upon their opposition to the religious group who operates those schools. But this is really a state and local rather than federal problem. Federal tax relief is not proposed as a way of helping specific religions but as a means to ease the financial burden imposed by the tax system on persons of all religions who have found it necessary or desirable to send their children to private schools. There is no history of conflict at the Federal level over the limited forms of aid to primary education or tax exemption for nonprofit institutions. Congress should make a specific finding that the tax credit proposal has not led to any religious division either in the Congressional debates or in the political debates surrounding the program. Indeed, this would seem to be proven by the fact that so many Senators have added their names to proposals to grant tax relief for those paying tuition to private schools.

V. COLLEGES AND UNIVERSITIES

I believe that the proposed tax relief program is constitutional even though it relates to tuition for parochial elementary and secondary education. However, no one can be certain as to how the Supreme Court will rule on such a program relating to parochial elementary and secondary education because the Justices are hopelessly fragmented on this issue. The last Supreme Court decision concerning aid to primary schools, *Wolman v. Walter*, 433 U.S. —, 97 S. Ct. 2593 (1977), resulted in a series of majority and plurality opinions with votes shifting on each slightly different but related educational program. The reason for these differing votes is that the Justices are evenly split between three positions. Chief Justice Burger and Justices White and Rehnquist will allow the state to help the education of all children so long as there is no clear aid to religion. Justices Stewart, Blackmun, and Powell believe that an independent application of the three part test will allow the state to promote some but not all forms of secular education. Justices Brennan, Marshall, and Stephens are committed to the position that the First Amendment was designed to prohibit any aid to religion, although only Justice Brennan seems ready to vote to invalidate even the most indirect forms of services to students attending parochial schools. Thus I would be less than candid if I indicate some certainty as to how the Supreme Court would vote on the proposed tax relief program. It does seem clear that programs which aid students attending religiously affiliated colleges and universities will not be tested as strictly as those aiding students attending parochial elementary and secondary schools.

While the Supreme Court employs the same purpose, effect, and entanglement test in this area, it is easier for programs relating to higher education to meet these tests. The Court will accept the legislative purpose of the programs as secular in nature. The programs will also be held not to have the primary effect of aiding religion if there is at least some formal guarantee by college authorities, or a guarantee in the nature of the grant, that the funds will not directly aid religious instruction or other sectarian activities. There is a two-part test to determine whether a specific aid program for religiously affiliated colleges and universities has a "primary effect" of advancing religion. To avoid such an effect: (1) the institution's secular function must not be "permeated" with a religious atmosphere, and (2) there must be assurance from the college or the government that the aid will not be used for religious teaching or other religious activities. It would seem that the proposed tax legislation could meet these tests because the Supreme Court previously has upheld the Federal Higher Education Facilities Act. The reference in the legislation proposed by Senators Packwood and Moynihan to the Higher Education Act and the certification by the Commissioner of Education should be taken as sufficient to exclude religiously permeated institutions.

It is also relatively easy for these programs to withstand analysis under the excessive entanglement test. There is little need for extensive controls to assure that these institutions will not use funds to advance religion; the nature of the tax relief aid is such that it has an inherent statistical guarantee against such use. Thus, administrative contacts between the government and religious authorities can easily be kept to a minimum. Finally, these programs have not been found to be politically divisive by the Supreme Court. Even annual grant programs by state governments to colleges have not been the subject of debate along religious lines. [See *Roemer v. Board of Public Works*, 426 U.S. 736 (1976).] The largely secular atmosphere of these institutions and the public evaluation of higher education helps to keep debate about such subjects focused on educational and fiscal policy rather than on religion. Additionally, the high percentage of non-sectarian private colleges prevents these programs from becoming religious issues.

Because the tuition relief program is much more likely to receive Supreme Court approval insofar as it relates to higher education, it may be advisable to add a separate provision in legislation which states that Congress considers these provisions severable. In this way Congress can help to insure that there will be tuition relief for those attending private institutions of higher education even if the Supreme Court invalidates those parts of the bill relating to elementary and secondary schools.

THE SUPREME COURT, THE RELIGION CLAUSES AND THE NATIONALIZATION OF
EDUCATION

(John E. Nowak*)

AN INTRODUCTION TO A "NEW" PROBLEM

Last term, the Supreme Court of the United States ended the possibility that the states would be able to grant any meaningful form of aid to students attending parochial elementary or secondary schools. Although there is room for debate on the exact implications of the opinion, in *Meek v. Pittenger*¹ there appears to be a majority of the justices who would prohibit any such aid under the religion clauses of the first amendment.² The emergence of the "new" majority position merits comment on the reasons for, and the effect of, an absolute rule in this area.

It will be left to others to determine the permissible amount of health or safety services that may be provided to children attending religious schools after *Meek*.³ This article will examine instead the new blanket prohibition of aid to the education of those students. After describing briefly the decisional background, it will examine the emergence of the new majority in *Meek*. The article will then employ basic economic analysis to show the effect of the majority's prohibition of aid to parochial schools on the educational opportunities available to the children of low-income families. Finally, it will examine the merit of the majority's position by determining whether any economic effect of the prohibited programs would in fact endanger the values inherent in the religion clauses.

While there were several important early decisions concerning the permissibility, under the free exercise clause, of government regulations which limited the freedom to engage in certain religious practices,⁴ there was no significant exploration of establishment clause principles until *Everson v. Board of Education*.⁵ In *Everson*, a five-member majority upheld a state program which reimbursed parents for expenditures for transportation of their children to nonpublic schools. While the majority indicated that any form of aid to religious institutions would be prohibited,⁶ the justices also evidenced a belief that general governmental services such as fire and police protection did not constitute "aid" to the religious functions of these schools.⁷ The majority found that the providing of free transportation to school for all children was no more than the provision of such a service to all the children of the state.

After *Everson*, the Court began to develop a test for determining when government was aiding religion in a prohibited manner rather than relying on ad hoc determinations of what constituted "aid." In *School District v. Schempp*,⁸ the Court found that prayers and Bible reading in the public schools violated the establishment clause as determined by a "purposes and effect" test. The Court held that "to withstand the structures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."⁹ As the prayers and Bible reading had at least a primarily religious effect, they failed this test.

However, in *Board of Education v. Allen*,¹⁰ the Court upheld a New York program under which books were loaned to all children, including those who attended parochial schools. Central to the Court's decision was its view that the parochial schools also served secular goals by their instruction in nonreligious

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¹ 421 U.S. 349 (1975).

² "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. . . ." U.S. CONST. amend. I. The free exercise clause was first held applicable to the states through the fourteenth amendment in *Cantwell v. Connecticut*, 310 U.S. 296 (1940). The establishment clause was first held applicable to the states in *Everson v. Board of Educ.*, 330 U.S. 1 (1947).

³ It appears that the majority in *Meek* would allow some diagnostic health services to be provided to such children so long as they were not educational services. See note 41 and accompanying text *infra*.

⁴ See, e.g., *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Reynolds v. United States*, 98 U.S. 145 (1879).

⁵ 330 U.S. 1 (1947). The only cases prior to 1947 of any significance are *Bradfield v. Roberts*, 175 U.S. 291 (1899) (federal grant to religiously affiliated hospital upheld), and *Quick Bear v. Leupp*, 210 U.S. 50 (1908) (Indian tribal money held in trust by the Government could be used to pay tuition at a parochial school).

⁶ 330 U.S. at 15-16.

⁷ *Id.* at 18.

⁸ 374 U.S. 203 (1963).

⁹ *Id.* at 222.

¹⁰ 392 U.S. 236 (1968).

subjects.¹¹ So long as the state took some meaningful steps to insure that the books were suitable only for secular instruction, the majority held that the primary purpose and effect of the program was to help educate children in secular subject matter.¹²

The "purpose and effect" test remained the sole criterion for the permissibility of state aid to religious groups for a number of years. But in *Walz v. Tax Commission*,¹³ the Court expanded the test while upholding the constitutionality of property tax exemptions for religious organizations. So long as the exemption was part of a general exemption of "nonprofit" property, it had no purpose or effect which violated the establishment clause. Chief Justice Burger, writing for the majority, isolated the values protected by the clauses:¹⁴

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

However, in the view of the *Walz* majority, the values inherent in the religion clauses were not protected fully by the "purpose and effect" test. Accordingly, the majority also required that a program avoid causing "excessive entanglement" between government and religion.¹⁵ Since Chief Justice Burger concluded that a tax exemption created no more administrative entanglement between government and religion than would the taxation of the property itself, the exemption was upheld.

The dimensions of this new excessive entanglement principle were unclear in *Walz*. At this point, there were two possible interpretations of the test. First, the test might only require that government and religion not become too involved administratively since continual contact in a regulatory setting would endanger both the freedom of religious sects and the impartiality of the government. Second, the entanglement concept might require a prohibition of programs which would create political division along religious lines.¹⁶

In *Lemon v. Kurtzman*¹⁷ and *Tilton v. Richardson*,¹⁸ Chief Justice Burger seemed to refine the excessive entanglement test to a prohibition of detailed government regulation of religious activities. In both cases the Court found a secular purpose in the legislative attempt to improve the education provided students in both public and private schools.¹⁹ In *Lemon*, the Court held invalid government salary supplements for teachers of secular subjects in parochial primary and secondary schools. As these schools were viewed as pervasively religious and their employees committed to the teaching of approved beliefs,²⁰ the majority found that numerous reporting and supervision requirements would be necessary to insure that the effect of these payments was not the direct support of religious teaching. This continuing governmental involvement with, and supervision of, religious groups constituted an "excessive entanglement" prohibited by the establishment clause.²¹ But in *Tilton*, a majority upheld federal building grants to religiously affiliated colleges. The primary secular teaching function of religiously affiliated colleges, the skepticism of older students and the adherence to principles of academic freedom by these schools meant that there was less likelihood that a grant to religious colleges would be used for sectarian purposes.²² Moreover, since the reporting requirements did not require a detailed or continuous supervision of religious activities, the program did not give rise to excessive entanglement.²³

¹¹ The Court was at least unwilling to assume that all education in parochial schools was permeated with religion on the basis of a record containing no evidence bearing on this issue. The absence of such evidence was stressed by the Court. *Id.* at 248.

¹² The majority felt that requiring the approval of the books as being secular in nature by public school boards was a sufficient safeguard. *Id.* at 245, 248. Whether or not this is a meaningful safeguard has been seriously challenged. See Note, *Sectarian Books, the Supreme Court and the Establishment Clause*, 79 *Yale L.J.* 111 (1969).

¹³ 397 U.S. 664 (1970).

¹⁴ *Id.* at 669.

¹⁵ *Id.* at 674.

¹⁶ Such an interpretation might have been suggested by the majority opinion's emphasis on the long history of such tax exemptions and the absence of any conflict concerning their legitimacy. *Id.* at 678-80. The argument specifically was used by Justice Harlan. *Id.* at 695 (Harlan, J., concurring).

¹⁷ 403 U.S. 602 (1971).

¹⁸ 403 U.S. 672 (1971).

¹⁹ In both cases the Court was willing to accept the stated legislative intent to improve the quality of education in secular matters. *Tilton v. Richardson*, 403 U.S. 672, 678-79 (1971); *Lemon v. Kurtzman*, 403 U.S. 602, 613, (1971).

²⁰ *Lemon v. Kurtzman*, 403 U.S. 602, 618-19, 621-22 (1971).

²¹ *Id.*

²² *Tilton v. Richardson*, 403 U.S. 672, 685-87 (1971) (Burger, C. J., plurality opinion).

²³ *Id.* at 687-88. If a particular college were shown to be as involved with sectarian activities as were parochial primary schools, the plurality would prohibit aid to that institution. *Id.* at 682.

Chief Justice Burger also noted that the yearly aid programs for elementary and secondary schools, unlike the college building grant program, had a high potentiality for creating political debate and division along religious lines.²⁴ Thus, the "political divisiveness" branch of the entanglement test appeared to be given an independent existence here, although Chief Justice Burger soon would find himself dissenting from its strict application.

In 1973, the Court decided a number of cases dealing with the permissibility of state aid to parochial schools or to the students who attend them. In two cases, the Court followed its earlier decisions and invalidated direct subsidies to parochial primary and secondary schools while upholding aid for religiously affiliated colleges.²⁵ However, the Court was faced with a totally different type of aid program in *Committee for Public Education v. Nyquist*²⁶ and *Sloan v. Lemon*.²⁷ In these cases, New York and Pennsylvania had attempted to reimburse the parents of students attending nonpublic schools for a portion of the tuition which they paid to those schools. The *Nyquist* case gave rise to the more significant opinion as New York had attempted to insure the secular effect of its program by making the payments directly to the parents, limiting the amounts to no more than one-half of the tuition paid, and excluding high-income families.²⁸ But a majority of the Court, in an opinion by Justice Powell, found these restrictions irrelevant. The state's attempt to enable these families to exercise freedom of choice in religious or educational matters was deemed insufficient to justify a deviation from a strict application of the religion clauses tests.²⁹

The form of payment and its direction to the parent were held to be irrelevant, as the majority perceived a benefit going to the religious schools from the dollar subsidy and their increased attractiveness as an alternative to publicly operated education.³⁰ The majority found that this effect could not be offset by statistical guarantees, which were insufficient to establish that the state had completely avoided aiding religion.³¹ Thus, it appeared that the only way to limit the effect of such payments would be through reporting programs which in turn would result in excessive administrative entanglement.³² The opinion in *Nyquist* indicated that a majority of the Court was committed to a strict application of the purpose and effect tests so that virtually any program of aid to parochial schools, or their students, would be held to result in either aid to religion or excessive entanglement.³³ The majority felt justified in reaching such a result because of the politically divisive nature of such programs.³⁴

²⁴ *Tilton v. Richardson*, 403 U.S. 672, 689 (1971) (Burger, C.J., plurality opinion); *Lemon v. Kurtzman*, 403 U.S. 602, 622-24 (1971).

²⁵ In *Leritt v. Committee for Public Educ.*, 413 U.S. 472 (1973), the Court, in an opinion by Chief Justice Burger, followed the reasoning of the 1971 opinion and invalidated a law which granted payment to parochial and secular private schools for "mandated" services such as the administration of state-prepared examinations. In *Hunt v. McNaught*, 413 U.S. 734 (1973), a majority upheld a South Carolina program which created a state board to assist colleges and universities in issuing revenue bonds for secular building projects.

²⁶ 413 U.S. 756 (1973).

²⁷ 413 U.S. 825 (1973).

²⁸ The law provided for direct payments to parents with an annual taxable income of under \$5,000 and tax credit to those with an adjusted gross income of under \$25,000. In no event could the payment exceed the lesser of statutory limits, set between \$50 and \$100, or 50 percent of the tuition actually paid. Law of 1972, ch. 414, §§ 1-5 (1972) N.Y. Laws 1969 (held unconstitutional). The law, complete with tax credit tables, is reprinted at 413 U.S. at 761-67.

²⁹ *Committee for Public Educ. v. Nyquist*, 413 U.S. 756, 788-89 (1973).

³⁰ The majority found no relevant distinction between grants to schools, grants to parents, or secular tax credits for parents. *Id.* at 783, 786-87, 790-91. The majority dismissed in a footnote Chief Justice Burger's argument that this involved a general welfare payment to all children, as it was the equivalent of providing public education subsidies and was paid directly to the family. *Id.* at 782 n. 38.

³¹ *Id.* at 787-88, 790.

³² While the majority did not decide the question of the existence of excessive administrative entanglement in these programs. *Id.* at 794, its repeated emphasis on the inability of statistical reports to guarantee an absence of aid to religion leads to no other conclusion. *Id.* at 777-78, 780, 787-88, 790.

³³ Justice Powell's majority opinions in both cases seem clear on this point. In *Committee for Public Educ. v. Nyquist*, 413 U.S. 756 (1973), he wrote: "Our cases, however, have long since foreclosed the notion that mere statistical assurances will suffice to sail between the Scylla and Charybdis of 'effect' and 'entanglement'." *Id.* at 787-88. The majority opinion in *Sloan v. Lemon*, 413 U.S. 825 (1973), reaffirmed this circular test:

"In holding today that Pennsylvania's post-*Lemon v. Kurtzman* attempt to avoid the Establishment Clause's prohibition against government entanglements with religion has failed to satisfy the parallel bar against laws having a primary effect that advances religion, we are not unaware that appellants and those who have endeavored to formulate systems of state aid to nonpublic education may feel that the decisions of this Court have, indeed, presented them with the "insoluble paradox" to which Mr. Justice White referred in his separate opinion in *Lemon v. Kurtzman*. . . . But if novel forms of aid have not readily been sustained by this Court, the 'fault' lies not with the doctrines which are said to create a paradox but rather with the Establishment Clause itself. . . ."

Id. at 835.

³⁴ *Committee for Public Educ. v. Nyquist*, 413 U.S. 756, 794-98 (1973).

Chief Justice Burger dissented from the application of the entanglement test.³⁵ He found the majority's disdain for statistical guarantees unjustified and its use of the "effect or entanglement" test an unprincipled way of prohibiting all aid to children who attend parochial schools.³⁶ As long as the children were the primary and direct beneficiaries of the program, Chief Justice Burger would hold that the statistical guarantee of no aid to religious activity was sufficient to avoid the finding of either a prohibited effect or excessive entanglement.³⁷

Despite the strong language of the majority in *Nyquist*, Pennsylvania again attempted to aid children attending nonpublic schools. Apparently the state assumed that the Court would not ban a general program of aid to students if the services or goods provided were not readily adaptable for use in religious instruction. Pennsylvania's new program provided for three forms of student aid: (1) a textbook-loan program similar to the one approved in *Allen*; (2) the provision of auxiliary guidance, testing, remedial and therapeutic services by public school employees who would provide the services at the private schools; and (3) the loaning to nonpublic schools of instructional equipment and materials of a secular nature.³⁸

In *Meek v. Pittenger*,³⁹ the Court struck down all but the textbook-loan program as violations of the establishment clause. In this case it became clear that a new majority had emerged on the Court which was prepared to invalidate any program of aid to children attending parochial schools other than the provision of basic governmental services or textbooks. Indeed, three justices would have overruled the *Allen* textbook decision so that virtually no aid beyond general health and safety measures, such as police and fire protection, could be provided for parochial school students.⁴⁰ Since the majority distinguished laws which provided only for the diagnosis or testing of parochial school students to protect their health and safety, there may remain a limited area of noneducational services which need not be denied these children.⁴¹ However, the majority opinion clearly prohibits any educational aid beyond a textbook program.

Justice Stewart, writing for the majority, did not hesitate to employ whatever tests or standards were necessary in order to achieve this result. In voiding the program of lending instructional materials, he found it irrelevant that the materials were not suited inherently to the teaching of religion.⁴² Justice Stewart reasoned that, although the equipment and educational materials were secular in nature, they aided the religiously operated institution in maintaining and securing its position in the educational marketplace. As the function of parochial primary and secondary education inherently is religious, this constituted impermissible aid to religion in the majority's view.⁴³ Yet if this "aid-to-the-enterprise" theory is adhered to, Justice Brennan was correct in concluding that the textbook program is similarly a form of prohibited aid.⁴⁴ Although the books are given to the student, the aid accrues to the school in the same manner as if the books were loaned to the school directly.⁴⁵ Justice Stewart's focus on the form of the textbook program⁴⁶ cannot be reconciled with the position taken in *Nyquist*

³⁵ The New York law had included a provision for "maintenance and repair" grants to parochial schools. Only Justice White dissented from the finding that this provision was invalid as having the effect of aiding the religious functions of the parochial schools. *Id.* at 813 (White, J., dissenting). Chief Justice Burger and Justice Rehnquist joined Justice White in dissent only as to the majority's invalidation of the tuition-reimbursement plans. *Id.* at 798 (Burger, C.J., dissenting); *id.* at 805 (Rehnquist, J., dissenting).

³⁶ *Id.* at 803-04 (Burger, C.J., dissenting).

³⁷ When payments are made directly to individuals, Chief Justice Burger still would require a showing that the program was not "a subterfuge for direct aid to religious institutions or a discriminating enactment favoring religious over nonreligious activities." *Id.* at 801.

³⁸ Laws of July 12, 1972, act nos. 194 and 195 [1972] Pa. Laws 861, 863 (held unconstitutional). All relevant portions of the acts are reprinted in *Meek v. Pittenger*, 421 U.S. 349 (1975).

³⁹ 421 U.S. 349 (1975).

⁴⁰ *Id.* at 378 (Brennan, J., joined by Douglas and Marshall, J.J.).

⁴¹ *Id.* at 371 n. 21. The majority noted that diagnostic speech and hearing services of Act 194 appeared to be valid but must fall with the invalid portions of the act as these provisions did not appear to be severable. *Id.*

⁴² The majority accepted the lower court's characterization of these materials as: "self-polic[ing], in that starting as secular . . . they will not change in use." *Id.* at 365, quoting *Meek v. Pittenger*, 374 F. Supp. 639, 660 (E.D. Pa. 1974).

⁴³ 421 U.S. at 366.

⁴⁴ *Id.* at 379 (Brennan, J., concurring in part, dissenting in part).

⁴⁵ *Id.* As the student or his family will have a limited amount of resources (dollars) to allocate to education, the provision of books to the child at "zero cost" will free resources for additional tuition expenses regardless of whether the child receives the books directly or indirectly. In either event the family can contribute more money to the school without affecting their ability to purchase other goods due to the book subsidy.

⁴⁶ *Id.* at 361.

by the same justices who joined in this opinion. There, Justice Stewart and Blackmun concurred in Justice Powell's finding that the form of payment or reimbursement was irrelevant to the determination of the program's validity under the establishment clause.⁴⁷ Thus, there seems to be no principled basis for distinguishing the textbook program apart from the concept of *stare decisis*.⁴⁸

The majority position on the legitimacy of the auxiliary services program reveals the extent of the prohibition of aid to parochial school students. The state sought to avoid a religious effect by using its own employees to provide assistance in developing purely secular educational skills. This should have avoided the need for strict regulation or reporting as these employees would not be tied to the religious school either philosophically or economically. Thus, the program avoided the basis for the finding of entanglement which was used in *Lemon* to invalidate subsidies to employees of the parochial schools. However, Justice Stewart, making little attempt to distinguish *Lemon*, found that there was a possibility that one of these state employees would foster religion in student and that the state fully must guard against this to avoid aiding religion.⁴⁹ Here Justice Stewart did not invoke the "aid-to-the-enterprise" test, but reverted to the view that all activities within parochial school were permeated with religion. Consequently, the majority held that it is impossible to avoid all possible religious effect, even in secular programs for remedial students, without constant supervision on a scale that would result in a prohibited form of entanglement.⁵⁰ Again the Court did not hesitate to apply the strict effect or entanglement test to prohibit all such aid since it found these programs to be divisive politically.⁵¹

The Court's use of the aid-to-the-enterprise, effect or entanglement, and political divisiveness tests indicates that the new majority will use any "test necessary to invalidate any program granting aid to parochial elementary or secondary schools or educational aid to the students who attend them. While some limited forms of noneducational health and safety services which benefit these students may be upheld in the future, no meaningful form of educational aid beyond the *Allen*-type textbook program will be upheld.

NATIONALIZED SCHOOLS AND ECONOMIC ANALYSIS

Meek signals the end of the use of "tests" to determine the legitimacy of any program of aid to children attending religious primary or secondary schools. A majority of the justices appears unwilling to discriminate between types of aid, or the educational needs of particular groups of children benefited by such aid, if there is any possibility that religious schools might attract additional students as a result of such aid. Thus, one must consider whether the total prohibition of aid to these religiously affiliated schools is a principled one. In order to make this determination the inquiry must examine what would appear to be the most neutral type of aid—a tuition-voucher program for the children of low-income families.⁵² If this form of aid can be shown by economic analysis to be compatible

⁴⁷ See note 30 supra.

⁴⁸ The major portion of Justice Stewart's opinion concerning textbooks is no more than a conclusion concerning the similarity between this program and the one approved in *Board of Educ. v. Allen*, 392 U.S. 236 (1968), 421 U.S. at 361. Thus, it would appear that Justices Stewart, Powell and Blackmun feel that *Allen*-type programs must be upheld simply because of the states' reliance on the past decision.

⁴⁹ *Meek v. Pittenger*, 421 U.S. 349, 370-371 (1975).

⁵⁰ *Id.* at 372.

⁵¹ *Id.*

⁵² This article will focus on a voucher program which provides subsidies only to low-income families. The constitutionality of general voucher programs has been explored before but previous articles have predated the absolute position and have failed to employ economic analysis in considering such a program. A complete treatment of the aid to parochial schools question may be found in Choper, "The Establishment Clause and Aid to Parochial Schools," 56 Calif. L. Rev. 260 (1968) [hereinafter cited as Choper].

For a review of the 1973 decisions and voucher programs, see Note, Voucher Systems of Public Education after *Nygulst* and *Sloan*: Can a Constitutional System Be Devised? 72 Mich. L. Rev. 895 (1974). For reviews of the permissibility of such programs which focus primarily on the use of such vouchers for attendance at schools which segregate on the basis of race, see Areen, Education Vouchers, 8 Harv. Civ. Rights—Civ. Lib. L. Rev. 466 (1971); King, Rebuilding the "Fallen House"—State Tuition Grants for Elementary and Secondary Education, 84 Harv. L. Rev. 1057 (1971). It should be noted that it is now clear that these programs need not be judged by the same standard. Aid beyond truly general governmental services which goes to racially discriminatory schools violates the fourteenth amendment. This finding of prohibited aid will be made as to racially discriminatory schools though a program would be upheld for religious schools, as parochial schools advance free exercise clause values. Thus, a textbook-loan program identical to the one approved in *Allen* has been held invalid insofar as books are loaned to students who attend racially discriminatory private schools. *Norwood v. Harrison*, 413 U.S. 455 (1973). It should be noted that the Court's decisions as to the unconstitutionality of segregated schools are supported by economic analysis which shows that discrimination against racial minorities in school systems inflicts on them a much greater cost than is imposed on unwilling whites who are forced to integrate. R. Posner, *Economic Analysis of Law* 297-300 (1973).

with the principles protected by the religion clauses it would undercut the total prohibition imposed by the new majority. The impact of such a program both on educational opportunities and religious principles will be examined first to determine whether legitimate ends are advanced by such a program.⁵³ Then the objections of a majority of the justices to such programs will be examined to determine whether those objections in fact are directed to the protection of values embodied in the religion clauses.

Initially it should be noted that the wisdom or legitimacy of any of these programs has nothing to do with the decision to provide "free" education. In order to assess adequately the nature of aid that states seek to give privately operated schools, and the Court's position on the constitutionality of such programs, the concept of subsidized education must be distinguished from that of publicly operated or "nationalized" schools.

Each state, or society, must make an initial decision as to whether or not it will require families to bear the cost of their children's education. There may be various arguments for or against the government provision of education at zero cost to the student. Some might oppose public funding on the ground that the child's development of his or her own human capital should be done at his or her (or his or her parent's) expense and in the amounts that he or she (or his or her family) choose to purchase. However, at least as to primary (and almost certainly through most of secondary) education, very few people would accept such arguments. Even those committed to individual "libertarian" philosophies or neoclassical economics appreciate that the general educational level of our neighbors affects each of us. Basic education prepares each of our fellow citizens to be better citizens and contributors to society, which in turn reduces the cost to each of us of the later, external effects of too little education on the part of our neighbors.

Yet some might question the wisdom of providing these subsidies on the basis that it will result in some measure of wealth transfer. Whether or not any wealth transfer occurs in the provision of a uniform subsidy for education will depend on the type of program and the people involved. If we assume that the subsidy is granted to all children at an equal level and that the average taxpayer family is richer than the average recipient family then there would be a wealth transfer from rich to poor through the provision of subsidized education. However, if the tax system is highly regressive, the lower income families might bear a disproportionate percentage of the tax burden. If such were the case, high-income families might receive more from the provision of subsidized education than they give in taxes. This would involve a wealth transfer from lower to upper income persons.⁵⁴

However, regardless of any wealth transfer effects, subsidized education (at least at the primary level) does have an egalitarian benefit in that it will provide educational opportunity for all children. Whether an individual child's parents are rich or poor, black or white, willing or unwilling to make further investments in education, each child has the opportunity to receive a minimally adequate education due to the governmentally provided subsidy.

⁵³ The system and economic analysis which follow, are based on the following economic works. The voucher system and economic analysis which follow were first suggested in A. Smith, *The Wealth of Nations* 736-38 (Mod. Lib. ed. 1937). The concept was fully developed and the analysis refined by Professor Friedman. M. Friedman, *Capitalism & Freedom* 85-107 (1962) [hereinafter cited as Friedman]. The problems of zero tuition and higher education which were explored by Professor Alchian also relate directly to the analysis of the voucher program. Alchian, *The Economic and Social Impact of Free Tuition*, in H. Manne, *The Economics of Legal Relationships* 598-613 (1975) [hereinafter cited as Alchian].

Further citation for specific points of the analysis will not be given unless some specific work should be consulted on the cited problem. Those who have not been exposed previously to economic analysis might wish to consult the following introductory works: A. Alchian and W. Allen, *University Economics—Elements of Inquiry* 1-27, 487-528 (3d ed. 1972); R. Posner, *Economic Analysis of Law* 1-10, 252-65 (1973); L. Reynolds, *Microeconomics—Analysis & Policy* 3-22, 346-65 (1973); P. Samuelson, *Economics* 1-17, 58-100, 801-22 (9th ed. 1973). Those totally unfamiliar with economic analysis and who do not wish to consult economic texts can read a "popularized" version of these principles in D. North and R. Miller, *The Economics of Public Issues* 125-37, 171-79 (2d ed. 1973).

⁵⁴ This can be expected to occur where state-operated universities charge little or no tuition. As the students who attend these universities are from income brackets above those who pay the majority of state taxes, the system causes a wealth transfer from lower to higher income groups. Additionally, insofar as the students are chosen for their intellectual abilities their subsidy involves a wealth transfer from the less intelligent to the more intelligent. Alchian, *supra* note 53, at 600. However, these problems should not be as likely to occur in connection with subsidized primary education as there is no selection of students which disproportionately benefits children from upper income brackets.

Once the state decides to provide educational subsidies, all wealth transfer and egalitarian-libertarian inquiries and arguments cease to be relevant,⁵⁵ and the critical question becomes what form the subsidies will take. It is important to realize that this is a distinct inquiry. Simply because the government subsidizes the cost of schooling does not mean that the government must provide the subsidy "in kind" through publicly operated schools. Nor does the government's decision to subsidize student-used educational materials, such as books, papers, pencils or computer time, mean that it must provide them in kind or at a certain place. The state could just as well provide a cash payment or tax credit to enable the student to choose his or her own school or educational materials.

With the historical development of public schools, and the vast political power wielded by those with an interest in their maintenance, it is admittedly unrealistic to suggest that the state can now freely choose to provide all subsidized education in a system which does not involve substantial in-kind provision of schooling through the operation of public schools. However, the question must still be faced as to whether or not the state will offer alternative forms of subsidized education so that citizens individually may choose a form of education other than that which is provided in kind by the government.

Due to the influence of those connected to government-operated schools, one would expect significant alternate subsidies only when those persons with a financial interest in the government-operated schools perceive a benefit in providing such an option. This would tend to occur in highly industrialized states where a large number of low-income families are crowded into a few urban school systems. The overcrowding of the urban schools makes it difficult to provide adequate education. Thus, all the participants in such a school system should perceive that a benefit will accrue to them if private educational facilities reduce the burden on the system.⁵⁶ Because those with "high" incomes can be expected to opt out of such systems in any event, the state need only provide the education subsidy on other than an in-kind basis for children whose family wealth position precludes their selection of an alternate system.

For this reason a number of industrial states have enacted tuition-voucher plans for low-income families.⁵⁷ Under such a plan children who come from families below a certain income level are guaranteed a certain dollar amount subsidy for their education by the state government. They may take this subsidy "in kind" by attending a public school, in which case they will also benefit from any further taxes which are imposed by local governments to run such schools. However, if children choose to go a privately operated school, they may in effect draw on a state account to pay their tuition up to a fixed amount which is less than the state would pay to finance their education in a publicly operated school.⁵⁸ In this way the state has reduced the amount of the subsidy, but has stopped requiring that they take the benefit in kind.

While such a plan clearly seems forbidden by the Court's decisions, the questionable reasoning of those decisions becomes apparent once the economics of the plan are explored. Indeed, it may have been the Court's lack of economic

⁵⁵ Regardless of one's position on the necessity or wisdom of such subsidies, at this point society has expressed its desire as to the nature of the collective "indifference curve" and the amount of resources that are to be allocated to educational subsidies. While economic analysis or actual experience may cause society to change its position on the amount of the allocation in the future, the current decision and allocation are now facts. However, one must appreciate that the philosophical and legal debate about the necessity of such programs will continue. Compare J. Rawls, *A Theory of Justice* (1971) and Michelman, *On Protecting the Poor Through the Fourteenth Amendment*, 83 Harv. L. Rev. 7 (1969), with R. Nozick, *Anarchy, State, & Utopia* (1974) and Winter, *Poverty, Economic Equality and the Equal Protection Clause*, 1972 Sup. Ct. Rev. 41.

⁵⁶ In fact, this is exactly what has happened in major urban areas. The majority of parochial schools exist in the most populous states and serve urban areas. U.S. Dep't of Health, Educ., & Welfare, *Digest of Educ. Statistics 39-41* (1973) [hereinafter cited as *Digest*]. In those low-income areas the quality of education can be expected to decline in the presence of increasing problems of financing and overcrowding. See President's Panel on Nonpublic Education and the Public Good (1972) [hereinafter cited as *President's Panel*]. The eight most populous states face even greater problems in the years ahead if parochial schools close and the government-operated systems are forced to serve directly additional students who otherwise would have attended these schools. See Swartz, *The Estimated Marginal Costs of Absorbing All Nonpublic Students into the Public School System* in President's Comm'n on School Finance, *Economic Problems of Nonpublic Schools* 301, 347 (1972).

⁵⁷ See, e.g., Law of 1972, ch. 414, §§ 2-5 [1972] N.Y. Laws 1696 (held unconstitutional in *Committee for Public Educ. v. Nyquist*, 413 U.S. 756 (1973)), Law of August 27, 1971, act no. 972 [1971] Pa. Laws 358 (held unconstitutional in *Sloan v. Lemon*, 413 U.S. 825 (1978)); Law of July 1, 1972, pub. act 77-1890 [1972] Ill. Laws 246 (held unconstitutional in *People ex rel. Klinger v. Howlett*, 56 Ill. 2d 1, 305 N.E.2d 129 (1973)).

⁵⁸ This payment usually is made directly to the student or the student's family. See programs listed in note 57 *supra*.

analysis which led to the total prohibition on aid to parochial schools. For this reason the effect of such a program on a purely nonreligious level will be examined first. While the increased efficiency of such programs might well lead one to propose a voucher system as the primary means of providing subsidized education,⁵⁹ the focus here is on the particular economic and educational benefits of a voucher program designed for the children of low-income families.⁶⁰

The first and perhaps the most important effect of a voucher program is that it provides a more meaningful equality of educational opportunity for children from low-income families. The provision of subsidized education only through a government-operated school system imposes very severe hardships on children from low-income families who seek a superior education. If the local public school system seems insufficient for developing intellectual abilities of the children of the higher income families, the parents may move to a place where the public school system is superior or simply withdraw their child from the public school system and provide the child with a privately financed education. Neither of these options is available to low-income families. The low-income parents may be equally desirous of improving the education of their children, especially if they perceive that their children have exceptional intellectual abilities or that the local public schools fail to provide even a minimally adequate education. Indeed these parents might well be willing to do without many other "basic necessities" in order to provide their children with a superior education. However, because subsidized education is provided only in kind, they can only change the quality of their child's education with a massive dollar supplement which is beyond their means. If the state would give them the dollar equivalent of the per-pupil cost of the local public school, they could supplement this figure with some of their own resources and use the increased amount to send their child to another school. However, where the subsidized education is provided only in kind, the parents would have to be able to move to a substantially richer neighborhood or to bear the entire cost of private education themselves in order to improve the educational opportunities of their children. These options, of course, will be beyond the means of such families. Thus, the single, nationalized school system will always yield lesser educational options for the children of the poor.

It is of some importance to note that the effects of this systemic restriction on equal educational opportunity are most serious at the primary levels of education. At this point the child is incapable of making his own decisions as to the investment in his human capital—there are no educational loans or scholarships available which can be utilized to overcome his family's limited economic capacity to provide for his education. Thus, the children of the poor will be restricted in their ability to obtain an adequate primary education, which, in turn, will hinder any further development of their talents. This is in effect a restriction of their total economic potential and adds to the wealth-class stratification in society.⁶¹

Moreover, this cost is not borne by the poor alone. The failure of a given person to go to college or professional school has little external effect—the principal benefit of such education being an increase in the earning potential of the student. If a person does not perceive it to be in his or her best interest to invest in this development of human capital in order to increase the dollar return on his or her education, no serious external effect on society can be anticipated.⁶² However, basic education is necessary for any meaningful level of participation in society. The failure of a child to receive adequate primary education is likely to increase the cost of that child to the rest of society as the child matures. For example, the child may later be unable to participate adequately in the employment market which in turn increases the probability of a later imposition cost on society either in the form of reliance on social welfare programs or the commission of illegal

⁵⁹ This would be a "pure" voucher system such as has been proposed by Professor Friedman. See Friedman, *supra* note 53.

⁶⁰ For the purposes of this article, "low-income family" need not be defined precisely. As a working hypothesis I will assume that one can describe statistically families (or individual children who lack family support) which face severe resource allocation problems because of their gross income and wealth position so that they have no meaningful choice of sending their children to nonpublic schools. This range should be above the federal "poverty" demarcation and one can expect that these families will be concentrated in low-income urban areas. See President's Panel, *supra* note 56.

⁶¹ For further analysis of the restrictive effect of the current public school system on economic mobility, see Clark, *Alternative Public School Systems, in Equal Educational Opportunity* (Harv. Educ. Rev. ed. 1969) [hereinafter cited as Clark] See generally J. Coons, W. Clune and S. Sugarman, *Private Wealth and Public Education* (1970).

⁶² For a more complete exposition of this concept, see Alchian, *supra* note 53.

acts. Thus, it is apparent that the court's primary-higher education distinction, as reflected in the *Lemon* and *Tilton* decisions,⁶³ is backwards economically: the court is permissive in its attitude toward aid to higher education, which has little external effect on society, while it strictly prohibits aid which would be of the most importance to the child and society at large.

Not only would a voucher system present low-income families with increased educational opportunity, but it would also enhance the quality of education provided in the state-operated schools. Absent such a voucher system, state-operated schools in low-income areas face no competition. Consequently, there is no economic incentive for public school officials in these areas to improve the quality of their product—the education of children. The low level of achievement on standardized tests by inner city students is not surprising when one realizes the teachers and administrators in those schools do not suffer any ill effects because of their students' poor showing.⁶⁴ Because the parents cannot withdraw their children from the schools and take the tuition payments with them, there is no financial effect on these schools from parent or student dissatisfaction. This is to be contrasted with schools in higher income, or less populated areas where the threat of declining enrollments may serve as an incentive to increase the perceivable quality of education.

Perhaps the major impediment to a measurably improved system of education in the inner city schools is their overcrowded condition. However, this is a direct result of the failure to provide subsidized education away from the governmentally operated system. These schools will continue to be overcrowded so long as children in the areas can only receive a subsidized education by attending them. In effect the nationalized system requires this overcrowding by offering a financial incentive to attend this limited group of schools. The use of a voucher system for low-income families should encourage parents to withdraw their children from the overcrowded, low-quality schools of the inner city and send them to schools with fewer disciplinary or educational problems.

Moreover, both in the development of alternative private schools and in the running of public schools, the tuition-voucher program will encourage educators to be responsive to the desires of the parents and children. So long as teachers and administrators in the inner city schools are insulated from any financial reprisals by the parents there is little real incentive for them to comply with parents' wishes that their children be taught either in a manner which is more responsive to their culture or which will result in higher performance in certain testable intellectual capacities.⁶⁵ The voucher system would allow parents to send their children to the school which they perceive is best performing these functions or to establish new schools which would educate their children in the desired manner. Absent a voucher system, low-income families lack the financial ability to organize an alternative educational system. But whether low-income families become involved with the creation of new schools or turn to existing private schools as an alternative to the public school system, each public or private school would have to tailor its educational program to the desires of parents and children in order to compete for their tuition dollars.

The final effect of the voucher program is indeed a religious one. Just as the voucher program increases the educational opportunity of the children of low-income families, it also increases their opportunity to exercise the rights guaranteed them by the free exercise clause. Even before the application of this clause to the states, the Supreme Court found that families had a right to withdraw their children from the public school system and educate them in a manner more acceptable to their own philosophical or religious principles.⁶⁶ So long as the alternative form of education meets reasonable state requirements, parents and children have a right to engage in such alternative forms of education. But this right is a hollow one for those families who cannot afford to pay for their share of the publicly operated schools and then forsake the subsidy. The voucher system would make the free exercise rights of these families more meaningful by allowing them to choose between the provision-in-kind benefits at the government-operated school or a partial subsidy for privately operated schools.

⁶³ See notes 17-24 and accompanying text supra.

⁶⁴ The measurable indicators of education whether by student tests or otherwise show students in low-income areas to be receiving a low-quality education as compared to students in wealthier areas or private schools. See President's Panel, supra note 56; Digest, supra note 56. See also Alchian, supra note 53. For a report on the quality of education and the problems of a specific urban district, see Mayor's Advisory Panel on Decentralization of the New York City Schools, *Reconnection for Learning: A Community School System for New York City* (1967).

⁶⁵ While it may be true that there is a political incentive for higher administrators to respond to citizen complaints, this is not likely to affect most teachers and administrators.

⁶⁶ *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

Thus, the voucher system for low-income families has several important benefits. First, it increases the educational opportunities of children from low-income families and reduces wealth stratification. Second, it will ease the burden on and improve the quality of government-operated schools. Third, it would allow for a greater freedom of conscience for low-income families by allowing them to make meaningful decisions as to whether they want their children educated in parochial schools. In light of the societal benefits following from the voucher plan, it is legitimate to ask whether the Court's blanket prohibition is protecting significant religion clause values.

RELIGION CLAUSE VALUES AND SUPREME COURT "TESTS"

The question of whether or not a neutral aid program such as the low-income voucher plan has a religious purpose is resolved easily. Economic analysis demonstrates that the neutral provision of subsidies will only increase individual liberty and equality as well as the efficiency of publicly operated education. The incidental aid to religion seems inconsequential compared to these non-sectarian benefits. The question of whether or not any individual legislator voted for these programs because of a religious motivation seems irrelevant as there are significant secular ends which are advanced by such programs.⁶⁷

A more serious question is whether the low-income voucher program constitutes a prohibited form of aid to religion. Certainly the Court is correct in holding that a central purpose of the establishment clause was the prohibition of aid to specific religious or religious activities.⁶⁸ The provision of aid to help certain religions promulgate their faiths carries the seeds of destruction for all the values of the religion clauses.⁶⁹ Such aid has a high potentiality for an identification of government and particular religious beliefs which could lead to the official establishment of religion and the suppression of divergent beliefs. While it is doubtful that the framers of the first amendment intended to prohibit the federal government from aiding all religions over nonreligion,⁷⁰ the prohibition of such aid seems necessary in the modern world. As it is difficult, if not impossible, to define those current philosophic beliefs which might qualify as "religion," the favoring of all "religions" over nonreligion would certainly tend to punish certain beliefs and the exercise of freedom of conscience in some manner.⁷¹

But if these principles are clear, the question of what constitutes a prohibited form of aid is not.⁷² Certainly it cannot be that aid in any meaningful sense is forbidden, for that would require the government to actively inhibit religious activities and penalize all those who wish to practice religion. Any time the government engages in a program which allows either a religious organization or persons who wish to support religious groups to increase or retain more of their real wealth, the government has financially aided religion. For example, it makes

⁶⁷ Due to the important secular benefits of such programs it would be difficult to view such motivation as so blatant or important as to be constitutionally cognizable. See generally Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 *Yale L.J.* 1205 (1970); Note, *Legislative Purpose and Federal Constitutional Adjudication*, 83 *Harv. L. Rev.* 1887 (1970).

⁶⁸ C. Antieau, A. Downey & E. Roberts, *Freedom From Federal Establishment* 204-09 (1964) [hereinafter cited as Antieau]; J. Story, *Commentaries on The Constitution of the United States* 627-34 (5th ed. 1891).

⁶⁹ The clauses taken together require a unifying principle or value. Professor Kurland has shown the necessity for a single concept of government neutrality concerning religion which is safeguarded by the principle "that government cannot utilize religion as a standard for action or inaction because these clauses, read together as they should be, prohibit classification in terms of religion either to confer a benefit or to impose a burden." P. Kurland, *Religion and the Law* 112 (1962) [hereinafter cited as Kurland].

Professor Freund has identified three values of the establishment clause which must be considered in determining whether any program which arguably aids religion violates the clause. They are: "voluntarism in matters of religion, mutual abstention of the political and the religious caretakers, and governmental neutrality toward religions and between religion and nonreligion." Freund, *Public Aid to Parochial Schools*, 82 *HARV. L. REV.* 1680, 1684 (1969) [hereinafter cited as Freund]. These values will be examined in relation to the "tests" adopted by the Court. Thus, "voluntarism" and "neutrality" are protected by the primary purpose and effect tests. The value of "mutual abstention" is protected by the "entanglement" test.

⁷⁰ Antieau, *supra* note 68.

⁷¹ This position has been adopted by the Court and leading commentators. See *School Dist. v. Schempp*, 374 U.S. 203 (1963); Kurland, *supra* note 69; Freund, *supra* note 69.

⁷² This especially is true as to school aid questions. Professor Choper argued that state constitutions showed a "historic policy" against aid to religious schools. Choper, *supra* note 52, at 263. However, other scholars have demonstrated that the "no aid" clauses of state constitutions related to a later period in American history. W. Kats, *Religion and American Constitution* 64 (1964) [hereinafter cited as Kats]; Antieau, *supra* note 68, at 163-74 (1964).

no difference in terms of the total wealth position of a church whether the government grants it a tax exemption which saves it \$1,000 a year, or taxes and returns the \$1,000 a year to it in the form of a grant. Nor does it make any difference to the parents of children who attend parochial schools whether the state provides them with fire and police protection or, instead, the schools are charged with a government grant of funds sufficient to cover these costs. Thus, it seems that the prohibited forms of aid cannot encompass all government activities which make it easier for people to engage in religion or for parents to send their children to parochial schools. The government could only avoid aiding religion in this manner by actively penalizing participation in religious activities, which would be prohibited by the free exercise clause.⁷⁵

Until the *Nyquist* decision, the prohibition seemed only to encompass the provision of dollars or goods directly to religious groups in such a manner that these subsidies were readily useable for sectarian purposes. The rationale for this prohibition was twofold. First, the direct provision of funds or goods for religious activities gave the appearance of a government preference for particular beliefs. Second, such aid led to government control over religion by making even the most basic religious functions dependent upon the continuation of government benefits. The voucher plan for low-income families avoids these problems by providing only the amount of money for tuition payments that it would cost the state to provide nonsectarian education in the public school. As the state will require that essentially the same minimal educational services be provided in the private schools receiving aid, there is no reason to suspect that the sectarian institution could "turn a profit" on the tuition vouchers. Thus, no principle of voluntarism is abridged by the program since religious education is not subsidized by tax dollars. As Professor Choper has shown, a formula such as this should insure that no religion in fact becomes dependent on government subsidy for engaging in its basic sectarian functions and that there is no public identification or government with particular religious beliefs.⁷⁶

Yet it might be argued that as to those families who easily could afford to send their children to parochial schools, the provision of tuition vouchers constitutes an unconstitutional encouragement of religious education.⁷⁷ While it is hard to envision how the equal or lesser subsidy for privately operated education suggested here could be an encouragement in any case,⁷⁸ such an argument clearly is irrelevant as to low-income families. To require more than the statistical guarantee of a formula for aid to those families is to hold that they have a right to exercise their religious beliefs by sending their children to parochial schools but that the state must so favor a nationalized school system that it effectively eliminates that right.

Finally, one must determine whether the voucher plan creates an "excessive entanglement" between government and religion. As shown previously,⁷⁹ this concept has been used to invalidate programs which cause either administrative entanglement or political division.

The administrative regulation of religious activities would pose great danger to the values of government neutrality in religious matters. First programs which call for a high degree of administrative contact and regulation might leave the impression that those groups which survive regulation are governmentally approved. Such regulation also endangers the freedom of religious societies by requiring them to be responsive to government administrators in

⁷⁵ There has been no suggestion even by the new majority that government could deny basic welfare services to religious groups on this basis. Indeed, the Court continues to require the government to accommodate those who wish to practice their religious beliefs so long as the accommodation neither seriously impairs neutral goals nor is a direct aid to religious activities. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

The tension between the guarantees of the free exercise and establishment clauses can only be resolved by a unifying principle of neutrality. Kurland, *supra* note 69. In determining the permissible scope of aid, this tension-neutrality concept should cause the Court to distinguish between aid "which has the effect of inducing religious belief" and that which "merely accommodates or implements an independent religious choice." Schwartz, *No Imposition of Religion; the Establishment Clause Value*, 77 *Yale L. J.* 692, 723 (1968). See Katz, *supra* note 72.

⁷⁶ Choper, *supra* note 52.

⁷⁷ This was the basis for the majority's rejection of the formula argument in *Nyquist. Committee for Public Educ. v. Nyquist*, 413 U.S. 756, 786 (1973).

⁷⁸ No matter how "rich" the family, the voucher system does not encourage them to do anything. While it increases family resources and removes the special incentive to send one's children to government schools, it has no effect on the final choice of schools. That is determined by competition among all schools—public and private—for the students and their subsidized tuition payments. See Choper, *supra* note 52, at 297-98; M. Friedman, *supra* note 53, at 91.

⁷⁹ See text accompanying notes 32-34 *supra*.

order to maintain the flow of benefits. Additionally, this type of involvement may undermine the neutrality of the government itself. A high degree of regulation will require some formal administration to insure that the day-to-day regulations are followed and that reporting requirements are met. However, in the long run, administrators and those who are being regulated frequently develop a mutuality of interest. It is in the interest of the public administrators to please those who are regulated in order to maintain their position and increase the power of their agency. Similarly, it is in the interest of the regulated entities to accommodate, if not control, those who regulate them so that they will receive favorable rulings in areas where the administrators exercise some discretion. This mutuality of interest can lead to the "capture" of administrative agencies by those whom they are supposed to regulate and make it difficult to determine whether such agencies are acting on behalf of the public or the regulated entity.⁷⁹ There is no reason to believe that the regulation of religious activities would follow a different pattern.

Thus, Chief Justice Burger was quite correct in concluding that the first amendment forbids any program of government aid which would require substantial reporting and regulation⁸⁰ since it is the first step to agency regulation of religious societies. However, so long as the aid program does not involve a substantial probability that the benefits could be used directly for sectarian functions, there is no need for a reporting and regulation system which would lead to administrative entanglement. For example, vouchers which are computed by a formula which gives statistical assurance that no aid will be provided to sectarian activities should not require further regulation of this type.⁸¹ Similarly, the provision of truly neutral educational materials which are not readily adaptable for religious education requires no further regulation to insure that they are not used for the religious orientation of students.⁸²

To insist that any form of aid, no matter how neutral, continually be reported on to insure its neutrality but then to invalidate the program because of the reporting requirement seems circular. This result is justified, in the view of a majority of the Court, by the political divisiveness principle.

The origin of the excessive entanglement-political divisiveness test merits attention. The concept was introduced by Justice Harlan in his concurring opinions in *Board of Education v. Allen*⁸³ and *Walz v. Tax Commission*.⁸⁴ However, he only meant to use the concept to indicate that the Court should be careful not to encourage such political fragmentation. His conclusions as to the validity of the textbook program and the tax exemption show that he did not intend to use the concept as a strict test of constitutional validity.⁸⁵ Similarly, in the *Lemon* and *Tilton* decisions, it appeared that the Chief Justice was only using this concept to reinforce the conclusions of the Court. He found that the programs of aid to religious primary, secondary and college level schools all had a secular purpose. However, the challenged forms of aid to primary and secondary schools were found to be extremely susceptible to use for religiously oriented activities, which meant that the government would have to engage in a prohibitive form of day-to-day regulation to insure that no aid was given to religious functions. At the college level, the greatly decreased likelihood that the forms of aid could or would be used for sectarian activities meant that the government could rely on milder forms of reporting and regulation to insure secular use of the funds. Thus, the real distinction between the two programs was not in the politically divisive nature of each program, but that one form of aid invited excessive administration while the other did not.⁸⁶ The Chief Justice merely reinforced the Court's conclusions by noting that there was political division over the primary school aid programs, but not the college grant program.⁸⁷

⁷⁹ K. Davis, *Administrative Law Treatise* § 1.03 (1958); T. Morgan, *Economic Regulation of Business—Cases and Materials* 21-23 (1976); Posner, *Theories of Economic Regulation*, 5 *Bell J. of Econ. & Mgt. Science* 335 (1974); Stigler, *The Theory of Economic Regulation*, 2 *Bell J. of Econ. & Mgt. Science* 3 (1970). See also L. Kohlmeier, *The Regulators—Watchdog Agencies and the Public Interest* 69-82 (1969).

⁸⁰ The administrative entanglement test was added in *Walz v. Tax Comm'n*, 397 U.S. 666 (1970).

⁸¹ Choper, *supra* note 52, at 287-90.

⁸² Even the new majority of the Court has admitted that a variety of instructional materials may be "self-policing" in this sense. *Meek v. Pittenger*, 421 U.S. 349, 365 (1975).

⁸³ 392 U.S. 236, 249 (1968) (Harlan, J., concurring).

⁸⁴ 397 U.S. 664, 695 (1970) (Harlan, J., concurring).

⁸⁵ Thus, although Justice Harlan cited the Freund article, *supra* note 69, in his *Walz* concurrence, 397 U.S. at 695, he showed no inclination to reconsider his position in *Allen* because of this concept. *Id.*

⁸⁶ Compare *Lemon v. Kurtzman*, 403 U.S. 602, 618-19, 621-22 (1971), with *Tilton v. Richardson*, 403 U.S. 672, 685-88 (1971) (Burger, C.J., plurality opinion).

⁸⁷ *Lemon v. Kurtzman* 403 U.S. 602, 622-25 (1971); *Tilton v. Richardson*, 403 U.S. 672, 689 (1971) (Burger, C.J., plurality opinion).

The test, however, took on a life of its own in *Nyquist*. Here a form of completely neutral aid—a tuition-voucher plan—was stricken in part because of the belief that any significant aid to students in sectarian schools caused political division.⁷⁷ This principle was invoked again in *Meek* to justify the prohibition of furnishing auxiliary educational aids and services to students, a form of aid with little potential for use in sectarian functions.⁷⁸ Indeed, three of the justices were so committed to this concept that they favored invoking it to strike down the *Allen* textbook program.⁷⁹ They were correct in noting that no significant aid to parochial schools is permissible under the political divisiveness test. There was no principled way to distinguish the textbook program under the test⁸⁰ since any form of aid which would enable children to go to parochial schools will carry with it the seeds for debate cast in religious terms about its merits.

If the political divisiveness test is in fact being used by the majority to ban religious conflict, the attempt would appear to be both unprincipled and futile. There is no principled way to sort out religious from nonreligious principles so as to exclude from the political process those matters which stir religiously oriented emotions. Laws ranging from Sunday-closing legislation to abortion regulations are all susceptible of being debated along religious lines. Yet the justices who apply the political divisiveness test so strictly in school aid cases have made no effort to prohibit legislative debate in these areas.⁸¹ Such selective use of the concept indicates that even its proponents doubt its merits. However, even if the justices could devise a divisiveness test which would have principled application only in school aid cases, the attempt to outlaw such division would prove futile. The prohibition of aid to parochial schools will not end sectarian debate over educational programs and budgets—it will only shift its focus. By prohibiting even neutral aid to parochial schools, the Court has seriously disadvantaged them in competing with the governmentally operated school system. Instead of religious groups proposing legislation which would benefit the students who would attend their schools, they will be forced to oppose aid to public schools so as to benefit their schools indirectly. Insofar as the proponents of religious education can reduce the amounts spent on public schools, they will decrease the incentive for parents to send their children to such schools.

Indeed, the shifted focus of the political conflict may well increase political division along religious lines. As inner city school performance continues to decrease, one would expect increased pressure on government to aid private schools so that the residents of the city have an alternative to the public school system.⁸² However, it will be in the interest of those who favor religiously oriented education to oppose such aid if it is not provided on an equal basis to parochial schools. Those who favor parochial schools will perceive that aid to nonreligious private schools directly threatens their existence by offering an alternative to the public school system which the state has placed in an economically preferred position to their schools. This would leave religious schools at a dual disadvantage in the market place. Public schools would have the benefit of the highest governmental subsidy, while private nonreligious schools would have less subsidy but greater responsiveness to parents and teachers. The religiously oriented schools would be the only ones where the students or their families are required to bear the full cost of operating the school. Those who favor the continued existence of parochial schools would find it beneficial to oppose aid to both the public schools and nonreligious private schools. Thus, one may expect to see new forms of political division along religious lines due to the majority's ban on aid to parochial schools.

There is little hope that the children of the poor will be provided meaningful religious or educational freedom of choice so long as the Court continues to use the circular "aid-or-entanglement" test and political divisiveness concept as its guiding principle. The forms of aid which could survive a strict application

⁷⁷ *Committee for Public Educa. v. Nyquist*, 413 U.S. 765, 795-97 (1973).

⁷⁸ *Meek v. Pittenger*, 421 U.S. 349, 365 n.15, 372 (1975).

⁷⁹ *Id.* at 374-78 (Brennan, J.). This opinion was joined by Justices Douglas and Marshall.

⁸⁰ *Id.* at 377-78 (Brennan, J.).

⁸¹ Indeed, the Court itself has stirred some of the most serious political division along religious lines by its rulings on such matters as the permissibility of prayers in public schools. See *Columbia Broadcasting System, Storm Over the Supreme Court* 43-74 (1963). This portion of the book is a transcript of a national news report on the political debate over the Court's decision prohibiting "school prayers" in *Engel v. Vitale* 370 U.S. 421 (1962).

⁸² See President's Panel, *supra* note 56, at 14; Clark, *supra* note 61.

of these tests are worthless in terms of providing real freedom of choice for these families. Yet economic analysis shows that there is no danger to the values of the religion clauses which is posed by neutral forms of aid such as the religion plan for low-income families. No principle of voluntarism is endangered by such a program as no tax dollars go to the funding of religious activities. There is no danger to government neutrality as the programs merely allow low-income families to exercise freedom of choice in educational matters. Finally, the principle of mutual abstention is preserved by providing only services or dollars amounts which are not likely to aid religious activities and which avoid administrative entanglement.

Indeed, the current position of the Court is counterproductive in terms of first amendment values. An absolute rule virtually destroys the freedom of choice in both religious and educational matters for low-income families. Additionally, it limits the variety and quality of educational opportunity which is offered to the children of those families. Finally, it raises an almost insurmountable barrier for those industrialized states attempting to solve the problems of overcrowded inner city schools. The Court-ordered nationalization of education thus seems to advance neither the principles of the first amendment, egalitarianism nor the efficient pursuit of social goals through publicly funded education. Hopefully, the Court will one day alter its position and allow the states to provide alternate forms of funding to those students who would choose private sectarian schools as well as those who wish to attend governmentally operated institutions.

CONCLUSION

There seems to be no particular principle of the religion clauses which is endangered by neutral programs which benefit students of religious schools. It well may be that a majority of the justices have come to believe that it is their role to eliminate political division over religious issues insofar as possible. However, if that is their goal, it seems unprincipled to the extent that they pursue it only in decisions on aid to nonpublic school students, and unworkable in that the judiciary cannot effectively prevent religious groups from acting on behalf of what they perceive as their own interests. Additionally, economic analysis shows that such programs can provide important secular benefits without resulting in aid to religious activities or excessive administrative entanglement. Thus, one can question seriously whether there is any principle of religious freedom which the new majority is attempting to protect through its absolute ban on any form of meaningful aid to parochial schools.

Professor Bickel suggested that the Court's rulings on educational issues were designed to put a standardized type of public education in a preferred market place position.⁶³ By nationalizing education one might hope that future generations would come out with a uniform humanistic ethic which would encourage them to support the type of principles which the Court seems committed to in its "civil liberties" decisions.⁶⁴ Professor Bickel's suggestion would seem to be borne out by the fact that each justice's "strictness" in this area is related to the "liberalness" evidenced in his decisions on civil liberties issues.⁶⁵ However, the analysis proffered in this article shows that such a goal is ill-served by the prohibition of aid to parochial schools. Rather than producing a uniform populace with a uniform ethic, the Court will only succeed in denying a meaningful opportunity to participate in the economic and political market place to the children of low-income families. This portends further wealth and racial division in society rather than the acceptance of uniform goals.

⁶³ A. Bickel, *The Supreme Court and the Idea of Progress* 12125, 136-37 (1970).

⁶⁴ *Id.*

⁶⁵ The division of the justices in *Meek v. Pittenger*, 421 U.S. 349 (1975), provides an excellent example of this relationship. There, Justices Douglas, Brennan and Marshall voted to overrule *Allen* and to allow no aid to parochial schools or their students. Justices Blackmun, Powell and Stewart upheld the textbook program but would allow no more aid than had been approved by previous decisions. Chief Justice Burger and Justice Rehnquist would uphold neutral aid in the form of secular goods and services if they were provided directly to the students. The one exception to this apparent relationship is Justice White, who would uphold a wider variety of programs than would Chief Justice Burger or Justice Rehnquist. See *Committee for Public Educ. v. Nyquist*, 413 U.S. 756, 813 (1973) (White, J., dissenting). However, if Justice White is an exception, he shows a principled consistency here. He has perceived the effect of limiting the educational opportunities of low-income children and he consistently votes to increase those opportunities. See *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 63 (1973) (White, J., dissenting).

