Taxation: Liberal Standard Proposed for Deducting Charitable Contributions to Religious Schools

Minn. L. Rev. Editorial Board

Follow this and additional works at: https://scholarship.law.umn.edu/mlr

Part of the Law Commons

Recommended Citation
https://scholarship.law.umn.edu/mlr/3094
Taxation: Liberal Standard Proposed for Deducting Charitable Contributions to Religious Schools

Plaintiff taxpayer attempted to deduct the $2241 he paid to a Talmud Torah school "in consideration of" pre-Bar Mitzvah training for his three children. The school did not absolutely require the payment; the United Jewish Fund subsidized tuition for children whose parents were unable to pay. The Minnesota tax court allowed the deduction, finding that the school provided only religious educational services, indistinguishable from other services normally provided by a church or synagogue to its members. Because a general donation by a member who receives such services has uniformly been held tax

---

1. The Minnesota income tax statute refers to the subtraction for a qualifying expenditure as a credit against taxable income. MN. STAT. § 290.21(1) (1976). In response to this statutory terminology, the Minnesota supreme court said, "Although the statute actually uses the language 'credits' against 'taxable net income,' in order to avoid confusion with 'tax credits' or credits against tax liability, this opinion refers to a credit against taxable net income as a deduction." Gotlieb v. Commissioner of Taxation, 245 N.W.2d 244, 245 n.2 (Minn. 1976). This Comment will follow the same usage.

2. MN. STAT. § 290.21 (1976). The relevant portion of the statute reads:

Subdivision 1. The taxes imposed by this chapter shall be on or measured by, as the case may be, the taxable net income less the following credits. . . .

Subd. 3. An amount for contribution or gifts made within the taxable year:

(b) to or for the use of any community chest, corporation, organization, trust, fund, association, or foundation located in and carrying on substantially all of its activities within the state, organized and operating exclusively for religious, charitable, public cemetery, scientific, literary, artistic, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual.

3. Gotlieb v. Commissioner of Taxation, 245 N.W.2d 244, 245 (Minn. 1976). The taxpayer stipulated that his payment was "in consideration of" the training.

4. The school sent letters to parents telling them the cost of the education. Statements were then sent to the parents unless they requested an interview to explain that they were unable or unwilling to make a payment.
deductible, the court ruled that the form of the "contribution" as tuition did not call for different treatment. The Supreme Court of Minnesota reversed, holding that any payment made "in consideration of" educational services could not be a gift within the meaning of the statute.

Five of the nine justices, however, joined in a concurring opinion which stated that a deduction for voluntary payments to a school providing only religious educational services should be allowed if the payments were nonrefundable and created no legally enforceable obligation in the organization. Gotlieb v. Commissioner of Taxation, 245 N.W.2d 244, 247 (Minn. 1976) (Rogosheske, J., concurring). Because this concurrence by a majority of the court proposed so unusual a test for deductibility, this Comment will analyze the several problems inherent in that test.

It is well settled that a payment made for legal consideration is not a charitable contribution or gift. Where, however, a payment is not explicitly acknowledged to be "in consideration of,"

5. Gotlieb v. Commissioner of Taxation, MINN. STATE TAX REP. (CCH) ¶ 200-712 (1975), rev'd, 245 N.W.2d 244 (Minn. 1976).

6. In this context the term "voluntary" means that any education received by the taxpayer's children would not be conditioned on his payment.

7. Although "nonrefundable" seems synonymous with "no legally enforceable obligation," the concurrence apparently included the additional requirement out of an abundance of caution, in order to cover situations in which a taxpayer might claim that the donee school had no legally enforceable obligation to provide educational services, but where the school nonetheless had a history of refunding the payment upon the occurrence of a certain contingency, for example, when a taxpayer's child was expelled. Thus the test could be construed to mean that a deduction for voluntary payments to a school that provides only religious educational services and has never refunded such payments should be allowed if the payments create no legally enforceable obligation in the organization.

8. Had Gotlieb not stipulated that his payment was "in consideration of" the educational service rendered by the Talmud Torah school, the deduction probably would have been allowed. See 245 N.W.2d at 247. Although the concurrence limited its test to "payments to and for the use of a Talmud Torah school," id., the most reasonable interpretation of the opinion is not that the court intended generally to distinguish other types of religious educational services, but rather that it was addressing the particular facts of Gotlieb.

