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FEDERAL TUITION TAX CREDITS AND THE ESTABLISHMENT CLAUSE: A CONSTITUTIONAL ANALYSIS

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INTRODUCTION

The right of parents to direct the education of their children is firmly established in American jurisprudence. Indeed, more than half a century ago, in the landmark case of Pierce v. Society of Sisters, the Supreme Court announced that the Constitution itself protects parents' choice to have their children educated at a private school rather than at a public institution. The economic, social, and political changes which have occurred since Pierce, however, often have rendered this constitutional protection meaningless. Parents who choose to have their children educated in a nonpublic school not only must bear the constantly escalating costs of private education, but also must support public education through their payment of taxes. Because of this dual financial burden, many parents are precluded from exercising their so-called constitutional right to

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1 268 U.S. 510 (1925).
2 See id. at 535. In Pierce, a constitutional objection was raised to a statute that required parents to send their children between the ages of eight and sixteen to a public school. Id. at 530. The Court held that the statute infringed upon the rights of parents to exert control over the education of their children. Id. at 534-35; see Wisconsin v. Yoder, 406 U.S. 205, 213-14, 232 (1972) (traditional interest of parents in religious upbringing of children is one of the factors that must be weighed against the state's interest in imposing regulations on the education of its citizens).
send their children to a nonpublic school.\(^3\)

Congress and a number of state legislatures have responded in a variety of ways to the need for preserving the viability of nonpublic education.\(^4\) One such response has been tuition tax benefits for parents who send their children to nonpublic schools. Since a significant portion of the nonpublic schools throughout the country are church-affiliated, however, these tuition tax-benefit programs invariably have generated questions concerning their validity under the constitutional proscription of government aid to religion.\(^5\) This Article considers the constitutionality of federal tuition tax credit legislation under the establishment clause of the first amendment.\(^6\)

**Contemporary Standards of Establishment Clause Analysis**

Admittedly, the language of the establishment clause is vague. As Chief Justice Burger acknowledged in *Lemon v. Kurtzman*,\(^7\) "we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law."\(^8\) Traditionally, this vagueness resulted in the application of a two-part "purpose and effect" test.\(^9\) In *Walz v. Tax Commissioner of New York*,\(^10\) however, the Court added a third prong to its original standard—"excessive entanglement."\(^11\)

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\(^3\) 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, 785-86 (1977); Note, *Government Neutrality and Separation of Church and State: Tuition Tax Credits*, 92 Harv. L. Rev. 696, 700-02 (1979).


\(^5\) See *infra* notes 14-25 and accompanying text.

\(^6\) The establishment clause of the Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I.

\(^7\) 403 U.S. 602 (1971).

\(^8\) Id. at 612.


\(^11\) Id. at 674. In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Court engaged in a full discussion of the applicable standard:

Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. 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."

*Id.* at 612-13 (citations omitted).
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Although the specific contours of these three elements have undergone considerable change since Lemon, this three-part standard has remained the basis of the Court's establishment clause analysis. Accordingly, in order for federal tuition tax credit programs to withstand objections based upon the establishment clause, the resulting benefits must have both a secular purpose and a secular effect and must not create undue governmental involvement with religious elements.

TUITION TAX-BENEFIT LEGISLATION AND JUDICIAL ATTITUDES UNDER THE ESTABLISHMENT CLAUSE: THE NYQUIST DECISION

Tuition tax-benefit legislation, at least at the state level, has not been viewed favorably by the judiciary. The leading case in this area is Committee for Public Education & Religious Liberty v. Nyquist. In Nyquist, New York legislation provided that parents who have taxable income of less than $5000 per year could receive nonpublic school tuition reimbursement grants from the state of up to $100 per child. Parents who did not qualify for these reimbursement grants, but whose adjusted gross income was less than $25,000 per year, were eligible for a tuition tax "benefit," in the form of a reduction from adjusted gross income, for each of their children who attended a nonpublic elementary or secondary school. Unlike the tuition reimbursements, however, the amount of the tax reduction was unrelated to the amount expended on nonpublic school

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15 Id. at 764. The reimbursement grant could not exceed 50% of tuition actually paid. Id.
16 Id. at 765 & n.18.
17 Id. at 765-66.
tuition.\textsuperscript{19}

The Supreme Court ruled that both programs violated the establishment clause insofar as neither could satisfy the secular-effect element of the Court's three-part analysis.\textsuperscript{20} With respect to the tuition reimbursement program, the Court stated that the statute's lack of specifically articulated secular restrictions caused the program to have the "unmistakable" effect of subsidizing sectarian schools.\textsuperscript{21} Condemning the tuition tax-benefit program, the Court asserted that, for purposes of constitutional analysis, there should be no significant distinction between receiving an actual cash payment for sending one's child to a nonpublic school and being permitted to lessen a tax burden for undertaking the same activity.\textsuperscript{22}

Opponents of federal tuition tax credit legislation argue that Nyquist is determinative of whether such legislation would be unconstitutional.\textsuperscript{23} Such a contention ignores both compelling assertions to the contrary and the reality that this area of constitutional law is particularly unsettled. Professor Philip Kurland's remarks on the subject remain accurate today. With respect to "the continuing question whether the national government can contribute financially to parochial education, directly or indirectly," Professor Kurland stated that "anyone suggesting that the answer, as a matter of constitutional law, is clear one way or the other is either deluding or deluded."\textsuperscript{24} Nyquist was merely one chapter in a continuing constitutional saga. Decisions of the Court since Nyquist indicate a shift in analytical emphasis, if not a fundamental restructuring of establishment clause doctrine.\textsuperscript{25} These latter decisions leave the continuing viability of Nyquist in question. Thus, the constitutionality of federal tuition tax credits cannot be resolved merely by citation to Nyquist or any other case. Resolution of the issue requires an independent and detailed examination of federal tuition tax credits in light of the entire body of establishment clause doctrine.

**FEDERAL TUITION TAX CREDITS AND THE SECULAR-PURPOSE ELEMENT**

Although viable federal tuition tax credit legislation must have a secular purpose, this requirement does not mean that the federal govern-

\textsuperscript{19} Id.
\textsuperscript{20} Id. at 798.
\textsuperscript{21} Id. at 783.
\textsuperscript{22} Id. at 789-91.
\textsuperscript{23} See id. at 761 n.5; Young, supra note 3, at 784, 792.
\textsuperscript{25} See infra notes 78-107 and accompanying text.
ment must be acting to promote purely secular goals. In \textit{Walz v. Tax Commission},\footnote{397 U.S. 664 (1970).} for example, Chief Justice Burger noted that "[t]he legislative purpose of the property tax exemption is neither the advancement nor the inhibition of religion; \textit{it is neither sponsorship nor hostility}."\footnote{Id. at 672 (emphasis added).} In this light, the secular-purpose test does not seem to require that government have a secular purpose, but rather that it not have a religious purpose. The distinction is significant. A pure secular-purpose requirement would mean that any legislative consideration of religious goals would be unlawful. Even a brief reading of the cases indicates otherwise. In the school-prayer cases, for example, many of the Justices seemed to recognize a "non-religious" purpose.\footnote{See, e.g., School Dist. v. Schempp, 374 U.S. 203, 223, 225 (1963).} Indeed, there are only two cases in which the Court invalidated legislation for lack of a secular purpose.\footnote{38 Stone v. Graham, 449 U.S. 39, 41 (1980); Epperson v. Arkansas, 393 U.S. 97, 109 (1968).} Furthermore, the Court's method of discerning whether a permissible secular purpose exists is not a searching one. The Court merely looks to the purpose asserted by the legislature. In \textit{Lemon}, for example, the Court stated that "[t]he statutes themselves clearly state that they are intended to enhance the quality of secular education in all schools . . . . There is no reason to believe the legislatures meant anything else."\footnote{39 Lemon v. Kurtzman, 403 U.S. at 613.}

\section*{The Secular-Effect Element}

\textbf{The Shifting Meaning of Secular Effect and Continued Viability of Nyquist}

Justice Harlan once remarked that "it is far easier to agree on the purpose that underlies the first amendment's establishment and free exercise clauses than to obtain agreement on the standards that should gov-
ern their application.\textsuperscript{31} This observation is perhaps most accurate with respect to the secular-effect elements of the establishment clause test. Over the past 2 decades, this element has undergone numerous subtle yet highly significant transformations in meaning. The unfortunate consequence has been that the exact contours of "secular effect" are difficult to perceive from one Supreme Court decision to the next. Proper understanding of the secular-effect test nevertheless is crucial to any constitutional evaluation of federal tuition tax credit legislation.

The secular-effect requirement traditionally meant that legislation would be held unconstitutional only if its primary or principal effect was "to influence—either positively or negatively—the pursuit of a religious tradition or the expression of a religious belief."\textsuperscript{32} In School District v. Schempp,\textsuperscript{33} for example, the Court stated that, in order for the legislation "to withstand the strictures of the Establishment Clause there must be ... a primary effect that neither advances nor inhibits religion."\textsuperscript{34} This standard was quoted with approval 5 years later in Board of Education v. Allen,\textsuperscript{35} in which the Court upheld textbook loans to students attending nonpublic schools.\textsuperscript{36}

This formulation of the secular-effect standard reached maturity in Tilton v. Richardson,\textsuperscript{37} wherein the Court upheld construction grants provided to religious colleges under Title I of the Higher Education Facilities Act of 1963.\textsuperscript{38} In Tilton, Chief Justice Burger declared that "[t]he crucial question is not whether some benefit accrues to a religious institution as a consequence of the legislative program, but whether its principal

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  \item\textsuperscript{31} Walz v. Tax Comm’n, 397 U.S. at 694 (Harlan, J., concurring).
  \item\textsuperscript{32} L. Tribe, American Constitutional Law 839 (1978). The secular-effect requirement may affect either the free exercise clause or the establishment clause. \textit{Id.}
  \item\textsuperscript{33} 374 U.S. 203 (1963).
  \item\textsuperscript{34} \textit{Id.} at 222 (citing Everson v. Board of Educ., 330 U.S. 1 (1947)) (emphasis added).
  \item\textsuperscript{35} 392 U.S. 236 (1968).
  \item\textsuperscript{36} \textit{Id.} at 243. The Court’s discussion in \textit{Allen} as to why a textbook loan program did not have a “primary effect of advancing religion” is helpful in understanding the primary-effect concept. The \textit{Allen} Court stated:

  The test is not easy to apply, but the citation of \textit{Everson} by the \textit{Schempp} Court to support its general standard made clear how the \textit{Schempp} rule would be applied to the facts of \textit{Everson}. The statute upheld in \textit{Everson} would be considered a law having “... primary effect that neither advances nor inhibits religion.” We reach the same result with respect to the ... law [challenged here]. ... The law merely makes available to all children the benefits of a general program to lend books free of charge ... Perhaps free books make it more likely that some children chose to attend a sectarian school, but that ... does not alone demonstrate an unconstitutional degree of support for a religious institution.

