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Donald E. Boles

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DONALD E. BOLES*

Seldom in the history of American law and politics has there been more speculation, discussion and controversy over the composition and philosophy of the Supreme Court than we have seen during the first three years of the Nixon Administration. Because of his theory and method of selecting Justices and his unprecedented opportunity in modern times as a first-term president to fill four vacancies on the Court, some think President Nixon may violate the separation of powers by attempting to subordinate the Court to the Executive Branch. Although the President may find, as did some of his predecessors, that a man's apparent legal philosophy before ascending to the Supreme Court is not automatically retained after he is on the bench, he must be equally aware that a great many Presidents did "guess" right in their selection of a man and his philosophy.

One of the most vexatious problem areas for legislative and judicial policy makers since World War II has concerned a variety of issues in the field of church-state relations involving the First Amendment, especially as they affect various programs of governmental aid to parochial schools. Indeed some of the sharpest attacks on the Warren Court were directed toward its rulings in this field and related programs of prayer,[1] Bible reading in the public schools,[2] and other attempts to retain the sanctity of the "Wall of Separation Between Church and State".[3] Many of Mr. Nixon's most prominent supporters were in the forefront of these criticisms. Thus, the attitude of a potential high Court nominee in the field of church-state relations would seem an important factor the President considered.

* Professor of Political Science, Iowa State University.

[1] Engle v. Vitale, 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed. 2d 601 (1962).

[2] School District v. Schempp, 374 U.S. 203, 83 S.Ct. 1960, 10 L.Ed. 2d 844 (1963).

[3] An example of a legislative attack on the results of both *Schempp* and *Engle* was seen on November 8, 1971, when H.R.J. Res. 191—a proposed Constitutional amendment which provided "Nothing contained in this Constitution shall abridge the right of persons lawfully assembled, in any public building which is supported in whole or in part through the expenditure of public funds, to participate in voluntary prayer or meditation"—was voted upon. Although a majority of House Members voted for this, it failed to get the requisite ⅔ majority. 39 C. Q. WEEKLY REP. 2307 (1971).

There is some merit, then, in attempting a reading of the Court's trends since Chief Justice Burger and Justice Blackmun began their tenure. At this writing, it is only the 1970–71 Term that may provide some clues and it is dangerous to attempt any firm conclusions for several reasons. First, of course, the time-span and issues covered are too narrow. Second, the Court is in the middle of a substantial change in personnel and it seems safe to say that a number of years must elapse before it can be seen how extensive are the resulting changes in judicial philosophy. Nonetheless, some striking features of the 1970–71 Term are highlighted by a review of the civil rights and civil liberties decision of the Court.

First of all, the number of cases, involving civil rights and civil liberties issues, eighty-two, was higher than in any preceding year in the last fifteen.[4] It constitutes 55.4 percent of the 148 cases decided with written opinions during the Term. Clearly, Americans are still actively concerned about the preservation of their constitutional rights and at this juncture the Court has not curtailed its consideration of such issues.

A second notable feature of the Term is the fact that for the first time in almost a decade and one-half, the number of decisions favorable to the person asserting a constitutional right dropped below one-half of the total. Such decisions amounted to forty out of a total of eighty-two.

Third, the first two Nixon appointees already on the Court followed an almost identical voting pattern in civil liberties and civil rights cases. Their action revealed a pattern, not too surprisingly, which was markedly more conservative than any of the other members of the court, including those, such as Justice White, who have long been regarded as part of the Court's "conservative wing." This seems to confirm a view generally held that the Nixon appointees are likely to make the Court less receptive to broad interpretations of constitutional freedoms.

A fourth feature of the Term reveals that despite the large number of cases decided there were few substantial changes in the law. For the most part, the Court neither undid pro-libertarian decisions of the past nor did it advance to new ground in this field. The net impact of the first two Nixon appointees has been to halt the trend of the past decade toward enlarging individual rights, but not reverse it.

Of major significance, however, is the fact that in one key area the Court's action last term presented a different picture and this is in the field of church-state relations. There, a recent trend toward narrowing the constitutional guarantees was reversed in one of the most publicized deci-

[4] For a detailed summary of the court's action in this area *see, e.g.,* COMMITTEE ON LAW AND SOCIAL ACTION OF THE AMERICAN JEWISH CONGRESS, THE CIVIL RIGHTS AND CIVIL LIBERTIES DECISIONS OF THE U.S. SUPREME COURT OF THE 1970–71 TERM—A SUMMARY AND ANALYSIS. *See also,* Bartholomew, *The Supreme Court of the U.S. 1970–71,* 24 WESTERN POL. SCI. Q. 687 (1971).

sions during the term, *Lemon v. Kurtzman.*[5] In 1968, the Court in *Board of Education v. Allen*[6] had upheld the use of tax-raised funds to purchase secular textbooks for use in parochial schools. The *Allen* decision was inconsistent with the Court's statements in a host of other cases dating back to 1947, which established that under prohibition against establishment of religion in the First Amendment, "No tax . . . can be levied to support any religious activities or institutions . . .". Then in the 1969–70 Term, in *Walz* v. *Tax Commission,*[7] the Court upheld tax exemption for churches, against the claims that it violated the prohibition against "establishment" of religion.

In the *Lemon* decision, however, the Court firmly rejected the argument that the state may finance the operations of church-affiliated schools by any methods that purport to aid the child rather than the school. This action is generally viewed as blocking attempts to obtain massive state financing of nonpublic schools. Of equal interest is the fact that Chief Justice Burger wrote the Court's opinion in the 8–1 decision, and some might doubt if the newly seated Nixon appointees, Justices Powell and Rehnquist, will bring about a different result should these issues arise again.[8]

Today's Education Establishment

While few would deny that formalized education constitutes a significant section of the social and economic spectrum, many are not aware of the enormity of the American educational enterprise. (See Table I.) In 1971, more than sixty-three million Americans were engaged full-time as students, teachers or administrators in the Nation's educational superstructure. In addition, 137,000 persons made education a time-consuming avocation as trustees of local school systems, state boards of education, or institutions of higher learning. Thus, while opponents from both the right and left political wings may appear to be making short-range political capital by attacking the foundations of the American educational system, they are striking at a formidable force. This, of course, is not to suggest that the educational establishment is or should be above criticism, deserved or otherwise. It is to suggest that politicians and others, when attacking a system of democratic education, do so at considerable long-run political peril.

At present we are dealing with the fundamental relationship of public

[5] 403 U.S. 602 (1971).

[6] 392 U.S. 236 (1968).

[7] 397 U.S. 664 (1970).

[8] *See, e.g.,* THE CIVIL RIGHTS AND CIVIL LIBERTIES DECISIONS OF THE U.S. SUPREME COURT OF THE 1970–71 TERM.

schools to private and parochial schools, not just with the use of the public funds for private schools. Only recently have the realities inherent in these knotty questions been faced by educators, lawyers and policymakers.[9] It is helpful, therefore, to remove the arguments from the sometimes sterile legal arena, so as to include questions involving the very practical economic and social effects of programs designed to provide public funds for education.

TABLE I

The American Educational Establishment 1971–1972[10]

Institutions	
Elementary	
Public	64,539
Non-public (Private and Parochial)	15,340
Secondary	
Public	23,972
Non-public	4,606
Students	
Elementary (k-8 grade)	
Public	32,470,000
Non-public	4,230,000
Secondary	
Public	13,710,000
Non-public	1,440,000
Teachers	
Elementary	
Public	1,136,000
Non-public	172,000
Secondary	
Public	960,000
Non-public	91,000
Cost (in Billions)	
Current Expenditures and Interest in Elementary and Secondary	
Public	43.3
Non-public	4.7
Capital Outlay, Elementary and Secondary	
Public	5.5
Non-public	1.3

[9] *See, e.g.,* address by Herman R. Goldman, Associate Commissioner for Equal Educational the U.S. Office of Education and the National Education Association.

[10] SATURDAY REV., DEC. 18, 1971, at 68. These figures are based on available estimates from Opportunity, U.S. Office of Education, to the Joint Conference of Public and Non-Public School Superintendents in the Nation's Larger Cities, Airlie House, Warrenton, Va., Nov. 15, 1971.

Economics and Parochial Education

There is little question that parochial schools are and have been in financial crisis.[11] However, their difficulties differ little from the financial woes faced by many public school districts in the United States, although the reasons for the problems may be somewhat different. Rejection of school bond proposals as a result of the so-called taxpayers' revolt or drives to restrict and limit cost-of-living increases for public school teachers are merely some of the more obvious financial problems faced by the public schools and certainly affect their operations as much as the absence of public funds would affect the functions of a parochial school.[12]

There is also increased similarity between public and parochial schools with respect to other troubles afflicting education. For example, a Roman Catholic school system was hit by a large-scale strike for the first time in November 1971. More than 700 lay teachers walked off their jobs in the ten-county Archdiocese of New York, which employs 2,800 lay teachers. Thirty teachers who are members of religious orders reportedly supported the strike.[13] Called by the AFT-affiliated Federation of Catholic teachers, the strike was intended to achieve parity in pay for elementary and secondary teachers, where there had been a differential of from $600 to $3,400, and to secure salary increases for all teachers. Top pay for elementary teachers in the system had been $9,600, and for secondary teachers, $13,000. At the same time, the Secondary Teachers Association of the San Francisco Archdiocese, also an affiliate of AFT, was striking for higher pay and other benefits in seven Roman Catholic high schools of San Francisco. Moreover, the American Federation of Teachers has announced that the organization of non-public school staffs is one of its major goals for this year. To help it in this endeavor, the AFT has hired a full-time organizer.[14]

A 1966 survey published by the Notre Dame Press showed parochial schools turning away hundreds for the lack of funds.[15] A follow-up survey in May 1970 brought the forecast that the Church's elementary schools enrolling 2 million, or half the national parochial school total, would close

[11] *See, e.g., Catholic Religious Order Files for Bankruptcy,* THE DES MOINES REG., Nov. 5, 1970, in which the Salvatorian Order, a Roman Catholic religious order, sued for bankruptcy. On October 12, the Supreme Court refused to hear an appeal on the case from a federal district court of Wisconsin.