9. Such a payment is not a gift at common law, see, e.g., Roske v. Ilykanyics, 232 Minn. 383, 45 N.W.2d 769 (1951); Suske v. Struka, 229 Minn. 409, 39 N.W.2d 745 (1949), nor for purposes of the federal charitable contribution deduction statute, see, e.g., Allis-Chalmers Mfg. Co. v. United States, 200 F. Supp. 91 (E.D. Wis. 1961); Willis D. Wood, 39 T.C. 1 (1962).
but the taxpayer nonetheless appears to have received some benefit from the recipient organization, courts have examined the facts surrounding the "contribution" to determine whether it is an allowable deduction under section 170 of the Internal Revenue Code. In *DeJong v. Commissioner*, for example, taxpayers claimed as a charitable deduction the amount paid to a school run by a nonprofit Christian society. The tax court held that $400 of the amount claimed—the stipulated cost of educating the taxpayer's two children who attended the school—was in the nature of tuition paid for educational services and therefore a nondeductible family expense. The Ninth Circuit, relying on the definition of "gift" formulated by the United States Supreme Court in *Commissioner v. Duberstein*, affirmed, stating:

The value of a gift may be excluded from gross income only if the gift proceeds from a "detached and disinterested generosity" or "out of affection, admiration, charity or like impulses" and must be included if the claimed gift proceeds primarily from "the constraining force of any moral or legal duty or from the incentive of anticipated benefit of an economic nature." We must conclude that such criteria are clearly applicable to a charitable deduction under § 170.

10. Since the transaction contemplated by the phrase "contribution or gifts" in the Minnesota statute is the same as that in section 170(c) of the Internal Revenue Code of 1954, and since there were no Minnesota cases interpreting that language, the Gotlieb court recognized the applicability of federal decisions to state law, 245 N.W.2d at 246. The federal statutory terms "gift" and "contribution" have been held to be synonymous. Channing v. United States, 4 F. Supp. 33 (D. Mass.), aff'd, 67 F.2d 986 (1st Cir. 1933), cert. denied, 291 U.S. 686 (1934).

11. 309 F.2d 373 (9th Cir. 1962).

12. Harold DeJong, 36 T.C. 896, aff'd, 309 F.2d 373 (9th Cir. 1962). A "personal, living or family expense" such as tuition is expressly not deductible under both the federal and state statutes. I.R.C. § 262; Minn. Stat. § 290.10 (1) (1976). Thus, when a taxpayer makes a payment to a qualified charitable organization expecting and receiving benefit in return, see notes 13-17 infra and accompanying text, the courts hold that the payment in substance is more like an "expense" than a "gift." It is likely that Congress in enacting the charitable contribution deduction statute, War Revenue Act of 1917, ch. 63, § 1201 (2), 40 Stat. 330, as an incentive to charitable giving, see 55 Cong. Rec. 6728 (remarks of Senator Hollis), was assuming that a gift was by definition a transfer for which there was no other economic incentive.


14. DeJong v. Commissioner, 309 F.2d 373, 379 (9th Cir. 1962). The following cases have followed the Duberstein-DeJong test: Winters v. Commissioner, 468 F.2d 778 (2d Cir. 1972); Karl D. Pettit, 61 T.C. 634 (1974); James Summers, 43 T.C.M. (P-H) ¶ 74,162 (1974); Charles O. Grinslade, 59 T.C. 566 (1973); Eugene G. Feistman, 39 T.C.M. (CCH) 550 (1971); Donald W. Fausner, 55 T.C. 620 (1971); Harold E. Wolfe, 54 T.C. 1707 (1970); Edward A. Murphy, 54 T.C. 249 (1970); John J.L.
In *Winters v. Commissioner,*\(^{15}\) the Second Circuit, although phrasing the test differently, applied the same principle. The court held that a voluntary payment to a parochial school was not a gift under the tax statute because "induced in substantial part" by anticipation of economic gain.\(^{16}\) Thus, under the prevailing interpretation of the federal charitable deduction provision, whether a payment is a gift depends on the taxpayer's expectation as indicated by the circumstances of the transaction. The task of the fact finder is to determine "what the basic reason for the taxpayer's conduct was in fact—the dominant reason that explains his action in making the transfer."\(^{17}\)


15. 468 F.2d 778 (2d Cir. 1972).

