Ronald Reagan Presidential Library
Digital Library Collections

This is a PDF of a folder from our textual collections.

Collection: Blackwell, Morton: Files
Folder Title: Tuition Tax Credits II (1 of 2)
Box: 27

To see more digitized collections visit:
https://reaganlibrary.gov/archives/digital-library

To see all Ronald Reagan Presidential Library inventories visit:
https://reaganlibrary.gov/document-collection

Contact a reference archivist at: reagan.library@nara.gov

Citation Guidelines: https://reaganlibrary.gov/citing

National Archives Catalogue: https://catalog.archives.gov/

710 E. Kentucky
DeLand, Fla 32720
April 19, 1983

Honorable Ernest Hollings
U. S. Senate
Washington, D. C.

Dear Senator:

It was brought to my attention that you made the statement in regard to tuition tax credits for parents of private-school children that "Reagan's plan would benefit a few at the expense of many and violates the first Amendment."

While at first, this statement may appear to be reasonable to you, a closer scrutiny reveals it to be superficial and misleading. As the best legal authorities have shown, the President's plan does not violate the famous First Amendment, but, on the contrary, derives its protection from the First Amendment. This is true even though the Liberals have misinterpreted and twisted the Amendment in an attempt to destroy religious freedom and promote their cause of humanism, which denies the existence of God.

"The false propaganda that separation of church and state means separation of xxxxxx God and Christians from the state has been partly responsible for the spiritual, moral and governmental decline that has occurred in recent decades."

Authorities have stated that "it is clear in the U. S. Constitution that the state is not to dominate the church and the church is not to dominate the state. The American idea from the beginning was liberation from the 'state church' tyranny of the old world, which so frequently persecuted those, who, for reasons of faith and conscience, refused to conform." Today, we find the same type of oppression taking place. BUT "THE FAMOUS FIRST AMENDMENT DECLARES THAT 'CONGRESS SHALL MAKE NO LAW RESPECTING AN ESTABLISHMENT OF RELIGION, OR PROHIBITING THE FREE EXERCISE THEREOF!"

The attempt on the part of Congress to prohibit parents from receiving tax credits and to exercise their basic right of free choice as to whether the credits will be used in a public or private school, is clearly and unequivocally a violation of that part of the Constitution which mandates "free exercise of religion."

Furthermore, voluntary prayer in tax-supported schools is no more a violation of church-state separation than are the opening of Supreme Court sessions or the U. S. Senate with prayer. A survey by George Gallop showed that voluntary school prayer is backed by 73% to 27% of those polled. In fact, the prohibition of xxxxxx voluntary prayer in schools is a violation of the "free exercise" clause. Surely, if religion may be exercised freely, it should neither be barred from, nor imposed upon, any forum or institution in the nation. If liberals, socialists, and Communists succeed in destroying the church-related schools in America, voluntary prayer will not last long in our nation. Dr. Billy Graham has said there is no substitute for the church-related school. The need has already been established so that we know that private schools cannot continue to exist in America without tax exemptions, tax credits, and the like.

A presidential panel, headed by an outstanding educator, Dr. Connaught Marshner, "has called for abolition of the Department of Education and institution of a voucher system. The Advisory Panel on Financing Elementary and Secondary Education said that instead of funneling $3 billion in federal aid to low income school districts, Washington should give poor parents vouchers they can spend at either private or public schools." I strongly support this sensible plan. This plan is

compatible with the basic American principle of free choice, as opposed to the Communist principle of state domination, and it is protected by the American Constitution.

Moreover, public schools benefit by competition from church-related schools. Since students in church-related schools normally score much higher on achievement tests than those in comparable grades in the public schools, and neither discipline nor drugs have been a problem as they have been in public schools, competition from church-related schools should be encouraged because it forces public schools to be more accountable. Unlike the Soviet Union, where the children belong to the state, in America the legal rights of the children are vested in their parents. The parents pay the taxes for the support of the schools, and have every right to be heard and considered in school administration.

The American people have every right to seek an alternative in educating their children because of the strong leftward trend followed by the public schools, which are subjected to the dominance of the National Educational Association. I can remember when the NEA was a professional organization. Unfortunately, the NEA has degenerated into a political union which controls the subject matter and values taught in the public schools, neither of which can be considered compatible with the ideals of most parents. This can readily be confirmed by the minutes of the national convention, as follows:

"Resolutions Passed at Last NEA Convention in Minneapolis:

1. Mandatory and 'uncensored' sex education in every public high school.
2. Decriminalize the possession of marijuana.
3. Allow practicing homosexuals to teach in public schools.
4. Allow teachers full freedom to teach 'controversial issues' without parents or boards of education having the power of review.
5. Forced unionization of all public school teachers.
6. Federal financing of abortions."

