

September 2017

New Approaches to Church-State Litigation

David J. Young, Murphy, Young & Smith Columbus, Ohio

Follow this and additional works at: <http://scholarship.law.stjohns.edu/tcl>



Part of the [Catholic Studies Commons](#)

Recommended Citation

David J. Young, Murphy, Young & Smith Columbus, Ohio (2017) "New Approaches to Church-State Litigation," *The Catholic Lawyer*: Vol. 26 : No. 3 , Article 6.

Available at: <http://scholarship.law.stjohns.edu/tcl/vol26/iss3/6>

This Diocesan Attorneys' Papers is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in The Catholic Lawyer by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact cerjanm@stjohns.edu.

NEW APPROACHES TO CHURCH-STATE LITIGATION

DAVID J. YOUNG, ESQUIRE

The topic for today, church-state litigation as it relates to nonpublic schools, would have been much easier to prepare if the authors of *The Brethren* had decided to include this subject. As soon as the book came out, I read it to see if it was going to cover aid to nonpublic school cases. If they had, we would know the "real" reason why the Court accepted jurisdiction in one case and rejected it in another. We would obtain copies of hidden drafts of opinions that never were published. We would find out who traded abortion votes for education votes and education votes for baseball antitrust votes. But since the authors opted not to cover that subject, we must develop our insights the hard way. We will have to view the subject in its historical perspective to see what has happened in the past and to see where we are today.

If the subject of new approaches to church-state litigation were on the agenda 2 or 3 years ago, we would all be here in dark suits. That would be the proper attire and we would all reflect a very somber demeanor. At that time, we had behind us the terrible experience of *Lemon v. Kurtzman*¹ in 1971, the *Nyquist*² series of cases in 1973, and the *Meek*³ decision in 1975. The entire Catholic educational community was in a state of shock. I am pleased to state that we have an entirely different situation today. The extremely important decisions in *Wolman v. Walter*⁴ and *Committee for Public Education & Religious Liberty v. Regan*⁵ provide realistic bases for optimism. What I would like to talk about today is: where do we go from here? If we have seen a reversal of the downward momentum, what does it mean? What should we be doing in terms of new state legislation? How should we defend ESEA? What about new

¹ 403 U.S. 602 (1971).

² *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973).

³ *Meek v. Pittenger*, 421 U.S. 349 (1975).

⁴ 433 U.S. 229 (1977).

⁵ 444 U.S. 646 (1980).

federal legislation? What do these recent decisions teach us?

In order to provide some insights, I would like to discuss *Regan*, the most recent decision. Before trying to reach some conclusion or to respond to your questions with respect to *Regan's* teaching, however, I would like to examine the historical perspective of church-state litigation. If we combine that historical perspective with a careful reading of *Regan*, perhaps we can reach some conclusions with respect to where our future lies.

Hopefully, during the midst of this analysis, we can talk about some new approaches to church-state litigation, possible new cases to challenge some of the terribly repressive, *ad hoc* criteria which have been developed by the Supreme Court of the United States during the years 1971 through 1975, and provide some further insights concerning how we can continue to stress the other side of the first amendment coin—the free exercise and the establishment clauses. Let us first turn to *Regan*. As you know, it is a short decision as well as a five to four victory. It arose from New York. The decision was written by Justice White and he was joined by Justices Burger, Rehnquist, Stewart, and Powell. The rather strong dissent by Justice Blackmun is quite instructive. Most of us realized that we had lost Justice Stevens before *Regan*. There is no question about it now. His dissent is unequivocal.

When I talk to educators throughout our state and nation, the major question is how important a victory was *Regan*. There are those who suggest it is limited to funding. It only provided \$8 to \$12 million and that is not a great sum of money for New York. There are those who suggest that reimbursement for testing, record keeping, and attendance taking is not very significant. I believe those who downplay the importance of *Regan* are being extremely shortsighted. I classify it as a tremendously important victory and I think the people in New York who are responsible for it should be congratulated. To be sure, *Regan*, in and of itself, is not going to solve the financial problems of those who have to suffer with administration of nonpublic schools under financial disability. But we are not going to find any one case that is going to solve those financial problems. We must build the foundation through a series of cases. Hopefully, this will help us achieve our ultimate goal: equitable distribution of education tax dollars.