16. *Id.* at 781. The court characterized *DeJong* as holding that the taxpayer's "contributions were induced in substantial part by the benefits which the parents anticipated from the enrollment of their children." *Id.* (emphasis added). This formulation seems to express most clearly the basic inquiry under the subjective test—whether the anticipation of benefit was an important factor in a taxpayer's decision to make a payment in the first instance or his decision concerning the amount of the payment. Under the "substantial inducement" qualification, a deduction would be allowed where it was found that the "anticipation of benefit" was such an insignificant motivating factor that the taxpayer would have made the same payment in any case.

The Commissioner of Internal Revenue recently has begun to phrase the standard in terms of the taxpayer's "reasonable expectation" of economic benefit rather than actual anticipation. Rev. Rul. 232, 1976-1 C.B. 105 (emphasis added); Rev. Rul. 506, 1972-2 C.B. 106. No court has adopted the Commissioner's version of the standard.


The First Circuit, in *Oppewal v. Commissioner,* 468 F.2d 1000 (1st Cir. 1972), adopted a different approach, stating that payments to qualifying organizations are not deductible "if to any substantial extent, offset" by the value of services given in return. *Id.* at 1002. The "substantially offset" standard was offered as a remedy to the purported problems in the "subjective" *Duberstein-DeJong* rule. The *Oppewal* court, following *Crosby Valve & Gage Co. v. Commissioner,* 380 F.2d 146 (1st Cir.), *cert. denied,* 389 U.S. 976 (1967), maintained that if the subjective test literally required an attitude of detached and disinterested generosity or motives of affection, respect, or admiration, then such "bad" or indifferent motives for making a contribution as a desire for community goodwill, or to gain prestige, avoid taxes, or salve the conscience could defeat a deduction that otherwise would qualify. *See also Singer Co. v. United States,* 449 F.2d 413, 421-23 (Ct. Cl. 1971); *Comment, Disinterested Generosity: An Emerging Criteria of Deductibility Under Section 170,* 1968 Utah L. Rev. 475, 478.

That contention misrepresents the meaning of the so-called subjective standard as interpreted by the courts. It is not a mind reading test. As stated by the Ninth Circuit:

The inquiry into motive and purpose here does more than probe the subjective attitude of the donors and the extent to
A standard that focuses on the recipient, allowing a deduction regardless of the taxpayer's anticipation of benefit so long as the organization incurs no legally enforceable obligation to render services in return, has never been clearly approved by any court. There is, however, some support for such a rule. In which public spirited and charitable benevolence prompted their action. The inquiry serves to expose the true nature of the transaction: that, as the jury found, the 'gift'... was in expectation of the receipt of certain specific direct economic benefits within the power of the recipient to bestow directly or indirectly, which otherwise might not be forthcoming.

Stubbs v. United States, 428 F.2d 885, 887 (9th Cir. 1970), cert. denied, 400 U.S. 1009 (1971). See also Sedam v. United States, 518 F.2d 242 (7th Cir. 1975).

The most reasonable interpretation of the "subjective" standard, borne out by the cases, is that detached and disinterested generosity means the absence of any legal, moral, or economic reason for the transfer. For instance, in three cases citing the detached and disinterested generosity language where the court disallowed the deduction, the taxpayer anticipated educational services for his children in return for payment, Winters v. Commissioner, 468 F.2d 778 (2d Cir. 1972); DeJong v. Commissioner, 309 F.2d 373 (9th Cir. 1962); Donald W. Fausner, 55 T.C. 620 (1971). See also Harold E. Wolfe, 54 T.C. 1707 (1970) (deduction disallowed where taxpayer transfers his interest in a water and sewer system to a village in anticipation of the undertaking to maintain and operate it); S.M. Howard, 39 T.C. 833 (1963) (deduction disallowed where taxpayer anticipates receiving a position on a hospital staff in return for his payment). The opinion by the Minnesota court in Gotlieb correctly interpreted and applied the Duberstein-DeJong rule. "The antithesis of payments which proceed from a detached and disinterested generosity is payments made by a taxpayer in consideration of economic value flowing back to him." 245 N.W.2d at 246.