[12] Nationwide, the rejection rate of school bond issues in 1960 was 20.4%, encompassing some $368 million in programs. In 1969, this had increased to 43.2% and some $2.2 billion. 2 PROGRESSIVE 16 (1972).

Iowa voters rejected 32 out of 49 (65%) school bond issues proposed in 1971; 34 out of 48 (71%) proposed in 1970. This compares with a rejection rate of about 40% in 1969, and of about 30% for 1966–68. THE DES MOINES REG., Jan. 15, 1972.

[13] *See,* PHI DELTA KAPPAN, Jan. 1972, at 337. *See also,* Marge Benjamin, ch. II, at 23–33 (Education Planning Section of the N.Y.C. Planning Commission, 1972).

[14] PHI DELTA KAPPAN, Jan. 1972, at 337.

[15] *Op. cit.* at 337.

in the next six years unless new funds were forthcoming.[16] The National Catholic Education Association forecast more schools closing and this fact is borne out by restriction of parochial school operations in such diverse places as Iowa,[17] the Cincinnati Diocese and elsewhere. It is important to note, however, that a significant number of Roman Catholic school administrators, teachers and people well informed on problems of educational administration are, in many instances, of the opinion that it is to the best interest of the students that, in some of these cases, the schools be closed because of the questionable quality of the education which the particular school may be able to provide.

As one looks at figures compiled from a variety of sources, one rather startling fact emerges concerning the closing or restricting of parochial schools in this country: There have been more schools closed since than before the passage of the Elementary and Secondary Education Act, which has in it a provision which might permit the use of public funds under certain circumstances to parochial and private schools if the state laws and state constitutions will permit. It should be emphasized, of course, that one of the underlying if not direct questions before the Supreme Court, in the cases of *Lemon v. Kurtzman*[18] and *DiCenso* was whether state laws utilizing state funds for parochial schools, probably aided by supplementary funds available because of the permissive language in the Elementary and Secondary Education Act, was in fact, a violation of the First Amendment's Establishment of Religion Clause.

Returning to the point that more parochial schools have closed and more continue to close since the passage of the Elementary and Secondary Education Act, the following figures were presented by a member of the Newark, New Jersey, Archdiocese and Board of Education, at the National Education Society Convention:

1966–67	50	Elementary schools closed;
1967–68	152	Elementary schools closed;
1968–69	225	Elementary schools closed; and
1969–70	301	Elementary and secondary schools have closed or are in the process of closing.

Enrollment in Catholic secondary and elementary schools dropped from 5.6 million in the 1964–65 school year to an estimated 4.86 million in the school year 1969–70—a decline of three-quarters of a million students in only five years.[19] According to a report of the Center of Urban Redevel-

[16] For more recent data of parochial school closing see, *Parochaid,* NATION'S SCHOOLS, Aug. 1971, at 9–11.

[17] THE DES MOINES REG., Oct. 22, 1970, at 16.

[18] 403 U.S. at 602.

[19] Dr. Cordasco, quoting National Educational Association in Christian Science Monitor, Oct. 3, 1970.

opment in Education, there will be no parochial elementary schools left in Brooklyn and Queens, New York, within five years, unless larger financial contributions are forthcoming.[20]

Reactions of Public School Proponents

The economic consequences for taxpayers from either the filtering off of public funds to private schools or enlarging the public system to handle present parochial school enrollments are matters of major debate. One view is that the public schools as now established are inadequate to their own enrollments, let alone adding to their numbers parochial school students from schools that have been closed for financial reasons.[21]

On the other hand, it is argued by organizations such as state associations of school administrators that wherever faced by situations where the parochial schools have closed down, public schools have been able to absorb the students with little or no loss to pupils, staff or administrators. A situation of this nature occurred several years ago in the St. Louis area, where parochial school administrators threatened to flood public schools with their students. With some minor inconvenience, the public schools proved quite capable of handling students from parochial schools. This tactic to pressure the policymakers of the city and state was given up and the students shortly returned to the parochial schools.

A cost-benefit analysis done for the Office of Planning and Programming of the State of Iowa arrived at some findings which have far-reaching implications concerning the necessity of parochaid in that state. The results noted that "[t]he impact on the facilities of additional students from closed non-public schools would be a temporary one and would require additional school construction in only those districts with extremely high, 20% or more, numbers of non-public students. The long-run effect would be absorbed in the natural replacement of schools facilities." [22] The main part of this study dealt with the marginal cost of providing services—primarily transportation, shared time, and auxiliary services—to the non-public students by the public system. The conclusion resulted from the discovery that existing public school facilities to providing these services were underutilized.[23]

Certainly one of the problems which confronts the parochial schools and

[20] N. Y. Times, Apr. 24, 1970.

[21] *See, e.g.,* statement of Dr. Edward R. D'Alessio, Director of the Division of Elementary and Secondary Education, U.S. Catholic Conference before the Subcommittee on Education of the Committee on Labor and Public Welfare of the U.S. Senate, Dec. 2, 1971, at 7.

[22] Edwin L. Hullander, Marginal Cost Analysis of Selected Plans for State Aid to Non-Public Schools (State of Iowa, Office of Planning and Programming, mimeo, Aug. 1971). *See also,* Benjamin study, note 13 *supra,* ch. IV, Catholic schools' financial problems and projections.

[23] *Ibid.*

explains why they are in economic difficulty is the notable decrease in religious teachers who receive only modest stipends and, conversely, the marked increase in the number of lay teachers, in parochial schools, who insist upon larger salaries to meet their living expenses. For example, in 1958, the cost of lay teachers' salaries for the Archdiocese of New York was $1.5 million; by 1971 this had increased to $20.1 million.[24]

As has been noted elsewhere,[25] the Supreme Court has been faced with problems of this nature in a variety of decisions over the years, involving not only parochial and private schools but the public schools as well. The emotional quality of the briefs and of the issues emerging in these cases has seldom been duplicated. Some examples are worth noting.

Flast v. Cohen[26] is of critical importance to an understanding of recent decisions in such cases as *Lemon, DiCenso* and *Tilton.* The significance of *Flast* was fundamental in procedural scope, since it first established that the Court would accept jurisdiction in cases in which the establishment clause of the First Amendment was at issue and in which the litigation, almost by the nature of things, took on the quality of a taxpayer's suit. Prior to that time, in a series of cases, there had emerged the *Frothingham* rule.[27] Under this rule, the Court had held, since the 1920's, that it would not accept taxpayers' suits against the expenditure of federal funds for federally sponsored programs. This had the practical result of making it impossible to attack federal grant-in-aid programs. The *Flast* case makes it clear, at a minimum, that the establishment clause may in fact be litigated and that certain federal programs, such as the Elementary and Secondary Education Act of 1965, are not totally immune from judicial scrutiny or judicial review.

An important earlier case concerning utilization of public funds for parochial schools was the 1968 *Allen* decision,[28] where the Supreme Court upheld a New York law providing public funds for textbooks "loaned" to parochial school pupils. This judgment, the *New York Times* noted, "deepened the already serious inroads that have been made into the vital principles of church-state separation." Needless to say, spokesmen for the financially hard-pressed parochial schools hailed the decision. At least one estimate suggests more than twenty state legislatures have now voted to aid parochial schools by one means or another.[29]

This emotion-riddled question is also a burning political issue. For ex-

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[24] N.Y. Times, Nov. 2, 1971, at 16.

[25] *See,* BOLES, THE BIBLE, RELIGION AND THE PUBLIC SCHOOLS (3rd ed. 1965); and BOLES, THE TWO SWORDS (1967). *See also,* LEO PFEFFER, CHURCH STATE AND FREEDOM (1967). For another view of this point and contiguous matters *see,* MICHAELSEN, PIETY IN THE PUBLIC SCHOOL (1970).

[26] 392 U.S. 83, 88 S.Ct. 1942 (1968).

[27] Frothingham v. Mellon, 262 U.S. 447 (1927).

[28] Board of Education v. Allen, 392 U.S. at 236.

[29] Lemon v. Kurtzman, 403 U.S. at 602.

ample, the Michigan Supreme Court, in October 1970, upheld a statute permitting the use of public funds to parochial schools under the Elementary and Secondary Education Act.[30] However, the State's legislature then scheduled a state-wide referendum for November 3, 1970, on a constitutional amendment seeking to end the controversy over the general principles of public funds for parochial schools. The Amendment fully prohibiting state aid to parochial schools was dramatically approved by Michigan voters in the general election of 1970.[31]

Recent American presidents have been drawn deeply into this controversy. President Kennedy, for example, rejected pleas from fellow Roman Catholics for federal aid, announcing that he and his staff considered it unconstitutional.

Under strong pressure, President Nixon has named a panel of which half are Roman Catholics to examine the parochial school crisis. In September 1971, Auxiliary Bishop William E. McManus of Chicago said that this four-man Presidential Panel on Non-Public Education, of which he is one of the two Roman Catholic members, was considering a federal tax-credit plan aimed at assisting parents of non-public school pupils. Since the decision in *Lemon,* the Panel had been concentrating on programs aimed at assisting students rather than schools themselves, Bishop McManus explained.[32]

At the same time, administrative sources predicted that President Nixon might make recommendations for "new forms" of aid to non-public schools. A study is being conducted by the U.S. Commissioner of Education, Department of Health, Education and Welfare, and is reported again by "administration sources" to have high priority in the wake of President Nixon's pledge in a speech to the Knights of Columbus, "to 'stop the trend' which is closing non-public schools at a rate of one a day . . . and turn it around".[33]

On this subject, Donald E. Morrison, President of the National Education Association commented bitterly: "For the President of the United States to talk about public funds to private schools and the voucher system is the most irresponsible action ever witnessed in this country." [34]

In the United States today, non-public schools are about 87% Roman Catholic, although in some states such as Wisconsin at various times Lutheran schools outnumbered Roman Catholic parochial schools. Absorption of these pupils into the public schools, Mr. Nixon estimates, would cost about $4 billion annually.[35] It should be emphasized that these

[30] Wall Street J., Jan. 22, 1969, at 187; Christian Science Monitor, Oct. 14, 1970.