UNIVERSITY OF CALIFORNIA, BERKELEY,
Berkeley, Calif., December 8, 1977.

Senator DANIEL P. MOYNIHAN,
U.S. Senate,
Washington, D.C.

DEAR SENATOR MOYNIHAN: Thank you for your good letter of November 18 concerning S. 2142, in which I am very interested, particularly as it involves the constitutional issue of aid to church-affiliated schools. I take the liberty of enclosing a reprint of my analysis of the subject, written nine years ago and before the spate of decisions since then essentially rejecting my thesis, which would permit substantial public financial assistance to parochial schools.

I wish that I could take the time out to write a detailed analysis of the series of more recent Supreme Court decisions in this area and their application to S. 2142. Instead, I am submitting the following brief statement:

Under the existing decisions of the Supreme Court, S. 2142 proposes a program whose constitutionality is uncertain. There are a substantial number of relevant cases. In my judgment, none comes close to being a model of analytic clarity. Several of the most important holdings contain no single opinion for a majority of the Court. And the Court's composition has changed somewhat since several of these decisions were rendered. In lieu of drafting a comprehensive analysis of the problem, I hope you will find this brief statement of some value as support for my view, to use your words, that S. 2142 may well be "a sound and responsible measure that will cause the Supreme Court to take another look."

In respect to assisting elementary and secondary school children, the most significant decision is *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973). There the Court held that New York's program of "tax relief" to parents who pay tuition for their children at nonpublic elementary and secondary schools violated the Establishment Clause. S. 2142 differs in one arguably important respect from the law in *Nyquist*. In that case, the Court emphasized that the "tax reductions authorized by this law flow primarily to children attending sectarian, nonpublic schools," the Court noting that 85 percent of the nonpublic elementary and secondary schools in New York were church-affiliated. The Court left open the question of "whether this factor alone might have controlling significance in another context in some future case. . . ." Since the recipients of the tax credit in S. 2142 include persons at all levels of education, the percentage attending church-affiliated schools would undoubtedly be much smaller than that under the New York program. Thus, it may be argued that, in contrast to the law in *Nyquist*, S. 2142 neither has a "primary effect that advances religion" nor contains the potential for political "divisiveness" along religion lines against which the Court has said the Establishment Clause was intended to protect.

In respect to assisting college students, the most significant decision is *Roemer v. Board of Public Works*, 426 U.S. 736 (1976). There the Court held that Maryland's program of annual grants to all accredited private colleges, based on their number of students, did not violate the Establishment Clause. Since S. 2142 involves tax credits to individuals rather than money grants directly to church-affiliated institutions as in *Roemer*, that case provides substantial support for S. 2142's constitutionality. But S. 2142 differs in an arguably important aspect from the law in *Roemer*. In that case, the law provided (and the Court emphasized) that "the funds not be used for 'sectarian purposes.'" Since S. 2142 places no restriction on how the funds are used, and since the Court might conclude (as it did in *Nyquist*) that there is no difference in "substantial impact" between aid to students and aid to the institutions themselves, *Roemer* may be argued as being distinguishable.

Apart from the above statement, I would, if you would like, be glad to consult with anyone who is producing a more comprehensive statement or to review what is proposed to be submitted. Further, if you think I could be helpful by testifying at the Committee's hearing, I would certainly be happy to try to arrange my schedule to do so—although the only day that would now appear possible for me is January 20.

Best wishes,
Sincerely,

JESSE CHOPER,
Professor of Law.

Enclosure.

THE ESTABLISHMENT CLAUSE AND AID TO PAROCHIAL SCHOOLS

(By JESSIE H. CHOPER)*

I

INTRODUCTION

[Footnotes have been omitted from this reprint and may be found in the Committee files.]

In 1947, Mr. Justice RUTLEDGE found "[t]wo great drives . . . constantly in motion to abridge . . . the complete division of religion and civil authority which our forefathers made. One is to introduce religious education and observances into the public schools. The other, to obtain public funds for the aid and support of various private religious schools." *Everson v. Board of Education*, the occasion for his observation, was the first significant decision of the Supreme Court in current history interpreting the establishment clause of the first amendment. Involving bussing of children to parochial schools, it concerned the second of the Justice's "two great drives."

Since 1947, the Court has addressed itself extensively to the first of the two issues in controversy—the influence of religion in the public schools. Although litigation on that question continues to arise, the Court's pronouncements, despite some criticism, seem largely to have resolved the matter. Therefore, it is evident that the most sensitive issue involving religion and government today is, as in *Everson*, that of public aid to parochial schools. Intense interest in the constitutional aspect of the topic is reflected in a recent pamphlet reporting that as of December 1, 1967, at least a score of cases involving the establishment clause question were pending in state and lower federal courts. And, on January 15, 1968, the Supreme Court, for the first time in over twenty years, agreed to hear argument on the subject.

A. *The concept of aid*

Forcefully emphasized and oft-repeated language in Supreme Court opinions, beginning with *Everson*, appears to permit little room for debate about aid to religion:

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . . 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.

On this basis, President John F. Kennedy declared in 1961 that a "clear prohibition of the Constitution" forbade the allocation of federal funds for parochial schools.

What constitutes aid or support, however, is "obviously a sophisticated and not a simple literal concept." In the *Everson* decision itself, for example, the Court upheld public reimbursement to parents for the expense of bussing their children both to public schools and to Catholic parochial schools; yet the Court acknowledged the "possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the State." Even the *Everson* dissenters seemed to agree that the furnishing of police and fire protection and of water and sewage services to churches and church schools conformed with the establishment clause. Yet it may plausibly be said that all of these "in fact give aid and encouragement to religious instruction." Neither the fact of a "continuing and increasing demand for the state to assume" their cost, nor the fact that their provision by state funds affords the church "greater strength in our society than it would have by relying on its members alone" demonstrates their unconstitutionality. Some additional ingredient—some brighter line of demarcation—is necessary for invalidation of the expenditure of tax funds.

Thus, despite the Court's rather insistent declarations, "[p]redictability is still elusive." It is not clear that "a non-preferential expenditure of public moneys to

*B.S. 1957, Wilkes College; LL.B., 1960, University of Pennsylvania; D. Hu. Litt., 1967, Wilkes College; Professor of Law, University of California, Berkeley. The author wishes to express his gratitude to his colleague, Frank I. Goodman, for his very helpful comments and to Alan S. Koenig, of the third year class, for his excellent and exceptionally thorough research assistance.

religious institutions in furtherance of purposes in which government and the churches have concurrent interests may . . . so deeply involve government in religious matters as to violate what the Court conceives to be the basic values served by the First Amendment." In sum, it does not appear that the Court has firmly foreclosed the issue of the constitutionality of aid to parochial education.

B. The relevance of "history" and "experience"

Despite the fact that the Court has not absolutely precluded inquiry into the constitutionality of aid to parochial schools, it could be argued that the history of the religion clauses of the first amendment has already determined the outcome. It has been contended that "history and experience may be sounder guides to locating Jefferson's 'wall of separation between church and state' than abstract logic." But reliance on history alone is futile. Perhaps it is true that "[n]o provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment. It is at once the refined product and the terse summation of that history." But a recent detailed inquiry into the practices, preferences, fears, and experiences of the entire generation that promulgated the religion clauses catalogues a wide assortment of possible explanations for their phraseology and concludes that "it is impossible to give a dogmatic interpretation of the First Amendment, and to state with any accuracy the intention of the men who framed it . . ."

The historical facts are that free public education was virtually nonexistent during the early years of independence, and where it did occur it had a distinctly religious orientation. The relevance of the latter fact for the meaning of the establishment clause, however, is unconvincing in light of the further fact that established religions and churches flourished in the colonies, persisting at times into the nineteenth century. And, if experience is to be our guide, it is perplexing to find that, despite provisions in almost all state constitutions which arguably, and often explicitly, prohibit public aid to sectarian schools, it was calculated twenty years ago that both federal and state funds "are actually being allocated, in no less than 350 instances, to American parochial schools today." And it is reasonable to assume that increased public concern with education has caused that number to grow significantly.

Most assuredly, however, history occupies a prominent role in the formulation of establishment clause principles. It has been properly utilized by the Court, not to discover the precise intention of the framers as to the controversial religious questions of today, but rather to "divulge a broad philosophy of church-state relations." History should furnish the informed perspective needed to fashion a rational constitutional standard that serves several purposes, including cognizance of the evil consequences feared by the framers, appreciation of values presently cherished, and capability of consistent application to the relevant problems. Too strong a reliance on history and experience, given their detailed inconsistencies which cannot be rationalized on principled grounds, will result only in ad hoc, unreasoned rulings. Such rulings conceal value judgments that, although inevitable in constitutional decisionmaking, should be laid bare by the articulation of general principles.

C. The Purpose of the Article

It has been seen, at the threshold, that both Supreme Court rulings and first amendment history leave open the constitutional question of aid to parochial schools. This article will propose a rule under the establishment clause for testing the constitutionality of aid to those parochial schools that provide at least some secular education. It is particularly appropriate, in dealing with this topic of aid to parochial schools, to recall Mr. Justice Frankfurter's warning that "preoccupation by our people with the constitutionality, instead of with the wisdom, of legislation or executive action is preoccupation with a false value." But it is constitutionality alone that must concern us here, irrespective of any preference as to the desirability of assisting nonpublic schools. Perhaps in resolving this issue "the members of the Court must have recourse to their own convictions about the place of religion in education and public life," but surely not to the exclusion of the other, more consequential determinants.

In brief, my proposal is that governmental financial aid may be extended directly or indirectly to support parochial schools without violation of the estab-

Establishment clause so long as such aid does not exceed the value of the secular educational services rendered by the school.

The general theorem is not advanced as being wholly novel. It has been suggested by other commentators and implicitly relied upon by State courts facing the question under State constitutions. But a thorough examination of its implications in light of history, precedent, principle, and intricacies in application is called for. No attempt will be made here to predict the Court's future course of action. Rather, the proposed rule seeks to take account of "past event and initial purpose" and, in this light, to elaborate, as dispassionately as possible, a constitutional rationale "suitable for the government of the future."

Part II of the article explores a general rationale for the broad scope of the establishment clause, with particular emphasis on its historical and contemporary goals, and with incidental reference to the fourteenth amendment and to doctrines of standing. Part III describes the functioning of this establishment clause rationale. Part IV discusses the specific operation of the proposed rule for parochial schools. Part V places the rule for aid to parochial schools in juxtaposition to competing theories, examining the efficacy of these other approaches and more fully illustrating the workings of the thesis advocated. Finally, Part VI briefly summarizes existing Federal programs in aid of parochial education, measuring them against the rule proposed herein.

II

AN ESTABLISHMENT CLAUSE RATIONALE

A proposal permitting governmental financial assistance to parochial schools not exceeding the value of secular services they render comports with a general rationale for the establishment clause that reflects both contemporary and historical aims.

A. Historical Support

Although the indistinctness of the precise historical designs of the establishment clause has already been noted, several aims emerge quite lucidly. Its paramount purpose then, like its major concern today, was to safeguard freedom of worship and conscience—in a word, to protect religious liberty. And it is equally clear that this purpose comprehended the intention that "the conscience of individuals should not be coerced by forcing them to pay taxes in support of a religious establishment or religious activities." In other words, as part of the general attempt to safeguard religious belief, the establishment clause sought to protect taxpayers from being forced by the Federal Government to support religion. This is cogently confirmed by Thomas Jefferson's "Virginia Bill for Religious Liberty" which proclaimed "that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical"; by James Madison's "Memorial and Remonstrance Against Religious Assessments" (whose title is itself revealing) which condemned even forcing "a citizen to contribute three pence only of his property" to support any religious establishment; by Thomas Cooley's *Constitutional Limitations* which found clearly unlawful "under any of the American constitutions . . . [c]ompulsory support, by taxation or otherwise, of religious instruction"; and by many important Supreme Court opinions in the church-state field—majority, concurring, and dissenting. Whatever other historical bases for the establishment ban, it is beyond reasonable dispute that it purported to secure religious liberty, in particular by prohibiting taxation for religious purposes. That historical intent conforms with the contemporary American view that "it is a violation of religious liberty to compel people to pay taxes to support religious activities or institutions."

B. The Scope of the Establishment Clause

Given this background, the broad philosophy of church-State relations reflected in the nonestablishment precept becomes manifest: Governmental action for *religious* purposes is highly suspect; it is constitutionally objectionable when it impinges on religious liberty either, as I have argued elsewhere, by compromising the individual's religious beliefs, or, as outlined above, by directly coercing the individual to support religion by allocating tax funds for sectarian use. On the other hand, governmental action for *secular* purposes does not

fall within the core of the establishment clause's concern—the "nonestablishment guarantee is directed at public aid to the *religious* activities of religious groups."

1. *Conflicting approaches*

(a) *Absolutism*.—This circumscription of the establishment clause has not met with universal approval. Some would have the clause invalidate any governmental support to certain institutions controlled by a church or religious organization "[e]ven if a completely secular part of [the institution's services] could be isolated." This seemingly "absolutist" theory will be discussed below.

(b) *Neutrality*.—Another highly respectable thesis falls on the opposite side of the spectrum. Under the doctrine developed by Professor Kurland which states simply "that government cannot utilize religion as a standard for action or inaction," it would seem that government could constitutionally finance the entire operational costs of all state-accredited educational institutions, including those controlled by a religious organization, because the classification—state-accredited educational institutions—which includes most ordinary parochial schools, is not in the religious terms which his doctrine forbids.

A shortcoming of this approach is that it permits the employment of tax-raised funds for strictly religious purposes. Seemingly, this doctrine would allow the use of public money for the construction of churches and synagogues if the legislative classification were broad enough—say, a statute allocating funds for new structures to house all voluntary associations, enacted on the ground that members lacked requisite resources for such undertaking. Although such a statute may not be said to give intentional and purposeful support to religion, in the sense that it "singles out a religion, or religions generally, for direct financial assistance," this particular statute's clear effect contradicts a vital value underlying the establishment clause. The breadth of the classification—using tax funds to support buildings for the Rotary, Odd Fellows, and Chamber of Commerce, in addition to recognized (and nonconformist) religions—would seem to many people only to add pocketbook insult to constitutional injury. Even the most avid proponents of aid to parochial schools would seem to agree that such subsidies of religion are not permissible. Whether consciously or not, the "official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies. This the Establishment Clause prohibits."

(c) *Divisiveness*.—It has frequently been declared that the function of the establishment clause is "above all, to keep bitter religious controversy out of public life by denying to every denomination any advantage from getting control of public policy or the public purse." The conflict among religions brought about by a struggle for public funds is surely unfortunate and undesirable. And upholding the constitutionality of some amounts of aid to parochial schools or to the children that attend them might well push in this direction. One might agree that "if government interferes in matters spiritual, it will be a divisive force," thus making such action constitutionally suspect. But to make "divisiveness" determinative of constitutionality, despite the secular nature of the governmental program in controversy, is neither a desirable nor a workable approach to the problem.

Whether rightly or wrongly, the various churches and religious groups have exerted powerful political influence in national and state legislative halls—frequently in disagreement with one another—concerning such causes as Sunday closing, gambling, prohibition, abolition, integration, overpopulation, birth control, sterilization, marriage, and divorce. Surely such legislation is not therefore invalid. Nor would a denial of aid to parochial schools largely diminish the extent of religious political activity. In fact, it "might lead to greater political ruptures caused by the alienation of segments of the religious community." Those who send their children to parochial schools might intensify opposition to increased governmenta' aid to public education on the ground that it raises their taxes without direct personal benefit, decreases their financial ability to support the parochial schools, and augments the operational costs of parochial schools seeking to maintain qualitative parity with the improved public schools.

2. *Application to the States*

Before proceeding further, certain other peripheral matters may be treated. The discussion to this point has assumed that the first amendment's mandate, that "Congress shall make no law respecting an establishment of religion," is equally applicable, through the fourteenth amendment, to action by the states. This has been the Court's consistent position and, in view of this, the Court has

recently noted that contrary arguments "seem entirely untenable and of value only as academic exercises."

Examination of the dispute, however, may help to clarify the scope of the establishment clause. The relevant fourteenth amendment language is that "no State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ." It is therefore asserted that the fourteenth amendment should forbid only those violations of the first amendment's establishment clause that "significantly affect the secured liberties of individuals" so as to deprive them of such liberty without due process of law—the implication being that some establishment clause infractions do not significantly impair fourteenth amendment liberties. It is this suggestion that may be challenged.

The suggestion assumes that while the fourteenth amendment prevents infringements of liberty which "significantly affect" the individual, the first amendment forbids abridgements which do not do so. It bears repeating, however, that central design of the establishment clause was that it act "as a co-guarantor, with the Free Exercise Clause, of religious liberty," by preventing the government generally from coercing religious belief and specifically from compulsorily taxing individuals for strictly religious purposes. If nonsecular federal action involves either of these consequences, I would suggest that it has "significantly" affected individual freedom. Thus, if such state action involves either, it has seemingly violated the fourteenth amendment by "significantly" affecting personal liberty. However, if federal action involves neither consequence, then I would suggest that the establishment clause itself—as a matter of constitutional construction—has probably not been breached. The establishment clause, in sum, may well ban no activity that should not also be held to violate the fourteenth amendment, consistent literally with the latter's relevant language.

3. Standing of Federal taxpayers

The question of a federal taxpayer's standing to challenge federal aid to parochial schools—or, for that matter, aid for church construction itself—is generally beyond the scope of the discussion. But again, brief inquiry may be enlightening in examining the reach of the establishment bar.

Frothingham v. Mellon holds that a taxpayer's interest in federal appropriations is too minute, remote, uncertain, and indeterminable to support a suit challenging federal spending. Whether the decision rests on a finding that the matter therefore does not meet the "case or controversy" requirement of article III of the Constitution, or whether it is based only on a judicial rule of self-limitation, is unclear. But even if it is the former, a taxpayer's suit based on an alleged establishment clause violation is arguably distinguishable from *Frothingham*.

The ordinary federal taxpayer's suit urges simply that the congressional appropriation is ultra vires—beyond the natural power and thus "reserved to the States" by the tenth amendment. The gravamen of the claim is that there has been a violation of states' rights (although the allegation is frequently added that this results in a deprivation to the individual of property without due process of law). In such circumstances, the Court has good reason to decline jurisdiction—to find "essentially a matter of public and not of individual concern"; to require the taxpayer "to show . . . that he has sustained or is immediately in danger of sustaining some direct injury . . . and not merely that he suffers in some indefinite way in common with people generally."

When the federal taxpayer's suit urges that the congressional appropriation violates the establishment clause, however, his claim is not merely one of ultra vires. The expenditure of compulsorily raised tax funds for religious purposes, both historically and contemporarily, may well be characterized as an abridgment of individual religious liberty. The issue is not only one of states' rights; it may be one of alleged governmental infringement of individual rights protected by the Constitution. "Direct injury" has allegedly been "suffered"—and not "in some indefinite way." Mr. Justice Jackson recognized that "[o]ne of our basic rights is to be free of taxation to support a transgression of the establishment clause; that the Court "had jurisdiction" "[w]here a complainant is deprived of property by being taxed . . . to support a religious establishment." Thus, *Frothingham* may be inapplicable to a suit based not on the tenth amendment, but rather on the establishment clause.

The establishment clause rationale described herein concludes that the clause generally forbids nonsecular governmental action which infringes religious beliefs and specifically bars coercive taxation for strictly religious purposes. Under this rationale, governmental spending for secular purposes is permissible.

This rationale is not only consistent with contemporary and historical values underlying the establishment clause, but also affords an evaluative perspective for the problems of the role of the fourteenth amendment and the question of standing to sue.

III

DEFINITION OF SECULAR PURPOSE

The broad establishment clause rationale described above would generally forbid government expenditures for strictly religious purposes and would bar governmental action for these purposes if infringements of religious liberty followed. On the other hand, it would generally permit the state to act for secular purposes. Thus, it is analytically critical to decide what constitutes a secular purpose and how it should be determined. This is frequently a perplexing inquiry because a law may be enacted for a multiplicity of purposes and may produce a multiplicity of effects. A Sunday closing law, for example, may have the secular purpose of promoting the general welfare by creating a day of respite or the religious purpose of forbidding work to enhance church attendance.

Certain aspects of the problem are quite clear. The fact that religious groups sponsored a law—or even were its sole sponsors—does not make its purpose non-secular; the Civil Rights Act of 1964 might not have passed without the support of churchmen. Nor, with the rare and limited qualification to be noted below, should existence of a secular purpose turn on judicial examination of legislative motives—a long, forbidden psychoanalytic attempt to find the “*real* reason,” articulated or unspoken, for passing a law. Rather, whether government action is secular or religious should generally be determined by the nature of its *independent* or *primary* effect (a term to be illustrated below, and not to be confused with “principle” or “paramount” effect). If the primary effect is to accomplish a nonreligious public purpose, the action should generally be held immune from establishment clause attack. But if the primary effect is to serve a religious end, the action’s purpose should not be characterized as secular even though an *ultimate* or *derivative* public benefit may be produced.

A. Illustrations

Specific instances are necessary to illustrate the point. It has been maintained that public school prayer recitation and Bible reading serve the secular purpose of producing profound convictions in children, thus making them better citizens. But if such are the effects, they come about only if the primary goal of these practices—the implanting of spiritual and religious beliefs—is achieved; the purported secular ends are derivative from the primary religious effect. Thus, under the analysis suggested above, the purpose of the governmental action is religious.

Sunday closing laws also serve an undeniably religious end by encouraging church attendance in removing the obstacle of having to report for work. But they also produce an independent secular effect—“a Sunday atmosphere of recreation, cheerfulness, repose and enjoyment.” And this secular effect is in no way dependent on or derived from the religious impact of the statute.

Governmental actions whose secular benefits flow from the achievement of a primary religious effect must be suspect under the establishment clause. Such actions “employ Religion as an engine of Civil policy.” Allowing such actions would literally read the clause out of the first amendment; it would justify government subsidization of that church that the government found best inculcates its members with the deep convictions that make for better citizenship. But governmental action that produces independent secular efforts should generally be unassailable even if an equally necessary or inevitable effect is the benefitting of religion. If not, the fire department could not protect burning churches.

B. Judicial determination

This is not to say that the task of distinguishing primary religious and secular effects is always free of difficulty. But usually it is. Thus, in *Torcaso v. Watkins*, the Court observed that there could be “no dispute about the [religious] purpose or effect” of a requirement that public officeholders declare a belief in God. And in *Engle v. Vitale*, the Court had “no doubt that . . . daily classroom invocation of . . . the Regents’ prayer is a religious activity.”

On occasion, governmental action with a primary religious effect may be wrapped "in the verbal cellophane" of a secular purpose. Thus, in the *Bible Reading Cases* the state argued secular purpose—"the promotion of moral values, the contradiction of the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature." The Court easily rejected the assertion agreeing instead with the trial court's finding that the exercises had a religious character.

In such instances, the Court is not—nor should it be—making the judgment that any secular purpose of the laws fails to be paramount over whatever religious end the church obtains by the regulated conduct. For the Court to engage in such an ad hoc balancing process—relying only on the Justices' subjective notions of paramountcy—to treat the problem as "one of degree," is not satisfactory when more objective standards are available. Even where a religious purpose exists, the state's secular purpose need not be dominant or paramount; the existence of a "legitimate" independent primary secular purpose should be sufficient. The determination of "legitimacy" by the Court undeniably involves the making of a not wholly objective judgment. But, unlike the "dominance-paramountcy" inquiry, it is a judgment of a quite limited nature, mainly disposed of by common sense and observation of the obvious effects of the enactment. Although the inquiry is necessitated by a recognition that a disingenuous legislature can easily find secular purposes to cover any religious interest it wishes to further, such a cover is almost always revealed as cellophane.

A few additional illustrations may be helpful. In 1921, the California legislature appropriated 10,000 dollars for the restoration of the San Diego Mission, resulting in an unquestionable financial benefit of a strictly religious nature to the Roman Catholic Church, which owned and controlled the mission for the use of its parishioners. There was also an independent primary secular effect, however, in no way derived from the religious impact of the action, which could not be fairly characterized as a mere "cover." As the court noted, the missions have significant architectural, historical, and educational value, and the aid therefore served a secular esthetic purpose. Under the proposed analysis, this should generally be adequate to establish constitutional validity. It might be added, as a persuasive rather than a constitutional argument, that it is reasonable to believe that reconditioning the mission would pay financial dividends to the state treasury, by increased tourism, in excess of its cost. The mission case thus involved no possible infringement of religious or conscientious scruples, either directly or through diversion of tax funds to religious purposes.

A municipality should not, however, be permitted to allocate public funds to build houses of worship for the purpose of encouraging church-going people to live in the community. In contrast to the mission restoration example discussed above, which attracted people by appealing to their esthetic and educational interests, this plan would publicly finance the religious needs of individuals in order ultimately to derive a secular goal. Even though the plan might increase the general tax base in the community, thus compensating the public for its religious expenditure, its primary effect—from which the secular end would be derived—would be religious.

Finally, it has been suggested that, as part of a state's mental health budget, funds might be granted to the Roman Catholic Church and Protestant Episcopal Church to subsidize confession costs because of their therapeutic value. But it would seem here that the purported therapeutic benefit—which we may concede is secular—would come about only as a result of the confessor's having obtained spiritual satisfaction. The exclusive primary effect is religious.

C. Supreme Court rationale

The rather specific rationale of several decisions of the Supreme Court is consistent with this "secular purpose" approach. In the *School Bus Case*, the Court acknowledged that the governmental program substantially benefitted religion in the "possibility that some of the children might be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the State." Yet, the Court upheld public payments of the bus fares of parochial school pupils as "public welfare legislation" protecting "children going to and from church schools from the very real hazards of traffic." There was a legitimate independent primary secular purpose and effect. The Court utilized the same analysis in the *Sunday Closing Law Case*, recognizing that the estab-

lishment clause "does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions."

In the *Bible Reading Case*, the Court was most explicit. It laid down a "test" as follows: "what are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.

If the Court meant that there is an establishment clause violation if the purpose and primary effect is religious but that there is no such violation if a secular legislative purpose and primary effect exists, and if the Court used the word "primary" as I have used it in the discussion above—that is, as distinguished from "ultimate" or "derivative"—then the Court's test essentially states the reasoning that I have employed.

In fairness, this places undue weight on tiny words which usually denote no such significance. The Court may perhaps have drafted the test not for the specific situation in *Schempp*, but for the question of aid to parochial schools. Even so, because of differing inferences that may be drawn, it provides no ready answer. Perhaps, on the other hand, the Court was concerned only with the problem before it. In any case, my only contention is that the *Schempp* "test" is not inconsonant with the "secular purpose" approach proposed herein.

IV

AID TO PAROCHIAL SCHOOLS

A. Secular Purpose

At least some governmental aid to support parochial education serves a primary or independent secular purpose. No one can deny the state's legitimate interest in improving the educational quality of all schools, or the benefits to society in general from education, or even the national defense interest in an enlightened citizenry. The fact is that "parochial elementary and secondary schools educate one out of every eight future citizens of this country, and that the teacher and classroom needs of parochial school systems are possibly even more serious than are those of the public school systems."

Even Mr. Justice Rutledge, in his vigorous dissent in *Everson*, admitted that "it is much too late to urge that legislation designed to facilitate the opportunities of children to secure a secular education serves no public purpose." His position was that the establishment clause forbids state support for "religious training, teaching or observance." I agree. But "[i]f the fact alone be determinative that religious schools are engaged in education," he could "see no possible basis, except one of dubious legislative policy, for the state's refusal to make full appropriation for support of private, religious schools, just as is done for public instruction." I disagree.

Parochial schools perform a dual function, providing some religious education and some secular education. Government may finance the latter, but the establishment clause forbids it to finance the former. That government money may be used for partial support of church schools does not mean that "it can be used for the support of our churches, and that we are moving toward a union of church and state in America." Conceding Mr. Justice Jackson's premise that "Catholic education is the rock on which the whole structure rests," his conclusion does not follow that rendering "tax aid to its Church school is indistinguishable . . . from rendering the same aid to the Church itself."

It must be perceived that by using tax funds to support the secular aspects of parochial education, the state expends no more than would be required either to support parochial school pupils if they attended existing public schools, or to establish additional public schools at various sites for all pupils presently attending parochial schools, neither of which alternatives raises colorable constitutional objection. This point is not made to prove that either the free exercise clause or political fairness demands government aid for parochial schools. Rather, it demonstrates that, when the state affords public money to finance the secular aspects of education in church-related schools, it imposes a tax burden essentially identical with that which it could constitutionally impose for separate secular facilities. To do so in no way violates

the historical and contemporary policy underlying the establishment clause against infringing religious liberty through taxation for religious purposes.

In addition, it is possible that, by affording some state aid to nonpublic schools (but substantially less than the per capita public school cost), a net decrease in the tax burden would result; a number of nonpublic pupils who are now shifting to public schools for economic reasons might cease doing so and, as is frequently predicted, many public school children might transfer to parochial or private schools. Of course, this latter argument is not of constitutional scope, because a net increase in tax burden should be equally constitutional if the public aid were limited to the secular aspects of education in parochial schools. Nor could government finance religion in the hope, or even with the assurance, that it would in some way produce a smaller overall tax burden. Economically, the argument is appealing. Constitutionally, however, I know of no dissent from the proposition that it would be a patent use of religion as an engine of civil policy in violation of the establishment clause.

B. Discrimination among recipient schools

The proposal contained in this article assumes that any governmental aid will be extended to parochial schools on a constitutionally nondiscriminatory basis. For the legislature to single out say, Lutheran parochial schools or their students for aid, while refusing to afford equal privilege to other similarly situated church-related or private schools, would be a patent violation of the establishment clause, as would giving aid only to church-related schools while denying it to others similarly situated. The former action would "prefer one religion over another." The latter would "aid all religions as against non-believers."

This is not to say that if aid is to be extended beyond the realm of public schools it must be afforded nondiscriminatorily to all nonpublic schools. The statute in the *Everson* case itself distinguished between nonpublic schools "operated for profit in whole or in part" and those that were not, as does Title III of the Elementary and Secondary Education Act of 1965. Such a classification, not based on religion, should not violate the establishment clause. Nor despite suggestions to the contrary, should such an economic differentiation be held to contravene the equal protection clause of the fourteenth amendment. Perhaps wealth is "a capricious or irrelevant factor" to measure a voter's qualifications or to determine certain rights of those accused of crime. But surely it is not such a factor for the purpose of distribution of public largesse. It has been suggested that equal protection forbids discrimination both for and against Negroes but never seriously that it makes poverty an equally neutral factor.

It is true that this profit-nonprofit classification turns on the character of the school, which is the immediate recipient of the aid, rather than on the particular needs of each child in attendance, and that some needy students will be enrolled in schools operated for profit while some affluent children will be registered in nonprofit institutions. Although a more perfect system might look to the individual child rather than base its judgment on the assumption that nonprofit schools educate more needy children, this would be much more difficult to administer. In the context of an essentially economic classification, equal protection "is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective." "It is by . . . practical considerations based on experience rather than by theoretical inconsistencies that the question of equal protection is to be answered."

Statutes constitutionally neutral on their face, however, may be invalid in effect. Under a proper statutory definition, for example, the only "nonprofit" school in town may be a parochial school. Absent a judicial finding that the legitimate statutory definition merely camouflaged an illegitimate preference of religion violating the establishment clause, the statute should not be held invalid. A public appropriation for a primary secular purpose should not be void merely because, under an appropriate neutral standard, a religiously controlled institution happens to be the only recipient.

A more difficult issue, but one apparently of no great consequence, arises where an aid statute by its terms names the parochial schools of one church only, or names only parochial schools, and it is unknown from the statute or its available legislative history whether other similarly situated schools exist. The Court could:

(a) strike down the statute, thus forcing the legislature to redraft properly if it

can; (b) strike down the statute, unless it were shown that there were no others similarly situated; (c) uphold the statute, unless it were shown that there were others similarly situated.

O. *The Compensable Amount*

The constitutional principle proposed herein speaks of the secular educational services rendered by the church-affiliated school. Assuming that these services may be isolated, little difficulty arises where their cost is the same to the parochial school as to the public school system. Because government may properly finance the secular education of all children, whatever their religious faith, payment to a parochial school under these circumstances of the same amount that such education costs in the public schools should be immune from establishment clause protest: No tax funds are being expended for strictly religious purposes; no more tax funds are being used than would be if the pupils were in public schools; the church obtains no financial benefit except compensation for the cost of secular services rendered. A fortiori, there is no difficulty if the cost of providing this service in the parochial school is less than it is in the public school system, as is not unlikely, and government pays the parochial school only this lesser amount.

But suppose that the cost of providing secular educational services in the parochial school is less than is the cost in the public school system and government pays the parochial school the latter amount. Although here also no more tax funds are being expended than would be if the pupils were in public schools, the church obtains a net financial benefit. Nevertheless, this should not violate the establishment clause. Literally thousands of church-related agencies offer secular services that are funded—or purchased, if you will—by government. If any organization—profit or nonprofit, religious or nonsectarian—provides a secular service to government at the “going rate,” and is able to profit thereby because of low labor costs, efficiency, or any other reason, the Constitution should not be held to prohibit it. In fact, for government to refuse to deal on equal terms with an organization providing public services because that organization is religiously-affiliated might even be seen as a violation of the free exercise clause.

It must be recalled that government assistance to religion which neither infringes religious liberty nor expends tax funds for strictly religious purposes should not be considered violative of the establishment bar. Thus, in the context of the immediate discussion, it is the “cost” to the public and not the “aid” to religion that is determinative. As long as the government receives in full the secular services purchased, the relative cost or profit to religion of supplying those services should have no relevance to the establishment clause. Its prohibition should be satisfied by a showing that the government is getting the secular services it paid for. Consequently, where something costs the government little or nothing, it should make no difference what secular services it receives. For example, the government may allow religious organizations temporarily to use vacant public buildings for strictly religious purposes. Such occasional use of public buildings may substantially “aid” religious groups, and it may save them significant rental fees. But, if the use is not “regular and extended in duration,” the “cost” to the public is nil or de minimis, and there should be no establishment breach. It may be argued that, even though the use of the building cost the state nothing, it could charge these religious organizations measurable rental fees. But the establishment clause should not require that government profit at religion’s expense. It should merely forbid public expenditures for strictly religious purposes.

Therefore, if the government lends money at a rate of interest equal to or above the government borrowing rate but below the commercial rate, it may so lend to sectarian groups, *even though they use the money for strictly religious purposes*. The church benefits, but at no cost to the state. This should not be confused with government loans for *secular* purposes. Since, as to these, grants would be unobjectionable, loans at any rate are obviously valid. It follows that a state may buy textbooks—even religious ones—at quantity prices and sell them to parochial schools at the discounted price.

Finally, suppose that the cost of providing secular educational services in the parochial school exceeds the cost in the public school system and government pays the parochial school the former amount. Although the church here does not obtain funds that may be used for strictly religious purposes, more tax funds are being expended than would be if the children were in public schools. There

should, nonetheless, be no violation of the establishment clause. So long as the state expenditure is in fact for a primary secular goal, no tax funds are being used for strictly religious purposes.

D. The Permeation Issue

1. The Facts

Probably the most complex matter concerning public financial assistance to parochial education is the permeation (or integration) issue. It is frequently contended that "official Catholic doctrine refuses to recognize any distinction between secular and religious teaching." Pope Pius XI and Pope Leo XIII are quoted as ordering "that every . . . subject taught, be permeated with Christian piety," as are Catholic educators, theologians and philosophers. A Lutheran school manual demands "that all areas of the curriculum reflect an adequate philosophy of Christian education." Seventh Day Adventists declare their "endeavor to permeate all branches of learning with a spiritual outlook." After all, it is asked, "if religion is taught only one or two hours a day in church schools, what is the point of maintaining the separate parochial school system?"

But there is less than universal agreement as to the facts. Others familiar with Catholic—and Jewish—parochial school education explain that the pupil there "learns essentially the same arithmetic, spelling, English, history, civics, foreign languages, geography, and science" as is taught in the public schools, but in addition learns religion "and the religious dimensions of secular knowledge." In the Lutheran school system, it is said that "the main features of the public school curriculum are reproduced." In response to a study showing that many "secular course" textbooks used in parochial schools are permeated with religious symbols, concepts, and doctrines, it has been said that the examples "were highly arbitrary and not representative," and that "Catholic educators . . . as a whole, do not favor textbooks in which dabs of spurious religion serve only to distort the essential subject matter. . . ."

Further evidence that secular subjects in parochial schools need be little different than their counterpart public school offerings is found in the fact that, as part of shared time programs, many parochial school students actually take such courses as mathematics, physics, science, foreign languages, music, industrial arts, home economics, and physical education in the public school itself. Catholic educators have observed that "basic instruction" in such courses as literature and history could well be undertaken in shared time programs in the public schools "with the church adding the distinctive note which it can bear to the revelation of God in these areas" in the parochial school. Thus, it is concluded, the reason for maintaining a separate parochial school system is not for the purpose of teaching a wholly different curriculum. Rather, it is to add "the most important of the four R's," the feeling being that children attending public schools that taught only secular subjects five days a week would consider religious training unimportant, and that this impression could not be overcome by a few after school hours on Sunday school.

Several facts emerge clearly from the foregoing discussion. First, "permeation" is a word of varied and imprecise meaning. Father Drinan can state as "the undeniable fact that secular instruction in a Catholic school is 'permeated' by a Catholic atmosphere and Catholic attitudes," yet urge that "permeation should avoid every suggestion of quasi-coercion of 'indoctrination.'" Second, the secular courses taught in parochial schools rarely, if ever, mirror exactly the courses taught in the public schools. Third, although "no scientific study has ever been done on the extent of the permeation of sectarian teaching in the instruction in secular subjects in Catholic schools," it is likely that some secular subject courses in some parochial schools are so "permeated" that they are in reality courses of sectarian indoctrination, despite the regulatory power of the state—whether exercised or not; that some courses are completely, bona fide secular; that some courses fall between these extremes. Fourth, the problem of the parochial school secular courses being turned into nothing more than religious instruction is not inherent; no religion demands it, nor constitutionally could a religion demand it if contrary to reasonable state requirements.

2. Extent of permissible aid

Under the rationale proposed in this article, public financial assistance to parochial education may not exceed the value of the secular educational service rendered. One relatively effortless way of avoiding the whole problem of permeation in this connection is simply to ignore it by taking the position that "the

secular character of secular subjects is not changed by a moral or religious permeation"; "that it is impossible to study and interpret man and his activities apart from his moral and religious values"; and that "the National Merit Scholarship competition . . . is clear evidence that students who attend church-related schools receive a secular education as good as that received by students in our public schools." On this reasoning, there would be no prohibition to financing accredited parochial schools on a lump-sum parity with public schools without further investigation.

But this may be too simple. Competitive examinations and sociological studies are not so exact as to determine conclusively that the educational services rendered in parochial schools are as complete and effective and have the same impact from a nonreligious perspective on the overall development of the student as does public school education. Viewed from the basis of per-hour input, it is reasonable to assume that this is not the case, given the parochial school time spent on religious instruction. And it is clear that the state may not subsidize religious instruction or indoctrination, no matter where undertaken.

The establishment clause prohibition against using tax funds for strictly religious purposes appears to require a more careful scrutiny to assure that only the secular aspects of parochial school education will be publicly financed. But to admit "an admixture of religious with secular teaching" is the beginning, not the end, of the inquiry. To concede that "commingling the religious with the secular teaching does not divest the whole [course or activity] of its religious permeation and emphasis," is not to conclude that no part of the course or activity may be aided with public money.

A secular subject parochial school course or activity may concurrently serve independent, dual purposes—that is, full secular value may be obtained for the time and resources expended, and religious interests may also be served. If such is the case, the entire course or activity serves a primary secular purpose—and may therefore be fully financed—the aid to religion notwithstanding. On the other hand, a secular subject parochial school course or activity may partially serve both religious and secular ends. Here, an allocation must be made; only the secular product may be publicly financed. Of course, if a "secular subject" parochial school course or activity is in reality religious instruction, it cannot be publicly funded at all; and if it is exclusively secular in purpose, it may be totally funded.

(a) *The Relevance of "Atmosphere."*—Before applying this approach, certain other matters should be considered. That the general atmosphere of parochial schools—as created by religious symbols, teachers in religious attire, and compulsory religious exercises and courses—is oriented toward religious goals should not affect the constitutional judgment as to whether the particular course or activity may be publicly funded. The clearly sectarian purpose of these countermeasures produces no infringement of religious liberty, since students attend the parochial schools of their own volition. And since public funds are not used to subsidize these items, but only for the proven secular aspects of the educational experience, no expenditure of tax money for religious purposes results.

(b) *Judicial Definition of "Religion."*—Under the analysis proposed herein, the question whether a particular course or activity serves a primary secular purpose, a primary religious purpose, or mixed purposes must ultimately be for the Court. It "must be ready to define religion, religious teaching and religious commitment." But this would not be a novel exercise for the judiciary.

As has already been noted, the Court has on a number of occasions labeled particular governmental activity religious or secular. In the *Sunday Closing Law Cases*, the Court expressed its willingness and obligation to engage in "close scrutiny" to determine if an action's purpose and "its operative effect" were religious. So, too, should the Court examine challenged parochial school courses and activities when necessary.

In the *Regents' Prayer Case*, which is closely analogous to the question in issue, the Court passed judgment on such public school activities as recitation of the Declaration of Independence (or the Gettysburg Address) and the singing of the Star Spangled Banner—all of which are somewhat religiously "permeated"—and concluded that these exercises were patriotic or ceremonial rather than "religious." In the *Bible Reading Cases*, the Court ruled that study of the Bible and religion "as part of a secular program of education" was proper, thus addressing itself to the very matter under discussion here.

It has been argued that it is extremely difficult to distinguish religious from secular textbooks; that "the task of separating the secular from the religious in

education is one of magnitude, intricacy and delicacy." But just as the Court, if called upon to do so, must determine whether a public school textbook is religiously indoctrinatory, or whether a public school history course is really religious instruction, it should make the same constitutional judgment in respect to parochial school affairs. When a public school action is found religious the remedy is to enjoin; when a parochial school practice is held religious, to forbid its public subsidization.

The general undesirability of requiring the Court to define what is religious and what is not need not be disputed. But, although the Court "can and must avoid passing on the truth of particular religious beliefs," it cannot escape the former task. "This necessity arises out of the constitutional language itself, which sets down religion as a subject for special treatment." A judicial definition must be fashioned under the "absolutist" theory, which bars all aid to "religion." It must be determined under Professor Kurland's thesis, which forbids classifications in terms of "religion." And it must be faced under the rationale proposed herein.

As has been the case concerning the Court's handling of the issue of religious exercises and activities in public schools, most decisions under the proposed rationale for adjudicating these problems in parochial schools will not be difficult. The Court, guided by common sense and the obvious effects of the activity, rather than by its own "prepossessions," may set the standard in a few cases. If abuses occur, they may be checked by federal or state aid administrators, reviewed by state and lower federal courts, with ultimate review always available in the Supreme Court.

Pragmatically, the issue should rarely arise, at least in the foreseeable future, for it is highly unlikely, as a matter of political reality, that the total amount of governmental assistance to parochial education will even approach the conceded value of the secular educational services it renders.

(c) *Illustrations.*—Keeping this last point in mind, some specific illustrations of problems that could arise under the proposed rationale may be helpful. The second grade arithmetic text assigned in a Catholic parochial school may use sectarian characters, illustrations or examples, phrasing arithmetic problems in terms of rosary beads instead of apples, and using pictures of parochial schools instead of public schools. Or, if the text is "clean," the teacher may use these illustrations. Trumpet instruction may involve an unusual amount of religiously-oriented music, and French language instruction may include a high concentration of religiously-significant words or reading.

Considerations of religious liberty, not present in voluntarily-attended parochial schools, might prevent all or some of this in public schools. But in the examples above, full secular value seems to have been obtained for the time and resources expended, despite the fact that religious interests may also have been served.

(1) *Burden of Justification.*—Some educators might urge that the above uses of sectarian material did not afford the parochial pupils a secular educational experience completely analogous to that offered in the public schools. If such a case is made, the state or federal financing agency and the recipient parochial school should have the burden of justifying allocation of the full cost of the course to the secular side of the ledger. Although legislative and executive action ordinarily carries a much stronger presumption of constitutionality, the Court has forcefully held that this is not the case when the precious personal freedoms of speech, press, and religion are at stake.

It may seem to some that individual liberty is only indirectly affected when governmental grants to religious bodies are challenged under the establishment clause, thus vindicating use of the usual presumption of constitutionality or something close to it. But the prohibition against the use of compulsorily raised tax funds for strictly religious purposes, central to the concept of nonestablishment as an important guarantor of religious liberty, suggests that here, too, the regular presumption should be modified. Thus, after an opponent of aid initially demonstrates that a parochial school course or activity is in whole or part primarily religious, in the sense used in this article, the obligation of rebuttal should rest with those defending aid. In cases of uncertainty, the issue should be resolved against the public funding.

(2) *Examples.*—In a parochial school biology text or course, after a full explanation of the theory of evolution, the church's perspective on the matter may also be fully articulated. Or, in the civics course, the concept of racial equal protection may be amplified by presenting both the relevant secular and theo-

logical values. Since there would seem to be no constitutional objection to such an objective presentation in the public schools, there should likewise be none here, despite the concurrent religious educational value, and despite the fact that these matters may never be mentioned in the average public school class. They still have significant secular educational value. Even a parochial school course in "religion" itself may so qualify if properly handled.

There is a very fine line, however, between objective presentation and subtle commitment, and this truth is not confined to parochial schools. Some texts used in public schools—and, undoubtedly, some teachers—unintentionally emphasize Humanistic or antireligious values. Undoubtedly, the opposite is also true. Such emphasis will vary from public school to public school, dependent in part on the cultural, religious and racial composition of the students and teachers. To the extent that this is constitutionally permissible, effectively unavoidable, or de minimis in the public schools, it should be similarly unobjectionable in the parochial schools for the purpose of public funding—subject always to the burden of justification discussed above.

A parochial school history course or text may teach that all major events are related to or produced by one of the basic truths of the religion, or may emphasize the contribution of one religion over all others. Parochial school texts in English composition may "stress Catholic religious words and teachings," or a current events class may use a weekly magazine whose articles are "Catholic-oriented." An advanced biology text or course may omit all references to birth control, sterilization, and euthanasia, or specifically reject most parts of evolutionary theory and shift scientific concepts so that they appear to be based on religious tenets. A parochial school geography text may describe only Catholic families in various cultures, or the teacher may ask the students to map all Catholic churches in the state of Nebraska.

Clearly, some or all of these parochial school activities, as well as some referred to earlier, cannot be fully supported with public funds. Either the quantity of religious perspective has deprived the course of full secular educational value, or the quality of sectarian permeation has so slanted the material as to have partially undermined or even fully destroyed its secular content. The very description of these courses and texts appears to state a sufficient case to shift the burden of justifying any quantum of secular value to those defending governmental support.

E. Allocation

It must be reemphasized that, as a realistic matter, problems of the nature just discussed will arise rarely, as will problems of allocating cost between religious and secular parts of "mixed" parochial school activity. As with the issue of permeation, the burden of justifying both the propriety of the allocation and the method used should be on the government or recipient defendant once the assallant has made the requisite initial demonstration.

Several problems of allocation that have disturbed courts may serve as brief illustrations. The cost of bus transportation to parochial schools, for example, cannot be allocated in "proportional shares as between the secular and religious instruction." The reason is that, as will be amply shown, the activity fully serves an independent secular purpose. Thus, its value, if provided by the parochial school while public school children are bussed at public expense, may be completely listed in the secular services column. No allocation is necessary.

Suppose that public funds are used to construct a building for educational research on the campus of a church-affiliated college, title being vested in the school. If the building is always used for this purpose as contemplated, no allocation problem arises. But suppose, after three years, the building is to be converted into a chapel and utilized exclusively for religious purposes. If in the building's three years as a research center, the total governmental contribution to the college, including the full amount of the grant for the building, did not exceed the value of the secular educational service rendered by the college, the matter is closed. The fact that the building will now be used for religious purposes is irrelevant. The taxpayers have gotten at least full secular value for their contribution. But, if in those three years the total governmental contribution, including the grant, exceeded the value of the college's secular educational services, the building may not be used for religious purposes until the college reimburses the government for the excess amount or some other proper arrangement is made. The science of accounting, with judicial review when appropriate, is neither above nor below the needed task.

F. Relevant Supreme Court Decisions

Reference has previously been made to passing remarks by some observers suggesting that existing Supreme Court opinions have already resolved the problem of aid in parochial schools. It is *Everson v. Board of Education* that is most frequently cited for this proposition—by advocates on both sides of the issue. The brief of the National Catholic Welfare Conference reasons: "The underlying principle of the case is plain: government aid may be rendered to a citizen in furtherance of his obtaining education in a church-related school." It points out that the majority opinion's stringent interpretation of the establishment clause, although more than a mere dictum, "must be read in the light of the actual result of the case . . . [which is that] secular education in church-related schools . . . is supportable by government," and in light of the opinion's edict that the state "cannot exclude . . . [persons], because of their faith, or lack of it, from receiving the benefits of public welfare legislation"; that there was "careful avoidance by the majority of any rule which would preclude aid [for] . . . secular subject training." Finally, it reads the Court's language barring any tax support for "any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion," as only excluding "aid in support of (a) the teaching or practicing of religion . . . ; (b) religious institutions as religious institutions."

The argument is incisive and not unpersuasive. But it is by no means conclusive. An argument at least as convincing can be made the other way: The whole tone of the majority opinion strongly implied that bus transportation marked the outermost limit of permissible governmental aid. The Court suggested that the plan at bar went to the "verge" of the state's constitutional power. The Court said, albeit in dictum, that the establishment clause forbade a state to "contribute tax-raise funds to the support of an institution which teaches the tenets and faith of any church"; that the line to be drawn is "between tax legislation which provides funds for the welfare of the general public and that which is designed to support institutions which teach religion." The latter point seems directly to contradict the "religious institutions as religious institutions" conclusion. In the busing situation presented by *Everson* the Court stressed that the state "contributes no money to the schools," and that the services provided were "indisputably marked off from the religious parochial schools."

In respect to the proposal advanced in this article for aid to parochial schools, the best that can be said of the *Everson* opinion is that all discussion by the majority beyond that vital to the result of the case itself was dictum and that discussion in subsequent supreme Court opinions lends some credence to the proposal urged herein.

Advocates on both sides of the issue also rely on *Bradfield v. Roberts*, which held that federal appropriations for ward construction and care of indigent patients to a hospital in the District of Columbia operated by the Roman Catholic Church did not violate the establishment clause. The National Catholic Welfare Conference contends that the Court recognized that "the church exercises great and perhaps controlling influence over the management of the hospital." Thus, it concludes that the Court "did not rule that a direct appropriation to a sectarian institution would be unconstitutional." The Conference asserts therefore that *Bradfield* and *Everson* are "clear precedent for aid."

The language relied on in *Bradfield*, however, may represent not the Court's conclusion, but its statement of the complainant's allegation. For the Court carefully explained that the hospital, incorporated by act of Congress, was simply "a secular corporation being managed by people who hold to the doctrines of the Roman Catholic Church, but who nevertheless are managing the corporation according to the law under which it exists"; and that its "property and its business are to be managed in its own way, subject to no visitation, supervision or control by any ecclesiastical authority whatever, but only that of the Government which created it." This surely may not be said of parochial schools. But neither may it be said, as opponents of aid allege, that "[i]mplicit in this decision is the holding that the Constitution would be violated by a grant of Federal money . . . to an institution controlled by a sectarian organization" or "subject to an institution controlled by a sectarian organization" or "subject to ecclesiastical authority."

A more reasonable conclusion is that *Bradfield* leaves open the aid to parochial schools question.

A number of writers consider Supreme Court decisions involving religion in the public schools as bearing directly on the question of aid to parochial schools. It

is true that *McCullum v. Board of Education*—in which the Court invalidated “on-premises” released time—does refer disapprovingly to “the use of tax-supported property for religious instruction.” But the entire opinion makes clear that it was an additional factor, the “utilization of the tax-established and tax-supported *public school system* to aid religious groups to spread their faith,” that was conclusive.

Zorach v. Clauson—in which the Court refused to invalidate the New York “off-premises” released time plan—does contain the dictum that “[g]overnment may not finance religious groups . . .” But it is inaccurate to contend that the *Zorach* Court distinguished *McCullum* on the ground that “public . . . funds were not used in New York.” Rather, the Court stressed that in *McCullum* “the force of the public school was used to promote [religious] instruction,” whereas the Court found this not to be so in New York.

Under the rationale proposed in this article the cases dealing with religion in the public schools are clearly distinct from the question of aid to parochial schools. That the former involve governmental programs lacking independent primary secular purpose has been documented elsewhere. That at least certain amounts of governmental financial aid for parochial education serves a primary secular purpose has been documented above. Moreover, religion in the public schools involves infringements of religious liberty by compromising students conscientious beliefs. Although aid to parochial schools involves the expenditure of public money, it has been noted above that use of tax funds for secular purposes does not violate the constitutionally protected right of conscience.

G. The Doctrine of Alternative Means

Several members of the Court have employed an “alternative means” rationale in establishment clause cases. Mr. Justice Frankfurter has theorized that “[i]f a statute furthers both secular and religious ends by means unnecessary to the effectuation of the secular ends alone . . . the statute cannot stand.” Mr. Justice Brennan has opined that “[t]he Constitution enjoins those involvements of religious with secular institutions which . . . use essentially religious means to serve governmental ends where secular means would suffice.”

Using this doctrine, opponents of aid for parochial schools have urged its unconstitutionality. They reason that the state’s secular goal of maintaining and improving the quality of education for all students may be achieved without extending governmental financial assistance to parochial schools—that is, without the use of what they characterize as essentially religious means. They recognize that the state is constitutionally forbidden to require all students to attend public schools. But they conclude that the state need only channel aid to the public schools, thus improving their quality, and concomitantly raise the standards of accreditation for private and parochial schools to a similar level.

There are several points to be made in response. First, a majority of the Court has never employed the “alternative means” rationale in an establishment clause case. Second, a close reading of Mr. Justice Frankfurter’s reasoning indicates that he was only suggesting the doctrine’s use when a statute’s *primary effect* was religious and the purported secular end was *derivative*, as I have used these terms herein. Third, in respect to government programs that directly serve independent secular ends, Mr. Justice Brennan stresses utilization of the doctrine when the program jeopardizes “the religious liberties of any members of the community.”

If a statute’s primary purpose is religious, and it presents no real danger to individual religious and conscientious beliefs, perhaps it should be invalid if non-religious alternative means are available. And, if a statute’s primary purpose is secular, and it presents threats to religious freedom, a persuasive argument may be made that the alternative means doctrine should be employed. But if a statute’s primary purpose is religious, and it is likely to result in compromising the individual’s religious or conscientious beliefs, as I have argued here and elsewhere, it should violate the establishment clause even in the absence of an alternative means. And, finally, if a statute’s primary purpose is secular, and it does not impinge on rights of conscience, I would suggest that the alternative means doctrine should not apply even though the statute inevitably affords some aid to religion. Such a statute presents none of the evils at the core of the establishment ban, and to subject all such legislation to judicial review, for a search for alternative means that afford no aid whatever to religion, would bring innumerable measures before the Court and unnecessarily involve it in an essentially

legislative task. Governmental aid to support the secular aspects of parochial education falls into this final category.

Even if the alternative means rationale were applicable to this final category, it is not clear that aid to parochial schools would be invalid. Mr. Justice Brennan apparently did not exclude this final category discussed above from the doctrine's coverage, but he did state that the means used would be invalid only if the secular objectives of the state could be "*effectively* achieved in modern society" by the alternative nonreligious means. So, too, Mr. Justice Frankfurter would have applied his thesis only "where the same secular ends could *equally* be attained by means which do not have consequences for promotion of religion." Similarly, commentators speak in terms of "*practical* alternatives less likely to offend the first amendment," and achievement of the public purpose "by nonsectarian methods without unreasonably increasing costs or administrative burdens."

A forceful argument may be made that it would be highly ineffective and impractical to aid only public schools and simultaneously raise the accreditation standards for all others. Apart from the limits that the free exercise clause might place on the state's ability so to regulate parochial schools, such action could well result in a large influx of private and parochial school students to the public schools. Tax funds would have to be used for construction of expanded public school facilities, and an inefficient and uneconomic waste of existing parochial school facilities would result. "Such pragmatic considerations would be irrelevant if this command of the Constitution were clear . . . [but] the lack of an effective alternative should be highly relevant when a plausible constitutional defense can be made. . . ."

To summarize briefly, the establishment clause should be held to prohibit non-secular government action that infringes religious belief, and to forbid taxing for strictly religious purposes. Therefore, as applied to questions of parochial school aid, the establishment clause should not be held to prevent government from subsidizing these schools to the extent that they provide secular services. As long as the government gets its money's worth of things secular, it should make no difference that the supplying institution is somehow religious in nature. The establishment clause, rather than asking whether religious institutions inevitably benefit thereby, should instead ask whether the government is receiving the full value of secular services purchased. The question, consequently, is not *whether* to aid parochial schools which supply secular services, but rather *how much* aid to extend. In resolving that inquiry, the courts must first characterize an educational service or activity as generally religious or secular. If secular, the government may subsidize it at full value; if religious, those defending the aid should carry the burden of showing that the activity contains specific secular aspects entitled to aid. In conclusion, however, it must be remembered as a political reality that the necessity for such allocation will generally remain academic as long as parochial schools continue to provide considerably more in secular services than they receive in aid.

V

OTHER THEORIES

Earlier discussion has traced the operation of a proposed rule for testing the constitutionality under the establishment clause of aid to parochial schools. Reference will now be made to other theories involving aid to parochial schools and the establishment clause, with particular examination of their own internal consistency and viability and with the intention of further illuminating certain aspects of the constitutional proposals made in this article.

A. Absolutism

The so-called "absolutist" theory, mentioned earlier, would prohibit all aid which benefits religious institutions either directly or indirectly, sustaining "appropriations only when it can be found that in fact they do not aid, promote, encourage or sustain religious teaching or observances, be the amount large or small." This view "assumes both that state and religion coexist in mutually exclusive and self-contained spheres and that each sphere can be sharply defined." It would seemingly invalidate use of public library books for reading assigned by a parochial school teacher, the stationing of policemen near parochial schools, fire protection and other municipal services for parochial schools, and the laying of sidewalks at public expense in front of parochial schools. All these publicly funded activities may fairly be said directly or indirectly

to benefit parochial schools and aid, promote and encourage the religious teaching that takes place therein. It may accurately be concluded that the absolutist theory is "of such far-reaching consequence, and in conflict with so many practices, that it is neither administratively, politically, nor ethically [nor constitutionally] tenable."

B. Child Benefit v. Aid to School Itself

The so-called "child-benefit theory" also fails in its purpose of both presenting a viable constitutional test and confining the amount of permissible public aid for parochial education. This approach takes several forms. Principally, the theory distinguishes between valid public assistance to aid the child and invalid public assistance to aid the parochial school itself. Under it, "lunches, textbooks, bus transportation, and health services" are "clearly constitutional"; appropriations for "language instruction and laboratory facilities" are uncertain; grants "for building, maintenance and teachers' salaries are foreclosed."

Although this theory may be characterized as "a workable compromise interpretation of the First Amendment," it places form over substance. The hard fact is that aid for any secular educational purpose, from transportation and textbooks to construction of a science laboratory and payment of a Spanish teacher's salary, helps the child to take his proper place in society. "There is no logical stopping point." The "child benefit theory" thus has no reasoned limits and misses "the real issue, which is the nature of the benefit and its relationship to the 'Establishment Clause.'" a subject already discussed at length herein.

The implicit rationale of the majority in the *Everson* decision suffers the same defect. It upheld public payment of bus transportation on the ground that the children were merely "receiving the benefits of public welfare legislation," yet suggested, in strongest dictum, that this was as far as the establishment clause would extend. But it must be granted that State subsidization of all secular education similarly affords children the benefits of public welfare legislation. The establishment clause should forbid no aid in that category.

The *Everson* majority seemingly also sought to draw a line by emphasizing that in the case at bar "the State contributes no money to the schools. On the basis of this reasoning, it has been concluded that "direct grants to sectarian schools are prohibited." and that "grants for assistance in the construction of general school facilities and for increasing teachers' salaries, to be administered by governmental agencies and made available directly to sectarian schools, are the clear case of what is proscribed by the Constitution.

Closely akin to the "child benefit theory," this rationale also places form over substance. The constitutional result turns on the payee of money or recipient of property, whatever the primary effect of the government action or whoever the true ultimate beneficiary. It would invalidate a consignment of microscopes to a parochial school or a grant of funds to construct a science laboratory regardless of the clear secular purpose. "Similarly, if the only reasonable or practicable means of providing fire and police protection were to give a religious school public funds and have it perform this function itself," such granting of funds would also be unconstitutional. Surely, it should make no constitutional difference if arithmetic textbooks are given to the parochial school rather than to the pupil or a public library from which he may withdraw them.

It is argued by some that if grants to parochial schools do not violate the establishment ban, then nothing does except discrimination among religions, thus challenging the Supreme Court's unequivocal position that governmental support of all religions is forbidden. Not true. Under the rationale I propose, governmental aid may not exceed the value of the secular services even where given to every religion.

It is contended that providing school bussing or laboratory equipment to a parochial school should be invalid because this makes "access to this public welfare benefit . . . dependent on conditions set by a religious group. These conditions will generally involve conformity to a religious creed or practice as the price for admission to the school and its publicly donated equipment." It may be true that "placing citizens in the position of having to accept church authority in order to obtain necessary public welfare benefits . . . constitutes an establishment of religion." But it is not true that providing parochial schools with secular educational services has this effect. Under the rationale I propose, parochial schools would get no greater benefits than are

already accorded public schools. Thus, access to the benefits is in no way dependent on the acceptance of church authority.