Much more.

The NEA has over 1,800,000 members.

The following quotes from the NEA publication, To Nurture Humaneness, indicates the type of philosophy to which the NEA subscribes:

1. Denial of belief in God and the hereafter. (Humanism)
2. Education as a powerful ally of humanism.
3. Abolition of religious education and prayer in public schools.
4. Denial of rights of the unborn. (Abortion)
5. One-world government as preferable to other forms of government.
6. Absence of all sexual restrictions.

Regarding #6, one individual in my home community, who has knowledge of the local school situation, told me of a situation in this locality when an incident occurred which illustrates what is happening in our schools as a result of the subject matter taught in sex education classes. The teacher explained the facts of life to the class, then assigned a term project that consisted of putting into practice the knowledge about sexual relations that he had given them. The result was that this opened the way of promiscuity to the members of the class, a plan already followed in Communist countries where promiscuity is common.

No one is more qualified to speak out on the First Amendment than William B. Ball, a well-known constitutional lawyer and the author of several law reviews and articles, who states:

"I consider the Christian school movement a great blessing to America. Give it another decade of strong development, and we will begin to see its remarkably wholesome effects on our society. Graduates of Christian schools will begin to exert substantial influence and leadership in politics, the professions, communications, business and perhaps most of all--family life. We daily read statements of judges and politicians, that crime and social deterioration may be stemmed only through changing laws, reforming prisons, and spending money. But to reduce crime, we must rear citizens who will observe the Ten Commandments." As one who worked for many years as a social worker, I can attest to the statement that "changing laws, reforming prisons, and spending money" will not solve the crime problem, and this knowledgeable lawyer has reached the only accurate conclusion.

William Ball has further stated: "Some people seem to believe that we have government for the sake of government, that everything should be done by government, that every ill can be cured by govenmment, and that all must be dependent on government. The U. S. clearly has gone a long way in that direction, and nothing shows that so well as the struggle of Fundamentalist schools for their religious freedom." I have seen and have deplored the evils of the over-dependent attitude on government when I was working in the field of social work--the belief that "government takes care of all citizens from the womb to the tomb", and I warn against its debilitating effects!

Attorney Ball further stated that "this past decade, Fundamentalist Christians have been heroically Christian in resisting the view that everything is ultimately subservient to the state. They also believe there are certain matters in which we must all serve the common good, and that, in the sphere of the common good, government may act through laws duly established. Their view is true and right.

"On the other hand, Fundamentalist Christians are on solid constitutional ground when they adamantly refuse to take licenses to carry out such ministries as Christian schooling and day care. I mention these situations to highlight the fact that, under the Constitution, there are areas in which government may do some regulating, and areas in which government should do no regulating. One big cause of controversy and confusion about the Fundamentalist school movement has been the failure to sort out these differences.

"Many state education officials appear to hold the view that government is the superior (if not sole) educator, and that it can dictate to the field of education. A handful of Fundamentalists seem to feel that "we, the people" (through elected representatives) can have nothing whatever to say about the education of the young.

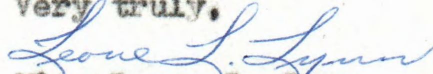
NOTHING IN OUR CONSTITUTION SAYS THAT GOVERNMENT IS THE SUPERIOR OR SOLE EDUCATOR. INDEED, UNDER OUR CONSTITUTION, GOVERNMENT'S PROVINCE IN THE FIELD OF EDUCATION IS EXTREMELY LIMITED. CONSTITUTIONALLY, GOVERNMENT SHOULD NOT BE DEEMED TO HAVE ANY SUPERVISORY POWERS WHATEVER OVER NON-TAX SUPPORTED RELIGIOUS EDUCATIONAL PROCESSES. But under the Constitution it would appear that "we, the people" can impose on one another, through duly enacted laws, the obligation that all American children learn the language of their country, how to compute, the form of government of our country, and other such "basics." Too, "we" may constitutionally impose reasonable health, safety, sanitation, and fire regulations.

"The average public servant, including most judges, does not understand our case. Some of them have surprisingly little understanding of Constitutional liberty, and many very honestly believe that government is the proper and sole source of good standards for schools or child-care institutions. We would like them all to be appreciative of Christian ministries, deeply and especially sensitive to First Amendment liberties. What they need is conversion to good ideas about Christian ministries and constitutional liberties."

William Ball summed up the problem when he said: "Secularism is on the march throughout the whole Western world. It intends to structure American taxation, education, health programs, labor relations, antidiscrimination laws, and all social aspects of American life to conform to its aims. The challenge is great, but our response must be superior."