[31] N.Y. Times, Nov. 5, 1970, at 34, col. 7.

[32] The Witness (Official Newspaper of the Archdiocese of Dubuque), Sep. 2, 1971.

[33] N.Y. Times, Aug. 22, 1971, at 7.

[34] N.Y. Times, Jan. 28, 1971.

[35] Christian Science Monitor, Oct. 5, 1970. The Department of Health, Education and Wel-

are figures which are disputed by a whole host of public school organizations and associations concerned with the preservation of our public school system.[36]

There has been a flurry of studies recently by proponents of parochial schools seeking to show the impact of public school closings and subsequent shifting of their students to the public schools. One of these, done by the New York State Council of Catholic School Superintendents, estimated that the decline in parochial school attendance in New York State between June and September of 1968 added about $29.5 million to public school costs. It went on to state that the three-quarter million children in Catholic schools saved New York State taxpayers about $790 million in operational expense in 1970.[37]

Another study by Dr. Cordasco, who is favorably inclined toward programs utilizing public funds for parochial schools, estimates that Detroit has paid around ninety million dollars in the past four years to accommodate former parochial school pupils in the public school. Historically, he argues, "the impoverished urban Irish Community created a community school system to serve its children and its motivation was political and social," only incidentally religious.[38] "The Catholic Church in America was (and is) in essence, an Irish church, and other Catholic ethnic communities entertained a subordinate relationship to the Irish dominance and power." [39]

There are others who have argued as strenuously that the parochial school system was created in the middle of the Nineteenth Century because of the heavy Protestant emphasis on the public schools through a variety of direct and indirect practices that were taken for granted and followed on a *pro forma* basis.[40]

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fare frequently utilizes this figure, plus an "estimated 5 billion for additional physical facilities."

[36] *See. e.g.,* American Association of School Administrators, American Vocational Association for Supervision and Curriculum Development, Horace Mann League, National Association of Elementary School Principals. National School Boards Association and Rural Education Association as participants in an *amici curiae* brief; also National Catholic Education Association; National Association of Episcopal Schools, National Union of Christian Schools, National Conference of Yeshiva Principals and Lutheran Education Association as participants in an *amici curiae* brief in the *Lemon* case.

[37] 16 CATHOLIC LAWYER 15 (1970); *see also,* Benjamin study, note 13 *supra,* ch. II, at 35; ch. IV, at 18, 21.

For a discussion of the interest group effect over time, *see,* Schecter, *Federal Aid to Parochial Education,* in CONTEMPORARY CONSTITUTIONAL ISSUES 181 (1972). Another aspect of the financial crisis in education: the current problem of support for the education of Catholic elementary and secondary school children.

[38] Cordasco, note 19 *supra.*

[39] Christian Science Monitor, Oct. 3, 1970. For differing analysis of the nature of the American Roman Catholic parochial system *see,* Westhues, *An Alternate Model for Research on Catholic Education,* 77 AM. J. OF SOCIOLOGY 279 (1971).

[40] *See, e.g.,* BOLES, THE BIBLE, RELIGION, AND THE PUBLIC SCHOOLS, at 1–36 (3rd ed. 1965); PFEFFER, CHURCH, STATE AND FREEDOM, at 342 (1967).

In the last several decades, moreover, the Supreme Court has taken a vigorous role in striking down many of the programs that constitute badges and implements of Protestantism in the public schools, such as Bible reading, prayers and the like. Hence, it might be argued that the primary reason for the creation of parochial schools no longer exists.

An interesting and different approach to an analysis of potential points of conflict giving rise to Roman Catholic parochial education and its interaction with a governmental structure which provides public education and largely excludes church-run schools from receiving tax dollars is offered by the sociologist Westhues.[41] He explains that most of the research on Roman Catholic education has utilized survey methods in the study of attitudes toward and effects of Catholic schools. Individual Catholic laymen or school children have been the object of the analysis and the orientation has been "instrumentalist."

Westhues suggests an alternative "nomothetic" model. His basic hypothesis, rooted in open-systems theory of organization, is that Roman Catholic education arises out of a perception on the part of the Roman Catholic Church of an environment threatening to itself. This is elaborated in terms of four variables: (1) minority position (2) ethnicity (3) hostility of environment, and (4) modernization. With states as the units of analysis, demographic and socio-economic data was used to test the hypothesis using the analytic techniques of correlation and regression. The results, with some modifications, support the organizational model.

Westhues concludes that minority position and the educational level of the population are important predictors of the extent of church involvement in education. A non-Catholic environment, overtly hostile to Catholicism, does not have the hypothesized independent effect. The concept of ethnicity, he speculates, probably has some effect, but exactly what this might be could not be determined by his research. Moreover, he concludes that the effect of the density of Roman Catholic population is inconsequential for grade school involvement in recent years but is of some importance for high school involvement.

Westhues' approach is of major significance to legislators and other governmental policymakers, even though he modestly refrains from advancing a definitive prediction of the future of Catholic education. However, he does note that if the level of modernization of the population continues to rise, Catholic Church involvement in education will decline.[42]

PTA Policy on Public Funds for Public Schools

A substantial different point of view from the Roman Catholics' regarding the utilization of public funds has been put forward by a variety of

[41] Westhues, *An Alternate Model for Research on Catholic Education*, 77 AM. J. OF SOCIOLOGY 279 (1971).

[42] *Ibid.* at 290–291.

other organizations, such as the National Council of Parents and Teachers. As early as July 1, 1970, Mrs. Edward F. Ryan, National Chairman for Legislation, directed a memorandum to the National Board of Managers, State Chairman, for Legislation, regarding the PTA's policy of public funds for public schools. It explained that, "Next year, 1970–71, may well prove to be a critical year in determining the issue of public funds for public schools only. The following statement is a reaffirmation of long-held PTA policy, and may be used in any way you wish":

> The National PTA believes that a strong public school system which provides excellent educational opportunity to all children is essential to maintaining the strength of our democracy. This responsibility can be met only through the open doors of the public schools. In our view, therefore, money drawn from all citizens according to their economic ability, in taxes, should go only to schools open equally to the children of all citizens, and governed by the representatives of all citizens in the public school boards.
>
> PTA policy is not critical of independent or parochial schools. Such schools serve a variety of good purposes, and many of us throughout PTA utilize them for our own children for special reasons. Public schools, however, are governed in the public interest and for the good of all children, by public policy and regulations. Public funds going to non-public schools would be used to serve selected purposes for a restricted enrollment.
>
> Again, if tax support were to go to both public and non-public schools, non-public schools would be strengthened beyond the public schools and could compete broadly for both teachers and students. One of the chief educational virtues of the public schools is that the student body is representative of our society. If non-public schools were enabled to draw heavily upon public school students in a selective fashion, both equal educational opportunity and education for democracy would be impaired. Moreover, a competitive system of non-public schools frequently weakens local interest in and support of public schools. Therefore, support of non-public schools is not an appropriate saving of public funds.
>
> It is our obligation as citizens, rather, to concentrate our efforts in financial support of the public schools, and for the welfare of our democratic society strive to make public education excellent for all children.

At approximately the same time, in a memorandum dated only 1970, Carol Kimmel, who is listed as a member of the Special Committee on Legislative Programs, submitted a memorandum titled the "National Congress of Parents and Teachers Position Paper on Public Funds for Public Schools." This paper pointed out that the position of the National PTA has always been quite clear as it relates to funds for the public schools. "As early as 1905 the PTA supported federal aid to education. Until 1945 it

seemed to have been taken for granted that this meant funds for public schools only." In 1945, however, this explicit statement was proposed:

> We believe that any such funds to help states provide adequate educational opportunities for all children and youth appropriated by the federal government should go to public tax-supported schools only.

The memorandum continues by noting that again in 1966 the National Chairman of Legislation stated to the Chairman of the Senate Committee on the Judiciary:

> The National Congress of Parents and Teachers several years ago adopted by action of its state branches a policy in support of federal aid to education, within certain limitations. Chief of these limitations is our long established policy that appropriations of public funds for education should be supported only for publicly controlled, tax-supported schools.
>
> The efforts of the President and the Congress to equalize and improve educational opportunity in our country cannot help but command our sympathy and admiration. We also fully approve the maintenance of private resources. Nevertheless we continue to suggest most urgently that public subsidy of non-public schools will over a period of time seriously weaken the public schools, which we deeply and firmly believe are the mainstay of our democratic society.

In 1970, the NCPT legislative program still states:

> In order that the free public school system be maintained and strengthened, federal funds for education must be appropriated only for public controlled, tax-supported schools. States should be encouraged to give their best support to equalizing educational opportunities and services within their own boundaries.

In the memorandum, Carol Kimmel noted, in addition, that the appropriation of public funds to non-public schools, however, has become a reality in some states and is a focus of a bitter battle in others.[43] The national PTA urged the state branches to become actively involved in this struggle. "Our conviction remains that the best interest of the children of the nation will not be served by making public funds available to non-public schools." [44] The first and greatest task imposed on our schools was

[43] For the Iowa position, *see*, REPORT OF THE GOVERNOR'S EDUCATIONAL ADVISORY COMMITTEE (Oct. 4, 1971; Laws of the Sixty-Third General Assembly, Second Session. Ch. 1110, approved Apr. 29, 1970 (formerly Senate File 1293).

[44] In addition, it is noteworthy that the National Conference on Religious Education Programs adopted a resolution in opposition to the use of public funds for parochial schools. The resolution, adopted at its annual meeting, Oct. 12–14, 1970, argued that, in the view of administrators of county and multi-county school systems, such aid violates the Establishment and Freedom of Religion Clauses of the First Amendment. THE DES MOINES REGISTER, Nov. 1, 1970, at 10T.

to provide an enlightened citizenry in order that self-government could be accomplished and maintained. The second great task has been "the creation of national unity." The tendency toward divisiveness in the Nation today is so great as to threaten this unity, the statement noted. Yet because of the great press for financial support of the schools, some people feel that it might be wiser to aid the non-public schools than to risk their closing and these children being added to the rolls of the public schools.

