Aid to Parochial Schools--Income Tax Credits

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I. INTRODUCTION

The Minnesota legislature, in its 1971 regular session, enacted a bill that allows parents of children attending nonpublic elementary and secondary schools during the tax year to credit a portion of these educational costs against their state income tax.\(^1\) "Education costs" include tuition, classroom instructional fees and textbooks used in teaching those subjects taught in public schools.\(^2\) Specifically excluded are the costs of textbooks used in the teaching of religious tenets, doctrines or worship.\(^3\)

Since the passage of the bill, the United States Supreme Court has ruled on the issue of governmental aid to church related education in two cases. In \textit{Lemon v. Kurtzman}\(^4\) the Court ruled two statutes unconstitutional under the establishment clause of the First Amendment:\(^5\) a Pennsylvania statute\(^6\) granting financial support to nonpublic elementary and secondary schools through reimbursement for teachers' salaries, textbooks and instructional materials in specific secular courses; and a Rhode Island statute\(^7\) authorizing payment to nonpublic elementary school instructors of a supplement equal to 15 per cent of their annual salary. On the same day in \textit{Tilton v. Richardson}\(^8\)

\begin{itemize}
  \item \textit{Minn. Stat.} \S\S 290.086, 290.087 (1971).
  \item \textit{Minn. Stat.} \S 290.086 (2) (1971).
  \item \textit{Minn. Stat.} \S 290.086 (4) (1971).
  \item 403 U.S. 602 (1971).
  \item The First Amendment provides in relevant part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." The establishment clause was held to be applicable to the states through the Fourteenth Amendment in \textit{Everson v. Board of Education}, 330 U.S. 1 (1947). The free exercise clause was incorporated into the Fourteenth Amendment in \textit{Cantwell v. Connecticut}, 310 U.S. 296 (1940). Constitutional issues of this sort will arise regarding the Minnesota tax credit plan due to the inclusion of sectarian schools among the classes of elementary and secondary institutions covered by \textit{Minn. Stat.} \S 290.086 (3) (1971). Minnesota Civil Liberties Union \textit{v. State of Minnesota}, no. 379526 (Second Judicial Dist., Minn., Aug. 24, 1971), is a recently initiated suit involving such a challenge.
  \item 403 U.S. 672 (1971). One aspect of the federal aid which the majority held unconstitutional was the provision for termination of the recipient's obligation not to use the facility for sectarian instruction after a 20 year period. \textit{Id.} at 682-83.
\end{itemize}
the Court found certain provisions of the Higher Education Facilities Act, permitting federal construction grants for the building of nonpublic college and university facilities, to be free from constitutional defects.

This note will analyze these and prior Supreme Court decisions to ascertain the directions the Court is presently taking in interpreting the establishment clause, and to determine the constitutionality of the Minnesota tax credit plan. The plan's validity under the relevant Minnesota constitutional provisions will also be considered.

II. THE TAX CREDIT PROVISIONS

A. Scope

In providing a personal income tax credit for parents who send their children to a nonpublic school, the Minnesota legislature defined such an educational institution as an elementary or secondary school other than a public school which is located in Minnesota, which complies with the Civil Rights Act of 1964, which is not operated for profit and which fulfills the requirements of the state's compulsory attendance laws.

Although the amount of the credit is based upon the parents' actual educational expenditures, two limitations often will reduce the amount allowed as a permissible credit. First, the maximum amount of credit per pupil unit is not to exceed $100 during 1971 and 1972. Thereafter it may be increased by the same percentage that state aid to public schools is increased, provided that the amount of the credit does not exceed the actual cost to the parents of sending a child to a nonpublic school.

This provision ensures that changes in the cost of educating children in public schools will be reflected in the tax credit allowed parochial school parents. Second, the ratio of the tax credit to the individual nonpublic school "restricted maintenance cost" per pupil unit in average daily attendance is intended to include any alternative measure which may be designated by law to calculate state foundation aid for public schools. MINN. STAT. § 290.086(1) (1971) contemplates that pupil units are to be counted in the manner provided by MINN. STAT. § 124.17 (1969), apparently denying use of the changes established during the 1971 regular session under chapter 829.

10. MINN. STAT. § 290.086(3) (1971).
12. Under MINN. STAT. § 290.086(5) (1971) the words "per pupil unit in average daily attendance" are intended to include any alternative measure which may be designated by law to calculate state foundation aid for public schools. MINN. STAT. § 290.086(1) (1971) contemplates that pupil units are to be counted in the manner provided by MINN. STAT. § 124.17 (1969), apparently denying use of the changes established during the 1971 regular session under chapter 829.
14. Id.
pupil unit cannot exceed the ratio of the average state foundation aid per pupil unit for public schools to the average state and local maintenance cost per pupil unit. The "restricted maintenance cost" in nonpublic schools is the ordinary maintenance cost under Minn. Stat. § 124.211(2) (5) less 20 per cent. The purpose of this limitation is to equate the benefits received by parochial school parents from the tax credit with the advantages derived by public school parents when the state provides for some of the educational costs of each student.

B. Mechanics

A taxpayer who files for the tax credit cannot also claim a deduction for tuition or costs of transportation of any dependent under other applicable provisions. Also, if the amount of the credit surpasses any tax which would otherwise be due, such surplus is paid to the claimant as a refund. The taxpayer must substantiate his claim by providing the Department of Taxation with receipts and certificates from an official of the nonpublic school, and penalties are imposed for any fraudulent or excessive claims.

III. VALIDITY UNDER THE UNITED STATES CONSTITUTION

Despite Chief Justice Burger's frank admission that "[c]andor compels acknowledgment . . . that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law," certain criteria have been developed under which the constitutionality of church-state statutes may be tested. The difficulty is not in identifying these guidelines, but in their application, as the law continually struggles to reconcile the prohibitions against any establishment of religion with the individual's right to the free exercise of his faith.

The absolute terms in which the two religion clauses are drafted inevitably lead to conflict if either is carried to its logical extreme. However, the clauses should be approached by look-
ing to the objective they are meant to serve, not by construing literally the words themselves. As stated in *Everson v. Board of Education,* accommodation of these two provisions requires the state to be a neutral in its relations with groups of religious believers and nonbelievers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them.

Furthermore, this necessary and desirable neutrality can be breached by even "minor encroachments." Such neutrality is to be fulfilled, not by treating all religious institutions equally in the granting of aid, but by an abstention from "fusing functions of Government and of religious sects." This approach recognizes the doctrine of voluntarism: the belief that ideological and religious concepts are to be accepted only on their own merit, unaided by any external coercion or persuasion.

Total separation is impossible to attain, yet it remains the goal. Reformulation of methods to reach that goal must continue as the definitions of the word "religion" and the concept of appropriate state action take on new contours over time. However, since total separation is impossible, all failures to reach that goal are not unconstitutional. There is a permissible allowance for a slight "deviation from an absolutely straight course," which allows for "play in the joints" in a manner which tends to make court decisions unpredictable, but adds an element of practicality to the First Amendment. This is particularly relevant in the field of education, where the governmental approach to fulfilling the need for better education has made noninvolvement with religion impossible.

**A. Establishment Clause**

As noted in *Engel v. Vitale,* the establishment clause is

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23. *Id.* at 668.
based on the realization that any union of government and religion "tends to destroy government and to degrade religion."³⁴ The evils against which this clause was intended to protect are "sponsorship, financial support, and active involvement of the sovereign in religious activity."³⁵ Three tests have been enunciated in pursuit of these objectives.³⁶ First, an enactment must have a secular legislative purpose. Second, its primary effect must be neither the advancement nor the inhibition of religion. Finally, the end result must not be an excessive governmental entanglement with religion.

1. Secular Purpose

In Abington School District v. Schempp,³⁷ where the first two tests were enunciated, the Court's attempt to assure the "wholesome neutrality" required by the religion clauses lead to the expression of the following criteria:

[What are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the establishment clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.³⁸

Difficulty in the application of this first test is not limited to the problem of determining what constitutes a "secular" purpose. Questions may also arise as to the proper means of determining a legislative purpose and, where multiple purposes are apparent, as to the relative weight needed for the state's particular secular purpose to prevail.

