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Government Aid to Church-Related Education: An Alternative Rationale

Church-related schools in the United States are in serious economic trouble, and have been for a number of years. Government attempts to alleviate the problem through aid programs have often been challenged in the courts under the establishment clause of the first amendment, and many of these challenges have resulted in Supreme Court decisions. Unfortunately, the reasoning behind these decisions is often difficult to understand and even more difficult to defend. Because of the continuing flow of aid-to-church-related-education cases being brought before the courts, it is important that a consistent, defensible rationale be developed to justify old precedents and cope with new problems as they arise. This Comment will examine and criticize the Supreme Court’s reasoning in the aid cases and then attempt to sketch the outlines of a more satisfactory rationale.


2. "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I.


5. The scope of this Comment, then, is limited to government aid programs that impact on church-related schools. Although the principles that are developed may in certain instances have broader applicability, no attempt will be made to generalize the discussion to other areas of church-state relationships.
I. ESTABLISHMENT CLAUSE VALUES

In Lemon v. Kurtzman, the Supreme Court distilled from previous opinions three tests that have proven to be the doctrinal starting point for determining the constitutionality of government enactments challenged under the establishment clause: "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.'"7

The first two tests express the idea that the government should not enact programs having either the purpose or the effect of advancing or inhibiting religion. This idea, which lies at the heart of establishment clause theory, will be referred to as the value of neutrality.8 The third test has two branches. The first branch suggests that excessive involvement of the state in religious activities, or administrative entanglement, is an evil to be avoided.9 The second branch suggests that political divisions along religious lines, or political entanglement, should also be guarded against.10 These values, neutrality and the avoidance of administrative and political entanglement, have been referred to repeatedly by the Court. They constitute the theoretical foundation of establishment clause analysis.

II. THE COURT'S UNSATISFACTORY RATIONALE

Although the values underlying the establishment clause are clear, their practical implications are often in doubt. This Section will briefly outline the cases in which the Supreme Court has attempted to apply these abstract values to practical problems.

7. Id. at 612-13 (citations omitted).
8. No aid program has ever been invalidated on the grounds that it lacked a secular legislative purpose. This is probably due to the Court's reluctance to question legislative motives. See Note, Establishment Clause Analysis of Legislative and Administrative Aid to Religion, 74 COLUM. L. REV. 1175, 1179-80 (1974).
involving government aid to church-related education. The rationale relied upon in these cases will be examined and criticized. Since the Court has taken a significantly different view of aid involving sectarian elementary and secondary schools (parochial schools) as opposed to sectarian colleges, these will be considered separately.

A. Aid to Parochial Education

The first important case involving aid to parochial education was *Everson v. Board of Education*.12 In *Everson*, the Court asserted that the establishment clause meant that neither a state nor the federal government "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."13 In spite of this absolute "no aid" rhetoric, the *Everson* Court upheld a state program providing busfare refunds to the parents of students attending both public and parochial schools. The Court reasoned that the state was merely extending the benefits of general welfare legislation to all citizens without regard to their religious beliefs.14 In his dissent, Justice Rutledge argued that in reality the majority opinion permitted the government to do what was expressly forbidden; that is, to support religious institutions. He contended that subsidizing busfares, an essential element of the costs of parochial education, constituted as a practical matter aid to religion.15

After *Everson*, the next important case involving aid to parochial education was *Board of Education v. Allen*,16 where the Supreme Court upheld a state program providing secular textbook loans to students attending both public and private (including parochial) schools. In making its decision, the Court recognized that parochial schools have dual functions, secular and sectarian. It intimated that aid to the sectarian function was impermissible. However, the Court was unwilling to agree with the parties challenging the program that either "all teaching in a sectarian school is religious or that the processes of secular and religious training are so intertwined that secular textbooks fur-

13. Id. at 15-16.
15. Id. at 44-49 (Rutledge, J., dissenting).
nished to students by the public are in fact instrumental in the teaching of religion."17

In *Lemon v. Kurtzman*,18 the Court used a two-step approach to disallow state programs providing salary subsidies to teachers of secular subjects in parochial schools. First, the Court held that the establishment clause prohibits a teacher receiving government salary subsidies from inculcating religion.19 Second, the Court found that the government inspections required in order to ensure compliance with the constitutional rule would create excessive administrative entanglement.20 The Court also observed that there were substantial dangers of political entanglement inherent in these programs. "The potential for political divisiveness related to religious belief and practice" was aggravated in these programs "by the need for continuing annual appropriations and the likelihood of larger and larger demands as costs and populations grow."21

In *Committee for Public Education & Religious Liberty v. Nyquist*,22 the Court disallowed a program that provided state subsidies for the maintenance and repair of parochial school facilities. The Court reasoned that these facilities would be used, at least in part, for sectarian purposes.23 In this same case, tuition refunds and tax benefits for the parents of parochial schoolchildren were disallowed on the ground that there were no restrictions guaranteeing that the government money would be used only for secular purposes.24

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17. *Id.* at 245-48. Subsequent Supreme Court cases have upheld other textbook programs similar to the one upheld in *Allen*. See *Wolman v. Walter*, 433 U.S. 229, 236-38 (1977) (plurality opinion); *Meek v. Pittenger*, 421 U.S. 349, 359-62 (1975) (plurality opinion). However, the Court has repudiated a significant element of the *Allen* rationale. See notes 37-39 and accompanying text infra.


19. 403 U.S. at 619.

20. *Id*.

21. *Id.* at 622-24.


23. *Id.* at 774-80.

24. *Id.* at 780-94. The Court was unimpressed by the fact that since parents receiving tuition reimbursements were free to spend the money in any manner they chose, there was no assurance that actual government dollars would end up in the hands of the parochial schools. Neither was the Court impressed by the fact that the parents participating in the tax benefit program received no actual cash payments; the state merely refrained from collecting a certain portion of their taxes. The Court held, rather, that "neither form of
By the time Nyquist was decided, a recurrent theme had developed in Supreme Court opinions which will be denominated the "no direct aid rule." The Court, recognizing that church-related education has two aspects, secular and sectarian, disallowed aid to sectarian activities but permitted aid to secular activities. The Court intimated that under circumstances where separation of secular and sectarian activities was impossible or unenforceable without the creation of excessive administrative entanglement, no aid whatsoever was permissible. The establishment clause was held violated if even one penny of government money went to support religion. On the other hand, the Court permitted secular activities to be funded to the extent they could be isolated, even if this aid had the effect of freeing other funds to be used for sectarian purposes.

