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NYQUIST AND PUBLIC AID TO PRIVATE EDUCATION

VICTOR J. PIEKARSKI*

The latest Supreme Court decisions involving an application of the religion clauses of the first amendment to state statutes, may serve to foreclose any further attempts by a state to aid parochial schools. The cases concerned the validity of two New York statutes and one of Pennsylvania. In *Levitt v. Committee for Public Education and Religious Liberty,* the Court struck down New York’s grant for reimbursing nonpublic schools for expenses related to testing and reporting required by the state, as a violation of the establishment clause. In *Sloan v. Lemon,* it found Pennsylvania’s parent reimbursement plan similarly violative. And finally, in the most detailed and most important opinion of the three, *Committee for Public Education and Religious Liberty v. Nyquist,* the Court held New York’s package of reimbursement for maintenance and repair expenses, reimbursement of tuition expenses, and its tax credit for tuition expenses unconstitutional.

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1. N.Y. Laws, 1970, ch. 138 § 2, provided for reimbursing nonpublic schools throughout the state for 
   
   expenses of services for examination and inspection in connection with administration, grading, and the compiling and reporting of the results of tests and examinations, maintenance of records of pupil enrollment and reporting thereon, maintenance of public health records, recording of personnel qualifications and characteristics, and the preparation and submission to the state of various other reports as provided for or required by law or regulation.

   The second New York statute provided for three distinct aid programs: N. Y. Laws, 1972, ch. 414 § 1, amending N. Y. Educ. Law, art. 12 §§ 549-553 (McKinney Supp. 1972) provided for direct money grants to nonpublic schools for “maintenance” expenses; N. Y. Laws, 1972, ch. 414 § 2, amending N. Y. Educ. Law, art. 12-A § 559-563 (McKinney Supp. 1972) created a limited tuition reimbursement program for parents of parochial school children who earned less than $5,000.00; and N. Y. Laws, 1972, ch. 414 §§ 3, 4 and 5 amending N. Y. Tax Law, §§ 612(c), 612(j)(McKinney Supp. 1972) which provided for tax credits for tuition paid to parochial schools by parents not eligible for the reimbursement program and earning less than $25,000.00 per annum.


since all three aspects were found to have "a primary effect that advances religion." The scope and variety of these latest plans, coupled with those which had gone before, seem to run the gamut of legislative options which aim at finding a way to constitutionally aid nonpublic schools. States may provide bus transportation and books, but precious little else. The Supreme Court has so held; but is such a result necessary? Does the first amendment command the states to stand by, the hands holding the legislative purse strings bound by the cords of judicial opinions, and watch the decline of an alternative system of education and the concommitant increase in demands made upon an already overburdened state school system? Hopefully not. The answer lies not, however, in the inventiveness and ingenuity of new legislative schemes, but in a reevaluation by the Supreme Court of its various criteria for finding state plans either constitutional or forbidden. The aim of this article is to suggest a new test which would satisfy both the commands of the religion clauses of the First Amendment and the demands of proponents of state aid to parochial schools.

The background of the Nyquist case can be quickly summarized. Soon after the New York aid package became law, it was challenged in federal court by the Committee for Public Education and Religious Liberty, an unincorporated association, and several individual residents and taxpayers of New York. A three-judge court was convened and the case was decided without an evidentiary hearing. The district court found the maintenance and repair provisions, and the tuition reimbursement provisions unconstitutional, but upheld the tax credit scheme.

The Supreme Court, in an opinion by Justice Powell, found all three aspects unconstitutional as violative of the establishment clause. The maintenance and repair provisions fell because their effect was to subsidize the religious mission of sectarian schools since no attempt was made "to restrict payments to those expenditures related to the upkeep of facilities used exclusively for secular

6. Id. at 774.
10. Aid may constitutionally take the form of "public provision of police and fire protection, sewage facilities, and streets and sidewalks." Id. at 242.
11. 413 U.S. at 768-769.
12. Id. at 779-780.
purposes.” The other two portions of the scheme were struck down for similar reasons. The Chief Justice, and Justices White and Rehnquist, dissented in separate opinions, finding both the tuition reimbursement and tax credit portions of the statute unobjectionable.

Before beginning his examination of the three plans contained in the statute, Justice Powell reviewed the purpose and aim of the religion clauses, the standard they require, and the test fashioned by the Supreme Court in previous cases in order to assure that the standard had been met. In his view, the establishment clause protects against the evils of “sponsorship, financial support, and active involvement of the sovereign in religious activity.” Later, he states that “our cases require the State to maintain an attitude of ‘neutrality,’ neither ‘advancing’ or ‘inhibiting’ religion.” The test he would apply is also expressly set out: “[F]irst, [the statute] must reflect a clearly secular legislative purpose. . . . second, must have a primary effect that neither advances nor inhibits religion . . . and third, must avoid excessive government entanglement with religion.” None of these expressions of purpose, standard, and criteria are new. Rather, they have been evolved through judicial interpretation of the establishment clause since 1946. An understanding of these earlier cases is necessary in order to fully appreciate the import of the above three statements. It is also necessary in order to fully elucidate those aspects of the opinion which, in this author’s view, should be abandoned, and those alternative criteria which will be submitted later as replacements.