  \textit{Id.} at 243-44.
  \item\textsuperscript{37} 403 U.S. 672 (1971).
  \item\textsuperscript{38} \textit{Id.} at 679-84.
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or primary effect advances religion." This clearly was not a "no-aid" standard. Rather, under Tilton and the earlier cases, it appears that particular legislation did not violate the establishment clause if its necessary effect was at least arguably nonreligious.

The fairly permissive secular-effect standard, however, did not remain controlling. The first intimation of a shift toward a more discerning test was seen in Walz and Lemon. Neither of these cases, however, elaborated upon the secular-effect element and, in failing to do so, cast the standard into a state of confusion which ultimately led to open discord among the Nyquist Justices.

While Nyquist invalidated New York's tuition reimbursement and tax-benefit programs upon the ground that they impermissibly provided "financial support for nonpublic, sectarian institutions," the majority's rationale was by no means persuasive. Justice Powell, who authored the majority opinion, conceded that the controversial legislation effectively perpetuated "a pluralistic educational environment" and protected "the fiscal integrity of overburdened public schools." He also acknowledged that these effects were essentially secular. Notwithstanding that these "effects" were similar to those found in Allen, Justice Powell regarded the New York legislation as lacking a "primary secular effect."

Justice Powell's unique textual application of the secular-effect test did not escape notice. In a dissenting opinion, Justice White, joined by Chief Justice Burger and Justice Rehnquist, took the majority to task, arguing that they had ignored precedent: "[T]he test is one of 'primary' effect, not any effect. The Court makes no attempt at that ultimate judgment necessarily entailed by the standard heretofore fashioned in our cases." Justice Powell and the Nyquist majority retorted and, in so doing, seemingly recognized that they had rewritten the secular-effect test.

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39 Id. at 679.
41 See Lemon v. Kurtzman, 403 U.S. 602, 613-14 (1971); Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970). The Lemon Court was unable to decide the issue of state aid to nonpublic schools on grounds of excessive entanglement without addressing the secular-effect test. See 403 U.S. at 613-14.
42 See Nyquist, 413 U.S. at 783 n.39 (finding of primary secular effect does not preclude further scrutiny for effect of advancing religion), 822-24 (White, J., dissenting) ("a resulting, but incidental, benefit to religion should not invalidate [a law]").
43 Id. at 783.
44 Id.
45 Id. at 783 & n.39.
46 Allen, 392 U.S. at 243-44.
47 Nyquist, 413 U.S. at 783 n.39, 798.
48 Id. at 823 (White, J., dissenting).
49 Id. at 783 n.39. The Nyquist Court, in addressing Justice White's dissent, stated:
The Court in Nyquist thus worked a dramatic transformation of the meaning of “secular effect.” After Nyquist, instead of the “arguably non-religious” test of Allen and Tilton, legislation must have merely a remote, indirect, and incidental beneficial impact upon religious interests. According to the Nyquist majority, even if a statute has a “primary” secular effect, it is invalid if it also has a “direct and immediate effect” of aiding religion. Such a standard is onerous indeed.

That Nyquist completely rewrote the law of secular effect was startling enough, but the way in which the Court proceeded to interpret its newly adopted “no aid,” “remote and incidental” standard was even more extraordinary. Given that the New York legislation had an apparently permissible secular effect according to earlier cases such as Allen, Justice Powell found it necessary, in order to strike down the legislation, to construe his “remote and incidental” concept in a manner entirely novel to establishment clause doctrine. He reasoned that, notwithstanding any legitimate and permissible primary secular effects the legislation may have possessed, the “great majority” of the nonpublic schools toward which it was directed were sectarian. Accordingly, asserted Justice Powell, the effect of the legislation was “unmistakably to provide desired financial support for non-public, sectarian institutions.”

Id. (citations omitted).

Professor Tribe has summarized aptly the impact of Nyquist:

The constitutional requirement of “primary secular effect” has thus become a misnomer; while retaining the earlier label, the Court [in Nyquist] has transformed it into a requirement that any non-secular effect be remote, indirect and incidental. This shift is significant, for the remote-indirect-and-incidental standard plainly compels a more searching inquiry, and comes closer to the absolutist no-aid approach to the establishment clause than the primary effect test did.

L. Tribe, supra note 32, at 840 (emphasis in original).

Nyquist, 413 U.S. at 783.

Id.
Justice Powell's "great majority" argument was not entirely foreign to establishment clause jurisprudence. Judicial scrutiny of the percentage of religious-affiliated persons or institutions within the class benefited had been employed in previous cases to determine whether such a program had a permissible secular purpose. As Chief Justice Burger observed, however, the great-majority argument was irrelevant to discern whether legislation had a permissible secular effect. In sum, Nyquist adopted what amounts to a "no aid" approach. According to Justice Powell, if the class of beneficiaries of an educational aid program can be characterized as "significantly religious," then the program's effect is not merely "remote and incidental" and, therefore, the program must be adjudged unconstitutional. Such a no-aid test was absolutely necessary for the Court to invalidate the New York statutes at issue in Nyquist.

It is debatable whether any meaningful program benefiting nonpublic education, even if carefully tailored, could survive the Nyquist no-aid standard. Indeed, in the first post-Nyquist decision to confront tuition tax-benefit legislation, the court read Nyquist to be an absolute prohibition of any religious effect whatsoever, no matter how tangential the effect might be. In Minnesota Civil Liberties Union v. Minnesota, the Supreme Court of Minnesota was faced with a state statute that provided a tax credit for parents who paid tuition to send their children to a nonpublic elementary or secondary school. The trial court found that the statute satisfied each prong of the three-part establishment clause test and hence was constitutional. On appeal, the Minnesota Supreme Court reversed on secular-effect grounds. The court initially noted that

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56 Nyquist, 413 U.S. at 804-05 (Burger, C.J., concurring in part and dissenting in part) (the percentage of "beneficiaries of an educational program of general application who elect to utilize their benefits for religious purposes" is not a criterion for constitutionality).
57 See id. at 783 & n.39.
58 See id. The majority recognized the apparent secular effects of New York's tuition-reimbursement and tax-benefit programs. Id. The Court indicated that because New York had "legitimate, nonsectarian state interests" supporting each part of the amendments, it had to base its decision upon either the effect or entanglement test. Id. at 773-74. As the dissent noted, under any other more lenient secular-effect standard, particularly those used in cases such as Allen, Tilton and Everson, the legislation would have been upheld. Id. at 823-24 (White, J., dissenting). The key to the Nyquist result, therefore, was its adoption of the "no-aid, remote and incidental" secular-effect approach. Id. at 783 n.39.
60 302 Minn. at 233, 224 N.W.2d at 344, 353.
61 Id. at 217-18, 224 N.W.2d at 345.
62 Id. at 225-26, 224 N.W.2d at 347, 349.
63 Id. at 234-35, 224 N.W.2d at 353-54.
"[a]bsent subsequent decision of the [United States] Supreme Court," the trial court's finding that the legislation had a permissible secular effect "was fully justified under the standards established . . . in Tilton v. Richardson." According to the Minnesota court, however, the intervening Supreme Court decisions altered the course of determining establishment clause questions: "In applying the 'primary effects test' we must be guided by the realization . . . that this is no longer a primary effects test, but an 'any effects' test. Under such a standard, the legislation in question cannot pass constitutional muster." The accuracy of the Minnesota Supreme Court's reading of Nyquist was confirmed by the United States Supreme Court in Meek v. Pittenger, in which the Court held that the Nyquist formulation of secular effect was a virtual prohibition against all aid of any substance.

Meek presented a challenge to Pennsylvania statutes creating three assistance programs for nonpublic elementary and secondary education. Expressing an unwillingness to overrule Allen, the Court upheld Pennsylvania's textbook loan program. The two remaining programs, however, were struck down—the auxiliary services program because it created an impermissible "excessive entanglement between church and state" and the instructional materials program because it had the impermissible effect of advancing religion. In invalidating the latter, it was clear that the Court was following the remote-and-incidental formula developed in Nyquist. Justice Stewart, author of the majority opinion, initially spoke of the necessity that any benefit to church-related schools be "indirect and incidental." Justice Stewart then announced, explicitly relying upon Nyquist, that any "substantial aid" to church-related schools violates the secular-effect requirement, because such "substantial aid . . . inescapably

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See id. at 366. The Court stated that the aid in question, although neutral on its face, "results in the direct and substantial advancement of religious activity." Id.

Id. at 352-55. In Meek, the three assistance programs for nonpublic elementary and secondary education were (1) a textbook loan program virtually identical to that upheld in Allen; (2) a similar program providing for loans of instructional materials such as maps, charts, and audio-visual equipment; and (3) an auxiliary services program, by which remedial education, guidance and counseling, and speech and hearing therapy services were furnished to nonpublic schoolchildren. Id.

Id. at 359-62. The Court stated that the benefit of the textbook loan program went directly "to parents and children, not to the nonpublic schools." Id. at 361 (footnote omitted).

Id. at 367-72.

Id. at 362-66.