"Some basic issues, however, must be considered," this memorandum points out. First, "public schools must receive much greater financial support. If funds for non-public schools come from the same source this is a danger to the financing of the public schools."

Second, "at the present time public schools have not been able to provide equality of educational opportunity and it does not seem to be readily attainable. Across-the-board funding, as done by most states, does not meet this need. Disproportionate funding for urban areas particularly is needed." This is essentially the point made by the California Supreme Court in *Serrano* v. *Priest* in 1971, striking down the property tax base for funding public schools because it violated the equal protection clause.[45]

Third, "at present, if money is given to non-public schools it is given to *all* non-public schools. Private schools already have tuition payments and private funds at their disposal. In many cases this would permit them to offer services that are not available to the children of public schools." [46]

Fourth, "historically, aid to non-public schools develops a dual and multiple school system. The support of multiple school systems will in the long run cost society more because of inherent inefficiencies and overlapping districts, services, etc."

Fifth, "currently many non-public schools are not accountable to the public or state for performance and in some of the proposals for the aid to non-public schools no provision is made for performance accountability."

Sixth, "a compelling aspect of equality of education is that it must be open to all without discrimination on the basis of religion or race. This is not true of non-public schools. The growth of non-public elementary schools since the passage of the Civil Rights Act of 1964 is distressing. Because non-public schools are restricted in their enrollment policy even men of good will find the very policies that are necessary for survival result in selecting student bodies that are basically white and in any case nearly always middle and upper class. This thus defeats the basic concept of using the schools to upgrade all persons. Good research indicates that the schools with all types of students result in better education. Aid to non-public

[45] Serrano v. Priest, 96 Cal. Rptr. 601, 482 Pac. 2d 1241, 5 Cal. 3d 584 (1971).

[46] This point is expanded in 85 HARV. L. REV. 167 (1971).

schools would increase this growth tremendously and would make it very difficult to integrate public schools."

Many parents of parochial school students are not unaware of the effects of such segregated education. For example, Patricia Gallagher in a recent letter to the Editors of *America Magazine* explains that she withdrew her children from the parochial schools because she saw them as isolating her children from today's basic social problems.[47]

Seventh, "as a non-public school system, the selectivity of the system necessarily leaves the unacceptable for economic, social, academic or physical (as well as race or religion) reasons to the public schools. This damages the classroom situation in the public schools. Also, class distinction grows between the two school populations. The mixing of all children and the learning process of living with those different from oneself is lost. Thus one of the unifying factors of the nation is lost."

Eighth, "as a non-public system grows, a large segment of parents, predominately of the affluent and educated level loses its concern for the quality of education in the public schools and the ability to maintain a higher level of financial support for public school decreases sharply."

Ninth, "public schools are available for all children and should be adequately funded in order that every child receive a quality education. Parents who choose to educate their children in a specific religious or cultural atmosphere should accept their responsibility for the financial support of the kinds of schools they prefer. Public schools are the responsibility of the people to the children and the nation. The National PTA urges every member in every state branch of the PTA to safeguard the future of public education by taking a firm stand in opposition to public funds being appropriated to any schools other than publicly controlled, tax-supported schools."

Public Opinion and Tax Aid to Parochial and Private Schools

One of the questions asked in "The Second Annual Survey of the Public Attitude Toward the Public Schools," by George Gallup was:[48]

> It has been proposed that some government tax money be used to help parochial schools make ends meet. How do you feel about this? Do you favor or oppose giving some government tax money to help parochial schools?

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[47] *See,* AMERICA, Jul. 24, 1971; *see also,* NATIONAL CATHOLIC EDUCATION ASSOCIATION, A REPORT ON U.S. CATHOLIC SCHOOLS, 1970–71, ch. 4 (1971). Other figures contained in the study indicate that the decline in the members of Catholic schools is less marked in the southeast and mideast regions of the U.S., which may indicate a desire to continue racially segregated rather than religiously oriented education in areas with highly concentrated racial minorities. *Id.* at 5.

[48] PHI DELTA KAPPAN, Oct. 1970.

	National Total (%)	*No Children in School (%)*	*Public School Parents (%)*	*Parochial School Parents (%)*	*High Schoo Juniors & Seniors (%)*
Favor	48	47	47	59	56
Oppose	44	44	47	33	36
No opinion	8	9	6	8	8
	100	100	100	100	100

A second question posed to the national sample was:

> In some nations, the government allots a certain amount of money for each child for his education. The parents can then send the child to any public, parochial, or private school they choose. Would you like to see such an idea adopted in this country?

	National Total (%)	*No Children in School (%)*	*Public School Parents (%)*	*Parochial School Parents (%)*	*High School Juniors & Seniors (%)*
Favor	43	43	41	48	66
Oppose	46	46	48	40	27
No opinion	11	11	11	12	7
	100	100	100	100	100

A major problem in assessing the actual meaningfulness of these data is found when one checks a similar public opinion poll of 1969.[49] The problem is that the questions asked were not precisely the same and thus there is a certain elemental danger in attempting to draw too many conclusions from such a comparison. The 1969 Gallup poll based on a national sample indicated that thirty percent of the respondents preferred private schools, thirty percent preferred parochial schools, and forty percent preferred public schools. One suggestion that might be drawn from these figures is that approximately eighteen percent more Americans sampled in 1970 were willing to see some form of aid to parochial or private schools. The number opposing such aid, however, has also increased by four percent.

In any event, school administrators and policy makers would be making an egregious error in underassessing support for programs to assist parochial schools or the effectiveness of the various groups pushing for them. From this it would appear that those seriously interested in maintaining strong public schools, for whatever reason, apparently have not been doing an effective job in making the role of the public schools known and fully appreciated.[50]

[49] PHI DELTA KAPPAN, Nov. 1969, at 132.

[50] It has been fashionable lately in some circles to attempt to debunk the rationale behind the public schools of this Nation. *See, e.g.*, Greer, *Public Schools: The Myth of the Melting Pot*, SATURDAY REV., Nov. 15, 1969, at 84; C. GREER, COBWEB ATTITUDES: ESSAYS IN AMERICAN EDUCATION AND CULTURE (1970). Another interesting analysis of a diverging view concerning the melting pot quality of the public schools is found in C. E. SILBERMAN, CRISIS IN THE CLASSROOM (1970). Silberman argues that, on the basis of material gathered by him and by other notables,

One reason for the changes of attitude by people who were formerly strong supporters of the public schools and opposed to providing public money for private or parochial schools is the decay of the American inner city. For example, members of some of the Protestant groups that have been particularly noted for their opposition to any infringement upon the separation of church and state now, noting a decay in the quality of the city's public schools, take a different view of public aid to private or parochial schools. They, themselves, may be doing as many have already done in larger metropolitan areas—sending their children to private or parochial schools to avoid contact with children of other races, ethnic background or different socio-economic levels. To a person in this position, public aid to private and parochial schools would have the advantage of reducing tuition costs. Therefore, middle income-level Protestant parents, who normally might oppose public aid to private or parochial schools, are changing their value judgments on this matter.

In 1969, a survey was conducted on a sample of school board members in an urban metropolitan county regarding their opinions on the merits and limitations of the voucher plan suggested by Professor Milton Friedman, a strong proponent of free enterprise, "capitalist" economic systems.[51] Under Friedman's voucher proposal, each school-age child would be guaranteed specific sums of money which would be paid as tuition to any "approved" school. Parents would be free to spend this and additional moneys to purchase educational services. Non-public and public schools could compete among themselves for students by offering a variety of educational choices.

It is normally thought that such vouchers would be used to pay tuition and other costs to existing parochial or private schools. However, nothing would prevent the use of the vouchers to encourage the creation and support of John Birch schools, Black Panther schools, Rosicrucian schools and any other school an individual or group might wish to establish. This would clearly undercut the very foundations of the Nation's public school

there are two impressions of the American public school system that stand on shaky beds of fact. As one reviewer explains it among the theses, two in particular stand out: (A) People "in" education don't think pointedly enough about why they are doing what they do; mindlessness is everwhere rife. (B) The second is that at the present moment reformers and innovators have an obligation to lobby for more emphasis on the education of the feelings and imagination and for a slow-down of cognitive rat-racing. As Silberman puts it, "finding the right balance is never easy; there will always be a certain tension between two groups of educational objectives those concerned with individual growth and fulfillment and those concerned with the transmission of specific skills, intellectual disciplines and bodies of knowledge." "...In the older American progressive schools the balance certainly needs to be tipped toward the cognitive; in most American schools today... the need is to tip it very strongly back.... *See,* LIFE, Oct. 30, 1970, at 12.

[51] FOX & Levenson, *In Defense of the Harmful Monopoly,* PHI DELTA KAPPAN, NOV. 1969, at 131. For a full discussion of vouchers *see,* M. FRIEDMAN, CAPITALISM AND FREEDOM, at 85–107 (1962).

system. It would also interfere with such basic economic factors as the economies of scale. The plan has become a major political campaign issue in a number of states, such as California, where it was a key dispute in the Unruh-Reagan gubernatorial campaign.

Fox and Levenson studied attitudes toward the voucher plan in a large midwestern urban metropolitan county containing thirty-three school districts. Reactions were secured from eighty-nine school board members who read a brief paragraph describing the plan. Sixty-six of the respondents, or 74.2%, checked "I don't like it." [52] They were then asked to check their reasons. In a descending order of frequency, these were:

Comment	*Frequency*
1. It would weaken or destroy the school system	19%
2. It would complicate school planning: e.g. forecasting enrollments, transportation, negotiations, etc.	12%
3. The vagueness of the proposal opens too many questions about controls, equalization cost differences, competition among public schools and teaching of sectarian religion	11%
4. It would lead to increased government influence and control of all schools	10%
5. It is clearly violative of the constitutional principle of separation of church and state and the use of public funds for private purposes	88%
6. It would lead to educational chaos	8%
7. The better approach is to improve quality, effectiveness and efficiency within the present public school system	8%
8. It would accentuate divisiveness, segregation, socialization and misunderstanding	7%
9. Public schools would become havens for the disadvantaged when costs outstrip government subsidy	7%
10. It destroys the "American Way" by fostering a socialist state	5%

From these comments, which clearly have at their base general feelings concerning public aid for sectarian purposes, the separation of church and state, or the welfare of the public schools, three dominant judgments of the voucher proposal appear:

1. It would weaken or destroy the public school system;
2. its vagueness opens too many questions about controls, equalization, cost differences, competition among public schools and the teaching of sectarian religion; and
3. it clearly violates the constitutional principles of separation of church and state and the use of public funds for private purposes.