Perhaps the greatest weakness in the "child benefit theory" and the "no money to the parochial school" rationale is that they permit public funds to be used for strictly religious purposes, beyond use for secular purposes, in contravention of a basic thrust of the establishment clause. Proponents of the "aid the child" approach advocate direct State subsidies to parents who may then choose any school for their children's education, subject to the State's right of accreditation. "Thus the schools would in no way be subsidized with public funds; only parents and their children would be subsidized."

No one denies that these subsidies would ultimately reach the parochial school's treasury; such a result would probably be a specific condition of the wards. After all, that is their precise purpose. Thus, if the public subsidy exceeds the value of the secular educational service rendered, tax funds are being utilized for strictly religious purposes. The parent subsidy theory fails to recognize this difficulty. Tax funds could be used for religion even if the amount given is only "equal to the sum expended on every child who attends the free schools," because there is no guarantee that the parochial school offers the same quantum of secular education as the public schools, nor that the lesser quantum offered costs the parochial school as much as the sum made available to it. The strictly religious use of tax monies could result even if the amount given is only "part of a tuition which is itself considerably less than the cost of education at the school attended," because even this smaller governmental subsidy might exceed the cost or value of the secular educational service rendered.

A "subsidy-to-the-parent-for-school-tuition" plan is not analogous to a government old age assistance program. In the latter instance the subsidized citizen may spend the money in any way he wishes, save it, or give it away. Government does not condition its grant, as it does the parent subsidy scheme, on the recipient's channeling the funds to a specific limited class of ultimate beneficiaries, which class includes church-affiliated institutions.

That a person receiving old age assistance donates a portion to his church presents no colorable establishment clause issue. It is analytically identical to a public employee's donating a portion of his compensation to his church. There is not the slightest government compulsion to utilize tax funds for religious purposes. But a government condition that a tuition subsidy be transferred to some school of the parent's choice (including a parochial school) is analytically identical to a state payment to any voluntary association that a recipient joins (including his church or synagogue). Government has thereby restricted full freedom of choice as to how tax funds will be spent. It has singled out religion, albeit as part of a somewhat larger category, for government financial aid. If the ultimate religiously-affiliated beneficiary does not render secular services in return, tax raised funds will be used for strictly religious purposes. As has already been observed, this result is contrary to the underlying purposes of the establishment clause.

For these reasons, under the theory advanced in this article, certain provisions of the old "G. I. Bill of Rights" seem to violate the establishment clause. Under that bill, as reportedly administered, the government paid tuition directly to the veteran's school, even if it was a theological seminary. This was not a case in which "G.I.'s are paid a certain amount which they can use in any way they want . . . [as] compensation for their serving in the armed forces." That would be like old age assistance. The G.I. Bill, however, was a case of "conditioned" benefits, within a fairly limited category, as described above.

The funneling of tax money to theological seminaries appears to serve a strictly religious purpose. That this is "education they would have undertaken had they not been taken in the Army" is irrelevant. On this theory, the government could make contributions to any voluntary association to which the veteran had belonged because he would have done so had he been at home. Moreover, excluding theological seminaries from the Bill would not appear to have been a denial of free exercise for religion does not demand attendance there. Further, every veteran, whatever his religion, could have his tuition paid for secular education at any accredited institution, including those that are church-related.

C. "Earmarking"

1. Restricted Grants

Another effort to draw a line regarding the constitutionality of aid to parochial education may be described as the "restricted purpose" or "earmarking" theory. Its thrust is that, where the public funds awarded to church-affiliated schools—

or to students attending them—are designated for specific secular purposes, the nonestablishment precept is satisfied because such grants, unlike more general grants, would not finance religious functions. Thus, allocation of public funds for improving secular educational methods, construction of dormitories, acquisition of science, mathematics and foreign language equipment, textbooks also used in public schools, and scientific and medical research are valid. On the other hand, governmental appropriations “with no restrictions and no direction as to the purposes for which the money can be spent would be unconstitutional.”

The majority opinion in *Everson* lends some support to this “restricted purpose” theory. It spoke of bus transportation, ordinary police and fire protection, connections for sewage disposal, and public highways and sidewalks as “general government services . . . separate and . . . indisputably marked off from the religious function.”

2. Freeing of Funds

The “restricted purpose” or “earmarking” rationale, however, is not a viable constitutional test. Although use of the public funds may be strictly limited to the ends designated, their allocation releases additional church funds for strictly religious purposes—be it for religious proselytizing, the purchase of religious insignia, or any of a countless number of other purely religious ends. Because of this “freed funds” effect—hardly a matter that may be deemed “immaterial” by the advocates of this rationale—the theory effectively fails to fulfill its own purposes and places form over substance.

To avoid this consequence, it has been argued that a grant may be “earmarked for a specific purpose which would not otherwise be undertaken by the recipient” But this is an inquiry more easily stated than demonstrated. For example, that the cost of textbooks or transportation had formerly been borne by the parents, does not mean that their provision now by the state will not provide additional funds to the religious institution. The latter could now easily and justifiably increase its tuition charge, thus providing it with funds available for strictly religious use.

Even if the property or service which the government finances had not previously been part of the parochial school’s—or parents’—activities, it cannot be said with any confidence that funds are not freed. It would be extremely difficult to prove that the parochial school, or the parent, would not have itself undertaken the matter in the near future—the question not infrequently turning on the subjective thoughts of the school’s administrators or all parents, or on the credibility of their testimony in respect thereto. In addition, a court may “be compelled to examine the financed structure of the school, its previous success or failure in fund-raising campaigns, and the proposed allocation or its resources.” This approach might produce an undesirable situation whereby the parochial school administrators or the parents would defer providing a particular service because to provide it now would make a subsequent government subsidy unconstitutional. Finally, it would be virtually impossible to prove that the parochial school would never have itself undertaken the project—be it special remedial reading, field trips, special tutoring, or even a “head-start” program. It is more natural to assume that any service provided by public schools is also within the reasonable contemplation of parochial schools.

“Earmarking” is of no consequence under the rationale proposed in this article. Nor is the freeing of funds which is an effect of even police and fire protection. Rather, the crucial inquiry is whether the total government assistance exceeds the value of the secular educational service rendered. The state funds may be paid to the parent or directly to the school so long as they serve a primary or independent secular purpose, as defined herein.

Even if the parochial school endorsed the government’s bank draft directly to a seller of religious books or insignia, it should be of no constitutional significance; this is logically no different than the school’s endorsing the draft to a seller of dictionaries or bus transportation, and then drawing a check on funds in its own account—which it would otherwise have used for the dictionaries or bus transportation—to pay for the religious books or insignia. Even if the state, at the parochial school’s request, were itself to supply religious tracts to the school—unlikely as this may be—there should be no issue if the total public appropriation to the school were not greater than the value of the secular services rendered; this is analytically the same as the state supplying dictionaries to the parochial school and the school then buying the religious tracts with the funds freed. Of course, the state should not be able to condition its grant on use for reli-

gious purposes. In that case, although the parochial school might use the funds thus freed for secular purposes, the grant would not assure this result. Only a religious end would be guaranteed, and by conscious government dictate. This the establishment clause forbids without further inquiry or computations.

D. Child Benefit "Revisited"

Having considered the "child benefit" and "earmarking" theories, what may be termed the "LaNoue-child benefit revisited" theory merits some attention. Mr. LaNoue submits three criteria as the bases for a constitutional formulation respecting aid to parochial schools: First, if the aid goes directly to the parent or child, no religious institution should acquire new property through the state action. (The shortcomings of this criterion have already been fully explored.) Second, all control over administration and spending of the public funds should remain with the state—for example, the state should select any textbooks provided. (But, whoever the selecting agency, establishment clause values are preserved if the book is to be used for a primary secular purpose.) Third, no religious use should be made of what the state provides. (This ignores the freed funds effect.)

E. Aid to Hospitals Distinguished

Government grants and loans for hospital construction, to institutions including those that are church-affiliated, generally conceded to present no establishment clause problems, are analogous to public financing of the secular aspects of parochial education. Just as the state may "care for the destitute ill," so, too, may it provide for the educational advancement of its citizenry. To paraphrase Mr. Pfeffer, "As long as the sum paid to the denominational [school for the cost of its nonreligious education] does not exceed the amount the state would be required to expend to [provide this education in public schools], the [parochial school] is not really receiving government aid.

The cases have been distinguished by some, principally on the grounds that admission to religiously-affiliated hospitals is on a nonsectarian basis and that the hospitals make no attempt to promote religious dogmas. Apart from the facts that at least Catholic parochial schools are not restricted to members of that faith, and that sectarian hospitals not infrequently have religious insignia in the rooms, have religiously significant requirements for doctors who may enter, and follow medical codes differing from that of the American Medical Association, there is a more constitutionally relevant response. When government funds are being expended only for primary secular purposes—either ministering to the sick or serving the secular educational needs of the young—the religious affiliation of the recipient institutions or those in attendance should be inconsequential—as should be the fact that "parochial schools are created specifically for religious as well as secular purposes."

Religious restrictions on admission to an institution supported by public funds or such an institution's general religious tone should be similarly irrelevant constitutionally so long as the benefits provided may conveniently be obtained elsewhere. On the other hand, if "the government has chosen to aid a religious institution to save the expense of building new public facilities" or has "granted a government financed monopoly over certain services in a particular geographical area," the result may be different. Under these circumstances, an otherwise private institution is performing what has traditionally been, or what has effectively become, a "public function." Therefore, there is a forceful argument that it should be subject to the "state action" restrictions of the Constitution—that either governmental assistance must be terminated or the institution must be bound by the constitutional obligations of the state.

F. Balancing

Probably the most forthright school of thought that wishes to have the Constitution permit some public financial assistance to parochial education but forbid public subsidization of all the secular aspects is that which contends that "today . . . most of the distinctions of the law are distinctions of degree." The view is that the Court must decide "when a little becomes too much," and must engage in "the process of balancing the many competing considerations and ultimately weighing them on policy considerations." The *Everson* majority's clear implication that bus transportation lay at the brink of unconstitutionality may be relied on for substantiation.

This test is sometimes phrased in terms of a "direct-indirect" or "active-passive" standard. But, in essence, the approach requires the Court to juggle a nearly infinite number of diverse factors—for example, whether the state's purpose is religious or secular, the importance in terms of priorities of the public purpose, the relative probability of its accomplishment, the type and quantum of benefit given to religion, whether funds will be freed, the relative strength of sectarian influences operative within a particular recipient institution, the relationship of the benefit to the religious aspects of the institution aided, the extent to which the state selects the institutions to be aided. These, in turn, must be measured by the implications of the free exercise clause as tempered by the force of the establishment clause, considered in light of the existence and adequacy of alternative means, and perhaps bolstered by a presumption of unconstitutionality, (or maybe constitutionality).

The defect of this approach is by now apparent. If "the method of weighing constitutional objectives in order to choose among them affords no guidance for further action, except on what Holmes called a 'pots and pans' basis," then subjective assessment of the multitudinous elements at issue here is presumptively inappropriate for an independent judiciary as we know it. Only in limited and compelling circumstances is such a process even justifiable, much less desirable. The advocates of this approach themselves acknowledge that, as applied to aid to parochial schools, "it is futile to hazard a prediction of the outcome" and that the consolation to "[t]hose who see no distinction between transportation and any other form of assistance whatsoever [is that they] should keep in mind that, apparently, the court [in *Everson*] did."

G. Horace Mann

The recent, celebrated *Horace Mann* decision in Maryland, invalidating under the establishment clause the allocation of state funds to three or four church-related colleges for construction of science and classroom buildings, a dining hall, and a dormitory, employed a somewhat more limited but analytically similar balancing approach. The state court, interpreting the relevant Supreme Court opinions as barring any direct grants to "sectarian" institutions, utilized a six-criteria formula to determine whether each recipient college met this test. The court itself recognized the inappropriateness of this constitutional approach—"to decide each case upon the totality of its attendant circumstances." It admitted that application of its test was "a rather elusive matter, being somewhat ephemeral in nature."

The more basic defect in the *Horace Mann* decision was that, for establishment clause purposes, it ignored the fact that, no matter how "sectarian" the recipient college, the state expenditures seemingly served a primary secular purpose; undoubtedly, the colleges found to be "sectarian" receive many indirect public benefits that "aid" them as significantly as the funds in issue. Thus, to bar all direct governmental grants to church-affiliated educational institutions simply because they engage in certain practices that foster religion, while acknowledging that "not every activity of a religious group is necessarily a religious activity," not only jeopardizes a host of existing state and federal programs, but places form over substance and is constitutionally unsatisfactory.

H. Manipulation

1. Lending Textbooks

The test for determining whether governmental assistance to religion breaches that neutrality demanded by the first amendment, it has recently been argued, should be whether "the aid could be manipulated by church or state to dominate the other." The aid involved, for example, in the *Allen* case now pending before the Supreme Court—lending secular textbooks to parochial school students—is found to violate that standard on several counts.

First, "since textbooks are used in the classrooms as an integral feature of the educational process, there is no certainty that they would not be manipulated for religious instruction in parochial schools." True. But even assuming that similar manipulation could not occur with respect to state-provided school lunches (by prayers in connection therewith, for example), or state-financed school medical examinations (by their illustrative use in classroom theological discussions), or state-laid sidewalks providing access to the denominational school, the point is not well taken. Even public aid that is itself immune from sectarian manipulation frees church funds either for uses subject to manipulation, or for strictly reli-

gious uses. This being so, the attempted limitation only formalistically accomplishes the end sought. The sole criterion should be whether the total public support exceeds the value of the secular service rendered. If allegedly secular activities are so manipulated as to be no longer fairly characterized as nonreligious, they may not be included in valuing the secular service provided.

Second, it is contended that lending textbooks "will create and foster a pressure to dominate the choosing of books that shall be used in the public schools (so that they may also be used in parochial schools)." That may be true. But if such pressures occur and are unconstitutional, they should be dealt with specifically rather than be striking an entire program. And, however, irresistible such pressures would be, they seemingly exist even in the absence of the program because approximately half of Catholic children presently attend public schools.

2. Control Follows Aid

Finally, it is urged that if "parochial schools become dependent on state financing of books for children, manipulative conditions could attach which would compel sectarian schools to restrict religious instruction or which could ultimately result in dissolution of a separate parochial system altogether." This "control follows aid" assertion, frequently heard and already referred to, deserves further consideration.

It was said ten years ago that "examination of the state constitutional and statutory provisions reveals little public control of private schools and teachers." An authoritative and comprehensive federal study reported at that time that in only five states do departments of education "have explicit statutory responsibilities for the certification of teachers of nonpublic schools," and indicated that curriculum regulation was indeed minimal. And there is little reason to believe that much significant change has taken place since then.

It is argued that increased state financial assistance to parochial schools will bring additional state supervision because it is "discriminatory . . . to allow public funds to be spent by private schools without public control and yet insist on such public control for public schools." Perhaps this will be true as a realistic political matter. However, government may believe controls are unnecessary or undesirable, and aid conditioned on controls thought unsatisfactory by the recipient may be refused. More importantly, as a constitutional matter, the state's power to regulate nonpublic schools is wholly independent of any allocation of public funds. This is confirmed in practice by requirements already noted and by a number of others. On the other hand, public aid or not, the Constitution forbids unreasonable restriction of religious instruction or dissolution of the parochial school system.

The landmark decision of *Pierce v. Society of Sisters* is relevant on both counts. Invalidating a state requirement of compulsory public school education, the case held that due process of law forbids unreasonable state interference with parents' liberty to direct their children's education. The parental right being grounded in the Constitution, state authority to curtail it would not appear to be augmented by the grant of governmental funds. But *Pierce* also recognized state authority "reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require . . . that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare."

Those whose conscientious scruples constitutionally entitle them to attend a church-related school plainly have no absolute right under the free exercise clause to maintain those schools free of state regulation, whatever the amount of public financial support given them. Although the state may have no right "to standardize its children by forcing them to accept instruction from public teachers only," to attain important societal goals it clearly may regulate action demanded by religion or conscience. This is especially true where the interests of children are concerned. Although the free exercise and due process clauses may assure private or sectarian schools the liberty "to inculcate whatever values they wish," those clauses do not hamper the state's power reasonably to promote children's welfare through basic secular education. Thus, the "control follows aid" argument, at least as to its constitutional relevance, loses its force.

I. Accreditation

By virtue of *Pierce v. Society of Sisters*, states must make it possible for parochial schools to gain accreditation. It is therefore contended that "public

money . . . cannot logically be withheld from the private school if it is publicly accredited as an institution where children may fulfill their legal duty to attend school." This reasoning, acclaimed as the "strongest argument to sustain . . . general aid to parochial schools," may be misleading.

The fact of accreditation should not be determinative. Under the establishment clause analysis proposed herein, a state could constitutionally "accredit" a parochial school course in religious instruction for the purpose of satisfying the minimum number of units required for graduation under state law. Since the purpose and effect of such a course could be religious—sectarian indoctrination—accreditation by the state would serve a primary religious end. But it would neither compromise anyone's religious scruples nor involve the use of compulsory raised tax funds. However, for the state to support such an accredited course with public funds would have the latter effect and, therefore, should be held to violate the bar against establishment of religion. Similarly, accreditation of a parochial school should not necessarily permit its being financed with public money on a par with schools that are not church-affiliated. The establishment clause should bar any grant of public funds exceeding the value of the secular services rendered.

J. The Public Welfare-Educational Process Distinction

Many opponents of public aid to parochial education, conceding the validity of certain "health" measures" like free medical and dental services and free hot lunches for children in parochial schools, would draw the line there. Aid beyond this—in the form of school bus transportation, textbooks, or science equipment—is aid "to the educational process itself" and falls within the constitutional ban. Medical care and hot lunches are "true welfare benefits," it is contended, needed by a child "whether he goes to a public school, to a parochial school, or to no school at all." But school transportation and textbooks "are essential aids to the function of education as such . . . [and] cannot constitutionally be provided where the education is religious, since the function [aided] thus becomes religious education."

This rationale may be challenged on a number of grounds. First, it is inconsistent with a conclusion drawn by its own advocates. The public welfare-education distinction would invalidate all school medical, nurse and dental care and milk and hot lunch programs for parochial school students. Although such services may be needed by every child, these state and federal programs do not "go to pupils as minor citizens . . . [but rather] to them as school-children." They are not provided to the unfortunately substantial number of school-age children not enrolled in any school, nor to children absent from school, nor to any children on those days when schools are closed. Similarly, this thesis would disqualify parochial school students from the benefit of such municipal services as school area traffic control devices—including stationing traffic officers on school corners—home instruction for those temporarily unable to attend school, the public library school bookmobile, school driver training, reduced rates by a publicly owned system for pupils traveling to school or school activities, and publicly sponsored educational television programs for classroom use.

Conceding that "transportation, where it is needed, is as essential to education as any other element," this is equally true of medical care and hot lunches. Hot lunches in particular, we know today, are no less important for many children than, as Mr. Justice Rutledge said of transportation, "the very teaching in the classroom or payment of the teacher's sustenance. Many types of equipment, now considered essential, better could be done without." Any distinction between them does not hold.

But the more basic objection to distinguishing between medical care and school lunches, on the one hand, and bus transportation, science equipment, and the like, on the other, is that all of these items fulfill independent primary secular purposes. Even if they are all classified as essential to the educational function, none has the primary effect of aiding religious education in violation of the establishment clause. A child needs secular education "whether he goes to a public school, to a parochial school, or to no school at all"; secular education is a "true welfare benefit."

The *Everson* dissenters found the bussing plan the same as furnishing "free carriage to those who attend a Church," or paying "the cost of transportation to Sunday school, to weekday special classes at the church or parish house, or to the meetings of various young people's religious societies." State action of these

sorts would obviously violate the establishment clause. Although a secular purpose would be served (convenience of citizens, protection against traffic hazards), it would be accomplished by unconstitutionally singling out one religion or all religions for preferential advantage.

Aid to all schools, or all school children, or all school children in nonprofit schools does not so discriminate. Such aid is as constitutionally nonpreferential as providing free carriage to all citizens or subsidizing all public transportation costs. Because these general programs have a primary secular purpose, they should not violate the establishment bar when the transportation happens to be used to get to church, to religious meetings, or to parochial schools. The programs are logically the same as all other municipal services afforded all property without classification reflecting its religious ownership.

It appears both logically and pragmatically ironical to contend that bus transportation for school children alone violates the establishment clause but that bus transportation for everybody, including school children, does not. The latter not only provides the same benefit to religious education as the former, but, unlike the former, it also subsidizes trips to Sunday school and church services. These apparent inconsistencies disappear under a rationale that looks to whether the government service provided—transportation and textbooks, for example—serves a primary secular purpose.

K. The "Who Controls" Test

Whether "it is the church (or church institution) or the state that performs or controls the performance of the services paid for by the state" has been submitted as the "ultimate test," under the establishment clause, for permitting public financial assistance to parochial education. Its basis is that "[i]t is reasonable to assume that services performed or controlled by a religious institution could and would be used to further the religious objectives of that institution, whereas services performed or controlled by a public body would be secular in purpose and form. This thesis would permit "the transportation of school children by a *public* bus," despite the fact that this would be "ultimately beneficial to parochial school students and incidentally or indirectly of aid to the church institutions they attend." But it would forbid the supplying of textbooks because "the use of texts in an educational context which is privately, rather than publicly, managed and administered directly serves a religious educational purpose."

1. General Criticism

The principal difficulty with this proposal is in its basic assumption. It is possible that a parochial school will so structure its services as to further, exclusively or partially, its religious objectives. If so, as was discussed earlier, such services cannot be supported by government to a greater extent than the value of the secular ends served. Further, it is clear beyond doubt that public schools may also so structure some of their services. If so, the courts must intervene when called upon. And it is also manifest that services controlled by a religious institution frequently do in fact further society's nonreligious objectives. If not, public financial support could not even be given to a religiously-affiliated hospital, a result apparently required by this thesis.

Transportation of parochial school children in a bus leased by the school would probably be described, under this approach, as a service "controlled" by the religious institution and thus the rental fee could not be paid by government. But bus transportation would nonetheless have a secular purpose. Even religious instruction given during the bus ride would not affect the primary secular purpose of safety and convenience. And if the government closed its fire department and instead paid any private fire protection agency selected by the parochial school, the establishment clause should not invalidate this action.

The "who controls" approach has also been applied to library books. Mr. LaNoue argues that a constitutional distinction should be drawn between housing books in a parochial school library on "indefinite" or "permanent" loan and having books "housed in public buildings" being "removed . . . only for the period necessary for reasonable educational use . . . for a textbook one semester or one year." But the purpose of either alternative is plainly secular; the "control" exerted over the books by the parochial school seems essentially the same; the public cost of each program appears identical, as does the benefit to the child and his school. This should not be the stuff of which constitutional distinctions are made.

He asserts that "since the books will not be centrally catalogued, students and teachers from other schools will be unable to borrow the public materials." True. But so long as the primary purpose is secular and parochial schools are not given preference over other schools similarly situated, the fact should be of no constitutional significance.

2. *Shared Time*

Proponents of the "who controls" rationale would permit public financing of shared time or dual enrollment programs in which parochial school pupils take part of their course work in the public schools. Yet, not only would they bar use of these funds to pay for secular services of parochial schools, they would also invoke the establishment clause to forbid public school instructors teaching courses in the parochial schools themselves. Therefore, the very same public school teacher who taught, say, a section of a course in home economics or geography to a class including parochial school students, as part of a shared time program in the public school, could not teach the same course at the parochial school at what might very well be the same total public expense. Nor would it appear that a publicly hired speech therapy or driver training teacher could instruct parochial pupils at the church-affiliated school. Of course, these results would not obtain under the establishment clause approach suggested in this article.

(a) *Parochial School Representation.*—The fact that a parochial school representative may participate with public school officials in the planning and administration of shared time programs has been condemned under the establishment clause. But this is not the type of religious participation in the affairs of government that must be thwarted. If the participant seeks to inject religion into the shared time curriculum, he may not do so. But if his participation is addressed to secular educational concerns, no establishment issue should arise. Surely, a meeting of government officials and community leaders to discuss publicly funded programs for riot prevention may constitutionally include church representatives, who may suggest a secular role that their institutions might play.

(b) *Preference to Catholicism.*—Especially in respect to shared time, it has been alleged that public financial aid to parochial schools is in fact preferential aid to Roman Catholicism because that religion is the principal one engaged in the field of education whereas other denominations emphasize different endeavors. But numerous civil regulations for secular purposes affect the interests of different religious groups disproportionately—obvious examples being laws requiring Sunday closing, enforcing monogamy, and prohibiting usury. So long as the state's purpose and primary effect is nonreligious, the establishment ban should be held satisfied.

L. *Higher Education Distinguished*

It is frequently asserted that aid to church-related colleges and universities is constitutionally distinguishable from aid to elementary and secondary parochial schools. The principal reason advanced is that college attendance is voluntary, whereas public support of parochial schools is support of coerced religious instruction. There is little doubt that, if children are assigned by public authority—that is, coerced—to attend what is in effect a parochial school, their first amendment rights of religious liberty have been breached, whatever their religious faith. Public support of the school under those circumstances merely compounds the evil. But, in the usual case, government compulsory education laws coerce no child to attend a parochial school, and public aid to both public and parochial schools "would not make attendance at either type of institution any more or less compulsory." For both higher and lower levels of education, a public purpose is achieved if the amount of governmental financial assistance does not exceed the value of the secular educational service rendered.

The further argument is made that, since a much higher percentage of students is enrolled in private colleges than in private elementary and secondary schools, the national interest in affording the former financial assistance is much stronger. But, again, a secular purpose would be served in both instances. Finally, there are two responses to the argument that "church colleges are not in the business of religious indoctrination, unlike church grammar and high schools." First, it may be contradicted by the facts: "[I]n many church-related colleges, religion is just as central a part of the educational program and objectives as it is in parochial schools." Second, as has already been shown, the "permeation" issue should not act as a complete bar to aid.

IV

EXISTING FEDERAL PROGRAMS

It has recently been calculated that at present there are more than one hundred federal programs allocating property or funds worth billions of dollars to religiously-affiliated institutions, the Department of Health, Education, and Welfare alone aiding close to two thousand church-connected educational agencies. Those programs involving the transfer of commodities or equipment for the achievement of specific secular goals, clearly fall within the class of permissibility under the establishment clause approach proposed herein, as do others affording direct grants for research of a designated nonreligious nature and for training personnel for these purposes. Taxpayers' dollars are plainly not being used for religious purposes. Nor are they so being utilized when public funds are appropriated for the construction or purchase of facilities or property that will be employed for strictly secular purposes or for the establishment of special programs for the achievement of public ends.

Somewhat more suspect, at least in principle, are those plans that grant money to church-affiliated educational institutions for part-time employment assistance to students. It is possible under such programs that public funds will be employed for strictly religious purposes—for example, to pay a student assistant in a religious indoctrination course. But the statutory scheme may protect against this, and even if it does not, it is highly unlikely, given present realities and those of the foreseeable future in respect to the quantum of public financial assistance, that any establishment clause issue would arise under the proposed rationale.

A substantial number of current federal programs pay tuition grants to deserving students. The possible dangers inherent in this form of government monetary assistance have already been discussed. But, again, as a practical matter, there should be no real nonestablishment problems. In conclusion, whatever the eventual judicial decision concerning the constitutionality of parochial school aid, the federal legislature has long given implicit recognition to its administrative viability, in respect to the rule proposed herein.

CONCLUSION

This article has attempted to serve several purposes. One has been to explore the broad scope of the first amendment's mandate that "Congress shall make no law respecting an establishment of religion," from both a traditional and normative perspective, accounting for both historical and contemporary goals. As a rationale for the constitutional adjudication of issues arising under the establishment clause, it suggests that a distinction be drawn between state action for religious and secular purposes and that the first amendment was designed to safeguard personal religious liberty by preventing the government from coercing religious belief and from taxing for religious purposes. The recommended approach is advanced, however, only as a point of departure. It does not mechanically produce answers, nor is it intended to articulate a "completely coherent system applicable across the board." Further, it demands a delicate judicial judgment in close cases, although it would seem that the really difficult applications are more frequently created by imaginative hypotheticals than by the authentic dynamics of government action.

The articles' second major purpose has been to propose constitutional rule for the thorny political issue of governmental financial assistance to parochial education. Specifically, the rule advises that governmental aid to parochial schools is constitutional to the extent that it does not exceed the value of their secular services. Whatever the incidental benefits to religious institutions, the establishment clause should be satisfied by ensuring that government receive secular returns from those institutions commensurate with its financial expenditure.

It is easier to describe briefly what tasks have deliberately been omitted. No reconciliation of the pertinent state, federal, or Supreme Court decisions has been attempted. No prediction as to the outcome of Supreme Court decisions in relevant present and future litigation has been advanced. I have not endeavored to make a carefully balanced appraisal, on the basis of my own likes or dislikes or those of others, of what is a desirable, feasible or politic legislative course.

If the constitutional rationale advocated will sustain enactments thought unwise by some, they must be reminded that it does not command results

thought abhorrent by others. For the Court to decide that some parochial school aid may be constitutional does not preclude the legislature from finding that it is unwise or improper. The realm of what is sound and just in this highly complex and emotionally charged area should remain open for informed debate and expedient resolution so long as the basic underlying freedom guarded by the establishment clause is preserved.

MANASSAS, VA., November 25, 1977.

HON. HARRY F. BYRD,
U.S. Senate,
Washington, D.C.

DEAR SENATOR BYRD: In a letter to you dated November 3, 1977, I indicated my interest in S. 834 (Garn-Schweiker) which provides for a tax deduction or credit for private education.

I have since learned that the bill is in your Finance Committee and that there will be hearings in January. I am therefore restating my previous request that I be granted the opportunity to submit my remarks to be included in the public record.

I have just read Mr. Hathaway's conference report on the Career Education Incentive Act. While Career education sounds very fine as it is presented in the report, I have found it to be otherwise in actual practice.

If I am permitted to present my case, I will endeavor to show that such a program in the hands of humanist teachers can result in severely disturbed children in need of care by psychiatric specialist. I have in my possession a copy of a "Social Development Program" administered under the Federally funded EXCel program, (Exploring Careers through Experiential Learning). A young man known to me was withdrawn from this program, treated by a psychiatrists, and then removed from day school to work full time and take his high school subjects at night.

Article 26, Section 3 of the U.N. Charter on Human Rights provides that parents have a prior right to determine the kind of education that will be given to their children. This right is taken away from us now by state and federal bureaucrats who want to work social change by resocializing our children. This is now so widespread and entrenched as to be subversive.

Please give me the opportunity to speak for my right to educate my children to believe in Free Enterprise, decency, and Christian morality and faith. Thank you.

Very truly yours,

MARGARET A. CHARLTON.¹

STATEMENT OF THE CENTER FOR CONSTITUTIONAL STUDIES, NOTRE DAME LAW SCHOOL, NOTRE DAME, IND.

SUMMARY

I. Introduction

If enacted by Congress, this proposal would—beginning in the tax year of 1980—provide a tax credit equivalent to half of tuition expenses up to \$500 per student attending an eligible elementary or secondary school, a vocational school or an institution of higher education. There have been several similar proposals to extend some tax benefit to those who incur educational expenses in addition to the payment of property and income taxes in support of public education. Like all tax credits, this proposal would have a significant impact on the federal treasury and must be treated as a tax expenditure.

¹ Attachments to Mrs. Charlton's letter were made a part of the committee file.

II. Constitutional Analysis

A. Tax credit applied to higher education

To determine the validity of governmental financial assistance to nonpublic, church-related education, the Court requires that the aid meet each of three standards: (1) the statute must have a valid secular purpose; (2) the primary effect of the statute must be one that neither advances nor inhibits religion; and (3) the statute must not implicate the government in excessive entanglement with religion, either by "comprehensive, discriminating, and continuing state surveillance" of religion or by virtue of the potential within a statute for creating "political division along religious lines." In the Supreme Court trilogy of cases affecting higher education, *Tilton*, *Hunt* and *Roemer* programs involving both federal and state aid were upheld under the No-Establishment Clause. A recent summary affirmation by the Supreme Court, the *Blanton* case, indicates that the kinds of restrictions appropriate for institutional assistance may not be constitutionally required with respect to aid to college students. Hence it is highly probable that the Court would sustain a college tuition tax credit against a challenge under the No-Establishment Clause.

B. Elementary and secondary education

Although the Court has allowed many forms of public assistance to church-supported colleges, it has invalidated nearly all recent attempts by state legislatures to provide support for nonpublic schools at the elementary and secondary levels. In view of this history, the Court would certainly scrutinize a tuition tax credit as applied to pre-collegiate education more carefully than it would if the credit were allowable only for college tuition.

The proposal would certainly pass the first test: Congress should have no difficulty in asserting a valid secular purpose, whether of educational policy or of tax policy, for its enactment of the legislation. By the same token, the legislation would probably also pass the excessive entanglement test because the enforcement procedures required by this proposal would involve not a governmental surveillance of church-related schools, but the audit mechanism typical to any relation between a taxpayer and the Internal Revenue Service.

The test which would probably create the greatest difficulty for the Court in accepting this proposal is the primary effect test. In the *Nyquist* case (1973) the Court relied heavily for tax modifications for parents of children attending church-related elementary and secondary schools. Even though the support of these schools was indirect, the Court ruled that the "inevitable effect" of this tax benefit was "to aid and advance those religious institutions."

The Court cannot be expected to reverse *Nyquist*, but there are several features in the federal tax credit proposal which distinguish it from its ill-fated state analogue. It is perhaps obvious though not without significance that a federal tax credit would come before the Court as an act of Congress, and therefore in a posture of greater strength. For the Court throughout its history, except for three brief and rare periods of judicial activism, has usually deferred to the wishes of Congress in the exercise of the taxing and spending power. Secondly, the beneficiary class of the federal tax credit proposal would be considerably broader than that involved in the New York statute. Thirdly, the "child benefit" theory (a state may provide general welfare assistance to all students) seems in better favor among the Justices now than when *Nyquist* was decided. And fourthly, the Court has recently indicated a greater willingness to acknowledge a distinction between the secular educational functions of nonpublic schools and the sectarian religious mission of their sponsoring bodies. For these reasons it is reasonable to expect that the Court can be persuaded to distinguish *Nyquist* in deliberations on the constitutional validity of the tax credit proposal.

C. Other constitutional considerations

In weighing this proposal Congress should be guided not only by the negative command of the No-Establishment Clause prohibiting a governmental establishment of religion, but also by the positive values asserted in the remainder of the First Amendment. Freedom of expression and communication provides one constitutional rationale for legislation of this sort, for educational choice is closely related both to the instrumentalist view that free speech is protected in order to promote greater political participation in our democracy, and to the personalist view that the First Amendment protects every person's right to form beliefs and opinions. Secondly, the Free Exercise of Religion Clause might be

used to support the claim that government "should put no unnecessary obstacles in the way of religious training for the young." Thirdly, the Equal Protection aspect of the Fifth Amendment Due Process Clause provides a constitutional basis for an equitable distribution of resources necessary for meaningful educational choice. Finally, in the light of *Coit v. Green* and *Norwood v. Harrison* it is clear that the Court will not countenance either a tax provision or an educational benefit which encourages or promotes racial discrimination in the admission of students or the hiring of faculty. An amendment would be necessary to bring the credit within the teaching of the Court.

III. Conclusion

Our own conclusion is that with some amendments the Tuition Tax Credit Act of 1977 may well survive a challenge under the No-Establishment Clause of the First Amendment, although on the basis of recent cases decided under this clause the Court would scrutinize more carefully any substantial benefit even indirectly accruing to church-related elementary and secondary schools than to independent institutions of higher education. And it is our view that the remainder of the First Amendment—Free Exercise of Religion, Freedom of Speech, Freedom of the Press, Freedom of Association, Freedom of Assembly, and Freedom to Petition the Government for Redress of Grievances—when viewed together with the guaranty of equality implicit in the Due Process Clause of the Fifth Amendment, could provide members of Congress with additional constitutional rationales to support this legislation as a permissible way to support freedom of educational choice for all members of our society.

STATEMENT

I. Introduction

Since the early 1960's there have been before the Congress several proposals to provide a tax benefit for those who incur educational expenses over and above the property and income taxes levied for the support of public education. These proposals have taken various forms, some providing a credit, some a deduction, and others an additional personal exemption for each student supported by a taxpayer. Policy makers debating the wisdom of these proposals must acknowledge that any taxation incentive or benefit has a direct impact on the federal treasury and should, therefore, be treated as a tax expenditure.¹ Since other scholars have studied the likely budgetary impact² and the potential distributive

¹ See Statement of Stanley S. Surrey on the Tax Expenditure Budget, in Hearings on Economic Analyses and Efficiency in Government—Before the Subcommittee on Economy in Government of the Joint Economic Comm., 91st Cong., 1st Sess. (Sept. 16, 1969); Surrey, "Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures," 83 Harv. L. Rev. 705 (1970); S. Surrey, *Pathways to Tax Reform* (1973). Partly because of the views of Professor Surrey, Federal law now requires a listing of tax expenditures in the budget. Pub. L. 93-344, 88 Stat. 297, 31 U.S.C. §§ 1301 et seq. The fiscal year 1978 Federal budget cites the Congressional Budget Act of 1974 which defined tax expenditures as "revenue losses attributable to provisions of the Federal Government tax laws which allow a special exclusion, exemption, or deduction from gross income or which provide a special credit, a preferential rate of tax, or a deferral of tax liability." It then provides a current definition of the term: "Tax expenditures are one means of which the Federal Government pursues public policy objectives and, in most cases, can be viewed as alternatives to budget outlays, credit assistance, or other instruments of public policy." Special Analyses, Budget of the U.S. Government, Fiscal Year 1978, 119 (1977) (emphasis supplied).

² The authors of the bill project that the bill would entail a revenue loss of \$4.7 billion in the tax year beginning January 1, 1980; compared to the estimated fiscal year 1980 budget of \$550 billion, "this legislation [would cost] less than 1 percent of that projection." 123 Cong. Rec. S15626 (daily ed. Sep. 26, 1977). Opponents of the bill, as might be expected projected a higher cost for enactment of the measure (\$6 billion in fiscal year 1980), but they have not yet published an account of how they reached this conclusion. News Release, Church-State News Service, Sept. 27, 1977. Senator William Roth (R.-Del.) author of S. 311, a bill which would have provided for a college tuition tax credit, and which passed the Senate last session as a rider to the Social Security legislation, estimated that the cost of this legislation would be \$1.3 billion in 1978, \$1.7 billion in 1979, and \$2 billion in 1980. 123 Cong. Rec. S927 (daily ed. Jan. 18, 1977). The Congressional Budget Office projected that the cost of the Roth bill would be \$1,389 billion in 1978, \$1,852 billion in 1979, and \$2,32 billion in 1980. "Response to Questions from the Senate Budget Committee," Mar. 17, 1977. The Policy Analysis Service of the American Council on Education stated that the probable cost of the Roth bill would be \$1.58 billion in 1978, \$1,971 billion in 1979, and \$2.41 billion in 1980. T. Corwin and P. Knepper, *An Analysis of S. 311: The College Tuition Relief Act 17, 42* (1977).

effect³ of these proposals, no economic analysis will be presented here. The chief focus of these comments will be on the constitutional questions presented by one of these proposals, the Tuition Tax Credit Act of 1977,⁴ introduced by Senators Moynihan and Packwood.

To facilitate the discussion of this legislation a section-by-section digest of the bill might be helpful. Section 2(a) of the bill seeks to amend the Internal Revenue Code by adding a new section 44C, authorizing a tax credit equal to 50 percent of the tuition, not to exceed \$500 per student, paid by a taxpayer for attendance at an eligible educational institution by the taxpayer, a spouse or dependents. The credit is available to spouses filing a joint return. A taxpayer filing a separate return may claim the credit because of expenses incurred on behalf of a spouse if the spouse had no gross income for the taxable year and is not claimed as a dependent of another taxpayer.

The credit is allowable for tuition paid to any elementary or secondary schools, to vocational schools which come within the meaning of section 195(2) of the Vocational Education Act of 1963,⁵ and to colleges and universities which come within the meaning of an "institution of higher education" under sections 1201(a) and 491(b) of the Higher Education Act of 1965,⁶ or to a similar institution certified by the Commissioner of Education.

A taxpayer may not take both the credit and a deduction for tuition expenses incurred in order to maintain or improve skills required in his trade or business under Internal Revenue Regulation 1.162-5.

Sec. 2(b) of the bill would authorize a refund to the taxpayer of the difference between the credit and the tax liability, where the credit exceeds the tax liability.

Sec. 8 states that amendments to the Internal Revenue Code proposed in this bill would take effect in the tax year beginning January 1, 1980.

II. Constitutional Analysis

Over the past six years the Supreme Court has drawn a bright line between precollegiate and postsecondary nonpublic education.⁷ Largely because the Court has adopted a stereotypical characterization of what transpires in Church-related institutions at these two levels, it has routinely upheld many forms of federal and state assistance both to institutions and to students at colleges and universities,⁸ while it has invalidated many forms of state assistance to private elementary and secondary schools as well as to students attending these schools.⁹

³ The ACE report cited above, note 2, assesses the distributional impact of a college tuition tax credit both on the taxpaying beneficiaries (students and their families) and the authors also estimate the dynamic implications of higher education tax credit, such as types of institutions which would be affected by the legislation. Id. pp. 6-8, 18-22. The changes in student enrollment (increase in total enrollment, shift from part-time to full-time enrollment, shift from public 2-year colleges to public 4-year colleges, and shift from public to private institutions) and changes in institutional pricing policy. Id. pp. 23-27. For an economic analyses of aid to nonpublic schools, see West, "An Economic Analyses of the Law and Politics of Nonpublic School 'Aid,'" 19 J. Law and Economics 79 (1976).

⁴ S. 2142, 95th Cong. 1st Sess.; 128 Cong. Rec. 815626 (daily ed. Sept. 26, 1977).

⁵ The bill adopts by reference the statutory definition of a vocational educational school found in the Vocational Education Act of 1963, Pub. L. 88-210, 77 Stat. 409, as amended by Pub. L. 94-482, 20 U.S.C. 1248.

⁶ The bill adopts by reference the statutory definition of an institution of higher education found in the Higher Education Act of 1965, Pub. L. 89-329, 78 Stat. 1251, 20 U.S.C. 403.

⁷ See, e.g., Gianella, "Lemon and Tuition: The Bitter and the Sweet of Church-State Entanglement," 1971 S. Ct. Rev. 147.

⁸ See *Americans United for the Separation of Church and State v. Blanton*, 98 S. Ct. 39 (1977) (affirming summarily a district court judgment upholding the validity of state financial assistance to students at church-related colleges); *Smith v. Board of Governors of the University of North Carolina*, 98 S. Ct. 39 (1977) (same); *Roemer v. Bd. of Public Works of Maryland*, 426 U.S. 736 (1976) (upholding annual noncategorical grants to private colleges); *Hunt v. McNair*, 413 U.S. 734 (1973) (upholding issuance of state revenue bonds benefiting a church-sponsored college); and *Tilton v. Richardson*, 403 U.S. 672 (1971) (upholding Federal construction grants for facilities used for a secular educational function at a church-related college). For a discussion of these cases, see A. Howard, *State Aid to Private Higher Education*, 2-14 (1977).

⁹ See *New York v. Cathedral Academy*, 98 S. Ct. 340 (1977) (invalidating expenditure of State funds to reimburse nonpublic schools for recordkeeping and testing services required by State law); *Wolman v. Walter*, 97 S. Ct. 2593 (1977) (invalidating expenditure of State funds for guidance counselling for elementary and secondary students in nonpublic schools, or for loan to such students or their parents of instructional materials and equipment in use in public schools, or for field trip transportation and services such as are provided to public school students); *Mesk v. Pittenger*, 421 U.S. 349 (1975) (invalidating expenditure of State funds for loan to nonpublic schools of instructional materials and equipment or for provision of auxiliary services—remedial and accelerated instruction, guidance counselling, testing, speech and hearing services—to nonpublic schools); *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) (invalidating State grants

Assuming without conceding the validity of the Court's characterization of Church-supported higher education and precollegiate education, we structure our constitutional analysis within the framework of this distinction. Our conclusion is that a strong argument can be made for the constitutionality of this tax proposal as it relates to both levels of education, but that it is more difficult to overcome existing legal precedents which tend to disfavor the validity of a tax credit as it relates to church-supported elementary and secondary schooling.

A. Higher education

Since 1971 the Court has used a tripartite test for determining the validity of public funding of nonpublic schools under the No-Establishment Clause of the First Amendment. Announced in a 1970 case upholding a state statute granting a tax exemption to churches and religious associations,¹⁰ the test was applied a year later to the elementary and secondary educational context in *Lemon v. Kurtzman*¹¹ and to the higher educational context in *Tilton v. Richardson*.¹²

The first element of the test is that "the statute must have a secular legislative purpose."¹³ Although a statutory scheme may be invalidated if it fails to meet any one of the three tests the Court has fashioned for No-Establishment Clause cases, no plan has ever been struck down for failure of the legislature to articulate a plausible secular purpose. It is safe to say that Congress can as easily devise a statement of purpose for the tax credit proposal which would pass this first "test," as it did in the construction grant program (upheld in *Tilton*)¹⁴ or as the South Carolina legislature did when it authorized the issuance of state revenue bonds for construction on church-related college campuses (upheld in *Hunt v. Mo-Nair*).¹⁵ or as the Maryland legislature did when it provided noncategorical grants as annual subsidies to eligible colleges and universities (upheld in *Roemer v. Bd. of Public Works of Maryland*)¹⁶ or as the Tennessee legislature did in formulating a reason for its program of assistance to students attending both public and nonpublic colleges, universities, and vocational or technical institutes (upheld by the summary affirmation in *Americans United for the Separation of Church and State v. Blanton*).¹⁷

The second test requires that "the principal or primary effect [of a statute] must be one that neither advances nor inhibits religion."¹⁸ Although the Court has invalidated several state schemes supporting private elementary and secondary education on the grounds that those plans failed to meet this second test, it has yet to strike down a program of public funding in support of church-related colleges and universities or of students attending the institutions.¹⁹ But in the higher education trilogy of *Tilton*, *Hunt*, and *Roemer*, the Supreme Court has imposed some limitations on institutional assistance, noting that aid programs unrestricted as to use would run afoul of the No-Establishment Clause even if the sectarian colleges and universities did not constitute a majority of the beneficiary class. Thus in *Tilton* the Court paid little or no attention in its constitutional analysis to the fact that the four church-related colleges sued constituted

for maintenance and repair of nonpublic facilities and equipment used for elementary and secondary education in low-income urban areas, or for tuition reimbursement grants to low-income parents, and invalidating tax adjustment for middle-income parents who paid tuition to nonpublic elementary and secondary schools); *Sloan v. Lemon*, 418 U.S. 825 (1973) (invalidating State reimbursement of parents for a portion of tuition paid to nonpublic schools); *Levitt v. Committee for Public Education and Religious Liberty*, 418 U.S. 472 (1973) (invalidating State subsidies to nonpublic schools for administering State-prepared "Regents' examinations" and teacher-prepared tests on secular subjects); *Lemon v. Kurtzman*, 408 U.S. 602 (1971) (invalidating State salary supplements to teachers of secular subjects in nonpublic schools, and State "purchase" of "secular educational services" from nonpublic schools by directly reimbursing such schools for teachers' salaries, textbooks, and instructional materials relating to secular subjects).

¹⁰ *Walz v. Tax Commission of the City of New York*, 397 U.S. 664 (1970).

¹¹ 408 U.S. 602 (1971).

¹² 408 U.S. 672 (1971).

¹³ *Lemon*, 408 U.S. at 612.

¹⁴ 408 U.S. 672 (1971).

¹⁵ 413 U.S. 734 (1973).

¹⁶ 426 U.S. 736 (1976).

¹⁷ 433 F. Supp. 97 (M.D. Tenn. 1977) aff'd, 98 S. Ct. 39 (1977); see also *Smith v. Bd. of Governors of Univ. of North Carolina*, 429 F. Supp. 871 (W.D.N.C. 1977), aff'd, 98 S. Ct. 39 (1977).

¹⁸ *Lemon*, 408 U.S. at 612.

¹⁹ In cases involving higher education the Court maintains a distinction between secular educational functions and sectarian religious goals. See cases cited in note 8 supra. The Court disallows or ignores this distinction at the level of elementary and secondary education. See cases cited in note 9 supra.

only a small number of the institutions benefited by the federal construction grant program. Similarly in *Hunt* the Court imposed restrictions on sectarian use of the single Baptist college which benefited from the South Carolina program of revenue bonds. And in *Roemer* similar restrictions were imposed on the church-related recipients of the Maryland grants, even though they constituted less than a third of the beneficiary class.

More recently, the Court appears to have stated that restrictions which might be constitutionally mandated with respect to institutional assistance at the college and university level need not apply to student aid at the same level. For as one commentator on the *Blanton* decisions has noted, the Supreme Court by summarily affirming the decisions of the district courts in Tennessee and North Carolina did not evince any interest in examining the issue of whether the institutions indirectly benefited by the student assistance in question were in fact "pervasively sectarian" in character.²⁰ By contrast, the Court continues to display keen interest in such allegations at the primary and secondary level.²¹ So it seems safe to predict that the Court would affirm the constitutionality of a federal income tax credit for college tuition even though the college attended by the taxpayer, his spouse or dependent was church-related.

"excessive entanglement" test.²² A program may violate the First Amendment if it requires an on-going administrative interaction between the government and the church-related institution benefited by the legislation²³ or if the legislation has the potential for generating "political divisions along religious lines."²⁴ The "political divisiveness" test has been used by the Court only once in recent cases involving higher education,²⁵ and it has never been relied on to invalidate aid at this level. For those reasons it constitutes no formidable barrier to a college tuition tax credit, and further comment on this test will be reserved for the application of a tax credit at the elementary and secondary level.

The administrative entanglement test likewise presents no insurmountable obstacle to a college tuition tax credit. For the enforcement of such a provision in the Tax Code would chiefly involve a relationship between the government and those taxpayers whose tax returns would be audited by the Internal Revenue Service. It is, of course, conceivable that the IRS would involve itself in some way with the church-related institutions indirectly benefited by the tax credit. For example, they might scrutinize the beneficiary colleges and universities to ascertain whether they practice invidious racial discrimination in student admissions or faculty employment. Although the Revenue Ruling²⁶ which disallows tax exempt status for racially segregated schools appears to have originated with the concern that the federal government should not by its tax policy encourage, foster, or support a system of schools operated on a racially segregated basis²⁷ as an alternative to white students to avoid public schools desegregated under the doctrine of *Brown v. Bd. of Education*,²⁸ the scope of this ruling could easily be enlarged by the Internal Revenue Service to include higher education as well. In that event, government officials would be involved in some surveillance of a church-related institution, but such monitoring would probably be sporadic and episodic rather than the continuous sort which the Court ruled fatal at the elementary and secondary level in *Lemon*.²⁹ The degree of administrative entanglement between the government and religious groups which would be necessitated by a college tuition tax credit would not be so excessive as to violate the constitution.

In sum, although the institutions indirectly benefited by a tuition tax credit would include church-related or after *Blanton*, perhaps even "pervasively sec-

²⁰ See Editorial, "Free Choice for College Students," *America* 257 (Oct. 22, 1977).

²¹ See Gaffney, "Meek, Wolman, and the 'Fear of Imaginable but Totally Implausible Evils' in the Public Funding of Nonpublic Education," in *Freedom and Education: Pierce v. Society of Sisters Reexamined* (D. Komers and M. Wahoake eds. 1978).

The third test used by the Court in No-Establishment Clause cases is the "We must also be sure that the end result—the effect—is not an excessive government entanglement with religion." *Wals v. Tax Commission*, 397 U.S. 664, 674 (1970).

²² "The questions are whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an impermissible degree of entanglement." *Id.* at 675.

²³ *Lemon v. Kurtzman*, 403 U.S. 603, 622 (1971).

²⁴ *Tilton v. Richardson*, 403 U.S. 672, 688 (1971).

²⁵ Rev. Ruling 71-447, 1971-72 C.B. 230.

²⁶ *Green v. Kennedy*, 309 F. Supp. 1127 (D.D.C. 1970); *Green v. Connally*, 330 F. Supp. 1150 (D.D.C.) aff'd sub nom. *Coit v. Green*, 404 U.S. 997 (1971); and see *Norwood v. Harrison*, 413 U.S. 455 (1973) (disallowing the application of Mississippi's textbook loan program to students attending racially discriminatory private academies).

²⁷ 347 U.S. 483 (1954).

²⁸ "A comprehensive, discriminating, and continuing State surveillance will inevitably be required to ensure that . . . the First Amendment . . . [is] respected." *Lemon v. Kurtzman*, 403 U.S. 60, 619 (1971).

tarian" college and universities, it is highly probable that the Supreme Court would sustain a college tuition tax credit against an attack under the No-Establishment Clause of the First Amendment.

B. Elementary and secondary education

For purposes of Equal Protection analysis under the Fourteenth Amendment, the Court in recent decades has fashioned a test of stricter scrutiny when the classification involved in the statute under question includes a suspect category such as race.⁶⁰ Nonpublic church-related grammar schools and high schools as well as the students who attend them, appear in the light of several recent cases to be an analogously "suspect class."⁶¹ For the Court has virtually constructed an inverse ratio between the command of the No-Establishment Clause and the level of nonpublic education benefited by public assistance. What the constitution allows at a college is forbidden at the precollegiate level.

For example, in *Tilton* Chief Justice Burger opined that religion would not "seep" into the use of the buildings constructed with federal grants.⁶² And he apparently felt that there is little likelihood that "religion would permeate the area of secular education" on a college campus because "religious indoctrination is not a substantial purpose or activity of these church-related colleges and universities . . ."⁶³ As with the rational basis "test" employed in many Equal Protection cases in the 1960's, minimum scrutiny in higher education cases is the order of the day.

No such minimal scrutiny exists at the level of elementary and secondary education. At this level the Justices are more inclined to repudiate the distinction between secular education functions undertaken by a nonpublic school and the religious mission of a sponsoring body.⁶⁴ Indeed, the Justices search not only for actual abuse, such as direct governmental support for overt religious proselytizing, but for "the potential for impermissible fostering of religion" even where this potential "under the circumstances [is] somewhat reduced."⁶⁵ At times this inclination of the Court moves even an ardent separatist like Justice Marshall to concede the folly of conducting extensive searches for hidden dangers out of a "fear of imaginable but totally implausible evils."⁶⁶

The result of state aid cases since *Lemon* and *Tilton* has been consistent at least in maintaining a form of symmetry. The Court allows most forms of aid at the college level, and it invalidates at the precollegiate level the following forms of state assistance: grants for maintenance and repair of facilities and equipment used for education in low-income urban areas,⁶⁷ tuition reimburse-

(1973).
ment grants to low-income parents,⁶⁸ tax adjustments for parents who paid tuition to nonpublic schools,⁶⁹ subsidies to tax adjustments for parents who paid

⁶⁰ Some commentators would trace the origin of this development to the now famous "footnote four" of the *Carolene Products* case, in which Chief Justice Stone wrote: "It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny . . . than are most other types of legislation. . . . Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious . . . or national . . . or racial minorities . . . ; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial scrutiny. *United States v. Carolene Products Co.*, 304 U.S. 144, 152-53n. 4 (1938) (citations omitted) (emphasis added).

⁶¹ See cases cited in note 9 supra.

⁶² *Tilton v. Richardson*, 403 U.S. 672, 681 (1971).

⁶³ *Id.* at 687.

⁶⁴ Contrast, e.g., the concurrence of Justice Douglas in *Lemon*, 403 U.S. at 635 ("It is well known that everything taught in most parochial schools is taught with the ultimate goal of religious education in mind") with the dissent of Justice White, *id.* at 633 ("Our prior cases have recognized the dual role of parochial schools in American society: they perform both religious and secular functions.") (emphasis added).

⁶⁵ *Meek v. Pittenger*, 421 U.S. 349, 372 (1975).

⁶⁶ *Wolman v. Walter*, 97 S. Ct. 2593, 2612 n.6 (1977) (Marshall, J., concurring and dissenting). Justice Marshall was referring to the contention, rejected by all members of the Court except Justice Brennan, that diagnostic personnel hired by the public school district but conducting a hearing test in a nonpublic school "may be influenced to indoctrinate the pupils with whom they deal in the tenets of the sect that runs the sectarian school." Even the opponents of State-financed diagnostic services for children at nonpublic schools conceded that optometric services presented no "danger," presumably because of the difficulty—though not impossibility—of reducing the Bible or a catechism to the size of an eye chart.

⁶⁷ *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756, 774-80

⁶⁸ *Id.* at 780-89; and see *Sloan v. Lemon*, 413 U.S. 825, 828-33 (1973).

⁶⁹ *Nyquist*, 413 U.S. at 789-94.

state-prepared "regents examinations" and teacher-prepared tests on secular subjects,⁴⁰ loan of instructional materials and equipment (other than textbooks) not readily divertable to religious purposes,⁴¹ "auxiliary services" (e.g., remedial instruction, speech and hearing services) provided by public employees on the premises of nonpublic schools,⁴² and the provision of "such field trip transportation and services to nonpublic school students as are provided to public school students."⁴³ From a review of the Supreme Court's decisions on public assistance to church-related nonpublic education at the elementary and secondary levels, it is certain that the Court would scrutinize a tuition tax credit more carefully at the precollegiate level than at the level of higher education.

Although the bill as drafted contains no findings of fact or statement of purpose, the tax credit proposal would surely survive a constitutional challenge alleging that it failed to state a valid secular purpose. If the Congress wished to assert an educational policy as the basis of such an enactment, it would have only to borrow from the statements of purpose found acceptable in the many State statutes reversed by the Court on other grounds.⁴⁴ And if the Congress chose to stress reasons of tax policy as the basis for its judgment, valid secular purposes for such legislation abound.⁴⁵

A tax credit for tuition paid at the precollegiate level would inevitably invite a constitutional challenge on the basis that the primary effect of the credit would be impermissible government assistance of religion. Within the line of cases from *Everson* to *Wolman*, the most directly analogous is *Nyquist*, where the Court invalidated New York state income tax "modifications" for parents of children attending nonpublic elementary and secondary schools on the grounds that the "inevitable effort" of this tax benefit was "to aid and advance those religious institutions."⁴⁶

Since *Nyquist* is of such recent vintage, it cannot be expected that the Court would reverse itself on a tax credit proposal similar in many respects to the New York legislation which it struck down in 1973. But there are several features to the Packwood-Moynihan bill not present in the New York statute which might be argued in an attempt to distinguish *Nyquist*.

First, the Packwood-Moynihan bill would come before the Supreme Court in a stronger posture than its New York counterpart for the simple reason that it would be an act of Congress. To say this is not to assert that the Court is powerless to reverse an act of Congress which it finds violative of the constitution. *Marbury v. Madison*⁴⁷ instructs us to the contrary. But it should be noted that since 1803, when *Marbury* was decided, only six acts of Congress have been invalidated under the First Amendment;⁴⁸ and only one of those cases, *Tilton*, involved the No-Establishment Clause.

⁴⁰ Compare *New York v. Cathedral Academy*, 98 S. Ct. 340 (1977) and *Levitt v. Committee for Public Education and Religious Liberty*, 413 U.S. 472, 479-82 (1973), with *Wolman*, 97 S. Ct. at 2600-01.

⁴¹ *Meek v. Pittenger*, 421 U.S. at 362-66; and see *Wolman*, 97 S. Ct. at 2605-07.

⁴² *Meek*, 421 U.S. at 367-72; but see *Wolman*, 97 S. Ct. at 2601-05.

⁴³ *Wolman*, 97 S. Ct. at 2608-09.

⁴⁴ See, e.g., New York Tax Law § 612 (Supp. 1972-73) (accompanying notes), as cited in *Nyquist*, 413 U.S. at 767.

⁴⁵ See McNulty, "Tax Policy and Tuition Credit Legislation: Federal Income Tax Allowances for Personal Costs of Higher Education," 61 Calif. L. Rev. 1, 14-68 (1973). The author suggests five possible purposes for a higher education tax allowance: (1) to improve the tax law's definition of taxable income (pp. 16-36), (2) to make the tax system more equitable by focusing on the differing taxpaying abilities of students and their families as compared to other taxpayers (pp. 36-42), (3) to subsidize educational institutions, students and their families (pp. 42-57), (4) to redistribute educational services, increasing access to education to classes of people excluded from meaningful choice by virtue of economic restraints (pp. 57-64), and (5) to correct a misallocation of resources in the economy (pp. 65-68). Although Professor McNulty's article focuses on higher education, it would not require much imagination to apply his categories to precollegiate education as well.

⁴⁶ 413 U.S. at 793.

⁴⁷ 1 Cranch (5 U.S. 137 (1803) (invalidating in part the Judiciary Act of 1789, 1 Stat. 81, § 13, as an unconstitutional enlargement of the original jurisdiction of the Supreme Court, fixed by Art. III, § 2).

⁴⁸ *Lamont v. Postmaster General*, 381 U.S. 301 (1965) (invalidating a provision of the Postal Services and Federal Employees Salary Act of 1962, 76 Stat. 840, § 305, authorizing postal employees to detain and to destroy "communist political propaganda"); *United States v. Robt*, 389 U.S. 258 (1967) (invalidating a provision of the Subversive Activities Control Act of 1950, 64 Stat. 922, making it unlawful for a member of a "communist front organization" to work in a defense plant); *Schacht v. United States*, 398 U.S. 58 (1970) (holding unconstitutional a provision of the Act of Aug. 10, 1956, 70A Stat. § 772(f) permitting the wearing of U.S. military apparel in theatrical productions only if the portrayal does not tend to discredit the armed forces); *Tilton v. Richardson*, 403 U.S. 672 (1971) (invalidating under the No-Establishment Clause the provision of the Higher Education Facilities Act of 1963, 77 Stat. 378, which allowed for religious use of facilities constructed

It should also be noted that the Court in modern times is much more reluctant than it was in the 1890's, and the 1920's and '30's, to defeat tax legislation enacted by Congress as violative of the Constitution. Because the Court in 1895 had invalidated a modest income tax which it perceived as the "first onslaught of socialism,"⁴⁹ a constitutional amendment was required. The Sixteenth Amendment was ratified in 1913, and since that time the Court has had only two "activist" periods in which it invalidated many forms of federal tax legislation. In 1920's and '30's the Court struck down tax provisions which did not square with the conservative economic views espoused by a majority of the Justices.⁵⁰ From 1936 to 1968 the Court did not strike down any provision of the federal tax laws as violative of the Constitution. The second "activist" period occurred at the zenith of the recent "due process revolution." Since 1968, the Court has on four occasions invalidated provisions of federal tax laws insofar as they abridged the right to be free from self-incrimination protected by the Fifth Amendment.⁵¹ To this date, the Court has never struck down a federal tax law on First Amendment grounds.