Id. at 364-65. Allowable indirect-and-incidental benefits of government assistance programs include school lunches, health facilities, and bus transportation. Id. at 364.
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results in the direct and substantial advancement of religious activity.774

The Meek-Nyquist no-aid standard apparently terminated the abil-
ity to provide any meaningful assistance to nonpublic elementary and
secondary education.76 Since at least a significant portion of nonpublic
schools are church-related,76 Meek and Nyquist effectively erected an ir-
rebuttable presumption that aid to nonpublic schools will have a consti-
tutionally impermissible religious effect. The Meek-Nyquist no-aid stan-
dard, however, has not remained intact. Subsequent to those decisions,
the Court seemingly shifted back to the more flexible secular-effect stan-
dard delineated in cases such as Allen and Tilton.77 The first hint of this
retreat to a more favorable posture regarding assistance to nonpublic edu-
cation appeared in Wolman v. Walter.78

In Wolman, the Court upheld those portions of an Ohio statute au-
thorizing expenditures of state funds to supply nonpublic school students
with textbooks, standardized testing and scoring services, speech and
hearing diagnostic services, and special education therapeutic and reme-
dial services.79 Although the Court relied upon Meek and Nyquist to in-
validate the sections of the statute which provided nonpublic schools with
instructional materials and field trip services, it was clear that the no-aid
standard of Meek and Nyquist was not being applied fully.80 Indeed,
many of the programs upheld in Wolman were strikingly similar to those
condemned in Meek.81 Unfortunately, Wolman did not engage in any de-
tailed elaboration of the analytical construct that was being applied. Jus-
tice Blackmun’s opinion, instead, focused upon previous decisions con-
cerning similar statutory provisions.82

The implication that the Court had retreated from the no-aid ap-
proach of Meek and Nyquist was confirmed in Committee for Public Ed-

74 Id. at 366.
75 See Young, supra note 3, at 792-95.
76 See Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 816 (White,
J., dissenting). Justice White noted that of the 5.2 million nonpublic school students in the
United States in 1972, 83 percent were enrolled in Catholic schools. Id. (White, J.,
dissenting).
77 See infra notes 78-107 and accompanying text.
79 Id. at 236-48. The Court remarked that the textbook program was very similar to the
programs upheld in Allen and Meek. Id. at 237-38 & n.6.
80 See id. at 250-55. The Court relied primarily upon the fact that there had been no at-
tempt to separate the secular from the sectarian functions of the materials and equipment.
Id. at 250-51. It is interesting, however, that nowhere in the Wolman opinion did Justice
Blackmun cite footnote 39 of the Nyquist decision.
81 See supra notes 69-80 and accompanying text.
82 Wolman v. Walter, 433 U.S. at 236-55; see Committee for Pub. Educ. v. Levitt, 461 F.
ucation v. Regan.\textsuperscript{83} Regan involved a challenge to a New York statute authorizing the use of state funds to reimburse nonpublic schools for the costs of performing various testing and reporting services required by state law.\textsuperscript{84} An earlier version of the statute had applied to both state- and teacher-prepared examinations.\textsuperscript{85} Finding that reimbursement for the latter posed the potential for state funding of examinations reflecting "religious instruction," the Court had struck down the earlier legislation in \textit{Levitt v. Committee for Public Education (Levitt I)}.\textsuperscript{86} Following \textit{Levitt I}, the New York legislature in 1974 enacted the statute that the Court eventually confronted in \textit{Regan}.\textsuperscript{87} Although the 1974 version was limited to reimbursement of state-prepared examinations, and thus according to \textit{Levitt I} should have been acceptable, it nevertheless was invalidated by a federal district court in \textit{Levitt II}.\textsuperscript{88} The district court relied extensively upon the Supreme Court's intervening decision in \textit{Meek} for the proposition that any "substantial aid" to nonpublic, predominantly church-affiliated schools is unconstitutional.\textsuperscript{89}

\textit{Levitt II} was appealed directly to the Supreme Court, where surprisingly, given the apparent clarity of the \textit{Meek-Nyquist} no-aid rule, it was vacated and remanded for reconsideration in light of the \textit{Wolman} opinion.\textsuperscript{90} On remand, the district court in \textit{Levitt IV} was faced with apparently irreconcilable Supreme Court precedent. Whereas \textit{Meek} and \textit{Nyquist} purported to forbid all "substantial aid" to nonpublic, predominantly church-affiliated schools, \textit{Wolman} at least impliedly indicated that the \textit{Meek-Nyquist} formulation of the secular-effect test was no longer to be strictly followed. Initially, the district court framed the "central issue" as whether the New York statute had the primary effect of advancing religion,\textsuperscript{91} which included an inquiry into the statute's "direct and immediate" effect.\textsuperscript{92} Furthermore, the court observed that at least prior to \textit{Wolman}, \textit{Meek} "virtually mandated" the conclusion that the 1974 New York legislation had the unconstitutional effect of directly and

\textsuperscript{83} 444 U.S. 646 (1980).
\textsuperscript{84} Id. at 648.
\textsuperscript{85} Id. The 1970 statute did not contain an auditing requirement for school records which would guarantee that public money would not be used for sectarian schools. Id. at 649.
\textsuperscript{86} 413 U.S. 472 (1973).
\textsuperscript{87} 444 U.S. at 650-52. The 1974 statute did not "reimburse nonpublic schools for the preparation, administration, or grading of teacher-prepared tests." Id. at 652. In addition, this statute did require an audit of public-fund expenditures. Id.
\textsuperscript{89} Id. at 1178-80. The \textit{Levitt II} court stated that, absent the \textit{Meek} rationale, it might have agreed that the statute's primary effect was not to promote religion. Id. at 1178.
\textsuperscript{90} 433 U.S. 902 (1977).
\textsuperscript{92} Id.
immediately advancing religion.83 Nevertheless, the district court in Levitt IV proceeded to reject the Meek-Nyquist secular-effect test and, based upon Wolman, adopted a “more flexible concept” of secular effect.84 Analyzing the 1974 legislation under such a concept, the court determined that the legislation indeed had a primary secular effect and, accordingly, upheld the statute though substantially similar to that previously invalidated in Levitt II.85

Levitt IV was appealed directly to the Supreme Court, at which time it became the Regan case.86 There, the appellants argued that the district court’s application of a more flexible concept was contrary to Meek.87 Justice White, who authored the majority opinion, disagreed. After recognizing that the district court had adopted a more flexible approach to secular effect, Justice White attempted to explain why such a test was not necessarily inconsistent with Meek.88

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82 Id. at 1127.
83 Id. The court stated:
It appeared to us that in Meek the Court . . . was establishing a per se rule prohibiting any state aid to educational activities carried out in sectarian schools . . . . Applied consistently, Meek would allow only state aid coming under the mantle of “general welfare” programs serving the health and safety of school children.

. . . .

Although Wolman does not expressly renounce Meek’s theory that aid to a sectarian school’s education activities is per se unconstitutional, it does revive the more flexible concept that state aid may be extended to such a school’s educational activities if it can be shown with a high degree of certainty that the aid will only have secular value of legitimate interest to the State and does not present any appreciable risk of being used to aid transmission of religious views. It is this concept which we apply to the provisions of the statute before us.

Id. (footnotes and citations omitted).

84 461 F. Supp. at 1128-31. The district court determined that due to the “secular nature of the examinations and the almost entirely mechanical method for their administration,” there was little danger that the tests would be used to foster religious principles. Id. at 1128. Furthermore, the court pointed to the auditing mechanisms as an additional safeguard. Id.
86 Id. at 661. The appellants stressed “[t]hat any aid to a sectarian school is suspect since its religious teaching is so pervasively intermixed with each and every one of its activities.”
87 Id.
88 Id. at 653-62. Justice White stated:

The difficulty with [appellants’] position is that a majority of the Court, including the author of Meek v. Pittenger [Justice Stewart], upheld in Wolman a state statute under which the State, by preparing and grading tests in secular subjects, relieved sectarian schools of the cost of these functions, functions that they otherwise would have had to perform themselves and that were intimately connected with the educational processes. Yet the Wolman opinion at no point suggested that this holding was inconsistent with the decision in Meek. Unless the majority in Wolman was silently disavowing Meek, in whole or in part, that case was simply not understood by this Court to stand for the broad proposition urged by appellants and espoused by the District Court in Levitt II.
The *Regan* Court then affirmed the district court's decision that New York's testing reimbursement program was valid under the establishment clause.\(^9\)

Although Justice White stated that *Regan's* more flexible concept of secular effect did not mean that *Meek*, and accordingly *Nyquist*, had been undercut, his assertion is unpersuasive.\(^10\) Had the *Meek-Nyquist* no-aid formulation been followed in *Wolman* and *Regan*, it is difficult to perceive how the programs challenged in those cases could have been upheld, since those programs undoubtedly afforded "substantial," "direct," and "immediate" aid to church-related elementary and secondary schools.\(^11\) Justice Blackmun, dissenting in *Regan*, expressed just this difficulty. The legislation upheld by *Regan*, Justice Blackmun contended, involved the same sort of direct and substantial aid that was prohibited by *Meek* and *Nyquist*.\(^12\) Justice Blackmun could rationalize this inconsistency only by concluding that certain of the Justices, who were previously hostile to assistance for nonpublic education, had undergone a change of heart.\(^13\)