Many people have little undesstanding of the role of the church-related schools in today's educational system, but when it is properly understood, I do not understand how those genuinely interested in the youth of our nation can fail to agree with Mr. Ball when he says that he considers "the Christian school a great blessing to America." Even more disconcerting is the wider problem of secularism and its threat to all of the Western world! I cannot accept the radical and revolting concepts being taught in America's public schools today! Can you honestly say that you can accept them? Unless your interest in the field of education stems largely from a political candidates' perspective, I would be interested in hearing from you.

Very truly,



Miss Leone L. Lynn

cc: Concerned Women for America
✓ Mr. Morton Blackwell

LEHRFELD & HENZKE, P. C.
A LAW CORPORATION
SUITE 1110
1301 PENNSYLVANIA AVENUE, N. W.
WASHINGTON, D. C. 20004

(202) 659-4772

WILLIAM J. LEHRFELD
LEONARD J. HENZKE, JR.

DELIVERY BY HAND

July 26, 1983

file Tuition tax Credits

Mr. Morton Blackwell
Special Assistant to the
President for Public Liaison
The White House
Washington, D.C. 20500

Re: Tuition Tax Credits Legislation

Dear Mr. Blackwell:

This firm serves as legal counsel to the Knights of Columbus and the other members of the Committee for Private Education. We have recently completed a detailed legal analysis of the Constitutionality of S. 528, and enclose a copy for your reference.

I am also furnishing a copy to Bill Barr, and to the Office of Legal Counsel at the Justice Department. We shall see to it that members of the Senate receive a copy at about the time the Justice Department releases its legal opinion.

Don't hesitate to call if we can help further in any way.

Sincerely yours,

Leonard J Henzke Jr

Leonard J. Henzke, Jr.

Enclosure

LEHRFELD & HENZKE, P. C.
A LAW CORPORATION
SUITE 1110
1301 PENNSYLVANIA AVENUE, N. W.
WASHINGTON, D. C. 20004
(202) 659-4772

WILLIAM J. LEHRFELD
LEONARD J. HENZKE, JR

THE CONSTITUTIONALITY OF FEDERAL TUITION TAX CREDITS

I. Introduction and Summary

S. 528 was reported out of the Senate Finance Committee in June 1983, and is currently awaiting action by the full Senate. The bill would provide a federal income tax credit of up to $300 per dependent for one-half of the tuition expenses paid by an individual to private elementary and secondary schools. The credit would constitute an adjustment in the federal Internal Revenue Code, to provide a measure of tax relief to supporters of private schools, who have been burdened by recent federal tax increases for private schools.

The United States Supreme Court recently considered the constitutionality of a tuition tax benefit plan similar to S. 528 in Mueller v. Allen, No. 82-195, decided June 29, 1983. There the Court held that a state income tax deduction for tuition did not violate the Establishment Clause of the First Amendment because it had a predominately secular purpose and effect, and did not entangle Government in religion. S. 528 is also Constitutional for much the same reasons.

1. (i) The Supreme Court in <u>Mueller</u> held that "'[l]egislatures have especially broad latitude in creating classifications and distinctions in tax statutes'" because such provisions enable legislatures to "'achieve an equitable distribution of the tax burden.'" This reasoning applies <u>a fortiori</u> to S. 528, because the Supreme Court has held that the Congress is subject to "restraints less narrow and confining" than the States in enacting tax classifications. <u>Steward Machine Co.</u> v. <u>Davis</u>, 301 U.S. 548, 583-584 (1936). Congress' powers to make tax adjustments are granted by the United States Constitution itself, in Article I, Section 8, and the Sixteenth Amendment. Only this year, the Supreme Court described Congress' Taxing Powers as "virtually without limitation." <u>United States</u> v. <u>Ptasynski</u>, No. 82-1066 (June 6, 1983). Indeed, the Supreme Court has never held a federal income tax statute unconstitutional on its face.

S. 528 is, both in its terms and purposes, primarily an exercise of these Taxing Powers. There are many secular tax purposes for the adoption by Congress of such a modification in the tax Code. In the past several years, an increasing percentage of private school support has consisted of nondeductible tuition rather than deductible gifts. Moreover, the Internal Revenue Code has recently been amended several times in ways that increase the federal tax burdens on private schools. More refined studies of the theory and effects of federal taxation have shown other ways in which the Code places undue tax burdens on private school supporters. The bill would make adjustments in the Revenue Code

which would help remedy the inequities in the tax burdens of public and private school supporters. While the bill would allow a partial tax credit rather than a deduction, that is unimportant since the credit format is used simply to prevent peculiarly federal mechnisms, such as the standard deduction, from skewing the economic impact of the statute in favor of high-income taxpayers. Similar credits for individuals are common in the Internal Revenue Code.