Examination of legislative motives has long been considered an inadequate approach.³⁹ It has been suggested that courts will tend to avoid any such analysis where secular purposes can be gleaned from statutory declarations and legislative history.⁴⁰ However, the secular purpose test, if it is to serve an independent role apart from the primary effect test, must require more than a glance at a statutory preamble. It is difficult to imagine a leg-

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³⁴. Id. at 431.
³⁸. Id. at 222.
islature so lacking in ingenuity that it cannot find at least one secular purpose to offer as justification for its enactment.\footnote{LaNoue, The Child Benefit Theory Revisited: Textbooks, Transportation and Medical Care, 13 J. Pub. L. 76, 77-78 (1964). One suggested cure for this is to search for assurance that the means employed by the government do not destroy the meaningfulness of the proposed secular ends. L. Pfeffer, Church, State and Freedom, 178-80 (1967); Hammett, The Homogenized Wall, 53 A.B.A.J. 929, 932 (1967). As stated by Justice Brennen in Abington School Dist. v. Schempp, 374 U.S. 203, 265 (1963), "[T]he teaching of both Torcaso and the Sunday Law Cases is that government may not employ religious means to serve secular interests, however legitimate they may be, at least without the clearest demonstration that nonreligious means will not suffice."}

The approach taken by the Supreme Court has been to "accord appropriate deference" to the legislature's stated intent unless contradictory facts can be shown.\footnote{Lemon v. Kurtzman, 403 U.S. 602, 613 (1971).} In Board of Education v. Allen,\footnote{392 U.S. 236 (1968).} where the New York statutory allowance for textbook loans was held not to be in violation of the First Amendment, Justice White noted that "[a]ppellants have shown us nothing about the necessary effects of the statute that is contrary to its stated purpose." A similar approach was used in Schempp, where factors such as required reading from the Bible, the optional use of the Catholic Douay version and allowance for non-attendance were held inconsistent with the stated purpose of promoting morals and teaching literature.\footnote{Id. at 243.}

The relative importance of the particular secular purpose necessary to label the enactment as essentially nonreligious has received little attention by the Court. Although the view has been expressed that the secular purpose must be paramount,\footnote{374 U.S. 203, 223-24 (1963).} it seems something less should suffice. Professor Choper argues that the secular purpose need not be paramount if there exists a legitimate independent secular purpose.\footnote{Hammett, supra note 41, at 932.} The value of this idea is that it gives greater deference to the findings and conclusions of the legislative body in a matter that is really a legislative task, namely identifying and implementing methods to solve the state's allocation and welfare problems. It also reduces the subjective balancing test that would otherwise result. At the same time the primary effect test, the excessive entanglement test, and the Court's tendency to search for facts contradicting the stated purpose temper the possible dangers of a concept such as Choper's.

\footnote{Choper, supra note 39, at 280.}
The result is that the statute's constitutionality will turn upon conclusions derived from more meaningful and concrete inquiries.

2. *Primary Effect*

Even if the purpose of the governmental action is compatible with the establishment clause, its primary effect must not be the advancement or inhibition of religion. Such a generalized test, however, immediately raises a vast number of questions, many of which the Court has not answered. Perhaps this is because "primary effect" is not to be fixed by definition but is simply to serve as the "end product of a complex empirical judgment." 48

While the Court in *Everson v. Board of Education* stated that "[n]either [a state nor the federal government] can pass laws which aid one religion, aid all religions, or prefer one religion over another," 49 such a strict "no aid" approach has not been followed. 50 This fact has engendered debate among commentators as to the meaning of "primary." For example, one commentator thought it must mean "first-order, fundamental effect" in order to be consistent with past decisions. 51 Another suggested a relative measurement in which the church may not receive a greater share of the benefits than the state. 52 Choper, on the other hand, would consider as "primary" any independent secular effect, regardless of possible additional religious effects. 53 This definitional problem recently may have been resolved. Chief Justice Burger spoke of the "principal or primary effect" throughout his opinions in both *Lemon* 54 and *Tilton*, 55 treating

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49. 330 U.S. at 15.
50. As recently as Tilton, the Court stated 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 or primary effect advances religion." 403 U.S. at 679.
51. Giannella, supra note 32, at 533.
52. Hamnett, supra note 41, at 933.
54. 403 U.S. 602, 612 (1971). In Tilton v. Richardson the opinion of the Court was written by Chief Justice Burger with Justices Blackmun, Harlan and Stewart joining. The concurring opinion of Justice White provided the majority needed to uphold the federal program. Dissents were filed by Justice Brennan and by Justice Douglas with Justices Black and Marshall joining. Chief Justice Burger also wrote the opinion of the Court in *Lemon v. Kurtzman*, again joined by Justices Blackmun, Harlan and Stewart. The concurring and dissenting opinions must be separated in terms of the Rhode Island case and the Pennsylvania case. Justice Douglas concurred in both cases in Lemon and was joined by Justices Black and Marshall, but the latter only as to the Rhode Island case since he took no part in the consideration or decision of the
the word "principal" as synonymous with "primary." It appears then that some impact on religion will not violate the primary effect test.\textsuperscript{56}

Yet to define "primary effect" is not to assure ease in its application. One approach indirectly mentioned by the Court in applying this test has been the child benefit theory. The doctrine generally provides that the state may validly extend assistance to the child or his parent, though public aid to parochial schools themselves would be unconstitutional. \textit{Everson} was the first significant Supreme Court decision to advance this concept.\textsuperscript{57} While not adopting the child benefit theory in the precise form in which it was developed by earlier state court decisions, the majority viewed this program as simply an instance where children receive the benefits of public welfare legislation, regardless of the fact of their attendance at church-related schools. The Court emphasized that "[t]he State contributes no money to the schools."\textsuperscript{58} In \textit{Allen} the Court came closer to the state court formulation of the child benefit concept, stating "no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools."\textsuperscript{59} And most recently Chief Justice Burger used this rationale in \textit{Lemon} to find the Pennsylvania plan more clearly defective than that of Pennsylvania case. Justice Brennan filed a concurring opinion and would have reversed outright the judgment in the Pennsylvania case. Justice White filed a concurring opinion as to the Pennsylvania case and a dissenting opinion in the Rhode Island cases. Hereinafter, references in the text to statements of Chief Justice Burger in \textit{Tilton} and \textit{Lemon} refer to the opinion of the Court, which he wrote.\textsuperscript{55}

\textsuperscript{55} 403 U.S. 672, 679 (1971). It should be noted, however, that the Court has warned against reliance on words which may be broad in nature and later used inconsistently in specific applications. Walz v. Tax Commission, 397 U.S. 664, 668 (1970).

\textsuperscript{56} This is not necessarily a relaxation on permissible aid since a program which has substantial, but less than "principal," effects may fail nevertheless under the establishment clause as constituting excessive governmental entanglement. \textit{See} text accompanying notes 74-104 infra.

\textsuperscript{57} Actually, Chief Justice Hughes, in Cochran v. Louisiana State Bd. of Ed., 381 U.S. 370 (1930), initially recognized the significance of the identity of the recipient of the aid. However, the taxpayer's challenge to the expenditure of public funds used in purchasing textbooks for all students in the state was not based upon the establishment clause, the First Amendment not having been incorporated into the Fourteenth Amendment at that time, but rather on a theory of taking of private property for a private purpose in violation of the Fourteenth Amendment.

\textsuperscript{58} 330 U.S. at 18.

\textsuperscript{59} 392 U.S. at 243-44.
Rhode Island in that in the former the aid passed directly to the nonpublic school. 60

Obviously the child benefit theory, to have any practical usefulness, must be applied mechanically since any other form of implementation realizes no limitations. For example, certainly most money given to church related schools for improvements will be reflected in benefits to the child. 61 Yet such a mechanical test is clearly subject to criticism as placing form over substance. 62 In cases in which the criticism is valid, the child benefit theory probably should not be used, but the criticism is not necessarily valid in all instances. Surely situations could arise where state control over assistance is significantly enhanced by channeling the benefits directly to the student. 63 Such an arrangement would reduce the possibility of the program being manipulated to serve religious ends and decrease the need for surveillance to implement the particular state plan, thereby minimizing direct contact between church and state. 64

This justification for the child benefit theory is related to the proposition that the real issue to be faced is the nature of the aid, not the conduit through which it passes. 65 Clearly, assistance which could be used for strictly religious purposes should not be upheld simply because of the identity of the recipient. The Court has apparently recognized this even though the issue has not been directly before them. In Allen the majority devoted a great deal of time to identifying the secular aspects of the aid after a short discussion of the identity of the recipient. 66 Also, though the Court did mention that the textbooks involved were loaned at the request of the pupil, and that ownership remained at least technically in the state, 67 thereby benefiting only pupils, the significance of this fact is slight since private schools previously had never contributed such books. In Walz v. Tax Commission 68 this element apparently was deemed not control-

60. 403 U.S. 602, 621 (1971).
61. L. Pfeffer, supra note 41, at 568.
63. Giannella, supra note 32, at 577.
64. As to the dangers of direct church-state contact, see text accompanying notes 74-104 infra.
ling since the textbook provision was viewed as "surely an 'aid' to the sponsoring churches because it relieved those churches of an enormous aggregate cost for those books." Likewise, the Court found the Rhode Island teacher supplement plan in Lemon unconstitutional, while the federal grants at issue in Tilton, which were given directly to the private colleges, were held to be valid.