Notwithstanding Justice White's claim that *Regan* and *Wolman* are consistent with *Meek* and *Nyquist*, Justice Blackmun appears to have advanced the better argument. *Regan* and *Wolman* simply did not apply the no-aid, secular-effect test of *Meek* and *Nyquist*. This was not only the express conclusion of Justices Blackmun, Brennan, Marshall, and Stevens in *Regan*, but also that of the district courts in *Levitt IV*\(^14\) and *National Coalition for Public Education v. Harris*.\(^15\) A majority of the Court has rejected the *Meek-Nyquist* no-aid, remote-and-indirect formulation and instead has adopted a secular-effect standard by which governmental assistance for nonpublic education will satisfy the secular-effect element if,

\[^{9}\text{Id. at 661.}\]
\[^{10}\text{Id. at 662.}\]
\[^{11}\text{See supra note 98 and accompanying text. Professor Tribe believes that the "remote and incidental" secular-effect test of *Nyquist* was essentially a no-aid approach to the establishment clause. L. TRIBE, supra note 32, at 840; see supra note 52 and accompanying text. Professor Tribe's conclusion is borne out by *Meek*, with its statement that "any substantial aid" to nonpublic, predominantly church-affiliated schools violates the secular-effect test. *Meek*, 421 U.S. at 366.}\]
\[^{12}\text{See infra notes 102-03 and accompanying text.}\]
\[^{13}\text{*Regan*, 444 U.S. at 668 (Blackmun, J., dissenting). Justice Blackmun was joined in his dissenting opinion by Justices Brennan and Marshall.}\]
\[^{14}\text{Id. at 663-64.}\]
\[^{15}\text{461 F. Supp. at 1127-28.}\]
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according to Regan, it can be “shown with sufficient clarity that . . . [such assistance will] serve the State’s legitimate secular ends without any appreciable risk of being used to transmit or teach religious views.”106 This “appreciable risk” test, of course, reflects merely the Regan Court’s adoption of the “more flexible concept” of secular effect developed in Wolman and recognized by the district court in Levitt IV.107

The secular-effect standard thus has evolved from the relatively permissive “primary effect” tests of Tilton and Allen to the strict no-aid test of Nyquist and Meek, and back to the more flexible Regan appreciable-risk approach. The importance of this trend for federal tuition tax credit legislation is considerable. Nyquist is the most frequently raised constitutional objection to federal tuition tax credits.108 Opponents of federal tuition tax credit legislation argue that Nyquist demands the conclusion that federal tuition tax credits would violate the secular-effect element.109 As explained earlier, however, the result reached in Nyquist was a direct consequence of its no-aid test. Given that the no-aid test was a dramatic transformation of prior law, it is likely that the result reached in Nyquist would have been different had the Court not adopted its no-aid approach. This is significant since the no-aid approach is no longer an accurate statement of the meaning of the establishment clause. The Meek-Nyquist definition of secular effect was, at least implicitly, disavowed in Regan.110 In its place, the Court has substituted Regan’s appreciable-risk concept.111

Nyquist retained vitality only so long as the no-aid test upon which it was based remained good law. With that test now rejected, and hence with its major if not sole source of analytical support undercut, Nyquist must be considered questionable precedent by which to evaluate future tuition tax-benefit legislation. The two post-Nyquist court of appeals decisions on tuition tax benefits, Rhode Island Federation of Teachers v. Norberg112 and Public Funds for Public Schools v. Byrne,113 must be con-

106 444 U.S. at 662.
107 Id.
109 See supra note 23 and accompanying text.
110 See Committee for Pub. Educ. v. Regan, 444 U.S. 646, 661 (1980). Justice White’s opinion in Regan noted that the decision of Meek v. Pittenger is not to be interpreted as holding that any aid to secular educational functions of sectarian schools is forbidden. Id.
111 Id. at 662.
112 630 F.2d 855 (1st Cir. 1980).
sidered suspect for the same reason. Neither *Norberg* nor *Byrne* addressed whether the *Nyquist* formulation of secular effect remains valid. Rather, the court in each case accepted, with little hesitation, *Nyquist*’s no-aid approach and, on that basis, struck down the legislation before it.\(^{114}\)

Whether federal tuition tax credits will be deemed to have a permissible secular effect cannot be resolved merely by reliance upon *Nyquist* or the cases which have accepted its view of secular effect. Given the changes that have occurred in this area since *Nyquist*, the secular-effect issue can be answered only by analysis of the factors which traditionally have been determinative of secular effect, in light of the *Regan* appreciable-risk standard which currently governs this aspect of constitutional law.

*Traditional Measures of Secular Effect*

*Separability and Breadth*

Although the rigor with which the secular-effect element has been applied has undergone significant fluctuation from *Everson* to *Regan*, the focal points of judicial inquiry into the issue seemingly have remained relatively constant. Professor Tribe has suggested that two factors, “separability” and “breadth,” are of critical importance in determining whether particular legislation survives the secular-effect test.\(^{116}\) According to Professor Tribe, the separability factor translates into “whether the secular impact is sufficiently separable from the religious” impact.\(^{116}\) His breadth analysis concerns the class of persons benefited by the legislation: whether “religious enterprises are benefited no more than, and only as part of, some much broader category.”\(^{117}\) Both factors are premised upon a rationale of “symbolic identification” by the public of governmental and religious activity.\(^{118}\) With respect to separability, the relevant inquiry is whether the public perception of a governmental program is that government is “aiding” religion, rather than, for example, merely aiding individual persons without regard to their religious attitudes.\(^{119}\) Similarly, the hypothesis with respect to the breadth factor is that “the broader the class benefited, the less likely it is that the program will be perceived as aid to religion.”\(^{120}\)

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\(^{114}\) *See Norberg*, 630 F.2d at 858-59; *Byrne*, 590 F.2d at 518.

\(^{115}\) *See generally* L. Tribe, *supra* note 32, at 840-46.

\(^{116}\) *Id.* at 840.

\(^{117}\) *Id.* at 845.

\(^{118}\) *See id.* at 844-45.

\(^{119}\) *See id.* at 843-44.

\(^{120}\) *Id.* at 845.
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Perhaps the clearest example of the significance of the separability factor is the so-called "child benefit" doctrine set forth in *Everson v. Board of Education*¹ and *Board of Education v. Allen.*² In *Everson*, the Court upheld a New Jersey transportation reimbursement program, whereby parents of children attending either a public school or a non-profit, nonpublic school were reimbursed by the state for expenses incurred in transporting their children to and from school on the public transit system.³ Similarly, the Court in *Allen* upheld a New York statute requiring local public school authorities to loan textbooks free of charge to all students enrolled in schools which complied with the state's compulsory education law, including students attending nonpublic schools.⁴ Although the true meaning of *Everson* and *Allen* is a matter of considerable dispute, even within the Supreme Court, this much is settled: the critical factor in each case was that the assistance provided was "so separate and so indisputably marked off from the religious function" of the affected church-related schools that it could not be said to constitute impermissible aid to religion.⁵

The traditional view of the child-benefit doctrine is derived from the proposition that assistance provided to individuals, rather than to the church-related institutions which those individuals happen to attend, is not aid to religion and is not forbidden by the establishment clause.⁶ At least three Justices subscribe to this traditional view. One, of course, is Justice White, the author of the majority opinion in *Allen.*⁷ The second is Justice Rehnquist.⁸ The third and most adamant proponent of the traditional view of the *Everson-Allen* child-benefit concept is Chief Justice Burger. In *Lemon v. Kurtzman*, the Chief Justice reaffirmed the vitality of the traditional view of *Everson* and *Allen* by relying upon it to distinguish the legislation at issue.⁹ The Chief Justice's dissent in *Ny-
quist contains further documentation of the constitutional validity of the Everson-Allen principle that assistance to individuals is not “aid” to religion.130

Federal tuition tax credit legislation undoubtedly would be approved under the traditional view of Everson and Allen as long as the tax benefits would accrue to the parents, and not to the schools to which those parents send their children. In such a case, there would be no direct benefits to religious institutions. Indeed, it cannot be said with any certainty that federal tuition tax credits would even indirectly accord financial benefits to church-related schools, since any expendable monies which parents may enjoy on account of the credits would be spent as they chose. While the schools may receive an indirect benefit in that the parents may be more likely to send their children to nonpublic rather than public schools, such assistance, as expressed by Everson and Allen, does not contravene the establishment clause.131

Unfortunately, the Court recently has not had occasion to consider fully the child-benefit doctrine of Allen and Everson. In Americans United for Separation of Church & State v. Blanton,132 however, the Court hinted that it had returned to the classic reading of Allen and Everson, as urged by the Chief Justice and Justices White and Rehnquist.133

ha[d] the . . . defect of providing . . . financial aid directly to the church-related school. This factor distinguishes both Everson and Allen, for in both those cases the Court was careful to point out that . . . aid was provided to the student and his parents—not to the church-related school.

Id.

130 413 U.S. at 799-802 (Burger, C.J., dissenting). The Chief Justice stated that although there is not a straight line running through the Court’s interpretation of the establishment and free exercise clauses of the first amendment, one basic and solid principle does exist—the establishment clause does not forbid the creation of a general welfare system which distributes welfare benefits to private individuals. Id.

131 See Allen, 392 U.S. at 243-44; Everson, 330 U.S. at 17. According to the interpretation of Everson and Allen advanced by Chief Justice Burger and Justices White and Rehnquist, federal tax credits for nonpublic school tuition are not constitutionally distinguishable from financial reimbursement for nonpublic school transportation. See Nyquist, 413 U.S. at 803 (Burger, J., dissenting); id. at 812 (Rehnquist, J., dissenting); id. at 820-21 (White, J., dissenting). Justice Powell disagrees with the Burger-White-Rehnquist reading of Everson and Allen, and apparently believes that the separability found to exist in those cases does not derive exclusively from the fact that the benefits went to parents and children rather than to schools, but from some other combination of elements. In Nyquist, Justice Powell argued that Everson and Allen did not create an irrebuttable presumption of constitutionality: “[T]hose decisions make it clear that, far from providing a per se immunity from examination of the substance of the State’s program, the fact that aid is disbursed to parents rather than to the schools is only one among many factors to be considered.” Id. at 781.

132 434 U.S. 803 (1977), aff’g 433 F. Supp. 97 (M.D. Tenn.).

133 See supra notes 127-31 and accompanying text.
Blanton was a summary affirmance of a federal district court decision which upheld a state student assistance program. The principal basis for the district court's decision in favor of the legislation was that, like Everson and Allen, "the emphasis [was] . . . on the student rather than the institution." According to what remains of Justice Powell's reading of Everson and Allen, it appears that federal tuition tax credit legislation, which would assure that tax credits accrue directly to the benefit of parents, would receive favorable constitutional treatment. Such legislation seemingly is valid since direct disbursement to parents is at least presumptively indicative of a "guarantee of separation" between the assistance provided and the religious functions of whatever church-related institutions may be incidentally benefited. Although the Powell application of the child-benefit doctrine leaves open the possibility that other aspects of the legislation may be so constitutionally infirm as to require elimination of the Everson-Allen presumption of validity, there is nothing which precludes the creation of a statute avoiding such infirmities. Other factors, considered below, also support the constitutionality of federal tuition tax credits.