I. The Cases

The first amendment commands that “Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof.” The first major test of state aid to nonpublic schools as violative of the first amendment was considered Everson v. Board of Education. A state plan to reimburse parents of all children for the cost of bus transportation to and from school was challenged as a law “respecting an establishment of religion” since

13. Id. at 774.
14. The Court held that they subsidized the religious mission of the school since no attempt was made to distinguish its secular and religious functions.
15. 413 U.S. at 772, citing Walz, supra, note 10.
16. Id. at 788.
17. Id. at 773.
the plan reached parents of children in church-related schools. After reviewing the history of the adoption of the first amendment, Mr. Justice Black, speaking for the majority, held that the establishment clause meant at least this:

Neither a state or the Federal Government can set up a Church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force or influence a person to go or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups or vice versa. In the words of Jefferson, the clause against establishment of religion was intended to erect "a wall of separation between Church and State."

Black then continued to describe not only what New Jersey could not do because of the establishment clause, but also what it could not do because of the free exercise clause. The upshot of this is "[T]hat the Amendment requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them." Although the majority found this plan to be on the "verge" of an establishment, they held it to be constitutional since the beneficiaries were school children and not parochial schools.

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19. Some authorities have viewed Black's version of constitutional history as rather biased, if not totally erroneous. "Undoubtedly the Court has the right to make history, as it has often done in the past; but it has no right to make it up." Corwin, The Supreme Court as National School Board, 14 LAW AND CONTEMP. PROB. 3 (1949).

20. 330 U.S. at 18.

21. New Jersey cannot consistently with the "establishment of religion" clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church. On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or the lack of it, from receiving the benefits of public welfare legislation.

Id. at 16.

22. Id. at 18.
directly, and because this was seen as "public welfare legisla-

tion."23

The most important aspect of the case is, of course, the applica-
tion of the establishment clause to the states. Although there were
some statements in earlier cases which indicated that the first
amendment was made applicable to the states by the fourteenth's
guarantee of "liberty", these cases concerned free exercise and not
establishment problems.24 Yet, Justice Black felt no need to explain
or justify this new incorporation.25 However, the question has, for
all practical purposes, been mooted, and any argument either
against or supportive of parochaid must perforce accept this as a
given fact.26

The next two cases to reach the Supreme Court involved pro-
grams of "released time." In *McCollum v. Board of Education*,27
the Illinois program of allowing religion classes to be held in public
schools at certain hours during the school day, was struck down
as unconstitutional. The Court found that "[T]he state ... affords
sectarian groups an invaluable aid in that it helps to provide pupils
for their religious classes through use of the State's compulsory
public school machinery. This is not separation of Church and
State."28 Although the plan provided that attendance at these
classes was voluntary, the Court saw an element of coercion. Mr.
Justice Frankfurter put it most strongly in his concurring opinion:
"The Champaign arrangement thus presents powerful elements of

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23. Id.
24. "The First Amendment declares that Congress shall make no law respecting an
establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amend-
ment has rendered the legislatures of the states as incompetent as Congress to enact such
criminal statute which prohibited soliciting without a license. The defendant was a mem-
er of the Jehovah's Witnesses. The Court held the statute unconstitutional as infringing
upon free exercise of religion.
25. On the issue of incorporation without disagreement, Kauper offers this explanation:
"The only satisfactory explanation is that they impliedly accepted the proposition that the
establishment clause embodies one of those 'fundamental principles of liberty and justice
which lie at the base of all our civil and political institutions.' Palko v. Conn., 302 U.S.
15 ARIZ. L. REV. 307 (1973). Mr. Justice Roberts said as much in Cantwell: "The funda-
mental concept of liberty embodied in the [the Fourteenth] Amendment embraces the
liberties guaranteed by the First Amendment." 310 U.S. at 303.
26. Challenges to the incorporation of the First Amendment into the Fourteenth would,
in the words of Justice Clark, "seem entirely untenable and of value only as academic
28. Id. at 212.
inherent pressure by the school system in the interests of religious sects. . . . The law of imitation operates, and non-conformity is not an outstanding characteristic of children. The result is an obvious pressure upon children to attend.\textsuperscript{29} The second case involving a similar released time program was \textit{Zorach v. Clauson}.\textsuperscript{30} There, the children who wished to attend religious instruction were released from school and went to places other than public schools. The non-participants remained in school until the end of the school day. Mr. Justice Douglas, after acknowledging that "[T]he First Amendment does not say that in every and in all respects there shall be a separation of Church and State,"\textsuperscript{31} found the plan constitutionally sound. The majority found no elements of coercion present here\textsuperscript{32} as in \textit{McCollum}. The dissenters saw the facts differently on this point.\textsuperscript{33}