Although federal statutes generally fare better before the Supreme Court than state statutes and municipal ordinances, the Court in modern times has evinced no desire to review the details either of the Internal Revenue Code or of the tax laws of the several states. *Nyquist* represented the first time in its recent history that the Court invalidated a state tax provision on constitutional grounds. To the extent that this history manifests both the Court's deference to state legislatures in the details of their tax codes and an even greater deference to Congress in shaping the contours of federal tax policy than it gives to the state legislatures, the Packwood-Moynihan bill is distinguishable from its state counterpart, and would likely receive more favorable consideration from the Court.⁵²

Secondly, this congressional legislation would make available a tax credit for tuition paid at all levels of education. The beneficiary class, then, is not restricted to a group "composed exclusively or even predominantly of religious institutions."⁵³ To the extent that a federal income tax credit would be available to all taxpayers as a means of facilitating or enabling choice of education at a variety of educational institutions, including public and nonpublic colleges and vocational schools, and nonpublic grammar schools and high schools, it would be less easy for the Court to assert that the primary effect of the legislation was to subsidize the "sectarian activities of religious schools."⁵⁴

Thirdly, if the bill were to be reviewed by the Court as it is currently composed, it would have a better chance of being upheld than did the New York statute struck down in *Nyquist*. In rejecting the contention that the channelling of the tuition grants and tax credits directly to the parents rather than to the schools insulated the programs from further scrutiny, the majority in *Nyquist*, led by Justice Powell, appeared to have rejected the "child benefit" theory

with Federal funds after passage of 20 years); *Blount v. Rizzi*, 400 U.S. 410 (1971) (invalidating, for want of procedural provisions protecting freedom of expression, the Act of Aug. 16, 1950, 64 Stat. 451, authorizing the Postmaster General to close the mails to distributors of obscene materials); and *Chief of Postpol Police v. Jeanette Rankin Brigade*, 409 U.S. 972 (1972) (affirming a District Court order invalidating the Act of July 31, 1946, 60 Stat. 719, prohibiting parades or assemblages on U.S. Capitol grounds).

⁴⁹ *Pollock v. Farmers' Loan and Trust Co.*, 157 U.S. 429 (1895) on rehearing, 158 U.S. 601 (1895). The citation is from the oral argument.

⁵⁰ See, e.g., *Blasier v. Macomber*, 252 U.S. 189 (1920) (invalidating in part a provision of the income tax law of 1916, 39 Stat. 757, § 2(a), counting stock dividends as income); *Evans v. Gore*, 253 U.S. 245 (1920) (invalidating in part a provision of the Revenue Act of 1918, 40 Stat. 1065, § 213, taxing the salaries of Federal judges), overruled in *O'Malley v. Woodrough*, 307 U.S. 277 (1939); *Bailey v. Drexel Furniture Co.*, 259 U.S. 20 (1922) (invalidating the Child Labor Tax Act of 1919, 40 Stat. 1138); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (invalidating the Bituminous Coal Conservation Act of 1935, 49 Stat. 991, as imposing not a tax but a penalty not sustained by the Commerce Clause).

⁵¹ *Marchetti v. United States*, 390 U.S. 39 (1968) and *Grosso v. United States*, 390 U.S. 62 (1968) (invalidating provisions of Int. Rev. Code of 1954, §§ 4401-4423, 68A Stat. 525, requiring gamblers to pay occupational and excise taxes); *Haynes v. United States*, 390 U.S. 85 (1968) (invalidating provisions of Int. Rev. Code of 1954, §§ 5841, 5851, 68A Stat. 728, requiring possessor of illegal firearms to register with the Treasury Department); *Leary v. United States*, 395 U.S. 6 (1969) (invalidating provisions of *Marijuana Tax Act of 1954*, §§ 4741, 4744, 4751, 4753, 68A Stat. 560, requiring possessors of marijuana to register and to pay a tax); and *United States v. United States Coin and Currency*, 401 U.S. 715 (1971) (invalidating a provision of the Int. Rev. Code of 1954, § 7802, 68A Stat. 867, providing for forfeiture of property used in violating internal revenue laws).

⁵² The *Nyquist* Court intimated as much in a footnote stating: "our decision today does not compel, as appellees have contended, the conclusion that the educational assistance provisions of the 'G.I. Bill,' 38 U.S.C. 1651, impermissibly advance religion in violation of the Establishment Clause." 413 U.S. at 782-83, n. 38.

⁵³ *Nyquist*, 418 U.S. at 793.

⁵⁴ *Id.* at 794.

espoused by the Court in *Bd. of Education v. Allen*.⁵² According to this theory, the federal government and the several states may, consistently with the No-Establishment Clause, fund general welfare assistance provided to benefit all students whether in a public or a nonpublic school. But if Justice Powell repudiated this theory in *Nyquist*, he appears at least to have changed his mind on the matter since then. For he joined Justice Stewart's opinion in *Meek* and Justice Blackmun's plurality opinion in *Wolman*, both of which incorporate the child benefit theory into their rationale. It would seem that this theory commands the acceptance of a majority of the Justices on the Court as presently constituted. The following argument, then, can be made for the constitutionality of a tax credit as it relates to elementary and secondary education: the credit would have the direct effect of enabling the taxpayer to exercise broader selection in the way his dependents are educated.⁵³ The indirect effect of assisting the religious body sponsoring the educational experience would, on this view, be incidental and permissible.

Fourthly, the Court has given a recent indication that it is willing to acknowledge a distinction between the secular educational function of nonpublic schools at the elementary and secondary levels, and the sectarian religious mission of their sponsoring bodies. The *Nyquist* Court reduced this distinction to a minimum.⁵⁴ And the *Meek* Court virtually obliterated the distinction.⁵⁵ But the *Wolman* Court revived the distinction and breathed new life into it.⁵⁶ Hence one can now argue more easily than one could two years ago after reading *Meek*, four years ago after reading *Nyquist*, or six years after reading *Lemon* that the Congress would not be establishing a religion were it to allow all taxpayers to take a federal income tax credit equivalent to 50 percent of the tuition expenses incurred for the education of the taxpayer's spouse or dependents.

The Court will probably be asked to adjudicate the constitutional validity of this legislation. In such a test case the Court would undoubtedly apply to this legislation the tripartite test it has devised for cases arising under the No-Establishment Clause. As we suggested above in the section on higher education, the Court would probably not tarry long in upholding whatever secular purpose the Congress might choose to articulate as the basis for the legislation.

It is conceivable that the Court might invalidate this tax scheme on the grounds that the primary effect of the legislation is tantamount to an impermissible establishment of religion. To a great degree such a conclusion results from the continued reliance by some members of the Court on unsupported generalizations about nonpublic schools at the elementary and secondary levels.⁵⁷ Though the Court has occasionally expressed the view that religion "seeps into" or even "permeates" virtually all educational experiences occurring in church-supported elementary and secondary schools, it has not cited any credible empirical evidence as the basis of this view. Given the tendency of the Court to maintain unsupported stereotypes, it would seem useful for Congress to generate, during hearings on this bill and similar legislation, a full factual record on what is happening in America's schools⁵⁸ and why a federal tax policy maximizing freedom of choice

⁵² 392 U.S. 236 (1968) (upholding a New York statute authorizing the loan of secular textbooks to students attending nonpublic schools).

⁵³ For a powerful statement of this position, see Arons, "The Separation of School and State: *Pierce* Reconsidered," 46 Harv. Ed. Rev. 76 (1976).

⁵⁴ In *Allen*, the Court conceded that the loan of textbooks might produce some incidental benefit to sectarian institutions; "perhaps free books make it more likely that some children choose to attend a sectarian school . . ." 392 U.S. at _____. But the Court upheld the program since the direct beneficiaries were the students rather than the institutions. See also *Nyquist*, 413 U.S. at 800 (Burger, C.J., concurring and dissenting); and see *Meek*, 421 U.S. at 359-62, and *Wolman* 97 S. Ct. at 2590-2600.

⁵⁵ Compare *Allen*: ". . . this Court has long recognized that religious schools pursue two goals, religious instruction and secular education," 392 U.S. at 245, with *Nyquist*: ". . . sectarian schools perform secular educational functions as well as religious functions, and . . . some forms of aid may be channeled to the secular without providing direct aid to sectarian. But the channel is a narrow one. . . ." 413 U.S. at 775.

⁵⁶ "The church-related elementary and secondary schools that are the primary beneficiaries of [the Pennsylvania statute] . . . typify . . . religion pervasive institutions. The very purpose of many of these schools is to provide an integrated secular and religious education. . . . Substantial aid to the educational function of such schools, accordingly, necessarily results in aid to the sectarian school enterprise as a whole." 421 U.S. at 366, and at 379-81 (Brennan, J., concurring and dissenting); see also *Lemon*, 403 U.S. at 657 (Brennan, J., concurring).

⁵⁷ See, e.g., *Wolman*, 97 S. Ct. at 2601-03.

⁵⁸ See, e.g., *Lemon*, 403 U.S. at 635 (Douglas, J., concurring).

⁵⁹ See, e.g., the address of Sen. Moynihan at LeMoyne College, May 14, 1977. "The Court asks itself an empirical question. What is 'the primary effect' of this Act? It then gives an a priori answer! The primary effect is to advance religion 'because of the predominantly religious character of the schools benefitting from the Act.' That is not a proof. It is an

in education may be a wise one.⁶⁶ During such hearings, Congress might also invite the testimony of legal historians who are prepared to argue the inadequacy of the Court's exclusive reliance on the Virginia experience as the historical basis for its reading—or as some would maintain, its misreading—for the purpose and meaning of the First Amendment since *Everson*.⁶⁷

The last part of the tripartite test adopted by the Court as its constitutional touchstone in cases involving public funding of church-related institutions poses the questions: does the legislation promote excessive administrative entanglement between the government and religion, or does it foster political divisiveness along religious lines? Three brief comments are in order on the entanglement test as applied to a credit for tuition paid at the elementary and secondary levels. First, the same comment made above with respect to the operation of an enforcement procedure at the college level applies here as well: whatever policing of the provisions of this legislation might be necessary would involve the IRS and the taxpayer, not the HEW inspector and the parochial schools. It is not clear that giving to IRS officials another item for them to enforce through the audit mechanism would necessarily lead to any official contact with religious groups. In any event, it is doubtful that such contact would constitute the sort of "comprehensive, discriminating, and continuing state surveillance" of religion found excessive in *Lemon*.⁶⁸

Secondly, the excessive entanglement test—by its terms a matter of degree⁶⁹ no longer commands as much respect for its utility or accuracy as a standard of constitutionality as it used to among the Justices. Chief Justice Burger, for example, who authored the test in *Wals* and extended it to the educational context in *Lemon* and *Tilton*, now seems mildly soured by the fruit of the *Lemon* tree. In Burger's view, Justice Stewart's use of the entanglement test in *Meek* to invalidate the auxiliary services portion of the Pennsylvania statute conflicted both with *Allen* and *Lemon*.⁷⁰ "Certainly," Burger wrote, "there is no basis in 'experience and history' to conclude that a State's attempt to provide—through the services of its own State-selected professionals the remedial assistance necessary for all its children poses the same potential for unnecessary administrative entanglement . . . which concerned the Court in *Lemon v. Kurtzman*."⁷¹ And Burger saw "at least as much potential for divisive political debate in opposition to the crabbed attitude the Court shows in this case."⁷²

Thirdly, the "political divisiveness" aspect of this test has also suffered something of a demise. This is due in part, no doubt to intense scholarly criticism that argues that a test which calls for political consensus and which tends to stifle "robust, spirited debate" violates at least the spirit of the remainder of the First Amendment, with its protections of free exercise of religion, freedom of speech and association, freedom of the press, and freedom to petition the government for redress of grievance. Even if a majority of the Court were still persuaded that the potential for political conflict along religious lines remains a

assertion. Where are the facts that support the assertion?" 128 Cong. Rec. S8054 (daily ed. May 19, 1977).

⁶⁶ For a sociological study of Catholic parochial schools, see A. Greeley and P. Rossi, *The Education of Catholic Americans* (1966); A. Greeley, W. McCready, and K. McCourt, *Catholic Schools in a Declining Church* (1976). For a recent report on the financial pressures on nonpublic education, see President's Commission on School Finance, *Schools, People, and Money: The Need for Educational Reform* (1972). Regrettably no similar study has been done on the acute financial crises affecting many of the public school systems in decaying urban areas with a low property tax base. Such a study should investigate the quality of public education in the wake of cases like *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1978) which allows inequitable distribution of educational resources, and *Milliken v. Bradley*, 418 U.S. 717 (1974), which set aside an order requiring the adoption of a metropolitan areawide plan for desegregating the schools of the city of Detroit and 53 adjacent suburban school districts. Such a study might fruitfully compare the performance of the public school systems and their nonpublic counterparts. See, e.g., Hoyt, "Learning a Lesson from the Catholic Schools," *New York Magazine* 48 (Sept. 12, 1977).

⁶⁷ See, e.g., the arguments forcefully presented by Stephen Arons in the article cited in note 56 *supra*.

⁶⁸ See, e.g., 128 Cong. Rec. S15628 (remarks of Sen. Moynihan, daily ed. Sept. 26, 1977). In addition to the classical sources cited by Sen. Moynihan (*Storey*, *Seward*, *Spencer*, *Kent*, *Cooley*, and *Corwin*), see J. Constanzo, *This Nation Under God: Church, State and Schools in America* (1964); P. Kauper, *Religion and the Constitution* (1964); M. Howe, *The Garden and the Wilderness: Religion and Government in American Constitutional History* (1965); R. Morgan, *The Supreme Court and Religion* (1972); F. Sorauf, *The Wall of Separation: The Constitutional Politics of Church and State* (1976); and W. Berns, *The First Amendment and the Future of American Democracy* (1977).

⁶⁹ *Lemon*, 403 U.S. at 619.

⁷⁰ See *Wals*, 397 U.S. at 674 (1970).

⁷¹ *Meek*, 421 U.S. at 385 (Burger, C.J., concurring and dissenting).

⁷² *Id.* at 385-86.

⁷³ *Id.* at 386.

warning signal not to be ignored,"⁷¹ a "political divisiveness" argument would by the very terms of this test be misplaced in the context of this legislation. For like other programs of public support of higher education, this proposal is likely to benefit many more taxpayers than those attending or supporting students at church related institutions; and it would not require recurrent legislative action. To the extent that the credit could be expanded or contracted, it is predictable that Congress would be lobbied by special interest groups. But it seems remote indeed that the Court would invalidate the current proposal on the mere suspicion that it might create political division along religious lines. Finally, it should be noted that the "political divisiveness" test has never been relied on by the Court as the sole basis for invalidating any state or federal legislation.

While final judgment must, of course, be reserved for the Supreme Court, it is our conclusion that with some amendments the Tuition Tax Credit Act of 1977 may well survive constitutional challenge under the tripartite test used by the Court in its review of statutes affording public assistance to those who wish to pursue their educational goals in the nonpublic church-related sector.

C. Other constitutional considerations

In weighing the factors for and against legislation of this sort, the Congress ought not to be guided only by recent cases decided under the No-Establishment Clause of the First Amendment. For the Constitution contains many other themes relevant to the deliberations of Congress on such legislation. In short, the Constitution ought not to be regarded merely as a negative indicator of what Congress or the Executive may not do, but also as a rich source of the social values significant to this Republic which can and should be considered in the formation of public policy. Such values include freedom of expression, the free exercise of religion, and the equitable distribution of governmental resources for the purpose of education. If only because members of the Congress no less than the members of the federal Judiciary take an oath to support the Constitution of the United States, the protection and promotion of these constitutional values ought to be regarded as a congressional obligation of the highest order.

(1) Freedom of expression

Members of Congress might be motivated to support this legislation because they see in it a means of promoting the value of freedom of communication and expression.⁷² For enhancing the value of freedom of educational choice results not only in legitimate diversity of educational experiences.⁷³ Expanded freedom of educational choice also supports the underlying values of the First Amendment: political participation in the democracy and the dignity of the human person.

Alexander Meiklejohn articulated a political or instrumentalist view of the First Amendment. The very title of his book on the subject, "Political Freedom,"⁷⁴ indicates this perspective. In a subsequent article he wrote: "The revolutionary intent of the First Amendment is, then, to deny all subordinate agencies authority to abridge the freedom of the electoral power of the people."⁷⁵ Justice Brennan relied on Meiklejohn in speaking of the value of "uninhibited, robust and wideopen" debate about public issues in the context of freedom of the press.⁷⁶ In *Brown v. Bd. of Education*⁷⁷ the Court did not deal directly with a First Amendment challenge, but laid to rest the racially animated "separate but equal" doctrine on Fourteenth Amendment grounds. But in a famous dictum the Court highlighted the notion that education serves a political end:

"Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures

⁷¹ See, e.g., *Lemon*, 403 U.S. at 625; *Mek*, 421 U.S. at 372; and *Wolman*, 97 S. Ct. at 2610 (Brennan, Jr., concurring and dissenting).

⁷² For a systematic treatment of this theme, see L. Tribe, *American Constitutional Law*, 576-786 (1978), and T. Emerson, *The System of Freedom of Expression* (1970).

⁷³ For an early articulation of this value, see *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 634-35 (1819); for a contemporary restatement of the theme, see the article by Stephen Arons cited in note 56 *supra* (relying chiefly on *Pierce v. Society of Sisters*, 268 U.S. 510 (1925)) and the symposium cited in note 21 *supra*. See also *Meyer v. Nebraska*, 262 U.S. 390 (1923).

⁷⁴ A. Meiklejohn, *Political Freedom* (1960).

⁷⁵ Meiklejohn, "The First Amendment Is an Absolute," 1961 S. Ct. Rev. 245, 254 (emphasis supplied).

⁷⁶ *New York Times v. Sullivan*, 376 U.S. 254, 270 (1964); see Brennan, "The Supreme Court and the Meiklejohn Interpretation of the First Amendment," 79 *Harv. L. Rev.* 1 (1965), and Kalven, "Uninhibited, Robust and Wide-Open—A Note on Free Speech and the Warren Court," 67 *Mich. L. Rev.* 289 (1968).

⁷⁷ 347 U.S. 483 (1954).

for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to success in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms."⁷⁹

Because nonpublic as well as public schools contribute in building the "foundation of good citizenship," they too merit consideration when Congress makes available a benefit in the educational area.

The second strand of First Amendment analysis does not negate the instrumentalist of political view, but incorporates it within a broad range of personal rights which the amendment protects. Thomas Emerson has grouped into four categories the "values sought by the society in protecting the right to freedom of expression":

"Maintenance of a system of free expression is necessary (1) as a method of assuring individual self-fulfillment, (2) as a means of attaining the truth, (3) as a method of securing participation by the members of society in social, including political, decision-making, and (4) as a means of maintaining the balance between stability and change in society."⁸⁰

The stress in Emerson's theory is on personal development:

". . . every man—in the development of his own personality—has the right to form his own beliefs and opinions. Hence suppression of belief, opinion and expression is an affront to the dignity of man, a negation of man's essential nature."⁸¹

The Court has not explicitly alluded to Emerson's theory in any First Amendment decision of which we are aware. But the Court has espoused a view of the relatedness of the rights protected by the amendment and has spoken of these core values as protecting freedom of the mind as well as of conscientious choice. For example, in *Thomas v. Collins* Justice Rutledge wrote:

"It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. . . . This conjunction of liberties is not peculiar to religious activity and institutions alone. The First Amendment gives freedom of mind the same security as freedom of conscience."⁸²

Since education—both in the nonpublic as well as in the public sector—is concerned with mental and personal development, and since schooling is inevitably involved in the formation of beliefs, members of Congress ought to weigh seriously the general values underlying the First Amendment—both personal and political—in their deliberation on this legislation.

(2) *Free exercise of religion*

The constitutional analysis of the bill provided above focused on the No-Establishment Clause of the First Amendment because the Court has relied on that clause almost exclusively in its scrutiny of state and federal aid to non-public education. In *Walz*, however, Chief Justice Burger acknowledged the existence of a tension between the two Religion clauses, "both of which are cast in absolute terms and either of which, if expanded to a logical extreme would tend to clash with the other."⁸³ For Burger, such a clash occurred in *Nyquist* when the Court in his view expanded the demands of the No-Establishment Clause to a logical extreme and thereby ignored the experience and history on which prior First Amendment cases had been decided.⁸⁴ According to Burger, it had been:

"* * * the experienced judgment of various members of this Court over the years that the balance between the policies of free exercise and establishment of religion tips in favor of the former when the legislation moves away from direct aid to religious institutions and takes on the character of general aid to individual families."⁸⁵

⁷⁹ *Id.* at 493 (emphasis added).

⁸⁰ T. Emerson, *Toward a General Theory of the First Amendment* 3 (1966).

⁸¹ *Id.* at 4.

⁸² *Walz*, 397 U.S. at 669.

⁸³ *Nyquist*, 413 U.S. at 802 (Burger, C.J., concurring and dissenting).

⁸⁴ *Ibid.*

Justice White made a similar argument in his *Nyquist* dissent:

"Constitutional considerations aside, it would be understandable if a State gave . . . parents who prefer to send their children to nonpublic schools a call on the public treasury up to the amount it would have cost the State to educate the child in public school, or, to put it another way, up to the amount the parents save the State by not sending their children to public school.

"In light of the Free Exercise Clause of the First Amendment, this would seem particularly the case where the parent desires his child to attend a school that offers not only secular subjects but religious training as well. A State should put no unnecessary obstacles in the way of religious training for the young."⁴⁴

Although a majority of the Court was not persuaded by the Free Exercise claim presented in *Nyquist*,⁴⁵ there is nothing to prohibit members of Congress from being more sensitive to the position that "the free exercise principle should be dominant in any conflict with the anti-establishment principle."⁴⁶ As Professor Laurence H. Tribe has written in his treatise on "American Constitutional Law":

"Such dominance is the natural result of tolerating religion as broadly as possible rather than thwarting at all costs even the faintest appearance of establishment."⁴⁷

(3) *Equal protection of the laws*

Another factor for Congress to consider is the value of equality as it relates to educational opportunity. It is clear from *Pierce v. Society of Sisters*⁴⁸ that the state may not monopolize the educational process to the extent of compelling all students to attend a public school. More recently in *Wisconsin v. Yoder*⁴⁹ the Court affirmed a limited right of students to an immunity for a compulsory school attendance law where the objection to attendance was based on religious convictions. But the Court has not expanded this sort of religiously based immunity into a theory of an entitlement of all students—whether in public or nonpublic schools—to share in the educational resources which government controls and distributes. Indeed, the recent equal financing case, *San Antonio School District v. Rodriguez*⁵⁰ and the more recent Medicaid abortion funding cases⁵¹ together teach that although an individual may enjoy a right protected by the Constitution, the existence of such a right does not by itself create a corresponding obligation upon the state to fund the exercise of the right at all, much less on an equal footing.

When an equal protection argument for funding of church-supported nonpublic education on an equal basis with nonsectarian private education was presented in 1973, the Court rejected it unambiguously. Justice Powell wrote in *Sloan v. Lemon*:

"The argument is thoroughly spurious. . . . 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."⁵²

And in the context of a successful challenge to a Mississippi program whereby textbooks were loaned to students at racially discriminatory private academies, Chief Justice Burger observed in dictum:

"In *Pierces*, the Court affirmed the right of private schools to exist and to operate; it said nothing of any supposed right of private or parochial schools to share with public schools in state largesse, on an equal basis or otherwise. It has never been held that if private schools are not given some share of public funds allocated for education that such schools are isolated into a classification violative of the Equal Protection Clause."⁵³

⁴⁴ *Id.* at 814 (White, J., dissenting).

⁴⁵ *Id.* at 788-89.

⁴⁶ L. Tribe, *American Constitutional Law* 833 (1973); for a systematic attempt to reconcile the two religion clauses, see at pp. 819-34.

⁴⁷ *Id.* at 833.

⁴⁸ 268 U.S. 510 (1925).

⁴⁹ 406 U.S. 205 (1972).

⁵⁰ 411 U.S. 1 (1973); but see *Serrano v. Priest*, 5 Cal. 3d 597, 487 P. 2d 1241 (1971).

⁵¹ *Beal v. Doe*, 97 S. Ct. 2866 (1977) and *Maher v. Roe*, 97 S. Ct. 2876 (1977); see also *Poelker v. Doe*, 97 S. Ct. 2391 (1977).

⁵² 413 U.S. 825, 834 (1973).

⁵³ *Norwood v. Harrison*, 413 U.S. 455, 462 (1973).

The Equal Protection argument need not, of course, be a bludgeon. Legal scholars⁹⁴ and philosophers⁹⁵ have fashioned more subtle arguments for an equitable distribution of resources necessary for meaningful educational choice than either Justice Powell or Chief Justice Burger acknowledged in 1973. Indeed, on the same day that Burger wrote the dictum in *Norwood v. Harrison* cited above, he wrote in dissent to the *Nyquist* decision:

"In the instant cases as in *Everson* and *Allen*, the States have merely attempted to equalize the costs incurred in obtaining an education for their children. . . . It is no more than simple equity to grant partial relief to parents who support the public schools they do not use."⁹⁶

Although the Court as currently composed has not demonstrated an eagerness to engage in decisionmaking that would seek to distribute governmental resources more equitably, this may be as much based on the Justices' view of the proper functions of the judiciary and the legislative branch as it is on their view of the propriety of the substantive results of some of their recent decisions. And even if such judicial modesty is not the sole basis for these decisions, Congress need not and should not wait for directions from the Court on how to exercise the taxing and spending power committed to the legislative branch by Article I of the Constitution.

A brief historical memory suffices to make this point. For there would have been no New Deal had the Congress in the 1930's deferred to the economic preferences of Justices like Willis Van Devanter, James C. McReynolds, George Sutherland, or Pierce Butler. It must also be noted that the current Court has not indicated a strong desire to engage in the sort of open confrontation with Congress relished by the "four horsemen." Hence if Congress were to enact legislation seeking to include students attending nonpublic schools on an equitable basis as beneficiaries of governmental resources, it is doubtful that the Court would destroy such efforts in a cavalier way.

Final judgment on legislation must of course be reserved for the Court. For as Chief Justice Marshall wrote in *Marbury*, "it is emphatically the province and duty of the judicial department to say what the law is. . . ." But Congress has at least an initial role to play in determining the constitutionality of legislation which it enacts under its Article I powers. By articulating a variety of constitutional values—freedom of communication and expression, free exercise of religion, equal protection of the laws, as well as the anti-establishment of religion principle—as the legislative purpose or rationale of enacting this proposed tax benefit, Congress could be of service to the Court in the determination of the constitutional validity of this legislation. As Justice Bushrod Washington wrote in *Ogden v. Saunders*:

"It is but a decent respect to the wisdom, integrity, and patriotism of a legislative body, by which any law is passed, to presume in favor of its validity, until its violation of the Constitution is proved beyond a reasonable doubt."⁹⁷

(4) Racial discrimination

The bill as currently drafted authorizes a tax credit for tuition paid to an educational institution, without regard to whether the institution maintains a policy of racial discrimination in student admissions and faculty hiring and promotion.⁹⁸ If the legislation were enacted without any language to correct this oversight, federal tax policy supporting and even encouraging the congressional taxing and spending power would have been exercised in a manner that would support and even encourage the undoing of the educational policy formulated in *Brown v. Board of Education*⁹⁹ and its progeny.¹⁰⁰ As was pointed out above, such a result is contrary both to case law and Revenue Rulings. But this result could be avoided by adding to the definition of an "eligible educational institution" language such as that contained in S. 1570, defining an eligible institution as a charitable, tax-

⁹⁴ See, e.g., Arons, note 56 supra; and Tribe note 72 supra at 1129-36.

⁹⁵ See generally J. Rawls, *A Theory of Justice* 258-332 (1971).

⁹⁶ *Nyquist*, 413 U.S. at 803 (Burger, C.J., concurring and dissenting) (emphasis added).

⁹⁷ 5 U.S. (1 Cr.) 137, 177 (1808).

⁹⁸ 25 U.S. (12 Wheat.) 213, 270 (1827); see also *Fletcher v. Peck* 10 U.S. (6 Cr.) 87, 128 (1810).

⁹⁹ By contrast, it should be noted that in the *Wolman* case, the most successful recent attempt of a State legislature to provide financial assistance to students attending non-public parochial schools, it was stipulated that none of the schools attended by the students benefited by the legislation maintained a policy of racial discrimination in the admission of pupils or in the hiring of teachers. 97 S. Ct. at 2598.

¹⁰⁰ 347 U.S. 483 (1954).

¹⁰¹ For a collection of school desegregation cases decided after *Brown*, see G. Gunther, *Constitutional Law: Cases and Materials* 716-44 (9th ed. 1975) and the current supplement to this volume at pp. 70-81.

exempt organization under 501(c)(8) of the Internal Revenue Code, thereby incorporating by reference the revenue ruling referred to above. Or Congress could assert national educational and tax policy independently of the existing Revenue Ruling, by adding language like that found in a bill currently before the Minnesota legislature, H.F. 1449, which defines a nonpublic school eligible to participate in an educational grant program as a "school . . . other than a public school, wherein a resident of Minnesota may legally fulfill the compulsory school attendance requirements . . . and which meets the requirements of Title VI of the Civil Rights Act of 1964 (P.L. 88-352)." It should be noted that the President's Commission on School Finance recommended in its 1972 Report that aid to nonpublic schools be conditioned upon full compliance with the Civil Rights Act of 1964, and full accountability to the public concerning enrollment data.¹⁰⁸

III. Conclusion

Our own conclusion is that with some amendments the Tuition Tax Credit Act of 1977 may well survive a challenge under the No-Establishment Clause of the First Amendment, although on the basis of recent cases decided under this clause the Court would scrutinize more carefully any substantial benefit even indirectly accruing to church-related elementary and secondary schools than to independent institutions of higher education. And it is our view that the remainder of the First Amendment—Free Exercise of Religion, Freedom of Speech, Freedom of the Press, Freedom of Association, Freedom of Assembly, and Freedom to Petition the Government for Redress of Grievances—when viewed together with the guaranty of equality implicit in the Due Process Clause of the Fifth Amendment, could provide members of Congress with additional constitutional rationales to support this legislation as a permissible way to support freedom of educational choice for all members of our society.

STATEMENT OF ANDREW M. GREELEY, NATIONAL OPINION RESEARCH CENTER

My name is Andrew Greeley. I am Program Director of the National Opinion Research Center, a social science institution affiliated with the University of Chicago. I propose to offer some comments on the subject of tax relief for parents of children attending private schools. In particular, I will base my comments on research done over the past fifteen years by a number of colleagues and myself on the impact of Roman Catholic parochial schools on the students who attended them. I should note at the beginning also that I am a Catholic priest, in canonical good standing (though not on the mailing list of my own archdiocese—and not on the mailing list of the University of Chicago, for that matter). However, none of the research done on Catholic schools at the National Opinion Research Center was funded by the Roman Catholic Church. Funding agencies involved at various times were the Carnegie Corporation, the Carnegie Commission on Higher Education, and the National Institute of Education.

I will address myself first of all to some generally held attitudes about Catholic schools:

1. *The education young people receive in Catholic schools tends to be inferior to that they would receive in public schools.*—Available evidence indicates that scores on standardized achievement tests are virtually the same in Catholic schools and in public schools, perhaps slightly higher in Catholic schools. They are of course much higher in Catholic schools in large cities where scores on standardized achievement tests tend to be very low. Furthermore, even holding constant parental education, occupation, income, those who have attended Catholic primary and secondary schools are much more likely to go on to higher education, and do achieve higher economic prestige and higher educational levels than Catholics who went to public schools.

2. *Catholic schools, because they are limited generally to one religion, tend to be racially, religiously, and politically divisive.*—In fact, all the available evidence indicates that Catholics who have attended Catholic schools are no less likely to have friends of other religious denominations than Catholics who have attended public schools. Catholic school Catholics are also no less likely to support school bond referenda which will assist public schools. Finally, on measures of racism

¹⁰⁸ President's Commission on School Finance, *Schools, People and Money: The Need for Education Reform* (1972); see also President's Panel on Nonpublic Education, *Nonpublic Education and the Public Good* (1972).

and anti-Semitism, those who attend Catholic schools have higher measures of tolerance than those who have attended public schools, whether the latter be Catholic or non-Catholic. Furthermore, in the last ten years, the impact of Catholic schools on racial and religious tolerance has increased.

3. *Catholics send their children to parochial schools because, as Mr. Justice Powell put it in his recent Supreme Court decision, they are under canonical constraints to do so.*—In fact, the empirical evidence shows that 80 percent of American Catholics are in favor of the continued existence of Catholic schools, a proportion which has not declined in the past fifteen years. The declining enrollment in the Catholic schools is the result of failure of the Catholic Church leadership to build new schools in the suburban areas of the large cities to which the Catholic population is moving. The decision has been frequently made despite pressures from the Catholic laity for construction of the schools. Whatever may have been the case in the past, the pressure for Catholic schools presently comes not from the clergy and the hierarchy but from the laity.

4. *Catholic schools produce rigid and authoritarian personalities who take a narrow and inflexible approach to their religion.*—In fact, the evidence shows that Catholic school Catholics are more likely to approve the changes in their Church since the end of the Second Vatican Council, and are more likely to display flexible religious and ethical attitudes.

5. *Catholics really don't expect tax support or tax relief for their schools.*—The data show, however, that three-quarters of the Catholic population do indeed support some sort of government help for the Catholic schools and that this proportion has not changed for the last decade and a half. Furthermore, the majority of American Catholics are convinced that it is anti-Catholic bigotry that interferes with government support for their schools.

6. *Catholic schools made a major contribution in the development of the American Catholic Church and hence tax relief which supports them would be a direct aid to religion.*—In fact, however, the correlations between number of years in attendance at Catholic schools and adult religious behavior are slight. The most powerful influence on adult religious behavior is the religious behavior of one's parents, particularly one's father, and the religiousness of one's spouse. Compared to father and spouse (whether it be husband or wife), the impact of the school on religious devotion is trivial.

7. *Catholic schools tend to be racially segregated.*—In fact, three-quarters of the children in Catholic families attending parochial schools are attending racially integrated schools. There has been a dramatic increase in attendance in Catholic schools of non-Catholic Blacks. It is estimated, for example, that in the city of Chicago one out of every ten Blacks is in a Catholic school and that perhaps two-thirds of Blacks are not Catholic. We have little evidence as to the reasons for this choice by Black parents to send their children to Catholic schools—a choice which is occurring in all the large cities in the country where there are Catholic school systems. Neither government nor private research funding agencies seem interested in this extraordinary phenomenon.

8. *Tax relief for the parents of children attending Catholic schools will put an undue burden on non-Catholic taxpayers.*—In fact, however, the evidence seems to be that taxpayers get a great bargain in the continuation of Catholic schools. In New York, for example, the pupil operating cost at a Catholic school is \$462, and at a public school is \$2,647. Most of this difference has little to do with the somewhat lower salaries paid in Catholic schools. According to the research of Professor Thomas Bitullo Martin, most of the saving comes from much lower administrative overhead in Catholic schools. Again, in New York City there is one central office administrator for every 6,000 students in the Catholic schools and one administrator for every 234 students in the public schools. Central administration in the public schools costs in excess of \$67,000,000 in New York; in the Catholic schools, \$250,000. If there were no Catholic schools in New York City and similar cities, taxpayers would not only have to absorb the burden of educating the children now in the Catholic schools, but they would have to do so at a cost six times higher than the present cost. Some slight tax relief for the parents of children attending such schools appears to be an extraordinarily wise financial investment.

9. *Catholic schools are closed institutions, run by Church authorities, with no opportunity for outside investigation or for parental control.*—In fact, however, many if not most Catholic parochial schools in the country are administered by democratically elected school boards in the parish, the school boards sometimes even setting the budget and hiring the principal. The decentralization and the

democratization of the parochial school in the years since the Second Vatican Council is one of the most extraordinary, indeed, most revolutionary educational developments in recent history. It has been ignored by the education establishment because the educational establishment is convinced there is nothing to learn from research on Catholic schools—and in the case of the review panels for the National Institute of Education, apparently is willing to reject in principle any research on Catholic schools which may “enhance their image.” Half the schools, incidentally, are much more readily available for research and inspection than are public schools in many large cities. For many years scholars have not been able to research Chicago public schools but there has been no obstacle to research Chicago Catholic schools. If a complaint is made about ignorance of what goes on in Catholic schools, the fault lies not with the schools but with the university research institutions and private and public funding agencies.

10. *Graduates of Catholic schools are not equipped intellectually for careers requiring scientific skills and the objective pursuit of truth.*—In fact, however available research evidence shows that Catholics are now more likely to pursue academic and scientific careers than the typical white American, and are as likely as anyone else to be productive research scholars and to hold tenured faculty appointments at the country's best universities. And those Catholics who have attended Catholic schools are even more likely to successfully pursue scientific and academic careers than Catholics who have attended public schools. It is worth observing, incidentally, that those Catholics who have faculty appointments at the country's best universities are for the most part concentrated in the high quality state universities. They are still underrepresented at elite private institutions like Harvard, Yale, Princeton, and the University of Chicago. In striving to explain this phenomenon to me, one colleague remarked in all seriousness, “When women and Blacks are underrepresented at the best private universities, the reason is discrimination; but Catholics are underrepresented because of their intellectual inferiority.” Nobody has, incidentally, suggested affirmative action for the country's largest minority.

I would submit to you gentlemen that most Americans who think seriously about an education and virtually all of the important people in the educational establishment accept the ten propositions I have cited above as true beyond any doubt or question, so true, in fact, as to be beyond examination, much less refutation. There are a number of names for men and women who cling to propositions despite substantial evidence that the propositions are wrong. Dogmatists is one of the more charitable names.

It is perhaps obvious that I am in favor of legislation to provide tax relief for parents who exercise their constitutional right to educational freedom of choice, but in these remarks I do not intend to argue directly for such legislation; I merely intend to acquaint you with the scholarly research evidence against the conventional wisdom about Catholic schools, a conventional wisdom which, I am sure, would warn you of the dangers of providing tax relief to parents who send their children to such schools.

**THE HORACE MANN LEAGUE
OF THE UNITED STATES OF AMERICA, INC.,
Short Hills, N.J., January 17, 1978.**

*U.S. Senate,
Committee on Finance,
Subcommittee on Taxation and
Debt Management Generally.*

HONORABLE SENATORS: The Horace Mann League, a nationwide association of educators committed to the preservation and strengthening of the American public school system, wishes to record its respectful opposition to S. 2142, popularly called the Packwood-Moynihan Bill, which would grant tax credits to parents who send their children to nonpublic educational institutions.

The opposition is based upon the strong conviction that the proposal is constitutionally infirm and is directly offensive to the First Amendment prohibition against the governmental establishment of religion.

The United States Supreme Court has consistently applied two tests in assessing the constitutionality of similar plans designed to aid religiously-oriented educational institutions: (1) What is the “primary purpose and effect” of the law? and (2) Does the law create an “impermissible degree of entanglement”

between church and state? See for examples, *Lemon v. Kurtzman* and *DiOenso v. Robinson*.

The proposed legislation would quite probably meet the second test, for unlike other suggestions of direct institutional aid which would require sustained and detailed state supervision, this proposal would require no official scrutiny of institutional programs, since the financial benefits would accrue directly to the parents involved, and not to the educational institution.

However, the indirection of the aid to be granted cannot obscure the fact that the proposal is one intended to succor the financially-distressed private and parochial institutions. The primary purpose and effect, then, is to aid, and thus in Constitutional terms, to "establish" predominantly sectarian institutions, S.2142 fails to meet the first Constitutional test promulgated by the Supreme Court of our land.

It could be argued that the proposed legislation is merely a tax relief or, more specifically, an income-redistribution scheme. If that is indeed its purpose, the end sought would be better accomplished through means which are not of questionable constitutionality.

Justice Douglas, in his opinion in the *Lemon v. Kurtzman* case, cautioned that "sophisticated attempts to avoid the Constitution are just as invalid as simple-minded ones." The Horace Mann League of the United States of America concurs with this statement, and stands in firm opposition to the Packwood-Moynihan bill.

Respectfully submitted.

PAUL W. ROSSEY, *President*.

STATEMENT OF THE ASSOCIATION OF AMERICAN PUBLISHERS

"We must be careful lest our campuses be occupied principally by those at the poverty level, who qualify for special aid, and those from the upper income brackets, who can afford to pay—a campus peopled only by the very rich and the very poor, pricing out the middle income, is also violative of the American system."—Page 576 of Sen. Rpt. 92-604 (Education Amendments of 1972).

"To fail education is to be penny wise and people foolish"—Adlai Stevenson.

The Association of American Publishers (AAP) is the general association of book publishers in the United States. It comprises the General Publishing Division, Direct Marketing/Book Club Division, Technical, Scientific and Medical Division, International Division, College Division, Mass Paperback Division, and School Division. Our 327 member publishing houses produce the vast majority of general trade, educational, reference, professional and religious books published in this country. AAP members publish 80% of the instructional materials used in the nation's classrooms.

The Association of American Publisher's supports the enactment of legislation providing a tax credit for higher education tuition payments.

Both in the Senate debates on tuition tax credit and in testimony before this committee, statements have repeatedly detailed the increasingly high cost of a college education. It is a fact that student costs at some colleges range upward from \$7,000 for the current year. Even costs at public four-year colleges average some \$3,000, which means some are lower and some even higher.

All this adds up to the fact that a middle-income family may have to spend as much as one-fourth to one-half of its after-tax income to send a son or daughter to college. For example, if a parent who is making \$30,000 a year and paying about 40 percent of his earnings in federal, state and local taxes sends his son to MIT, the \$8,000 cost for tuition, room and board represents more than a third of his \$18,000 after-tax earnings. If there is more than one child of college age, the family burden becomes so onerous as seriously to curb ambitions for a higher education.

There is little question but that cost factors affect college enrollments which are now leveling off. There has been a decrease in enrollments of young Americans (age 18 to 24) who are dependent upon their parents for expenses; at the same time, there has been an increase in part-time students who today comprise more than half of all college students, which reflects the greater need to earn tuition and expense money by holding at least a part-time job.

To-date, the focus of congressional testimony has been on the plight of the family with children who desire a college education. But what of the older students, over 35, who today comprise more than a third of all college students? For the most part, they are individuals of modest income who, moreover, lack full access to federal and state student assistance programs. They must pay their own way.

The Congress, in the Education Amendments of 1974 (sec. 801 of Public Law 93-380), declared "it to be the policy of the United States of America that every citizen is entitled to an education to meet his or her full potential without financial barriers." Enactment of tax credit for college tuition would be consistent with that declaration. We urge passage of such a measure.

STATEMENT OF MONROE CITIZENS FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY,
MARTHA LATIES, CHAIRMAN

My name is Martha Laties. I am the Chairman of Monroe Citizens for Public Education and Religious Liberty (MCPEARL). MCPEARL is a Monroe County New York, coalition working to keep public funds for public schools only.

MCPEARL is dedicated to the protection of free public education, open to all children; and committed to the preservation of religious liberty as guaranteed by both the Federal and state constitutions.

MCPEARL opposes S. 242, the Tuition Tax Credit Act, because the act would violate the First Amendment of the U.S. Constitution and because it would undermine public elementary and secondary schools.

S. 2142 would violate the First Amendment of the U.S. Constitution, which forbids government establishment of religion, by funding schools of pervasive religious character by means of Federal income tax credits and grants for tuition paid to those schools.

In 1973, the U.S. Supreme Court found unconstitutional a similar New York State law, which authorized state income tax credits and grants for tuition paid to nonpublic schools of pervasive religious character. The case was *Committee for Public Education and Religious Liberty (PEARL) v Nyquist*. The Court said, "Insofar as such benefits render assistance to parents who send their children to sectarian schools, their purpose and effect are to aid and advance those religious institutions."

Furthermore, since S. 2142 would fund schools through tuition reimbursements, the elementary and secondary schools funded would be the nonpublic schools, which charge tuition. Government support of private schools weakens the public schools. Private schools select their students. They choose the brightest and best-behaved and return children with learning and behavior problems to the public schools. The public schools then must deal with a disproportionate number of children who are difficult to teach and whose presence creates a poorer learning atmosphere for all children. The poorer learning environment then drives able children from public schools to private schools, and the learning environment becomes even worse. Public schools tend to become refuges for the children no private school will accept. Public schools located in poor neighborhoods of big cities have already suffered from this effect.

Federal funds should be used to strengthen those schools and to reverse the downward trend, but S. 2142 would use Federal funds to speed the decline of public schools already in trouble and would push some which are now holding their own onto the downward slide.

To protect religious liberty, to uphold the U.S. Constitution, and to support public elementary and secondary education, please reject S. 2142.

STATEMENT OF M. K. CURRY, JR., PRESIDENT OF BISHOP COLLEGE AND PRESIDENT OF
THE UNITED NEGRO COLLEGE FUND

The 41 member post-secondary four year private institutions of the United Negro College Fund has enrollments of over 80 percent of its students on financial aid. Since a majority of those students come from families with total income less than \$6,000 a year, our concerns regarding tuition relief for their families are paramount.

For the last four years we have been asked by Congress for our views and

recommendations on how low-income students might best be assisted. It is in Congressional testimony that we believe that the campus-based student assistance programs at present, are the best mechanisms for assuring access and choice for low-income students. If the present student aid programs were ever adequately funded, it would be a sound step in eliminating the disparity between the affluent and the poor and the chance for all Americans to have a good education.

We too, are interested in how best middle-income families can be assisted so that access and choice is also guaranteed them. I might venture to say that the children of our graduates would fall into this middle-income bracket; thus, our concerns are great. But, as we attempt to solve this dual problem, let us not deplete one program for the other. We must realize that the poor have less access to all the varieties of remedies that are available to help them solve their problems, while the middle class has a much stronger voice in Congress, as well as, greater access for private loans and arrangements.

It is our belief, therefore, that if Tuition Tax Credits are approved, they will do much to undermine the present structure of student assistance programs which are now targeted toward that percentage of the American population that needs that assistance the most.

It is our belief that if Tuition Tax Credits are realized, these are the possible negative effects:

1. THEY ARE NOT DIRECTED TOWARD THOSE SEGMENTS OF THE POPULATION THAT ARE IN MOST NEED OF STUDENT ASSISTANCE

(a) If our understanding of S2142 is correct, a nonrefundable tax credit would not benefit those in most need of assistance. Many low-income families do not pay taxes anyway, thus eliminating participation by this group. Under the same program, high wage earners could benefit from the tax credit greatly, by sending their children to low tuition public institutions. This fact also discourages attendance by the population at private, post-secondary institutions.

(b) A refundable tax credit could greatly benefit the wealthy. They would have the same tax credit as the low-income family. The Treasury Department in this instance, would be short-changing itself and the general taxpayer would be paying to educate the wealthy.

Currently, there are federal loan programs already in place to assist middle-income families—the Guaranteed Student Loan Program, National Direct Student Loans, and College Work-Study Program. Over the last several years, the eligibility requirements have been raised to include greater middle-income participation. This is also true of the BEOG (Basic Educational Opportunities Grant), and the SEOG (Supplemental Educational Opportunities Grant) Programs. The UNCF has gone on record for supporting the BEOG Program to be totally directed exclusively toward the very low-income families in our nation. We have not been that stringent toward the SEOG and other student aid programs, because we realize some compromise must be reached to accommodate more of the moderate and middle-income families who are also suffering from skyrocketing tuition costs.

We support increased appropriations for the presently functioning student aid programs so that moderate and middle-income families can be included without dissipating monies presently available for the very low-income.

2. THE TUITION TAX CREDIT COULD FORESEEABLY DIMINISH FUNDS CURRENTLY BEING ALLOCATED FOR STUDENT ASSISTANCE PROGRAMS

It has been suggested that the Treasury Department would lose close to \$4.7 billion annually, if the Tuition Tax Credit were to become a reality. There is a likely chance that this large amount of money would be used as a leverage to decrease current student assistance programs which have already been changed to include the middle-income group. The end result would be that the most deserving group (the most needy), would receive less.

3. THERE IS A REASONABLE ASSUMPTION THAT TUITION TAX CREDITS WOULD DIMINISH FINANCIAL SUPPORT FROM THE PRIVATE SECTOR AND STATE GOVERNMENTS

(a) Many contributors from the private sector who traditionally give to help poor students may believe that their gifts are no longer needed. This erroneous conclusion would place a heavy financial burden on educational charitable groups to prove to donors that their contributions would still be needed even

more so by the poor. There is fear that it will undermine fundraising efforts currently being conducted in support of the most needy students.

(b) The states may feel that they no longer need to channel funds into financial assistance programs for students, since there will be a tuition tax credit. The state could easily find other areas to transfer education monies. These are serious possibilities which must be thoroughly analyzed before such legislation is passed.

4. INCREASED ADMINISTRATIVE BURDEN ON THE SMALL, PRIVATE INSTITUTIONS THAT ARE ALREADY OVERBURDENED WITH FEDERAL REPORTING REQUIREMENTS

The higher education community has voiced repeatedly its already deep concern over the prolific amount of paper work that goes into maintaining federal educational programs. This tuition credit would only add to that burden, thus helping to suffocate administratively, the smaller, struggling institutions—many of which are serving those students most in financial need.

Many institutions, both public and private, will be inclined to raise their tuition to correlate with the tax credit allowance. This would, ultimately, undermine any attempt by poor families to gain access to high cost, private institutions.

It would seem to me at this stage of the development of the student aid programs, with greater emphasis being placed on inclusion of middle-income families, it would be wiser to try and solve these problems within the context of present legislation before we splinter up student assistance programs. This seems appropriate, especially in light of all the negatives that the Tuition Tax Credit would apparently create. We therefore, recommend postponement of all current Tuition Tax Credit legislation.

STATEMENT OF WALTER G. DAVIS, DIRECTOR OF EDUCATION, AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS

I am pleased to submit my views today on behalf of the AFL-CIO and its 14 million members. The AFL-CIO is vitally interested in education because we not only represent teachers, administrators, office workers and maintenance workers but also because of our consumer interest in representing our children's stake in these public policy decisions and our members' stake in lifelong learning opportunities.

The working people of America believe now as they believed in the early days of this country that quality education for their children and for themselves is a priority consideration in the improved quality of life to which we all aspire. As many of you realize, it was our predecessors in organized labor who first lobbied for the concept of free universal public education.

In 1832 the Philadelphia trade unions issued a report calling for free public schools in every part of the state to be governed by publicly elected school boards.

In the same period, 1829, the Working Man's Party called for a free public school system which would "unite under one roof the children of the poor men and the children of the rich".

Vigorous labor support for education has been documented in convention statements since the founding of the AFL in 1881. We stand firmly behind the same concerns for quality education for all today. It is for this very reason that we are opposed to the concept of tuition tax credits for we feel such measures will divert needed funds from programs that would much more effectively target aid to those who need it most.

It is our strong conviction that tax credits could also do irreparable harm to the nation's public school system:

They would provide avenues of evasion for full integration of the public schools by subsidizing directly or indirectly those schools which discriminate against minorities in their admissions policies.

They would drain needed budgetary funds for an already inadequate federal education support program. A major bill before this committee is estimated at a revenue loss of about 4.7 billion in 1980. That's an amount equivalent to a 35 percent increase in total federal outlays expected in that year for all higher education, elementary, secondary and vocational education and research. That same 4.7 billion is double the amount of funds requested for the Basic Opportunity Grant program which directly targets federal education aid to undergraduates who need it.

They would provide little if any help to those most in need of the education dollars and at the same time provide windfall tax relief to the wealthy. According to AFL-CIO Research Department estimates approximately 25 percent of the benefits of the tax credit would go to the 10 percent of the nation's taxpayers whose adjusted gross incomes exceed \$30,000 a year.

Opposition to tuition tax credit should not be interpreted to imply that we are opposed to support for nonpublic schools. This is not the case. We have consistently advocated that all eligible children should qualify for federal and state programs of assistance whether they are enrolled in public or nonpublic schools. What we are saying is the we do not believe that the tax relief route is an efficient way to address the problems of financing nonpublic schools.

We do not believe that providing preferential tax relief, in effect a tax subsidy, is appropriate tax policy or educational policy. It will neither promote the goals of tax equity, tax simplification nor the goal of increased educational opportunities.

We likewise do not feel that a tax subsidy will reduce the rising costs of higher education . . . in our view just the opposite would result. We believe, ideally, that post secondary education should be free and open to all who can qualify and benefit from this experience. Realistically, we know this is not in the immediate future but the concept remains as our long range goal for the nation.

In the meantime, public policy should be aimed at providing the opportunity for post secondary education to all those students most in need of financial assistance. To that end we call for full funding of the student aid programs now in place.

We are as concerned as any of the sponsors of tuition relief bills submitted to the Congress that many moderate and middle income children have been priced out of the higher education market. We know this group is having the largest rate of decline in enrollment. However, we believe that specifically targeted aid to those groups most in need is a far more effective use of available federal funds. For example, we urge the increased funding of the Basic Opportunity Grants to provide tuition relief for families with adjusted gross incomes up to \$25,000. We urge the full support of the Guaranteed Student Loan program. We urge full funding for the Cooperative Education program and strongly disagree with its proposed phaseout.

And finally, we believe tax proposals such as the ones before this committee would be an open invitation to raise tuition charges and thereby further negate any possible benefits to the moderate and middle income groups.

EDUCATION

Education in America will face its greatest challenge in the last quarter of the century. Accelerated change in educational needs today requires a deeper analysis of future expectations from the society at large.

Vocational educators need to know what should be taught. Some 54½ million Americans above the age of 16 have been characterized as functional illiterates—a devastating statistic for the most advanced society in the world. The spiralling cost of higher education has shut the doors of many small, private colleges and effectively restricted access to the sons and daughters of workers whose incomes fall between affluence and poverty.

The past two decades were turbulent for American education. The post-World War II "baby boom" threw schools into a crisis; school construction had not kept pace of the mounting enrollments; classrooms were overcrowded and many sub-standard; teachers were in short supply and woefully underpaid. Evidence mounted to prove a gross inequality of education opportunity existed among students in the same district. Students enrolled in vocational schools worked on out-of-date equipment never found in the workplace, and many vocational students were in fact written off as misfits and castoffs who could not make it in academic programs.

To these problems was added the financial crisis created by the migration to the suburbs in most metropolitan areas, leaving cities with an eroded tax base and the expensive problem of trying to teach large concentrations of educationally-deprived students. Many suburbs found it necessary to rapidly expand their school systems far beyond immediate financial resources.

It was in the midst of that crisis situation that Congress, under the leadership of Presidents Kennedy and Johnson, passed a succession of education bills,

designed both to meet the immediate crisis and to commit the federal government to full partnership in the financing of education. Among those bills were the Vocational Education Act of 1963, the Higher Education Act of 1965, and the Elementary and Secondary Education Act of 1965.

This legislation was passed with the active support of organized labor, which has a two-fold interest in education. First, unions represent those who build schools, maintain them and teach in them. Even more important, however, union members pay a considerable portion of the school taxes and their children attend the schools. Union members, therefore, have a deep interest in the quality of education which children receive for the tax dollars spent.

In the early Nixon years a concerted effort was made to reduce the federal commitment to education. Existing programs were funded at only a fraction of what Congress had authorized; in some instances, programs were not funded at all.

Thus, the promise of the '60s of quality education was not realized by many Americans. Instead, gimmicks abounded—an abortive effort was made to replace categorical grants to the states with insufficient block grants; followed by an unsuccessful attempt to pass an education revenue sharing bill; closely followed by changing the name of that plan to consolidation.

While the tug of war continued between the administration and the Congress badly-needed education programs disintegrated, thus accomplishing the original intent of the Nixon-Ford administrations.

Among the most needed programs is the impact aid to school districts populated with families working at federal installations and/or families residing in federally supported low-income housing. All current impact aid programs are vitally needed, particularly in major cities which stand to lose staggering amounts of education funds upon the discontinuance of any segment of the program.

In another area, President Ford, shortly after he was sworn into office, made a speech at Ohio State University in which he called for closer ties between education and labor. This triggered a comprehensive effort on the part of the federal government to join education with the world of work.

Federal grants to hold regional and national conferences focused attention on career education and the relationship of education and work. The labor movement criticized the lack of concern about the state of the economy by academic researchers anxious to mix formal education with work experience at any cost. Ideas to amend child labor laws and to engage students in the workplace for zero pay placed trade unionists on notice of potential dangers.

While the AFL-CIO has long argued that there should be a close relationship between education and work, the preparation for a job is only one of the many functions of education. Proper student preparation for life must lead to better consumers and producers as well as better informer citizens. Education must also prepare students for their future roles in family life.

Above all, education must help students reach their full potential. A striking example would be new efforts to place the visual and performing arts on equal footing with the regular elementary and secondary school curricula. While we support such ventures, we believe professional artists and teachers should fully participate in all planning stages before proceeding in this innovative program area. Moreover, students must be made aware of the career limitations in this field. Instructors, on the other hand, must have access to the necessary special training to meet the standards of the nation's school systems.

Present trends point to future conditions of economic and social insecurity requiring the average adult to return to the classroom two or three times during their lifetime. The reasons are varied: projected rapid changes in technology, America's future response to third world demands for a new world economic order, the energy and raw materials issues and future developments in international trade.

Thus, every citizen will need expanded educational experiences in order to assure informed judgments in fulfilling citizenship responsibilities. Adult education must be prepared to meet this need and provide opportunities for average Americans to acquire the adaptive skills necessary.

From early childhood education to lifelong learning opportunities—education is America's investment in the future. It must provide Americans the knowledge and tools with which to cope with changing technology and political alignments on a global basis.

As always, education must withstand buffeting from those who would sacrifice America's future to meet arbitrary budget restraints, or seek to use students

to undermine established wages and working conditions in the name of "career education," or use emotional tactics to frustrate the goals of equal access to quality education for all children.

EQUAL EDUCATIONAL OPPORTUNITY (BUSING)

A fundamental tenet of the American labor movement is that quality education shall be equally accessible to every American child, regardless of race, color, creed, or family income status.

The issue of segregated schools was settled in May 1954 in the historic Supreme Court decision in *Brown v. Board of Education*.

But there are individuals, politicians and organizations who seek to cloud the issue of quality education for all by focusing on the phony issue of busing.

The facts are that more than 40 percent of all children in this country ride buses to school every day, while three percent do so because of court orders.

School boards should accept the responsibility for desegregation of school systems and the elimination of overt discrimination and not force this responsibility on the courts alone. Care must be taken in the redrawing of boundaries to avoid perpetuating segregation or increasing pressures and tensions in the communities to benefit opportunistic politicians who seek political advancement based on community division.

Affirmative community involvement and the formation of coalitions of local groups and organizations can be a key to the successful resolution of the problems that arise when the courts have ordered desegregation. Only through involving citizens in the planning and implementation of desegregation plans will proper support be developed and tensions avoided.

Coalitions must deal with the issues daily and help prepare the community for a constructive rather than a negative response to court decisions. Because the fact remains that the court decisions are handed down when the law of the land has been violated and overt segregation exists, compelling the courts to act when the communities themselves refused to act.

"Forced busing" is the current code word to obscure the issue of the right of every child to have equal access to a quality education. The AFL-CIO will continue to work for fully open housing for all Americans, full employment to provide job opportunities and decent incomes for all, and, ideally, quality education in a neighborhood school. But until these goals are met busing orders may be necessary tools to provide equality of access to quality education.

EARLY CHILDHOOD EDUCATION

The need for early childhood development and child care programs continues to go unmet with little hope of change appearing on the horizon. A Bureau of Labor Statistics report shows that in 1977 there are seven million pre-school children and 14 million school-age children growing up in two-parent families where both parents are working or in single-parent families where the parent is working outside the home. But to meet this overall need there is approved day care available for only 1.7 million children.

Considering consequences of not providing children with proper educational, physical and emotional development, the lack of federal response to the situation is alarming. Under the threat of a second veto by President Ford, the 94th Congress passed a watered-down version of a bill to provide financial assistance to the states to bring day care centers into compliance with federal health and safety requirements. The federal staffing ratios, however, were postponed pending completion of an HEW study being conducted to determine the appropriateness of federal standards.

The Democratic platform, adopted in July 1976, called for federally-financed developmental child care programs operated by the public schools or other local organizations to be available to all who need or desire them.

President Carter's first budget proposal restored cuts in programs for children contained in the Ford budget, and HEW Secretary Califano stated that special emphasis was placed on the needs of children in determining the budget. These are hopeful developments, but much more will be needed if proper care and opportunities for development are to be available at this target population.

ELEMENTARY AND SECONDARY EDUCATION

Elementary and secondary education has been starved for funds almost since the federal law was enacted. A state allotment under Title I is determined by

a count of the economically disadvantaged children living in that state. Yet, the funds appropriated, as opposed to authorized amounts, are so limited that about half of the children counted actually receive any of the aid.

America can ill afford not to fully fund Title I of ESEA. To inhibit the intellectual growth of economically disadvantaged children in the name of budgetary constraints is untenable when future uncertainties demand the highest proficiency in the basic subjects of reading, writing, and arithmetic. Students at the elementary and secondary levels will also require adequate backgrounds in the humanities, the arts and social studies before facing the complexities of the world of the future.

The Title I concept of providing aid to disadvantaged children is a sound one, ESEA-I should be reauthorized, fully funded and implemented in order to fulfill the promise of the Elementary and Secondary Education Act. ESEA-I should not be consolidated into block grants or similar approaches that would change the character of this most important of all aid to education programs.