When emphasis is shifted in this way to the nature of the aid, the easiest type of program to sustain is that which can be labelled as "public welfare legislation." These benefits or services, which do not directly involve the educational process, can be said to be "indisputably marked off from the religious function," and such general assistance should not be denied to citizens simply because of their religious faith. Yet the variability of the social services provided militates against using this approach as justification for many of the more difficult programs. As was stated by Chief Justice Burger when considering the "good works" performed by churches:

To give emphasis to so variable an aspect of the work of religious bodies would introduce an element of governmental evaluation and standards as to the worth of particular social welfare programs, thus producing a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize.71

Aid more directly related to the church school's educational process has not invariably been declared unconstitutional. For example, in Allen the Court upheld a New York law which required school boards to loan, without charge, textbooks to students at both private and public schools.72 However, this surely is not a blanket acceptance of state plans which make allowances for books and other instructional materials; and since Allen involved a motion for summary judgment it raises the possibility that an attack on the Minnesota tax credit scheme, even as it relates to textbooks, will not necessarily be upheld. In Allen there was also no evidence of the methods of teaching the material in the books, nor was there evidence of the atmosphere surrounding the use of the materials. A program of aid for teacher's salaries should be distinguished from Allen because the apparently neutral or nonideological nature of these benefits is much more suspect due to the control exercised over the instructors by

the church hierarchy, the religious affiliations of such teachers with the accompanying potential tendency to advance their faith, and the unascertainable nature of the techniques employed in their daily teaching duties. Thus, even though the rule in Allen is limited, the conclusion that benefits directed to the educational system itself are unconstitutional is misleading without specific reference to the particulars of the programs in question.

3. Excessive Entanglement

In Walz v. Tax Commission a New York Constitutional provision authorizing exemptions from taxation for real property used exclusively for religious educational or charitable purposes and owned by nonprofit associations for such purposes was upheld against an attack based primarily on the establishment clause. That decision, however, actually restricted the permissible scope of governmental involvement with religious institutions by prescribing yet another establishment clause test: whether or not the statute could result in an "excessive government entanglement with religion." In Lemon Chief Justice Burger found excessive government entanglement after examining the institutions benefitted, the nature of the state aid and the resulting relationship between the government and religious authority. A slightly different approach was taken by Justice Brennan, concurring in Schempp, where he noted that the types of involvement the drafters of the Constitution meant to avoid were those which (a) serve essentially religious activities of religious institutions, (b) employ the organs of government for religious purposes, or (c) use religious means where secular means would suffice. In effect then, acceptable involvement has been measured by both a qualitative and a quantitative yardstick.

The quantitative aspect of excessive entanglement requires an inquiry into whether there are "sustained and detailed administrative relationships" or whether the involvement calls

75. N.Y. Const. art. 16, § 1.
for "official and continuing surveillance." One factor mentioned by Chief Justice Burger in Tilton as diminishing the potential danger of entanglement was the fact that the governmental aid was a "one-time, single-purpose construction grant," without continuing financial relationships or dependencies. However, the dissenting opinion of Justice Douglas, with whom Justices Black and Marshall concurred, contained strong language making it clear that the quantitative test is not totally accepted by all members of the Court. Justice Douglas saw as "constitutionally insignificant" the fact that the money was not appropriated annually and suggested that small payments over a number of years are just as violative of the First Amendment as a large, lump-sum payment.

In some instances the amount of surveillance deemed impermissible may be qualified by the type of surveillance required under the particular program. Obviously not all types of contact between government and church-related schools are condemned. As was noted by Justice White in a discussion of Pierce v. Society of Sisters:

\[Pierce v. Society of Sisters, 268 U.S. 510 (1925)\]

Instead of a blanket prohibition the Court has condemned only those relationships between church and state which allow the state to decide what is secular or religious.

When the establishment clause is applied to assistance programs involving parochial schools, the question of "permeation" inevitably arises—the extent to which the sectarian permeates and is inseparable from the secular. The permeation concept is crucial to both the primary effect and entanglement tests, since any aid to sectarian functions is prohibited while aid to secular needs may be permissible. There has been a continuous debate over whether a line of separation realistically can be drawn between secular and religious teachings. On the one hand, it is suggested that parochial schools may fulfill the secular function in the same manner as the public schools, with only a minor re-

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82. Id. at 692-93 (dissenting opinion of Douglas, J.). However, the language used by Justice Douglas apparently fails to separate primary effect and entanglement issues.
83. 268 U.S. 510 (1925).
ligious accent. Contrariwise, it is forcefully advanced that the Roman Catholic faith will not recognize any distinction between secular and religious teachings, since it cannot visualize teaching as a neutral activity. Both Pope Leo XIII and Pope Pius XI said “it is necessary not only that religious instruction be given to the young at certain fixed times, but also that every subject taught be permeated with Christian piety.” As one commentator has noted, “it is commonplace observance that in the parochial school religion permeates the whole curriculum and is not confined to a single half hour period of the day.”

Board of Education v. Allen was the first Supreme Court decision to specifically face the permeation issue. The Court, in response to the contention that there should be an irrebuttable presumption that church schools necessarily integrate religion into secular education, recognized the dual goals of religious schools. The Court ruled that it could not find, solely on the basis of judicial notice, that the state’s provision of textbooks was an involvement with religion which the First Amendment would not permit. The Court, however, did not set forth the kind of evidence of nonperformance of the secular function that gives rise to a finding of the unconstitutional permeation.

In Lemon and Tilton the Supreme Court again addressed itself to the integration problem, but the ramifications of those decisions are not completely clear. In the Rhode Island program in Lemon the district court’s findings on the potential for excessive entanglement were held sufficient to substantiate a violation of the establishment clause. The district court found a close proximity of church schools to the parishes, the use of religious symbols, the availability of religiously oriented extracurricular activities, the availability of religiously oriented extracurricular activities, and the rendering of nonsecular tax aid to religious schools.

This view was voiced by Justice Jackson in Everson: “Catholic education is the rock on which the whole structure rests, and to render tax aid to its church school is indistinguishable to me from rendering the same aid to the Church itself.” 330 U.S. at 24.

392 U.S. 236 (1968).

Id. at 245-48.

The complaint filed against the Pennsylvania plan in Lemon alleged that church related elementary and secondary schools are controlled by religious organizations whose function is to promote a religious faith and operate in a manner so as to fulfill that purpose. Hearing the case as a motion to dismiss for not stating a claim for relief dictated acceptance of the allegations as true. 403 U.S. at 620.
activities and the employment of many teaching nuns.\textsuperscript{94} Although the court found no specific incidents of religious values infiltrating into secular courses,\textsuperscript{95} the likelihood of such an occurrence led the state legislature to enact the controls and surveillances that violated the entanglement test. However, in \textit{Tilton} Chief Justice Burger used what appears, at first glance, to be a different approach. In response to the claim that religious institutions use every possible device to propagate a particular religion, the Chief Justice pointed to the district court findings to emphasize that no evidence existed to warrant a holding that religion permeates the secular education, citing \textit{Allen}.\textsuperscript{96} The record in \textit{Tilton} was found to differ significantly enough from \textit{Lemon} to warrant an opposite result on the entanglement issue. Not only was there an absence of the specific dangers enumerated in \textit{Lemon}, but other factors tended to show a lesser emphasis on religion, which required fewer governmental controls to prevent the infiltration of sectarian ideas into secular education. Among these factors were (1) the fact that higher education was involved, (2) the nonideological character of the aid, and (3) the one-time, single-purpose relationship.\textsuperscript{97}

One can sympathize with Justice White's opinion that such reasoning is a "curious and mystifying blend."\textsuperscript{98} However, the two opinions can be reconciled in such a way as to make inaccurate Justice White's criticism in \textit{Lemon} that Chief Justice Burger refused to accept express findings that none of the teachers mixed religious and secular instruction.\textsuperscript{99} In \textit{Tilton}, it is true that the Chief Justice rejected an approach which looked to a "typical institution," saying that no evidence had been presented that justified a conclusion that secular education was intertwined with religion in the particular institutions involved. But it must be emphasized that here the Chief Justice was addressing himself solely to the "primary effect" test, which may explain this seemingly inconsistent approach. If the contention is that the primary effect of the aid to certain school functions is an advancement of religion, evidence that religion is indeed a part of secular instruction should be crucial. However, excessive entanglement can be present even if evidence of permeation is not

\textsuperscript{94} \textit{Id.} at 615-16.
\textsuperscript{95} \textit{Id.} at 618-19.
\textsuperscript{96} \textit{Tilton v. Richardson}, 403 U.S. 672, 680-81 (1971).
\textsuperscript{97} \textit{Id.} at 685-89.
\textsuperscript{99} \textit{Id.}
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available to show a specific effect of aid to religion, because the
government must employ substantial controls over certain activi-
ties in order to prevent religion from entering secular teaching.
Since governmental involvement should be related directly to
the degree of danger that religion will be aided, evidence relevant
to the entanglement issue is not necessarily that which shows a
mixture of secular and religious functions, but rather evidence of
many facts indicating the likelihood of such mixture. Thus the
Chief Justice did not reject either of the statutory programs in-
volved in Lemon or Tilton on the basis of the primary effect test,
since the findings in each negated any suggestion of inter-
mingling of secular and religious teachings. Rather Lemon and
Tilton were differentiated on the entanglement issue because the
evidence in Tilton showed a lesser need for government involve-
ment.

