TUITION TAX CREDITS

HEARINGS

BEFORE THE

SUBCOMMITTEE ON TAXATION AND DEBT MANAGEMENT

OF THE

COMMITTEE ON FINANCE UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

FIRST SESSION

ON

S. 550

JUNE 3 AND 4, 1981

Part 1 of 2

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TUITION TAX CREDITS

WEDNESDAY, JUNE 3, 1981

U.S. SENATE,
SUBCOMMITTEE ON TAXATION AND DEBT MANAGEMENT,
COMMITTEE ON FINANCE,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9 a.m., in room 2221, Dirksen Senate Office Building, Hon. Bob Packwood (chairman) presiding.

Present: Senators Packwood, Grassley, Long, Bentsen, and Moynihan.

[The press release announcing hearings, the bill S. 550, a description by the joint committee, and prepared statements of Senators Dole, Roth, Moynihan, and Quayle follow:]

Press Release No. 81-129

PRESS RELEASE

FOR IMMEDIATE RELEASE
May 8, 1981

COMMITTEE ON FINANCE
UNITED STATES SENATE
Subcommittee on Taxation and
Debt Management
2227 Dirksen Senate Office Bldg.

FINANCE SUBCOMMITTEE ON TAXATION AND DEBT MANAGEMENT SETS HEARING ON TUITION TAX CREDITS

Senator Packwood, Chairman of the Subcommittee on Taxation and Debt Management of the Senate Committee on Finance announced today that the Subcommittee will hold a hearing on June 3 and 4, 1981 on S. 550. S. 550 would provide for a tax credit for a portion of educational expenses paid for elementary, secondary, vocational, and college education.

The hearing will begin at 9:30 a.m. each day in Room 2221 of the Dirksen Senate Office Building.

Requests to Testify. Witnesses who desire to testify at the hearing must submit a written request to Robert E. Lighthizer, Chief Counsel, Committee on Finance, Room 2227 Dirksen Senate Office Building, Washington, D.C. 20510, to be received no later than noon on Wednesday, May 27, 1981. Witnesses will be notified as soon as practicable thereafter whether it has been possible to schedule them to present oral testimony. If for some reason a witness is unable to appear at the time scheduled, he may file a written statement for the record in lieu of the personal appearance. In such case a witness should notify the Committee, as soon as possible, of his inability to appear.

Consolidated Testimony. Senator Packwood urges all witnesses who have a common position or who have the same general interest to consolidate their testimony and designate a single spokesman to present their common viewpoint orally to the Subcommittee. The procedure will enable the Subcommittee to receive a wider expression of views than it might otherwise obtain. Senator Packwood urges that all witnesses exert a maximum effort to consolidate and coordinate their statements.

Legislative Reorganization Act. Senator Packwood stated that the Legislative Reorganization Act of 1946, as amended, requires all witnesses appearing before the Committees of Congress "to file in advance written statements of their proposed testimony, and to limit their oral presentations to brief summaries of their argument."

Witnesses scheduled to testify should comply with the following rules:

(1) All witnesses must submit written statements of their testimony.

(2) Written statements must be typed on letter-size paper (not legal size) and at least 100 copies must be delivered not later than noon of the day before the witness is scheduled to appear.

(3) All witnesses must include with their written statement a summary of the principal points included in the statement.

(4) Witnesses should not read their written statements to the Subcommittee, but ought instead to confine their oral presentations to a summary of the points included in the statement.

(5) Not more than five minutes will be allowed for the oral summary.

Written statements. Witnesses who are not scheduled to make an oral presentation, and others who desire to present their views to the Subcommittee, are urged to prepare a written statement for submission and inclusion in the printed record of the hearings. These written statements should be typewritten, not more than 25 double-spaced pages in length, and mailed with five (5) copies to Robert E. Lighthizer, Chief Counsel, Committee on Finance, Room 2227 Dirksen Senate Office Building, Washington, D.C. 20510, not later than Friday, June 18, 1981. On the first page of your written statement please indicate the date and subject of the hearing.

P.R. #81-129

DESCRIPTION OF S. 550
TUITION TAX RELIEF ACT OF 1981

ON JUNE 3 AND 4, 1981

PREPARED FOR THE USE OF THE

COMMITTEE ON FINANCE

BY THE STAFF OF THE

JOINT COMMITTEE ON TAXATION

INTRODUCTION

The Senate Finance Committee's Subcommittee on Taxation and Debt Management has scheduled public hearings on June 3 and 4, 1981, on S. 550, the Tuition Tax Relief Act of 1981 (introduced by Senators Packwood, Moynihan, Roth, Durenberger, Heinz, and others).

This pamphlet, prepared in connection with the hearings, contains seven parts. The first part is a summary of present law and the bill. Parts two and three contain brief descriptions of present law relating to tax benefits for educational expenses and nontax benefits for education, respectively. Part four discusses prior Congressional action relating to tuition tax benefits. Part five provides a brief summary of selected issues. Part six provides a more detailed description of the provisions of S. 550, and part seven contains the estimated revenue costs of the bill.

I. SUMMARY

Present Law

Present law provides no tax credit or deduction for personal educational expenses. However, in certain cases, taxpayers are entitled to a personal exemption for a dependent, which they could not claim otherwise, because the dependent is a student. Moreover, individuals generally may exclude from gross income amounts received as scholarships and fellowships, or amounts received under qualified educational assistance programs. Finally, certain types of "job-related" education expenses may be deducted.

Private elementary and secondary education is financed, primarily, with private funds. However, many private schools and their students receive some sort of public, financial assistance.

Currently, the Federal Government provides more than $13 billion for postsecondary education. The bulk of these funds are made available through Pell Grants, Guaranteed Student Loans, and the Social Security Student Benefit Program. Moreover, there are several, smaller college student assistance programs, such as Supplemental Educational Opportunity Grants, National Direct Student Loans, and the College Work Study Program. Funds for postsecondary education also are made available through grants from such agencies as the National Science Foundation and the Public Health Service.

Summary of S. 550

In general, the bill would provide a refundable tax credit for 50 percent of the educational expenses paid by an individual for himself, his spouse, or his dependents. Qualified educational expenses would be tuition and fees required for enrollment or attendance at a private elementary or secondary school, or a public or private college or vocational school.

The maximum amount of the credit would be $250 for educational expenses allocable to education furnished after July 31, 1982, and before August 1, 1983. Thereafter, the maximum credit amount would be $500. In addition, the credit would be available for graduate students and half-time students for educational expenses allocable to education furnished after July 31, 1984.

The bill would be effective for taxable years ending after July 31, 1982, with respect to amounts paid after that date for educational expenses incurred after that date.

II. PRESENT LAW RELATING TO TAX BENEFITS FOR EDUCATIONAL EXPENSES

A. Special Rule for Claiming Dependency Exemption for a Child Who is a Student

In certain cases, taxpayers are entitled to a personal exemption for a dependent, which they otherwise could not claim, because the dependent is a student. Generally, a taxpayer may claim a $1,000 personal exemption deduction for each dependent who has less than $1,000 gross income for a taxable year. However, the gross income limitation does not apply if the dependent is the taxpayer's child and is under the age of 19 or is a student (Code sec. 151).

B. Income Tax Exclusion for Scholarships and Fellowships

Individuals generally may exclude from income amounts received as scholarships and fellowships (Code sec. 117). The exclusion also covers incidental amounts received to cover expenses for travel, research, clerical help, and equipment when they are expended for these purposes. The exclusion for scholarships and fellowship grants is restricted to educational grants by relatively disinterested grantors who do not require any significant consideration (e.g., promises of future services) from the recipient, except in the case of certain Federal grants. Similarly, where an educational institution allows delayed payment of tuition, the Internal Revenue Service regards tuition postponement to be a loan and, therefore, not includible as income to the student (Rev. Rul. 72–2, 1972–1 C.B. 19).

In general, an amount that is received by an individual as a grant under a Federal program, which would be excludible from gross income but for the fact that the individual recipient is required to perform future services as a Federal employee, is excludible if the individual establishes that it was used for tuition and related expenses.

C. Deduction for "Job-Related" Educational Expenses

Education expenses which qualify as trade or business expenses under Code section 162 may be deducted. Expenditures made by an individual for his own education generally are deductible if they are for education which (1) maintains or improves skills required by the individual's employment or other trade or business or (2) meets the express requirements of the individual's employer or the requirements of applicable law or regulations imposed as a condition to the retention by the individual of an established employment relationship, status, or rate of compensation (Treas. Reg. sec. 1.162–5(a)). These types of education commonly are called "job-related" education.

D. Income Tax Exclusion for Amounts Received Under Educational Assistance Programs

For taxable years beginning after December 31, 1978, and before December 31, 1983, amounts paid by an employer for an employee's educational expenses may be excluded from the employee's income if paid pursuant to a qualified educational assistance program (Code sec. 127). A qualified educational assistance program must be a separate written plan of an employer for the exclusive benefit of employees. The plan also must meet requirements with respect to nondiscrimination in contributions or benefits and in eligibility for enrollment, but it need not be funded or approved in advance by the Internal Revenue Service. For a program to qualify, the employees must be given adequate notification and must not be able to choose taxable benefits in lieu of the educational assistance.

Benefits which may be provided under the program include tuition, fees, and similar payments, books, supplies, and equipment. Covered studies need not be restricted to courses which are job-related or part of a degree program.[1] However, an employee claiming an exclusion under this section may not claim any other deduction or credit (e.g., a Code sec. 162 deduction for job-related education) with respect to any excludible benefits.

E. Tax-Exempt Bonds for Student Loans

Present law provides an exemption from taxation for the interest on bonds ("qualified scholarship funding bonds") issued by certain private, non-profit corporations to finance college student loan programs (Code secs. 103(a)(2) and (e)).

A qualified scholarship funding bond is an obligation of a non-profit corporation organized by, or requested to act by, a State or a political subdivision of a State (or a possession of the United States), solely to acquire student loan notes incurred under the Higher Education Act of 1965. The entire income of such a corporation (after payment of expenses and provision for debt service requirements) must accrue to the State or political subdivision, or be required to be used to purchase additional student loan notes.

F. Other Tax Provisions of Benefit to Education

Some provisions that benefit education, in general, and sometimes students, in particular, include the exclusion from income of gifts (Code sec. 102), which may comprise a large portion of a student's support, and the charitable contribution deduction (Code sec. 170), which allows a deduction for contributions to educational institutions. Other provisions, such as the exclusion of interest on State and municipal bonds (Code sec. 103) and the deduction for State and local taxes (Code sec. 164) indirectly assist publicly-supported educational institutions by easing the financial burden on State and local governments.

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[1] Generally, however, no exclusion is permitted for educational assistance furnished for courses involving sports, games, or hobbies.

III. NONTAX BENEFITS FOR EDUCATION

A. Elementary and Secondary Education

Private elementary and secondary education is financed primarily from private funds. However, many private schools receive some type of public, financial assistance. For example, some States furnish private schools with standardized tests and scoring services, loan textbooks to private school students, and provide transportation to and from school. The Federal Government is authorized to furnish private school students with compensatory instruction and certain other services under the Elementary and Secondary Education Act, the Education of the Handicapped Act, and other Federal legislation dealing with education.

Federal assistance is provided for public elementary and secondary education through a variety of programs administered by the Department of Education. These programs include the Elementary and Secondary Education Act of 1965, Impact Aid, the Adult Education Act, the Vocational Education Act, and the Education of the Handicapped Act.

B. Postsecondary Education [1]

The greatest amount of Federal student assistance for postsecondary education is furnished through programs authorized under title IV of the Higher Education Act, which is administered by the Department of Education. The five principal sources of assistance under that Act are the Guaranteed Student Loan program, Pell Grants (formerly, Basic Educational Opportunity Grants), Supplemental Educational Opportunity Grants, College Work Study, and the National Direct Student Loan program. With the exception of Guaranteed Student Loans, these programs provide "needs-based" assistance. In addition to these programs, the Department of Education administers several, smaller programs that provide grants, loans, and other types of special student services. These programs include the State Student Incentive Grant program and the Graduate and Professional Opportunity Grant, Graduate Fellowship, and Legal Training programs, as well as several programs, that provide special services to students, such as the Veterans Cost-of-Instruction, Migrant Student, and Law School Clinical Experience programs.

The largest sources of Federal student assistance outside of the Department of Education are the Social Security Student Benefit program, administered by the Department of Health and Human Services, and several veterans education programs, administered by

[1] For a more complete description of Federal assistance to postsecondary education, as well as proposed budget cuts, see Congressional Research Service Issue Brief Number IB 81042, "Student Financial Assistance: FY 82 Budget."

the Veterans Administration. Also, outside of the Department of Education is the Student Loan Marketing Association, a Federally chartered, privately owned corporation that provides secondary marketing for the Guaranteed Student Loan program.

C. Fiscal 1982 Budget Considerations

The Administration has proposed to consolidate about 45 separate education programs into two block grants and to cut overall spending for education and training by approximately 25 percent. The conference report on the first budget resolution provides $14.2 billion in outlays for fiscal year 1982, which is about $900 billion above the $13.3 billion recommended by the Administration. In January, the Carter Administration had recommended $15.8 billion in outlays for education in 1982.

IV. PRIOR CONGRESSIONAL ACTION RELATING TO TUITION TAX BENEFITS

In the 1950's, tax deductions from adjusted gross income for some portion of college expenses and an additional personal exemption for each student were the most common legislative proposals for tax relief for educational expenses. In the 1960's, tax credit proposals became popular. From 1967 to 1977, six education tax credit proposals passed the Senate, but none was ever approved by the House of Representatives.

1977 Legislation

The Social Security Financing Amendments of 1977, as passed by the Senate, contained an amendment, known as the "Roth amendment," to provide a tax credit for certain educational expenses. This amendment was deleted from the bill by the conferees.

The 1977 amendment would have allowed a tax credit for educational expenses paid by an individual for himself, his spouse, or his dependents. The credit would have covered 100 percent of the eligible educational expenses at institutions of higher education (but not graduate schools) or postsecondary vocational schools, up to a maximum of $250 for any one individual. This credit would have been refundable only for the first year that it was effective.

1978 Legislation

In February 1978, the Senate Finance Committee reported a House-passed tariff bill with an amendment providing a refundable credit for tuition and fees paid for undergraduate college and post-secondary vocational school expenses after August 1, 1978, and for elementary and secondary school expenses after August 1, 1980. On August 1, 1981, this credit would have been extended to the educational expenses of graduate students and part-time students. The credit would have been for an amount equal to 50 percent of tuition and fees, with a maximum credit of $250 per-student per-year as of August 1, 1978, increasing to a maximum of $500 per student on August 1, 1980. This bill was never considered on the Senate floor.

The House Ways and Means Committee, in April, 1978, reported a bill (the "Tuition Tax Credit Act of 1978") that would have provided a nonrefundable credit equal to 25 percent of the tuition paid by the taxpayer to one or more eligible educational institutions for himself, his spouse, or any of his dependents.[1]

This credit would have been available only for tuition paid to undergraduate institutions of higher education and postsecondary vocational schools. The maximum credit would have been $100 for 1978, $150 for 1979, and $250 for 1980.

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[1] H.R. Rep. No. 95-1056, 95th Cong., 2d Sess. (1978).

The House amended this bill to provide a credit, with the same limits applicable to tuition paid to undergraduate institutions, for graduate postsecondary expenses. In addition, the bill was amended to provide a credit for expenses paid to elementary and secondary schools. The maximum credit for elementary and secondary school expenses would have been $50 for 1978, $100 for 1979, and $100 for 1980.

The Senate Finance Committee, in August, 1978, reported the House-passed bill with amendments (the "Tuition Tax Relief Act of 1978").[2] This bill would have provided a nonrefundable credit for an amount equal to 50 percent of the educational expenses paid by the taxpayer during the taxable year. Beginning August 1, 1978, the maximum credit for undergraduate college or postsecondary school expenses would have been $250. This amount would have increased to $500 on October 1, 1980. In addition, the credit would have been expanded to cover students in private elementary and secondary schools (including vocational secondary schools) and half-time undergraduate students, as of October 1, 1981. The maximum credit for elementary and secondary school expenses would have been $250. The Senate amended this bill by deleting coverage for elementary and secondary school expenses and by providing that no credit would be allowed after December 31, 1983.

On October 3, 1978, the Conference Committee reported a bill that would have provided a credit equal to 35 percent of tuition paid to institutions of higher education and postsecondary vocational schools.[3] The maximum credit allowed under this proposal would have been $100 for 1978, $150 for 1979, $250 for 1980, and $250 for 1981. The House rejected this proposal, and the Conference Committee submitted a second report that, in addition to a credit for higher education expenses, would have allowed a credit for secondary education expenses (a maximum credit of $50 in 1978, $100 in 1979, $100 in 1980, and $100 in 1981).[4] This proposal was rejected by the Senate.

96th Congress

Although there were several bills providing for tuition tax credits introduced in the 96th Congress, no legislative action was taken on them.

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[2] S. Rep. No. 95-1066, 95th Cong., 2nd Sess. (1978).

[3] H.R. Rep. No. 95-1682, 95th Cong., 2d Sess. (1978). A similar provision was contained in the Senate version of the Revenue Act of 1978, but was deleted in conference. (See, H.R. Rep. No. 95-1800, 95th Cong., 2d Sess. (1978).)

[4] H.R. Rep. No. 95-1790, 95th Cong., 2d Sess. (1978).

V. SUMMARY OF SELECTED ISSUES

A. Constitutional Issues

The constitutionality of providing Federal tax benefits to nonpublic school students or their parents has long been a subject of debate because of the sectarian character of most nonpublic schools. No case dealing with tax credits or deductions directly related to the actual cost of nonpublic school tuition has been decided by the Supreme Court. However, in *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973), the Court held that a New York State income tax deduction for each child attending nonpublic secondary or elementary school in an amount unrelated to the actual cost of tuition violated the establishment clause of the First Amendment of the U.S. Constitution.[1] Although the *Nyquist* decision did not deal specifically with tax credits or deductions based on the actual cost of tuition, the Court's opinion suggests that these types of benefits also might be unconstitutional. In testing the constitutionality of a statute under the establishment clause of the First Amendment, the Court applied three cumulative tests:[2]

(1) the statute must have a secular purpose;

(2) the primary effect of the statute must neither advance nor inhibit religion; and

(3) the statute must not foster excessive government entanglement with religion.

The Court concluded that the New York State statute met the secular purpose test, but held that the statute failed the primary effect test, and indicated *in dicta* that prospects for passing the excessive entanglement test were not good. In its decision, the court cited the case of *Kosydar* v. *Wolman*, 353 F. Supp. 744 (S.D. Ohio 1972) in which the United States district court held that a State refundable tuition tax credit based on educational expenses incurred and subject to a dollar limitation violated the Establishment Clause.

Although tax credits or deductions for nonpublic elementary or secondary schools may entail constitutional difficulties, Federal aid to church-related colleges and universities generally has been regarded with less suspicion by the Supreme Court. In upholding construction grants to church-related colleges and universities for nonsectarian facilities, the Court found in *Tilton* v. *Richardson*, 403 U.S. 672 (1971), that there was much less likelihood that religion would permeate secular education at that level, and, thus, the risk that government aid would support religious activities or foster excessive government entanglement with religion was reduced significantly.

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[1] The First Amendment states that: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof * * *"

[2] To be found constitutional under the establishment clause, a statute must pass all three tests. *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971).

B. Policy Issues

Arguments for tuition tax credits

Several arguments have been advanced in favor of tuition tax credits. In general, those in favor of such credits point out that private elementary and secondary schools serve a useful function that merits some sort of public support, that private schools allow parents to choose the education that is best for their children, and that private schools need more support in order to maintain their high standard of quality and to prevent loss of enrollments. It also is argued that, with ever-increasing college costs, some relief should be provided to families and students who are trying to keep up with those costs.

Moreover, it is maintained that tuition tax credits would provide middle- and lower-income families with some of the opportunities now enjoyed by upper-income families who have the means to choose private schools and expensive colleges for their children. Furthermore, it is argued that tuition tax credits would be simple to claim and easy to administer.

Arguments against tuition tax credits

Those who oppose tuition tax credits argue that public money should not be used to support private schools, and that the credits merely would be a windfall to families who already can afford to provide their children with a private school or college education. These people argue that direct aid programs are better targeted to needy individuals than tuition tax credits. Moreover, some opponents of tuition tax credits believe that they would provide an excuse for private schools and colleges to increase their tuition even more. Furthermore, some people believe that providing tuition tax credits for private education could lead, eventually, to Federal Government control of private institutions.

C. Technical Issues

Any proposal for a tax credit involves several technical issues. These issues, involving, for example, the form of the credit, whether the credit should be refundable, and eligibility for the credit, also involve substantive questions.

Form of the credit

Issues relating to the form of the credit concern, primarily, whether the credit should be a flat amount or a percentage credit, the maximum amount of the credit, and whether the credit should be on a per-taxpayer or per-student basis.

A percentage credit would add complexity, as compared to a credit for a flat amount, for those who could claim it because it would require an extra computation. However, allowing a credit for only some fraction of tuition expenses would assure that the taxpayer pays some part of the tuition out of his or her own funds.

Putting a maximum amount on the credit helps in holding down the overall revenue loss of the proposal. However, the level of the maximum amount could have some effect on the types of individuals and institutions who would benefit from the credit.

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The credit could be applied on a per-taxpayer or per-student basis. While allowing the credit on a per-taxpayer basis generally would hold down the cost, some might argue that this would discriminate against large families.

Refundability

A refundable tax credit involves larger revenue costs than a nonrefundable credit. However, a refundable credit would extend benefits to individuals who have no tax liability or whose tax liability is too small to benefit fully from the full amount of the credit.

Income phaseout

Some tax credits provided under present law contain income phaseouts (*e.g.*, disability income credit, earned income credit, and credit for the elderly) in order to direct their benefits toward lower- and middle-income taxpayers. Whether or not to adopt an income phaseout with respect to tuition tax credits would depend upon whether the Congress wanted the benefits to be phased out for upper-income groups or whether it wanted all taxpayers to be potentially eligible for the same amount of credit.

Eligible institutions

A major issue with respect to tuition tax credits concerns which institutions should be covered by the credit. That is, whether the credit should be extended to all colleges and private elementary and secondary schools; whether the credit should be limited to colleges, private secondary schools, or private elementary schools (or some combination of the three); or whether the credit should be extended to public, as well as private, elementary and secondary schools. A related issue is whether the credit for private education should be limited to schools that are exempt from Federal income tax.

Many proponents of credits for elementary and secondary education who are concerned about potential constitutional issues with respect to those credits have contended that combining credits for elementary and secondary schools with credits for higher education might reduce the likelihood that the elementary and secondary provisions would be held unconstitutional.

Other issues

Tuition tax credits give rise to several other issues. These issues include whether the credits should be available for part-time students and graduate students; whether creditable expenses should be offset by certain benefits (*e.g.*, scholarships and fellowships); whether other tax benefits for creditable expenses should be disallowed; and what effect tuition tax credits should have on other educational assistance programs.

VI. DESCRIPTION OF S. 550

(THE TUITION TAX RELIEF ACT OF 1981)

A. Declaration of Policy

The bill contains a statement of policy. This statement would declare that it is to be the policy of the United States to foster educational opportunity, diversity, and choice for all Americans. It states, further, that Federal legislation should recognize the right of parents to direct the education and upbringing of their children, and the heavy financial burden now borne by individuals and families who must pay tuition to obtain the education that best serves their needs and aspirations (whether at the primary, secondary, or post-secondary level), and should provide some relief.

Moreover, this statement would declare that Congress finds, without the relief to be granted by this bill, the personal liberty, diversity, and pluralism which constitute important strengths of education in America would be diminished and that the assistance provided by the bill can appropriately be provided through the income tax structure with a minimum of complexity and governmental interference in the lives of individuals and families. While the Congress would recognize that the Supreme Court is ultimately responsible for determining the constitutionality of provisions of the law, this policy statement would provide that Congress finds that the relief to be provided by the bill is in accord with all provisions of the Constitution.

The policy statement concludes that the primary purpose of the bill would be to enhance equality of educational opportunity for all Americans at the schools and colleges of their choice.

B. General Provisions

Under the bill, an individual would be allowed to claim a tax credit for 50 percent of the educational expenses paid by him or her during the taxable year to one or more educational institutions for himself or herself, his or her spouse, or any of his or her dependents. This would be a refundable credit. That is, if the amount of this credit exceeded an individual's tax liability, the difference would be received in the form of a direct payment from the Treasury.

The benefits to be provided by the bill would take effect in stages. The maximum amount of educational expenses that could be taken into account with respect to any individual, for the taxable year, would be $500 for expenses that are allocable to education furnished after July 31, 1982, and before August 1, 1983. The maximum amount of educational expenses that could be taken into account for expenses allocable to education furnished after July 31, 1983, would be $1,000. Thus, the maximum credit would be $250 for education furnished after July 31, 1982, increasing to $500 for education furnished after July 31,

1983. If an individual made payments, within one taxable year, for education furnished before August 1, 1983, as well as for education furnished after July 31, 1983, the maximum credit would be $500, but only $500 of the expenses paid for education furnished before August 1, 1983 could be taken into account.

Prior to August 1, 1984, creditable expenses would be expenses for the education of a full-time, undergraduate, college student or a full-time student at a vocational school, a private secondary school, or a private elementary school. (Amounts paid before August 1, 1984, for educational expenses allocable to education furnished on or after that date would be treated as having been paid on August 1, 1984.) A full-time student would be an individual who, during any four calendar months during the calendar year in which the taxable year of the taxpayer begins, is a full-time student at an educational institution. The credit would be extended to graduate students and half-time students in the case of expenses allocable to education furnished after July 31, 1984. A graduate would be one who has been awarded a baccalaureate degree by an institution of higher education. A half-time student would be an individual who, during any four calendar months during the calendar year in which the taxable year of the taxpayer begins, is a half-time student at an eligible institution under regulations which are consistent with regulations prescribed by the Secretary of Education.

C. Specific Provisions

1. Eligible educational institutions

The credit to be provided by the bill would be available with respect to educational expenses paid to: (1) an institution of higher education,[1] (2) a vocational school,[2] (3) a secondary school, or (4) an elementary school.

An eligible elementary school would be a privately operated, not-for-profit, day or residential school which provides elementary education; which is exempt from taxation under Code section 501(a) as an organization described in Code section 501(c)(3); and which does not exclude persons from admission to the school, or participation in the school, on account of race, color, or national or ethnic origin.

An eligible secondary school would be a privately operated, not-for-profit, day or residential school which provides secondary education that does not exceed grade 12, which also is a tax-exempt organization and does not exclude persons because of race, color, or national or ethnic origin.

Furthermore, eligible elementary and secondary schools would include facilities (whether or not privately operated) that offer education, as a substitute for regular public elementary or secondary education, for individuals who are physically or mentally handicapped.

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[1] Defined as an institution described in section 1201(a) or 481(a) of the Higher Education Act of 1965 (as in effect on January 1, 1981).

[2] An area vocational education school (as defined in section 195(2) of the Vocational Education Act of 1963, as in effect on January 1, 1981) which is located in any State.

Payments for education furnished by an elementary or secondary school of a State educational agency that is privately operated would not qualify for the credit unless the payments are incurred for the education of handicapped individuals.

2. Eligible expenses

Expenses eligible for the credit would be tuition and fees required for the enrollment or attendance of a student at an eligible educational institution, including any required fees for courses.

Specifically excluded from the category of eligible expenses would be any amounts paid, directly or indirectly, for the following items: (1) books, supplies, and equipment for courses of instruction at an educational institution; (2) meals, lodging, transportation, or similar personal, living, or family expenses; and (3) education below the first-grade level or attendance at a kindergarten or nursery.

If an amount paid for tuition and fees includes payment for an item that does not qualify as an educational expense (for example, a charge for books), and the charge with respect to that item is not separately stated, then the taxpayer would have to document the portion of the total amount paid that is attributable to educational expenses.

3. Reduction of creditable expenses

The bill would require that otherwise eligible educational expenses be reduced by certain amounts attributable to the payment of educational expenses. These amounts would be: (1) amounts received from a tax-free scholarship or fellowship grant; (2) certain Veterans' benefits;[3] and (3) any other payment (except for a gift, bequest, devise, or inheritance which is excludible under Code sec. 102(a)) for educational expenses, or attributable to attendance at an educational institution, that is exempt from income taxation under any law of the United States.

In addition, pursuant to Treasury Regulations, otherwise eligible expenses would be reduced by any amount attributable to the payment of educational expenses received with respect to any individual to the extent that it is an interest subsidy on any loan received by the individual, or constitutes any other form of financial assistance to the individual. Offsets for these amounts would apply only with respect to amounts received after the date on which final Treasury Regulations are issued.

If an amount which must be applied to reduce otherwise eligible educational expenses is not specifically limited to the payment of educational expenses, then the portion of such amount which is attributable to the payment of educational expenses would be determined under Treasury Regulations.

4. Taxpayer who is a dependent of another taxpayer and treatment of spouse

An individual would not be permitted to claim a credit for educational expenses if the individual is a dependent of another taxpayer.[4]

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[3] Specifically, educational assistance allowances paid under chapter 32, 34, or 35 of title 38, United States Code.

[4] For example, a student whose parents are entitled to claim a personal exemption for him could not claim a credit for his own educational expenses. The student's parents could claim a credit for educational expenses they pay for the student, provided the expenses otherwise are eligible.

Moreover, an individual could claim a credit for a spouse's educational expenses only if the individual is entitled to claim a personal exemption for the spouse or if the individual and his spouse file a joint return.

5. Disallowance of expenses as credit or deductions

Under the bill, an individual would not be permitted to claim any deduction or credit, under any other section of the Internal Revenue Code, for any educational expenses that have been taken into account in determining the amount of credit that is claimed with respect to educational expenses. However, a taxpayer would be permitted to elect, under Treasury Regulations, not to claim a credit for educational expenses.

6. Limitation on examination of books and records

The bill would provide that nothing contained therein could be construed to grant additional authority to examine the books of account, or the activities, of any school that is operated, supervised, or controlled by, or in connection with, a church or convention or association of churches (or the examination of the books of account or religious activities of such church or convention or association of churches).

7. Separability

The bill provides that the invalidation of any of its provisions, or the application thereof to any persons or circumstances, would not invalidate the remaining provisions or the application of those provisions to other persons or circumstances.

8. Relationship of credit to other educational assistance programs

The bill would provide that any tax refund received by an individual, or any reduction in tax liability of any individual, as a result of this credit would not be taken into account as income or receipts for purposes of determining the individual's eligibility (or any other individual's eligibility) for benefits or assistance, or the amount or extent thereof, under any Federal program of educational assistance or under any State or local program of educational assistance that is financed in whole, or in part, with Federal funds.

9. Credit not to be considered as Federal assistance

The fact that an educational institution enrolls a student for whom a credit is claimed would not deem such institution to be a recipient of Federal assistance.

D. Effective Date

The bill would apply to amounts paid after July 31, 1982 (in taxable years ending after that date) for educational expenses incurred after that date.

VII. REVENUE EFFECT

The provisions of S. 550 are estimated to reduce budget receipts by $99 million in fiscal year 1982, $2,691 million in 1983, $5,160 million in 1984, $6,308 million in 1985, and $6,857 million in 1986.

The following table gives a breakdown (for fiscal years 1982–1986) of the estimated revenue cost of the credit attributable to elementary and secondary education and the cost attributable to college and other postsecondary education.

ESTIMATED REVENUE EFFECT OF S. 550, FISCAL YEARS 1982–1986

[Millions of dollars]

Item	1982	1983	1984	1985	1986
Elementary and secondary education	−40	−1,082	−2,030	−2,198	−2,276
College and other postsecondary education	−59	−1,609	−3,130	−4,110	−4,581
Total revenue effect of the bill	−99	−2,691	−5,160	−6,308	−6,857

II

97TH CONGRESS
1ST SESSION

S. 550

To amend the Internal Revenue Code of 1954 to provide a Federal income tax credit for tuition.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 24 (legislative day, FEBRUARY 16), 1981

Mr. PACKWOOD (for himself, Mr. MOYNIHAN, Mr. ROTH, Mr. GOLDWATER, Mr. ANDREWS, Mr. TOWER, Mr. THURMOND, Mr. DURENBERGER, Mr. SCHMITT, Mr. HEINZ, Mr. HATCH, Mr. JEPSEN, Mr. D'AMATO, and Mrs. HAWKINS) introduced the following bill; which was read twice and referred to the Committee on Finance

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A BILL

To amend the Internal Revenue Code of 1954 to provide a Federal income tax credit for tuition.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; DECLARATION OF POLICY.

(a) SHORT TITLE.—This Act may be cited as the "Tuition Tax Relief Act of 1981".

(b) DECLARATION OF POLICY.—The Congress hereby declares it to be the policy of the United States to foster

educational opportunity, diversity, and choice for all Americans. Federal legislation—

(1) should recognize—

(A) the right of parents to direct the education and upbringing of their children, and

(B) the heavy financial burden now borne by individuals and families who must pay tuition to obtain the education that best serves their needs and aspirations—whether at the primary, secondary, or postsecondary level, and

(2) should provide some relief (as set forth in the amendments made by this Act).

The Congress finds that without such relief the personal liberty, diversity, and pluralism that constitute important strengths of education in America will be diminished. The Congress finds that this assistance can appropriately be provided through the income tax structure with a minimum of complexity and governmental interference in the lives of individuals and families. While the Congress recognizes that the Supreme Court is ultimately responsible for determining the constitutionality of provisions of law, the Congress finds that the provision of such relief to individuals or families in this manner is in accord with all provisions of the Constitution. The primary purpose of this Act is to enhance equality of

educational opportunity for all Americans at the schools and colleges of their choice.

SEC. 2. CREDIT FOR EDUCATIONAL EXPENSES.

(a) IN GENERAL.—Subpart A of part IV of subchapter A of chapter 1 of the Internal Revenue Code of 1954 (relating to credits allowable) is amended by inserting before section 45 the following new section:

"SEC. 44F. EDUCATIONAL EXPENSES.

"(a) GENERAL RULE.—In the case of an individual, there shall be allowed as a credit against the tax imposed by this subtitle for the taxable year an amount equal to 50 percent of the educational expenses paid by him during the taxable year to one or more educational institutions for himself, his spouse, or any of his dependents (as defined in section 152).

"(b) LIMITATIONS.—

"(1) MAXIMUM DOLLAR AMOUNT.—The amount of educational expenses taken into account under subsection (a) for any taxable year with respect to any individual may not exceed—

"(A) $500, in the case of educational expenses allocable to education furnished after July 31, 1982, and before August 1, 1983, and

"(B) $1,000, in the case of educational expenses allocable to education furnished after July 31, 1983.

The $1,000 limitation contained in subparagraph (B) for any taxable year shall be reduced by the amount of educational expenses described in subparagraph (A) which are taken into account for that taxable year.

"(2) CERTAIN PAYMENTS EXCLUDED.—

"(A) SECONDARY AND ELEMENTARY SCHOOL EXPENSES.—Educational expenses attributable to education at a secondary school (including a vocational secondary school) or elementary school shall not be taken into account under subsection (a) to the extent that they are attributable to education at an elementary or secondary school (as defined in section 198(a)(7) of the Elementary and Secondary Education Act of 1965, as in effect on January 1, 1981) of a State educational agency (as defined in section 1001(k) of such Act as so in effect) that is privately operated except for expenses attributable to education at a school or institution described in subparagraph (C) of subsection (c)(5).

"(B) PART-TIME AND GRADUATE STUDENTS.—

"(i) IN GENERAL.—Educational expenses allocable to education furnished before August 1, 1984, with respect to any individual who is not a full-time student or who is a graduate student shall not be taken into account under subsection (a).

"(ii) LESS THAN HALF-TIME STUDENTS.—Educational expenses allocable to education furnished after July 31, 1984, with respect to any individual who is not at least a half-time student shall not be taken into account under subsection (a).

"(C) CERTAIN PAYMENTS INCLUDED.—For purposes of subparagraph (B)(i), amounts paid before August 1, 1984, for educational expenses allocable to education which is furnished on or after such date shall be treated as having been paid on such date.

"(D) FULL-TIME STUDENT.—For purposes of this paragraph, the term 'full-time student' means any individual who, during any 4 calendar months during the calendar year in which the taxable year of the taxpayer begins, is a full-time student at an educational institution.

"(E) HALF-TIME STUDENT.—For purposes of this paragraph, the term 'half-time student' means any individual who, during any 4 calendar months during the calendar year in which the taxable year of the taxpayer begins, is a half-time student (determined in accordance with regulations prescribed by the Secretary which are not inconsistent with regulations prescribed by the Secretary of Education under section 411(a)(2)(A)(ii) of the Higher Education Act of 1965 for purposes of part A of title IV of that Act as such Act was in effect on January 1, 1981) at an educational institution.

"(F) GRADUATE STUDENT DEFINED.—A graduate student is a student with a baccalaureate degree awarded by an institution of higher education.

"(c) DEFINITIONS.—For purposes of this section—

"(1) EDUCATIONAL EXPENSES.—The term 'educational expenses' means tuition and fees required for the enrollment or attendance of a student at an educational institution, including required fees for courses. Such term does not include any amount paid, directly or indirectly for—

"(A) books, supplies, and equipment for courses of instruction at an educational institution,

"(B) meals, lodging, transportation, or similar personal, living, or family expenses, or

"(C) education below the first-grade level, or attendance at a kindergarten or nursery.

In the event an amount paid for tuition and fees includes an amount for any item described in subparagraph (A), (B), or (C) which is not separately stated, the taxpayer shall document the portion of such amount which is attributable to educational expenses.

"(2) EDUCATIONAL INSTITUTION.—The term 'educational institution' means—

"(A) an institution of higher education;

"(B) a vocational school;

"(C) a secondary school; or

"(D) an elementary school.

"(3) INSTITUTION OF HIGHER EDUCATION.—The term 'institution of higher education' means an institution described in section 1201(a) or 481(a) of the Higher Education Act of 1965 (as in effect on January 1, 1981).

"(4) VOCATIONAL SCHOOL.—The term 'vocational school' means an area vocational education school (as defined in section 195(2) of the Vocational

Education Act of 1963, as in effect on January 1, 1981) which is located in any State.

"(5) ELEMENTARY AND SECONDARY SCHOOLS.—

"(A) ELEMENTARY SCHOOL.—The term 'elementary school' means a privately operated, not-for-profit, day or residential school which provides elementary education and which meets the requirements of subparagraph (D).

"(B) SECONDARY SCHOOL.—The term 'secondary school' means a privately operated, not-for-profit, day or residential school which provides secondary education that does not exceed grade 12, and which meets the requirements of subparagraph (D).

"(C) HANDICAPPED FACILITIES INCLUDED.—The terms 'elementary school' and 'secondary school' include facilities (whether or not privately operated) which offer education for individuals who are physically or mentally handicapped as a substitute for regular public elementary or secondary education.

"(D) REQUIREMENTS.—An elementary school or secondary school meets the requirements of this subparagraph if such school—

"(i) is exempt from taxation under section 501(a) as an organization described in section 501(c)(3), and

"(ii) does not exclude persons from admission to such school, or participation in such school, on account of race, color, or national or ethnic origin.

"(6) MARITAL STATUS.—The determination of marital status shall be made under section 143.

"(d) SPECIAL RULES.—

"(1) ADJUSTMENT FOR CERTAIN SCHOLARSHIPS AND VETERANS BENEFITS.—

"(A) REDUCTION OF EXPENSES.—The amounts otherwise taken into account under subsection (a) as educational expenses of any individual for any taxable year shall be reduced (before the application of subsection (b)) by any amounts attributable to the payment of educational expenses which were received with respect to such individual for the taxable year as—

"(i) a scholarship or fellowship grant (within the meaning of section 117(a)(1)) which under section 117 is not includible in gross income,

"(ii) an educational assistance allowance under chapter 32, 34, or 35 of title 38, United States Code, or

"(iii) a payment (other than a gift, bequest, devise, or inheritance within the meaning of section 102(a)) which is for educational expenses, or attributable to attendance at an educational institution, and which is exempt from income taxation by any law of the United States.

"(B) REDUCTION FOR OTHER AMOUNTS.—Under regulations prescribed by the Secretary, the amounts otherwise taken into account under subsection (a) as educational expenses of an individual for any taxable year shall be reduced by any amount attributable to the payment of educational expenses which is received with respect to any individual for the taxable year and is not described in subparagraph (A), and which—

"(i) is equal to the amount of the interest subsidy on any loan proceeds received by such individual during such taxable year, or

"(ii) constitutes any other form of financial assistance to such individual.

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The provisions of this subparagraph shall apply with respect to amounts received after the date on which the final regulations are issued.

"(C) AMOUNTS NOT SEPARATELY STATED.—If an amount received by an individual which is described in subparagraph (A) or (B) is not specifically limited to the payment of educational expenses, the portion of such amount which is attributable to payment of educational expenses shall be determined under regulations prescribed by the Secretary.

"(2) TAXPAYER WHO IS A DEPENDENT OF ANOTHER TAXPAYER.—No credit shall be allowed to a taxpayer under subsection (a) for amounts paid during the taxable year for educational expenses of the taxpayer if such taxpayer is a dependent of any other person for a taxable year beginning with or within the taxable year of the taxpayer.

"(3) SPOUSE.—No credit shall be allowed under subsection (a) for amounts paid during the taxable year for educational expenses for the spouse of the taxpayer unless—

"(A) the taxpayer is entitled to an exemption for his spouse under section 151(b) for the taxable year, or

"(B) the taxpayer files a joint return with his spouse under section 6013 for the taxable year.

"(e) DISALLOWANCE OF CREDITED EXPENSES AS CREDIT OR DEDUCTION.—No deduction or credit shall be allowed under any other section of this chapter for any educational expense to the extent that such expense is taken into account (after the application of subsection (b)) in determining the amount of the credit allowed under subsection (a). The preceding sentence shall not apply to the educational expenses of any taxpayer who, under regulations prescribed by the Secretary, elects not to apply the provisions of this section with respect to such expenses for the taxable year.".

(b)(1) CREDIT TO BE REFUNDABLE.—Subsection (b) of section 6401 of such Code (relating to amounts treated as overpayments) is amended—

(A) by striking out "and 43 (relating to earned income credit)" and inserting in lieu thereof "43 (relating to earned income credit), and 44F (relating to tuition tax credit)", and

(B) by striking out "39, and 43" and inserting in lieu thereof "39, 43, and 44F".

(2) Paragraph (2) of section 55(b) of such Code (defining regular tax) is amended by striking out "and 43" and inserting in lieu thereof ", 43, and 44F".

(3) Subsection (c) of section 56 of such Code (defining regular tax deduction) is amended by striking out "and 43" and inserting in lieu thereof "43, and 44F".

(c) LIMITATION ON EXAMINATION OF BOOKS AND RECORDS.—Section 7605 of such Code (relating to time and place of examination) is amended by adding at the end thereof the following new subsection:

"(d) EXAMINATION OF BOOKS AND RECORDS OF CHURCH-CONTROLLED SCHOOLS.—Nothing in section 44F (relating to credit for educational expenses) shall be construed to grant additional authority to examine the books of account, or the activities, of any school which is operated, supervised, or controlled by or in connection with a church or convention or association of churches (or the examination of the books of account or religious activities of such church or convention or association of churches).".

(d) SEPARABILITY.—If any provision of section 44F of the Internal Revenue Code of 1954 (or any other provision of such Code relating to such section), or the application thereof to any person or circumstances, is held invalid, the remainder of the provisions of such section and the application of such provisions to other persons or circumstances, shall not be affected.

(e) DISREGARD OF REFUND.—Any refund of Federal income taxes made to any individual, and any reduction in

the income tax liability of any individual, by reason of section 44F of the Internal Revenue Code of 1954 (relating to credit for educational expenses) shall not be taken into account as income or receipts for purposes of determining the eligibility of such individual or any other individual for benefits or assistance, or the amount or extent of benefits or assistance, under any Federal program of educational assistance or under any State or local program of educational assistance financed in whole or in part with Federal funds.

(f) TAX CREDIT NOT TO BE CONSIDERED AS FEDERAL ASSISTANCE TO INSTITUTION.—Any educational institution which enrolls a student for whom a tax credit is claimed under the amendments made by this Act shall not be considered to be a recipient of Federal assistance under this Act.

(g) CONFORMING AMENDMENT.—The table of sections for subpart A of part IV of subchapter A of chapter 1 of such Code is amended by inserting immediately before the item relating to section 45 the following:

"Sec. 44F. Educational expenses.".

SEC. 3. EFFECTIVE DATE.

The amendments made by section 2 of this Act shall apply to taxable years ending after July 31, 1982, for amounts paid after such date for educational expenses incurred after such date.

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STATEMENT BY SENATOR DOLE
SUBCOMMITTEE HEARING ON TUITION TAX CREDITS
JUNE 3, 1981

MR. CHAIRMAN:

TODAY AND TOMORROW WE HEAR THE VIEWS OF OUR COLLEAGUES, THE ADMINISTRATION, AND THE PUBLIC REGARDING A PROPOSAL TO PROVIDE REFUNDABLE TAX CREDITS FOR TUITION PAYMENTS FOR ELEMENTARY, SECONDARY, VOCATIONAL AND COLLEGE EDUCATION.

THIS PROPOSAL PRESENTS THORNY ISSUES. BECAUSE OF THE RELIGIOUS AFFILIATION OF MANY PRIVATE SCHOOLS, SOME ARGUE THAT TAX RELIEF FOR TUITION PAYMENTS VIOLATES THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT TO THE CONSTITUTION. OTHERS ARGUE THAT SUCH A PROVISION CAN ONLY AUGMENT PUBLIC SCHOOL "BRAIN DRAIN", THE DESERTION BY BRIGHTER STUDENTS OF PUBLIC EDUCATION, THUS MAKING OUR ALREADY TROUBLED PUBLIC EDUCATIONAL SYSTEM EVEN MORE TROUBLED. STILL OTHERS ARGUE THAT, IN A TIME OF NECESSARY THOUGH PAINFUL FISCAL RESTRAINT, IT IS HARDLY APPROPRIATE TO CUT BACK ON DIRECT FEDERAL SUBSIDIES TO PUBLIC EDUCATION AT THE SAME TIME WE GRANT A TAX SUBSIDY TO THE PARENTS OF PRIVATE SCHOOL CHILDREN.

ARRAYED AGAINST THESE CRITICS IS A BROAD SPECTRUM OF PROPONENTS OF TUITION TAX CREDITS WHO ARGUE THAT EDUCATION IS BEST SERVED BY A DIVERSITY OF EDUCATIONAL PHILOSOPHIES AND INSTITUTIONS AND THAT SUCH DIVERSITY CAN ONLY BE ASSURED BY HEALTHY PRIVATE AND PAROCHIAL SCHOOLS. THE HEALTH OF THESE

SCHOOLS, THE PROPONENTS ARGUE, IS ERODED BY INFLATION AND ITS IMPACT ON THE TUITION-PAYING PARENT.

I HOPE THAT THESE HEARINGS WILL PROVIDE A FORUM FOR THE FULL AIRING OF ALL OF THESE VIEWS. IF A TUITION TAX CREDIT IS TO BECOME A PART OF A SECOND TAX BILL THIS YEAR WE MUST BE CONFIDENT THAT IT IS BOTH CONSTITUTIONAL AND FAIR.

OPENING STATEMENT OF
WILLIAM V. ROTH, JR., U.S.S.

WVR.

JUNE 3, 1981

BEFORE THE
SUBCOMMITTEE ON TAXATION & DEBT MANAGEMENT

THE TUITION TAX RELIEF ACT

MR. CHAIRMAN, TODAY THE SUBCOMMITTEE ON TAXATION AND DEBT MANAGEMENT BEGINS TWO DAYS OF HEARINGS ON THE TUITION TAX RELIEF ACT OF 1981, A MEASURE I COAUTHORED WITH YOU AND PAT MOYNIHAN.

I BELIEVE A TUITION TAX CREDIT WILL RESTORE FREEDOM OF CHOICE TO THE MILLIONS OF AMERICAN FAMILIES WHO ARE STRUGGLING TO PAY BOTH NONPUBLIC SCHOOL TUITION AND HIGHER TAXES FOR PUBLIC SCHOOLS. THE TAX BURDEN ON THE AVERAGE FAMILY HAS INCREASED SUBSTANTIALLY DURING THE PAST 10 YEARS AND MIDDLE-INCOME FAMILIES HAVE LESS DISPOSABLE INCOME TO SPEND ON A COLLEGE OR PRIVATE ELEMENTARY AND SECONDARY EDUCATION FOR

THEIR CHILDREN. INDEED, MIDDLE INCOME AMERICANS ARE BEING SQUEEZED OUT OF COLLEGE.

THERE ARE MILLIONS OF FAMILIES TODAY WHO ARE NEITHER AFFLUENT ENOUGH TO AFFORD THE HIGH COST OF COLLEGE NOR CONSIDERED POOR ENOUGH TO QUALIFY FOR THE MANY DIFFERENT GOVERNMENT ASSISTANCE PROGRAMS THEIR TAXES MAKE POSSIBLE.

WE ARE RAPIDLY APPROACHING A SITUATION IN THIS COUNTRY WHERE ONLY THE VERY AFFLUENT AND THE VERY POOR WILL BE ABLE TO ATTAIN A HIGHER EDUCATION. THE GROUP IN THE MIDDLE --THE VERY TAXED--WILL BE UNABLE TO AFFORD IT. IN MY JUDGEMENT, SOMETHING IS DRASTICALLY WRONG WHEN TODAY'S DIPLOMA COSTS MORE THAN YESTERDAY'S HOUSE.

A TUITION TAX CREDIT IS THE SIMPLEST AND MOST EQUITABLE WAY TO PROVIDE MIDDLE-INCOME FAMILIES RELIEF FROM

MOUNTING EDUCATIONAL COSTS. THIS CREDIT WILL ALLOW PEOPLE TO KEEP MORE OF THEIR OWN HARD-EARNED MONEY RATHER THAN HAVE IT TAXED AWAY BY UNCLE SAM. THE TUITION TAX CREDIT OFFERS THE BEAUTY OF NO ADMINISTRATIVE OVERHEAD, NO FORMS TO FILL OUT, AND NO NEED TO BEG, PLEAD OR ASK FOR A GOVERNMENT HANDOUT.

THE CREDIT APPROACH IS NOT THE TOTAL SOLUTION TO THE PROBLEM OF RISING EDUCATIONAL COSTS. BUT IT WILL ALLOW MIDDLE AMERICA TO HOLD THE LINE, AT LEAST IN PART, IN THE BATTLE AGAINST INFLATION IN OUR SCHOOLS AND UNIVERSITIES. WE OWE OUR NATION'S CHILDREN NOTHING LESS.

FROM THE OFFICE OF

Senator Daniel Patrick Moynihan

New York

FOR IMMEDIATE RELEASE

CONTACT: Tim Russert
Vicki Bear
202/224-4451

Statement by Senator Daniel Patrick Moynihan (D.-N.Y.)

I shall be brief. This morning we begin hearings on S. 550, the Tuition Tax Relief Act of 1981. All witnesses who have asked to appear to testify on this bill have been given the opportunity. A number of distinguished scholars are participating, several at our invitation, others at their own initiative. We will hear from members of the President's Cabinet and sub-Cabinet. From representatives of many groups and organizations. And from a number of private citizens. It promises to be a full and open examination of the issues posed by S. 550.

But in an important sense this is also a hearing on a much more fundamental question. Simply stated, it is the question of whether justice is finally to be done for the millions of American children who attend schools that are not operated under governmental auspices. The question of whether the policies of the federal government are finally to be made even-handed in their treatment of public and non-public education at the elementary and secondary level.

When federal aid to education finally became a reality in 1965, it was understood that all students and all schools would benefit. Indeed, without that understanding the legislative and political stalemate that had theretofore barred federal education assistance would have endured.

But sixteen years, eight Congresses and four administrations later, it is painfully clear that the promise to nonpublic education has not been kept. In practice, most private school children do not receive anywhere near their "fair share" of assistance from the federal government.

When, four years ago, it appeared to me that there was no prospect of providing justice to nonpublic schoolchildren within the basic arrangements through which federal aid to elementary/secondary education is delivered, I embraced an alternative means of providing such justice, namely through tax credits for tuition payments.

The public schools, I have said time and again, come first. Assuring their viability, their vitality and their quality is the first responsibility of government in the field of education. I have done all that is within my power to see that salutary policies and adequate funding characterize federal assistance to public education. Only this year, I have introduced legislation to provide unrestricted federal aid to public schools, and to hold them harmless from all costs resulting from federal mandates.

The public schools come first. But attending to their needs does not erase the responsibilities of government to the one child in ten whose parents believe should be educated in nongovernmental schools.

That is why I have proposed tuition tax credits, and why I support tuition tax credits.

But I wish to be clear that tuition tax credits are but a means to an end. They are not the only imaginable means, and they are not the only means that would confer justice. The fundamental question facing the Congress at this time is not the pros and cons of specific provisions of a particular bill. It is whether we wish to see justice done.

As it happens, the 97th Congress is also going to engage in a searching re-examination of the provisions of the Elementary and Secondary Education Act and of other programs that now provide aid to primary and secondary schools. The administration has proposed to convert many of those programs into "block grants" (and has also proposed a severe and, in my view, unwise reduction in funding). But whether we move toward block grants or retain the existing "categorical" approach, an opportunity is at hand to re-establish the understanding of 1965 by devising suitable and effective means of assuring full participation to all eligible youngsters and institutions, whether operated by government or under private auspices.

I hope that opportunity is seized. It is not, however, within the jurisdiction of the Committee on Finance. What is within our jurisdiction is another route to the same destination. The route we know as tuition tax credits. The hearings today and tomorrow will deepen and broaden our understanding of that proposal. But let us never permit our interest in the bill at hand to deflect our attention from the end we seek to attain. For it is an issue of justice. And justice must be done.

STATEMENT OF SENATOR DAN QUAYLE

Subcommittee on Taxation and Debt Management
Finance Committee

Hearings on S. 550 - Income Tax Credit for Tuition
June 3-4, 1981

Tuition tax credits, a controversial issue which today's hearing addresses, is one with which I have been involved since 1977 when I served in the House of Representatives. During the 95th Congress, I was a co-sponsor of two bills - H.R. 8086, which allowed income tax credits for specified higher education expenses, and H.R. 10559, which extended the credit to all educational levels. Although this legislation was never enacted, I supported it then and I continue to support such a concept today.

The arguments for and against tuition tax credits are many. My reasons for supporting such a credit stem from several areas - presently parents who choose to educate their children through the nonpublic sector pay twice: once in the local taxes which to a large extent support public education, and again in the fees they must pay to a nonpublic school because they have made the decision that their child's needs can best be served in a specific institution. I favor tuition tax relief too because I believe a need exists for competition among our educational system. Competition tends to improve quality and to make institutions more responsive to the needs of their clients - in this case children and their parents. Many children are now denied freedom of choice because their parents cannot afford the financial burden associated with private educational institutions. This is true to a greater degree with respect to elementary and secondary institutions since the Federal government has well

established programs of financial aid for post-secondary education.

I have been advised of the fears of some of the public education sector that tuition tax credits may be harmful to our public school system. I believe, to the contrary, that a lack of tuition relief would be far more destructive to our educational system. The influx of students into the public system as they are forced out of private schools for economic reasons would have a negative effect on public schools and universities. Many public educational facilities are already over-crowded. Large numbers of students flooding into the system can only result in severe over-crowding, increased property taxes, a need for increased Federal aid to public schools, and more important, less individual attention for all students.

Without tuition tax credits, private education would shortly be limited to the very wealthy and the poor, who receive Federal aid to attend the school of their choice. Without assistance, students in the middle income brackets would be denied the freedom of choice that exists for these other individuals. In the past twenty-five years, the percentage of students choosing private colleges has declined from 50% to 25%. And nearly one-half of private elementary and secondary students come from families with incomes of less than $15,000.

Although it is true that a tuition tax credit would mean a revenue loss to the Treasury, this amount is far less than the increased spending that would be required to provide public education to the millions of students now attending private

schools. And the added benefits that increased competition would provide - both to the public schools and the nonpublic schools - hold the possibility of greater educational improvements to the benefit of all children.

I firmly believe that now is the time to make tuition tax credits a reality and I urge the Senate Finance Committee to act swiftly on S. 550. I lend my full support to this important proposal which could signal a new trend in education at all levels in this country.

Senator PACKWOOD. The committee will come to order.

I might remind the witnesses today that except for Members of Congress or the administration, we have asked all of the witnesses to hold their statements to 5 minutes apiece.

The parents panel that will appear this afternoon will be 3 minutes apiece.

And your entire statements will be placed in the record. We have a long, long list of witnesses today, and I know that there will be a number of questions from me and others that are going to show up. And we have a long list of witnesses tomorrow. It is my intention to go all day today, until 4, 4:30, 5—whatever is necessary—and again, all day tomorrow to finish this and hopefully, all sides will have a chance to be heard.

My views on this legislation are obviously well known. I think it is one of the most important philosophical pieces of legislation to come before this Congress.

I thought so in previous Congresses, when we have introduced it, and I've not changed my mind.

I know there are those who will oppose it using the argument that if we appear to be trimming back other educational expenses, we should not be furthering expenses for tuition tax credits.

However, I discover that all of those who make that statement also opposed this bill 2 years ago, 3 years ago, and 4 years ago, when the issue of cutting back other educational expenses was not the issue.

So while I am perfectly prepared to hear your testimony on that issue, if you would care to indicate why when we were increasing expenses for education you were still opposed to it, I would appreciate it.

Now, is Senator D'Amato here yet?

Or, is Senator Hart here?

Is John Chapoton here?

Then, let's start with a panel if they are here.

John Chapoton, the Assistant Secretary of the Treasury.

STATEMENT OF HON. JOHN E. CHAPOTON, ASSISTANT SECRETARY OF THE TREASURY FOR TAX POLICY

Secretary CHAPOTON. Thank you, Mr. Chairman.

I am pleased to appear before you this morning to present the views of the Treasury Department on S. 550, the Tuition Tax Relief Act of 1981.

This legislation would provide a refundable income tax credit for 50 percent of tuition and fees for the taxpayer, his or her spouse, or any dependent at a private elementary or secondary school, or undergraduate college or university, up to a maximum credit of $250, for tuition and fees after July 31, 1982, and before August 1, 1983, and up to $500 for tuition and fees thereafter.

The credit would be extended to graduate students and half-time students beginning August 1, 1984.

The tax credit is intended to effect the stated purpose of the bill, which is to enhance equality of educational opportunity for all Americans at the schools and colleges of their choice.

This is a matter of considerable personal concern to the President. This administration is determined to work as closely as possible with Congress in constructing a tuition tax credit bill, one that provides substantive tax relief to the families of non-public-school students, one that broadens and enriches educational opportunities and promotes excellence in our schools.

Equality of educational opportunity clearly requires that a diverse range of schools—public and private—be available to all American families, and that all American families have the financial ability to permit meaningful freedom of choice among schools.

We believe that parents have a fundamental right, and responsibility to direct the education of their children in a way which best serves their individual needs and aspirations. Moreover, we believe that parental involvement in the decisionmaking process enhances the quality of education provided.

Private schools are essential to fulfilling our national educational needs. They provide a healthy diversity of approach, and are often a significant source of innovation and experimentation.

But private schools are expensive, and inflation is making them more so. At the same time, higher taxes caused by bracket creep are making it more difficult for families to afford private education.

Federally funded student aid programs involve significant administrative costs and tax credits offer a simpler means to fund private education by permitting families to keep the money they have earned and to spend that money for the education they themselves select.

The Treasury Department supports tuition tax credits. Their enactment will recognize the value of our private schools, will assist families in meeting the increasing costs of education and, most importantly, will strengthen the right of parents to decide the education of their children.

As you know, however, the Treasury's primary focus at this time is the President's initial set of tax proposals. Other proposals, however meritorious, must wait until completion of legislative action on the economic recovery program.

Nevertheless, we can state now that tuition tax credits will be at the top of our agenda at the appropriate time.

We do wish to discuss particular aspects of the tuition tax credit concept. These are areas which we believe the Congress will wish to address. We intend to work closely with this subcommittee and the Congress in developing the best possible system of tuition tax credits.

First, tuition tax credits have a significant revenue impact, and therefore they must be considered together with other budget matters.

While we do not have precise revenue estimates on S. 550 at this time, we believe the costs to the Treasury would be approximately $2.7 billion in fiscal year 1983, rising to nearly $7 billion in fiscal 1986 as the credit is phased in.

In a time of budgetary austerity, these are clearly significant amounts. Moreover, these estimates would be increased to the extent that direct student assistance programs are reduced or private school enrollments or tuitions increase. Once enacted, there may be additional pressure to increase the amount of the credits. Thus, Congress may wish to coordinate any tax credit with direct educational expenditures, so that they complement one another and so that the total budgetary cost of both types of program is at a desirable level.

Second, we believe that refundability would provide assistance to needy families who are not taxpayers. However, we think that this feature is not desirable from the standpoint of tax policy. Congress will surely wish to consider this question carefully.

Finally, any new provision adds some complexity to the tax law. We must work hard to simplify the provision as much as possible.

Mr. Chairman, this is an extremely important area of public policy, and we at the Treasury Department are most eager to work with the Congress on it at the appropriate time.

Thank you, Mr. Chairman.

Senator PACKWOOD. Mr. Secretary, I wonder if I might ask you to step aside, just momentarily, and let Senator Hart testify because he has to leave for another committee meeting.

Secretary CHAPOTON. Sure.

Senator PACKWOOD. Gary, why don't you come up now, if that is all right with you.

[The statement follows:]

GARY HART
U.S. Senator for Colorado

For Immediate Release
June 3, 1981

Contact: Kathy Bushkin
202/224-5852

Testimony by Sen. Gary Hart
Before the Senate Finance Subcommittee
on Tax and Debt Management
on Tuition Tax Credits

Mr. Chairman, I appreciate the opportunity to testify this morning. Although we may differ in approach, we share the same goals of improving the quality of education in this country.

All of us are concerned about the rising costs of elementary, secondary and, especially higher education. In particular, those rising costs pose a serious problem for middle income families.

But, a tuition tax credit plan is poor policy in several respects. It is irresponsible economic policy. It is unfair and perhaps unconstitutional public policy. And it is unwise educational policy. It also runs counter to the overwhelming sentiment of the American people and the new Administration for reduced Federal spending, reduced Federal interference, and reduced Federal regulation.

Tuition tax credit legislation is bad economic policy because it represents a revenue loss of more than $4 billion at a time when we are cutting one important program after another in an effort to balance the Federal budget. This proposal represents a setback in fiscal restraint. And, as a member of the Senate Budget Committee, I believe this legislation is inconsistent with our efforts to target Federal programs and financial assistance to those who need it most. Tax credits are unrelated to family income or the varying costs of attending different types of institutions.

In addition, this scheme may be basically inflationary, since many schools will view the tax credits as an opportunity to raise tuition even further. Educational institutions may in effect "capture" the tax, while those paying tuition will merely see the cost of education rise by the amount of the credit.

Mr. Chairman, for all of these reasons, this legislation represents poor economic policy.

It is poor public policy as well.

First, under the proposed legislation, tuition tax credits would in effect provide private school students more than two-and-a-half times the amount of Federal support given public school students. Nationally the Federal government now provides less than $200 per pupil for public education. Under the proposed tuition tax credit legislation, the amount of Federal assistance could be as high as $500 per child in a non-public school. The philosophy of American public education is undermined by aiding private schools more than public schools, however, that would be the effect of tuition tax credit subsidies.

Second, tuition tax credits require all taxpayers involuntarily to pay twice for education. If parents use a private school, that is a voluntary choice. But if they get tax subsidies for it, then it is other taxpayers who have to pay twice. They have to pay once for the public schools and again through the subsidy for the private schools. That is involuntary and unfair.

Third, tuition tax credits would result in increased Federal regulation of private schools. Before the credits could be given for private school tuition, the Federal government would be required to judge the legitimacy of a school that benefits from the credit. Eventually, the Federal government would have to set criteria for a qualifying school. This would be an unprecedented interference in private education.

This Adminsitration has called for less Federal involvement in education by reducing spending for education programs and by proposing block grants. Ironically, tuition tax credits increase Federal involvement and regulation.

Fourth, this legislation raises serious constitutional questions. Ninety percent of private schools are church-related. And there is a long, well-established line of Supreme Court cases striking down legislation which either directly or indirectly advances a particular religion and challenges the constitutional guarantee of separation of church and state.

Finally, this legislation would be poor educational policy for two important reasons.

First, the four billion dollar price tag for tuition tax credits would surely force Congress to cut back on other existing education programs. The Congress has already approved extreme budget reductions in a variety of education programs. Further reductions would prove devastating, especially for those citizens who are "truly needy."

Second, tax credits, by allowing special benefits through taxes for even wealthy families, could undermine the support of public schools through an unfair and unwise competition. Tuition tax credits could create a separate and unequal dual education system in the United States composed of elite private schools and disadvantaged public schools.

This would be unfortunate both for our institutions of public education and for our individual neighborhoods and communities. As the Washington Post stated in an editorial more than three years ago:

> Most Americans understand that it takes a strong sense of national community to hold this huge and heterogeneous country together. That sense of community arises, above all, from the public schools -- the experience that a child shares with others of widely differing backgrounds and conditions for 12 years or so while growing up. Subsidies that encourage parents to take their children out of public schools will inevitably diminish this strength.

While diversity in education is important, the Federal government's first priority should be to insure the vitality of its public educational institutions. Everyone benefits, either directly or indirectly, from a strong public school system.

Perhaps the most difficult costs for the middle income family have been those of higher education. The better and more efficient way to strengthen our institutions of higher learning for all Americans is to strengthen and improve our existing system of basic opportunity grants which entitles students to subsidies based on family income. Under a system of basic grants and subsidies there would be more money available to those most in need. We should also be willing to explore new and creative ways of providing direct aid for higher education to those who truly need it. I hope we can work together in the future in this regard.

We would be well served to be guided by the words of Thomas Jefferson who, in a letter to James Madison said:

> "Above all things, I hope the education of the common people will be attended to; convinced that on their good senses we may rely with the most security for the preservation of a due degree of liberty."

I appreciate this opportunity to testify and commend you for holding these hearings to thoroughly explore this important issue.

Senator HART. Thank you very much, Mr. Chairman.

I apologize to the administration witness, and I appreciate the committee's indulgence in arranging its order of testimony to accommodate my schedule.

I appreciate the opportunity to appear here, Mr. Chairman, and Senator Moynihan.

Although we may, as Senators, differ in approach, we share, I think, the same goal of improving the quality of education across this country.

All of us, or course, are concerned about the rising costs of elementary, secondary, and higher education, especially higher education. And tuition, is of course, one of the most serious problems that middle-income families in this country face.

I must say, in that regard, that I applaud, even though I disagree with, the leadership that both of you have shown in addressing this problem.

Mr. Chairman, respectfully, I must say that I think a tuition tax credit plan is poor policy in several very important respects.

First of all, it is fiscally irresponsible economic policy.

Second, it is unfair and perhaps, unconstitutional public policy.

And third, it is unwise educational policy.

It also runs counter to the overwhelming sentiment, of both the American people and the new administration, for reduced Federal spending, reduced Federal interference and reduced Federal regulation.

Tuition tax credit legislation is bad economic policy, in my judgment, because it represents more than a $4 billion revenue loss, in a time when we are cutting one important program after another, in efforts to balance the Federal budget.

This proposal represents, in my judgment, a setback in an effort toward fiscal restraint.

As a member of the Senate Budget Committee, together with our colleague from New York, this legislation, it seems to me, is inconsistent with our efforts to target Federal programs and assistance to those who need it most.

Tax credits are unrelated to family income or the varying costs of attending different types of institutions.

In addition, Mr. Chairman, this proposal may be basically inflationary, since many schools will view the tax credit as an opportunity to raise tuitions even further.

Educational institutions would, in effect, capture the tax, while those paying tuition would merely see the cost of education rise by the amount of the credit.

Mr. Chairman, for all of these reasons, in my judgment, this legislation represents poor economic policy.

It is poor public policy, as well.

First of all, under the proposed legislation, tuition tax credits, would in effect provide 2½ times per capita the amount of Federal support given public school students to those students in private schools.

Nationally, the Federal Government now provides less than $145 per pupil support for public education. Under the proposed tuition tax credit legislation, the amount could be as high as $500 per student, in a nonpublic school.

Second, tuition tax credits require all taxpayers, involuntarily, to pay twice for education. Just the reverse argument of the argument that is made in support of the legislation. The parents use the private school—that is a voluntary choice. But if they get tax subsidies for it, then it is other taxpayers who have to pay twice. They have to pay once for public schools, and again through the subsidy for private schools.

That is involuntary and unfair.