In recent years, efforts have been made to broaden the scope of Title I funds by changing the target population from the economically disadvantaged to the educationally disadvantaged. As tempting as this might seem, this concept would shift available funds from the inner city, already in dire need, to the suburbs. Moreover, as the gap between the funding levels authorized by the Congress and the actual appropriation grows, less money would go to those programs the law intended to assist.

CAREER EDUCATION

Recent federal interest in career education seems preoccupied with a vaguely-defined concept that: (1) the early grades should be focused upon making children aware of the wide range of careers which will one day be open to them; (2) teaching in the middle grades a few rudimentary skills which are useful in several occupations; and (3) in the high school years releasing students for a considerable part of their school day to actually gain experience in the workplace.

Organized labor believes there should be a close relationship between education and the workplace, and has closely followed developments in the field of career education. At the local, state and federal level, union leaders have devoted time and energy to conferences, committees and projects concerned with various aspects of career education.

Through this, we have come to know both the merits and potential dangers in career education. The AFL-CIO has expressed the following conclusions:

1. Career education should prepare students for the world of work; but not at the expense of the broader activity designed to help them reach their full potential.
2. Career education should expand career options.
3. Career education plans should not negate child labor laws, health and safety standards and minimum wage laws.
4. Career education plans must take into account the state of the local economy, including the area rate of unemployment, and employment trends.
5. Career education advisory committees at all levels should include representatives from labor, business, government, education and community groups.

VOCATIONAL EDUCATION

The 94th Congress passed the Educational Amendments of 1976, which included extending and improving the Vocational Education Act of 1963. This statute established a workable plan for vocational education related to actual employment and training needs. The Vocational Education Amendments of 1968 created special programs for non-English speaking young people, handicapped students and children from economically disadvantaged families. The 1976 amendments continued these earlier programs and authorized more realistic funding levels through 1982, of nearly \$1.5 billion in that year.

With regard to vocational education, the Carter administration will find most of the necessary legislation already enacted. What is required is a determination to make the programs work and the leadership to obtain appropriations at the fully authorized level.

The original act requires the establishment of a National Advisory Council on Vocational Education with labor representation, but the Nixon-Ford administrations virtually ignored this requirement. The AFL-CIO is seeking immediate action to implement the law.

HIGHER EDUCATION

It was not many years ago that higher education was beyond the dreams of most young people from workers' families. Today higher education is a common aspiration of working people for their children.

But even as higher education has become the common expectation of the sons and daughters of union members, the escalating costs of higher education are making college inaccessible to many children of working families. Wealthy families can afford the increases and for low income families there are a variety of financial aids to facilitate their education plans.

For the average worker there is little available financial assistance. The Basic Opportunity Grant program provides grants to students up to \$1,800 a year, depending upon family income. As family income increases, the size of the grants decrease. The full grant is not enough to cover the costs of higher education for very low-income students and the grants for moderate-income students are so small as to be of no real help.

There is also a program of federally-guaranteed loans through which a student whose adjusted family income is below \$25,000 can borrow up to \$2,500 a year at relatively low interest rates with repayment delayed until after the student leaves school. However, most lending institutions are reluctant to make these loans because they get a better return on their money by putting it into higher interest loans.

In recent years there has been considerable support, particularly from the non-public institutions, for a change in the income tax law which would permit parents to claim a tax credit for money spent on tuition. Although this proposal has a surface attractiveness, the AFL-CIO has opposed it and will continue to do so. Tuition tax credits would be the most expensive possible kind of federal aid to education, depriving the federal treasury of something in the neighborhood of \$10 billion in tax revenue, with the greatest benefit going to upper-level income families who already receive sufficient tax breaks.

The AFL-CIO has long argued that the best form of student aid is low tuition. Scholarships assist the brilliant student and grants assist the poor. Low tuition assists all students. The AFL-CIO's long range goal is to make tuition-free higher education available to all students, which is why we have joined in the National Coalition for Lower Tuition. In the meantime, federal policy should be designed to encourage colleges and universities to roll tuition back to more manageable levels.

LIFELONG LEARNING AND WORKERS EDUCATION

The AFL-CIO has a long commitment to adult education and workers education. Unions have sponsored far-reaching labor education programs designed to make union leaders and members more effective participants in union and community activities.

Today's technological changes will have a profound effect on every American, especially workers. In the coming years major changes are expected in many occupations where there is now relative stability. These changes make the availability of adult education more important than ever, enhancing the concept of lifelong learning. There is no place today for what was once called "terminal" education. A person who terminates an education, whether at the eighth grade or Ph.D. level, will soon find that education to be obsolete in terms of the demands which must be satisfied. Education must be a continuous process which goes on throughout one's lifetime.

An increasing number of collective bargaining agreements between unions and employers provide for tuition refunds for union members who enroll in approved classes. Some 55 agreements provide tuition refunds for education, including labor education. This is an excellent development that deserves to be encouraged, but it should in no way be regarded as a substitute for a careful assessment of the needs for lifelong learning and for public funding at a level commensurate to that need.

Workers' education in the United States has undergone unparalleled growth in recent years. Unions have stepped up their activity to meet the growing demand for qualified, experienced trade union officers and staff in need of furthering their education experiences to cope with a changing society.

The AFL-CIO is continuing to make a major commitment in this field. Unions now have a variety of education resources available to them for program development, which in turn benefits all workers. Staff training, for example, ultimately strengthens each labor organization. The study of trade union issues, on the other hand, strengthens the trade union movement.

AFL-CIO affiliates are fortunate to have the options of enrolling their members, staff and officers in programs and institutes at the George Meany Center for Labor Studies. They may also select one or several of the 40 major universities which conduct ongoing labor education programs. They may call upon the AFL-CIO Department of Education for technical assistance in carrying out their education mission. Or, they may use all or a combination of the above options. Whichever they choose, each affiliate and state and local central body should assess the current level of their education needs and take appropriate action.

The future portends a great challenge for the American labor movement in the fields of economics, trade union growth, social justice and political action. The growing complexities in collective bargaining alone suggests the constant up-grading in knowledge and information to fulfill our primary task of effective representation.

Without question, the aims and objectives of the American labor movement will be achieved by the enhanced interest of its members, officers and staff in trade union goals. This is the role of the workers education system. It must continue to grow.

COUNCIL RECOMMENDATION

Education in America is facing its greatest challenge. World technological and political changes present an uncertain future that can only be met through increased education opportunities for all Americans.

The federal government must resume its partnership with states and local governments through increased funding of education programs. Localities must modernize their own methods of funding education.

From its inception, the American labor movement has stood for quality education within the reach of every citizen. At no time in this nation's history has achieving that goal been more important.

Equal educational opportunity (busing)

AFL-CIO affiliates and state and city central bodies are commended for their support of peaceful desegregation for schools. They are encouraged, where court orders are pending, to mobilize their organizations—together with church, civil rights, civic organizations, Community Relations Service of the Justice Department and the National Center for Quality Integrated Education—to actively participate in the planning and implementation of workable desegregation programs and such plans as the courts may order.

We call upon the members of organized labor and all the people of this nation to join together to advance the desegregation process and ensure that it occurs without violence or turmoil in the communities in this land.

Early childhood education—

The AFL-CIO urges the adoption of legislation, as rapidly as possible, to attain the goal of free, high-quality, comprehensive early childhood education and child care services for all children who need them. The legislation should include the following elements:

1. Coordinating by the prime sponsor of a range of programs including health, nutrition, education and support services in a variety of settings, including family and group day care homes.
2. Utilization of public school systems as the presumed prime sponsors, wherever they are prepared to undertake quality programs meeting federal requirements. All services should meet federal requirements and standards, as well as all local school and facility codes and laws.
3. Deny eligibility to receive federal funds to profit-making operators. Existing public and private non-profit programs that meet federal requirements should be declared eligible to receive federal funds.
4. Provision for effective parent involvement in the programs, and training and in-service training of professional and para-professional staff.
5. Full protection of the job rights and employment conditions of workers in child care programs, and a requirement that all construction, renovation and repair undertaken under the program must conform to the prevailing wage standards of the Davis-Bacon Act.
6. Assurance that mothers required to work under any welfare reform proposals are provided quality day care for their children.

Elementary and secondary education

The AFL-CIO believes that the ESEA Title I concept of providing aid to disadvantaged children is a sound one and should be reauthorized, fully funded

and implemented in order to fulfill the promise of the Elementary and Secondary Education Act. We do not believe that this program should be consolidated into block grants or other approaches that would change the character of this important aid to education program.

We do not believe that the target population of Title I funds should be shifted from economically disadvantaged to the educationally disadvantaged. The intellectual growth of economically disadvantaged children is vital for them to break the trap of poverty and move into productive careers.

Further, we believe the federal impact aid program must be maintained to preserve education programs in those school districts populated with families working at federal installations and/or residing in federally supported low-income housing.

Vocational education

The AFL-CIO believes vocational education must be related to actual employment and training needs.

Therefore, we call upon Congress to appropriate authorized funding levels for vocational education, and urge the Carter administration to provide determined leadership required to make the programs work. Further, we hope the administration will provide for proper labor representation on the National Advisory Council on Vocational Education.

Career education

The AFL-CIO believes career education should expand career options and prepare students for the world of work. But these programs can only be developed in consideration of local economic conditions, the area rate of unemployment and employment trends. We reject so-called "career education" programs that are a disguise for efforts to negate child labor laws, health and safety standards and minimum wage laws.

Labor, management, government, education and community groups should actively participate on the National Advisory Council and any state or local councils to help design well-balanced programs that will assist students in reaching their full potential.

Higher education

The AFL-CIO supports full funding of student and institutional aid for higher education. We are particularly concerned by the widening gap between the costs of higher education and existing programs to help students.

The higher education system is in danger of becoming a haven for the children of the upper classes only. Costs, including those for state-supported colleges and universities, are beyond the reach of middle-income families—especially where two or more children are college bound.

The best form of student aid is low tuition. We reject the superficial attractiveness of tuition tax credits which would deprive the federal treasury of needed tax revenues and excessively concentrate its benefits for those in the highest income brackets.

The ultimate goal for this nation must be free tuition in the field of higher education if all are to be given an equal opportunity.

While the struggle continues to achieve this goal, we support those alternatives which advance this principle. One such alternative is cooperative education. This program, now installed in over 1,000 colleges, is a joining together of classroom study and off-campus work. It provides that students earn equal pay for work performed by other workers. It offers the added advantage of useful career experience during the formal learning period.

The amount of money earned by students is often sufficient to pay a great part of their tuition; and for the sons and daughters of union members, this can be a major factor in the decision to go forward in education.

Lifelong learning and workers education

The effect of technological change upon the work force has been and will be profound. As a result, the availability of adult education is more important than ever, and it should be broadened into the context of lifelong learning.

The AFL-CIO urges the administration to accelerate the development of federal policies designed to expand adult learning programs to make them accessible to every American.

We urge our affiliates to carefully examine the potential of negotiated tuition refund agreements or other education benefits in future contracts as a means for their members to participate in approved education programs suitable to their needs throughout their working life and beyond.

Finally, we urge each affiliate to make full use of the George Meany Center for Labor Studies, which has developed into one of the outstanding adult learning centers of the country. It has a dedicated, union-oriented faculty, and its facilities and its services are available to every AFL-CIO affiliate.

STATEMENT OF THE NATIONAL EDUCATION ASSOCIATION

The National Education Association is opposed to S. 2142 and to any other legislation designed to provide tax credits for tuition paid to public or private elementary, secondary, vocational, or postsecondary institutions. Such a scheme is unsound fiscally, unsound constitutionally, and unsound as a matter of public policy.

THE TAX CREDIT WOULD CONSTITUTE A RAID ON THE TREASURY

Proponents of tax credit proposals seem to assume that the federal government currently provides adequate financing for public education. School closings and cutbacks on educational programs and services belie this notion. The current federal contribution is only eight percent of the total cost of public education—barely a beginning, far from adequate. If the federal government cannot pay its share to keep the public education system operating, how can it contemplate paying for a duplicative, nonpublic education system?

Tuition tax credits would drain the federal Treasury of much needed revenues—at least \$4.7 billion under S. 2142, according to the Joint Congressional Committee on Taxation and Revenue. They would decrease the funds available for national needs.

The purpose of our imperfect tax structure is to impose on all a financial obligation which is to be used to serve general purposes for the public benefit. To exempt some from this obligation for a selected purpose constitutes nothing more than a general expenditure for that selected purpose for that special population.

TAX CREDITS ARE INEQUITABLE

Under proposed legislation tax credits could amount to \$500 per child. The federal government contributes nowhere near \$500 per child enrolled in the public schools. Less than \$145 of the current average per pupil expenditure of \$1,742 comes from federal sources.

A tax credit of \$500 for children in nonpublic education K-12 would benefit only the parents of some 5.6 million nonpublic school students, while parents of the 43.9 million students in public schools would receive no benefit. It is a gross distortion of the American concept of free public education for all for Congress to consider aiding private interests more than the public interest, the privileged more than the poor.

In post-secondary education, according to the late Lawrence N. Woodworth, Assistant Secretary of the Treasury for Tax Policy, "The typical recipient of the tax credit would be wealthier than the average citizen. In 1975, the median family income of families with an 18-24 year old dependent in college was more than \$4,000 greater than the median family income of all families with an 18 to 24 year old dependent and more than \$6,000 a year greater than the median family income of all families. In a sense, the tax credit might be viewed as providing relief to upper-middle income taxpayers for the temporary liquidity problem associated with the transfer of wealth to children through payment of educational expenses. In fact, in the absence of offsetting changes in the tax structure, the tax expenditure would increase the share of the taxes borne by lower income families."

A table showing income and student charges 1967-1976 is attached.

TAX CREDITS ENCOURAGE SEGREGATION

Nonpublic schools of whatever persuasion tend toward exclusivity by definition. They exist primarily to serve selected enrollees on some segregating basis: creed, sex, economics, intellectual capacity, race, and so forth. If they have no such unique or exclusive purpose, there is no reason for their existence.

Parents and students should not be denied their right of free association by governmental interference. But neither should the government subsidize their exercise of this right in violation of the greater public's needs.

TAX CREDITS DO NOT SERVE THE NATIONAL INTEREST IN EDUCATION

An essential premise of our society is that free public education should be provided for all. There is no intellectually honest reason to provide additional incentive at government expense to those who choose to value their right of association more than their right to a free public education.

The common good is served by a system of tax supported public schools. Only the individual good would be served by an education tax credit.

Americans build and maintain private pools without a recreation tax credit.

Americans own private getaway cabins without a park tax credit.

Americans hire private security forces without a police tax credit.

Americans build private roads and limit access to them without a highway tax credit.

TAX CREDITS VIOLATE THE CONSTITUTIONAL PRINCIPLE OF SEPARATION OF CHURCH AND STATE

NEA has long sought to protect the First Amendment's guarantees of the free exercise of religion. To excuse certain groups of individuals from their tax burden so that they may exercise their religion would have the effect of advancing religion in violation of the First Amendment.

A long line of Supreme Court cases in recent years has dealt with the constitutionality of varying methods of providing aid to nonpublic elementary and secondary schools. The Court has consistently struck down provisions which either directly or indirectly have the primary effect of advancing religion and offsetting the constitutional prohibition against laws respecting the establishment of religion.

The only form of "aid" which the Court has found to be consistent with the First Amendment are those which provide general welfare and health services, textbooks, and transportation to all children. In a recent opinion, *Wolman v. Walter*, 97 S Ct 2593 (1977) the Supreme Court was careful not to extend this doctrine beyond its previous decisions and indicated that when faced with the question of expanding nonpublic aid or of prohibiting it, prohibition should be the favored course.

The unconstitutionality of the tuition tax credit scheme for elementary and secondary nonpublic schools is without question in light of the Supreme Court's ruling in *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1973). The Court in *Nyquist* found that a New York statute providing income tax benefits to parents of children attending nonpublic schools to be a violation of the First Amendment in that it would have the "impermissible effect of advancing the sectarian activities of religious schools."

Although the New York statute was designed under the guise of "tax deduction" rather than a tax credit, the Court saw no distinction in the labels attached to the tax scheme and indicated that regardless of its name its effect was unconstitutional. (Whether you call it tax credits, tuition reimbursements, or tax deductions, the account books look the same and the effect is the same.)

Supporters of tuition tax credit proposals contend that the First Amendment is not violated since the tax benefits adhere to the parent of the nonpublic school child, not to the private school itself. But the Supreme Court in *Nyquist* specifically rejected this argument and found that the effect of the aid is "unmistakably to provide desired financial support for nonpublic, sectarian institutions."

Our concern over the effect enactment of this type of assistance would have on other nonpublic aid schemes was expressed most eloquently by the Supreme Court in *School District of Abington Township v. Schempp*, 374 U.S. 203, 225 (1963) when the Court indicated that it was "no defense to urge that the religious practices now may be relatively minor encroachment on the First Amendment," for what today is a "trickling stream may be a torrent tomorrow."

CONCLUSION

There can be no doubt that the nation faces serious problems in our education system and in our taxation structure. But attempts, such as the tuition tax credit proposals, to solve the problems of both by treating them as a single, intertwined issue fail to meet the legitimate needs of either.

In higher education, legal decisions on the constitutionality of tax credits are neither as numerous nor as clear as for elementary and secondary education. However, legal decisions in elementary-secondary education are, in our opinion,

applicable to higher education. Current federal programs to assist higher education are largely in the form of assistance to students rather than to institutions. NEA supports this approach, and the expansion of existing student aid programs, adjusted to include middle income families.

To some, the tax credit for middle-income Americans with children in college is perceived to be a necessary form of tax relief. Tax relief should be dealt with in the overall context of tax reform, rather than in educational policy.

We call upon the Congress to meet one of its principle obligations: to provide free quality public education for all. This must be a national priority. Substantial improvements, adequately funded, in our public education system would, unlike tax credits, benefit all citizens.

STATEMENT OF ERIC M. STEEL

After a spate of Close Encounters of the Third Kind, an Encounter of the Fourth Kind was only a matter of time. Sure enough, one night last week a solitary inhabitant of the land of Zuz alit at my feet in an abandoned shopping plaza from a chariot of fire identical with that which took Elijah up into heaven. Since cons ago his race had contrived to cast off the tyranny of sex, he was neither male or female, and since the strange creature gave me no name, I can only call it It.

Before the sexual revolution in Zuz "children" were born, or rather emerged fully grown from giant eggs, each with an IQ of one billion. Being that smart, they naturally had no need for education. After a few more eons of putting their heads together, they discovered a recipe for immortality. Thereafter they had no need for children, or sex, or any pursuit likely to distract them from their mission: investigation of the universe.

I was happy that It had chosen to quiz me on the affairs of our planet. I have always been proud of our way of life, particularly of our form of government, ruled as we are, not by kings nor dictators, but by duly elected representatives of the people. When It was curious about our system of education, I welcomed the chance to talk about the network of free public schools and colleges we have stretched from coast to coast in order to enable each of our children to become all he is capable of becoming. Following are excerpts from our conversation.

It. Public education, no doubt. But surely not free. Those schools and colleges must cost plenty of money.

Me. Yes, indeed. Billions. But everybody pays for them. And when everybody pays for something, it's more or less free, if you see what I mean.

It. Not entirely. You mean everybody pays indirectly for them, through taxes, but nobody pays directly to attend.

Me. That's right. From everybody according to his means. That's the American way.

It. So all your children are educated in your public schools?

Me. Oh no. Not all the children. No parents are forced to send their children to a public school. This a free country. If they want, they can send them to a private school.

It. If they have the money, of course.

Me. Well, it used to be that way. But maybe it's not going to be that way any more. Right now some of our representatives are trying to get a bill passed which would give parents who want a private school for their children a tax credit—money that would help them pay the fees.

It. But why would they want a private school for their children?

Me. Well, you know how it is. When everybody can go to something, nobody wants to go to it. We are a classless society, of course, but some of us, when we get ahead a bit, get a trifle status-conscious, and one of the ways we can show we have a slight edge on some of fellow citizens is by sending our children to a private school.

It. What you say amazes me. What you're saying is that even though they don't have a slight edge money-wise, you're going to give them money so that they can still appear to have a slight edge by sending their children to a private school.

Me. Not me. Not me. Those representatives I was telling you about . . . Besides, there's more to it than that. Many of these private schools are actually better than many of the public schools.

It. And why is that?

Me. It's very simple. Everybody has to go to school and the only school the poor people can go to is the public school. And since there are many more poor people than rich people, the classes in the public school are much bigger than in the private school, so the students don't get as good a chance to learn. Besides, heaven only knows what sort of homes some of these kids come from. They'd sooner throw a match into the wastebasket or draw a knife on their teacher than sit down and learn to read, write and count, as decent kids should.

It. How awful. And you propose to solve this problem, you say, by helping a few to escape from this jungle and leaving the others to perish in it?

Me. Oh, don't worry about that. They'll survive all right. They're tough.

It. And how will they survive? By picking pockets and purses and mugging and killing, if that's the only way they've learned to earn a living. Haven't the people who would take public money to send their children to private schools thought of that? And don't they get chills up their spines?

Me. I'm sure they do. But you know how folks are. They've probably said, "After us the deluge," as so many have before them.

It. Would it not be better for all concerned to take the money they are proposing to give people to help their children escape from the public schools, and spend it in the public schools. They could provide more teachers so that the classes would be no bigger than in the private schools, and more counselors so that the trouble-makers who won't let their classmates learn and who want to burn down the building will eventually develop into some sort of law-abiding citizen. No matter how long or how much money it takes! If that's not what money is for, what then is money for? Make the public schools as good as the best of the private schools. Then let the rich enjoy the "prestige" of a private school, if that continues to tickle their fancy. If they can and will pay the fees, that is. If they can't, and if the private schools have to close down because they can't, then let the private schools close down.

Me. Oh, we couldn't have that. We've always had private schools.

It. One of your wise men has said that if you've had an idea or an institution for a very long time, it may well be time to consider getting rid of it.

Me. Then you wouldn't be in favor of helping them out?

It. I would be very much in favor of their helping themselves, as private enterprises are supposed to do—but not to public money. What I would recommend for private schools is what another of your wise men recommended for a much needier cause—benign neglect. This bill is so unfair to the mass of the people that...

Me. But our President has just told us that life can be unfair.

It. So unfair, I repeat, that it is even more unfair than I thought it was. The poor people, who have to send their children to the public schools and will get nothing out of this bill except, perhaps, a few dollars in lab fees, will really be paying taxes to help their richer neighbors send their children to a private school. It's preposterous. It's like asking a man who has to settle for a Honda to help pay for his neighbor's Cadillac.

Me. That's a nasty way of putting it! I don't like it. So I'm going to call it a false analogy. And everybody knows that if there's one surefire way of destroying a good argument, it's calling it a false analogy. Besides, many of the rich pay taxes too. All, in fact, but some of the very rich. They have loopholes, you see. They pay low taxes or none at all.

It. Say that again, please.

Me. Oh no! Let's not get into that.

It. How many children, would you say, attend a public school for every one that attends a private one?

Me. I don't know. Maybe 10 or 12.

It. And if this bill were to pass, maybe the number attending the private schools would double. That would make 9 or 11 to 2. That would mean that 9 or 11 would lose while 2 would gain. In your country, where everyone has a vote, how do you think this bill would fare if the people voted on it?

Me. It would certainly lose. But the people don't vote. The lawmakers see to that. It's the lawmakers that vote. And that's a good thing too. If the people voted on everything, all sorts of crazy bills would become law.

It. If you'll excuse me, I think at this point I'll have to take time out for a little spin. I'll be back shortly.

TEN MINUTES LATER

It. As I recall, you told me that yours is one of the most religious countries in the world.

Me. That's right. We have, I think, 203 different religions.

It. Your religious interest me. That's perhaps because we have no religion at all.

Me. That's dreadful. How does that happen?

It. Well, we're immortal. So we need no religion. We've nothing to hope for and nothing to fear. But tell me, how does it happen, if you're so religious, that you don't teach religion in your public schools?

Me. To tell the truth, some of us would like to. But we can't. How do you think the Mennonites would feel if we taught Methodism in our public schools? They'd be furious! How would the Roman Catholics feel if we taught Greek Catholicism? How would the Mormons feel if we taught Mohammedanism in our schools. They would sue. How would YOU feel if you were forced to pay to have some religion other than your own taught in the schools you pay for.

It. That's the most sensible thing you've said since you started.

Me. Oh thanks.

It. I'm glad to see you agree with me that religion is a private, not a public thing.

Me. Well, here in the good old U.S.A. it's really more of a public than a private thing. We think it's patriotic to be religious. You see, our enemies are against religion. So we have to be for it in a big way, don't we! But we can't teach any religion in our public schools.

It. I imagine some of your religious leaders don't like the public schools.

Me. They certainly don't! All they like is their own religious schools.

It. So they run religious schools? Schools that turn out good Catholics, Protestants, Jews and so forth?

Me. Yes, some of them do. And in this free land of ours, that is their privilege.

It. It is indeed. But if this bill you were telling me about becomes law, all taxpayers will have to pay to help maintain these religious schools.

Me. Not so. The schools will get no money. It will go to the parent, so that his children can get the religious education his church wants them to get. Aid to the child, not aid to the school. The parent turns over the money to the school, of course. But the big idea is to help the student.

It. But if that money didn't get to the school, it might have to close its doors, might it not?

Me. Now your strong anti-religious bias is really beginning to show, It. Let me tell you. These religious schools can be a great power for good. They can give us diversity of education.

It. The only diversity they can give seems to me to be diversity of religion. So the big question is: Is that good or bad? Does diversity of religion bring people together or drive them apart?

Me. Whatever it does it must be a good thing. Otherwise they wouldn't keep clamoring for it the way they do. I sometimes wonder, though, how they got on without it for centuries in the old days when there was only one religion and it didn't like diversity at all. It seems to like it a lot more now.

It. I can see why it would. It would get most of the money. But isn't it against the law to give government money to religious schools?

Me. The Law of the Land says it can't be done, but the lawmakers keep on passing laws just the same, in the hope that one of them will get by the Nine Old Men whose job it is to see that the lawmakers don't get away with murder.

It. But why should the lawmakers want to get by with—what did you say—murder? Haven't they sworn to respect and defend the Law of the Land?

Me. Yes, but some of them have good reason for trying to get round the law if they can. Everyone of them believes that it's in the best interest of the nation that he be re-elected. So his first concern—and can you blame him—is to get re-elected. That takes money, and since the rich have more money than the poor, he would be foolish to vote against the laws that would do a little something for the rich and the middleclass. That is why he might be inclined to vote for rather than against a helping hand for private schools. Besides—and this is what counts for many of the legislators, there is one church that operates from 85 to 90 percent of the private religious schools. This church used to have all its faithful well in hand. It could deliver "the Catholic vote" in any election. But in recent years the faithful have become better informed and less faithful. Many no longer go to church regularly, they ignore their church's teaching on birth control and divorce,

and they oppose it in what may prove its last bid for nationwide approval—its stand on the abortion issue. As a result, the Catholic Church can no longer deliver the Catholic vote. It talks in a loud, human voice and carries a big stick, but no longer has the strength to hit anybody with it.

It. Then why are the lawmakers still afraid of it?

Me. The church has a good PR department, so most people don't yet realize how divided it is against itself. Besides, it still takes in a lot of money and it spends a good part of it in lobbying. It keeps nagging away—especially at those lawmakers who were brought up in the Church, until they give up and give in. Finally, it still has a small hard core of faithful, who will vote whichever way the Church tells them to. The lawmaker knows that if he votes for parochial aid they will vote for him. He also knows that many of those who oppose parochial aid don't feel strongly enough about it or about anything else to vote against him at the next election, and probably won't bother voting at all. So he prefers the bird in the hand and votes for parochial aid. Can you blame him?

It. So these lawmakers are deliberately voting against what they know the people want?

Me. Oh yes. In all ten states where the people had a chance to vote on the issue, they voted every time against parochial aid.

—It. Then what can the people do to defend themselves against their representatives?

Me. They can vote them out of office, but they won't do that until they get real mad. What usually happens is that small dedicated groups insist on getting the Nine Old Men to decide whether the Law of the Land has been broken or not.

It. And what do the Nine Old Men say, as a rule?

Me. Oh they say that the Law has been broken and they stop all further payments to religious schools.

It. But in the meantime a lot of money has already been paid to these schools.

Me. Certainly. And spent too. A billion or two, perhaps.

It. And the people who really respect the Law of the Land and don't want to see a cent going to religious schools have to spend quite a lot of money to get the Nine Old Men to rule on the issue, I suppose.

Me. Yes, they do. But after all, as you said earlier, what is money for? Anyhow, those who are backing this bill don't think they're going to have any trouble with the Nine Old Men this time. They had trouble before because they wanted to give the money only to the religious schools. This time they're going to give money to non-religious schools as well, so they feel the Nine Old Men won't turn them down.

It. They can't be serious. If a man robs a bank and gives part of the loot to a deserving charity, does that make him less a thief?

Me. I don't get it.

It. Don't worry. The Nine Old Men will. I don't think I can stand to hear any more about the way you Earthlings behave. As one of your poets asked, "Can such things be!"

Me. That's too bad. I've really enjoyed talking to you. When will we see you again?

It. Perhaps not for another 2000 years. Maybe you'll have grown up a little by then.

**STATEMENT OF THE PARENT TEACHERS ASSOCIATION, LOUIS PASTEUR JUNIOR
HIGH SCHOOL 67, QUEENS**

Senate Bill S. 2142 creates a blueprint for the destruction of the public school systems throughout the United States. This bill is a vehicle for returning education to the medieval system of church control of education whereby the clergy decided who should attend school and gain access to the professions and skilled trades while leaving the rejected to a lifetime of menial labor. By allowing a taxpayer to deduct from taxes due up to \$500 for each dependent attending private or parochial school, the bill provides an immediate "gift" to all parents who have children in these schools. The ensuing revenue gap estimated at four billion dollars will then be retrieved by higher taxes in some other area at the expense of parents with children in the public schools and those taxpayers without children. It is a blatant sellout to the parochial school lobby.

This bill violates the principle of separation of church and state. It will hasten the exodus of the middle class from the public schools making it economically

feasible to flee to the suburbs or enter parochial schools. It will be impossible to comply with Federal desegregation regulations since there will be fewer pupils to racially balance. The religion with the most parochial schools will dominate education and all learning will suffer as independent thinking and dissent is suppressed by parochial school administrators who will have the power to expel the "rebels". The poor and lower middle class will populate the public schools and more empty buildings will become a threat to the community since they can be converted to any undesirable function at the whim of the City "planners".

The essence of this bill is to take resources away from the public schools and give it to the private and parochial schools. There is no legal or moral justification for this bill. The net result will be the loss of academic freedom, imposition of a quasi-censorship of curricula and creation of bigotry as the multitude of religions in our society will then have the economic resources to promulgate their faiths at taxpayers expense.

The long term result of this bill will be a change from a pluralistic society to one of strong factions fighting for dominance. Civil disorder and guerrilla warfare are realistic projections that will result from the formation of racial, ethnic, and religious tribes.

STATEMENT OF JOEL PACKER, LEGISLATIVE DIRECTOR, NATIONAL STUDENT LOBBY

Mr. Chairman and members of the Committee, I would like to thank you for the opportunity to present this statement for the record. The statement is presented on behalf of the National Student Lobby (NSL), a seven-year old coalition of student governments from throughout the country which has concentrated its efforts on lobbying on those issues which affect students in their role as students, and the United States National Student Association (NSA), also a coalition of student governments, now in its 31st year of continuous operation. Both organizations have as members both public and private institutions of higher education as well as state and system-wide student associations. Collectively, NSA and NSL represent approximately two million college students.

This statement is presented in opposition to the several bills which would grant a tax credit or deduction for college expenses. This position has been discussed and approved at several of our meetings, including those of the state associations, both of our Boards of Directors, our governmental affairs committee, and the participants at a conference sponsored for students by the Office of Education on the subject of student financial assistance.

While we are opposed to the concept of tax credits, we do strongly agree with the goals of the sponsors of such legislation, which is to increase aid to the middle-income family. We, as national student organizations have been fighting for several years for increases in the OE student aid programs, not only to increase the level of awards to low-income students, but to expand eligibility in order to allow some higher income students to become eligible. To this end, our top priority has been fully-funding Basic Grant awards. In fact, simply increasing the Basic Grant from its current level of \$1,400 in the 1977-78 academic year (fiscal year 1977) to \$1,800, which the President recommends for fiscal year 1979, will result in an additional 345,000 students receiving BEOG awards, of which 102,000 have incomes between \$10,981 and \$14,640, and 178,000 have incomes above that level.

We applaud this committee for holding these hearings which have stimulated the debate over the need for increased federal assistance for college expenses. We believe, as our statement outlines, that the tax credit would be an inequitable, inefficient and ineffective method of providing such increased aid. We recognize that the Senate has on six different occasions passed tax credit proposals, and we, therefore, do make several suggestions outlining what the best form for such a credit would be, if the Senate decides to once again pass such a program.

THE NEED FOR INCREASED ASSISTANCE

Some individuals contend that middle-income families have not been adversely affected by rising college costs. We would strongly disagree. CBO in their report, "Federal Aid to Postsecondary Students: Tax Allowances and Alternative Subsidies" cite data showing that median family income rose faster than college costs from the period 1967 to 1976. However, an earlier CBO study, "Postsecondary

Education: The Current Federal Role and Alternative Approaches", shows that student charges as a percent of income were somewhat higher in 1975 than in 1967. But even if median income did increase at a faster rate than college costs, that simply means that a "typical" family which earned say, \$13,000 in 1967 and is now earning \$23,000 is in relatively good shape. But what of the family currently earning \$13,000? Not every family has had their income increase at exactly the same rate as the median income. And of course one has to take into account the huge increase in taxes since 1967, which as Senator Roth points out, has been 97 percent.

However, what is more important is that the percentage of 18-24 year old dependents enrolled in college has declined since 1967 (see attachment). While it has risen somewhat from 1974 levels, we are still enrolling a smaller percentage of young people in college today than we were a decade ago. For all income groups in 1976, the enrollment rate was 38.8 percent.

Costs and income levels are factors in college enrollments. Looking at college participation rates, that is the number of high school graduates going directly on to any college, the American Association of State Colleges and Universities points out that this rate is correlated with the level of tuition. Thus, in California, with very low tuition at public institutions, about 75 percent of all high school graduates went on to college, while in such states as Maine and Vermont, with very high tuition, the participation rate is only about 35 percent. And if direct proof is needed on the effects of college cost increases on enrollment, one need only look at the tragic case of the City University of New York, where after the imposition of tuition (an effective cost increase of almost \$800 in one year) 50,000 fewer students attended the University, a decrease of 20 percent.

A survey performed for the First National City Bank in 1975 found that 12.8 percent of Americans indicated that someone in their family had been prevented from going to college in the last five or six years because of cost. The same study showed that 60 percent of families experienced hardship in meeting college costs, with half of those reporting "extreme" difficulty.

Information from the Bureau of Labor Statistics show that in autumn 1974, a family of four with an income of \$14,333 (the BLS intermediate level), after meeting all taxes and necessary living costs such as food, housing, clothing, and medical care, would have only \$662 left over for all "miscellaneous consumption" which includes education. Obviously not enough to afford a college education.

NSA and NSL wish to point out however, that while the need exists for providing additional relief to middle-income families, the needs of the lower-income person must not be forgotten. Large increases in their awards are desperately needed to keep pace with inflation and increased college costs. For instance, under the Supplemental Opportunity Grant Program, SEOG, data from the Office of Education shows that the average award per recipient has declined from \$528 in 1970 to \$524 in 1977. In this period, it has fluctuated from \$505 to \$570. Regarding Basic Grants, the maximum award from the 1973-74 academic year through the current one (1977-78) has remained constant at \$1,400. While it will go up to \$1,600 in fiscal year 1978 and the President has recommended an \$1,800 award in fiscal year 1979, the lowest-income student will not receive these increases due to a provision that arbitrarily keeps the maximum award level at no more than half the cost of one's education.

And though the student aid programs have helped enormously in expanding access for lower-income students, the fact remains, as the attached chart from A.C.E. shows, that those from incomes over \$25,000 are enrolled at almost twice the rate of those families with incomes under \$5,000. At private universities there is almost a four-fold difference.

One last piece of data. The attached chart from the Higher Education Research Institute, shows that for fall 1975, net price of college, which is total expenses minus the sum of grand aid and family resources has been roughly equalized for all levels of college costs, for all family incomes up to \$20,000. But, unless aid is increased for the lower-incomes and extended into the middle-incomes, this net price barrier will become increasingly insurmountable as college costs continue to skyrocket.

OPPOSITION TO TAX CREDITS

Having stated the need for additional middle-income relief for college costs, why then do we oppose the various tax credit plans? NSL and NSA simply believe that a targeted increase in existing O.E. student assistance programs would be a better vehicle to solve this problem. Let me stress however that this position only relates to the question of financing for postsecondary education.

Neither NSA or NSL have any formal position on the question of tax credits for elementary and secondary education. An entirely different set of issues is involved there, many of them constitutional in nature. No direct or indirect aid now goes to students, their parents or the institutions. At the higher education level large amount of aid are granted private college and universities, mainly through student assistance. While the policy questions are somewhat related, they are separate and should be decided separately.

We oppose tax credits for the reasons set forth below :

1. Tax credits are an inefficient, regressive form of aid

Under several of the tax credit bills pending before the Senate, such as S. 96 by Senator Hollings, S. 311 by Senator Roth, S. 834 by Senator Schweiker, S. 954 by Senator Durkin and S. 1781 by Senator Anderson, the credit which would be granted is nonrefundable. Therefore only those with sufficient tax liability would receive the credit. This greatly skews the income distribution of the benefits toward the upper-incomes. The January 1978 CBO study estimated that under a \$250 nonrefundable credit, such as that in Sen. Schweiker's bill, and in the first year of Sen. Anderson's and Sen. Roth's, only 49 percent of the benefits would accrue to those families with incomes between \$10,000 and \$25,000.

Even under the Packwood/Moynihan bill, which does include a refund provision, people from upper-income brackets, such as those earning \$50,000 and above, would still receive the same benefit as the low and middle-income family. This is inequitable in our opinion, since we believe that benefits should relate to income and financial need. NSL's and NSA's position is summed up by Eugene Steurele, an economist with the Office of Tax Analysis in the Treasury Department, "... a program based upon ability-to-pay would be better targeted to meet the needs of our citizens. An across-the-board tax credit is inferior to programs of targeted grants or loans in meeting the goal of equalizing educational opportunity." (Case Currents, Dec. 1977).

2. Tax credits would create a great incentive for institutions to increase tuition

Since every student would be eligible for the same amount of money, colleges would see an opportunity to increase costs to "capture" federal revenues. A CBO study from March 1977 states, "... it is clear that tuition charges are more likely to increase in response to a broad across-the-board subsidy like that contained in S.311 than they are when a subsidy is targeted on a more narrowly defined group of students . . ." While this is obviously speculation, and several institutional representatives have argued that tuitions will rise in any event and that Boards of Trustees are reluctant to raise tuition, our experience has shown that while Trustees may be reluctant, State Legislatures are looking for ways to reduce state costs and one of the first places they look is the State University.

3. There is no guarantee that tax credits will be used for educational expenses

Under the O.E. programs, money is generally paid out to the student at the time educational costs must be paid, at the beginning of each semester. In many of the programs, the money is credited directly to the student account, so it is fairly well guaranteed that the funds will be spent on their intended purpose. Tax credits on the other hand, would in effect be received when the parent files his/her income tax return, generally in the late winter/early spring. This is six to seven months after college tuition was paid. The money additionally is not going to the student but the parent and thus there is reason to believe that the credit will be spent on items other than educational costs.

4. Tax credits rather than simplifying the delivery of student aid, will further complicate the problem

It is true that the Office of Education programs are somewhat cumbersome and complex. But efforts are underway to simplify the system. Under the new Multiple Data Entry System (MDES), 2.5 million fewer Basic Grant forms will be issued by O.E. this year. Students can now use one form to apply for both BEOG and the three campus-based programs. The Coalition for Coordination of Student Aid is continually working to further refine and simplify the system.

Tax credits, while relatively simple to understand, would require the intervention of IRS in order to validate and enforce that taxpayers claiming to have paid someone's educational expenses actually did so, and that the student was enrolled in an eligible institution. HEW currently does all that in regard to the OE programs. An expansion of these programs would simply utilize the existing beauracracy and machinery, whereas the creation of a tax credit will force IRS to set up parallel systems. As Steurele from Treasury points out,

“... the adoption of another tax expenditure would only add complexity to the labyrinth of federal expenditures for education and would further split program responsibility across agencies . . . There is a further technical difficulty . . . the problem of enforcement. The IRS should not be in a position of policing educational institutions to determine if their courses meet the necessary requirements for the credits.”

5. Part-time students under some of the bills would be ineligible

Under the Roth or Anderson tax credit one must be a full-time student to be eligible. According to CBO, in 1976 almost 39 percent of total degree-credit enrollment were part-time students. Their numbers have been increasing and are likely to continue to do so. These students, if they are at least half-time, are eligible for OE grants and other programs. They would not be aided at all under the Roth or Anderson tax credits. An expansion of existing student aid programs to include middle-income persons would be beneficial to these part-time students. It is true however, that the Packwood/Moynihan bill does include part-time students.

EXPAND EXISTING STUDENT AID PROGRAMS

We believe that \$1 to \$1.5 billion in additional appropriations are necessary to expand the OE student assistance programs to adequately meet the needs of middle-income students, while at the same time increasing aid somewhat to the lower-income persons currently receiving awards, and removing inequities affecting independent students. We applaud the Administration (something we haven't done too often in the past) for favoring this type of approach. At a budget briefing on Jan. 21, Secretary Califano and Commissioner Boyer pointed out that \$700 million is earmarked in the President's fiscal year 1979 budget request as part of a \$3 billion contingency fund to expand aid to the middle-incomes. We are also happy to see that Senator Pell will be introducing legislation to this effect in the Senate, and that Rep. Bill Ford plans to do so in the House.

I realize that this committee does not have jurisdiction over these programs, but I do want to set forth for the record some changes that could be made in the programs which we favor. Many of these changes, which we have been discussing with OE and HEW, do not require any statutory changes.

a. Basic educational opportunity grants—BEOG

The administration has already recommended full funding of the program at the \$1,800 maximum award level, and a liberalization of the expected family contribution schedule, by raising the asset reserves from \$17,500 for personal assets to \$25,000 and from \$25,000 to \$50,000 for farm and business assets. Both of these changes will prove beneficial to middle-income families. Other changes that we think should be considered include:

1. *Further increasing the maximum award.*—One high-level OE official estimates that it would require a maximum grant of \$2,200 to keep pace with inflation. We support such an increase. To ensure that inflation does not eat away at the value of awards in the future, the maximum award should be tied to an inflation index relating to the cost of college. President Carter, while still a candidate, in an interview with the National Student Lobby stated that he was “in favor of the inflation index.” This would require a statutory change.

2. *Reduce the tax rate on discretionary income.*—These tax rates are applied against discretionary income to determine the family contribution. Currently they are 20 percent for the first \$5,000 of discretionary income, and 30 percent for income above that. These could be reduced to 15 percent and 20 percent. Reducing the rate for the first \$5,000 would benefit everyone with net taxable income above the family size offsets (see below), while reducing the higher rate, would benefit those over \$11,000 net taxable incomes.

3. *Increase the family size offsets.*—These offsets, which are intended to provide for basic subsistence expenses which must be met before any contribution can be expected toward a student's educational expenses, are deducted from net taxable income. For 1977-78 the offset for a family of four will be \$6,250. These offsets were originally based on the Social Security Low Income Thresholds for 1971 and have been increased each year by the CPI percentage increase. These offsets could be increased to match the medium level income, rather than the low-income threshold. This would benefit all those above the current cutoffs.

4. *Improve the treatment of independent students.*—Particular changes that needs to be made here are increasing the offset for single independents (only about

\$1,100 in 1978), lowering the tax rates on discretionary income particularly for those independents with their own dependents, and using the same asset treatment for the independents with their own dependents as is used for dependents. Many of these students are older, and do not fit the description of the child from a "rich" family taking advantage of the system. In fact, approximately 70 percent of those who are independent are over 23 years of age.

5. *Remove the half-cost limitation.*—This does not really relate to the middle-income issue, but nonetheless, we believe this arbitrary rationing device, which was described earlier, should be repealed. This requires Congressional action, and while it might not be dealt with at this particular time, it certainly needs to be addressed during next year's reauthorization of the Higher Education Act.

This combination of changes would provide award to families of at least \$25,000 gross income, and probably would be closer to \$30,000.

b. Supplemental educational opportunity grants—SEOG

1. Increase the appropriation to at least \$400 million from the current level of \$270 million. The recommended funding level from the O.E. regional review panels has far exceeded the actual appropriation. For fiscal year 1977, data from OE shows that the recommended level was almost \$600 million. Besides generally needing more funds, another problem is the distribution of those funds. Appropriations are divided into Initial Year awards, and Continuing year awards, with approximately half the money going for each award. This results in a shortfall of funds for upper-division students, since there is not enough available to ensure that every recipient continues to receive a grant. So, for the increase to \$400 million, about 260,000 new awards could be granted if the average award remained the same.

2. Change the requirement that to be eligible the expected family contribution cannot exceed more than 50 percent of the cost of education. This could be raised to say 60 percent or higher, and would particularly benefit middle-income families, if sufficient appropriations are available.

c. College work study—CWS

1. Fully fund at the maximum level of \$600 million.

2. Repeal the provision that allows payment of subminimum wages.

d. State student incentive grants—SSIG

1. Increase the appropriation from \$63.75 million to at least \$113.7 million. This will result in an increase in the number of awards of about 200,000. SSIG, of the three grant programs, currently reaches more middle-income families than BEOG or SEOG.

e. Loans

1. Increase the income ceiling for eligibility for a subsidized Guaranteed Student Loan, from the current level of \$25,000 adjusted family income (\$31,000 gross income), to \$40,000. If a student has income below this level the Federal Government pays the interest charges while the student is enrolled in college, and for the first nine months after graduation. By increasing the income ceiling to \$40,000 virtually all students would become eligible for the interest subsidy. We believe that loans should be the last resort of students seeking financial assistance, and that students should not be forced to take out unrealistic levels of loans. However, particularly for higher-income people who desire or need such loans, they should be easily available.

2. Increase the appropriation for National Direct Student Loans to \$350 million. This would expand the number of loans available under this low-interest program.

Mr. Chairman, NSL and NSA believe that a package such as this, if carefully considered will prove a far superior method of aiding middle-income students than tax credits.

SPECIFIC SUGGESTIONS REGARDING TAX CREDITS

As stated earlier, if the Congress does insist on enacting a tuition tax credit, we believe there are certain specific provision which must be included if such a credit is to prove at all worthwhile. Such suggestions from NSA & NSL include those set forth briefly here:

1. A refund provision, such as that in the Packwood/Moynihan bill. Without such provision, the income distribution is completely inequitable and would exclude all low-income people.

2. A progressive reduction above a certain income level. This would ensure that higher income individuals who are not as financially pressed as lower- and middle-income families, receive lower amounts of aid. Such a reduction could start at \$25,000 and reduce the credit by 2% of adjusted gross income in excess of this level, thereby phasing out a \$500 credit at \$50,000 income. Senator Holling's bill contains a reduction factor.

3. Inclusion of part-time students for the reason stated earlier.

4. Inclusion of graduate and professional students.

5. Inclusion of living expenses. These are just as much of a financial burden to students and their families as are tuition and fees. All existing OE student aid programs take into account living expenses such as room, board, books, etc. in determination of awards. In fact while tuition charges vary greatly from state to state and between public and private institutions, non-instructional costs are far more uniform.

6. The credit should not be reduced by the amount of student aid received. Particularly if only tuition expenses are covered and funds received from other student assistance programs are subtracted from the expenses, then low-income people will be cut out from receiving the credit.

In closing, I hope that the Committee will seriously consider the issues that I have raised. We have no quarrel over goals, only over the method to achieve those goals. It is gratifying that the Congress and the Administration both finally recognize the plight of millions of persons in their struggle to attend college, and are formulating various proposals to provide financial relief. I urge this committee to support the student aid alternative rather than the tuition tax credit.

EDUCATION PARTICIPATION RATES OF DEPENDENT STUDENTS BY FAMILY INCOME AND CONTROL OF INSTITUTION, 1975-76

[In percent]

Enrolled in college	Family income						
	Total	Under \$5,000	\$5,000 to \$9,000	\$10,000 to \$14,999	\$15,000 to \$19,999	\$20,000 to \$24,999	\$25,000 and over
Total:							
Full time.....	43.7	30.6	33.9	38.4	46.6	46.9	63.2
Part time.....	5.2	4.4	4.7	5.4	4.8	6.7	5.2
Total.....	48.9	35.0	38.6	43.8	51.4	53.6	68.4
Public:							
Full time.....	33.3	26.0	26.8	30.0	36.3	36.4	44.1
Part time.....	4.5	3.8	3.9	4.9	.4	5.3	4.8
Total.....	37.8	29.8	30.7	34.9	40.7	41.7	48.9
Private:							
Full time.....	10.4	4.6	7.1	8.4	10.3	10.5	19.1
Part time.....	.7	.6	.8	.5	.5	1.4	.4
Total.....	11.1	5.2	7.9	8.9	10.7	11.9	19.5

¹ Of those people 18 to 24 years old who were high school graduates, 43.7 percent were enrolled on a full-time basis in college.

Note: Calculations are based on all dependent family members aged 18 to 24 years minus those enrolled below college, those who have completed 4 or more years of college, and those who are high school dropouts.

Sources: Policy Analysis Service, American Council on Education based on U.S. Bureau of the Census data.

TABLE 3.—PERCENT OF 18- TO 24-YEAR-OLD DEPENDENT FAMILY MEMBERS¹ ENROLLED IN COLLEGE, BY FAMILY INCOME,² OCTOBER 1967-OCTOBER 1976

Family income	Percent enrolled									
	1967	1968	1969	1970	1971	1972	1973	1974	1975	1976
None to \$8,525.....	20.0	22.5	24.8	20.8	22.8	22.6	20.1	20.3	23.5	22.4
\$8,525 to \$17,050.....	37.9	38.5	38.8	36.6	35.4	34.2	31.2	31.7	35.1	36.3
\$17,050 to \$25,575.....	51.9	50.7	50.6	48.4	46.4	44.2	42.7	41.4	45.4	47.5
\$25,575 plus.....	68.3	63.8	65.2	61.7	61.8	56.9	56.6	57.5	59.6	58.2
All income groups.....	39.1	39.7	41.3	39.1	38.9	37.8	36.6	36.2	38.7	38.8

¹ A dependent family member is a relative of the primary family head other than the wife.

² Family income in 1976 dollars, civilian noninstitutional population.

Source: CBO calculations based on data supplied by the Census Bureau.

APPENDIX 8

PERCENTAGES AND AMOUNT OF TOTAL COLLEGE COSTS FROM FAMILY CONTRIBUTION AND NONRETURNABLE GRANT AID SOURCES BY PARENTAL INCOME AND INSTITUTIONAL COST FOR 1ST TIME, FULL-TIME STUDENTS IN FALL 1975 AND CALCULATED NET PRICE

Institutional cost ¹	Parental income													
	None to \$6,000		\$6,001 to \$10,000		\$10,001 to \$15,000		\$15,001 to \$20,000		\$20,001 to \$30,000		\$30,001 or more		Total	
	Percent	Amount	Percent	Amount	Percent	Amount	Percent	Amount	Percent	Amount	Percent	Amount	Percent	Amount
0 to \$1,500:														
Total cost ²	100.0	\$2,123	100.0	\$2,143	100.0	\$2,164	100.0	\$2,294	100.0	\$2,527	100.0	\$2,938	100.0	\$2,353
Grant aid ³	50.1	1,078	38.4	825	20.6	446	11.6	267	7.0	176	4.2	124	18.3	430
Family resources ⁴	23.4	496	32.6	699	49.2	1,055	59.4	1,362	70.5	1,781	80.9	2,377	56.3	1,325
Sum of grant aid plus family resources.....	73.4	1,574	71.1	1,574	69.8	1,501	71.0	1,629	77.4	1,957	85.1	2,501	74.6	1,755
Net price ⁵	25.9	549	28.9	619	30.6	663	29.0	665	22.6	570	14.9	437	25.4	598
\$1,501 to \$2,000:														
Total costs.....	100.0	3,335	100.0	3,444	100.0	3,582	100.0	3,627	100.0	3,774	100.0	3,960	100.0	3,646
Grant aid.....	53.3	1,779	44.7	1,540	31.5	1,128	21.9	796	10.9	410	4.7	188	24.4	689
Family resources.....	16.9	564	22.6	763	34.0	1,217	44.6	1,618	60.9	2,300	82.0	3,247	47.1	1,718
Sum of grant aid plus family resources.....	70.3	2,343	67.3	2,303	65.5	2,345	66.6	2,414	71.8	2,710	86.7	3,435	71.5	2,607
Net price.....	29.8	994	33.1	1,140	34.5	1,237	33.4	1,213	28.2	1,064	13.3	525	28.5	1,039
\$2,001 to \$2,500:														
Total cost.....	100.0	4,153	100.0	4,168	100.0	4,253	100.0	4,245	100.0	4,425	100.0	4,697	100.0	4,416
Grant aid.....	51.0	2,118	45.2	1,885	32.4	1,377	23.1	980	13.8	611	3.2	150	21.1	932
Family resources.....	20.4	849	25.1	1,045	36.8	1,567	48.0	2,039	66.4	2,936	86.1	4,046	55.2	2,437
Sum of grant aid plus family resources.....	71.4	2,967	70.3	2,930	69.2	2,944	71.1	3,019	80.2	3,549	89.3	4,196	76.3	3,369
Net price.....	28.6	1,186	29.7	1,238	30.8	1,309	28.9	1,226	19.8	876	10.7	501	23.7	1,047
\$2,501 to \$3,000:														
Total cost.....	100.0	4,424	100.0	4,471	100.0	4,595	100.0	4,878	100.0	5,097	100.0	5,130	100.0	4,925
Grant aid.....	48.4	2,141	40.7	1,821	31.7	1,456	23.8	1,161	13.6	695	3.6	184	17.0	837
Family resources.....	23.5	1,041	26.7	1,192	38.5	1,767	48.2	2,350	66.1	3,368	86.7	4,450	63.2	3,110
Sum of grant aid plus family resources.....	71.9	3,182	69.6	3,013	70.1	3,223	72.0	3,511	79.7	4,063	90.3	4,624	80.1	3,947
Net price.....	28.1	1,242	30.4	1,358	29.9	1,372	28.0	1,367	20.3	1,034	9.7	496	19.9	978
\$3,001 to \$4,000:														
Total cost.....	100.0	4,959	100.0	5,029	100.0	5,212	100.0	5,395	100.0	5,535	100.0	5,333	100.0	5,325
Grant aid.....	52.2	2,589	47.6	2,396	35.6	1,906	27.3	1,473	13.7	756	3.6	194	18.1	964
Family resources.....	17.8	883	21.4	1,074	35.0	1,824	43.7	2,356	63.6	3,523	85.4	4,553	61.8	3,290
Sum of grant aid plus family resources.....	70.0	3,472	69.0	3,470	71.6	3,730	71.0	3,829	77.3	4,279	89.2	4,757	80.0	4,254
Net price.....	30.0	1,487	31.0	1,559	28.4	1,482	29.0	1,566	22.7	1,256	10.8	576	20.0	1,071
All institutional cost:														
Total cost.....	100.0	2,369	100.0	2,414	100.0	2,459	100.0	2,617	100.0	2,902	100.0	3,521	100.0	2,731
Grant aid.....	50.9	1,205	39.9	962	23.6	580	14.8	388	8.7	253	4.0	141	18.8	513
Family resources.....	22.2	525	30.4	733	45.3	1,115	55.8	1,459	68.6	1,990	82.9	2,920	55.8	1,524
Sum of grant aid plus family resources.....	73.0	1,730	70.2	1,695	68.9	1,695	70.6	1,847	77.3	2,243	86.9	3,061	74.6	2,037
Net price.....	27.0	639	29.8	719	31.1	764	29.4	770	22.7	659	13.1	460	25.4	694

665

¹ Institutional cost is tuition and fees from HEGIS.

² Total is the sum of all student expenses. All amounts listed are in dollars.

³ Grant aid is composed of BEOG, SEOG, State aid, local and private scholarships, veterans benefits, and social security dependents benefits.

⁴ Family resources are the sum of parents' contribution, spouses' contribution, and savings.

⁵ Net price is total expenses minus the sum of grant aid and family resources.

Source: Preliminary tabulations from studies on the Impact of Student Financial Aid, Higher Education-Research Institute, Los Angeles, Calif. Office of Planning, Budgeting and Evaluation Contract No. 300 75-0382.

PARENTS ASSOCIATION OF P. S. 173, QUEENS.
Flushing, N.Y., January 22, 1978.

Senator HARRY BYRD,
*Senate Finance Committee,
 Dirksen Senate Office Building, Washington, D.C.*

DEAR SENATOR BYRD: I am writing to you on behalf of Presidents Council of School District 26, Queens, New York. We are an organization of presidents of Parents Associations of all the public schools in our district, whose total enrollment is 14,000 children.

As parents whose commitment is to quality public education we object to the proposed Packwood-Moynihan bill. It is a threat to every American's constitutionally guaranteed right to freedom of religion, a menace to the American system of free, public education, and an outrageously expensive burden on an already overburdened tax-paying public.

The first amendment to the Constitution says, "Congress shall make no law respecting an establishment of religion . . .". In 1971 that injunction to Congress seemed to be stated clearly enough for all to understand, but time seems to have blurred its meaning for some. That meaning is, quite clearly, that government is in no way to support institutions of religious education. Our country has developed this cardinal rule out of the bitter experience of the earliest refugees to these shores. Members of many different sects found themselves together, and with the great good sense that has come to characterize the American people, came to the conclusion that freedom for any one religious group was dependent on freedom for all groups. The beauty of the first amendment is that although the religious makeup of our population has changed, and will continue to change, our country continues to absorb new sects peacefully. Our government has neither patronized, nor persecuted, any religious group; and through this policy of "benign neglect", has created a climate in which all our citizens are free to follow their conscience. Considering how many of us there are, and how many different beliefs we have, we have lived in amazing peace and harmony with one another.

To meddle with this simple rule which ensures each of us freedom of conscience is to begin to pick away at the foundation of national tranquility and stir up and inflame sectarian rivalries.

Recent Supreme Court rulings have interpreted the Constitution to mean that direct aid to pupils enrolled in a sectarian school can be permitted. The present bill proposes to decrease the taxation of families sending their children to tuition-charging, non-public schools, including sectarian or religious schools. . . . There is no direct connection between the financial aid given and a benefit to an individual child. There are no guarantees that increased tuitions might not immediately swallow up any monetary gain a family might accrue. The only recipients of benefits from these tax credits would be the private schools, the vast majority of them sectarian in nature. By relieving a particular religious group and its members from part of the obligation of supporting its affiliated religious school, more money will be available to support sectarian activities. There is no way of directing any of the monetary benefits from the proposed tax credit to a child solely for the welfare of that child.

What then, does this bill propose to accomplish? Its supporters would have us believe that it endeavors to aid families in their efforts to educate their children. Only the hypothetical man from Mars, called upon so often to see our society with fresh eyes, might see this as an unmitigated good. If however, we informed the mythical visitor that there were at present fifty different state systems of education, providing at no cost, an education for every child within its boundaries, he might then wonder why some citizens felt they were entitled to aid when they chose not to use what was free to all.

The Packwood-Moynihan bill is an attack on public education in the United States. It provides rewards and incentive to parents who abandon use of the public schools for use of private schools, and encourages citizens to lose interest in the maintenance and betterment of the public schools. The American public schools are a unique institution developed in response to the needs of a democracy for an educated citizenry. These systems of public education conscientiously refrain from indoctrination of pupils in any religious belief. This is done in order to preserve the rights of the individual to practice his religion as he wishes, and to direct the religious education of his children as he sees fit. It reserves to the citizen the choice between an education which is secular, that is, promulgates no teachings of religion, and an education which indoctrinates the child in a particular faith. Each of us has this right guaranteed to us by the Constitution. Rights, however, carry with them, implied responsibilities. Government provides the

continuous option of the tuition-free public school. The parent who chooses private education for his child has taken upon himself the burden of financing it.

It is not easy to live in a free society. To be free does not mean to be propped up at the expense of one fellow taxpayers. The estimated cost of the Packwood-Moynihan bill is four to six billion dollars. As tax-payers we resent the idea that our taxation must continue high in order to both support the public schools and to subsidize private education.

In conclusion, let me reiterate our objections to the proposed Packwood-Moynihan bill. The most strenuous objection is the violation of the principle of separation of church and state which would occur should this bill be enacted. Secondly, public education of our nation's youth would suffer as a result and since the overwhelming majority of young people are educated in the public schools, a majority of our future citizens would suffer. Lastly, but by no means leastly, since the sums involved in lost tax revenue would be so enormous, is the cost of this legislation. There are so many more direct ways of ensuring quality education. Our district is probably typical of any large, urban district in that we have been suffering terribly in the last few years, and are in desperate need of teachers, special help for the many handicapped children who are being absorbed into our school system, and some type of education especially suited for the gifted child. These are only a few of the most urgent needs which have very little chance of being met if billions are drained away from tax revenues.

We hope that you will be convinced by our objections and not allow this bill to reach the Senate floor.

Very truly yours,

KATHERINE COHEN,
Parents Association, PS 173Q.

DEAR SENATOR MOYNIHAN: I strongly object to the proposed Moynihan-Packwood bill which would allow tax credits for tuition to non-profit, private schools.

This legislation would undermine the public school system, when it is in need of additional support. I also feel that it is unconstitutional, as it violates the principle of separation of church and state.

I hope you will reconsider your support of this legislation.