Separability and Allocation of Aid to Secular Functions

It is settled that nonideological assistance to nonpublic education does not contravene the establishment clause. In Regan, for example, reimbursements to nonpublic schools for costs incurred in conducting state-required testing and in maintaining records necessary for compliance with state minimum education standards were approved because such activities, even when undertaken by church-related schools, are religiously neutral. As the court stated in National Coalition for Public Education v. Harris, "[c]ases such as Regan, Hunt, and Tilton reveal that under certain circumstances, the government may furnish funds or services directly to a sectarian institution if their use is effectively restricted to non-religious functions." 434 U.S. at 803 (1977).


134 Americans United for Separation of Church and State v. Blanton, 433 F. Supp. 97, 105 (M.D. Tenn.), aff'd, 434 U.S. 803 (1977). The student assistance program was enacted by the Tennessee General Assembly to provide "needy students with the financial assistance necessary to attend the accredited college of their choice in Tennessee." 433 F. Supp. at 99.

135 Id. at 104. The court noted that college students are not as susceptible to religious indoctrination as elementary or secondary school students, id. at 103, and that no single religion is favored by the program, id. at 104.

136 See Allen, 392 U.S. at 244-45; Everson, 330 U.S. at 16-17.

137 See infra notes 139-43 and accompanying text.

444 U.S. at 656-57.

gious functions and activities."  

The premise underlying the principle applied in Regan and Harris is that even church-related schools have more than just a religious function. To the extent that nonpublic schools engage in providing a basic secular education, they are fulfilling and advancing a public purpose which otherwise would be satisfied by government. According to the Regan-Harris principle, governmental assistance to this secular nonideological function would appear constitutional, since such assistance promotes only the clearly identifiable secular function of providing a basic education, and otherwise is religiously neutral.

Separability and Affirmative Government Assistance

On the one hand, direct payments by government to church-related schools in order to further the religious missions of those schools is undoubtedly impermissible. At the other extreme, exemption of religious organizations from legal requirements incumbent upon similarly situated nonreligious organizations can, under certain circumstances, be constitutional. Indeed, in some cases, such an exemption of religious "persons" may be mandated by the free exercise guarantee.

Being mindful of the fact that the rationale underlying the secular-effect test's separability concern is to avoid a "symbolic identification" of

141 Id. at 1259.
142 Cf. Board of Educ. v. Allen, 392 U.S. 236, 245 (1968) ("this Court has long recognized that religious schools pursue two goals, religious instruction and secular education").
143 Tax assistance programs were held unconstitutional in previous cases on the ground that the amount of the particular tax benefit was unrelated to the amount of nonpublic school tuition actually paid. See Nyquist, 413 U.S. at 791; Norberg, 630 F.2d at 857; Public Funds for Pub. Schools, 590 F.2d at 576; Minnesota Civil Liberties Union, 302 Minn. at 219-20, 224 N.W.2d at 345-46. In each case, the fact that the legislation was arbitrary with respect to the amount of allowable tax benefits was a sufficient basis to find a lack of adequate separation between the educational assistance provided and the religious training functions of the church-related schools.
144 See Everson, 330 U.S. at 15-16. In Everson, the Court stated: "[N]o 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." Id. at 16.
145 Cf. Walz v. Tax Comm'n, 397 U.S. 664, 676-80 (1970) (the tax exempt status of religious organizations is fundamental in American history, and to exclude such organizations from the tax exempt status accorded to other nonprofit organizations would place religion at a relative disadvantage).
146 Cf. Thomas v. Review Bd. of the Ind. Employment Sec. Div., 450 U.S. 707, 719-20 (1981); Sherbert v. Verner, 374 U.S. 398, 410 (1963) (disqualification from unemployment compensation benefits due to refusal to perform certain work violated first amendment). A legislature may have discretion to alleviate burdens imposed on free exercise and religious voluntarism, which are not sufficient to constitute violations of the first amendment, even though the process of accomodation involves a departure from the principles of separation. Note, supra note 3, at 710.
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It seems clear that there is a greater likelihood of such identification when government takes affirmative steps to provide direct assistance to religiously affiliated institutions. Conversely, that likelihood diminishes significantly when aid is not affirmative, but rather consists merely of government abstention from imposing a legal burden which otherwise could be imposed, such as exempting religious organizations from a tax which could be levied upon them. In the latter situation, since there is no positive governmental action, there is less chance that government will be viewed as taking steps to sponsor religion. Such a distinction between presumptively impermissible affirmative and direct assistance on the one hand, and presumptively permissible indirect and exemptive government conduct on the other, was recognized by the courts in Kosydar v. Wolman, and Minnesota Civil Liberties Union v. Roemer.

Although the question is a difficult one, it appears that federal tuition tax credits are more in the nature of exemptive governmental activity and, thus, are constitutional. In Roemer, for example, the court relied upon the exemptive activity theory in upholding a tuition tax deduction statute. Perhaps more significantly, Chief Justice Burger determined that this affirmative-exemptive distinction militates strongly in favor of the tax exemptions for churches which were upheld in Walz. Both the tax exemption of Walz and the tax deduction of Roemer were held constitutionally valid. Both, in essence, involved alleviation of a tax burden through noncollection of a tax which otherwise could be levied. It is possible, of course, that a low-income taxpayer who takes a tax credit may be entitled to a payment from the government, but that result reflects no more than the taxpayer's overall tax status, of which a tax credit

147 See Walz, 397 U.S. at 691 (Brennan, J., concurring) ("[t]ax exemptions . . . constitute mere passive State involvement with religion and not the affirmative involvement characteristic of outright governmental subsidy").
148 See id. at 674-76; Note, supra note 3, at 714-15.
151 Id. at 1321-22.
152 Walz, 397 U.S. at 674-76. Chief Justice Burger stated:

Granting tax exemptions to churches necessarily operates to afford an indirect economic benefit.

[But the] grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state. . . . There is no genuine nexus between tax exemption and establishment of religion [since tax] . . . exemption creates only a minimal and remote involvement between church and state.

153 See id.; Roemer, 452 F. Supp. at 1322.
for one item is merely a part. The tax credit alone, like any exemption or
deduction, requires no affirmative steps on the part of the government. Indeed, the similarity between the measures approved in Walz and Roe-
mer is reinforced by Nyquist. There the Court noted that, constitution-
ally, it is irrelevant whether a tax measure is termed a “deduction,” a “credit,” or even a “modification.” Rather, substance must control over form.

Moreover, Nyquist’s invalidation of New York’s tuition tax-benefit program does not undermine the conclusion that a mere exemptive tax measure is constitutionally valid. The tax-benefit program struck down in Nyquist was not enacted, nor did it exist in isolation; it was part of a broader plan which included New York’s tuition reimbursement grant program. As the Court noted, the tuition tax-benefit sections of the challenged New York legislation were intended to be “comparable to, and compatible with, the tuition grant” sections. The Court further stated that, given this close relationship between the two programs, if the tuition grant measure were unconstitutional, then the tax-benefit measure also is invalid. To a large extent, therefore, the constitutional defects in New York’s tuition tax-benefit program were a function of that program’s “legally inseparable” ties to the tuition grant program. Whether the tax-benefit plan would have been held unconstitutional absent those ties is debatable, although Roemer and particularly Walz indicate that such a purely or at least predominantly exemptive tax measure would be permissible. In any event, the unique aspects of the integrated legislation at issue in Nyquist prevent that decision from having considerable preceden-
tial weight on this question. The more relevant precedents are Walz and Roemer, and they favor the conclusion that predominantly exemptive measures are constitutional.

Breadth, National Legislation and Genuine Tax-Benefit Programs

Whereas the Nyquist Court purported to rely primarily upon the separability factor and the assertion that sufficient separation cannot ex-
ist if assistance to nonpublic education has a “significantly religious” flavor, the Court explicitly avoided consideration of the “breadth” aspect of the secular-effect test. Indeed, the Court observed that its decision

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154 See Note, supra note 3, at 715. A tax credit plan “requires no administrative apparatus for direct distribution of government funds to schools.” Id.
156 413 U.S. at 789-90.
154 See id. at 764.
157 Id. at 790.
156 Id. at 791 n.50.
158 See id.
156 But see L. Tribe, supra note 32, at 845 (“the narrowness of the benefited class was a key
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should not be construed as extending to such legislation as the GI Bill of Rights\textsuperscript{161} which accords educational assistance to a broad class of beneficiaries.\textsuperscript{162}

Significantly, both of the examples to which the Court referred in limiting the scope of \textit{Nyquist} involved national legislation, whereas \textit{Nyquist} and other cases which have invalidated tuition tax-benefit programs were concerned with state legislation. This distinction between the sources of legislation challenged under the establishment clause is highly significant to the breadth aspect of the secular-effect test.\textsuperscript{163} Because the underlying concern of the breadth factor is avoidance of any symbolic identification by the general public of governmental assistance with religious activity, it is apparent that facially neutral legislation at the national level, directed at a broad cross-section of the nation's population, is less likely to involve any such symbolic identification.\textsuperscript{164}

The purpose of tuition tax-benefit legislation is to preserve educational opportunity for all persons, without regard to religious persuasion. Yet, in a state where the beneficiaries of such legislation are concentrated into only a few denominations, or even where the entire constituency of the state is comprised predominantly of persons adhering to only a handful of religious beliefs, such a purpose probably will not be achieved, at least not in a neutral fashion.\textsuperscript{165} As the Court noted in \textit{Nyquist}, under such circumstances the primary beneficiaries of the legislation would not be all persons regardless of religious attitude, but rather a select group of certain politically powerful religious adherents.\textsuperscript{166}