Third, Mr. Chairman, tuition tax credits would result in increased Federal regulation to private schools. Before the credits can be given for private school tuition, the Federal Government would be required to judge the legitimacy of a school that benefits from the credit.

Eventually, the Federal Government would have to set criteria for qualifying schools.

This would be an unprecedented interference in private education.

This administration, Mr. Chairman, has called for less Federal involvement in education by reducing spending for education programs and by proposing block grants.

Ironically, tuition tax credits increase Federal involvement and Federal regulation.

Finally, Mr. Chairman, this legislation raises a serious constitutional question, of which you are aware.

Ninety percent of private schools are church-related. There is a long, well-established line of Supreme Court cases, striking down legislation which either directly or indirectly advance religion, and challenge the constitutional guarantee of separation of church and state.

Finally, this legislation would be poor educational policy for two reasons. First, the $4 billion price-tag for tuition tax credits would surely force Congress to cut back on other existing education programs.

Congress has already approved extreme budget reductions in a variety of education programs. Further reductions would prove devastating, especially to those citizens that are truly needy.

Second, tax credits, by allowing special benefits through taxes for wealthier families could undermine the support of public schools through an unwise and unfair competition.

Elite private schools and disadvantaged public schools would increasingly create a separate and unequal dual education system in the United States.

This would be unfortunate both for our institutions of public education and for our individual neighborhoods and communities.

While diversity in education is important, Federal Government's first priority should be to insure the vitality of its public education institutions. Everyone benefits, either directly or indirectly, from a strong public school system.

Mr. Chairman, you would be well served to be guided by the words of Thomas Jefferson, who in a letter to James Madison said, "Above all things, I hope the education of the common people will be attended to; convinced that on their good senses, we may rely with the most security for the preservation of a new degree of liberty."

I appreciate this opportunity to testify, and commend you for holding these hearings to thoroughly explore this very important public issue.

Senator PACKWOOD. Gary, I assume it is fair to say that you would oppose this legislation, if indeed, costs were not a factor, and it were constitutional.

Senator HART. Well, that is to say if it were different legislation, I would not oppose it. That is correct.

Senator PACKWOOD. Well, you don't like the concept of the tuition tax credit from the standpoint of educational policy.

Even if this were a burgeoning economy, and the Federal Government's support of education was going up dramatically, and there was no question of the constitutionality,—you would still have misgivings about this legislation.

Senator HART. I would have misgivings about it from the educational point of view.

But my principal opposition at the present time are first: constitutional, and second, budgetary.

Senator PACKWOOD. You know, we have never had a constitutional test on the tuition tax credit grant that applies all the way from grade school through college.

Senator HART. I understand that.

Senator PACKWOOD. And I don't know how that issue can be resolved by us.

I mean, both Senator Moynihan and I know that the case is going to court. And there is nothing we can do about it.

I prefer it didn't. But it is going to court. How are we going to resolve the constitutional issue without passing it?

Senator HART. Well, I think we all have to make our independent judgments on that, based upon our understanding of the Constitution, and the recommendation of the experts.

And I think—well, I don't know what testimony this committee has received in the past from those constitutional experts about the constitutionality of this type of legislation.

If you have not, it would be interesting to hear.

Senator PACKWOOD. But what we have received in the past is split, and what we will receive in these next few days, I think, looking at the witnesses and knowing their backgrounds, will be split.

There is no way this Congress can resolve whether or not it is constitutional. If we say, well, it might be unconstitutional, therefore don't pass it, we will never know.

Senator HART. Well, I understand that.

But again, I think the very fact that it has not been tested or that is not a definitive Supreme Court decision should not cause any of us to resist making our own judgments about what is and is not constitutional.

In my judgment it is unconstitutional. That is one person's opinion. I have to operate on that basis. That is not to say that any individual Senator, or a collection of Senators should seek to replace the judgment of the Supreme Court, which obviously has different responsibilities under the Constitution.

Senator PACKWOOD. Pat?

Senator MOYNIHAN. May I just pursue this by first thanking our colleague for his very clear testimony. We hope to use these hearings as an opportunity for dialog on the subject. We are not committed beyond all recall to tuition tax credits as a means of assisting the nongovernment schools.

But this was the one vehicle available to us when the Carter administration declined to go along with including the nongovernment schools in general aid, which was the original idea in 1965, when such aid began.

Now, you say, Senator Hart, that the philosophy of American public education is undermined by aiding private schools more than public schools. Is that your exact meaning?

I mean, would the philosophy not be undermined by aiding them equally?

Or do you really mean, that you don't think that nonpublic schools should be aided?

Senator HART. That statement is probably not the most clear expression of my intention.

It is, in my judgment, undermining the philosophy of American education and its commitment to public education to establish governmental support for private institutions.

But I think, if you will, the felony is compounded, by a system weighted in favor——

Senator MOYNIHAN. But you use a nice lawyer-like term—"the felony is compounded."

And so, the point is that you would be against nongovernment aid in any significant measure.

I wonder if I could make a point. We are the only industrial democracy in the world that has this difficulty.

All our neighbors, Canada, Great Britain, Australia—support the religious based schools, as well as the state schools, as they would call them. They have no difficulty in so doing. Only we do.

And what we hope these hearings would bring out is that this is becoming a problem for us. I don't think a President has run for office in 20 years without making some commitment in this direction. And then in office it turns out—well, you can't do it, the taxes are too high, next year maybe—but the public clearly would like to see some resolution.

And are you really absolute that it is a felony to give aid at all, and a compounded felony if you can show that the aid is greater than——

Senator HART. Well, first may I say to the Senator from New York—I think the principal reason why we differ from our industrialized allies or colleagues in this regard has to do with our founding document, the Constitution.

I think that is the principal reason why we have not gone forward. It hasn't been budgetary—so much of this has been structural and fundamental.

And that is what separates us in my judgment, from our neighbor nations.

Senator MOYNIHAN. Could I, then, just say one thing to you as a friend—and we are certainly friends. One purpose of these hearings is to show that the assumption that the Supreme Court has

been right in these cases is no longer universal or even probably dominant in legal scholarship.

I mean, the strongest advocates came before this committee 3 years ago and said the Courts have simply been wrong. The establishment clause of the first amendment had one meaning: it was that Congress could not interfere with the established churches of Massachusetts, Maryland, Virginia—there were eight States with established churches. And that is all that was intended.

May I also just say that in the *Tilton* case, the Supreme Court had to face the law passed by Congress which provided aid to higher education in all denominations.

In order to distinguish between higher and lower education, in upholding the statute, the Supreme Court—God bless them—had to say that it is well known that elementary and secondary school students are more susceptible to religious indoctrination than are college students.

Now you have a degree in divinity, don't you?

Senator HART. I do, indeed.

Senator MOYNIHAN. Would you think that was well known, or would you think that was a rather embarrassing effort to avoid not striking down an act of Congress?

Senator HART. Well, obviously, I would say to my colleague from New York, I would have to go back and review the case—not rely totally on his characterization of it.

My last class in constitutional law goes back several years, and indeed, I don't appear here in any role as a constitutional scholar, by any means.

My recollection of that case is somewhat to the contrary of the way the Senator from New York has characterized it.

But, if his characterization were correct, I would say probably it was a strained decision.

Senator MOYNIHAN. Just one last point.

You would agree that the Supreme Court has held it constitutional to aid religious colleges and universities?

Senator HART. That is my understanding.

Senator MOYNIHAN. Yes, and that is the only such aid this Congress ever passed.

We never passed a bill which deals with elementary or secondary.

Senator HART. Well, I understand that.

But let me return to the fundamental premise here. And that is, even given perhaps, a widespread feeling that the Supreme Court is wrong. I don't think any of us should adopt the attitude in legislating, that the Supreme Court is irrelevant. And that it has said in the past, we should disregard totally, and operate on a sort of a tabular roster every time we legislate.

There are precedents in our society. They go back sometimes 200 years. My own feeling about the constitutional issue in this matter, frankly, has less to do with the most recent utterance of the Supreme Court, whatever that is, than it has to do with writings of the Founding Fathers and the context in which the Constitution was written and the establishment clause arises.

Now I understand that there are scholarly differences about what was intended. But my own laymen's reading, if you will, as I

stated in my testimony, strongly, against passage of this type of legislation.

Senator MOYNIHAN. May I just say that I agree with you. The issue of public policy comes first, the constitutional question second. But, when the Constitution was written, there were no schools other than religious schools. The public schools were a social invention of the mid-19th century.

There were only denominational schools at the time of the first amendment.

Senator HART. I understand that.

Senator PACKWOOD. Senator Long?

Senator LONG. After a while, those bright lights begin to hurt my eyes. And if I stay there very long, they start getting red, and people wonder what is the matter with me.

So that I would hope the room can be arranged so that they arrange a little spot of shade somewhere, so that those of us who really just plan to sit here and listen——

They tell me that they do have a camera that will pick you up in soft light, but they don't have enough of them to go around. And so, you have to take what you can get.

But, I personally, am not trying to win a point one way or the other, I would just like to hear the conversation, and I hope that they can arrange it so that I can just sit in the shade sometimes and hear what is going on.

Senator PACKWOOD. Russell, I might say this—I sat so long over there where you are in the shade, that I haven't gotten used yet to the bright lights hurting my eyes.

Senator LONG. I think we ought to have it fixed, so, Senator, I would suggest we have it so a Senator can have it both ways.

When their turn comes at bat they can get up there at home plate and the cameras can pick them up at their best.

And those of them that just want to sit here and think about the debates can do that too.

Thank you very much.

Senator PACKWOOD. Chuck.

Senator GRASSLEY. Thank you, Mr. Chairman. I'm not here to ask any particular witness any questions, Senator from Colorado.

But I am here to listen to the testimony, and I am supportive of the legislation. I don't know whether I am listed as a cosponsor yet, but I do want to be a cosponsor of your legislation, and I am supportive of it, knowing that there are some constitutional questions about it.

It may be that it may be constitutional for higher education and not for elementary and secondary education.

It could be it wouldn't be constitutional for either, or it could be that it would be constitutional for both.

But I think we have gotten ourselves into a position, today, where this is more of an up-to-date issue, just because of the high level of taxation that we as a Government have foisted on the people of this country.

It has impacted in a very difficult way upon middle-income Americans. And this bill is probably to the benefit, as much to middle-income Americans, as any other level of people.

Although I know that through the negative approach it also has benefits for those that don't pay income taxes.

But let's suppose that that aspect of it was not adopted. And the extent to which it would help those who pay income tax who want to make use of private schools—that they would have that alternative.

I think it speaks to a part of a solution—the over taxation of middle-income Americans and their opportunity to provide an education, free of all the redtape and Government regulation you have to go through if you want to get help—particularly as you go to colleges or universities.

Thank you, Mr. Chairman.

Senator PACKWOOD. I recall reading through the basic educational opportunity grant forms a couple of years ago, which then were, as I recall four to six pages long. And in terms of complexity, I would defy any normal 18- or 19-year-old to fill it out accurately, the first time.

And when you get to the end of it you've got to check a box that everything you have said there is true upon pain of perjury and $5,000 fine, and/or a year in prison.

I would have some hesitancy in signing it.

Second, I remember one paragraph—it was marvelous in describing who was a dependent, and who was eligible and who you could claim—and the last sentence said, in no way may your spouse be considered your parent, which I thought was perhaps evident.

Senator MOYNIHAN. Could I just say to my dear friend, Senator Hart, urge on him that the issue of public policy clearly comes first.

And the state of constitutional judgment is very much more influx than it has ever been.

In a passage in *Tilton V. Richardson, decided in 1971* which upheld the constitutionality of the Higher Education Facilities Act of 1963, the Chief Justice noted, "There is substance to the contention that college students are less impressionable and less susceptible to religious indoctrination."

Now, with the utmost respect to the Chief Justice, if you will believe that you will believe anything. I wrote to the president of the American Psychological Association, Professor Bardura at Stanford University, and he wrote back and said, "I know of no empirical evidence to support the contention that college students are relatively unsusceptible to religious indoctrination."

And I would like to say to you, the Congress would be fully within the range of prudence to adopt this if it thought this to be good public policy, and to let the Court decide.

The Court has solemnly held that it is constitutional to provide a parochial school with books, but not with maps, because books are teaching aids and maps aren't teaching aids. Teaching aids are constitutional and somewhere—we are always invoking Jefferson who was not on hand when the first amendment was adopted—but the Constitution finds a distinction between a map and a book. And an atlas, which is a map and a book, would take another case. There is just enormous uncertainty here, so that the issue of public policy comes first.

Senator HART. All I can say to my colleague from New York is that if the constitutional argument rested upon what I think was probably the dictum of the Chief Justice in that case, it would be a thin argument indeed.

I think it is much stronger than that, as to the impressionability of relative age groups. But, in any case, in my own judgment, and it is a singular judgment, the constitutional argument is a very strong one.

And I think it is much stronger than the recitation of that quotation would indicate.

I would finally say to the chairman, with regard to filling out forms. The same government that wrote the forms that the chairman rightly objects to, would be writing the forms and the regulations for the private school to qualify for this kind of tuition subsidy.

Senator PACKWOOD. Significantly less. Right now, the private schools—if they want to get a 501(c)3 exemption so their donors can take a deduction—have to go through all of the hoop, and no more, that they will have to go through for the tax credit. For anybody to send their child off to the Saint Rose Parish Church, and take a $400 tax credit is infinitely simpler than any Government grant educational form I have seen.

Senator HART. Well, I don't mean to be quarrelsome, but the chairman surely must contemplate the day, when and if this legislation passed, and it was deemed to be constitutional, which I personally doubt that it would be, that you would see roadside private schools springing up all across the land, claiming to qualify for students to attend with public subsidy. Now someone is going to have to determine whether that is a qualified school or not. And if that doesn't lead to the listing of regulations, writing of lengthy regulations, and filling out of lengthy forms, I don't know what would.

Senator PACKWOOD. Any other questions?

Senator Hart, thank you very much.

Mr. Secretary, let me put on Senator D'Amato for 1 minute, and then we will get back to you.

STATEMENT OF HON. ALFONSE D'AMATO, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator D'AMATO. Good morning, Mr. Chairman, Pat.

Senate bill S. 550 has been unceasingly attacked by those who say it violates some of the basic constitutional principles on which this Nation was founded. The very opposite is true.

We are not endorsing private education over the public school system. Most importantly, we are not attempting to deny anyone a good education by what some say is a threat to public education.

Instead, a Federal income tax credit for tuition embodies one of this Nation's most-treasured freedoms—the freedom to choose.

Today, our tax system and inflation are denying Americans the freedom to give their children the kind of education they desire and could afford. We can return to them this basic American right by passing this proposal.

One of the major reasons that America has the status as a world leader is it's tradition of granting all its citizens a chance for a quality education.

While it was creating one of the world's great public education systems, America also saw private schools grow and flourish at all levels.

In fact, it was the Nation's private colleges and universities which broke the ground for today's public institutions of higher learning.

Even though private schools have been acknowledged for their contributions to the development of America, there has been an uneasy compromise between public and private education.

Families who have chosen a private education for their children have continued to support the public system through their taxes. They have paid costs that have been steadily rising in both systems.

The price increases of heating fuel, school books—even the cost of all the other expenses needed to provide a quality education—have not been isolated to just the public schools.

Private schools have also borne these costs. And the burden, in the end, has been carried by the parents of the school children. These are the same parents who are carrying the burden of increased food costs, clothing costs, housing costs—all the expenses necessary to provide a quality life for their children.

In New York State this has been done by nearly half a million families with children attending private elementary and secondary schools.

Those children were educated in more than 2,000 schools this past school year—schools which make up more than 18 percent of all the elementary and secondary schools in the Nation. It is clear that these schools have earned their place in America's educational system.

It is equally clear that not only have they contributed to the intellectual development of millions of Americans, they have also contributed to the diversity and pluralism which has been a characteristic of our entire culture.

We could lose this and more if we ignore the economic plight of those exercising their freedom of choice in education. We can't simply hide behind church-state arguments.

To ignore this bill or defeat it on the grounds that it may be unconstitutional is as ridiculous as closing down the schools because some students may fail.

Let us give this proposal the chance it deserves. It has been carefully crafted to avoid any constitutional conflicts. It clearly states that a tuition credit to students does not constitute Federal aid to their schools.

It clearly states that the financial records of church affiliated schools can not be examined by the Government if this bill becomes law.

It is also clear that this proposal is not the elitist document that some have claimed it to be. If we pass this legislation, all families will benefit—from those with lower incomes to those with incomes well above the national average.

Not only would we be opening the doors of elementary and secondary schools to children of lower income families, we would also give these children a chance to attend colleges they could not ordinarily afford.

Private colleges in New York State, such as Columbia, Syracuse, and Renselaer Polytechnic Institute, would be attainable for students who lack nothing but the necessary financial resources.

This proposal and the benefits that would result from it are no more restricted to one income strata than is private education's value to our society. We need to open up the availability of private schools to children from all income levels. This bill will not only benefit the children, it will strengthen our entire educational system.

Just as we should not allow constitutional conjecture to stand in the way of this bill's passage, we should also not allow prejudice and ignorance to scuttle our proposal.

The suspicions and fears which created the doctrine of separating church and state are part of the prejudices some feel toward private schools. Let's not forget that these schools are dedicated first and foremost to education.

We will not be establishing a national religion with this bill. The tax exemptions granted to churches today have not created such dogma and I'm convinced the same would happen under this proposal.

By granting an income tax credit, we are not endorsing any church's doctrine, we are simply allowing the exercise of religious freedom and the right to choose the way one's child will be educated.

For Government to interfere in these principles is to have Government demand obedience to one set of educational principles and one set only. None of us believes Government has that right. All of us know that such decisions are too important to be entrusted to anyone but parents wanting the very best for their child.

Thank you.

Senator PACKWOOD. Senator, thank you.

I agree totally with your statement, and especially your reference to tax deductions for churches, which are of course, constitutional.

An allowance in a credit is just a difference as to how you want to go about deducting an amount from your tax liability. I have read the cases, and I cannot grasp why it is constitutional to give money to the church, whose principle function is indoctrination, but unconstitutional to give it to a church school, whose principle function is education.

I just can not grasp that.

Senator D'AMATO. It is an argument that is advanced with much vigor and emotion. It is certainly one that is designed to, I believe, do away with private schools.

The opportunity for a private education is being diminished by the tremendous costs that people and these schools are facing. I believe, in many cases, that private schools make the difference between a community being a viable one for working people and people of moderate income, in neighborhoods that are deteriorating, where the public school system has become less than desirable.

I hate to think what some of our cities would be like without that alternative.

Senator PACKWOOD. Well, there are some who oppose this bill because they do not like private schools.

They will use the smoke screen of constitutionality, or they will use the smoke screen that we are cutting costs elsewhere, therefore we shouldn't be increasing costs here, or the smoke screen of an elitist bill.

You and I know the number of private schools in this country that are elitist. And they are relatively few. Their tuitions are $4,000 or $5,000 or $6,000 and whether or not this bill passes is not going to make any difference to the person who can afford to send their child to Andover or anyplace else.

They are going to go. But whether or not you have three or four children and you can afford $500 or $600 a year tuition is the key. That is what this bill is aimed at, and that is why it has a $500 maximum lid on it.

It is not a bill designed to make sure that the great elite academies of this country stay open.

Pat?

Senator MOYNIHAN. Well, I thank my friend and colleague, and would emphasize his point. There is a purpose for these hearings and it sometimes may seem obscure, but we are trying to first of all to establish that there is a difference between the issue of public policy and the issue of what the courts will agree to.

You must first decide whether you think something is good public policy, and then you proceed to the next question.

We think it is good public policy, and we are surprised to find the schools that have just—schools you and I know, Senator, from New York—I went to Mount St. Carmel, Astoria, Holy Name in Manhattan, places like that, as well as the public schools—have them described somehow as elite schools. They are simply the schools of the people who live in those neighborhoods. They are not elite neighborhoods—they are good neighborhoods. And those schools have been there for two centuries. No one ever thought that Mount St. Carmel was the equivalent of Groton. It was just as good as Groton, but no one knew that.

I can recall, 20 years ago when President Kennedy came to Washington, I came with him and the same issue was raised. And at that time, rather surprisingly, it was sort of whispered, a thing that rather indulgently the Commissioner of Education would tell you—that you know, these are really not good schools and it really wouldn't be fair to let children go to them.

Now 20 years later, it turns out these schools are so good that if anyone had the slightest incentive the public schools would empty out.

Senator D'AMATO. They have become, in essence, a threat and danger to some public schools. I can't agree with you more. It is such a twisted and distorted, illogical position to take. To say that the public school system is endangered as a result of the strength of private schools is false.

And I say thank God for them because they set a challenge and an example that some public schools should be following and endeavoring to achieve.

Senator MOYNIHAN. They provide a somewhat different mix of pedagogical approaches and so forth. And you have a little competition—it doesn't do you any harm.

In all of the industrial democracies and up in our neighbor Canada, they have a mixed school system, complete access to the religious schools, and they have about the same proportion there as we do here.

I mean, most parents will want their children in public schools, which is fine. And some will wish them in these other schools.

And that is fine, and we don't have to fear either. We ought to be working together.

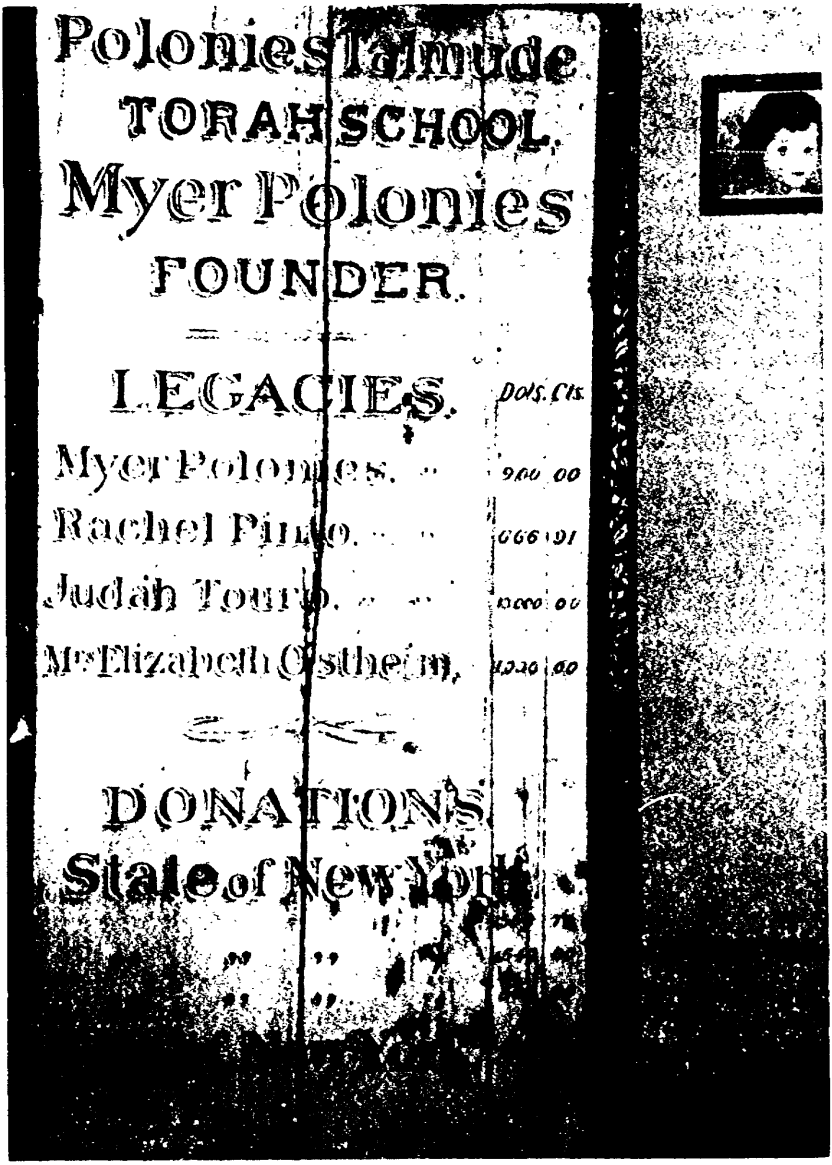
Can I just make a point to my fellow New Yorker on this curious constitutional issue which we really have to address. Abraham Lincoln laid down the principle in the debate on Dred Scott. He said, A Supreme Court decision is not a "Thus saith the Lord". Our obligation to the Court is to obey it. We don't have any obligation to agree with it. And the Court can be wrong.

I have a photograph here. It is a wonderful one. We have, as you know, in New York, a very old, old synagogue which we on the West Side of Manhattan used to call the Spanish and Portuguese Synagogue because, indeed, that is what it was. In 1654, the Jews were expelled from Brazil. They came up and some settled in New York. And they in the early 19th century, around 1808, they set up a Torah school, which is just to teach the Torah, the first five books of the Bible.

They have a photograph of a little signboard, which showed what contributions had made it possible. And it was Mr. Myer Polonies, who was founder of the Polonies Talmude Torah.

And the legacies were one for Mr. Polonies, $900, Pinto, Touro, Ostheim—then donations: State of New York, $1,550, $542, $500, City of New York, $420. It was thought to be the most normal thing in the world in those days.

It wasn't until 1947 that the Supreme Court thought otherwise.



Senator D'AMATO. I think that it is a very interesting observation that you make. I might add, Senator, that one never attends a hearing or a meeting and hears Pat Moynihan put forth his gems of wisdom without that person coming away from that richer in knowledge.

Senator MOYNIHAN. I am overwhelmed. I agree. [Laughter.]

Senator PACKWOOD. Russell?

Senator LONG. Let me just, first, congratulate you on a very good statement, Senator.

It is precise, and it is thoughtful, and it deserves the attention of the entire Senate.

It was my privilege—just a few minutes ago, it seemed to be the right thing to do—make a contribution so that I could afford it.

I went to Louisiana State University, which has a lot of, mainly, State support. But also universities like Tulane, Loyola, are working very hard with very limited resources to do a job for the people. And they need help.

Your point is completely correct that we ought to try to help all of them do a job. Now, when you really get down to it, in some areas we don't have adequate education anywhere in the entire United States.

Just to give you one example, if you have a son or daughter that you want to really be educated best in foreign trade, and that is now a growing area—$200 billion a year of foreign trade going back and forth.

If you want your son or daughter to get the best education, I would say send them over there to Switzerland. That is where the best schools in trade would be. And, by the way, you've got to teach them either German or French to take the courses.

But that is where the best is. And, if you want to compete with the best, it is well to find out what the best education that can be provided—where on Earth it is, and try to get it or provide it.

We ought to have it here. And rather than quarrel and argue about how to do it than have the Government provide it, sometime it is better to just go find a foundation that might be willing to fund getting a few good professors to do that somewhere, get the top.

Just this last week, I sat down with some people interested in quality education because we need a good professor at Louisiana State University to teach people how to keep these deep wells from blowing out. The pressure down there gets to be about 15,000 pounds per square inch. That is a lot of pressure, 15,000 pounds.

You don't have many trucks that weigh that rolling down the highway because they would get locked up if most of them carried that much weight.

And that is weight per square inch. If you try to keep that thing from going out of the ground it is quite a problem.

And the heat down there is about 450 degrees. So there is a huge amount of energy to be found with these deep wells. But to keep those wells from blowing out is a real problem.

Now somebody has to teach people to do it. And I really think that there is not an adequate school anywhere in the world to do that.

Well, we want to try to find a good man to give us $1 million to endow a chair, where what the university can pay would be added to what his million dollars would make possible, and we think we could provide just about the best in America at that university where we educate a lot of petroleum engineers.

Wherever you have the quality, you are going to attract your best people. Now, that ought to be done. And people ought to have

the right to choose. If they think they can get a better education for their children somewhere, they ought to have it.

And furthermore, if they want to contribute to have the best quality in their area, if they think that in the public schools, let's say, that they can't maintain discipline, and that is a real problem—I don't know if it's one in New York; it's one in Louisiana——

Senator D'AMATO. Senator, if I might, I'd like to ask some of those who question the right to alternative schools: What do they think the quality of life would be like in New York City without them?

How do they think of those small schools operated by the religious organizations struggling to survive financially in their own right?

What would have happened to the children of immigrants who came to this Nation and were provided an unparalleled educational opportunity without these successes? Yes, an education which included studies of religious, ethnic, cultural backgrounds that are so important.

Has not our city, as well as the public schools, benefited from the achievements—the heroic achievements and efforts—of those who attended America's earliest private schools?

This bill, of course, won't create thousands of tiny schools along the roadsides. It would simply allow those that are in place today the opportunity to continue. And the poor people, the lower-middle-class workers, and their children will be the recipients and beneficiaries, of this measure. The inner-core cities themselves will be the victim if these educational opportunities are not available to the residents of these areas.

There would be an exodus of people out of these areas if we fail to act.

Senator LONG. Now, you and I know that prejudice plays a part in this. I really think that everybody is prejudiced in one way or the other. He is a part of his environment, he is a part of his heredity. There is nothing wrong with being prejudiced; it just means that a fellow tends to have his mind laid up to begin with. He is what he is, as Popeye has been known to say.

So there is nothing really wrong with it. But I think it is sad for people to be prejudiced, and not to realize that they are.

Most prejudice tends to come from the Protestant side of the fence. I am a Protestant. And I find myself as an older Bible reader thinking of what Jesus told the Pharisees, "Do ye these things, but leave not the other undone."

Now the private schools were here before we had the public schools. They were here first. And they are doing a good job. And public schools are doing a fine job, too.

I am a product of the public school system, but just because you do a good job with public schools or because you are trying to do a better job with public schools, that doesn't mean you ought to try to hold the other people down and keep them from doing a good job.

You ought to try to compete and do a better job. Or at least an equally good job. And the idea of saying, well it will help this system if we hold that one down, I don't think that follows at all. I

think that we render a service when we say to the public school system, here is what you have to compete with.

If you can't find a way to maintain discipline in those classrooms, you are going to lose your best students to those private schools. All things being equal, most parents would prefer to have their children in a public school.

They don't want to pay the extra money. But on the other hand, if they have little choice about it; if they can't get the education that they think the children should have and they want to make the sacrifice—I think we ought to try to encourage them. And bless them for doing it.

It is completely in the American tradition that we try to say that every parent is encouraged to see that his child comes up in the best way that he can to be well educated, trained at home to the extent that the parents can give them the attention but when they send them outside give them the best education that they can get for it.

And they ought to have the option. And they—frankly, I find some difficulty buying your side of the argument, I hear it and it may have some good points, but it seems to me—you've got a very good point, and the people sponsoring the bill have a very good point.

But we ought to encourage these people if they want to put something into it and try to do a better job to do so. And I say that without prejudice to the public school. Help them too, why not?

I just don't think that we have to be against one in order to be for the other.

Senator PACKWOOD. Do you want to be added as a cosponsor?

Senator LONG. Senator, you don't need cosponsors. You might need a few votes.

Senator MOYNIHAN. We know that you are a cosponsor, and we appreciate it very much, Senator D'Amato.

Senator D'AMATO. Thank you very much.

[The prepared statement of Senator D'Amato follows:]

STATEMENT BY SENATOR ALFONSE D'AMATO

Senate bill S. 550 has been unceasingly attacked by those who say it violates some of the basic constitutional principles on which this Nation was founded. The very opposite is true.

We are not endorsing private education over the public school system. Most importantly, we are not attempting to deny anyone a good education by what some say is a threat to public education.

Instead, a Federal income tax credit for tution embodies one of this Nation's most-treasured freedoms—the freedom to choose. Today, our tax system and inflation are denying Americans the freedom to give their children the kind of education they desire and could afford. We can return to them this basic American right by passing this proposal.

One of the major reasons that America has the status as a world leader is its tradition of granting all its citizens a chance for a quality education. While it was creating one of the world's great public education systems, America also saw private schools grow and flourish at all levels. In fact, it was the Nation's private colleges and universities which broke the ground for today's public institutions of higher learning.

Even though private schools have been acknowledged for their contributions to the development of America, there has been an uneasy compromise between public and private education.

Families who have chosen a private education for their children have continued to support the public system through their taxes. They have paid costs that have been steadily rising in both systems.

The price increases of heating fuel, school books—even the cost of all the other expenses needed to provide a quality education—have not been isolated to just the public schools.

Private schools have also borne these costs. And the burden, in the end, has been carried by the parents of the school children. These are the same parents who are carrying the burden of increased food costs, clothing costs, housing costs—all the expenses necessary to provide a quality life for their children.

In New York State this has been done by nearly half a million families with children attending private elementary and secondary schools. Those children were educated in more than 2,000 schools this past school year—schools which make up more than 18 percent of all the elementary and secondary schools in the Nation.

It is clear that these schools have earned their place in America's educational system. It is equally clear that not only have they contributed to the intellectual development of millions of Americans, they have also contributed to the diversity and pluralism which has been a characteristic of our entire culture.

We could lose this and more if we ignore the economic plight of those exercising their freedom of choice in education. We can't simply hide behind church-state arguments.

To ignore this bill or defeat it on the grounds that it may be unconstitutional, is as ridiculous as closing down the schools because some students may fail. Let us give this proposal the chance it deserves. It has been carefully crafted to avoid any constitutional conflicts. It clearly states that a tuition credit to students does not constitute Federal aid to their schools.

It clearly states that the financial records of church affiliated schools cannot be examined by the Government if this bill becomes law. It is also clear that this proposal is not the elitist document that some have claimed it to be. If we pass this legislation, all families will benefit—from those with lower incomes to those with incomes well above the national average. Not only would we be opening the doors of elementary and secondary schools to children of lower-income families, we would also give these children a chance to attend colleges they could not ordinarily afford. Private colleges in New York State, such as Columbia, Syracuse and Rensselaer Polytechnic Institute, would be attainable for students who lack nothing but the necessary financial resources.

This proposal and the benefits that would result from it are not more restricted to one income strata than is private education's value to our society. We need to open up the availability of private schools to children from all income levels. This bill will not only benefit the children, it will strengthen our entire educational system.

Just as we should not allow constitutional conjecture to stand in the way of this bill's passage, we should also not allow prejudice and ignorance to scuttle our proposal. The suspicions and fears which created the doctrine of separating church and state are part of the prejudices some feel toward private schools. Let's not forget that these schools are dedicated first and foremost to education.

We will not be establishing a national religion with this bill. The tax exemptions granted to churches today have not created such dogma and I'm convinced the same would happen under this proposal.

By granting an income tax credit, we are not endorsing any church's doctrine, we are simply allowing the exercise of religious freedom and the right to choose the way one's child will be educated. For Government to interfere in those principles is to have Government demand obedience to one set of educational principles and one set only. None of us believes Government has that right. All of us know that such decisions are too important to be entrusted to anyone but parents wanting the very best for their child.

Senator PACKWOOD. Now, let's get back to Secretary Chapoton. And again, I might say to the witnesses, you see why it is imperative we hold your statements to 5 minutes. You will get an ample chance in response to questions to elaborate.

Mr. Secretary, I want to ask you very carefully about the paragraph on page 2, "The Treasury Department supports tuition tax credits but all in good time."

As I have told you before, speaking for Senator Moynihan and myself, we are willing to attempt to accommodate the economic desires of the administration. To us the philosophy of this bill is very important, and we want to get it established.

But I want to know, very specifically, in exchange if we work out an accommodation that is economically satisfactory to the adminis-

tration that the administration does indeed want this bill passed in this Congress.

Secretary CHAPOTON. That is correct, Mr. Chairman.

The administration supports this bill, does indeed want this bill passed; the constraint is, as other witnesses have addressed and you indeed have addressed, there is a budgetary constraint on any economic move such as this, and we want to work with this subcommittee for the end of getting appropriate tuition tax credit legislation passed.

Senator PACKWOOD. I can assure you, as far as I am concerned, we will be able to reach an economic accommodation.

Pat?

Senator MOYNIHAN. Thank you, Mr. Secretary, for being so courteous in waiting here.

I want to just ask if you would not expand on your statement that Congress may wish to coordinate these tax credits with direct educational expenditures so that they complement one another. So that the total budgetary cost of both types of programs is at a desirable level.

Would you expand on that? Do I take you to think that I would be attracted to the idea that we get into this zero-sum game that so concerns many? That whatever the one system gets, the other system loses, and vice versa.

Is that what you are saying?

Secretary CHAPOTON. Senator Moynihan, no, we are not in a zero offset game here.

We do not mean that at all. We simply mean——

Senator MOYNIHAN. I know that you don't.

Are you aware that many people do fear that?

Secretary CHAPOTON. Yes, we do understand that.

No, that provision in the testimony simply goes to the point that there are overall budgetary constraints, and that there are outlays on the Education Department that must be considered—as this item is being worked into the budget as well.

Senator MOYNIHAN. Would you think it would be a useful aspect of public policy to apportion Federal aid in some measure reflecting the number of students?

Secretary CHAPOTON. I think that is a question for the Department of Education.

Senator MOYNIHAN. But you do agree that—this is not a sum-zero game.

Secretary CHAPOTON. That is correct.

Senator MOYNIHAN [continuing]. In which whatever one side wins, the other side loses. That is the most—what could be worse for education; there aren't that many people who care about education to begin with, and to have some fiendish, antieducation forces that are at work—of the people who care about education in this room, half of them are opposed to the other half, and we will end up getting nothing for either if we don't get together.

Secretary CHAPOTON. No, that is not our position.

Senator MOYNIHAN. Thank you very much.

Senator PACKWOOD. Russell?

Senator LONG. You say this administration supports this bill?

Secretary CHAPOTON. This administration supports the tuition tax credit concept; basically we would want to work with this subcommittee. I do not want to state that we want to support this bill, in the absolute form that it is.

There are certain aspects to consider. One, we have concerns about the refundability aspect of it, and the level of the credit is a budgetary constraint, although this level does seem to have more support—general support when you are talking about tuition tax credits.

And there are certain more technical aspects that we would want to work on.

Senator LONG. It has been suggested that we might bypass the refundability argument, which tends to be a jurisdictional argument among committees on the Hill.

We might just bypass that by giving to a taxpayer the right to assign his tax credit, if he can't use it, to just assign it to somebody who is in a position to use it.

How far have you gone in looking into that approach?

Secretary CHAPOTON. In this context or——

Senator LONG. No, in any context.

Secretary CHAPOTON. We have looked at that approach in the investment tax credit context in some detail. Basically we have not supported, well, as you know, we have not supported the refundability of the tax credit.

We have looked at assignability in direct forms, such as just a certificate that you sell to another taxpayer, or through different commercial transactions, in the investment tax credit area—leasing, liberalized leasing rules, that type of approach. We see certain problems and benefits in each of the approaches.

There is certainly some desirability when you give a tax benefit to allowing—particularly, say you want to talk about purchase of equipment—to allowing people who are not in a taxable position to enjoy some of the benefits that people in businesses that are in the taxable position would enjoy.

Senator LONG. Let's just think about that for a moment.

I think this is a very important issue that goes beyond this bill.

A tax credit is not a deduction; we understand the difference, don't we?

Secretary CHAPOTON. Correct.

Senator LONG. A tax credit is something where we think it is a good thing if the taxpayer will do something.

And we think it is such a good thing that we allow him a certain percentage of whatever he puts into something as incentive, and basically we can regard that as a tax subsidy.

Now, I don't agree with Mr. Stanley Surrey's argument about tax expenditures. I read it and I'll show it sometime. I think it is just screwy the way he looks upon it; that a tax expenditure is the same as an appropriation.

But, in this case, it is really an expenditure of funds in that we say that if you will do this, we are going to let you reduce your taxes by this amount of money.

So, I guess if you want to call anything a tax expenditure, this would be a tax expenditure.

Now, but why a person has earned the subsidy. I find myself asking, if he has earned it, why shouldn't he be permitted to assign

it if he can't use it? Or to sell it if he can't use it? He is entitled to something that he had earned.

As that ad on television said about whoever that outfit is supposed to be. It is not the one with the bull, but one of these fellows—they earned it, you see. They earned it, they worked for it. All right now. If he has earned it, and he is entitled it, is there really anything wrong with assigning to somebody who could use it?

Secretary CHAPOTON. There is a lot to be said for that argument that indeed you make it more expensive for a business which cannot use it, to buy the equipment, but if that business does spend the money, and as you put it, it earn the credit.

And the fact may be that it has no tax liability and doesn't receive the benefit, whether you call it a subsidy or however you term it. You make that equipment more expensive than it is for someone else.

I think that is an idea that has been discussed for some time. I think it is less objectionable, if it is between taxpayers, that you allow the benefits to be transferred.

There are, I think, probably two major constraints on taking that step. One is budgetary, when you are talking about the investment tax credit, again, it makes it a lot more expensive to do that.

The second one is the perception concept that should you allow people to enter into paper transactions to reduce their taxes, that is the buyer of the benefit, even though the benefit you are trying to get is to the seller of the tax credit.

But, that is the way you would have to——

Senator LONG. Well, it need not—if you handle it the way that it ought to be handled, speaking to your second point, he ought to be able to get at least 99 cents on the dollar for what it is worth because if you handle it the way it ought to be handled, the guy who owes the taxes can just when he pays his tax bill, he can just send that certificate on in.

Either you or I, I know for a fee, we'd be glad to draft a certificate to say what it would say. You just put the guy's name in up here, you put your name in down there, and that is all there is to it.

If you owe $1,000 you assign your $1,000 to the other guy, when he pays his taxes he sends that certificate in and reduces his tax liability by $1,000.

That is simple enough to do.

Secretary CHAPOTON. That is correct.

Senator LONG. All right, now, the other point gets down to simple economic justice.

What kind of sense does it make to deny somebody economic justice just because it costs the Government some money?

In other words, when you really get down it, when we came up with this investment tax credit, I was around here at the time, and the whole idea was that we wanted to provide incentive for people to modernize and buy new equipment.

And to say that, yeah, we are going to do that, except that for the people who need it the worst, they don't get it.

Now, who needs it the worst? With a company like Chrysler, goodness knows they need to modernize and get that new machinery moving even worse than General Motors does.

They are right on the ropes. And a railroad that is trying to make it; trying to survive, trying to stay under existing management where everybody is making a sacrifice to stay afloat.

They need it, and they don't get it. And then to say, well, you know, if we did that, it would increase the cost.

Well, somebody should have thought about that to begin with. But we are not that smart.

It seems to me as though when we are getting ready to cut taxes, here comes a tax bill which in 1986 is going to cost $222 billion; that is not my estimate, that is people who are supposed to know better than I do what it would cost.

I am not quarreling about that. I am just saying that if we are going to do something of a huge nature; wouldn't that be the logical time to take care of that matter?

Mr. CHAPOTON. Well, it indeed might have been, Senator.

The problem is complex. I mean, when you talk just about credits, it is easier to see. Part of the benefit, and the business people and we, measure the benefit of the credit and the accelerated deductions for depreciation, cost recovery, as a present value of benefit. So that really the benefits are in both the credit and the accelerated deductions.

And we turn over to the deduction side, it is much more difficult to talk about passing those benefits along to someone else.

So you—and yet, they are actually viewed as the same by persons considering an investment—the present value of the cost recovery and the present value of the investment tax credit.

You can isolate the discussion and talk about the credit. And give some form of transferability to it. And I agree that there is a lot of logic in doing that.

Senator MOYNIHAN. Could I just make one point, Mr. Chairman?

Senator PACKWOOD. Yes.

Senator MOYNIHAN. To say to the Secretary that, in terms of the cost of this program—as we estimate it, in revenue effect, about two-thirds of the cost is for higher education. And the higher education doesn't want tuition tax credits anymore, in the main or doesn't seem to.

Because the last administration, in an effort not to provide any aid to elementary or secondary schools, came up with the guaranteed student loan program and in effect, bought out that element in the support.

So it may be that we are only talking about a bill which in the final form would have one-third the present revenue effect.

Secretary CHAPOTON. Yes, sir, I understand——

Senator MOYNIHAN [continuing]. Which would no doubt please your hard bitten Treasury heart.

Secretary CHAPOTON. I understand that and it certainly would again from a budgetary standpoint; it would make it easier, certainly.

Senator MOYNIHAN. Thank you, Mr. Secretary.

Senator PACKWOOD. Mr. Secretary, thank you very much.

Senator LONG. Could I just interject one more question.

I just want to ask one final question about this matter refundability.

After you people get through thinking about it up there, if you conclude, as I have concluded a long time ago, that refundability ought to be one of our tools available to execute a tax policy, where you are subsidizing something where we want to subsequently, definitely know we want to subsidize this by way of a tax law.

If you have made that decision and you would like to use refundability, which I think is something that really should be done, I am inclined to think that the way to get it, is to go to assignability first.

And once everybody understands that you have got the right to assign it, then I don't think it will give them a brain hemorrhage when they start thinking about refundability the second time.

Thank you.

Senator PACKWOOD. Thank you, Mr. Secretary, I appreciate it.

Secretary CHAPOTON. Thank you, Mr. Chairman.

[The prepared statement of Hon. John E. Chapoton Assistant Secretary for Tax Policy, U.S. Treasury Department follows:]

STATEMENT OF HON. JOHN E. CHAPOTON, ASSISTANT SECRETARY FOR TAX POLICY

Mr. Chairman and members of the subcommittee, I am pleased to appear before you this morning to present the views of the Treasury Department on S. 550, the "Tuition Tax Relief Act of 1981". This legislation would provide a refundable income tax credit for 50 percent of tuition and fees for the taxpayer, his or her spouse or any dependent at a private elementary of secondary school, or undergraduate college or university, up to a maximum credit of $250, for tuition and fees after July 31, 1982 and before August 1, 1983, and up to $500 for tuition and fees thereafter. The credit would be extended to graduate students and half-time students beginning August 1, 1984.

The tax credit is intended to effect the stated purpose of the bill, which is to enhance equality of educational opportunity for all Americans at the schools and colleges of their choice.

This is a matter of considerable personal concern to the President. This Administration is determined to work as closely as possible with Congress in constructing a tuition tax credit bill, one that provides substantive tax relief to the families of nonpublic school students, one that broadens and enriches educational opportunities and promotes excellence in our schools. Equality of educational opportunity clearly requires that a diverse range of schools—public and private—be available to all American families, and that all American families have the financial ability to permit meaningful freedom of choice among schools. We believe that parents have a fundamental right, and responsibility, to direct the education of their children in a way which best serves their individual needs and aspirations. Moreover, we believe that parental involvement in the decision-making process enhances the quality of education provided.

Private schools are essential to fulfilling our national educational needs. They provide a healthy diversity of approach, and are often a significant source of innovation and experimentation. But private schools are expensive, and inflation is making them more so. At the same time, higher taxes caused by bracket creep are making it more difficult for families to afford private education. Federally-funded student aid programs involve significant administrative costs and effort for the government and families alike. Tuition tax credits offer a simpler means to fund private education by permitting families to keep the money they have earned and to spend that money for the education they themselves select.

The Treasury Department supports tuition tax credits. Their enactment will recognize the value of our private schools, will assist families in meeting the increasing costs of education and, most importantly, will strengthen the right of parents to decide the education of their children. As you know, however, the Treasury's primary focus at this time is the President's initial set of tax proposals. Other proposals, however meritorious, must wait until completion of legislative action on the economic recovery program. Nevertheless, we can state now that tuition tax credits will be at the top of our agenda at the appropriate time.

We do wish to discuss particular aspects of the tuition tax credit concept. These are areas which we believe the Congress will wish to address. We intend to work closely with this Subcommittee and the Congress in developing the best possible system of tuition tax credits.

First, tuition tax credits have a significant revenue impact, and therefore they must be considered together with other budget matters. While we do not have precise revenue estimates on S. 550 at this time, we believe the costs to the Treasury would be approximately $2.7 billion in fiscal year 1983, rising to nearly $7 billion in fiscal 1986 as the credit is phased in. In a time of budgetary austerity, these are clearly significant amounts. Moreover, these estimates would be increased to the extent that direct student assistance programs are reduced or private school enrollments or tuitions increase. Once enacted, there may be additional pressure to increase the amount of the credits. Thus, Congress may wish to coordinate any tax credit with direct educational expenditures, so that they complement one another and so that the total budgetary cost of both types of program is at a desirable level.

Second, we believe that refundability would provide assistance to needy families who are not taxpayers. However, we think that this feature is not desirable from the standpoint of tax policy. Congress will surely wish to consider this question carefully.

Finally, any new provision adds some complexity to the tax law. We must work hard to simplify the provision as much as possible.

Mr. Chairman, this is an extremely important area of public policy, and we at the Treasury Department are most eager to work with the Congress on it at the appropriate time.

Senator PACKWOOD. Next we will hear from a panel composed of Dr. James Skillen, Dr. Eugene Linse, and Robert Smith.

Again let me say your statements in their entirety will be in the record, and do the best you can to summarize them.

PANEL OF DR. JAMES SKILLEN, EXECUTIVE DIRECTOR, ASSOCIATION FOR PUBLIC JUSTICE, WASHINGTON, D.C.; DR. EUGENE LINSE, CHAIRMAN, CITIZENS FOR EDUCATIONAL FREEDOM, WASHINGTON, D.C.; AND ROBERT L. SMITH, EXECUTIVE DIRECTOR, COUNCIL FOR AMERICAN PRIVATE EDUCATION, WASHINGTON, D.C.

Dr. SKILLEN. Mr. Chairman and Honorable Senators, I thank you for this opportunity to testify in support of tuition tax credits.

The Association for Public Justice is working to promote public policies that strengthen just interrelationships among all the institutions and organizations of society. We are not, first of all, a lobby group for either private or public schools. We are concerned with the structure of the public order.

For this reason, we believe that the relationship of government to education is of crucial significance. When considering this relationship, we are dealing with families, schools, local communities, and government, as well as with churches, voluntary associations, and any number of other organizations.

Most of the debates about tuition tax credits, vouchers and other plans to aid nonpublic schools come back to whether or not the debater starts with the assumption that the present system of public support for education is just or unjust.

Those who accept the basic structure of the present system will point to the difficulties and threats to America if the Federal Government grants a tuition tax credit.

We have heard some of their concerns—excessive Federal involvement in essentially a state responsibility, excessive costs to the Federal Treasury, a threat to the separation of church and state, a danger to the poor and minorities, and a threat to the public school system.

Those who believe that the present system is unjust point, on the other hand, to the financial inequity to parents who pay for both public and private schools, to the public discrimination against private schools which perform a public service, to the need for greater competitive quality in Amercan education, to the failure to do justice to parental responsibility in education, and to the misapplication of the first amendment.

The Association for Public Justice supports the principle of tuition tax credits as one step in the direction of doing greater justice to students, parents, schools, and other institutions and communities in American society. Our concern is with the foundational assumptions and principles involved.

Let me summarize briefly two points which we have worked out in further detail in our prepared statement.

In American history, we have come to honor the disestablishment of the church, and essentially to honor the noncontrol of the internal life of most business enterprises on the part of the Government.

But why not education? Why has there been that assumption that schools, somehow, are a legitimate and proper institution for governments to organize and run themselves as part of governmental process and bureaucracy?

In that respect, we have an ambiguity in our American tradition of families and schools. On the one hand, through the *Pierce* v. *Society of Sisters* case in Oregon and our signing of the U.N. Declaration on Human Rights and other such documents, we recognize that families have the primary responsibility for the education of their children.

On the other hand, we have granted to government preemptory rights, as I would call them, to organize the structure within which parents will then have the choice whether or not to use government schools. And as we know, the result is that families have only a secondary option to choose schools. They must send their children to schools, but they have the right to select which school only with some economic infringement.

As has been pointed out earlier this morning, schools actually existed before the public schools. They were run by private associations and institutions. So the schools have an identity, they have a character; they are not simply something that automatically should be viewed as an extension of government.

So the question is: How can government do justice to families and schools without first of all assuming that it has the original right to determine the structure and rights of those families and schools when it comes to education?

First government preemption is not necessary for just oversight of education. By that I mean it is not necessary for the Government to own and control the schools in order to see that justice is done to all students, parents, and taxpayers.

Second, with regard to the first amendment problem, it seems to me that the basic issue again is one of fundamental assumptions. The Supreme Court has so interpreted the terms "religious" and "secular" as to grant to itself the first right to determine what is religious and what is secular. And it has for the most part assumed

that the state has monopoly over what is secular, while churches have the monopoly over what is religious.

Overlooked, for the most part, is what are families and schools. Our conclusion is that families and schools, like all other institutions, are both religious and secular. They concern life in this world, and they concern fundamental directions, fundamental values, fundamental assumptions.

The way to do justice to those families and their rights and to all schools that spring up would be for the Government to treat them as having their own rights and responsibilities to bring before the bar of justice and not to have the Government predetermine which ones will be acceptable and funded.

Senator PACKWOOD. Doctor, thank you. The remainder of your statement will be placed in the record.

Dr. Linse.

Dr. LINSE. Thank you gentlemen.

My name is Eugene Linse.

I am chairman of the board of trustees of Citizens for Educational Freedom, a national public interest group with offices here in Washington and also in some of the several States.

In preparing for my presentation here today, one of the things that I picked up was the rather excellent review of most of the issues in a journal called, the Republican Journal of Thoughts and Opinions, Common Sense, done by Senator Packwood himself, titled "The Accessible Dream."

It certainly is an excellent summary of the arguments that one has heard here and will hear here in the next day.

Also, I would call attention to the current article in U.S. News & World Report, which both supports the idea of tax credits for nonpublic schools, particularly the words of the Commissioner of Education, who I understand is also going to testify here in the next day or so.

The thrust of my remarks stresses and emphasizes the importance of the family, and the right of the family to make important and significant decisions and that it is my belief that the tax credit legislation here under consideration will enhance that opportunity to make those choices.

But in preparing for the presentation, it seemed to me I should like to get at it from a somewhat different perspective than the technicalities of law and constitutional law that we discuss here.

And so, in reviewing some of those themes that are common to our Judeo-Christian heritage and the development of political thought in the West, what struck me particularly was, that though there are three important themes; the Judeo-Christian heritage, the theoretical orientation of an Edmund Burke—who was a conservative—which demands a decent respect for our traditions and our institutions, and the warm thoughts of John Stuart Mill, who championed freedom as he drafted in his concern in his essay on liberty, written about 120 years ago.

I should not want to go into a discussion of the Judeo-Christian heritage in America. That is certainly regarded with a considerable amount of material and support in our literature and our institutions in society.

I think that there was a phrase in the report "Listening to American Families," the White House Conference on the Family last year, that made some sense just in this regard.

The message was enormously positive; that is, the importance of family and parental relationships. Americans from every walk of life, from all races, of every political and philosophical persuasions, demonstrated a deep faith in families as the bedrock, the starting point for surviving in an increasingly complex society.

What they asked was that government in the United States assist them in binding the family more closely together in the exercise of rights in the efforts to carry out their responsibilities.

The next paragraph in my testimony summarizes some of the arguments that you have heard and that you will have heard here. I want to simply refer to the last sentence in that paragraph on page 2 if you have the copy before you "that Senator Moynihan, himself an author of this legislation under consideration, is a resource on the relationship between public and private education in the full sweep of our history, as his speeches and writings attest."

What about the constitutional question and especially that of parents rights? The U.S. Supreme Court has on numerous occasions dealt with this question. Most recently, on May 26, it refused to hear an appeal from Indiana, in which public schools authorities used somewhat objectional methods to search students in junior and senior high schools for drugs.

The argument advanced by school authorities to justify their action was that, in relationship to all the students in these matters, they stood in loco parentis.

That they should have more latitude than would be permitted than where other public authorities are charged with the invasion of a person's rights.

Almost 50 years ago, Justice McReynolds, writing for the majority in the *Meyers* case, asserted that the right of the parents includes the right of the individual to contract, be married, to establish a home, to bring up children, to worship God according to the dictates of one's conscience, and generally, to enjoy those privileges long recognized in common law as essential to the orderly pursuit of happiness by free men.

In the years between, in this past half century, in *Pierce* v. *the Society of Sisters,* and *Abbington* v. *Schempp,* and also in the *Wisconsin* v. *Yoder* case, one has a continuing discussion of the relationship of parents to their children, and what these rights all involve.

John Stuart Mill's essay "on liberty" is, to me, an informative one. Let me simply comment on it that his emphasis on liberty is that the function of Government is to supply a larger measure of opportunity in the exercise of freedom.

The point that I should want to make, though, is that there is a significant difference between liberty and license. It is not license that one should want to defend here, anywhere.

And that are, indeed, some limits to liberty. But how far should that liberty extend?

John Stuart Mill would argue, unless one can show that the exercise of freedom threatens to destroy those fundamental institutions in a free society that champion and defend freedom; unless,

in the exercise of freedom the individual threatens the freedom of another; unless, in the exercise of freedom, the individual becomes a serious threat to himself, freedom should be freely allowed to function in a society.

It is my position that to preserve and to extend to more persons those conditions that make life more human and less coercive, that is what the function of Government is; that is a noble objective, it is in support of these principles of freedom of opportunity to choose, the rights of parents to choose, that I urge favorable consideration of S. 550.

Thank you.

Senator PACKWOOD. Doctor, thank you very much.

Senator MOYNIHAN. I might say Professor Linse is a political scientist as I am. That makes me feel better.

Senator PACKWOOD. There are many references to *Pierce* v. *the Society of Sisters* in both your testimony and the witnesses that will follow you.

That is a case, Pat, that came out of the State of Oregon in the early 1920's. The Klu Klux Klan gained control of the Oregon Legislature, and simply passed a bill outlawing private schools, period.

And it was such a clear violation of our fundamental rights, the courts had no difficulty in striking it down, but it is amazing for a State that is regarded as tolerant as Oregon is, that within our recent memory we had that kind of a legislature.

Mr. Smith.

Mr. SMITH. My name is Bob Smith. I am executive director of the Council for American Private Education, known as CAPE.

CAPE is a Washington-based coalition of 15 elementary and secondary school organizations whose member schools enroll about 85 percent of all private school students.

Member organizations subscribe to policies of nondiscrimination, with respect to race, color, and national origin.

CAPE urges support of the Packwood-Moynihan bill. The basic case is simple and it is straightforward.

First, all families have the constitutional right to send their children to the school of their choice. Choice for the vast majority of families is religiously determined.

Two, the increased cost of exercising educational choice because of higher tuition costs and higher living costs is putting a heavy fiscal burden on the majority of private schools parents.

Three, the tuition tax credit represents a modest amount of relief to such families, and because the refundability provision in this bill gives new educational opportunities to those least able to exercise them—the poor.

To elaborate on these points just a bit: One, family choice in education is akin to family conviction about education, the kind of choice which is compelled by what the family stands for.

Two, private schools educate the children of economically typical American families; 62.7 percent of private school parents earn less than $25,000 a year; 27 percent earn less than $15,000 a year. And very significantly, 72 percent of private school families living in inner cities earn less than $15,000.

Point three, although as a nation we are proud of our policy of equal educational opportunity, we find ourselves in the untenable

position of having such policies only at the college and university level.

Four, the circumstances of private schools in this country are mixed. Many are just barely hanging on. These are the private schools which are the backbone of private education in this country—our urban private schools.

In the 10 largest and oldest cities, 20.43 percent of the schoolchildren are enrolled in private schools. We urgently suggest that the future of these cities, the tax base which supports their public schools, their communities, stability, and improvement, their support of culture and recreation, and yes, most important, education, which will make people continue to want to live in them depend on their having a significant number of families who use private schools.

Urban private schools are inextricably tied to the health of cities.

The arguments against tuition tax credits are familiar. One, they will destroy public education. In our view, they will strengthen it by assuring that, where it is weakest, in our major older cities, there will be resources like taxes, people, institutions, and concern to give it the requisite support it must have.

The Coleman study does not support the view that there will be any signifi[illegible]t shift out of public education if we enacted a tuition tax credit [illegible]ill. By and large, we all know that parents ultimately make schoc choices on the basis of education and not on the basis of several hundred dollars.

They will take urgently needed funds away from public education. This point has been spoken to. The Packwood-Moynihan bill involves a phase-in of tuition tax credits so that their first full-year impact on the budget will be felt in the budget of 1983.

Therefore, the monetary effect of tuition tax credits will be experienced within a far different budgetary climate than exists today.

It is, of course, simply not the case that there is a finite amount of dollars available for education. Senator Moynihan stated, when he introduced this bill, that both the size of the credit and the timing issue are negotiable with the administration. We feel this is a highly responsible approach.

Tuition tax credits threaten the constitutional separation of church and state. The only way to determine the constitutionality of this bill is to make it possible for the Supreme Court to rule on it. The first amendment, church-state litigation is a tangled web. We hope the Court gets an early opportunity to take Packwood-Moynihan under review.

From an educator's standpoint, one of the most troubling aspects of this legislation is the extent to which it is engendering hostility between public and private education. The enmity and misunderstanding between our two sectors is as long as it is unfortunate. This legislation is not antipublic schools and if it were we would not be interested in it.

Both public and private school supporters should keep in mind that both sectors are part of an amazingly diverse and rich national system of schools. They differ in every possible way—in degrees of autonomy, financing, goals, governance, enrollments, and pedagogy, to name a few of the most important.

To make this system as vigorous as possible is to reinforce the strengths of each of its parts.

In conclusion, if I may, we believe that from its earliest days the Nation has benefited from the existence of private schools as a rich tradition of pluralism and diversity and that it is essential that there be maintained the constitutional rights of parents to choose the kind of education they want for their children.

We find that right to be threatened for an increasing number of private school parents. We are deeply concerned that this right cannot be exercised by the poorest of our society, and find this legislation an appropriate, if modest step, in the direction of offering the needed equal educational opportunity, which is well established at the college level.

In short, we support the Packwood-Moynihan bill which advances the cause of justice, pluralism, equal educational opportunity and the strengthening of a national network of schools, public and private, which is the envy of the entire world.

Senator PACKWOOD. Both Senator Moynihan and I have said over and over again, that the public schools come first. That indeed, it is the obligation of the Government to make sure that people are educated. And I think our records, in terms of supporting public education are rather high.

I am a product of public schools. My children go to the local, neighborhood public school, and I have no intention of taking them out of it and sending them to the private school nearby if this bill passes.

Nor do I think that most parents plan to take their children out of public schools. If they do, they are going to have to pay a significant additional amount of money because it is only a 50 percent tax credit.

I fail to understand how, without any evidence at all unless it is out of fear, that people can think that this bill is going to destroy public education.

There is no evidence to that effect. We have had a slight decline over the past 15 years in private school enrollment, although it has stabilized a bit now.

But it is not our intent to destroy public education. We have not found any evidence that passing S. 550 would lead to that. Nor would Pat and I countenance anything that would lead to that.

Gentlemen, thank you very much for your first-rate statements. I had a chance to read them ahead of time, and I appreciate your staying within the time limit.

Pat?

Senator MOYNIHAN. May I just once again repeat what was so eloquently said by the chairman.

It has pained us to find a simple effort to maintain a diverse, plural system, represented as an effort to destroy public schools; is nothing of the kind.

But there is a lot of teaching to be done here, and I think that this Professor Linse has taught very well—on this point.

John Stuart Mill and liberty is very relevant here. And also a point which was easily understood in the beginning of this Republic and somehow lost in recent years. Years ago, Nathan Glazer and I published a book on New York State and City, and described

this controversy when it first came up in New York in 1840, after about 30 years of just routine public State assistance to the denominational schools, of which there were none other. And the Secretary of State, a man named Spencer, had to make a proposal on this.

Spencer was the first translater of DeToqueville. He said,

> Of course these schools are entitled to public assistance. How could they not be? What possible grounds could be held against sharing equally?

And then he made a point about whether religion is involved in one and not the other.

He said, "No books can be found, no reading lessons can be selected which do not contain more or less of some principles of religious faith, either directly avowed, or indirectly assumed. Even the moderate degree of religious direction which the public school society imparts, must therefore, be sectarian; that is, it must favor one set of opinions or another."

And it is believed that this will always be the result in any course of education the wit of man can divine.

As for avoiding sectarianism by abolishing religious instruction altogether he says, "On the contrary, it would be in itself sectarian; because it would be consonant to the views of a peculiar class, and opposed to the opinions of other classes."

You can not avoid it. And you are right to make the point that these are all judgments that no institution can avoid having, and therefore, why not support the range.

I would like to make just one more point, Mr. Chairman. The Council on American Private Education has made a very strong statement urging the enactment of a tax credit law that has the necessary protection to insure that none of the benefits therefore inures to the advantage of parents of children who have chosen to educate their children in institutions who discriminate on the basis of race, color, or national origin.

Without such protections, the Council can not support this legislation. I think this would fit with the John Stuart Mills' description of liberty.

That liberty asserted by oneself, which destroys the liberty of others is not acceptable. There are limits to liberty. This would be one of the limits.

Now, I believe that this is a very strongly held view by the Council. Is it not?

Mr. SMITH. It is, Senator.

Senator MOYNIHAN. And if this bill does not make clear that no discriminatory institutions can be supported by it, you can not support this legislation.

Mr. SMITH. That is very true.

Senator MOYNIHAN. And I think that is true of all three of you, is it not?

As now written, do you find it acceptable?

Mr. SMITH. Absolutely.

Senator MOYNIHAN. Mr. Linse?

Mr. LINSE. I might comment on that.

There is a history of experience with just this kind of legislation that comes out of Minnesota. Minnesota did have a tax credit bill for 3 years. And that particular question of how discrimination was

handled was in that case tied to the Civil Rights Act of 1964. My position would be that I am not—it is immaterial which process one uses.

The point should be made that discrimination should be outlawed as far as benefits are concerned.

Senator MOYNIHAN. Well, we fully agree, and we thank you gentlemen for the approach you have made, particularly for asking why this must tear the education community asunder. Why can't we talk with each other and support each other? It is only when we support each other that we have any influence down here.

Senator PACKWOOD. Pat, I might add one thing on discrimination.

This bill, as Pat and I were drafting it, was the subject of much negotiation. And that provision is the bottom line below which we will not go. And if that provision is lost, through amendment or otherwise, it will lose our support.

That we cannot, will not, countenance racial discrimination, period.

And if, in order for some people to support this bill, they have to have that clause out, we will have to go without their support.

Senator MOYNIHAN. This couldn't be more clear.

If the provisions prohibiting discrimination in this legislation are taken out by amendment, Senator Packwood and I no longer support this bill. And you would wish us not to?

Mr. SMITH. True.

Senator PACKWOOD. Gentlemen, thank you very much.

Excellent testimony.

[The statements of the preceding panel follow:]

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Principal Points of Testimony in Support of Tuition Tax Relief Legislation
to be Delivered before the Senate Finance Committee
by James W. Skillen

1. The Responsibility to Educate -- APJ supports the Tuition Tax Relief Act of 1981 because it recognizes the primary right of parents to select the kind of education they desire for their children, consistent with their religion and educational philosophy, without financial penalty. Justice requires of government an equitable handling of the opportunity it controls, without penalty or advantage to any person, group, or institution due to religious, racial, economic, or other social and individual differences. The present funding policy for education does not measure up to this test. Passage of this legislation will help to make it possible for every parent and child to choose, without economic discrimination, the kind of education they desire.

2. Qualitative Diversity in Education -- Diversity rather than monopolistic uniformity is a better guarantor of educational quality. Encouraging diversity through this legislation need not lead to the end of fair and free education for all, but will mean the enlargement of opportunity and public care for education. APJ is not calling for a system that will threaten educational opportunity for every child, but just the opposite--governmental guarantee of genuine opportunity for students to go to the school of their choice without discrimination or financial penalty. APJ's support for diversity is based on the belief that human culture thrives only in responsible freedom, and that government, therefore, has no authority to direct society by controlling the internal life of non-political institutions, including schools as well as churches and economic enterprises.

3. The Supreme Court and Educational Freedom -- Through the Supreme Court's misinterpretation of the First Amendment, government has preempted the rights of parents in the field of education and has predetermined what is "secular" and what is "religious". Some schools, the Court assumes, are secular and the monopoly of the state, while others are religious and the monopoly of the church or other religious institutions. APJ maintains that all schools are both secular (pertaining to this world) and religious (imparting values, morals, and world views). The present system puts full governmental support (an establishment) behind whatever philosophies and religions happen to be dominant in the public schools at a given time and place.

4. Government Responsibility -- Government does have a responsibility in education--to see to it that no injustice is allowed to rest at the foundation of educational opportunity, as is now the case. Racial discrimination and poverty should not be allowed to jeopardize the right of any child to go to the school of his (or his parents') choice. Tax credit legislation will not do all that is necessary to establish full justice in the area of education, but it is an important and valuable step in that direction.

ASSOCIATION FOR PUBLIC JUSTICE
BOX 56348, WASHINGTON, D.C. 20011

TESTIMONY PREPARED FOR PRESENTATION BEFORE THE SENATE FINANCE COMMITTEE IN SUPPORT OF THE TUITION TAX RELIEF ACT OF 1981 -- June 3, 1981

Mr. Chairman:

On behalf of the Association for Public Justice, I want to thank the Senate Finance Subcommittee on Taxation and Debt Management for this opportunity to testify in support of the Tuition Tax Relief Act of 1981 (S. 550). The Association for Public Justice is a non-denominational association of Christian citizens that is working to promote justice throughout the public domain.