The fact-bound, essentially objective nature of the standard was illustrated in Duberstein itself where the Court allocated to the trier of fact the primary responsibility to deal with "[t]he non-technical nature of the statutory standard, the close relationship of it to the data of practical human experience, and the multiplicity of relevant factual elements." 363 U.S. at 289. Thus, where the fact finder determines that the taxpayer's payment is "substantially offset" by an economic benefit from the donee, it is not unreasonable to infer that the taxpayer's payment was substantially induced by his "anticipation of the benefit." Since actual receipt of economic benefit is the key element from which motive has been inferred, the deduction is likely to be equally available under either the subjective or objective test.

Although the results in most cases are unlikely to differ under either the subjective or objective test, in certain cases the verbal formulation may make a difference. Assume, for example, that a taxpayer set up a foundation to make scholarship grants through a board of trustees, and a scholarship was awarded to the taxpayer's child on the usual merit criteria. On these facts, because the taxpayer's payment to the foundation was offset in part by a benefit received, the objective test would require that the deduction be reduced by the amount of the scholarship. Under the subjective test, on the other hand, the facts support a finding that anticipation of the benefit to his child was not a substantial inducement to the taxpayer to make the payment. Therefore,
Wardwell's Estate v. Commissioner, the taxpayer claimed a deduction based on the amount she pledged to endow a room in a rest home before she entered that institution. The tax court disallowed the deduction, holding that her final payment under the pledge, made the day before she entered the home, was in anticipation of preferential admission and a reduced room rate. The Eighth Circuit reversed, but the basis of the decision is unclear. The court first appeared to find that the taxpayer did not anticipate or receive benefit in return for her contribution, but then went beyond this narrow factual holding to declare:

Under the facts above stated, to hold that the room endowment payment made by Mrs. Wardwell was from "motive" and "expectation" of a beneficial nature, is to "confound 'motive' with (legal) 'consideration' and 'expectation' with 'legal rights'—and—embodies tests for the recognition of charitable gifts" which is not "supported by the Court's own findings of fact."

the donor's deduction for his payment to the foundation should be allowed without reduction by the amount of the scholarship. See Edward N. Chase, 9 B.T.A.M.(P-H) 140, 142 (1940) (deduction allowed when taxpayer's nephew received the scholarship).

It would be a rare case in which a deduction would be disallowed because the trier of fact found "anticipation" without finding actual benefit. Because of the difficulties of proving the anticipation of a benefit that was never received, the Commissioner of Internal Revenue would be unlikely to challenge a deduction in such a case. But at least one court using a subjective test has left open this possibility:

Taxpayers complain that in fact the dedication [of a portion of their commercial property for a public road] has not increased the value of their property; that the allegedly anticipated economic benefits have failed to materialize, and that the record makes this clear. This, however, is not the test. Taxpayer's subsequent disappointment in the ultimate monetary value of the benefits sought and received cannot affect the situation.

Stubbs v. United States, 428 F.2d 885, 887 (9th Cir. 1970), cert. denied, 400 U.S. 1009 (1971) (deduction denied where court found both actual benefit and anticipation of benefit).

18. 301 F.2d 632 (8th Cir. 1962).

19. Wardwell's Estate v. Commissioner, 35 T.C. 443 (1960), rev'd, 301 F.2d 632 (8th Cir. 1962). While a resident at the home, Mrs. Wardwell paid the standard rate for care and maintenance, plus extra charges for infirmary care. Unlike those who did not endow a room, however, she did not pay $30 a month to the home's building fund. 301 F.2d at 637. Those residents who could not afford the payment to the building fund were not required to pay it.

20. The tax court's findings of fact were overturned as clearly erroneous on the grounds that (1) documents accompanying the transfer indicated that the taxpayer did not execute the pledge in anticipation of preferential admission; and (2) because she paid the same charge as other patients for care and maintenance, it was incorrect to hold that she "benefitted" from a reduced room rate. 301 F.2d at 636, 638.