Those of us who have studied the long series of *Levitt* decisions⁶ know that more than anything else, they stand as a tribute to the persistence of the people in New York. *Regan* had its genesis in legislation which was adopted either in the very late 1960's or the very early 1970's. The basic premise of that legislation was that the state mandated testing

⁶ *Levitt v. Committee for Pub. Educ. & Religious Liberty*, 413 U.S. 472 (1973).

of pupils, record keeping, and attendance taking. If the state requires these things, however, it should pay for them. This was certainly a laudable objective. If that sort of legislation had been adopted immediately after *Board of Education v. Allen*⁷ rather than after *Lemon* it certainly would have been sustained.

The case was considered by the Supreme Court of the United States in 1973—the same time the Court decided *Nyquist* and some 2 years after *Lemon*. The Court rejected the constitutionality of the legislation on the ground that some of the aid was for *teacher-prepared* tests. Teacher-prepared tests could inculcate religious values. It used the same formula which had been developed in *Lemon*. If it is potentially religious, then there is a primary religious effect. If you have controls to ensure that there is no religious assistance, then you have excessive religious entanglement between government and church.

This problem caught *Levitt* the first time in 1973. As most of you will recall, New York came back a second time with an attempt not necessarily to change the constitutional principle but to obtain retroactive reimbursement. I think that occurred in *New York v. Cathedral Academy* and *Levitt v. Committee for Public Education & Religious Liberty*⁸ and, as I recall, it failed. Meanwhile, in 1977, the Supreme Court of the United States decided the *Wolman* case which involved nine different separable branches of aid, one of which was standardized achievement testing. The way we drafted legislation in Ohio, the state provided the tests. They were sent back to neutral scoring authorities. It was clearly a neutral non-ideological form of aid.

There are those who would suggest that *Regan* is merely an extension of *Wolman*, but it really is more than that. It goes further than *Wolman* in this particular regard. *Regan* does several things beyond what was approved in *Wolman*. The most important of which is that rather than supply the tests and the scoring, *Regan* provides financial reimbursement for the cost of testing, the cost of scoring, and for record keeping and attendance taking. Justice White often writes brief and understandable opinions. He made it look as though there is no real difference. But, in the long run, the fact that the Court moved one step forward will be tremendously significant.

Most important, however, is the second prong of what *Wolman* started and what *Regan* accomplished. What we have seen from *Wolman* and *Regan* is a reversal of many of those repressive criteria established earlier, and a movement towards the *Allen* criteria developed in 1968.

Shortly after our victory in *Wolman*, I wrote an article for the Ohio

⁷ 392 U.S. 236 (1968).

⁸ 434 U.S. 125 (1977); 413 U.S. 472 (1973).

State Law Journal.⁹ At that time, I was very concerned about the repressive doctrines that had stymied so many of our efforts to achieve equitable distribution of education tax dollars. So, rather than simply state where the law was then, I tried to suggest where it ought to go. I quoted from the 1976 decision of *Roemer v. Board of Public Works of Maryland*,¹⁰ in which higher education aid was upheld. The Court stated that “[t]he 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 affirmed . . . or to expand upon them substantially, but merely to insure that they are faithfully applied in this case.”¹¹

Now, if that were the law and if that were the way the law was to remain, we would be in trouble. Those principles would have destroyed our efforts to achieve assistance to nonpublic school pupils. I wrote at that time:

Notwithstanding these assurances by the Court that this area of the law is settled, the question still remains: has the thoughtful scholarship of the Supreme Court’s most respected Justices provided a framework that will avoid continued controversy? This article will show that they have not. Despite the strong assertions in recent decisions by the Court that religion clause principles are well defined, the fact is that there have been periodic major shifts in the factors the Court considers in judging the constitutionality of a state aid program. These shifts have had a divisive impact on the Court. In recent years this division has resolved itself into a three-way split. This article attempts to identify the current trend of the Court in state aid cases by analyzing this split and the recent movement of the swing group of Justices.¹²

If you will recall, after *Wolman*, it looked as though there was a three-way split in the Court. Justices Burger, Rehnquist, and White probably would have approved most of the well-drafted programs. Justices Marshall, Brennan, and Stevens would have proceeded little further than providing for health assistance. Then we had those three very, very important Justices in the middle—Blackmun, Stewart and Powell. When one looks at the history before *Wolman*, when one notes what the Court was saying immediately before *Wolman* and *Regan* concerning the repressive principles from *Lemon* and *Nyquist* being “in concrete,” and when one compares that to what is being said in *Regan*, the shift in the Su-

⁹ Young, *Constitutional Validity of State Aid to Pupils in Church-Related Schools—Internal Tension Between the Establishment and Free Exercise Clauses*, 38 OHIO ST. L.J. 783 (1977).