THE RESPONSIBILITY TO EDUCATE

The Association for Public Justice supports the Tuition Tax Relief Act of 1981 because such a policy will help to make a more just society for all Americans. By supporting the freedom of choice in education, the Bill recognizes the primary right of parents to select the kind of education they desire for their children. This fundamental right has been forcefully stated in the United Nations' Universal Declaration of Human Rights (Article 26, 1948) and the Declaration of the Rights of a Child (Principle 7, 1959).

At present, the United States has only a limited form of freedom of choice in education. As a democratic society we can be thankful that the 1925 Supreme Court decision in Pierce vs. Society of Sisters guaranteed the right of parents to send their children to non-public schools. But while parents in the United States are not forced to send their children to public schools, they must "pay" extra in the form of tuition for freedom of choice. This freedom comes, quite literally then, at a very high price. It is a price completely beyond the reach of the poor and also an increasing number of middle class citizens.

For many parents the decision to send their children to schools which teach a world and life view consistent with the values of the home is one of conscience and religious conviction. The basic question before the Congress is whether only

the parents who sehd their children to public schools should receive financial support, or whether parents who send their children to non-public schools should also receive some financial assistance since they too pay taxes for education.

The Association for Public Justice affirms that in a pluralistic society the principles of public justice require of government an equitable handling of the goods, services, welfare, protection, and opportunity that it controls, without penalty or specific advantage to any person, group or institution due to religious, racial, linguistic, sexual, economic or other social and individual differences. The present public funding policy for education by the federal, state, and local governments does not measure up to this test of a truly democratic-pluralistic, governmental policy. Passage of tax credit legislation will help to alleviate this injustice by beginning to make it possible for every parent and child to choose, without economic discrimination, the kind of education they desire.

Our support for tuition tax credit legislation should not be viewed, then, as a kind of special pleading for one particular group of citizens. Our aim is liberty and justice, a measure of equity and fair play, for every individual and group in the United States. Every individual and group in society deserves impartial treatment as a basic civil right, not only politically and economically, but also in education.

QUALITATIVE DIVERSITY IN EDUCATION

Some support tax credit legislation with the argument that competition among different kinds of schools is necessary in order to guarantee quality and progress in education. We would agree that diversity rather than monopolistic uniformity is a better guarantor of educational quality. If those of us who are concerned with education want solutions to the growing number of problems and declining quality in education, then we should support measures that will encourage qualitative

diversity in education. Some fear that encouraging a healthy diversity of schools through tuition tax credits will lead to the end of fair and free education for all. APJ believes that such a policy will mean the enlargement of public care for education and opportunity. Government at all levels should continue to pay close attention to all aspects of educational need so that justice is done to every child who needs schooling. But this should begin with a fuller recognition of parental responsibilities for younger children and of educators' creativity. If the schools which now receive a disproportionate share of public funding cannot offer a sufficiently high quality of education to attract that proportion of support from parents and students, then surely we have a right to question the legitimacy of that system of public provision for education. APJ is not calling for a system that will threaten educational opportunity for every child; we advocate just the opposite, namely, a governmental guarantee of genuine opportunity for students to go to the school of their choice without the threat that any child will suffer discrimination. (In this regard, APJ specifically supports Section 44F(c)(5)(D)(ii), on p. 9 of S. 550, requiring non-discriminatory admissions policies, and Section 2(b) on pp. 12-13 of S. 550, providing for refundability of the credit if no tax is due.)

However, the concern of APJ goes beyond the promotion of anti-monopolistic diversity in American education. The basis of our support for qualitative diversity in education is to be found in our understanding of the nature of education and the task of government. We believe that the policies of government should be founded on the recognition that the ongoing development of human culture can thrive only in responsible freedom. Government therefore has no authority to direct society by attempting to gain control of the internal life of non-political communities, institutions, and organizations. This conviction has been implemented in our history in the case of certain other institutions and enterprises. The disestab-

lishment of the church was carried through on grounds that the government ought not to interfere with the practice of religion. There is strong opposition in the United States to the idea that government should control the internal life of economic enterprises. But somehow government establishment of schools has not been challenged by the majority of Americans in the last one hundred years. In fact, the conviction that education is the original and proper responsibility of local, state, and federal governments has become so ingrained that nearly all Americans speak of independent schools as "private" or "non-public" even though they render the same public service that government schools render. Why do we assume that governments have an original right to establish and operate schools when we reject their right to establish churches and to control the major economic enterprises of our society?

THE SUPREME COURT AND EDUCATIONAL FREEDOM

To answer this question we would have to examine several important dimensions and characteristics of American history and of the United States Constitutional structure, including the Supreme Court's legal bias against non-public schools in favor of state schools based on a faulty interpretation of the First Amendment to the Constitution. While the federal government acknowledges both the primacy of parental responsibility in education (as noted earlier, in the U.N. Universal Declaration of Human Rights, Art. 26; the Declaration of the Rights of a Child, Principle 7; and the U.S. Supreme Court decison, Pierce vs. Society of Sisters, 1925) as well as the right of citizens to exercise their freedoms of speech, assembly, and religion (see the First Amendment to the Constitution), nevertheless, the laws of the land that hold for education only respect parental responsibility and civil freedoms within a context predetermined by governmental primacy. Our basic principles say that citizens have an original right to freedom

of speech, assembly, and religious practice, and that parents have an original right to educate their children, but we have given to our governments preemptive rights over parents and free citizens in the field of education, a preemption which is only slightly mitigated by allowing private schools to exist at their own expense.

The Supreme Court has sustained this contradiction by an appeal to the now generally accepted distinction between the "religious" and the "secular." But this distinction, as usually made, cannot do justice to either the First Amendment or the rights and responsibilities of such institutions as families and schools. With respect to education, the Supreme Court has assumed (without justification) that governments have a prior monopoly in the secular realm and that churches and similar institutions have a monopoly on religion. Families and schools, as institutions, are not adequately recognized at the start as having any standing in regard to what is religious and secular. From that starting point, the Court has then consistently argued that most governmental aid to religious schools violates the First Amendment's prohibition against government establishment of religion. The government can legitimately finance its own schools since they are, by governmental definition, "secular" and not religious, but it cannot aid "religious" schools since, by the government's definition, they are not "secular" but religious.

But more than one Justice on the Court has pointed to the problem with this one-sided stance of the Court, since it actually interferes with the other religion clause in the First Amendment that mandates the free exercise of religion, and because it puts full government support (an establishment) behind whatever outlooks, philosophies, world views, moralities, and religions happen to be dominant in the public schools at any given time and place. The commitments and moralities of the public schools are thus imposed on all students regardless of the religious

and moral disposition of their parents and themselves. (See Stewart's dissent in Schempp 374 U.S. 203 at p. 313, and Douglas in Lemon 403 U.S. 602 at p. 630.)

The error comes in the initial assumptions. The Court has never accounted for its non-neutral use of the terms "religious" and "secular". If it would attempt to give such an account, it would discover that churches and so-called religious bodies are not the only "religious" institutions in our society. Public schools, in attempting to be "secular", cannot at the same time be neutral, and thus they reveal their secularistic commitment and viewpoint. In another connection, the Court has properly acknoweldged that traditional religious commitments are not the only ones that must be protected under the religion clauses of the First Amendment. All kinds of commitments, including commitments to irreligion and secularism, must be protected under the First Amendment. (See Seeger 380 U.S. 163; Welsh 398 U.S. 333; and Torcaso 367 U.S. 488.)

If the Court would give an account of its use of the terms "religious" and "secular", it would also discover that the government is not the only or even the primary "secular" institution in our society. "Secular" means "of or pertaining to this world," and all families and schools, no matter how religious or irreligious, no matter how committed or uncommitted, are "secular" institutions -- they pertain to life in this world. With regard to parental responsibilities and education, therefore, the religious/secular dichotomy is useless and misleading. All schools are both secular and religious.

Ever since the Everson and McCollum cases in 1947 and 1948 (330 U.S. 1 and 333 U.S. 203), however, the Supreme Court has been supporting governmental primacy in education and thereby discriminating against the non-state schools that have been established by groups of parents, by churches or by other organizations on the ground that government schools are purely secular and other schools are fully or

partially religious. There is nothing in the Constitution, however, that can justify this distinction or the discrimination that results from it since the prior rights of religious freedom and of parental responsibilities require that the government should do nothing that infringes these rights.

Here is the truly serious problem that we confront today. The different levels of government in the United States count on parents to nurture their children through to a healthy and stable maturity. These governments realize, moreover, that society cannot survive without parents fulfilling their responsibility and without the moral training that religious institutions and other free associations help to provide for the young people of our society. But precisely these rights and freedoms are violated by our present system of government preemption in education -- preemption of the rights to practice religion or irreligion freely and to train up children in the way that parents believe is best. Parents clearly do not have equitable freedom to train their children within the framework of their own convictions, because at a very early age in the life of children, the government steps in with its preemptive claim to determine the structural framework of education within which parents must fulfill their responsibilities. The social contradiction is that government expects parents to fulfill their responsibilities, but it turns around and takes away an essential part of parental freedom which is necessary for the fulfillment of those responsibilities.

GOVERNMENT RESPONSIBILITY

This is not to say that government should have no interest in or responsibility for education. Our argument is not one of anarchic libertarianism which opposes governmental authority at every turn. A political community characterized by public justice requires that government exercise its full and proper authority in the public domain. A free economy cannot mean "hands off" irresponsibility on

the part of government. Free religion does not mean governmental disregard for religion. And freedom in education does not mean that government should leave schools alone. Allowing schools to be schools rather than departments of the governmental bureaucracy means simply that the government should exercise its oversight in a way that allows parents and educators to develop the schools of their own choosing without penalty or special favor to any one school or school system.

Any number of educational concerns should occupy the energies of local, state, and federal governments. Racial discrimination should not be allowed to jeopardize the right of any child to go to the school of his (or his parents') choice. Poverty should not be allowed to keep some children from selecting the best education that they would desire. Government's responsibility for education means that it should not allow any injustice to rest at the foundation of educational opportunity as is now frequently the case. With tuition tax credits and other means of establishing equity, government will be in a better position than at present to consider such elements of justice in the midst of educational diversity. Having begun to overcome its own unjust funding and establishment policies, it will be able to deal with all schools more fairly. If governments see the need for maintaining government-run schools, then such activity should not lead to any special advantage for those schools or to any penalty against the choice of non-government schools.

Tax credit legislation will certainly <u>not</u> do all that is necessary to establish full justice in the area of education, because even a substantial tuition tax credit from the federal government to parents will not be enough to give the non-governmental schools equal standing alongside the public schools. Nevertheless, such legislation is one of the most important and valuable steps that can

now be taken in the direction of equity and justice in education. It will give tremendous encouragement to those who want justice, who are oppressed by majoritarian and financial limits to their parental responsibilities and conscientious convictions. Justice requires that governments at all levels act now to protect and enhance freedom of choice in education.

Respectfully submitted,
Dr. James W. Skillen
Executive Director
Association for Public Justice

Summary of Testimony of Dr. Eugene W. Linse
Senate Subcommittee on Taxation and Debt Management
June 3, 1981

I. The political theory undergirding tax credit legislation includes:
   a. the Judeo-Christian heritage
   b. respect for our traditions and institutions
   c. John Stuart Mill's emphasis on freedom in "On Liberty"

II. Parents' rights have a long judicial history.
   a. The recent Indiana case
   b. Fifty years: from Meyer to Yoder

III. The function of public policy is to enhance freedom.
   a. Pluralism, tolerance and diversity are among its chief components.
   b. Freedom of choice is an inherent good.

IV. Where freedom is limited, choice is sometimes not possible.
   a. The exercise of freedom should not be an option only of the rich.
   b. Tax credit legislation will help balance the options of the poor.

V. The proper function of government is to extend the exercise of freedom.
   a. There is a distinction between liberty and license.
   b. Tax credit legislation will enhance the exercise of freedom in our society.

TESTIMONY OF

Dr. Eugene W. Linse

Gentlemen:

My name is Eugene Linse. I am Chairman of the Board of Trustees of Citizens for Educational Freedom, a national public interest group that has for more than 20 years supported the principles of freedom in education and the principle of parents' rights in education (in public and non-public schools alike.) Our organization has a Washington office and a number of active state federations, particularly in states with a strong concentration of nonpublic schools. I am by profession a Political Scientist, a member of the faculty of Concordia College, St. Paul, Minnesota, where I teach in the field of American Government and Constitutional Law.

Thank you for extending to me the privilege of appearing before you and permitting me to comment on the legislation under consideration - tax credits for educational purposes, S.550. It is largely to the principle of parental rights in education that I should like to address myself.

There are three major themes in western political thought that converge and that provide a philosophical framework within which the subject of tax credits for education needs to be discussed. These three are respectively the Judeo-Christian heritage of the west, and particularly the history of the development of ideas of freedom in the United States, the theoretical orientation of an Edmund Burke, conservative, which demands a decent respect for our traditions and our institutions, and the warm liberal thought of John Stuart Mill and his championing of freedom as contained in his essay "On Liberty" drafted more than 120 years ago.

As for our Judeo-Christian heritage in America, I need not recite the background in religious thought and ethics that supports the emphasis on the family, the relationship of parents and children, the rights and responsibilities each has to the other in matters spiritual, social, economic and physical. Our literature abounds with this material; our institutions are strongly committed to this fundamental belief; no institution, private or public, can claim a special right to a discussion of this principle. There is general consensus regarding its importance as a foundation to our culture. Last year's White House Conference on the Family once again demonstrated in countless examples commitment by individuals at all social and economic levels that our citizenry was keenly aware and zealously concerned about protecting and extending family and parental relationships. "Their message was enormously positive," says the Report: Listening to American Families. "Americans from every walk of life, of all races, of every political and philosophical persuasion demonstrated a deep faith in families as the bedrock, the starting point for surviving in an increasingly complex society." And they asked government in the USA to assist them in binding the family more closely together in the exercise of rights and the efforts to carry out responsibilities.

Others here today will discuss our institutionalization of education and especially the limits and definitions our courts have imposed in their interpretation of the U.S. Constitution as to what is permissible and what is impermissible within the contours of this, our basic document. There will be those who argue for no change, no new laws, no reconsideration, even, of present legislation. In effect, they will say that whatever is, is right. What ought

to be -- is what is. They miss the vision of a dynamic society, one engaged in change, whether we will it or not. They would baptize the present and interdict the future. Their solution to the problems of education is largely a litany of more of the same. While we should not forsake our institutions and our traditions, yet our loyalty to them need not inhibit our efforts to find better ways to accomplish our continuing responsibilities in the world of education. Or for that matter, looking once again to determine what the reality of our past and our traditions all contains. Senator Moynihan, himself an author of the legislation under consideration, is a resource on the relationship between public and private education in the full sweep of our history, as his speeches and writings attest.

But what of the question of parents' rights? The United States Supreme Court has on numerous occasions dealt with this question. Most recently, on May 26 it refused to hear an appeal from Indiana in which public schools authorities used somewhat objectionable methods to search students in junior and senior high school for drugs. The argument advanced by school authorities to justify their action was that in relationship to all the students in these matters they stood in loco parentis - that they should have more latitude than would be permitted were they other public authorities charged with the invasion of a person's rights. Almost fifty years ago Justice McReynold, writing for the majority in the Meyer case, asserted that the rights of parents included . . . . "the right of the individual to contract, . . . to marry, to establish a home and to bring up children, to worship God according to the dictates of one's conscience, and generally, to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." In the years between - this past half century - the Supreme Court has often sustained what it said earlier. In Pierce v Society of Sisters, In Abington v Schempp, and in the case which is almost in its entirety a discussion of the relationship of parents, schools and society, Wisconsin v Yoder. What emerges from all of the cases is the respect that the U.S. Supreme Court shows for parental rights and the lengths it is prepared to go to sustain the exercise of the e rights.

Yet the question before us today is not just one of law, it is also one of public policy - a discussion of what ought to be rather than what is. Let the principles of John Stuart Mill, that 19th Century liberal advocate of freedom, guide us in making judgments about the merits of the legislation. Mill believed that intellectual and political freedom are in general beneficial both to the society that permits them and to the individual that enjoys them. To permit individuality and freedom of judgment and action, as if they were merely tolerated vices, is not enough. Liberal society, such as the one we know, puts a positive value on freedom as essential to well being and as marks of a high civilization. The apparatus of liberal government should always rationally be used for beneficial ends, the foremost of which is the enhancement of freedom. The real argument for freedom, Mill believed, is that it produces and gives scope to a high type of moral character. Mill's essay On Liberty is addressed to all of society. It is a plea for a public opinion that values differences in points of view, that limits the amount of agreement it demands, that welcomes new ideas as sources of discovery. The greatest threat to liberty, in the view of John Stuart Mill, is a public majority that is intolerant of the unconventional, that looks with suspicion upon divergent majorities, that is willing to use the weight of numbers to repress and regiment minorities.

The major themes that run through the works of John Stuart Mill bear repeating here, for they are the principles of statesmanship. His is a respect for human beings, the sense that they must be treated with a due regard for the dignity that moral responsibility deserves and without which moral responsibility is impossible. He argues that the human personality reaches its highest achievements in a free society. Social and political freedom (and economic freedom as well), the freedom of parents to make choices in the education of their children, is itself a good, because freedom is the proper condition of a responsible human being. To make these choices, to develop definitions of value within the framework of alternatives is not a means to happiness; it literally is a substantive part of happiness. A good society, must, therefore not only permit freedom, but must also open up the opportunity for a larger measure of the exercise of freedom.

If we apply these principles in support of freedom, found in the works of Mill, to the matter of choices in education in America, what is soon apparent is that we are not all equally free to make the choices he would endorse in a free society. No family should be forced to abandon its beliefs in order to gain the benefit of a state-subsidized education or forfeit such a proffered government benefit in order to preserve the family belief structure. Tax Credit benefits would open the door, particularly for the poor, to alleviate this restriction on freedom under which they now are bound. If one is not to be compelled to sacrifice beliefs as the price for receiving unemployment checks, why should the same principle not obtain in an even more personal, private and cherished domain, one's fundamental religious conviction and the education of one's children?

Surely a system of government and public policy that shows enough regard for an individual to protect and secure economic interests must serve as well to protect his religious convictions and the convictions he holds as to the value system in which he should want to rear his children. The current status of our laws has the effect of guaranteeing freedom of choice to those who can afford to pay for private education in addition to their support of public education through taxes. Those who are poor are effectively denied their right of choice . . . They cannot afford the exercise of freedom of choice; in the alternative they may not refuse to send their children to school. That is not the measure of freedom. That is the mark of regimentation, the effectual denial of freedom of choice in education. Tax credits, S.550 is a step in the right direction, particularly for the poor, not only in private education, but also in public education, which, in many cases, is no longer free, even to those who are its patrons by choice. Chief Justice Burger said it well, ". . . it is no more than simple equity to grant partial relief to parents who support schools they do not use." And, one should add, to provide relief so that a real alternative is available to those who do.

There is a difference between liberty and license. It is not license that I defend here. But, what then, are the limits to liberty? How far should it extend? Freely, John Stuart Mill would argue, unless one can show that the exercise of freedom threatens to destroy those fundamental institutions in a free society that champion and defend freedom; unless, in the exercise of freedom the individual threatens the freedom of another; unless, in the exercise of freedom, the individual becomes a serious threat to himself. As a liberalizing influence, one that enhances freedom, tax credit legislation

scores well on these three tests. The freedom that it encourages is both an individual as well as a social good. The function of government in a free society is not merely a negative. Legislation becomes a means of creating, increasing and equalizing the exercise of freedom by its members. To preserve and to extend to more persons those conditions that make life more human and less coercive is not merely a legitimate function of government; it is a noble objective indeed. It is in support of these principles of freedom the opportunity to choose, the right of parents to choose, that I urge favorable consideration of S.550.

Thank you!

Testimony by Robert L. Smith

The Council for American Private Education (CAPE) welcomes this opportunity to participate in these hearings on the Packwood-Moynihan tuition credit bill, S. 550.

CAPE is a Washington-based coalition of 15 national organizations serving private schools at the pre-school, elementary, and secondary levels-- approximately 16,500 schools enrolling nearly 4.2 million schoolchildren. These organizations, by enrollment, represent more than 85 percent of American private schools. Member organizations are non-profit and subscribe to a policy of non-discrimination in admission with regard to race, color and national origin. CAPE's members are: The American Lutheran Church; American Montessori Society; Association of Evangelical Lutheran Churches; Association of Military Colleges and Schools of the U.S.; Christian Schools International; Friends Council on Education; Lutheran Church-Missouri Synod; National Association of Episcopal Schools; National Association of Independent Schools; National Association of Private Schools for Exceptional Children; National Catholic Educational Association; National Society for Hebrew Day Schools; Seventh-day Adventist Board of Education; Solomon Schechter Day School Association; and the U. S. Catholic Conference.

CAPE urges passage of the Packwood-Moynihan bill. The reasons are even more cogent and urgent now than they were three years ago when, in a similar setting, a number of our member organizations testified on behalf of tuition tax credit legislation. The Coleman study has recently highlighted the nature and quality of private education, and by so doing has given public policy makers a far clearer picture of what parents opt for and why, when they select private schools. The financial circumstances of the typical American family, among which are the great majority of private school families, are far more stringent today than even in 1978.

The basic case for tuition tax credits is very simply and straightforward. Let's review it briefly:

1. All families have the constitutional right to send their children to the school of their choice. For the vast majority of private school families, choice is religiously determined. For all, it is made on the basis of deliberate, careful family thinking.
2. The increasing cost of exercising that choice, the result of higher tuition of private schools, and the higher costs of family living, including property taxes, all accounted for by run-away inflation, is putting a heavy fiscal burden on the majority of private school families.
3. The tuition tax credit represents a modest effort to relieve the family burden while at the same time, because of its refundability feature, give new educational opportunities for those least able to exercise them, those for whom it means the most, the poor.

In relation to this basic case for tuition tax credits, let's keep these crucial facts in mind:

1. A family's choice in the education of its children is one of the most important it will ever make. For most, it's a conscientious judgment, involving fundamental beliefs and often centuries of tradition. For example, here's the way one of our private school organizations, representing Jewish schools, once expressed its commitment to this principle of choice. "We are an ancient people, committed with a passion to education for thousands of years. The viability of our religiously affiliated schools means more to us than a medium to provide knowledge and culture to our children; it is the sole determinant of our very ability to survive as a faith community in the pressure cooker of contemporary societal stresses." This sentiment is echoed in terms not dissimilar by literally millions of families, Catholic, Lutheran, Christian, Seventh-day Adventist, Baptist, Episcopal, Quaker, Mennonite, and all the others. For "choice, " read "fundamental conviction." It is the kind of choice Sir Thomas More made when he had to choose between his conscience and Henry VIII's will. His choice was compelled by what he stood for. And so it is for millions of private school

parents.

2. There is widespread misunderstanding about the economic circumstances of private school parents. Private schools educate American children from all strata of society. In fact, most families (62.7%) who send their children to private schools earn less than $25,000 a year. Slightly less than half (45.6%) report an annual income of under $20,000; slightly more than a quarter (27%) earn below $15,000, and 11.2% have earnings below $10,000 a year. Significantly, 72% of private school families living in inner cities earn less than $15,000 per year. 10% of the children who go to private schools are members of minority groups. The Black and Hispanic children who attend Catholic schools, the largest segment of the private school community, account for 20% of those schools' enrollment. The second largest body of schools, that of the Lutherans, reports a 14% minority classification. The indendent schools have increased their minority enrollment by 20% in the last two years, bringing it to 9%. It would be a safe estimate that well over 150 million dollars in financial aid was devoted last year by private education to facilitate minority students' attendance in private schools.It should be recognized by all that the Packwood-Moynihan bill is crystal clear, and CAPE's support of the bill depends on it, that tuition tax credits will not go to a parent whose child attends a school which discriminates.

3.Equality of educational opportunity is a cornerstone of national educatinal policy. It means that democracy is as important in education as in all other facets of our existence. Yet we find ourselves in the untenable position of saying that only those who have reached college age are eligible for equality of educational opportunity. We should feel the same degree of outrage that a particular school is out of Johnny's reach because his family can't afford to send him there as we would if Yale or Harvard were the exclusive preserve of the children of only those who could afford the $10,000 per year tuition.

4. The circumstances of private schools in this country are mixed. There are vast numbers of private schools, indeed those which make up the backbone of private education in this country, which are not thriving. They are barely hanging on. These are the private schools in our major cities.

Taking 10 of the largest and oldest cities in the country (Detroit, Los Angeles, Chicago, New York, Baltimore, Philadelphia, Boston, Cleveland, Washington and San Francisco) and using the last U.S. census figures available (1970), private schools enrolled an average of 20.43% of all the school children in those cities at that time. The figures run from 11.4% and 12% in Washington and Los Angeles to 25.2% and 34.3% in New York and Philadelphia.

If there is a critical mass of private schools in this country, this is it. For just as in public schools, private schools have suffered devastating effects from the migration of the middle class from our central cities over the past decade and a half.

It is the view here that the future of these cities, their tax base which supports their public schools, their community stability and improvement, their health and safety services, their support of cultural and recreational and, yes, education facilities which make people want to live in them, depends on having a very significant number of families who use private schools.

There are two crucial national interests at stake in this debate. The first we've just mentioned-- making effective the right of parents to make conscientious determinations about their children's education. The second is the extent to which private education serves the public interest. For it would be poor public policy indeed to advocate tuition tax credits if they were for use in a system of education which bore no relationship at all to any significant national educational purpose. (We often hear in one form or another, for example, the observation that it's all right for private schools to exist, but the government has no business making any kind of investment in them.)

Why Do We Need Private Schools?

1. Because private schools serve to offer competition to the public education. The recent Coleman study on private school quality has done more to elicit fundamental thinking about what will improve public education than anything in education since Sputnik. Progress in all human endeavors requires standards against which to measure successful change. Private schools, smaller, selective, autonomous, with clear goals, provide that necessary measure to public elementary and secondary education.
2. Because private schools provide natural laboratories to test educational ideas. Examples:
   a) For years the Seventh-day Adventist schools have included work experience as an integral part of education. Now the idea is common throughout education.
   b) Individualized instruction has been practiced for years in nearly all private schools. It is now a goal of many in public education.
   c) The question of size and school organization has been with us since, at the least, James Conant articulated the advantages of the large consolidated high school. Private schools, with their relatively smaller size and more personal arrangements now seem to be the wave of the future.
   d) Minority experience in pre-college education is little understood, though continually referred to. Private schools can and do serve as laboratories to learn more about what really happens to students, all students in school, why and how. This kind of knowledge is the central business of education.
   e) There are several notable examples of private school pioneering: in vocational education, development of kindergartens, education for women, schools for teachers and a variety of elements of special education for the handicapped.
   f) Because if private schools didn't educate over 5 million students annually, the public schools would be forced to, at an estimated annual increased cost of 8 billion dollars.

The arguments against tuition tax credits are familiar:

1. They will destroy public education. In our view, they will strengthen it by assuring it competition and by assuring that, where it is weakest, in our major older cities, there will be resources like taxes, people, institutions and concern to give it the requisite support it must have. The Coleman study does not support the view that there will be any significant shift out of public education if we enacted a tuition tax credit bill. Finally, by and large, we all know that parents ultimately make school choices on the basis of education and not on the basis of several hundred dollars. Those choices are being made now, without tuition tax credits. They will continue to be made on the basis of thoughtful, careful parental consideration of what educational opportunity is best for the individual child.
2. They will take urgently needed funds away from public education. The Packwood-Moynihan bill involves a phase-in of tuition tax credits so that their first full-year impact on the budget will be felt in the budget of 1983. This bill is expected to be part of a tax package designed to further stimulate the economy. Therefore the monetary effect of tuition tax credits will be experienced within a far different budgetary climate than exists today. Timing questions are ultimately those of the Administration.

It is, of course, simply not the case that there is a finite amount of dollars available for education-- an assumption which is made by those who state that every dollar lost to the Treasury by tuition tax credits is a dollar

lost to public education. The intention is that the economy will be significantly improved by 1983, in part by the tax package just referred to, so that expenditure for education's most vital needs can be increased. And as pointed out, aid to public education comes in many different forms, not simply in direct subsidies.

The ultimate timing of the phase-in of tuition tax credits is, of course, closely related to both the stimulation and activity of the economy as a whole. Senator Moynihan stated, when he introduced the bill, that both the size of the credit and the timing issue are negotiable with the Administration. We feel this is a highly responsible approach.

3. Private schools will simply increase tuition if parents get tuition tax credits. This argument is used by those who are familiar with pricing policies in the market place, but it's woefully mistaken in terms of private school tuition-setting practices. Private schools raise tuition under the same pressures of inflation which cause increases in public school budgets. About 80% of the private school budget goes to the adults who teach, administer, and keep the school running. Salaries must be adjusted annually if good people are to be kept and encouraged.

The decision to raise tuition is never taken lightly by a private school. It's analagous to raising the price of bread or milk by the small-town grocer. He or she knows and likes everyone it will affect and hates to make things harder for them. The existence of tuition tax credits can never diminish the anguish felt by school and parents every time there's a tuition increase.

Yes, tuition increases will inevitably continue to be made by private schools, whatever happens with tuition tax credits. They're as inevitable as aging and just as hard to accept.

4. Tuition tax credits threaten the constitutional separation of church and state. The Establishment Clause of the Constitution has been interpreted by the Supreme Court to mean that the constitutionality of a law involving the relationship of church and state will be judged by a three-pronged test: that it reflect

a secular legislative purpose; that it have a primary effect that neither advances nor inhibits religion; and that it avoid excessive entanglement with religion. CAPE believes that tax credits, which go to individuals families and not to schools themselves, are in conformity with these requirements.

As Senator Moynihan said when he introduced the bill, the only way to determine its constitutionality is to make it possible for the Supreme Court to rule on it. First Amendment church-state litigation is a tangled web. We hope the Court gets an early opportunity to take Packwood under review.

One of the most troubling aspects of thes legislation is the extent to which it is engendering hostility between public and private education. The enmity and misunderstanding between our two sectors is as long as it is unfortunate. I can speak for the leadership of my organization by saying that we wish nothing but success to our colleagues in public education. This legislation is not anti-public schools and if it were we would not be interested in it.

Both public and private school supporters should keep in mind that both sectors are part of an amazingly diverse and rich national system of schools. They differ in every possible way - in degrees of autonomy, financing, goals, governance, enrollments and pedagogy, to name a few of the most important.

To make this system as vigorous as possible is to reinforce the strengths of each of its parts. For all serve the good of the whole, and the whole serves as does no other educational undertaking anywhere in earth, the diverse and voracious faith of our pluralistic society in the value and power of education.

In conclusion, we believe that from its earliest days the nation has benefitted from the existence of private schools as a rich tradition of pluralism and diversity and that it is essential that there be maintained the Constitutional rights of parents to choose the kind of education they want for their children. We find that right to be threatened for an increasing number of private school

parents. We are deeply concerned that this right cannot be exercised by the poorest of our society and find this legislation an appropriate, if modest step, in the direction of offering the needed equal educational opportunity which is well established at the college level.

In short, we support the Packwood-Moynihan bill which advances the cause of justice, pluralism, equal educational opportunity and the strengthening of a national network of schools, public and private, which is the envy of the entire world.

Senator PACKWOOD. Now we move on to a panel: David Landua, Richard Puckett, Nancy Neuman, Marilyn Braveman, and Joanne Goldsmith.

PANEL OF: DAVID E. LANDAU, LEGISLATIVE COUNSEL, AMERICAN CIVIL LIBERTIES UNION, WASHINGTON, D.C.; RICHARD GENE PUCKETT, EXECUTIVE DIRECTOR, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, WASHINGTON, D.C.; NANCY N. NEUMAN, SOCIAL POLICY DIRECTOR, LEAGUE OF WOMEN VOTERS OF THE UNITED STATES, WASHINGTON, D.C.; MARILYN BRAVEMAN, DIRECTOR OF EDUCATION, THE AMERICAN JEWISH COMMITTEE, NEW YORK, N.Y.; AND JOANNE T. GOLDSMITH, EXECUTIVE DIRECTOR, NATIONAL COALITION FOR EDUCATION AND RELIGIOUS LIBERTY

Senator PACKWOOD. Mr. Landau.

Mr. LAUNDAU. Mr. Chairman, my name is David Laundau.

I am Legislative Council of the American Civil Liberties Union, which is a nonpartisan organization of 200,000 members, which is dedicated to the preservation and enhancement of the Bill of Rights.

Throughout its history the ACLU has been concerned with the First Amendment protection for religious freedom and guarantee of separation of church and state. It is our judgment that under well-established Supreme Court precedent, S. 550 would be a law respecting an establishment of religion and would therefore violate the First Amendment. We oppose its enactment.

S. 550 proposes a special tax benefit for parents who send their children to private sectarian schools. We believe the First Amendment was designed to prohibit the Government from aiding and advancing religion in this way.

Just as the Government may not prohibit the free exercise of religion including sending children to private religious schools, it also may not advance any particular religion or religion in general.

The Government must remain neutral on the issue of religion. Because 85 percent of private elementary and secondary schools in this country are religiously affiliated, S. 550 would have the direct effect of advancing religion. It therefore can not be squared with the principal of neutrality toward religion embodied in the establishment clause of the first amendment.

The Supreme Court has agreed with this view of tax benefits for private religiously affiliated schools. We have attached for the record a detailed analysis of current case law in the area, which I will only briefly summarize here.

The principal authority in this area is *Committee for Public Education and Religious Liberty* v. *Nyquist.* In that case the Supreme Court invalidated New York State's tuition tax credit as a violation of the Establishment Clause of the First Amendment.

The Court reached this result by applying a three-prong test for determining an establishment of religion; to survive constitutional attack, the statute in question first, must reflect a clearly secular purpose; second, must have a primary effect that neither advances nor inhibits religion; and third, must avoid excessive entanglement with religion.

The Court held that the primary effect of the tuition tax credit was the direct advancement of religion. Since 85 percent of New York's nonpublic schools were religiously affiliated, the tax credit represented a charge made upon the State for the purpose of religious education.

They also noted that tuition tax credits carried and gave potential for entanglement in the issue of aid to religion.

There are several features of the Nyquist decision, which are of particular relevence here. First, the Supreme Court stated that the label given to statutory scheme such as tax modification, tax deduction, or tax credit was unimportant.

The crucial factor was that the State had provided a special tax benefit for parents who send their children to private religious schools. S. 550 is identical to the New York State statute in this respect.

Second, there was no attempt to restrict the credit to the portion of the tuition which was used exclusively for secular purposes. S. 550 also does not limit the credit to that portion of the tuition which is used exclusively for secular purposes.

Third, the fact that the credit is taken by parents is not constitutionally significant. As Justice Powell stated for the majority, "the effect of the aid is unmistakably to provide desired financial support for nonpublic sectarian institutions."

Finally, the entanglement concerns expressed by the Court in Nyquist are greatly magnified under the Federal proposal because the tax credit has a far higher limit—$500—than the New York law which had aid up to $50 for elementary school students and double that for high school students.

The Supreme Court has not retreated from the Nyquist decision which has been widely recognized by the lower Federal courts.

We believe the case law in this area to be fundamentally sound. It is rooted in the history of this Nation which was formed in part to escape from the tyranny of Government—advanced religion.

The separation of church and state is a cornerstone of our constitutional democracy. We urge Congress to honor this constitutional principle and reject the special tax benefits for private religious schools which would be enacted by S. 550.

Thank you for the opportunity to present our views.

Senator PACKWOOD. Thank you, Mr. Landau.

Mr. Puckett.

Mr. PUCKETT. Thank you, Mr. Chairman.

At the outset of this hearing, the observation was made about opposition to the bill, as whether it is the same as in 1978.

So let me clarify that our opposition in 1981 is primarily based on the same grounds as 1978.

My name is R. G. Puckett, I am executive director of Americans United for Separation of Church and State.

We appreciate this opportunity to address this committee on S. 550——

Senator PACKWOOD. Let me just interrupt for a second.

And I admire your consistency, because I recall your testimony and it has not changed. And it is, indeed, philosophical, rather than based upon are we in hard economical times or not.

And I think that is a much more honest way to attack this than to really be opposed to it but say oh well, we are opposed to it because these are hard economic times. That is not a philosophical ground. And you have been very consistent.

Mr. PUCKETT. Thank you, sir.

Americans United is a 34-year-old organization dedicated exclusively to maintaining and promoting the free exercise of religion and its first amendment corollary separation of church and State. We draw our membership from individuals of conservative and liberal political persuasions as well as the full spectrum of religious faiths.

Our analysis of S. 550 shows it to be unconstitutional. We arrive at this conclusion based on examination of year after year of Court decisions establishing a clear historical record that tax aid, given directly or indirectly to parochial or church-related schools, is aid to a church, and therefore, unconstitutional.

And others on this panel may make reference to the celebrated cases such as Nyquist and so forth. Let me use one as an illustration here, that may not appear.

The Bob Jones University v. *Johnson* case—in that case, Bob Jones University had an admissions policy, which excluded all unmarried blacks. Now that admissions policy was based upon religious belief and interpretation of the Bible. And of course, Bob Jones University had not asked for any kind of Federal funds, but they were an approved institution for the VA administered educational benefit program.

And so the test was at that point, and Bob Jones was declared an unfit institution for Veteran's Administration benefits because of the discriminatory admissions policies.

And in that decision, the Court held, "that all that is necessary for Title I purposes, is a showing that the infusion of Federal money through payments to veterans assists the education program of the approved schools."

The Court stated that payments to veterans served to defray the costs of the school's education program by releasing funds which would otherwise be spent on the student.

In refusing to distinguish between payments received directly by the university, and payments received by a veteran, the Court said that the payments ultimately reach the same beneficiaries and the benefit to a university would be the same in any event.

I submit, Mr. Chairman, that whether it is directly given, or whether it is a tuition tax credit, tax money going to an individual for a religious school is an aid to that school.

There is no question that this tax does advance religion since at least 85 percent of all nonpublic schools are church-related. The fact that the aid may be viewed as incidental in amount in light of high tuition rates does not alter its intent to aid religion.

The fact that the aid is routed through the parents is also incidental. Parents merely serve as conduits of that aid, which eventually goes to the schools. We believe the child benefit theory could not pass constitutional muster in this case.

Senator Moynihan said recently in his testimony before the Judiciary Committee's Subcommittee on the Separation of Powers on S. 158, the human life statute:

> The Supreme Court's interpretation of the Constitution has not always met with Congressional (or popular) approval. But this does not diminish Congressional responsibility to respect the established method of "correcting" a Supreme Court decision: amendment.
>
> The amendment process is lengthy. It is cumbersome. Its outcome, as we have seen with the Equal Rights Amendment, is far from guaranteed. But it is the only one legitimately available to us. To proceed in any other way to change a Supreme Court interpretation of the Constitution is to undermine the Constitution.

Certainly that statement could be applied in this situation. We are not suggesting at the same time that the amendment process be initiated to reverse our long history of not forcing individuals to pay taxes to a religion. But the point is well taken that the legislation proposed, ought not undermine the Court's decisions which are clearly before us.

I would like to affirm what the witness to my left has already stated, that in the State of New York itself, the question of tax money for parochial school interests was ruled unconstitutional at State level, but the principle is the same.

Therefore, we strongly oppose this bill, and hope that it will be defeated.

Thank you for this opportunity.

Senator PACKWOOD. Thank you very much.

Ms. Neuman.

Ms. NEUMAN. Mr. Chairman, Senator Moynihan, I am Nancy Neuman, social policy director of the League of Women Voters of the United States.

The league has opposed tuition tax credits since 1978, when the league national convention, consisting of over 2,000 league leaders from across the country, directed the national board to oppose tax credits for families of children attending nonpublic elementary and secondary schools.

Convention action was based on a two-pronged league position: Support of equal access to education and support for desegregation as a means of promoting equal access to education.

In January 1981, the league reaffirmed this commitment by designating opposition to tuition tax credits as a major action priority. In support of this major action priority, league members across the country are writing letters to their Members of Congress opposing tuition tax credits, meeting with Members of Congress to discuss the issue and organizing local educational campaigns on tuition tax credits.

The league has held a position in support of equal access to education since the early sixties, and has promoted it at both the national and local levels through a variety of efforts. The league

has supported a wide variety of Federal programs enacted during the past two decades aimed at meeting the educational needs of the poor and minorities.

We have also worked for a strong Federal civil rights enforcement role,including support for busing as an option for implementing school desegregation.

Local league efforts in support of peaceful school desegregation have been constant and tireless—involving everything from filing court suits, establishing community coalitions and running rumor control centers.

Now, I would like to outline the reasons why the league is adamantly opposed to tuition tax credits. We believe that tuition tax credits would undermine America's traditional system of tuition-free universal public education.

First, providing such an educational system has long been the cornerstone of our American democracy. Our public schools open their doors to all types of students and serve a vital socializing process.

In performing this role, our public schools must bear the special burden of educating all, including those children who are handicapped, have discipline problems, or may be otherwise difficult or expensive to educate.

Private schools on the other hand, are under no such obligations and can exclude these children.

For example, in Iowa the public schools have been leaders in providing special education for handicapped and disabled children. July Dolphin, school finance director of the Iowa League stated:

> Iowa's special education program works because of the great heterogeneity of the public schools' population. Tuition tax credits would encourage parents to enter their children in private schools. Thus, leaving the public schools with children the private schools would not accept—those with learning disabilities, physical handicaps and emotional problems. Tuition tax credits would destroy Iowa's special education programs.

A second reason the league opposes tuition tax credits is that private schools already primarily serve the advantaged, and tuition tax credits would actively promote this pattern. The fact that public schools serve somewhat different clientele than private schools was highlighted in an April 7, 1981 study by the national assessment of education programs.

The study revealed that public, private-Catholic and private non-Catholic school populations contain different proportions of students from various socioeconomic backgrounds.

For instance, 11 percent of the 13 year-olds in the public schools came from homes in which neither parent finished high school; the proportion of such students in Catholic schools is only 4 percent; the proportion in non-Catholic private schools is 1 percent.

Senator MOYNIHAN. What is the proportion in Catholic schools?

Are you telling me that the students in Groton come from families where their parents graduated from high school?

Ms. NEUMAN. The assumption is that, primarily students who would go to a school like Groton come from an educated family.

Senator MOYNIHAN. Right.

What about the majority of students in nonpublic schools?

Are you suggesting that their educational background is different from that of public schools?

Ms. NEUMAN. Yes, I am.
Senator MOYNIHAN. Well, you are wrong.
Ms. NEUMAN. All right.
I can supply you with further background on this statement. [See attached study.]

READING ACHIEVEMENT IN PUBLIC AND PRIVATE SCHOOLS: IS THERE A DIFFERENCE?

For 11 years, the National Assessment of Educational Progress (NAEP) has been collecting data about educational achievement in American schools. Because NAEP data are drawn from a national sample of schools, it is possible to compare performance of students in public and private elementary and secondary schools.

This paper presents such a comparison using reading performance data gathered during the 1979-80 school year assessment of 9-year-olds, 13-year-olds and 17-year-olds. The data indicate that private school students, as a group, perform somewhat better than public school students. But the public/private differences in mean performance levels range from none at all to almost 12 points, depending upon what age or population group one examines; and the differences between public and private school performance are also largely a function of the fact that each presently serves a somewhat different population of students.

Table 1 presents mean reading performance percentages for students in public and private schools. Nationally, the difference is about 5 percentage points at age 9, 6 points at age 13 and 6.5 points at age 17 in favor of the private schools. This is not a large difference, but, considering that we are comparing averages, it is a substantial one.

The differences are greater or less in some parts of the country and among some populations. For instance, at age 9, there is an 11-point difference for students living in the Southeast and a 10-point difference for black children. However, there is no apparent difference between public and private schools in other parts of the country and no apparent difference for students attending schools in advantaged areas.

Looking at the data for all three ages, it appears that, given the students they currently serve:

- Private school students' reading performance is somewhat better than public school students', on the average.
- The private school advantage is greatest in the Southeast for elementary students, the West for junior high school students and the Northeast for high school students.

TABLE 1. Mean Achievement for Public and Private Students for Three Ages and Selected Groups, 1980 Reading Change Assessment[1]

	Age 9			Age 13			Age 17		
	Public/Private[2] Difference	Predicted[3] Standard Error	Adjusted[4] Difference	Public/Private Difference	Predicted Standard Error	Adjusted Difference	Public/Private Difference	Predicted Standard Error	Adjusted Difference
Nation	5.1§	1.5§	(1.4§)	5.7§	1.3§	(2.4§)	6.5§	1.5§	(2.8§)
Region									
Northeast	2.9	2.3	(0.8)	4.2	2.2	(2.9)	10.4	2.4	(6.7)
Southeast	10.8	2.8	(9.6)	5.4	3.2	(3.6)	*	*	
Central	-0.4	2.3	(1.0)	2.0	2.2	(-0.3)	1.6	2.1	(-4.9)
West	*			9.9	2.3	(6.7)	*	*	
Sex									
Male	6.6	1.9	(2.0)	6.7	1.8	(1.9)	8.8	1.9	(4.6)
Female	3.9	2.0	(1.2)	4.6	1.7	(2.8)	3.6	2.1	(0.5)
Community size[5]									
FCIF	4.0	2.0	(-0.3)	7.7	1.6	(3.2)	7.5	1.9	(1.2)
FCISF	5.6	1.9	(2.5)	3.9	2.1	(1.7)	6.2	2.1	(4.7)
Type of community[6]									
Advantaged urban	1.0	3.2	(-1.2)	0.8	2.4	(2.5)	1.1	3.4	(-0.9)
Parental education[7]									
HSGHIS	4.0	2.5	(1.3)	5.6	2.1	(4.1)	6.7	2.2	(2.5)
PHS	4.4	2.0	(1.1)	2.3	1.6	(0.9)	3.9	1.8	(3.1)
Race									
White	3.5	1.6	(0.6)	3.8	1.5	(2.0)	5.0	1.6	(2.4)
Black	9.7	4.2	(8.1)	11.5	3.0	(4.7)	6.2	4.4	(3.4)

*Sample sizes too low to permit reliable estimates.

[1]Reading performance was assessed with 88 reading items at age 9, 91 items at ages 13 and 17. The items assessed literal comprehension, inferential comprehension and reference skills. The data are for reading only. Public/private differences may be smaller or larger in other subject areas.

[2]The private schools assessed included Catholic (CDS) and non-Catholic (SDS) schools. Although many of the non-Catholic schools were church-related or supported, many few were Christian-fundamentalist schools.

[3]The standard error of the difference is an estimate of the potential sampling variability. Generally, if the difference is at least twice its standard error, we are very confident that it is a real difference and not an artifact of sampling variation.

[4]The "adjusted" difference is the difference that would probably exist between public and private schools, if public schools were serving the same populations of students as private schools. Table 2 shows that they are not.

[5]Community size: big cities (population 200,000+) and the fringes around them -- (FCIF); and medium cities (population 25,000-200,000) and small places (population below 25,000) combined -- (FCISF).

[6]Type of community: advantaged-urban -- schools in or around cities having populations greater than 200,000 and serving communities in which a high proportion of the residents are in professional or managerial positions.

[7]Parental education: students neither of whose parents graduated from high school (HHS) are combined with students who had at least one parent graduating from high school (CHS) to create one category. A second category, post high school (PHS), includes students who had at least one parent educated beyond high school.

- There is no difference between public and private school students' reading performance in the Central states.

- There is no apparent difference between public and private school students attending schools in advantaged-urban areas, and there is only a slight difference for students whose parents have a post high school education.

- The private junior high and high school advantage is larger for schools in high population metropolitan areas than it is in smaller cities and towns.

- Black 9- and 13-year-olds in private schools perform better than those in public schools.

Remember, these are statistical averages. Particular public or private schools in your area may or may not conform to this pattern.

These differences largely reflect the fact that public schools serve a somewhat different clientele than private schools. As Table 2 reveals, public, private-Catholic and private-non-Catholic school populations contain different proportions of students from various socioeconomic backgrounds. For instance, 11% of the 13-year-olds in the public schools come from homes in which neither parent finished high school; the proportion of such students in Catholic schools is only 4%, and in non-Catholic private schools, it is less than 1%. Conversely, 46% of the students in the public schools have parents with post-high-school education. But the proportion of such students in Catholic schools is 59% and in private non-Catholic schools, 71%. Similar proportions exist for other indicators of socioeconomic status such as the advantaged-urban and disadvantaged-urban categories. While a third to more than half of the students in private schools live in advantaged areas, only 7% of the public school students do. Clearly, the private schools contain a much higher proportion of students from backgrounds known to be associated with high academic performance and a much lower proportion of students from backgrounds known to be associated with low academic performance. What would happen if public schools dealt with the same proportions of high- and low-socioeconomic students found in the private schools?

To estimate what the results might be, the populations were equated so that both public and private populations shared equal proportions of students from various socioeconomic strata. The results appear in Table 1 as "adjusted" differences.

TABLE 2. Estimated Percent of Public and Private Students by Selected Reporting Groups, Age 13, 1980

	Public	Private Catholic	Private Non-Catholic	All
Parental education				
Not graduated high school	10.9%	3.8%	0.3%	9.9%
Graduated high school	32.3	29.1	20.3	31.6
Post high school	46.3	59.1	71.1	48.2
Unknown	10.6	8.0	8.3	10.3
Total	100.0	100.0	100.0	100.0
Race				
White	79.3	79.1	91.4	79.7
Black	13.6	15.5	6.6	13.5
Hispanic	5.7	4.9	1.7	5.5
Other	1.5	0.5	0.3	1.4
Total	100.0	100.0	100.0	100.0
Sex				
Male	49.0	45.4	49.3	48.7
Female	51.0	54.6	50.7	51.3
Total	100.0	100.0	100.0	100.0
Size of community				
Big cities	14.4	46.3	38.5	17.9
Fringes	23.6	15.8	37.9	23.5
Medium cities	13.2	15.8	8.8	13.2
Small places	48.8	22.2	14.7	45.3
Total	100.0	100.0	100.0	100.0
Region				
Northeast	23.0	42.8	15.2	24.3
Southeast	25.1	7.7	29.3	23.8
Central	23.4	41.0	23.1	26.6
West	26.6	8.5	32.3	25.3
Total	100.0	100.0	100.0	100.0
Type of community				
Rural	9.2	8.8	12.0	9.2
Disadvantaged urban	11.2	1.8	0.0	10.0
Advantaged urban	7.1	32.6	54.4	11.0
Other	72.5	56.8	33.6	69.8
Total	100.0	100.0	100.0	100.0

When populations are equated for socioeconomic status, the mean differences between public and private schools diminish considerably or vanish. There is no statistically significant advantage nationally, at any age. Regionally, private school students still outperform public school students in the Southeast at age 9 and in the Northeast at age 17. But 17-year-old public school students outperform private school students in the Central states. Seventeen-year-old boys in private schools still do somewhat better than those in public schools, and private high school students in medium-sized cities and smaller towns do somewhat better. But all the other differences in favor of private schools disappear.

This adjustment was only a statistical exercise, suggesting what might happen if public and private schools were attended by the same kinds of students. But they are not. And we do not <u>really</u> know what would happen if they were. All we can say is that, at the moment, private school students perform somewhat better on the reading assessment than do public school students, and that difference appears to be largely accounted for by differences in the populations involved rather than in the schools themselves and their instructional programs.

Senator MOYNIHAN. Mr. Chairman, do you mind if I just press that?

Senator PACKWOOD. Why don't we do this—why don't we let her finish her statement because we have two others on the panel. You may question her after.

Go ahead, we interrupted you a bit. Why don't you take another minute and finish up.

Ms. NEUMAN. Did you want me to continue?

Senator PACKWOOD. Why don't you take another minute to conclude because we interrupted.

Ms. NEUMAN. OK.

I would like to stress that the league believes tuition tax credits are inconsistent with our Nation's commitment to promote school desegregation. Tuition tax credits would have a particularly disastrous impact on public schools in desegregated school districts to the detriment of a strong integrated education system.

In many communities segregation academies have been established to thwart desegregation and promote white flight.

Moreover, Congress has repreatedly hampered whatever efforts the Internal Revenue Service has made to deny tax-exempt status to such racially discriminatory private schools, therefore, tax benefits are flowing to these schools.

We have some information in our testimony about the Nashville League and what they have found in terms of increase in private school enrollment as a result of school desegregation.

And you will see that in the written testimony.

I would like to conclude that we also are an organization that has opposed tuition tax credits since 1978, as you know, and it has primarily come out of our concern for equal access to education.

Thank you.

Senator PACKWOOD. Thank you very much.

Ms. Braveman.

Ms. BRAVEMAN. Thank you.

I am speaking on behalf of the American Jewish Committee in opposition to tuition tax credits for elementary and secondary schools.

The American Jewish Committee is a 75-year-old human and intergroup relations organization with over 40,000 members from all parts of the country, representing a wide spectrum of viewpoints on civic and Jewish communal issues.

I am going to depart a little bit from the written material that I sent you in the interests of not repeating, and also would like to call your attention to the material which I will submit, two articles, "Religion and Public Education, Statement and Views," which is the committee's official, full long statement of our views on church and state, and an article "Why We Need Church-State Separation" by our legal director, Sam Rabinov, published in the February 1980 issue of Reformed Judaism.

Senator PACKWOOD. You want to submit both of those for the record?

Ms. BRAVEMEN. Yes.

Senator PACKWOOD. Yes, they will be submitted and put in the record.

Ms. BRAVEMAN. Thank you.

[The material follows:]

Why We Need Church-State Separation

by Samuel Rabinove

In 1843 in New York City, a group of Jewish parents whose children attended public schools, where religion was part of the normal curriculum, protested the content of a textbook called *American Popular Lessons*. The Board of Education appointed a committee to look into the matter. The report of this committee, which rejected the Jewish protest, read in part as follows: "Your committee has examined the several passages and lessons alluded to by the said trustees, and they are unable to discover any possible ground of objection, even by the Jews, except what may arise from the fact that they are chiefly derived from the New Testament and inculcate the general principles of Christianity." That kind of insensitivity has its present-day counterpart in the attitude of well-intentioned Christians who simply cannot understand why Jewish parents object to devotional Christmas observances in public schools. It is often said that America is a Christian country and therefore this sort of thing is to be expected. Yet in the Constitution of the United States there is no mention of Christ. In fact, nowhere in that document is there any mention of God either. These omissions scarcely could have been inadvertent since most of the Founding Fathers were God-fearing Christians. They knew very well what they were doing.

Jefferson and Madison

Thomas Jefferson and James Madison were painfully aware of what had happened to heretics and dissenters of all denominations in country after country in Europe where church and state had been joined. They knew too that our country was settled in large part by refugees from such religious-political despotisms, many of whom, ironically, were themselves infected with the virus of intolerance and denied to others in America the very freedom of worship which they so passionately had demanded for themselves in Europe. The Anglicans, for example, drove the Puritans out of England; shortly thereafter, the Puritans drove the Baptists out of the Massachusetts Bay Colony. Subsequently, Roger Williams founded in Rhode Island the first American colony to rigorously separate church and state and to grant total religious tolerance to its inhabitants. Not surprisingly, Rhode Island soon became a haven for Jews.

Samuel Rabinove is the director of the discrimination division of the American Jewish Committee.

Madison Shaped First Amendment Separation

A major factor in the development of freedom of conscience in America was a paper issued by James Madison in 1785. In his *Memorial and Remonstrance against Religious Assessments*, Madison contended that support of religion should be voluntary, that taxation to support religion would create enmity and would endanger freedom. This paper was influential in shaping the First Amendment to the Constitution.

The United States Supreme Court in 1947 enunciated a rule of law, which was subscribed to by the entire bench at the time and reaffirmed in three subsequent cases, in the following terms: The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the federal government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . . No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the federal government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice-versa*. [Emphasis added.] In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and state."

Separation Never Absolute

Yet, the Supreme Court and the First Amendment notwithstanding, there has never been in this country absolute separation of church and state. Actually, there have been quite a few accommodations between church and state in America—including government aid to religion such as military chaplaincies, tax exemption for religious property, and tax deductibility of contributions to churches and synagogues—which are widely accepted as proper. There are other issues of church-state separation, however, which are in sharp dispute and where the question often is where the line shall be drawn. In these controversies, most Jews tend to align themselves with those who support separation of church and state. While, on some of these issues, at least most Christians also support the separation principle, it is the Jews who have been perceived by many as the cutting edge of the forces which seek to protect or extend it.

Prayer in the Schools

The issue of organized prayer and Bible reading in public schools is a good illustration of the conflict model, with major Jewish organizations having supported the challenge to these traditional practices. In 1963 the US Supreme Court, by a vote of 8-1, held that they violated the First Amendment. Although the decision caused a furor at the time and was widely denounced as being anti-religious and un-American, it has since gained a measure of public acceptance. Thus far, efforts in Congress to amend the Constitution to permit public school prayer have not been successful. Still, public opinion polls indicate that most Americans support school-sponsored prayer on a voluntary basis and, despite the Court's ruling, prayer and Bible reading continue today in a good many school districts, particularly in rural areas of the South and Midwest. But their prevalence in the country as a whole is certainly far less than when the Court's decision was rendered. There is nothing in the Supreme Court's ruling to prevent any pupil from uttering a serious prayer (or a less serious one such as, "O God, how I wish the bell would ring!") provided the school program is not disrupted thereby. The fact remains, however, that some

Christians, who perhaps were not too favorably disposed to Jews to begin with, blame "the Jews" for taking away prayer from public school children and thus contributing to the general decline in public order and morality in America.

Religious Symbols on Public Property

Another issue on which there continues to be controversy has to do with the placement of religious symbols on public property. While this is not usually seen as a major problem by most Jews, some of the challenges to such practices have been initiated by Jews. Since the law on this question is not entirely clear, its murky areas still invite litigation and, in consequence, considerable animosity. Although it may be a technical violation of the separation principle for a village to erect its traditional Christmas tree each December in the public square, there is probably no court in the land that would prohibit this. And the number of Jews who find such a practice truly objectionable is probably very small indeed. A Nativity scene on a public school lawn, however, is quite another matter, particularly if it were coupled with a beautiful, deeply Christological Christmas program. Jews do not seek to undermine Christianity, but neither do they wish their impressionable young children to be enticed into what may appear to be the official state religion. In general, it is probably fair to say that while most Jews are not happy with the placement of religious symbols on public property, including a menorah in celebration of Chanukah, neither are they inclined to do battle over this issue. A question that is frequently raised, however, is: Why not place religious symbols on private property, such as a church, synagogue, religious school, or private home? In other words, as a practical matter, is it really necessary to place them on public property?

Since the controversy over public aid to religious schools involves two matters which are dear to the hearts of most people—money and religion—it is not surprising that it has engendered an abundance of sound and fury. Yet this is one issue as to which Jews, Protestants, and Catholics are by no means monolithic. While it appears that most Jews and Protestants oppose public aid to religious schools and most Catholics support it, there are significant minorities within each faith group which do not share the prevailing views of those in their own groups. Most Orthodox Jews, for example, endorse public aid to religious schools, and many Catholics oppose it. In a series of decisions in recent years, the US Supreme Court in substance has ruled, under the First Amendment, that it is not the business of government to subsidize, whether directly or indirectly, schools whose chief reason for being is to propagate a religious faith and therefore has sharply restricted the use of tax monies to aid religious schools. Among the forms of aid which the Supreme Court has struck down are tax credits and tuition grants. In spite of sharp divisions among the religious groups, since the American Jewish Congress, American Jewish Committee, and Anti-Defamation League of B'nai B'rith have all been involved in litigation which has challenged public aid to religious schools, disgruntled advocates of such aid have been prone to blame "the Jews" for the Supreme Court's rejection of the constitutionality of such aid.

Ten States Reject Public Aid

As to how the public at large feels about this issue, it is interesting to note that every time the question of public aid to religious schools has been submitted to public referendum (in ten states), it has been rejected. This has happened in states as varied

and farflung as Maryland, Michigan, Missouri, Nebraska, and Oregon. Most recently, in November 1978, the voters of Michigan rejected an educational voucher plan (a form of tuition grant), in which tax dollars would have enabled parents to enroll their children in parochial and other private schools, by a resounding majority of 3 to 1. Michigan, incidentally, is a state where Jews constitute only 1 per cent of the population.

What does the future hold for church-state separation problems and the Jews? As long as some of our citizens seek to enlist the authority of government to advance their deeply held religious beliefs, tensions over these issues are likely to persist. The common thread that runs through all of the church-state issues is a sincere conviction on the part of some that the concept of government neutrality toward religion and sectarian values, even on issues such as abortion where there is no consensus at all, is unacceptable. And since most American Jews, for historical and cultural reasons which seem persuasive to them, are likely to continue to resist what they see as governmental intrusions into a sphere where it doesn't belong, Jews will continue to be targets for the anger and frustration of those who feel aggrieved and will be "scapegoated" accordingly by people whose underlying feelings towards "the Jews" are more hostile than friendly.

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Religion and Public Education

The American Jewish Committee is frequently asked to express its position on the many complex issues related to religion and the public schools. This statement of views is an attempt to respond to such requests.

The beneficent teachings of religion have contributed immeasurably to man's progress from barbarism to civilization. This country particularly, settled in large measure by those seeking freedom of conscience, has been profoundly influenced by religious concepts. With church affiliation in the United States now at an all-time peak, religion is certainly an important factor in our lives.

In the opinion of many, the vitality of American churches and synagogues flows from our unique tradition of separating church and state. This cardinal principle has insured freedom of conscience for all. It has permitted scores of religious sects to flourish without hindrance. It has enabled us to escape most of the sectarian strife and persecution which has marked the history of other lands.

Today, the long-established interpretation of the separation principle, especially as it applies to the role of the public schools with regard to religion, is still being debated. While our time-tested concept of public education as a secular institution is relatively secure, there are numerous areas of controversy as to the implementation of this concept.

There are, of course, many church-state issues unrelated to the schools—religious symbols on public property, for example. But since public education continues to be the center of concern, it is here that attention is focused.

NATURE OF THE CONTROVERSY

Recurrent world crises have caused many Americans to question whether our moral fibre is strong enough to surmount the stresses and strains of troubled times.

Such soul-searching has provoked much discussion about the role of religion in the education of our children. Because of the increase in juvenile crime, drug abuse and other youth-related problems, some anxious parents are wondering whether there ought not be greater religious emphasis in the public schools.

Some religious leaders claim that public education, in neglecting religion, has failed to perform its full function and that our children are therefore morally deficient. These critics contend that since the child's "working day" is spent in the classroom, it is incumbent upon the public school to provide opportunities for religious training and expression.

Other clergymen maintain that, in keeping with our constitutional principle of separation, the task of inculcating a religious outlook is the responsibility of the home, the church and the synagogue, and is not a legitimate function of the public school.

Quite apart from the role of religion in the public school, a very significant controversy exists with regard to the use of public funds for sectarian schools. Proponents of such aid argue in terms of what they conceive to be simple justice for citizens who pay taxes for public schools which they do not use, as well as in terms of the financial needs of sectarian schools today. Those who resist public aid for religious schools contend that such aid breaches the constitutional principle of separation and that diverting public funds away from public schools embodies a grave threat to the future of public education.

BASIC PREMISES

The American Jewish Committee's long-held position with respect to this problem, which was reaffirmed in October 1971, is based on two primary convictions:

1) *Separation of church and state, as defined by the United States Supreme Court in interpreting the guarantees of the First Amendment, offers a sound foundation for maintaining religious freedom.*

In the words of the Court:

> Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."*

Applying the Court's pronouncement to education, three general conclusions emerge:

—The maintenance and furtherance of religion are responsibilities of the church, the synagogue and the home, not of the public school.

—The time, facilities, funds and personnel of our public schools must not be used for religious purposes.

—Public funds may not be used for aid to

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*Everson v. *Board of Education*, 330 U.S. 1, p. 15 (1947).

denominational schools.

2) *The public school is one of the chief instruments for developing an informed citizenry and for achieving the goals of American democracy.*

Any effort to revamp the school curriculum by introducing a religious emphasis would inevitably create divisive intergroup tension, thus undermining the effectiveness of our schools as builders of democracy. Therefore, to maintain the non-sectarian character of the public school system, satisfactory solutions to the problems of religion in education are required.

Guiding Principles for the Schools

The public schools should continue to be governed by certain general principles dictated by experience, law and tradition:

—The schools should maintain complete neutrality in the realm of religion. They should never undermine the faith of any child nor question the absence of religious belief in any child.

—While ordinarily the will of the majority governs in a democratic society, the First Amendment makes this rule inapplicable to matters of religion. Freedom of conscience is the wellspring of the First Amendment.

—Teachers should not undertake religious instruction in the schools.

—Children of whatever shade of religious opinion should enjoy total equality in the classroom. Thus, whether the children be Protestant in a predominantly Catholic community, Catholic in a predominantly Protestant community, or Jewish in a predominantly Christian community, they should be on an equal footing with all their schoolmates. Moreover, students with no formal religious training, as well as those who do not accept religious viewpoints, must stand as equals of

their religiously educated, observing schoolmates.

—Pertinent references to religion, even to doctrinal differences, whenever intrinsic to the lesson at hand, should be included in the teaching of history, the social studies, literature, art and other subjects. Great care must be taken to insure that the teacher's religious identification or absence thereof does not color his or her instruction. Where discussion of doctrine is not relevant to an understanding of subject matter, the teacher should refer the children to home, church or synagogue for interpretations.

THE MAJOR ISSUES

Religion in the School Curriculum

Teaching about Religion: One of the most perplexing problems stems from the suggestion that the public schools teach about religion—in other words, that children study it in a factual and objective way.

The merits of this proposal are difficult to appraise, especially on the elementary and high school levels, because there is no generally accepted definition of "teaching about religion." To some, it merely implies discussing the influence of religion and religious institutions on our civilization; to others, it means examining and comparing different theological doctrines; still others feel it should also include teaching a common core of principles undergirding the major faiths.

The schools are, of course, obligated to provide our youngsters with insights into the ethnic and religious sources of American life. Such instruction, however, should not be regarded as "teaching about religion." Rather, it should continue to be viewed as an integral function of general intergroup education. In the same context, the public schools can and

should instill in children an understanding of the origin and meaning of religious freedom, an awareness that our nation abounds in religious sects and an appreciation that it is the genius of American democracy to welcome and respect religious diversity.

The schools should also foster an understanding of the impact of religion on our civilization. Indeed, this knowledge is intrinsic to a well-rounded education. Such events as the Crusades, the Inquisition, the Reformation and the colonization of America, as well as the Holocaust, would be hopelessly distorted if religious motivations were not given proper weight. It would be equally wrong to omit the Bible from courses in literature or to ignore religious influences which illuminate the study of art or music. But separate courses in religion are quite another matter. Despite the best of intentions, such courses are all too likely to become vehicles for sectarian inculcation. Public schools cannot promote any or all religions.

If, as some charge, teachers shy away from religious references even when they are basic to an understanding of subject matter, prompt investigation of current school practices is called for. A study of this kind would disclose whether our children are, in fact, being deprived of essential learning. Hopefully, it also would result in better handling of religious references in today's public school curriculum.

Teacher Training: One immediate need may be to improve the quality of teacher training. Many delicate and complicated matters are included in the public school curriculum. Often, they touch on serious emotional involvements stemming from religious differences. Teachers could be helped to avoid offending the sensibilities of parents and of children in their classrooms if all teacher-training institutions included in their courses

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of study the necessary sociological and historical background concerning the different ethnic and religious groups in our land.

Comparative or "Common Core" Religious Instruction: Any instruction in the public schools attempting to deal with religious doctrines on a comparative basis is undesirable. Teachers and school administrators would encounter great difficulty in determining where "facts" end and dogmatic belief begins. Indeed, the definition of religion itself would present a serious stumbling block, and the role of the teacher would become quite untenable. For instance, how would teachers interpret the crucifixion of Jesus? The Trinity? The Nativity? Are they expected to conceal their personal convictions on matters as to which they may feel deeply? One might well doubt that every teacher could do so. Should the teacher explore all points of view, thus making the classroom an open forum for religious discussion? And most important of all, would this not tamper with the child's traditional family faith during his tender, impressionable years?

It is likewise inadvisable, if not impossible, for the public schools to teach a common core of religious belief. Such instruction, in all likelihood, would be unacceptable to some religious groups. Moreover, teachers and school administrators would be subjected to severe pressures arising from the need to accommodate the conflicting viewpoints found in almost every American community. That is why religiously oriented textbooks are unacceptable.

In short, teaching about religion in the doctrinal sense is the function of the home, the church and the synagogue.