21. Id. at 638 (quoting Wardwell's Estate v. Commissioner, 35
The cited language, although confusing, implies that, contrary to the Duberstein-DeJong rule, expectations are irrelevant if the parties do not exchange legal consideration, a position that has not been seriously considered since. In DeJong, the Ninth Circuit stated, without elaboration, that Wardwell was "inapposite" to the issues in dispute there. The Commissioner of Internal Revenue has also unambiguously disapproved the implications of Wardwell's "legal rights" language.

The majority opinion in Gotlieb v. Commissioner of Taxation adopted the Duberstein-DeJong standard, concluding that a payment flatly stipulated to be "in consideration of" religious training could not qualify as a charitable contribution. The taxpayer clearly expected and received benefit equal in value to the payments.

The antithesis of payments which proceed from a detached and disinterested generosity is payments made by a taxpayer in consideration of economic value flowing back to him. When a taxpayer gives to a qualifying charitable institution, to the extent his payment is a gift he retains no legally enforceable right to demand value in return. In the case at bar it was stipulated that the payments were made "in consideration of" the training provided by the Talmud Torah School. It follows that if the school had accepted the taxpayer's payments on behalf of his children and then refused to provide services to those children, the taxpayer could compel a refund of his money. This is not a characteristic of a contribution or gift as contemplated by Minn.St. 290.21, subd. 3(b).


22. 309 F.2d at 379.
23. Although finding that in Wardwell "there was no direct showing . . . that such payment was required to procure [taxpayer's] admission then or that the home thereafter charged and collected less for her regular care and maintenance than it would have otherwise charged her," Rev. Rul. 506, 1972-2 C.B. 108, the Commissioner of Internal Revenue announced his disagreement with Wardwell "insofar as it can be construed as holding that nothing short of a legally enforceable right to obtain a return benefit will preclude a given transfer from being a gift under section 170 of the Code." Id.

There is some indication that Congress also rejected the rule that "expectations" are not to be considered in defining a gift. A congressional report on the 1954 Internal Revenue Code defined "gifts" as "those contributions which are made with no expectation of a financial return commensurate with the amount of the gift." H.R. REP. No. 1337, 83d Cong., 2d Sess. A44 (1954); S. REP. No. 1622, 83d Cong., 2d Sess. 196 (1954) (discussing distinction between business and charitable contribution deductions).

24. 245 N.W.2d at 246 (footnote omitted).
The concurring opinion seized on the language quoted above and turned it around, arguing that a deduction should be allowed where "it can be shown that the payment is not refundable, the school undertakes no legally enforceable obligation to accept and instruct the child, and the educational service provided by the school is purely religious in character." 25

Under this standard, if the trier of fact concluded that the donee undertook no legally enforceable obligation, it would be unnecessary to examine the circumstances of the transaction to determine whether the primary purpose for the transfer was nonetheless the taxpayer's anticipation of economic benefit. 26 Thus, the concurring opinion, without citation of authority or reasoned argument, approved a standard for charitable deductions that is contrary to, and more liberal than, the accepted interpretation of section 170.

The concurrence also appeared to limit the application of its more liberal standard to cases in which the payment was made to an organization providing purely religious educational services. This raises serious questions of improper statutory interpretation and violation of constitutional principles.

Like the federal statute, Minnesota's charitable contribution provision qualifies organizations to receive tax deductible contributions when they serve, inter alia, "religious, charitable, public cemetery, scientific, literary, artistic, or educational" 27 purposes. This list of qualifying organizations provides no reasonable basis for a court to distinguish among them, disallowing, for example, a deduction for a "contribution" made to a secular school qualified under the statute as an educational organization, while allowing a deduction for a "contribution" made under the same circumstances to a Talmud Torah school operating exclusively for religious purposes. The statutory language clearly indicates that the deductibility of contributions should be governed by a uniform standard. Moreover, special treatment for payments

25. Id. at 247 (Rogosheske, J., concurring).
26. Under a "legally enforceable obligation" standard the deductions claimed and disallowed in DeJong, Oppewal, and Winters would have been allowable. In each case the tuition payments were voluntary, and the taxpayers' children could have attended school even had no payments been made. Similarly, there is no suggestion in those cases that the parents would have been legally entitled to a refund had their children failed to receive the education. See Oppewal v. Commissioner, 468 F.2d 1000 (1st Cir. 1972); Winters v. Commissioner, 468 F.2d 778 (2d Cir. 1972); DeJong v. Commissioner, 309 F.2d 373 (9th Cir. 1962).
made to organizations providing purely religious educational services would violate the first amendment prohibition against the establishment of religion. The establishment clause requires that government activity have a secular purpose. It must not have the "primary effect" of advancing or inhibiting religion and its administration must not involve excessive governmental entanglement with religion.