Subsequent cases have followed the no direct aid rule. Government programs providing parochial school students with standardized testing and scoring services were upheld on the grounds that they constituted aid to secular activities only. The aid is sufficiently restricted to assure that it will not have the impermissible effect of advancing the sectarian activities of religious schools. Tuition reimbursement or tax benefit programs similar to those challenged in Nyquist have generally been disallowed by the district courts. Public Funds for Pub. Schools v. Byrne, 444 F. Supp. 1228 (D.N.J. 1978); Kosydar v. Wolman, 353 F. Supp. 744 (S.D. Ohio 1972), aff'd sub nom. Grit v. Wolman, 413 U.S. 901 (1973); Wolman v. Essex, 342 F. Supp. 399 (S.D. Ohio), aff'd, 409 U.S. 806 (1972). The United States District Court for Minnesota, however, recently upheld a state enactment allowing the parents of all children attending both public and private (including parochial) schools to deduct from their personal income for purposes of computing state income tax an amount corresponding to their expenses for tuition, transportation, and secular textbooks. Minnesota Civil Liberties Union v. Roemer, 452 F. Supp. 1316 (D. Minn. 1978). This program may be distinguishable from those disallowed in prior cases in that it benefited parents of children attending both public and private schools.

25. The term "no direct aid rule" has never been employed by the Court; it is an invention of the author. The Court expressed a similar thought when it stated that direct aid to religious activities is impermissible, while enactments that have "an indirect and incidental effect beneficial to religious institutions" are permissible. Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 775 (1973).


29. "Stated another way, the Court has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends," Hunt v. McNair, 413 U.S. 734, 742-43 (1973).

provision of speech, hearing, and psychological diagnostic services on parochial school premises by school board employees and physicians working under government contracts was also upheld. The Court reasoned that the nature of these activities minimized the danger of religious inculcation by those performing the services and hence the necessity of entangling inspections. A program furnishing parochial schoolchildren with therapeutic, guidance, and remedial services at locations apart from parochial school premises was upheld because no entangling interaction between public and parochial school officials was required to ensure secular content. On the other hand, administrative entanglement dangers were held sufficient to disallow provision by public employees of remedial and accelerated instruction, guidance counseling and testing, and speech and hearing therapeutic (as opposed to diagnostic) services when conducted on parochial school premises. Also struck down were statutes providing public funds for the preparation of examinations by parochial schoolteachers and government-funded busing for field trips. The Court reasoned that the implementation of measures sufficient to ensure that no religion seeped into the preparation of the examinations or the teaching associated with the field trips would entail excessive administrative entanglement.


The fact that a unit on a neutral site on occasion may serve only sectarian pupils does not provoke the same concerns that troubled the Court in Meek. [In Meek v. Pittenger, 421 U.S. 349, 367-71 (1975), the Court disallowed a program providing similar services on parochial school premises.] The influence on the therapist's behavior that is exerted by the fact that he serves a sectarian pupil is qualitatively different from the influence of the pervasive atmosphere of a religious institution. 433 U.S. at 247 (footnote omitted).

34. Meek v. Pittenger, 421 U.S. 349, 367-72 (1975). The Court also noted that these programs created a serious potential for political entanglement. Id. at 372.


Although the no direct aid rule has been consistently upheld, subsequent cases have diverged from the Allen-Lemon-Nyquist rationale in one respect. In *Meek v. Pittenger*, the Court disallowed a program that provided loans of instructional materials such as maps, charts, and laboratory equipment to parochial schools. The Court was not convinced by the argument that these materials, like secular textbooks, are incapable of diversion to religious uses and are hence self-policing—no entangling inspections are required to guarantee that they will not be used to inculcate religion. Rather, the Court concluded that parochial schools are so pervasively sectarian that secular and sectarian activities cannot be separated; hence, any direct subsidy impermissibly aids religion. This determination is disturbing because it directly contradicts a premise that was apparently essential to the Court’s ruling in *Allen* and was not questioned in either *Lemon* or *Nyquist*.

**B. Programs Aiding Church-Related Higher Education**

Substantially more government aid has been allowed to flow to church-related colleges than to parochial schools, largely because of the Court’s determination that church-related colleges are generally less sectarian than parochial schools. The Court has found that major portions of the curriculum at most church-related colleges can be labeled secular and are hence eligible for government subsidies. Furthermore, it has been accepted that

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39. The Court in *Wolman v. Walter*, 433 U.S. 229, 251 n.18 (1977), recognized this inconsistency between *Allen* and *Meek* and accepted the *Meek* rationale, refusing to overrule *Allen* only as a matter of stare decisis. See generally *Survey—A Survey of Selected Contemporary Church-State Problems*, 51 NOTRE DAME LAW. 737, 759-89 (1976).
40. The Supreme Court cases dealing with government aid to church-related colleges are *Roemer v. Board of Pub. Works*, 426 U.S. 736 (1976) (noncategorical grants to church-related colleges approved where statute prohibited sectarian use of funds and none of the aided institutions were so pervasively sectarian that secular and sectarian aspects could not be separated); *Hunt v. McNair*, 413 U.S. 734 (1973) (participation of church-related colleges not found to be pervasively sectarian in program whereby the state issued revenue bonds to assist in the construction of facilities to be used for secular purposes upheld); and *Tilton v. Richardson*, 403 U.S. 672 (1971) (participation of church-related colleges not found to be pervasively sectarian in federal program providing grants for the construction of academic facilities to be used for secular purposes upheld).
the highly secular atmosphere at most church-related colleges lessens the dangers of administrative entanglement.\textsuperscript{43} Since the chances of religion contaminating subsidized portions of the curriculum would be slight, the requisite inspections by government officials to ensure that no government money goes to sectarian activities could be "quick and nonjudgmental."\textsuperscript{44}

This generally favorable prognosis for programs aiding church-related colleges must be qualified in one respect. The no direct aid rule mandates that no aid whatsoever can flow to institutions in which religion is so pervasive that it is impossible to separate the secular and the sectarian aspects.\textsuperscript{45} Nevertheless, some lower courts have permitted students attending certain pervasively sectarian institutions to share in the benefits of government assistance programs available to both public and private college students.\textsuperscript{46}

\textsuperscript{43} Roemer v. Board of Pub. Works, 426 U.S. 736, 761-67 (1976) (plurality opinion); Hunt v. McNair, 413 U.S. 754, 745-46 (1973); Tilton v. Richardson, 403 U.S. 672, 684-88 (1971) (plurality opinion). The \textit{Tilton} Court also noted that the potential for political divisiveness is less with colleges and universities than with elementary and secondary schools. \textit{Id.} at 688-89.