Thirty-eight of the eighty-nine school board members, almost half, saw the church-state question as being important. Fox and Levenson concluded their study by noting that the church-state controvery is:

> [P]erhaps the basic theme which appears to underlie a substantial number of the negative comments of the school board members responding to this

[52] *Ibid.* at 131.

survey. The generalization is thus hazarded that the vast majority of school board members elected by their fellow citizens—regardless of their political, economic, social, and/or religious persuasion, but collectively motivated by their dedication to the best possible education under government auspices for all children—do not regard the kind of voucher plan as a viable alternative for the necessary improvement in quality education in America.[53]

The American Federation of Teachers, AFL-CIO, is drastically opposed to any form of voucher payments to private schools—to the point of having stopped an experiment in their usage in Gary, Indiana.[54]

Sources of Church-State Conflict

In viewing the politics of church and state, it is relatively easy to identify important sources of tension that underlie but appear superficially remote from the daily conflicts that swirl around the school controversy.[55] For example, differences of religious ideology produce very different "civic" attitudes concerning the proper relationship between religious institutions and public authority. Roman Catholics do, in fact, operate from different premises concerning certain church-state relations than do Baptists, Jews, or nonbelievers. There is also animosity between creeds and a difference of church structure.

As is generally known, it was well into the 20th century before America could no longer be considered truly a "Protestant Nation." This in no way means that most of the people were regular churchgoers, but in a cultural sense Protestant ideas and Protestant spokesmen commanded society. Protestant notions of individualism, equality and congregational democracy interlocked with and supported the prevailing political ideology of face-to-face government, and *laissez faire*.[56] Authority and centralization in religion, as they saw it, were held incompatible with democracy, and political liberty went hand-in-hand with individual revelations through the scriptures.

The Episcopalians are probably the exception to this view of Protestantism, since they have generally found it more difficult to be democratic and anti-episcopal. A variety of Low Church leaders, however, have given it a serious try. Moreover, because of their British associations, Episcopalians were suspect on both foreign and establishmentarian grounds. So it might be said that while the United States was predomi-

[53] *Ibid.* at 134.

[54] Schucat, *With Education in Washington,* 7 THE EDUCATION DIG. 54 (1941). *See also,* Mahone, *Should Public Service Get Public Aid?,* 51 THE SIGN 17 (1952).

[55] *See,* R. MORGAN, POLITICS OF RELIGIOUS CONFLICTS: CHURCH AND STATE RELATIONS (1968).

[56] *Ibid.* at 20. The classic study of this subject is, of course, R. H. TAWNEY, RELIGION AND THE RISE OF CAPITALISM (N.D.).

nantly provincial, it was also predominantly "free church Protestant." It is, of course, impossible to describe the variety of differences in Protestant ideas concerning religion and the public order, because one cannot accurately speak of a single Protestant position.[57] There are, however, several important doctrinal themes running through Protestant thinking. Historically, a major element is strict separation between church and government. As a logical outgrowth, this has notably a negative conception of the role of the state. One of the great virtues of the principle of denominationalism was that voluntarism and privatism were more or less taken for granted by the vast bulk of Protestants. It was perhaps regrettable that everyone could not worship in accordance with Baptist forms or Presbyterian forms or Methodist forms, but the Protestant consensus was that it would be a greater evil if everyone's independence was jeopardized. Religion as a doctrinal matter came to be viewed as strictly a private affair.[58]

Roger Williams, one of the most profound Protestant theoreticians in the United States, put it this way:

> The Church is like unto a body or college of physicians in a city; like unto a Corporation, Society, or Company of East-Indie or Turkie-Merchants or any other Society or Company in London; which Companies may hold their courts, keep their Records disputations; and in matters concerning their Societies may dissent, divide, break into Schisms and Factions, sue and implead each other at the law, yea, wholly break up and dissolve into pieces and nothing.[59]

Traditionally, Baptists and Presbyterians have been more conscientious about the separationist doctrine than Episcopalians, with the Congregationalists falling somewhere in the middle. Nonetheless, the strict separation of church and state remains a powerful notion around which broad Protestant support can be mobilized.[60]

Another proud and important tradition in American thought, distinct but not divorced from Protestantism, is the concept of secularism. Contrary to some of the views heard since the 1950's that secularism is an undersirable and recent growth in American culture, it is "as American as apple pie." The Constitution was profoundly affected by the secular learning of the Enlightenment, and some of its principal architects were deists

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[57] *See, e.g.*, T. SANDERS, PROTESTANT CONCEPTS OF CHURCH AND STATE (1964).

[58] *See, e.g.*, E. TROELTSCH, A SOCIAL TEACHING OF THE CHRISTIAN CHURCH (1931); Roche, *American Liberty: An Examination of Traditions of Freedom*, in ASPECTS OF LIBERTY (Konvitz & Raucheter eds. 1958); W. HUDSON, AMERICAN PROTESTANTISM (1961).

[59] S. MEAD, THE LIVELY EXPERIMENT, at 58 (1963).

[60] On the question of erosion of this solidarity, *see* M. MARTY, THE NEW SHAPE OF AMERICAN RELIGION (1958).

and agnostics. Many of the most influential political innovators of the late 18th Century were nominally faithful to Protestantism, but notably secular in outlook.

What is important for us about secularism is the way in which it is interlocked with Protestantism on the subject of church and state. For both, religion is a private, voluntary and individual matter with which the state has no concern whatever. Jefferson and Williams could agree that "compulsion stinks in God's nostrils," [61] and the secular states stood in exactly the same relationship to a religious association as did one whose purpose was for literary discussion or the companionable consumption of madeira. Tradition commanded that government keep out.

Jewish attitudes concerning church-state relationships are grounded on an entirely different experience from those of Protestants and secularists. A desire for separation of church and state stemmed from the brutal lessons of Jewish history. Jews, as a matter of theology, are not optimistic rationalists in the Enlightenment tradition. They do not necessarily view religious associations as a result of purely voluntary identification and activity. Richard Rubenstein has pointed out, "there is nothing voluntary about the normative conception of membership in the Jewish community." [62]

American Jews generally were made separationists because of the conviction that Jews living in Christian countries where the state is a supporter of religious activities are apt to be made uncomfortable at best or persecuted at worst. Thus, the best chance for the Jews to live decently is in a scrupulously secular state—a state which does not advocate support or interact in any way with religion. Therefore, secularization becomes a salvation for a typically small religious minority. Jews, for example, favor many of the separationist outcomes in governmental policy, as do Protestants and secularists. A variety of factors may bring highly diverse groups together on matters of public policy.

It has been difficult for many to understand that philosophical differences between the various groups just mentioned are of such magnitude that often no amount of good will can compromise them so long as the parties continue to take their traditional ideologies seriously. No matter how one faces the situation or how carefully it is analyzed, it remains clear, for example, that Roman Catholics generally take a favorable view of cooperative relations between government and religious institutions, whereas Protestants and secularists do not. This is illustrated by the Roman Catholic legal theorist, Norman St. John-Stevas, who demonstrates beyond a

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[61] R. MORGAN, THE POLITICS OF RELIGIOUS CONFLICTS: CHURCH AND STATE RELATIONS, at 23 (1968).

[62] Rubenstein, *Church and State: The Jewish Posture,* in RELIGION AND THE PUBLIC ORDER 152 (D. Giannella ed. 1964). For further analysis of the Jewish position, *see, Religious Education,* American Jewish Congress Newsletter, Jul. and Aug. 1970.

doubt the contradictions between the Roman Catholic and Protestant positions concerning the nature of the state, when he writes:

> The Catholic starts with the conception of the good but damaged natural man; the Protestant with an idea of man utterly corrupted by the Fall. For the Catholic the state would have been necessary for man had he remained a perfect being; for the Protestant it is the direct result of original sin. For Luther the world was sin and the devil its landlord. The employment of [state] power to further social and religious ends seems reasonable to Catholics, but Protestants, at least in theory, are distrustful of all worldly power, as contaminated by sin.[63]

While it is true that Calvin took quite a different view of this situation than Luther, it is also true that American Protestantism has been much more Lutheran than Calvinist in its orientation and attitudes concerning the state. Somewhat ironically, European Lutherans have ultimately come to accept the notion of establishment particularly so far as it applies to schools in nations such as the Netherlands, Protestant portions of Germany and the Scandinavian countries. In America, with a few recent exceptions, Luther's negative view of the state has continued to be translated into the separationist doctrine.

One of the more articulate Roman Catholic theologians who concerned himself with the church-state dispute was the late John Courtney Murray, S.J. Father Murray was regarded by many to have presented what might be regarded as the typical Roman Catholic concept of church-state relation.[64] He rejected the phrase "separation of church and state," and referred rather to the *distinction* between church and state. "The first article of the American political faith is that the political community is a form of free and ordered human life and looks to the sovereignty of God as the first principle of its organization." Therefore, Murray supported cooperative arrangements between government and religious institutions on a carefully limited and nondiscriminatory basis. Thus, when one looks at the spectrum of Roman Catholic theorists from the more to the less sophisticated, deep skepticism is found about the wisdom and historical foundations of the basically separationist line the United States Supreme Court has taken during the last twenty years. This culminated in 1962 and 1963 in decisions banning compulsory prayer and Bible reading in the public schools.[65]

The so-called "accommodationist" predisposition of the Roman Catho-

[63] N. St. John-Stevas, Life, Death and the Law, at 31 (1964).

[64] J. C. Murray, We Hold These Truths, at 72–73 (1964).