Allowing tax exemptions for religious organizations on the same footing as other nonprofit organizations is constitutional under this standard. In Walz v. Tax Commission the United States Supreme Court stated that to strike down such statutes would increase government entanglement with religion, possibly involving religious organizations in tax valuation of their property, tax liens, and tax foreclosures. In addition, the Court


29. See Epperson v. Arkansas, 393 U.S. 97 (1968); McGowan v. Maryland, 366 U.S. 420 (1961). In Epperson the Court struck down an Arkansas statute that made teaching Darwin's theory of evolution in public schools unlawful because it was clear that the campaign to secure adoption of the statute was religiously motivated, 393 U.S. at 108 n.16, and the state had not given any secular rationale for the statute, id. at 107.


31. See Meek v. Pittenger, 421 U.S. 349 (1975); Lemon v. Kurtzman, 403 U.S. 602 (1971); Walz v. Tax Comm'n, 397 U.S. 664 (1970). Generally this three part test is applied by asking each question in order. See Roeber v. Board of Pub. Works, 426 U.S. 736 (1976); Meek v. Pittenger, 421 U.S. 349 (1975); Sloan v. Lemon, 413 U.S. 825 (1973); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973). Thus if a nonsecular legislative purpose is found, there will be no need to proceed to an analysis of "effect" or "entanglement." Legislative statements of secular purpose, however, are usually taken at face value. See Meek v. Pittenger, 421 U.S. at 363; Sloan v. Lemon, 413 U.S. at 829-30; Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. at 773-74. Most of the recent cases have been decided on the presence or absence of the provision's "primary effect" in advancing or inhibiting religion, or the extent to which the statutory provision will foster excessive government entanglement with religion. See generally Note, Establishment Clause Analysis of Legislative and Administrative Aid to Religion, 74 Colum. L. Rev. 1175, 1180-81 (1974); Comment, Constitutional Law: Public Aid to Parochial Schools Held Unconstitutional, 58 Minn. L. Rev. 637 (1974).


33. Id. at 674-76. In determining whether excessive government involvement existed in Walz, the Court noted: The test is inescapably one of degree. Either course, taxation of churches or exemption, occasions some degree of involvement
pointed out that the tax exemption provision benefits a large number of secular nonprofit organizations, and thus does not have the "primary effect" of either advancing or inhibiting religion.\textsuperscript{34} The Court also noted that it was not insignificant that the exemption had a long history.\textsuperscript{35}

In contrast, a system of tax credits for tuition paid to nonpublic schools does not meet the constitutional test. In \textit{Committee for Public Education \& Religious Liberty v. Nyquist},\textsuperscript{36} the Supreme Court struck down a New York tax credit provision,\textsuperscript{37} holding that since the credits did not apply to a broad class of organizations, but only to nonpublic schools, the majority of which are sectarian, their primary effect was the advancement of religion.\textsuperscript{38} The Court also pointed out that, unlike tax exemptions for religious organizations themselves, the system of tax credits in \textit{Nyquist} increased rather than minimized government entanglement with religion.\textsuperscript{39} Finally, the Court noted that, unlike the

\begin{quote}
with religion. Elimination of exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes.
\end{quote}


The Court also noted that additional church-state involvement would be threatened by church tax support of government. The Court stated: "We cannot ignore the instances in history when church support of government led to the kind of involvement we seek to avoid." 397 U.S. at 675.

34. \textit{Id.} at 673. See also \textit{id.} at 696-97 (Harlan, J., concurring); \textit{Committee for Pub. Educ. \& Religious Liberty v. Nyquist}, 413 U.S. 756, 794-95 (1973) ; Comment, supra note 31, at 666.