(ii) The Minnesota tax statute was also held to have a primarily secular purpose and effect because such assistance ensures that the citizenry are well educated, helps relieve the financial burden on public schools, promotes healthy educational competition among schools, and generally contributes to the political and economic health of the community. The fact that such a statute, while promoting these public purposes, incidentally subsidizes parental choices which often arise from religious motivations, was treated as a mere incidental support to religion.

S. 528 would have the same valuable secular purposes and effects. The fact that the majority of persons who receive the tax credits become eligible for them because of their religious beliefs in the value of religious education is not controlling. Indeed, only this year the Court held that providing tax subsidies to racially nondiscriminatory schools does not violate the Establishment Clause, even though it indirectly prefers religions which teach racial integration over religions which promote racial separatedness. Bob Jones University v. United States, No. 81-3,

decided May 24, 1983. Similarly, the Court has held that draft deferments on conscientious objector grounds do not violate the Establishment Clause, even though most persons are deferred on the basis of their religious beliefs.

The presumption that federal tax statutes constitute an exercise of the Congressional Taxing Power, and not a subsidy of collaterally affected persons or entities, is necessary in order to allow Congress to exercise its Taxing Powers respecting private schools (religious and nonreligious) and religious organizations. If every credit, deduction, or exemption were viewed as a federal grant or subsidy, and every tax as a penalty, the dozens of tax statutes dealing with all or parts of these classes would be in jeopardy under the Religion Clauses and other provisions of the Bill of Rights. For example, FUTA tax exemptions for religious schools, the exclusion extended ministers for parsonage allowances, and special social security tax provisions for religious orders and their members, could become _ultra vires_ Congressional Tax Powers.

(iii) In the Minnesota statute involved in _Mueller_, approximately 96 percent of the students for whom tuition deductions were taken attended religious schools, although about 660,000 public school students were also eligible for the deductions. The Supreme Court concluded that the availability of deductions for public as well as private school pupils was important in demonstrating the statute's primarily secular effect,

hold that "a program * * * that neutrally provides state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause." _Id._, Slip. Op. 10.

S. 528 similarly would provide tax benefits to a broad spectrum of religious and non-religious schools, although in its present form it does not allow credits for tuition or other expenses of public school pupils. Viewed nationally, over 800,000 pupils in non-religious private schools will be eligible for the federal tax credits, representing about 16 percent of all private school children. In at least eleven states, non-religious private school students constitute 25 percent or more of private school enrollment. Given the breadth of the secular purposes and effects, any benefits to religions are merely incidental.

3. S. 528, like the statute in _Mueller_, also satisfies the Constitutional prohibition on government entanglement in the affairs of religion. As in _Mueller_, the credit would be claimed by parents or guardians, not by schools or churches, and there is virtually no government contact with the latter. Racial discrimination provisions similar to those in the bill, and impacting on the schools participating in the program, were recently held not to violate the Establishment Clause in _Bob Jones University_ v. _United States_, _supra_, Slip. Op. 29.

II. DETAILED ANALYSIS

A. The Federal Judicial Branch Gives Great Deference to Federal Tax Statutes Because of the Preeminence of the Congressional Taxing Power.

We start with the astonishing but often overlooked fact that, since the adoption of the Sixteenth Amendment in 1913, the Supreme Court has never held a federal income tax statute unconstitutional on its face. Indeed, the Court has seldom if ever held a federal income tax statute unconstitutional as applied to specific factual situations.[1/] Federal excise and other non-income tax statutes have rarely been held unconstitutional and when they have, it has virtually always been in the context of criminal cases where the pertinent provisions, as applied to specific defendants, conflicted with Fourth and Fifth Amendment guarantees.[2/] Only this year, the Court stated that the Constitutional Taxing Power was "virtually without limitation," in upholding exemptions from the Windfall Profits Tax. United States v. Ptasynski, supra.

1/ In Coit v. Green, 404 U.S. 997 (1971), aff'd per curiam (mem.) Green v. Connally, 330 F. Supp. 1150 (D.D.C. 1971)(3-judge ct.), the Internal Revenue Service's prior policy of recognizing the charitable status of racially discriminatory schools was held to be contrary to I.R.C. § 501(c)(3). The courts did not explicitly decide the case on Equal Protection grounds.

2/ For example, United States v. Sanchez, 340 U.S. 42 (1950), upheld the constitutionality of the excise tax on marihuana transfers. In Buie v. United States, 396 U.S. 87 (1969), the Court held that a seller of marihuana could not justify his failure to sell marihuana pursuant to the required government order form on self incrimination grounds. However, in Leary v. United States, 395 U.S. 6 (1969), the Court held that the self-incrimination privilege protected a marihuana buyer from prosecution for failure to obtain an order form and pay the tax.