¹⁰ 426 U.S. 736 (1976).

¹¹ *Id.* at 754.

¹² Young, *supra* note 9, at 785.

preme Court is apparent and meaningful. Justice Blackmun, in the second paragraph of his dissent in *Regan*, complains that the Court's judgments in *Meek* and in *Wolman* at last had fixed the line between that which is constitutionally appropriate public aid and that which is not. He concludes the initial section of his dissenting opinion by talking about the defection of Justices Powell and Stewart, stating: "I am able to attribute this defection only to a concern about the continuing and emotional controversy and to a persuasion that a good-faith attempt on the part of state legislature is worth a nod of approval."¹³ So, suddenly, many of the repressive doctrines are not being mentioned and Justice Blackmun is complaining about their demise.

Thus, when one looks at *Regan* with this historical perspective, when one observes *what was not said*, one begins to appreciate the significance of the decision.

I am optimistic about the long-range implication of *Regan*. There are those who are similarly excited, and, in their unbridled optimism, urge precipitous action. Some would urge that since we have minimum achievement standards in all the states, and since it is mandatory to have qualified mathematics, English, and history courses, the state should finance this mandate. This takes *Regan* to its logical extension; however, I am not yet that optimistic. The USCC has recently sent out a note of caution to prevent overreaction. In the last 15 years I have been a critic of excessive caution; but, I must admit that at this particular time, I join the USCC in that caution. I recall what happened after *Allen*. There we tried to build a roof on the house before the foundation was built. Here we must build a foundation before we achieve our ultimate goals. I am much more optimistic that we can achieve those goals today than I have been at any time since 1968 when *Allen* was decided.

Often, we can best apply proper historical perspectives by looking at a chronological chart. This is why I developed the chart passed out today. One of our paralegals did some charting and prepared various lists to try to see if they could provide additional insights for future strategy. We are always struggling with the questions: should we build a record, should we stipulate, should we go forward solely on the pleadings? That is why that portion of the chart is present. It is not instructive so we need not pay much attention to it. The chart also shows a breakdown of judges, but frankly, it was not very instructive either. Our current split of judges is recent and only the last couple of years are instructive. Not every case on the chart is an aid to nonpublic school cases; some are cases which we have cited frequently in the nonpublic school cases.

If you have your chart, you can look at the case itself, the year it was

¹³ 444 U.S. at 664 (Blackmun, J., dissenting).

decided, and the result. This is particularly instructive and reflects the trends and shifting of judicial response.

The chart starts out with *Bradford v. Roberts*,¹⁴ not because it is a nonpublic school aid case (it involved aid to hospitals), but because its rationale is quite helpful. Perhaps we should have added *Pierce v. Society of Sisters*.¹⁵ It also helps build our foundation even though it was not an aid case.

The next case, *Cochran v. Louisiana State Board of Education*,¹⁶ sustained a textbook loan program, though first amendment principles had not yet been honed. It simply serves as a good starting point in the school aid series. The next case was, of course, *Everson v. Board of Education*¹⁷ which was decided in 1947, and which stands today as the first aid case decided on first amendment grounds. The case was a five to four decision. We all know that Justice Black later said that if he had it to do over again, he would have voted the other way. So, from 1947 until 1967, *Everson* was of questionable precedential value. Pennsylvania's bus bill case came before the United States Supreme Court at about that time.¹⁸ The Court refused jurisdiction, thereby solidifying *Everson*.

When we review our historical perspective we see that *Everson* is similar to *Regan*. *Everson* sustained not just bus rides, but compensation to parents for the cost of bus rides. That was a dollar aid to parents. It said that you cannot deny general welfare benefits to children because of their faith or lack thereof.

Today, *Everson* stands as valuable precedent. If there had been an effort to expand the aid immediately, however, we would have seen not only the expansion effort fail, but we may have lost *Everson*. It would have provided Justice Black with an opportunity to shift his vote.

Between 1948 and 1952 we saw the *McCullum v. Board of Education*¹⁹ and *Zorach v. Clauson*,²⁰ release-time cases. All of you know that this reversal resulted from a careful testing of the *McCullum* case. That careful testing caused the Court to permit an alternate approach. In 1968 the Supreme Court rendered its finest decision relating to aid to nonpublic school pupils. The Supreme Court in *Board of Education v. Allen*,²¹ presented a two-fold test. In order to survive an establishment clause challenge, the legislation must have a secular purpose and effect. It may

¹⁴ 175 U.S. 291 (1899).