35. 397 U.S. at 677-80. The Court noted that although "[i]t is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use," the continued allowance of the tax exemption had not "given the remotest sign of leading to an established church or religion." \textit{Id.} at 678.


37. 1972 N.Y. Laws ch. 414. The statute provided for state aid for "maintenance and repair" of facilities at nonpublic schools, reimbursement of up to $100 or 50% of tuition to low-income parents of children attending the schools, and a tax benefit which functionally resembled a tax "credit" to higher income parents.

38. 413 U.S. at 793-94. The Court found that the purposes of the statute as stated by the New York legislature, to preserve "a healthy and safe educational environment for all of its school children," to promote "pluralism and diversity among its public and nonpublic schools," and to help relieve an overburdened public school system were sufficiently secular to satisfy the first part of the establishment clause test. \textit{Id.} at 773.

39. \textit{Id.} at 793. The finding of entanglement in \textit{Nyquist} seemed to be a departure from prior case law. The tax credit scheme in \textit{Nyquist}
tax exemption statute at issue in *Walz*, the statute in *Nyquist* was only recently enacted. 40

Measuring the *Gotlieb* concurrence's test of deductibility against the established criteria of constitutionality leads inevitably to the conclusion that the test is impermissible. It is difficult to imagine, and the concurrence did not suggest, a secular purpose for applying a more liberal standard of deductibility to payments made for Talmud Torah tuition but not to payments made for parochial school tuition, 41 or to other qualified reci-

---

40. The Court admitted, however, that "historical acceptance without more would not alone have sufficed." 413 U.S. at 792. See also note 35 supra.

41. This discussion assumes the constitutionality of tax deductions for gifts made to religious organizations under the charitable contribution deduction statute. For the relevant text of the Minnesota statute, see note 2 supra. This assumption has already been made by at least three Supreme Court justices, see Committee for Pub. Educ. & Religious Liberty v. *Nyquist*, 413 U.S. 756, 807 (1973) (Rehnquist, J., dissenting in part, joined by Burger, C.J., and White, J.). Like the tax exemption statute upheld in *Walz*, the federal charitable contribution deduction statute has a long history, having been enacted shortly after the sixteenth amendment was ratified. *War Revenue Act of 1917*, ch. 63, § 1201(2), 40 Stat. 330. Minnesota's statute, which is virtually identical to the federal statute, was enacted in 1933, 1933 Minn. Laws ch. 405, § 27(f), the same year in which the legislature first imposed a state income tax. In addition, like the statute upheld in *Walz*, the charitable contribution deduction provisions are broad and include many kinds of organizations. Elimination of these tax deductions for gifts to religious organizations, however, would not result in the excessive government entanglement with religion, such as tax valuation of church property, tax liens, and tax foreclosures, that the *Walz* Court foresaw as the result of eliminating tax exemptions to churches.

On the other hand, the tax benefit statute struck down in *Nyquist*, see note 37 supra, can be distinguished in that, unlike the charitable
pients of tax deductible contributions. Moreover, even assuming that a valid secular justification for the limitation could be offered, the concurrence's test is nonetheless analytically indistinguishable from the tax credits held unconstitutional in *Nyquist.* First, the *Gotlieb* test would only affect the deductibility of transfers made to a narrow class of recipients distinguished by their purely religious character. Thus, the requirement would more clearly have the effect of advancing religion than the statute in *Nyquist,* which applied to tuition payments made to any nonpublic school, a few of which offered purely secular education. Application of the test would also appear to produce state involvement in religion to the same extent that the tax benefit statute in *Nyquist* did.42 Finally, the judicial interpretation is recent, a factor that appears to militate against constitutionality in establishment clause cases.43 Thus, insofar as the *Gotlieb* concurrence implies that a different test will be applied to payments to organizations providing purely religious educational services than to payments to other qualified recipients of tax deductible contributions, such an application would appear to violate the establishment clause. It would have no clear secular purpose, and the primary effect of its application in advancing religion appears indistinguishable from the primary effect of the statute struck down in *Nyquist.*

Perhaps the overriding concern of the justices concurring in *Gotlieb*44 was the seeming unfairness of allowing deductions for the full amount of contributions made to churches where the taxpayer's children attend Sunday school, with no reduction for the reasonable value of the educational services received, while denying comparable deductions to parents of Talmud Torah students.45 The rule proposed by the *Gotlieb* concurrence was contribution deduction statute, it was recently enacted, and applied only to nonpublic schools, most of which are sectarian.