Some people urge that the schools affirm the existence of a personal God, in the belief that children would thus learn the source of our

inalienable rights. Most people recognize that children should learn about God. But if this were done in a public school setting, the discussions concerning His nature and His revelation would inevitably lead to creedal divisiveness. Instruction in this subject matter, as in other areas of the curriculum, would necessarily be governed by a set of guiding principles, thus requiring the schools to adopt a body of religious principles. While a majority of the religious leadership might well agree on certain basic tenets, the difficulty of interpretation in the classroom would remain, as would the problem of the unaffiliated minority.

The Clergy as Instructors: Some would invite clergymen into the classroom to give sectarian instruction to children of their respective faiths. This practice, which might well lead some children consciously or unconsciously to conform to one of the dominant faiths represented in the school, has been ruled unconstitutional.*

Stressing the Religious Faith of Our Ancestors: It has been suggested that the schools stress the moral and spiritual heritage handed down by the Founding Fathers, in order to bring home the fact that Americans are a religious people. Advocates of this proposal urge, as one way of carrying it out, a study of historical documents, such as the Declaration of Independence. For example, the New York Board of Regents, in a statement in 1951, expressed the belief that school studies would thereby be brought into "focus and accord," and would teach "respect for lawful authority." But it is also worthy of note that the Constitution of the United States contains no mention of God, an omission which was scarcely inadvertent.

There can be little question of the wisdom of pointing to the religious influences which

*McCollum v. *Board of Education*, 333 U.S. 203 (1948).

motivated the Founding Fathers—though it should also be remembered that they held divergent religious views and that some of them were strongly anti-clerical. Nor is there any doubt that children should understand the religious values implicit in our great charters of liberty. However, any tendency to provide other than an objective historical perspective in the study of these documents should be discouraged.

Providing a Non-Sectarian Religious Emphasis: It is virtually impossible for public schools to provide "non-sectarian" religious education. Agreement is hard to achieve even on the meaning of this term. Sometimes it refers to religious instruction acceptable to a majority of the Protestant denominations, but not necessarily acceptable to others.

The term is also used to denote the highest common denominator of the three major faiths. Assuming such a formula could be arrived at, it is all but certain that its practical application would be sectarian. The teacher's unconscious bias, arising from personal convictions or lack of them, would inevitably color his interpretation.

Moral and Ethical Values: The total school environment should reflect and help clarify the highest moral and ethical values of our society. Hence, through all of the curriculum, the school should seek to develop character and responsible citizenship, as well as encourage young people to respect all people according to individual worth.

Certain moral and ethical values are basic to all religions. But curricula should make it clear that these values do not have their sole sanction in religion and should not lead to the conclusion that those not religiously affiliated are morally suspect, or that good citizenship and belief in God are synonymous. By taking sides in the age-old philosophical dispute over

the ultimate sources of values, the school would thereby be using its authority to usurp the proper function of the home, church and synagogue, at the same time encroaching upon the right of personal choice in a matter of conscience. Our schools must recognize that there is no unanimity concerning the well-springs of moral behavior. While many hold that the values which guide human conduct stem from the great religions, there are others who believe that these values derive chiefly from human experience.

The Bible and Prayer in the Schools

Bible Reading and Prayer Recitation: Most Americans look upon the Bible as the source of religious inspiration. Children are taught to revere it as sacred. *Therefore, the reading of any version in the public schools, except when explicitly undertaken as part of a literature course, must be regarded as a devotional act, inappropriate for classroom or assembly.*

Organized prayer, whether spoken or silent, constitutes an act of worship and has no place in public school classroom or assembly. The U.S. Supreme Court has held that neither Bible reading nor prayer recitation in the public schools is permissible under the Constitution.* In the *Schempp* and *Murray* cases the Court declared:

> The conclusion follows that in both cases the laws require religious exercises and such exercises are being conducted in direct violation of the rights of the appellees and petitioners. Nor are these required exercises mitigated by the fact that individual students may absent themselves upon parental request, for that fact furnishes no defense to a claim of unconstitutionality under the Establishment Clause. Further, it is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream

**Engel* v. *Vitale*, 370 U.S. 421 (1962); *Abington School District* v. *Schempp*, and *Murray* v. *Curlett*, 374 U.S. 203 (1963).

> may all too soon become a raging torrent and, in the words of Madison, "it is proper to take alarm at the first experiment on our liberties."

In sum, in the United States it is not the business of government either to compose or to sponsor prayers for children to recite.

Distribution of Gideon Bibles: Neither the Gideon Bible nor any other sectarian tract should be distributed on school property. Since religious groups are thereby aided in propagating their faiths, this practice has been held to be unconstitutional. *Equally objectionable would be proselytizing of students, whether by teachers or by other students, however this may be done.*

Use of School Premises for Religious Purposes

After School Use: Where school buildings are habitually made available to civic groups after school hours, thus converting the premises to general community centers, religious groups should be accorded the same privileges enjoyed by other organizations. However, the buildings should not be used during school hours for religious education, meetings or worship.

Religious Census: It would be constitutionally invalid to extend public school facilities to sectarian groups for the purpose of conducting a religious affiliation census.

Religious Holiday Observances

Although sectarianism has no place in the American public school, the problem of religious holiday observances cannot be resolved by a doctrinaire application of the separation principle. Many factors must be taken into account:

—Even before public schools were established in America, Christmas and Easter were celebrated in classrooms. These observances

are therefore deeply imbedded in tradition.

—There are differences of opinion among both Christians and Jews as to which aspects of the holiday observances are sectarian and which are not.

—The nature of each celebration varies from community to community, from school to school and even from classroom to classroom.

—For many people, these holidays have assumed the aura of national, as well as sectarian, events.

—Many Christians deeply resent the removal of sectarian content from traditional holiday programs.

—Experience shows that a fair and dispassionate public discussion of this problem is difficult to attain and that the attempt invariably induces community friction.

Under these circumstances, making a public issue of religious holiday observances in the schools on balance is not likely to be beneficial. However, through informal discussions with school administrators and teachers, it may be possible to plan these events in such a way that no child's religious sensibilities will be offended by undue sectarian or doctrinal emphasis. Such discussions are best initiated many months before the holidays, rather than immediately prior to or during the holiday observances. *Certainly it should be made clear to administrators that deeply devotional or Christological holiday observances, such as Nativity scenes, plays, pageants or carols that worship the infant Jesus, are objectionable.*

The alternative of joint observances, such as Christmas-Hanukkah celebrations, presents additional complications. Some see no difference in principle between celebrating a single religious event and holding a joint observance. They feel that if one part of the program is sectarian, the wrong is simply compounded by adding still another religious emphasis.

Others, however, believe that the joint observance fosters cross-cultural understanding by showing children how their neighbors celebrate religious holidays. While joint religious holiday programs are inadvisable—Hanukkah is not comparable with Christmas—it should nevertheless be recognized that they have enjoyed a measure of support in a few communities.

Federal and State Aid to Education

It is abundantly clear to most people today that massive government assistance, Federal assistance in particular, is indispensable if the quality of education in America is to be improved. *But, on the elementary and secondary levels, public funds should be used to support public schools only. Extension of such aid, either directly or indirectly, to denominational schools is opposed in principle both on constitutional grounds and for reasons of sound public policy.* Among the kinds of indirect aid that are opposed, for example, are tax credits or deductions and voucher plans or tuition grants to parents of students in private schools. To divert public funds to private schools, religious or otherwise, would weaken the fabric of public education.

However, benefits directly to the child, such as lunches and medical and dental services, should be available to all children at public expense, regardless of the school they attend, provided there is public supervision and control of such programs, while others, educationally diagnostic and remedial in nature, such as guidance, counseling, testing and services for the improvement of the educationally disadvantaged, where offered public school students, may also be made available to all children at public expense, regardless of the school they attend, provided however that such programs shall be administered by public agen-

cies and shall be in public facilities and do not preclude intermingling of public and private school students where feasible.

Within the context of the Elementary and Secondary Education Act of 1965 (ESEA), which was expressly designed to aid disadvantaged children, certain types of assistance such as textbook loans and remedial educational services on parochial school premises are not opposed, subject to judicial review of the constitutionality of this legislation. (By remedial educational services, Congress specified those benefits that were "therapeutic, remedial or welfare.") Studies of the implementation of the law on the community level have uncovered abuses which might ultimately cast doubt on the constitutionality of significant portions of ESEA. For example, public school teachers have been assigned to instruct parochial school students on parochial school premises in other than the "therapeutic, remedial or welfare" categories contemplated by Congress. While the teaching of art and music is surely enriching, it is doubtful that it falls within the Congressional intent as manifested by the Act's legislative history, in contrast to the work performed by speech therapists, remedial reading specialists or guidance counsellors. In other words, implicit in the Act is a rather subtle and perhaps specious distinction between specialized educational services to benefit children and regular curricular instruction which would benefit schools.

While the constitutionality of public busing of parochial school pupils has been upheld under the Establishment Clause of the First Amendment as a welfare benefit to children, rather than assistance to religious schools,* the American Jewish Committee is opposed to such busing in principle.

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*Everson v. *Board of Education*, 330 U.S. 1 (1947).

Providing for transportation for religious school pupils does constitute aid, even if indirectly, to the religious schools themselves. Moreover, experience has shown that limited bus laws, once on the statute books, are readily expanded to permit the transporting of religious school children over distances which depart from the regular public school routes, thus imposing a financial burden on taxpayers beyond that initially contemplated.

If a state is justified in providing busing as a welfare benefit, to protect pupils from traffic hazards, it may be argued that the state has a corresponding duty to fireproof parochial schools in order to protect pupils from fire hazards, or to heat such schools in order to protect pupils from cold. Hence, busing is seen by some not as an end in itself, but rather as an opening wedge toward the goal of full public subsidy of religious school operations.

In the implementation of any government aid involving children in sectarian schools, the following safeguards should be included:

1. No religious institution may acquire any new property, or expand already existing property.

2. No public funds may be used for any religious purpose.

3. To the maximum extent possible, the expenditure or distribution of funds allocated should be controlled by a public agency.

In general, the distinction between health, safety and welfare benefits to *children* in all schools, and substantive educational assistance to non-public *schools* is a crucial one and must be maintained. Thus, while the U.S. Supreme Court in 1968 upheld the constitutionality of a New York State law requiring public school systems to lend secular textbooks to pupils attending religious schools,* such loans are so

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Board of Education v. *Allen*, 392 U.S. 236 (1968).

close to educational assistance to schools that they are opposed as unwise, unless the use of such textbooks is limited to disadvantaged children, as under ESEA.

It should be stressed that the controversy over government aid to religious schools is not an issue juxtaposing one faith group against another. All faiths have their "separationists," as well as their "accommodationists," depending upon individual attitudes and values, and even when persons of different faiths find themselves on opposite sides of this controversy, fellowship and cooperation in other matters need not be impaired. Interreligious good will does not require anyone to compromise basic principle.

Dual Enrollment

*The American Jewish Committee endorses Dual Enrollment or "Shared Time" programs—in which non-public schools send their pupils to public schools for instruction in one or more non-religious subjects, provided that certain basic safeguards are adhered to in their implementation.**

1. All pupils involved in such programs must be under the exclusive jurisdiction of public school authorities while on public school premises.

2. Parochial school pupils must be freely intermingled with regular public school pupils in all instruction and other activities provided for them by public schools.

3. All such instruction must be given solely by public school personnel, on public school premises, during regular school hours.

4. All decisions regarding books, materials, curricula, schedules and homework, as well as any other administrative decisions customarily

*These would include such courses as mathematics, science, industrial arts, home economics or physical education, which would ordinarily be included in the regular public school curriculum. Other subjects which have religious content would continue to be taught in parochial schools.

made in connection with classes and other activities in the normal operation of public schools today, must be under the exclusive control of public school authorities.

5. There shall be no religious tests for teachers or other personnel in the public school system.

6. No public school classes may be cancelled or curtailed because of the needs of any religious group, nor may any other accommodation to any religious group be made by public school authorities as a result of "shared time" programs, other than those accommodations normally made to pupils in the interest of the religious liberty of pupils.

7. Provisions must be made within the public school system to oversee the implementation of each "shared time" program on a continuing basis and to evaluate its compliance with the safeguards cited above.

The Dual Enrollment concept is reflected also in our endorsement above (page 15) of diagnostic and remedial services for educationally disadvantaged non-public school pupils in public facilities.

Released Time

Many communities have adopted the practice of released time, whereby children are excused from school with the consent of their parents in order to receive religious instruction. When conducted off school premises and without pressure on children to participate, this program has been held to be constitutional.* Nevertheless, released time is opposed for the following reasons:

—It threatens the independent character of the public school. Since part of the compulsory school day is "released" by the state on condition that the participating student devote

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*Zorach v. *Clauson*, 343 U.S. 306 (1952).

this time to sectarian instruction, the state accomplishes by indirection what it admittedly cannot undertake to do directly—it provides a governmental constraint in support of religion.

—It is a mechanism for divisiveness which is repeated at weekly intervals throughout the school year. Even when most carefully administered, the program's inherent abuses become evident: Subtle sectarian pressures are exerted by overzealous teachers; non-participating children are frequently embarrassed.

—The normal school program is disrupted. Because classroom activities generally remain static during the released time period, children who do not participate suffer an unnecessary loss of school instruction.

—The available data indicate that some children simply do not reach their religious centers. Where such unexcused absences occur, the program contributes to truancy.

Federal and State Aid to Higher Education

The American Jewish Committee is not opposed to government aid to church-related higher educational institutions where their central purpose is other than to promote religion. Concerns about religious indoctrination in colleges and universities are not the same as in elementary and secondary education. Education beyond high school is not a required state function nor is attendance mandated. Moreover, most students are better equipped and more inclined to evaluate critically the teaching and values of colleges and universities. College students may be considered mature enough to resist those limited attempts at religious indoctrination that may well occur at institutions of higher education which receive government funds.

The mere fact that an educational institution is affiliated with or sponsored by a church or a

religious sect should not necessarily bar it from access to public funds. It is important rather to examine the particular institution as a whole and to determine, in the light of its total program and activities, whether or not its central purpose is to promote religion, i.e., whether it is pervasively sectarian. Generally speaking, a college may be considered to be "pervasively sectarian" if it meets one or more of the following criteria:

—Faculty members or students are required to subscribe to a particular religious belief as a condition of employment, admission or graduation.

—Students are required to attend religious programs or observances of one particular faith.

—Students are required to register for courses or to attend classes designed to foster a particular religious doctrine (in contrast with objectively presented courses in comparative religion or the history of religion).

—Students are subject to disciplinary measures based solely on religious grounds.

Government aid to higher educational institutions that are "pervasively sectarian," according to the criteria set forth above, is opposed. However, for those church-related institutions of higher education that are not "pervasively sectarian," government aid should be permissible to advance the secular purposes of such institutions.

Closing of Public Schools on Jewish High Holy Days

Whether or not public schools should be closed on Jewish High Holy Days is an administrative question to be decided by school authorities in the light of their own judgment as to the advantages or disadvantages involved. In some communities, the public school authorities might find that the large number of

absences of Jewish children and teachers makes it difficult to engage in any fruitful educational work and therefore justifies keeping the schools closed in the interests of economy and efficiency. In other communities, public school authorities may reach a different conclusion. The decision is one to be made by the authorities. From the standpoint of the Jewish community, what is important is that where the schools remain open, no Jewish child or teacher shall be penalized for remaining away from school on a Jewish religious holiday.

Baccalaureate Programs

When exercises or programs marking graduation from public school and conducted under the auspices or with the participation of the public school authorities (popularly called baccalaureate programs) are religious in their nature or contain religious elements, they violate the principle of separation of church and state and therefore must be opposed.

Such school-sponsored exercises or programs are a violation, whether they take place on or off public school premises and whether during or after school hours; nor is it material that attendance at such programs may be declared to be voluntary. Since the education provided in the public schools must not be religious, the ceremony conducted by the public school authorities marking the termination of the period of education likewise must not be religious. Non-religious commencement or graduation exercises are perfectly acceptable, of course, but they should be held either in the school or in a place other than a church or synagogue, and either during school hours or at some other time not conflicting with the religious requirements of any of the school population, so that there may be no bar to attendance by any of the graduating body.

IN CONCLUSION

Religion has flourished in this country, hand in hand with the American tradition of separation of church and state, which has served as a bulwark of religious liberty. And the public schools themselves have served as a great unifying force in American life—welcoming young people of every creed, seeking to afford equal educational opportunity to all, emphasizing our common heritage and serving as training grounds for healthful community living. Thus, the schools have performed an indispensable function, and any proposed departure which threatens to prevent them from fulfilling this traditional role must be weighed with the greatest caution.

Experience indicates that public consideration of church-state issues often engenders community tensions. Deep religious loyalties and antagonisms are stirred, and extreme reactions sometimes displace calm and objective debate. In discussing these problems, community groups therefore have a responsibility to guard against provoking inter-religious tensions.

It is hoped that this Statement of Views will stimulate thoughtful discussion, and help to keep the public schools free of sectarian strife.

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Ms. BRAVEMAN. I don't want to discuss the constitutional issues today, I don't want to repeat what has already been said.

I will limit my remarks to a very small portion of our position and our feelings.

I will talk about the interrelationship between dollars, accountability, and religious freedom as we see them.

And our perspective is just not ours alone, but those of school board members who are members of our committee, who are members of private school boards of trustees, and many of our other members.

In terms of money; we don't believe that added money in and of itself provides quality education. One of our major programs, for several years has been to urge schools boards to trim spending, to develop more cost effective methods of providing sound education and services—in this year particularly important because of the Federal cuts.

But when the Federal Government tells the public schools they must absorb cuts in programs designed to serve the poor and disadvantaged, while it proposes a diversion of tax dollars to nonpublic education, it is very difficult for us to sell the theory that public schools should be more cost effective.

It is very difficult for me to tell my local school board in upstate New York that they need to be cost effective when they are starving, if money goes into nonpublic schools in the area.

So the money is a serious thing.

My second point relates money to accountability. It is the clear desire of the administration to return control over public services, including public education, to communities.

In so doing, there will be a shift in Federal funds from programs to specific populations and problems to block grants.

This is obviously going to create very serious problems for the schools as groups compete against groups for diminishing dollars.

But we believe that that responsibility is rightly placed in elected boards of education, who are accountable to local taxpayers, who have open board meetings, who have public votes on their budgets, and strong public influence over their curriculum, even though we don't always agree with some of that curriculum.

Nonpublic schools, on the other hand, were designed to be free of such public control. They are places in which unpopular and minority views can, should and must be upheld and taught; they are very important to the society.

But we believe that added funds for nonpublic schools will inevitably result in added control and raise church-state problems.

I share the constitutional views of the people on the panel today. But I really want to talk about religious freedom.

We believe that religious freedom includes the freedom of parents to select schools that will educate their children according to their own belief systems.

In those schools, neither Federal nor State governments can or may in any way interfere with, control or regulate the religious teachings of the schools.

But if public funds were to flow to them, directly or nondirectly, the Government would become obligated to insure compliance with a whole range of Federal policies.

One example, of course, was the recent effort of the IRS, only on the basis of tax exemption, and not even on the basis of actual tax dollars, to deal with the problems of discriminatory schools.

I know that you want to deal with those problems. I don't know how you can deal with those problems without a great deal of Government involvement and control. Previous U.S. Supreme Court decisions upholding limited funds for services to disadvantaged children in nonpublic schools have acknowledged the virtual impossibility of separating religious and secular curriculums. Any attempts to try to do so will surely constitute intolerable Government entanglement with religion.

Tuition tax credits for nonpublic schools are not just a simple technique to help people avail themselves of nonpublic education.

They could be the first step in a radical change in the very nature of American education and American public policy and decisionmaking. Unless you are fully prepared to take that step, we urge that you pause and consider all its implications carefully.

The AJC is well aware that public education has its problems. But it is an institution that has served us well.

The answers lie in strengthening rather than weakening it, and we remain committed to public policies designed to do so. One solution may be shared timed or dual enrollment, as described in our pamphlet, "Religion and Public Education."

Tuition tax credits are a major threat to public education.

Thank you.

Senator PACKWOOD. Thank you very much.

Ms. Goldsmith.

Ms. GOLDSMITH. Thank you, Mr. Chairman.

I appreciate the opportunity to be here before you this morning. You will note, of course, that we too, have not changed our position. We have been active as a national coalition for public education and religious liberty since 1974.

We are an organization of 30 civil libertarian, educational, and religious organization, all of whom support similar goals.

A list of these organizations is on the letterhead.

Our member organizations are dedicated to preserving religious liberty and the principle of separation of church and state and to maintaining the integrity and viability of public education. Our primary interest is in the protection of the guarantees of the first amendment to the Constitution which speaks to the basic right of all Americans to practice religion without Government coercion, involvement, or interference.

The organizations participating in this coalition, representing a broad cross section of the American people, have consistently opposed all forms of such financial assistance.

They have expressed their opposition in many ways, including general educational activities, expressions of view to legislators, support of referendums barring aid to nonpublic schools, and initiation and support of litigation against those legislative measures that have been approved.

The constitutional issue has been addressed by Leo Pfeffer, legal counsel to National PEARL. Rather than restate the relative issues, we would remind the committee that we fully associate this organization with the statement submitted by Mr. Pfeffer.

We believe firmly that separation of church and state is good for schools and good for religion. To believe that Federal control would not follow Federal dollars is indeed foolhardy.

We understand that the particular proposal now before the committee purports tax relief to parents, not direct aid to nonpublic schools. We believe that this should be understood for exactly what it is; an attempt to circumvent the Constitution without in any way addressing the legitimate need for additional assistance for institutions of higher learning or public elementary and secondary schools.

The National Coalition supports the role of nonpublic schools, their right to exist is not questioned—but their right to tax credits or grants is.

We do not believe it right or proper to ask the American taxpayer to support nonpublic schools which would have the effect of draining tax dollars away from the already underfinanced public schools.

There are those who argue that nonpublic school parents carry an extra burden, are somehow double taxed.

Following that idea to its logical conclusion, then those who have no children should not have the responsibility of paying for schools nor should those who don't drive an automobile pay for roads, crossing guards, or traffic lights.

Some say that the constitutional right to send a child to whatever school one chooses, public or nonpublic, loses its value because to choose the nonpublic school one must pay an additional fee.

Does that make the constitutional right meaningless? We think not. The Government does not subsidize newspapers or the distribution of leaflets. Does that make freedom of the press any less valuable? We think not.

We believe that we pay taxes for the public good. We are taxed for public purposes such as police, fire protection, roads, parks, medicare, and public housing. We pay for schooling, for every child, not just our own.

We believe this is a good public policy.

We feel that the tuition tax credit proposal would have a discriminatory effect vis a vis public school parents and private school parents, in that it would be a distinct advantage to private school parents and might well trigger a stampede from the public schools to private school.

We feel that this could possibly have a corrosive effect on the public schools and could result in the public schools being populated almost entirely by the poor and racial minorities and the handicapped.

Therefore, we oppose this measure on constitutional grounds and on grounds of practical public policy.

Thank you.

Senator PACKWOOD. Thank you very much.

Let me address, if I might, to Mr. Landau and Mr. Puckett, a historical rather than a constitutional question.

Do you have any questions in your mind—I want to phrase it slightly differently.

Do you have any historical question about the intention of the founders of this country in terms of allowing public money to be given to church schools?

I mean historically, did they do it?

Mr. LANDAU. I think they did.

Senator PACKWOOD. Does that mean that the founders did not think it was unconstitutional?

Mr. LANDAU. Well, I think that there were many kinds of aid to religion back in the 1700's and 1800's that are no longer acceptable today.

Senator PACKWOOD. Oh, no, I understand that.

I understand that Emerson has made them unacceptable.

But I am talking about history, because Emerson was, in theory, rested upon the Constitution, and maybe the 14th amendment via the 1st amendment.

But I want to know about what the intention of our founders was? Did they intend to prohibit public money being literally given to a church for the purpose of running a school?

Mr. PUCKETT. I think we can answer that from the historical aspect in Virginia, can we not?

Senator PACKWOOD. You can answer that in every State, as a matter of fact.

Mr. PUCKETT. The answer was "No."

Senator PACKWOOD. They did not see anything wrong with it?

Mr. PUCKETT. The issue of—they did see something wrong with it.

The issue of church-state separation came into the forefront in Virginia because of a proposal to fund Christian teachers in the State of Virginia.

It led to the action in the State of Virginia which ultimately led to the national level.

Senator PACKWOOD. Just let me read you this statement from a report the Library of Congress just finished for me.

Here is just the first sentence:

> This paper examines whether public aid was provided to private elementary and secondary schools during the early years of the Republic—roughly during the first half-century after independence from England. In one respect this question is easy to answer. For the historical record clearly reveals that public assistance was made available to schools that we would today label "private." Such assistance also went to private, sectarian schools organized by churches and other denominational groups.

Do you quarrel with that statement?

Mr. PUCKETT. Yes, I do.

In the State of Virginia, most notably.

Senator PACKWOOD. Well, let's talk about what our founders intended.

As they drew the Constitution, did they intend to prohibit States from giving money or cities—the Federal Government didn't give any educational money in those days—did they intend to prohibit public bodies from giving money to private schools, sectarian schools?

Mr. PUCKETT. I think it is a slight overstatement of the case to rest it only in the schools.

The unfortunate experiences in the early days of our colonies led to a deep concern for the union of church and state. A figure was

quoted earlier that 8 out of the 13 had established churches. It was my understanding nine did, but I will not quibble over one.

The unpleasant experience of people being imprisoned——

Senator MOYNIHAN. I understand there was one State where there was, in fact, two established churches.

Mr. PUCKETT. All right. The unpleasant experience of people being imprisoned, or beaten, or made second-class citizens because they did not conform to the established churches. That is what prompted our first amendment.

Senator PACKWOOD. But they didn't regard paying this money, apparently, to sectarian schools as establishment of religion.

The very people that wrote the Constitution belonged to local assemblies that did it.

Mr. PUCKETT. Well I think if you look at the Virginia situation you find that that is not the case.

A man who was a member of the established church opposed the use of tax money to finance Christian teachers.

Senator PACKWOOD. I didn't say the State of Virginia could or could not choose to do it itself, if it wanted to.

I am saying did the founders of our Constitution, intend by the first amendment to prohibit the State of Virginia, or the State of New York from giving money to sectarian schools?

Mr. PUCKETT. It would be my interpretation that the nonestablishment clause would apply to schools as well as any other institution.

Senator PACKWOOD. Well, then how do you account—let's except Virginia—how do you account, and I will read here; this is a second study done by the Library of Congress, and this relates to New York:

> In 1795, the legislature of the State of New York enacted a law to provide public funding for the establishment of schools throughout the state. Although intended to create what we would today label public, elementary schools, the legislation also authorized the use of funds for the support of church-run charity schools in New York City.

And it goes on. And indeed, the evidence is clear; historically the legislature appropriated money. It was given to church schools in New York City.

And this was after our Constitution was passed. Well, the picture that Pat has of the Torah School that was opened in the State of New York giving money.

How on earth could they do that if they thought it was unconstitutional? The very people who drew it thought it was unconstitutional?

Mr. PUCKETT. I think they could be wrong in that generation as well as in ours, and vested interests could be exercised then as now.

Senator PACKWOOD. Well, they may be wrong. I am not going to argue whether they were wrong or right. I happen to think they were right.

All I am saying is they did it.

They wrote a Constitution that had a first amendment in it, and then they went back to their State legislatures and their city councils, and appropriated this money for church schools.

Now, you may think that is wrong, but you agree they did it?

Mr. PUCKETT. I really don't quite understand where you are going, Mr. Chairman.

Senator PACKWOOD. What I am trying to prove is that as far as the founders of this country were concerned, those who drew the Constitution; they did not find it unconstitutional for the State of New York to give money to a church school.

Mr. PUCKETT. I don't have any record of a test case then.

I hear you say that because they did it made it right. Because you can produce a photograph saying that it was done, that made it right.

I disagree. That did not make it right.

And whether there was a test case then or not would be the matter of constitutionality.

Senator PACKWOOD. I didn't say that made it right. I happen to think it is right. I'm asking did they do it?

Mr. PUCKETT. The fact that they did it does not justify it.

Senator PACKWOOD. Did they do it?

Mr. PUCKETT. Apparently so, from the picture that Mr. Moynihan has produced.

Senator PACKWOOD. It is more than a picture.

Mr. PUCKETT. But the point is, it was not tested in the constitutionality—it was not examined.

Senator PACKWOOD. You know, Pat and I had this discussion coming back from New York the other night.

You were indicating, Pat, in talking with some people, it is literally impossible to get them to grant even history.

You can argue if it is right or wrong, but just to grant it.

Did it happen?

My time is up.

Senator MOYNIHAN. This is not something out of the Icelandic sagas. The checks canceled by the Baptist Church from the city of New York for its schools are somewhere in city hall in the basement.

The simple fact was that the Founders of the Constitution—the first amendment meant one thing. It meant the U.S. Government must not prefer one religion over another.

That is all it meant. As for the running of the hospitals, schools, and so forth, they assumed the churches to do that. Nobody else did it.

One may distinguish between the question: Do you think it is good public policy and the question: Do you think it is constitutional?

One may think it is entirely constitutional but it is very bad public policy. That is our point. I would like to make just two other points, if I can, Mr. Chairman.

Because, you know, this history is so clear, that it has been very interesting how difficult it is recovering it.

You heard about my testimony about constitutional amendments?

I would say that it is not for the Congress to, by law, tell the courts what a word in the Constitution means. That would be usurping the role of the Supreme Court.

We cannot say that when the first amendment speaks of a free speech that speech means only speech and does not mean, shall we

say, broadcasting. Only the Court can interpret the meaning of the word. We should not bind the Court.

I think—I would like to ask, however, the question that Ms. Neuman has raised. And this is on page 4 Ms. Neuman. And let me just preface this by saying there is a measure of distortion going on in the last few years, that the nongovernment schools, the nonpublic, which for generations—the largest body of them—have for generations done nothing more than educate the children the immigrants bore in our large cities.

They still do. In the central cities, in the Northeast in particular, they educate the children of the poor. Suddenly they are being turned into elite academies; this is marvelous transformation. And it seems to me so unjust, and I am not in any way suggesting that you are being unjust. But let me ask you, what does it mean when you say, for instance, that 11 percent of the 13 year-olds in the public schools came from homes in which neither parent finished high school? The proportion in non-Catholic private schools is 1 percent.

Why did you leave out 60 percent of the private schools?

Yes, I know the people who go to Andover tend to have parents who went to high school. But isn't—wouldn't the proper comparison be private schools and public schools in their totality?

Ms. NEUMAN. Yes, I would be happier with that sentence if it were complete.

Senator MOYNIHAN. Yes, and that is all, I mean. This is not necessary. The idea to depict these schools as somehow elite schools—they are neighborhood schools. As a matter of fact, in many parts of our country, they educate the poorest children. And they do it pretty well.

The other thing I would like to ask you, just to help an old professor here. You say, while a third to more than half of the students in private schools live in advantaged areas, only 7 percent of public school children live in such areas. What is an advantaged area?

Ms. NEUMAN. I asked the same question when I went over this testimony. This comes from the National Assessment Study, and their definition of an advantaged area is an area where the level of people living in it—it is area outside of an urban area, primarily made up of people in professions.

Senator MOYNIHAN. What a lot of nonsense.

Did they seriously say that public money goes to finding out that 93 percent of public school students live in disadvantaged areas?

Ms. NEUMAN. Yes, sir.

Senator MOYNIHAN. Those are junk data.

I don't press you on it. I don't blame you. Don't defend what is not defensible, and I only mean to say that a lot of this kind of talk about only 7 percent of public school students live in advantaged areas. You would think we were a bunch of, my God, the life we live in this terrible country.

Ms. NEUMAN. Well, I would—there probably aren't that many advantaged areas in the country.

Senator MOYNIHAN. Well, to describe only people who live in Chevy Chase as somehow not being miserable misses the point of our country, doesn't it?

Ms. NEUMAN. Well, I would like to add on a personal note. I happen to live in an area where there is no choice; a parent would have no choice whatsoever, in terms of choosing private education, because I live in a rural area in a small town. There are no private schools; no parochial schools.

There is one public school system there and because that is our only choice, the parents absolutely have to be involved in this school system, because we can't send our children anywhere else unless we want, you know——

Senator MOYNIHAN. You don't live in an advantaged area then.

Ms. NEUMAN. Obviously not.

Senator MOYNIHAN. I mean, I would talk to my husband about that.

Ms. NEUMAN. Well, since he shares your profession, he doesn't have much choice.

Senator MOYNIHAN. I don't have much choice either.

May I just make one other point, and let's for heavens sake be cheerful on these matters.

The idea that the parochial schools are somehow run in a sort of authoritarian way and they don't have any school boards, and they don't have any representation of their communities—is just an idea that comes to one group of people not knowing another group of people in this country. And we are a very diverse country. But all those schools have school boards and they are chosen about the way schools boards are chosen. And they serve very much the same school boards serve.

Ms. BRAVEMAN. They have individual boards of trustees, certainly, but they have no larger public to which they are accountable or responsible.

Senator MOYNIHAN. No, but in a very legitimate sense in which a community involved chooses people, these are very representative, recognizable American institutions.

People don't know that because they are——

Ms. BRAVEMAN. I didn't say that. Some private school boards may be very good and very representative.

I know some who are.

Senator MOYNIHAN. Well, I am not going to quarrel over this.

Ms. BRAVEMAN. But to equate them with elected boards of education who have control over budgets and who are responsible to an entire community is not fair.

Senator PACKWOOD. I think, Senator Moynihan, all you are saying is parents who are on the equivalent of the board of directors of the St. Rose Parish Church were chosen in a reasonably democratic fashion, and they are reasonably representative of the community.

Senator MOYNIHAN. They are recognizable American institutions.

Senator PACKWOOD. Senator Bentsen.

Senator BENTSEN. Ms. Neuman, take heart. I found much of your testimony quite defensible.

Ms. NEUMAN. Thank you.

Senator BENTSEN. I enjoyed it and I agreed with much of it. Each of us is touched with our own personal experience. I went to a small rural school. There wasn't any choice but public education. But my children were reared in a large city. They went to both

public schools and they went to parochial school. They both render a great service.

But I am deeply concerned about what is happening to the public school system in our country.

I am not here to debate history of what I see happening and the exodus I see, of those who are well to do, from the public school system to the private school.

My concern is tuition tax credit hastens that. We have more of the disadvantaged and more of the poor, who are the residual in the public school system. That is why I support the position you take.

It is a situation that I see becoming worse day by day. So, what I can do to contribute to the bolstering of the public schools system, I will. There is much that I understand the need and the contribution of the private school.

I wish I could be here for all the testimony, but my problem is I have the Clean Air Act before the Environmental Public Works Committee. We are doing markup there.

Thank you very much for your contribution.

I know that my friend over here on the right is just as sincere and just as strong in his viewpoint and much more articulate.

Senator PACKWOOD. Thank you very much.

Gentlemen, let me ask you a question again. I don't want you to respond with Everson. I know those decisions. I read those decisions. I don't know Nyquist maybe as well as you do, but I read it more than several times.

Explain to me in lay language why it is constitutional if I give $500 to my church and take a deduction, but it is not constitutional if I give $500 to my church and school and take a deduction?

Mr. LANDAU. The ACLU takes the position it should not be constitutional for you to take a deduction for giving to your church.

We take the position that there should not be tax exemptions for religious property.

Senator PACKWOOD. Let me ask you this. In your mind, you can consistently make no difference? They are both unconstitutional?

Mr. LANDAU. Right.

Senator PACKWOOD. Well, I come to the conclusion the other way around, if the first is constitutional, the second has to be. It is less of a——

Mr. LANDAU. Well, the problem is the Supreme Court decided tax exemptions first, in 1970, and then it went on and said, we draw the line there. Whether or not this was logical is another question, but they did come up with those distinctions saying that the tax exemption affected a neutral class because it was just not——

Senator PACKWOOD. Well, that is a tax exemption as opposed to the constitutionality of the deduction that I give. I can understand their reaching a decision on the exclusion of church property from taxation or whatever. But I cannot fathom the difference between my giving $500 to the church, for which they pay the minister or whatever they do with it, and giving $500 to the church, for which they pay a teacher.

When, in deed, the principal purpose of the church is to indoctrinate, and it is only a partial purpose of the school.

Mr. LANDAU. Well, I think there are contributions which you can make or that could be structured in a way which would for secular purposes, which the church engages in.

If the church runs a hospital, for example, where there is no religious activity going on whatsoever.

Senator MOYNIHAN. Religious activity in a hospital where people are dying every day. I think you have not been in a hospital lately.

Mr. LANDAU. No; I am saying there are programs the church is engaged in—maybe it is giving food to the poor. I am just trying to come up with an example.

Senator PACKWOOD. Well, I can go further than that. If instead of giving my money to the church and earmarking it for the school, I simply give it to the church and they run the school, then that is constitutional.

Mr. LANDAU. If the money goes for secular——

Senator PACKWOOD. No, I give the money to the church. The church runs the school. My contribution is tax deductible.

Mr. LANDAU. That's right.

Senator PACKWOOD. It is not unconstitutional. But if they separate it and they say "$500 for the church and $500 for the school," the second part becomes unconstitutional.

I cannot fathom the logic.

Mr. LANDAU. I think we would agree with that. We would come out on the opposite end of what is constitutional and what is unconstitutional.

Senator PACKWOOD. Mr. Puckett. I would appreciate your comments.

Mr. PUCKETT. I think the question of church taxation or nontaxation, the deductibility of contributions and all, is something to be very carefully examined. I think you have pointed up the flaw and the inconsistency. I think it has to have a fresh look at it.

Senator PACKWOOD. Do you think that contributions to churches should be unconstitutional?

Mr. PUCKETT. I think we would have to be very careful in defining what the church is doing and its function and so forth. I think there is a constitutional question.

Senator PACKWOOD. We don't define it now. You can give it to the church and it is constitutional.

Mr. PUCKETT. That is precisely what I am saying. That there needs to be an examination of what the church does and what——

Senator PACKWOOD. Do you think it is unconstitutional if they use it for purely church functions, that is, indoctrination in the faith?

Mr. PUCKETT. Yes, sir. I hold to the position that church property used for worship services or specific religious education, should be tax exempt.

Senator PACKWOOD. Now, I am not talking about exemption. I am talking about my contribution to the church. If they use it for the sole purpose of indoctrination, you are saying that is OK. That is constitutional.

Mr. PUCKETT. It is presently, sir. But I am saying it ought to be examined.

Senator PACKWOOD. Do you think it ought to be constitutional?

Mr. PUCKETT. I have a real problem with it.

Senator PACKWOOD. Now let me ask, if I might, both Ms. Goldsmith and Ms. Braveman a question. You both made reference in your statements—let me find it here—that inevitably control is going to follow in the school system if we allow the tuition tax credits.

Do I paraphrase what you say, roughly correctly?

[No response.]

Senator PACKWOOD. Why has that not followed with control of the churches?

Why, if we allow me to give money to the church and deduct it, has Government control of the church not followed?

Ms. BRAVEMAN. I draw a distinction in terms of the mandated nature of education.

Senator PACKWOOD. The mandated nature of what?

Ms. BRAVEMAN. Attendance at elementary and secondary school is mandated.

Senator PACKWOOD. No, but your statement is that the control follows the money.

Ms. BRAVEMAN. Yes. I draw the distinction between the church and the school in that attendance at a school is mandated, mandated by State governments, and because of the mandate there is an additional need to control. There is no mandate to attend church.

Senator PACKWOOD. And because of the mandate, the control follows, that you must go to school?

Ms. BRAVEMAN. Yes, the combination of the mandate, the money and attendance, absolutely.

Senator PACKWOOD. My time is up.

Senator Moynihan.

Senator MOYNIHAN. Well, could I simply point out to you that because education is schooling, is mandated up to a certain year, there is scarcely a private school that I am aware of, they are public schools in every sense save in their sponsorship, that is not filled with regulations.

I mean, do you think the State of New York just lets anybody open up a school, particularly those that have been there for two centuries and say, "Since we are paying for our own way, we don't have any fire escapes around here."

Ms. BRAVEMAN. The State of New York is full of mandates and regulations, many of which I have been fighting for many years, and if the State of New York finds that, in any way, its taxpayers are putting more money into the nonpublic schools, you can rest assured that Albany will attempt to control those schools. They did it in the past.

Senator MOYNIHAN. They are doing it now.

Ms. BRAVEMAN. They will do it more.

Senator MOYNIHAN. But let me ask you this. I would like to pursue the points that the chairman made very well. Mr. Landau, it is the view of the American Civil Liberties Union that a contribution to a church ought not to be tax deductible by a citizen?

Mr. LANDAU. To a religious organization.

Senator MOYNIHAN. To religious organizations. Ms. Braveman, is that your view? Is that the view of the American Jewish Committee?

Ms. BRAVEMAN. No, it certainly isn't.

Senator MOYNIHAN. Why is it not? Why do you seem to agree on these all so much, but you don't agree on that?

Ms. BRAVEMAN. No. This country is a very complex society.

Senator MOYNIHAN. We can agree on that.

Ms. BRAVEMAN. Its very complexities are the very things we find very exciting. We are run by a series of compromises.

A compromise has been tax exemptions for religious institutions. I think it does cause a lot of problems. There are constant arguments in the State legislatures about it. We have bills relating to cults right now where Government is attempting to define religion.

I think it is a compromise. It has served the fabric of American society well. The issue of tax credits for elementary and secondary education is not the same kind of compromise.

Senator MOYNIHAN. Well, may I just say, let me just speak to you very clearly here. I don't think that Mr. Landau would view these issues as settled by compromise. You think they are issues of principle, don't you?

Mr. LANDAU. That's true.

Senator MOYNIHAN. And they are constitutional issues.

There was a great New York Congressman, of Celtic ancestry, who once went down to see Grover Cleveland, at a time when he was President. He proposed certain action he had in mind.

President Cleveland said, "But, that would be unconstitutional." Our friend from Manhattan said, "Mr. President, what's the Constitution between friends?"

Now that is a compromise, you see. But that is not the ACLU view of the way we deal with the Constitution. Right?

Mr. LANDAU. That's correct.

Senator MOYNIHAN. You think it is the principle.

Mr. LANDAU. Yes.

Senator MOYNIHAN. Ms. Braveman, the ACLU is very much of the view that a donation to the American Jewish Committee would not be deductible. Do you think that is true? Do you think that should be done?

Ms. BRAVEMAN. That is what they believe?

Senator MOYNIHAN. That is what they believe.

Senator MOYNIHAN. Do you agree with that?

Ms. BRAVEMAN. No, of course not.

Mr. LANDAU. I don't think that is what I said. I said a religious institution is different.

Senator MOYNIHAN. The American Jewish Committee is a religious institution. Let me assure you of that.

Ms. BRAVEMAN. It is a civic and communal institution.

Senator MOYNIHAN. Yes. But, his view would outlaw donations to your organization.

Ms. BRAVEMAN. I would fight him very strongly.

Senator MOYNIHAN. You would fight him very strongly.

But now, this is what I mean. It is not quite a compromise to say that the institutions I am associated with should have a tax deductibility, but the institutions you are associated with should not.

Since we have some that are and some that aren't, that is a compromise. No, that is not a compromise. That is looking after us and not looking after other people.

Why can't you see the same principle that you see very clearly the principle when it is applied to your own institution, what about these other institutions?

Ms. BRAVEMAN. That is not fair. There are lot of issues on which I disagree with the Civil Liberties Union and I still contribute as much money as I can to them. I think they are in the business of presenting advocate's position on very important constitutional issues.

Senator MOYNIHAN. No, I am not talking about the Civil Liberties Union. We are all in favor of them.

Are you tax deductible?

Mr. LANDAU. Yes.

Senator MOYNIHAN. Not you. Nobody takes you off their—— [Laughter.]

Mr. LANDAU. There is a foundation. There are two organizations; one is tax deductible and one is not.

Senator MOYNIHAN. You get tax deductions. The American Civil Liberties Union goes around saying other people shouldn't get tax deductions, but you do yourself.

We in the Finance Committee find this to be a universal principle that whatever people propose for others they frequently think is all right for themselves.

Ms. BRAVEMAN. I didn't make that point. I came here to talk about tax credits as a matter of public policy. I think that as matters of public policy they are not specifically related to the issue of tax exempt status.

Senator MOYNIHAN. We very much agree that these are two issues. Is it a good public policy and then, of course, is it a constitutional one.

Would you think it was constitutional?

Ms. BRAVEMAN. I am not a constitutional lawyer. From my reading of the cases, particularly of the New York State tax credits law declared unconstitutional I suspect that the court will be deeply divided and will probably rule it unconstitutional.

I think that as a matter of public policy, though, if the public policy you have in mind is to help the nonpublic schools, I think that it can be done in matters that are less clearly unconstitutional.

Senator MOYNIHAN. You said "less clearly." You just told me you thought the court would be deeply divided. That wouldn't be very fair.

Ms. BRAVEMAN. Scrub the "less clearly." In matters that would not be as constitutionally suspect and really could help both public and private schools.

I think public policy that provides tax credits for elementary and secondary schools is one that has not been thought through very carefully. If one truly believes in helping nonpublic schools, as I do, there are other ways to try.

Again, I would submit some consideration of the shared time and dual enrollment concept.

Senator MOYNIHAN. Fine. All I would ask is that we distinguish the issue of public policy from the constitutional issue, and not always interpose the constitutional issue.

Already the present administration I am sorry to say, having committed itself to making nonpublic schools eligible for block grant aid, said, no, it couldn't do that because it wouldn't be constitutional.

You can't find out what is and is not constitutional until you pass a law. The court does not give advisory opinions.

Thank you.

Senator PACKWOOD. Thank you very much for taking the time. We will take up again at 1 o'clock.

[The statements follow:]

TESTIMONY OF

DAVID LANDAU, LEGISLATIVE COUNSEL

AMERICAN CIVIL LIBERTIES UNION

Mr. Chariman and Members of the Committee:

The American Civil Liberties Union appreciates the opportunity to present its views on the subject of S.550, a bill which provides for tax credits for parents who send their children to private schools. The ACLU is a non-partisan membership organization dedicated to the preservation and enhancement of the Bill of Rights. Throughout its history the ACLU has been concerned with the First Amendment protection for religious freedom and guarantee of separation of church and state. It is our judgment that under Well-established Supreme Court precedent, S. 550 would be a law respecting an establishment of religion and would therefore violate the First Amendment. We oppose its enactment.

S. 550 proposes a special tax benefit for parents who send their children to private sectarian schools. We believe the First Amendment was designed to prohibit the government from aiding and advancing religion in this way. Just as the government may not prohibit the free exercise of religion including sending children to private religious schools, (Piere v. Society of the Sisters, 268 U.S. 510 (1925), it also may not advance any particular religion or religion in general. School District of Abington Township v. Schempp, 374 U.S. 203 (1963). The government must remain neutral on the issue of religion. Because over 85% of private elementary and secondary schools in this country are religiously affiliated, S. 550 would have the direct effect of advancing religion. It therefore cannot be squared with the principal of neutrality toward religion embodied in the Establishment Clause of the First Amendment.

The Supreme Court has agreed with this view of tax benefits for private religiously affiliated schools. We have attached for the record a detailed analysis of current case law in the area, which I will only briefly summarize here. The principal authority in this area is Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 657 (1973). In that case the Supreme Court invalidated New York state's tuition tax credit as a violation of the Establishment Clause of the First Amendment. The Court reached this result by applying a three-prong test for determining an establishment of religion: to survive constitutional attack, the statute in question first, must reflect a clearly secular purpose; second, must have a primary effect that neither advances nor inhibits religion; and third, must avoid excessive entanglement with religion. Lemon v. Kurtzman, 403 U.S. 602 (1971).

The Court held that the primary effect of the tuition tax credit was the direct advancement of religion. Since 85% of New York's non-public schools were religiously affiliated, the tax credit represented "a charge made upon the state for the purpose of religious education," 413 U.S. at 791. They also noted that tuition tax credits carried and gave potential for entanglement in the issue of aid to religion 413 U.S. at 794.

There are several features of the Nyquist decision, which are of particular relevance here. First, the Supreme Court stated that the label given to statutory scheme such as "tax modification," "tax deduction" or "tax credit" was unimportant. The crucial factor was that the state had provided a special tax benefit for parents who send their children to private religious

schools. S. 550 is identical to the New York statute in this respect. Second, there was no attempt to restrict the credit to the portion of the tuition which was used exclusively for secular purposes. S. 550 also does not limit the credit to that portion of the tuition which is used exclusively for secular purposes. Third, the fact that the credit is taken by parents is not constitutionaly significant. As Justice Powell stated for the majority, "the effect of the aid is unmistakably to provide desired financial support for non-public sectarian institutions." 413 U.S. at 783. Finally, the entanglement concerns expressed by the court in Nyquist are greatly magnified under the federal proposal because the tax credit has a far higher limit - $500 - than the New York law which had aid up to $50 for elementary school students and double that for high school students.

The Supreme Court has not retreated from the Nyquist decision which has been widely recognized by the lower federal courts.

See Public Funds for Public Schools of New Jersey v. Byrne, 590 F. 2d 514 (3d Cir. 1979), Rhode Island Federation of Teachers v. Worberg, 479 F. Supp. 1364 (D.R.I. 1979), Kosydar v. Wolman, 353 F. Supp. 744 (S.D. OH. 1972).

We believe the case law in this area to be fundamentally sound. It is rooted in the history of this nation which was formed in part to escape from the tyranny of government - advanced religion. The separation of church and state is a cornerstone of our constitutional democracy. We urge Congress to honor this constitutional principle and reject the special tax benefits for private religious schools which would be enacted by S. 550.

Thank you for the opportunity to present our views

AMERICAN CIVIL LIBERTIES UNION

Washington Office

February 1981

MEMORANDUM

UNCONSTITUTIONALITY OF TUITION TAX CREDITS
UNDER THE FIRST AMENDMENT

The issue of the constitutionality of tuition tax credits for private elementary and secondary schools[1] is a matter of settled law. In 1973, the Supreme Court invalidated New York state's tuition tax credit as a violation of the Establishment Clause of the First Amendment. Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 65 (1973). This 6-3 decision means that the Supreme Court would quite clearly strike down any similar federal tuition tax credit. The Court's opinion was authored by Justice Powell and joined in by Justices Douglas, Brennan, Marshall, Stewart and Blackmun. Chief Justice Burger and Justices White and Rehnquist dissented.

The Nyquist case involved a challenge to provisions of the New York State Education and Tax Laws which provided,

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1. This memorandum concerns only the constitutionality of tuition tax credits for nonpublic elementary and secondary schools. The Supreme Court has not considered the issue of credits for private collegiate education.

The New York statute did have a secular purpose. Although the state had a legitimate interest in promoting pluralism in education, the primary effect of the statute was the direct advancement of religion. Writing for the Court, Justice Powell likened the tax credit to the cash reimbursement for tuition enacted under a separate section of the law and also invalidated by the Court. Since 85% of nonpublic schools were religiously affiliated, the tax credit represented "a charge made upon the state for the purpose of religious education." 413 U.S. at 791.

There was no attempt to restrict the credit to the portion of the tuition which was used exclusively for secular purposes.[8] The credit could be taken for that portion of the tuition which went to pay the salary of the employees who maintained the school chapel or the cost of renovating classrooms in which religion is taught. Indeed, it was the function of the law to provide assistance to private schools, the majority of which were sectarian. And, even though the tax benefit went to the parents and not the schools, the purpose of the benefit was to insure that parents still have the option to send their children to religiously oriented schools. Thus "the effect of the aid is unmistakably to provide desired financial support for nonpublic sectarian institutions." 413 U.S. at 783.

The Court sharply distinguished tax exemptions for property used solely for religious purposes which had been previously upheld in Walz v. Tax Commission, 397 U.S. 664 (1970). It stated that such exemptions, which covered all property devoted to educational, charitable or religious purposes, were extended to a large and neutral class of beneficiaries. The class of organizations that benefited from them was not composed of exclusively or predominately religious institutions. Tax credits, on the other hand, would flow primarily to parents of children attending sectarian nonpublic schools. Rather than having a general tax status, tax credits are special benefits. As Justice Powell wrote, "Special tax benefits...cannot be squared with the principle of neutrality established by the decisions of the Court. To the contrary, insofar as such benefits render assistance to parents who send their children to sectarian schools, their purpose and inevitable effect are to advance those religious institutions." 413 U.S. at 793.

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8. The Court noted that it would be impossible to impose upon religious institutions restrictions on use of the tuition. 413 U.S. at 714.

for the purpose of the Establishment Clause. The Court applies a stricter test for aid to nonpublic elementary and secondary schools.[10] See L. Tribe, American Constitutional Law, Secs. 14-19, 14-12 (1978)

The Supreme Court has not retreated from the Nyquist decision, which has been widely recognized by the lower federal courts.[11] Under the three-prong test used in Nyquist to analyze statutes which are challenged under the Establishment Clause, any proposal for federal tuition tax credits for private elementary and secondary schools violates the Establishment Clause of the First Amendment and is therefore unconstitutional.

David E. Landau
Legislative Counsel

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10. Compare, Roemer v. Board of Public Works of Maryland, 426 U.S. 735 (1976) (upholding annual noncategorical grants to state accredited private colleges, including religiously affiliated institutions, provided that none of the state funds is utilized by an institution for sectarian purposes and that the institution does not award only seminarian degrees); and Wolman v. Walter, 433 U.S. 229 (1977) (striking down a Ohio statute supplying nonpublic elementary and secondary school students with instructional materials and equipment and field trip services).

11. The overwhelming majority of lower federal courts before and after Nyquist have declared that state statutes which provide tax benefits to parents of nonpublic school children violate the First Amendment. See Public Funds for Public Schools of New Jersey v. Byrne, 590 F.2d 514 (3d Cir. 1979) (striking down New Jersey's granting of deductions to parents of children attending nonpublic schools), Rhode Island Federation of Teachers v. Norberg, 479 F.Supp. 1364 (D.R.I. 1979) (striking down Rhode Island statute granting tax deduction limited to amount of tuition to parents of children attending both public and nonpublic schools); Kosydar v. Wolman, 353 F.supp. 744 (S.D.O. 1972) (striking down Ohio statute granting tax credits to parents who had increased expenses in excess of those borne by parents generally in securing primary and secondary schooling for their children). Contra Minnesota Civil Liberties Union v. Roemer, 452 F.Supp. 1316 (D. Minn. 1978) (upholding Minnesota statute which granted tax deductions to parents of students attending both public and private schools.)

TESTIMONY OF

R. G. PUCKETT
Executive Director
AMERICANS UNITED FOR
SEPARATION OF CHURCH AND STATE

Mr. Chairman and Members of the Subcommittee:

My name is R. G. Puckett. I am executive director of Americans United for Separation of Church and State. We appreciate this opportunity to address the Subcommittee on Taxation and Debt Management on S.550, the tuition tax credit legislation.

Americans United is a 34 year-old organization dedicated exclusively to maintaining and promoting the free exercise of religion and its First Amendment corollary separation of church and state. We draw our membership from individuals of conservative and liberal political persuasions as well as the full spectrum of religious faiths.

It is this concern and regard for the First Amendment guarantees of religious liberty that has prompted our request to testify on this proposed legislation. While our interests center primarily in the area of the constitutional aspects of this bill, I will also address the economic and public policy problems surrounding it.

Our analysis of S.550 shows it to be unconstitutional. We arrive at this conclusion based on examination of year after year of Court decisions establishing a clear historical record that tax aid, given directly or indirectly to parochial or church-related schools, is aid to a church and, therefore, unconstitutional.

The Court has allowed only incidental aids, or auxiliary aids, which directly serve as benefit to all children equally and not the institutions. Aid of this type includes loans of textbooks, diagnostic services, school lunch programs, though it has been established in other Supreme Court cases that this aid may not go to schools which practice racial or other types of discrimination.

Beginning with the Lemon v. Kurtzman decision in 1971, the Court set down a three-part test of constitutionality for any plan to aid a parochial or church-related school. The law in question must reflect a clearly secular legislative purpose; it must have a primary effect that neither advances nor inhibits religion, and it must avoid excessive government entanglement with religion.

A series of decisions during the seventies has established a clear judicial precedent that the type of aid S.550 promotes is unconstitutional.

In the 1973 Nyquist case the Court ruled unconstitutional a New York State tuition tax credit plan similar to that proposed in S.550. It said that since the benefits go "to parents who send their children to sectarian schools, their purpose and inevitable effect is to aid and advance those religious institutions."

Further, there is no question that this tax aid advances religion since at least 85 percent of all nonpublic schools are church-related. The fact that the aid may be viewed as incidental in amount in light of high tuition rates does not alter its intent to aid religion. The fact that the aid is routed through the parents is also incidental. Parents serve merely as conduits of that aid, which eventually goes to the schools. We believe the child benefit theory could not pass constitutional muster in this case.

Sen. Moynihan said recently in his testimony before the Judiciary Committee's Subcommittee on the Separation of Powers on S.158, the Human Life Statute:

"The Supreme Court's interpretation of the Constitution has not always met with Congressional (or popular) approval. But this does not diminish Congressional responsibility to respect the established method of "correcting" a Supreme Court decision: amendment.

"The amendment process is lengthy. It is cumbersome. Its outcome, as we have seen with the Equal Rights Amendment, is far from guaranteed. But it is the only one legitimately available to us. To proceed in any other way to change a Supreme Court interpretation of the Constitution is to undermine the Constitution."

Certainly that statement could be applied in this situation. We are not suggesting at the same time that the amendment process be initiated to reverse our long history of not forcing individuals to pay taxes to a religion. Historically the American people have not shown much support for aid to parochial schools. For approximately the past 15 years Americans from Alaska to New York have consistently voted against such aid. The following are results of the statewide referenda of the past decade on government aid to parochial and private schools, elementary, secondary and postsecondary.

State	Year	Vote Against	Vote For
New York	1967	72.5%	27.5%
Michigan	1970	57%	43%
Nebraska	1970	57%	43%
Oregon	1972	61%	39%
Idaho	1972	57%	43%
Maryland	1972	55%	45%
Maryland	1974	56.5%	43.5%
Washington	1975	60.5%	39.5%
Missouri	1976	60%	40%
Alaska	1976	54%	46%

While postsecondary education has been treated differently by the courts from aid to elementary and secondary schools, we believe tuition tax credits are not appropriate form of aid. The majority of institutions of higher education agree with our opinion.

Beyone this, the genesis and promotion of this bill represents a certain confluence of religious and political interests. As the Supreme Court pointed

out in the 1971 Lemon parochiaid ruling, "in a community where such a large number of pupils are served by church-related schools, it can be assumed that state assistance will entail considerable political activity. Partisans of parochial schools, understandably concerned with rising costs and sincerely dedicated to both the religious and secular educational missions of their schools, will inevitably champion this cause and promote political action to achieve their goals. Those who oppose state aid, whether for constitutional, religious, or fiscal reasons, will inevitably respond and employ all of the usual political campaign techniques to prevail....

"Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect."

This bill could so entangle religion and politics that two centuries of progress in our country with regard to religious liberty and church-state separation could be obliterated.

Furthermore, to deny that denominational elementary and secondary schools do not discriminate by religion is to deny their very purpose -- to remain religiously homogeneous. Giving public funds to such schools through the tuition tax credit proposal in S.550 would result in federal government subsidization of sectarian division and divisiveness in education. The result of this could only be a decline in interfaith and community harmony and socio-economic crisis in education.

Beyond the obvious constitutional problems this proposed bill presents, there are numerous other problems it could create which I would like to focus on now.

One such problem is the costs of this proposed legislation. Projected costs range from 4.7 to 7 million dollars. This is lost revenue from non-stimulative credits, which do not generate new revenues, and which are uncontrollable and inflationary. It seems unconscionable to us that Congress would pass such legislation at a time when such drastic cuts are being made in the education budget.

Another problem involves the issue of regulation of parochial schools. There is no amount of federal funds that can be taken by these schools that will not be accompanied by increased regulations. Yet we have heard more outcries in recent years from the same people who are asking for the aid, complaining that government is regulating their churches and their schools.

It was stated in the bill that "this assistance can appropriately be provided through the income tax structure with minimum of complexity and governmental interference in the lives of individuals and families." Yet a stumbling block to that promise appears a few pages later. You state explicitly that schools receiving the aid may not exclude persons from admission on account of race, color or national or ethnic origin.

That would certainly require new policing efforts by some agency, such as the Internal Revenue Service or the Department of Education. If you will recall, there were great protestations and eventual legislation following attempts in 1979 by the IRS to remove the tax-exempt status of nonpublic schools which discriminate by race or which are racially out of balance.

Government bureaucracy and red tape would evolve around the inevitable regulations that would come with tuition tax credits and would entangle government with religion, precisely what our founding fathers were trying to prevent with the religion clause of the First Amendment.

Furthermore, this is the opposite effect the Administration claims it wants to return power to state and local control. No church could freely exercise its religious mission of educating its youth with government investigating its accounting books and the educational standards of their schools. Barbara Morris, a conservative activist and writer, warned in the Pro-Family Newsletter in April that the tuition tax credit plan is a "trap that will result in government control of all schools." Morris also noted that "providing information for such tax credits on 1040 or other tax forms will enable the government to identify every family with children enrolled in Christian schools as well as the schools they attend -- information they do not presently have."

The public schools were founded on the concept of a free universal system of education for every child, regardless of economic status, race, religion or ethnic background. The institution of public schools has been the foundation that has helped evolve a strong middle class in our country, one of the highest literacy rates in the world, and a chance for every citizen in this country to better him or herself.

This proposed legislation would completely upend that concept and tradition. The federal government currently spends approximately $160 per year per child and approximately $58 per private school child per year. This bill would add an additional $500 to the aid going to private school children -- up to $558 per child with none to the public school child. Further prospect for more money being funnelled into the program could result in state tuition tax credit legislation being passed.

Meanwhile, the public school child will still receive only $160 per child, which will still be reduced as the Administration cuts the education

budget. That is far from equitable, particularly in light of the fact that tuition tax credits will benefit only 10 percent of the school age population. And it will go primarily to upper income families, who can afford to send their children to expensive nonpublic schools and have a tax liability large enough to take advantage of a tuition tax credit.

Furthermore, how much is enough? Who is the final arbiter to decide that? If 50 percent of tuition costs to nonpublic schools is constitutional, then why not the full amount of tuition costs?

The amounts of the credits could escalate because parents would be encouraged to remove their children from public schools and place them in nonpublic schools to take advantage of the tax credit. This could force the costs of programs in private schools to increase, thus encouraging those schools to ask for a greater tax credit. Those schools could also raise their tuition rates to take full advantage of the credit.

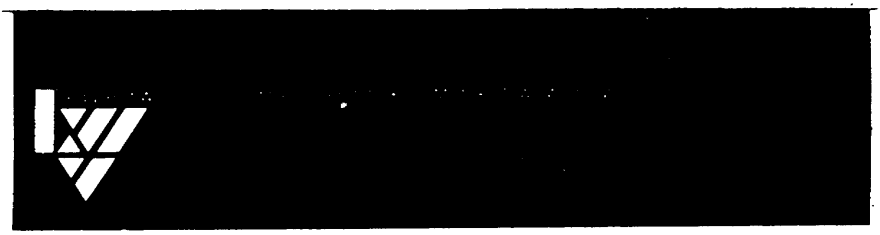
The result could be an educational civil war between the private and public schools for public funds.

At the same time the private schools are currently not required to follow minimum educational standards established for public schools. This aid would foster an elitist caste system of education in this country with the public schools becoming the dumping ground of those not acceptable to the private schools, such as the poor, the handicapped, and others.

That is why the idea that tuition tax credits will foster so-called needed competition between the public and private schools is so flawed. The roles of the public and private sectors in education are very different. Private schools do not have to follow standards of teacher qualifications, salaries, curricula, services, etc.

Beyond that the local citizenry would have no say in what happened to the private schools which are privately controlled far from the eye of the public meetings as with the boards of education of public schools.

We understand the problems that parents, who choose to send their children to nonpublic schools, have in paying high tuition rates. But the answer is not to provide public funds to those special interest schools. It is bad economic and public policy because it could create chaos in our educational system and destroy our long tradition of separation of church and state and the right to privately and freely exercise their religious beliefs. Americans United asks this Subcommittee to oppose S.550.



TESTIMONY BEFORE THE
SUBCOMMITTEE ON TAXATION AND DEBT MANAGEMENT
OF THE SENATE FINANCE COMMITTEE
ON THE
TUITION TAX RELIEF ACT OF 1981, S 550
BY
NANCY HEUMAN, SOCIAL POLICY DIRECTOR
LEAGUE OF WOMEN VOTERS OF THE UNITED STATES
JUNE 3, 1981

. Chairman, members of the Subcommittee, I am Nancy Heuman, Social Policy Director of the League of Women Voters of the United States. We are pleased to join other members of the National Coalition for Public Education in expressing the views of our members on the Tuition Tax Relief Act of 1981, S 550.

The League of Women Voters of the United States, a non-partisan citizen organization, has members in all 50 states as well as the District of Columbia, Puerto Rico and the Virgin Islands.

The League has opposed tuition tax credits since 1978, when the League national Convention, consisting of over 2000 League leaders from across the country, directed the national board to oppose tax credits for families of children attending

non-public elementary and secondary schools. Convention action was based on a two-pronged League position: support of equal access to education and support for desegregation as a means of promoting equal access to education.

In January 1981, the League reaffirmed this commitment by designating opposition to tuition tax credits as a major action priority. In support of this major action priority, League members across the country are writing letters to their members of Congress opposing tuition tax credits; meeting with members of Congress to discuss the issue and organizing local educational campaigns on tuition tax credits.

The LWVUS has held a position in support of equal access to education since the early sixties, and has promoted it at both the national and local levels through a variety of efforts. The League has supported a wide variety of federal programs enacted during the past two decades aimed at meeting the educational needs of the poor and minorities. We have also worked for a strong federal civil rights enforcement role, including support for busing as an option for implementing school desegregation.

At the local level, concern for education is high on the League's agenda. Based on the concern that a child's education should not be determined by the property wealth of his or her local school district, nearly every state League has studied the issue of school finance and is involved in identifying inequities in the ways in which schools are funded.

Local League efforts in support of peaceful school desegregation have been constant and tireless--involving everything from filing court suits, establishing community coalitions, and running rumor control centers.

Now, I would like to outline the reasons why the League is adamantly opposed to tuition tax credits. We believe that tuition tax credits would undermine America's traditional system of tuition-free, universal public education. First, providing such an educational system has long been the cornerstone of our American democracy. Our public schools open their doors to all types of students and serve a vital socializing process. In performing this role, our public schools must bear the special burden of educating all, including those children who are handicapped, have discipline problems, or may be otherwise difficult or expensive to educate. Private schools on the other hand, are under no such obligations and exclude these children. For example, in Iowa the public schools have been leaders in providing special education for handicapped and disabled children. Judy Dolphin, School Finance Director of the Iowa LWV stated:

> Iowa's special education program works because of the great heterogenity of the public schools' population. Tuition tax credits would encourage parents to enter their children in private schools. Thus, leaving the public schools with children the private schools would not accept--those with learning disabilities, physical handicaps and emotional problems. Tuition tax credits would destroy Iowa's special education programs.

A second reason the LWVUS opposes tuition tax credits is that private schools also already primarily serve the advantaged, and tuition tax credits would actively promote this pattern. The fact that public schools serve somewhat different clientele than private schools was highlighted in an April 7, 1981 study by the National Assessment of Education Programs.[1]

The study revealed that public, private-Catholic and private non-Catholic school populations contain different proportions of students from various socioeconomic backgrounds. For instance, 11% of the 13-year-olds in the public schools came from homes in which neither parent finished high school; the proportion in non-Catholic private schools is 1%. Similar proportions exist for other indicators of socio-economic status. While a third to more than half of the students in private schools live in advantaged areas, only 7% of the public schools students live in such areas.

Since tuition tax credits would be a reimbursement for tuition costs, they would encourage middle and upper middle income class families to enroll their children in private schools; thus creating an educational caste system. The Packwood-Moynihan proposal would allow an individual to take a tax credit equal to 50% of the educational expenses paid by him/her during one year up to a maximum amount of $500 per student. Given the expense of a private school education, this current proposal would provide only a partial reimbursement for tuition costs. Therefore, most low-income families would still not be able to afford to send their children to private schools, leaving the public schools with an increasingly larger percentage

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[1]National Assessment of Educational Progress, Reading Achievement in Public and Private Schools: Is There A Difference? A Special Analysis of the National Assessment Reading Data (Denver, Colorado, 1981). p. 1.

of lower income students. Sociologist James Coleman's new study of private high schools, for example, shows that families with incomes above $38,000 a year are more than four times as likely to send their children to private schools than families with incomes under $7,000.[2] A case in point is Nashville, Tennessee where the number of needy children in public schools is growing. Rosalind McGhee, President of the LWV of Nashville, reports that:

> During 1970-71, 16% of the students in Nashville's public schools were eligible for the free lunch program. By 1980-81, 44% of the public school students were eligible. Clearly, those who will not benefit from tuition tax credits are a growing proportion of the school population.