[65] For a sophisticated analysis of the Roman Catholic position, *see* R. Drinan, Religion, the Courts and Public Policy (1963); J. Krewin, The Catholic Viewpoint on Church and State (1960). For a somewhat less subtle and more exiguous view, *see* W. O'Brien, Justice Reed and the First Amendment (1948); J. O'Neill, Catholicism and American Freedom (1952).

lics, which favors cooperative arrangements between church and state, gives rise to a reading of the Constitution's religion clauses in a way pragmatically different from the Protestant reading. Roman Catholics find it difficult to accept the theory that the First Amendment holds religion to be a purely private concern on which the state is morally neutral—a theory in which the state has no legitimate interest in the relationship of men to God. It is essential to emphasize, once again, that this is precisely the assertion at the heart of the Protestant separationist theory and is adhered to for a variety of different reasons by secularists and most American Jews. The point is not merely to regret the existence of these highly divergent views of church-state relations, but to recognize that they not only do exist but are significant.

Various religious antipathies play a role in policy formation that is frequently deeper than even some of the best political analysts would like to believe. As a result there can be little doubt that there is a significant carryover in such a basic and critical field as church-state relations and the public school system. In one of the most noted investigations of the 1960 election results, Phillip E. Converse, Angus Campbell, Warren E. Miller and Donald Stokes of the Survey Research Center of the University of Michigan found rather surprising defections to Nixon of regular Democratic "party identifiers" who had in 1956 voted for Stevenson. This tendency was most evident in the South. (See Table II.)[66] The study's conservative estimate of John F. Kennedy's net loss on "the religious issue" was 2.2% of the total vote, which is roughly the difference between a 52–48 victory and a 50–50 tie.

There is, of course, a possibility that all of those Democrats who voted against Kennedy because of his religion did so out of the reasoned conviction that a Roman Catholic in the White House would be a dangerous thing. Many distinguished Americans were persuaded by this point of view and there are still those who feel a case can be made of it. Yet the imagination is boggled by supposing that such reasoned deliberation was a major factor in the anti-Catholic vote of 1960. The bulk of religious defection from the Democratic candidate seems much more likely to have resulted from ancient unreasoning antipathy to the Church of Rome.

The Survey Research Center of the University of California at Berkeley produced some additional data along these lines. The Center has been conducting an extensive study of anti-Semitism in America. One part of this study sought to discover the extent of anti-Semitic attitudes within nine Protestant denominations. The interview scheduled to generate the data also included a number of inquiries concerning Protestant attitudes toward Roman Catholics. While the answers given to the Berkeley questions

[66] Campbell, et al., *Stability and Change in 1960*, 55 AM. POL. SCI. REV., 277, 278.

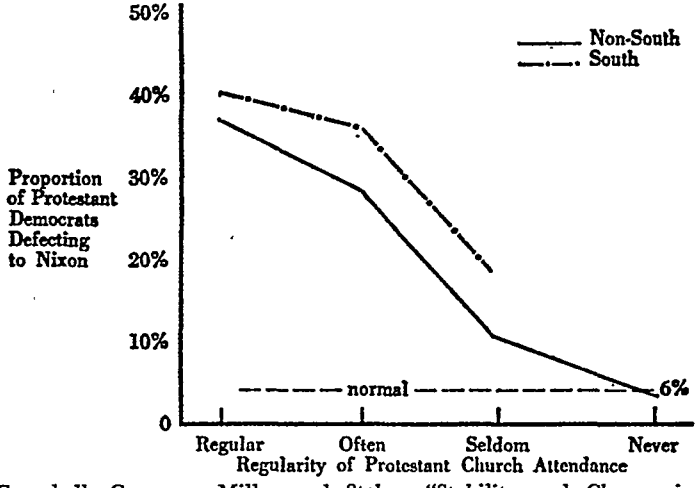
TABLE II

Offsetting Effects of the Catholic Issue, 1960 Democratic Presidential Vote

Area		% of 2-Party Vote in Area
Outside the South, Kennedy's "unexpected" . . .		
Gains from Catholics		5.2
Losses from Protestant Democrats and Independents		−3.6
	Net	+1.6
Inside the South, Kennedy's "unexpected" . . .		
Gains from Catholics		0.7
Losses from Protestant Democrats and Independents		−17.2
	Net	−16.5
For the nation as a whole, Kennedy's "unexpected" . . .		
Gains from Catholics		4.3
Losses from Protestant Democrats and Independents		−6.5
	Net	−2.2

Source: Campbell, Converse, Miller and Stokes, "Stability and Change in 1960," 55 *American Political Science Review* at 278.

Defections to Nixon Among Protestant Democrats as a Function of Church Attendance



Source: Campbell, Converse, Miller and Stokes, "Stability and Change in 1960," 55 *American Political Science Review* at 277.

do not necessarily reflect the sort of antagonisms already discussed, they certainly are worth noting. Given the nature of the question, it was possible for a person to respond negatively from reasoned conviction as would be the case of the anti-Catholic voting study of 1960. The directions shown in the data, however, are suggestive that substantial percentages within all of the denominations thought it "tends to be true" that Catholics seek

TABLE III

Reply to: Catholics try to impose their religious practices on others, answers are in % with "Don't knows" not shown. N = 3,000

	Congregational	Methodist	Episcopal	Disciples of Christ	Presbyterian	Lutheran (L.C.A. & A.L.C.)	American Baptist	Lutheran (Mo. Synod)	Southern Baptist
True	11	16	19	14	23	18	18	23	25
Tends to be true	31	30	31	34	26	32	28	41	16
Tends to be false	31	31	23	28	23	23	26	16	38
False	21	19	23	18	22	21	21	15	16

Source: Survey Research Center, University of California at Berkeley.

TABLE IV

Reply to: Catholics tend to vote as a bloc for Catholic political candidates. Answers are in % with "don't knows" not shown. N = 3,000

	Congregational	Methodist	Episcopal	Disciples of Christ	Presbyterian	Lutheran (L.C.A. & A.L.C.)	American Baptist	Lutheran (Mo. Synod)	Southern Baptist
True	22	31	37	28	39	28	38	41	43
Tends to be true	45	44	35	36	36	38	36	27	39
Tends to be false	17	13	13	28	11	16	12	16	8
False	9	7	10	2	7	10	6	7	4

Source: Survey Research Center, University of California at Berkeley.

to impose their religion on others. (See Table III.) Significant percentages felt that the American Catholic community seeks to advance its own interest through bloc voting. (See Table IV.) This study also found considerable anti-Semitism among Roman Catholic and Protestant respondents.[67] The Southern Baptists, in most cases, prove to be the denomination harboring the most intense emotional antipathy toward the Roman Catholic Church; in the study they returned the highest negative response. Those denominations which are identified as more urbane and tolerant of Roman Ca-

[67] *See,* C. GLOCK & R. STARK, CHRISTIAN BELIEFS AND ANTI-SEMITISM, at 60–80 (1966). These findings are also discussed by R. E. Morgan, note 61 *supra,* at 30–35.

tholicism, such as Episcopalians and Congregationalists, had lower negative scores.

Recent Court Action

The 1971 cases of *Lemon* v. *Kurtzman*[68] and *Tilton* v. *Richardson*,[69] although forging important new conclusions or rules of law, provide few innovative points of analysis in the Court's views on the major imponderables in this controversy which rest in the political, socio-economic and philosophic realm. For example, the majority opinions contain only ten brief citations in each decision which deal with the broad ramifications in American society of such programs, although the decision itself looks into some of them with real insight. None of the notes reveal the vastness of the literature and and research in the field, the complexities and nuances of the controversy, or the possible effects of the decision being handed down. Court-watchers may well wonder if this signifies a trend of the Nixon-appointed justices. On the other hand, the Chief Justice, in a most commendable way, looks pragmatically at precise practices and school policy statements to demonstrate that they constitute effective badges and implements of sectarian religion in those schools receiving public funds, such as those involved in *Lemon* and *DiCenso*.

Writing for the eight-member majority in *Lemon* and *DiCenso*, Chief Justice Burger firmly rejected the argument that the state may finance the operations of church-affiliated schools by any method that purports to aid the child rather than the school. In the companion case, *Tilton* v. *Richardson*[70] the Court was much more narrowly divided, with the Chief Justice speaking for the Court, Justice White concurring, and Justices Douglas, Black, Brennan, and Marshall dissenting. There, federal grants to sectarian colleges for the construction of secular purpose buildings were upheld, providing that religion was not involved in the use of such facilities. At the same time, however, the Court struck down the section of the Higher Education Facilities Act of 1963 which had the effect of limiting to twenty years the college's obligation not to use federally-financed facilities for sectarian instruction or religious worship, since it would unconstitutionally allow the government's contribution of property of substantial value to religious groups. Nonetheless, the majority ruled that this section was severable and the remainder of the law could stand.

At this time, it would appear that the decisions in *Lemon* and *DiCenso* have the most immediate and far-reaching impact upon the American education scene. In *Lemon*, the Court dealt with a Pennsylvania statute enacted in 1968 authorizing the State Superintendent of Public Instruction

[68] 91 S.Ct. 2105 (1971).
[69] 91 S.Ct. 2091 (1971).
[70] *Id.*

to "purchase" various "secular educational services" from non-public schools, directly reimbursing those schools for teachers' salaries, textbooks and instructional materials in connection with specific secular subjects. The state statute prohibited payment for any religious teachings or forms of worship. Plaintiffs were taxpayers and a parent of a child attending public schools, who argued that the statute not only violated the "Establishment Clause of the First Amendment as incorporated into the Due Process Clause of the Fourteenth Amendment, but in addition violated the Equal Protection Clause of the Fourteenth Amendment because it financed schools that could discriminate on the basis of race and religion in admission and hiring." A three-judge U.S. district court by a 2–1 vote granted the state's motion to dismiss the complaint on the ground that the statute was constitutional.

In the second case in the joinder, *DiCenso,* the Court viewed a 1969 statute authorizing state officials to supplement the salaries of teachers of secular subjects in non-public elementary schools by paying directly to the teachers an amount not to exceed fifteen percent of their current annual salaries. As thus supplemented, a teacher's salary could also not exceed the maximum salary paid to public school teachers and both classes of teachers were required to hold state certification. Non-public school teachers were required to agree "not to teach a course in religion" so long as they received such supplements. This program was declared unconstitutional by the state courts of Rhode Island.