Also noticeable in the recent opinions, in their approach to
the entanglement issue, is the emphasis on facts leading to dan-
gers of involvement rather than the specific statutory procedures
to be implemented by the government. This development of
Walz is necessary to understand the statement of Justice White:

Thus, the potential for impermissible fostering of religion in sec-
cular classrooms—an untested assumption of the Court—para-
doxically renders unacceptable the State's efforts at insuring
that secular teachers under religious discipline successfully avoid
conflicts between the religious mission of the school and the se-
cular purpose of the State's education program.¹⁰⁰

Evidence of specific instances of permeation in the teachings of
the secular subjects in nonpublic schools may be far more diffi-
cult to establish than evidence of specific examples where imple-
mentation of the aid will require substantial controls to prevent
the influx of religion into secular functions, thus highlighting the
fears of Justice White. But the implication of the recent Supreme
Court cases is that a state will not be allowed to increase the
chances that its statutory scheme will be declared constitutional
by not specifically providing for the necessary surveillance in the
statutes. The emphasis is on the reasonable steps required to
apply the statute, not the legislature's declarations on how the
program will be policed. As stated in Lemon:

[T]he potential for impermissible fostering of religion is pres-
et. The Rhode Island Legislature has not, and could not, pro-
vide state aid on the basis of a mere assumption that secular
teachers under religious discipline can avoid conflicts. The State
must be certain, given the Religion Clauses, that subsidized

¹⁰⁰. Id. at 666-67.
teachers do not inculcate religion—indeed the State has undertaken to do so.101

As a result of the Lemon decision a different form of involvement has stepped into the forefront as a further criterion for compliance with the First Amendment. Assistance programs which tend to divide public opinion concerning political actions along religious lines lead to the very dangers the First Amendment seeks to avoid. To allow legislative decisions to be analyzed within a religious frame of reference is to destroy the wall that has been built between church and state.102 This problem of political divisiveness was first recognized by Justice Goldberg in Schempp, when he said that the activities in question must not involve the state so significantly and directly in the realm of the sectarian as to give rise to those very divisive influences and inhibitions of freedom which both religion clauses of the First Amendment preclude.103

As Justice Harlan stated, what is at stake is prevention of involvement that is likely to “lead to strife and frequently strain a political system to the breaking point.”104

B. Free Exercise

In free exercise issues the Court has focused on the “coercive effect of the enactment” on the individual’s practice of religion106 whereas such an inquiry has been found irrelevant to questions involving the establishment clause.106 Whether this difference in approach avoids potential inconsistencies is open to question.

Despite the language of the free exercise clause it is clear that it does not prohibit all governmental actions that have a coercive effect on religious activity. In Reynolds v. United States,107 in response to the claim of a Mormon that it is unconstitutional not to exempt him from a polygamy statute because of his religion, the Court held that “[I]aws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices.”108 The

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101. 403 U.S. 602, 619 (1971). Although Chief Justice Burger did not state upon whom the burden would be placed in regard to this issue, it is likely to be on he who challenges the legislation.
102. Id. at 622–25.
106. Id.
107. 98 U.S. 145 (1878).
108. Id. at 166.
fear was that to reach a contrary result "would be to make the
professed doctrines of religious belief superior to the law of the
land, and in effect to permit every citizen to become a law
unto himself."^{109}

While the Court has stood steadfast against direct govern-
mental regulation of religious beliefs,^{110} its approach to overt
practices has shifted from the simplistic rationale in Reynolds.
In Braunfeld v. Brown,^{111} the Court found that certain Sunday
closing laws, as applied to Orthodox Jewish merchants who
closed their businesses on Saturday in accordance with their re-
ligious faith, did not violate the free exercise clause. Rather
than following the Reynolds approach the majority adopted an
alternative means test:

\begin{quote}
the statute is valid despite its indirect burden on religious ob-
servance unless the State may accomplish its purpose by means
which do not impose such a burden.\footnote{112}
\end{quote}

The shift in reasoning was completed in Sherbert v. Verner.\footnote{113}
Now such constitutional issues are to be decided by balancing
the religious liberties of the individual with the compelling in-
terests of government.\footnote{114} The Court typically has rejected free
exercise claims where the regulated conduct posed a substantial
threat to public safety, peace and order.\footnote{115} Yet the difficulty of
applying this standard to specific problems\footnote{116} makes it too vague
a criterion to be a helpful means of solving problems extending
into other related areas. The necessary element of individual
coercion, however, consistently has been lacking in cases where
those seeking to attack a program of financial aid to private
schools have attempted to use the free exercise clause. In Tilton
the free exercise argument arose out of the compulsion to pay
taxes from which part of the building grants were financed. Re-

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{109. Id. at 167.}
Island, 345 U.S. 67 (1953); Cantwell v. Connecticut, 310 U.S. 296, 303
(1940).}
{111. 366 U.S. 599 (1961).}
{112. Id. at 607. Indirectness was to mean that hardships would be
placed upon particular religious practices, but one would still be al-
lowed to realize these practices and yet comply with the law.}
{113. 374 U.S. 398 (1963).}
{114. For examples of suggested factors to be applied in this balanc-
ing process see Clark, Guidelines for the Free Exercise Clause, 83 Harv.
L. Rev. 327, 345 (1969); Dodge, The Free Exercise of Religion: A So-
Liberty, Nonestablishment, and Doctrinal Development, 80 Harv. L. Rev.
1381, 1390 (1967).}
jection of this contention was based upon an analysis of the type of compulsion at which the free exercise clause is directed: coercion aimed at the practice of the taxpayer's particular religious beliefs.\(^\text{117}\) This was simply a reiteration of the position taken in Allen and Walz, and there is no reason to suggest that a change will be forthcoming in later school aid cases.

The free exercise clause has also been utilized by supporters of school aid legislation. The contention typically is that a free exercise violation arises when students are denied benefits simply because of their religion. Such denial, it is further contended, might even result in a decrease in the quality of education such that parents are forced to change the schools to which they send their children. Support for this argument is said to arise from the Court's statements in Everson v. Board of Education that the state cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation.\(^\text{118}\)

Despite this Supreme Court declaration, the lower courts subsequently have reached inconsistent results in response to arguments that the free exercise clause supports school aid.\(^\text{119}\) This is due in part to the emphasis given language later in the Everson case, namely that this remark was not "to intimate that a state could not provide transportation only to children attending public schools . . . ."\(^\text{120}\) The Ohio court, in Honohan v. Holt, interpreted such statements to mean that there is no constitutional requirement that benefits be provided to every student. However, if that is the state's desire it is unconstitutional to limit aid to only public school students and children in private, nonreligious schools.\(^\text{121}\) The West Virginia Supreme Court has been less restrictive, merely stating that any denial to children attending parochial schools of rights to bus transportation equal to those accorded children in public schools "deprives Catholic children and their parents of their right of religious freedom in vio-

\(^{\text{117}}\) 403 U.S. 672, 689 (1971).
\(^{\text{118}}\) 330 U.S. 1, 16 (1947).
\(^{\text{120}}\) 330 U.S. 1, 16 (1947).
\(^{\text{121}}\) 170 Ohio Misc. 47, 69, 244 N.E.2d 537, 545 (1969).
lation of the provisions of the First Amendment . . . .” In *Epeldi v. Engelking*, the Idaho court found such reasoning to be “a circuitous route to arrive at a predetermined goal.” By their own choice the students were said to have denied themselves the right to enjoy any of the benefits given to public school students. This was simply the price for exercising one's religious beliefs.

C. EVALUATION OF MINNESOTA PROVISIONS

These tests and other factors stressed by the United States Supreme Court indicate the precarious position of the Minnesota tax credit plan. In evaluating the program's validity under the First Amendment it is useful to keep in mind the arguments typically advanced by the proponents of this type of plan: (1) that the aid goes directly to the child or his parent, the school benefitting incidentally at most, and (2) that the government is merely refraining from receiving tax money rather than giving actual support to religion.

123. 488 P.2d 860, 866 (Idaho 1971).
125. Freeman, Tax Credits and the School Aid Deadlock, 194 Catholic World 201, 207-08 (1962).
126. Proponents of the Minnesota tax credit plan will undoubtedly seize upon the *Walz* decision for support of this second contention as to the form of the aid. In finding no nexus between a tax exemption and the establishment of religion, the majority in *Walz* viewed the New York statute as “simply sparing the exercise of religion from the burden of property taxation levied on private profit institutions.” 397 U.S. at 673. Sponsorship was absent because the “government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state.” Id. at 675. The weight which the Supreme Court gave to these distinctions between the forms of aid provided will be very important to the challenge of the Minnesota tax plan since the myriad other factors upon which the Court in *Walz* arguably based its decision are not present with the tax credit scheme. Absent are the two hundred years of history which negate involvement in a political sense or as the first step toward the establishment of religion. The Court admitted that this “is not something to be lightly cast aside.” Id. at 678. Also missing is the practical consideration in *Walz* that the alternative to exemption is expansion of involvement by taxing the churches. Id. at 674. Certainly by removing the tax credit the state's role results in lesser involvement since it would merely entail the normal tax collection procedure. Absent also is “voluntary pluralism,” deemed so essential by Justice Brennan when he stated in his concurring opinion that “Government may properly include religious institutions among the variety of private, nonpublic groups that receive tax exemptions, for each group contributes to the diversity of association, viewpoint, and enterprise essential to a vigorous pluralistic society.” Id. at 689. See also Id.
1. Secular Purpose

It would seem to have been in the interest of those supporting the Minnesota bill to have included a statement of its purpose, especially in light of the great weight given such statutory declarations. Yet the omission is not critical. The state's legitimate concern in maintaining minimum standards in accredited schools and to improve society through better education of our youth extends to private as well as public schools because of the dual function church related schools are conceded to provide. Many of the statute's defenders do not emphasize these reasons, focusing instead on the financial crisis facing parochial schools. However, this adds nothing to its validity. The Court is unlikely to consider economic conditions as significant in determining constitutionality.