\textsuperscript{44} The phrase is used in Roemer v. Board of Pub. Works, 426 U.S. 736, 764 (1976).

\textsuperscript{45} See note 27 and accompanying text \textit{supra}.

\textsuperscript{46} See \textit{Americans United for the Separation of Church \& State v. Blanton}, 433 F. Supp. 97 (M.D. Tenn.) (financial assistance program available to resident students attending accredited Tennessee public and nonpublic colleges upheld; among the participating institutions were sectarian and pervasively sectarian colleges), \textit{aff'd}, 434 U.S. 803 (1977); Durham v. McLeod, 259 S.C. 409, 192 S.E.2d 202 (1972) (state program authorizing establishment of educational assistance authority to make and guarantee loans to college students attending the public or private institution of their choice upheld; sectarian colleges and probably some pervasively sectarian colleges were allowed to participate), \textit{appeal dismissed}, 413 U.S. 902 (1973). Cf. Bob Jones University v. Johnson, 396 F. Supp. 597 (D.S.C. 1974) (provision of V.A. benefits to students attending a pervasively sectarian college held not violative of the establishment clause, but disallowed because of racially discriminatory policies of the college), \textit{aff'd}, 529 F.2d 514 (4th Cir. 1975); \textit{Americans United v. Rogers}, 538 S.W.2d 711 (Mo.) (tuition grants to students attending public and approved private colleges upheld; sectarian colleges were allowed to participate, but unclear whether any pervasively sectarian colleges were allowed participation), cert. denied, 429 U.S. 1029 (1976). \textit{But cf. Lendall v. Cook}, 432 F. Supp. 971 (E.D. Ark. 1977) (scholarship program available to public and private college students upheld; sectarian colleges were allowed participation, but the court apparently would have disallowed participation by pervasively sectarian colleges had there been any receiving benefits); Smith v. Board of Governors, 429 F. Supp. 871 (W.D.N.C.) (scholarship programs available to private college students upheld; sectarian colleges allowed participation, but the court apparently would have disallowed participation of pervasively sectarian colleges had there been any receiving benefits), \textit{aff'd}, 434 U.S. 803 (1977); \textit{Americans United for the Separation of Church \& State v. Dunn}, 384 F. Supp. 714 (M.D. Tenn. 1974) (tuition grant program allowing for the participation of church-related colleges disallowed; case remanded by the Supreme Court because of changes made in the administration of the program), \textit{vacated and remanded sub nom. Blanton v. Americans United for the Separation of Church \& State}, 421 U.S. 958 (1975); \textit{Americans United for Separation of Church \& State v. Bubb},
C. The Need for a Different Rationale

The Supreme Court's school aid decisions are subject to criticism in at least two respects. First, as has already been mentioned, there is an inconsistency between Board of Education v. Allen47 and more recent opinions: the Allen decision assumed that religion is not so pervasive in parochial schools that secular and sectarian aspects cannot be separated, while recent decisions have assumed just the opposite.48 This criticism is minor in the sense that it does not directly bring into question the validity of the Court's rationale; it merely suggests that either Allen or the more recent cases were based on an incorrect factual determination.

The second criticism is more significant: there appears to be a fundamental conflict between the value of neutrality and the results of the cases. The Court continues to pay homage to neutrality while approving programs that appear to provide aid to religion.' Indeed, most if not all of the programs that have been

379 F. Supp. 872 (D. Kan. 1974) (students attending pervasively sectarian colleges not allowed to participate in state tuition grant program aiding students attending independent colleges; students attending other church-related colleges allowed to participate).

47. 392 U.S. 236 (1968).

48. See notes 37-39 and accompanying text supra.

49. The classic formulation of this criticism was rendered by Mr. Justice Jackson in his dissent to Everson v. Board of Educ., 330 U.S. 1, 19 (1947) (Jackson, J., dissenting):

In fact, the undertones of the opinion, advocating complete and uncompromising separation of Church from State, seem utterly discordant with its conclusion yielding support to their commingling in educational matters. The case which irresistibly comes to mind as the most fitting precedent is that of Julia who, according to Byron's reports, "whispering 'I will ne'r consent,'—consented."

See also id. at 28-74 (Rutledge, J., dissenting).

The Supreme Court in Norwood v. Harrison, 413 U.S. 455 (1973), disallowed a Mississippi statutory program under which textbooks were loaned free of charge to students attending public and private schools without regard to whether participating private schools had racially discriminatory policies. The Court reasoned as follows:

Free textbooks, like tuition grants directed to private school students, are a form of financial assistance inuring to the benefit of the private schools themselves. An inescapable educational cost for students in both public and private schools is the expense of providing all necessary learning materials. When, as here, that necessary expense is borne by the State, the economic consequence is to give aid to the enterprise; if the school engages in discriminatory practices the State by tangible aid in the form of textbooks thereby gives support to such discrimination. Racial discrimination in state-operated schools is barred by the Constitution and "[i]t is also axiomatic that a state may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish." Lee v. Macon County Board of Education, 267 F. Supp. 468, 475-476 (MD Ala. 1967).

Id. at 463-65 (footnote omitted). It is difficult to explain why this same kind of reasoning should not be employed to disallow as a violation of the principle of neutrality the provision of secular textbooks to students attending parochial schools.
approved provide financial aid to religion in the sense that they channel government money to sectarian institutions either directly or indirectly through students and parents. The fact that government assistance is restricted to the secular aspects of church-related education does not, as a practical matter, keep it from furthering religion. The sectarian school, in the words of Justice Douglas, is "an organism living on one budget."$^{50}$ Aid to a part, be it classified as secular or sectarian, necessarily aids the whole. The Supreme Court's rationale is unsatisfactory, then, because it leaves unresolved the paradox of simultaneous Court approval of the value of neutrality, which would appear to disallow all aid, and programs which in fact appear to provide aid.

Recent Supreme Court decisions signal a growing dissatisfaction with the current rationale. None of the three latest cases dealing with government aid to church-related education, *Wolman v. Walter*,$^{51}$ *Roemer v. Board of Public Works*,$^{52}$ and *Meek v. Pittenger*,$^{53}$ was able to command a majority opinion throughout. Altogether, fifteen separate opinions were filed in these three cases. It would appear, then, that this area of the law stands in need of a more uniformly acceptable rationale.

### III. AN ALTERNATIVE RATIONALE

In attempting to sketch the outlines of a more satisfactory rationale, it is appropriate to begin with the values that underlie the establishment clause. The implications of the values of neutrality and the avoidance of administrative and political entanglement will be discussed in the context of government programs aiding education. Then, consideration will focus on the relevance of five factors the Court has identified as bearing upon the judicial determination of whether these values are vindicated.