The reluctance of the Supreme Court to hold unconstitutional federal tax statutes is not a mere historical happenstance. It is not an accident that Congress' "Power to lay and collect Taxes, Duties, Imports and Excises" is the first of the Legislative Branch's powers listed in Article I, § 8. That power has been reaffirmed and fortified by adoption of the Sixteenth Amendment, which gives Congress express "Power to lay and collect taxes on incomes, from whatever source derived."

Indeed, the Constitutional power to "lay" taxes on differing sources also means that not each and every object or source for tax must be taxed. Exemptions alone, even of educational and religious organizations, cannot form the basis for striking down the tax. Pollock v. Farmers Loan and Trust, 157 U.S. 429 (1895).

The Supreme Court has repeatedly recognized that the Taxing Power under Article I of the Constitution is at the core of the National Legislature's authority. Given the history and importance of Congress' Constitutional Taxing Power, the Supreme Court's historical deference to its co-equal Branch is not surprising. The absence of a Congressional Taxing Power in the Articles of Confederation was one of the primary reasons for the adoption of the Constitution. Nor did the early federal Judiciary forget that the Nation's first internal civil uprising was to challenge Congress' imposition of a tax on distilled spirits. Congress itself has never granted the courts jurisdiction to issue injunctions interfering with the enforcement of its tax

statutes.[3/] Indeed, the Supreme Court has recognized the propriety of such judicial abstention in federal tax matters (Cheatham v. United States, 92 U.S. 85, 89 (1875)):

> If there existed in the courts, State or National, any general power of impeding or controlling the collection of taxes, or relieving the hardship incident to taxation, the very existence of the government might be placed in the power of a hostile judiciary.

In an analogous situation, the Supreme Court has stated its reluctance to interfere with the Treasury Department's issuance of legislative tax regulations authorized by Congressional enactments. As the Court stated (United States v. Correll, 389 U.S. 299, 306-307 (1967):

> * * * we do not sit as a committee of revision to perfect the administration of the tax laws. Congress has delegated to the Commissioner, not to the courts, the task of prescribing "all needful rules and regulations for the enforcement" of the Internal Revenue Code. 26 U.S.C. § 7805(a). In this area of limitless factual variations, "it is the province of Congress and the Commissioner, not the courts, to make the appropriate adjustments."

The relationship between Congress' Article I Taxing Power and the Sixteenth Amendment, and other Constitutional provisions generally and the Bill of Rights in particular, cannot be boiled down to a simple formula. Each situation must be judged on its own facts, so as to carry out the Framer's intent, and to maximize to the greatest extent possible all the Constitutional powers and rights in question. "[T]he Constitution does not

3/ See Section 7421(a) of the Internal Revenue Code of 1954; 28 U.S.C. § 2201.

conflict with itself by conferring upon one hand a taxing power and taking the same power away on the other hand * * *." Brushaber v. Union Pacific Railway, 240 U.S. 1, 24 (1916).

The difficulty and uniqueness of determining the Constitutionality of a federal tax statute like S. 528 is complicated by the fact that the limiting provision in question here is the Establishment Clause. In Mueller v. Allen, supra, at 3-4, the Court noted the obscure and unclear character of its precedents in this area:

> Today's case is no exception to our oft-repeated statement that the Establishment Clause presents especially difficult questions of interpretation and application. It is easy enough to quote the few words comprising that clause--"Congress shall make no law respecting an establishment of religion." It is not at all easy, however, to apply this Court's various decisions construing the Clause to governmental programs of financial assistance to sectarian schools and the parents of children attending those schools. Indeed, in many of these decisions "we have expressly or implicitly acknowledged that 'we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of Constitutional law.'" Lemon v. Kurtzman, 403 U.S. 609, 612 (1971), quoted with approval in Nyquist, 413 U.S. 756, 761 (1973).

B. S. 528 Is In Form and Substance A Neutral Tax Mechanism in Furtherance of Congress' Taxing Powers.

The thrust of the "principal effect" part of the Establishment Clause test,[4/] and indeed of all the other parts of the test, is Government neutrality toward religion. Such neutrality not only sums up the Establishment Clause tests, but also marks the channel between avoidance of religious establishment on one hand, and noninterference with religious exercise on the other hand. See, e.g., Committee for Public Education v. Nyquist, supra, 413 U.S. at 792-793; Gillette v. United States, 401 U.S. 437, 453-454 (1971); Walz v. Tax Commission, 397 U.S. 664, 669, 674, 676 (1970).

It is clear that S. 528 is religiously neutral, because in form and substance it is primarily an application of Congress' Taxing Power. The bill would amend the Internal Revenue Code to add a new tax credit to those now provided in Sections 44 through 44H. The tax credit would apply to 50 percent of qualified tuition expenses paid by a taxpayer for any qualified dependent. The credit would only apply to tuition paid to a private, non-profit elementary or secondary school. The credit would be limited to $100 per dependent the first year of enactment, and rise to a maximum of $300 per dependent in the third year.