National educational assistance legislation, in contrast, is not susceptible to this criticism. Such legislation would benefit persons of all religious beliefs, regardless of geographic distributions or concentrations. Indeed, national religious diversity serves to ensure proportionate representation in Congress, a factor which likely would not exist in the legislatures of states in which certain faiths are highly concentrated. Religiously proportionate representation and distribution of benefits, in turn, permit federal legislation to coincide more closely with the goal of preserving freedom of educational choice. The simple fact that such legislation is national in character guarantees that the class of beneficiaries will be far broader than any class which possibly could be benefited by

\textsuperscript{162} \textit{Nyquist}, 413 U.S. at 783 n.38.
\textsuperscript{163} See L. Tribe, \textit{supra} note 32, at 845.
\textsuperscript{164} See id. at 844.
\textsuperscript{165} See \textit{Nyquist}, 413 U.S. at 768.
\textsuperscript{166} See id.
comparable state legislation.\textsuperscript{167}

Although the case of \textit{Americans United for Separation of Church & State v. Blanton}\textsuperscript{168} addressed the constitutionality of a higher education student assistance grant program,\textsuperscript{169} the rationale employed in resolving this issue would apply to federal tuition tax credit legislation. In affirming the constitutionality of the student assistance grant program, the \textit{Blanton} court referred to \textit{Durham v. McLeod},\textsuperscript{170} a case which was dismissed by the Supreme Court for lack of a substantial federal question on the same date that \textit{Nyquist} was decided.\textsuperscript{171}

In the instant case, as in \textit{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.\textsuperscript{172}

\textit{Blanton} thus upheld the legislation because it accorded benefits to a broad class of beneficiaries. Federal tuition tax credit legislation, which would be a mere part of the Internal Revenue Code, would have a similar

\textsuperscript{167} See \textit{Tuition Tax Relief Bills, 1978: Hearings on S. 2142 Before the Subcomm. on Taxation and Debt Management Generally of the Senate Finance Comm., 95th Cong., 2d Sess. 295-97, reprinted in 124 Cong. Rec. 8707-08 (1978)} (statement of A. Scalia). At subcommittee hearings of the Senate Finance Committee, it was stated:

\begin{quote}
[A] final distinction, perhaps the most critical, between the present bill (S. 2142) and the laws struck down in \textit{Nyquist} . . . is that here we are talking about a federal law. It is unquestionable that the Supreme Court . . . is more disposed to accord validity to the acts of this Congress than to those of state legislatures . . . . In the individual States, where, not infrequently, a single denomination accounts for a majority or a near majority of the electorate, the danger that the legislature will aid a particular religion under the guise of pursuing purely secular governmental ends is sometimes acute, and justifies particularly rigorous application of anti-establishment principles, even at the expense of other constitutional values which might otherwise predominate. In the national legislature, by contrast, no single religious sect predominates, and the danger of sectarian action in favor of a particular group is negligible.
\end{quote}


\textsuperscript{169} 433 F. Supp. at 98.

\textsuperscript{170} 258 S.C. 409, 192 S.E.2d 202 (1972).

\textsuperscript{171} 413 U.S. 902 (1973).

\textsuperscript{172} 433 F. Supp. at 104.
effect. In addition, *Blanton* involved state legislation and, as noted above, federal legislation inherently carries with it greater "breadth" than comparable state enactments.\(^\text{178}\) Hence, the *Blanton* rationale appears to be sufficiently persuasive so as to dismiss the fear that federal tuition tax credit legislation involves impermissible religious benefits.

One need not search to find congressional precedent for federal tuition tax credit legislation. In 1943, President Roosevelt sent two memoranda to Congress urging the development of legislation aimed at easing the burdens of returning servicemen. On June 22, 1944, Congress enacted the first so-called G.I. Bill.\(^\text{174}\) Among other things, this bill provided for educational assistance payments to veterans who wished to complete or continue their education.\(^\text{178}\) Additional evidence of congressional support for sectarian education was the enactment of statutory provisions providing reimbursement to the District of Columbia public school system for expenses incurred in the education of congressional and Supreme Court pages.\(^\text{178}\) The federal government also makes monthly educational assistance payments directly to senior R.O.T.C. students,\(^\text{177}\) and even pays the full tuition of selected 4-year R.O.T.C. students.\(^\text{178}\) 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 practice as "establishment" of religion.

Another precedent for federal tuition tax credit legislation lies in the federal government's exemption of religious organizations from payment of income tax, and in the deductions granted for charitable contributions.\(^\text{179}\) The history of these exemptions and deductions reveals a legislative conviction that the loss of revenue is more than offset by the relief

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\(^\text{178}\) See supra note 167.


\(^\text{175}\) Id. at 287-91. 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. Section 1681(a) of title 38 provides for the payment of a specified amount each month to any qualified veteran "to meet, in part, the expenses of the veteran's subsistence, tuition, fees, supplies, books, equipment, and other educational costs." 38 U.S.C. § 1681(a) (1976).

\(^\text{177}\) In sections 1691 and 1692, Congress authorized payments to educationally disadvantaged veterans who desire to complete their high school education, or who need tutorial or other remedial assistance in order to begin college. See id. §§ 1691, 1692.

\(^\text{176}\) See 2 U.S.C. § 88a(a)-(c) (1976). Congress is obligated to reimburse the District of Columbia for its expenses whether the page attends a public, private or sectarian school. Id.

\(^\text{178}\) See 37 U.S.C. § 209 (1976); cf. Wolman v. Essex, 342 F. Supp. 399, 412 n.17 (S.D. Ohio 1972) ("if religious schools indirectly derive benefit from [the R.O.T.C.] . . . programs, this benefit is entirely incidental and subordinate to the legitimate secular purposes underlying their enactment").


\(^\text{180}\) See I.R.C. §§ 501(c)(3), 170(c)(2)(B) (1982). In Helvering v. Bliss, 293 U.S. 144 (1934), the Supreme Court noted that tax deductions are granted for gifts to religious, educational and other charitable organizations in order to encourage such contributions. Id. at 147.
from financial burdens which the government otherwise would have to meet by appropriations from public funds. The federal government, through the Internal Revenue Code, also has provided tax credit incentives for individual accomplishment of public purposes. Moreover, the Supreme Court has been extremely reluctant to interfere with legislative flexibility respecting tax decisions.

To the extent, therefore, that federal tuition tax credit legislation has the necessary breadth and separability, it will not be symbolically identified with government support of religion. Benefits will accrue to all persons who wish to take advantage of its provisions, not merely to religious persons. Thus, such legislation should not be considered violative of the establishment clause.

Alternative Bases for Finding Secular Effect

Although the separability and breadth considerations are central to an analysis of whether legislation has a permissible secular effect, they are not necessarily the sole considerations. Two other factors provide additional and alternative bases for the conclusion that federal tuition tax credit legislation would have a constitutional secular effect: non-preferential treatment and the preservation of freedom of choice.

Breathing content into the religion clauses, and particularly into the establishment clause, the Supreme Court has relied extensively upon the intent of the Framers of the first amendment. When the first amendment was adopted, "official" state religions and churches supported by state revenues were commonplace. These churches were, in effect, "agencies" of the various states which funded them. The intent of the Framers in authoring the establishment clause was not to put an end to

181 See Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 509-10 (1937). Inherent in the nature of taxation is that the state be free to choose who it will tax and who it will not. Id. A legislature is not obligated to tax every member of a class, it may make distinctions provided it does so on a rational basis. Id. The congressional power to lay and collect taxes conferred by article I, section 8 of the Constitution is subject to no greater restraints than those imposed upon the taxing power of the states. See Steward Machine Co. v. Davis, 301 U.S. 548, 581 (1937). The Court, in Gibbons v. District of Columbia, 116 U.S. 404 (1886), stated that Congress, in the exercise of its taxing power, "may at its discretion wholly exempt certain classes of property from taxation." Id. at 408. Gibbons was cited with approval by the Walz Court to support its conclusion that property tax exemptions for religious institutions are constitutionally permissible. 397 U.S. at 679-80. A similar rationale should apply to tuition tax credits.
182 See, e.g., Nyquist, 413 U.S. at 770 n.28; Everson, 330 U.S. at 10-14.
the "official" state churches. The Framers merely intended to protect state prerogatives to maintain their own religions by prohibiting the national government from disestablishing the "official" state churches and in their place establishing a "national" religion.\textsuperscript{185}

To accomplish their goal of preventing national disestablishment of state churches, the Framers did not erect a total prohibition of all federal assistance to religious interests.\textsuperscript{186} Instead, through the establishment clause, the Framers sought to prevent any preferential treatment by Congress of any particular religion.\textsuperscript{187} According to the Founding Fathers, the establishment clause permitted federal aid to religious interests as long as such aid was not disbursed in a religiously discriminatory manner.\textsuperscript{188}

The Framers' concern with religious preference arose from their belief that religious diversity inherently leads to religious freedom.\textsuperscript{189} Such pluralism, of course, would be destroyed if the strength of the federal government were placed behind one religion. For example, in the constitutional debates, James Madison proposed to include among the enumerated powers of Congress the authority "to establish a University, in which no preferences or distinctions should be allowed on account of religion."\textsuperscript{190} The proposal was defeated by two votes, but only because Gouverneur Morris of Pennsylvania was able to convince the delegates that it was unnecessary, since both the power to create such a university and the prohibition of religious preferences were already within the listing of enumerated congressional powers.\textsuperscript{191} Certainly, federal tuition tax credit legislation would not involve religious "preferences," as that concept was understood and written into the Constitution by the Framers. Since it is not a congressional attempt to promote a national religion, such legislation apparently comports with the fundamental purposes of the establishment clause.

Examination of the historical record of religion clauses, however,
reveals more than just a concern with religious preferences. The Supreme Court itself has recognized two fundamental and guiding principles which subsist in the clauses: “voluntarism,” that matters of conscience and belief should be left to the free choice of the individual, without undue restraint or coercion by government; and “separatism,” that church and state should remain institutionally separate with neither the state becoming involved in religious affairs nor religious disputes giving rise to political divisiveness.

In many respects, there is an inherent conflict between these principles. On the one hand, voluntarism mandates that government not burden the practice of religion. Indeed, under certain circumstances, it even may require affirmative governmental action in order to alleviate the collateral coercive effects of facially neutral legislation. Separatism, on the other hand, dictates that government shall not aid religion. If either principle is applied literally, it is conceivable that there will be a breach of the other.