#### A. VALUES UNDERLYING THE ESTABLISHMENT CLAUSE

1. **Neutrality**

   In the context of aid to education, government programs can advance or inhibit religion in two different ways. First, the government may enact programs that have the effect of either helping or hindering sectarian schools. Second, the government may

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deal with sectarian schools in such a way as to give the impression of either official sponsorship or disapproval of religion. The value of neutrality suggests that government actions should neither help nor hinder sectarian schools and should neither sponsor nor manifest official disapproval of religion. For the purposes of this Comment, these two principles will be called, respectively, educational neutrality and sponsorship neutrality.

a. Educational neutrality. In considering the principle of educational neutrality, it is instructive to examine the effects on sectarian education of programs that aid public schools alone and also of programs that aid both public and sectarian schools. These effects will vary according to the nature of the sectarian institutions. For example, consider a highly sectarian school sponsored by a church that holds attendance at this school to be a religious requirement. Exclusion from a program subsidizing public education would probably have little impact on this school. Since attendance is essentially an act of faith, and substantially all of the students who attend are believers or the children of believers, there would no mass student exodus should facilities and services lag behind those available at corresponding public institutions. Moreover, if this school were permitted to share in the benefits of programs aiding public education, attendance might increase greatly as a larger number of believers find it within their financial capabilities to attend or send their children.

On the other hand, the effects of government aid programs on a mildly sectarian school would be very different. For example, consider a church-related college at which the inculcation and practice of religion is only a minor aspect. Although many of the students enjoy and take advantage of the limited sectarian activities available, their main purpose in attending is to obtain what the school principally provides—secular education. If this institution is allowed full participation in government programs subsidizing corresponding public schools, the level of enrollment may increase, but probably only to the degree that enrollment at corresponding public colleges increases. On the other hand, if this

54. The Supreme Court on several occasions has held that sponsorship of religion is one of the evils the establishment clause was designed to prevent. E.g., Meek v. Pittenger, 421 U.S. 349, 359 (1975) (plurality opinion); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 772 (1973); Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970).

55. This seems to be a fairly accurate representation of the typical parochial school. See notes 86-89 and accompanying text infra.

56. This seems to correspond with the Supreme Court's description of the prototype sectarian college. See note 97 and accompanying text infra.
school is denied participation in government aid programs, a dramatic reduction in enrollment could result. Since the students who typically consider attending this college are mainly concerned with secular education, they are unlikely to be willing to forego the benefits of improved services and facilities or the lower costs available at comparable government institutions in order to enjoy the limited sectarian aspects present at this school. If government funding of public colleges continues to increase, the school at some point will probably be forced to close or drastically reduce the scope of its operations.\footnote{57}

These considerations lead one to question the facile assumption that permitting church-related schools to participate in government educational subsidies always has the effect of advancing sectarian education. Indeed, this premise may be strictly true only in the case of the most highly sectarian schools. Rather, it would appear that a certain amount of aid to church-related schools is justifiable in order to allow them to maintain their economic stability in the face of ever-increasing government funding of competing public schools.

Educational neutrality, then, should not be equated with disallowance of all programs that have the effect of channeling government money into church-related education. Instead, this Comment offers the following proposal which constitutes the crux of an alternative rationale: \textit{Government programs subsidizing education should be termed educationally neutral if no change in the success or failure of church-related schools can be traced to their enactment.} Under the principle of educational neutrality, the government would be permitted (not required\footnote{58}) to allow for the participation of sectarian schools in general\footnote{59} educational aid


Mildly sectarian colleges of this type are important to religious institutions in at least two respects. First, even though the sectarian influence manifest at these schools may be slight, it is nevertheless important in that it may constitute the only religious exposure that many of the attending students are willing to accept. Second, the very existence of church-related colleges tends to enhance the prestige, social acceptability, and intellectual credibility of religion. The widespread failure of these institutions (which probably comprise the majority of the sectarian colleges in the United States) would constitute a major loss to religion.

\footnote{58. In recognition of the legislatures' wide discretion in allocating the benefits of public welfare legislation, it would probably be unwise to require state subsidies of sectarian schools.}

\footnote{59. It might be wise to require that all programs rendering subsidies to sectarian schools also be made available to corresponding nonsectarian private schools. If only sectarian private schools are subsidized, aid programs may be interpreted as governmental sponsorship of religion.}
programs to the extent necessary to maintain their current status.\textsuperscript{60}

This principle is susceptible to a mechanical application. The courts might logically determine that the best objective measure of the success or failure of sectarian schools is the level of enrollment.\textsuperscript{61} Then, whenever an aid program was challenged under the establishment clause, the courts would determine, with the help of expert testimony, whether the net effect of the program would be to increase enrollment at sectarian schools. If so, the program would be held violative of the establishment clause; if not, the program would be upheld as within the principle of educational neutrality.

This mechanical application of the principle of educational neutrality is undesirable, however, because it would likely lead to the partial participation of sectarian schools in a large number of educational programs, creating substantial problems of administration. From the standpoint of administrative efficiency and certainty in the law, it would be preferable to allow for the full participation of sectarian schools in limited classes of general educational subsidies. The more vulnerable the institution to increasing governmental expenditures for public education, the larger the class of subsidies in which it should be allowed to participate.

This concept of educational neutrality is useful because it provides a rationale for limited government subsidization of church-related education. It resolves the paradox of simultaneous Court adherence to the principle of neutrality and approval of programs that in fact channel aid to sectarian schools. More importantly, this concept provides a general framework within which specific decisions can be made. It would probably not be wise for courts to make specific judgments concerning the effects of government aid on individual sectarian schools.\textsuperscript{62} It would,

\textsuperscript{60} The principle of educational neutrality is in harmony with the ideas of Professor Giannella, who “sanction[s] the propriety of governmental support of religious institutions to the extent necessary to counterbalance the negative influences which the state’s increased societal role has on religion.” Giannella, Religious Liberty, Nonestablishment, and Doctrinal Development: Part II. The Nonestablishment Principle, 81 \textit{Harv. L. Rev.} 513, 587 (1968).

\textsuperscript{61} Of course, the success or failure of church-related schools can be defined on the basis of a number of factors. The regard with which these schools are held in the community, the degree of sectarianism they manifest, and the quality of secular education they provide may all be important factors in measuring their success or failure and their contribution to religion. However, the number of students who are enrolled is possibly the most important factor, and undoubtedly it is the most easily measured.