¹⁵ 268 U.S. 510 (1925).

¹⁶ 281 U.S. 370 (1930).

¹⁷ 330 U.S. 1 (1947).

¹⁸ See *Rhodes v. School Dist. of Abington Township*, 389 U.S. 11 (1967).

¹⁹ 338 U.S. 203 (1948).

²⁰ 343 U.S. 306 (1952).

²¹ 392 U.S. 236 (1968).

neither advance nor inhibit religion. Unfortunately, the Court in 1971 added a third test that lead to disastrous results.

The *Allen* Court presented a logical and favorable decision on the following facts: (1) the state had an interest in the secular education of all its children; (2) the church-related schools which the children opted to attend met state-established minimum standards; (3) the nonpublic schools accomplished both religious and secular objectives; and (4) the secular education was not so permeated with religious education that one could not aid one without aiding the other. This was an excellent analysis. Many reasonable people who were drafting legislation providing aid to nonpublic school pupils felt that the door was wide open. I cannot criticize people who interpreted the decision in that way and rushed forward with legislation calling for substantial forms of aid, because I felt the same way at the time. Even so, the events after *Allen* prove quite instructive. Perhaps, if all of us had noted more carefully Justice Burger's opinion in *Walz v. Tax Commissioner of the City of New York*,²² which was decided shortly after *Allen*, we would have exercised more caution. Although *Walz* was a victory, it led to the announcement of the third test. The *Walz* decision arose from New York. It involved the constitutional validity of tax exemption for church-related institutions. A taxpayer in New York argued: "My first amendment rights are violated when you exempt churches and this causes me to spend my tax dollars for religious purposes." In sustaining the validity of tax exemption in New York, Justice Burger reasoned that there was less entanglement between church and state with tax exemption than without. He spoke of the evils of state entanglement in church affairs. This, of course, gave birth to the repressive doctrine that arose in the nonpublic aid cases in the following year, 1971.

The next reported school aid cases were the *Lemon* and *DiCenso* decisions. Pennsylvania read *Allen* as opening the door and concluded that a program of educational service contracts between church schools and the state would be upheld. The state paid the schools for providing state-accredited secular education. This was declared unconstitutional in *Lemon*. Rhode Island presented a different aid program in *DiCenso*. This program addressed itself to the major cost incurred by nonpublic school-teacher salaries. The program called for the state to supplement the salary of teachers who were teaching secular education. Rhode Island had a disastrous result at the district court level. *Lemon* and *DiCenso* were combined in the Supreme Court of the United States and you know the result—both programs were declared unconstitutional. Justice Burger complained of the momentum that followed *Allen*. His view was that once

²² 397 U.S. 664 (1970).

the idea of school aid gains momentum, it is hard to stop. Justice Harlan said that he never saw such a thing as a slippery slope without a constitutional toehold. But Justice Burger felt that we had gone too far, too fast.

We not only lost *Lemon*, but because we went too far, too fast, we invited the first of a series of new repressive doctrines. Instead of using the purpose and effect test that had been used in *Allen*, Justice Burger instituted a third test. This test of "excessive entanglement between church and state" had two prongs. Legislation will fail if the mechanisms established to prevent benefit to religion require administrative entanglement between church and state. The doctrine of political divisiveness was also developed. This doctrine presumes that since such legislation aids religious schools, it will cause divisiveness in the community along religious lines when it is before the state legislature. Consequently, this allegedly creates political divisiveness. This doctrine presents a classical bootstrap argument. No prior decision spoke of such a test. It is a terribly repressive doctrine that could spread to a multitude of other areas.

Thus, in 1971 we experienced not only a tremendous loss but found ourselves encumbered by two new doctrines, one more repressive than the other. Constitutional scholars concluded after *Lemon* that proponents of nonpublic school aid faced a real dilemma. If controls are not established to ensure that the *Allen* effect test is met, a program will fail to meet the primary religious effect test. Similarly, if one establishes adequate controls to ensure that there is no aid to religion, excessive entanglement between church and state will result. So it is quite a dilemma. Even if the test could be avoided, there is the inevitable confrontation between political divisiveness and legislation calling for additional appropriations each biennium in the legislature, which will result in further divisiveness along religious lines.