Tuition tax credits would then be a federal subsidy created to provide assistance for the parents of a small percentage of the nation's students, only 11.3% of the total student population, including many of the most economically advantaged students in the country.

Third, the League believes tuition tax credits are inconsistent with our nation's commitment to promote school desegregation. Tuition tax credits would have a particularly disastrous impact on public schools in desegregated school districts to the detriment of a strong integrated education system. In many communities "segregation academies" have been established to thwart desegregation and promote "white flight." Moreover, Congress has repeatedly hampered whatever efforts the Internal Revenue Service has made to deny tax-exempt status to such racially discriminatory private

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[2] Coleman, James S. Private and Public Schools, Chicago: University of Chicago, 1981.

schools, therefore, tax benefits are flowing to these schools. We are appalled to think that the Congress would further promote financial support of such institutions. There is growing evidence in a number of desegregated school districts that white flight has stabilized or declined, but establishment of tuition tax credits would erode the efforts of parents and community organizations to establish quality integrated education. Echoing the national League's concern that tuition tax credits would erode much of the positive gains public schools have made toward desegregation, the Nashville, Tennessee LWV contends:

> ...that the tax subsidy is a powerful incentive for parents to leave the public schools. Nashville made considerable progress in implementing desegregation. Initially there was considerable "white flight" but enrollments have now stabilized. In October 1980 private school enrollment was 14,882 while the public school enrollment steadied at 68,000. Thus, Nashville's 20% plus private school enrollment is almost double the national average of 10%. This is a clear demonstration of a trend which began in earnest at the time of Nashville's 1970-71 court ordered busing for desegregation. Of the 43 private schools included in the October 1980 count, 40% of these schools have been founded since 1969. Nine of these schools have been established after implementation of the 1971 court order to integrate our public schools.

Finally, the League believes tuition tax credits are a massive expenditure that our nation cannot afford. They would cost approximately $2.7 billion (includes K-12). These tax credits would be in the form of non-stimulating credits; that is, credits that do not in turn generate new revenues. This is a massive amount of lost revenues--approximately one-third of all funds provided by the federal government to support education in our country. We find it unconscionable that the Administration advocates tuition tax credits, which would primarily benefit upper income families, at the same time that it has ordered drastic budget cuts of 25% of federal aid to education at the expense of our neediest school children.

Furthermore, the federal government is already providing financial support to private schools. While the federal government's annual contribution to the public schools at present amounts to $160 per student, the federal government also contributes to private schools -- at least $58 for each private school student -- through existing education programs, such as school lunch, transportation, and aid to disadvantaged children.

In addition, the tax-exempt status of many private schools already gives them the equivalent of a considerable federal financial contribution.

In conclusion, the League of Women Voters is opposed to tuition tax credits because: they would inhibit equal access to education for all students; they would create an educational caste system; they would cripple efforts to achieve school desegregation and they are a massive tax expenditure our nation should not assume.

The American Jewish Committee
Institute of Human Relations · 165 East 56 Street, New York, N.Y. 10022 · 212/751-4000 · Cable Wishcom, N.Y.

Statement of the American Jewish Committee

before the Senate Finance Subcommittee

on

tuition tax credits for

non-public schools

by

Marilyn Braveman

Director of Education

June 3, 1981

ON BEHALF OF THE AMERICAN JEWISH COMMITTEE, I AM TESTIFYING IN OPPOSITION TO TUITION TAX CREDITS.

THE AJC IS A 75-YEAR OLD HUMAN AND INTEGROUP RELATIONS ORGANIZATION WITH OVER 40,000 MEMBERS FROM ALL PARTS OF THE COUNTRY, REPRESENTING A WIDE SPECTRUM OF VIEWPOINTS ON CIVIC AND JEWISH COMMUNAL ISSUES.

ATTACHED, FOR A FULL DESCRIPTION OF OUR VIEWS IS OUR PAMPHLET "RELIGION & PUBLIC EDUCATION" AND AN ARTICLE "WHY WE NEED CHURCH-STATE SEPARATION," BY AJC'S LEGAL DIRECTOR SAMUEL RABINOVE, PUBLISH IN REFORM JUDAISM FEB. 1980.

IN THE TIME ALLOTTED TODAY, I WILL LIMIT MY REMARKS TO THREE INTERRELATED ISSUES -- DOLLARS, ACCOUNTABILITY AND RELIGIOUS FREEDOM.

I- DOLLARS -- THE FEDERAL GOVERNMENT IS TRIMMING THE FEDERAL PORTION OF PUBLIC EDUCATION BUDGETS AT THE SAME TIME IT PROPOSES TUITION TAX CREDITS FOR NON-PUBLIC SCHOOL TUITION.

WE DO NOT BELIEVE THAT ADDED MONEY, IN AND IF ITSELF, WILL PROVIDE QUALITY EDUCATION. IN FACT, WE HAVE URGED SCHOOL BOARDS TO RESPOND REALISTICALLY TO THE FINANCIAL FACTS OF THE

DECADE, TO TRIM SPENDING AND TO DEVELOP MORE COST-EFFECTIVE METHODS OF PROVIDING SOUND EDCUATIONAL SERVICES DESPITE FEDERAL CUTS. BUT, AT THE SAME TIME THAT THE FEDERAL GOVERNMENT IS TELLING PUBLIC SCHOOLS THAT THEY MUST ABSORB CUTS IN FUNDS DESIGNED TO SERVE THE POOR AND DISADVANTAGED IT PROPOSES TO DIVERT TAX DOLLARS, AT AMOUNTS VARIOUSLY ESTIMATED AT FROM $4B TO $6B (BASED ON CURRENT ENROLLMENT PROJECTIONS) TO NON-PUBLIC SCHOOLS. IT IS MOST DIFFICULT FOR US TO RECONCILE THESE TWO POLICIES.

II- ACCOUNTABILITY -- PUBLIC SCHOOLS ARE CLEARLY ACCOUNTABLE TO THEIR COMMUNITIES. NON-PUBLIC SCHOOLS ARE NOT.

IT IS THE CLEAR DESIRE OF THE ADMINISTRATION TO RETURN CONTROL OVER PUBLIC SERVICES, INCLUDING PUBLIC EDUCATION, TO THE COMMUNITIES. IN SO DOING, THERE WILL BE A SHIFT IN FEDERAL FUNDS FROM PROGRAMS TARGETED TO SPECIFIC POPULATIONS AND PROBLEMS TO BLOCK GRANTS. THIS CAN CREATE SERIOUS PROBLEMS AS GROUPS COMPETE AGAINST OTHER GROUPS FOR THEIR SHARE OF THE DIMINISHING

DOLLAR. BUT THE RESPONSIBILITY TO SOLVE THOSE PROBLEMS IS RIGHTFULLY PLACED WITH ELECTED BOARDS OF EDUCATION, ACCOUNTABLE TO LOCAL TAXPAYERS, WITH OPEN BOARD MEETINGS, PUBLIC VOTES ON THEIR BUDGETS AND STRONG PUBLIC INFLUENCE OVER THEIR CURRICULUM.

NON-PUBLIC SCHOOLS, ON THE OTHER HAND, WERE DESIGNED TO BE FREE OF SUCH PUBLIC CONTROL. THEY ARE PLACE IN WHICH UNPOPULAR AND MINORITY VALUES CAN BE UPHELD AND TAUGHT.

III- RELIGIOUS FREEDOM -- ADDED FUNDS FOR NON-PUBLIC SCHOOLS WILL INEVITABLY RESULT IN ADDED CONTROL AND RAISE CHURCH-STATE PROBLEMS.

THE CONSTITUTIONAL ISSUES ARE DEALT WITH BY OTHERS ON THIS PANEL. WE SHARE THEIR VIEWS AND HAVE PARTICIPATED IN LAW SUITS WITH THEM. BUT WE HAVE AN ADDITIONAL EMPHASIS. WE BELIEVE THAT

RELIGIOUS FREEDOM INCLUDES THE FREEDOM OF PARENTS TO SELECT SCHOOLS THAT WILL EDUCATE THEIR CHILDREN ACCORDING TO THEIR OWN BELIEF SYSTEMS. NEITHER FEDERAL NOR STATE GOVERNMENTS CAN IN ANY WAY INTERFERE WITH, CONTROL OR REGULATE THE RELIGIOUS TEACHING IN SUCH SCHOOLS.

BUT IF PUBLIC FUNDS WERE TO FLOW TO NON-PUBLIC SCHOOLS, WHETHER DIRECTLY OR INDIRECTLY, THE FEDERAL GOVERNMENT WOULD BECOME OBLIGATED TO INSURE COMPLIANCE WITH OTHER FEDERAL POLICIES. AN EXAMPLE WAS THE RECENT EFFORT BY THE I.R.S., SIMPLY ON THE BASIS OF TAX EXEMPTION, AND NOT ON THE BASIS OF ACTUAL TAX DOLLARS, TO REQUIRE THAT WHOLE CATEGORIES OF SCHOOLS ENGAGE IN AFFIRMATIVE ACTION PROGRAMS. JEWISH ORGANIZATIONS AND OTHERS WERE ABLE TO PROTEST THIS BECAUSE WE DID NOT TAKE FEDERAL DOLLARS AND WERE ENTITLED TO CONTROL OVER OUR OWN CURRICULUM.

SURELY, THE PUBLIC WILL DEMAND THAT NON-PUBLIC SCHOOLS, ONCE THEY ARE FUNDED WITH PUBLIC MONEY, BE SUBJECTED TO THE SAME KINDS OF REGULATIONS AS PUBLIC SCHOOLS. SUCH ACTIONS BY THE FEDERAL GOVERNMENT OR THE STATES MUST INEVITABLY RESULT IN UNTOWARD INVOLVEMENT WITH RELIGION.

TUITION TAX CREDITS FOR NON-PUBLIC SCHOOLS ARE NOT JUST A SIMPLE TECHNIQUE TO HELP PEOPLE AVAIL THEMSELVES OF NON-PUBLIC EDUCATION. THEY COULD BE THE FIRST STEP IN A RADICAL CHANGE IN THE VERY NATURE OF AMERICAN EDUCATION AND AMERICAN PUBLIC POLICY AND DECISION MAKING. UNLESS YOU ARE FULLY PREPARED TO TAKE THAT STEP, WE URGE THAT YOU PAUSE AND CONSIDER ALL ITS IMPLICATIONS CAREFULLY. IF YOUR GOAL IS TO HELP PUBLIC AND NON-PUBLIC SCHOOLS, WE SUGGEST THAT A BETTER WAY IS THROUGH SHARED TIME, OR DUAL ENROLLMENT PROGRAMS AS DESCRIBED IN OUR PAMPHLET.

THE AJC IS WELL AWARE THAT PUBLIC EDUCATION HAS ITS PROBLEMS. BUT IT IS AN INSTITUTION THAT HAS SERVED US WELL. THE ANSWERS LIE IN STRENGTHENING RATHER THAN WEAKENING IT, AND WE REMAIN COMMITTED TO PUBLIC POLICIES DESIGNED TO DO SO. TUITION TAX CREDITS ARE A MAJOR THREAT TO PUBLIC EDUCATION AND TO RELIGIOUS LIBERTY.

MARILYN BRAVEMAN
DIRECTOR OF EDUCATION
AMERICAN JEWISH COMMITTEE
JUNE 3, 1981

81-620-24

National Coalition for
PUBLIC EDUCATION AND RELIGIOUS LIBERTY
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STATEMENT

NATIONAL COALITION FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY

on

TUITION TAX CREDITS

before the

SENATE COMMITTEE ON FINANCE

Wednesday, June 3, 1981
Joanne T. Goldsmith

[illegible] tax exempt under IRC

The National Coalition for Public Education and Religious Liberty represents 30 civil libertarian, educational, and religious organizations, all of whom support similar goals. A list of these organizations is attached to this statement.

Our member organizations are dedicated to preserving religious liberty and the principle of separation of church and state and to maintaining the integrity and viability of public education. Our primary interest is in protection of the guarantees of the First Amendment to the Constitution which speaks to the basic right of all Americans to practice religion without government coercion, involvement, or interference.

The National Coalition for Public Education and Religious Liberty wishes to be sure that this Committee and the Congress are aware that the great majority of Americans firmly oppose the use of government funds to help finance nonpublic schools. We hope that you will give full hearing and consideration to our point of view.

The organizations participating in this Coalition, representing a broad cross-section of the American people, have consistently opposed all forms of such financial assistance. They have expressed their opposition in many ways, including general educational activities, expressions of view to legislators, support of referenda barring aid to nonpublic schools, and initiation and support of litigation against those legislative measures that have been approved.

These efforts have been successful. The Supreme Court of the United States has invalidated all forms of nonpublic school aid

except textbooks, transportation, and health and welfare on the elementary and secondary levels.

The constitutional issue has been addressed by Leo Pfeffer, Legal Counsel to National PEARL. Rather than restate the relative issues, we would remind the Committee that we fully associate this organization with the statement submitted by Mr. Pfeffer.

The National Coalition for Public Education and Religious Liberty believes firmly that separation of church and state is good for schools and good for religion. To believe that federal control would not follow federal dollars is indeed foolhardy.

We understand that the particular proposal now before the Committee purports tax relief to parents, not direct aid to non public schools. We believe that this should be understood for exactly what it is: an attempt to circumvent the Constitution without in any way addressing the legitimate need for additional assistance for institutions of higher learning or public elementary and secondary schools.

The National Coalition supports the role of nonpublic schools their right to exist is not questioned -- but their right to tax credits or grants is. We do not believe it right or proper to ask the American taxpayers to support nonpublic schools which would have the effect of draining tax dollars away from the already underfinanced public schools.

There are those who argue that nonpublic school parents carry an extra burden, are somehow double taxed. Following that idea to its logical conclusion, then those who have no children should

not have the responsibility of paying for schools nor should those who don't drive an automobile pay for roads, crossing guards, or traffic lights.

Some say that the constitutional right to send a child to whatever school one chooses, public or nonpublic, loses its value because to choose the nonpublic school one must pay an additional fee. Does that make the constitutional right meaningless? We think not. The government does not subsidize newspapers or the distribution of leaflets. Does that make freedom of the press any less valuable? We think not.

We believe that we pay taxes for the public good. We are taxed for public purposes such as police, fire protection, roads, parks, medicare and public housing. We pay for schooling, for every child, not just our own. We believe this is good public policy.

We feel that the tuition tax credit proposal would have a discriminatory effect vis a vis public school parents and private school parents, in that it would be a distinct advantage to private school parents and might well trigger a stampede from the public schools to private schools. We feel that this could possibly have a corrosive effect on the public schools and could result in the public schools being populated almost entirely by the poor and racial minorities and the handicapped.

Therefore, we oppose this measure on consitutional grounds and on grounds of practical public policy.

[Whereupon, at 11:37 a.m., the hearing recessed, to reconvene at 1 p.m., the same day.]

Senator PACKWOOD [presiding]. The hearing will come to order. We will start this afternoon with a panel of parents, Helen Brice, Barbara Fields, Lydia Jones, Carmen Madden, Richard Sylvester, and Frances Bell. I might say Senator Moynihan said he would be a bit late, he apologizes if he misses your testimony, he will be here about 1:20 or 1:30 he said.

Do you want to start in the order that I read them off? Helen Brice? Go right ahead.

PANEL OF HELEN BRICE, WASHINGTON, D.C.; BARBARA FIELDS, WASHINGTON, D.C.; LYDIA JONES, LANDOVER, MD; CARMEN MADDEN, WASHINGTON, D.C.; RICHARD SYLVESTER, WASHINGTON, D.C.; AND FRANCES BELL, WASHINGTON, D.C.

Mrs. BRICE. Good afternoon. My name is Mrs. Helen Brice. I am a retired schoolteacher from the District Columbia public school system. I taught for 22 years in that system. My daughters began their formal education in public schools.

Despite considerable opposition from my fellow teachers, my husband and I decided to enroll both children in private schools. We did so because private schools teach moral values and help students make decisions which assist them in coping with the many conflicts they will face in daily life, especially social, racial, and moral conflicts.

In addition to this, private schools have an atmosphere of discipline, uncommon in most public schools, and are able to advance students to grade level or beyond.

Although my daughters are now out of college, I urge the support of tuition tax credits because this would afford many more parents with low income, assistance in choosing a nonpublic school education for their children.

During the summer I teach classes in enrichment courses in a private school. About 90 percent of the students are from public schools and they give up their vacation time to attend this program because it offers them curriculum material in reading, math, and English that they were not able to grasp during the school year.

Public school teachers have told me that students who attended this summer school achieved more in their classes than students who did not attend. They asked that it be continued.

My husband and I sacrificed to send our daughters to private schools with no assistance. I hope in the future parents will have assistance to help them make a choice in the education they wish for their children.

Thank you.

Senator PACKWOOD. Thank you very much. Barbara Fields?

Mrs. FIELDS. Good afternoon, my name is Barbara Fields. I am a divorced parent of two children, a daughter 16 and a son age 13.

We moved here from New York State—Westchester County—11 years ago. I have worked for the Singer Co. for 12 years, and am now store manager for one of the local branches, making approximately $13,000 a year.

My daughter did attend public schools here in Washington for 3 years, when I and other school officials noticed a change in her

attitude and her grades, even though she came from one of the best public schools in Larchmont, N.Y.

The school principal, knowing the potential she had, advised me to put her into a private school. She attended Our Lady of Victory School the rest of her elementary years, and is now attending Immaculate Conception Academy.

My son is attending Our Lady of Victory and is going to attend a Catholic high school.

You do not know how rewarding it has been for me to know that my children are getting the best education that I can give them.

They have had to do without many things because I could not afford to give to them due to the high tuition cost, uniform expenses, transportation expenses, not to mention registration fees and book fees.

I think I would move from this area if my children had to attend public school in Washington. Teachers in the parochial schools show more individual attention, take more time, and let you know right away if something is wrong.

Example: Dawn had to go to summer school for math. She did, and is now a "B" student in math. This could never have taken place in a public school unless big changes are made within the public school systems.

The tuition tax credit would help me and other parents further their education and to give my children and other children an incentive to learn.

Thank you.

Mr. PACKWOOD. Let me ask you if I could. What is the tuition at Our Lady of Victory?

Mrs. FIELDS. For my daughter tuition is $1,300 a year and my son's is $1,000 a year.

Mr. PACKWOOD. Is that because you have two children in school or is that one high school and one prehigh school?

Mrs. FIELDS. One high school and one prehigh school.

Mr. PACKWOOD. $1,300 and $1,000.

Mrs. FIELDS. Right.

Mr. PACKWOOD. Thank you very much. Lydia Jones?

Mrs. JONES. Good afternoon. My name is Lydia Jones and for me to be privileged to address this committee is doubly satisfying.

For years I have entered voting booths, pulled levers, and wondered if anyone really cared to hear my thoughts on any issue.

I work for Batelle Columbus Labs Washington Operations Office. I am the mother of, and have responsibility for, 7 children ages 6 to 15.

Five attend St. Margaret's School, one St. Patrick's Academy, and one Mackin Catholic High School.

I choose to sacrifice to keep them there because I believe it is an investment that will bring dividends that will last a lifetime for them and for me.

I am not materially wealthy, but I will continue to try to keep them in parochial schools.

To paraphrase Safeway Stores slogan, you get everything you want from a school and a little bit more.

They are on the receiving end of genuine concern and love and I watch as they in turn, learn to care about others as well as themselves.

They do without unnecessary things, usually, but not always, without complaints, because each in his or her own way understands the sacrifices entailed in keeping them in Catholic schools.

They want to be there. I want them there, and passage of this bill would aid me and other parents in continuing to provide this opportunity.

Thank you.

Mr. PACKWOOD. Do you mind if I ask the same question about tuition, what do you pay per child for tuition?

Mrs. JONES. At Mackin I get a reduced grant-in-aid so that I pay $650 for Carl. I have applied for a grant-in-aid for my daughter at St. Patrick's. I haven't heard as yet on that. St. Margaret's is $1,300 not counting the bus.

Mr. PACKWOOD. Right. Thank you. Carmen Madden?

Mrs. MADDEN. Good afternoon. My name is Carmen Madden. I am Puerto Rican and I am a housewife.

My husband works at Goddard Space Flight Center.

I have five children ranging in age from 5 to 11 years. My three oldest children attend Sacred Heart School. My youngest two attend public school.

As a matter of fact, I am and have been for the past 3 years, chairman of the neighborhood school council at the public school my children attend.

A few years ago, after conversations with other parents, and with teachers at the public school, and after examining the education provided by parochial schools, I determined that the parochial school offer a higher quality of education than the public schools.

It was then that I transferred my three oldest children to Sacred Heart. My assessment proved correct in that my children's scores on national tests rose steadily with each successive year at Sacred Heart School.

I was also pleased with the sense of values, respect for others, and discipline which Sacred Heart offered. The children themselves seemed happier and more secure at Sacred Heart than at the public schools.

The coming school year, I will be paying $1,215 tuition for the three children, and $180 registration fee. And by the way, if you have a copy of the written statement that I sent, there is a correction to be made there, because I quoted you wrong tuition there. This one that I am quoting now is the correct one.

Sometime within the next 2 years, my two other children will be transferred to Sacred Heart, since in my estimation the education at the local public school is only adequate for the first couple of years.

Because of a continual rise in taxes, inflation, and the cost of living, because of continuing to assure high quality education for our five children becomes increasingly difficult.

As a matter of fact, because the majority of parents at Sacred Heart School find it difficult to meet the cost of their children's tuition, several years ago, our pastor initiated a program whereby parents who work on fund-raising projects for the school, can

deduct a percentage of the amount they raise for the school from the children's tuition.

I therefore urge you to pass this bill and help the thousands of parents who must sacrifice for their children's education.

I thank you.

Senator PACKWOOD. Let me ask you again, about the tuition, because I want to make sure. The figure in your statement, the $1,700 was in error; is that correct?

Ms. MADDEN. No; it was off really by—what I will be paying this coming year is for tuition, $1,215. I will be paying $180 registration fee.

Senator PACKWOOD. For how many children?

Ms. MADDEN. That is for the three children.

Senator PACKWOOD. For the three children.

Ms. MADDEN. Right. You pay $1,250, did you say?

Senator PACKWOOD. Plus $180 registration fee for three children?

Ms. MADDEN. Right.

Senator PACKWOOD. Thank you very much.

Mr. Sylvester.

Mr. SYLVESTER. Good afternoon.

I am Richard Sylvester. I work for the U.S. Department of Commerce, Office of the Secretary, at 14th and Constitution Avenue, Northwest.

My annual income is $16,406. I support my wife and four children, three of school ages.

My older daughter, Angela Evette, attends St. Cecelia's Academy. The tuition at St. Cecelia is approximately $1,000. I think that is $995, to be exact.

Although we receive a grant, we pay a balance of $775, plus books, uniforms, and expenses that occur over the school year.

St. Cecelia is not within walking distance for Angela. Transportation and lunch are added expenses: $1.20 for transportation, and $1.75 for lunch.

My younger daughter, Kelly Theresa, and older son, Richard Joseph, attend Assumption Catholic School which is located in the hardcore poverty belt of southeast Washington. They are operating on something like a $180,000 budget, which requires $816 tuition for the second child. I understand next year it will be more. So the tuition will probably be more again next year.

Richard and Kelly also have added expenses of books, uniforms, transportation, and other miscellaneous expenses.

They too must ride a bus to and from school and must bring their lunch and buy a part of it, usually milk or any beverages they may have with their lunch.

My children are getting a good quality education at those schools. Both they and myself fear that going to the public school system in southeast Washington, where we live would really lessen their chance of having a good education.

Over the years I have cut corners and sacrificed even the necessities to keep my children in the parochial school. I can visualize even more difficult times in the future with the rising cost of living.

I am deeply concerned for my children's education. I myself have experienced both the parochial and public school system. I attend-

ed parochial school in the State of Louisiana from grades 1 through 8. At the parochial school there was discipline and a high quality of education.

There the teachers were concerned with education and teaching respect. Making transition into the public school system was not an easy task.

Very quickly I learned the teachers were concerned with their paychecks and not with your education. Even then the old statement was popular, "I got mine. You get your's the best way you can."

When I graduated from a public school, I went to the University of Southwestern Louisiana where very quickly I learned that I was only a good 10-grade student.

I would not want my children experiencing what I did. I would like them to have the type of education that would enable them to enter the university and make a good living, make good productive lives.

For that education, I chose the parochial school, especially because of my experience.

I am deeply in favor of the tuition tax credit bill.

Thank you very much.

Senator PACKWOOD. Is Frances Bell here?

[No response.]

Senator PACKWOOD. Let me ask all of you this. This morning we had lots of testimony that private schools are for the elite and for the rich and that this bill is not designed for the average person, but simply designed to help the rich pay for their very expensive education, and by that they meant tuition of $4,000 or $5,000 a year.

I take it that all of you fall into an average income class and that the tuition you cited are indeed accurate, and would be reasonably representative of the tuition at most of the private schools in the Washington, D.C. area. Is that a fair statement?

I realize it wouldn't be true at Cathedral or it would not be true at some of the other schools, but for most of the private schools around here, as far as you know, the tuition would be roughly average?

Ms. BRICE. It is about right.

Ms. FIELDS. Yes.

Ms. JONES. Yes.

Ms. MADDEN. Yes.

Mr. SYLVESTER. Yes.

Senator PACKWOOD. All of you, again, I am not going to ask you how much money you make, but all of you make an average income and certainly wouldn't fall into what anyone would call an elite category; is that a fair statement?

Ms. BRICE. Yes.

Ms. FIELDS. Yes.

Ms. JONES. Correct.

Ms. MADDEN. Yes, sir.

Mr. SYLVESTER. Yes, sir.

Senator PACKWOOD. Time and again we have to make this point over and over because the criticism is that this is a rich person's bill.

Ms. FIELDS. OK. I wouldn't mind telling you how much I make. I earn between $12,000 and $13,000 a year. I support my two children. A lot of times, I fall behind on tuition payments. The school is nice enough to me to have me work it out until I can catch up with my tuition payments. It is hard. My daughter makes her own clothes so she won't have to buy clothing. I have taught her how to sew.

Senator PACKWOOD. Yet, you will struggle this hard to keep your children in a parochial school system.

Ms. FIELDS. Yes, I will.

Senator PACKWOOD. Why?

Ms. FIELDS. Because I know they are getting the best. I have been in public school systems here in Washington where I have set up sewing machines, for instance, in a home economics class.

It took a whole hour for the sewing teacher to get a group of girls to sit down. By the time she got them to sit down the class was over.

No way am I going to put my children in a school like that.

Senator PACKWOOD. Ms. Brice.

Ms. BRICE. I would also like to say that the school from which I retired is in the inner city. There are many students there. I felt and I think my colleagues would agree with me, there were many students there who were capable of achieving on a very high level.

However, because the parents are of low income, they are not able to attend a parochial school.

I feel if this bill is passed, many of those children will have the opportunity. It is sad. We have good teachers in the public schools. Like all other professions, we have some bad ones. But we have many good teachers but the control just isn't there. The system will just have to change.

Senator PACKWOOD. Why isn't the control there? Why can you take the same children and move them over to a parochial school and the control is there?

Ms. BRICE. The philosophy is different. We are able to teach values in parochial schools, based on shall we say, religion.

In the public schools we are impinging on somebody's rights. We can't even start the day with a prayer.

Senator PACKWOOD. For years though that was not a problem in the public schools.

Ms. BRICE. It was no problem.

Senator PACKWOOD. And we didn't teach religion.

What has gone wrong in the last 20 or 30 years or whatever it started to go on that did not exist 20 or 30 years ago? Even then they were not teaching religious values.

Ms. BRICE. Well, when I came through the public schools in District Columbia.

Senator PACKWOOD. And you taught 22 years in the public schools.

Ms. BRICE. Yes. I grew up here in Washington, D. C.

We started the day with a prayer. The teachers did not teach religion. But I would say about 99.4 percent of the boys and girls went to Sunday school.

On Monday mornings we were asked to recite a verse which we had learned in Sunday school class. And then, how we were asked, would you use this in everyday living.

I think this in turn, started the roots.

I think now we just don't—we don't see the inner person of someone else to the point where we can be kind to people. We have come through a "now" and "me" generation. We are not giving to our fellowman and we are not teaching this to our children.

We have to teach the whole child.

Senator PACKWOOD. The public school cannot do this?

Ms. BRICE. We could, but do you know, I really had some administrators come in and say, "You don't do this."

Senator PACKWOOD. You don't do what?

Ms. BRICE. You don't teach religion. How can you teach a boy or girl right from wrong if the boy or girl asks you, "Well, why is this wrong? Why is this right?" You have to cite some moral laws there somewhere.

We have two kinds of laws. The law of the land and law of God.

Senator PACKWOOD. And that is not new.

Ms. BRICE. No, it is not.

I think those parents who would like for their daughters and sons to have a religious education, together with their academic, I think they should have this choice.

We have some good public schools, but not all boys and girls are exposed to those schools.

Senator PACKWOOD. I understand that Mrs. Shirley Cornish is here. Would you come up and make a statement, please?

Ms. CORNISH. Yes, I would like to make a statement pertaining to what you said about Catholic schools are for the rich. That is just not really true. I have seven kids and I am separated from my husband. My kids, four of them are out of school now. I still have three. All of them went from the 1st to the 12th grade. I was able to send all of them to school.

Senator PACKWOOD. Where do you work?

Ms. CORNISH. I work for C. & P. I am a clerk. I couldn't exactly tell you what my salary is right now. Not for the whole year.

To me, it is a struggle trying to put all of them from the 1st to the 12th grade. Right now, some of them want to go to college, but I am not able to send them because of the tuition going up in high school. I only have three left in high school. There are two at ICA and one at Magins. One graduated this year from the 12th grade.

He wanted to go to college, but he wants to stay out for the summer and help me pay the tuition for the other three.

It is very hard to pay rent, buy food, their clothes and books and so forth, and try to keep them in school also.

So, even though it is hard, I still try and do without.

So, to me, I don't think Catholic schools are really for the rich. It is just the people who are very interested in keeping their kids in school for a good education.

Senator PACKWOOD. Could you just give us a rough estimate of what you make.

Ms. CORNISH. It is about $324 a week.

Senator PACKWOOD. That is take home?

Ms. CORNISH. No. Taking home, I make $192.

Senator PACKWOOD. Thank you. Thank you very much.

I don't have any other questions. I just want to thank you very much for taking the time. I know it is inconvenient to come. What you said is very, very helpful to us. Thank you.

Ms. BRICE. Thank you.

Ms. CORNISH. Thank you, Senator Packwood.

Ms. FIELDS. Thank you, sir.

Ms. JONES. Thank you.

Ms. MADDEN. Thank you.

Mr. SYLVESTER. Thank you.

[The statements follow:]

Testimony

by

Mrs. Mary Ann Babendrier

My name is Mrs. Mary Ann Babendrier. I am the parent of thirteen children who have all attended parochial elementary and secondary schools. I have had children in the parochial school system for the last twenty-one years. My husband is employed by the Federal Government and in the early years of our marriage held two jobs in order to meet tuition, school transportation and other school expenses. Although several of our children are now in college or have completed their formal educational training, our school expenses last year were in excess of $7,000.00.

My husband and I believe that education must deal with the total person and religious education is essential to this concept. We believe that religious education reinforces home religious training and gives the individual sound principles for moral decision making.

Thirty years ago the climate of society was much different than it is today. We are concerned more than ever that education offer discipline and moral principles for decision making. I urge your support of Tuition Tax Credits to offer assistance to parents who wish to send their children to a nonpublic private or parochial school. My husband and I firmly believe it is a constitutional right to receive such support.

Testimony

by

Mrs. Frances Bell

Good afternoon, my name is Frances Bell and I am a resident of the District of Columbia. I am self-employed and I support myself and two sons. One son is in an elementary parochial school and the other son is in a parochial high school.

Last year my tuition, books and fees amounted to over $2,200. I am also a single parent and female head of the household, so the burden of tuition adds to our total financial burden.

The reason my children are in Catholic schools is one of education. It is my belief that if they are not sufficiently prepared to go into the world as adults and earn a substantial and decent living, then they in turn will not be decent, substantial adults. My earlier experience with the public schools was that the education is not adequate, and I shopped for parochial schools as you would shop for a house or a car, and I found schools to fit their needs and what I feel are their goals and desires.

I hope to try to keep them in parochial schools because of the education they are getting, the leadership training they are getting, and the religious background of these schools.

I also feel that without this they will not be able to get into the better colleges or into the better jobs as adults. If this particular bill passes, and because of my income and my financial situation, I think it will aid our family financially. It will aid us spiritually and will also aid us as a family because if our financial burden is eased, so will our life style.

I would also like to add that I am the total support of a disabled mother.

Testimony

by

Mrs. Helen W. Brice

Good Afternoon:

My name is Mrs. Helen Brice. I am a retired school teacher from the D.C. Public School System. I taught for twenty-two years in that system. My two daughters began their formal education in public schools.

Despite considerable opposition from my fellow teachers, my husband and I decided to enroll both children in private schools. We did so because private schools teach moral values and help students make decisions which assist them in coping with the many conflicts they will face in daily life, especially social, racial, and moral conflicts. In addition to this, private schools have an atmosphere of discipline, uncommon in most public schools, and are able to advance students to grade level or beyond.

Although my daughters are now out of college, I urge the support of Tuition Tax Credits because this would afford many more parents with low income assistance in choosing a nonpublic school education for their children.

During the summer I teach classes in enrichment courses in a private school. About 90% of the students are from public schools and they give up their vacation time to attend this program because it offers them curriculum material in reading, math and English that they were not able to grasp during the school year. Public school teachers have told me that students who attended this summer school achieved more in their classes than students who did not attend. They asked that it be continued.

My husband and I sacrificed to send our daughters to private schools with no assistance. I hope in the future parents will have assistance to help them make a choice in the education they wish for their children.

Testimony

by

Mrs. Barbara Fields

Good afternoon, my name is Barbara Fields. I am the single parent of two (2) children, a daughter age sixteen (16) and a son age thirteen (13). We moved here from New York State (Westchester County) eleven (11) years ago. I have worked for the Singer Company for twelve (12) years, and am now store manager for one of the local branches, making approximately $13,000.00 a year.

My daughter did attend public schools here in Washington for three (3) years, when I and other school officials noticed a change in her attitude and her grades, even though she came from one of the best public schools in Larchmont, New York.

The school principal, knowing the potential she had, advised me to put her into a private school. She attended Our Lady of Victory School the rest of her elementary years, and is now attending Immaculate Conception Academy. My son is attending Our Lady of Victory and is going to attend a Catholic High School.

You do not know how rewarding it has been for me to know that my children are getting the best education that I can give them. They have had to do without many things because I could not afford to give them to them due to the high tuition cost, uniform expenses, transportation expenses, not to mention registration fees and book fees.

I think I would move from this area if my children had to attend public school in Washington. Teachers in the parochial schools show more individual attention, take more time, and let you know right away if something is wrong.

Example: Dawn had to go to summer school for math. She did, and is now a "B" student in math. This could never have taken place in a public school unless big changes are made within the public school systems.

The Tuition Tax Credit would help me and other parents to further their education and to give my children and other children an incentive to learn.

Testimony

by

Mrs. Lydia Jones

For me to be privileged to address this Committee is indeed satisfying.

For years I have entered voting booths, pulled levers and wondered if anyone really cared to hear my thoughts on any issue.

My name is Lydia Jones. I work for Batelle Columbus Labs Washington Operations Office. I am the mother of, and have responsibility for, seven children ages six (6) to fifteen (15). Five attend St. Margaret's School, one St. Patrick's Academy and one Mackin Catholic High School.

I choose to sacrifice to keep them there because I believe it is an investment that will bring dividends that will last a lifetime for them and for me. I am not materially wealthy, but I will continue to try to keep them in parochial schools.

To paraphrase Safeway Stores slogan, you get everything you want from a school and a little bit more. They are on the receiving end of genuine concern and love and I watch as they in turn, learn to care about others as well as themselves. They do without unnecessary things, usually, but not always, without complaints, because each in his or her own way understands the sacrfices entailed in keeping them in Catholic schools. They want to be there, I want them there and passage of this Bill would aid me and other parents in continuing to provide this opportunity.

Testimony

by

Mrs. Carmen Madden

I am Mrs. Madden. I am Puerto Rican. I am a housewife. My husband works at Goddard Space Flight Center. I have five children ranging in age from 5 to 10 years. My three oldest children attend Sacred Heart School. My youngest two attend public school. I am Chairman of the Neighborhood School Council for the public school my children attend. I pay approximately $1,700 per year tuition for my three oldest children.

Both my husband and I attended parochial school. I started my children in the public school system because when my oldest child was 5 years old our local parochial school did not have a kindergarten. I kept the children in public school until the 2nd grade when I determined that the public school education was not adequate. When the children were first transferred to the Catholic school their scores on the national SRA test were below grade level. After being at Sacred Heart School for a year, their scores went up above grade level.

I want my children to attend a Catholic school that supports my own philosophy and moral values and provides adequate discipline. The children themselves prefer the Catholic school to the public school.

Because most of the parents at Sacred Heart School have to sacrifice to pay their children's expenses, the pastor established a program by which parents could deduct a certain amount of the tuition if they worked on school projects.

Since our five children are so close in age, expenses for their education becomes substantial as they advance in school. We therefore, ask that you please support Senate Bill 550.

Testimony

by

Mr. Richard J. Sylvester

Good afternoon, I am Richard J. Sylvester. I work for the United States Department of Commerce, Office of the Secretary, 14th and Constitution Avenue, N. W. My annual income is $16,406.00. I support my wife and four children, three of school age. My older daughter, Angela attends St. Cecilia's Academy. The tuition at St. Cecilia's Academy is approximately $1,000. Although we received a grant, we pay a balance of $775.00 plus books, uniforms and other expenses that accrue over the school year. St. Cecilia's Academy is not in walking distance for Angela; transportation and lunch are added expenses. $1.20 for the bus ride and $1.75 for lunch.

Richard, my older son, and Kelly Teresa, my younger daughter, attend Assumption Catholic School, both on scholarships or grants. For Richard and Kelly there are books, uniforms and miscellaneous expenses. They too must ride a bus to and from school and must bring and buy part of their lunch.

Over the years I have cut corners and sacrificed even the necessities to keep my children in a parochial school. I can visualize even more difficult times in the future with the rising cost of living.

I am deeply concerned for my children's education. I have experienced both the public and parochial school systems. I attended parochial school in the State of Louisiana from grade 1 through 8. At the parochial school there was discipline and a very high quality of education. There, the teachers were concerned with education and teaching respect. Making the transition into the public school was not an easy task. Very quickly I learned the teachers were concerned about their paycheck, not your education. Even then the old statement was popular, "I got mine, you get yours."

When I graduated from that public high school I went to the University of Southwestern and realized I was only an average 10th grade student.

I would not want my children to experience what I did. I would like them to have the type of education that would enable them to enter a University and live productive lives. For that education I chose the parochial schools, because of my experience.

I am deeply in favor of the tuition tax credit bill.

Senator PACKWOOD. Next we will move to a panel of Prof. E. G. West, Prof. Frank Brown, Dr. Harold Buetow, and Joel Sherman.

A PANEL OF DR. E. G. WEST, CARLETON UNIVERSITY, OTTAWA, CANADA, REPRESENTING THE HERITAGE FOUNDATION; DR. FRANK BROWN, DE PAUL UNIVERSITY, CHICAGO, ILL., AND CHAIRMAN, NATIONAL ASSOCIATION FOR PERSONAL RIGHTS IN EDUCATION; DR. HAROLD BUETOW, CATHOLIC UNIVERSITY, WASHINGTON, D.C., AND JOEL SHERMAN, ESQ., NATIONAL INSTITUTE OF EDUCATION, WASHINGTON, D.C.

Senator PACKWOOD. Professor West, do you want to start?

Dr. WEST. Yes, sir.

My contribution is an attempt to estimate the financial costs and benefits of the Packwood-Moynihan tax credit plan.

I had only a few days to work this out, so my estimates are very broad at the moment and I am working on refinements right now, but on the first approximation of the costs in terms of forgone tax revenues to the Federal Government, the amount would be $1.75 billion in the first year of full operation in 1983.

The effect of the PM plan will be to lower the access price of private schooling, and I am talking exclusively of secondary schools and elementary schools. I am leaving out colleges for this discussion. The effect of the plan will be to reduce the price of independent education significantly to all families, and since, in economics, the law of demand predicts that more is always demanded at a lower price than at the previous price, some families who would otherwise use public schools will subsequently transfer to private schools. We have to expect this.

A crucial question concerns the magnitude of this transfer. Pending the outcome of further research, and judging from presently available work, I have estimated the consequences of a relatively modest long-run switch of about 3 percent of public school students into private schools.

This is a conservative estimate as you will guess from comparing it with an opinion poll conducted by *Newsweek* last April which reported that 23 percent of parents with children in public school, said they would probably move to a private school. I think that is very much of an overestimate. So I am sticking with my modest 3 percent estimate.

Three percent of public school population in 1983 amounts to 1⅓ million students. As each batch of these students transfers there will be a significant gain to society because private schooling costs per student are about half those in public schools. I am quoting from official figures.

At a cost therefore of $500 forgone tax revenue, State and local governments would save much more than this with each student transferring because it will no longer be necessary to educate that student at public cost, in the usual way.

The total savings of society and to State and local governments would be $3⅓ billion in my present estimates. This amount, of course, more than offsets the cost of the Federal Government in forgone revenues. So, in other words, the social benefits of the PM plan can be reasonably predicted to outweigh the costs.

Now insofar as State and local governments reduce their taxes in response to their reduced budgetary obligations toward education, private disposable income will increase. But as it is spent, some of it will flow back to the Federal Government. It will leak back to this authority through indirect and direct Federal taxes. Even if some State and local governments attempt to keep the social savings in budget surpluses, the means are available for the Federal Government, directly or indirectly to obtain some share of these surpluses and so recoup its losses.

My argument in other words, is ultimately the net cost in forgone revenues to the Federal Government could be zero. Society as a whole, meanwhile, will enjoy positive net benefits.

Thank you.

Senator PACKWOOD. Let me ask you just this question. You take a very conservative estimate of how many students would move. I take it your estimated savings to the local governments would be greater if more moved.

You are just being very cautious in your estimate.

Dr. WEST. That is right.

Senator PACKWOOD. Thank you.

Professor Brown.

Dr. BROWN. Thank you.

In urging the Government to make available an equitable share of the education tax dollar for all children, our organization the National Association for Personal Rights in Education (NAPRE), emphasizes that our primary concerns are first, not church-state relationships, but relationships between taxpaying parents and Government, and second, with the personal constitutional rights of parents and students, to academic freedom and religious liberty and the distribution of the education taxes.

Unfortunately, the U.S. Supreme Court has, over the past few decades, chosen to decide the question of the distribution of a share of these taxes within the framework of church-state controversy.

We intend today, to concentrate on a more basic error; namely, that the Everson opinion through which the tests have been evolved, was itself tainted by gross misapplications to the division of education taxation of James Madison's Memorial and Remonstrance and Thomas Jefferson's bill for establishing religious freedom in Virginia.

Jefferson wrote his bill to block what was known as an establishment all through the colonial period, namly, tax support to pay for the clergy and churches of a preferential church.

Madison had a somewhat similar fight against the assessment bill through which the Episcopalians and others tried to get on the public payroll again.

These two documents overthrew what the people of the day understood to be an establishment; namely, the practice of taxing the public for the exclusive support of the ministers and church buildings of one preferential religion.

But, Justice Black misinterpreted this to justify the denial of an equitable share of the education tax dollar to religious dissenters from the State public schools.

By no standard of scholarship can these documents uphold Black's opinions on the good way and bad way of spending the

schooling taxes, the good way, by giving a monopoly to the State public schools and a bad way by giving tax equity to parents and students in church-related schools.

If Justice Black and his allies on the court did not get their justification from Madison's Memorial and Jefferson's bill, where did they get it?

Well, they got it from the traditional public school approach, which in the middle of the 19th century set up and gave a nonsectarian test. If parents would accept this nonsectarian public school, but if they rejected this test and selected other schooling, they were denied a share of the education tax. You can use it if you don't accept it. That is the religious test which violated the establishment clause and violated the religious clause. But the people who enforced that test have thus far in this society been politically powerful enough to enforce this on dissenters.

Unfortunately, many justices have brought to the court an unquestionable acceptance of the unwarranted claims of the public school.

They accept this school as genuinely public. But since all schooling is public in teaching academic subjects, and private in imparting educational philosophies, there can no more be one public school than one public church.

We need some reexamination in this matter. We should keep in mind that the public school is not the result of academic excellence, but of political power.

A second thing is that the U.S. Supreme Court, in ignorance of the nature of schooling, and of constitutional history, has usurped the valid authority of many legislatures seeking to correct these ancient educational injustices and to expand educational opportunity to all children.

We should here emphasize personal rights. We should emphasize the religious freedom clause which Black just put to one side and ignored within his definition of the establishment clause.

The arguments go on. I would just like to make sure I get in a few points near the end here.

We have concentrated somewhat on the religious question, but there is also the academic freedom.

You ask the question: Why have the public schools gone down? There are two basic reasons among others operative in the internal life of the school.

One is the substitution of the basic traditional viewpoint that has been carried on from Aristotle to Aquinas to the Founding Fathers of viewing the child as a learning person.

That has been replaced in many schools by a type of behaviorism which seeks to manipulate the child. That is a very fundamental change.

A second thing is that the accreditation standards have been expanded by all kinds of new rules on teaching methods, rather than academic content.

The fact is that many teachers who have taken so many of these education courses are actually ignorant, and are not able to carry on a proper educational program. This is a rather crude way of saying it, but it also happens to be true.

Please as an inner city group, we ask please hold on to the negative income or refundability provision. In this respect there are 50,000 children alone in the Catholic schools of Chicago, struggling to get some education.

Senator PACKWOOD. That is one of the reasons Senator Moynihan and I put that provision in. Not only does it limit this from being a rich person's bill when we put a $500 cap on it, but if you make it refundable it is very clearly tilted toward the lower income group.

That was our intention. This is a group by and large that is served by private schools.

Dr. BROWN. Senator Packwood, what is going on in so many of the inner city public schools—one of the earlier witnesses mentioned, that there are many, many dedicated public school teachers and there are—is a crime. It is a crime against this society and a crime against those children.

Senator PACKWOOD. Dr. Buetow.

Dr. BUETOW. My name is Harold A. Buetow. I have a doctorate in education and a law degree and I am a professor at Catholic University of America, in Washington, D.C., in the history and philosophy of education.

I wrote a history of Catholic schools in the United States and I am doing research in other non-Government schools.

From this background I speak as an interested citizen to the issue of tuition tax credit.

At the outset are problems of definition and nomenclature—there is no such thing as a private or nonpublic school. Every school is by definition, essentially public. Every school obtains its student clients from the public domain and returns them for good or ill to society, obtains its teachers from State-certified curriculums, uses textbooks from the same publishers, meets reasonable State standards and adopts public pedagogical research.

What many call private or nonpublic schools might better be termed non-Government schools. They differ from Government schools chiefly in their stated goals and in their methods of financial support.

I might say in that connection that I have been reading the recent Australia decision with regard to this same issue in which they use that nomenclature.

I would like to interject also, into my statement, the fact that on the basis of these schools being Government and non-Government schools, they all have been funded in the history of the United States and it is only a relatively recent anomaly of history that has brought this issue up whereby these non-Government schools have not been publicly supported by——

Senator PACKWOOD. Now, say that again.

Dr. BUETOW. That in the history of the United States it is only a relatively recent anomaly that the distinction has been made between public and nonpublic schools, on the basis of which distinction public funds have been denied to what are called the nonpublic schools, but which in reality are solely non-Government schools.

Senator PACKWOOD. So what you are saying is that for a fairer period of our history, we funded what we would today call private

schools, you simply call them non-Government schools, and we saw nothing wrong with partially paying for their expenses.

Dr. BUETOW. That is correct, sir.

Further, any attempt to relegate this question into a liberal-conservative issue is false because all schools, in order to be successful, have to be a combination of both liberal and conservative.

Another facet of these schools is their heterogeneity, the main division being between church affiliated schools and independent schools.

And prescinding from the enormous financial contribution that these schools have made, they have made in my opinion, historically, contributions that are absolutely tremendous in four areas in particular, the first being goals.

Non-Government schools have always had goals that are consistent with and deeply supportive of our Democracy. They have varied from time to time, but they have always agreed with the 1951 statement of the National Education Assocation and the American Association of School Administrators that "The development of moral and spiritual values is basic to all other educational objectives."

They found their particular mode of personal formation to be singularly consonant with the ideals that characterized Colonial America, inspired the Declaration of Independence, sustained the early Republic, and has represented the very best that this Nation has had to offer ever since.

The Christians among them have always tried to realize the observation of Daniel Webster that "Whatever makes men good Christians makes them good citizens."

In curriculum, church affiliated non-Government schools have always made their greatest contribution in their inclusion of religious based values about which those very impressive parents a little while ago were talking.

Modern definitions of religion by some theologians, as well as the U.S. Supreme Court, indicate that it is that which gives one a ground of being and answers to all the basic questions of existence.

Because schooling, to be true education, must address these matters it is impossible, from any imaginable viewpoint—historical, psychological, sociological, anthropological, philosophical or whatever--to have true schooling or true education without religion.

In fact, ours is the first country, in all the history of the world, to attempt official education, theoretically at least, divorced from religion.

But it is only a question of what religion will be present in the schools. Thomas Paine, no friend of organized religion, observed in his *Common Sense* as far back as 1776, that "When we are planning for posterity, we ought to remember that virtue is not hereditary."

The Ordinance of 1787 pointed to its order of curriculum priorities in including religion and morality with knowledge, as an object of education.

Let me simply conclude by stating that with such modern problems as inflation, it is no longer possible for most of our citizens seeking real choice in schooling, to continue their historical double taxation.

It is no longer possible for most non-Government schools to continue their tremendous historical contributions to this country. Equitable financial treatment is needed, and tuition tax credits could be a giant step in that direction.

Senator PACKWOOD. Thank you very much.

Dr. Sherman.

Dr. SHERMAN. My name is Joel D. Sherman. I am currently the Associate Director of the School Finance Project of the U.S. Department of Education.

I have been asked to talk this afternoon on the issue of public finance of public schools in countries outside of the United States.

The remarks in my statement are based on my work in a 10-nation study of primary school finance conducted by the organization for economic cooperation development, and on subsequent work I have done on the financing of public and private schools in Australia.

A brief word about the OECD study. It consisted of 10-country case studies of finance arrangements for public and private schools, and a comparative study of the relationship between finance arrangements and policy.

Let me highlight four of the conclusions from the study which I think are relevant to this hearing.

First, almost all countries provide some form of public funding of private schools, including schools affiliated with religious institutions.

Financial support generally takes one of two forms. One arrangement is highly centralized. Central governments establish service levels for staff and other major school costs which they then pay directly from central government funds.

Minor operation expenses such as building maintenance are met from local revenues.

The second approach is more locally based. Local school systems establish service levels within centrally determined limits.

These services are supported partially or totally from central government grants in aid.

Second, finance arrangements currently in operation in these countries are the products of a historical evolution. They generally reflect several factors. Among them, the general structure of governmental relations, the organization of schools in the country, and the way the country has resolved the question of church-state relations.

Third, in the four countries that have a Federal form of government; namely, Australia, Canada, the Federal Republic of Germany, and the United States, education is constitutionally a State responsibility.

As a result, public financial support for private schools has come historically almost exclusively from State governments, usually in a form that used to fund public schools.

The Canadian Province of Ontario, for example, supports public and separate, that is, denominational, elementary school boards through an equalization formula similar to that used in several American States.

Of the four Federal countries, only Australia extensively provides Federal funding to private schools.

Federal funding of both public and private schools in Australia is a relatively new phenomenon.

Within a period of about 25 years, the Commonwealth has gone from a position of no aid to extensive support of current operating and capital costs in both school sectors.

The first modest initiatives in support of private schools were undertaken in the 1950's. The Commonwealth provided assistance to individuals in the form of tax deductions from the Federal income tax of school tuititions and gifts for school building purposes.

Throughout the 1950's and 1960's the amount of the deductions were increased periodically.

The present Commonwealth role in financing both public and private schools has its origins in the work of the Government committee appointed in 1972. The recommendations of the committee, which centered on a needs-based approach to Commonwealth funding, underpin the current Federal program structure in Australia.

Under this system, financial assistance for private schools has been provided through two sets of programs. The non-Government schools program which are for private schools exclusively and the joint programs in which both Government and non-Government schools participate.

The first group includes two major general aid programs: one for current operating expenses, the second for capital construction and improvements; and three small categorical programs for disadvantaged schools, special education, and migrant education.

The joint programs are in the area of multicultural education, special education for children in residential institutions, services and development, and educational innovation.

Six points of importance emerge from the Australian experience with funding private schools.

First, Commonwealth funding of private schools has evolved incrementally and has paralleled the growth in Commonwealth support for public schools generally.

This evolution has been from indirect assistance in the form of tax deductions for individuals, to limited funding of categorical programs for capital facilities, to large scale general aid and specific purpose grants in areas of major national concern.

Second, Commonwealth support of operating and capital costs is now quite extensive. In 1981, Commonwealth education programs totalled over $700 million of which 45 percent of the total was allocated to non-Government schools.

Third, the vast majority of funds for private schools is distributed through an equalizing formula which provides higher grants to low resource schools.

Fourth, the initiation of Commonwealth financial support and subsequent increases in funding have generally been accompanied by decreased public opposition to a policy of Federal aid. However interest group pressure to eliminate Commonwealth aid has been strong.

A few years ago, the Council for the Defense of Government Schools brought a legal challenge to Commonwealth aid to private schools. The Australian High Court, however, upheld Government

policy of funding private schools in a decision handed down this year.

Finally, during a period of increased Government funding of non-Government schools, and a declining school age population, non-Government school enrollments have increased while Government school enrollments have declined.

Australian experience suggests that there may be an interaction between Government funding policies, such as the finance of capital costs and school enrollments in the public and private school sector.

The central issue facing the Commonwealth today is how the viability of the Government school system can be maintained while making provision for equitable and reasonable choice of schooling.

Senator PACKWOOD. Doctor, let me make sure I understand, because I find your testimony most interesting.

Australia funds public and private schools roughly equally?

Dr. SHERMAN. The funding for non-Government schools is pegged to a level of support for Government schools for average operating costs for Government schools.

Senator PACKWOOD. Right. I understand that you talked about an equalization formula. If they are in a poorer area they may get a higher level of funding than if they are in a wealthy area.

Dr. SHERMAN. Under the general operating program in Australia, which is called their recurrent grants program, the funds are distributed under a formula which is a kind of equalizing formula.

Schools which have resources which are significantly lower than the Government average operating cost at the primary and secondary schools sector receive higher grants than schools which have higher resource levels from tuition and other private contributions.

Senator PACKWOOD. Now, even with this rather extensive system of funding public and private schools which their High Court has found to be constitutional or whatever standard it was measured against, people have not fled to the public schools in droves.

Your figures indicate 78 percent of the people still go to the public schools.

Dr. SHERMAN. That's correct.

If you look over the history of funding for private schools, generally enrollments up through 1978 were increasing in both sectors.

Within the last few years, in a period of stable enrollment, there has been some shift. Nonpublic school enrollments have increased, but have not reached their high levels of the 1950's.

Senator PACKWOOD. What do you mean increased marginally.

Dr. SHERMAN. They now represent about 22 percent; whereas, in previous years, they represented about 20 or 21 percent.

Senator PACKWOOD. Then the other interesting point that as this funding level has increased, the opposition from the public, apart from what you made reference to as a special interest group, the opposition has receded.

Dr. SHERMAN. As funding arrangements have been institutionalized, by and large, there has been broader public acceptance of Government support.

Senator PACKWOOD. Senator Moynihan.

Senator MOYNIHAN. Thank you Mr. Chairman.

I was interested in that statement. May I first say to Dr. Sherman that we are very conscious that you are appearing as a scholar reporting on research and not in any way reflecting the policy of the Department of Education. We understand that and I want to make it clear.

Professor Linse, speaking this morning, reflected that in Minnesota they had a tax credit for tuition and that far from separating these institutions they brought them together. There was a common educational front and interest and cooperation was much more extensive then than it was prior or has been since.

It seems to me an important point.

I believe it is also the case that the Australian Constitution has an establishment clause almost identical to our own.

The High Court—they probably have a more exact and immediate understanding of what an establishment of religion means, had no difficulty saying that supporting schools of various religious denominations does not establish a religion, and it doesn't.

Anyone who says it does, they don't know what it means to establish a religion.

Although there are aspects of the Constitution that would, some of the language of the Constitution is getting a little bit behind us.

If you stopped a person on the street, and said, "What is a law that works corruption of blood," they wouldn't necessarily know what kind of a law you are talking about.

The Constitution forbids such a law and 17th and 18th century England knew what it meant.

I think the establishment—the idea of establishment is getting a bit beyond that as a familiar term, but hardly inaccessible.

I wonder if I could say to Professor Buetow that the point you made, sir, it seems to me so important. If we could with sort of a certain amount of good nature and patience try to explain it to one another, you cannot teach anything without in some measure teaching religion. It can't be done.

That is not a choice open to us, because as you explained, you present any presentation of reality involves certain assumptions which cannot be avoided.

This morning, I took occasion to read a passage from a report that was written in 1843 by the secretary of state of New York, at a time when New York supported interdenominational schools.

The then Protestant schools of New York had banded together into what they called the Public School Society and sort of agreed upon a kind of nondenominational Protestant construction. That is where our term "public school" comes from, the Public School Society of New York, formed in the late 1930's.

That is why in New York City you have public school 1, and public school 2, and so forth.

Spencer, who was an upstate New York Whig, was the first translator of Tocqueville in our country. He had this little passage about the proposal to abolish religion altogether. He said, "Well, as for avoiding sectarianism by abolishing religious instruction altogether, on the contrary, it would be in itself sectarian, because it would be consonant with the views of a particular class and opposed to the opinion of other classes."

You would agree with that wouldn't you?

Dr. BUETOW. Certainly, sir.

Senator MOYNIHAN. It is just a level of logic, it holds true, but sometimes we find it difficult to accept.

Dr. BUETOW. But since 1843 that position has become the established position in the Government schools today.

Senator MOYNIHAN. So there is an established doctrinal set of beliefs which we are asserting not to be doctrinal, but there is a certain kind of doctrinal position which says this is not doctrinal. It is not to be avoided in logic.

Thank you very much.

Senator PACKWOOD. Senator Moynihan, interestingly, I don't have the book here, I think it is the "History of Public Education in the United States," but don't hold me to that title, it is a book about 30 years old. In that book they confirm what you just say about the New York public school system becoming a quasi-public Protestant established system, because everything was working out well giving out money to the different church schools until the Catholics and the Scotch Presbyterians wanted a share of the money.

At that stage it became personna non grata to give it to them, so the public school system was founded and they continued to teach roughly the values they had taught in managing to exclude the Catholics from the——

Senator MOYNIHAN. I have to report that no denominational bias of any kind, but simply the sadness that attends all these matters. Everything was going well until it turned out the Baptists were padding their payrolls. [Laughter.]

Something that again would be avoided in New York City, one denomination or another, in whatever generation.

The actual division over whether you would use the King James Bible or the Duay Bible.

Dr. BUETOW. It is also interesting, in that connection, Senator, that with that same footnote 11, I believe it is, of *Torcaso* v. *Watkins,* that they defined as religions those also which are nontheistic and include among the examples of such, things like Buddhism, and Taoism, et cetera.

So that in the definitions of the Supreme Court which they have not applied to education, it seems to me, they do admit of this possibility of which we speak, namely, that there would be religions without the traditional aspect of sectarianism or whatever.

Senator MOYNIHAN. Thank you very much.

Senator PACKWOOD. Gentlemen, thank you very much for taking the time.

[The statements follow:]

SUMMARY STATEMENT BY E.G. WEST:

My contribution is an attempt to estimate the financial costs and benefits of the Packwood/Moynihan tax credit plan.

On a first approximation the costs, in terms of foregone tax revenues, would be one and three-quarter billion dollars in the first year of full operation: 1983. With a more liberal version of the plan, which would allow 100 percent of tuition instead of 50 percent, the total costs would be two and a half billion dollars.

The effect of the P/M plan will be to lower significantly the price of private education to all families. Since the "law of demand" predicts that more is always demanded at a lower price, some families, who would otherwise use public schools, will subsequently transfer to private schools. A crucial question concerns the magnitude of this transfer.

Pending the outcome of further research, and judging from presently available work on the responsiveness of private school enrollments to tuition reductions, I have estimated the consequences of a relatively "modest" long run switch of about 3 percent of public school students into private schools. The cautious nature of this estimate is indicated by comparison with a Newsweek national poll which reported on April 20, 1981 that 23 percent of parents with children in public school said they would probably move to a private school.

Three percent of the public school population in 1983 amounts to one and one third million students. As each batch of them transfers there will be significant gains to society, or to taxpayers generally, because private schooling costs (per student) are about one half of those in public schools. At a cost of $500 foregone federal tax revenue, state and local

governments would save more than an equal amount for each student transferring, since it will no longer be necessary to educate him at public cost in the usual way. The total saving to society (or to state and local governments) would be three and one third billion dollars. This amount more than offsets the cost to the federal government. The social benefits of the P/M plan can therefore be reasonably predicted to outweigh the costs.

Insofar as state and local governments reduce their taxes in response to their reduced budgetary obligations towards education, private disposable income will increase. But as it is spent, some of it will flow back to the federal government through indirect and direct federal taxes.

Even if some state and local governments attempt to keep the social savings in budget surpluses, means are available for the federal government directly or indirectly, to obtain some share of them and so recoup its losses. The argument, in other words, is that ultimately the net cost in foregone revenues to the federal government could be zero. Society, as a whole, meanwhile, will enjoy positive net benefits.

THE PACKWOOD/MOYNIHAN TAX CREDIT PROPOSAL: CALCULATING THE COSTS AND BENEFITS

by

E.G. West
Carleton University,
Ottawa, Canada.

When the Packwood/Moynihan (P/M) tax credit plan for education was first presented in 1978, no clear consensus emerged about its total cost. An attempt will be made here to derive a more precise estimate for the new 1981 version. The focus here is not upon the cost to one particular level of government, say the federal government, but upon the cost to society as a whole, or to governments of all levels in combination. Attention will equally be given to the potential benefits, since the economist is ultimately interested in the benefit/cost ratio.

To anticipate the argument it will be shown that there is a strong possibility that the financial benefits of the P/M plan will outweigh the financial costs to society as a whole. The discussion will confine itself exclusively to the effects of the plan upon elementary and secondary education.

Costs

The P/M plan proposes that starting in the year 1983 the users of private schools will be able to claim tax credits upon their income tax based on fifty percent of the tuition fees up to a maximum tax credit of $500. There will be an interim year in which this maximum will be

only $250. Since it will be argued here that an improvement on the P/M plan would be to allow 100 percent of tuition fees up to $500, calculations of the costs will proceed according to the existing proposal, call it Plan A, and our improved proposal, call it Plan B.

To begin to measure costs we first need information about the typical tuition fees that are paid in the independent sector. The total cost of the federal government will obviously be different where average tuition is $250 from the case where it is $500. The latter case will allow the family to claim the greater tax credit.

It is because accurate estimates of tuitions paid by private school students were previously unavailable that the cost calculations of the 1978 P/M scheme were controversial. Since then new information has been provided. It has appeared in the Current Population Survey, which is a monthly sample survey of approximately 50,000 households, conducted by the Bureau of the Census. In the October 1978 Supplement to the Survey, there was a question on private school tuitions. The answers to it have given us much of the information we seek.[1]

We now know that in 1978 the average (median) tuition for the sample population in question, was $356 per annum for elementary schooling and $901 for high schools. In order to relate this information to the new P/M proposal, we need to make projections down to 1983, the year in which the plan comes into full force. Accordingly, the fourth column of Table 1

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[1]Martha J. Jacobs, "Tuition Tax Credits for Elementary and Secondary Education: Some New Evidence on Who Would Benefit." Journal of Education Finance 5 (Winter, 1980), 233-254.

TABLE 1.

PATTERNS OF TAX CREDIT DISTRIBUTIONS
AND MINIMUM TOTAL VALUES UNDER THE PACKWOOD/MOYNIHAN PROPOSAL.

(ZERO SWITCHING FROM PUBLIC TO PRIVATE SCHOOLS ASSUMED)

(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
				PACKWOOD / MOYNIHAN			
				Plan A (50% / $500)		Plan B (100 % up to $500)	
	Projected Total Public Enrollment* 1983	Projected Total Private Enrollment 1983	Projected Median Tuition 1983	Median Benefit/child 1983	Estimated Total Benefits	Median Benefit/Child 1983	Estimated Total Benefits
	(In Thousands)	(In Thousands)			(In Millions)		(In Millions)
Elementary (Grades 1 - 8)	30,301	3,700	$ 573	$ 287	$1,062	$ 500	$1,850
High School (Grades 9 - 12)	13,465	1,400	$1,450	$ 500	$ 700	$ 500	$ 700
TOTAL:	43,766	5,100	N/A		$1,762		$2,550

* Figures taken from: The Condition of Education, 1980 Edition, National Center for Education Statistics, Table 2.1.

estimates the prevailing tuition levels in that year on the reasonable assumption that they have risen by 10 percent per annum since 1978.[2] The estimate for elementary schooling is $573 and that for high schooling is $1,450. Under Plan A of the P/M proposal, which allows up to 50 percent of tuition charged, the average benefit per child in 1983 will be $287 (see column 5). Multiplying this figure by the projected enrollment for that year, gives us a total cost of $1,062 millions for elementary schools. The corresponding total cost for high schooling comes to $700 millions. The combined cost of the P/M scheme, therefore, comes to $1,762 millions.

We now need to justify consideration of the alternative version of the P/M scheme that is called here "Plan B." Consider the disadvantage of that feature of the P/M proposal (under Plan A) that limits the credit to 50 percent of a school's tuition charge. This involves a discrimination against the users of the less expensive private school. For instance, a person attending a school whose fees amounted to $500 would receive only $250 in tax credit whereas probably richer families using schools charging $1,000 would receive $500. Many would argue that this is a disadvantage from the point of view of equity. It may also be a disadvantage politically because of the large numbers of parent-voters who are likely to patronize the lower cost private schools.

What extra total cost would be involved in switching to Plan B?

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[2]Some evidence that tuitions in independent day schools actually rose by 10 percent per annum between 1970-80 is given by John Hoyt Stookey, "An Optimistic View of the Independent School Market," Independent School December 1980, Volume 40 No. 2.

Column 7 of Table 1 shows that the average (median) benefit per child would be the same (at $500) for elementary and high schooling. Column 8 estimates the total benefits to participating families, or the total cost to the federal government. The figure comes to just over two and a half billion dollars. The abolition of the 50 percent limit, in other words, would increase total costs by about 45 percent.

TABLE 2.

AVERAGE CURRENT EXPENDITURE PER PUPIL IN PUBLIC AND PRIVATE SCHOOLS: UNITED STATES, SCHOOL YEARS 1977-78 AND 1983-84

School Year	Public	Private
	$	$
1977-78*	1,736	819
1983-84 (projection assuming a 10% inflation rate from 1977-78)	3,075	1,451

*Source: National Center For Education Statistics Bulletin, U.S. Department of Health, Education and Welfare - Education Division, October 23, 1979.

Figures in Table 2 show that in the year 1977-78 the average current expenditure per pupil in public schools was $1,736 while that in private schools was $819. The average cost of private schooling, in other words, was just under one half of that in public schooling. Table 2 also shows our projections for 1983-84 based on an assumed inflation rate of 10 percent per annum. In that year the average expenditure per public

school pupil is estimated to be just over $3,000 and that for the private pupil just under one half of that amount.

We come now to what to us is one of the most crucial considerations in any discussion of the consequences of the P/M proposal. The effect of it will be to reduce significantly the access price of private education. In its absence, for instance, Table 1 tells us the average price of elementary education in 1983 will be $573. The P/M scheme will reduce this by one half to $287 since the tax credit will provide for the other half. (Under Plan B of the scheme, the price reduction would be 87 percent.)

In economics the "law of demand" states that more is demanded at a lower price than at a higher price. Applied to the present issue this means that some families who would otherwise go to public schools would switch to private schools after the price reduction. At the moment, we are working on an experiment that will give us a more precise estimate of the degree to which students will switch (economists call this the problem of the elasticity of demand). In the interim, we shall offer some "intelligent guesses."