Due to this natural antagonism, the general rule which has evolved is one of “neutrality.” In developing this rule, however, the Court never has accepted the theory of “strict neutrality,” under which “government cannot utilize religion as a standard for action or inaction because . . . [the religion clauses] prohibit classification in terms of religion either to confer a benefit or to impose a burden.” Instead, the Court has adopted a position of “flexible neutrality.” As Chief Justice Burger stated in Walz, the religion clauses contain “room for play in the joints productive of a benevolent neutrality.” Such flexible or benevolent neutrality is essential to allow meaningful resolution of the tension between the principles which underlie the religion clauses. Of the two principles, voluntarism
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is said to be more fundamental in the constitutional sense, and hence must take precedence whenever a conflict exists between the two.\textsuperscript{201}

The tension between voluntarism and separatism can easily be seen in the educational crisis toward which federal tuition tax credit legislation is directed. As previously noted, the right of parents to send their children to a nonpublic school, and particularly to a church-related school, is constitutionally protected.\textsuperscript{202} This parental right is at the core of those rights falling within the ambit of the voluntarism/free choice principle. Additionally, nonpublic schools play a crucial role in the overall scheme of American education.\textsuperscript{203} Yet, social and economic upheaval in recent decades seriously has threatened both the ability of parents to exercise their so-called constitutional right in a meaningful fashion and the ability of nonpublic schools as a whole to serve as a viable alternative to public instruction.\textsuperscript{204} Obviously, this threat to such important values is sufficiently serious as to justify governmental intervention in the form of exemptive assistance to nonpublic education.\textsuperscript{205} Such assistance, in this sense, can be viewed merely as an attempt to preserve the vitality of a choice which, the Supreme Court has stated, is deserving of constitutional protection.\textsuperscript{206} It is, in other words, an attempt to preserve voluntarism. Governmental assistance, however, also raises serious establishment and separatism concerns.\textsuperscript{207} The resulting tension between the applicable constitutional rules thus has been termed a "departure from neutrality."\textsuperscript{208}

Federal tuition tax credit legislation can be perceived as a congressional attempt to remedy this departure from neutrality. Since the voluntarism value is more fundamental than its separatism counterpart, any establishment problems created by federal tuition tax credits accordingly should be subordinated to the constitutionally higher priority of ensuring an environment in which religious liberty can have a meaningful existence. In this sense, federal tuition tax credit legislation, if enacted, would

\textsuperscript{201} See L. Tribe, supra note 32, § 14-3, at 818-19. The principle of voluntarism dictates that the individual's freedom of belief and conscience be protected from governmental interference or involvement. Id.

\textsuperscript{202} See supra notes 1-2 and accompanying text.

\textsuperscript{203} Wolman v. Walter, 433 U.S. 229, 262 (1977) (Powell, J., concurring in part, dissenting in part). Justice Powell believed that, among other things, parochial schools "relieve substantially the tax burden incident to the operation of public schools." Id. (Powell, J., concurring in part, dissenting in part).

\textsuperscript{204} See Nyquist, 413 U.S. at 813-18 (White, J., dissenting); Moynihan, Why Private Schools Merit Public Aid, Washington Post, Mar. 5, 1978, at 1, col. 1.

\textsuperscript{205} See Nyquist, 413 U.S. at 819-20 (White, J., dissenting).

\textsuperscript{206} See supra notes 1-3 and accompanying text.


\textsuperscript{208} Note, supra note 3, at 702.
be a means of assuring that parents will be able to exercise their constitutional right to send their children to a nonpublic school. Its consequent effect would be to promote constitutional norms, and not to violate those embodied in the effect element of the establishment clause test.\textsuperscript{206}

It is likely that opponents of federal tuition tax credit legislation will assert that such a voluntarism argument was made and rejected in Nyquist. It is true that in Nyquist, the State of New York contended that "its program of tuition grants should survive scrutiny because it is designed to promote the free exercise of religion."\textsuperscript{210} The Court, nevertheless, held that the program did not satisfy the no-aid, secular-effect standard. For two reasons, however, that holding does not necessarily connote that the voluntarism argument is invalid when applied to federal tuition tax-benefit legislation.

First, Nyquist's consideration of the free exercise issue was colored, if not controlled, by its adoption of the no-aid standard, the current validity of which is highly questionable. The Nyquist majority took an exceedingly narrow view of the concept of neutrality. Rather than analyzing neutrality in terms of the overall context of governmental school financing, Justice Powell and the Nyquist majority considered only the specific program in question.\textsuperscript{211} They looked only at the provisions of the legislation before them.\textsuperscript{212} Indeed, at least one other commentator has observed that "[t]he overall effect of the government's school financing programs—with its disincentives as well as incentives to private education—was not evaluated."\textsuperscript{213} Accordingly, the Court did not engage in "balancing any government-created or government-enhanced burdens on the choice of private schools against the tax incentive."\textsuperscript{214} Just as Chief Justice Burger believed that the no-aid test was an unjustified statement of constitutional doctrine, the Chief Justice disagreed with the majority's narrow view of neutrality and school financing.\textsuperscript{216} Chief Justice Burger, joined by Justices White and Rehnquist, would have examined the voluntarism argument in light of the cumulative effect of all government financing for schools.\textsuperscript{216}

\textsuperscript{206} Cf. Nyquist, 413 U.S. at 802 (Burger, C.J., concurring in part, dissenting in part) ("[w]here the state law is genuinely directed at enhancing a recognized freedom of individuals, even one involving both secular and religious consequences, such as the right of parents to send their children to private schools... the Establishment Clause no longer has a prohibitive effect" (citation omitted)).
\textsuperscript{210} Id. at 788.
\textsuperscript{211} See id. at 788-89.
\textsuperscript{212} See Note, supra note 3, at 707.
\textsuperscript{213} Id.
\textsuperscript{214} Id.
\textsuperscript{216} See Nyquist, 413 U.S. at 804 (Burger, C.J., concurring in part, dissenting in part).
\textsuperscript{216} Id. at 803 (Burger, C.J., concurring in part, dissenting in part). Chief Justice Burger
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To the extent that the no-aid standard has since been disapproved, the narrow view of neutrality taken in Nyquist also must be considered suspect. Aside from the more permissive secular-effect test now being applied by the Court, the other decisions since Nyquist indicate that Chief Justice Burger's broad view of neutrality is now the accepted position. Particularly on point is the recent decision of Widmar v. Vincent,\textsuperscript{217} in which a student religious group brought a free exercise/voluntarism challenge against a university regulation that prohibited the use of university facilities for religious worship or instruction.\textsuperscript{218} The university argued that to allow its facilities to be used by religious student groups would constitute impermissible establishment of religion.\textsuperscript{219} In rejecting this argument and holding for the students, the Court relied heavily upon its observation that university facilities were made available generally to all nonreligious groups.\textsuperscript{220} The Court looked beyond the mere language of the legislation before it and considered the effect of the law in the overall context of the university's treatment of all student groups. Such an approach is the exact opposite of that employed by the Nyquist majority. It is, instead, the position advocated by Chief Justice Burger in his Nyquist dissent. According to the Chief Justice's view, when tuition tax-benefit legislation is examined in the broader context of all government school financing, it is clearly permissible as a means of equalizing opportunities and preserving choices protected by the Constitution.\textsuperscript{221}

The nature and source of the legislation itself provides a second reason favoring the conclusion that, contrary to what can be read into Nyquist, federal tuition tax credits would be found constitutional under the voluntarism argument. Nyquist, and the decisions following it, involved state legislation. Legislative preservation of freedom of educational choice is essentially a matter of civil rights. Although the states undoubtedly are authorized to act in this area, civil rights and their protection are peculiarly the province of the federal government.\textsuperscript{222} As such, federal legisla-
tion in aid of constitutional rights should be entitled to greater judicial
decision more judicial deference than that exhibited in *Nyquist*.\(^2\)

In sum, federal tuition tax credits should pass the more flexible secu-
lar-effect test since it is consistent with the child-benefit doctrine ap-
proved in *Allen* and *Everson*, satisfies the separability and breadth crite-
ria so often stressed by the Court, and comports with the original
understanding of the type of governmental action permissible under the
establishment clause. Furthermore, such legislation may be viewed as a
congressional attempt to protect the freedom of choice guaranteed by the
first amendment and not to promote specific religious values.\(^2\)

Given the confusion existing in this area of the law, absolute predic-
tions as to the constitutionality of any legislation are impossible. Never-
theless, compelling and supportable arguments may be made that federal
tuition tax credit legislation would have a permissible secular effect.\(^2\)
That leaves for consideration the last element of the Court's three-part
test—that of "excessive entanglements."

**Federal Tuition Tax Credits and Excessive Entanglements**

As noted earlier, the excessive-entanglements prong of the current
Supreme Court standard first appeared in Chief Justice Burger's rather
abrupt statement in *Walz* that legislation also must avoid "excessive gov-
ernment entanglement with religion."\(^2\) In *Lemon*, it subsequently be-
came clear that excessive entanglement was a distinct and independent
element of establishment clause analysis.\(^2\) As its name suggests, the en-
tanglements test is concerned principally with governmental involvement
with religious interests.\(^2\) The Court has recognized, however, that "some
involvement and entanglement is inevitable" and hence permissible.\(^2\)
Indeed, the *Walz* Court observed that the "test is inescapably one of

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\(^{223}\) See supra note 181.

\(^{224}\) See supra notes 1-2 and accompanying text.

\(^{225}\) Some of the legitimate secular reasons which can be advanced for the enactment of fed-
eral tuition tax credit legislation are that private education provides an alternative to public
schools and fosters "wholesome competition," *Wolman*, 433 U.S. at 262 (Powell, J., concur-
ing in part, dissenting in part), that the states' financial burden of supporting public
schools is reduced, id., and that middle income parents paying tuition need a tax break to
compensate for inflation, *Hunter*, supra note 207, at 527. There is no question that the
collapse of a viable and affordable private alternative would be disastrous for many states'
public school systems.