Thus, although the constitutionality of tax deductions for gifts to religious organizations has not been determined expressly, see Committee for Pub. Educ. & Religious Liberty v. *Nyquist,* 413 U.S. 756, 780 n.49 (1973), the better view is that *Walz* controls, and the deductions are constitutional.

42. See note 39 supra.
43. See notes 35 & 40 supra.
44. The majority opinion also evinced this concern. 245 N.W.2d at 246-47.
45. See id. at 247. In view of the Commissioner's express sanction of the deduction for religious contributions in the form of pew rents or periodic dues paid into the general fund of a church, Rev. Rul. 47, 1970-1 C.B. 49, it is unlikely that courts will ever disallow deductions for dona-
undoubtedly an attempt to ensure the same tax treatment for both classes of payments. As a matter of tax law, however, there are fundamental differences between ordinary Sunday schools and Talmud Torah schools. Under the Duberstein-DeJong standard, it is doubtful that the anticipation of a child’s Sunday school education would, as a factual matter, be found to be “a substantial inducement" to a parent for his payment to a church’s general fund. A parent would be unlikely to increase his payments to the church or begin to make payments simply because he had a child in Sunday school. The payments to the Talmud Torah school, however, apparently are paid only when the parent has a child attending the school.

In this respect, payments to the Talmud Torah school are more akin to tuition paid to parochial schools or payments made to a church or synagogue in direct exchange for such services as a wedding or a Bas Mitzvah, payments for which deductions have been denied. Conversely, if the Talmud Torah were financed from the general donations made to synagogues, rather than by assessing tuition payments directly from parents of students, the parents could probably deduct the full amount of their contributions. Such a solution, of course, looks suspiciously like

sections to the extent that they are offset by the reasonable value of Sunday school.

46. The only court that has considered why deductions for payments to churches are not disallowed, even though the taxpayer apparently anticipates various services in return, attempted to resolve the dilemma by distinguishing “incidental” from “direct” benefits received by the taxpayer. Thus, a deduction would be allowed for payments to a church because the “services and other benefits” received by the taxpayer, even if anticipated, were not “direct.” Edward A. Murphy, 54 T.C. 249, 253 (1970).

The court in Murphy would allow the deduction when the taxpayer anticipated a benefit that was “merely incidental to making the organization function according to its charitable purpose” and consisted only of “the satisfaction of participating in the furtherance of its charitable or religious cause.” Id. at 253. The standard suggested by the Service and adopted by most courts, however, is whether the benefit is “incidental” “in comparison to the benefits accruing to the public at large.” Rev. Rul. 446, 1967-2 C.B. 119, 120. See, e.g., United States v. Transamerica Corp., 392 F.2d 522, 524 (9th Cir. 1968); Singer Co. v. United States, 449 F.2d 413, 423 (Ct. Cl. 1971); Harold E. Wolfe, 54 T.C. 1707 (1970).

47. See note 16 supra.

48. See Oppewal v. Commissioner, 468 F.2d 1000 (1st Cir. 1972); Winters v. Commissioner, 468 F.2d 778 (2d Cir. 1972); DeJong v. Commissioner, 309 F.2d 373 (9th Cir. 1962).


a distinction of form rather than of substance. Yet as the Minnesota court explained in Gotlieb,

If a taxpayer's remittances to a qualifying organization are used for the same purpose in either case, it may seem at first an exaltation of form over substance to allow a deduction for those payments which are gifts or contributions, yet allow no deduction for those payments which are not gifts or contributions. As is so often necessary in tax laws, however, Minn. St. 290.21 gives special significance to the form of the payment. 51

Thus, although the rule proposed by the concurrence was a well-intentioned attempt to make the charitable deduction provisions of the Minnesota statute appear to operate more fairly, the results under such a standard would be unacceptable as a matter of tax law, statutory interpretation, or constitutional principle. It should not be viewed as authoritative in any future cases arising under Minnesota Statutes section 290.21.

---

51. 245 N.W.2d at 247 (emphasis added).