The next pair of cases, unlike \textit{McCollum} and \textit{Zorach} which involved relationships between public schools and religious groups, had to do with activities solely within the public school. \textit{Engel v. Vitale}\textsuperscript{34} involved the "Regent's Prayer" which was to be read aloud each day in public schools. A child could be excused upon parental request. After pointing out the danger of a government-sponsored prayer to free exercise guarantees,\textsuperscript{35} Justice Black distinguished the force of both clauses:

The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce non-observing individuals or not.\textsuperscript{36}

Yet, shortly thereafter, he states that: "When the power, prestige and financial support of the government is placed behind a particular religious belief, the indirect coercive pressure upon religious

\textsuperscript{29} \textit{Id.} at 227.

\textsuperscript{30} 343 U.S. 306 (1951).

\textsuperscript{31} \textit{Id.} at 312.

\textsuperscript{32} If there had been evidence of coercion, Justice Douglas recognized that "a wholly different case would be presented." \textit{Id.} at 311.

\textsuperscript{33} "This released time program is founded upon a use of the State's power of coercion, which for me, determines its unconstitutionality." \textit{Id.} at 323. Opinion of Justice Jackson (dissenting).

\textsuperscript{34} 370 U.S. 421 (1961).

\textsuperscript{35} "... [O]ne of the greatest dangers to the freedom of the individual to worship in his own way lay in the governments' placing its official stamp of approval upon one particular kind of prayer or on one particular form of religious services." \textit{Id.} at 429.

\textsuperscript{36} \textit{Id.} at 430.
minorities to conform to the prevailing officially approved religion is plain." The Court found an impermissible establishment and struck it down.

*Abington School District v. Schempp* involved Bible reading in public schools with the same opportunity for students to be excused as in *Engel*. After citing the possible existence of a coercive element, Justice Clark stated the test to be applied in establishment cases: "[W]hat are the purpose and the primary effect of the enactment . . . .[T]o withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." The Court found the practice to be a "religious exercise, required by the States in violation of the command of the First Amendment that the Government maintain strict neutrality, neither aiding or opposing religion."

The next case returned attention to plans providing state aid to nonpublic schools. In *Board of Education v. Allen*, a New York law provided for the loaning of books to students in private, as well as public, schools, to be used in the courses offered in those schools. A similar plan had been before the Supreme Court before *Everson* was decided, but the issues presented involved questions of due process and not establishment of religion. The Court analogized it to the situation present in *Everson*—public welfare legislation benefiting children and only indirectly benefiting religious institutions. The Court applied the *Schempp* test and upheld the plan.

The next major step in the evolution of the criteria against which state plans which attempted to aid religion were to be measured, came in a tax case, *Walz v. Tax Comm.* The case involved a tax exemption for property used solely for religious purposes.

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37. *Id.* at 431.
39. One allegation of the complaint stated that the practice violated petitioners' freedom of religion "in that it threatens their religious liberty by placing a premium on belief as against non-belief and subjects their freedom of conscience to the rule of the majority." *Id.* at 212.
40. *Id.* at 222.
41. *Id.* at 225.
42. 392 U.S. 236 (1961).
44. 392 U.S. at 244.
45. *Id.* at 243.
Mr. Chief Justice Burger, writing for the majority reviewed the purposes of the establishment and free exercise clauses. He said that for the founding fathers, the establishment of religion "connoted sponsorship, financial support and active involvement of the sovereign in religious activity." 47 He held the thrust of both clauses was, and is, "benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." 48 The case is important not for the Chief Justice's interpretation of the first amendment, however, but for the rather summary addition of a third testing criterion—whether or not the end result of the legislation created an excessive government entanglement with religion. 49

This third test was enough to strike down the state plans considered in Lemon v. Kurtzman and the companion case of Early v. DiCenso, Nyquist's immediate predecessors. 50 Both plans provided that the state would bear some of the costs of secular education provided by nonpublic schools. The Rhode Island statute provided a salary supplement to teachers in private schools. 51 The Pennsylvania statute authorized the "purchase" of "secular educational services" from nonpublic schools. Under this arrangement, the state directly reimbursed nonpublic schools solely for their actual expenditures for teachers' salaries, books, and instructional materials. 52 After stating the three-pronged test gleaned from its previous cases, 53 the Court, after finding it unnecessary to decide the primary effect of the statutes, held both unconstitutional under the entanglements test. 54 The Court also noted the further defect in the Pennsylvania plan of directly reimbursing the private schools, 55 thus distinguishing it from Everson and Allen. Finally, the Chief Justice noted that: "As well as constituting an independent evil against which the Religion Clauses were intended to protect, involvement or entanglement between government and reli-

47. Id. at 668.
48. Id. at 669.
49. Id. at 674.
51. Id. at 607.
52. Id. at 609.
53. "First the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances or inhibits religion . . . finally, the statute must not foster "an excessive government entanglement with religion"." Id. at 612-613.
54. Id. at 614.
55. Id. at 621.
gion serves as a warning signal,\textsuperscript{56} indicating that entanglements may be a sign of incipient establishment.