2. Primary Effect

Whether the tax credit plan has the effect of advancing religion will depend, in part, upon the Court's acceptance of the child benefit theory. That the plan concerns itself with providing tax relief to the parents rather than paying subsidies to the school will surely be argued as a principal basis for its validity. While it has been advanced that the child benefit doctrine is not necessarily the exaltation of form over substance in all instances, it clearly is such an instance when implemented under the Minnesota tax plan. Whenever conditions are necessarily made a part of the legislation in order to validly pursue the state's particular goals to the extent required under the Minnesota tax plan.

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127. See text accompanying notes 37-45 supra.
129. As Chief Justice Burger stated in Lemon: [N]othing we have said can be construed to disparage the role of church-related elementary and secondary schools in our national life... Nor do we ignore their economic plight in a period of rising costs and expanding need. . . . The merits and benefits of these schools, however, are not the issue before us in these cases. The sole question is whether state aid can be squared with the dictates of the Religion Clauses.
403 U.S. at 625.
130. See text accompanying notes 61-64 supra.
credit scheme, the likelihood of more direct relationships with religious institutions increases to the point of finding substantial merit in the form-over-substance contention. The counter rationale which was argued to justify the child benefit theory is overshadowed by the evils of such resulting relationships.

The nature of the aid provided, also considered an appropriate concern, is justification for objection to the statute. Under the New York textbook provision at issue in Allen, the books which could be loaned free of charge were the ones designated for use in the public schools or approved by the school boards. The approach taken under the Minnesota statute is to look not at the contents of the material but the courses in which they are being used. "Textbooks" are defined to include materials "used in nonpublic schools in teaching only those subjects legally and commonly taught in public elementary and secondary schools" and not those used "in the teaching of religious tenets, doctrines or worship, the purpose of which is to inculcate such tenets, doctrines or worship." One of the principal reasons for distinguishing teachers from textbooks was that "a textbook's content is ascertainable, but a teacher's handling of a subject is not" and "[u]nlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment." When emphasis is placed on the type of course taught rather than the pages in a text, certainly a more comprehensive and continuing governmental surveillance is necessary and the dangers of a primary effect of aiding religion increase.

But these problems will arise under the Minnesota plan since "education costs" includes not only textbooks and classroom instructional fees but also tuition charges, such costs surely, in part, used to pay teacher's salaries. In order not to constitute aid to religion the salaries would have to be only for the support of purely secular subjects. Yet Lemon would lead to a finding of an unconstitutional degree of involvement were this separation to be policed effectively. While the Court in Lemon did consider such evidence as the Rhode Island "Handbook of School Regulations," it is improbable that any program aiding

131. See text accompanying notes 65-73 supra.
134. Id. at 619.
religious teachers will be sustained, particularly if they are teaching in a school of their faith.\textsuperscript{137}

3. \textit{Excessive Entanglement}

Impermissible entanglement of a political nature is a substantial obstacle to the validity of the tax credit.\textsuperscript{138} Admittedly it is not a simple task to differentiate legislative programs giving rise to a division of opinion along religious lines from plans not causing such division. But the fact that an objective measurement of any church-state relationship cannot be made precisely suggests that the proper approach might be to search further for those specific circumstances which hold a high potential for involvement. The Minnesota tax credit plan appears to be of questionable validity when analyzed in light of such circumstances as stressed in \textit{Lemon}.\textsuperscript{139} The innovative nature of the

\begin{footnotesize}
\textsuperscript{137} To modify the nature of the aid by the form in which it is provided, here a tax credit, may not be sufficient to protect the Minnesota statute from constitutional attack. Justice Brennan was able to justify the distinction between the tax exemption at issue in \textit{Walz} and the direct subsidies by stating that:

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\text{[t]hough both provide economic assistance, they do so in fundamentally different ways. A subsidy involves the direct transfer of public monies to the subsidized enterprise and uses resources exacted from taxpayers as a whole. An exemption, on the other hand, involves no such transfer.}
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397 U.S. at 690. However, these generalizations are inadequate as guidelines when one seeks to compare the Minnesota tax credit with either tax exemptions or direct subsidies. Obviously a tax credit is similar to an exemption in that there is a mere abstention from tax collection (although even this is not so when a tax refund results). However, to claim that this factor automatically guarantees the constitutionality of the plan is to err. For example, in clarifying the differences between direct subsidies and exemptions, Justice Harlan noted:

Subsidies, unlike exemptions, must be passed on periodically and thus invite more political controversy than exemptions. Moreover, subsidies or direct aid, as a general rule, are granted on the basis of enumerated and more complicated qualifications and frequently involve the state in administration to a higher degree, though to be sure, this is not necessarily the case.

\textit{Id.} at 699. The Minnesota tax credit scheme would appear to be an exception to this general rule. The frequency and directness of the relationships between the state and religion are clearly more substantial than was necessary under the New York property tax exemption and are more like the programs upheld in \textit{Lemon}. Also relevant to this distinction is the proposed increase in tuition by many private schools by the amount of tax relief granted under the new law. Minneapolis Tribune, Aug. 29, 1971, § E at 1, col. 1. The statutory plan is more closely aligned with the concept of direct support since the legislative provisions do not sufficiently discourage the private schools from increasing their tuition charges in this manner.

\textsuperscript{138} See text accompanying notes 102-04 supra.

\textsuperscript{139} 403 U.S. 602, 623-24 (1971).
\end{footnotesize}
tax credit is more akin to the Rhode Island and Pennsylvania programs than the old and established property tax at issue in Walz. The likelihood of the ultimate extension of such a tax credit plan, the establishment of state churches and religion, while not subject to precise measurement is certainly predictable enough to provide a more persuasive argument against constitutionality than the universal practice of tax exemption for church property. Also weighing against the Minnesota plan is the emphasis the Court has placed on the issue of whether the aid will benefit a broad class. Unlike the statutes at issue in Walz, the tax credit provisions benefit relatively few religious faiths, and thus the fear arises that every sect or group will make their individual demands as legislative programs in this field are initiated or revised. Another consideration tending to increase the likelihood of excessive intertwining of religion and politics is the frequency with which the state must cope with the “aid” question, due to the continuing annual applications under the plan and the ease of procedure in amending these tax credit schemes.

Permeation in the Minnesota nonpublic elementary and secondary schools was seen not to be a foregone conclusion under Chief Justice Burger’s analysis so as to render the program per se unconstitutional. While any primary effect violation will then turn on the evidence in each particular case, the Minnesota legislature’s attempt to remove permeation problems from any entanglement contentions may run afoul of Chief Justice Burger’s approach, since he emphasized the steps which would be necessary to separate the secular and sectarian as well as the administrative measures in the act. The portion of the tax plan which directly attempts to avoid permeation issues is the provision for the determination of costs to more fully measure the appropriate maximum amount allowable as a tax credit. Under the statute, “restricted maintenance costs” is defined as 80 per cent of the calculated maintenance costs for an individual non-

140. The one possible flaw in this contention arises from Minn. Stat. § 290.09(22) (1969). That section allows the taxpayer to utilize a tax deduction for the tuition charges and costs of transportation of a dependent attending an elementary or secondary school. Such a provision has existed since 1945 without being subjected to attack on First Amendment grounds. Yet the statute’s lack of acceptance by other states and the lack of awareness of it on the part of Minnesota residents in light of present church-state issues are only two of the reasons to distinguish the statute from the tax exemption in the Walz case which had been so generally accepted.

141. See text accompanying notes 86-87 supra.
public school student.\textsuperscript{142} The rationale is that nowhere in the state do the religious costs for a child in a nonpublic school exceed 20 per cent of the total educational costs. Thus the state will not become involved with cost allocations between religious and secular instruction for the many students attending private schools, yet at the same time allegedly providing no aid for religion.

Various problems are evident with this type of approach. First, the assumption as to the 20 per cent figure may need to be reviewed at certain intervals to assure its continued validity, and such review would entail some small degree of entanglement. But even if the assumption of 20 per cent proves correct, the critical issue still remains whether this is an instance where the type of program necessitates certain steps for implementation that should be given priority over the actual statutory procedures. Certainly there is an element of arbitrariness in the Minnesota statute which could lead to differences in the percentages of relief given to various nonpublic students for secular costs due to the variations at each private school. Also significant is Chief Justice Burger's holding in Lemon that state inspection in an attempt to determine what amounts of the total expenditures are attributable to secular education and what amounts to religious activity is one of the most seriously damaging types of involvement.\textsuperscript{143} Yet the legislature's avoidance of entanglement does not lead to a potential danger of benefits to religion, given that the 20 per cent assumption is accurate, but only to imprecision. This, in effect, forces the Court to go one step further than it has before in that it now would be considering the state's attempt to prevent involvement in light of the arbitrariness which would otherwise result. Unless this capriciousness can be invalidated in itself the Court is faced with questions over the quality of legislation, something to which it is not likely to respond.