The Supreme Court affirmed the Rhode Island decision and reversed the Pennsylvania decision in a single opinion, noting that the Establishment clause bars any law "respecting" an establishment of religion. The Court inferred from this that a "given law might not establish a state religion but nevertheless be 'respecting' that end in the sense of being a state that could lead to such establishment and hence offend the First Amendment."

Interestingly, Chief Justice Burger made no direct reference to the techniques of analysis first fashioned by Justices Black and Clark in *Engle* v. *Vitale*[71] and expanded in *Schempp.*[72] In the former case, Justice Clark explained the test to determine if a state law violated the establishment clause. The First Amendment is violated, the Court announced there, "if either [the purpose or primary effect of the law] is the advancement or inhibition of religion". Next, drawing a distinction between the establishment clause on the one hand and the free exercise clause on the other, the Court explained in *Schempp,* "A violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause is not so attended."

[71] 370 U.S. 421 (1962).
[72] 374 U.S. 203 (1963).

Although not alluding as such to the guidelines in *Engle* and *Schempp,* the Court does refer to the criteria set forth the year before in *Walz* v. *Tax Commissioner.*[73] That case, which many feel is the logical unfolding of the doctrines of *Engle* and *Schempp* except as to its ruling, the Court felt requires it to draw lines with reference to the "three main evils against which the Establishment Clause was intended to afford protections: sponsorship, financial support, and active involvement of the sovereign in religious activity." Looking at the historical evolution of Supreme Court doctrine over many years, the Chief Justice gleans the following cumulative criteria. "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion;[74] finally, the statute must not foster 'an excessive government entanglement' with religion." [75]

Turning first to the legislative purpose, the Court observed that the statutes afford no basis for the conclusion that the legislative intent was to advance religion. "On the contrary," the Court somewhat ingenuously noted, "the statutes themselves clearly state that they are intended to enhance the quality of the secular education in all schools covered by the compulsory attendance laws. There is no reason to believe the legislatures meant anything else." Thus the first test of "purpose" was met.

In the abstract, the Court agreed that secular and religious education are "identifiable and separate." On the other hand, it observed that both Pennsylvania and Rhode Island had recognized that elementary and secondary schools have a religious mission and had accordingly created statutory restrictions designed to separate the religious functions. Such precautions, the Court felt, were taken in "candid recognition that these programs approached, even if they did not intrude upon, the forbidden areas in the Religious Clauses." On a most important point, the Chief Justice explained that it was unnecessary to decide whether these precautions kept the program from having a principle or primary effect that advances religion, "for we conclude that the cumulative impact of the entire relationship arising under the statutes in each state involves excessive entanglement between government and religion."

Although the Chief Justice felt that previous decisions of the Court do not call for total separation between church and state, since total separation is an impossibility in an absolute sense, he concluded that the controlling approach was that advanced by Justice Harlan in his concurrence in *Walz,* where he explained that what the "Establishment Clause in fact prohibited were those programs whose very nature is apt to entangle the state in details of administration . . ." of church activities. The Court then found

[73] 397 U.S. 664, 668 (1970).

[74] Board of Education v. Allen, 392 U.S. at 243 (1968).

[75] *Walz,* 397 U.S. 664.

that both the Pennsylvania and Rhode Island statutes fostered an impermissible degree of entanglement.

Looking specifically at the Rhode Island programs first, the Court observed a plethora of activities resulting in excessive entanglement. The church schools were located close to the parish churches. The school buildings contained identifying religious symbols, and there were religiously-oriented extracurricular activities. Furthermore, approximately two-thirds of the teachers in the schools were Nuns belonging to various orders. In fact, the district court found, "the role of teaching Nuns in enhancing the religious atmosphere had led the parochial school authorities to attempt to maintain a one-to-one ratio between Nuns and lay teachers in all schools rather than permitting some to be staffed almost entirely by lay teachers." The Chief Justice felt that this process of inculcating religious doctrine was clearly enhanced by the impressionable age of the pupils, particularly in primary schools.

In a highly sophisticated fashion the Court distinguished its approach here from the 1968 *Allen* case,[76] which had upheld a New York statute utilizing public funds for textbooks in parochial schools. There was a significant difference, the Court explained, since "teachers have a substantially different ideological character than books . . . a textbook's content is ascertainable, but a teacher's handling of a subject is not." Thus a "conflict of functions inheres in the situation." While a number of teachers testified that they did not inject religion into their secular classes, the Court believed that the record suggested "the potential, if not actual hazards of this form of state aid."

Finally, with respect to the Rhode Island situation, the Court concluded that the fact the statutes excluded teachers employed by schools whose average per-pupil expenditure on secular education exceeds the comparable figure for public schools requires close governmental scrutiny of the schools' financial records and an "evaluation of the religious content of a religious organization [which] is fraught with the sort of entanglement that the Constitution forbids."

Turning next to the Pennsylvania situation, the Court found it was necessary to assume the validity of the allegations that the church-related schools receiving public aid were controlled by religious organizations and had the purpose of promoting religious faith, since the case had been decided on the pleadings without a trial. But like the Rhode Island statute, the Pennsylvania law gave rise to "impermissible entanglement," because grants such as this involving a "continuing cash subsidy" are always accompanied by "varying measures of control and surveillance."

In conclusion, the Court took judicial notice of political and economic

[76] Board of Education v. Allen, 392 U.S. 236 (1968).

realities that are essential and elemental ingredients in controversies of this nature. The Chief Justice explains that a broader base of entanglement of yet a different character is presented by the "divisive political potential of this state program." He then outlines in refreshing candor the danger that partisans of parochial schools would be ranged in opposition to those who oppose state aid and that "candidates will be forced to declare and voters to choose." Finally, the Court went on, "The potential for political divisiveness related to religious belief and practice is aggravated in these two statutory programs by the need for continuing annual appropriations and the likelihood of larger and larger demands as costs and populations grow."

In his concurring opinion, which Justice Black joined, Justice Douglas found that there was impermissible entanglement because the surveillance required by statute "puts a public investigator in every classroom and entails a pervasive monitoring of these church agencies by the secular authorities." Moreover, Justice Douglas rejected the "concept that the relief given to the public school system by private schools justified violating the establishment principle" and denied that financing sectarian education revived the evil of uniformity in the public schools because "the advantages of sectarian education relate solely to religious or doctrinal matters."

In *Tilton* v. *Richardson,* the related case decided the same day as *Lemon* and *DiCenso,* the Court's opinion was neither as clear, forceful, or unanimous. It sharply divided by a 5–4 vote, with Justice White concurring in an opinion which agreed only as to results but strongly opposed the "caveats against entanglement" which he insisted constituted a "blurred, indistinct, and variable barrier". Justice Douglas wrote a dissent in which he was joined by Justices Black and Marshall. Justice Brennan filed a separate dissenting opinion.

The suit brought by fifteen taxpayers challenged grants made to four sectarian colleges under Title I of the Federal Higher Educational Facilities Act of 1963. Under the Act, grants are made for the construction of a wide variety of academic facilities, but funds for facilities for sectarian instruction, religious worship, or in connection with divinity schools are prohibited. Moreover, it provides that the United States retains an interest in the facilities for twenty years, and if the restrictions on the use are violated during that period, the United States may recover a specified portion of the grant. The grants challenged here covered two libraries, a music and arts building, a science building, and a language laboratory.

A three-judge district court dismissed the complaint, ruling broadly that the Act authorized grants to church-related colleges and universities for secular purposes only. The Supreme Court concluded that the grants

were constitutional but that the section limiting the United States' interest to only twenty years violated the First Amendment. It remanded the case for appropriate proceedings.

The judgment of the Court was announced by Chief Justice Burger in an opinion having the support of only three of his brethren—Justices Harlan, Stewart, and Blackmun. The Chief Justice dealt first and briefly with the contention that the statute itself barred grants to sectarian schools, concluding that this was not supported by either the language or the history of the statute.

Regarding the constitutional issue, four basic questions must be considered, the Chief Justice explained:

> First, does the Act reflect a secular purpose? Second, is the primary effect of the Act to advance or inhibit religion? Third, does the administration of the Act foster an excessive entanglement with religion? Fourth, does the implementation of the Act inhibit the free exercise of religion.

Chief Justice Burger concluded that the law did, indeed, have "a legitimate secular objective," which was the development of the intellectual capacity of young Americans. Next, concerning the effect of the statute, he found that it was carefully drafted to insure that the funded facilities would be devoted to secular purposes and that the record showed that none of the four colleges had violated the statutory restrictions. The plaintiffs' claims that religious and secular functions were inseparable in the four Connecticut colleges was rejected by the Chief Justice, since he could find no evidence that religion "seeps into the use of any of these facilities." He acknowledged, however, that:

> Perhaps some church-related schools fit the pattern that appellants describe. Indeed, some colleges have been declared ineligible for aid by the authorities that administer the Act, but appellants do not contend that these four institutions fall within this category.

The section of the statute which limited the prohibition of religious use of the structures to twenty years was, however, a violation of the "religion clauses," Chief Justice Burger found, since "it cannot be assumed that a substantial structure has no value after that period and hence the unrestricted use of a valuable property is in effect a contribution of some value to a religious body." This finding did not require the Court to invalidate the entire statute, because, as the Chief Justice noted by citing a host of cases, "the cardinal principle of statutory construction is to save and not to destroy."

This section of the opinion cannot be passed without making a special note concerning the Chief Justice's merging of the two religion clauses in the First Amendment to strike down this section, despite the careful

delineation of these two clauses and the criteria set forth distinguishing them in earlier cases, such as *Engle*[77] and *Schempp*.[78] Inasmuch as the Chief Justice does not elaborate further on this point, it may or may not be of significance in the future. The operational importance of such a melding could be major and some would argue most mischievous.