4/ The other parts of the test are (i) whether the statute reflects a secular legislative purpose; (ii) whether the administration of the statute fosters an excessive government entanglement with religion; and (iii) whether the implementation of the statute inhibits the free exercise of religion. Tilton v. Richardson, 403 U.S. 672, 678 (1971).

Taxpayers with adjusted gross income exceeding $50,000 would not qualify for the credit. Tuition paid by parents to racially discriminatory schools would not be eligible for the credit.

The bill addresses income tax classifications and issues which have been a part of the federal income tax statutes from their very earliest years. The Internal Revenue Code has historically contained many provisions which have established various tax, deduction, and exemption classifications applicable to private schools. Some of these classifications apply to all schools, some only to private or to public schools, and some solely to religious schools. Over the years, the relative tax burdens of religious schools, or private schools and their financial supporters, have ebbed and flowed with other changes in the tax law. S. 528 is merely a continuation of this adjusting process,[5/] aimed at providing limited tax relief to parents of dependent children who attend private schools and whose income tax liability merits a modest downward adjustment. The Congress, through lengthy hearings and deliberations, perceived these persons are in need because of other changes in the Code which have increased their direct and indirect federal tax burden.

Over the past 15 years, Congress has steadily increased the federal tax burden of private nonprofit schools, which cf ccurse directly increases the burden on parents who are the principal financial supporters of these schools. The uninitated observer might be surprised to hear this fact, because most people

5/ In one bill or another, federal tax credits for private school parents have been seriously considered for more than ten years.

probably believe that churches and nonprofit private schools pay no federal taxes. While that was once the case, it is no longer so.

By far the most substantial federal tax burden imposed on churches and private schools is contained in the Social Security Amendments of 1983, signed in May 1983 by President Reagan. Beginning January 1, 1984, this statute will impose a combined 14 percent tax burden on the wages of all employees of churches, church schools, and other private nonprofit schools. Many such schools are in desperate straits trying to find funds to pay this sudden, unexpected financial burden.

A few statistics will reveal the enormity of the new financial burden imposed upon private schools by this statute. Assuming average annual wages of $10,000-$15,000 per full-time teacher, and approximately 20 students per teacher, next year's increase in Social Security taxes will impose an additional financial burden of $70-$105 per private school pupil for FICA taxes on teacher salaries alone.[6/] FICA taxes on wages of other employees will make this burden even greater.

But this is not the only increase in the Federal Tax burden recently imposed upon private schools by the federal tax code. In 1976, the Federal Unemployment Tax Act was amended to require taxation for the first time of non-profit private schools,

---

6/ Precise figures on average wages of private school teachers are not available. Average wages of public school teachers are $17,602 in 1980-81. Digest of Education Statistics 1982, Table 49 (National Center for Education Statistics), Appendix A, *infra*. We are also unaware of any statistics on the percentage of private schools which previously elected to participate in Social Security. Our firm's experience is tht the schools with the most precarious financial base have not participated.

except for certain church-controlled private schools.[7] In 1983, this tax is equivalent to about 3 percent of the first $7,000 of an employee's wages, or a maximum of about $200 per employee per year.

Finally, in 1969 Congress extended the unrelated business tax (I.R.C. §§ 511-514)[8] for the first time to churches and church-owned schools. The tax had been imposed on non-religious private schools in 1951. No statistics appear to be available showing the amount of taxes collected from such private schools. However, the main impact of the tax is not in the total amounts collected, but in its particularized burden on those schools which traditionally relied on a controlled business to supplement revenues.

Of course, some--but not all--of these taxes were also imposed upon public schools. But such taxes, like other increases in costs, are borne by the citizenry at large--including parents of private school pupils. By contrast, taxes on private schools are borne almost exclusively by parents of private school pupils.

S. 528 is merely a continuation of this adjusting process,[9] aimed at providing limited tax relief to parents of dependent children who attend private schools and whose income tax liability merits a modest downward adjustment. The Congress,

---

7/ See St. Martin Lutheran Church v. South Dakota, 451 U.S. 772 (1981).

8/ "I.R.C" and "Code" refer to the Internal Revenue Code of 1954.

9/ In one bill or another, federal tax credits for private school parents have been seriously considered for more than ten years.

through lengthy hearings and deliberations, perceived these persons are in need because of other changes in the Code which have increased their direct and indirect federal tax burden.