\textbf{IV. VALIDITY UNDER THE MINNESOTA CONSTITUTION}

Not only must the tax credit plan confront substantial obstacles at the federal level, but it must also satisfy the appropriate Minnesota constitutional provisions\textsuperscript{144} which are much more specific than the clauses in the First Amendment to the United

\textsuperscript{142} MINN. STAT. § 290.086(1) (1971).
\textsuperscript{143} 403 U.S. 602, 620 (1971).
\textsuperscript{144} MINN. CONST. art. 8, § 2; art. 1, § 16; art. 4, § 33; art. 9, § 1.
States Constitution. While it is true that these more specific provisions do not deny validity to every assistance program and that statutes will be held unconstitutional only when invalid beyond a reasonable doubt, one cannot ignore the Minnesota Supreme Court's conclusion that the state restrictions are much more stringent than the federal limitations.

A. **MINN. CONST. ART. 8, § 2**

Perhaps the most demanding of the pertinent state constitutional provisions is Minn. Const. art. 8, § 2:

The legislature shall make provisions, by taxation or otherwise, as, with the income arising from the school fund, will secure a thorough and efficient system of public schools in each township in the State. But in no case shall the moneys derived as aforesaid, or any portion thereof, or any public money or property, be appropriated or used for the support of schools wherein the distinctive doctrines, creeds or tenets of any particular Christian or other religious sects are promulgated or taught.

1. **Minnesota Decisions**

The only meaningful interpretation of this provision is found in the recent case of *Americans United, Inc. v. Independent School District No. 622.* There the state supreme court upheld an authorization by a school board to provide transportation for children attending sectarian schools issued pursuant to the appropriate bussing statute. While not expressly adopting the child benefit theory, inferences from the court's opinion lead to the conclusion that the doctrine was accepted as relevant, though limited. Such thinking possibly became the central theoretical basis for the passage of the tax credit provisions. Yet one cannot refuse to consider the extensive dicta in the court's decision. Language expressing concern over support directly connected with the educational process, and thus not sustainable as safety or welfare legislation, is prevalent throughout the opinion. Support of parochial schools was considered indistinguishable from support of religion. The wide latitude given these private schools in their various functions was said correspondingly to require taxpayers and the state to be free from support-

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146. *Id.* at 204, 179 N.W.2d at 151.
147. *Id.* at 213, 179 N.W.2d at 155.
148. 288 Minn. 196, 179 N.W.2d 146 (1970).
149. *Id.* at 215, 179 N.W.2d at 156.
Concern for the continued existence of sectarian schools if not assisted by public funds was felt to be misplaced. Such economic arguments would better be directed at the need for a constitutional amendment.

2. Opinions of Other State Courts

a. Bussing Cases

The *Americans United* opinion does not seem unreasonable in light of the considerations mentioned in *Everson v. Board of Education*. Yet the invalidation of similar transportation programs by courts in many other jurisdictions exemplifies the more rigid position often taken at the state level. However, this is not to imply that the *Americans United* decision stands by itself. Those state courts that have faced the issue of the constitutionality of such bussing statutes are sharply divided.

Although peculiarities in the various states' constitutional provisions or legislative histories leave any comparative analysis of limited usefulness, certain identifiable approaches weave through many of the opinions. The expenditures of public funds for transportation of students to nonpublic schools has been justified by viewing the program as simply general welfare legislation or by employing the child benefit theory in finding that the direct support is to the student and the benefits to the church related school are inconsequential or incidental. Other courts have felt that the fact cannot be ignored that the educational institutions are relieved of the expense of bringing the child to school. Another factor emphasized in rejecting the

150. Id. at 217, 179 N.W.2d at 157.
151. Id.
bussing laws has been that transportation programs are more easily identifiable as an element essential to the parochial schools than, for example, police or fire protection. A theory which has met with even less success is that the costs incurred by the state are not more than would exist if these students were attending public schools. Such an argument recognizes no limits in application. Equally unsuccessful has been the argument that the legislation is merely a legitimate exercise of the police power. This idea only begs the question since constitutionality must invariably circumscribe its scope.

Provisions as specific in nature as the Minnesota constitution's article 8, section 2 have been interpreted in other states. In Spears v. Honda the Hawaii Supreme Court, in construing the constitutional prohibition against public funds being "appropriated for the support or benefit of any sectarian or private educational institution," rejected the child benefit theory and found "support" in the increase in enrollment and tendency for the bussing statute to help develop, strengthen and make successful the nonpublic schools. The same rationale has been applied by the Delaware Supreme Court based on a provision of that state's constitution which denies the use of educational funds "by or in aid of any sectarian, church or denominational school." However, article 4, section 30 of the California constitution, which prohibits legislative attempts to "help to support or sustain any school, college, university, hospital, or other institution controlled by any religious creed, church, or sectarian denomination whatever" was held by the California Supreme Court in Bowker v. Baker to be distinguishable from constitutional provisions denying both direct and indirect aid to denominational schools, in that the former might allow for incidental and intangible benefits.

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161. HAWAI Const. art. 9, § 1.
162. 51 Hawaii at 12-13, 449 P.2d at 137.
164. DEL. CONST. art. 10, § 3.
b. Textbook Cases

Variations also existed in determinations of the acceptability of statutory plans which permit the state to provide textbooks to students in both public and nonpublic schools. In *Dickmann v. School District* the Oregon "free textbook" statute was said to violate the constitutional prohibition against the use of public moneys "for the benefit of any religious [sic] or theological institution." While admitting that all benefits conferred upon parochial schools are not disallowable, both the child benefit theory and the value received doctrine were rejected as impliedly recognizing no limitations in application. Instead the proper analysis was the functions rather than the institutions aided. In so doing the Oregon Supreme Court saw the textbook provisions to be more directly related to educational instruction permeated by religion rather than general welfare allowances such as school transportation laws.

However, opposite conclusions have been reached in many other states which are often difficult to reconcile. For example, although the relevant section of the New Hampshire constitution states that "no money raised by taxation shall ever be granted or applied for the use of the schools or institutions of any religious sect or denomination," the New Hampshire Supreme Court viewed a similar textbook statute as merely an attempt to fulfill a public purpose since presumably only books used for secular subjects were included in the plan. If adequate limitations were placed on the program to assure that no greater or more direct benefits would be given a religious sect, the court then could not allow itself to deny assistance because of the student's particular religious beliefs. The New York statute at issue in *Allen* was also found to not violate state constitutional proscriptions. The New York constitution provided

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168. 232 Ore. at 247, 366 P.2d at 538.
169. According to this latter concept, largely discarded today, when a religious institution performs a task which the state itself would otherwise have to fulfill, payments to that organization are not in support of it, but merely remuneration for services rendered. See generally Cushman, *Public Support of Religious Education in American Constitutional Law*, 45 Ill. L. Rev. 336, 336-37 (1950).
170. 232 Ore. at 250-55, 366 P.2d at 539-42.
171. Id. at 255-57, 366 P.2d at 542-43.
174. Id. at 581-83, 258 A.2d at 346-47.
that public moneys could not be "used, directly or indirectly, in aid or maintenance . . . of any school or institution of learning wholly or in part under the control or direction of any religious denomination."175 In overruling Judd v. Board of Education,176 the leading expression of the child benefit theory, the court held "directly or indirectly" to refer to the "means of attaining the prohibited end of aid to religion as such."177 Thus the legislation was considered only an attempt to improve the quality of learning in the state, and the collateral benefit to parochial schools was seen as inconsequential in light of the educational lag that would otherwise result.178 The Louisiana Supreme Court in Borden v. Louisiana State Board of Education179 held that state's textbook law to be constitutional in spite of comprehensive and exacting constitutional provisions. While no appropriations could be made of public funds to support "any private or sectarian school"180 the court nevertheless upheld the program as a permissible exercise of the state's police power in the promotion of education and the furtherance of the general welfare.181 The parochial schools were deemed to not be the real beneficiaries at all since they obtained nothing directly and were not relieved of any obligations.182 Similarly, the Mississippi Supreme Court approved a textbook loan system as not in violation of constitutional limitations against appropriations "for the support of any sectarian school."183

c. Tuition and Other Educational Expenses

The early judicial applications of state constitutional provisions to statutory allowances for tuition and other related costs arose in the context of state contracts with religious institutions for care of wards of the state. The Nevada Supreme Court viewed such arrangements as inconsistent with the state's constitutional prohibitions against public funds being used "for sectarian purposes."184 The daily religious activities, although brief