Suppose that 3 percent of the total population in public schools decided to switch into private schools following the price reduction implied in the P/M tax credit plan. In this case, about one and a third of a million students would transfer from the public to the private sector. At a cost of $500 tax credit per student, the authorities would save an expenditure of $3,075 (the cost of a public schooling in 1983).[3] The net saving to society, therefore, would be $2,575 for every student that switches. The total savings to society from all the numbers transferring would be just

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[3]Under Plan A of course the authorities would face a cost somewhat lower than $500.

over three and one third billion dollars. From society's point of view, the savings of lower level governments far exceeds the federal costs of providing tax credits to the existing private school population. (Recall from column 6 and 8 of Table 1 that these costs come to just under two billion dollars under Plan A and to about two and a half billion dollars under Plan B.)

Expansions of about 3 percent in demand following a price reduction of 50 percent, for elementary schools, and a reduction of 34 percent for high schooling, would be regarded by economists as very "modest" elasticities. One study in 1972 argued, nevertheless, that private school enrollments are relatively insensitive to tuition levels.[3] For technical reasons, however, we believe this finding was inadequate. The newer information on tuitions generated by the Current Population Survey should provide the basis for a more satisfactory measure.

Meanwhile, a nationwide poll conducted by Newsweek (April 20, 1981) has reported that 23 percent of parents with children in public schools say they would probably switch to private schools if Congress approved tuition tax credits of $250-500 a year. Such opinion polls have their own particular inadequacies, so too much reliance should not be placed on this source. But it does put into perspective the "modest" figure of 3 percent switching used in our example. And pending the results of our further research, we shall venture our judgement that switching to the extent of 3 percent or even more is not unlikely in the long run.

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[4]Kenneth M. Brown, "Enrollment in Non-Public Schools," Economic Problems of Non-Public Schools prepared by the Office of Educational Research, University of Notre Dame, for the President's Commission on School Finance, 1972.

Notice finally that because the greater the price reduction the greater the expected increase of demand. For this reason the adoption of our Plan B (which reduces price the most) will lead to more switching and more saving to society that will offset the increased cost to the federal government.

Concluding Considerations

There are many issues not addressed in this paper for reasons of space. Some will contend the reported statistics of the average cost of public schooling as being twice that of private schooling. Since we have reviewed these objections fairly comprehensively elsewhere[5] there is no need here for further discussion.

Others will argue that private schools discriminate against minorities and provide an escape for those wanting to avoid integration of public schools. Findings of the 1981 Coleman Report, however, conclude that tax credits would even more greatly facilitate private school enrollment for students from lower income families relative to students from higher income families. And Blacks and Hispanics would differentially benefit educationally. Like us, therefore, the Coleman Report focusses upon the degree and pattern of switching from public to private. Most critics, hitherto, have curtailed their investigation to a study of the present population of the present private schools. Yet the issue is largely one of dynamics than statics.

Another argument sometimes made[6] is that there would be a

[5] E.G. West, The Economics of Tax Credits, Critical Issues Series, The Heritage Foundation, Washington, 1981 pp. 30-31. (see attached)

[6] See, for instance, J. Jacobs, op. cit., p. 244.

significant opportunity for schools to raise tuitions. If this happened it would, of course, upset our calculations of price reductions. The answer is that arbitrary tuition increases are only possible where monopolies are present. Private schooling, especially in urban areas, happens to be a strongly competitive industry where free entry prevails. Tax credits will therefore not be absorbed in tuition increases.

While on the question of monopoly, we shall find better evidence for its existence, or potential existence, in the public sector. In the absence of the current margin of private schools, the present near-monopoly of publicly provided education would become a full monopoly. Insofar as tax credits restrain it further there will be a new downward trend in costs, in the public sector. This, indeed, is an additional social benefit that did not appear in our previous calculations - largely because it is difficult to quantify.

We have left somewhat in the air the question of the final "cost" to the federal government. While Table 1 indicates this to be around $2 billions, this is not the end of the story. We have argued that society will benefit by more than $2 billions. This could be manifested, for instance, in revenue surpluses being enjoyed by lower level governments as the relative cost of their education bills decline, (following the marginal switching to a less expensive education). It is also possible, that some of these governments may reduce taxes so that people would enjoy higher real incomes. In either case, there is an increase in society's income flow from which the federal government could share. It could well recoup its losses (of $2 billion) while still leaving others better off. Our argument in other words, is that ultimately there need be no net cost to the federal

government. Elsewhere, meanwhile, net benefits would result.

This conclusion is relevant to the argument of those who doubt the constitutionality of the P/M plan because it involves state aid from "public funds." If the level of "public funds" are no lower after the exercise than before, this argument is difficult to maintain. But even if this were not so, a tax credit does not mean that "public funds" are being granted. Public funds only exist after positive taxes net of credits have been collected. Insofar as the credit is provided, the money remains the property of the individual, not the State.

The P/M plan, in fact, is not one of state aid but one of the removal of a previous state hindrance. The present system that taxes everybody to support a public school system prohibits in degree the ability of those parents who would normally patronize a parochial school. Whenever the parent chooses a parochial school he forgoes the opportunity of receiving a "free" education in the government sector. The forgoing of this opportunity, to the economist, is the very essence of the term "cost." In other words, the present public sector automatically imposes costs on the private and parochial sectors. The result is some degree of prohibition of religion; and this is forbidden by the First Amendment. The P/M plan sets out, therefore, to reduce the degree of unconstitutionality in the present system; but, in so doing, it also brings with it the promise of important financial net benefits that have been the main focus of this paper.

(Statement of Frank Brown, professor of economics, DePaul University, and chairman, National Association for Personal Rights in Education(NAPRE), speaking for NAPRE, for S.550, the tuition tax credit bill, to the U.S.Senate Committee on Finance Subcommittee on Taxation and Debt Management, June 3, 1981, Dirksen Senate Office Building, Washington, D.C.) (Immediate release).

A REEXAMINATION OF PERSONAL RIGHTS

In urging government to make available an equitable share of the education tax dollar to all elementary and secondary school children, including those in church-related schools, the National Association for Personal Rights in Education(NAPRE), a 22-year old parental organization, emphasizes that our primary concerns are, first, with relationships, not between church and state, but between taxpaying parents and government, and, second, with the personal constitutional rights of parents and students to academic freedom and religious liberty in the distribution of the education taxes.

Unfortunately a U.S. Supreme Court majority has over the past few decades chosen to decide the question of the distribution of a share of these taxes to families in church-related elementary and secondary schools within the framework of church-state controversies and has in this connection developed three tests to determine the constitutionality of relevant legislation. Does the legislation have a secular legislative purpose? Does it neither enhance nor inhibit religion? Does it entail excessive government entanglement with religion?

We do not intend today to detail the specious reasoning of these three tests, but shall rather concentrate on a more fundamental error, namely, that the Everson opinion (Justice Hugo Black, 1947) from which these tests have evolved was itself tainted by gross misapplication to the division of education taxation of James Madison's Memorial and Remonstrance and Thomas Jefferson's Bill for Establishing Religious Freedom in Virginia and by unexamined appeals to religious controversies in Europe and colonial America.

Jefferson wrote his Bill, which was introduced into the Virginia General Assembly in 1779 and enacted with some amendment in 1786, to outlaw monopolistic tax support for any one church or any one religion. Madison wrote his Memorial in 1785 as part of a successful struggle to defeat in that year the efforts of the Episcopalian church to regain tax support for its ministers and churches. Not having sufficient political power to restore the tax monopoly which it had enjoyed in the pre-Revolutionary War period, the Episcopalian church had organized a coalition of Christian sects behind an Assessment Bill(1784) whose prime purpose was exclusive tax support for Christianity, with taxpayers being given the option of assigning their assessments to the religious society of their choice and with each such society, with two exceptions, authorized to make "a provision for a Minister or Teacher of the Gospel of their denomination, or the providing places of divine worship, and to none other use whatsoever?

These two documents overthrew what the people of the day understood to be an establishment of religion, namely, the practice of taxing the public for the exclusive support of the ministers and church buildings of one preferential church or religion, but Justice Black misapplied them to justify the denial of an equitable share of the education tax dollar to parents and students in church-related schools.

By no standard of scholarship can these documents uphold Black's views on the good way and the bad way of spending the schooling taxes, the good way by giving a monopoly to the state public schools and the bad way by giving tax equity to parents and students in church-related schools. By no standard of scholarship can the sometimes valid but often pseudo-scholarly attempt of Black in Everson to offer a definitive interpretation of the Establishment Clause support denial of tax equity to such parents and students.

Justice Black, in his appeal to religious controversies of the past, also overlooked the fact that the continuing American controversy over the schooling question is similar to those he described, because in the matter of schooling, which for many families is a

matter of religious conviction, some powerful elements in this society have been able to politically enforce the view that the public school is a sufficiently valid tax-supported opportunity for all while many dissenters loudly and persistently dissent.

In its opposition to tax equity for children in church-related schools, the Black interpretation has also incorrectly cited the authority of the following expression from Jefferson's Bill---"That to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyrannical? We submit that by any scholarly standards for the evaluation of the internal and external evidence of historical documents, Jefferson was here attacking a tax upon a citizen for the support of a preferred church or religion and that the Black interpretation wrenched this expression from context to deny a share of the education tax to students in church-related schools.

If Justice Black and his allies on the court did not get their justification for denial of tax equity to such students from Madison's Memorial and Jefferson's Bill, where then did they get it? We contend that their arguments are those of the dominant mid-19th century sects which, in establishing the state public school system,---a move influenced by many factors, not the least of which, as demonstrated by Professor Jorgenson of the University of Missouri and others, was Know-Nothingism, an intolerant Nativist crusade,---imposed on the American people a novel religious test whereby only those who would assent to the allegedly nonsectarian, but actually Protestant arrangement within the new state school would receive the benefits of the education tax, even their own.

Unfortunately many justices have brought to the court an unquestioning acceptance of the unwarranted claims of the public school. They accept this school as genuinely public, but, since all schooling is public in teaching academic subjects and private in imparting educational philosophies, there can no more be one public school than one public church. They accept this school as a secular institution, but there is no schooling that is not entangled pro or con with the ultimate commitments or religions of taxpayers. They accept this school as neutral and nonideological, but there is no neutral and nonideological schooling, a fact well-known to those who understand the schooling process. They accept the school as nonsectarian, but, in the division of a common tax, nonsectarianism has no more claim on the tax dollar than competing values. They have made some moves to de-Protestantize the public schools, but in the process have not moved toward educational neutrality but have rather assisted in promoting secular humanism, an outlook on life which considers man to be the measure of the world and which is at swords' points with most religiously-oriented families.

This society needs a reexamination of the role of government(local,state,federal) in the distribution of the education taxation. Most members of the public school bloc seem to be terrified at any suggestion that they might have to compete on a democratic basis with other educators, but, as a force committed to freedom, our society should open up rather than keep closed opportunities for educational choice. It should keep in mind that the public school is the result not of academic excellence but of political power and that its tax monopoly is being held in place mainly by a U.S.Supreme Court majority which, in ignorance of the nature of schooling and of constitutional history, has usurped the valid authority of many legislatures which have sought to correct past injustices and to expand educational opportunity to all children, including those in church-related and other private schools.

Instead of concentrating so heavily on church-state issues, the reexamination should highlight the personal rights to academic freedom and religious liberty of parents and students. It should emphasize these personal rights under the First(Establishment Clause, Religious Freedom Clause), Fifth(liberty, property), and Fourteenth(liberty, property, equal protection of the laws) Amendments to the Federal constitution and relevant provisions of state constitutions. It should recognize that these personal rights of parents stand on their own constitutional merits and may not be minimized or destroyed by reason of any relationship between government and any church or school.

In this regard, since schooling is inextricably tied in with the religious commitments of many parents, the appropriation by government of a monopoly of the education tax for its own schools constitutes a violation of the Establishment Clause. However, by assuming that the public school is secular and neutral, the court has come to the grotesque conclusion that the Establishment Clause is violated not by the public school tax monopoly but rather by legislation trying to provide tax equity for long-suffering dissenters.

Again on the Establishment Clause our reexamination should make the necessary distinctions between the tax against which Madison and Jefferson inveighed and the tax involved in providing some measure of equity for families which might bring it to a church-related school. In the first case the state wills that the tax go to a specific preferred church or religion; in the second case the parent, and not the state, decides which school is to be the beneficiary.

The argument over the distribution of education taxes sometimes invokes the question of the secular function of the state. If secular function means that the state has obligations to see that the children of the society should learn reading, writing, and other academic subjects, then this definition can be accepted. But, if secular function is taken to mean that the state may tax a pluralistic public, including those who prefer religiously-oriented schools, and then offer the taxes only through a state school permeated with a secular humanism that is at odds with the values of many citizens, then this definition violates the religious freedom guarantees of state and federal constitutions.

Discussion of religious values in schooling brings to mind one of the most significant changes in American education, namely, the present-day development of Christian schools. Their founders come for the most part from some of the religious sects which in the mid-19th century created the state public school as a nonsectarian Christian institution but now, disillusioned that their religious practices and values have been supplanted by secular humanism, they are leaving the public schools to form their own schools. Some critics attack these schools as racist, but, while some of them undoubtedly are, as are in fact some public and other private schools, it would be a grave mistake to ignore the reality that these schools are largely inspired by the desire of parents to provide an intensely academic and genuinely religious educational atmosphere for their children.

Our statement has necessarily concentrated on the religious rights of families in church-related schools, but it supports equally the academic freedom of families to have some sort of tax-supported choice to seek out worthwhile schooling for their children. This academic freedom is all the more important today in view of the tragic decline in educational standards brought about in many public schools, first, by the abandonment of traditional philosophies which consider the student as a person capable of developing intellectual habits of reasoning and judgment and the substitution therefor of an educational behaviorism that seeks to manipulate the child, and, second, by the expansion of accreditation procedures based on teaching methods rather than academic content.

In conclusion may we as a parental group active in the inner-city express our strongest support for the retention of the negative income or refundability provision of S.550. The advocates of the public school tax monopoly maintain that the enactment of any sort of tax benefits to provide choice for parents, whether through S.550, the tuition tax credit bill under discussion here today, or through some other method, will leave the poor stranded in low-level public schools. We think not. We think that the poor may well be the first to leave low-level public schools, as might be evidenced by the fact that already some 50,000 minority students are now enrolled alone in the Catholic schools of Chicago.

S.550 is a step to educational freedom that is worth every cent.

(312) 333-2019

Frank Brown, Chairman, NAPRE,
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SUMMARY OF PRINCIPAL POINTS OF TESTIMONY ON TUITION TAX CREDITS
TO SENATE COMMITTEE ON FINANCE BY HAROLD A. BUETOW

There is no such thing as "private" or "nonpublic" schools, only government and nongovernment schools. Nongovernment schools represent a pattern, not a system; their diversity includes, among other differences, church-affiliated and independent schools. Counting all of U. S. history, nongovernment schools represent about half of the country's schooling efforts.

Their contributions, in addition to the financial, have been especially in four areas. In goals, their enunciated outcomes on which all else depends, they have always lent profound support to the ideals of our democracy. Their concepts of personal formation have been consonant with the ideals of colonial America, inspired the Declaration of Independence, sustained the early Republic, and represent the best this nation has to offer ever since. In curriculum, they

to such values as [illegible] pair. Many have become "great-souled persons" who have contributed mightily to our country in both peace and war. Their teachers have been pre-eminently renowned for their competence, dedication, and sacrifice. First coming to these shores when this country was, on the whole, culturally deprived, they provided, and have continued to provide, [illegible]

In conclusion, [illegible] contributed many valuable [illegible]

TESTIMONY ON TUITION TAX CREDITS TO SENATE COMMITTEE ON FINANCE, JUNE 3, 1981, BY HAROLD A. BUETOW

My name is Harold A. Buetow. I have a Ph.D. in education and a law degree. I am a professor at The Catholic University of America, Washington, D.C., in the history and philosophy of education. I wrote a history of Catholic schools in the U.S. (Of Singular Benefit: Macmillan, 1970), and am doing research on other nongovernment schools. From this background, I speak as an interested citizen to the issue of tuition tax credits.

At the outset are problems of definition and nomenclature. There is no such thing as a "private" or "nonpublic" school. Every school is by definition essentially public: every school obtains its student-clients from the public domain and returns them, for good or ill, to society; obtains its teachers from state-certified curriculums; uses textbooks from the same publishers; meets reasonable state standards; and adopts public pedagogical research. What many call "private" or "nonpublic" schools might better be termed nongovernment schools; they differ from government schools chiefly in their stated goals and in their methods of financial support. Should this nomenclature carry connotations of totalitarian or Communist regimes, this is proper because there is no other civilized country in the Western world that is so restrictive in schooling as the United States. The latest example of the equalization of financial and other treatment for nongovernment and government schools in the Western world is Australia, whose High Court handed down a decision in this direction on February 10, 1981 (State of Victoria v. Commonwealth of Australia). Further, any attempt to relegate the question into a liberal-conservative issue is false. All schools, to be successful, must be both conservative and liberal: conservative in passing on to the younger generation what the older generation preserves as worthwhile, liberal in that they are open to change and contribute to the freeing up of youth to achieve fully their potential.

Attempts at definition are further complicated by the fact that there is

no "system" among nongovernment schools, only a pattern, and a great deal of heterogeneity. They contain, for example, both church-affiliated ones and independents. Both of these in turn come in infinite varieties. Schooling's "establishment" in the United States has historically not looked favorably upon nongovernment schools for a variety of reasons. One is perhaps a feeling of being frustrated and threatened because society has so relied upon the fine record of government schools that it came to look to them for what no social agency alone should reasonably be expected to do. Another is perhaps prejudice against the Catholic Church, which has historically sponsored the major percentage of nongovernment schools. Harvard history professor Arthur M. Schlesinger, Sr., called this prejudice "the deepest bias in the history of the American people." It is well to remember, however, that current church-affiliated schools come in all stripes from Black Muslim to Jewish to independent, and the proportion of Catholic schools among them has greatly decreased.

When one considers that government schools did not appear in the United States until about the second quarter of the nineteenth century, that all schools before that were nongovernment ones sponsored by church or family, and that about ten percent of schooling has remained nongovernment, one realizes that, from the perspective of total history of the country, around half of the schooling efforts have been nongovernment. These efforts represent a unique contribution of any group to any country at any time, the very best of our heritage, and the marvel of the world. Prescinding from their enormous financial donation, nongovernment schools have contributed particularly in four main areas: goals, the enunciated and hoped-for outcomes on which all else depends; curriculum, which implements goals and encapsulates all that the school is trying to present; students, the ultimate reason for the existence of schooling; and teachers, through whose front-line presence all else flows.

Nongovernment schools have always been aware that it is only when outcomes

are measured against goals that success or failure can be ascertained. We use the term "goals" rather than "aims" or "objectives" because this metaphor from athletics connotes something specific and concrete, not vague or hit-or-miss, for which participants show a willingness to sacrifice and sweat to achieve. Though formed in general by the word of God, the goals of church-affiliated schools--the major component of the nongovernment enterprise--have varied in their emphases from an escatalogical stress on the last things of life to the incarnational importance of what to do here and now to improve the quality of life.

Nongovernment schools have had goals always consistent with and deeply supportive of our democracy. They have varied from the imparting of vocational competence for Indians to the acquisition of culture for the more sophisticated. They have included formation, information, and initiation. They have always agreed with the 1951 statement of the National Education Association and the American Association of School Administrators that "the development of moral and spiritual values is basic to all other educational objectives." They found their particular mode of personal formation to be singularly consonant with the ideals that characterized colonial America, inspired the Declaration of Independence, sustained the early Republic, and represented the best this nation has had to offer ever since. Though some say that the purpose of church-affiliated schools was to preserve the faith in a hostile atmosphere, it was more positive than that. The Christians among them have always tried to realize the observation of Daniel Webster that "whatever makes men good Christians, makes them good citizens."

In curriculum, church-affiliated nongovernment schools have always made their greatest contribution in their inclusion of religious-based values. Modern definitions of religion, by some theologians as well as the U. S. Supreme Court, indicate that it is that which gives one a "ground of being" and answers to all the basic questions of existence. Because schooling, to be true education, must address these matters, it is impossible from any imaginable viewpoint--historical,

psychological, sociological, anthropological, philosophical, or whatever--to have true schooling or education without religion. (In fact, ours is the first country in all the history of the world to attempt official education theoretically divorced from religion.) It is only a question of *what* religion will be present in the school. Thomas Paine, no friend of organized religion, observed in his *Common Sense* as far back as 1776 that "when we are planning for posterity, we ought to remember that virtue is not hereditary." The Ordinance of 1787 pointed to its order of curriculum priorities when it remarked that "religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall ever be encouraged." William James in 1890 spoke of "the hell we make for ourselves in this world by habitually fashioning our characters in the wrong way." With our rising crime rate at ever-decreasing age levels and the degree of participation in our democracy becoming less, our times substantiate the wisdom of the past.

Fulfilling the statement of the Massachusetts Code of 1648 that "the good education of children is of singular benefit to any Commonwealth," nongovernment schools have benefited their *students*--especially those whom the Bible called the *anawim*: minority groups, the poor, immigrants, and the otherwise powerless. These schools have influenced their students' behavior significantly in such important areas as religious knowledge, ethical attitudes, and sensitivity to such values as tolerance and hopefulness against strong temptations to despair. They have formed those "great-souled persons" of whom the ancient Greeks first spoke. When their influence has been combined with consonant values in the home, a "multiplier effect" has enhanced their influence for good.

From the viewpoint of *teachers*, the truth of Henry Adams' words that "a teacher effects eternity" has with historical consistency been demonstrated by way of one of the most needed teacher qualities, dedication, which has been found in superabundant measure among nongovernment-school teachers. With respect to

all the meaningful aspects of true education, their training has put them in a close race with their government-school counterparts, each at various times and in various subjects seesawing higher than the other. Roman Catholic teaching religious communities, for example, provided teacher-training almost twenty years before the first government normal school opened. Nongovernment-school teachers almost never received salary and other benefits equal to their government-school counterparts. They set up their schools, especially in the westward movement, in log cabins, church basements, choir lofts, parsonages, and abandoned buildings (including, in at least one instance, a still). Including women, they faced dangers from the elements, long journeys, border warfare, brigands, disease, and at times meanness which, but for the pages of history, would be hard to imagine. First coming to these shores when this country was, on the whole, culturally deprived, they brought learning in many disciplines. Besides preventing religious illiteracy, they have provided most beneficial cultural enrichment and quality of life.

We observe, in conclusion, that throughout their history the nongovernment-school enterprise has contributed, especially in impoverished areas, many "firsts": first schools, textbooks, dictionaries and formulations of local languages, printing presses, normal schools, teachers of Negroes and Indians, and free education in many regions. There have also been many instances from colonial times to the present in which state, society, and church have cooperated in schooling as in the military, the legislature, and other important components of life. These have included the "public-parochial" school--schools in which, through the amicable agreement of civil and ecclesiastical authorities, a local church group owns and runs the school and the civic community pays the costs. Founded in the past, to the singular benefit of all involved they continue in more instances than publicly acknowledged.

These and other nongovernment schools have provided not divisiveness but

needed diversity. A pattern of nongovernment schools on a footing equal in every way with their government-school counterparts can also provide needed competition and challenges to both, and will help avoid such dangers to education as wasteful megalithic and suppressive monolithic structures, decreased experimentation and innovation, and creeping "Big-Brotherism." What the United States in its two centuries of existence has contributed to the history of the world in religion (pluralism), in business (anti-trust), and in politics (personal freedom), it has not applied to schooling.

With such modern problems as inflation, it is no longer possible for most of our citizens seeking real choice in schooling to continue their historical double taxation and for most nongovernment schools to continue their historical contributions to our country. Equitable financial treatment is needed. Tuition tax credits could be a giant step in the right direction.

Joel D. Sherman, Ph.D.
Associate Director
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Summary of Testimony

The OECD study of primary school finance produced these four conclusions about public finance of private schools in countries outside the United States.

- First, almost all countries provide some form of public funding of private schools, including schools affiliated with religious institutions.

- Second, support for schools generally takes one of two forms. Central governments establish service levels, e.g., pupil-teacher ratios, textbooks allowances, etc., and directly fund the costs of these services from central government revenues. Or, central governments provide grants to local school systems to support operating and capital costs established by the central government.

- Third, finance arrangements in these countries are products of an historical evolution, and should be viewed as unique for each country, rather than as approaches to be universally applied.

- Fourth, in the four Federal countries -- Australia, Canada, the Federal Republic of Germany, and the United States -- public finance of private schools generally comes from state governments. Only Australia provides extensive federal funding of private schools.

A review of Australian experience with funding private schools suggests the following six conclusions.

- First, Commonwealth support for private schools has evolved incrementally and has paralled the growth of Commonwealth support for public schools.

- Second, Commonwealth financial support is quite extensive, representing about 45 percent of its grants to the primary and secondary schools sector.

- Third, the vast majority of Commonwealth funds for private schools are distributed through an equalizing formula which provides higher grants to low-resource schools.

- Fourth, Commonwealth funding has been accompanied by decreased public opposition to aid but strong interest group pressure to eliminate Commonwealth support of private schools.

- Fifth, increases in direct funding of programs in schools has been accompanied by a reduction in indirect support in the form of tax deductions to individuals.

- Finally, Australian experience suggests that there may be an interaction between government funding policies and school enrollments in the public and private school sectors.

My name is Joel D. Sherman, I am currently the Associate Director of the School Finance Project of the U.S. Department of Education.

My statement this afternoon will address the issue of public finance of private schools in countries outside the United States. These remarks are based on my work on a ten-nation study of primary school finance conducted by the Organization for Economic Cooperation and Development (OECD) and on subsequent work that I have done on the financing of public and private schools in Australia. I will spend the first part of the time available to me discussing the OECD study, and its observations about public finance of private schools, and the remaining time talking about finance arrangements in Australia, the country I am currently most familiar with.

A brief word about the OECD study. It consisted of ten country case studies of finance arrangements for public and private schools and a comparative study of the relationship between finance arrangements and policy objectives. The countries which participated in the study included several Western democracies, Australia, Canada and the United States. Several findings from the study are relevant for this hearing.

First, almost all of the countries provide some form of public funding of private schools, including schools affiliated with religious institutions. In general, the funding consists of direct central government expenditure on centrally-determined service levels or grants to local school systems to support operating

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and capital expenditures. The most extensive support of private schools occurs in the Netherlands where public and private primary schools are both fully supported by public funds.

Second, finance arrangements currently in operation in these countries are the products of an historical evolution. They reflect the ways that countries have resolved the question of the role of church and state in providing education. In this respect, specific finance mechanisms should probably be viewed as unique for each country, rather than as approaches to be universally applied.

Third, in the four countries which have a federal form of government, namely, Australia, Canada, the Federal Republic of Germany, and the United States, education is constitutionally a state responsibility. As a result, public financial support for private schools has come historically almost exclusively from state governments, usually in a form that is similar to that used to fund public schools. The Canadian province of Ontario, for example, supports public and separate, that is, denominational, school boards through an aid program called a percentage equalizing formula, similar to that used in several American states.

Of the four Federal countries, only in Australia is there extensive Federal funding of private schools. I would like therefore to talk in more detail about Australia for the next few minutes.

First, a few general observations. Australia is a country with six states and two territories in a land area about the size

of the continental United States. Its population numbers about 14 million and is concentrated in six capital cities and their surrounding suburbs. In 1980, primary and secondary schools in Australia enrolled just under 3 million pupils, with about 78 percent in government (public) schools, 17-18 percent in Catholic schools, and the remaining 4 percent in other non-government (private) schools, most of which are sectarian in nature.

Federal funding of both public and private schools in Australia is a relatively new phenomenon. Within a period of about 25 years, the Commonwealth has gone from a position of no aid to extensive support of current operating and capital costs in both school sectors. The first modest initiatives in support of private schools were undertaken in the early 1950's. The Commonwealth provided assistance to individuals in the form of tax deductions from the Federal income tax of school tuitions and gifts for school building purposes. Throughout the 1950's and 1960's, the amount of the deductions was increased periodically.

Direct Commonwealth support of public and private schools was initiated during the 1960's, in response to growing pressure for Federal aid. It took the form of limited, special-purpose programs to fund capital projects in both school sectors. The 1963 program provided aid for science laboratories and equipment; the 1968 program aided secondary school libraries. By the late 1960's, however, pressure for more extensive funding of operating costs produced a collection of recurrent and capital programs, including a per capita grant to private schools of $35 per primary

and $50 per secondary school student.

The present Commonwealth role in financing both public and private schools has its origins in the work of the Interim Committee for the Australian Schools Commission, appointed by the Labor Government in 1972. In its 1973 report, commonly referred to as the Karmel Report, the Committee recommended a large increase in Commonwealth funding and the allocation of funds on a needs basis. The goal of Commonwealth support was to raise all schools to an acceptable standard and provide equal educational opportunity for all children.

The recommendations of the Interim Committee underpin the current Federal program structure in Australia. Under this system, financial assistance for private schools is provided through two sets of programs -- the "Non-Government School Programs," which are for private schools exclusively, and the "Joint Programs," in which both government and non-government schools participate. The first group includes two major general aid programs -- one for current operating expenses, the second for capital construction and improvements -- and three small categorical programs for disadvantaged schools, special education and migrant education. The joint programs are in the area of multicultural education, special education for children in residential institutions, services and development, and educational innovation.

Since funding for these programs was initiated in 1974, the preponderance of resources has been concentrated in the general program funds. Because of their large size, the method of dis-

tributing these funds iparticularly noteworthy. General recurrent funds are distributed through a formula which is analogous to the equalizing formulas currently in use in several American states. Resource levels in non-government schools are compared with national average costs in primary and secondary schools. Schools are then categorized into six groups, based on their relative resource levels. Low resource schools receive higher per capita grants than high resources schools; the latter have to fund a higher proportion of their costs from private contributions. In recent years, about 80 percent of non-government school students -- mostly in Catholic schools -- have been in the highest subsidy category.

Six points of importance emerge from the Australian experience with funding of private schools. First, Commonwealth funding of private schools has evolved incrementally, and has paralled the growth in Commonwealth support for public schools. This evolution has been from indirect assistance, in the form of tax deductions for individuals, to limited funding of categorical programs for capital facilities, to large-scale general aid and specifi-purpose grants in areas of major national concern.

Second, Commonwealth support of operating and capital costs is now quite extensive. In 1981, Commonwealth education programs totalled over $700 million, with about $312 million, or 45 percent of the total allocated to non-government schools.

Third, the vast majority of funds for private schools is

distributed through an equalizing formula which provides higher grants to low-resource schools. In 1981, recurrent grants to these schools averaged about one-third of standard government school costs.

Fourth, the initiation of Commonwealth financial support -- and subsequent increases in funding -- has generally been accompanied by decreased public opposition to a policy of federal aid, although interest group pressure to eliminate Commonwealth aid has remained strong. A few years ago, the Council for the Defense of Government Schools brought a legal challenge to Commonwealth aid to private schools. The Australian High Court, however, upheld government policy in a decision handed down in February of this year.

Fifth, increases in direct funding of programs in schools has been accompanied by a reduction in indirect support to individuals. Tax reductions for private school tuition were increased between 1952 and 1974, but with the commencement of large-scale funding of the schools themselves, the size of these deductions was cut back significantly.

Finally, during a period of increased government funding of the non-government schools and a declining school age population, non-government school enrollments have increased, while government school enrollments have declined. Australian experience suggests that there may be an interaction between government funding policies, such as the finance of capital costs, and school enrollments in the public and private school sectors.

Senator PACKWOOD. We will next have a panel of Walter Berns, William Ball, and Antonin Scalia.

A PANEL OF WALTER BERNS, RESIDENT SCHOLAR, AMERICAN ENTERPRISE INSTITUTE FOR PUBLIC POLICY RESEARCH, WASHINGTON, D.C.; WILLIAM BALL, ESQ., BALL & SHELLY, HARRISBURG, PA., AND ANTONIN SCALIA, STANFORD UNIVERSITY LAW SCHOOL, STANFORD, CALIF.

Dr. BERNS. Senator, I have prepared a written statement and ask it be made a part of the record, please.

Senator PACKWOOD. As with all of the statements in their entirety, they will be put in the record.

Dr. BERNS. I feel I should begin by making two apologies. One, I am not going to say anything today that I haven't said in fact 3 years ago, as I recall.

Secondly, I am sure that nothing I will say today will be as compelling as the statements made by the panel of parents here earlier this afternoon.

That was a moving moment.

Senator PACKWOOD. I do not mean this in any adverse sense, but it is not often we get witnesses like that, that have to live every day in what we are talking about in theory and high finance, they have to live every day as a matter of life.

Dr. BERNS. Well, the point to which I want to direct myself today is simply the question of constitutionality of S. 550. I want simply to argue, as I have argued in the past, that it can be demonstrated that as originally understood, the first amendment, or put it this way, the Congress that proposed the first amendment and the States that ratified the first amendment, had in mind a statement that would in no way forbid the kind of public aid to private schools that this bill is proposing.

To be more precise, I would say that the first amendment, as originally understood, does not forbid tuition tax credits.

This means that the Supreme Court is wrong, and I think one ought not mince words about that.

The Court began to go wrong in Everson, in 1947, not when it allowed public rides to private schools, but when inconsistently it said, by way of dictum, a dictum that was subsequently to be made into a rule of law, that the first amendment forbids public aid to religious institutions even on a nondiscriminatory basis.

The Court picked up this idea, that is, the idea that not only does the first amendment require Government to be neutral among the various religions, but neutral between religion and irreligion.

It picked up this idea from an amicus brief filed in Everson by the American Civil Liberties Union.

That brief did not present a true account of the debates in the First Congress.

My statement that I submitted to the committee, provides some of the evidence in support of what I am saying on this point, and that statement refers to my book, "The First Amendment and the Future of American Democracy," where I go into great detail on that particular point as well as others.

The purpose of the first amendment, in its free exercise clause, as well as in the clause forbidding laws respecting an establish-

ment of religion, was, as I put it in the statement, and in the book, to subordinate religion.

By that I mean to subordinate all religious opinions as, in the eyes of the Constitution, all religious beliefs, truths, tenets, and teachings are in fact mere opinions, subordinate those to the self-evident truths of the Declaration of Independence.

This means that all religious opinions are to be tolerated. None is to be favored, and therefore, all are to be tolerated.

Subordination also means to consign religion to the private sphere, to make it a private thing, which means that the weight of the Government is not to be put behind any particular religious teaching, and all religious teaching must be subordinate to the law.

But the framers of the Constitution and the men of the First Congress that proposed the first amendment, were very much aware of the political importance of religion. They saw the connection between morality and the perpetuation of our political institutions and between religious institutions and morality.

In other words, they recognized that these private institutions to which religion had been consigned, performed a public role and were to be assisted by the public on a nondiscriminatory basis.

As I said, this can be, and has been, demonstrated.

Now Professor Scalia will, I suspect, go into detail as to the current state of the Supreme Court law on this subject.

I want merely to say two things about this, both leading to the same conclusions.

The Congress should not defer to the Supreme Court on this subject.

First, this is a court that upholds a tax exemption, *Walz* against the *Tax Commission,* a 1970 case, but strikes down a tax credit because it aided religion, Nyquist. Even though the tax exemption was given to church property, and the tax credit to the parents, low income parents, of nonpublic schoolchildren.

This, when the principle stated in that case is that the public aid must not advance religion.

The second point. This is also a court that has established three religions. There are in fact three established churches in the United States right now.

The first of these are the Seventh-day Adventists, who alone are entitled to unemployment compensation, even though they refuse to take jobs in a laundry, that are available, and they refuse to take it because the laundry requires them to work on Saturday.

No one else in this country is given that privilege.

Second, the second established church in this country is the Old Order Amish—this is *Wisconsin* v. *Yoder,* 1972—because they alone do not have to obey a valid criminal law that requires parents to send their children to school.

They alone are exempted from that.

Third, in a case decided on April 6 of this year, we have the Jehovah Witnesses. They are an established church now in the United States because they alone are free to quit their jobs in a foundry because they have scruples about helping to make metal that will be used to make tanks, and even so, they alone are permitted to get unemployment compensation.

Three established churches. Not the three major denominations in this country, but established nevertheless.

Now a court that makes these judgments has forfeited its authority to speak on this subject, or to put it more mildly, a court that makes these judgments certainly is a court to which this Congress does not have to defer on such matters.

Thank you, gentlemen.

Senator PACKWOOD. Thank you very much.

You give us heart.

Mr. Ball.

Mr. BALL. I would begin, if it please the committee, by saying that I think I would agree with what you just heard with respect to the Supreme Court's errors in dealing historically and practically with the establishment clause.

But unlike him, I see daylight in the position of the Supreme Court and I believe that your bill should pass muster in the Supreme Court of the United States.

Irrespective of whether I am right or Professor Berns is right on that question, I think I should stress in this brief summary of testimony, a few points that I think are extremely important.

The first is that there is a tremendous impulse among Americans today toward liberty in education. This is not merely on the question of freedom of religion, it also relates to people who have a strong intellectual, educational and cultural desire to be able to support education which is not taking place in government schools.

As far as religion is concerned, of course, there is a tremendous need for a genuine free exercise of religion and not a paper free exercise of religion.

Parents today, who are under several commands all of which are inescapable would of course want legislation such as this.

Those commands which are inescapable are the economic demands of inflation, taxation, and unemployment.

Second, the effect of the compulsory attendance law.

Third, commands of conscience. Somehow in all of the argument on the establishment clause aspects of this legislation, we hear very little admission on the part of opponents of your bill, of the reality of the commands of conscience.

Now I say that the Supreme Court should be able to accommodate choice here, even within its present holdings, because in fact it has never actually dealt with this precise measure.

I see in the very decisions that Professor Berns cites—in the case of *Wisconsin* v. *Yoder* which I tried and which I argued in the Supreme Court, and in the case of the Seventh-day Adventists—*Sherbert* v. *Verner*—and in the case of Mr. Thomas, the Jehovah Witness, just the other week—in all of these situations, I see the Court not as creating a religious preference for these individuals at all, and thus making an establishment clause problem, but instead making an accommodation to religious liberty and focusing on the free exercise clause of the first amendment.

This, I think is what is necessary here and what the Court's necessary response to the Packwood-Moynihan bill would be.

It would see the bill as an enabler of religious liberty. It would see it also as presenting no threat whatever to public education

because it ought to see public education in the light of what public education has become in the United States.

First of all, on the secular plane, as failing conspicuously and widely, though gorged with public funds, to furnish children education in basics so that they are literate and to furnish them training in civic virtue.

This, the universal complaint about public education will certainly not be ignored by the Supreme Court.

Now, I realize that Judge Rosenn, in the decision of *Byrn* v. *Public Funds for Public Schools* has held unconstitutional, a not completely similar piece of legislation originating in New Jersey.

What Rosenn misses, what the third circuit misses in that opinion, and which needed a great deal of fleshing out by a good trial record which did not appear in that case, was the idea the narrowness of the class of which he spoke would not be the same kind of class that we have in the Packwood-Moynihan bill which broadly involves private education in the definition of elementary and secondary school the class being far broader than that which was seen, for example, in Nyquist.

I do have some concern about certain provisions of the bill and the one of chief concern is its antidiscrimination clause.

We think that clause needs strengthening and we believe it needs to be so drafted as to assure that IRS is not up to the antics it was in connection with its proposed revenue procedure of 2 years ago where it would enter fully into the life of a religious school and there dictated staffing, its admissions policy and everything that has to do with the life of the institution.

The language we have provided, I should add, is a stronger piece of civil rights language. It invokes severe penalties for perjury. I can only add that a similar provision, this provision we have listed in the very last page of our testimony, is one which would protect the religious school, because of its peculiar nature under the Constitution, from the kinds of intrusions that IRS has attempted. That could readily be extended to the private, nonreligious school, such as CAPE, for example, very conspicuously represents.

I thank you very much.

Senator PACKWOOD. Mr. Ball, thank you.

I think Walter Berns is only facetiously saying that the Court has established three religions. I am not sure you and he are very far apart in terms of where he thinks the Court might go, given the opportunity to pass on a piece of legislation that they have never had a chance to pass on before.

Professor Scalia, thank you for coming.

Prof. SCALIA. Thank you, Senator. I am in the happy position of agreeing with both Mr. Ball and Mr. Berns. I agree with Mr. Ball that the present bill is distinguishable from earlier cases. But, even more emphatically, I agree with Professor Berns that it is somewhat demeaning to engage in the process of distinguishing it from earlier cases.

Because I feel the stronger about the latter, I would like to begin by using as a text, perhaps the only portion of your bill I disagree with. That is the statement on page 2, the Prolog, that says, "while the Congress recognizes that the Supreme Court is ultimately responsible for determining the constitutionality of provisions of

law * * * ". I do not think that statement is accurate, unless it is subjected to several important implied limitations.

First of all, there are quite a few provisions of law that the Supreme Court will not touch by reason of the political question doctrine. The Court itself has said it will not do so.

Secondly, there are other provisions of law that will never come before the Court because of the doctrine of standing—which, incidentally, has been treated in this area, by reason of the case of *Flast* v. *Cohen,* in a manner in which it has been treated nowhere else. *Flast* v. *Cohen* is one of the many inconsistencies created by the Court in this field.

But, thirdly, and most importantly, even when there is standing and when the issue is not a political question, the principle that the Supreme Court is ultimately responsible for determining the constitutionality of provisions of law must be subjected to the limitation that that responsibility exists for purposes of applying or not applying the provision of law to the case before the Court. It is not an ultimate responsibility to dictate constitutional law to the Congress in any binding fashion. For if that were the case, we would still have the dead hand of Mr. Justice McReynolds governing our interpretation of the Commerce Clause. That is to say, the Court would never be given the opportunity of changing its mind since each Congressman's oath of office would prevent him from voting for legislation that would place at issue Mr. Justice McReynolds antiquated views.

This is not to say, of course, that the Congress should not take into account the decisions of the Supreme Court. Quite to the contrary, in many respects and concerning many issues, the Court is distinctively qualified to make judgments concerning constitutionality. Its holdings ought to be given great weight in your own deliberations on the subject, perhaps even conclusive weight when those holdings represent a settled, rational line of constitutional principle. But the area we are talking about today is not one of those areas. It is assuredly not one in which you should feel any great tug of responsibility to consider carefully and regard as near-conclusive the latest decisions of the Supreme Court.

The reason is that the Court's decisions in this field set forth neither a settled, nor a consistent, nor even a rational line of authority that you could rely on even if you wanted to. That is a strong statement, but it doesn't take much effort to demonstrate its truth. The following represent a few of the Supreme Court's holdings in this field.

A State may provide bus transportation to and from sectarian schools, but it may not provide bus transportation for field trips from such schools to a museum or to the zoo.

A State may provide textbooks for use in sectarian schools, but it may not provide maps. I think Senator Moynihan has noted in the past that we are still waiting breathlessly to find out what the Supreme Court will do with maps that are in textbooks. [Laughter.]

As Professor Berns pointed out, a State may exempt from real estate taxes, entirely, premises devoted exclusively to the very worship of God—churches and synogogues—but it may not provide, in some circumstances at least, a partial income tax remission for

tuition payments to schools whose function consists in part of sectarian education.

Finally, a State may not reimburse sectarian schools for administering, grading and reporting to the State the results of tests and examinations on secular subjects, but it may reimburse such schools for the cost of keeping attendance records that assure that the children attend class each day, to learn, of course, both secular and religious subjects.

There are other inconsistencies. One that I would like to bring your attention to is the so-called three-part test of *Lemon* v. *Kurtzman.* It is referred to in most of the testimony you have heard as the starting point of constitutional analysis. In fact, however, it is a very questionable starting point, because its location keeps shifting. The test has changed over the years. When it was first set forth, it was described as follows:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, * * *; finally, the statute must not foster "an excessive government entanglement with religion."

It is the second part of the test which is most at issue here. Note, as originally expressed, in 1971, the second part of the test referred to "its [the statute's] principal or primary effect", connoting a single, main effect. This meaning is reaffirmed later in the *Kurtzman* opinion when the Court refers to *the* principal or primary effect" [emphasis added] of the statutory program.

However, in 1973, when the Court uses the test to strike down legislation, in *Committee for Public Education and Religious Liberty* v. *Nyquist,* listen to how the test changes:

> [T]he propriety of a legislature's purposes may not immunize from further scrutiny a law which has *a* primary effect that advances religion. * * * [I]t simply cannot be denied that this section has *a* primary effect that advances religion in that it subsidizes directly the religious activities of sectarian elementary and secondary schools. [Emphasis added.]

I won't complete the quote, but what I have read makes clear what happened. The Court transmogrified "*the* principal or primary effect," meaning quite obviously the *main* effect, into *a* primary effect," in the sense of a *direct* or *immediate* effect as opposed to an indirect or secondary effect.

In its latest decision, the *Regan* case, by the way, the Court has gone back to its original formulation. It is anyone's guess where the Justices will come out the next time. One suspects it depends on how they want the decision to come out.

In any case, I am firmly of the view that this line of decisions is not something that you should rely upon. I had intended to discuss how you can distinguish the present bill, if you wish to rely upon existing decisions, but my time has expired.

Senator PACKWOOD. We have moved a long way since we had these hearings 3 or 4 years ago. Senator Moynihan and I were then commenting it was almost impossible 4 years ago to get witnesses to admit what the history of the country was, as to how we funded sectarian schools in the early part of our history. It was just denied, as if somehow the pages of history went blank for 50 years.

We have passed that hurdle. I think we are very close now to being able to prove that the factual history upon which the Court relied in *Everson* is wrong. The history was wrong.

In some stage this bill is going to move through Congress and it is going to move to the Court and I think it is going to be declared constitutional. It is going to be, because of the perpetual help that we have had from the three of you and others like you who have just been willing to be patient and perpetual about repeating over and over and over what the history was, where the history was wrong in *Everson.* Finally, somehow that seeps through.

I cannot thank the three of you enough.

Senator Moynihan.

Senator MOYNIHAN. Well, I would both completely endorse that and hopefully might stay with our panel a little longer, Mr. Chairman.

Senator PACKWOOD. Oh, yes.

Senator MOYNIHAN. I do want to say once again that we see these hearings as a mode of teaching. It was startling to us 3 years ago, to find that the whole memory of the Constitution and its origins and the early experience of the Republic just wasn't there. It had just disappeared.

There had been a deficiency in scholarship and one eminently made up by Professor Berns was the first amendment and the future of American democracy.

You sir, I think it ought to be reported because he did not choose to say it himself, but Professor Scalia, who has come to us all the way now I think from Stanford; is that right?

Professor SCALIA. Yes, sir. I am visiting at Stanford.

Senator MOYNIHAN. You are visiting. But Professor Scalia was the Assistant U.S. Attorney General in the Office of Legal Counsel. He does not appear as merely an informed professor, but as one who has had responsibilities advising the Attorney General and the President of the United States on what is and what is not constitutional.

I think it should be noted, first of all, you were the chairman of the committee on constitutional law of the Federal Bar Association for the past previous decade.

It is just beginning—there are some people who will never hear us on this, but there are enough open minds that we are only trying to make the point that the Court has been astonishingly confused and becomes more confused.

You mentioned Judge Rosenn's decision, Mr. Ball. But you also may have read the concurring opinion of Judge Weis in the *Byrne* decision in which he said, "Does Nyquist control?"

The answer is, yes. But then there is another question. What on earth did the court do in *Nyquist?* He said, "Where did this regime of hostility to religion arise?"

He began to cite. I don't know if you had a chance to read that decision.

Mr. BALL. Yes, I have.

Senator MOYNIHAN. You have to cite some of the things you were citing, Professor Scalia. You can do this, you can't do that.

The idea that the Constitution of the United States distinguishes between maps and textbooks is to trivialize.

I see a footnote in your paper, saying that that three-part test of *Lemon* v. *Kurtzman,* this doctrine you say, "Is the brainchild not of the Founding Fathers, but of Prof. Paul Freund of Harvard, was

invented and applied ad hoc in litigation in which Catholic schools were the prime figures."

Paul and I are members of the Saturday Club. So I must be very protective of a reputation that needs no protection from such as I.

But, how did that come about? How did the Court get so tangled. Why can't the Court say the obvious thing. We love the Court. It is a precious institution.

Don't you think it jeopardizes its reputation when it begins to be so ahistorical?

What do you think about that? Why don't they just say, "Oh, of course, the first amendment meant what it says."

Professor SCALIA. I think that is right. One doesn't even have to be terribly historical. I think the root of the problem is what Professor Berns has pointed out, and that is the so-called principle of neutrality. It is not only a recent invention, but one which the Court hasn't consistently applied. It retracted it in a later opinion, in which Mr. Justice Douglas, writing for the Court, said, "We are a religious people whose institutions presuppose a supreme being." Then it went back to the neutrality principle in later cases.

Or more precisely, it went back to an expression of the neutrality principle; its actual holdings have remained inconsistent with that doctrine. And no wonder. The neutrality doctrine is simply incompatible with the existence of a free exercise clause in the first amendment. There is no way to reconcile the two. The very existence of a free exercise clause indicates that the Constitution gives special favors to religion. You can indeed get off from Government work on Saturday for religious reasons, because otherwise the free exercise of your religion is being impinged upon. Now, you can't get off on a Saturday simply because you want to play bridge or because you have a philosophical aversion to working on Saturday. Why? Because religion has special privileges. That is what the free exercise clause means.

Given a free exercise clause, it is impossible to interpret the establishment clause in such a fashion as to provide no favor whatever to religion.

Dr. BERNS. Senator Moynihan, he won't thank me for this, but you might send Mr. Finn over. Of course, he can delegate it to someone else. But have him go through the briefs and records of the *Everson* case, to which I referred in my testimony, and compare the amicus briefs there and what purports to be the history of the debates in the first Congress on this point of neutrality with the record that is to be found in the annals of Congress.

Now, of course, when a lawyer presents an amicus brief, he is under no particular oath to tell all the truth. He is a lawyer. [Laughter.]

Better, he is an advocate. He is an advocate for his client. What happened, of course, in that particular case, is that Justice Rutledge in his concurring opinion in *Everson*, picked up part of what purported to be the full story, but was not.

Then, that got advanced from that footnote in Rutledge's opinion, to become a point of law. I didn't know that Paul Freund was the author of the Kurtzman test. But this is part of it, at least. It is simply bad history.

Mr. BALL. If I may add one thing to that. I think the bad history point is extremely important. There are two defects which the Supreme Court has suffered from in litigation in this area.

One has been that it has accepted canned history uncritically, or perhaps there haven't been competing briefs that have outlined history well enough. But the Freund thing is an excellent example.

Paul Freund presented a paper at an American Bar Association panel. This was picked up in a commercial law journal called Case and Commentary which the people who publish American Jurisprudence circulate, and it is full of little potboilers about the practice of law and how to run a law office. It had the Freund item in it.

That was then taken from there and elevated into Harvard Law Review as a serious piece perhaps because Freund's name was attached to it.

Thus, it got bootlegged into high class literature for the Supreme Court to read. There is not one footnote in the thing. The whole entanglement idea was Freund's own brainchild. It was "home-made law."

The other thing to look for in Supreme Court holdings is the occasional ignoring of a well-developed trial record, but I say that with hesitation because in the Amish case, the court paid great attention to the record.

In *Meek* v. *Pittinger*, which is one of the cases in this field, Pennsylvania had a program of auxiliary services to children, some of which would take place on the premises of a religious school.

This was speech and hearing and so on, remedial services to children taking place on the premises of a religious school.

In that case, we put a witness on the stand who was a very distinguished child psychologist who had treated children on the premises of a religious school, a Protestant religious school.

He was asked then whether or not he attempted to indoctrinate the children with religion. He said,

> What religion? I am Moravian in religion. I do not agree with the doctrines of this particular school.
>
> Secondly, the American Psychological Association forbids my introducing sectarian religious concepts in the course of counseling.

This perfectly superb piece of the trial record was absolutely ignored by the Supreme Court which said his very presence in counseling children on the premises of a religious school will cause religion to seep in somehow.

That is just crazy.

Senator MOYNIHAN. Well, I have to say that as a professor of Government, I have been pretty disturbed that the Court has been so willing to be oblivious of what was after all, an act of Congress, a first amendment act of Congress. Its meaning is discoverable. The meaning doesn't have to go beyond what it says.

We have the annals of Congress.

Mr. Chairman, I wonder if I could ask the record stay open until we get that *amicus* brief in *Everson* and if we might put it in with a critique?

Senator PACKWOOD. We will put it in right at this spot in the record.

Senator MOYNIHAN. If we could do that.

[The brief referred to follows:]

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 52

ARCH R. EVERSON,
Appellant,

—v.—

BOARD OF EDUCATION OF THE
TOWNSHIP OF EWING, *et al.*,
Appellees.

ON APPEAL FROM THE COURT OF ERRORS AND APPEALS
OF THE STATE OF NEW JERSEY

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AS AMICUS CURIAE ON PETITION FOR REHEARING

AMERICAN CIVIL LIBERTIES UNION,
Amicus Curiae.

KENNETH W. GREENAWALT,
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Of the New York Bar,
Of Counsel.

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The American Civil Liberties Union, for reasons stated therein, filed a brief *amicus curiae* upon the merits.

The issues in this case are so grave, the doubts raised by the opinion of the Court are pregnant with such conflicts, that we respectfully urge reargument and reconsideration. The opinion indicates that the action of New Jersey which it sustained "approaches the verge" of Constitutional power but where the brink may be, is left

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obscure. While it emphasizes the compelling nature of the prohibitions in the First Amendment and declares the Court's determination to avoid "the slightest breach" in the wall separating church and state, what will now be considered a breach is left in doubt. The legislation under review is apparently regarded as close to a breach but is held not to be one. In sustaining the legislation as for the "public welfare," no limitations upon the use of that justification for what would otherwise transcend Constitutional power, are clearly prescribed.

In view of the past controversies reflected in state court decisions, the existence of related legislation in various states, the support mustered on behalf of such legislation in this Court and comments in the press following the decision, it may safely be predicted that there will now occur an intensive drive in many communities to pass new legislation on the authority of the Court's opinion and to extend existing legislation to the utmost limits, which it may be argued the opinion sanctions.

There is no reason to doubt that, encouraged by the use of broad reference to "public welfare" legislation, these efforts will go far beyond bus transportation and will include, among other things, attempts to provide, at public expense, such other essential facilities as books, lunches, salaries, school buildings, etc. The opinion certainly does not contain clear warnings as to the limits of the "public welfare" justification. While there are a myriad of questions which need consideration, two groups of questions may be mentioned as of special importance:

(1) Upon the record before the Court it is clear that the legislation, as interpreted by the local action, which the Court upholds, provided for reimbursement to parents

of children attending only public schools and certain schools maintained by the Catholic church. If such selective legislation is now to be regarded as "public welfare" legislation, it would be desirable for the Court to delineate the precise nature of permissible discrimination.

(2) Clarification of the concept in its context is needed also to enable local authorities to distinguish between action which will be regarded as valid "public welfare" legislation and that which will be regarded as invalid support to religious institutions. For example, may or must local authorities now provide at public expense facilities in denominational schools equivalent to those provided in public schools, such as free supplies, meals, tuitions, etc.? Must the public maintain private and secular school houses and standards of instruction equivalent to those in public schools? If all of the approximately 250 sects in the United States should now choose to maintain denominational schools, would the Court's decision apply equally to them? The questions which readily occur are numerous and fundamental.

The efforts which experience shows will undoubtedly follow the Court's decision will not only involve, as we believe, further serious breaches in the wall erected by the Constitution, but also the sort of unseemly contest among religious sects for public support which the First Amendment was intended to prevent by forbidding all the support. (See Madison's Memorial and Remonstance, Par. 11.) Thus a construction of the First Amendment exempting "public welfare" legislation may be readily turned into an instrument disruptive of the "domestic tranquility" and "general welfare" for which the Preamble shows the Constitution itself was established.

The issues here are so grave, the doubts so many, that the matter should not be left merely to future consideration in other cases. The consequences of the storms which may be loosed in local communities by this decision, at least unless it is clarified, may not lend themselves readily to mere subsequent adjudication. The cracks in the wall will be easier to avoid now than when great shoring-up operations may be needed. This Court has frequently recognized, in recent years, the propriety of early reconsideration of great issues involving religious freedom and none of these recent cases involved issues more important than those here.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION,
Amicus Curiae.

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Of the New York Bar,
Of Counsel.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 52

ARCH R. EVERSON, *Appellant,*

—against—

BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, IN THE COUNTY OF MERCER, *et al.,*
Appellees.

ON APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AS AMICUS CURIAE

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No. 52.

ON APPEAL FROM THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE*

Interest of American Civil Liberties Union

This brief is filed with consent of the parties. The American Civil Liberties Union is a nonprofit, nonpartisan organization having a nationwide membership of persons of all religious views and sects including citizens of New Jersey. It is devoted to the preservation and protection of the fundamental liberties guaranteed citizens of this country by Federal and State constitutions. It believes in the historic, basic American doctrine of separation of church and state and that only by its steadfast ap-

strict observance can the religious freedom of all the people be assured.

We wish it clearly understood that in filing this brief we do not, expressly or by implication, attack or criticize the principles or practices of any religious organization or disparage parochial or private schools for those whose consciences or preferences prompt them to use such means for the education of their children. We respect the convictions of those who believe it desirable that a school which combines secular and religious instruction is best adapted to the proper development of their children.

What we say here we would repeat with equal emphasis in respect of schools or institutions of any religious denomination or sect.

Our sole concern is with the constitutionality of the appropriation of public moneys for transportation of children to private, sectarian schools.

Statement of the Case

The facts are simple, undisputed. Appellee Board of Education of Ewing Township, New Jersey, in September, 1942, adopted a resolution providing for "transportation of pupils of Ewing to the Trenton and Pennington High and Trenton Catholic Schools by way of public carriers as in recent years". It agreed to pay, for that current school year, the cost of transportation to such Catholic parochial schools. Part of the agreed sum was paid, the balance remaining unpaid because of this suit. Transportation was by public carrier buses. The Board reimbursed Township parents for bus fares, between that township and Trenton, paid by their children attending the four Trenton Catholic parochial schools. These schools, located outside of the Ewing school district, were maintained by

the parish and parents, religion was taught there, and a Catholic priest was school superintendent.

The Board's resolution was based on a New Jersey statute (Rev. Stat. 18:14-8, as amended by Chap. 191, N. J. Laws of 1941) which provides:

> "18:14-8. Whenever in any district there are children living remote from *any* schoolhouse, the board of education of the district may make rules and contracts for the transportation of such children to and from school, *including the transportation of children to and from school other than a public school, except such school as is operated for profit in whole or in part.*
>
> *When any school district provides any transportation for public school children to and from school, transportation from any point in such established school route to any other point in such established school route shall be supplied to school children residing in such school district in going to and from school other than a public school, except such school as is operated for profit in whole or in part.*" (Italics ours.)

The amendments of 1941 changed "the schoolhouse" to "any schoolhouse", and added the italicized matter.

On application of appellant, resident and taxpayer of Ewing Township, a writ of certiorari was issued by the New Jersey Supreme Court to review the legality of the resolution. Appellant urged the resolution and statute were illegal as violating various provisions of the New Jersey Constitution (Art. I, Pars. 3, 4, 19, 20, and Art. IV, Sec. 7, Par. 6), and the Fourteenth Amendment of the Federal Constitution.

The New Jersey Supreme Court (one Justice dissenting) set aside the resolution, holding it violated Art. IV,

Sec. 7, Par. 6 of the State Constitution providing that the fund for the support of free schools may be appropriated only to the support of public free schools and not for any other purpose under any pretense (132 N. J. L. 98; R. pp. 34-41).

On appeal, the New Jersey Court of Errors and Appeals reversed and dismissed the writ on the ground the resolution and statute did not contravene the State or Federal Constitutions. Three judges dissented (133 N. J. L. 350; R. pp. 45-62). That Court denied reargument, but allowed this appeal (R. pp. 63, 65).

Appellant assigns as error that the resolution and statute contravene the Fourteenth Amendment in authorizing the gift and use of public funds in aid of private and sectarian schools and the taking of private property for a private purpose or private persons and constitute legislation respecting the establishment of religion and authorizing support of religious tenets by taxation (R. pp. 64-65).

POINT I

The statute and resolution are violative of the Federal constitutional guarantees respecting religious freedom and the fundamental doctrine of separation of church and state inherent therein.

We respectfully submit that the use of public moneys to transport children attending parochial schools is in aid and support of such schools and of religious institutions and tenets, and that the statute and resolution authorizing such expenditures violate the fundamental American principle of separation of church and state and the constitutional prohibition respecting the establishment of religion.

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The First Amendment of the Federal Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof". The Fourteenth Amendment provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law". The First is made applicable to the States through the due process clause of the Fourteenth. The fundamental concept of liberty embodied in the Fourteenth Amendment embraces the liberties guaranteed by the First Amendment. The Fourteenth has rendered the states and their agencies as incompetent as Congress to enact laws regarding religion prohibited by the First. (See *Cantwell* v. *Connecticut*, 310 U. S. 296, 303; *Douglas* v. *Jeannette*, 319 U. S. 157, 162; *Murdock* v. *Pennsylvania*, 319 U. S. 105, 108; *Board of Education* v. *Barnette*, 319 U. S. 624, 639; *Palko* v. *Connecticut*, 302 U. S. 319, 324.)

Boards of education, as well as States, must observe these constitutional limitations. In the *Barnette* case, *supra*, at page 639, this Court (in overruling *Minersville District* v. *Gobitis*, 310 U. S. 586), said:

> "The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. • • •
>
> Such Boards are numerous and their territorial jurisdiction often small. But small and local authority may feel less sense of responsibility to the Constitution, and agencies of publicity may be less

> vigilant in calling it to account. * * * There are village tyrants as well as village Hampdens, but none who acts under color of law is beyond reach of the Constitution."

This Court does not have to become "the school board of the country" to insist that local school boards and local legislation conform to constitutional limitations. No real issue of "educational policy" is involved here. Moreover this Court will not, in matters of public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed. (Cf. *Illinois* case, *supra,* at p. 598; *Barnette* case, *supra,* at pp. 640, 642.)

In weighing arguments of the parties here, it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. For the due process test, it is enough for a state to have a "rational basis" for adopting restrictive legislation. But the freedoms of religion, which are in a preferred position, may not be infringed on such slender grounds. While it is the Fourteenth which bears directly upon the States, it is the more specific limiting principles of the First that we believe should finally govern this case. (*Barnette* case, *supra,* at p. 639; *Murdock* case, *supra,* at p. 115.)

In this brief we are dealing with the Fourteenth merely as the transmitting instrument.

As we shall show, the use of public funds to transport sectarian school children is in support of the school and of the religion and religious tenets fostered and taught there. The purpose of the First Amendment, seen in the perspective of history, is clear enough. It was designed to bring about the complete separation of church and state. In the *Barnette* case, *supra* (at p. 655), Mr. Justice Frankfurter referred to this "doctrine of church and state, so cardinal in the history of this nation and for the liberty of our people". This separation was to be achieved by guaranteeing to every person freedom from state interference in his religious beliefs and practices and by preventing the state from lending its aid, support or influence to any religion or religious establishment. No longer were religious institutions to be supported out of the public treasury.

The task of translating the majestic guarantees of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with problems of the twentieth century is not difficult in this case, because the problems of today, involved here, were fully known and experienced in essentially similar manifestations in the eighteenth century and long before, and had led, after a century-and-a-half struggle for religious freedom and the separation of church and state, to the framing and adoption of the First Amendment. The embodiment of these great principles in the new State and Federal constitutions was simply writing colonial experience into the fundamental law of the land. So clearly was this grand purpose etched in history that in 1942 a Justice of this

confidently could state (*Barnette* case, *supra*, at pp. 653, 654):

> "The great leaders of the American Revolution *were determined to remove political support from every religious establishment.* • • •
>
> The prohibition against any religious establishment by the government placed denominations on an equal footing—*it assured freedom from support by the government to any mode of worship* and the freedom of individuals to support any mode of worship. • • •
>
> The essence of the religious freedom guaranteed by our Constitution is therefore this: *no religion shall either receive the state's support* or incur its hostility. Religion is outside the sphere of political government." (Italics ours.)

And this Court definitely could state in *Davis* v. *Beason*, 133 U. S. 333, 342:

> "The first amendment to the Constitution, in declaring that *Congress shall make no law respecting the establishment of religion,* or forbidding the free exercise thereof, *was intended* • • • *to prohibit legislation for the support of any religious tenets, or the modes of worship of any sect.*" (Italics ours.)

That separation of church and state is a fundamental American principle is manifest from history.

Before the adoption of the Constitution, attempts were made in some colonies and States to legislate not only in respect of the establishment of religion, but in respect to its doctrines and precepts as well. The people were taxed, against their will, for the support of religion, and sometimes for the support of particular sects to whose tenets they could not and did not subscribe. For instance, Mary-

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land gave its legislature power to "lay a general and equal tax for the support of the Christian religion"; and Massachusetts and New Hampshire empowered their legislatures to raise public moneys "for the support and maintenance of public Protestant teachers of piety, religion and morality". Punishments were prescribed for a failure to attend upon public worship and sometimes for entertaining heretical opinions.

The controversy upon this general subject was animated in many of the States, but seemed at last to culminate in Virginia, when we declared our independence. The Episcopal Church had been the established church in that colony. The Presbytery of Hanover, as soon as independence had been declared, and on October 24, 1776, presented a memorial to the general assembly of Virginia asking the abolition of the establishment, which had involved, among other things, the payment of state funds to Episcopal clergy. In their memorial they pointed out what they deemed to be the proper function of government and declared that they were desirous of no state aid in religious affairs. They said "We ask no ecclesiastical establishment for ourselves nor can we approve of them and grant it to others" and they entreated:

> "• • • that all laws now in force in this commonwealth which countenance religious domination may be speedily repealed—that all of every religious sect may be protected in the full exercise of their modes of worship and exempted of all taxes for the support of any church whatsoever, further than what may be agreeable to their own private choice or voluntary obligation."

The Baptists and Quakers joined the Presbyterians in opposing the establishment of the Episcopal church, with

the result that the latter was disestablished. A motion was put before the Assembly, however, to levy a tax for the support of not only the Episcopalian but all denominations. The Presbytery of Hanover, Virginia, again presented a remonstrance in which they stated:

> "As it is contrary to our principles and interest and, as we think, subversive to religious liberty, we do again most earnestly entreat that our Legislature would never extend any assessment for religious purposes to us or to the congregations under our care."

The proposed measure was defeated in 1779, but it appeared again in 1784, when the House of Delegates had under consideration a "bill establishing provision for teachers of the Christian religion." This bill would have allowed every person to pay his money to his own denomination, or if he did not wish to help support any denomination, his money would go to the maintenance of a school in the country. Action on this bill was postponed until the next session to enable the legislature to obtain expressions of opinion on it from the people. This brought out a determined opposition. Thereupon Madison wrote and circulated his famous pamphlet "A Memorial and Remonstrance" in which he demonstrated "that religion, or the duty we owe the Creator" was not within the cognizance of civil government, and made the following statement, which is as applicable today as it was then, however innocent the intrusion of religion into matters pertaining to the State may seem to be:

> "It is proper to take alarm at the first experiment upon our liberties. We hold this prudent jealousy to be the first duty of citizens, and one of the noblest characteristics of the late Revolution.

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> The freemen of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle. We revere this lesson too much soon to forget it. *Who does not see that the same authority which can establish Christianity, in exclusion of all other religions, may establish with the same ease, any particular sect of Christians,* in exclusion of all other sects? that the same authority which can force a citizen to contribute *three pence only* of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?" (Italics ours.)

At the next session, the proposed bill was not only defeated, but there was passed in its stead, on December 16, 1785, an "Act for establishing religious freedom" (Statute of Religious Freedom), written by Thomas Jefferson, which is a declaration of religious independence applicable to all situations growing out of a union of state with religion or to any project which would involve such union. The preamble thereto said, among other things:

> "* * * that to compel a man to furnish contributions of money for propagation of opinions which he disbelieves, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable opportunity of giving his contributions to the particular pastor whose morals he would make his pattern, and whose powers he feels most persuasive to righteousness * * *"

The statute itself in part provided:

> "That no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever, * * *."

About a year after the passage of that statute, the convention met which prepared the United States Constitution. Jefferson, away in France, expressed disappointment in a letter that the proposed draft contained no provision for religious freedom. A number of states thereafter proposed amendments, including a declaration of religious freedom. At the first session of the first Congress, the amendment now under consideration was proposed with others by Madison and was adopted. Jefferson afterwards, in reply to an address to him by a committee of the Danbury Baptist Association, took occasion to speak of the First Amendment as "thus building a wall of separation between church and State." (For the foregoing, see *Reynolds* v. *United States,* 98 U. S. 145, 162-164; *"The Legal Status of Church-State Relationships in the United States"*, by Dean Alvin W. Johnson, pp. 90-95 (Univ. Minn. Press, 1934), and authorities there cited; *"Religion in Colonial America"* by William Warren Sweet (1942 Scribner's), especially Chap. X, *"America and Religious Liberty"*, pp. 319-339; *"Jefferson Himself"*, by Bernard Mayo, Houghton Mifflin Co., 1942, pp. 75, 79-84, 86-87. "American Charters, Constitutions and Organic Laws," F. N. Thorpe, Vol. 3, p. 1689, Maryland Constitution of 1776, Art. XXXIII; Vol. 3, pp. 1889-90, Mass. Constitution of 1780, Art. III; Vol. 4, p. 2454, New Hampshire Constitution of 1784, Art. I, Sec. VI.)