Turning next to the question of whether the Act created an impermissible entanglement of church and state, the Chief Justice said, first, that it could not be said here, as it was in *DiCenso,* that the schools were an "integral part of the religious mission of the Catholic Church." In the light of the skepticism of college students, the nature of college and graduate school courses, the high degree of academic freedom characterizing many church-related colleges, the non-local constituencies of the colleges and the lack of a continuing financial relationships with government, contrasted to programs subsidizing teachers in primary and secondary schools, excessive governmental entanglement is avoided in this case, the Chief Justice explained.

The plaintiffs had also claimed impairment of the free exercise guarantees of the First Amendment because they were compelled to pay taxes whose proceeds financed grants to colleges with church connections plaintiffs did not share. The Chief Justice summarily dismissed this argument, saying that the cost to the plaintiffs "is not fundamentally distinguishable from the tax exemption sustained in *Walz* or the provision of textbooks upheld in *Allen.*"

Justice White filed a separate concurring opinion dissenting from the decision in *DiCenso,* concurring in the result in *Lemon* on procedural grounds and concurring in the result in *Tilton.* He insisted that it was unquestioned that parents have a constitutional right to send their children to sectarian private schools. Moreover, prior cases, he said, recognized that parochial schools have both religious and secular functions. Thus, he went on: "that religion may indirectly benefit from governmental aid to the secular activities of churches does not convert that aid into an impermissible establishment of religion."

Concerning the Court's entanglement argument, he felt the majority had rejected without justification the district court's finding that in fact there was no commingling of secular and religious instruction in the Rhode Island parochial schools. The result as he saw it was:

> The Court thus creates an insoluble paradox for the State and the parochial schools. The State cannot finance secular instruction if it permits religion to be taught in the same classroom; but if it exacts a promise that religion will not be so taught—a promise the school and its teachers are

[77] 370 U.S. 421 (1962).
[78] 374 U.S. 203 (1963).

quite willing and on this record able to give—and enforce it, it is then entangled in the 'no entanglement' aspect of the Court's establishment clause jurisprudence.

Justice Douglas wrote a dissenting opinion in *Tilton,* in which Justices Black and Marshall joined. Under the Federal Act, he noted, a project is eligible for a grant if it will result in "expansion of the institution's student enrollment capacity. . . ." The result, he noted, is that while the public purpose of secular education would no doubt be furthered by the program, "the sectarian purpose is aided by making the parochial school system viable." This increase in "student enrollment," as Justice Douglas saw it, was "aimed at . . . those of the particular faith now financed by taxpayers' money." The distinction between annual grants and a single lump sum grant is rejected by the dissenters since "it is hardly impressive that rather than giving a smaller amount of money annually over a large number of years, Congress instead gives a large amount all at once."

Justice Brennan wrote a separate dissenting opinion in *Tilton,* in which he expressed the view that the Act was unconstitutional only insofar as it authorized grants to sectarian institutions, but only to that extent. He would have remanded the case for a hearing to determine whether the four colleges involved were, in fact, "sectarian institutions." He emphasized that "the common feature of all three statutes before us is the provision of a direct subsidy from public funds for activities carried on by sectarian education institutions." Finally, the theme that runs throughout his dissent is his concern with the governmental surveillance of religious institutions which all three of the programs involved in *Lemon, DiCenso* and *Tilton* require.

Postscript

Given the multiplicity of programs involving public funds which proponents of parochial schools have devised to help support their educational enterprise, few observers expected the decisions of the Supreme Court in the Summer of 1971 to constitute a definitive answer to the constitutional question of public aid to church-related schools. Their expectations were well-founded—within approximately six months, three other states have had similar programs come under judicial scrutiny. Moreover, there is little reason to think litigation of this nature will diminish in the near future.[79]

On November 24, 1971, the Supreme Court of Ohio upheld as not violative of either the Ohio or United States Constitution a state statute

[79] An enlightening discussion of both sides of the question of whether the ESEA of 1965 violates the establishment clause, may be found in A. H. SCHECTER, CONTEMPORARY CONSTITUTIONAL ISSUES, at 203–227 (1972).

which provides for state reimbursement to public school districts which provide "services and materials to pupils attending non-public schools within the school district for guidance testing and counselling programs; programs for the deaf, blind, emotionally disturbed, crippled and physically handicapped children." [80] Public funds were also provided to non-public schools for audio-visual aids, remedial reading programs, educational television services, and programs for the improvement of the educational and cultural status of disadvantaged pupils.[81]

Justice Herbert of the Ohio Supreme Court wrote the unanimous opinion, in which he distinguished the Ohio program from the types struck down by the U.S. Supreme Court in *Lemon* and *DiCenso*. In Ohio, there did not exist the thorough entanglement in the "extensive and continual audit and data inspection" between the respective state government and the church-related schools," he observed. Furthermore, the Ohio plan involved auxiliary personnel only, not "teachers of secular subjects," as in Pennsylvania and Rhode Island. He explained, "it is difficult for us to perceive how specialized services, all tuned to the needs of the physically, emotionally, and culturally handicapped children, could give rise to the same fears of religious bias as might exist in an informal, day-to-day teaching situation." Some observers will not share his view as to the obvious distinction between a teacher of standard classroom subjects and other types of teachers in a school.

The Ohio Court found another distinction that may appear to some to be more apparent than real. Justice Herbert explained that "it is uncontroverted here that the auxiliary personnel involved are both *hired* and *paid* by the State of Ohio through its local public school district. That fact effectively negates the existence of "religious control and discipline" as an element of the instant case.[82]

On January 17, 1972, the Illinois Supreme Court ruled that the State does not have to begin paying the $30 million in aid to parochial schools approved by the State Legislature in the Fall of 1971. In its ruling, the Illinois Court avoided the question of conflict between church and state. Rather, its opinion turned on the Court's finding that the Governor exceeded the powers authorized by the Illinois Constitution of 1970 in his handling of the measure.[83]

The Legislature passed the first version of the bill in June 1971, but the Governor refused to sign it, saying it was full of constitutional pitfalls. The Legislature revised it and it was finally approved in October. In the

[80] P.O.A.U. v. Essex, 28 Ohio St.2d. 79, 275 N.E. 2d 693 (1971).

[81] R. C. § 3317.06 (H).

[82] At this juncture no evidence of the status of an appeal, if any, to the U.S. Supreme Court was found, but given the brief period of elapsed time that of itself is not significant.

[83] For a discussion *see*, DES MOINES REGISTER, Jan. 18, 1972.

present case, the Illinois Supreme Court rejected the petition of L. E. Klinger, the father of four children, two of whom attended public schools, to force the State Auditor to start paying the aid. The Auditor had refused to authorize payment until a constitutional test of the parochial school aid package was made in the courts. The bills to aid parochial schools included $20.5 million for textbook and auxiliary services, such as guidance counseling; $4.5 million for grants to families of poor pupils; and $5 million for experimental education programs.

Another test of the Illinois law is pending in the United States District Court in the Southern District of Illinois.[84]

Earlier in January a three-judge federal district court had ruled unconstitutional the New York State law of 1971 granting financial aid to parochial schools, thus voiding payments of $33 million to non-public elementary and secondary schools. The district court decision was based on the Supreme Court's ruling in *Lemon* and *DiCenso*.

The New York statute provided subsidies for teachers' salaries, books, and supplies for secular subjects in parochial schools, and sought to accomplish this without necessitating repeal of the State's Blaine Amendment.[85] The news media reported that the federal court's decision had been "anticipated" by Catholic leaders, who had said they did not believe the law "could survive the court test" in light of the U.S. Supreme Court's rulings. The Church leaders, however, said they would continue to work with the New York Legislature to attempt to devise a constitutional plan to aid parochial education. The Governor also promised that his administration would draft a new parochial aid plan during the 1972 session.[86]

Conclusion

It is difficult to conclude a review such as this, since it is obvious the debate and contention continue. Several things are worth noting, however, as elements which should prove of significance in moving the matter to a solution—if indeed there is one.

First, elementary school age population has at least reached a plateau or is in decline in many areas of the country because of the stabilizing birthrate. If this trend continues, as many demographers predict, the reversal of growth trends prevailing since World War II will have dramatic effect on both public and parochial schools. A decline in public school enrollment means, of course, there will be more space for any parochial students who wish to enroll. This, coupled with the fact that space-

[84] *Ibid.*
[85] *Ibid.*
[86] *Ibid.*

cost studies in a number of states indicate there is now enough space in the public schools to accommodate parochial school students blunts the arguments of many proponents of church-related schools that such schools are bailing out the states' taxpayers and the public schools, and thus should receive some public financial support.

If the decline in school age population continues, this will also mean there should be less need for funds from either the public or private sector to enlarge the parochial school buildings along the lines of some state and federal funding programs for such schools. Building expense might then largely involve costs of repair and maintenance or replacement. When questions of replacement arise, the corollary question should confront state policymakers as to whether they want to use tax funds to provide duplicate facilities to those available in the public schools.

It seems more likely, in view of the cost trends in the Nation, that the greatest economic pinch on parochial school systems is felt in the area of teachers' salaries, since more and more of these schools throughout the country are forced to rely on lay teachers. Thus, if public funds are to meet the true economic needs of church-related schools, they should be aimed at direct or indirect salary subsidies, which the Supreme Court has apparently categorically prohibited in *Lemon* and *DiCenso*. Nonetheless, there is little reason to believe that a variety of sophisticated and not so sophisticated attempts will not be made to continue to provide such assistance.

From a pragmatic standpoint, it must be recognized that the Supreme Court has removed most of the practices in the public schools—such as state-sponsored prayers, Bible reading and related practices—that Roman Catholics and others legitimately objected to as doctrinal vestiges of Protestantism. If any remain in a given school system, protestors should have little difficulty in seeing that they are removed. Thus, bonafide religious objections to public school programs, which were largely responsible for the creation of a Roman Catholic parochial system in the United States, have become minimal or non-existent.

If there are other religious reasons why a sect wishes to maintain parochial schools, of course, this is their constitutional right, so long as general state standards are met. But there are fewer controlling reasons why taxpayers who do not share these religious convictions should be called upon to foot part of the bill. Moreover, if upper and middle class Protestants wish to use the parochial or private school systems as a vehicle for their children to avoid children of ethnic minorities or children from lower socio-economic parents, they should pay the real cost of such education.