Sincerely yours,

Katherine Cohen; Carol Kantro; Gertrude Kalish; Gurjil K. Mander; Leonard R. Nagsen; Barbara Nagsen; Robert Jacobson; Barbara Jacobson; Mr. and Mrs. T. Sharpe; Penni Yenta Cherin; Jاسبinder Dhaliyak; Mrs. Bruce Lieberman; R. Riss; Mrs. Lawrence; Marylin K. Sperling; S. Metelitz; L. Noy; George A. Wade; Shula Springer; Burt Wayne Eisenmann; Mrs. G. Heitmann; Mrs. R. Grieve.

Mr. & Mrs. Thomas Day; Gary/Harold Johnson; Martha Jackson; Gerry M. Dalche; Rose Ann Dalche; Phyllis Siegel; Ettie Gorniz; Sari Radner; Sharyn A. Braunstein; Vivien, & Ming-haw Lin; Pin Yin Chen; Mrs. Markman; Shulri Sugin; Mrs. Jeanette Wade; L. Moy; Irene J. Hinnil; Gerald Heitman; Vickie Blumenfeld; Mrs. Thelma B. Rodriguez; Mrs. Stanley Richter; Gene Fram; S. Hunter; Mrs. Sandra Riemenschnelder; Mrs. F. M. de Guzman; Tim Ensuw; Rose Shustak.

Patricia Bagnati; Nancy Comerford; Bernard Hanisch; S. Hunter; Elaine Yuron; Kostas G. Penesis; Mrs. Bargara Korman; Mrs. R. Mollo; Mrs. F. M. de Guzman; Tobe Gushman; Mr. and Mrs. J. H. Bell; Yancheng Lin; E. Y. Kim; Eileen Keogh; Jim White, M. E. Krause; S. Weinberg; M. K. Ramatehamaiwan; William Kusnetz; Sari Radner; Adriene Gerson; Mrs. Rose Davis; Fred Malin; Mr. and Mrs. Thomas Day.

Harvey Kimpton; L. Siper; Kathlyn Fabriel; James Fortis; L. Liss; Walter D. Smith; Mrs. Michael Borhegyi; Linda Carlson; Linda Salis; Mrs. Diesman; Mr. R. Greene; Della M. Goode; Gluseffe Seirfera; Rosalind Mazner; John M. Eng; David S. Person, Sanden Hamberger; Golda Lerman; Ann Moon; Vivien Lin; Linda Salis; Audrey Selluma; Ann Moon.

Mrs. Genevieve Senono; John Schwartz; S. Hunter; Ann Jagorka; Mrs. L. Lechenstein; Karen Ashkenese; Rita Ackerman; Mrs. Karen Gallo; Phyllis Gruber; Rita Ackerman; Mrs. R. Pagnozzi; Lona Chandrin; Mrs. Elaine Alvo; L. Kornblatt; Mr. and Mrs. Richard Del Favero; Mrs. R. Mollo; Mary Selze; Eveline Davill; Hartke Vardhan; Gloria Gottlieb; America Marcos; Dolores Cohen; L. Siper; Mrs. Wolpin; Elizabeth Kilvin; Yvonne P. Garness; Alice Dony; Marjorie Goldberg; Florence Marks.

JANUARY 11, 1978.

Re Packwood-Moynihan bill S-2142.**THE SENATE FINANCE COMMITTEE,
Dirksen Senate Office Building,
Washington, D.C.**

DEAR SIR: I am against the proposed Packwood-Moynihan bill. I feel that this legislation is unconstitutional as it violates the principles of separation of church and states. I also feel that such legislation would undermine the public educational system at a time when it is in need of additional support.

In a district as small as ours, we must maintain our public schools.

We must save public education!!

We must save our school!!

Very truly yours,

(Mrs.) DELLA GOODE.

STATEMENT OF NATIONAL COALITION FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY

(By Joanne T. Goldsmith, executive director)

The National Coalition for Public Education and Religious Liberty represents 30 civil libertarian, educational, and religious organizations, all of whom support similar goals. A list of these organizations is attached to this statement.

Our member organizations are dedicated to preserving religious liberty and the principle of separation of church and state and to maintaining the integrity and viability of public education. Our primary interest is in protection of the guarantees of the First Amendment to the Constitution which speaks to the basic right of all Americans to practice religion without government coercion, involvement or interference.

The National Coalition for Public Education and Religious Liberty wishes to be sure that this Committee and the Congress are aware that the great majority of Americans firmly oppose the use of government funds to help finance non-public schools. We hope that you will give full hearing and consideration to our point of view.

The organizations participating in this Coalition, representing a broad cross-section of the American people, have consistently opposed all forms of such financial assistance. They have expressed their opposition in many ways, including general educational activities, expressions of view to legislators, support of referenda barring aid to nonpublic schools, and initiation and support of litigation against those legislative measures that have been approved.

These efforts have had a substantial degree of success. The Supreme Court of the United States has invalidated all forms of nonpublic school aid except textbooks, transportation, and health and welfare on the elementary and secondary levels.

The constitutional issue has been addressed by Leo Pfeffer, Legal Counsel to National PEARL. Rather than restate the relative issues, we would remind the Committee that we fully associate this organization with the statement previously presented by Mr. Pfeffer.

The National Coalition for Public Education and Religious Liberty believes firmly that separation of church and state is good for schools and good for religion. To believe that federal control would not follow federal dollars is indeed foolhardy. One of the major complaints leveled against the federal bureaucracy is the amount of control and paper work required by federal programs, educational programs as well as the myriad of other federal programs. From health care services to transportation to the defense department, all complain of the details and justifications required to spend the tax dollar.

We understand that the particular proposal now before the Committee purports tax relief to parents, not direct aid to non-public schools. We believe that this should be understood for exactly what it is: an attempt to circumvent the Constitution without in any way addressing the legitimate need for additional assistance for institutions of higher learning or public elementary and secondary schools.

The National Coalition supports the role of nonpublic schools—their right to exist is not questioned—but their right to tax credits or grants is. We do not believe it right or proper to ask the American taxpayers to support nonpublic schools which would have the effect of draining tax dollars away from the already underfinanced public schools.

There are those who argue that nonpublic school parents carry an extra burden, are somehow "double taxed". Following that idea to its logical conclusion, then those who have no children should not have the responsibility of paying for schools nor should those who don't drive an automobile pay for roads, crossing guards, or traffic lights.

Some say that the constitutional right to send a child to whatever school one chooses, public or nonpublic, loses its value because to choose the nonpublic school one must pay an additional fee. Does that indeed make the constitutional right meaningless? We think not.

The government does not subsidize newspapers or the distribution of leaflets. Does that make freedom of the press any less valuable? We think not.

We believe that we pay taxes for the public good. We are taxed for public purposes such as police, fire protection, roads, parks, medicare and public housing. We pay for schooling, for every child, not just our own. We believe this is good public policy.

We feel that the tuition tax credit proposal would have a discriminatory effect vis-a-vis public school parents and private school parents, in that it would be a distinct advantage to private school parents and might well trigger a stampede from the public schools to private schools. We feel that this could possibly have a corrosive effect on the public schools and could result in the public schools being populated almost entirely by the poor and racial minorities.

Therefore, we oppose this measure on constitutional grounds and on grounds of practical public policy.

PARTICIPATING ORGANIZATIONS IN NATIONAL COALITION FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY

American Association of School Administrators; American Civil Liberties Union; ACLU National Capital Area; ACLU of Connecticut; American Ethical Union; American Humanist Association; American Jewish Congress; Americans United for Separation of Church and State; Anti-Defamation League of B'nai B'rith; Baptist Joint Committee on Public Affairs; Board of Church and Society of the United Methodist Church; Central Conference of American Rabbis; Illinois PEARL; Minnesota Civil Liberties Union; Missouri Baptist Christian Life Commission.

Missouri PEARL; New York PEARL; Monroe County, New York PEARL; Nassau-Suffolk PEARL; Michigan Council Against Parochialism; National Association of Catholic Laity; National Council of Jewish Women; National Education Association; National Women's Conference, American Ethical Union; Preserve Our Public Schools; Public Funds for Public Schools of New Jersey; New York State United Teachers; Ohio Free Schools Association; Union of American Hebrew Congregations; Unitarian Universalist Association.

PHILADELPHIA, PA., *January 18, 1978.*

Re Tuition tax credit bill.

SENATE FINANCE COMMITTEE,
Dirksen Senate Office Building,
Washington, D.C.

(Attention: Michael Stern)

DEAR REPRESENTATIVES: I am writing to my voice my concern over the above referenced bill which I feel has good intentions, but possible harmful repercussions. I am particularly concerned about this credit as it applies to elementary and secondary schools, which I consider a more necessary level of education than college and which have a greater impact on the institution of public education.

First of all, it must be pointed out that sending a child to private or parochial schools is by choice, just as buying a second car, a dishwasher, or taking a ski weekend is by choice. If this is the choice, so be it. But I feel that public subsidy (which, in effect, this would be) of these choices is entirely inappropriate (the Constitutional issue of separation of church and state aside.) If these schools are a family's choice, they must also be their burden. Government does not own this problem. A more appropriate response from public officials would be toward public institutions such as:

Public Education.—I realize that for many people this is not considered an alternative at all. I would like to point out that there are many to whom this is the *only* alternative, and it is from them that this bill will take.

And it is from them—predominantly minority lower income groups—that we will feel the repercussions. The more public education is ignored and treated as a “non-alternative” by government and citizenry alike, the more it says to lower eschelon groups: You don't matter. I need only to remind you of the riots of the 1960's to say that people do respond to not carrying, to the denial of their existence and their dignity and it is often unpleasant when they do. And—when they do—we ALL pay.

I do not object to giving middle income tax payers a break (especially since that happens to be my station in life) but if you do, take it from those who have more, not those who have less! I would welcome an effective tax reform that closed tax loopholes for the rich or offered tax cuts for us all.

Furthermore, our current tax structure is not without benefits to the average middle-income family which allows: deductions of interest payments on mortgages and interest payments on other loans and credit cards, deductions on gasoline for one or more cars, deductions of sales and other taxes, etc. In addition, the homes owned by many middle-income families serve as a good investment, a hedge against inflation via appreciation of property values and also forced savings via increase in equity. There are those who have not even these advantages—this tax credit bill will ultimately take from them and their only source of education for their children.

There is a real question in the the minds of many if public education will survive—I feel this should be of concern to everyone. My two young (white) children attend an urban (Philadelphia) public school where they are in the minority racially. They are safe. they are happy, and they are learning (their scores on national tests have consistently been in the 90 percentile and above.) If I had believed all the negative things I had heard about public education without ever investigating for myself, I too would probably not have considered it a viable alternative. However, I did investigate and found that (at least for the schools in my area) all the things I had heard were either dead wrong or exaggerated to a point that no longer resembles reality. I do not wish to become involved in a discussion of public vs. private education, but I do want to point out that most of the “experts” who were so horrified by my choice of public education have never been in a public school nor sent their children to one.

As for college, it's a moot point whether everyone should go and whether or not it is a necessity for job-finding. Furthermore, the middle-class may not qualify for federal assistance, but they do qualify for many other types of scholarships, many of which go begging because people haven't bothered to seek them out. My primary concern, however, is still what this tax credit would do to public education, which doesn't need any more excuses for not using it. Public education is often given the lowest priority by people in a position to do something about it. This is of concern for two important reasons:

1. Ordinary concern for fellow human beings, who regardless of their economic station in life, deserve a dignified means of improving their station if they so desire (i.e., via education).

2. The ultimate social and economic effects on our cities that continuing to ignore public education may bring, either with a bang: as in the rioting, or with a whimper: as in the slow death of our major urban centers. The availability of good public education affects:

- The choice of home sites by young families.

- The tax base (and thereby the services provided).

- The crime rate (over 50% of all *serious* crimes are committed by juveniles).

- The level of social unrest.

- The influx of new business and the stability of old (and thereby employment levels).

- The stability of neighborhoods.

- The cost of welfare and unemployment.

- The sense of community and responsibility.

- The integration of society via well-integrated schools and ultimately well-integrated neighborhoods.

- The ultimate health and vitality of any area.

Whether one is a potato farmer in Maine or Idaho, or a raiser of hogs in Iowa, it is in the cities of this nation that we find our concentration of commodity and financial markets, our concentration of consumers, our major interlocking systems of transportation, our major ports and crossroads of activity.

It is in the cities of our country that we obtain the crosspollination of ideas and cultures that has been so important to our success in the past and is so vital to the continued survival and growth of not just our cities, but the nation as a whole. We let our cities die at our own risk. This tax credit bill for elementary and secondary school levels of private and parochial education could be a nail in their coffin.

Sincerely,

(Mrs.) KAY ROOT.

STATEMENT OF STEPHEN B. FRIEDHEIM, C.A.E., EXECUTIVE VICE PRESIDENT,
ASSOCIATION OF INDEPENDENT COLLEGES AND SCHOOLS

Mr. Chairman and Members of the Committee: I am Stephen B. Friedheim, Executive Vice President of the Association of Independent Colleges and Schools (AICS). On behalf of some 500 residential, post-secondary educational institutions which comprise the membership of AICS I want to express my appreciation for the opportunity to offer testimony on the several legislative proposals before the Committee which would authorize tax credits for educational expenses.

AICS has quite a diversity of member institutions despite the fact that they are all residential and all are post-secondary schools and colleges. There are no public tax-supported institutions in AICS. All schools and colleges are either private tax-exempt (501(c)(3)) institutions or they are proprietary tax-paying corporations. About one-fourth of the AICS institutions award degrees under authority of the appropriate state education agency in which they are located. Each AICS institution is accredited either by the AICS Accrediting Commission or some other nationally recognized accrediting agency duly designated by the Commissioner of the United States Office of Education pursuant to PL 82-550 and subsequent legislation. Each AICS institution meets the definition of "an institution of higher education" purposes of Title IV of the Higher Education Act of 1965 as amended pursuant either to Section 1201(a) or Section 491(b) of that Act. There are about 300,000 students enrolled in AICS institutions.

Initially let me state that our greater concern is that if there is to be legislation authorizing tax credits for educational expenses that the definition of eligible institutions equally include all accredited residential post-secondary institutions as does the Higher Education Act of 1965 in its definitions so that there will be no discrimination among or between students in public tax-supported, private tax-exempt, or proprietary tax-paying institutions solely by reason of the form of institutional governance. We urge the Committee to incorporate, as do many of the bills before it, the existing standard educational definitions of institutional eligibility for at least three reasons, they are:

(1) there is already in place an educationally sound system of eligibility presently administered by the Office of Education.

(2) it would obviate the necessity of the Treasury Department having to deal with determinations of whether or not the institution has condoned segregation because to qualify for eligibility under the Higher Education Act that determination would have already been satisfactorily resolved.

(3) it would otherwise preclude excessive government entanglement with the education community and particularly that element of that education community that has an affinity with or is controlled by religious institutions as are some of the AICS institutions.

PROPRIETARY SCHOOLS SPECIAL CONCERNS

By way of background, the Committee may remember the satisfaction manifested by the proprietary schools in AICS in 1967 and 1968 when the original Ribicoff-Dominick tax credit proposal, which by definition included residential accredited proprietary schools, was passed by the Senate. However, at that time students in residential accredited proprietary schools did not then have the benefits of the Opportunity Grants, the College Work-Study Program and the National Defense Student Loan Program. In those years, it appeared that a system of tax credits was the only financial entitlement that students in proprietary schools might be able to count on in addition to the infant Guaranteed Student Loan Program.

However, in 1972 important amendments to the Higher Education Act gave equal access to all programs of student aid to students in accredited residential

proprietary schools. The public policy reflected in the 1972 amendments of the Higher Education Act clearly gave equal access to students in proprietary schools to the student aid programs and hence legitimated as a matter of public policy the needs of those students in the programs administered by the USOE. In all candor, the proprietary schools were thus co-opted into the education establishment.

POSSIBLE INCONSISTENT EDUCATION POLICIES

In addition to our basic concern for equal and even handed treatment for all students AICS wishes to express a parallel concern that the educational policy of this country should be reviewed in its entirety and not in the special light of tax considerations only. We are concerned that any hasty enactment of a tax allowance for tuition might preclude the Congress from utilizing the existing flexibility or potential of the Higher Education Act as amended to assist a larger universe of students. This would include particularly those generally defined as middle-income families as for example at page 9 of the Committee print of January 17, 1978. It is our understanding that estimates for a loss of tax revenue through a tax credit system could be as high as \$1.7 billion dollars. In contrast, we have been informed that an expansion of the existing Basic Equal Opportunity Grant Program (BEOG) so that an average family of four with income of \$25,000 annually would be eligible for an educational assistance grant of \$250 at an estimated cost of about \$1 billion dollars instead of an estimated \$1.7 billion dollars in tax credits.

There are already what some people feel are inconsistent educational policies in different departments of the government. For example, present tax legislation permits the deduction of educational expenses only when such education or training makes the individual better or more effective at his present job or occupation. In contrast, the educational opportunities available to veterans under the GI Bill are limited to those educational or vocational objectives that would permit the veteran to attain a new or different job. GI Bill benefits are not available to make veterans better at their existing job. Indeed, such diverse statutory requirements dealing with education policy are paradoxical.

If there is to be a system of tax credits for educational expenses we certainly hope that the statutory language concerning availability of the credit would be on an even handed basis as that permitted under the Higher Education Act of 1965. We would urge therefore that it utilize the eligibility definitions of the Higher Education Act. We urge a continuation of the present philosophy that permits a student under Section 151 to qualify as a dependent whether he attends a public, private or proprietary institution to equally insure that the same student should equally be entitled to the proposed tax credit whether his is at a public tax-supported, private tax-exempt, or a proprietary tax-paying institution.

CONSTITUTIONAL QUESTIONS

Insofar as residential post-secondary student assistance is constitutional, we would respectfully urge the Committee to review two very recent decisions of the United States Supreme Court. They are: *Americans United for the Separation of Church and State, et al. v. Blanton*, No. 77-250 (1977) and *Smith v. Board of Governors of The University of North Carolina*, No. 77-84 (1977). They also appear in Volume 54 L.Ed.2nd No. 1, 1977. Particularly in the North Carolina case, a system of grants has successfully withstood the scrutiny by the Supreme Court on the church state issue. Apparently the Court chose not to apply the more stringent test of the case of *Lemon v. Kurtzman* referred to by the staff in the Committee Report at Committee Report at page 8. Of course, the *Lemon* case was not directly a student aid case as might be tax credits. The *Lemon* case dealt with teachers salaries for secular courses in parochial elementary and secondary schools.

It does appear therefore that in so far as post-secondary education is concerned that equality of access to a grant and loan for all students in public, private, non-sectarian church related, and proprietary schools has thus far weathered a realistic constitutional test. There may be on the other hand, certain factual differences in the universe of elementary and secondary schools which might call in to play the more stringent tests of the *Lemon* case. For example, in the elementary and secondary school system there is not the existing system of accreditation and eligibility for those schools which there is for post-secondary institutions under Title IV of the Higher Education Act. Therefore it may be necessary at the elementary and secondary school level for the Treasury Depart-

ment to insinuate itself into this type of schools and particularly the private and perhaps parochial schools such that there might be a government entanglement with religion.

While elementary and secondary are not our direct concern, we note again that it would be paradoxical to permit the present deduction under Section 151 but to deny the proposed tax credit solely by reason of the form of governance which might be proprietary tax paying rather than private tax exempt or public tax supported. Such an exclusion might provoke other constitutional questions or invidious discrimination or possibly no rational basis for the distinction.

The present eligibility definitions of Higher Education Act are tested and have several advantages. These include:

(1) They are already in existence and no additional administrative entity is required.

(2) They would avoid any entanglements by the Treasury Department with the post secondary educational system of this country.

(3) It would preclude segregated institutions since it is impossible for an institution which is accredited to become an eligible institution of higher education as defined by the Higher Education Act because of the necessity of certain affirmations required by HEW.

In this connection, we are pleased to note the reference in the statement by the Treasury Department through its acting Assistant Secretary Lubick of January 19, 1978 who noted that some schools "have not foregone tax exemptions because of segregation, but because they are profit making." By profit making I assume he means tax-paying rather than tax-avoiding or tax-consuming.

AICS would support any even handed program which would provide educational assistance to all students and which would be consonant with the general educational policies of the United States. Thus, we suggest that there are some present inconsistencies in the tax law which might be further examined by the Committee prior to enactment of a system of tax credits. We would also hope any system of tax credits or deductions for that matter, would in no way interfere with the present administration of other educational programs of student assistance or inhibit their expansion particularly with regard to middle-income students.

MIDDLE INCOME STUDENTS DO ATTEND PROPRIETARY SCHOOLS

Somehow, there is a misconception that residential proprietary schools, particularly those which are vocationally oriented, do not have an appreciable increment of middle-income students. This is an erroneous impression. For example, approximately 20 percent of the students in the AICS schools have had two or more semesters of college. Many times they are not college drop outs. In most cases they are transfers who have made a rational decision to seek specific job oriented education rather than mere liberal arts training which offers no specific occupational hopes or aspirations. The form of governance of the educational institution (*i.e.*, public tax-supported, private tax-exempt or proprietary tax-paying) is in no way related to the complexity of the educational program or the legitimacy of the academic degree. For example, right here in the District of Columbia there is South-eastern University, accredited by AICS which is a non-profit tax exempt 501(c)(3) institution with a Congressional charter.

A few blocks away is Strayer College, an accredited four year proprietary tax-paying institution with a long history of service to the residents of the District of Columbia and surrounding states. The side by side existence of these two long established institutions illustrates how baseless it is to attempt to measure or to exclude an institution solely by reason of its form governance, particularly, perhaps that it might be a proprietary tax-paying institution rather than a private tax-exempt or public tax-consuming institution.

TAX CREDIT EFFECT ON TUITION COSTS

There have been some serious concerns expressed concerning the possibility that in the event of a tax credit it could result in increased tuition costs by reason of the tax credit. We would respectfully point out to the Committee either the apparent success or nonnecessity of the language adopted by the Congress in the Higher Education Act in the 1968 amendments with regard to proprietary schools participation in the National Defense Education Act Loan Program. There were those who expressed the fear, which proved groundless, that proprietary schools by reason of participation in the NDEA Loan Program might increase tuition. Section 491(b)(1) of that act requires that "any

proprietary institution of higher education which has an agreement with the Commissioner containing such terms and conditions as the Commissioner determines to be necessary to insure that the availability of assistance to students under this Title has not resulted and will not result in an increase in tuition, fees, or other charges to students."

This provision, which has proved to be unnecessary, nonetheless might assuage some critics of the tax credit program. On the other hand, the Treasury Department to directly enter into such agreement might again insinuate the Federal Government unnecessarily in the affairs of higher education generally and might constitute an unacceptable degree of entanglement of religious institutions. Utilization of the existing USOE eligibility system would make such entanglement unnecessary.

Just as there has been a Congressional statement with regard to a prohibition of increasing tuition merely by reason of participation in a program, we would hope that in the event of enactment of a system of tax credits that the Congress would include some assurance to the post-secondary education community that it is in no way intended to inhibit the further expansion or at a very minimum a maintenance of effort of other direct programs of student financial assistance. Also we would suggest that taking into account the changing age of our population and the needs of more mature students who must be employed while pursuing an education, we would hope that any system of tax credits would contemplate part time students. A larger and larger percentage of the population attends post-secondary education on a part time basis only. Finally, we suggest that the Committee may wish to direct their attentions to the real needs of graduate and professional students. Indeed, it would seem that this group of students, already encumbered with indebtedness through insured loans and having exhausted their access to grant programs, may be in fact the neediest group of all with regard to tax credit assistance.

CONCLUSION

AICS as a small organization representing only some 500 post-secondary, residential institutions as compared, for example with the near 3,000 colleges and universities which are so ably represented by the American Council on Education acknowledges that the larger issue or whether or not there will be in fact legislation enacted permitting a tax credit for education expenses is in fact a public policy question beyond the heft of AICS. We can only express a concern that if there is to be such legislation that it be extended to include, in an even handed manner such as the Higher Education Act of 1965 as amended, all students in accredited post-secondary residential institutions whether they be public tax-supported institutions, private tax-exempt institutions or proprietary tax-paying institutions. We also would hope that the Committee would enact affirming language which would insure that there would be no inhibition at the expense of other aid programs of higher education which can also embrace middle income students and that the Committee would include in any tax credit program part time and graduate students.

We would be happy to respond to the full extent of our capability to any questions or data requests directed to us by the Committee or its staff.

Thank you again for the opportunity of giving this testimony.

Respectfully submitted.

STEPHEN B. FRIEDHEIM, CAE.

STATEMENT OF RAYMOND NATHAN, DIRECTOR, WASHINGTON ETHICAL ACTION OFFICE, AMERICAN ETHICAL UNION

The American Ethical Union is a national religious federation, with member societies throughout the United States. We believe strongly in the constitutional principle of separation of church and state, and consider S. 2142 and similar bills in direct violation of that principle. For that reason, we urge the Finance Committee and the Senate to reject these proposals.

The Supreme Court ruled in 1973 that an almost identical New York State law had the "impermissible effect of advancing religion," and therefore violated the First Amendment. S. 2142 and related bills would have the same impermissible effect.

They would take tax money paid by the parents of children who go to free public schools, and put it in the pockets of parents who send their children to church-affiliated and other private schools.

Under the proposed legislation, a family paying \$1,000 a year tuition for each of four children in parochial school could claim a \$2,000 tax credit. A rough calculation shows that if their gross income was \$17,850 and they used the standard deduction, they would pay no income tax whatsoever. Meanwhile, a family in identical economic circumstances but sending its four children to a free public school would have to pay their full tax obligation of \$2,000.

Clearly this is discriminatory, and an unconscionable use of an estimated \$4.7 billion in taxpayers' money. We hope it will be rejected as bad public policy.

STATEMENT OF THE OHIO COUNCIL OF UNIVERSITY PRESIDENTS

This Statement sets forth the views of the Ohio Council of University Presidents on S. 311 and S. 2142. The Council believes the concept of a tuition tax credit is not in the best interests of universities, students and students' families.

Although this Committee has before it two bills establishing tuition tax programs, the overall effect of both upon higher education would be equally debilitating.

The purpose for which tuition tax credits are intended must be fully analyzed before any further consideration can be given to this marked departure from federal policy. At a time when institutions of higher learning are hard pressed with increasing financial burdens, a tuition tax credit, which is touted as helping the slowly sinking middle class, surfaces. A tuition tax credit may be a justifiable social policy, but it is not a fair and equitable solution to the nagging financial problems of post-secondary institutions and of the middle class. In fact, it is an over-simplification to equate tax credits with assistance to higher education. Such a credit may be a waste of limited federal resources, especially when there are other effective and available avenues to accomplish the credit's intended goals.

Aside from the obvious revenue loss estimated at anywhere between 1.7 and 4.7 billion dollars for the first year, the subsequent possibility for a slow death of already existing or potential federal assistance programs must be considered.

We are not ignoring, in fact we totally recognize and sympathize with, the plight of the average taxpayer, and it is for this reason that we see tuition tax credits as an inefficient and ineffective means of providing federal assistance to those who are most needy. According to a Congressional Budget Office study entitled *Post-Secondary Education: The Current Federal Role and Alternative Proposals of 1977*, the relief provided by a \$250 tax credit would be disbursed in the following manner:

	Percent
Those earning less than \$9,000-----	5
Those earning between \$9,000-\$15,000-----	7
Those earning between \$15,000-\$20,000-----	9
Those earning above \$20,000-----	79

It is generally accepted that the average annual income is between \$7,000 and \$15,000. Thus the average taxpayer would hardly be the primary beneficiary of a tuition tax credit!

Given the already precarious position of higher education and the historical role of the federal government in preserving and assisting these institutions, it is apparent that public expenditures should be used to benefit those areas which need financial assistance the most. This is especially valid when resources are limited, as is the case of federal higher education dollars.

Furthermore, there has been no substantial study made of whether a tuition credit will encourage enrollments. We do not see, when most average income families are faced with immediate cash flow problems, how a tax credit will help. Since students and their families are finding themselves increasingly pushed by escalating costs, institutions will not experience increased enrollments. If tuition costs increase, then, any benefit to the middle class through tuition tax credits will be short-lived.

The issue confronting Federal policy makers is not whether more federal funds should be channeled to higher education, but rather what is the most efficient vehicle to accomplish such Tuition tax credits are improperly targeted and inefficient. The proposed plans would only serve to increase further the labyrinth of federal education assistance policy. If the credit is adopted, it is likely Congress will be subjected to continuing efforts to increase the amount of the credit, which, if successful, will perpetuate a larger drain on U.S. tax revenues. Public

policy, it has been argued, should be directed by public processes, not through "back-door financing" as would be the case here.

A tuition tax credit bill would only exacerbate an already serious problem. Credits of this nature make no distinction between the wealthy and the needy. Eventually this drain on our public resources must affect existing federal assistance programs, making it increasingly difficult for those who really need federal assistance to obtain college degrees.

Therefore, we believe the best way to ease the problem of increasing costs of post-secondary education is to expand existing federal programs to better account for the needs of the applicant and his family. We see no reason to involve another federal agency, here the Internal Revenue Service, in the administration of educational assistance. The Council firmly supports federal programs which will uphold the basic tenets of our educational system, not those such as the tuition tax credit which may perpetuate its demise.

UNIVERSITY OF CALIFORNIA, BERKELEY,
January 24, 1978.

MICHAEL STERN,
Staff Director, Committee on Finance, Dirksen Senate Office Building, Washington, D.C.

DEAR MR. STERN: Enclosed is a reprint of a long article I wrote five years ago on the subject of college tuition credits and other federal income tax allowances. I send it to you with the thought that it might be of some utility in connection with the hearings this month and the subject as it arises in your office in general. I had hoped to volunteer a statement or to send you excerpts or an edited version of this article for your consideration and that of the Subcommittee on Taxation and Debt Management, but I was unable to prepare anything in time for the hearings. If there is still time for such a submission, I would be very grateful if you would let me know. Or, if it is possible for me to submit the article as it stands, I would very much like to do that.

I must admit, there has been some shift in my views since the article was written. Since that time two of my children have become college students and the immensity of the burden of their tuition and other expenses, even for someone in a relatively high income bracket, has come home to me with considerable force. Compared to expenses for psychiatric care and psychoanalysis for my then wife some years ago, the college expenses now are approximately twice as heavy because of the absence of any deduction or other allowance for the college expenses.

I should be very grateful if you could arrange to give me any available copy of the hearings or statements submitted in connection with the hearings on January 18-20 on the various Senate bills to provide tax relief for persons who pay school tuition. I should like them for my own research and for the use of my students.

Thanks very much for your attention to this request and this submission.

Very truly yours,

JOHN M. McNULTY, *Professor of Law.*

Enclosure.

[From the California Law Review, vol. 61, No. 1, January 1973]

TAX POLICY AND TUITION CREDIT LEGISLATION: FEDERAL INCOME TAX ALLOWANCES FOR PERSONAL COST OF HIGHER EDUCATION

(By John K. McNulty*)

[Footnotes 2 to 273 have been omitted from this reprint and may be found in the committee files]

The federal income tax law does not give an allowance for personal costs of ordinary higher education.¹ College and university tuition, fees and other

*Professor of Law, University of California, Berkeley. A.B., Swarthmore College, 1956; LL.B., Yale University, 1959.

¹The federal income tax does allow a deduction for some expenditures for supplementary, continuation, or refresher courses as trade or business expenses or costs of producing income. See Treas. Reg. § 1.162-5 (T.D. 6291, amended by T.D. 6918, 1967) "Expenses for Education." See also *Coughlin v. Commissioner*, 203 F.2d 307 (2d Cir. 1953). However, most expenditures for higher education—tuition and other costs for graduate as well as undergraduate students—are treated as nondeductible "personal, living, or

costs usually cannot be deducted or otherwise used to reduce federal income tax liability; rather, they must be paid with after-tax dollars.

Three times in recent years the United States Senate has passed a bill that would give some form of federal income tax allowance for the personal costs of higher education. Each time House and other objections killed the bill in conference. Nevertheless, such proposals revive, claim popular appeal and merit careful, systematic policy analysis—more of which remains to be given. This Article examines a variety of proposals for a higher education federal income tax allowance, both because of their own importance and as examples of problems and opportunities presented by other federal income tax allowances or subsidies such as tuition tax credits for elementary and secondary education. The analysis isolates several of the purposes a higher education tax allowance might serve—perfecting the definition of taxable income; improving tax equity; subsidizing education; redistributing income, wealth or educational opportunity; correcting misallocation of education resources—and examines the issues and approaches each purpose suggests. The wisdom of involving the federal government rather than leaving these problems to state and local governments is also discussed. Finally, the effectiveness of a tax allowance is compared to a direct government subsidy.

I

LEGISLATIVE BACKGROUND

The recent history of proposals for an education allowance in the income tax goes back at least as far as the early 1950's when efforts were made to obtain special tax deductions or exemptions for parents of college students. These efforts were motivated by the well-intended but rather blunt notion that government should help families burdened with the costs of higher education and by the desire to aid educational institutions, many of which were facing or anticipating severe financial problems.

A tax allowance in the form of a deduction from income provides an income-variant benefit under a graduated income tax such as ours, a benefit that gives greater tax relief to a high-income taxpayer than to a low-income taxpayer. A \$100 deduction, for example, saves \$70 tax for the high-bracket taxpayer whose marginal rate reaches 70 percent, while only \$20 for the low-bracket taxpayer whose marginal tax rate climbs only to 20 percent. And it saves nothing at all for someone who pays no tax—either because he has no income, because other allowances fully offset his income or because he evades tax. Furthermore, if an education expense is allowed only as a personal, nonbusiness deduction like that for charitable contributions or medical expenses, it is unavailable to a taxpayer who does not itemize his deductions but elects the standard deduction instead, a choice made by a large proportion of taxpayers. Perhaps due to recognition of the income-variant benefit of a deduction and its unavailability to many taxpayers, no special deduction for college expenses has been enacted, either as an additional exemption per se, or as a personal or as a business deduction. However, by virtue of the child's status as a student, a child remains a dependent for whom the parent can claim a dependency exemption if the parent contributes over half the child's support, even though the child has attained the age of 19 and has substantial income.

The movement in favor of a deduction soon transformed into a movement favoring an income tax credit. A credit, unlike a usual deduction or exemption, gives

(Continued)

family expenses" under *Int. Rev. Code of 1954*, § 262 and accordingly cannot be deducted. Nor can they be added to the basis of an asset to create a tax loss or to reduce gain upon eventual sale of the asset or to give rise to depreciation or amortization deductions.

For a review of the tax treatment of personal educational expenditures, see Goode, *Educational Expenditures and the Income Tax* in *ECONOMICS OF HIGHER EDUCATION* 282-84 (Mushkin ed. 1962). See also Heckerling, *The Federal Taxation of Legal Education: Past, Present, and Proposed*, 27 *OHIO ST. L.J.* 117 (1966); Wolfman, *The Cost of Education and the Federal Income Tax* (Proceedings of the Twenty-Ninth Annual Judicial Conference, Third Judicial Circuit of the United States), 42 *F.R.D.* 535 (1966) [hereinafter cited as Wolfman]. See generally CHOMMIE, *FEDERAL INCOME TAXATION* 79-83 (1968); Chommie, *Federal Income Taxation: Transactions in Aid of Education*, 58 *DICK. L. REV.* 93, 189, 291 (1954); Note, *Federal Tax Incentives for Higher Education*, 76 *HARV. L. REV.* 369, 382 (1962) [hereinafter cited as *Federal Tax Incentives*]. Of course, the taxpayer's personal costs of higher education may be lessened by federal income tax allowances available to institutions of higher learning in such forms as exemption from tax on their income, charitable contribution deductions allowed to benefactors of such institutions, or by the exclusion from the student's income of qualified scholarships.

an income-constant benefit. The creditable amount is subtracted directly from the taxpayer's bill, not from his income. Consequently it gives a "dollar for dollar" benefit to high- and low-income taxpayers alike, so long as both have precredit tax liability equal to or in excess of the available credit. A tax credit can also take the form of a sliding credit that diminishes with income or with expenditure on education or on some other basis.

A tax credit proposal was put forward before the House Ways and Means Committee on January 15, 1958 by John Meck, acting as Chairman of the Committee on Taxation of the American Council on Education. His proposal would have limited the credit to 30 percent of tuition and related fees, with a maximum credit of \$450 allowable. Meck reported substantial support for the credit, especially from parents and college presidents; he also admitted some opposition, coming from at least two directions. Some theoreticians objected to further eroding the tax base by any allowance for education. The Treasury, perceiving much the same effect, opposed a revenue loss which it then estimated would be from \$150 to \$500 million in taxes each year. The tax credit did not become law at that time.

By 1964, supporters of the tax credit approach had further refined the technique, and it was vigorously championed in the Senate by Senator Abraham Ribicoff. The tax credit then proposed (and rejected by the Senate) involved a percentage of tuition, a flat dollar ceiling of \$325 and a graduation clause that withdrew the credit, by steps, as a taxpayer's income increased. The scale of diminishing percentages of tuition and the ceiling of \$325 were designed to provide a relatively greater tax benefit for education obtained at a state college or university or other low-tuition institution, where the tax credit would equal a higher percentage of educational expenditures than at a high-tuition school. Above the point at which the \$325 ceiling took hold, no further credit would result from added expenditures on education. Senators with such apparent diversity of views as Humphrey and Goldwater have supported the sliding credit plan.

The tax credit approach was opposed by some who thought that even though it might enable schools to raise tuition levels or otherwise to release some scholarship funds for more needy students, it would fail to provide aid to those who needed it most: to low income families, who would have little or no tax liability for the credit to offset. Consequently, in 1967, Senator Prouty attempted to amend the Ribicoff bill expressly to provide a refund to a taxpayer whose tax credit(s) exceeded his tax liability. Although the Prouty amendment was rejected by the Senate, the refund credit became the model for later proposals, including those passed by the Senate (but defeated in conference) in 1969 and 1971.

The 1971 version of the tax credit bill, as passed by the Senate, permitted a 75 percent credit for higher education expenses up to \$200, an additional 25 percent for expenses of \$200 to \$500, and an additional 10 percent for expenses of \$500 to \$1500. (Thus the maximum credit allowable would be \$325.) The credit could be prorated among several people bearing the cost of a single student's education. The credit would phase out for high-income taxpayers; specifically, the credit would be reduced by an amount equal to one percent of the taxpayer's adjusted gross income over \$25,000. Expenses of higher education were defined to include tuition and fees, but not meals, lodging, or other personal expenses. Eligible institutions included those offering post-12th-grade instruction: colleges and universities and also many business, trade or technical schools. The amount of higher education expenditures eligible for the credit would be reduced by scholarships or veterans' benefits not included in gross income. If the credit exceeded the taxpayer's tax liability after reduction by other credits, the excess would be refunded to the taxpayer. Finally, no trade or business expense deduction could be taken under I.R.C. § 162 for an education expense for which a credit had been taken unless the taxpayer waived the credit. This version of the tax credit proposal, benefiting from the legislative processes of prior years, is the most sophisticated piece of such legislation yet passed by the Senate. Nevertheless it failed to be enacted, only to reappear in 1972 for consideration. It failed once again. Support for such a tax credit, viewed perhaps as middle class legislation, reportedly is growing since the passage of substantial federal grant and loan programs in 1972 for the primary benefit of low-income individuals.

Tax credit legislation and deduction proposals are by no means the only forms of federal income tax allowance that have been proposed to Congress. Other suggestions have included the following: an extra personal exemption for students or their parents; a rule allowing a student to capitalize education expenses and

amortize them through annual deductions over the "useful life of that education;" deferral of income tax otherwise due during student years, no matter what the source of the income; an outright cash scholarship of up to \$1,200, reduced by the amount of income tax paid by the student or his family for the prior years; government loans to students to be repaid by means of a surtax on their incomes during later earning years; permitting tax deductible contributions over a period of pre-college years to a trust fund and taxing only the principal upon termination or withdrawal, thus postponing tax and allowing interest to accumulate tax free; a federal income tax credit for payments of state taxes, or any new or increased state taxes levied to finance education; and still more could be noted.

Another tax-related solution to the problem of higher education costs is the growing practice by colleges and universities of deferring tuition payments until after graduation. Under one plan, a student agrees to pay the school a percentage of his income annually for up to 35 years. Thus, a graduate with high earnings may wind up paying more than a low wage earner. The maximum obligation is 150 percent of the deferred amount plus interest. Low-income students must at least repay the basic tuition without interest.

The Internal Revenue Service treats the deferred tuition as a loan to the student, rather than as taxable income. Interest on the delayed amount is deductible; principal payments are not. The difference between the more affluent graduate's high payments and the poor alumnus' relatively low outlays will not be considered taxable income to those paying less and will be treated as deductible interest for those paying more.

Although these other proposals have been studied and have gathered some support, the tax credit plan seems to have no equal for endurance and vitality. Some of the goals it seeks to accomplish probably are shared by the other plans: other goals may be peculiar to it. Its merits and defects may in part stem from its character as a tax allowance rather than as an outright payment, as a subsidy nominally to students rather than to schools; other of its advantages and disadvantages may be peculiar to its tax form as a credit rather than as a current deduction or amortization allowance.

II

POSSIBLE PURPOSES OF A HIGHER EDUCATION TAX ALLOWANCE

To evaluate proposals for a higher education tax allowance, it is critical to grasp the goals the allowance is intended to serve because they will affect several characteristics of the legislation: the scope and form of the allowance, the beneficiaries of the allowance and the period for which the allowance will be given. The goals of the various tax allowance plans that have been proposed have not been clearly articulated or isolated. Nevertheless, a review of the form and nature of these proposals give some clue to the purposes they are designed to serve.

One purpose sometimes suggested is to improve the tax law's definition of taxable income by allowing a current deduction, or other allowance such as amortization deductions, for education as a cost of earning income. This would aim at reversing what many perceive as a bias in the tax law against "human capital" as distinguished from other forms of capital. A second purpose is to make the tax system more equitable by focusing on the different taxpaying abilities of students and their families as compared to other taxpayers. A third prime purpose of tax allowances seems to be to subsidize educational institutions or students, and the families of students enrolled in educational institutions, or both. A fourth purpose may be to increase access to education for certain people, particularly the poor and the culturally deprived; in other words, to redistribute educational services. Such redistribution may be sought on the basis of wealth or across geographical lines. A fifth and related purpose may be to correct a misallocation of resources in the economy. Thus, for example, relative costs and benefits between private and public institutions of higher learning and among their students may be rearranged to provide more support for private education.

An assessment of the merits of a tax allowance and of the tax credit plan in particular requires an examination of the purposes sought to be served and reasons for federal government support for higher education, an evaluation of the tax allowance technique and its effectiveness in reaching its intended goals, and a comparison with other support forms.

A. To Perfect the Definition of Income

The federal income tax has its roots in an effort to identify and to tax something that might loosely be called "net income," gross income minus the costs of producing it. This effort suggests one theoretical ground for an income tax allowance for education costs: to perfect the income tax law's definition of taxable or net income. To do this, the argument runs, the tax law should allow a student either currently to deduct the expenses of his education or to capitalize them and to amortize that amount over the useful life of the education on the theory that the cost of education represents the cost of producing later income. By analogy, if a taxpayer purchases equipment or real property with a limited useful life for business use or for the production of income, his investment cost would be amortized and charged off against income. Deductions against income would be allowed over the useful life of the asset acquired, in amounts eventually equal to the historic investment cost. Consequently, receipts would be reduced to "net income" and only the "income" component would be taxed; no tax would be imposed on a return of capital invested. Likewise, runs the argument, an investment of money in education constitutes an investment in "human capital," and this investment in human capital should be depreciable since it has a limited useful life in income-producing activity.

Moreover, permitting a current deduction or eventual depreciation or amortization deductions in an amount equal to investment cost would correct the federal income tax law's apparent bias against investment in human capital. That bias can be seen not only in the failure to allow deduction of education expenses but more generally in disallowance of other expenses incurred in earning income by personal efforts—commuting and clothing expenses along with the other added costs incurred when one gives up a life of leisure for work. This bias against investment in human capital also can be perceived in the tax law's apparent favoritism for income earned by capital. The favorable rate of tax on long-term capital gains, the full deduction of business costs, and of interest, the advantageous timing given to some capital costs through an election to deduct them currently (rather than to capitalize and deduct them later), the low tax on net gains but high deduction of net losses on certain transactions in business-related property, the percentage depletion allowance for mineral extraction, opportunities to shift or split income from property by gift or trust or incorporation, opportunities to defer tax on gains in property by timing their realization or by making nonrecognition exchanges or sales and reinvestments, and the tax-exempt status of interest on municipal bonds can all be viewed as products of a bias in the tax law that runs against investment in human capital. An education expense deduction or amortization rule would help balance the scale to the extent expenses of education are costs of producing income, investments with a limited useful life, and costs of producing an income-generating asset that gradually is sold over the life of the person educated.

1. What Costs Should Be Included?

If a deduction (or capitalization and amortization) is deemed desirable to improve the definition of income, a significant difficulty is determining what portion, if any, of education expenses such as tuition and fees does in fact amount to a cost of producing income, as distinguished from personal consumption or personal investment expenditures. For a professional student such as a law student, would income-producing costs include all his tuition and educational or instructional fees? Or, are part of those fees paid to admit him to the purely personal delights of legal instruction, the elevated social status of the legal profession and related disciplines, bettered marital opportunities, parental approval, daily classroom entertainment, generally sharpened intellectual powers, and other personal fringe benefits of a legal education? Education expenditures, in other words, can be seen as, at least in part, expenditures for present or for future consumption. To separate the investment component from the consumption component of tuition charges, even for vocational, professional, or graduate school, proves very difficult, if not impossible.

The difficulty of estimating what portion of tuition and fees paid by a college student pursuing a nonprofessional or nonvocational curriculum appropriately constitutes "investment" in an income-producing asset, rather than an expenditure for current, or future consumption, proves still greater. It might seem to some that the costs of an undergraduate's work in General Studies, English, or history are insufficiently connected to specific income-producing activities to be regarded as a cost allocable to such income and therefore must be regarded as

personal in character just like the costs of his childhood food and shelter, music lessons or summer camp.

This reasoning may appear to apply even more forcefully to the student whose college education is not likely to or does not lead to production of any taxable income at all. The college graduate who does not work outside the home, for example, might be happier, more cultivated, more likely to marry "better" or to raise children more elegantly because of higher education, but most or all those benefits, any, are unproductive of present or future income actually taxable to him or her. A modern example might be a post-graduate drop-out, or someone who radically changes career to one not requiring or using college education very much at all.

Some undergraduate education may in fact yield future income, either directly or indirectly. But it is certain that some portion of college tuition, however difficult to determine what portion, purchases immediate or future recreation, pleasure, social, psychic, or economic benefits that will never be taxed as income to the student. That portion, great or small, should not be deducted, or capitalized and amortized, if the purpose of an education expense deduction is to perfect the law's definition of taxable income.

There remains the question whether expenditures other than tuition and fees should properly be considered as investment costs, in whole or in part. What about student health, student athletic or student government fees, for example? Book charges? Travel costs? Bar review and bar examination fees? More importantly, what of expenditures for food and shelter? One could say that costs of food and shelter are inherently personal expenses that cannot be treated as costs of producing income, since they would exist whether or not the person remained in school. But one might also argue that for people not attending school, such food and shelter costs would be borne out of earned income that the student must forego for the sake of academic life. The reasoning suggests that a deduction possibly should be allowed for food and shelter costs paid out of capital (savings) or borrowed funds, although the tax law usually does not take this approach, and the question parallels the issue of deducting or capitalizing foregone income itself.

What of the student's foregone income? Can foregone income be seen as a "cost" of education or vocational training such that a tax basis should be allowed and a current deduction or amortization of capital be permitted? One is tempted to answer that foregone income cannot properly be viewed as a tax cost of higher education, since the foregoing of such income is matched by the absence of any tax on it, so that the taxpayer and government are "even." But that answer is not wholly satisfactory, because the high school or college graduate who goes to work rather than attending college or graduate school earns a salary, pays tax on it, and has "after-tax-dollars" left over, dollars that the student, at least in the short run, must forego. This deficiency could be viewed as an investment of after-tax-dollars that the student should later be permitted to recover tax free. The federal income tax law, however, does not elsewhere acknowledge the loss of, or failure to receive, the after-tax dollar component of lost or unreceived income. Moreover, to acknowledge the after-tax-dollar component of foregone income in the calculation of an education expense allowance would be politically difficult, technically hard to regulate, inequitable by comparison with other comparable situations, and therefore theoretically unsound.

2. Compensating Tax Benefits

An argument for education expense deductions predicate on the tax law's perceived bias against investment in human capital threatens to run aground on an even more fundamental criticism: perhaps the tax law is not biased against education investment at all. First of all, a number of explicit, special provisions in the federal income tax give direct benefits to students, their families, or to other participants in the business of education. Perhaps the most obvious is the exclusion of scholarships and fellowships from gross income. Similarly, the I.R.S. regards tuition postponement as a loan and therefore not includible as income to the student. Another favorable provision is the additional exemption afforded parents of a student who has attained the age of 19 and is, therefore, no longer eligible for an ordinary exemption as a dependent "child." For that matter, the personal dependency exemptions and the standard deduction may well reflect an education expense component of the cost of living. Other tax rules of considerable benefit to education in general and sometimes to students in particular include the exclusion from income of gifts which often comprise a large part of a student's means of support, and even, though less directly, the charitable contribution de-

duction for gifts to educational institutions, the tax exemption for income of educational institutions and teachers' retirement fund associations. Other tax provisions, such as the exclusion of interest on state and municipal bonds and the deduction for state and local taxes indirectly assist public-supported institutions of higher learning by easing the financial burden on state and local governments, thus eventually deducting costs to students. Income splitting through contributions of income-producing property to a trust, the income from which is not taxed if used for the college education of the settlor's child, is another device that may be used to advantage by students and their families. Also, Social Security benefits, which are tax free, are increased or maintained longer if a child of a deceased enrollee qualifies as a student.

Much more important to the theory of a tax benefit for education viewed as an investment in human capital, however, is an *implicit* allowance in the federal income tax law: the failure to tax a student on the increase in his earning power and the receipt of other benefits from education, to the extent they exceed his cost, as those forms of "income" inure to his benefit. Our tax law does not say that a student realizes income as he learns information or skills or as he successfully passes courses or even when he receives his degree or certification or license to practice a lucrative profession. Yet the student grows in net worth as he passes through these stages in the educational process; he or she enjoys an implicit capital gain. Nevertheless, the tax law does not tax unrealized income, imputed income, and most nonmarket benefits, all of which a truly comprehensive income tax would include in its base. Present law thereby exempts from income a very important flow of benefits and increase in worth enjoyed by a person who gets an education.

Another unstated exclusion is that a student is not taxed on the difference between what his education actually costs and what he pays for it. Such difference does exist. Even at an expensive private college or university, the student pays for only a fraction of the value of what he receives. At a state college or university that charges little or no tuition to resident students, the gap between price and the cost or value of what is received becomes enormous. And the student receives these benefits tax free.

These unstated exclusions, of course, often amount only to a deferral of tax, not to total forgiveness. A student whose earning power is increased by an excellent legal or medical, vocational or general undergraduate education will eventually pay more tax than his less educated counterpart who skipped college to go to work, if and when the educated person earns income and thereby "cashes in" on his educational benefits. If he earns more than the high school graduate, he will pay more tax and, if the graduated tax rate structure works according to theory, he will pay not only proportionately but progressively more tax.

At least two cautionary points must be added. First, the deferral does in fact turn into total forgiveness if or to the extent the college graduate gets a pay-off on his education in nontaxable forms. So, a college graduate who gets more out of life, and who brings the benefits of education to his spouse, children, parents, siblings, hobbies, and nontaxable activities, will never pay tax on those benefits. Nonmarket economic benefits, including self-service, family, social, cultural, and political advantages and pleasures, even the option to continue education or training at still higher levels, all can inure to the benefits of the educated or trained person as a result of the education or training. Other income, received in cash or its equivalent, goes untaxed if it falls within an explicit allowance or exclusion such as that for interest on some state and local bonds. So, the unstated exclusion does more than merely defer tax on some financial as well as non-financial benefits of education, because those benefits—through other characteristics of our tax law—escape tax, even when they eventually are "realized."

Secondly, a deferral of tax can be virtually equivalent to forgiveness. For example, a deferral of tax for 15 years for a profitable taxpayer is approximately as valuable as total forgiveness would be, since his retained tax money earns compound interest or investment profits. For the student who would have had to borrow to pay the tax during his student years, deferral avoids the necessity to pay interest on borrowed funds. Thus, deferral of tax on the income that accrues as a person becomes educated amounts to a very large tax allowance and thereby to a subsidy for students and the education "business." Also, a student may manipulate the taxation of any financial pay-off on his education by levelling it over years, timing the realization for low-bracket years, shifting some of it to low-bracket taxpayers, turning it into capital gains, and otherwise reducing the tax cost from what it would have been if imposed when accrued.

However much the unstated exclusion may seem to compensate for the absence of amortization treatment of education costs, the tax law's disallowance of such costs does not stem from a conscious recognition of the unstated subsidy. That subsidy itself may be nonrational or even perverse in its operation; the tax treatment of it and of outright education costs appears equally incoherent or perverse. The two together have not been shown to provide a good overall system. To perfect the definition of taxable income, capitalization and amortization of the investment component of education expenditures should be allowed. The unstated exclusion for bargain pricing of education or for unrealized capital gain in the human asset—a tax break by no means peculiar to subsidies for education or for investment in human capital—should be evaluated separately and corrected, or not, apart from the question of amortizing education costs. There follows an effort to develop a model of an appropriate tax system consistent with the purpose of improving the definition of taxable income by making an explicit allowance for the personal costs of higher education.

3. Implications of Purpose To Improve Definition of Income

a. Identity of recipient.—Some implications for the nature of the tax allowance flow from focusing on perfection of taxable income as the goal to be served. To illustrate, the tax allowance should be given to the person whose income will be affected by the education, namely the student—rather than to the student's parents or others who might be given the allowance were a different goal to be served. Even if the student does not pay for his own education, expenditures by his parents, spouse, or other benefactors could be viewed as gifts to the student and deductible or capitalized in the same way it is possible for a taxpayer to depreciate an asset acquired as a gift or purchased with gift money and used in a trade or business or in the production of income.

b. Form of allowance.—Given a goal of perfecting the definition of income, the allowance should probably take the form of a deduction, more particularly deductions, from income over the useful life of the education, rather than as a credit or some other form. To more accurately reflect the fact that some portion at least of education expenses functions as a cost of producing later income, the allowance should enable a person who makes expenditures for education that increase his earning power, or that are intended to increase his earning power, to capitalize those outlays and write them off against his taxable income through depreciation or amortization allowances. The form of an allowance meant to perfect the law's definition of taxable income differs from the form of an allowance given for ability-to-pay reasons or to subsidize and encourage family support of students. To implement the latter goal, a tax deduction or tax credit probably should be allowed to the parents, students or other people who provide the resources for the educational expenditure.

c. Costs to be allowed.—If the purpose of the allowance is to perfect the definition of income, it should cover every expenditure that in fact is a cost of producing future income. Therefore, the allowance probably should extend not only to all tuition charges, current or deferred, but also to other expenditures or costs (probably excluding opportunity costs in the form of foregone earnings) that can be related directly to the income-producing purpose which lies at the heart of the allowance, so long as the aggregate costs exceed the consumption benefits received and the personal investment made by the student.

The standard for determining which educational expenditures are made for purposes that qualify the expenditures to be written off against income and which are made for other purposes will be difficult to determine. Perhaps the intent of the taxpayer should be very important, if not controlling, under an "ordinary and necessary" rule. Or, some forms of education such as basic professional, technical and vocational education may be presumed to be motivated primarily by economic considerations, as would refresher courses and supplementary training that relate directly to the occupation of the trainee.

Still another approach is to fall back on categorical solutions. A current deduction or amortization of educational expenditures could be allowed for costs relating to any program of study leading toward a degree from an accredited college or university, for vocational training at a recognized institution, and for supplementary or refreshed courses of a predominantly professional or vocational nature. Expenditures for ordinary high school studies probably would be classified as personal. Admittedly, such an approach would capitalize some educational expenditures that are in fact consumption rather than investment items, as measured by motivation or influence on income, and would deny an allowance

for other legitimate costs of producing income. Evidence that the rate of private monetary return on total private costs of college education is high may, in part, justify this imprecise approach and make the resulting inequities seem less objectionable from both a theoretical perspective (perfecting the definition of taxable income) and a public policy perspective (subsidizing education, assisting poor students and families), especially when compared to the present practice of permitting practically no educational expenditure to be charged against taxable income.

A more refined suggestion for solving the problem of mixed consumption and investment expenditures on education would be to treat as investment a proportion of education costs that would vary with the different average contribution to future earnings of different kinds of education. For example, 100 percent of law school, medical school, or automobile mechanics' institute expenditures might be deductible while a smaller percentage of general college and university expenditures and a still smaller percentage of high school expenditures would be allowed. Such an approach has the merit of recognizing the mixed nature of educational expenditures, but it in some ways appears nearly as arbitrary as the categorical "all or none" rules suggested earlier.

All in all, the difficulties of sorting out deductible costs of education loom large. Undoubtedly, these difficulties have played an important role in defeating proposals for a tax allowance in prior years. Troublesome as the line-drawing or estimating may be, if theory calls for an allowance, some reasonably satisfying and workable "sorting" rules can be developed.

d. Income eligible for an education cost write-off.—The strict logic of a federal income tax allowance in the form of a deduction for education costs, analogized to investment in depreciable machinery or equipment, implies an allowance only against income resulting from the investment in education. So, for example, the expenses of a legal education would be offset against income from practicing law or rendering other legal services, but not against income from inherited property. But, of course, professional education may contribute to the earning of income outside the field for which the taxpayer was most directly trained. Law school training, for example, may benefit a taxpayer who later enjoys earnings in politics, business, government, and other fields. Even if the taxpayer does not complete his legal education or ever become admitted to the bar, his future income may nevertheless be attributable, at least in part, to his investment in education.

In view of these difficult line-drawing problems, it does not seem feasible to require a direct causal link between the kind of education and source of earnings. One solution would be to limit the deductions or amortization charges to "earned income." Two problems then arise. First, education may make one a better investor and thus create some connection between education and unearned income. Second, some taxpayers may, by virtue of their educations, enjoy increased personal service income that does not enter into the federal income tax law's definition of "gross income" or taxable income at all. A hackneyed example is that of the housewife, the value of whose services does not enter into the tax law's definition of taxable income for herself or to her spouse. Logically, she should be denied a write-off for educational costs since her services do not produce taxable income to her or her family, even though she may be better qualified to perform them as a result of her education. A better solution would be to include the imputed value of her services in income, and to allow an offsetting education deduction for the cost of producing the income.

Certainly the easiest solution would be to rule all forms of taxable income eligible for the education expense allowance. Indeed, this approach applies to most business and investment costs, under existing tax law. To be sure, this may entitle some taxpayers to write off as investment in education some expenditures unrelated to their taxable income. Also, for a taxpayer who has income both from personal services attributable to his education and from inherited wealth or other property, the marginal effect and value of the amortization deduction will be influenced by the amount of investment income the taxpayer receives. These difficulties argue for the narrower rule which would limit the deduction or amortization charges to earned income.

e. Timing of allowance.—If the education expenditures are to be charged off against income that, at least presumptively, results from the investment, another technical problem is the one of timing. Not an immediate deduction, but capitalization and amortization or depreciation deductions spread over a period of income-producing years seem required if the practice in analogous situations is followed. Perhaps a current deduction would be appropriate for minor ex-

penses and amortization for major outlays, thereby permitting the taxpayer to write off his major investment over his normal working life, on the assumption that such period will reflect the return on this investment. Obviously, such a general rule might depart from the actual facts in given cases, but would have the advantage of simplicity for taxpayer and Internal Revenue Service alike.

Another possibility would be to let the taxpayer write off the expenditures at any rate he chooses. Although the natural tendency might be to take the deduction as soon as possible to get the immediate benefit of reduced taxes and, thus, to have the interest value of the tax deduction presently in hand, many taxpayers might prefer to spread the deduction over a longer period of time in order to offset income taxed at higher rates and also to provide a more even flow of after-tax income. A compromise would allow the taxpayer to amortize his major education expenses over a fixed period, such as twenty years, or over a period ending when the taxpayer reaches 65, whichever first occurs. All amortized expenses remaining at death could then be deducted in the last taxable year, much as the difference between depreciated costs and salvage value of a useless piece of depreciable property can be deducted from income in the year it is discarded. If a net loss resulted, a carry-back to prior taxable years could even be allowed. Similar treatment would be justified for a person who becomes unemployably disabled.

f. Other ramifications.—Finally, if a tuition or educational cost tax allowance is based on the theory that the costs are investments and thus resemble "business expenses," the allowance should be given tax stature equivalent to other business deductions. Specifically, the deduction should be taken from gross income in arriving at adjusted gross income, rather than from adjusted gross income in arriving at taxable income. The principal consequence of this structural location is that the deduction would be available to a taxpayer whether or not he itemized his deductions or took the percentage standard deduction instead. Similarly, the allowance should be given the same carry-forward and carry-back treatment given to other deductions predicated on a "cost of producing income" theory.

4. Effects on Revenue, Prices, Investment, and Career Decisions

Tax revenue would diminish if the Internal Revenue Code were amended to permit (1) a current deduction for minor educational expenses and (2) amortization of major outlays for education. The ultimate impact of revenue loss associated with one year's expenditures would, however, be felt only over a period of years roughly equal to the amortization period. Available data enable some approximate estimates to be made of the revenue loss resulting from the enactment of a deduction and amortization plan. One such estimate, made several years ago, projected amortizable or deductible expenditures for the year 1969-70 to be \$3.1 billion or more. On an assumption of a 25 percent marginal tax rate and a 10 percent wastage of deductions, the ultimate revenue loss for that year was estimated to total \$0.7 billion spread over a two-decade amortization period.