II. The Theories

From these cases a number of theories as to what is permissible under the establishment clause have been drawn. A number of them are no longer tenable in light of Nyquist and some have never found acceptance in the Supreme Court. But they are valuable nonetheless if only because their wreckage marks the sites of otherwise hidden barriers.

A. The Absolutes

The first two theories can be called the "absolutes." Theory one is that any aid is forbidden—"no law respecting an establishment of religion" means exactly that.\textsuperscript{57} This is what Black seemed to be talking about in Everson, but in the end he does find a safe area in which the state can act.\textsuperscript{58} The previously cited statement of Justice Douglas in Zorach would seem to put an end to this line of argument once and for all.\textsuperscript{59}

Theory two anchors itself to the case of Sherbert v. Verner,\textsuperscript{60} the position being that aid to parochial schools is required. Since the government in Sherbert could not pressure a citizen into foregoing religious belief by imposing an economic penalty upon the exercise of that belief,\textsuperscript{61} it cannot do so in the private school situation. The government must allocate school funds between public and private schools, otherwise the burden of supporting two systems falls exclusively upon those who send their children to parochial schools for religious reasons. This is tantamount to imposing an economic burden on the exercise of their religious beliefs and therefore a violation of their rights to free exercise.\textsuperscript{62} The

\textsuperscript{56} Id. at 624-625.
\textsuperscript{57} Griswold calls this approach "Fundamental Theological." Using this line of approach, "the judge puts on blinders. He looks at one phrase only; he blinds himself to everything else." Griswold, \textit{Absolute is in the Dark}, 8 UTAH L. REV. 167, 169 (1963).
\textsuperscript{58} Prompting this reproach from Mr. Justice Jackson in dissent: "The case which irresistibly comes to mind as the most fitting precedent is that of Julia who, according to Byron's reports, whispering 'I ne'er will consent,'—consented." 330 U.S. at 19.
\textsuperscript{59} "The First Amendment does not say that in every and all respects there shall be a separation of Church and State." 343 U.S. at 312.
\textsuperscript{60} 374 U.S. 398 (1962).
\textsuperscript{61} Id. at 404.
\textsuperscript{62} A more subtle argument was suggested in a student note: "State aid to parochial schools is necessary to guard people's free exercise of religion. To refuse aid to church-related schools, given their current financial problems, would be akin to enacting a law that
problems with this approach are twofold: first, it overlooks the aspect of voluntariness in the choice of school situation and the rather coercive situation which existed in Sherbert; secondly, and most importantly, it completely ignores the establishment clause. It has never been accepted by the Supreme Court and never will be, simply because it has the effect of writing the establishment clause out of the first amendment.

B. Separation

The next level is occupied by what may be called the “separation” theories. They are based on the premise that government can do nothing which aids or supports religion directly. These theories encompass the extremes marked at one end of the spectrum by Jefferson’s “wall” and at the other by Choper’s theory that the establishment clause does not prohibit aid to the extent that parochial schools perform secular services, since as long as the government gets its money’s worth, the nature of the supplying institution should make no difference.

1. The Wall of Separation

The idea of a “wall of separation between Church and State” is as important a metaphor as it is unfortunate. The ideal it describes is difficult to challenge yet equally difficult to meet, given the fact that in numerous areas, education being one, the interests of state are similar to the interests of churches. The decision that a state can not constitutionally require all students to attend public schools, would seem to make total separation impossible. But the Court struggled with this seeming paradox in its earlier cases. In fact, Justice Jackson’s reference to Byron’s Julia emphatically points out this inconsistency. From this struggle has emerged a

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all children must attend public schools, and that has already been declared constitutionally impermissible by the Supreme Court.” 17 CATH. L. REV. 242 (1971).


66. This paradox exists only if Jefferson’s metaphor is read literally. It has been suggested elsewhere that “separation of Church and State is not an independent principle, that the primary principle is that of religious liberty—protected from government action either establishing religion or prohibiting its free exercise. These protections are conveniently summarized in the phrase ‘separation of church and state.’” Katz, Freedom of Religion and State Neutrality, 20 U. CHI. L. REV. 426, 428 (1953).