\(^{226}\) *Walz*, 397 U.S. at 674.

\(^{227}\) *Lemon*, 403 U.S. at 614.

\(^{228}\) Id.

\(^{229}\) Id. at 625.
degree."\textsuperscript{230}

The entanglements concept itself is divided into two further inquiries, one concerning administrative entanglements and whether government has become involved directly in the operations of sectarian institutions,\textsuperscript{231} and the second concerning political entanglements and whether legislation creates the potential for excessive political divisiveness or fragmentation along religious lines.\textsuperscript{232} No court ever has invalidated a tuition tax-benefit program on the ground that it involved an impermissible administrative entanglement, and it is extremely unlikely that a court would do so.\textsuperscript{233} In Walz, the Court identified three types of administrative involvement forbidden by the establishment clause: (1) substantive governmental evaluation of religious practices;\textsuperscript{234} (2) "extensive state investigation into church operations and finances";\textsuperscript{235} and (3) governmental classification "of what is or is not religious."\textsuperscript{236} Tuition tax-benefit legislation obviously implicates none of these considerations. As previously discussed, such legislation is more in the nature of exemptive, rather than affirmative, governmental action.\textsuperscript{237} Without affirmative action, it is difficult to see how there could be any direct governmental involvement with religion.\textsuperscript{238}

The political entanglements issue presents a more difficult question. Each court which has invalidated tuition tax-benefit legislation has done so on secular-effect grounds,\textsuperscript{239} and most of these courts did not engage in an entanglements analysis.\textsuperscript{240} In Nyquist, however, the Court did make the gratuitous observation that New York's tuition tax-benefit program raised certain political entanglement problems.\textsuperscript{241} The Nyquist Court rea-

\textsuperscript{230} Walz, 397 U.S. at 674.
\textsuperscript{231} L. Tribe, supra note 32, § 14-12, at 866.
\textsuperscript{232} Nyquist, 413 U.S. at 794-98; L. Tribe, supra note 32, § 14-12, at 866-68. In Nyquist, the Court confined its analysis to political entanglement. See 413 U.S. at 794-98.
\textsuperscript{233} See Note, supra note 3, at 717. As one commentator has observed, federal interference in relation to a tuition tax-benefit plan should not be more burdensome than that associated with other programs, such as state accreditation programs and antidiscrimination laws. Id. at 715-16.
\textsuperscript{234} Walz, 397 U.S. at 674.
\textsuperscript{235} Id. at 691 (Brennan, J., concurring).
\textsuperscript{236} Id. at 698 (Harlan, J., concurring).
\textsuperscript{237} See supra notes 145-54 and accompanying text.
\textsuperscript{239} See, e.g., Nyquist, 413 U.S. at 794; Rhode Island Fed'n of Teachers v. Norberg, 630 F.2d 855, 858-61 (1st Cir. 1980); Public Funds for Pub. Schools v. Byrne, 590 F.2d 514, 520 (3d Cir.), aff'd mem., 442 U.S. 907 (1979).
\textsuperscript{240} See Byrne, 590 F.2d at 520; Minnesota Civil Liberties Union v. Minnesota, 302 Minn. 216, 233, 244 N.W.2d 344, 353 (1974), cert. denied, 421 U.S. 988 (1975).
\textsuperscript{241} Nyquist, 413 U.S. at 794.
soned that such a program could lead to political pressure for frequent enlargement of the tax benefit provided. In this situation,” the Court concluded, “the potential for seriously divisive political consequences needs no elaboration.”

Elaboration, however, would have been most helpful, for the political divisiveness potentially created by New York’s legislation was by no means obvious. The Court did not cite to any evidence indicating that there had been political fragmentation along religious lines, or that there had been political pressure to increase the tax benefit accorded. The summary entanglements analysis given in Nyquist was totally unnecessary to the Court’s decision. Notwithstanding the vague meaning of the Nyquist Court’s comments on political divisiveness, one thing is certain: the Court was not suggesting that the establishment clause forbids political advocacy by religious groups. Such a position would clearly be untenable in light of the recent decision in Widmar v. Vincent, in which the Court held that religious speech and association are protected fully by the first amendment. Certain other aspects of the political-entanglements concept also are settled, and they indicate that federal tuition tax credit legislation would not create such a degree of political-religious fragmentation as to give rise to unconstitutionality.

In his separate opinion in Walz, Justice Harlan elaborated upon the reason why interface between political activity and religion is a subject of establishment clause concern:

What is at stake as a matter of policy is preventing that kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point.

Few would disagree with Justice Harlan’s observation. Legislation should be invalidated if it carries with it the potential for straining the “political system to the breaking point.” That, of course, is an extreme situation, and one which is not present in the case of tuition tax-benefit legislation. Indeed, in both Nyquist and Walz, the Court indicated that tax

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442 Id. at 797.
443 Id.
444 The political divisiveness feared by the Nyquist Court is not advocacy by religious groups on political issues, but rather sectarian controversy along religious lines concerning government’s relationship with religion. See Kosydar v. Wolman, 353 F. Supp. 744, 767 (S.D. Ohio 1972), aff’d mem. sub nom. Grit v. Wolman, 413 U.S. 901 (1973).
445 Widmar v. Vincent, 102 S. Ct. 269, 274 (1981); see Wolman, 353 F. Supp. at 767 (acknowledging the additional “moral and philosophical dimension” which religious forces bring to political discussion).
446 397 U.S. at 694.
447 Particularly appropriate with respect to government involvement in religious life are Justice Powell’s comments in Wolman:
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legislation is even less likely to lead to political disruption because it does not involve the necessity for annual budget appropriations that do accompany government-grant programs. Therefore, one of the fundamental ingredients of political divisiveness, namely, annual legislative appropriations in order to continue the operation of a governmental aid program, is notably absent in the case of federal tuition tax credit legislation. It thus appears that such legislation is less vulnerable to attack because of political entanglements than legislation involving outlays of government funds.

Additionally, the political entanglements issue, in essence, is concerned with "special benefits" for religious groups. Such a special-benefit rationale derives from the prohibition of religious preferences. National tuition tax credit legislation is unlikely to involve religious preferences, particularly when the legislation confers benefits upon a broad class of persons in a facially neutral fashion. Similar reasoning was expressed by the court in National Coalition for Public Education v. Harris, which upheld provisions of Title I of the Elementary and Secondary Education Act of 1965. In concluding that the Act does not present the potential for political divisiveness, the Harris court emphasized that it was national legislation, that it had a broad base of beneficiaries, and that it was only part of a much larger social welfare program. Each of these factors also can be found in federal tuition tax credit legislation. Harris additionally stressed that there was no evidence that enactment and implementation of Title I had given rise to divisive religious fragmentation in Congress. A similar consideration is applicable here. Although tuition tax credits have been a subject of congressional debate and careful

At this point in the 20th century we are quite far removed from the dangers that prompted . . . the Establishment Clause . . . . 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.

433 U.S. at 263 (Powell, J., concurring in part, dissenting in part).

413 U.S. at 796-97; 397 U.S. at 699 (Harlan, J., concurring).

See supra note 233.

See Kosydar v. Wolman, 353 F. Supp. 744, 766-67 (S.D. Ohio 1972), aff'd mem. sub nom. 413 U.S. 901 (1973). A state cannot benefit "a class of a predominantly sectarian character in a manner which tends to advantage them when compared to the class of general citizens." Id. at 767.

See id.; see also Lemon, 403 U.S. at 625.

See Note, supra note 3, at 716.


Id. at 1267-70.

Id.

Id.
scrutiny for a number of years, there is nothing to indicate that this debate has risen to the level of religious dispute or infighting. Indeed, the Court recently noted that careful consideration by Congress of the constitutionality of its enactments should have just the opposite effect. In Rostker v. Goldberg, the Court observed that an enactment is entitled to heightened judicial deference when it previously has been scrutinized carefully by Congress for constitutional deficiencies.

Finally, political divisiveness along religious lines is not, standing alone, an independent basis for striking down legislation. On several occasions, the Court has characterized it as merely a warning signal that can lead to more careful scrutiny of legislation under the other elements of the establishment clause test, but which does not “alone warrant the invalidation of . . . laws that otherwise survive” those other elements. Hence, even if federal tuition tax benefit legislation spawns political-entanglement problems, these problems alone would not justify holding the legislation unconstitutional. Only if the legislation also runs afoul of the other elements of the three-part standard would such a result be warranted. As detailed throughout this Article, however, there is good reason to believe that well-drafted federal tuition tax benefit legislation would satisfy these other elements.

CONCLUSION

The validity of governmental assistance to nonpublic education is perhaps the most confused issue in the entire realm of constitutional law. As Judge Weis has noted, the Supreme Court’s cases on this subject exhibit a marked “lack of a principled and logical thread.” Consequently, accurate predictions as to how the courts will react to any given piece of legislation are exceedingly difficult to make.

These comments hold equally true for federal tuition tax-benefit legislation. In a nutshell, the case law offers little reassuring guidance. Nevertheless, a careful reading of the cases and an analysis of the underlying policy considerations indicate that well-drafted federal tuition tax credit

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258 Id. at 64.
259 L. Tribe, supra note 32, § 14-12, at 866.
260 Nyquist, 413 U.S. at 798.
261 See Hunter, supra note 207, at 542-43 (the “situation is chaotic”); Note, Church and State: The Past, Present, and Future of State Aid to Parochial Schools, 9 Sw. U.L. Rev. 1211, 1211 (1977) (school aid case law is a “chaotic compilation of inconsistent decisions”); see also Nowak, The Supreme Court, the Religion Clauses and the Nationalization of Education, 70 Nw. U.L. Rev. 883, 908-09 (1976).
legislation would be adjudged constitutional. At the very least, compelling arguments can be made to support such a proposition.

In closing, perhaps the general observations of Justice Powell in *Wolman v. Walter* will serve to place the foregoing analysis into perspective:

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.\(^{383}\)

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\(^{383}\) *Wolman*, 433 U.S. at 262 (Powell, J., concurring in part, dissenting in part).