A careful examination of the American Federal and State constitutions, in light of the historical background, discloses that nothing is more firmly set forth or more plainly expressed than the determination of their authors to preserve and perpetuate religious liberty and to guard against the slightest approach toward its infringement. They perceived that a union of Church and State, like that

which existed in England and other countries, was certainly opposed to the spirit of our institutions. (See Cooley's *"Constitutional Limitations"*, Vol. II, 8th Ed. (1927), p. 960; Johnson's *"The Legal Status of Church-State Relationships in the United States"*, *supra*, at p. 285.) As pointed out in Cooley's work at pages 966-7, there are certain things which are not lawful under any of the American constitutions, including the following:

> "1. *Any law respecting an establishment of religion.* • • • There is not complete religious liberty where any one sect is favored by the State and given an advantage by law over other sects. Whatever establishes a distinction against one class or sect is, to the extent to which the distinction operates unfavorably, a persecution; and if based on religious grounds, a religious persecution. The extent of the discrimination is not material to the principle; it is enough that it creates an inequality of right or privilege.
>
> 2. *Compulsory support, by taxation or otherwise, of religious instruction.* Not only is no one denomination to be favored at the expense of the rest, but all support of religious instruction must be entirely voluntary. It is not within the sphere of government to coerce it." (Italics ours.)

In light of our constitutional history, it was not difficult for Mr. Justice Frankfurter, in the *Barnette* case, *supra*, at page 600, to foresee arising in this Court the very issue involved in this case. He said:

> "• • • Children who go to public school enjoy in many states derivative advantages such as free textbooks, free lunch, and free transportation in going to and from school. • • • What of the claim that if the right to send children to privately maintained schools is partly an exercise

> of religious conviction, to render effective this right it should be accompanied by equality of treatment by the state in supplying free textbooks, free lunch, and free transportation to children who go to private schools? *What of the claim that such grants are offensive to the cardinal constitutional doctrine of separation of church and state?*
>
> These questions assume increasing importance in view of the steady growth of parochial schools both in number and in population." (Italics ours.)

The principle of separation of church and state carried over into the field of education. The same spirit that had manifested itself in opposition to state control or support of religion directly likewise bred opposition to state support of sectarian schools. If education was to be religious, it must be carried on by the churches and without the support of the state. With the demand for an educational system supported by the state came a similar demand that such education be nonsectarian. (See Johnson, *"The Legal Status of Church-State Relationships in the United States", supra,* at pp. 15-22, 152.) This principle was recognized by this Court in the *Barnette* case, *supra,* at page 637, where it was stated:

> "• • • Free public education, if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party, or faction."

Courts have been quick to perceive that using public funds to transport or otherwise aid sectarian school children invokes and violates this concept of separation of church and state. Mr. Justice Frankfurter diagnosed the issue in the *Barnette* case, *supra,* at page 660.

In the leading case of *Judd* v. *Board of Education*, 278 N. Y. 200, the New York Court of Appeals, in declaring a statute void and unconstitutional which authorized the use of public funds to pay for the transportation of pupils attending private parochial schools, stated:

> "• • • While a close compact had existed between the Church and State in other governments, the Federal government and each State government from their respective beginnings have followed the new concept whereby the State deprived itself of all control over religion and has refused sectaries any participation in or jurisdiction or control over the civil prerogatives of the State. And so in all civil affairs there has been a complete separation of Church and State jealously guarded and unflinchingly maintained. In conformity with that concept, education in State supported schools must be non-partisan and non-sectarian. This involves no discrimination between individuals or classes. It invades the religious rights of no one. While education is compulsory in this State between certain ages, the State has no desire to and could not if it so wished compel children to attend the free public common schools when their parents desire to send them to parochial schools (*Pierce* v. *Society of Sisters*, 268 U. S. 510), but their attendance upon the parochial school or private school is a matter of choice and the cost thereof not a matter of public concern. As Judge Pound aptly said in *People ex rel. Lewis* v. *Graves* (245 N. Y. 195, 198), 'Neither the Constitution nor the law discriminates against religion. Denominational religion is merely put in its proper place outside of public aid or support.' We furnish free common schools suitable for all children of the State regardless of social

status, station in life, race, creed, color or religious faith."

"Any contribution directly or indirectly made in aid of the maintenance and support of any private or sectarian school out of public funds would be a violation of the concept of complete separation of Church and State in civil affairs and of the spirit and mandate of our fundamental law." (Italics author's.)

• • •

"It is claimed that the statute may be sustained as a valid exercise by the Legislature of the police power of the State. This argument overlooks the consideration that even the police power must be exercised in harmony with the restrictions imposed in the fundamental law." (citing cases)

Judd v. *Board of Education,* 278 N. Y. 200, 210, 211, 215.

In the very recent case of *Gurney* v. *Ferguson,* 190 Okla. 254; rehearing denied; cert. den. 317 U. S. 588, 707, the Supreme Court of Oklahoma, in holding invalid and unconstitutional a statute authorizing an expenditure of public moneys to transport pupils to private parochial schools, said in this connection, at page 256:

"The brief for plaintiffs in error emphasizes the wholesomeness of the rule and policy of separation of the church and the state, and the necessity for the churches to continue to be free of any state control, leaving the churches and all their institutions to function and operate under church control exclusively. We agree. In that connection we must not overlook the fact that if the Legislature may directly or indirectly aid or support sectarian or denominational schools with public funds, then it would be a short step forward at another session to increase such aid, and only another short step to some regula-

> tion and at least partial control of such schools by successive legislative enactment. From partial control to an effort at complete control might well be the expected development. The first step in any such direction should be promptly halted, and is effectively halted, and is permanently barred by our Constitution."

In *Knowlton* v. *Baumhover,* 182 Iowa 691, at pp. 704, 705, the Court, in restraining school officials from paying out public school funds in aid of a parochial school, stated in an excellent opinion reviewing the authorities:

> *"If there is any one thing which is well settled in the policies and purposes of the American people as a whole, it is the fixed and unalterable determination that there shall be an absolute and unequivocal separation of church and state,* and that our public school system, supported by the taxation of the property of all alike—Catholic, Protestant, Jew, Gentile, believer, and infidel—shall not be used, directly or indirectly for religious instruction, and above all, that it shall not be made an instrumentality of proselyting influence in favor of any religious organization, sect, creed, or belief.
>
> * * *
>
> * * * To guard against this abuse, most of our states have enacted constitutional and statutory provisions, forbidding * * * all use or appropriation of public funds in support of sectarian institutions." (Italics ours.)

See also the able dissenting opinion in *Board of Education* v. *Wheat,* 174 Md. 314, 325 (a case involving transportation of parochial school children); *Harfst* v. *Hoegen,* 349 Mo. 808, rehearing denied; *Williams* v. *Board of Education,* 173 Ky. 708.

POINT II

The appropriation through statute or resolution of public funds for transportation of parochial school pupils is in aid and support of such schools and of the religion and religious tenets taught there, and constitutes state support of religion in violation of the said Constitutional provisions.

There can be no question that parochial schools generally and Catholic parochial schools in particular are private, religious, sectarian schools and institutions. They are not public schools or part of the public school system. It is recognized that parochial schools are instituted by the Catholic Church so that the youth thereof may receive instruction in its religious principles and beliefs along with secular education. Systematic religious instruction and moral training according to the tenets of that Church are regularly provided. The schools are supported and maintained by the local church parish and diocese. Invariably, the teachers are members of an order. Religious worship, as well as religious instruction, is involved. (See *Smith* v. *Donahue,* 202 App. Div. (N. Y.) 656; *Pierce* v. *Society of Sisters,* 268 U. S. 510, 532; *Board of Education* v. *Wheat, supra; Gurney* v. *Ferguson, supra;* 17 Enc. Brit., page 336: "Parochial Schools".) That secular subjects are also taught there does not change their character. As said in *Knowlton* v. *Baumhover, supra,* at page 706:

> "• • • At the bar of the court, every church or other organization upholding or promoting any form of religion or religious faith or practice is a sect, and to each and all alike is denied the right to use the public schools or the public funds for the advancement of religious or sectarian teaching. To

> constitute a sectarian school or sectarian instruction which may not lawfully be maintained at public expense, it is not necessary to show that the school is wholly devoted to religious or sectarian teaching."

The schools benefited here are four such Catholic parochial schools. As Justice Case (now Chief Justice) said below (R. 62):

> "The operation of a church school under the direction of, and teaching the tenets of, a church, is a primary function whereby that church puts its impress upon and holds the children of the church to its faith. The parochial schools are a part of the ministration of the church under whose control they are. The ministry of the church is concerned and connected therewith. Specifically, in this instance, a priest of the church is the superintendent. The schools are maintained by the parish and by moneys paid by the parents." (133 N. J. L. 350, 367)

Such schools clearly are religious institutions. They are quite different from a private secular hospital corporation which happens to be operated by individuals of a particular religious group (cf. *Bradfield* v. *Roberts,* 175 U. S. 291).

It is equally clear that the furnishing of transportation to children attending private parochial schools out of public moneys is in aid and support of such schools.

The majority, and better-reasoned, view of the courts of this country is that the private and sectarian schools are the beneficiaries of expenditures made out of public funds for the transportation of their pupils. That view is ably and typically expressed in the leading case of *Judd* v. *Board of Education, supra,* 278 N. Y. 200, 211, 212, where the New York Court of Appeals in a similar case stated:

"The argument is advanced that furnishing transportation to the pupils of private or parochial schools is not in aid or support of the schools within the spirit or meaning of our organic law but, rather, is in aid of their pupils. That argument is utterly without substance. * * *

Free transportation of pupils induces attendance at the school. The purpose of the transportation is to promote the interests of the private school or religious or sectarian institution that controls and directs it. 'It helps build up, strengthen and make successful the schools as organizations' (*State ex rel. Traub* v. *Brown,* 36 Del. 181, 187, writ of error dismissed, Feb. 15, 1938). Without pupils there could be no school. It is illogical to say that the furnishing of transportation is not an aid to the institution while the employment of teachers and furnishing of books, accommodations and other facilities are such an aid."

To the same effect see *Gurney* v. *Ferguson,* 190 Okla. 254, *supra; State ex rel. Traub* v. *Brown,* 36 Del. 181, writ of error dismissed, 39 Del. 187; *Mitchell* v. *Consolidated School District,* 17 Wash. 2nd, 61; *Sherrard* v. *Jefferson County Board of Education,* 294 Ky. 469; *State ex rel. Van Straten* v. *Milquet,* 180 Wisc. 109, which latter case was recently approved in *Costigan* v. *Hall,* 23 N. W. 2nd, 495 (Wisc. Sup. Ct. 1946). See also, Report of Minnesota Attorney General, 1920, page 300, which ruled that "to expend school funds for such purpose (transporting parochial school children in public school buses) would mean, upon a final analysis," * * * "the expenditure of public funds in aid of the support and maintenance of a private school wherein doctrines and creeds of a particular religious sect are promulgated and taught. This the law does not permit." In this connection, Johnson,

in his scholarly work *"The Legal Status of Church-State Relationships in the United States", supra,* states at pages 188-9:

> "The position here taken may be said to be consistent with our general public school policy and the American principles of separation of church and state. It may be difficult for some to see why their children going to a private or parochial school should be denied transportation in the public school bus which passes their doors, and for whose support they are taxed. This denial is, however, the only course that may be rightfully pursued. The matter of transportation is one of the privileges that accompanies attendance at a public school, and it is only as the children are enrolled in the public school that this privilege of transportation facilities may be shared by them. Any other course would directly or indirectly constitute an appropriation of public funds for private or sectarian purposes, and would thus ignore the fundamental purpose of our educational system as set forth in our constitutional and statutory laws."

In several states there has been evolved the theory that such transportation is for the benefit of the child, not the school. (See *Board of Education* v. *Wheat,* 174 Md. 314, *supra* (three Justices dissenting); *Adams* v. *St. Mary's County,* 180 Md. 550; *Bowker* v. *Baker,* 167 Pac. 2nd, 256; 73 Ad. Cal. App. Rep. 727; (4th Dist. Ct. of App. Calif.). In *Nichols* v. *Henry,* 191 S. W. 2nd, 930 (Ky.), the Kentucky Supreme Court expressly reaffirmed its ruling in the *Sherrard* case, *supra,* that public school funds could not be used for the transportation of children attending private schools, but held that a general tax levied for that purpose would be legal.

This "child benefit" theory seems first to have received judicial recognition in *1929* in the "lending text-book" cases of *Borden* v. *Louisiana State Board of Education* and *Cochran* v. *Same,* 168 La. Rep. 1005, 1030, decided simultaneously by a divided court of four to three. That case was followed in *Chance* v. *Mississippi,* 190 Miss. 453, another "lending text-book" case. The able dissenting opinion in the *Borden-Cochran* cases characterized this ruling of the majority as "a mere begging of the question" and as "an attempt to do indirectly that which cannot be done directly". In *Chance* v. *Mississippi,* the dissenting opinion, after citing the authorities and the State and Federal constitutions, including the First Amendment, stated:

> "Both the Federal and the State constitutions sought in unmistakable terms to provide for a complete separation of church and state. * * * The statute involved is a step in the direction of breaking down that separation."

The minority opinion in the *Cochran-Borden* cases was said by the New York Court of Appeals in *Judd* v. *Board of Education, supra,* to be the "better reasoned opinion". In the *Sherrard* and *Gurney* cases, *supra,* the Kentucky and Oklahoma Supreme Courts said that these Louisiana cases and a few others of similar import, were not only contrary to the great weight of authority but "were lacking in persuasive reasoning and logic". In *State ex rel. Traub* v. *Brown, supra,* the Delaware Court, apropos the *Borden-Cochran* decisions, said "We are not impressed by the reasoning of this case. There was a strong dissenting opinion". Compare *Synod of Dakota* v. *State,* 2 S. D. 366, 374, where as early as 1891 a similar argu-

ment (that tuition aided the state or students and not the school) was rejected with this comment:

> "This contention * * * is, we think, unsound, and leads to absurd results. The theory contended for by counsel would, in effect, render nugatory the provisions of the constitution * * * *This theory carried out to its legitimate results would enable any one leading sect to control the schools, institutions and funds of the state, as it could claim it was rendering services for the funds appropriated. It was undoubtedly to prevent such possible results that these provisions were inserted in the constitution.*" (Italics ours.)

See also, *Smith* v. *Donahue*, 202 App. Div. 656 (N. Y.), approved by the New York Court of Appeals in the *Judd* case, *supra*, for a complete answer to the views of the *Cochran* case majority.

There is much justification for the observation of Justice Case below (R. p. 57) that "It is the consensus of the weight of judicial opinion that the 'child-benefit' theory' is an ingenious effort to escape constitutional limitations rather than a sound construction of the content and purpose."

The "child-benefit" theory is not only unsound and devious, but it is extremely dangerous because it provides a ready excuse for all sorts of violations of basic principles. There is no limit or logic to the extent of its application. There is and can be no rational or clear line of demarcation in this field between what constitutes aid to a school as distinguished from aid to a pupil. For example, in the instant case, the provision is for transportation of children by public carrier buses and reimbursement of fares paid to the parents out of public funds. In [illegible]

cases legislation, going a step further, has provided for pupils of private sectarian schools to use, at public expense, in conjunction with public school children, the buses owned and operated by a public school district, along or near public school routes, thereby necessitating additional expenditures for more bus routes and buses. (See *Gurney* v. *Ferguson, supra; State ex rel. Van Straten* v. *Milquet, supra; Board of Education* v. *Wheat, supra; Mitchell* v. *Consolidated School District, supra; Bowker* v. *State, supra.*) By still another step, public funds are appropriated in large sums to supply buses *solely* and *especially* for private parochial school children—with no transportation being provided for public school children in the same county (*Adams* v. *St. Mary's, supra*). It is to be noted that while the *Adams* case was based on the earlier, split *Wheat* decision, the majority in the *Wheat* case had justified its decision on the ground that "*no buses are to be provided for private school children especially.*" Thus, it is seen how the process develops from small, indirect aid to direct and large expenditures for the especial and exclusive use of parochial school children, and the *Adams* and *Wheat* cases show how easily the transition can be made and justified once the principle is blurred.

Already, as seen, it has been urged, and occasionally held, in various cases that the use of public funds for transportation, text books and school supplies is justified as in aid of the pupil, not the school. Obviously, the "child-benefit" theory is equally applicable to and may next be urged in support of every proper expenditure for school purposes, such as free lunches, tuition, salaries of teachers, furnishings and equipment, repairs and improvements and even construction of school houses. "Indirect" aid will soon give way to "direct" aid. (See the *Judd*

case, *supra*, at p. 212.) This dangerous trend has been pointed out in various cases and articles. For instance, in the dissenting opinion of *Board of Education* v. *Wheat*, *supra*, at pp. 340, 341, it was said:

> "In a certain sense, the child is a beneficiary, as he is of everything which contributes to his ability to go to school and there to receive an education. However, the existence of the private school is the indispensable prerequisite. Without it, his sectarian education at school cannot be had; nor would any problem of transportation or of accessibility arise. Thus whatever educational benefits are received by the pupil proceed from the school as the primary source to the child. The sectarian school is in competition with the public free school, and cannot maintain its position without sufficient funds. * * * Any apt means for relieving the sectarian school of providing transportation for its pupils at the immediate charge against public funds is as direct and substantial a donation to the sectarian school, as if the moneys thus appropriated by statute had been paid into the treasury of the school. The device of providing a bus for the common carriage of public and sectarian school children or a bus for their separate carriage cannot affect this conclusion. State v. Milquet, 180 Wis. 109, 192 N. W. 392. An appropriation which would be unlawful by direct action may not be lawfully accomplished by indirection. If so, circumvention would attain a new use. There are other purposes and objects more necessary in sectarian schools than the carriage of their pupils, and the theory advanced would permit public funds to be used to pay either for the athletic supplies and equipment of pupils; or for the fuel bill to keep the school room adequately heated; or for the payment of salaries of instructors; or for musical instru-

> ments, encyclopedias, laboratory equipment; or for a fund to cover the traveling expenses of the children in their athletic contests. It is submitted that the use of general taxation for these illustrative purposes is neither reasonably nor logically permissible on the theory that the appropriation is not in aid of sectarian schools, but for the benefit of their pupils. * * * Transportation to and from a school is an important factor in securing and keeping pupils. It is obviously an aid."

See also *Gurney* v. *Ferguson, supra.* Dissenting opinion of Justice Case below (R. p. 55); and note in 25 Illinois Law Review 547.

These extensions are not mere far-fetched possibilities. Past experience has indicated their reality. In a number of cases the courts have been asked to uphold appropriations out of the public treasury to sectarian schools and institutions for purposes other than pupil transportation. The use of public funds to pay directly or indirectly the tuition fees of pupils in private or sectarian schools has been sought, but not permitted. See *Otken* v. *Lamkin,* 56 Miss. 758; *Synod of Dakota* v. *State,* 2 S. D. 366, *supra; Williams* v. *Board of Trustees,* 173 Ky. 708, *supra; Rutgers College* v. *Morgan,* 70 N. J. L. 460; Opinion of the Justices, 214 Mass. 599, cf. *Judd* v. *Board of Education,* 278 N. Y. 200, 215, *supra;* so also, for text books and school supplies, *Smith* v. *Donahue, supra, Haas* v. *Independent School District No. 1,* 9 N. W. 2nd, 707 (S. D.); so also, sums of money or financial aid generally, *Council of Newark* v. *Bd. of Ed. of Newark,* 30 N. J. L. 374; *Connell* v. *Gray,* 33 Okla. 591; *State of Nev.* v. *Hallock,* 16 Nev. 373; *Bennett* v. *City of La Grange,* 153 Ga. 428; *Constitutional Defense League* v. *Waters,* 308 Pa. 150; *People* v. *Bd. of Ed. of*

Brooklyn, 13 Barb. (N. Y.) 400; *A., T. & S. F. Rld. Co.* v. *City of Atchison,* 47 Kans. 712.[1]

The extremities to which school boards may go in the direction of breaching the historic wall of separation between church and state is illustrated by *Harfst* v. *Hoegen, supra.* There a parish parochial school was taken into the public school system by a local school board, and was thereafter supported by public funds. While the text books and courses of study were prescribed by the state, the children were marched to the church next door for a religious service each day and in school were given sectarian religious instruction. Religious symbols and pictures were in the rooms and the teachers were members of a religious order. In restraining such use of public funds, the Court said that the nominal supervision by the school board was but an indirect means of accomplishing that which the Constitution forbade, and it stated further (at p. 817):

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[1] Appellees' reference to three recent Federal Acts calls for brief comment.

1. The National Free Lunch Act (Act of June 4, 1946, c. 281, 60 Stat. 42 U. S. C. §§1751-1760) authorizes the disbursement of Federal funds through the states or other agencies or (where local laws prohibit this) directly by the Secretary of Agriculture to non-profit private schools (as well as public schools) for lunch room equipment and supplies and for serving lunches free or at reduced cost to pupils. The problems raised by this statute would require careful scrutiny. We do not believe that questions as to its constitutionality need be anticipated by the decision in the case at bar.

2. The District of Columbia Act providing and fixing a reduced fare of three cents for all school children not over eighteen years old on street railway and bus lines to and from schools in the District (Dist. Col. Code, 1940, §§44-214) is in the same category as the Act providing for the free transportation on such lines of policemen and firemen, (*id.* §§44-216). It is merely a matter of rate fixing. No use of or reimbursement out of public funds is involved.

3. The Serviceman's Readjustment Act of 1944 (Chap. 268, Pub. L. 346, 38 U. S. C. §701, Pub. L. 689) is a war measure of limited time duration involving grants to or for the benefit of World War II veterans for vocational and educational aid for their rehabilitation and readjustment in civilian life. More specifically it is for those veterans whose education was impeded, delayed, interrupted or interfered with by reason of entrance into service. Thereunder the veteran is free to enter any educational institution he chooses, public or private, sectarian or non-sectarian. It does not seem to us that this Act violates the First Amendment in respect to religious freedom.

> "Public money, coming from taxpayers of every denomination, may not be used for the help of any religious sect in education or otherwise. If the management of this school were approved, we might next have some other school gaining control of a school board and have its pastors and teachers introduced to teach its sectarian religion. Our schools would soon become the centers of local political battles which would be dangerous to the peace of society where there must be equal religious rights to all and special religious privileges to none."

Another illustration is in *Knowlton* v. *Baumhover, supra.* There a public school board, in a town peopled largely by Catholic families, sold the public school house as inadequate and rented for public school purposes part of the parochial school house adjoining the church. The instruction given was an admixture of secular and religious teaching. The Court restrained the public school officials from contributing public school funds for the support of this school. See also *Wright* v. *School Dist.*, 151 Kan. 485, where large sums from school taxes were used to supply, equip and maintain a parochial school; *State ex rel. Public School District* v. *Taylor,* 122 Neb. 454; and annotations, 141 A.L.R. 1148 and 5 A.L.R. 879.

In *"The Relation of Religion to Civil Government in the United States"* (Putnam's Sons, 1895), the author, Cornelison, stated at pages 345-346:

> "The fostering of any particular Christian sect, by making appropriations to it from the public treasury, is a wrong so obvious as to need no special consideration. * * *
>
> The public sentiment against making appropriations from the public treasury to any Christian sect upon any pretense whatsoever, whether of promoting

> education or charity, is so widespread and firmly established and the conditions in which such appropriations can be obtained are so unlikely to occur and so repugnant to the feelings of personal independence that no other safeguard is thought to be necessary to prevent the wrong."

The efforts outlined in the cases cited and in statutes recently enacted in some states show that, contrary to the author's expectation that self-restraint would be an adequate safeguard, vigorous application of constitutional principles is necessary to assure continued separation.

By means of the "child benefit" theory, aid to private sectarian schools out of public funds has been justified by proponents of such aid and by some courts as (1) an incident and in aid of the compulsory education laws.* (2) a valid exercise of the police power in aid of the health, safety and general welfare of the children, including prevention of traffic hazards, (3) a means to give parochial school children the equal rights, benefits and privileges to which it is said they are "entitled". One or more of these theories have been advanced and fully answered in the various school transportation and textbook cases mentioned above. Whether such purposes are stated in the statutes authorizing such aid or are implied by the courts in upholding such aid, they are merely rationalizations and devices to avoid constitutional limitations.

In other cases, such, for example, as this one (R. pp. 50-51) and the Kentucky *Sherrard* and *Nichols* cases, *supra*, such aid is judicially approved by drawing fine distinc-

* Compare this argument with that made by the appellees in *Pierce v. of Sisters, supra*, where it was urged, and held that state compulsory education laws could not interfere with the right to conduct and send children to such schools.

tions in respect of the source of the public moneys used. These distinctions are without substance. We believe the constitutional principle applies whatever the immediate source of such public moneys. When the Federal and State constitutions were framed, it was well understood that they were intended to prevent *any* aid, direct or indirect, out of the public treasury to sectarian schools. The basic constitutional principle ought not be frittered away by ingenious refinements.

POINT III

The decision of this Court in the *Cochran* case should not be considered as controlling in this case.

Appellee argued below that the decision of this Court in *Cochran* v. *Board of Education,* 281 U. S. 370, disposes of all appellants' assignments of error. The decision therein of the Louisiana Court (168 La. 1005, 1030) has been noted above. That Court was divided four to three. The fallacious reasoning of the majority has been exposed since many times. This Court's decision appears to have been based on the Louisiana Court's interpretation of the state statute.

It does not appear that this Court considered the consequences of applying the test by the First Amendment, transmitted by the Fourteenth, as it must now do under its recent decisions. As Mr. Justice Reed has pointed out in the *Murdock* case, *supra* (at p. 126), it is only in recent years that the freedoms of the First Amendment have been recognized as among the fundamental personal rights protected by the Fourteenth Amendment

from impairment by the State and until then these liberties were not deemed to be guarded from state action by the federal constitution. Particularly, as to the freedoms of religion, this recognition did not become fully crystallized until 1939 in *Cantwell* v. *Connecticut,* 310 U. S. 296, 303, though it had been suggested in such earlier decisions as *Palko* v. *Connecticut, supra,* at page 324, and *Hamilton* v. *Regents,* 293 U. S. 245, 262. Only recently has the great development of this principle taken place in this Court in a series of far-reaching cases involving religious freedom in various aspects. It is now no longer possible for a state or its agencies to escape Federal constitutional limitations by reliance on construction of state statutes by state courts when they are in derogation of Federal rights now clearly recognized.[2]

In the *Cochran* case, the state court majority held that public moneys appropriated for text books given free to private, sectarian schools were not in aid of such schools, but solely for the benefit of the state or the pupils. That such schools were thus relieved of the expense of supplying their own text books and were supported by public funds to that extent and that this was merely a method of doing indirectly what could not be done directly—using public funds to aid private sectarian institutions—was entirely disregarded and this Court felt constrained to accept the state court's construction. Furthermore, the Louisiana majority justified its conclusions on the ground that the books were merely lent, not given, to the pupils and there was no segregation of the beneficiaries. It certainly cannot be claimed here that bus rides or public money paid therefor are "lent" to the sectarian school

[2] Where as here a decision of a state court involves a local matter as well as constitutional rights, a state court decision of a local question cannot control the Federal constitutional right. *Marsh* v. *Ala.,* 90 U. S. Law. Ed. (Adv. Sheets) 227, 232.

or pupils or that this School Board resolution did not segregate the beneficiaries of the aid. Accordingly we suggest that the *Cochran* case should not be regarded as controlling here.

State legislatures and school boards can devise many indirect ways and means of aiding private, sectarian schools and institutions with public moneys, particularly in communities which are predominantly of a particular sect, if they are but slightly encouraged and given an opening wedge.* Such invasions of fundamental freedoms are never made all at once or by frontal attack, but are gradual and indirect. However seemingly innocent and minor they may appear to be, this Court must be vigilant in striking them down. Such has been the Court's policy.

This Court recently has held that neither a state nor a municipality thereof, under these constitutional limitations, may impose a tax on the exercise of a religious venture designed to propagate the beliefs of a particular sect and to deprecate the beliefs of more established faiths. It said that a community may not suppress, or the state tax, the dissemination of views because they are unpopular or distasteful, and such a device would be a ready instrument for the suppression of an unpopular faith which some minority cherishes and would be a complete repudiation of the philosophy of the Bill of Rights. See *Murdock* v. *Pennsylvania, supra,* at page 116; *Jones* v. *Opelika,* 316 U. S. 584, as overruled 319 U. S. 103; *Douglas* v. *Jeannette, supra.* If a state may not levy a tax on a religious propagation venture, it logically follows that it cannot constitutionally tax the people generally and use part of such taxes to sup-

* Since the *Cochran* case decision (1930) and apparently in reliance thereon, several states have enacted legislation designed to provide text books free to private sectarian schools and several more states have passed laws authorizing the use of public funds for transporting private, sectarian school pupils.

port a venture designed to teach and propagate the beliefs and practices of a religious sect. Such a device can be made a ready instrument to aid and support propagation of particular religious beliefs, through sectarian schools well and favorably established in a local community.

This Court has held that students in public schools cannot be compelled by boards of education to participate in a civil patriotic ceremony which happens to conflict with their particular religious faith. *Gobitis* case, *supra,* as overruled by *Barnette* case, *supra,* at page 642. It follows that public financial support in aid of sectarian schools teaching that or some other religious belief is not constitutional as in violation of the principles of religious freedom embodied in the First and Fourteenth Amendments.

It has been argued that use of public funds for sectaries is justifiable because all citizens are taxed for the support of public schools. However, any parents can send their children to public schools and none can be compelled to send them there rather than to a sectarian school. The choice is free. Only a weighing of values and desired advantages is involved. Sectarian religion need not be taught in school. It can be taught and practiced freely in churches and homes. Many sincerely religious parents prefer to have their children attend the secular public schools while others see advantages in having children go to private or religious schools. Other apparent inequalities can be suggested. Childless parents are taxed to support public schools. Quakers are compelled to pay taxes for the support of a government that carries on war and administers oaths contrary to their religious beliefs. Christian Scientists are taxed to support many governmental sponsored and financed medical practices, contrary to their religious beliefs. These

are merely some of the unavoidable inequalities of treatment that necessarily occur in the maintenance of popular, democratic government; they do not suggest that the historic separation of Church and State should be abandoned.

Conclusion

This case is important and timely. It presents a situation which, however innocent or plausible it may be made to appear, constitutes a definite crack in the wall of separation between church and state. Such cracks have a tendency to widen beyond repair unless promptly sealed up.

The case arises in the field of sectarian religion where it is difficult to maintain an attitude of calm and detachment. Many decisions in the field have been decided by divided state courts. This difficulty is intensified in states and communities where particular sectarian schools are widely patronized and established. Cf. the *Adams, Wheat, Knowlton* and *Harfst* cases, *supra*. Political pressures and religious feeling and intolerance often make it difficult for local officials to act according to the philosophy of the Bill of Rights. But these difficulties were even more acute in colonial times. The ideals of religious freedom and separation of church from state which permeate our constitutions and institutions were achieved in this country only after a 150 years struggle and after what Jefferson characterized as the "severest contests in which I have ever been engaged." (Jefferson Autobiography, Vol. I, pp. 53-59.)

To deny governmental or public financial support to sectarian institutions is not to deny the efficacy of religion or religious instruction. The church and the home are free to teach religion. Recent decisions have placed religious

exercises beyond state interference. The faiths that deserve to survive will survive without state support. It has been recognized by this Court that parochial education has been "long regarded as useful and meritorious." (*Pierce* v. *Society of Sisters,* 268 U. S. 510, 534.) The same can be said of such education whether it is given in Catholic, Quaker, Presbyterian, Congregational, Methodist, or other sectarian schools. The problem here is merely to keep the separation clear, to avoid public support for religions so that the State may neither subsidize nor control an area wholly beyond its competency.

The constitutional policy of our country has decreed the absolute separation of church and state, not only in governmental matters but in educational ones as well. Public money, coming from taxpayers of every denomination, may not be used for the help of any religious sect in education or otherwise. The Virginia Statute of Religious Freedom referred to such a practice as "sinful and tyrannical". The First Amendment was designed in part to prevent the very practice which had obtained in several of the colonies. Passage of time has not weakened but rather has emphasized the importance of preserving the constitutional barriers.

This Court aptly said in the *Barnette* case, "The first amendment to our Constitution was designed to avoid these ends by avoiding these beginnings."

We respectfully submit that the resolution and statute in question are plainly unconstitutional.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION,
Amicus Curiae.

I. GEORGE KOVEN,
JAMES A. MAJOR,
HARRY V. OSBORNE,
FRANK H. PIERCE,
JOSEPH BECK TYLER,
of the New Jersey Bar,

KENNETH W. GREENAWALT,
WHITNEY N. SEYMOUR,
of the New York Bar,

of Counsel.

Senator MOYNIHAN. Justice Douglas did go all around on these things. He said we are religious people who presume the existence of a Supreme Being. Then he said we weren't.

Then, he had another in *Tilton* v. *Richardson,* he cited a distinguished theological work by Mr. Loraine Boettner called Roman Catholicism, to explain some of his problems. It is Mr. Boettner who says, for example,

> Our American freedoms are being threatened by two totalitarian systems, Communism and Roman Catholicism, of the two in our country, Roman is growing faster than Communism, Romanism, and is the more dangerous, because it covers its real nature with a cloak of religion.

But, there is a passage which the Justice cites which I think is wonderful. I will take the chairman's patience just a moment to read this, because it is worth reading.

Lemon v. *Kurtzman,* 1971, this is brought in as legal material.

> In the parochial schools, Roman Catholic indoctrination is included in every subject. History, literature, geography, civics and science are given a Roman Catholic slant.
>
> The whole education of the child is filled with propaganda. That, of course, is the very purpose of such schools, the very reason for going to all the work and expense of maintaining a dual school system.

Now, gentlemen, listen to this.

> Their purpose is not so much to educate but to indoctrinate and train. Not to teach scripture truths and Americanism, but to make loyal Roman Catholics.

It appears that the fatal failing of the parochial—the Catholic—schools is that they don't teach scripture truths. They teach some other form of truth which is untruth.

From which, I assume, the role of public schools is that they should teach scripture truths. Right?

Doesn't that involve you with religion?

Well, not if it is the right religion.

Is that the point?

We get into some of the darker sides of American life. This has been a Supreme Court decision for all these years and no one sort of reels back and says, "What is this? What is he saying?"

We by all means want to be good natured about it, but also analytic. I think the Court has helped us get into a situation where the country is more troubled by this matter than it was.

We don't need more trouble.

Dr. BERNS. Yes, sir.

Mr. BALL. Senator, in connection with the matter of choice that I mentioned that parents face, and in connection with what you just had to say about indoctrination. You see, I am very concerned about the parents who feel that their children are today being indoctrinated in public education.

They feel that they don't have any way to get out.

The Supreme Court, again using some bad history and bad analysis in the Schempp case, the Bible reading case, said that we are not establishing a religion of secularism in the public schools.

Yet, it is true that the public schools today are necessarily addressing themselves to every basic moral question a child faces, and is having to give answers for them without reference to a religious context.

Therefore, inevitably, not necessarily out of a desire to impact secular humanism, but out of the inevitable fact that they must teach values without God, they are in fact imparting secular humanism.

This is a terribly important matter of concern to many fundamentalist Christians.

Senator MOYNIHAN. One might not have anything—a secular humanist with perfect propriety, except that that is the point of view about ultimate matters and just and only one.

But it is a very precise point of view.

Dr. BERNS. I can do no better than to compare a beginning reading text today, whatever they are called, primers, with McGuffey's reader, for example.

Senator MOYNIHAN. Yes.

Dr. BERNS. McGuffey's sold—I have the figures in the book, but something on the order of 125 or 175 million copies. Outside New England, of course, it was the principal way in which young people for 75 years in this country learned how to read.

Of course, McGuffey was a Methodist divine. Those reading texts that children learned in that book are just filled with civic virtues and moral virtues and so forth.

One can't help but believe that they had an effect on the children in those schools.

You can compare McGuffey with what has now replaced it.

Professor SCALIA. He was a Methodist divine, who taught by the way, at Mr. Jefferson's University.

Dr. BERNS. With Mr. Jefferson's permission, incidentally. That is to say, Mr. Jefferson was the man responsible for the establishment of that religious training on the University of Virginia campus.

Professor SCALIA. Senator.

Senator PACKWOOD. Yes.

Professor SCALIA. Since you were quoting from some of the cases, one of my favorite quotes is from the latest, the *Regan* case. The conclusion of the majority opinion contains a passage that says as politely and diplomatically as the court can, what I have just told you, namely, that these cases are a mess. I think it could be read as, indeed, a plea for some congressional guidance in the field. The majority opinion concludes:

> Establishment Clause cases are not easy; they stir deep feelings; and we are divided among ourselves, perhaps reflecting the different views on this subject of the people of this country. What is certain is that our decisions have tended to avoid categorical imperatives and absolutist approaches at either end of the range of possible outcomes. This course sacrifices clarity and predictability for flexibility, but this promises to be the case until the continuing interaction between the courts and the States * * * produces a single, more encompassing construction of the Establishment Clause.

I think the Congress can help.

Senator MOYNIHAN. They are saying, send us a bill.

Professor SCALIA. I can't say they are actually saying that, but if that doesn't indicate they would be helped by it, I don't know what could.

Senator PACKWOOD. Gentlemen, again, thank you very, very much.

Dr. BERNS. Thank you.

Mr. BALL. Thank you, sir.
Professor SCALIA. Thank you.
Senator MOYNIHAN. Thank you very much.
[The statements follow:]

Statement of Walter Berns
Resident Scholar
American Enterprise Institute

Doubts concerning the constitutionality of S. 550, the proposed Tuition Tax Credit Act, derive from the opinion that the First Amendment requires the Congress (and the states) to be neutral between religion and irreligion. This is erroneous. The source of the error is to be found in the 1947 case; Everson v. Board of Education, involving a New Jersey statute authorizing school districts to reimburse parents for bus fares paid by their children traveling to and from schools. The Supreme Court said that the Establishment Clause of the First Amendment meant that neither Congress nor a state legislature may "pass laws which aid one religion, aid all religions, or prefer one religion over another." Nor may any tax "in any amount, large or small . . . be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion."[1] Although the Court has seen fit to ignore this principle on occasion,[2] the Everson principle of neutrality between religion and irreligion is cited time and again and its validity is acknowledged in principle by most members of the Court. But, to repeat, it is erroneous; it does not accurately state the intent of the First Amendment.

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[1] Everson v. Board of Education, 330 US 1, 15, 16 (1947). Italics supplied.

[2] In 1970, for example, the Court upheld tax exemptions granted to church properties, even properties used for worshipping purposes. (Walz v. Tax Commission, 397 U.S. 664 [1970].) The following year it upheld the Higher Education Facilities Act, according to which federal "brick and mortar" grants are made to church-related col-

As I pointed out in The First Amendment and the Future of American Democracy, in his opinion for the Court in Everson, Justice Black simply relied on Jefferson's metaphorical wall between church and state, which made its first appearance in an 1802 letter to the Danbury Baptists, and on Madison's "Memorial and Remonstrance," written during one stage of the Virginia disestablishment struggle; he did not even refer to the debates in the first Congress on the First Amendment. In his separate opinion in Everson, Justice Rutledge referred to the debates, but rendered a disservice to the Constitution and the country by accepting as historically accurate the account of the debates presented in briefs filed by the appellee and an amicus curiae.[3] In this fashion was born the legend that the First Amendment embodies in all respects the views on church and state expressed in other contexts by Jefferson and Madison.

> Thus, Black found that it was the "feelings" of the Virginians which "found expression in the First Amendment," and that the First Amendment "had the same objective and was intended to provide the same protection against governmental intrusion on religious liberty as the Virginia statute;" and Rutledge, who dissented because he thought the busing scheme unconstitutional, said the purpose of the Amendment "was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion." The Virginia experience and Madison's "Memorial and Remonstrance"

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leges, among others. (Tilton v. Richardson, 403 U.S. 603 [1971].) In 1976, a bare majority of the Court permitted Maryland to provide noncategorical grants to private colleges -- "subject only to the restrictions that the funds not be used for 'sectarian purposes.'" (Roemer v. Board of Public Works, 96 S.Ct. 2337 [1976].)

[3]Walter Berns, The First Amendment and the Future of American Democracy (New York: Basic Books, 1976), pp. 58,72.

> provided "irrefutable confirmation of the Amendment's sweeping content." In this fashion, then, in this first and decisive case, the Virginians became not merely the principal but the sole authors of the religious provisions of the First Amendment.[4]

As the late Mark DeWolfe Howe of the Harvard Law School put it, in Everson the justices made "the historically quite misleading assumption that the same considerations which moved Jefferson and Madison to favor separation of church and state in Virginia led the nation to demand the religious clauses of the First Amendment."[5] This, he wrote, was a "gravely distorted picture."

It was distorted because it was a partial picture. The men of the First Congress surely wanted a separation of church and state, but as Professor Howe showed, not all of them wanted it for Madison's reasons; what is more, as I showed, not all of them wanted a complete separation. (Of the Americans of his time Madison was, with the exception of Tom Paine, the most radical on the church-state issue.) They recognized that the churches performed a public, or secular, service, and they favored public support of these private institutions to enable them to perform that public or secular service. Some members of the First Congress wanted to avoid a formulation of the Amendment that would forbid state laws requiring contributions in support of mini-

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[4] Ibid., p. 58. Footnotes omitted.

[5] Mark DeWolfe Howe, The Garden and the Wilderness: Religion and Government in American Constitutional History (Chicago: The University of Chicago Press, 1967), p. 172.

they favored the public support of ministers of religion and places of worship,
of religion
sters and places of worship. Other members sought to avoid any formulation that might "patronize those who professed no religion at all." Still others wanted merely to forbid laws "establishing one religious sect or society in preference to others." What is instructive in this context is the extent to which Madison was forced to modify his views in order to get an agreement on the form of the Amendment. For example, the House debate began on the Select Committee's version of the Amendment, which read as follows: "No religion shall be established by law, nor shall the equal rights of conscience be infringed." The debate was opened by Peter Sylvester of New York, who objected to this formulation because "it might be thought to have a tendency to abolish religion altogether." So to construe the clause seems unnecessarily apprehensive--unless Sylvester had reason to believe that to forbid the establishment of religion by law would be to forbid all governmental assistance to religion, and that without this assistance religion would languish and eventually die. What is of interest is Madison's reply: "Mr. Madison said, he apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience."[6]

It is on the basis of this record, rather than on the distorted version of the record that appears in the modern Su-

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[6] Annals of Congress, vol. 1, p. 758 (August 15, 1789). Italics supplied. See Berns, The First Amendment and the Future of American Democracy, ch. 1.

preme Court reports, that Joseph Story, in his great Commentaries on the Constitution, insisted that the First Amendment was not intended to require government to be neutral between religion and irreligion. "An attempt to level all religions, and to make it a matter of state policy to hold all in utter indifference, would have created universal disapprobation, if not universal indignation."[7] Story exaggerated if he meant to attribute this opinion to everyone, but the substance of what he said is accurate. "The historical record shows beyond peradventure that the core idea of 'an establishment of religion' comprises the idea of preference; and that any act of public authority favorable to religion in general cannot, without manifest falsification of history, be brought under the ban of that phrase."[8] So said the late Edward S. Corwin, one of the most respected of our constitutional scholars. Properly applied, the First Amendment forbids a national church and any preference in the aid or recognition extended to religion; applied to the states by way of the Fourteenth Amendment, it forbids state chruches and state preferences and, therefore, sectarian state schools. Whatever else it may forbid, there is nothing in the principle of the Amendment or in the reasons for the adoption of the Amendment to forbid indirect aid that has the effect of supporting religion without raising it above the subordinate position to which the principle

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[7] Story, Commentaries on the Constitution, vol. 2, sec.1874.

[8] Edward S. Corwin, A Constitution of Powers in a Secular State (Charlottesville, Va., Mitchie Co., 1951), p. 116.

consigns it. And, understood as the First Congress understood it, and as the great commentators of the past understood it, there is surely nothing in the First Amendment to forbid aid, direct or indirect, by nation or state, to nonpublic schools, including church-related schools. Whether that aid should be extended is not a constitutional question; it is a political question, and should be treated by the Congress as simply a political question.

With the First Amendment, the Founders intended to subordinate religion by consigning it to the private sphere or by relegating it to the care of private institutions; but there was a widespread recognition that these private institutions deserved public support precisely because, insofar as they provided moral education, they performed a public service. Washington made this point in his Farewell Address:

> Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. In vain would that man claim the tribute of patriotism who should labor to subvert these great pillars of human happiness, these firmest props of the duties of men and citizens. . . . And let us with caution indulge the supposition that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that national morality can prevail in exclusion of religious principle.

I would contend that an honest reading of the general condition of the country today would lead any fair-minded person to appreciate the importance--the secular importance, or what Washington would have called the political importance--of the moral education provided by church-related schools. As I put

it in my recent book on the First Amendment:

> No doubt there would be a problem if these schools, after the fashion of the Communist Party, taught the necessity of overthrowing constitutional government in the United States, or, after the fashion of the Ku Klux Klan, bred hatred of Jews and Negroes; and no doubt there would be a problem if they were administered by churches that did not accept the constitutional principle of religious tolerance and all that this implies. But assuming, as the evidence suggests we must, that nothing comparable to any of these lessons is taught in them today, the question should be asked whether it is good or bad for the United States for children to attend schools where, among other lessons, they are taught that it is right to honor their fathers and mothers and wrong to kill, commit adultery, steal, bear false witness, or covet their neighbors' possessions.[9]

In short, there are sound political reasons to support these private institutions, and, as I have indicated, there is no constitutional barrier to supporting them with tax credits.

In my opinion, there are also compelling political reasons for extending the same support to the private and secular colleges and universities. Their financial need is evident, and they, too, perform a public service. They do so by directly educating hundreds of thousands of young Americans, including a disproportionate number of those who go on to teach in the public institutions, and they have traditionally served these institutions by providing models of higher education properly understood.

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[9]Berns, op cit., p. 73. I say this as someone in no way involved with these schools or with the church by which most of them are supported.

STATEMENT OF WILLIAM BENTLEY BALL, ESQ.*
RE: SENATE BILL 550, TUITION TAX CREDITS
AT
HEARINGS BEFORE SUBCOMMITTEE ON TAXATION
OF THE SENATE FINANCE COMMITTEE
JUNE 3, 1981

I am testifying here today as a constitutional lawyer, and not as the retained representative of any organization. My firm offers my travel and services on this occasion simply in fulfillment of a public duty to respond to the gracious invitation extended to me to appear here.

I would hope that Senate 550 could be considered upon its merits - that is, in terms of its practical effect in helping people, in promoting freedom, and in terms of its constitutionality. I say this, because I greatly fear that rational consideration of the bill may not ensue, that subtle appeals to religious bigotry and appeals to hysteria may cloud the picture so greatly that the bill may never really be considered on its true merits. When I

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* Partner, Ball & Skelly, Harrisburg, PA. Professor of Constitutional Law, Villanova University Law School, 1955-1960. Chairman of Committee on Constitutional Law, Federal Bar Association, 1970-1974. Has conducted litigation on constitutional issues in the courts of more than twenty states and the Supreme Court of the United States. Author of various articles on constitutional law topics.

speak of "appeals to hysteria", I merely mean to say that major opponents of the tuition tax credit concept have been making rather intemperate statements to the effect that, if this measure is passed, public education is doomed. Of course, one would wonder why. If public education is highly valued, and if it is doing a job that is commendable in the eyes of most Americans, then it is inconceivable that the passage of the tuition tax credit bill would "doom" public education. But the doomsayers go on to say that public education, regardless of its failures, must not be competed with, because it bears the sacred character of unifier of our society, teacher of common values, embodiment of the democratic way of life. That argument gives public education virtually the status of a civil religion.

Americans of the early 20th Century were quite content, by and large, with public education. It taught children the basics and - liberally employing the Bible and Christian concepts - it imparted civic virtues. If Americans today are seeking to exercise options for other kinds of education, it is manifestly because they feel that public education has been failing to teach the basics and to impart civic virtue. And they will not give up those options and see public education continue to absorb 50% of the total budget of most

states on the ground that public education is a preferred and protected monopoly. In fact, these Americans are the people who have it right: the more free choice, the more democracy. Education in a free society consists of many institutions - not just one, not especially one. Each must take its chances in the free market. When any educational system is 100% publicly funded, yet is widely producing graduates who cannot read well, write well, or think well, it is time to cry out: "Let us start at once to make freedom of choice in education not a theoretical right but an economic possibility!"

Permit me then to turn to the specific constitutional questions which relate to the tuition tax credit concept.

I.

From the point of view of constitutional law, the tax relief concept contained in S. 550 must be seen in terms of aiding freedom and (in view of contentions of opponents of the bill) in light of whether it

violates the concept of church-state separation. Concerning the first aspect, there can be no doubt that the tax credit concept has three important constitutional dimensions: it promotes religious liberty, and - apart from that - it promotes intellectual liberty. And it helps secure parents' right to guide their children's destiny. In a truly free society, it would be hard to imagine anything more an essential part of human freedom than to be able to choose the education which one's own child is to have. The Supreme Court has, in various factual contexts, upheld these three liberties - religious, intellectual and parental - as "fundamental" rights. I hardly need take this body into the details of those decisions, but a short reference to them is important since, we must stress again, the constitutional issue before this sub committee is <u>not</u> whether S. 550 violates the Establishment Clause of the First Amendment; rather it is twofold: whether it violates the Establishment Clause <u>and</u> whether it promotes the values encompassed by the First Amendment's Free Exercise Clause - and indeed the freedoms of mind and of parental nurture protected by the Fifth and Ninth Amendments. Unhappily, the constitutional debate has thus far centered almost exclusively on the first question.

There are abundant expressions by the Supreme Court vindicating the rights of parents to choose private, or private religious,

education for their children. The decision, half a century ago, of Pierce v. Society of Sisters*, laid it down that our Constitution's "fundamental theory of liberty"

> ". . . excludes any general power to the State to standardize its children by forcing them to accept instruction from public teachers only."

The Supreme Court, in Pierce, also said that parents have a legal duty to provide education for their children. But if they have a "fundamental freedom" to do that other than in public school, it follows absolutely that the parent has a basic freedom to educate his child in a nonpublic school. The right to nonpublic education is, therefore, a fundamental liberty. That point was recently restated with great emphasis by the Supreme Court in the case of State of Wisconsin v. Yoder**, involving Amish parents.

Too little consideration has been given to that "fundamental liberty" in terms of today's economic conditions. In many contexts, over the past century, the Supreme Court has pondered the question of whether a "liberty" is really a "liberty" if it cannot be enjoyed. Long since has the Court upheld valuable social and civil rights legislation as against particular claims that the legislation unconstitutionally denied "freedom of contract". Dismissing that constitutional objection,

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* 268 U.S. 510 (1925)

** 406 U.S. 205 (1972)

the Court looked to the human need involved, the likelihood of that needs being fulfilled without legislation enabling it to be enjoyed, and competing constitutional considerations.

Parents in the 1980s face the twin pressures of runaway inflation and runaway taxation. Their "fundamental liberty" to educate their children in non-state schools is rapidly becoming a paper liberty. To obey conscience, they must educate their children in those schools; to obey the state, they must pay a second time for education through the school tax. It is quite correct to observe that the Catholic school system in the United States was built and paid for through the heroic sacrifices of immigrant working people - and that the burgeoning Fundamentalist school movement in our country today is being carried forward through a similar spirit of sacrifice. But dare we say that it is constitutionally required that citizens make such sacrifices as the price of complying with attendance laws in a way compatible with conscience? And does not, then, our tax structure (an immense factor in the economic pressures upon parents) in fact push parents to place their children in schools of the State?

It is utterly dishonest, in the face of the economic strain which so many parents of nonpublic school children now face, to say that they are perfectly "free" to "exercise their preference" for private

education. They are not, and a constitutional argument in favor of the tax credit concept is that it helps them to have that freedom.

II.

I come now to the second constitutional inquiry: Does the tax credit concept violate the Establishment Clause of the First Amendment? The question should be stated more precisely: In the Congress's necessary weighing of the constitutional values promoted by the tax credit concept as against possible Establishment Clause dangers resulting from the adoption of that concept, where shall the balance lie?

I have studied carefully the constitutional arguments made against the tax credit concept, and it is my opinion that the concept presents no danger whatever of violation of our principle of church-state separation reflected in the Establishment Clause. I conclude this in light of the tests which the Supreme Court has laid down for the determining of Establishment Clause violations. As you know, these are three: (1) Has the legislation a secular purpose? (2) Has the legislation a primary effect either advancing or inhibiting religion? (3) Does the legislation cause excessive entanglements between church and state?

It is clear that the tax credit concept passes the first and third of these tests. The Court has found no difficulty, even where it struck down legislation aiding education in religious schools, in accepting the legislature's expression the it was enacted for secular purposes, Lemon v. Kurtzman *. Certainly, too, the tax credit concept creates no "excessive entanglements" between church and state. It sets up a relationship between the federal tax authority and the individual citizen, as citizen. It creates no relationship between the Government and a church. The "day-to-day relationships" which the Court has discountenanced in its pronouncements against entanglements are completely lacking in the basic tax credit concept **.

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* 403 U.S. 602 (1971)

** Some opponents of the concept also make mention of so-called "political entanglements", borrowing from language of the Court in Lemon v. Kurtzman. That idea at core was that, if one kind of group - namely, a religious group - campaigned for legislation, the result would be "divisiveness" in the community; therefore, the legislation if enacted would be unconstitutional. This "doctrine", the brainchild, not of the Founding Fathers, but of Professor Paul Freund of Harvard, was invented and applied ad hoc in litigation in which Catholic schools were the prime figures. It was never dreamed of before and has never been applied in any other instance. Three Justices appear already to have abandoned this bizarre concept, and it is believed that courts generally will abandoned it resolutely, once its ramifications are posed in such a variety of logical applications as aid to Israel, religious witness in civil rights, welfare rights, etc.

That brings us to the final test: Does the tax credit concept have "a primary effect advancing or inhibiting religion"? It first must be understood that there is no decision of the Supreme Court directly in point. Everson v. Board of Education, 330 U.S. 1 (1947), is a relevant fundamental case decided under the Free Exercise Clause. Saying that the Establishment Clause creates a "wall of separation" between church and state, the Court went on to say that that clause did not command the denial of public welfare benefits to children on account of their enrollment in religious schools, but that the Free Exercise Clause commanded that they could not be excluded from such benefits because of such attendance.

The cases since then which have involved programs of benefits to such children have turned on three points: (a) the nature of the benefit, (b) the nature of the recipient and (c) the manner in which the program is necessarily administered. In Board of Education v. Allen, 392 U.S. 236 (1968), the Supreme Court upheld the free loan of non-religious textbooks to children attending religious schools. Here the nature of the benefit - a book - was held to be "neutral" from the point of view of sectarian teaching; the child was deemed (as in Everson) to be the recipient of the benefit; and the program was administerable without prolonged or supervisory interrelationships

of the state to the church schools. In Lemon v. Kurtzman, the Court struck down programs whereby states paid money to religious schools to reimburse them for furnishing educational services to children in mathematics, modern foreign languages, physical science and physical education. The Court said that these programs violated the Establishment Clause because they were excessively "entangling" - putting the state in the role of exercising surveillance to see that those educational services were , in content and mode of teaching, absolutely "secular". In Sloan v. Lemon, 413 U.S. 825 (1973), the Supreme Court also struck down a Pennsylvania statute whereby parents of nonpublic school students in that state were reimbursed by the state for tuition. The Court pointed out that most of the schools attended by nonpublic school pupils in Pennsylvania were "affiliated with the Roman Catholic Church." (Id. at 830 .) The Court held the program invalid on the principal ground that "[t]he State has singled out a class of its citizens for a special economic benefit." (Id. at 832 .) The Court at once made the following distinction:

> "We think it plain that this is quite unlike the sort of 'indirect' and 'incidential' benefits that flowed to sectarian schools from programs aiding all parents by supplying bus transportation and secular textbooks for their children." Ibid. (Emphasis by the Court.)

In Committee for Public Education v. Nyquist, 413 U.S. 756, (1973), the Court struck down a New York statute which contained a tax relief feature. In that statute, the tax relief feature (a) constituted three sections of a comprehensive statute of aid to religious schools and to parents of children enrolled therein and (b) was welded to a tuition grant provision similar to that voided in Sloan v. Lemon. As the Court stated, the amount of the deduction was ". . . unrelated to the amount of money actually expended by any parent for tuition", but was calculated on the basis of a formula which the Court said was "apparently the product of a legislative attempt to assure that each family would receive a carefully estimated net benefit, and that the tax benefit would be comparable to, and compatible with, the tuition grant for lower income families." (Id. at 790 .) The Court therefore held that this tax relief provision was indistinguishable from a tuition grant. The Court underscored the negative effect of this relationship by again emphasizing that the benefits of the program would go to one religious group predominantly. (Id. at 768 .)

While there have been other decisions in this general area of legislation, decisions which we have now briefly discussed (Pierce, Yoder, Everson, Allen, Lemon, Sloan and Nyquist) provide this Committee its guideposts in considering federal tax credit legislation. It is clear that the tax credit program here presented would be "general"

benefit legislation and that it does not contain the fatal feature of channeling benefits to any single group or to any group consisting predominantly of individuals of a particular religion.

Secondly, the benefits do not flow to religious institutions. They do not flow to institutions at all. In Everson those who contended that the use of public funds to bus children to religious institutions was, in practical effect a benefit to those institutions, were held to be in error. As Mr. Justice Powell noted in his opinion in Sloan, it was at most an indirect or incidential benefit to those schools, and its real effect was that of "aiding all parents". That is precisely the effect of the proposed tax credit concept.

Thirdly, the tax credit concept involves (as we have noted) no entanglements between church and state.

You desire to know: would the Supreme Court uphold federal tax credit legislation if enacted into law?

1. The precise issue has never been ruled upon by the Supreme Court.

2. Those decisions of the Court vindicating religious, intellecual and parental rights in education militate strongly in favor of constitutionality.

3. The adoption of the concept by the Congress will have strong constitutional significance in that it will represent a national judgment with respect to the public interest and welfare.

III.

I conclude with discussion of some provisions of S. 550 which do require amendment.

These changes are as follows (and I have entered these on a copy of the bill which is attached to my testimony as Appendix A) .

1. At page 2, line 4 of Senate Bill 550, we have recommended the insertion of language which indicates that the right of parents to direct the nurture, education and upbringing of their children is a "primary" right. We believe it desirable to state this in the strongest possible terms.

2. At page 2, line 16 of Senate Bill 550, we have recommended that the aim of this bill be characterized as the provision of "relief" instead of "assistance" to parents. This is to avoid any implication that the bill

is, in some sense, a subsidy.

3. At page 2, lines 19 through 21 of the bill, we have stricken the statement that Congress recognizes that the ultimate responsibility for the determination of constitutionality of the Act rests in the Supreme Court. We believe that that statement puts a badge of doubt on the bill. As far as we know, no other piece of Congressional legislation has ever contained such a statement, and its inclusion here is a veritable invitation to the Supreme Court to doubt the strength of Congress' conviction that the bill is in all respects constitutional.

4. At page 9, lines 4 through 7, is a provision relating to racial discrimination. It is very important that a strong anti-discrimination provision be included. The bill's wording, however, is unclear and, further, opens up religious schools to the kinds of surveillance and programming by IRS which the Congress has up to now refused to fund, and which violate religious liberty. We have recommended a substantial revision of the wording of the foregoing provision. Our revision is understood more fully when read in concert with our proposed new subsection (f), relating to the limitations to be placed on the examination of religious schools by the Internal Revenue Service, which is to be inserted between lines 12 and 13 on page 12, of Senate Bill 550. The proposed subsection (f) narrowly circumscribes the authority of the Secretary

of the Treasury in enforcing the racial exclusion provision as against religious schools. At the same time, our proposed procedure requiring sworn statements from the schools, is extremely simple to administer, both for the Secretary and for the schools. Penalties for non-compliance (criminal penalties for perjury) are severe, and the burden of proof certain. This contrasts very favorably with the proposed revenue procedures recently evolved by the Internal Revenue Service on the basis of no statutory provisions whatsoever.

5. We have recommended the deletion of lines 4 through 16 on page 13 of the bill. These provisions would be unnecessary in light of the new subsection (f) referred to above. Deletion of these lines will necessitate the editorial correction of the lettering of the subsections which follow on pages 13 and 14 of the bill.

6. We have also recommended a strengthening of the present subsection (f) which appears at lines 10 through 15 on page 14 of the bill. We have made this provision a more affirmative statement of prohibition against considering an educational institution which enrolls a student for whom a tax credit is claimed to be a recipient of federal "assistance".

APPENDIX A

97TH CONGRESS
1ST SESSION

S. 550

To amend the Internal Revenue Code of 1954 to provide a Federal income tax credit for tuition.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 24 (legislative day, FEBRUARY 16), 1981

Mr. PACKWOOD (for himself, Mr. MOYNIHAN, Mr. ROTH, Mr. GOLDWATER, Mr. ANDREWS, Mr. TOWER, Mr. THURMOND, Mr. DURENBERGER, Mr. SCHMITT, Mr. HEINZ, Mr. HATCH, Mr. JEPSEN, Mr. D'AMATO, and Mrs. HAWKINS) introduced the following bill; which was read twice and referred to the Committee on Finance

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A BILL

To amend the Internal Revenue Code of 1954 to provide a Federal income tax credit for tuition.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; DECLARATION OF POLICY.

(a) SHORT TITLE.—This Act may be cited as the "Tuition Tax Relief Act of 1981".

(b) DECLARATION OF POLICY.—The Congress hereby declares it to be the policy of the United States to foster

educational opportunity, diversity, and choice for all Americans. Federal legislation—

(1) should recognize—

(A) the primary right of parents to direct the nurture, education and upbringing of their children, and

(B) the heavy financial burden now borne by individuals and families who must pay tuition to obtain the education that best serves their needs and aspirations—whether at the primary, secondary, or postsecondary level, and

(2) should provide some relief (as set forth in the amendments made by this Act).

The Congress finds that without such relief the personal liberty, diversity, and pluralism that constitute important strengths of education in America will be diminished. The Congress finds that this relief can appropriately be provided through the income tax structure with a minimum of complexity and governmental interference in the lives of individuals and families. The Congress finds that the provision of such relief to individuals or families in this manner is in accord with all provisions of the Constitution. The primary purpose of this Act is to enhance equality of

educational opportunity for all Americans at the schools and colleges of their choice.

SEC. 2. CREDIT FOR EDUCATIONAL EXPENSES.

(a) IN GENERAL.—Subpart A of part IV of subchapter A of chapter 1 of the Internal Revenue Code of 1954 (relating to credits allowable) is amended by inserting before section 45 the following new section:

"SEC. 44F. EDUCATIONAL EXPENSES.

"(a) GENERAL RULE.—In the case of an individual, there shall be allowed as a credit against the tax imposed by this subtitle for the taxable year an amount equal to 50 percent of the educational expenses paid by him during the taxable year to one or more educational institutions for himself, his spouse, or any of his dependents (as defined in section 152).

"(b) LIMITATIONS.—

"(1) MAXIMUM DOLLAR AMOUNT.—The amount of educational expenses taken into account under subsection (a) for any taxable year with respect to any individual may not exceed—

"(A) $500, in the case of educational expenses allocable to education furnished after July 31, 1982, and before August 1, 1983, and

"(B) $1,000, in the case of educational expenses allocable to education furnished after July 31, 1983.

The $1,000 limitation contained in subparagraph (B) for any taxable year shall be reduced by the amount of educational expenses described in subparagraph (A) which are taken into account for that taxable year.

"(2) CERTAIN PAYMENTS EXCLUDED.—

"(A) SECONDARY AND ELEMENTARY SCHOOL EXPENSES.—Educational expenses attributable to education at a secondary school (including a vocational secondary school) or elementary school shall not be taken into account under subsection (a) to the extent that they are attributable to education at an elementary or secondary school (as defined in section 198(a)(7) of the Elementary and Secondary Education Act of 1965, as in effect on January 1, 1981) of a State educational agency (as defined in section 1001(k) of such Act as so in effect) that is privately operated except for expenses attributable to education at a school or institution described in subparagraph (C) of subsection (c)(5).

"(B) PART-TIME AND GRADUATE STUDENTS.—

"(i) IN GENERAL.—Educational expenses allocable to education furnished before August 1, 1984, with respect to any individual who is not a full-time student or who is a graduate student shall not be taken into account under subsection (a).

"(ii) LESS THAN HALF-TIME STUDENTS.—Educational expenses allocable to education furnished after July 31, 1984, with respect to any individual who is not at least a half-time student shall not be taken into account under subsection (a).

"(C) CERTAIN PAYMENTS INCLUDED.—For purposes of subparagraph (B)(i), amounts paid before August 1, 1984, for educational expenses allocable to education which is furnished on or after such date shall be treated as having been paid on such date.

"(D) FULL-TIME STUDENT.—For purposes of this paragraph, the term 'full-time student' means any individual who, during any 4 calendar months during the calendar year in which the taxable year of the taxpayer begins, is a full-time student at an educational institution.

"(E) HALF-TIME STUDENT.—For purposes of this paragraph, the term 'half-time student' means any individual who, during any 4 calendar months during the calendar year in which the taxable year of the taxpayer begins, is a half-time student (determined in accordance with regulations prescribed by the Secretary which are not inconsistent with regulations prescribed by the Secretary of Education under section 411(a)(2)(A)(ii) of the Higher Education Act of 1965 for purposes of part A of title IV of that Act as such Act was in effect on January 1, 1981) at an educational institution.

"(F) GRADUATE STUDENT DEFINED.—A graduate student is a student with a baccalaureate degree awarded by an institution of higher education.

"(c) DEFINITIONS.—For purposes of this section—

"(1) EDUCATIONAL EXPENSES.—The term 'educational expenses' means tuition and fees required for the enrollment or attendance of a student at an educational institution, including required fees for courses. Such term does not include any amount paid, directly or indirectly for—

"(A) books, supplies, and equipment for courses of instruction at an educational institution,

"(B) meals, lodging, transportation, or similar personal, living, or family expenses, or

"(C) education below the first-grade level, or attendance at a kindergarten or nursery.

In the event an amount paid for tuition and fees includes an amount for any item described in subparagraph (A), (B), or (C) which is not separately stated, the taxpayer shall document the portion of such amount which is attributable to educational expenses.

"(2) EDUCATIONAL INSTITUTION.—The term 'educational institution' means—

"(A) an institution of higher education;

"(B) a vocational school;

"(C) a secondary school; or

"(D) an elementary school.

"(3) INSTITUTION OF HIGHER EDUCATION.—The term 'institution of higher education' means an institution described in section 1201(a) or 481(a) of the Higher Education Act of 1965 (as in effect on January 1, 1981).

"(4) VOCATIONAL SCHOOL.—The term 'vocational school' means an area vocational education school (as defined in section 195(2) of the Vocational

Education Act of 1963, as in effect on January 1, 1981) which is located in any State.

"(5) ELEMENTARY AND SECONDARY SCHOOLS.—

"(A) ELEMENTARY SCHOOL.—The term 'elementary school' means a privately operated, not-for-profit, day or residential school which provides elementary education and which meets the requirements of subparagraph (D).

"(B) SECONDARY SCHOOL.—The term 'secondary school' means a privately operated, not-for-profit, day or residential school which provides secondary education that does not exceed grade 12, and which meets the requirements of subparagraph (D).

"(C) HANDICAPPED FACILITIES INCLUDED.—The terms 'elementary school' and 'secondary school' include facilities (whether or not privately operated) which offer education for individuals who are physically or mentally handicapped as a substitute for regular public elementary or secondary education.

"(D) REQUIREMENTS.—An elementary school or secondary school meets the requirements of this subparagraph if such school—

"(i) is exempt from taxation under section 501(a) as an organization described in section 501(c)(3), and

"(ii) has not, following the effective date of this act, excluded any person from admission to such school, or participation in any school program, activity or benefit, solely on account of race, color, or national or ethnic origin.

"(6) MARITAL STATUS.—The determination of marital status shall be made under section 143.