67. See note 58, supra.
number of theories which, for the sake of convenience, may be described as exceptions to the total separation ideal.

2. Child Benefit

The first of these exceptions was suggested in *Everson*, and has generally come to be known as the Child Benefit theory. The reasoning is that although it is impermissible for a state to aid religion, it is not impermissible for it to enact measures tending to benefit a class of citizens, here children, some of whom may be attending parochial schools. Similar reasoning was applied in *Allen* and sufficient to sustain the book-loan plan under the primary purpose and effect test employed by the Court in that case. But the theory has not had an easy history and it appears that upon closer inspection the fact that a third party is aided along with the school should have no constitutional significance. Accepting, for the moment, the first two of the Court's criteria, it would seem that child-benefit may be a valid secular legislative purpose. However, the theory cannot, of its own force excuse a failure under the effect test if, in fact, the primary effect of the legislation was to aid religion. The constitutionality of state aid programs should not rest upon whether or not the legislature could efficiently, or at least practicably, channel the aid through a third party. This position is adopted by the Court in *Nyquist* in striking down the tuition and tax credit plans and would seem to foreclose any future argument that the existence of an unconstitutional establishment depends upon whether the aid is direct or indirect. The question now is simply stated: Is the aid given impermissible?

3. Education-Welfare Distinction

After *Everson* and *Schempp*, the thrust of the arguments shifted from the broad issue of aid or no aid to whether aid to the "process" of education was permissible. Opponents of aid began

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68. Mr. Justice Black found the New Jersey statute to be "public welfare legislation," which would help to maintain the health and safety of all children on their way to school. 330 U.S. at 16-17.

69. "Direct aid to church-related institutions would be impermissible while aid to students would be permissible, because any aid channeled to the school through student subsidies would be indirect." Valente, *Aid to Church Related Education—New Directions Without Dogma*, 55 VA. L. REV. 579, 590-591 (1969).

70. 392 U.S. at 243.

71. "[T]he sharp dichotomy between pupil benefit and benefit to the school seems to me a chimerical constitutional criterion. . . ." Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1685 (1965).
with the proposition that a "parochial school's education is so 'permeated' with its own sectarian teachings and ideals that (its proselytizing function) cannot be separated from its secular educational function." Since aid to sectarian education would therefore be aid to religion, any state grants which were aimed at promoting the educational function, as opposed to strictly public welfare legislation, should be prohibited. The Court in Allen rejected this approach stating that it "had long recognized that religious schools pursue two goals, religious instruction and secular education." The "permeation" theory resurfaced again in Lemon and in Tilton v. Richardson, in part causing divergent holdings in the two cases. Various authors have tried to reconcile these seemingly inconsistent holdings on the theory that the nature of the institution benefited determines the constitutionality of the aid. This theory is in accord with the Court's statement in Nyquist that "[N]o attempt is made to restrict the payments to those expenditures related to the upkeep of facilities used exclusively for secular purposes, nor do we think it possible within the context of these religion oriented institutions to impose such restrictions." The Court also made it clear that the existence of a conduit is unimportant if the nature of the ultimate beneficiary is "permeated" with religion by striking down the second and third parts of the New York plan.


Auxiliary services that are essential aids to the function of education as such (e.g. textbooks and school transportation) cannot constitutionally be provided where the education is religious, since the function thus becomes religious education . . . where, however, the auxiliary services are provided to children as children, in aid of a public function, and unrelated either to schooling or to religious purposes or religious functions (e.g. fire and police protection, health programs, lunch programs) they are not subject to the interdiction of the First Amendment.

Id. at 580.
74. 392 U.S. at 244.
75. 403 U.S. 672 (1971). In that case the Court upheld direct grants to three sectarian universities. The Court held that they were not so "permeated" that aid to them would be tantamount to aid to their religious sponsors. The Court also found that the direct grants did not foster excessive entanglement between church and state.

77. 413 U.S. at 774.
78. Id. at 780.
4. Function Aided Approach

The Court's Nyquist opinion would seem to have put an end to a third theory supporting aid to nonpublic schools. After the Allen Court recognized the dual-education aspect of parochial schools, legislatures attempted to subsidize only the purely secular function of private schools. The theory was that "[I]f one assumes that the religious schools meet the state's standards for education in secular subjects, it is not aid to religion to apply tax funds toward the cost of such education in public and private schools without discrimination." The doctrinal ancestor of this approach is Bradfield v. Roberts, which upheld a federal grant to a Roman Catholic hospital. The Court, in that case identified a secular purpose and found it separable from any religiously oriented activities. This approach failed in Lemon because the mechanism of guaranteeing that the state funds would be used for secular purposes only created an excessive entanglement. A similar plan failed in Levitt because of the absence of any restrictions on the use of state funds. And so it would appear that any aid directed to a "permeated" institution, irrespective of the presence or absence of procedural safeguards, will be found unconstitutional under the present tests.