Such estimates are and must be uncertain for several reasons. First, allowance must be made for educational expenditures by men and women who subsequently withdraw from the labor force (or, at least, the tax rolls) before their educational outlays are completely amortized. Assumptions must also be made about the extent of full employment, and an appropriate marginal tax rate must be selected on which to base the computation. In addition, an increase in enrollment and tuition charges must be predicted and some adjustment should be made for the increase in educational expenditures that directly will result from the introduction of the tax allowance itself. Finally, loss of revenue will be reduced by any increase in taxable income attributable to education stimulated or made possible by the tax-relief provision.

In addition to its impact on tax revenue, a deduction and amortization plan, or a credit plan, could be expected to influence the level of tuition charges made by educational institutions and the enrollment decisions made by students and potential students. The capacity of students and their families to pay tuition charges would increase to some extent, particularly if an allowance were combined with additional student loans and student loan guarantees. In fact, if loans were readily available and if the tax law provided for amortization of major educational expenditures, it might be possible for institutions to raise their tuition charges to cover the full marginal cost of instruction, especially in those disciplines that most reliably correlate with high incomes.

Students and their families have increasingly accepted the idea of borrowing to finance education. Moreover, the population at large seems to be more sophis-

ticated about tax benefits and personal financial decisions than in prior years. As a consequence, the availability of tax amortization would tend to increase the willingness of students to borrow, and would probably encourage potential lenders to make more educational loans.

If one assumes that the ratio of tuition charges of public institutions to those of private ones remains relatively constant, then a tax allowance which reduces the tax cost of tuition payments would lead some students who might otherwise have enrolled at low-cost state universities and colleges to attend more expensive private schools. An amortization plan seems likely to have a lesser effect on this type of decision than would a current benefit in the form of a deduction or credit since the tax saving would be realized only over a period of years. Nevertheless, like any ungraduated or unlimited tax allowance, the amortization plan would probably stimulate enrollment in high-cost institutions more than in others. The magnitude of this influence seems very difficult to appraise.

Similarly, an amortization plan would have a relatively smaller influence than would a current allowance on total investment in education and on the choice of students between different occupations requiring differing levels of investment. For one thing, the tax saving must be discounted because it is distributed over a period of years. For another, taxpayers probably give disproportionate weight to actual out-of-pocket outlays of money. Finally, even if tuition and fees were substantially increased, the tax benefits of an amortization plan would usually amount to a relatively small proportion of the total personal cost of higher education so long as foregone earnings were not subject to amortization. Altogether, tax saving through eventual amortization could not be expected to have a very strong influence on the level of educational expenditures or occupational choice.

Because an allowance in the form of amortization by deductions give an income-variant benefit, proportionately greater relief would be given to high-income taxpayers than to those with low incomes. On the implicit assumption that the amortization allowance would influence enrollment decisions roughly in proportion to its ultimate financial benefit, one commentator has suggested that such a plan would accentuate the existing tendency for college and university students to be drawn from families with relatively high incomes. In contrast, a tax credit plan would give a tax benefit equal to a stated percentage of given expenditures and would provide an equal benefit for all taxpayers able to take advantage of a credit. As a result, it appears that a much larger part of the total tax reduction would accrue to the benefit of low-income and middle-income families under a tax credit plan than under a deduction or amortization plan costing the government the same amount of revenue foregone.

Either a tax credit or a deduction allowed to parents of college students would provide immediate tax relief, and over the long run the revenue effects would be about the same. However, a tax credit or immediate deduction for parents or others who meet the expenses of students cannot easily be justified as an improvement in the definition of taxable income, because such allowances benefit someone other than the person whose earning capacity is increased by the educational experience. In fact, the tax relief occurs at a time before the investment income is received. Therefore, proposals for credits or deductions to parents must be seen more accurately to be subsidies given for the purpose of encouraging socially desirable activity. Such proposals are not to be tested by the same logic as that applicable to attempts to refine the definition of taxable income. Instead, the subsidy proposals should be viewed in terms of their efficiency in stimulating additional expenditures of the kind desired and their effects on the distribution of benefits among potential beneficiaries. Also at issue should be whether the proposed tax benefit is for an expenditure that is as meritorious or as burdensome as those expenditures which are now receiving special tax treatment and whether it is more worthy or more difficult to bear than other perhaps socially desirable expenditures that do not presently receive any tax allowance.

For revenue reasons, simplicity, to prevent excessive erosion of the tax base, and to maintain the integrity of the tax system, some theorists attach overwhelming importance to keeping the income tax closely affiliated with the general principle of defining income. Once another tax subsidy is introduced into the Code, it is harder to resist still further proposals for additional subsidies. Therefore, for these theorists the federal tax allowance for personal costs of higher education should be justified, if at all, on the perfection of taxable income argument and should be constructed to accomplish only that purpose. Arguably, a tax allowance would do just that so long as it were directed toward students themselves, rather than parents or other benefactors.

If tuition charges increase and cover a larger proportion of college, university, and other post-secondary school education costs, the case for modification of the income tax to perfect the definition of taxable income will become more persuasive. Even if tuition were raised a great deal and covered a high proportion of the costs of instruction, however, foregone earnings would continue to compose a substantial personal cost of education beyond the high school level. Therefore, a tax allowance that applies only to out-of-pocket costs may not greatly influence education expenditures or access to educationally expensive occupations. Even so, it would seem desirable to recognize, for tax purposes, the extent to which educational expenditures are investments.

3. Summary

On balance, a deduction computed by capitalizing the taxpayer's educational expenditures and amortizing them over the useful life of the education seems to be the best way to construct a higher education tax allowance that rests on the theory of perfecting the definition of net income. A conceptually convincing case for constructing such an allowance can be made. Even though it would be difficult, if not impossible, to separate the investment component of the expenditure from the consumption component, a roughly-hewn allowance would be preferable to no allowance at all.

Unfortunately, recommendations for a deduction or capital treatment followed by amortization have been caught in a cross-fire of arguments. Some of the arguments, such as the view that a deduction is the wrong form of allowance because it produces income-variant effects, are not appropriately addressed to an allowance which is put forward to improve the definition of taxable income. For, just as a deduction is the proper form of allowance for business expenses and other costs of producing income, a deduction is the proper form for an educational expenditure seen as a business expense or cost of producing income. At most there is a paradox, not a real contradiction, in favoring income tax amortization by the student and opposing it by his family. Amortization to the student is a net income technique; to the parent, a subsidy. In reality, however, the choice of an appropriate tax allowance approach must be concerned not only with perfecting the definition of taxable income, but also with policy considerations concerning the wisdom of subsidizing educational expenditures and the importance of accommodating different taxpaying abilities. Therefore the following sections analyze some of the arguments for and against education expense accommodations or subsidies and examines the forms they might take.

B. Taxpayer Equity

Another important argument for a tax allowance for education expenses lies rooted in notions of fairness. Such an argument emphasizes the reduced ability to pay federal income tax of a taxpayer burdened with tuition and other education costs. For example, two families of equal size and wealth, each with \$20,000 adjusted gross income are in very different positions if the three children of one, but none of the other, are in college, vocational school or graduate school. Horizontal tax equity—that is, fairness among taxpayers similarly situated—and vertical equity, might be maximized by a tax allowance for the family with higher education costs.

Education costs most certainly reduce discretionary or disposable income, and therefore resemble other expenditures, such as extraordinary medical expenses, charitable contributions, and casualty losses, for which a federal income tax allowance is given. Tuition bears some resemblance to these expenditures in ways relevant to the question of deductibility. Like an expenditure for medical care, for example, an expenditure on tuition is socially desirable; it is viewed by many taxpayers as a duty, a high priority expense to be borne for the benefit of one's children or other dependents; and the payment does reduce the capacity of the taxpayer to pay taxes and to spend on personal consumption. As such, the argument runs, the tuition deduction should be allowed. A lesser conclusion goes only so far as to say that an education deduction should be allowed only to the extent medical expense and charitable contribution deductions are allowed. Both horizontal and vertical equity—that is, fairness among taxpayers with different incomes—could thus be improved.

In opposition it may be asserted that an implicit tax allowance is already given for education expenditures since students are not taxed on the difference between what they pay in tuition and what an education actually is worth. Moreover, it may be asserted that education expenditures are inherently personal, "consump-

tion-type" uses of income and hence should not be given any tax allowance either because these expenditures are more personal than medical, charitable, and other deductible items, or because medical and charitable expenses, too, should be disallowed. Of course, the Internal Revenue Code does not limit deductions to "trade or business" and "income-producing" expenditures. The Code permits deductions for some nonbusiness expenditures or losses (medical, charitable, interest on personal loans, taxes on personal property or consumption, casualty losses on personal property, bad debt losses on personal loans) while not allowing a deduction for others (recreation, food, shelter, ordinary medical expenses, non-casualty loss, consumption of personal property, artistic, social, and sexual activities). Some personal expenditures are deductible mainly for economic reasons (interest on home mortgages, taxes on personal residences), or, in important part, because the personal item is hard to distinguish from the income-seeking item (nonbusiness bad debts, interest on loans whose proceeds are mixed with other assets and used for mixed purposes). Some personal deductions are allowed mainly to encourage and subsidize the activity (charitable contributions, medical expenses). Sometimes the reduced ability-to-pay-taxes rationale predominates (personal casualty and theft losses). Elsewhere, limitations on the amounts deductible, or limits on the form of deductibility, suggest that Congress has compromised between a deduction-denying view of the item as personal and a full deduction-granting view of it as a cost of producing income. Or, some limits may simply suggest an unwillingness further to lighten the tax burden.

It certainly may be argued that education expenditures are as desirable and as beneficial, socially and economically, as charitable contributions or medical expenditures. On the other hand, if education costs are viewed as semi-involuntary expenditures that reduce ability to pay taxes, they resemble some non-deductible items (food, shelter) for which at most a personal or dependency exemption is allowed; but they also resemble some costs for which a deduction is allowed (casualty loss of personal property, personal bad debt loss) or for which a deduction in the form of an exemption is allowed (support of dependents, old age, blindness). In short, the tax law's variegated treatment of personal expenditures offers no clear guidance for handling education costs.

Equity considerations also invite a comparison between expenditures for public and private schools. Without an income tax allowance, families whose children attend high-tuition private colleges and universities are disfavored by the overall tax system. Students at low-tuition state schools receive untaxed "scholarships" in the form of discounts on the price charged them for their education. And the state taxes paid by their parents (and by all taxpayers, including the parents whose children attend expensive, private schools) to provide the low-tuition public education are deductible for federal income tax purposes. In short, tuition paid to a public school in the form of taxes is deductible; tuition paid to a private college is not. This tax differential accentuates the unfairness of making the parents of private college students, and childless taxpayers as well, pay state and local taxes to finance the education of students at public universities. Consequently, the argument goes, some or all of the tuition paid by families of students at private schools should be deductible from federal and state income taxes to help narrow the tax advantage enjoyed by families who pay no tuition and whose state taxes are deductible.

It seems by no means clear, however, that notions of tax equity require this result. For one thing, both sets of parents do pay state and local taxes and gain a deduction therefrom. To be sure, the parents of a private school student do pay more, taxes plus tuition, than do the parents of the public university student. But the excess can appropriately be categorized as a personal consumption expenditure which they are free to make or not. Since their children presumably could attend public colleges and get much the same benefits, tuition-free, as those enjoyed by the families of children attending public school, they are not being treated unequally by the tax law. At most, the private school parents can complain that the price of sending their children to private school is not only added on top of their state and local tax bill but is not deductible and hence must be paid out of income after taxes. This is not so much an argument about equality or distributive justice as it is a prayer for relief on grounds of ability-to-pay.

To be sure, the absence of their children from public schools reduces the total cost of public education in that state, thus reducing the state and local tax bill for parents of public school students—for which the private school parents naturally enough think they deserve a tax reward. The private school parents

also benefit, as taxpayers, from the reduced state or local taxes, but the amount of their benefit pales in comparison with the tuition they pay. Still, their argument should be addressed to the state and local tax and school system, it would seem, more than to the federal income tax. Their complaint does not focus so directly on a comparison between the deductibility of state and local taxes and the nondeductibility of tuition as it does on the perceived injustice of supporting no-tuition state colleges out of general state and local taxes, while providing less aid or none at all to private schools.

To the extent the complaint of private school parents is based on unfairness in the federal tax system itself, the argument is that the tuition-free education received in public universities is not included in the gross income of those students or their families, while the earnings necessary to pay private school tuition are included in family income and not taken out again by a deduction, credit, or other allowance. This argument has some force, but its logic would also increase the tax bill of private school parents as well, since private school students also receive their education at a great discount, a discount that should be taxable if the bargain element at tuition-free or low tuition state schools is to be counted as income. Whether any such inequity appears, in a comparison between non-deductible tuition and, for example, deductible charitable contributions and taxes, must be gauged with account fully taken of the income tax subsidy enjoyed by those who receive education at a discount that is enjoyed free of federal income tax.

In any event, the arguments based on horizontal and vertical equity within the tax system do not require a federal income tax allowance to make the correction. Direct subsidies in cash or vouchers from the government, or a tuition increase at public colleges, or other non-tax changes could address the perceived inequity.

If a net inequity is determined to exist and if a federal income tax allowance is chosen to correct it, the form of allowance need not be income-variant merely because other personal expense allowances in the tax law have this character. Better, an effort should be made to reform the other personal, nonbusiness tax subsidies (such as charitable contributions and medical expense and casualty loss) into a nonvariant form, a credit instead of a deduction, and add the education allowance as an equal counterpart.

In sum, equitable arguments for a cost-of-education tax allowance appear inconclusive. The amount of the tax subsidy given for below-cost or below-value education is uncertain, the externalities and nonfinancial and consumer benefits indeterminate and the "equities" not a matter of common consensus. Even so, if and to the extent the allowance is to be justified on ability-to-pay and incentive or public policy grounds, it should be granted to whomever actually pays or bears the costs. It should vary with the amount of the cost borne, and perhaps should vary (directly, not inversely) with adjusted gross income or some other measure of taxpaying ability. The Ribicoff-Dominick-Hollings tax credit plans bear these characteristics, suggesting that their *raison d'être* may lie largely in the "ability to pay" and the tax equity arguments, or at least that their underlying philosophy has become thickly overlaid by such considerations.

C. SUBSIDIZING EDUCATION

A tax allowance for higher education expenses has been advocated on the ground that education is a good thing," which government should support. The Senate's debates on tax credit bills carry this flavor, but do not refine the argument much further.

The theory, as indicated earlier, asserts that education can appropriately be viewed as a form of investment in human capital, just as the construction of a milling machine to be used in manufacturing constitutes investment in capital of another kind. So, just as the investment tax credit attempts to induce investment in milling machines and similar instruments of production, either because such capital and investment are regarded as a "good thing" or because such investment leads to other "good things" such as increased employment, incomes, and real welfare gains, a tax subsidy or direct expenditure subsidy for education may have similar incentive goals. Or the aim may be to redistributive education, or income, or to reallocate resources. Some goals may be more than just economic—for example, encouragement of the diversity of educational forms that might result from further subsidizing private education. In any event, the following discussion focuses on subsidizing education, rather than perfecting the definition of taxable income, with particular emphasis on economic theory.

1. Private rates of return on investment in education

One convincing piece of evidence that investment in education should be encouraged would be a showing that the private rate of return on private or public investment in education is high, or at least that it is higher than the rate of return on other investments. A comparatively high private rate of return on education investments suggests that education yields great productivity and desirable qualities in graduates. It suggests that highly educated people are in relatively short supply. In other words, there well may be underinvestment in education. However, this underinvestment can be expected to take care of itself in time, if the market is working well. The high private rate of return will draw more resources into education investment, unless imperfections in the market stand in the way. A persisting high private rate of return therefore suggests a market imperfection and a need to divert resources to the high return area from areas where they are less productively employed. To optimize investment, a subsidy could be used. Only after a look at all financial and nonfinancial private benefits and costs, and total social costs and benefits, however, could one finally size up the economic case for a subsidy.

Some indications can be found that investments in education bear a high rate of financial return to graduates, as high or higher than most other investments. The studies in this area, however, are rife with theoretical and empirical difficulties. Correlation between high degrees and high incomes, for example, might be attributable to a screening process or to unidentified common causes, rather than to increased productivity stemming from education. And it is difficult to adjust properly for differences in inherited ability, individual motivation, social class, on-the-job training, and other factors that correlate with life incomes. Nevertheless, a review of the economic literature leaves a residual conviction, which accords with anecdotal and impressionistic evidence, that education does contribute to higher income.

If anything, some of the studies probably understate the return rate on investment in education by treating all expenditures on education as costs of producing future income, thereby overstating costs, and by ignoring or underestimating the current and deferred consumption and nonfinancial benefits of education. These benefits may take the form of psychic pleasure, prestige, the intangible but real benefits of literacy and good citizenship, increased pleasure in social and recreational activities, and the like. It is possible that these nonfinancial factors escape the attention of, or at least are not given due credit by, a person contemplating higher education. But if it can be shown that additional benefits are captured by the individual student or his family in nonfinancial forms, the case for underinvestment is strengthened.

Underinvestment, if shown, could be the product of a bias in the tax law against investment in human capital, or could result if private returns to such investment fall short of social returns—that is, if society captures some of the benefits. Nonetheless, the high level of private return to education, in nonfinancial as well as financial forms, suggests that there is an underinvestment in education. From this conclusion, it is a short, though not a trouble-free, step to assert that to optimize investment, government should subsidize this high rate-of-return area of the economy.

When considering the case for a government subsidy, it is insufficient, of course, just to consider private benefits. Benefits to society, or externalities, must also be taken into account—that is, the total social rate of return must be considered.

Paradoxical though it may be to subsidize an area of the economy that enjoys high private rates of return on investments, a subsidy is called for if total social returns (including private returns) exceed total social costs (including private costs) by a large margin—in other words, if the social rate of return to investment in education is a high rate. Necessarily then, the inquiry must turn to the externalities resulting from education.

2. Social rate of return

Education makes a significant contribution to economic growth and to society as a whole, in both financial and nonfinancial ways. Difficult as these benefits are to quantify or gauge even roughly, social returns to education should not be disregarded. Even experts who despair of quantifying the external benefits of education nevertheless believe that such benefits are an important component of the payoff on investment in education. An examination of the economic externalities and geographical spillovers created by investment in education, factors that bene-

fit other persons or society as a whole but not the student and therefore which tend to be disregarded by him or her as the investor, may help explain the alleged underinvestment in higher education, and aid in evaluating proposals for a tax subsidy.

In the language of economics, an externality consists of a favorable or unfavorable effect on one or more persons or firms that emanates from the actions of a different person or firm. An external economy is a favorable effect; an external diseconomy refers to an external loss suffered by, or cost imposed upon, others. An externality is not confined to an individual economic unit but spills over to some of the rest of the economy, raising or lowering the level of real income and welfare generally.

Pollution of air or water is often cited as an example of an external diseconomy of manufacturing operations. A manufacturing firm that pours out smoke or effluents imposes costs on others that are not internalized in the firm's market transactions since this cost is not included in the price of goods sold. External economies may also result from individual or firm behavior. A commonplace example is the desirable pollination of a neighbor's fruit trees by a beekeeper's honey bees.

Quite common are the externalities created by some government behavior. In particular, when government provides social benefits in the form of "public goods," such government activity creates external economic benefits. Many beneficial government activities are not rationed or priced because access cannot be limited; these usually create significant external economies. For example, a lighthouse is a "public good" since it warns all ships of rocks on the shore. Even if the lighthouse was originally built to warn government ships, its benefits spill over to all other ships using the sealanes. The benefits of the lighthouse cannot be rationed by price because no sailor feasibly can be barred from enjoying the benefits of the signal light's warning; the benefits are provided to additional sailors without additional cost.

Education produces significant externalities, both in the form of benefits and costs. One commentator has observed that "while external effects are by no means confined to education, education is probably more likely to generate indirect benefits than any other single activity of comparable scope. Among the more intangible benefits are advances in knowledge, a better informed electorate, a healthier populace, less crime, a convenient mechanism for discovering and cultivating potential talent, a means to assure occupational flexibility of the labor force, transmission of cultural heritage, and enhancing the enjoyment of leisure by widening the intellectual and aesthetic horizons of the educated. Other benefits are more tangible and may be quantifiable—for example, spill-over income gains to persons other than those who receive the education and to subsequent generations. Without examining these and other externalities, it is impossible to reach rational conclusions about the real rate of return on investment in education since neither its total cost or total benefits can be determined; neither will it be possible to discern why an underinvestment in higher education persists in a relatively free-market situation, and finally, whether government subsidization is therefore desirable. For example, consider a person who thinks about investing some amount—say \$20,000—to obtain a college education. Assume this person desires to be an inventor and after careful study concludes that a college education is an indispensable prerequisite. And, the study might even determine that the education would probably produce royalties or other earnings over the lifetime of this inventor that would exceed by \$120,000 the income he would have enjoyed had he foregone college and followed the most profitable career then open to him. The added income, the \$120,000, is an internalized financial benefit to him that he should consider when deciding whether to go to college. But it may be that his inventions would produce benefits worth millions of dollars to other people who could use the inventions directly or in making other products or in advancing public health. Not all of the financial benefits of his invention are captured by the market and returned to the inventor-investor.

The failure of all benefits from investment in education to return to the investor may cause (and explain) underinvestment in education. When a student or his family decides whether to invest \$20,000 in a college education they weigh the costs against the anticipated returns or benefits. Thus, the inventor might decide not to attend college, thereby accepting \$120,000 less in lifetime earnings (with a present value of, say, \$15,000 or \$25,000 after taxes) than he could have earned as an inventor. Yet society ought to see to it that he goes to college, even if society has to pay his way. For if society does pay the bill, it

will, by hypothesis, reap a social return of millions on an investment of some \$20,000. If the inventor could be sure of reaping the millions, he might overcome his resistance and opt for college, but an additional return of \$120,000 over time and before taxes may not seem worth it to him, especially since uncertainties, not easily insured, usually are involved.

Because many effects of education inure to the benefit of people other than the potential student or his family, potential students may weigh the cost/benefit balance astutely for themselves but incorrectly from society's point of view. Too few students go on to college, it is possible, because the benefits (discounted for futurity, uncertainty, and future taxes) to them of higher education are outweighed by the costs to them, even though from society's point of view, the benefits to society or the economy as a whole would far outweigh the costs. Underinvestment in education results.

One cure for such underinvestment would be somehow to correct the market so that more, if not all, of the benefits of education are captured by the graduate. Another approach would be a subsidy for students or colleges through the tax and transfer system, to reduce the costs that must be borne by those who invest in it or consume it. A tax exemption or credit for students or their families would be one way to reduce the private costs of education.

3. Determining and defining Costs of Education

Just as it is difficult to determine, define, and measure the benefits of education, many difficulties inhere in determining costs of education, for purposes of calculating rate of return. Costs of education include internal personal costs as well as external social costs, the latter, of course, being the most difficult to quantify and evaluate. A government expenditure or a tax subsidy is a prime example of a social cost. Less visible social costs are the opportunities foregone by investing in education rather than in other fields. To the student, this means foregone income; to society, it means foregoing the student's net productivity (which may exceed or fall short of his foregone earnings). The most obvious personal cost of higher education is tuition and other educational fees paid by the student or his family.

Earlier passages have discussed what items should be included as costs when the purpose is to delineate what should be offset against gross income to perfect the definition of taxable income. The question of what are the costs of education may differ, however, when the purpose of the inquiry is to determine the amount of a tax allowance that should be given to subsidize education. Foregone earnings or the added expense of living away from home, for example, can be viewed as "costs" worthy of a subsidy designed to encourage education more readily than they can be viewed as costs of producing income. In fact, the failure to regard foregone income as a cost amounts to a failure to recognize one, if not the most, important impediment to college attendance, especially among low-income families. For such families, it is often not enough for scholarship or government aid programs to relieve the burden of actual cash outlays for education. The family has come to depend upon the earnings of some or all of its children, particularly the older children, for family support and possibly for meeting educational costs of brothers and sisters. As a practical matter, unless a substitute is found for the foregone income, many working young people from such families will have to do without higher education.

When the focus was on the goal of perfecting the definition of taxable income, the denial of a tax allowance for foregone income seemed appropriate when balanced against the unstated exemption from tax of such foregone income. This argument is not as persuasive, however, when discussing the wisdom of a government subsidy. It is easy to conceive, for example, of a scholarship or fellowship program that would cover not only out-of-pocket expenditures for tuition, but also the student's foregone income and thereby permit payment of personal living costs not only for the student, but perhaps, in part, for his family as well. If such a direct subsidy is thinkable and appropriate, it should be no less appropriate when translated into a tax allowance intended to act as an incentive subsidy rather than to perfect taxable income.

One problem, of course, is how to treat the educational benefits that are not taxed—the unstated exclusions, such as the accrued but unrealized increase in a student's earning power, the psychic nonfinancial gains, and the ability to defer tax and spread it over a number of years. It is sometimes argued that such subsidies are so great that they obviate giving an additional allowance for student expenditures such as tuition and room and board, not to mention foregone income.

Recognition of the existence and the magnitude of these unstated exclusions, however, does not necessarily undermine the arguments for a government subsidy or tax allowance for educational costs. For one thing, the unstated exclusion is given to all students, whether needy or not. Thus, if a purpose of the government expenditure or tax allowance is to help needy students gain access to education, a grant or an explicit tax allowance might be given on top of the unstated exclusion. Secondly, the unstated exclusion enables high-income taxpayers to avoid a higher marginal tax rate than that similarly avoided by low-income taxpayers. In other words, the unstated exclusion, like a deduction, has a perversely income-variant quality: it provides a greater financial benefit to those who presumably need it least. Thirdly, the unstated exclusion for the increase in net worth and income earning capacity of an educated person, not to mention the consumption benefit, resembles many other unstated exclusions that exist in our tax law.

Although the unstated exclusion for educational benefits may seem a significant departure from an ideal, comprehensive definition of "income," it fits rather comfortably in our present tax law's definition of income. The unstated exclusion does not protrude as a conscious subsidy or an extraordinary tax benefit. In fact, to suggest a reversal of this long-standing unstated exclusion would be to advocate erecting a new, very substantial and almost anomalous tax barrier to education. And finally, it is hardly unprecedented for the tax law to grant a tax allowance on top of an unstated exclusion, such as the one that presently benefits students.

The economic rate-of-return literature makes it clear that there may be good cause for public concern about the adequacy of educational expenditures, for many reasons. Not all the economic benefits of education accrue directly to students; there are economies of scale in operating educational institutions; capital markets are not freely accessible to private individuals; students are not perfectly informed about job opportunities and payoffs on education; risks are not easily protected against or privately insurable; many talented candidates do not reach post-secondary school education; inequalities by race, income, sex, parental and social background persist; resources are not efficiently allocated (as they are not likely to be in the absence of full marginal cost pricing of educational service); obtainable gains are lost, and unnecessary costs are still borne. Also, since only part of the costs of education are met directly by students or their parents, the rest borne by taxpayers, contributors, institutions, and others, the social rate of return on investment in education probably differs from the private rate of return. Most importantly, the probable high social rate of return on education investments suggests that not enough is being invested there. Partly because society suffers most from this underinvestment, some sort of government subsidy seems appropriate. The student costs that should be covered may include not only tuition, but also room and board and perhaps even foregone income. There is an instinctual aversion to the anomaly of permitting a tax allowance for all these items in the context of our present tax law. But when government tax programs are seen as a scholarship or fellowship scheme, the anomaly may disappear.

More work remains to be done to determine the benefits of education and training. Currently there has appeared a "backlash" of public sentiment about education, and the notion that society may have overinvested in at least some kinds of education is becoming increasingly popular. Consequently, any government action should be mindful of a need to redistribute resources among educational processes or among persons, but perhaps should not be aimed at a broadscale increase in investment in education. Most importantly, consideration of any future tax or expenditure subsidy must not ignore existing tax allowances and direct programs (basic opportunity grants, federally and state insured loan programs, grants to institutions)—that is, the full context of public finance of higher education.

Unfortunately, the economic literature does not carry the policymaker all the way to his goals: a decision about increasing or reducing government subsidies to education, an evaluation of whether the social opportunity cost of education exceeds its benefits, or vice-versa, and whether there is a case for more, or less, public investment in higher education.

The determination of what is a cost when designing a government subsidy (by expenditure or tax allowance) for the personal costs of higher education, therefore, should focus on the policies of the program and the specific goals to which the aid is addressed. Such goals include not only the perfection of the

definition of income, taxpayer equity, and the subsidization of education as a "good thing," but also redistribution of income and education according to wealth, effort, and geographical location, correction of a misallocation of resources, and other economic and noneconomic goals, some of which will be considered in the following sections.

D. REDISTRIBUTION OF INCOME, WEALTH, AND OPPORTUNITY

The preceding material on subsidizing education to increase investment and consumption has concentrated on increasing higher education spending of all kinds and by all possible consumers or investors. A further possibility exists: an education stimulus may be desirable for some people but not for others. Accordingly, government might decide to use a tax allowance or a direct governmental expenditure to effect redistribution among persons according to wealth, according to the absolute or relative financial contribution by a student or his family, or according to geographical lines, sex, race, age, or on other bases. The redistribution might be an effort to redistribute education itself and in particular to increase access to education for underprivileged people or people who are underinvesting in education. Perhaps another goal might be to accomplish a redistribution of income and wealth by redistributing educational access and opportunity. In other words, the aim might be to redistribute financial returns to education, nonfinancial returns, or both. Wise policy-making necessarily requires an analysis of the extent to which redistributing higher education can accomplish such aims, as well as an examination of the costs involved.

If redistribution according to wealth is the aim of a higher education tax allowance, it should be designed to provide greater help to low-income taxpayers than to high-income taxpayers. Consequently, an ordinary deduction or amortization for the costs of education, however those costs are defined, would be singularly inappropriate. Such a deduction engenders an income-variant effect, providing greater tax relief to high-bracket taxpayers than to low-bracket taxpayers, per dollar of eligible expenditure on education. Consequently, if income redistribution is the goal a tax credit would be more suitable. Even a tax credit could operate perversely, if it led to tuition increases that widened the education-opportunity gap between people of ample and those of moderate or insufficient means. A refund feature could counteract this price effect in part. And, a tax credit could be made income-variant in the other direction, by phasing out its benefits for taxpayers whose incomes climb to higher levels.

The tax credit bills most prominently presented by Senators Ribicoff and Dominick and those approved by the United States Senate in 1967, 1969, and 1971 have included such a phaseout. Nevertheless, some object that these bills would still provide greater benefits to higher income families. Since, below the point at which the income phase-out begins, families who can afford to send their children to more expensive schools would receive a greater tax benefit than families who send their children to schools charging so little that the total costs are less than the amount for which the maximum credit is available. Thus, below the cut-off point, the credit would be expenditure-variant and therefore perhaps, indirectly at least, income-variant.

Few of the tax allowances presently found in the Internal Revenue Code phase out with higher income. In fact, in most instances, the tax allowance increases with income. There does not seem to be any constitutional or structural barrier, however, to making an educational tax allowance vary inversely with income, either by an explicit high-income phase-out clause, or by making the allowance itself an item of income against which the graduated rates apply. Or, a tax allowance can be designed not to vary at all with income, thereby appearing to be redistributively neutral.

Taxpayers with little or no income tax liability will benefit only slightly, if at all, under a tax credit plan unless such taxpayers receive refund credits for part or all of the amount by which the credit to which they are entitled exceeds their tax liability. Although one might have thought that any credit plan would automatically provide for a refund, the early proposals were not so viewed, and indeed the same Senate that passed a non-refund tax credit bill rejected an amendment that would have added an explicit refund provision.

In any event a federal income tax allowance can be designed to provide greater benefits for taxpayers with lower incomes, thereby redistributing educational opportunities, incomes, or both. In fact, the redistributive purposes of such legislation make a tax allowance in some ways more attractive than other

forms of government aid, since the tax allowance can easily be integrated with the income and tax liability determinations made by a taxpayer. The best approach would probably be to couple a refund provision with a credit or deduction that is graduated to diminish as adjusted gross income grows. A flat tax allowance such as an additional exemption or a tax allowance in the form of a straight deduction for costs of education, on the other hand, would seem particularly unsuitable for purposes of redistribution.

If redistribution according to wealth is to be an important goal or subgoal of the education subsidy, and especially if the amount of subsidy given is to vary with the amount of costs borne by the student and his family, foregone income should not be ignored inasmuch as foregone income constitutes a high percentage of the costs of higher education, particularly for poor families who find it difficult to bear any education costs at all.

Unfortunately, the evidence is not convincing that redistributing education will enhance income equality. There are, of course, indications that lifetime earnings tend to rise with years of school completed, as do other benefits. The conclusion, however, that more education yields more productivity and hence more income and that a subsidy to higher education could, therefore, counterbalance the disadvantages suffered by underprivileged groups is far from clear. If more higher education to low-income people cannot reliably be expected to produce more income and wealth for them, absolute or relatively, neither a tax subsidy nor an outright grant should be enacted with that purpose.

1. Redistribution among persons according to financial effort

Another possible goal of a federal subsidy for personal costs of higher education would be to provide greater help to those students or families willing to bear higher amounts or percentages of effort to meet education costs, as an incentive, reward or rationing plan. Such a system would provide matching grants corresponding, under some formula, to the amount contributed by the recipient. A tax credit or other tax allowance that varies directly and proportionately with the amount of expenditure made by the student or his family would be a simple matching scheme. Thus, under a tax credit plan, the credit (and possibly refund) would increase as education expenditures grew. A deduction system would also give a larger allowance for a larger expenditure, although the actual tax benefit would vary with income unless specially limited.

A federal subsidy might well be planned to correspond with the effort of the student or his family, effort measured not in terms of absolute dollars but rather as a percentage of the family's ability to pay. Thus, a student or family willing to spend a large percentage of its wealth or income on education would receive a larger subsidy than a family willing to spend only a small percentage of income or wealth, even though the number of dollars expended by the latter family were substantial. Such a system would mean that the student in a very wealthy family would receive relatively little or no subsidy since even a large expenditure would amount to only a small percentage of the family's total wealth or income. Of course, although it becomes a simple matter to structure a federal income tax allowance geared to adjusted gross income, it is much more difficult to make the subsidy vary with the taxpayer's effort as gauged by percentage of wealth, simply because the federal income tax system does not include a measure of wealth in its usual processes.

2. Geographical Redistribution

A higher education tax allowance could also be structured to provide subsidies that varied on geographical grounds. An attempt might be made to provide a larger amount of federal aid to students or families in or from relatively poorer states or from states that spend *less* on education. The purpose might be to raise the standard of education (and income) in areas targeted for a larger subsidy, or to help correct for deficient primary and secondary schooling. Another possibility might be to provide greater federal aid to families and students in or from states that spend *more* on education per capita, or which exert more effort (tax effort). Effort could be determined by comparing education expenditures with ability to pay as measured by the share of that state or area of gross or net national product or tax revenues. Thus, the federal aid would act as an incentive or reward for high levels of state and local government investment in education. A tax allowance, just like a direct expenditure or voucher plan, could be established under some sliding scale that would withdraw or add a percentage of benefits according to the geographical location of the student, his family, or the

school. Whether the aid would go to the student, his family, or the school depends on the purpose of such a geographical scheme. It is not commonplace, however, for federal tax allowances to vary according to geographical location, and some questions might be raised about the propriety or even the constitutionality of such a system.

In addition, although a federal income tax allowance for personal costs of higher education can be as well scheduled and graduated along geographic lines as can a direct government expenditure, voucher, or other form of subsidy, the economic evidence to justify such a policy decision is lacking.

Even when addressing the problems of distribution and redistribution of costs and benefits of higher education, some analysts have concluded that existing state tax systems and low-cost public education programs do not constitute an effective device for shifting costs more heavily to those most able to bear them. Some suggest a "user charge" based on ability to pay for higher education with generous supplements to low-income students. Or, going further, they resort to the classical economic approach: optimal pricing of education, so that the price of a unit of education equals the opportunity cost of resources used to produce it and both equal the benefits provided by an additional unit of education.

Even though a tax mechanism can be designed to attempt to redistribute education or wealth, or at least to counteract the maldistributive tendencies of some forms of tax allowance for education the question remains whether public educational policy should be the instrument for achieving society's equity goals. Arguably, a negative income tax would be a far superior instrument. Education then should be self-financed by rich and poor students and families alike, rather than subsidizing the poor who obtain higher education at the expense of not only the rich but also the poor who do not go on to higher education.

E. TAX ALLOWANCES TO CORRECT MISALLOCATION OF RESOURCES

Possibly another aim of a federal subsidy for education, and in particular of a federal income tax allowance for the personal costs of higher education, may be to correct misallocations of resources. Such misallocations may be thought to exist between expenditures on education compared with expenditures on other commodities and investments. Another perceived misallocation may be that the wrong people are getting educated or, at least, that there is not an efficient allocation of educational resources among possible recipients. A further misallocation may be thought to exist between public and private education.

To correct such misallocations, federal tax or expenditure subsidies might be given to education generally, so as to reduce its price and increase its consumption. As an alternative, the government might elect to provide such subsidy for certain forms of education, as it did in the post-Sputnik era with direct federal aid for scientific education. Government might attempt to provide such aid to certain people, such as children from poor families, members of minority groups, and other identified members of the population who, it is thought, have been denied access to or have invested too little in education.

Another step toward correcting misallocation of educational resources would be to perfect methods for evaluating educational expenditures in terms of economic rate of return. Economic rate of return, of course, is a theoretical concept that may bear an imperfect relationship to the decision making of students and their parents in view of the importance often placed on various non-economic considerations, because of imperfections in the market such as lack of knowledge, uninsurable risks, externalities, nonfinancial benefits, and liquidity problems. Reactions may be imperfect, and "malinvestment" in education undoubtedly will occur. Nevertheless, tax or expenditure subsidy techniques based on rate of return thinking can contribute to an efficient allocation of investment resources to education. Ideally, one way to perfect such a reallocation would be to make the price of higher education either equal the full cost of providing the education, or subject to competitive market pressures. At present, higher education is provided at below-cost prices, even, apparently, in the most expensive private colleges and universities. If there were full-cost tuition or market priced tuition, loan funds or scholarship funds should be made available to people with inadequate means. Such students or families could then repay the loans with interest or could repay the advances in the form of a tax override on their income tax during the rest of their lives. Steps could also be taken to ensure that salaries, wages and other remuneration for services internalize more of the benefits of education, so that people would be induced to borrow, spend and bid for educational opportunity according to the real benefits that would return to such in-

vestment. It would then seem appropriate to allow students or their families to capitalize the investment component of their education expenditures for amortization purposes, as with any other investment. The consumption component should not be capitalized and amortized.

Another version of this same "market model" for the allocation of resources in education would be to provide an equal grant in cash to every eighteen-year-old person in the country. This cash grant could then be invested by him in education, if he chose to do so; if not, he could spend or waste the money, or invest it in income-producing assets or save the money in a bank. The purpose would be to provide even the poor and underprivileged potential student with the cash means to "bid" for a place in institutions of higher education at prices accordingly determined by the bidding process.

III

REASONS FOR FEDERAL AID

Of remaining concern is whether the federal government rather than state or local governments should provide desired educational assistance, either through a direct subsidy or a tax allowance. Apart from the financial difficulties in which many state and local governments find themselves, several reasons suggest the desirability of a federal approach to the problem. First, underinvestment in education, if shown, would appear to be a national problem, even though it may congeal in particular localities. Problems of inadequate access to higher education and vocational training are closely related to problems of crime and unemployment, both of which are increasingly regarded as national problems. Our labor force is in many ways a national one and depends on education for its maintenance. Our national army, the migration that takes place from area to area and various nationwide economic and social phenomena associated with insufficient education, all suggest a national approach to the problem of subsidizing higher education.

A somewhat more technical reason for urging a national approach involves the geographical spillovers education creates. Some state and local governments, for example, may underinvest in public education, because many students educated there tend to leave the area. This enables other states to reap the benefits of part of the education subsidy provided by the home state. Or, the opposite may be true. There may be underinvestment in higher education in areas to which people tend to come because highly trained people can be obtained from the pool of graduates that develops by virtue of subsidies in other states. In any event, the migration of people before, during and after education, coupled with the potential magnitude of the aid that may appear desirable and a need for uniformity and integrated policy, suggest that the approach should be national.

Even apart from migration, people's productivity and employment prospects are affected by the level of productivity of persons educated elsewhere. Tax burdens are affected by the level of welfare payments to, and tax payments by, persons educated elsewhere. The fiscal and welfare interdependence of states and localities with or without migration indicates that education subsidies should be, at least in large part, provided by the federal government. Hopefully, federal aid can be provided in a manner that will not encourage states and private sources to reduce their support.

IV

A TAX ALLOWANCE COMPARED TO A DIRECT GOVERNMENT EXPENDITURE

It has become nearly an article of faith in some circles that a tax allowance should not be used in lieu of a direct government expenditure in order to subsidize activities or stimulate taxpayer behavior. Prior work surely has served to place a burden on anyone seeking to enact a new tax incentive to demonstrate why a direct government expenditure would not be better.

This "comprehensive tax base" position recommends the elimination of tax allowances, tax preferences, tax loopholes, tax incentives and other tax provisions not required to reduce gross receipts or gross income to taxable or net income more or less as outlined by the Haig-Simons definition of income. Another point of view evaluates each tax allowance separately, without an absolute predisposition against the incentives or subsidies, to test its efficiency, advantages, and disadvantages in comparison with direct expenditures and other forms.

One objection to casting subsidies or incentives in the form of tax allowances has been that such tax allowances are not subjected to the kind of annual review

applied to the regular expenditure budget of the federal government. Although this argument is well founded up to a point, it would lose much of its force if the Treasury Department and the Congress truly relied on the Tax Expenditure Budget to identify and quantify the revenue losses or "tax expenditures" created by allowances used for subsidies or incentives. There may even be some merit in embedding an education subsidy in a tax law so that it is less likely than are outright grants or ordinary budget expenditures to be varied from year to year.

Tax allowances as subsidies or incentives have also been criticized because the amount provided depends on private decision-making and therefore remains hard to predict. Private decision-making, sometimes argued as a meritorious aspect of tax incentives, also affects and is affected by distortions introduced into the market and by unneutralities in the allocation of resources. Not only is private decision-making affected by many factors unrelated to the purpose of the subsidy, but it will not be altered at all to the extent a tax relief provides a windfall to a taxpayer who would have behaved the same without the subsidy or incentive or for those "outside the tax system." Again, these objections are well taken to some extent but should not be exaggerated. The amount of revenue lost through some allowances can be estimated by cumulating the appropriate explicit deductions or credits shown on each tax return. The amount of a tax subsidy or incentive is less certain when it does not require specification on the return. For example, the loss of revenue due to the failure to tax the imputed rental value of owner occupied homes can be estimated in only a very rough way. Unfortunately, the best of such "tax expenditure" estimates do not afford truly accurate gauges of the amount of revenue that would be raised if the tax allowance were repealed. For, the repeal itself would change taxpayer behavior; the amount of the revenue lost would be affected by repealing the tax incentive to engage in tax reducing behavior.

Another forceful objection to embedding incentives or subsidies in the tax system is that those incentives or subsidies often do not reach people who are not in the tax system; they provide no benefit to a taxpayer who has no taxable income, apart from the deduction. Personal allowances afford no aid to a taxpayer who elects the standard deduction. Or tax subsidies may be judged to be inequitable if income-variant. However, a federal tax allowance for education could be designed to benefit even those taxpayers without tax liability. A tax credit with a refund provision, for example, could enable low-income persons to obtain a check from the government by filling out a tax return and showing a credit with no offsetting, or only partially offsetting, tax liability. The use of computers and simplified forms and widespread taxpayer advice would assist in making these tax benefits or allowances available to those not otherwise involved in the tax system.

Such a proposal, however, may fail to take due note of the difficulty of alerting and relying on millions of taxpayers, some of them poor, and many unsophisticated in tax matters, to understand, comply with, and react to complicated tax laws. Many may fail fully to take into account such matters as a tax allowance and a possible refund in the future when making plans in the present. In particular, it may prove unlikely or difficult for a poor and underprivileged child in a rural area or in the urban ghetto to make plans to go to college on the recognition that he or his family may enjoy reduced tax liability or an outright refund payment from the government some months hence. At the very least, it might become necessary to arrange some form of advance payment of such refunds so that students and their families would have cash on hand to meet their education costs.

In addition, to place the education subsidy-incentive in the tax law arguably will damage the tax system, divide and complicate the consideration and administration of government programs, keep tax rates high by constricting the base and thus reduce revenues, and may take a toll in terms of waste, inefficiency, and inequity if not carefully protected. Careful protections in turn involve administrative and compliance costs just as they would in a direct subsidy program.

Of course there may be some advantages to using a federal income tax allowance rather than a direct government expenditure. Some believe, for instance, that a tax allowance would circumvent the constitutional barriers to direct government aid to schools and religious institutions. But the validity of this position remains uncertain at best. A second supposed advantage of the tax form of allowance is that it would avoid establishing a new government agency for granting scholarships. It must be remembered, however, that additional bureaucracy or administrative and compliance costs would also be sustained if an educational tax allowance were installed. A separate scholarship office also may better be

able to adjust grants to need, academic qualifications and other education-related considerations.

Even if a subsidy-incentive is decided upon, therefore the case for casting it in the form of a tax allowance remains unproven. As distinguished from an allowance in the tax law to perfect its definition of taxable income or otherwise to improve the tax law itself, a subsidy-incentive should probably be granted in some form other than a federal income tax allowance—at least at this stage in the evaluation. Even though a form of tax allowance can be constructed to accomplish many of the incentive-subsidy goals and to avoid some of the inequities or inefficiencies of a plain deduction, a direct grant or other non-tax form probably would turn out to be equal or superior.

V

FURTHER QUESTIONS ABOUT A TAX ALLOWANCE FOR EDUCATION

Of final importance is to ascertain the actual incidence and real impact of federal aid to higher education whether in the form of personal tax allowances or a direct government payment to students, their families, and institutions, or in voucher form. In each instance, the question is who will actually capture how much of the economic benefit of such government allowances or payments.

By placing additional funds and spending power in the hands of students and their families and thereby reducing the effective price of the eligible activity, education, the government will indirectly lead the providers of education and education-related commodities and services to raise their prices and also to expand their provision of the eligible activity. A new price and a new level of supply will be reached. Whether the subsidy takes the form of a direct grant, tax allowance, or education voucher, the students and their families will be better able to pay the tuition and other educational costs, and some of their other funds will be released for non-education consumption, savings, or investment. However, education prices will rise, to some extent, so educational institutions will benefit.

To the extent that the economic benefits of an education allowance are captured by educational institutions, the result may accord with one important purpose of government assistance to education: to give additional aid to educational institutions. Some critics have argued, however, that, to the extent government assistance is advocated in order to provide additional help to students and their families, that aim will not be achieved by the dollars that find their way into the hands of the educational institutions. On the other hand, if the aim is to help the educational institutions it will not be satisfied to the extent students and their families capture the benefits. But, of course, there is nothing incoherent about a tax allowance which has as its aim helping students, their families, the educational institutions, and even the purveyors of other goods and services consumed by students, their families, educational institutions, and their staffs.

The problem of subsidy and access to education actually presents several different dimensions for someone designing a direct subsidy or tax allowance. To deal with students who drop out or do not attend higher education for financial reasons, it would be important to give a definite and immediate cash benefit sufficient to meet their need, but no more. To influence other students to attend college, when they are doubtful whether it pays to do so, an amortization of expenses over the lifetime of the income earner, to increase the private return to investment in education, would be suitable. To aid private or public institutions of higher learning, a program that subsidizes students in order to increase their demand for education or to enable more of them to go is inefficient in the fiscal sense because such an incentive-subsidy depends on the private decision-maker capturing some of the benefits in order to accomplish its purpose. Also, it may be important to examine whether institutions of higher learning do behave like profit-maximizers in the market. One difference, at least, may be that they limit access to their commodity by entrance requirements as well as by price and perhaps also by traditional notions of appropriate size, student body mix in terms of sex or geographical origin, and other considerations. In any event, the proponents of a tax allowance should be expected to acknowledge who its beneficiaries will be, to what extent and why. The problem of incidence is in no way escaped by making the subsidy a direct expenditure rather than a tax allowance, or vice-versa.

A related but probably tougher problem is to ascertain who actually pays for a government expenditure program, whether it be an outright expenditure or a

tax expenditure by way of a tax allowance. Some recent work has turned up alarming evidence that free or low-cost public education may actually operate to distribute income from poorer to richer families, rather than the reverse, because of the manner in which it is financed. The overall evaluation depends on knowing what tax sources, by income level of taxpayers, by geographical location, or by some other gauge, pay for a particular expenditure or tax allowance program and how the distribution of benefits of a government expenditure, or tax allowance, program compares with the distribution of taxes that pay for these benefits. Is there an equi-proportional tax allocation of the burden of a tax-expenditure program? If so, then if a government's tax structure is progressive, the distribution of tax burdens for a new tax-expenditure program will also be progressive, and vice versa. However, there is little or no reason to believe that things work this way. The equi-proportional allocation is largely an assumption. In marginal terms, the determinative question is: if federal government expenditures on education are increased, by a tax allowance or otherwise, and if everything else remains the same, which taxes, falling on which taxpayers will be raised, or what other expenditure (or tax allowance) program, benefitting which persons, would be reduced? Economic studies do not answer this question for an education tax allowance, nor does intuition help. A change in an expenditure or tax allowance may lead to compensating adjustments in the tax structure or in the expenditure structure, or both. No simple basis for allocating tax burdens for a tax allowance, assuming revenues are to remain constant or abandoning that assumption, seems reliable. The equi-proportional assumption has been well challenged and the marginal approach has presented a need for data that, at least so far, has not been met.

In the absence of reliable conclusions about who would gain the benefits of a federal income tax allowance for personal costs of higher education and who would pay the costs of that tax allowance (in increased taxes or foregone benefits) either in the short run or when the dust has settled, a policymaker is left somewhere between extreme caution and despair. Not only the incentive-subsidy arguments for a tax allowance are undercut, but also the "tax equity" and even the "perfecting the definition of income" arguments are left almost hopelessly incomplete.

OVERVIEW AND CONCLUSION

A principal difficulty in evaluating and constructing a good tax subsidy, or a direct expenditure subsidy, for higher education is determining the real rate of return on education. The data and the techniques so far in use seem inadequate to the task. To put a reliable dollar figure on the benefits that are received from education and thus to determine the rate of return on investment in education seems unlikely in the immediate future.

An important related difficulty is that of separating the consumer benefit from the income-producing investment made by a student or family bearing the costs of higher education. It does not seem likely that a reliable method of separating the consumption and investment components and of quantifying each will become available in the near future.

Another loose end is the unresolved problem of how to treat foregone income and whether to regard it as in any sense or any part a cost of higher education. One technique is to treat all, or part of it, as a cost and to allow it to be capitalized just as out of pocket expenditures would be. Another approach is to regard the foregone income simply as a failure to receive income that is not taxed and not as a cost allowable as a deduction or credit. Another possibility is to treat foregone income and the imputed value of low-cost education as income, tax it, and then capitalize some portion of it, to be amortized over the life of the education obtained. Still another possibility is to accept the fact that foregone income is not a cost in the sense that most costs of producing income are defined for tax purposes, but also to realize that it is a real economic barrier to education and therefore something that should be the focus of a subsidy or some form of relief in order to afford access to education for low-income students and families.

When the question is asked why higher education should be publicly financed or subsidized, the two answers most commonly given are those having to do with efficiency and equity. The usual efficiency argument is that external benefits produced by individuals who obtain higher education make the social rate of return higher than the private rate of return to education. Therefore, without a public subsidy, a less than optimal quality of education will be purchased and therefore society as a whole will suffer. The subsidy reduces private costs and thus raises the marginal private rate of return, ideally to the level of the social

rate of return. Of course, to determine the subsidy level, the value of the external benefits must first be determined.

The equity justification insists that many qualified students cannot afford to pay the costs of higher education so that public subsidies should be provided to assist them. In the absence of such subsidies, the argument runs, access to higher education depends upon unequally distributed parental income and wealth rather than on the students' own ability to benefit from college. With an appropriate range of subsidies, the effects of differential economic position can be onset. This may be viewed as the question of vertical equity. This equity argument does not call for equal subsidy to all students but rather for a subsidy that will not provide any windfall to those people who are willing and able to pay an unsubsidized cost but will provide a sufficient subsidy so that those who are unwilling or unable to pay the unsubsidized cost will be willing to pay the lower, subsidized cost and will therefore obtain higher education. The objective of promoting greater equity may well come in conflict with the objective of obtaining economic efficiency. The vertical equity argument calls for a larger subsidy for poorer students or their families than for wealthier students, or at least for larger tax revenues from wealthier students and their families. The differential subsidy or increase in tax revenue might in turn reduce the amount of work effort supplied in the market or reduce the extent to which wealthier students attend college and university. However, if market imperfections are causing both inequity and inefficiency, a subsidy or other remedy for the market defect will meet both problems and the tension between them will never materialize.

Perhaps the equity and ability-to-pay arguments, alone or combined with the perfection of taxable income or the incentive-subsidy, will be enough to persuade some legislators to enact a tax allowance or further direct subsidy. After all, information and analysis of other personal or mixed tax allowances or outright subsidies fall short of the demands impliedly made here for an education allowance. Nevertheless, in a policy climate of protecting or improving the integrity of the tax base, the use of a tax allowance for other than tax reasons should not be easily accepted.

Measured against the criteria and conclusions of this Article, federal tax credit legislation does not recommend itself, though it may be politically more saleable than and theoretically preferable to some other proposals. The preceding analysis tends to show that a strong conceptual argument can be made for a tax allowance for education costs to perfect the definition of taxable income. Such an allowance should take the form of capitalization and amortization of all outright expenditures on education that are ordinary and necessary costs of producing income by the student. The equity argument, though appealing in some ways, does not carry the burden and an education subsidy or redistribution or reallocation program would better be handled outside the income tax system.

The tax credit legislation that so nearly has become law in the last decade will not substantially improve the definition of taxable income, because the tax allowance is often given to someone other than the income recipient, given at a time long before the income is earned, given in a form (a tax credit) that does not suit the purpose and is hedged about with restrictions (a \$325 ceiling and an income phase-out) that do not belong in a trade or business or cost of producing income allowance. The tax credit legislation must stand or fall as a subsidy or redistributor, or as a blunt move to readjust the tax burdens of middle-class families with children in post-secondary education. Unfortunately the need for and proper size of such a subsidy have not been demonstrated. If the tax credit were to lack a refund feature, as earlier bills did, it would be seriously deficient, almost indefensible, as a subsidy or incentive. It would poorly serve its equity goals. Even with a refund feature, the subsidy-incentive finds its way into the tax system by brute force, rather than an open embrace. Better to perfect the tax base by an appropriate amortization scheme and then to provide desired subsidies or incentives in separate, explicit programs with outright payments (or vouchers) given on the basis of need and merit as defined appropriately for the subsidy program—not as distorted or confined by an income tax context. Congressional dissatisfaction with the tax credit proposals and refusal to enact them, even in the face of strong and growing political pressures, may have followed from a sense of the deficiencies of these proposals.

In general, a tax apparatus can be designed to do almost anything that can be done with a direct government outlay, by way of recognizing or subsidizing the personal costs of higher education. For some few purposes, such as tax equity

and perfecting the definition of taxable income, a tax allowance may have advantages over the direct government expenditure; for other purposes, such as subsidy and incentive, the tax allowance form of relief may be less desirable than a direct government expenditure. The important task is to determine the purpose and extent to which a federal subsidy or tax recognition of the personal costs of higher education is desirable and the amount that should be given.²² In filtering out the goals of a proposed tax allowance or expenditure, analysts will progress far toward determining the form that it should be given: tax allowance or direct expenditure and if a tax allowance, to whom, when, how much, and what kind.

STATEMENT OF ROBERT J. BILLINGS, PRESIDENT, CHRISTIAN SCHOOL ACTION, INC.

Christian School Action is grateful for the opportunity of participating in these hearings on tuition relief bills set by this committee. Our purpose is to set forth, clearly and simply, the philosophies and concerns of the schools for whom we speak.

Christian School Action represents a coalition of more than three thousand (3,000) schools from across America. More than 95% of these are church related. Until the introduction of the Packwood-Moynihan Bill (S. 2142) Christian schools have not been too excited about legislation offering tax relief for it was seen as another opportunity for federal intervention. This is still a great concern.

Our schools are non-profit and support admissions policies which are non-discriminatory on the basis of race, color or national origin. We feel that the Christian school movement is a vital part of our American culture and should be protected and promoted. The people involved in this exercise of education are for the most part highly patriotic, God-fearing, law-abiding, and productive citizens. The schools involved have a basic Christian philosophy, high academic standards, and an emphasis upon patriotism, morals and discipline. Few, if any of these schools, have ever received Federal, State or local monies by way of grants or Title funds for their operations.

Our concerns are: (1) the phrase "accredited or approved" would likely eliminate most of our schools. We cannot accept standards set by the State or other association. (a.) to accept their recipe is to end up with their product. . . this we do not want!, (b.) accrediting associations have no real yardstick by which to completely measure our Christ-centered educational program, (c.) though the facts are the same in either system the philosophy is different, (d.) in any testing program, the median child consistently tests out one to two years ahead of the median child in the same grade in a government school, and (e.) to bow to pressures for accreditation is to succumb to outside control and intervention. This would be a compromise of our principles. (2) We are equally concerned that should this bill become law, regardless of the intent of the Congress, a branch of our government may consider that schools whose children are accepting this tuition credit will be considered "recipient institutions." Such a categorical evaluation of our schools may subject us to unnecessary controls. (3) Finally, we would like to see inserted in the Packwood-Moynihan Bill a "Parental Rights" clause. Parents have the greatest vested interest in their children and should have a constitutional right to send their children to any school of their choice without fear of reprisal or harassment from any agency. Children do not belong to the State but to parents.

Again I thank you for this opportunity of presenting our case. With some understandable reservations this committee and the Congress of the United States can expect our prayers for the passage of this bill.

ALVERNO COLLEGE,
Milwaukee, Wisc., January 31, 1978.

Mr. MICHAEL STERN,
Staff Director, Senate Committee on Finance, Dirksen Senate Office Building,
Washington, D.C.

DEAR MR. STERN: I wish to express my firm support for the "Employee Education Assistance Programs." There is a great need for consideration to be given to the working person who wishes to obtain and/or continue her/his education

but often cannot because of cost. To have legislation that would exempt tuition aid from employee income tax would greatly assist the individual.

As the Assistant Dean for Student Development, I know many working women who are attending school at great cost to themselves who would benefit by this legislation.

Sincerely,

CELESTINE SCHALL,
Assistant Dean for Student Development.

**STATEMENT OF HAROLD M. JACOBS, PRESIDENT, UNION OF ORTHODOX JEWISH
CONGREGATIONS OF AMERICA**

My name is Harold M. Jacobs. I am president of the Union of Orthodox Jewish Congregations of America (UOJCA) and Chairman of the New York City Board of Higher Education. This statement is on behalf of the UOJCA, and is not intended to represent the opinion of the New York City Board of Higher Education.

The Union of Orthodox Jewish Congregations of America is the central spokesman for more than one thousand orthodox synagogues throughout the United States and Canada and their individual members. I have also been authorized by the National Council of Young Israel representing 160 synagogues throughout the United States with a membership of 100,000 families, the National Society for Hebrew Day Schools (Torah Umesorah), representing 83,000 students of Jewish Day Schools, and the Rabbinical Council of America, the largest organization of Orthodox Rabbis in the world, to inform the committee that they too join in this statement and ask that it be accepted on their behalf.

My statement will deal exclusively with the social policy implications of S. 2142, Tuition Tax Credit Act of 1977, known as the Packwood—Moynihan Bill. The constitutional questions of the bill have addressed in testimony submitted by the National Jewish Commission on Law and Public Affairs, in whose statement we have joined.

The proposed legislation provides for an income tax credit, subtracted from the amount of tax owed, of 50 percent tuition payments to a limit of \$500 per year for each student dependent. It is our belief that such tax relief is desirable for parents of children attending private elementary and secondary schools. It is further our belief that enactment of the proposed legislation will allow for maintenance of the private school system, and that failure to enact such legislation may result in the demise of many private schools.

The first portion of the testimony will deal with importance of the private school in the American educational system. There are two reasons for the desirability of maintaining private schools which immediately present themselves.

First, private schools allow parents to choose the educational orientation they wish or which may be necessary for their children. Many private schools, aside from providing quality education, provide special educational services, or impart a particular viewpoint or additional education not available in public schools. If parents wish, for example, their children to learn of a particular cultural or religious identity, it is through the private school that such may be provided. We feel it imperative that this option remain available. It is not only the continuance of special cultural and religious traditions, however, which is at issue, but the very freedom of choice of parents.

Second, the private school fulfills an important function in alleviating the burden on the public school system. The fact is that were all private school students to attend instead public schools, the system would not have, or be able to afford, the means to educate them. Indeed, the public school system might collapse under the weight of the increased burden. While being a negative argument in favor of retention of private schools, it is nevertheless a realistic assessment of the consequences were private schools to close.

We thus feel it imperative that the private schools in the United States be allowed to survive and flourish.

The second portion of this statement will deal with the merits of the proposed tax credits. Having established the importance of the private school, why should tuition tax credits be granted parents or their students? There are three compelling answers to this question.

First, is the matter of double taxation. Taxpayers are required, through their taxes, to maintain the public school system, whether they use it or not. Those who pay tuition for private school education are maintaining, by their tuition payments, the private schools in addition to the public schools. We question the propriety of this severe double assessment. While we do not question nor wish to overturn the present taxpayer support of public schools, we do feel that requiring those already paying tuition for education of their children to support another educational system unfair. The rationale of a taxpayer supported public school system is the obligation of society to educate its young. If one is already paying in discharge of his duty to educate, why need he pay a second time—why is this a burden to be borne twice by those exercising their right to educate their children in private schools?