The credit for school expenses provided by S. 528 would be quite similar to the credit for the expenses of nursery school currently allowed working spouses by Section 44A of the Internal Revenue Code. Originally, this provision took the form of deduction, but it was changed to a credit in 1976 to allow persons using the standard deduction (non-itemizers) to benefit from it. S. Rep. No. 94-938, 94th Cong., 2d Sess. 132 (1976-3 Cum. Bull. (Vol. 3) 49, 170).[10/]

As a matter of tax theory, the tax credit for private school tuition here should be treated as such a neutral, income-defining mechanism. There are many factors which may or should be taken into account in adjusting taxable income for various educational items. State and federal governments relieve parents of their legal obligation to provide education to their children to the extent that government provides free public education. Arguably, such relief from a legal obligation could logically be taxed as gross income to parents of public school students (cf. Commissioner v. Tufts, 51 U.S. Law Week 4518 (May 2, 1983; U.S.

10/ The Internal Revenue Code contains numerous other credits for individuals. See, e.g., § 37 (credit for portion of income of elderly persons); § 41 (credit for portion of contributions to politcal parties); § 43 (credit for portion of purchase price of residence); § 44C (credit for energy conservation expenditures); §§ 901, 904, 906, 907 (credit for foreign taxes paid). In addition, § 170(i) of the Code provides a deduction for a portion of charitable gifts to churches, etc., even if the taxpayer does not itemize his deductions. Code Section 6096 allows each taxpayer to designate $1 of his tax payment to be contributed to a fund to be used by Presidential candidates. See Buckely v. Valeo, 424 U.S. 1 (1976).

Sup. Ct.)), although Congress and the Treasury have never interpreted Section 61 so broadly. Parents of private school pupils, however, pay tuition with after-tax dollars. Parents of public school students can deduct virtually the entire cost of public schools through the deduction for real estate taxes paid on their homes, while parents of private school students pay those same taxes yet receive no relief for their tuition costs.[11/] The tax credit is merely one means of adjusting these inequalities for all taxpayers--including those who do not itemize deductions--to arrive at a fair and equitable income tax liability. See Note, "Income Tax deductions and Credits for Nonpublic Education: Toward a Fair Definition of Net Income," 16 Harv. J. Legis. 90 (1979). The need for such an adjusting mechanism is particularly keen in light of the extra federal tax burdens which changes in the Code and in private school financing have imposed on private schools and parents of private school pupils over the past 10-15 years, as explained above.

C. The Federal Courts Treat Income Tax Statutes Such as S. 528 as Neutral Tax Mechanisms, Not as Subsidies, Grants or Penalties, in Adjudging Their Conformity to the Bill of Rights.

The Supreme Court has consistently indicated that it is fully cognizant of the preeminent importance of Congress' Taxing Powers, including the practical classifications and accommodations which are necessary in legislating a complex legal code to exact

---

11/ Indeed, parents of private school children are doubly burdened, since IRS presumes their contributions to private schools are disguised tuition to the extent of the "value" of their child's education. Rev. Rul. 79-99, 1979-1 Cum. Bull. 108. IRS has not published a similar rule for parents of public school children.

revenues from over 100 million taxpaying individuals and entities. It has accordingly formulated a number of interpretative rules to ensure that Congress has maximum leeway in enacting tax classifications. Under these rules, tax statutes are treated as neutral revenue measures, which neither subsidize nor penalize the affected persons, entities, or activities, for Constitutional law purposes.

For example, in the Supreme Court's first consideration of the 1913 income tax act, the Supreme Court upheld the constitutionality of the exemption of religious and other charitable organizations. Brushaber v. Union Pacific Railway, 240 U.S. 1 (1916), following the earlier, like conclusion in Pollock v. Farmers Loan and Trust Co., supra. The Court rejected the contention that this and other tax classifications unconstitutionally favored the exempted organizations, in contravention of the rights of other taxpayers under the Due Process Clause of the Fifth Amendment (Brushaber v. Union Pacific Railway, supra, at 24, 25-26):

> it is * * * well settled that [the due process clause] is not a limitation upon the taxing power conferred upon Congress by the Constitution; in other words, * * * the Constitution does not conflict with itself by conferring upon one hand a taxing power and taking the same power away on the other hand by the limitations of the due proces clause.
>
> * * *
>
> * * * comprehensively surveying all the contentions relied upon, * * * we cannot escape the conclusion that they all rest upon the mistaken theory that although there be differences between the subjects taxed, to

> differently tax them transcends the limit of taxation and amounts to a want of due process * * * 12/

The same rationale was followed by the Court in upholding the constitutionality of exemptions and exclusions from the Social Security Act of 1935, c. 531, 49 Stat. 620--including the exemption for charitable and religious organizations. Steward Machine Co. v. Davis, 301 U.S. 548, 583-584 (1936). The Court held that Congress was subject to "restraints less narrow and confining" than the states (id. at 584), and concluded that exemptions and deductions for different classes "are not confined to a formula of rigid uniformity in framing measures of taxation."