5. Choper's—Quid Pro Quo

One final theory which can be viewed as an exception to "separation" was suggested by Professor Choper. It is his position that:

Governmental financial aid may be extended directly or indirectly to support parochial schools without a violation of the establishment clause so long as such aid does not exceed the value of the secular educational service rendered by the school.

79. Lemon avoided squarely facing the question by deciding on entanglement rather than effect grounds.
80. See Valente, supra, note 69 at 593.
81. Katz, supra, note 66 at 440.
82. 175 U.S. 291 (1899).
83. "It is simply the case of a secular corporation being managed by people who hold to the doctrines of the Roman Catholic Church but who nevertheless are managing the hospital corporation according to the laws under which it exists." Id. at 298-299.
84. See note 3, supra.
85. This is the proverbial exception that swallows up the rule.
86. See note 64, supra.
87. Id. at 265-266.
If the establishment clause had never been the subject of a Jefferson letter this position would be hard to assail purely on the language of the first amendment. However, the Supreme Court has held that the ideal is separation and the inquiry has been directed as to how the various plans which have come under attack comport with that ideal. A second stumbling block is the permeation theory—the value of the secular educational service is impossible of estimation, since, in the Court's view, the secular and sectarian aspects cannot be distinguished.

C. Accommodation

Another theory rather limited in scope, easily distinguishable from the "absolute" and "separation" approach, was suggested by the holding in Zorach. The premise is that there are certain necessary relationships between church and state which have traditionally resulted in governmental "accommodation" of religious interests. One example would be an ordinance prohibiting excessive noise in an area around a church on a Sunday morning. But it could not be suggested that the state could "accommodate" a religion by building it a church. Similarly, it would seem that this theory would not be broad enough to support an "accommodation" of free exercise by paying for church schools. It is obvious that this approach would sanction violations of the first amendment if it accommodates only organized religions as it did in Zorach. It has the effect of balancing the first amendment claims of the group challenging the alleged establishment against the free exercise interests of the group being accommodated. The Court has held such a balance to be impermissible. The interests of the state and the claims of the opponents of the state's action should be the only relevant factors.

D. No Imposition

Another independent line of reasoning takes for its basis the outermost rim of establishment clause protection, that the government may not force religious beliefs upon its citizens. From this point, Professor Schwarz extrapolates what he terms a "no imposition" theory. In his view, "imposition" occurs when government

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action or aid induces religious belief. He sees the standard as freedom of religious choice and would allow aid which does not influence one's choice of religion or non-religion. Under this view, statutes like those found violative of the establishment clause in cases like *McCollum*, *Engel*, and *Schempp*, and those upheld in *McGowan v. Maryland* and *Braunfeld v. Brown*, would be unconstitutional in that they act directly upon the choice between religion and non-religion. That is, they have a clear free exercise overtone. Aid cases like *Everson*, *Allen* and *Lemon* which do not involve coercive choice of belief or disbelief, but rather coercive support, would be held to be constitutionally permissible. The proposal, though quite attractive, compresses the protections of the first amendment within the terms of the free exercise clause, leaving the establishment clause with little substance.

**E. Neutrality**

The last series of theories are the "neutrality" approaches. This is the name that the Court has applied to its own fashion of interpreting the religion clauses. But first, two other "neutrality" theories should be examined. The first is an attempt to use the doctrine affirmatively to argue that aid is mandatory. However, this merely substitutes "neutrality demands" for "free exercise demands" in the absolutist approach discussed previously. The second approach is much more subtle in that it would allow, rather than mandate, aid. The author of this theory, Professor Kurland, sees the commands of the religion clauses as:

[I]mpossible of effectuation unless they are read together as creating a doctrine more akin to the reading of the equal protection clause than to the due process clause; i.e. they must be read to mean that religion may not be used as governmental action, whether that action be the conferring of rights or privileges or the imposition of duties or obligations.  

90. *Id.* at 723.
91. *Id.* at 728.
94. This argument was stated, with apprehension, by Freund, *supra*, note 71 at 1682: Arguing that the aid in the New York case (Allen) was sustained because it was available neutrally to all students in 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.
All that would be necessary under this approach would be a secular purpose broad enough to encompass aid to church related schools. The flaw in the theory, however, is that it, like the child benefit theory, carries the plan over the purpose hurdle but leaves it open to attack under the Court’s effect test. The theory has found some support in Supreme Court opinions, but, given the state legislature’s wide discretion in defining its secular purpose, it would allow, in its broadest interpretation, the protections of the establishment clause to be overcome by the expedient of clever draftsmanship.