Second, is the ability of a parent to exercise his freedom of choice of school for his children. With private school tuition increasing every year, the burden on the parent becomes greater. Private schools cannot grant scholarships to all applicants in need, and, thus, must turn away prospective students. The tuition tax credit plan will allow parents otherwise unable, to educate their children in private schools. The converse is to, in effect, deny parents their freedom, because of financial inability, to educate their children in the school of their choice. Why should the less affluent be deprived of the choice available to the wealthy?

Finally, is the very survival of the private school. This is directly related to the above stated point. The well documented increased cost of education in this country has seriously hurt financially strapped private schools. If parents of prospective students are unable to afford ever increasing tuition payments, the private school will be forced to close—either due to lack of funds, lack of students, or both. The tuition tax credit will allow parents to send children to private schools and pay tuition for their education.

Thus, accepting the premise, as outlined in the first portion of this statement, of the importance of private schools, enactment of the tuition tax credit plan is imperative.

I therefore recommend passage of the legislation in question.

STATEMENT OF HARRY A. MARMION, PRESIDENT OF SOUTHAMPTON COLLEGE OF LONG ISLAND UNIVERSITY, AND CHAIRMAN OF THE FEDERAL RELATIONS COMMITTEE OF THE COMMISSION ON INDEPENDENT COLLEGES AND UNIVERSITIES

My name is Harry Marmion. I am president of Southampton College of Long Island University and chairman of the Federal Relations Committee of the Commission on Independent Colleges and Universities, an organization chartered by the Regents of the University of the State of New York which represents more than 100 institutions of higher learning in that state.

We appreciate this opportunity to discuss with you the question of using the federal income tax as a means of enhancing the quality of our nation's higher education institutions and assuring better access to them for all Americans who desire and would benefit from that experience. We are delighted that our Senator from New York, Senator Moynihan, is a lead sponsor of tax credit legislation and is working closely with his colleagues in the Congress to have a tax credit bill approved during this session of Congress. Higher education tax credit has been a popular proposal ever since it was strongly advocated by Senator Ribicoff from our neighboring state of Connecticut. Three times in recent years the Senate has included a higher education tax credit in legislation it has passed. Unfortunately these provisions were deleted in Senate/House Conferences in each instance.

While we feel strongly that this is an idea whose time has arrived, we want to emphasize at the outset that we do not regard higher education tax credits, tax deductions, tax deferments or any combination of these as a reasonable or practical substitution for the ongoing federal programs of student aid.

These student aid programs help address the needs of students from lower-income families and have been most helpful to all institutions of higher education. They deserve improvement, particularly to restore some of the erosion in their value to low income families caused by inflation.

The middle income family, however, is not poor enough to qualify for direct student aid. As a result, their only recourse is to assume large debts. It is not unusual today for graduate and professional students or their families to have assumed debts ranging from \$20,000 to \$50,000 and the plight of the undergraduate student becomes more severe each year. Recently The New York Times reported that college students ten years from now will require from \$46,000 to \$62,000 for 4 years of undergraduate study at an independent institution.

Needless to say, the high level of debt reflects independent institutions' high dependence on tuition income compared to government operated campuses' high dependence on tax-levy appropriations. For example, in New York State, the independent institutions receive about eight percent of their resources from tax-levy funds while government institutions get about 80 percent of their revenues from taxes. Thus, it costs New York State taxpayers over \$4,000 a year for each student enrolled at the State University compared to about \$600 a year for each student enrolled at an independent institution.

Since the amount of debt a middle income student faces has a direct correlation to an institution's dependence on tuition income, we recommend that a tuition tax credit bill should conserve public funds for students at non public institutions who now receive the least tax-levy subsidy for their higher education. A policy of this type would help to stabilize enrollments among the sectors and enhance student choice which is becoming increasingly limited because of inflationary tuition increases in the independent sector.

My colleague from New York, Chancellor Eggers of Syracuse University, suggests that a postsecondary tax credit be 25 percent of tuition up to a maximum credit of \$1,000. This refinement to the Moynihan-Packwood proposal would expand students' range of choice of college and promote a more equitable sharing of scarce tax dollars. In New York a freshman is charged \$750 for tuition at the State University. If the students family's net taxable income is \$15,000 the tuition would be reduced to \$650, as a result of New York's Tuition Assistance Program (TAP). A 50 percent—\$500 tax credit plan would cut that tuition payment in half. Now, if that freshman had a twin attending an independent college in New York State, where the average tuition is \$3,100, the TAP award would reduce tuition to \$2,650. A \$500 tax credit limit would only cut the tuition payment by less than 20 percent. However, if we change the tuition tax credit from 50 percent—\$500 to 25 percent—\$1,000, the twin attending the State University and the twin attending an independent institution would be treated equally. Both would have their after TAP tuition cost reduced by 25 percent. The student attending an institution which receives the bulk of its income from non-tax sources would no longer be penalized. This change in the tax credit formula would also address the phenomenon of the "tuition gap", which is the difference between the subsidized tuition charge in the tax supported institutions and the non-subsidized, substantially higher, tuition charges in the independent institutions.

In addition to this kind of tuition tax credit, I urge you to consider other incentives for middle-income families who are unable to obtain substantial student aid and who are incapable of affording the inflationary escalation of the costs of college attendance.

The Commission in Independent Colleges and Universities of New York State supports Governor Carey's proposal for legislation to create the PASS Plan—Parents and Students Saving Plan. Under this plan, Federal and State tax incentives would be provided to encourage families to save for their children's higher education in the same way they now plan for their own retirement years.

Modeled after the successful Keogh Retirement Plan, PASS would permit parents to make limited tax-free contributions to trust accounts created for their children's higher education.

The fact that PASS encourages family savings makes it a particularly attractive program at both the state and national levels.

Dr. John Silber, president of Boston University, recommends another approach which would help middle income families meet the high cost of education at an independent college. He recommends the establishment of a Tuition Advance Fund (TAF) through a \$5.5-billion revolving trust fund to be administered by the Social Security Administration. The Tuition Advance Fund would advance money to college students to pay their tuition bills. Students would repay the money through payroll withholding over their working lifetime. The exact amount of repayment would be contingent upon their earned income. It would

include a one-time service charge for administrative and other costs, but there would be no interest charged on the tuition advance. The advances would be limited to an aggregate total of \$7,500 per student in the independent sector and \$1,860 in the state-supported sector of higher education, and would be repaid by yearly payments equivalent to one percent of gross income until the advance is paid back. Future borrowing limits, as well as future repayment schedules, would need to be adjusted for inflation. The exact length of time required for any one student to repay an advance would depend on variations in annual income. A student who enjoyed a high income would repay quickly, and might, after repaying the original advance continue to pay a surcharge—perhaps not to exceed 50 percent of the advance itself.

The TAF program is advocated on the grounds that it would be equally attractive to the independent and state sectors, and would establish a means to make the full price of tuition in any institution available to any serious student, no matter what his financial circumstances. Further, it is argued repayments of tuition advances would make the revolving trust fund self-sustaining in 20 years, so that the overall cost to the government eventually would be continued within predictable levels.

In conclusion, I want to thank the members of the Senate Finance Committee and in particular, our Senator from New York, Senator Moynihan, for making tuition tax credit a priority item which must be considered by Congress before the 95th Session comes to a close.

UNIVERSITY OF CALIFORNIA, LOS ANGELES,
Los Angeles, Calif., January 24, 1978.

Senator DANIEL PATRICK MOYNIHAN,
*U.S. Senate Office Building,
Washington, D.C.*
(Attention of Dr. Chester Finn.)

DEAR MR. FINN: I would appreciate very much an opportunity to express my support for the Packwood-Moynihan bill. It is the kind of new approach to financing education that is long overdue and especially urgent as regards the education of minority youngsters. This bill would give to ghetto youngsters and their parents the one thing they most lack in today's educational systems namely, a voice and a choice. The fact that this bill applies to elementary and secondary education means that, for the first time, working class parents can exercise some choice as to where their children go to school—and therefore must be taken serious by education authorities, also for the first time in many cases.

My own research into the education of minority youngsters convinces me that (1) there is no reasonable likelihood of early improvement in most of the ghetto public schools where they are presently warehoused, and that (2) in the midst of this vast desert of educational failure are oases of startling successes: schools where slum youngsters from welfare families exceed the national norms and achieve the kind of results usually thought of as "middle class." The diversity of the schools in which these gratifying results are achieved suggests that it is not due to any particular teaching "method" or formula that can be routinely applied elsewhere. In other words, the benefits of successful education cannot be transplanted to bureaucratically encrusted schools, secure in their monopoly of neighborhood "customers" who cannot afford anything else.

Some of the successful private schools I researched charged low tuitions which would be either completely covered or made very affordable with a \$500 tax rebate. One of the great untold stories of contemporary American education is the extent to which Catholic schools, left behind in ghettos by the departure of their original white clientele, are successfully educating black youngsters there at low cost. There are, of course, also some public elementary and secondary schools that are achieving excellence in the kind of social settings that are usually cited to excuse failures. A tuition rebate would not mean the destruction of the public schools. It would mean a dismantling of some bureaucratic practices and attitudes that cannot survive in competition.

It is, incidentally, not uncommon for a majority of black youngsters in Catholic schools to be Protestants. They are sent to the Catholic schools as the only affordable alternative to "blackboard jungle" public schools in the same neighborhoods. Because the proposed legislation would pay parents and not institutions, there should be no more Constitutional objections on church-state

separation grounds than to the G.I. Bill, which was usable at denominational as well as other private and public institutions.

I have emphasized the impact of a tuition tax rebate on elementary and secondary education because—for low-income youngsters, at least—that is where the educational battle is won or (usually) lost. Desperate efforts and expedients at the college level cannot repair deficiencies and gaps that go back many years.

Much of the concern that a tuition tax debate would benefit primarily the wealthy seems completely misplaced, in view of the simple fact that there are so many more middle income, working class, and low income people. Private schools may currently be identified with affluence, but this bill would bring that option within the range of more moderate and low income people. The option itself is enormously valuable, not only for those who would exercise it, but for those who remain in public schools which could no longer take them for granted. The freeing of millions of youngsters and their parents from the control of educational bureaucrats and the fads, experiments, and politics they bring, would be little less than revolutionary. It is a revolution likely to be zealously resisted by those who have come to regard and treat the schoolchildren virtually as their property. It would be a tragedy if the rest of us allow them to scare us off this much-needed reform with alarms and bugaboos. It would be hard to think of any other area where \$500 would buy so much.

Respectfully yours,

THOMAS SOWELL,
Professor of Economics.

STATEMENT OF PROF. WALTER E. WILLIAMS ON TUITION TAX CREDIT ACT OF 1977

The Tuition Tax Credit Act of 1977 is a late, much needed, amendment to the U.S. Internal Revenue Code. The Bill has many features that promise to help American parents and taxpayers beleaguered by the increasing cost of schooling at every educational level. Most noticeably is the need for parental financial assistance at the elementary and secondary levels of education, particularly so in our major metropolitan areas where parents and taxpayers are not only faced with the rising costs of education but also faced with deteriorating education quality. This is particularly the case in cities with large minority populations. By and large these parents are helpless to do anything constructive about theirs and their children's plight. While the Tuition Tax Credit Act will not produce the complete solution to the educational problems in our country, it is an important step in the right direction. In what follows I will highlight what I think are the major benefits of the bill.

1. *Equity.*—One of the most noteworthy features of the Bill is its equal tax treatment of persons. In other words, the income tax deduction method of subsidies is regressive in the sense that high income taxpayers derive a greater benefit from a deduction than do their lower income counterpart. However, the income tax *credit* (as in the proposed legislation), which is a credit against tax due rather than a deduction from taxable income, results in all families receiving the same dollar benefit. This is a significant improvement in our tax structure which might even be extended to other aspects of our tax system.

2. *Federal Revenue.*—The Joint Committee on Taxation estimates that the proposed Tuition Tax Credit Act will result in a revenue loss equivalent to 4.7 billion dollars for the calendar year 1980. While I do not dispute this estimation, I do suggest that the cost be put in a longer viewed perspective. That is, parents of elementary and secondary school student, through the tax measure, will be better able to improve the quality of education received by their children. To the extent that this is a greater possibility under the tax credit plan, the nation will more than offset in years to come the revenue cost of the plan through human productivity gains obtained through better education. This benefit will partly accrue through reduced unemployment of the kind associated with poor quality education.

3. *Freer Educational Choice.*—Numerous professional studies and press reports in the national news media point to one unmistakable fact: the quality of education received particularly by black and Hispanic racial minorities is a national disgrace. Many minority families know this well but few are financially

able to pursue other alternatives. Those who can enroll their children in neighborhood private schools such as those run by Catholic agencies, Black Muslims and other community schools. These schools charge tuitions which may be as high as \$1,000 per child per year. While the tuition at these neighborhood schools may be modest, it often exceeds the capacity of a poor person to pay particularly if he has three, four, or five children to educate. The Tuition Tax Credit Act will spell the difference in many a poor family between poor and high quality education. It is quite interesting to note that by and large these non-public institutions in the black communities of America produce a higher quality education than their public counterparts *and* at a considerably lower cost (in almost all cases less than one-third the cost per pupil at public institutions). This kind of national cost savings should be explored and encouraged.

There are many other advantageous aspects of the Tuition Tax Credit Act of 1977 that could be supported in this testimony such as the promotion of pluralism, diversity and variety in our educational system. However, I close this brief testimony by urging the United States Congress to give this legislation its most favorable attention so as to make America's credo "equality of educational opportunity" more of a living reality, especially in the case of America's disadvantaged minorities.

[Telegram]

DALLAS, TEX., *January 18, 1978.*

HON. ROBERT PACKWOOD,
Dirksen Senate Office Building,
Washington, D.C.

I have considered your educational tax credit bill (S. 2142) and wish to congratulate you on this approach to saving on the cost of education for people today. I am headmaster of the First Baptist Academy here at First Baptist Church, Dallas, Tex., in a complete educational facility, kindergarten through high school. As such, I have been a longtime proponent of separation of church and state. I have been and am now an opponent of federal grant to churches and church related school. However, I find no constitutional difficulty or threat to the separation of church and state for taxpayers to be able to take an education tuition credit and relieve the onerous burden of education. I note that this bill provides no additional federal control over our christian school or the secular school, which we appreciate. We do have some serious concern over the language stipulation "state accreditation or approval", but I am sure that you and your colleagues on the Senate Finance Committee are given further consideration to such language. Our distinguished Pastor and former president of the Southern Baptist Convention, Dr. W. A. Criswell, joins me in conveying to you our support S. 2142, and urge you and your colleagues to proceed with prompt passage of this excellent measure.

Sincerely,

MELVIN R. CARTER,
First Baptist Academy,
P.O. Box 868, Dallas, Tex.

SAN ANTONIO, TEX., *January 26, 1978.*

MR. MICHAEL STERN,
Staff Director, Committee on Finance,
Dirksen Senate Office Building,
Washington, D.C.

DEAR MR. STERN: I am very much in favor of any bills which would provide tax relief for persons paying tuition to private elementary and secondary schools and colleges. I feel that anyone sending their children to such private schools ends up paying twice as much as if his children were in public schools. This is due to the fact that the private school has its own tuition and the public schools are financed through our tax dollars. Any tax relief which could be provided by the Congress in this area would certainly be a boon to such persons who have chosen to send their children to private schools.

Very truly yours,

JON R. SANDIDGE,

ROCHESTER, N.Y., *January 13, 1978.*

Senator RUSSELL B. LONG,
Chairman, Senate Finance Committee.

DEAR SENATOR LONG: I wish to state my opposition to bill S. 2142 and ask that my testimony be included in the record of public hearings on the bill, scheduled January 18-20 in Washington.

Enclosed on a separate sheet are a few reasons for my opposition. This is the first letter ever written and I feel it is of vital importance. Thank you.

MAYBELLE ANDERSON
Mrs. M. J. Anderson.

REASONS FOR OPPOSITION TO S. 2142

1. The Supreme Court declared unconstitutional (Pearl V. Nyquist, 1973) a similar N.Y. tax credit law because of its impermissible effect of advancing religion.

2. It is estimated that over half of the more than five billion dollars would go to sectarian institutions and out of the control of the taxpayer.

3. The bill would force all taxpayers to pay higher taxes for the aid of religious institutions.

4. Acceptance of tax aid could endanger the independence of non public schools and the religious mission of many of them.

5. This bill would set the stage for unconstitutional "excessive entanglement" between church and state.

MAYBELLE ANDERSON,
Rochester, N.Y.

ROCHESTER, N.Y., *January 11, 1978.*

Hon. RUSSELL B. LONG,
Chairman, Senate Finance Committee,
U.S. Senate, Washington, D.C.

DEAR SIR: I oppose the passage of the Packwood-Moynihan bill, S-2142 which would provide tax credits to parents of students. I am enclosing a statement of these objections, and would like this statement included in the record of public hearings on the bill. I believe the hearings are scheduled for January 18, 19 and 20.

Sincerely yours,

Mrs. MARJORIE S. STUART.

TESTIMONY OF MARJORIE S. STUART

I oppose passage of this bill on the grounds that, if passed, the bill would:

(1) Endanger the independence of private schools, and interfere with their religious mission, in the case of religious institutions.

(2) Advance the cause of certain religions which maintain private schools. A similar New York state law has been declared unconstitutional by the Supreme Court of the United States (Pearl vs. Nyquist, 1973).

(3) Force all taxpayers to pay higher taxes for the aid of religious institutions.

MARJORIE S. STUART.

TESTIMONY PREPARED BY THE NEW YORK STATE FEDERATION OF CATHOLIC
SCHOOL PARENTS

The New York State Federation of Catholic School Parents represents the parents of 450,000 children who now attend Catholic elementary and secondary schools in New York State. Although time restraints did not permit us to present oral testimony at the hearings on Tuition Tax Relief Bills, we do appreciate the opportunity to present in writing the official position of the New York State Federation of Catholic School Parents relative to the Packwood-Moynihan Bill (S. 2142) for your serious deliberations. Our Federation strongly supports S. 2142 and we urge your Committee to recommend passage of the bill to the full Senate.

There are many advantages to the bill and, therefore, many reasons for your support. But the strongest reason in our estimation is that, finally some knowledgeable and courageous Senators have designed a bill which would give parents some means to exercise, in practice, what they had been given years before in theory, the right to freedom of choice in education.

Both the heritage of English common law, from which our laws derive, and the concepts of American democracy assure us that parents have the obligation and right to guide the education of their children. This right and duty of parents was recognized by the United States Supreme Court in 1925 (*Pierce v. Society of Sisters*). In this case the court said, "The child is not a mere creature of the state. . . . Those who nurture him and direct his destiny have the right, coupled with the high duty to recognize and prepare him for additional obligations". The court went on to say that the school compulsory attendance laws could be fulfilled in nonpublic schools, even in religiously oriented schools. But in a series of untoward judgments since 1925, the Supreme Court has, in effect, said, "Parents have the right to choose nonpublic schools but in order to do this, the parents will have to pay twice—for the public school in the district where they live and for the private school which they choose for their child". Many parents are not able to pay twice. An unattainable right is no right at all.

It is not difficult to demonstrate the advantages to society of having diversity in education. Noted educators, historians, sociologists, and economists have all pointed out the advantages of having private and public institutions in the United States.

Helen Baker, writing for the American Civil Liberties Union said, "We believe the right to an education is so basic that unless there is some way to challenge the monolithic structure of compulsory institutionalization, all liberty will be lost. We must challenge the existing compulsory education laws to allow real alternatives to public school education to exist. We need diversification, change, and challenge; we need 'schools' that students want to go to and that parents can exercise choice in. (In loco parentis, for instance, is a mockery in a compulsory school system.) In time these alternative efforts may become the new public schools of America." (ACLU, No. 286, April 1972).

The United States Commissioner of Education, Ernest L. Boyer, in a recent speech (at the nonpublic school National Convention, November 29, 1977) said this, "Private education is absolutely crucial to the vitality of this Nation, and public policy should strengthen rather than diminish these essential institutions. After all, private education is rooted deep in this Nation's heritage. The first schools and colleges in this country were, in large part, private institutions. Distinguished leaders in all walks of life have studied at nonpublic schools. And many of America's independent institutions have contributed brilliantly—and enduringly to this Nation's heritage".

In New York State for example, there is a tremendous amount of data which shows that Catholic elementary and secondary schools, on every indicator of educational excellence, generally equal or surpass their public school counterparts. Pupil Evaluation Program scores, National Merit Competition, Regents Scholarship Competition—all attest to the quality education programs offered by Catholic Schools. Chancellor Boyer, in the same speech cited above said, "I'm convinced that because of the great diversity among America's nonpublic schools, education in this great Nation has been enormously enriched".

But, in this testimony, it is not our main purpose to attest to the usefulness of private schools. What we do maintain is that parents must have the right in practice to a *choice* of educational programs whether they be government sponsored or not. The Packwood-Moynihan bill will help parents to exercise this right of choice.

With all the stress these days on consumerism, many parents are beginning to *realize* that schools exist to help parents. Thomas Draney, in a recent article called "Common Sense in Education," had this to say:

". . . But the basic control of schools should be left in the hands of those people who care the most—the parents.

". . . Most parents are not qualified, and recognizing this, do not wish to play the role of teacher or administrator. But most are qualified and, I believe, desire the power of choice to chart their child's education in these basic areas:

"1. Philosophy behind values embodied in general educational philosophy of the school, in academic courses such as the humanities, in newer 'problem oriented' courses (necessarily value-oriented) such as drug, sex, and health education, and those related to other aspects of sociology.

"2. The general tone of the school in 'discipline' (dress code, personal grooming, conduct) and attitude towards class attendance, etc.

"3. General approach to education—either the traditional class-room oriented scheduling and teaching, or the more innovative individualized, student-oriented approach.

"4. The type of academic program (college preparatory, business, vocational, etc.) and availability and participation in non-academic programs, whether in the arts, athletics, clubs, etc., or the newer types of community involvement programs.

"Parents could choose a school which would offer the most possibility for development of the particular child, and might choose totally different schools for two children who have different abilities, personalities, and needs. Life being imperfect, parents may not have available to them the ideal school, but at least they should have the ability to select, according to *their* own priorities, the best type of school for *their* child. This freedom should not involve a financial penalty, and it should have the possibility of starting new schools where, according to the laws of economics and free enterprise, there is a sufficient demand for them to make them financially viable."

The point we'd like to make is that the Packwood-Moynihan bill would enable parents somewhat, at least, to exercise this freedom of choice in education. The Packwood-Moynihan bill provides a vehicle whereby the Congress of the United States can respond positively in a matter of parental rights.

In conclusion, we would like to report that, at least in New York State, and we suspect in the Nation generally, there is a significant number of voters, who are committed to fight for parental rights in education. One day soon, we feel that the right of parental choice in education will become a reality.

We urge the members of your Committee, and every other member of the most distinguished United States Senate, to contribute to this struggle for freedom of choice by voting yes to the Packwood-Moynihan bill.

Respectfully submitted on behalf of the Executive Committee.

WILLIAM P. GALLAGHER,
Executive Director.

AMERICANS UNITED,
FOR SEPARATION OF CHURCH AND STATE,
SYRACUSE CHAPTER,
DeWitt, N.Y., January 15, 1978.

Senator RUSSELL B. LONG,
*Chairman, Senate Finance Committee,
Senate Office Building,
Washington, D.C.*

DEAR SENATOR LONG: Please give consideration to the following which we would appreciate having read into the minutes of the January public hearing on the Packwood-Moynihan bill on Tuition Tax Credits.

The Syracuse Chapter Board of Directors of Americans United for Separation of Church and State *opposes* Senate Bill S. 2142.

Reasons

Tuition reimbursement grants and tax credits have been ruled unconstitutional because of their impermissible effect of advancing religion as ruled by the U.S. Supreme Court (*Pearl vs. Nyquist, 1973*).

Some provisions of the bill would violate every person's right to support the religious institutions of his/her free choice.

It would cause "excessive entanglement" between church and state.

Acceptance of and dependence upon tax aid could cost nonpublic institutions their freedom to pursue their special missions. (Where is diversity in education when government officials control not only the public but also private education? Where tax funds go, government intervention also goes.)

Costs would escalate. Once the precedent is established, what would prevent Congress from raising reimbursement of tuition to 100%, or increase the maximum of \$500 per student benefit to higher rates?

Tax credits merely shift from one group of people to another. Education is a continuing process for all age groups. No group should be excused from their share of educational costs.

We believe college students can best be aided by making existing student loan programs more generous and more acceptable.

Diversity in primary and secondary education is already being achieved in the public schools in many locations. The public at large should not be taxed to support private preference.

Rather than tax credits, we believe the solution lies in reducing taxes by reducing governmental expenditures as a means of slowing down inflation. In this way not only the middle income individual but all taxpayers will have lower taxes and thus a better opportunity to meet the costs of education, whether it be public or private.

ELIZABETH M. ZAHORA, *President.*

ROCHESTER, N.Y., *January 11, 1978.*

HON. RUSSELL B. LONG,
Chairman, Senate Finance Committee,
U.S. Senate,
Washington, D.C.

DEAR SENATOR LONG: We oppose the Packwood-Moynihan Bill (S-2142) providing tax credits for tuition, and respectfully request that you include our enclosed written testimony in the record of public hearings to be held January 18-20 on that bill.

Thank you.

Yours truly,

MR. EVERETT H. SPRAGUE.
MRS. LOIS R. SPRAGUE.

Testimony in Opposition to the Packwood-Moynihan Bill (S. 2142), and its companion bill, H.R. 9332: Submitted, to be included in the record of the public hearings held on the bill, by Mrs. Lois R. Sprague and Wm. Everett H. Sprague, Rochester, N.Y., January 11, 1978.

The Packwood-Moynihan Bill (S-2142), and H.R. 9332, which provide tax credits for tuitions paid for college, private high and elementary schools are a travesty of human justice!

Under the pretext of helping the "suffering" parents who pay tuitions to privileged private elementary and high schools, including religious schools, and/or tuitions at expensive colleges and universities, this bill would actually shift more of the tax burden onto the poor and lower middle income groups who send their children to public schools, and to low-cost state universities—if at all.

This bill taxes the poor to support the indulgences of the rich.

Moreover, the United States Supreme Court has already found unconstitutional the tax credit for tuition at religious schools. Including colleges in the plan makes the aid to religion no less an issue! Tax credits for religious school education increases taxes for other citizens who neither belong to, nor care to support the churches sponsoring that education.

S. 2142 and H.R. 9332 violate church/state separation and immorally tax the poorer people to indulge the expensive habits of the more affluent!

STATEMENT OF DR. PAUL DAVIDSON, PROFESSOR OF ECONOMICS, CHAIRMAN, NEW BRUNSWICK DEPARTMENT OF ECONOMICS AND ALLIED SCIENCES AND DIRECTOR OF THE BUREAU OF ECONOMIC RESEARCH AT RUTGERS—THE STATE UNIVERSITY OF NEW JERSEY

My name is Paul Davidson. I live at 18 Turner Court, Princeton, New Jersey. I received a Bachelor of Science degree from Brooklyn College in 1950, a Master of Business Administration degree from City College of New York in 1955 and a Ph.D. in Economics from the University of Pennsylvania in 1959. I was a member of the Economics Department of the Wharton School of Commerce and Finance of the University of Pennsylvania and taught there during the periods of 1955-1958 and 1961-1966. From 1958 to 1960 I was an Assistant Professor of Economics at Rutgers University. In 1960-61, I was Assistant Director of Economics Division of the Continental Oil Company. In 1964-65, I was Visiting Lecturer and Fullbright Scholar at the University of Bristol in England. In 1970-71, I was a Senior Visitor at the Faculty of Economics and Politics of the University of Cambridge (England). I have been a Professor of Economics at Rutgers since July 1966.

I am the author of a book entitled *Theories of Aggregate Income Distribution* (Rutgers University Press, 1960) and one entitled *Money and the Real World* (Macmillan, 1972). I have coauthored books entitled *Aggregate Supply and De-*

mand Analysis (Harper and Row, 1964), Milton Friedman's Monetary Framework (University of Chicago Press, 1975), and a monograph entitled Demand and Supply of Outdoor Recreation (Bureau of Outdoor Recreation, 1969). I am the author of numerous articles on various economic subjects which have been published in professional journals such as The American Economic Review, The Economic Journal, Oxford Economic Papers, Canadian Journal of Economics and Political Science, Public Finance, Econometrica, Land Economics, The Southern Economic Journal, The Natural Resources Journal, Review of Economics and Statistics, The Journal of Political Economy, Economic Inquiry, and the Brookings Papers on Economic Activity. I am also the editor of the Journal of Post Keynesian Economics.

I am testifying today in support of an Educational Tax Credit to be made a permanent part of the U.S. tax system. I believe there are many good reasons to support such a tax credit, but in the brief time allocated me before this committee, I wish to emphasize just two reasons—namely, the need for even more technically trained individuals to solve our resource limitation problems and the equity effect of providing substantial tax relief to the industrious middle income wage and salary earners.

Many economists and policy makers at all levels of government believe that beginning in the 1970's, our economy entered an era where resource limitations and scarcities, rather than a lack of effective demand, are major obstacles to growth and its concomitant rapidly rising standards of living for our citizens. If this is true and if we do nothing to improve the situation, we are condemning future generations to a dreary life in a stagnant economy.

Resource limitations, however, are constraints to growth and prosperity only when technological innovations and the growth of knowledge are not forthcoming. It is important to remember the historical record that the Malthusian concept of population outrunning resources and the "discovery" of the law of diminishing returns by Ricardo in the second decade of the 19th century occurred just at the inception of the Industrial Revolution with tremendous technological advances. Since Ricardo's and Malthus's time, those economies which have invested the largest proportions of their resources in educating their population, have seen their wealth grow at phenomenal rates, while the growth of those economies that did not invest much in education have been held in check by their "limited" resource base. In most of the latter countries, most of the population have remained in poverty for centuries.

Thus, if our society's future prosperity is being threatened by resource limitations, the solution is to invest in the "knowledge" industry, for the solutions to our problems require a more highly trained, technologically advanced labor force than ever. To the extent that a Tuition Tax Credit encourages and permits our population to finance its further education, it should be supported.

I need not remind this Committee that the Congress has recognized the importance of an investment tax credit for stimulating the accumulation of physical capital. The tuition tax credit would similarly affect the accumulation of human capital.

In my view, many of the important future benefits of the accumulation of knowledge are social rather than private in nature; thus private market incentives, in terms of higher future earnings, may not be sufficient to encourage private before-tax expenditures on education. Moreover, even if the private market incentives exist, the problem of financing the investment in human capital by the student and his family may be overwhelming. Even if the expected discounted future returns from education exceed their current costs, if the student cannot meet the current costs, he will be unable to undertake this expected profitable investment in human capital. And there are good reasons in the real world why such financing may be close to impossible for many families!

Primarily, because of the sociology of the family, children of the same family all reach the college attending age within a few years of each other. Thus, the investment in college education for each family is bunched in a few years leading to inordinate demands for financing in a very short period. Even upper middle income families find it difficult, or near impossible, to send two or three children to college at the same time. Only the very rich—or paradoxically the very poor who are eligible for all sorts of scholarships—may be able to afford this. The very large middle class—those earning incomes between say \$15,000 and \$75,000—find the bunching of college costs staggering, and with the inflation of the last ten years it would have been impossible for such families to make sufficient

financial provision for a college education while their children were growing up.

Student loans are to some extent helpful, but with the arbitrary limits on maximum loans per annum set years ago (before the recent high inflation rates), these loans are less helpful in financing than they were in the past. (For example, banks in my home town normally loan a maximum of \$1500 per year on student loans, while it costs over \$7000 a year for tuition, books, fees, room and board to send a student to Princeton University, and even at Rutgers—the State University of New Jersey where tuitions are low—the cost for in-state students to attend is in excess of \$3500.)

This suggests a second excellent reason for a tuition tax credit—equity considerations. For the cost of college is particularly crushing to middle income individuals—those blue collar and white collar, law-abiding, tax-paying families who earn their income by their own labor, and who are unable to take advantage of tax shelters, or to hide property, income, etc. These are also the people to whom a tuition tax credit would be a real boon.

Of course, there are other good reasons for a tuition tax credit, e.g., it is highly effective as an employment stimulating device per dollar of tax credit. Since education is a labor intensive industry to the extent the credit stimulates additional purchases, jobs at all levels, faculty, secretarial, maintenance people, etc. will be created directly, while jobs in publishing and printing industries, educational equipment, construction, etc. indirectly. Finally, within a few years, industry will have a larger more informed labor force to man its engines of prosperity.

STATEMENT OF JOHN J. REILLY, PRESIDENT, ASSOCIATION OF CATHOLIC
TEACHERS AFT No. 1776, AFL-CIO

My name is John J. Reilly. I am President of the Association of Catholic Teachers, the first and largest Catholic Teachers Union in the country. We are affiliated with the American Federation of Teachers and the AFL-CIO. I represent 1200 lay teachers in the 30 Archdiocesan high schools of Philadelphia and one high school in the Diocese of Trenton, New Jersey. Our organization is presently actively engaged in obtaining recognition for some 2300 lay teachers in Diocesan elementary schools. We have, over the past 10 years, also been involved with numerous other Catholic Teacher Organizations throughout the country from New York City to Los Angeles, California. We offer this to show that our personal experience is not restricted solely to the Philadelphia area. I am also a parent and a taxpayer residing in Chester County, Pennsylvania.

There can be no denying that the Tuition Tax Credit plan presently being considered is important, controversial and emotional. Education in this country, whether public or private, is faced with a crisis of major proportions at every level. The question is how best to address ourselves to these problems so that all students whether in the private or public sector will receive the best education this country can offer. To this end, our collective efforts should be directed.

It is unfortunate to hear statements that give clear indication that there are those among us who even at this critical stage make every effort to continue to disenfranchise a significant number of American parents and students. Their thrust stems not from fact or logic, certainly not from constitutional language, and most assuredly not from justice or need. I refer to those thousands of disenfranchised students attending non-public schools, particularly religiously-affiliated schools, who are in effect being treated as second-class citizens. Public school advocates would have us believe that the Tuition Tax Credit would reward those who have abandoned public schools. They raise the spectre of fear that if this legislation is passed, there will be a mass exodus from public schools. Yet, they ask us to accept such statements without offering anything to support such allegations. Why, one wonders, do they ignore history—a history which shows private and religious schools as a part of the American scene from Colonial Times, schools which flourished side by side when the public schools finally became part of the American educational scene in the 19th Century.

The long and rich tradition of Catholic schools in Philadelphia began in 1770. Today, these schools enroll some 185,000 students. It is a System of elementary and secondary schools that in size has few equals in the country; a System that is not only concerned with ever-dwindling resources but is also attempting to meet the problems of urban people. The number of students in Archdiocesan city schools is 100,000 with over 25,000 of them enrolled in inner city schools.

There are also over 24,000 non-Catholic, Black and Spanish-speaking students enrolled. It is a System that relies, not as some would have you believe on the upper middle and wealthy classes for its students and financial support but rather on that class of citizens who traditionally have been the solid bedrock of America. The lower middle class, the working people, the blue-collar worker. The class of Americans, as no other, upon whose shoulders the tax burden falls, who feel the inflationary spiral more acutely, as they see whatever gains they have made more than offset by their lack of purchasing power.

These are the citizens who hold firmly to the American Dream of a better education for their children, a dream that also states that when there is injustice, democracy will right it. They also believe that they have a right to select schools of their own choosing, a right upheld by the United States Supreme Court. These are also the citizens who find that to exercise that right they must bear a double burden of paying ever-increasing taxes to support public schools while faced with increased tuition costs at their own schools. They are, in effect, being penalized.

It is time to question, I believe, how a constitutional right can be so badly eroded as to be meaningless or destroyed? If the freedom to exercise a right is not available, where then is the right?

There is another aspect of this problem that should not be ignored. What happens if those who presently support non-public schools reach a point where it is no longer possible to continue contributions or meet tuition costs. I am sure we are all aware that taxpayers across the country are voting down school budgets forcing early school closings and reduced services. In other areas, there have been near taxpayer revolts over increased property taxes. How then can anyone ignore the potential cost in dollars to offset the possibility of non-public school students being forced into public schools?

In the Philadelphia area, if students in non-public schools were forced to attend public schools, a conservative cost figure based on the 1976-77 cost per pupil in public schools would show an additional cost in excess of \$300 million a year necessary for public school budgets. That cost does not reflect the full amount, since there would be a need for buildings, transportation, supplies, and additional teachers to accommodate the influx of new students.

One can only ponder the consequences of such an increase. One should also think about the loss of diversity and pluralism that have historically benefitted the educational sector. It is strange that competition which has been a mainstay of the American economy, enabling America to flourish and grow strong, should be considered bad when it comes to education. Should one not fear more a monolithic educational system which history has shown as not always fostering the free exchange of thoughts and ideas?

We wish to emphasize the importance of a Tuition Tax Credit that includes elementary, secondary, college, trade and vocational school students—across the board relief to those who must pay tuition in either public or private schools. We strongly urge that elementary and secondary schools be retained in the legislation. Recent court decisions have shown that so long as aid is not directed toward a particular class or religion, then the courts are more likely to view such aid in a favorable light, if challenged. If the Congress were to pass legislative aid only to colleges, it is unlikely that elementary and secondary schools could be added at a later date.

It is interesting to note that one of the greatest aids to education in America was the GI Bill which enabled thousands of Americans to attend schools of their own choosing, including religious institutions with monies from taxes. This legislation was never challenged on constitutional grounds and I feel that the present Tuition Credit legislation is of like character.

In the most recent documented study of Catholic schools by Father Andrew Greeley, *Catholic Schools in a Declining Church* (1976), two factors other than the general decline in the birth rate are pointed to as reasons for declining enrollment in Catholic schools: lack of schools (new schools not being constructed in those areas into which Catholics are moving) and increasing tuition. Of these two, I believe, and it seems true in Philadelphia, that increasing tuition is taking its toll. With ever-increasing taxes and inflation, the mounting tuition costs are forcing people who would normally have opted for Catholic schools to face decisions of far-reaching implications. If they place their children in non-public schools now, what will the financial burden be 4, 6, 8 years from now? Will they have to take their children out of non-public schools because of increasing costs? Would it not be better if rather than pay tuition now in the elementary

and secondary years, the parents saved the money for college? Parents have even told me that they can only afford one child in non-public schools. If you were faced with that decision, which one of your children would attend non-public school while the others were enrolled in public schools. In all of these decisions, the underlining question for parents is how to compensate for the loss of a value-oriented education offered by Catholic schools if their child must attend a public school.

There is another class of citizens that will be affected by the outcome of this legislation—the Lay Teachers who in increasing numbers staff Catholic schools. These teachers along with their religious colleagues believe enough in Catholic schools to work with a minimum of the frills found in public schools while performing an outstanding job of teaching the basics and helping to shape the character of their students in a value-oriented system. The caliber of their work can be attested to by the National Test Scores which show their students to be above the national norm. But lay teachers are faced with a grave decision. How long can their dedication to non-public schools continue to take precedence over the financial needs of their families as they see salary and benefit increases for their public school colleagues move further and further ahead. The loss of such teachers can be extremely detrimental to any school system.

In closing, I wish to stress again the importance of Tuition Tax Credit legislation for all levels of education. I would not like to see the words of Chief Justice Marshall, "The power to tax is the power to destroy," become a reality for non-public schools.

I wish to thank the many members of the Committee on Ways and Means who so courteously replied to our letters of concern on this legislation. I would also like to express my appreciation to the Committee for the opportunity to appear and present the position of the Association of Catholic Teachers.

STATEMENT OF CHARLES E. GRASSLEY

Mr. Chairman and Members of the Committee, I thank you for holding hearings on this important subject and for the opportunity, both for myself and for the many of my constituents who have written to me, to testify in favor of tuition tax credits.

National figures point to escalating increases in higher education costs. The situation is no different in my own State of Iowa. Over the past four years tuition at our state universities has increased by more than 20%. At private two and four year institutions, those increases have amounted to more than 30%.

Rising higher education costs are a national issue. They can best be treated on a national level. I want to emphasize that it is not only the citizens from the large cities and more populous states which will benefit from the passage of tuition tax legislation, but all citizens across the country.

In approving tax credits for tuition and related educational fees, we are not only helping many to go to the school of their choice but we are encouraging many to seek higher education who would not otherwise consider it because of cost. We must remember that the proliferation of knowledge and this country's progress—both increasing in geometric proportions—have not occurred independently. Rather, each has contributed to the other.

Education is an investment. Those with higher education receive higher salaries, they receive more frequent promotions, and they eventually rise to higher levels of employment. In recommending that tax credits be given to those who invest in education, we are merely promoting consistency in the tax code which allows special treatment for productive investment when the real beneficiary of that investment is the public.

As inflation eats away at the real and disposable incomes of our citizens, investment in higher education is more and more difficult. Our children are our most valuable asset, and their minds America's greatest resource. We should actively encourage them to pursue higher education and tuition tax credits will do just that.

Tuition tax credits will not solve the problem of increasing costs in post-secondary education. But the program will ensure that a greater number of young men and women will have greater opportunity to learn, and none can deny the value of an educated public. Disraeli said it of England years ago, but it is just as true in America today that, "upon the education of this country, the fate of this country depends".

Tuition tax credits will allow us to provide assistance without imposing government controls, because control over educational choices will be left in the hands of the individual and not preempted by the government. This is how it should be. Furthermore, it is more and more clear that unless we act now to authorize tax credits for higher education, the government will soon develop a monopoly over post-secondary education, because only the government will have money enough to finance higher education costs.

The dual system of public and private schools must be maintained. Tuition tax credits will help both equally to survive. There is discrimination now in the tax code against those who choose private education over public. In recommending tax credits for education costs, we are really trying to remove that discrimination by giving the individual the right and responsibility to pursue the type of education he prefers. These proposed tax credits can be applied against costs of community colleges, vocational schools, public and private universities and graduate schools without exception.

I am gratified to see how wide an endorsement the concept of tuition tax credits has received both here in the Senate and in the House. Over 140 Members of the House have sponsored some type of tuition relief. All political philosophies are represented among those 140 promoting tax credits.

It is not often that bills come before Congress with such wide and bi-partisan support. Tuition tax credits will not help just those living in the cities or just those in the country, rather they will help a group of citizens whose membership transcends geographic boundaries. It is the middle-income group—the already over-taxed working families of America—who will really benefit from a graduated tuition tax credit bill. Too long has this group been ignored, and too often has it borne the burden of financing programs for the special interests of other groups.

The very rich do not need a great deal of help to send their children to college. The very poor can usually qualify for scholarships. It is the middle classes who have felt the squeeze of rising higher education costs most severely. It is sad enough that they have not been able to send their children to the colleges of their choice, but it is sadder still that they have had to decide which child they could afford to send. It is this group that needs and deserve tuition tax credit legislation.

None of us is asking the government for help when we recommend tuition relief through tax credits. We may talk of a revenue loss—which, by the way will be less than one-quarter of one per cent of the budget—but we cannot talk of cost. The money spent on higher education, like the decision as to where that investment should be made, rightly belongs to the individual. Furthermore, higher education costs tax credits will allow the student emerging from college, vocational or graduate school to get a fresher start after graduation. He will not have to enter the working world with a debilitating financial burden. Likewise parents and colleges will benefit. Tuition tax credits will let the individual help himself and all America in the process.

I am happy to lend my support to legislation which would provide relief from the rising costs of higher education through a system of tuition tax credits. I feel that this method is appropriate, and I feel that Iowa and the rest of the nation will benefit from the speedy passage of this legislation.

EXTENSION DIVISION,
VIRGINIA POLYTECHNIC INSTITUTE AND STATE UNIVERSITY,
Blacksburg, Va., February 27, 1978.

Senator HARRY F. BYRD, Jr.,
*Chairman, Subcommittee on Taxation and Debt Management Generally, Senate
Committee on Finance, Dirksen Senate Office Building, Washington, D.C.*

DEAR SENATOR BYRD: Tax credit legislation is needed for the part time adult student who is now in a majority of all persons enrolled in post-secondary education. The nationwide trend for this new majority began to accelerate about a decade ago and continues to be the dominant pattern. The national pattern of part-time adult students also is the pattern in the Commonwealth of Virginia. VPI&SU institutional response to program needs for part time adult students can be considered typical. Other responsive institutions have similar growth data. Enclosed charts and graphs illustrate the trend in growth at Virginia Tech for part-time adult participation in courses and registrations for off-campus credit and for non-credit program. Records of the two components are maintained separately and are presented separately.

The typical profile of part-time adult students registered in these programs in Virginia is that of a fully employed, producing, tax paying citizen, voting citizen using continuing education to increase self worth. Some employers pay the tuition but most of these citizens pay their own way. We believe part-time adult students deserve the same pro-rata tax breaks on self-investment allowed businesses which invest in themselves.

We cannot agree with the current Executive viewpoint which ignores the adult who is a part-time student while making millions available for purposes which hold no productive return. In this country we have two approaches to people. We *maintain* people and we *develop* people. The developmental component represents a present investment in the future. Individuals who assume the initiative to develop themselves must be accorded equal consideration with individuals maintained by government. We recommend that the Congress assume the leadership posture enacting into law tax breaks for part time adult students.

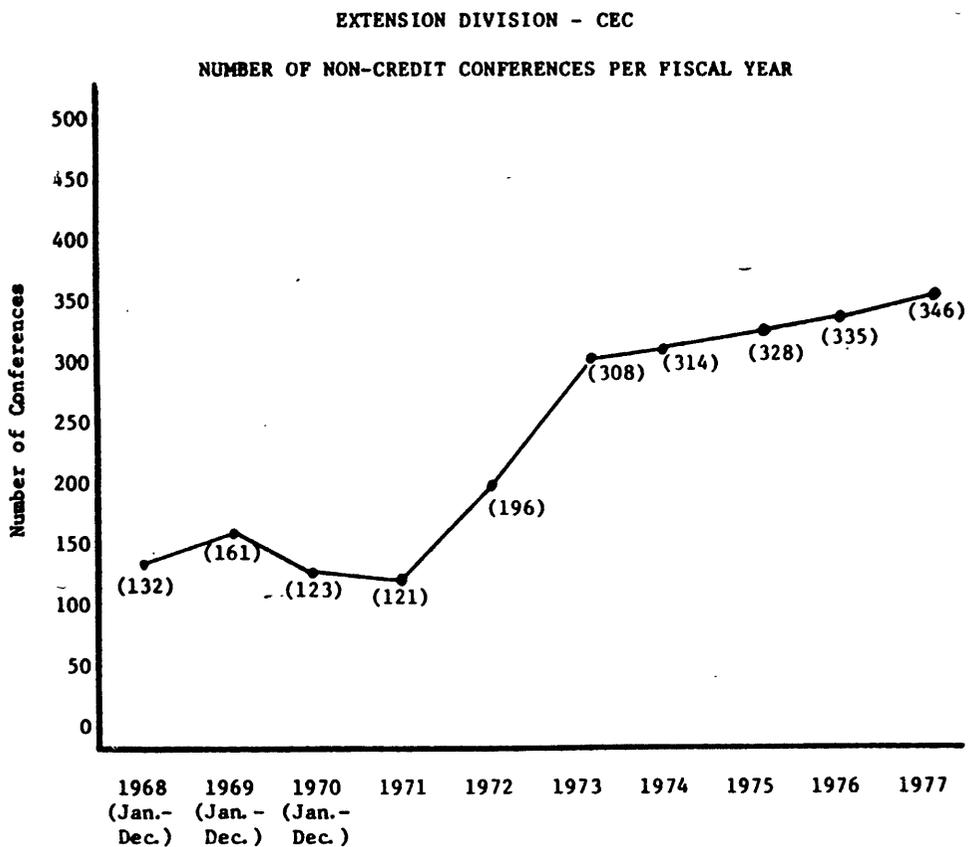
We offer the enclosed exhibits to illustrate the growth of demand by the part time adult student as recorded for one post-secondary institution in Virginia. We request your thoughtful consideration as you draft future public policy related to this need for human development. Tax credit legislation for part time adult students will be fair to all if available to all.

Yours truly,

WILLIAM L. FLOWERS, JR.,
Associate Dean.

Enclosures.

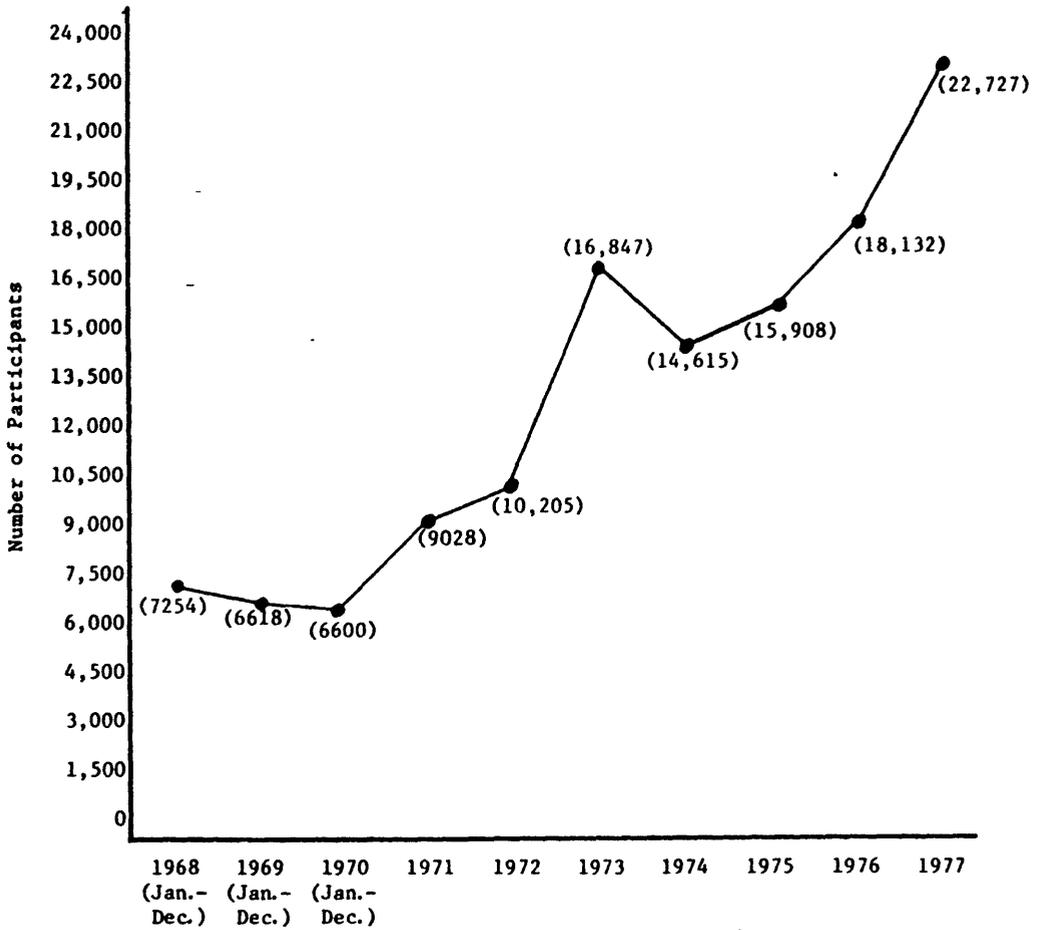
GRAPH I



Source: CEC Monthly Conference Data Report

GRAPH II

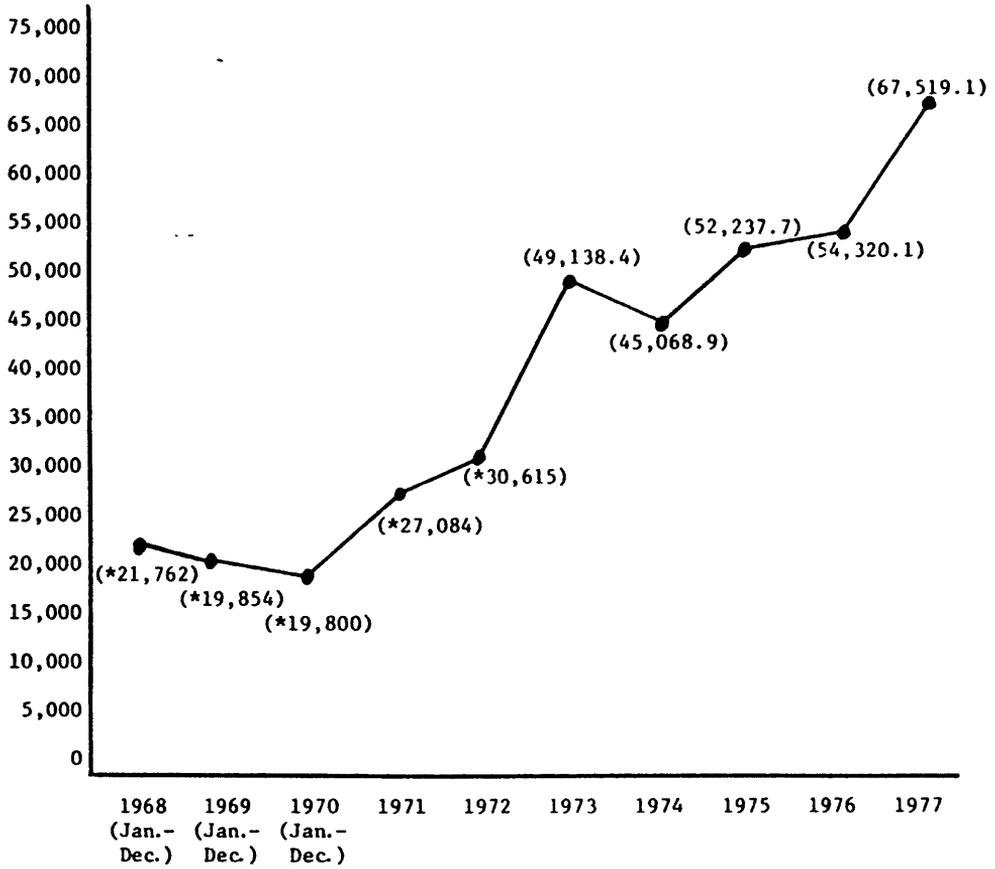
EXTENSION DIVISION - CEC
NON-CREDIT REGISTERED PARTICIPANTS PER FISCAL YEAR



Source: CEC Monthly Conference Data Report

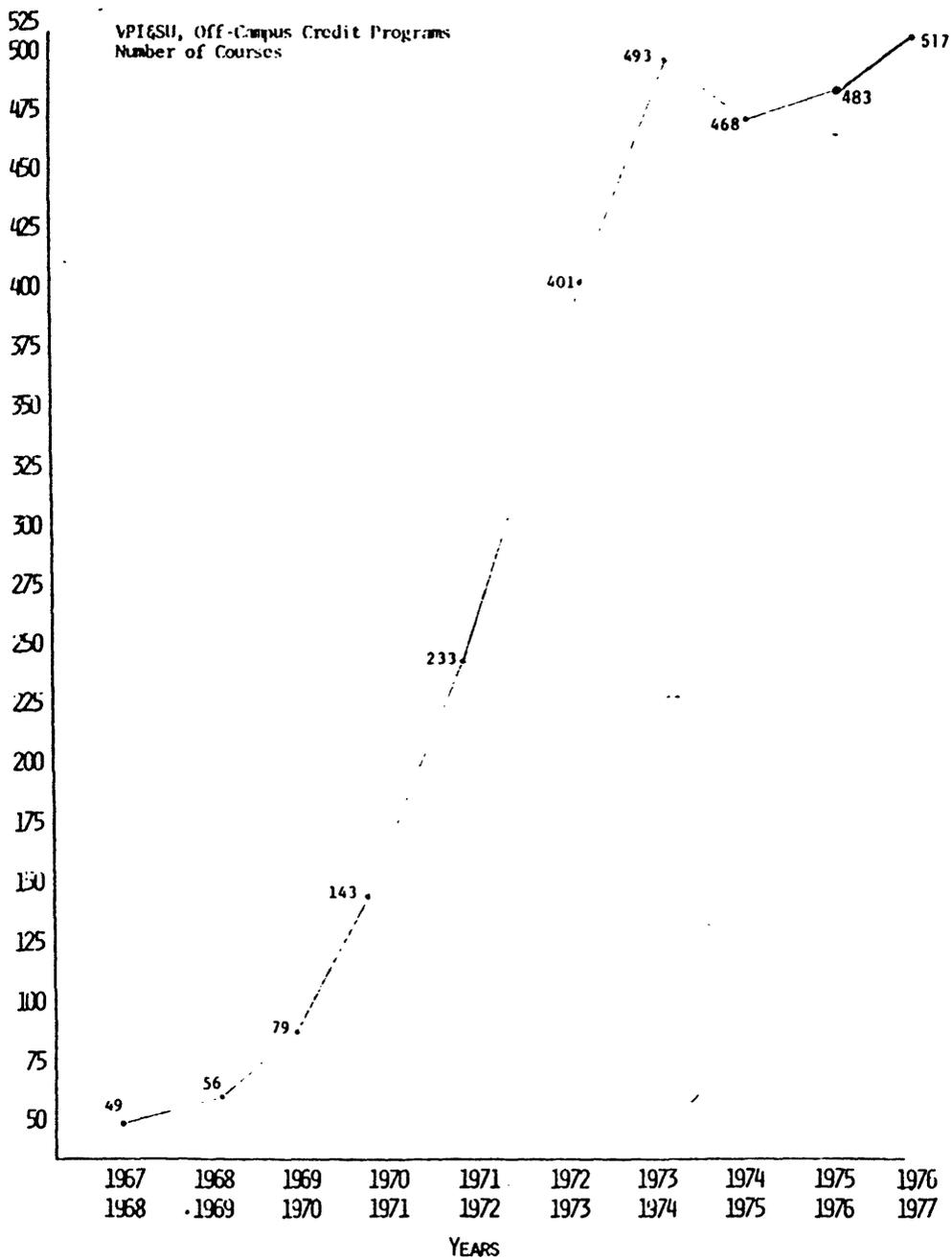
GRAPH III

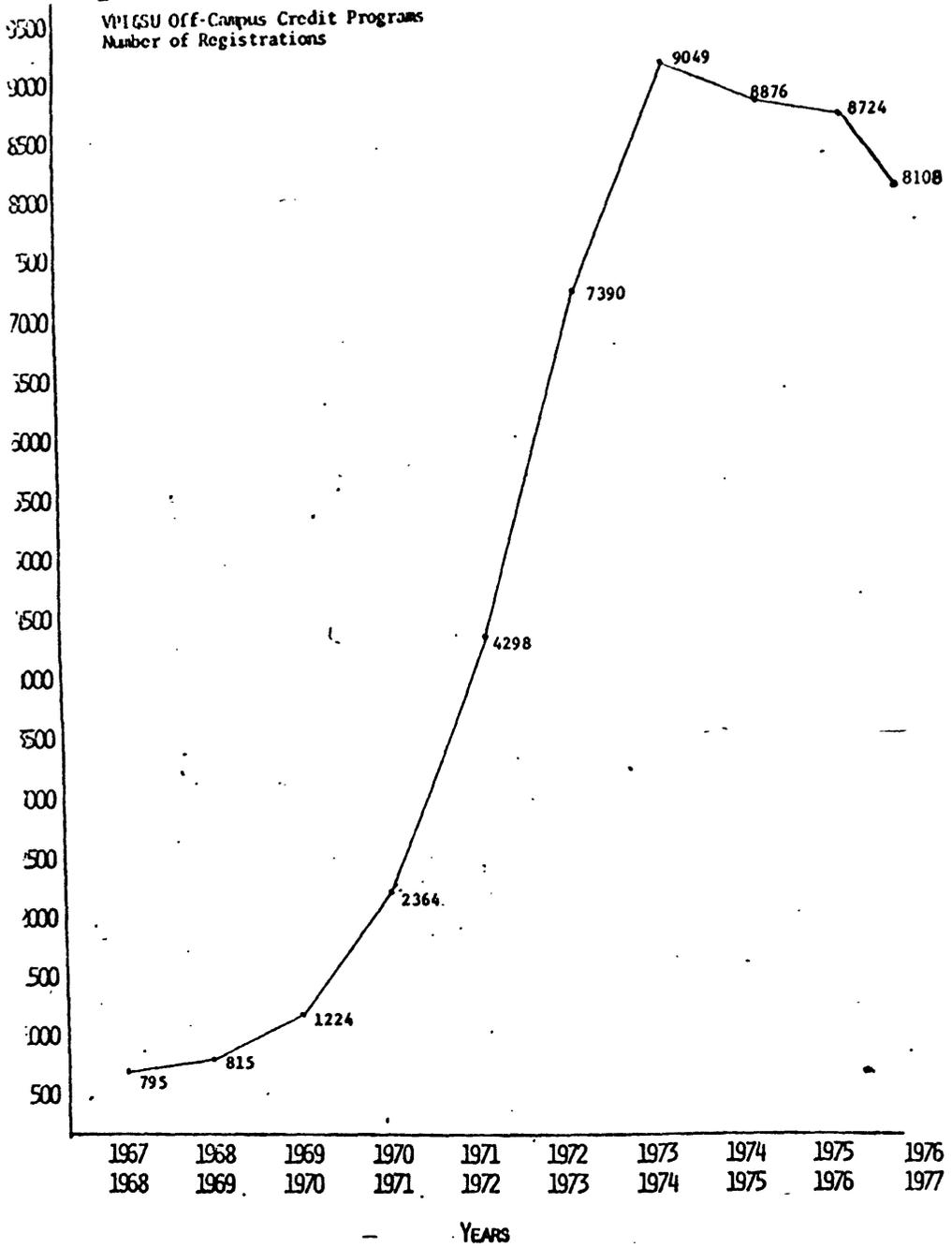
EXTENSION DIVISION - CEC
 NUMBER OF NON-CREDIT PARTICIPANT DAYS PER FISCAL YEAR
 (Number Participants X Numbers of Days Attending)



Source: Derived from the CEC Monthly Conference Data Report

*Estimate





— MASTERS DEGREES
- - - CAGS
· · · · DOCTORAL DEGREES

GRADUATE DEGREES AWARDED TO OFF-CAMPUS STUDENTS

1972 - 1977