\textsuperscript{62} The making of individual determinations might lead to excessive litigation. This
however, be acceptable for courts to make general determinations regarding the relative vulnerability of different classes of sectarian schools to increasing government spending for public education and consequently their eligibility for participation in government aid programs. The principle of educational neutrality establishes the broad outline of this alternative rationale; considerations that will be discussed subsequently are available to fill in the details.

b. **Sponsorship neutrality.** Whenever the state places or appears to place its imprimatur on one church or on religion generally, it has impermissibly aided religion in violation of the principle of sponsorship neutrality. Even though a program aiding church-related education may perfectly conform with the principle of educational neutrality, it may be objectionable if the form the aid takes gives the impression that the state is wielding its power, influence, or financial support in favor of a particular church or religion in general.

But, while sponsorship neutrality has rightfully been given great emphasis in deciding some establishment clause cases, its importance in the area of government aid to church-related education should not be overstated. Unless sectarian education is given special preference in the administration of government aid, it is unlikely the public will get the impression that state policy is proreligion. Indeed, the complete denial of aid might constitute in the eyes of many a manifestation of hostility toward religion.

Sponsorship neutrality could be called upon, however, to invali-
date programs that give specific assistance to highly sectarian functions.

2. Entanglement

If government programs neither injure nor assist religion, they comply with the value of neutrality. If they create undesirable governmental incursions into the realm of religion, or undue involvement of religion in the political process, however, they may be objectionable because of administrative or political entanglement.

a. Administrative entanglement. Administrative entanglement occurs when, in the words of Chief Justice Burger, there is "active involvement of the sovereign in religious activity."\(^{67}\) In this complex society there are innumerable contacts between church and state. It is clear that government enactments such as "fire inspections, building and zoning regulations, and state requirements under compulsory school-attendance laws," which impinge directly or indirectly upon sectarian activities, are unobjectionable.\(^{68}\) Similarly, there should be no constitutional objection to government and church officials consulting together regarding issues of common concern. Administrative entanglement problems of constitutional dimensions generally arise only when the government begins to regulate those aspects of sectarian institutions having ideological and particularly religious content. It should not be offensive to constitutional values for the government to exercise some control over the nonideological service aspects of church-related education, such as transportation, health care, and food services. The government typically regulates such activities to some degree regardless of who performs them. Serious administrative entanglement problems may follow, however, should the government begin to regulate what goes on the classroom.

There is a close correlation between the dangers of sponsorship and administrative entanglement. As government control over sectarian activity increases, so does the danger of administrative entanglement, and so also does the appearance of government sponsorship.

b. Political entanglement. Political entanglement can be viewed as the involvement of religion in political activity, or the

creation of political divisions along religious lines.\textsuperscript{69} Certainly political entanglement is an ill to be avoided. The religious persecutions that mar English and colonial American history testify of the evils of excessive involvement of religion in political affairs.\textsuperscript{70}

The threat of political entanglement should not be given undue emphasis, however. The dangers of serious political divisions along religious lines at the present time would appear to be quite remote.\textsuperscript{71} Recent experience has shown that the issue of government aid to church-related education can be discussed with remarkable moderation and tolerance on both sides.\textsuperscript{72}

\textbf{B. Factors Bearing Upon Establishment Clause Analysis}

In deciding establishment clause cases dealing with government programs aiding church-related education, the Supreme Court has placed varying degrees of emphasis on at least five different factors: whether aid is limited to secular aspects, whether aid is channeled to parents and students rather than to schools, whether aid is administered as a one-shot enactment rather than a program requiring periodic reexamination, the breadth of the class of beneficiaries, and the degree of sectarianism manifest at aided institutions. The relevance of these factors will be considered in the light of the values of neutrality and the avoidance of administrative and political entanglement.

1. Aid to secular aspects versus sectarian aspects

The Supreme Court has purported to disallow all aid that flows to the sectarian aspects of church-related education.\textsuperscript{73} This construction of the establishment clause creates enormous practical problems, since it requires the strict separation of church-related education into secular and sectarian parts. Not only is a strict separation very likely impossible, since all of the parts of a

\textsuperscript{69} Meek v. Pittenger, 421 U.S. 349, 372 (1975).
\textsuperscript{70} See generally Everson v. Board of Educ., 330 U.S. 1, 8-11 (1947).
\textsuperscript{72} Lewin, \textit{supra} note 71, at 111.
\textsuperscript{73} See notes 25-29 and accompanying text \textit{supra}.
school inevitably tend to partake of the character of the whole, but attempts to enforce such a separation often have the potential of creating serious entanglement.

According to the principle of educational neutrality, some aid to church-related education is justifiable and even desirable. Since aid to secular activities frees funds that can be used to promote sectarian activities, it makes little difference as a matter of practical economics that aid is restricted to secular aspects. Indeed, it could be argued that secular use restrictions produce little more than changes in internal accounting procedures and increased governmental interference and should, therefore, be avoided. Two considerations militate against this conclusion. First, if the government directly aids specifically sectarian activities there is danger that the public will view this as sponsorship of religion. Second, a judicious application of secular use restrictions can have the effect of keeping direct aid and, with it, government regulation away from the sensitive, highly sectarian elements of church-related education, thus minimizing rather than aggravating administrative entanglement.

Under the alternative rationale, then, this factor—whether aid goes to secular or sectarian aspects—would retain some importance. However, the Court's present paranoiac fear of allowing one penny of government money to aid sectarian activities would be exchanged for a more rational sensitivity to actual dangers of sponsorship and entanglement.

2. Aid to parents and students versus aid to schools

The Supreme Court has generally appeared to be willing to approve programs aiding sectarian schools indirectly through parents and students more readily than programs providing direct aid. As a matter of practical economics, this factor is relatively unimportant. By adjusting tuition rates, sectarian schools

74. The difficulty of separating secular from sectarian aspects is heightened by the lack of consensus as to the appropriate constitutional definition of religion. See generally Bowser, Delimiting Religion in the Constitution: A Classification Problem, 11 VAL. U.L. REV. 163 (1977); Note, Toward a Constitutional Definition of Religion, 91 HARV. L. REV. 1056 (1978).