III. The Court’s Position

A. The Standard

The Court’s standard is also called “neutrality,” but its essence is difficult to grasp. Perhaps the only way of delineating its perimeters is by reviewing what has been allowed and what has been prohibited in its name. Buses and books have been allowed, while any form of prayer in public schools has been prohibited. A “released time” plan with classes held outside of the public school did not violate the standard, while one holding classes in the public schools did. Direct grants to elementary and secondary schools for maintenance and repairs, for testing expenses, and for teachers’ salaries were unconstitutional under the standard, as were tax credit and reimbursement of tuition plans, but a direct federal grant to a church related university to increase its physical plant was not. Under the Court’s standard, the channel of aid, whether it be direct or indirect, is immaterial; as is whether the function aided is educational or viewed as “public welfare.” About all that can be gleaned from the various opinions as to what will be permitted is that:

... [A]id to sectarian educational institutions [is] constitutionally permissible provided that three precedent conditions are satisfied: (a) the primary mission of the school is secular education rather than religious training; (b) the aid given possesses inher-


97. Perhaps this statement can best serve to illustrate the Court’s rather amorphous standard: “Neutrality, a combination of cooperation, indifference, and accommodation, was adopted, forming the principle that state power should be used to handicap or favor religion. This undefinable term is constantly repeated and reused throughout later cases.” Wedlock and Jasper, Parochial and the First Amendment: Past, Present and Future, 2 J. Law & Ed. 377 (1973).
ent religious neutrality easily ascertained and controlled; and (c)
such aid does not require complex regulation and auditing proce-
dures on a perpetual basis.98

Assuming that, in most cases, the aid is money and that it possesses
inherent religious neutrality, constitutionality depends, under the
Court’s standard, upon the nature of the institution benefited and
upon the form of the aid. This result is mandated by the tests
employed by the Court in effectuating their neutrality standard.

B. The Tests

The excessive entanglements test makes the form of the aid,
and to a lesser extent, the nature of the institution benefited, of
particular constitutional significance. It is because of this test that
aid like that proposed in Nyquist or Lemon can never pass constitu-
tional muster. In Nyquist, the test was not applied; the fault of
the legislation was that it failed to provide safeguards that would
prevent government funds from being used to aid religion. How-
ever, can it be doubted that, if such safeguards were present, the
legislation would meet the same fate as the plan in Lemon? The
entanglements test completely closes the circle—aid is prohibited
unless there is some guarantee that it will be used only for secular
purposes; to ensure this, the legislature must provide safeguards;
but if these safeguards must necessarily entangle state machinery
with the workings of a religious institution, the aid is still viola-
tive.99 It has been suggested that the excessive entanglements test
be abandoned. The arguments against its application are many.
One commentator suggests that it is not a question of degree, but
rather, of the primary effect of entanglement. To illustrate his
point, he compares the entanglement occasioned by compulsory
school attendance laws and finds the enforcement of these laws
permissible because its primary effect is not the advancement or
inhibition of religion and not because it fosters less than excessive
entanglements.100 A second commentator sees the excessive entan-
glements test as a product of a no-assistance viewpoint, and finds
it vague in that the Court has failed to define the dividing line
between permissible governmental entanglement and excessive en-

98. Martin, Parochial School Aid—From Allen to Lemon to Tilton, 3 SETON HALL L.
100. Cunningham, Lemon v. Kurtzman: First Amendment Religion Clauses
Finally, it has been viewed by a third author as "[H]erald[ing] a significant decline in the neutrality standard." These criticisms of the Court's newest test make for a strong argument against its retention, but one more argument in favor of abandoning it can be mounted. Looking again to the comparable entanglements fostered by the enforcement of a compulsory school attendance law, it is obvious that the purpose which the entanglement seeks to vindicate is one that is clearly secular. If the excessiveness of the entanglement is determined by the purpose mandates it, then it would seem that the inquiry should be directed at the legislative purpose; yet, this is the one criterion which the Court has, rather cavalierly, found to be satisfied by the statutes challenged in both *Lemon* and *Nyquist*. But, abandoning the entanglements test would still fail to save the legislation found unconstitutional in *Nyquist*, given Justice Powell's statement that it was impossible to separate the secular and religious functions of the schools in question. With this being so, any amount of restrictions, or in other words entanglements, would not be sufficient to guard against the use of the money to aid the religious mission of the schools. Given the Court's acceptance of the permeation theory, without a full evidentiary record, and its place in the Court's test, the only alternative available for the proponents of aid to nonpublic schools would be to convince the Court to adopt new testing criteria. What these alternative tests should be will be dealt with in the remainder of this article.