175. N.Y. Const. art. 11, § 3.
178. Id. at 116-17, 228 N.E.2d at 794, 381 N.Y.S.2d at 804-05.
179. 168 La. 1005, 123 So. 655 (1929).
181. 168 La. at 1021-22, 123 So. at 661.
182. Id. at 1020, 123 So. at 660-61.
in duration, could not be considered as having no effect upon the impressionable minds of the children. However, in Dunn v. Chicago Industrial School for Girls similar contracts were upheld even though the Illinois constitution stated that it is improper for a public body ever to “make any appropriation or pay from any public fund whatever, anything in aid of any church or sectarian purpose, or to help support or sustain any school controlled by any church or sectarian denomination.” As justification for such a result the court noted that it would be contrary to fact and reason to say that the state's contribution of an amount less than the actual cost of all nonreligious materials furnished could possibly aid the religious functions of an institution. Also, the Supreme Court of Pennsylvania has rejected a constitutional attack on the payment of public funds for the support, care and maintenance of delinquent, neglected or dependent children placed in sectarian homes and institutions. Even though appropriations were forbidden for “charitable, educational or benevolent purposes . . . to any denominational or sectarian institution.” The program was accepted under the child benefit theory. Likewise, in Murrow Indian Orphans Home v. Childers the provision against the use of public money “directly or indirectly, for the use, benefit, or support of any sect, church, denomination, or system of religion, or for the use, benefit or support of any priest, preacher, minister, or other religious teacher or dignitary, or sectarian institution as such” was held not to condemn the state's contracts for care of dependent children. The state was merely rendering a service in fulfillment of its duty to care for these needy children.

Many other jurisdictions have rejected the various approaches used in these ward cases and have held unconstitutional programs aiding nonpublic schools through direct payments of tuition or other educational costs which are regarded as the “life blood” of these institutions. The South Dakota Supreme

185. Id. at 386.
186. 280 Ill. 613, 117 N.E. 735 (1917).
187. ILL. CONST. art. 8, § 3. This provision is now ILL. CONST. art. 10, § 3.
188. 280 Ill. at 618, 117 N.E. at 737.
190. PA. CONST. art. 3, § 18.
192. OKLA. CONST. art. 2, § 5.
193. 197 Okla. at 250, 171 P.2d at 603.
194. But see State ex rel. Johnson v. Boyd, 217 Ind. 348, 28 N.E.2d 256 (1940) (discussed in text accompanying notes 228-29 infra, interpret-
Court has construed those portions of its constitution providing that "[n]o money or property of the state shall be given or appropriated for the benefit of any sectarian or religious society or institution"¹⁹⁵ and that "[n]o appropriation of lands, money, or other property or credits to aid any sectarian school shall ever be made by the state"¹⁹⁶ to disallow a program whereby the parochial schools would receive tuition payments by the public board of education.¹⁹⁷ This constitutional provision was held to prohibit in every form, whether as a gift or otherwise, payments which support and strengthen the institution, regardless of whether the payments are in consideration for services rendered.¹⁹⁸ In Otken v. Lamkin¹⁹⁹ the constitution declaration that "[n]o religious sect or sects shall ever control any part of the school or university funds of this State"²⁰⁰ required the Mississippi Supreme Court to hold invalid a statutory plan allowing the state to make available to pro rata share of a school fund to cover educational costs of each child, regardless of the school which the student elected to attend. In Almond v. Day²⁰¹ the Virginia Supreme Court rejected the child benefit theory concluding that an allowance for tuition costs to orphans of veterans at whatever school attended was forbidden by constitutional denial of any appropriation of public funds "to any school or institution of learning not owned or controlled by the State."²⁰² The Missouri Supreme Court, in the case of Berghorn v. Reorganized School District,²⁰³ found the expenditures of public funds for the support of parochial schools to be inconsistent with the constitutional prohibitions against funds being used "to help to support or sustain any private or public school, academy, seminary, college, university or other institution of learning controlled by any religious creed, church or sectarian denomination."²⁰⁴ In State v. Taylor²⁰⁵ efforts by the public boards
of education to rent rooms in the parochial schools and employ nuns to instruct the students were held impermissible under a constitutional prohibition against sectarian instruction being allowed in an "institution supported in whole or in part by the public funds set apart for educational purposes." 206

More recent legislation attempting to provide for the purchase of secular services has met similar results. 207 In light of the role to be played by parochial schools, it has been said to be perhaps impossible to determine where the secular purpose ends and the sectarian begins. 208 The justification of a purchase of secular services as a legitimate public response to the economic crisis being faced by parochial schools has been rejected when encroachments of this type result. 209 The degree of entanglement necessary to assure secularity is said to increase to an improper extent. 210 The possible closing of schools which results from such decisions denying the granting of aid is considered not to be irrational in terms of damaging the desired diversity of educational systems because an opposite decision would create the same problem to the extent that coercive elements are imposed by the public school system as conditions or incidents of providing the aid. 211

B. MINN. CONST. ART. 1, § 16

Article 1, section 16 of the Minnesota constitution, a provision associated more generally with religion than article 8, section 2, provides in relevant part:

The right of every man to worship God according to the dictates of his own conscience shall never be infringed, nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any religious or ecclesiastical ministry, against his consent; nor shall any control of or interference with

206. NEB. CONST. art. 7, § 11.
208. State ex rel. Chambers v. School Dist., 155 Mont. 422, 438, 472 P.2d 1013, 1021 (1970) (applying MONT. CONST. art. 11, § 8, which forbids a public body from attempting to make "directly or indirectly, any appropriation, or pay from any public fund or moneys whatever, or make any grant of lands or other property in aid of any church, or for any sectarian purpose or for any school . . . controlled in whole or in part by any church, sect or denomination whatever.")
210. Id. at 1058, 241 So. 2d at 220.
211. Id. at 1067, 241 So. 2d at 223.
the rights of conscience be permitted, or any preference be given
by law to any religious establishment or mode of worship; but
the liberty of conscience hereby secured shall not be so con-
strained as to excuse acts of licentiousness, or justify practices in-
consistent with the peace or safety of the State, nor shall any
money be drawn from the treasury for the benefit of any reli-
gious societies, or religious or theological seminaries.

This section is much like the establishment clause and free ex-
ercise clause of the First Amendment, and the last clause of this
provision is similar to the prohibition against the expenditure of
public funds set forth in article 8, section 2.212

1. Minnesota Decisions

The few cases in which the court has had an opportunity to
apply this constitutional provision have usually not concerned
school aid.213 The one exception is Americans United, Inc. v. In-
dependent School District No. 622,214 although its usefulness for
analysis is limited by the summary fashion in which the court
dealt with this section. The conclusion that the bussing statute
"does not exceed the boundary of what is permissible under
Minn. Const. art 1, § 16; art. 4, § 33; art. 8, § 2; or art. 9, § 11215
resulted from an analysis of only article 8, section 2, considered
the most stringent of the applicable provisions.216

2. Other State Jurisdictions

a. Transportation Programs

In Honohan v. Holf217 the Ohio bussing statute withstood a

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212. Many of the cases in the text accompanying notes 154–212, su-
pra, also gave consideration to constitutional clauses similar to that con-
tained in the last part of MINN. CONST. art. 1, § 16. See, e.g., LA.
CONST. art. 4, § 8 as interpreted in Seegers v. Parker, 256 La. 1039, 241
So. 2d 213 (1970); MASS. CONST. art. 46, § 2 as interpreted in Opinion of
the Justices, 258 N.E.2d 779 (Mass. 1970); MO. CONST. art. 6, § 3 as in-
terpreted in Berghorn v. Reorganized School Dist., 364 Mo. 121, 260
S.W.2d 578 (1932); NH. CONST. pt. 2, art. 33 as interpreted in Opinion of
the Justices, 109 N.H. 578, 258 A.2d 343 (1969); OKLA. CONST. art. 2, § 5
as interpreted in Murrow Indian Orphans Home v. Childers, 197 Okla.
249, 171 P.2d 600 (1946); OR. CONST. art. 1, § 5 as interpreted in Dickman
as interpreted in Schade v. Allegheny County Inst. Dept., 386 Pa. 507,
136 A.2d 911 (1956); SD. CONST. art. 6, § 3 as interpreted in Synod of Da-
213. See State v. Olson, 287 Minn. 300, 178 N.W.2d 230 (1970); In re
Jenison, 287 Minn. 136, 125 N.W.2d 588 (1963).
214. 288 Minn. 196, 179 N.W.2d 146 (1970).
216. Id. at 201, 179 N.W.2d at 149.
217. 17 Ohio Misc. 57, 244 N.E.2d 537 (1968).
challenge based on the constitutional prohibition against being “compelled to attend, erect, or support any place of worship.” Assuming a school to be a “place of worship,” the court nevertheless concluded that the indirect benefits resulting to the school from bus transportation are not “support” within the purview of this constitutional provision. The Connecticut Supreme Court reached the same result in construing a constitutional prohibition against any person being “compelled to join or support . . . any congregation, church or religious association.” The word “support” was deemed never to have been intended to prevent every sort of incidental public assistance to, and encouragement of, religious activity. But in State v. Nusbaum the Wisconsin Supreme Court adopted a different interpretation of its constitutional provision:

nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any ministry, against his consent; nor shall any control of, or interference be given by the law to any religious establishments or modes of worship; nor shall any money be drawn from the treasury for the benefit of religious societies, or religious or theological seminaries.