77. See Board of Educ. v. Allen, 392 U.S. 236, 243-44 (1968), Everson v. Board of Educ., 330 U.S. 1, 18 (1947). In approving the programs challenged in both Allen and Everson, the Court noted that no government aid went to parochial schools; rather, it went to parents or students.
can absorb any aid the government provides to students or parents. This factor, however, is important in two other respects. First, channeling aid to parents and students instead of to schools serves as a practical shield against administrative entanglement. When aid is administered in this form, sectarian schools remain one step removed from direct contact with the government. Although there is no guarantee that the government will refrain entirely from meddling,\(^\text{78}\) the chances are that interference, regulation, and hence administrative entanglement will be lessened.\(^\text{79}\) Second, the dangers of sponsorship are reduced if aid is directed to parents and students rather than to schools. The less direct the contact between government and sectarian institutions, the less the government aid will constitute an official sanction of religion in the eyes of the public. Therefore, even though aid to church-related education may fall well within the principle of economic neutrality, it is better if government money is laundered before reaching sectarian schools by passing through a student or parent filter.

3. **One-shot enactments versus programs requiring periodic reexamination**\(^\text{80}\)

A certain degree of political divisiveness is engendered whenever legislative bodies consider programs that aid church-related education. The less often aid programs come before the legislature, the less the threat of political divisions along religious lines. Therefore, one-shot enactments should generally be preferred over programs that will likely come before the legislature periodically for review and revision.\(^\text{81}\) Since the danger of the development of serious political divisions along religious lines seems slight at the present time,\(^\text{82}\) this factor should not be given undue emphasis under the alternative rationale.

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78. Unfortunately, federal agencies have been known to rely upon the fact that some students attending private schools receive federal benefits to assert broad regulatory powers over the internal affairs of these institutions. See Comment, *HEW's Regulation Under Title IX of the Education Amendments of 1972: Ultra Vires Challenges*, 1976 B.Y.U. L. Rev. 133. Generally speaking, however, it would seem that government regulation of sectarian schools would be less likely if aid were channeled to students or parents rather than schools.


81. In addition, to the extent they limit ongoing financial relationships and dependencies, one-shot enactments tend to engender less administrative entanglement than other aid programs. See *Tilton v. Richardson*, 403 U.S. 672, 688 (1971) (plurality opinion).

82. See notes 69-72 and accompanying text *supra*. 
4. *Breadth of the class of beneficiaries*

The Supreme Court has suggested that the breadth of the class of beneficiaries is relevant in determining the constitutionality of government programs aiding church-related education.\(^8\) A general program benefiting both public and private education may be held constitutional, while the identical program may be disallowed if it benefits only sectarian education.

This factor is certainly relevant under the alternative rationale since the justification for allowing aid is to neutralize the effects of increasing government expenditures for public education. The principle of educational neutrality, which permits sectarian schools to participate in the benefits of government programs aiding public education to the degree necessary to maintain their current status, requires that there be a corresponding program benefiting public education for every program aiding sectarian education.

The types of programs most clearly falling within the principle of educational neutrality are general educational subsidies providing identical kinds of benefits to both public and private schools. Certain departures from this ideal should probably be permitted. For example, administrative considerations or entanglement concerns may dictate that aid to sectarian schools take a slightly different form than aid to corresponding public schools. The principle of sponsorship neutrality, however, suggests that radical differences be avoided because they give the impression of preferential treatment.\(^9\) Also, to require that every program benefiting sectarian education be enacted concurrently with a similar program aiding public schools would constitute an unnecessarily severe limitation on legislative prerogatives. Legislators should have the option of neutralizing in a single program the effects of a series of enactments aiding public schools. However, there should be some limitation placed on the power of legislators

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to promulgate aid programs for the purpose of neutralizing the effects of past enactments benefiting only public schools. This kind of legislation smacks of sponsorship, and in any event, the effects of past legislative enactments on present-day sectarian schools are very difficult to measure.

5. *Degree of sectarianism manifest at aided institutions*

This factor is important under the alternative rationale because it serves as an indicator of the relative vulnerability of different sectarian schools to increasing government expenditures for public education, and hence their eligibility for government aid according to the principle of educational neutrality. Generally speaking, the more sectarian the institution, the less it will be affected by government actions relating to public education. This factor is also relevant in weighing entanglement and sponsorship dangers: the more sectarian the institution, the more serious the dangers of sponsorship and entanglement.

IV. APPLICATION OF THE ALTERNATIVE RATIONALE

Having set forth the theoretical outlines of an alternative rationale for aid-to-education cases, this Comment now turns to the difficult problem of practical application. The implications of the alternative rationale in the contexts of aid to parochial education and aid to sectarian colleges will be considered.

A. Aid to Parochial Education

The Supreme Court has described Catholic

The church schools involved in the program are located close to parish churches. This understandably permits convenient access for religious exercises since instruction in faith and morals is part of the total educational process. The school buildings contain identifying religious symbols such as crosses on the

85. The degree of sectarianism manifest at aided institutions has been an important factor in most of the Supreme Court decisions dealing with government aid to church-related education. See, e.g., Wolman v. Walter, 433 U.S. 229, 249-50 (1977); Meek v. Pittenger, 421 U.S. 349, 363-66 (1975); Tilton v. Richardson, 403 U.S. 672, 685-89 (1971) (plurality opinion); Lemon v. Kurtzman, 403 U.S. 602, 615-19 (1971).

86. In 1975, over 80% of the students attending nonpublic elementary and secondary schools attended Catholic parochial schools. Doerr, *The Enduring Controversy: Parochial Aid and the Law*, 9 VAL. U.L. REV. 513, 522 (1975). Therefore, it is appropriate to view programs benefiting nonpublic elementary and secondary schools essentially as programs aiding Catholic parochial schools.
exterior and crucifixes, and religious paintings and statues either in the classroom or hallways. Although only approximately 30 minutes a day are devoted to direct religious instruction, there are religiously oriented extracurricular activities. Approximately two-thirds of the teachers in these schools are nuns of various religious orders. Their dedicated efforts provide an atmosphere in which religious instruction and religious vocations are natural and proper parts of life in such schools. Indeed, as the District Court found, the role of teaching nuns in enhancing the religious atmosphere has led the parochial school authorities to attempt to maintain a one-to-one ratio between nuns and lay teachers in all schools rather than to permit some to be staffed almost entirely by lay teachers.