In retrospect it is easy to see what happened. We can see what should have been done. In *Lemon* we went too far, too fast. After *Lemon* we should have stepped back and said, "We are wounded so we must pause in order to see what we are going to do before we push forward with a new aggressive program." Instead of returning to basics, New York presented a tripartite aid program including construction grants for low-income schools, tuition grants for low-income parents, and tax relief for parents who did not meet the low-income criteria. At the same time, Pennsylvania presented a parental reimbursement grant program. With the benefit of hindsight we can see why this led to such a disastrous result. When we look on the chart we see that from 1968 to 1975 everything except higher education proceeded in the wrong direction. We were losing all of the cases. Instead of backing up and solidifying our base, we were being more aggressive. *Meek* was decided in 1975. In retrospect, I think if *Meek* followed *Allen* by 3 or 4 years, it probably would have been sustained. It was not such a substantial jump from what the Court had said

in *Allen*. It was a very modest program. *Meek* involved equipment that was inherently secular, neutral, and non-ideological. It involved diagnostic testing and health personnel as well as remedial reading, speech, and hearing therapists. It was a gentle movement from *Allen*. If we had to do it over again, I think Pennsylvania would have followed *Allen* with *Meek*. The chances are that it would not have tipped our hand to such an extent that we all wanted to go in this historic game of chess. There would have been a much greater likelihood of it being approved. It came along, however, after the development of the *Lemon* and *Nyquist* tests. In addition to declaring the Pennsylvania case unconstitutional, the Court developed two more repressive tests. If one were not defeated by the administrative entanglement and political divisiveness tests, one ran afoul of the substantial aid or the religion-pervasive test. The Court in *Meek* concluded that the schools were so pervasively religious that one could not separate secular from religion—a complete reversal of *Allen*. All of the favorable principles enunciated in *Allen* had deteriorated.

Consequently, when we looked at the repressive *Lemon*, *Nyquist*, and *Meek* doctrines and saw what the Supreme Court said in 1976 in the *Roemer* case with respect to the principles being in concrete, it appeared as though the battle had been lost. This set the stage for the Ohio plan in *Wolman*.

In *Wolman*, Ohio did not try to blaze new trails. We looked at the bleak scene and decided to draft a piece of legislation that could survive and perhaps reverse the trend. For example, in *Meek*, the court said the school was so pervasively religious that even a speech and hearing therapist performing therapy on the premises was aiding religion. Ohio decided to leave the diagnostician and the health personnel on the premises because it was more difficult to argue that they could permeate religion or succumb to sectarianism. The Ohio plan called for other remedial personnel to perform their services beyond the edge of the property line. The plan called for these services to be performed in mobile units and other public facilities. The plan was based on the mobile library that parked in front of the school. The children go out and borrow books. They take the books they want and the mobile unit moves on. No one ever concluded that that was unconstitutional. Therefore, we arrived at the concept of taking auxiliary service personnel off the sectarian premises and putting them in a mobile unit or other public facility. There are many who criticize this concept because Ohio, in effect, was recognizing the Court's prior opinions. Well one does not have any choice! That is what the Court said, and one must test the doctrine and attempt to establish its limits. That is what Ohio did. The basic argument before the Supreme Court was a free exercise argument. *Meek* tells us that the public employees who perform educational services at church-related schools are likely to be influenced by the pervasively religious atmosphere and succumb to sectarianism.

The Ohio General Assembly responded to this concern by restricting therapeutic, remedial, and guidance services to off premises, neutral sites, which would not be permeated by a religious atmosphere. This means that those services are now provided by public employees, under public control, at neutral facilities. The American Civil Liberties Union argued that a nonpublic school child remained a sectarian citizen after he was released from the nonpublic school. They argued that the program would intimidate the publicly hired and controlled specialist into succumbing to sectarianism even at the neutral site. When the American Civil Liberties Union urged that nonpublic school children must be denied secular, neutral, and non-ideological services at neutral facilities, *they were insisting upon a penalty for free exercise of religion.*

In arguing *Wolman*, we stressed not only the outrage expressed by Justice Burger in *Meeke*, but also emphasized the footnotes presented by Justice Stewart in response to that outrage. Two things happened in *Wolman*. First, the doctrine of substantial aid announced in *Meeke* was eliminated. Eighty-eight million dollars of aid per biennium was sustained in *Wolman*. Although Justice Blackmun had been saying that \$8 to \$10 million was substantial in *Meeke*, the Court sustained \$88 million and did not even label it as substantial aid. The "substantiality" test was passed over very lightly in *Regan*.