IV. THE NEW TESTS

The question to which any test must provide an answer is whether or not the state has enacted a law establishing a religion. It is submitted that in order to answer this question, it must first be known when the right to be free from establishment has been transgressed. Since that right is incorporated into the fourteenth amendment's due process clause, there must be a deprivation of either "liberty" or "property" for that right to be violated. There is an invalid establishment of religion either because the legislation impairs the free exercise rights of the complainant or because it is

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103. 413 U.S. at 774.
104. See note 4, *supra*. 
a substantial diversion of state tax-raised funds in aid of religion.105 The tests, then, under a neutrality theory like that accepted by the Court, should be aimed at these two factors. The more difficult question is the second and so will be considered first. The argument in support of aid would be that:

A school is an educational institution and not a church if its object is intellectual development and if it is engaged, bona fide, in this task. The fact that it is owned by a church or that it gives some religious instruction or that its teaching is 'permeated' by religion or that aid to it is incidentally of some benefit to the Church, is immaterial. . . . The over-riding public purpose . . . [is] . . . to improve education, including education in institutions under religious auspices.106

If it is recognized at the outset that church-related schools are "permeated"107 with such a degree of religiosity that any aid will have the effect of benefiting religion to some extent, the question would be whether the stated, and unstated, purposes of the legislation are sufficiently secular and sufficiently beneficial to the state to overcome any objections on establishment grounds. The questions of permeation, or channel of aid, or whether it is public welfare legislation, would be mooted, leaving only the issue of the validity of the legislative judgment. If there is found, upon a balance between the factors which uphold the legislative action, that is, the underlying reasons for the enactment (which may include such things as public welfare aims) and the establishment claims, that there is a valid overriding legislative purpose, the inquiry should end there. However, if the statute also tends to restrict religious liberty, or, as Schwarz would say, tends to impose upon religious choice, the legislative purpose must also be balanced with the effect of the statute upon the right of free exercise. The advantage of these tests over those used by the Court are fourfold: first, they focus the issue by eliminating irrelevant, extraneous materials such as questions concerning the form of aid, permeation, the

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107. "Permeation" is an argument against aid; by stipulating to the fact that church schools are permeated, proponents of aid are merely recognizing that the Court would probably come to that conclusion anyway. Opponents of aid could not complain of the Court and the state legislature taking notice of this fact, since it has been the thrust of their argument since the Allen decision.
nature of the institution, etc., some of which the Court itself abandoned, sub silentio, in Nyquist. Second, they elevate the purpose criterion from the level of token inquiry to the level of a full-blown constitutional test more in keeping with what the Court says it is doing already, and along the lines of Kurland’s neutrality formulations. Third, they separate the deprivation of “property” aspects from the “liberty” questions. Finally, they are adaptable to questions arising under both clauses, a matter now quite impossible because of the existence of the entanglements test, but merely a return to the position taken by the Court before Walz.

Whether the application of these tests would have the effect of finding the plans in Nyquist, especially the maintenance and repair provisions, constitutional is hard to gauge since the Court held not only that there was an overriding and valid secular legislative purpose, behind the legislation, but also that there was an overriding establishment claim. Under the new test, both findings would have to be supported by a record whereas the Court in Nyquist assumed their existence. But if these new tests were to be applied to the facts in some of the earlier cases, the results are rather easy to predict. The prayer cases, Schempp and Engel, would be subjected to both tests and most certainly fail under the second since both involved what was tantamount to religious instruction in public school. The results in the released time cases, McCollum and Zorach, would at least be consistent since the purpose in both is the same, and because the establishment and free exercise claims in both would also be the same. Both could conceivably fall since the legislative purpose was, at most, merely an accommodation of organized religion, a purpose which should easily be invalidated by a claim flowing from either clause of the first amendment, since the accommodation benefits only organized churches, not religious beliefs across the board. Everson and Allen would yield the same results as before, since in both cases, the Court did make comparatively detailed findings as to purpose (as opposed to Lemon and Nyquist) and an attack, based upon a diversion of government funds in aid of religion, would be difficult to sustain under the new test given the existence of these findings.

V. Conclusion

Whether these new tests are ever accepted by the Supreme Court is of little moment, since their greatest value would be in tidying up a rather unclear situation by exorcising the chaff of form in its myriad varieties, from the wheat of substance. The Court is
correct in interpreting the first amendment religion clauses as mandating neutrality, any other interpretation would serve to exalt one clause at the expense of the other. It is also correct in its view that a balancing test is the only really effective means of safeguarding this neutrality. Obviously, the results produced by balancing will not satisfy one side since the balance shifts as each person uses the scale and determines the weight of each factor which must be considered. However, this cannot justify the Court’s retention of the excessive entanglements test which represents merely the weight of a judicial finger surreptitiously applied. The test should either be abandoned for the reasons suggested above, or the Court should flatly state that entanglement is establishment. Although any alternative adopted by the Court will, in all probability, not end attempts to aid nonpublic schools or the litigation aimed at preventing such aid, it would at least serve to polarize one factor in an area plagued by uncertainty and disagreement.