On the basis of these findings the District Court concluded that the parochial schools constituted “an integral part of the religious mission of the Catholic Church.” The various characteristics of the schools make them “a powerful vehicle for transmitting the Catholic faith to the next generation.” This process of inculcating religious doctrine is, of course, enhanced by the impressionable age of the pupils, in primary schools particularly. In short, parochial schools involve substantial religious activity and purpose.87

The highest church authorities would agree with the Supreme Court’s determination that “parochial schools involve substantial religious activity and purpose.”88 Attendance of children at parochial schools is viewed by the Catholic Church as a religious obligation.89

In light of these facts and findings, it would appear reasonable to conclude that the detrimental effect on parochial schools of increasing government expenditures for public education is

87. Lemon v. Kurtzman, 403 U.S. 602, 615-16 (1971) (footnote omitted). In Meek v. Pittenger, 421 U.S. 349 (1975), the Court made these findings with respect to the nature of parochial schools:

The very purpose of many of those schools is to provide an integrated secular and religious education; the teaching process is, to a large extent, devoted to the inculcation of religious values and belief. . . . Substantial aid to the educational function of such schools, accordingly, necessarily results in aid to the sectarian school enterprise as a whole. “[T]he secular education those schools provide goes hand in hand with the religious mission that is the only reason for the schools’ existence. Within the institution, the two are inextricably intertwined.”


89. Id. at 647. Canon law (canon 1374) requires that Catholic students as a rule attend Catholic schools. 1 J. Abbot & J. Hannan, The Sacred Canons 607-08 (2d rev. ed. 1960).
Therefore, under the principle of economic neutrality, parochial schools should be allowed to participate in government educational assistance programs to a limited extent only.

Since the Supreme Court has found the prototype parochial school to be substantially sectarian, it is appropriate that the courts take seriously the dangers of sponsorship and entanglement in the context of aid to parochial schools. In this regard, perhaps the most logical place to draw the line is at nonideological student-service functions such as health, transportation, and food services. It is less entangling if government and church officials consult together about buses, nurses, and school lunch than if there is government regulation of classroom activities. Similarly, the dangers of sponsorship are minimized if government aid funds only nonideological service functions directed at students rather than schools.

Systems whereby students would receive a voucher from the government entitling them to attend the private or public school of their choice have received much discussion in legal literature. The fact that vouchers connote no government favoritism for one kind of school over another and channel aid to students rather than schools makes them unobjectionable from the standpoint of sponsorship and administrative entanglement. However, they are objectionable inasmuch as they allow for complete participation of sectarian schools in government educational subsidies in contravention of the principle of educational neutrality.

Shared-time programs whereby students attend classes in
both public and parochial schools have also been discussed. Although these programs may enable parochial schools to maintain higher enrollments than would otherwise be possible, this result is attained only at the sacrifice of total control over the educational development of participating students. Because of this, it is very difficult to assess whether shared-time programs in reality constitute a benefit to religion. Therefore, it would seem harsh to disallow shared-time programs as violative of the value of neutrality.

Since public and parochial school officials are required to correlate their efforts, there are certain administrative entanglement problems inherent in shared-time arrangements. Such correlation would not likely engender the kind of government regulation of parochial education that is inherent in direct aid programs, however, because public and parochial school officials would meet as equals to work out solutions to mutual problems. Therefore, if government regulation, rather than mere interaction between public and parochial school officials, is viewed as the primary evil of administrative entanglement, shared-time programs should not be disallowed on this basis.

Under the alternative rationale, the Supreme Court cases in the parochial school context do not fare too badly. Except in limited circumstances the Court has disallowed parochial school participation in government programs that increase public education expenditures. This conforms with the principle of educational neutrality. Aid has been restricted, for the most part, to nonideological student-service functions, minimizing the dangers of sponsorship and administrative entanglement. Certain shared-time programs have been approved, and voucher-type programs are permitted. Certain


94. The Court has, however, upheld government programs providing free secular textbook loans to parochial schoolchildren. See notes 16-17 and accompanying text supra. Such programs entail government evaluation of the textbooks used in parochial schools and hence a degree of control over the ideological content of classroom activity. In reality, however, the control over classroom activity exercised as a result of these programs is probably slight. The entanglement and sponsorship problems created therefore are probably not serious.

95. In Wolman v. Walter, 433 U.S. 229, 244-48 (1977), the Court approved a shared-time program whereby parochial students received therapeutic, guidance, and remedial services in the public schools, in public centers, or in mobile units located apart from parochial school premises. However, government programs providing secular education to parochial students on parochial school premises have been disallowed by the district courts, mainly on the grounds of excessive entanglement. See Americans United for Separation of Church & State v. Board of Educ., 369 F. Supp. 1059 (E.D. Ky. 1974) (program
programs have been disallowed.94

B. Aid to Sectarian Colleges

The Supreme Court has divided the world of church-related higher education into two camps, sectarian colleges and pervasively sectarian colleges. This Subsection will discuss aid to sectarian colleges, and Subsection C will deal with aid to pervasively sectarian colleges.

The prototype sectarian college is described and contrasted with the typical parochial school in this passage from Tilton v. Richardson:

There are generally significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools. The "affirmative if not dominant policy" of the instruction in pre-college church schools is "to assure future adherents to a particular faith by having control of their total education at an early age." . . . There is substance to the contention that college students are less impressionable and less susceptible to religious indoctrination. . . . Furthermore, by their very nature, college and postgraduate courses tend to limit the opportunities for sectarian influence by virtue of their own internal disciplines. Many church-related colleges and universities are characterized by a high degree of academic freedom and seek to evoke free and critical responses from their students.

. . . In short, the evidence shows institutions with admittedly religious functions but whose predominant higher educational mission is to provide their students with a secular education.

whereby school district leased rooms in a parochial school and provided teachers for the instruction of parochial schoolchildren in secular subjects held unconstitutional because of excessive entanglement and also because the court found that the program had the primary effect of advancing religion); Americans United for Separation of Church & State v. Paire, 359 F. Supp. 505 (D.N.H. 1973) (program whereby school district leased rooms in parochial school and provided teachers for the instruction of parochial schoolchildren in secular subjects disallowed on grounds of excessive entanglement); Americans United for Separation of Church & State v. Oakey, 339 F. Supp. 545 (D. Vt. 1972) (program providing public teachers and educational materials for the teaching of secular subjects in parochial schools disallowed on grounds of excessive entanglement).

96. The Supreme Court has never considered a full voucher system for elementary and secondary schools like the one described in the text. However, the Court in Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973), disallowed two voucher-like programs, a tuition reimbursement program and a tax benefit program, that suffered from the same defect as full voucher systems: they had the potential for expanding into complete subsidies of parochial education, in violation of the principle of educational neutrality. See notes 22-24 and accompanying text supra.
Since religious indoctrination is not a substantial purpose or activity of these church-related colleges and universities, there is less likelihood than in primary and secondary schools that religion will permeate the area of secular education.97

The typical sectarian college, according to this description, is an island of sectarianism encircling the divinity school awash in a sea of secular education. This characterization probably fits most church-related colleges. Although a degree of sectarianism undoubtedly pervades the atmosphere at the typical sectarian college, its influence is weak in most parts of the institution. Religion, therefore, likely does not play a major role in the decisions of students to attend such colleges—with the exception, of course, of ministerial students. As a result, sectarian colleges are highly vulnerable to government programs that increase expenditures for public higher education; accordingly, few restrictions should be placed on their participation in such programs. Complete participation should not be allowed, however, because this would presumably cause an improvement in the status of such institutions, in violation of the principle of educational neutrality.