Primary and secondary schools were determined to be religious societies or seminaries and impermissible benefits were received by these organizations through cost savings and increases in enrollment.

b. Textbooks

The Louisiana constitution, being similar to the First Amendment in that it denies the passage of any law “respecting an establishment of religion,” has been interpreted to permit the implementation of a textbook program in a case in which the Louisiana Supreme Court viewed the students as the sole beneficiaries of such a statute. In Bowerman v. O'Connell the Rhode Island Supreme Court declared its constitutional requirement that “no man shall be compelled to frequent or to support

218. OHIO CONST. art. 8, § 3.
219. 17 Ohio Misc. at 67, 244 N.E.2d at 544.
221. Id. at 386-87, 161 A.2d at 777.
222. 17 Wis. 2d 148, 115 N.W.2d 761 (1962).
223. Wis. Const. art. 1, § 18.
224. 17 Wis. 2d at 156-58, 115 N.W.2d at 765-66.
any religious worship, place or ministry whatever" to be no more restrictive than the First Amendment as interpreted in Board of Education v. Allen. Therefore a textbook program was held not to violate the state constitution.

c. Tuition and Other Related Costs

In Dunn v. Chicago Industrial School for Girls the Supreme Court of Illinois found contracts whereby the state paid a religious institution for the care of girls committed thereto by the juvenile court not to be in violation of the constitutional provision which states that "no person shall be required to attend or support any ministry or place of worship against his consent nor shall any preference be given by law to any religious denominations or mode of worship." In State ex rel. Boyd v. Johnson the Indiana Supreme Court held that the clause providing that "no preference shall be given, by law, to any creed, religious society, or mode of worship; and no man shall be compelled to attend, erect, or support, any place of worship" did not mean the school board could not assist the financially depressed parochial schools by employing certain nuns to instruct the students, in only secular courses. In Rawlings v. Butler the statutory allowance of public funds to teachers who were members of a religious organization and rent school buildings from the church was determined not to violate section 5 of the Kentucky constitution, which states that "no preference shall ever be given by law to any religious sect, society, or denominaton . . . nor shall any person be compelled to attend any place of worship, to contribute to the erection or maintenance of any such place, or to the salary or support of any minister of religion." The teachers were said not to be teaching religion in the schools, their religious views and mode of dress being their personal affair. No constitutional objection could be seen to the renting of the buildings from the Roman Catholic Church since the church in no manner attempted to influence or control the conduct of the schools. However in Seegers v. Parker the Louisiana Supreme Court

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228. R.I. CONST. art. 1, § 3.
229. 280 Ill. 613, 117 N.E. 735 (1917).
230. ILL. CONST. art. 1, § 3.
231. 217 Ind. 348, 28 N.E.2d 256 (1940).
232. IND. CONST. art. 1, § 4.
233. 290 S.W.2d 801 (Ky. 1956).
234. Id. at 804.
235. Id. at 806.
declared invalid a purchase of secular services under the constitutional section which states that "no law shall be passed respecting an establishment of religion, nor prohibiting the free exercise thereof; nor shall any preference be given, nor any discrimination made against, any church, sect, or creed or religion." The court rejected the contention that the conduit for the aid is the appropriate test, instead finding unconstitutionality to be the result of excessive entanglement. Similarly, in Almond v. Day a statutory provision for tuition payments of orphans of veterans at any educational institution was held to violate the constitutional clause that "no man shall be compelled to frequent or support any religious worship, place, or ministry, whatsoever." Also deemed inconsistent were the Missouri constitutional provision that "no person shall be compelled to erect, support or attend any place or system of worship" and the statutory grant of payments to maintain parochial schools in the state.

C. Minn. Const. Art. 4, § 33 and Art. 9, § 1

Article 4, section 33 of the Minnesota constitution provides, in part, that the legislature cannot enact local or special laws "authorizing public taxation for a private purpose." Along similar lines, article 9, section 1 states that "taxes shall be uniform upon the same class of subjects, and shall be levied and collected for public purposes."

238. 256 La. at 1057-58, 241 So. 2d at 219-20.
243. Actually this constitutional provision is broader than Minn. Const. art. 4, § 33 in that there is the additional requirement of uniformity of taxation. The standard of protection afforded by this test is similar to that provided by the equal protection clause of the Fourteenth Amendment. Reed v. Bjornson, 191 Minn. 254, 261, 253 N.W. 102, 106 (1934). The demand is for substantial equality so that persons and property similarly situated are treated approximately the same. Anderson v. Commissioner of Taxation, 253 Minn. 528, 540-41, 93 N.W.2d 523, 533 (1958). The problem is thus one of classification with the legislature having wide discretion. Ability to pay and extent of protection or benefit are often considered to be an appropriate justification for various classes. Reed v. Bjornson, 191 Minn. 254, 266, 253 N.W. 102, 108 (1934). The difference here between the tax charged to nonpublic school parents and the amount owed by public school parents must be more generally based on some ground which is reasonable, not arbitrary, and which has a fair and substantial relation to the object of the legislation. In re Taxes on Real
While the Minnesota Supreme Court has considered "public purpose" issues to be resolved necessarily on an individual case basis, certain guidelines have been set forth which assist in an evaluation of the contention that the tax credit plan constitutes an expenditure of public funds for a private purpose. "Public purpose" is construed to mean "such an activity as will serve as a benefit to the community as a body and which, at the same time, is directly related to the functions of government." The public nature is deemed not to be destroyed by incidental aid to private institutions if the primary purpose of the legislation was to provide public aid.

The policy of the state has been to favor the establishment of private educational institutions. In determining qualifications for tax exemption under article 9, section 1 the Minnesota Supreme Court has also demanded evidence of the accomplishment of public purposes and has elaborated upon the requirements for meeting this test in the area of education. It is imperative that the institution be a reasonable substitute for a public school in offering comparable subjects which are taught in such a manner as to allow a student to change school systems without losing any credit for courses taken.


Many of the state courts have interpreted their state constitutional provisions to allow indirect or incidental aid. The tax credit plan attempts to reach this result in two ways. By granting aid to the parents rather than the school itself the legislature

244. Arguably a tax credit is not even covered by Minn. Const. art. 4, § 33 or art. 9, § 1, since it is not "public taxation" which is "levied and collected." But the public purpose doctrine has been given wide application to cover expenditures, Port Authority v. Fisher, 269 Minn. 276, 294, 132 N.W.2d 183, 195-96 (1964), and in one state exemptions have even been labelled as equivalent to expenditures. Snyder v. Town of Newtown, 147 Conn. 374, 386, 161 A.2d 770, 776 (1960).

245. Visina v. Freeman, 252 Minn. 177, 184, 89 N.W.2d 635, 643 (1958).


248. Id.

249. Id. at 557-59, 83 N.W.2d at 246-47.
attempted to avoid any direct relationships with religious institutions and any possible "support" of religion. Also, the language used in Walz was utilized to show indirectness in the refraining from tax collection as opposed to direct payments. While it is true that the Americans United decision implied that the child benefit theory might be accepted as a rational test it cannot be ignored that the tax credit is associated with the heart of educational instruction, an area into which the Minnesota Supreme Court has suggested that a statutory program cannot constitutionally venture. The more recent decisions from various other state courts which have interpreted constitutional provisions similar to article 8, section 2 and article 1, section 16 also generally reject any benefits directly related to tuition and teachers' salaries, although textbook allowances usually are approved. The older ward cases allowing state aid on the basis of such theories as the value received doctrine, while not to be ignored completely, must be discounted in light of the influential subsequent United States Supreme Court decisions. As for "public purpose" contentions under article 4, section 33 and article 9, section 1, arguably the parochial schools serve to benefit the community by providing educational opportunities, while at the same time relieving the state of some of its educational burden. As was stated in Everson: "It is much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose." But the private gains received by the parochial schools, which must be recognized as a consequence of the Minnesota Supreme Court's tendency to see permeation as inevitable, should not be ignored unless such benefits can be labeled incidental. Also, it is possible to argue that the student's choice of another educational system was a voluntary one, and the direct educational costs are for him to assume.

V. CONCLUSION

The constitutionality of the Minnesota tax credit plan is a grave question. This is true to an even greater extent under the Minnesota constitution than under the United States Constitution since this state, like many others, has attempted to formulate standards more rigorous than exist at the federal level. Both the technical means of implementing the program and

250. But see note 137 supra.
251. 330 U.S. 1, 7 (1947).
the program itself are subject to constitutional attack. The tendency of the Supreme Court and the state courts has been to realize the growing economic crisis which revolves around the school systems and yet to be hesitant in responding with aid of even minor proportions when dangerous church-state interrelationships exist. It is more likely than not that the Minnesota tax credit scheme will eventually be held unconstitutional.