"(d) SPECIAL RULES.—

"(1) ADJUSTMENT FOR CERTAIN SCHOLARSHIPS AND VETERANS BENEFITS.—

"(A) REDUCTION OF EXPENSES.—The amounts otherwise taken into account under subsection (a) as educational expenses of any individual for any taxable year shall be reduced (before the application of subsection (b)) by any amounts attributable to the payment of educational expenses which were received with respect to such individual for the taxable year as—

"(i) a scholarship or fellowship grant (within the meaning of section 117(a)(1)) which under section 117 is not includible in gross income,

"(ii) an educational assistance allowance under chapter 32, 34, or 35 of title 38, United States Code, or

"(iii) a payment (other than a gift, bequest, devise, or inheritance within the meaning of section 102(a)) which is for educational expenses, or attributable to attendance at an educational institution, and which is exempt from income taxation by any law of the United States.

"(B) REDUCTION FOR OTHER AMOUNTS.—Under regulations prescribed by the Secretary, the amounts otherwise taken into account under subsection (a) as educational expenses of an individual for any taxable year shall be reduced by any amount attributable to the payment of educational expenses which is received with respect to any individual for the taxable year and is not described in subparagraph (A), and which—

"(i) is equal to the amount of the interest subsidy on any loan proceeds received by such individual during such taxable year, or

"(ii) constitutes any other form of financial assistance to such individual.

The provisions of this subparagraph shall apply with respect to amounts received after the date on which the final regulations are issued.

"(C) AMOUNTS NOT SEPARATELY STATED.—If an amount received by an individual which is described in subparagraph (A) or (B) is not specifically limited to the payment of educational expenses, the portion of such amount which is attributable to payment of educational expenses shall be determined under regulations prescribed by the Secretary.

"(2) TAXPAYER WHO IS A DEPENDENT OF ANOTHER TAXPAYER.—No credit shall be allowed to a taxpayer under subsection (a) for amounts paid during the taxable year for educational expenses of the taxpayer if such taxpayer is a dependent of any other person for a taxable year beginning with or within the taxable year of the taxpayer.

"(3) SPOUSE.—No credit shall be allowed under subsection (a) for amounts paid during the taxable year for educational expenses for the spouse of the taxpayer unless—

"(A) the taxpayer is entitled to an exemption for his spouse under section 151(b) for the taxable year, or

"(B) the taxpayer files a joint return with his spouse under section 6013 for the taxable year.

"(c) DISALLOWANCE OF CREDITED EXPENSES AS CREDIT OR DEDUCTION.—No deduction or credit shall be allowed under any other section of this chapter for any educational expense to the extent that such expense is taken into account (after the application of subsection (b)) in determining the amount of the credit allowed under subsection (a). The preceding sentence shall not apply to the educational expenses of any taxpayer who, under regulations prescribed by the Secretary, elects not to apply the provisions of this section with respect to such expenses for the taxable year.".

Here insert subsection (f)- See Exhibit "A", attached.

(b)(1) CREDIT TO BE REFUNDABLE.—Subsection (b) of section 6401 of such Code (relating to amounts treated as overpayments) is amended—

(A) by striking out "and 43 (relating to earned income credit)" and inserting in lieu thereof "43 (relating to earned income credit), and 44F (relating to tuition tax credit)", and

(B) by striking out "39, and 43" and inserting in lieu thereof "39, 43, and 44F".

(2) Paragraph (2) of section 55(b) of such Code (defining regular tax) is amended by striking out "and 43" and inserting in lieu thereof ", 43, and 44F".

(3) Subsection (c) of section 56 of such Code (defining regular tax deduction) is amended by striking out "and 43" and inserting in lieu thereof "43, and 44F".

(c) EFFECTIVE DATE.—The amendments made by this section shall be applicable to taxable years beginning after December 31, 1963.

(d) SEPARABILITY.—If any provision of section 44F of the Internal Revenue Code of 1954 (or any other provision of such Code relating to such section), or the application thereof to any person or circumstances, is held invalid, the remainder of the provisions of such section and the application of such provisions to other persons or circumstances, shall not be affected.

(e) DISREGARD OF REFUND.—Any refund of Federal income taxes made to any individual, and any reduction in

the income tax liability of any individual, by reason of section 44F of the Internal Revenue Code of 1954 (relating to credit for educational expenses) shall not be taken into account as income or receipts for purposes of determining the eligibility of such individual or any other individual for benefits or assistance, or the amount or extent of benefits or assistance, under any Federal program of educational assistance or under any State or local program of educational assistance financed in whole or in part with Federal funds.

(e) (f) TAX CREDIT NOT TO BE CONSIDERED AS FEDERAL ASSISTANCE TO INSTITUTION.—No educational institution which enrolls a student for whom a tax credit is claimed under the amendments made by this Act shall be considered to be a recipient of Federal assistance under this Act.

(f) (g) CONFORMING AMENDMENT.—The table of sections for subpart A of part IV of subchapter A of chapter 1 of such Code is amended by inserting immediately before the item relating to section 45 the following:

"Sec. 44F. Educational expenses.".

SEC. 3. EFFECTIVE DATE.

The amendments made by section 2 of this Act shall apply to taxable years ending after July 31, 1982, for amounts paid after such date for educational expenses incurred after such date.

EXHIBIT "A"

"(f) Limitation on Examination of Religious Schools. In determining whether a religious elementary or secondary school meets the requirements of subsection (c)(5)(D) of this section, the Secretary shall have authority solely to:

"(1) ascertain whether the school is operated or controlled by a church or convention or association of churches, and, if not so operated or controlled, ascertain whether the school has applied for and been accorded recognition of exemption under section 501(a) as an organization described in section 501(c)(3); and

"(2) require that the school submit a statement, under oath or affirmation, and subject to penalties for perjury, that no person has been denied admission to the school or participation in any school program, activity, or benefit, during the taxable year for which a credit is claimed under this section, solely on account of that person's race, color, or national or ethnic origin."

Senator PACKWOOD. We will conclude today with a panel consisting of Hoke Smith, Steve Leifman, Dr. Melvin A. Eggers, Mr. Wilson, and Mr. Bragdon.

A PANEL OF HOKE SMITH, PRESIDENT, TOWSON STATE UNIVERSITY, REPRESENTING THE AMERICAN ASSOCIATION OF STATE COLLEGES AND UNIVERSITIES, WASHINGTON, D.C.; STEVE LEIFMAN, NATIONAL DIRECTOR, COALITION OF INDEPENDENT COLLEGE AND UNIVERSITY STUDENTS, WASHINGTON, D.C.; DR. RICHARD E. WILSON, VICE PRESIDENT FOR GOVERNMENTAL RELATIONS, REPRESENTING THE AMERICAN ASSOCIATION OF COMMUNITY AND JUNIOR COLLEGES, WASHINGTON, D.C., AND PAUL E. BRAGDON, PRESIDENT, REED COLLEGE, OREGON, REPRESENTING THE AMERICAN COUNCIL ON EDUCATION

Senator PACKWOOD. Do you want to proceed in the order that you are on the list?

Hoke Smith first?

Mr. BRAGDON. I believe, Senator Packwood, I am sort of chairing.

Senator PACKWOOD. All right.

Mr. BRAGDON. Moderating this panel.

Senator PACKWOOD. You call it as you want.

Mr. BRAGDON. Otherwise we can go with the printed agenda.

Senator PACKWOOD. No, we will normally do that if the panel has no other order, but we are delighted, if the panel organized it themselves, to go in the order that they want to go in.

Mr. BRAGDON. Thank you, sir.

I am Paul E. Bragdon, the president of Reed College. Today I am speaking on behalf of the American Council on Education, an organization which includes more than 1,600 colleges and universities in the United States.

It certainly won't come as any surprise to you or to lots of other people that when educators or those from the academic world get together, there are differences of opinion.

I think there have been wide-ranging differences of opinion with respect to tuition tax credits in general and S. 550.

I don't think there is any disagreement on a couple of points, however,

First of all, I think there is a great deal of appreciation for the concern for parents and for students who have to try to find and finance quality education at all levels in this inflationary period.

I would note that your efforts in this regard are not restricted to this bill or this proposal, but cover a number of other things.

Second of all, I think all of us in higher education would note that there is a history here, and unlike at the elementary and secondary level, there has been for some time, a program of need-based student assistance and loans available.

I think that there is broad agreement in the higher education community that Federal need based student assistance, grant work, and loan programs are the best vehicles for distributing limited Federal resources in a manner that best achieves equity and sensitivity to student needs.

I think that we are all concerned about the erosion and the lumps that will be taken in these programs and that are threatened at the present time.

With that threatened erosion and the real erosion we are afraid that tuition tax credits may be yet a competing thing that will reduce assistance to those who need it the most.

Finally, I don't believe that any of us in higher education would be in favor of substituting the tuition tax credit program in any guise, for the current program of student assistance and loans.

So much for areas of agreement. I think that when we consider tuition tax credits in relation to—as a way of augmenting the current programs, you will find people in higher education and you will hear them today, who are opposed to them outright.

You will find others that view them with some degree of sympathy or a great deal of sympathy, but who also have some concerns.

For example, many would be concerned as they have been through the years, that any program of tuition tax credits be both need and cost conscious.

In other words, be concerned with both access and choice for students, and would not want to see an exaggeration or exacerbation of the gap in the charges between the two sectors within higher education.

I think belatedly, those in higher education found themselves joining those in the business community and others, in talking about excessive regulation.

I think that perhaps unintentionally, the current bill has a couple of provisions in it that possibly might be discussed at the staff level, between some in the association and your staff, because I think the bill does, or we do think that the bill may have a potential for creating without the intention of doing so, more of what we have come to fear.

I speak particularly in the offset formula, which of course, is designed to prevent people from receiving greater benefits than they are entitled. But, we would not want it to defeat the legislation goal of simplicity by creating regulatory requirements within the Department of Treasury that become more complex than today's student aid form.

S. 550 reduces expenses qualifying for a tuition tax credit by the amount of scholarship, Federal aid, or veterans' benefits the student receives.

Such an area of difficulty is section (d)(c), which leaves for the Secretary's determination the treatment of tax-free awards for multipurposes.

This is covered in some detail on pages 6 and 7 of the prepared testimony. I would hope there might be some mutual staff exploration of those issues. I think those problems can be rectified.

Senator PACKWOOD. Paul, I might say that was the most difficult part of the bill to draw. This is one where we would be wide open to the benefit of your help. It is a difficult section. We didn't want people to be able to double dip.

Yet, in trying to draw this section, I simply—we were not expert and we need, may need advice.

Mr. BRAGDON. Thank you.

Senator PACKWOOD. Who do you want to go next?

Mr. BRAGDON. I think you could follow the listing.

Senator PACKWOOD. Follow the order then?

Mr. BRAGDON. Yes.

Senator PACKWOOD. Then we will take Hoke Smith next.

Dr. SMITH. Thank you.

I am Hoke Smith, president of Towson State University which is a university of approximately 15,000, primarily commuting students, near Baltimore.

Prior to that, I spent 22 years in private higher education at Drake University, at Des Moines, Iowa and Hirham College.

Today I am here on behalf of the American Association of State Colleges & Universities.

Our association has consistently opposed tax tuition credit as an effective method of supporting access to higher education.

Most recently, we voted unanimously at our annual meeting in Williamsburg, Va., to renew our opposition.

We believe that there are a number of strong reasons for opposing tax tuition tax credits as the most effective means.

First, tax credits could cost between $1 billion and several billion dollars a year. We are not naive enough to think that these funds would drop out of the air, but rather they would have to come from elsewhere within the Federal budget.

Given the current pressures on the overall budget, this I believe could result in turn in further drastic reductions in existing Federal grant work study and loan programs which provide far more assistance to the needy student.

These programs are obviously seriously threatened by budget cuts and proposed cuts made this year.

My student aid director estimates that the probable effect of these will be to limit us to at least 80 percent of the total need of students using all forms of packaging.

We believe that these proven programs, if fully funded, or funded at the current level, do more to foster educational opportunity, diversity, and choice for all Americans with tax credits.

Most tax credit plans provide relatively little or no aid to lower- and middle-income students who are most in need.

Many, in addition, exclude part time or self-supporting students, often the most needy, as well as graduate students.

We believe that student aid should be based upon the cost of providing educational services and student need rather than the amount of income tax paid by the parents.

The present complexity of tax laws makes the tax owed a function of many factors other than cash income.

In addition, I think that student aid in this form may be one of the areas which is least responsive to tax incentives.

Tax credits might actually have the effect of reducing access of middle and lower income students to more selective institutions.

These institutions which have a majority of their students from the upper level of the economic groups and which in many cases have low endowment, might be tempted to increase their tuition to take advantage of the benefits which would flow to higher income families.

Unless there are adequate need based funds, these higher tuitions would bar students from middle and lower socioeconomic classes from these institutions.

In turn, institutions which currently serve middle and lower income students, would not be able to take such action because their students and families would not benefit equally from tax credit legislation.

Most of the tax credit plans also discriminate against the approximately 80 percent of all students attending public colleges.

Indeed, in Maryland, which is always considered a stronghold of private higher education, 87 percent of our students are enrolled in the public sector.

Many of the tax credit plans also limit the percentage of tuition and fees in a way that would affect the taxpayers who send their sons and daughters to public schools and might, depending upon the specific plan adopted, result in their paying a higher percentage of their income taxes to support students who would benefit more from the tax plans.

Public colleges enroll about 80 percent of our lower income and minority students. Because of the regressive nature of a tax credit approach, these students will be less able to finance their education under the current need based programs.

Finally, tax credits might actually be more than, rather than less bureaucratic. If need based programs remain in existence, they would have to be adjusted to take into account the amount rebated to the family.

Since the determination of this amount would lag behind the actual tuition payment, there would be severe problems in articulation.

Also, from the family viewpoint, the funds made available for educational purposes by the tax rebate program would not be available during the freshman year, when the tuition payments were due, but rather late into the next tax period.

Also, the last benefit to the family would occur only after the student had graduated. Therefore, a tax rebate plan would be less responsive to the actual cash flow needs of the student and his or her family than is the current need based approach.

The higher education community is united in its feeling that the present student aid program, already seriously threatened by a budgetary reduction, should be maintained and stengthened in the spirit of rapidly rising costs.

We believe this is the best way to insure opportunity for access and choice.

Senator PACKWOOD. Out of curiosity, what is the tuition at Towson State University?

Dr. SMITH. Tuition next year will be $870, plus fees, will be slightly in excess of $1,000. That tuition level represents a 23.5-percent increase since last year.

Senator PACKWOOD. Thank you.

Steve Leifman.

Mr. LEIFMAN. My name is Steve Leifman. I am the national director of the National Coalition of Independent College & University Students.

I will be presenting my testimony on behalf of my organization, as well as the United States Student Association this afternoon.

First, what I would like to do is just go through some of the major points of my testimony. Then, if I have time, I would like to expand upon those afterward.

First of all, an adequate and balanced system of Federal student assistance is necessary so students can attend the higher education institution that best meets their needs, talents, and aspiration.

In addition, the Federal Government, by providing access and choice to students of higher education, through grants, work study and loans is thereby guaranteeing cost savings and quality education.

The proposed tuition tax credit bill directly and indirectly seriously threatens independent higher education.

Directly, as shown in our 1978 study, which can be shown on page 2 of our testimony, independent, higher education and independent college students will not receive benefits proportionate to those received by students attending public universities, thus, making it impossible for independent institutions to compete for students.

Indirectly, and equally important, tuition tax credits threaten to undermine current need based student aid programs at a time when student financial aid programs are being drastically reduced, because they are "too expensive." We find it incomprehensible that tuition tax credits can even be considered for higher ed.

The commitments made by Congress in recognition of the great need for student financial aid was seen just 2 years ago with the passage of the Middle Income Student Assistance Act, and less than 1 year ago with the passage of the 1980 Higher Education Amendment.

The table on page 4, illustrates for families with incomes between $15,000 and $25,000, the Federal grant approach, as used under MISA, provides nearly twice as much real support as under any tuition tax credit proposals.

Given the current political climate, it is unrealistic to believe that current need based programs will receive adequate funding with the passage of a $1 billion to a $4 billion tuition tax credit bill.

It is difficult to understand why the Congress would want to cut current student financial aid to low- and middle-income students, while at the same time pass a tuition tax credit bill that will provide money to families without need, and will cost the Federal Government more money than adequately funding the current student aid program.

Although as a replacement for the in-school subsidy as contained in the guaranteed student loan program, tuition tax credits would mean more money for students.

However, the benefits of the subsidy still far outweigh a tuition tax credit.

In addition, it would appear that a tax credit comes too late in the year to help pay tuition fees at the beginning of the semester, thus exacerbating the cash flow problem most middle-income families face.

The tuition tax credit will not fairly assist parents whose children attend independent institutions. Only 30 percent of the benefits would go to families sending their children to private colleges while although they have almost 60 percent of the financial need of all families likely to benefit from the credit.

The coalition might reassess its opposition to tax credits if the proposal was tuition and income sensitive and was a compliment to current programs.

We are convinced though that the most effective means to finance higher education is the continuation and increased funding of current student aid programs.

In our study that we did in 1978, we found that out of the total of 2,841 institutions, the public schools enrolled 8,883,000 students and the private schools about 2.2 million students.

In the academic year of 1976 and 1977, 1,406 public and 118 private institutions charged $1,000 or less in tuition or required fees.

Of these the public schools enrolled 8,600,000, and the independent schools enrolled 96,000 students.

S. 550 would mean that approximately 97 percent of all students currently enrolled in public colleges or universities would have at least half of their tuition paid by the U.S. Government regardless of need.

In comparison, only 4 percent of students enrolled in the independent sector would be able to benefit to this degree.

We cannot understand how people believe that private higher education would be assisted through a tax credit system which has tuition in almost all the public sectors.

It would be very difficult for the independent institutions to be able to compete.

Senator PACKWOOD. Can't that same argument be used, however, for any Federal grant that is uniform, in education?

Mr. LEIFMAN. Under the Federal now——

Senator PACKWOOD. Well, take your maximum grant.

Mr. LEIFMAN. Yes.

Senator PACKWOOD. Isn't that going to be of more benefit going to the University of Maryland, at a relatively reduced tuition and living at home than it is going to Harvard and living on campus?

I mean, it seems to me that argument cuts for any kind of uniform Federal grant.

Mr. LEIFMAN. Well, the uniform Federal grant though is need based.

Senator PACKWOOD. But there is a maximum grant.

Mr. LEIFMAN. Right.

Senator PACKWOOD. So that it would favor those schools that have lower costs.

Mr. LEIFMAN. That is true, but there are supplemental grants that help make up the differences which are not being increased at all and everything is being cut back.

So, we have a tuition gap growing. As the National Association of Independent Colleges & Universities point out, S. 550 would increase the ratio of tuition gap from 4.7 to 8.0 to 1.

That is really making a big problem for low-income and middle-income families to be able to afford an independent institution.

Thank you very much for your time.

Senator PACKWOOD. Good presentation.

Mr. LEIFMAN. Thank you.

Senator PACKWOOD. Dr. Eggers.

Dr. EGGERS. Thank you.

My name is Mel Eggers. I am chancellor of Syracuse University and I am here today in my capacity as chairman of the National Association of Independent Colleges & Universities, an organization which includes within its membership, 850 independent, nonprofit colleges and universities.

I appreciate the opportunity the committee has afforded us to present our views on S. 550.

As a spokesman for independent higher education, my remarks will focus on the effects of this legislation on students attending independent colleges and universities.

I may add, however, that although some of our member presidents feel strongly that such credits are important and appropriate for parents sending their children to independent elementary and secondary schools, including some member presidents who oppose tuition tax credits for higher education, we refrain from formal comment on this issue as lying outside the scope of our organizational charter.

Nevertheless, I would note that the situation in higher education is entirely different from that in primary and secondary levels.

It is unlikely that a single tuition tax credit formula would be appropriate for the two levels. I do suggest that that two levels be treated separately.

Tuition tax credit proposals have been discussed and debated by the member presidents of NICU at the last four annual meetings. Much of the discussion reflects the real concern that a tuition tax credit would be substituted in whole or in part for existing programs of student aid, which for reasons Paul Bragdon has stated, are viewed as preferable on the test of equity and need sensitivity.

But if we set aside the test, the tradeoff with student financial aid, then the heart of our concern is that a tuition tax credit proposal must take into consideration explicitly the difference in tuition charges of independent colleges and universities, that is, that a program should not increase what is commonly referred to as the tuition gap.

The impact of proposed tuition tax credits on this tuition gap is of special concern to us. As the gap increases the financial ability of students to choose an independent higher education declines with the attendant loss and the diversity in educational pluralism that is the hallmark of American higher education.

In formulating aid for students, the Federal Government must exercise great care to assure that the scales of competitive balance between the independent and State institutions of higher learning are not irrevocably tipped.

This difficult but important Federal responsibility is complicated by an environment of demographic decline in the student population and inflation driven increases in our costs.

We believe that in order to meet the twin principles of student equity and needs sensitivity in designing a tuition tax credit at the post-secondary level, as well as to avoid to the extent possible,

creating a new Federal regulatory engine, such a proposal would contain the following provisions.

A formula limited to tuition. A low percentage of tuition covered, combined with a high maximum credit to achieve greater cost sensitivity.

A tax credit which is refundable and a pro rata tax-free awards to achieve a greater degree of need sensitivity.

Legislative prohibition against treating tuition tax credits as Federal assistance, and institutions as recipients, the inclusion of graduate students and the avoidance of new regulatory burdens.

S. 550 is sensitive to a number of these concerns. It is limited to tuition, provides for refundable tax credits, prohibits tuition tax credits from being characterized as aid to the institution and attempts to avoid some of the regulatory burdens which would arise.

We are especially pleased to note the inclusion of graduate students within the eligible portion of this legislation when fully implemented.

Graduate education, important to the continued strength and preeminence of our country, has been the victim of both cutbacks in direct aid, as well as the lessening availability of funds in both governmental and private sector to support basic research.

Now, in evaluation S. 550, it is our view that it would tend to increase the gap and we would ask for special consideration on that.

In general, we would suggest as alternatives to formula, either a 10 percent of tuition and fees up to a maximum of $500 or 25 percent of tuition and fees, up to a maximum of $1,000.

This would have a neutral effect on the price differential between independent and public colleges.

Moreover, the Congressional Budget Office analysis, in 1978, shows a 25 percent, with a maximum of $1,000 formulation to be slightly over $2 billion, for fiscal year 1979, for postsecondary education, making it competitive with the cost of the current 50 percent, with a $500 formulation in S. 550.

But I would just conclude by mentioning once more that these considerations are applicable to post-secondary education and may not be relevant to primary and secondary education.

I would say again, that trying to find a formula that would cover both of them would be extremely difficult and I would urge they be separated.

Thank you.

Senator PACKWOOD. Thank you.

Mr. Wilson.

Mr. WILSON. Thank you, Mr. Chairman.

My name is Richard Wilson. I am a vice president with the American Association of Community & Junior Colleges.

I want to point out that I am pinchhitting. We had hoped that President Cayan of North Country Community College would be here. Unfortunately, the airplane from Albany, N.Y. to Washington, D.C., didn't make the flight this morning.

First, I want to point out we are speaking from a different perspective than other postsecondary institutions.

The community colleges enroll a large number of nontraditional students. They serve them. Consequently, things look a little differently from that point of view.

For example, the community college students are older. The average age is about 28. Most of them are employed, about three-fourths of them are employed at least part-time, many full-time.

Most of them are enrolled part-time as students. Two-thirds of the community college students are only part-timers.

Many of them come from low-income families. In fact, the largest group of students from low-income families go to community colleges.

Finally, the handicapped students are well represented in the community colleges, as well as the minorities. More than half of them go to community colleges.

The board of directors of AACJC took the position that tuition tax credits for postsecondary education is not in their best interest, and not in the best interest of the public.

They have five reasons for taking this position. In the first place, they believe that current student aid programs are doing a very fine job. They are serving the needy students, the low-income families in particular.

Second, they see the tuition tax credits for the postsecondary as being quite expensive and, since they are not designed to serve people from low-income families, as being of little value to the students attending the community colleges.

Third, they are very concerned that the present proposal does not provide much assistance for part-time students; none at all for those who are less than half time.

Keeping in mind that two-thirds of the community college students are part-timers, this is a very serious problem for us.

Fourth, we have the opposite problem of the high cost institutions when it comes to a percent of cost. If the percent of cost that is made reimburseable through a tuition tax credit is kept low, this impacts negatively on community college students.

Finally, the fifth reason is that the current allowable costs are limited to tuition and fees. These are not the major cost for community college students.

Their major costs are such things as books, transportation, and child care for our working mothers who are going to a community college. .

In the case of California, where there are more than 1 million community college students, there is no tuition. The fees are quite modest.

Therefore, the current proposal would be of almost no value at all to those students in California.

So, for these five reasons, we take the position that tuition tax credits are not the most appropriate or the best way to assist community college students.

I thank you for your attention.

Senator PACKWOOD. I could swear there is a change in theory from when we had the hearings before. Correct me if I am wrong.

When we had the percentage credit before, the community colleges thought and they testified in favor of the bill 3 years ago, the

community colleges felt that probably favored them the most, so long as there was a $1,000 lid, with a 50-percent credit.

In those days, it was a $500 maximum, with a $250 lid, because there is all you could get. If you had to pay $10,000 tuition, all you were going to get was $500, and that would be more inclined to cause people to go to lower tuition schools than higher tuition schools.

Now, Mr. Wilson, do I mistake what you are saying this time? It sounds to me like that is the reverse of the theory you are saying.

Mr. WILSON. Whenever the cost is reduced by some percent, half, 35 percent, 25 percent, it negatively impacts the community college students. They are the ones who are penalized by this arrangement.

A comparable situation is what we have with the basic grant program right now. Our complaint through the years is the limit of half cost which injures the low-income students going to low-cost institutions.

Senator PACKWOOD. Half cost or half time?

Mr. WILSON. Half cost.

Senator PACKWOOD. I see.

Mr. WILSON. The half-cost provision has been a real bother.

Senator PACKWOOD. I don't follow it. I fail to understand why. Let's say your costs were $1,000 a year, tuition fees and everything, and a student could get half of it, and a credit of $500. Let's say—what is Syracuse's for a year.

Dr. EGGERS. $5,500 for next year.

Senator PACKWOOD. All they are going to get is $500 at Syracuse.

Why isn't that more favorable to the community colleges than it is to Syracuse?

Mr. WILSON. Right now the national average cost for community colleges tuition and fees is $457.

Senator PACKWOOD. I understand that. That is why——

Mr. WILSON. If we take half of that, $220 some odd dollars.

Senator PACKWOOD. Just 3 years ago the testimony was that the independent colleges and universities had the biggest fear because they were afraid this was going to drive students to the public universities and colleges and the public universities and colleges were afraid it was going to drive people to the community colleges, because the percentage would be disproportionately favorable to lower the tuition.

I realize that community colleges still have a relatively low tuition. My hunch is by the time this bill is in effect, most of the public universities will be at $1,000 or more, so that they will be at a maximum tuition rate for reimbursement.

But I want to scratch all that, because we are not going to have a better panel representing higher education ever again on these hearings than we will have right here.

I will ask Senator Moynihan if he came to the same conclusion I did and he does.

One, I think the President is going to get most of what he wants on his higher education funding program. If he doesn't get it out of Congress, he is going to veto the bill, he says, and if he vetoes the bill, the bill will be sustained.

So, there is not going to be a question of what you and Senator Moynihan might like versus what the President might like. It is going to be what he likes versus nothing.

I think that is the alternative.

Too, I do not think the issue of tuition tax credits is going to make a difference one whit as to what the level of funding is going to be for higher education. If it is going to be cut, it is going to be cut. If the President vetoes the bill, it is going to be sustained until it is cut to where he wants it.

Now, if that premise is true, would all of you just as soon we just drop tuition tax credits out of this bill for higher education, drop it out. The administration wants to cut costs on this bill anyway. That will take care of two-thirds of the cost right there and remove any of the problems you may have in any kind of fraternal warfare between you.

I think my premise is right. I want to know what your preference is given those circumstances.

We might as well start with you.

Mr. LEIFMAN. Well, as I said in my statement, that there are a few points that would allow us to support a tuition tax credit bill.

Right now though, on principle, we do believe that the current programs are the best way to go. In the long run, in the next couple of years, it is going to be very hard to get any money back into the program if a tax credit bill is adopted.

However, we would be able to possibly go along with the tax credit bill if it had the following in it.

First, that it was viewed as additional funds for higher education over existing programs.

Second, it was tuition sensitive.

Third, that it was income sensitive.

Fourth, they were refundable.

Fifth, they were sensitive to independent students.

Sixth, that to graduate students.

Senator MOYNIHAN. That is awfully nice. You would take money under those conditions. [Laughter.]

Senator PACKWOOD. Mr. Wilson.

Mr. WILSON. The position of our board is very clear. They really do believe the tuition tax credit is not in the best interest of postsecondary education.

Senator PACKWOOD. Dr. Eggers.

Dr. EGGERS. It would be difficult for me to try to speak now for the association which is just—if you will excuse me, Senator, just skeptical about the substance to it. Whether they are right or not is for me is not to say. But if I may speak for myself on that, I would take it immediately.

Senator PACKWOOD. You would what?

Dr. EGGERS. I would take it.

Senator PACKWOOD. OK.

Paul Bragdon.

Mr. BRAGDON. Well, again, moving into this uncharted area, I would have to say that most of what I would say would be a personal opinion rather than representing any association.

I would say with respect to associations that the American Council on Education has not opposed tuition tax credits now, nor did it

do so 3 years ago. At least one of the associations, the National Association of Independent Colleges did not oppose them then and doesn't now.

But both had pointed out certain issues that they thought should be addressed if things were going that way.

I would presume that at least both of those associations would hold to those concerns.

On the issue of, now speaking just for myself, on—I did see the Treasury statement on tuition tax credit which again, on a purely personal way, seem to be in favor of it and yet say, not now, or at least a number of other things had to be taken into consideration before this would be moved to an active place on the legislative or administration agenda.

It took into account the amount of revenue that would be lost to the Treasury and what the effect would have on the budget which seems to me is exactly the same position that the administration would have with respect to the present package of student aid programs, as far as fiscal and budgetary impact is concerned.

I also believe the Congressional Budget Committee takes into account revenue loss by the tuition tax credit, revenue that wouldn't be available to the Government.

On that, I can't see the balance where the balance falls in a fiscal sense. It seems to me the dilemma is the same.

Senator PACKWOOD. We are going to have to work out with the administration a satisfactory settlement. I am simply saying this, I think the amount of money we appropriate for higher education is going to be about the same in fiscal 1982, 1983 and 1984 whether or not we pass tuition tax credit.

Mr. BRAGDON. I would assume that there are going to be punishing wounds in higher education and education generally, and in other areas in our society.

I would think it is our hope to preserve the programs, to preserve the integrity, to preserve as much funding for them as is possible under present circumstances and wait for a more favorable day.

Senator PACKWOOD. Dr. Smith?

Dr. SMITH. Of course, the association's view has been consistently against tax credit.

Speaking personally, having been in both public and private higher education, I would obviously have to defer to the Senator on questions of political reality.

I do think, however, that there is also a position in the long-term interest of higher education. This has two parts.

First, I do not believe, as I mentioned in the statement that tax credits are as effective in this area as tax incentives are in many areas.

There are a number of families for whom a tax credit would not make a difference of whether a student went to school or did not go to school, although it might make a difference in which school they went to.

One of the problems with tax credits, it would benefit those families who have no need, as well as those families who do have need.

From a general question of public policy, I would raise the question of whether the long-term interest of higher education as a very inflation sensitive sector of our economy would be benefited by a tax program which in effect would make it more difficult to stabilize the national budget, and might tend to increase the national debt.

I think we would all benefit more from stabilization of inflation.

Senator PACKWOOD. Senator Moynihan.

Senator MOYNIHAN. Thank you, Mr. Chairman.

I would like to thank the panel for being here. You have certainly added greatly to this record, gentlemen.

You are representing an organization, if you consult on the chairman's question, would you like to be out of this altogether?

Senator PACKWOOD. It would be helpful to us, if you do not want the money, that can be arranged. We are only trying to help.

As a matter of fact, we did help. The Carter administration was so appalled by the prospect that this legislation was going to pass, they came up with the guaranteed student loans.

Don't say we haven't done something for you. [Laughter.]

Senator MOYNIHAN. In 2 years they became—3 years—they became an absolutely indispensable aspect of American education. I mean, dating back to Thomas Jefferson in some way or other. [Laughter.]

We did exactly that. The proposition quoted by Mr. Leifman, by Mr. Califano, there is no reason why low- and middle-income families should have to subsidize the education of the very rich.

In no time at all, we were providing the very rich, no questions asked, with a tax-free Federal loan which we are told not a few of them turned around and put into a Federal securities.

Such are the ways of legislation. But, thanks to us, the administration of Mr. Carter that hadn't got a penny for higher education in 1978, suddenly found $2 billion. That won't happen in this administration, I fear.

But, listen, thank you very much. It was especially nice of you, Paul, to come all the way from the other side of the country.

Mr. BRAGDON. Well, actually, I didn't come but 2,700 or so miles from Oregon. I am now located in a place not so far in miles, but more at a distance from Washington than it is used to or likes to be; namely, I am a visiting scholar at Harvard this year. [Laughter.]

Senator MOYNIHAN. Oh, Lord. Well, if you keep working at it, you might be invited some day to the Maxwell School. [Laughter.]

Senator PACKWOOD. Thank you very much.

[The statements follow:]

Statement by

Dr. Hoke Smith

Towson State University, Maryland

Testimony Before the Senate Committee on Finance, June 3, 1981, by President Hoke Smith, Towson State University, Maryland, on behalf of the American Association of State Colleges and Universities (AASCU).

I am President of Hoke Smith of Towson State University, Maryland. I am pleased to be here today on behalf of the American Association of State Colleges and Universities (AASCU).

Our association has opposed tuition tax credit proposals throughout its history an an organization. Most recently, on November 25, 1980, we voted unanimously at our annual meeting in Williamsburg, Virginia to renew our opposition.

We believe there are many strong reasons for opposing tuition tax credits, some of which are well stated by other spokesmen for public and independent higher education appearing before this committee. Among these reasons are the following:

Tax credits could cost several billion dollars a year. Given the current pressures on the overall budget, this in turn could result in drastic further reduction of existing federal grant, work-study, and loan programs which provide

far more assistance to needy students. These programs are already seriously threatened by budget cuts and proposed cuts made this year.

One argument given for tax credits is that they would be "less bureaucratic" and could be substituted for student aid. Actually, credits would be just as bureaucratic, and would mean regulation in education involving the Department of the Treasury and the Finance and Ways and Means committees, in addition to the oversight now exercised by the Department of Education and the Congressional committees which deal with education.

Most tax credit plans discriminate against lower-income and middle-income students, providing relatively little or no aid to those students most in need. Many plans also exclude part-time and self-supporting students, often the most needy, as well as graduate students.

Tax credits would result in major pressures to raise tuition. Hard-pressed state legislatures would see such plans as a chance to "capture federal dollars" through higher student charges. Institutions in the independent sector, also hard-pressed, could be equally tempted. In this case, parents and students would not gain at all-and those not receiving the full tax credit would be worse off, since they would be paying more tuition.

Many tax credit plans also discriminate against the approximately 80 percent of all students attending public colleges. Public college students make up 80 to 90 percent

of all students (especially in-state residents) in most states and Congressional districts. Those tax credit plans limited to paying a percentage of tuition and fees mean that in most cases the great proportion of taxpayers who send their sons and daughters to public colleges would be paying more taxes to provide a benefit for a much smaller number of children attending private colleges. AASCU has developed a separate staff paper which explores this point.

Public colleges also enroll about 80 percent of all low-income and minority students attending college, so that these groups of students would be particularly discriminated against by a tax credit plan.

The higher education community is united in its feeling that the present student aid programs, already seriously threatened by budgetary reductions, should be maintained and strengthened in this time of rapidly rising college costs. Tax credits simply do not provide enough assistance, in a fair and equitable manner, to those in need. We urge Congress not to support this idea.

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SUBCOMMITTEE ON TAXATION AND DEBT MANAGEMENT

COMMITTEE ON FINANCE

UNITED STATES SENATF

JUNE 3, 1981

SUMMARY OF THE STATEMENT OF PAUL E. BRAGDON

I am Paul E. Bragdon, President of Reed College, representing the American Council on Education, an organization of over 1,600 public and independent colleges and universities.

There is broad agreement in the higher education community that federal need-based student assistance grant, work, and loan programs are the best vehicles for distributing limited federal resources in a manner that best achieves equity and sensitivity to student needs.

Consistent with its strong consensus on the priority for funding of federal need-based aid, the higher education community shares a deep concern that this priority has been seriously eroded by recent Congressional budget and appropriations actions in the past three years.

Such a strong erosion of need-based aid intensifies the concerns of the community with any postsecondary tuition tax credit legislation which would provide further competition for funding of need-based aid.

Legislative proposals for postsecondary tuition tax credits raise serious concerns for the whole community, particularly if they would be considered as a substitute for the existing federal student aid programs. No sector of the higher education community could support postsecondary tuition tax credits as an alternative to need-based student assistance.

Due to the presence of a finely-tuned need-based student aid system, tuition tax credit proposals at the postsecondary level raise different issues than proposals for elementary and secondary tax credits.

The views of the panel when tuition tax credits are viewed as supplemental assistance range from outright opposition to serious concerns with the formulation of S. 550.

The higher education community shares a common belief that the solutions advocated for meeting the parental and student dilemma of financing higher education can best be evaluated on the basis of their equity and their efficiency; their sensitivity to college expenses and to real family need; and their ability to minimize governmental interference with the individual decisions of our citizens.

STATEMENT

BY

PAUL E. BRAGDON

PRESIDENT OF REED COLLEGE

Mr. Chairman and Members of the Subcommittee:

I am Paul E. Bragdon, President of Reed College, representing the American Council on Education, an organization of over 1,600 public and independent colleges and universities.

As Chairman of this panel, I will explain some of the common concerns -- shared by all the members of the panel -- with the post-secondary portions of S. 550, the Tuition Tax Relief Act of 1981.

The subject of this hearing on tuition tax credit legislation for elementary through postsecondary education is an issue both this committee and the education community have struggled with for over a decade. The impetus for the postsecondary part of this proposal -- the financial plight of American families in attempting to send their offspring to college -- is real, and, with inflation, has grown even more severe. Tuition and other costs of attending institutions of higher education, while not keeping pace with inflation, now range from an average cost of attendance in the public sector of $3,600 to an average cost of attendance of $6,100 in the independent college sector this past year. Average tuition costs in 1981 are $650 and $3,300, respectively.

Federal need-based student assistance grant, work, and loan programs have been the cornerstone of federal higher education policy since the passage of the Higher Education Act of 1965. There is broad agreement in the higher education community that these programs, refined over the years, are the best vehicles for distributing limited federal resources in a manner that best achieves equity and sensitivity to student need. The concept of student need has also been adjusted over time so as to extend the reach of grant and loan assistance to

students from middle as well as lower incomes. Last year, over 40 percent of undergraduate students enrolled half time or more and attending public institutions, and over 60 percent of such students attending independent colleges and universities received some form of federal assistance. While there still exists a substantial gap between student needs and the resources available, need-based assistance has shown its usefulness as a sensitive allocation mechanism. The 1980 Amendments to the Higher Education Act set out as a federal policy that the combination of federal assistance and the expected parental contribution should meet 75 percent of a student's cost of attendance at an institution of higher education. Our primary goal and our best efforts must be focussed on making this goal a reality.

Consistent with its strong consensus on the priority for funding of federal need-based aid, the higher education community shares a deep concern that this priority has been seriously eroded in the past three years. Since 1979, major increases in federal student aid funds have been directed almost entirely to the extension of eligibility into the middle income ranges, without proportional increases in aid to the neediest students. This erosion has been accelerated by recent Congressional budget actions to make substantial cuts for FY 81, 82, and 83 in the primary federal programs which assist students in meeting the costs of college.

For example, the neediest students -- those whose families are unable to make any contribution to their educational costs -- received a maximum Pell Grant of $1,800 in FY 79 (Academic Year 1979-80). In FY 80 the maximum was reduced to $1,750. Under the Senate version of the FY 81 Supplemental/Rescission bill, the maximum would be further reduced to $1,650. Over this three-year period college costs have risen over 30 percent, while the value of the Pell Grant (in its Senate version) has been reduced by 20 percent. At the same time, other planned reductions in Pell Grant

eligibility provisions would deny need-based aid to some 600,000 students from families in the $19,000 - $25,000 income range.

Such a strong erosion of need-based aid intensifies the concerns of the community with any postsecondary tuition tax credit legislation which would provide further competition for funding of need-based aid.

In this context, legislative proposals for postsecondary tuition tax credits raise serious concerns for the whole community -- particularly if, as some members of Congress have suggested, they would be considered as a substitute for the existing federal student aid programs. No sector of the higher education community could support postsecondary tuition tax credits as an alternative to need-based student assistance. Tax allowances, by their nature, cannot provide either the up-front assistance nor the degree of sensitivity to student need and costs of attendance that can be achieved through direct grant programs.

Due to the presence of this finely-tuned need-based system, tuition tax credit proposals at the postsecondary level raise different issues than proposals for elementary and secondary tax credits. Moreover, existing Congressional proposals for tuition tax credits have differential effects and benefits on meeting the needs of students who wish to attend two-year, four-year, public or independent institutions.

My colleagues will discuss S. 550 and some of the differences that exist from their varying perspectives. The views of the panel when tuition tax credits are viewed as supplemental assistance range from outright opposition to serious concerns with the formulation of S. 550.

The public sector is unanimous in its opposition: The National Association of State Universities and Land-Grant Colleges (NASULGC), in an official statement, argued that tax credits are regressive, unnecessary, costly, ineffective in increasing access and choice, may result in reduced

student aid funding, and may exclude the majority of students. The American Association of State Colleges and Universities (AASCU) at its annual meeting resolved to urge rejection of tax credit legislation on the grounds that it could result in a drastic reduction of federal grant, loan, and self-help funds; tuition increases in both public and private institutions; and proportionately greater assistance to upper-income students. The American Association of Community and Junior Colleges (AACJC) Board of Directors has taken a stand opposing tuition tax credits "as a matter of public policy."

The independent sector has similar concerns with the tax credit legislation. The National Association of Independent Colleges and Universities (NAICU) at its 1981 meeting reaffirmed "its primary position that the existing federal grant, work, and loan programs of the Higher Education Act, as amended, are best able to serve the important principles of equity and need sensitivity. Tuition tax credits present a number of serious concerns and, if considered for higher education, should be viewed only as a supplement to adequate funding of the existing grant, work, and loan program. . ."

A detailed NAICU analysis concluded that the major tax credit bills considered by the Congress in recent years "could not replace the benefits Basic Grant funds gained under the Middle Income Student Assistance Act (MISAA) or substantial cutbacks in the Guaranteed Student Loan Program. Tuition tax credits viewed as an add-on could provide a modest tax benefit to families with incomes above $25,000 who are not eligible for MISAA. However, the benefit could not be sufficiently structured to reduce the tuition gap between public and independent higher education." The Association of Catholic Colleges and Universities (ACCU), "while supporting tax credits for elementary and secondary school parents, would favor them for

postsecondary education only if they were not a trade-off for present student aid programs and if they were sensitive to tuition and to family need."

The Consortium on Financing Higher Education (COFHE), a group of 30 independent institutions, has declared its belief that "tuition tax credit legislation at the collegiate level is an undesirable and ill-advised means of providing federal assistance to the families of students attending postsecondary institutions." The National Association for Equal Opportunity in Higher Education (NAFEO), representing historically black institutions in both the public and private sector, has stated its strong opposition to the enactment of tuition tax credit legislation because it "could undercut and destroy all of the major student financial assistance programs enacted since 1965."

The Association of American Universities, whose membership comprises the major public and private research universities, strongly supports the existing student aid programs and opposes tuition tax credits. The American Association of University Professors (AAUP) has termed postsecondary tax credit legislation "unwise and unwarranted." In terms of effective relief, impact on the relative attractiveness of private and public institutions, efficiency, and equity, AAUP declared, "the tax credit is inferior to the alternative of expanding the Basic Educational Opportunity Grants." Both the Coalition of Independent College and University Students (COPUS) and the United States Student Association (USSA) have strongly opposed tax credit legislation.

However, we share in common a belief that the solutions advocated for meeting the parental and student dilemma of financing higher education can best be evaluated on the basis of their equity and their efficiency; their sensitivity to college expenses and to real family need; and their ability to minimize governmental interference with the individual decisions of our citizens.

As the spokesman for our common position, I will address one substantive area of concern we have with the adjustment rules in S. 550. This is a problem unique to higher education. S. 550 seeks to guarantee that the combination of direct federal assistance, other tax-free awards, and a tuition tax credit will not result in providing a student with benefits in excess of the price of the student's education -- a goal from which there can be no dissent. The difficulty lies in creating an offset formula that will not defeat the legislation's goal of simplicity by creating regulatory requirements within the Department of Treasury that become more complex than today's student aid form. S. 550 reduces expenses qualifying for a tuition tax credit by the amount of scholarship, federal aid or veterans benefit the student receives. Two problems arise. Section (d)(B) (i) requires educational expenses to be reduced by the "amount of the interest subsidy on any loan proceeds received by the individual." At present students do not, on an individual basis, receive documentation to allow them to make such a calculation. To require them to include this sum would necessitate banks, state agencies, and institutions -- the principal lenders -- to assume new tasks. In the context of proposals to remove the federal interest subsidy and charge students for such costs monthly, bankers have threatened to leave the program. We would repectfully urge the sponsors to reconsider the inclusion of loan subsidies.

A second area of potential difficulty is Section (d)(C) which leaves to the Secretary's determination the treatment of tax-free awards for multi-purposes. Most federal assistance awards are calculated on total cost-of-attendance rules. Thus, for example, a Pell grant of $1,000 would have to be allocated in some manner allowing some portion of the grant to be counted against eligible expenses. Given Treasury's

propensity for detailed regulations, it would seem useful to provide more legislative guidance. Unfortunately, the most administratively simple offset approach -- dollar for dollar reduction of all tax-free awards against eligible expenses -- does not seem appropriate because it substantially reduces both the benefits and the number of eligible families whose income is below $15,000. Noted below is a chart compiled from 1978 Congressional Budget Office data that illustrates the potential importance of this point.

Income Distribution of Tuition Tax Credit Benefits
Utilizing Various Offset Formulae

Income Class	Senate Bill (A) Dollar-For-Dollar	Senate Report (B) Pro-Rata
Under $15,000	14%	32%
$15,000 - 25,000	31%	29%
$25,000 +	55%	39%

We are prepared to work with staff on an attempt to ameliorate this problem but we must admit, quite frankly, that however written, an offset formula will produce a level of regulatory complexity at the postsecondary level that will not exist at elementary or secondary levels of education.

Thus, even if tuition tax credits are viewed as a supplement to need-based student assistance, there are many difficult issues unique to postsecondary education which need to be reviewed.

We appreciate the efforts of you, Mr. Chairman, and many of your colleagues in drawing attention to the difficulties faced by students and their parents in affording a college education. Our goals, indeed our cause, is a common cause, providing all Americans, regardless of financial means, the opportunity to attend the college or university that best fits his or her needs and aspirations.

SUMMARY OF PRINCIPAL POINTS

MELVIN EGGERS, CHANCELLOR
SYRACUSE UNIVERSITY
SUBMITTED TO THE
SENATE FINANCE SUBCOMMITTEE ON TAXATION AND DEBT MANAGEMENT
JUNE 3, 1981

1. THE MEMBERSHIP OF THE NATIONAL ASSOCIATION OF INDEPENDENT COLLEGES AND UNIVERSITIES (NAICU) HAS ADOPTED THE FOLLOWING POLICY STATEMENT ON TUITION TAX CREDITS AT THE POSTSECONDARY LEVEL:

   NAICU REAFFIRMS ITS PRIMARY POSITION THAT THE EXISTING FEDERAL GRANT, WORK AND LOAN PROGRAMS OF THE HIGHER EDUCATION ACT, AS AMENDED, ARE BEST ABLE TO SERVE THE IMPORTANT PRINCIPLES OF EQUITY AND NEED SENSITIVITY. TUITION TAX CREDITS PRESENT A NUMBER OF SERIOUS CONCERNS AND IF CONSIDERED FOR HIGHER EDUCATION SHOULD BE VIEWED ONLY AS A SUPPLEMENT TO ADEQUATE FUNDING OF THE EXISTING GRANT, WORK AND LOAN PROGRAMS, AND SHOULD BE SENSITIVE TO BOTH THE UNMET STUDENT NEED AND THE VARYING COSTS OF ATTENDING HIGHER EDUCATIONAL INSTITUTIONS.

2. IN EXAMINING S. 550 AS A SUPPLEMENT TO STUDENT ASSISTANCE, IT SHOULD BE NOTED THAT ITS REFUNDABILITY FEATURE AND ITS INCLUSION OF A PRO-RATA OFFSET OF TAX-FREE AWARDS PROVIDE A DEGREE OF STUDENT NEED SENSITIVITY. TUITION TAX CREDITS, BY THEIR NATURE, CANNOT MATCH THE NEED SENSITIVITY OF THE EXISTING STUDENT AID PROGRAMS. WE SHARE THE CONCERN RAISED BY OTHER PANEL MEMBERS THAT THE ADJUSTMENT RULES NEED FURTHER MODIFICATION TO AVOID NEW REGULATORY BURDENS ON STUDENTS AND PARENTS.

3. WE WOULD URGE A MODIFICATION OF THE TUITION TAX CREDIT FORMULA CONTAINED IN S. 550 SO AS TO TAKE INTO CONSIDERATION EXPLICITLY THE DIFFERENCE IN TUITION CHARGED AT INDEPENDENT COLLEGES AND UNIVERSITIES.

4. S. 550, AS PRESENTLY CONSTRUCTED, WOULD EXPAND, ON THE AVERAGE, THE PRICE DIFFERENTIAL (TUITION GAP) BETWEEN STUDENT CHARGES AT INDEPENDENT AND PUBLIC COLLEGES FROM 4.7 TO 1 TO 8.0 TO 1. IT WOULD CUT IN HALF, ON THE AVERAGE, THE TUITION CHARGES AT PUBLIC INSTITUTIONS WHILE, ON THE AVERAGE, LOWERING THOSE AT INDEPENDENT COLLEGES BY 15%.

5. 25% OF TUITION AND FEES UP TO $1,000 IS COMPARATIVE IN COST TERMS WITH S. 550 AND HAS A NEUTRAL IMPACT ON THE TUITION GAP. IT WOULD PROVIDE A SIGNIFICANT SUPPLEMENTAL BENEFIT TO STUDENTS AND THEIR PARENTS IN BOTH SECTORS. HOWEVER, IT MUST BE NOTED THAT NAICU COULD NOT SUPPORT THE SUBSTITUTION OF A PROGRAM OF TUITION TAX CREDITS FOR THE EXISTING FEDERAL STUDENT ASSISTANCE PROGRAMS.

TESTIMONY

PRESENTED BY

MELVIN EGGERS

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

MY NAME IS MELVIN EGGERS. I AM CHANCELLOR OF SYRACUSE UNIVERSITY. I AM HERE TODAY IN MY CAPACITY AS CHAIRMAN OF THE NATIONAL ASSOCIATION OF INDEPENDENT COLLEGES AND UNIVERSITIES, AN ORGANIZATION WHICH INCLUDES WITHIN ITS MEMBERSHIP 850 INDEPENDENT, NONPROFIT COLLEGES AND UNIVERSITIES.

WE APPRECIATE THE OPPORTUNITY THE COMMITTEE HAS AFFORDED US TO PRESENT OUR VIEWS ON S. 550, THE TUITION TAX CREDIT RELIEF ACT OF 1981, WHICH WOULD PROVIDE, WHEN FULLY IMPLEMENTED, A 50% TAX CREDIT FOR TUITION AND FEE EXPENSES AT ELEMENTARY THROUGH POSTSECONDARY INSTITUTIONS UP TO A MAXIMUM OF $500. AS THE SPOKESPERSON FOR INDEPENDENT HIGHER EDUCATION, MY REMARKS WILL FOCUS ON THE EFFECTS OF THIS LEGISLATION ON STUDENTS ATTENDING INDEPENDENT COLLEGES AND UNIVERSITIES.

TUITION TAX CREDIT PROPOSALS HAVE BEEN DISCUSSED AND DEBATED BY OUR MEMBER PRESIDENTS AT OUR LAST FOUR ANNUAL MEETINGS. OVER THIS PERIOD TWO SEPARATE REVISIONS TO THE HIGHER EDUCATION ACT STUDENT ASSISTANCE PROGRAMS HAVE BEEN ENACTED PROVIDING THE FRAMEWORK FOR THE EXPANSION OF DIRECT FEDERAL ASSISTANCE TO OVER 3.4 MILLION STUDENTS. OUR ANNUAL MEETING DISCUSSIONS HAVE BEEN COLORED BY THE FEAR THAT THE ECONOMIC AND POLITICAL REALITIES OF THE TIMES MIGHT CONSPIRE TO VIEW A PROGRAM OF TUITION TAX CREDITS AS DIRECTLY COMPETING AGAINST FEDERAL STUDENT ASSISTANCE PROGRAMS FOR LIMITED FEDERAL RESOURCES.

AT OUR 1981 ANNUAL MEETING, THE NAICU MEMBERSHIP ADOPTED THE FOLLOWING POLICY STATEMENT ON TUITION TAX CREDITS AT THE POSTSECONDARY LEVEL. THE STATEMENT READS:

NAICU REAFFIRMS ITS PRIMARY POSITION THAT THE EXISTING FEDERAL GRANT, WORK AND LOAN PROGRAMS OF THE HIGHER EDUCATION ACT, AS AMENDED, ARE BEST ABLE TO SERVE THE IMPORTANT PRINCIPLES OF EQUITY AND NEED SENSITIVITY. TUITION TAX CREDITS PRESENT A NUMBER OF SERIOUS CONCERNS AND IF CONSIDERED FOR HIGHER EDUCATION SHOULD BE VIEWED ONLY AS A SUPPLEMENT TO ADEQUATE FUNDING OF THE EXISTING GRANT, WORK AND LOAN PROGRAMS, AND SHOULD BE SENSITIVE TO BOTH THE UNMET STUDENT NEED AND THE VARYING COSTS OF ATTENDING HIGHER EDUCATIONAL INSTITUTIONS.

LET ME ADD THAT, ALTHOUGH SOME OF OUR MEMBER PRESIDENTS FEEL VERY STRONGLY THAT SUCH CREDITS ARE IMPORTANT AND APPROPRIATE FOR PARENTS SENDING THEIR CHILDREN TO INDEPENDENT ELEMENTARY AND SECONDARY SCHOOLS -- INCLUDING SOME MEMBER PRESIDENTS WHO OPPOSE TUITION TAX CREDITS FOR HIGHER EDUCATION -- WE REFRAINED FROM FORMAL COMMENT ON THIS ISSUE AS LYING OUTSIDE THE SCOPE OF OUR ORGANIZATION'S CHARTER.

THE TESTIMONY WHICH PAUL BRAGDON, PRESIDENT OF REED COLLEGE, HAS DELIVERED TODAY, AND WHICH IS ENDORSED BY MY ORGANIZATION, SETS OUT THE REASONS FOR OUR PRIMARY SUPPORT OF STUDENT AID. LET ME, THEREFORE, TURN TO A DISCUSSION OF THE NATURE OF NAICU'S CONCERNS ABOUT A TUITION TAX CREDIT PROPOSAL SUCH AS S. 550 SHOULD IT BE VIEWED AS A SUPPLEMENT TO DIRECT FEDERAL ASSISTANCE.

THE HEART OF OUR CONCERN IS THAT A TUITION TAX CREDIT PROPOSAL MUST TAKE INTO CONSIDERATION EXPLICITLY THE DIFFERENCE IN TUITION CHARGED AT INDEPENDENT COLLEGES AND UNIVERSITIES. IF A STUDENT DECIDED TO ATTEND A PUBLIC INSTITUTION, THE TOTAL BILL FOR TUITION AND FEES IN THE 1980-81 SCHOOL YEAR COULD HAVE BEEN AS LITTLE AS $200 OR AS MUCH AS $1,400, DEPENDING ON THE LEVEL OF STATE TAX SUBSIDY AND STATE POLICIES CONCERNING TUITION AND FEES, BUT ON THE AVERAGE THE TOTAL BILL WOULD HAVE BEEN A LITTLE OVER $700. ON THE OTHER HAND, IF THE STUDENT DECIDED TO ATTEND AN INDEPENDENT INSTITUTION, THE TOTAL

TUITION AND FEE BILL COULD HAVE BEEN AS LITTLE AS $1,500 OR AS MUCH AS $7,380 -- OR ROUGHLY $3,300 ON THE AVERAGE. COMPARING AVERAGE TUITION RATES, THE AVERAGE PRICE DIFFERENTIAL TODAY BETWEEN AN INDEPENDENT COLLEGE AND A PUBLIC INSTITUTION IS 4.7 TO 1.

THE IMPACT OF PROPOSED TUITION TAX CREDITS ON THIS TUITION GAP IS OF SPECIAL CONCERN TO INDEPENDENT COLLEGES AND UNIVERSITIES. AS THE GAP INCREASES, THE FINANCIAL ABILITY OF STUDENTS TO CHOOSE AN INDEPENDENT HIGHER EDUCATION DECLINES WITH THE ATTENDANT LOSS IN THE DIVERSITY AND EDUCATIONAL PLURALISM THAT IS THE HALLMARK OF AMERICAN HIGHER EDUCATION.

IN FORMULATING AID FOR STUDENTS, THE FEDERAL GOVERNMENT MUST EXERCISE GREAT CARE TO ASSURE THAT THE SCALES OF COMPETITIVE BALANCE BETWEEN THE INDEPENDENT AND THE STATE INSTITUTIONS OF HIGHER LEARNING ARE NOT IRREVOCABLY TIPPED. THIS DIFFICULT BUT IMPORTANT FEDERAL RESPONSIBILITY IS COMPLICATED BY AN ENVIRONMENT OF DEMOGRAPHIC DECLINE IN THE STUDENT POPULATION AND IN INFLATION-DRIVEN INCREASES IN OUR COSTS.

WE BELIEVE THAT IN ORDER TO MEET THE TWIN PRINCIPLES OF STUDENT EQUITY AND NEED SENSITIVITY IN DESIGNING A TUITION TAX CREDIT AT THE POSTSECONDARY LEVEL AS WELL AS TO AVOID, TO THE EXTENT POSSIBLE, CREATING A NEW FEDERAL REGULATORY ENGINE, SUCH A PROPOSAL SHOULD CONTAIN THE FOLLOWING PROVISIONS:

1) A FORMULA LIMITED TO TUITION;
2) A LOW PERCENTAGE OF TUITION COVERED COMBINED WITH A HIGH MAXIMUM CREDIT TO ACHIEVE GREATER COST SENSITIVITY;
3) A TAX CREDIT WHICH IS REFUNDABLE AND A PRO-RATA OFFSET OF TAX-FREE AWARDS TO ACHIEVE A GREATER DEGREE OF NEED SENSITIVITY;
4) A LEGISLATIVE PROHIBITION AGAINST TREATING TUITION TAX CREDITS AS FEDERAL ASSISTANCE AND INSTITUTIONS AS "RECIPIENTS";

5) THE INCLUSION OF GRADUATE STUDENTS; AND

6) THE AVOIDANCE OF NEW REGULATORY BURDENS.

S. 550 IS SENSITIVE TO A NUMBER OF THESE CONCERNS -- IT IS LIMITED TO TUITION, PROVIDES FOR A REFUNDABLE TAX CREDIT, PROHIBITS TUITION TAX CREDITS FROM BEING CHARACTERIZED AS AID TO THE INSTITUTION, AND ATTEMPTS TO AVOID SOME OF THE REGULATORY BURDENS WHICH COULD ARISE. WE ARE ESPECIALLY PLEASED TO NOTE THE INCLUSION OF GRADUATE STUDENTS WITHIN THE ELIGIBLE POPULATION OF THIS LEGISLATION WHEN FULLY IMPLEMENTED (AUGUST 1, 1984). GRADUATE EDUCATION, IMPORTANT TO THE CONTINUED STRENGTH AND PREEMINENCE OF OUR COUNTRY, HAS BEEN THE VICTIM OF BOTH CUTBACKS IN DIRECT AID, AS WELL AS THE LESSENING AVAILABILITY OF FUNDS IN BOTH THE GOVERNMENTAL AND PRIVATE SECTOR TO SUPPORT BASIC RESEARCH.

WE ARE CONSCIOUS OF THE REGULATORY ENTANGLEMENTS WHICH CAN FLOW FROM FEDERAL LEGISLATION, AND HEARTILY ENDORSE THE COMMENTS MADE BY PAUL BRAGDON WITH REGARD TO THE REGULATORY MISCHIEF THAT MIGHT BE FORTHCOMING FROM S. 550'S FORMULATION OF THE ADJUSTMENT RULES. WE URGE THEIR MODIFICATION.

IN THE CONTEXT OF EVALUATING S. 550, OUR MOST SERIOUS CONCERN IS WITH BOTH THE PERCENTAGE OF TUITION COVERED AND THE MAXIMUM. A 50% OF TUITION AND FEES UP TO A MAXIMUM OF $500 FORMULATION, AS IS CONTAINED IN S. 550, WOULD, ON THE AVERAGE, EXPAND THE EXISTING TUITION GAP OF 4.7 TO 1 TO 8.0 TO 1 IF IT WERE IN PLACE THIS PAST YEAR. SUCH A PROPOSAL WOULD, ON THE AVERAGE, CUT THE TUITION CHARGED AT PUBLIC INSTITUTIONS IN HALF WHILE LOWERING THE TUITION CHARGES AT INDEPENDENT COLLEGES BY ONLY 15%. MOREOVER, IT IS LIKELY THAT INFLATION WILL CONTINUE IN THE NEAR FUTURE TO DRIVE UP THE TUITION COSTS AT PUBLIC AND INDEPENDENT COLLEGES AND UNIVERSITIES. THE $500 MAXIMUM PROVIDED IN S. 550 IS PROBABLY SUFFICIENT TO ABSORB THE INFLATIONARY IMPACT ON STUDENTS

ATTENDING PUBLIC INSTITUTIONS -- CONTINUING TO PROVIDE A BENEFIT EQUAL TO HALF OF THE TUITION CHARGES. HOWEVER, STUDENTS AT INDEPENDENT COLLEGES ARE ALREADY PAYING MORE IN TUITION CHARGES THAN THE MAXIMUM TAX CREDIT CEILING. THUS, OVER TIME, THE BENEFIT -- EXPRESSED AS A PERCENTAGE OF TUITION -- ACCORDED INDEPENDENT COLLEGE STUDENTS WILL SHRINK. THE PRICE DIFFERENTIAL BETWEEN TUITION CHARGES AT PUBLIC AND INDEPENDENT INSTITUTIONS WILL GROW EVEN WIDER.

IN GENERAL, TINKERING WITH THE PERCENTAGE OF TUITION COVERED (THE LOWER THE PERCENTAGE, THE HIGHER UP THE TUITION AND FEE LADDER THE CREDIT CAN REACH) AND THE MAXIMUM SIZE OF THE CREDIT (THE HIGHER, THE BETTER) CAN ACHIEVE A DEGREE OF TUITION COST-SENSITIVITY IN THE SIZE OF THE BENEFIT DISTRIBUTED TO STUDENTS ENROLLED AT INDEPENDENT AND PUBLIC INSTITUTIONS. TWO FORMULAE -- A 10% OF TUITION AND FEES UP TO A MAXIMUM OF $500 OR 25% OF TUITION AND FEES UP TO A MAXIMUM OF $1,000 -- WOULD HAVE A NEUTRAL EFFECT VIS-A-VIS THE PRICE DIFFERENTIAL BETWEEN INDEPENDENT AND PUBLIC COLLEGES. MOREOVER, THE CONGRESSIONAL BUDGET OFFICE ANALYSIS IN 1978 SHOWED THE 25%/$1,000 FORMULATION TO BE SLIGHTLY UNDER $2 BILLION FOR FY 1979 (FOR POSTSECONDARY EDUCATION) MAKING IT COMPETITIVE WITH THE COSTS OF THE CURRENT 50%/$500 FORMULATION IN S. 550. UNDER THIS FORMULATION, A STUDENT AT THE AVERAGE PUBLIC COLLEGE WOULD BE ELIGIBLE FOR A $175 TUITION TAX CREDIT ($700 x .25 = $175). THE STUDENT AT THE AVERAGE INDEPENDENT COLLEGE WOULD BE ELIGIBLE FOR A $825 TUITION TAX CREDIT ($3,300 x .25 = $825). THE EFFECTIVE TUITION RATE DROPS TO $525 ($700 - $175 = $525) AT THE PUBLIC INSTITUTION, AND $2,475 ($3,300 - $825 = $2,475) AT THE INDEPENDENT INSTITUTION, THUS PROVIDING A SIGNIFICANT BENEFIT TO STUDENTS AND THEIR PARENTS IN BOTH SECTORS.

WHILE THE FOREGOING HAS ATTEMPTED TO ADDRESS THE MAJOR FEATURES OF S. 550, I WOULD BE REMISS IF, IN CLOSING, I DID NOT AGAIN STRESS THAT OUR TOP

CONGRESSIONAL PRIORITY IS THE ADEQUATE FUNDING OF STUDENT ASSISTANCE PROGRAMS NOW IN PLACE. THIS IS THE FUNDAMENTAL FOUNDATION OF THE FEDERAL ROLE IN HIGHER EDUCATION. WHILE VARIOUS TUITION TAX CREDIT PROPOSALS CAN BE ADJUSTED TO MAKE THEM MORE OR LESS SENSITIVE TO STUDENT NEED AND THE VARYING COSTS OF ATTENDANCE AT INSTITUTIONS OF HIGHER EDUCATION, NOT ONE OF THEM HAS BEEN ABLE TO MATCH THE ABILITY OF THE EXISTING PROGRAMS OF DIRECT FINANCIAL ASSISTANCE, AS IMPERFECT AS THEY ARE, TO MEET THESE NEEDS. IN A TIME OF FEDERAL BUDGET CUTBACKS, WE MUST RESPECTFULLY URGE THAT THE FEDERAL GOVERNMENT'S LIMITED RESOURCES BE UTILIZED IN A MANNER THAT CONCENTRATES ITS AID IN A FASHION THAT WILL PRESERVE EDUCATIONAL OPPORTUNITY FOR ALL AMERICANS.

Testimony

Presented by

Peter Cayan, President
North Country Community College
Saranac, New York

Good afternoon. My name is Peter Cayan. I am President of North Country Community College in Saranac Lake, New York. I am here today representing the American Association of Community and Junior Colleges, an organization made up of 1,231 community, junior and technical colleges. We appreciate the opportunity to present our views to the Subcommittee on S. 550 and other tuition tax credit bills.

Community colleges enroll over 40 percent of the undergraduate students in the United States. As of the fall of 1980, they enrolled over 4.8 million students in credit courses and 4 million students in non-credit courses - almost 9 million people. The majority of our students, 62 percent, attend classes part-time. Most are employed and many support a family. The average age of students at most community colleges is between 28 and 31, and 53 percent of our students are women. Community colleges enroll far more minority students than any other sector in post-secondary education - 27 percent of the full-time and 20 percent of the part-time students at community colleges are from minority groups. They represent more than half of the minority undergraduates enrolled in postsecondary institutions today. Community colleges also serve a large proportion of disadvantaged students. According to one study of students enrolled in academic year 1979-80, 45 percent of the students enrolled half-time or more at community colleges came from families with incomes less than $15,000. That figure would be much higher if less-than-half-time students were included.

In April of this year, AACJC's Board of Directors took the position of opposing tuition tax credits "as a matter of public policy." The Board took this action for several reasons which I will explain.

Let me begin by saying that AACJC shares the concerns of its colleagues in the higher education community that tuition tax credits for postsecondary education could seriously erode support for the existing federal programs which help students meet the growing costs of college. AACJC is especially concerned that programs

dents attending low-cost institutions. These students receive a smaller credit, a much smaller credit if the percentage is held low, whereas students at high-cost institutions always receive the maximum credit.

Finally, we are concerned about the definition of allowable education expenses. Tuition is not the sole, or even main, educational cost for students attending low-cost colleges. For the more than one million students - 25 percent of community college enrollment - enrolled in tuition free community colleges in California, tax credits restricted to tuition and fees are meaningless. The inclusion of other expenses such as books, transportation and child care costs more accurately reflect actual educational costs.

Mr. Chairman, again I appreciate the opportunity to come before your Subcommittee and present the views of community, junior and technical colleges on tuition tax credits. If I can be of any assistance to you in the future with regard to this sensitive issue, please feel free to let me know.

[Whereupon, at 3:15 p.m., the hearing was adjourned, subject to the call of the Chair.]

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