Sponsorship and administrative entanglement concerns dictate that direct government aid be prohibited from touching the small enclaves of concentrated religiosity remaining in sectarian colleges. In other areas, government aid and government regulation are probably acceptable, since the degree of sectarian influence is slight.

Scholarship and student grant programs are particularly appropriate vehicles for aiding sectarian colleges. Sponsorship and administrative entanglement dangers, which are not serious because of the nature of the aided institutions in any event, would be further minimized by such an approach.98

97. 403 U.S. 672, 685-87 (1971) (plurality opinion) (citations and footnotes omitted).
98. Scholarship and similar programs that aid students attending sectarian (as opposed to pervasively sectarian) colleges have generally been upheld in the lower courts. For a synopsis of a number of the cases, see note 46 supra.

There has been some debate as to whether sectarian colleges receiving tuition from students aided by government programs should be required to segregate these funds in special accounts to be used for secular purposes only. See Smith v. Board of Governors, 429 F. Supp. 871, 878-79 (W.D.N.C.) (special accounts not required), aff'd, 434 U.S. 803 (1977); Americans United for the Separation of Church & State v. Dunn, 384 F. Supp. 714, 721 (M.D. Tenn. 1974) (use of funds received by participating colleges should be restricted to secular activities), vacated and remanded sub nom. Blanton v. Americans United for the Separation of Church & State, 421 U.S. 958 (1975). It seem doubtful that the imposition of such restrictions would alter the fiscal affairs of affected colleges other than to effect a change of internal accounting procedures. And, on balance, such restrictions would probably tend to create rather than prevent administrative entanglement and
The Supreme Court decisions dealing with aid to sectarian colleges are generally unobjectionable. Substantial participation in aid programs has been allowed, but direct aid has been restricted to "secular" aspects. This has tended to minimize sponsorship and administrative entanglement dangers. Furthermore, this restriction probably has the practical effect of limiting participation of sectarian colleges in programs subsidizing public higher education to the extent necessary to ensure compliance with the principle of educational neutrality.

C. Aid to Pervasively Sectarian Colleges

The Supreme Court has intimated that all colleges which do not substantially conform with the sectarian college model set forth in the previous section will be termed pervasively sectarian. Some statements of the Court can be taken as indicating that pervasively sectarian institutions should be denied all government aid. This result is correct in the case of pervasively sectarian colleges that are primarily Bible schools or religious seminaries, since these institutions would be essentially unaffected by increasing government expenditures for public education. This result seems too harsh, however, in the case of pervasively sectarian institutions that are not Bible schools or religious seminaries. Although these colleges are generally not as vulnerable to increasing funding of public education as their less sectarian counterparts, they are undoubtedly affected, and under the principle of educational neutrality should be allowed some participation in aid programs.

99. See notes 40-44 and accompanying text supra.

100. In two of the three Supreme Court cases dealing with government aid to sectarian colleges, the programs that were approved aided both public and nonpublic institutions equally. Hunt v. McNair, 413 U.S. 734, 741 (1973); Tilton v. Richardson, 403 U.S. 672, 676-77 (1971) (plurality opinion). The program approved in the third case aided only nonpublic colleges. Roemer v. Board of Pub. Works, 426 U.S. 736, 740 (1976) (plurality opinion). It could be argued, however, that this enactment was an attempt by the state legislature to neutralize in one program the ill effects suffered by sectarian and other nonpublic colleges due to a series of fairly contemporaneous enactments aiding only public colleges.

101. Since a certain degree of religious influence probably pervades the atmosphere at most sectarian colleges, it would be more accurate to say that direct aid has been prohibited from touching the small enclaves of concentrated religiosity remaining in these institutions.


In a footnote to his majority opinion in Committee for Public Education & Religious Liberty v. Nyquist, Mr. Justice Powell suggested that participation in scholarship or grant programs available to all students attending both public and private colleges may be an appropriate vehicle for aiding pervasively sectarian colleges. 104

Because of the manner in which we have resolved the tuition grant issue, we need not decide whether the significantly religious character of the statute's beneficiaries might differentiate the present cases from a case involving some form of public assistance (e.g., scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefitted. . . . Thus, our decision today does not compel, as appellees have contended, the conclusion that the educational assistance provisions of the "G. I. Bill," . . . impermissibly advance religion in violation of the Establishment Clause. 105

The dangers of sponsorship and administrative entanglement posed by such programs are substantially reduced, since aid is directed to students instead of to schools. Moreover, restricting aid to participation in general scholarship and grant programs probably has the practical effect of limiting the net assistance to these colleges to levels permissible under the principle of educational neutrality. 106

V. CONCLUSION

Government aid to church-related education poses an extremely difficult constitutional question. The Supreme Court, in the words of Mr. Justice Powell, has "sought to establish principles that preserve the cherished safeguard of the Establishment Clause without resort to blind absolutism." 107 The Court decisions

104. Presumably, Justice Powell would not have extended these benefits to Bible school or religious seminary students.

There is a conflict of authority among the lower courts as to whether students attending pervasively sectarian colleges may be permitted to participate in general scholarship or grant programs. See note 46 supra. However, the Supreme Court recently affirmed a general assistance program available to pervasively sectarian college students. Americans United for Separation of Church & State v. Blanton, 434 U.S. 803, aff'g 433 F. Supp. 97 (M.D. Tenn. 1977).

105. 413 U.S. 756, 782 n.38 (1973) (citations omitted).

106. Aid to students attending pervasively sectarian colleges should probably be restricted to participation in programs that truly aid all college students. Participation of these students in programs providing major assistance to nonpublic college students but only token assistance to public college students is probably objectionable.

have been generally successful in avoiding "blind absolutism," but the principles that have been established have been unclear and difficult to justify.

This Comment has proposed an alternative rationale which is believed to be more satisfactory. A principle of educational neutrality has been defined that resolves the paradox of simultaneous Court adherence to the value of neutrality and approval of programs that in fact channel government aid to church-related education. This principle, together with the principle of sponsorship neutrality and the values of avoidance of political and administrative entanglement, serves in large part to justify prior Court decisions and provides a framework within which future decisions can be made.

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