The second important thing which occurred in *Wolman* was the reduced emphasis on political divisiveness. In a footnote in *Wolman*, the Court concluded that since there was no aid to religion, divisiveness with respect to the legislative program would not be along religious lines. Hopefully, we are seeing that doctrine die a slow death in the Supreme Court. I know the doctrine still appears in various district courts, yet in the two most recent Supreme Court decisions, *Regan* and *Wolman*, that test was not determinative. *Wolman* served to reverse the adverse momentum. It started a new favorable trend. *Regan* took us a few steps further. Where do we go from here?

Some people could argue that since their state legislation mandates accredited secular education in nonpublic schools, the state should pay for it. This could be supported by the *Regan* rationale. My view is that now that we have the benefit of the historical perspective, we know that we moved too far, too fast after *Allen*. Now that we have *Wolman* and *Regan* we should build on their precedent slowly. We should build carefully and create a solid foundation. Let us look at the kinds of aid that we can get at the state level and then go to the federal level.

Some states still are not receiving transportation. We know that we can obtain transportation and that we can obtain transportation reimbursement. In Ohio, many of the students receive grants for reasonable transportation when they live far from school. These substantial dollars were upheld in *Everson*. In Ohio, we are receiving a total of approxi-

mately \$275 per child, each year. This includes transportation, textbooks, driver education, test aid, auxiliary health and teaching aid, and direct assistance to administer such aid. Thus, there are a number of safe harbors which can be used right now.

I believe that we can reverse the loss of educational materials suffered in *Meek* and *Wolman*. I propose the adoption of limited education equipment legislation. It could include, for example, math equipment which could be lent to the pupils. Gym equipment and physical education materials are quite expensive in our schools. I believe that the constitutionality of legislation calling for the loan of such equipment would be sustained. Legislation calling for the lending of math and physical education equipment would be a logical extension of *Wolman* and *Regan*. The Title I (ESEA) cases are experimenting with returning the teacher (the auxiliary service personnel) to the premises. One of the arguments being used is that although services are performed at nonpublic school premises, the classroom is in effect a public school classroom. In other words, a "leased classroom" approach. I advise against trying to expand the *Wolman* doctrine through the use of teaching personnel on the premises until after we see what happens in the Title I cases.

After the Title I cases reach the United States Supreme Court, I would like to find a case where a public school district, which has no schools of its own, reimburses its residents for the cost of education in an accredited school outside the district. That will be the ideal way to test grants to children or parents. This will present a broad base of applicability and our opponents will be unable to argue that it is a unique and special program designed for children attending religious schools. That would be an ideal program which would enable us to build a foundation before building the walls and roof.

Although I have recommended some restraints because of the pendency of the Title I cases, I think that we should prevail upon competent counsel, defending those cases, to be careful with respect to their various defenses. I do not like a defense which calls for placing teachers in the classroom because we do not inculcate religious values in the schools. If we win on that kind of logic, we will have won a case but lost the war. Remember this is an historic game of chess! We do not want to win a case that impairs our long-range objectives. Only a small percentage of educational aid comes from the federal government. The big dollars come from state legislation. If a federal case is won based upon a theory that destroys state elementary and secondary school aid, I submit we will have sustained a tremendous loss.

The arguments proposed in defense of some of the higher education cases greatly disturb me. At the same time we were losing *Lemon*, we won

Tilton v. Richardson.²³ At the same time we were losing *Nyquist* we won *Hunt v. McNair*.²⁴ But what did these cases tell us? "You can receive college aid if you are not effective at accomplishing your religious mission." Well, if there is no religious mission, the schools should not exist as Catholic schools. If we achieve state aid at the loss of inculcation of religious values, what have we achieved?

The temptation is great for us to rush too quickly after *Regan*. The temptation is great to win these cases at any cost. But such temptations must be resisted.

My final suggestion relates to future federal aid programs. Time does not permit discussion of the reasons why a federal program has a greater likelihood of success than its counterpart at the state level. Although I caution against state tuition grant legislation in the near future, I strongly recommend that we attempt to obtain income tax credit assistance at the federal level.

I would like to conclude by recalling a lunch I had with my dear friend, Bishop Elwell, shortly before his death. He always said, "How long—how long before we obtain true equity in educational tax dollar distribution?" At this lunch he urged: "I'm getting old, I would like to see this accomplished before I die." Well—we could not deliver. Even so, I look forward to the day when I can whisper to the good Bishop: "It is a little late—but here it is, Bishop Elwell—true equity—fair aid for our children."

²³ 403 U.S. 672 (1971).

²⁴ 413 U.S. 734 (1973).