There is no novelty in the current problem of reconciling the Taxing Powers with the Religion Clauses of the Constitution. The Supreme Court on numerous occasions faced a similar problem several years ago, in reconciling the Taxing Powers with the powers reserved to the States under the Tenth

---

12/ Earlier in 1910, in upholding the constitutionality of the excise tax on corporate income, the Court had stated (Flint v. Stone Tracy Co., 220 U.S. 107, 173):

> As to the objections that certain organizations, labor, agricultural and horticultural, fraternal and benevolent societies, loan and building associations, and those for religous, charitable or educational purposes, are excepted from the operation of the law, we find nothing in them to invalidate the tax. As we have had frequent occasion to say, the decisions of this court from an early date to the present time have emphasized the right of Congress to select the objects of excise taxation, and within this power to tax some and leave others untaxed, must be included the right to make exemptions such as are found in this act. (Emphasis added.)

Amendment. Justice Frankfurter eloquently described that dilemma in words that have application here (United States v. Kahriger, 345 U.S. 22, 38 (1953)(dissenting op.)):

> Concededly the constitutional questions presented by such legislation are difficult. On the one hand, courts should scrupulously abstain from hobbling congressional choice of policies, particularly when the vast reach of the taxing power is concerned. On the other hand, to allow what otherwise is excluded from congressional authority to be brought within it by casting legislation in the form of a revenue measure could, as so significantly expounded in the Child Labor Tax Case, supra, offer an easy way for the legislative imagination to control "any one of the great number of subjects of public interest, jurisdiction of which the States have never parted with . . . ." Issues of such gravity affecting the balance of powers within our federal system are not susceptible of comprehensive statement by smooth formulas such as that a tax is nonetheless a tax although it discourages the activities taxed, or that a tax may be imposed although it may effect ulterior ends. No such phrase, however fine and well-worn, enables one to decide the concrete case. 13/

13/ Even with respect to federal grants to religious schools, the Supreme Court has cautioned (Tilton v. Richardson, 403 U.S. 672, 677-678) (1971):

> Every analysis must begin with the candid acknowledgement that there is no single constitutional caliper that can be used to measure the precise degree to which these three factors are present or absent. Instead, our analysis in this area must begin with a consideration of the cumulative criteria developed over many years and applying to a wide range of governmental action challenged as violative of the Establishment Clause.
>
> There are always risks in treating criteria discussed by the Court from time to time as "tests" in any limiting sense of that term. Constitutional adjudication does not lend itself to the absolutes of the physical sciences or mathematics. The standards should

(footnote continued)

In Steward Machine, supra, the claim was that the statute's allowance of a 90 percent state tax credit against the federal unemployment tax was too generous a subsidy, and in effect "coerced" the states to enact a state unemployment tax. The Court rejected such a restriction on the federal tax power, concluding that a credit could not be declared unconstitutional merely because the states would find it difficult not to avail themselves of it.[14]

In another line of cases, the Court also repeatedly rejected claims that the federal tax power was limited to enacting statutes primarily designed to raise revenue, and that regulatory tax statutes were an unconstitutional interference with the powers of the states. The Court has consistently held that a federal tax statute "may not be declared unconstitutional because its effect may be to accomplish another purpose as well as the raising of revenue. If the legislation is within the taxing authority of Congress--that is sufficient to sustain it." United States v. Doremus, 249 U.S. 86, 94 (1919); In re Kollock, 165 U.S. 526, 536

(footnote continued from previous page)

> rather be viewed as guidelines with which to identify instances in which the objective of the Religion Clauses have been impaired. And, as we have noted in Lemon v. Kurtzman and Earley v. DiCenso, * * *, candor compels the acknowledgement that we can only dimly perceive the boundaries of permissible government activity in this sensitive area of constitutional adjudication.

14/ In Florida v. Mellon, 273 U.S. 12 (1927), the Court similarly upheld the Federal Government's large estate tax credit for state inheritance taxes, rejecting the notion that such a credit was prohibited because it gave undue incentive for states to enact inheritance taxes.

(1897). Thus the Court has upheld Congress' power to enact a federal statute requiring persons dealing in narcotics to register and pay a tax (United States v. Doremus, supra), and a federal tax requiring the registration and payment of a tax respecting certain firearms (Sonzinsky v. United States, 300 U.S. 506 (1937)). Indeed the Court has overruled a series of cases holding that a federal tax statute could be overturned on the ground that it was not designed to raise revenue, but was merely a penalty in the guise of a tax. United States v. Sanchez, supra, at 42, 44-45; Bob Jones University v. Simon, 416 U.S. 725, 741, fn.12 (1974).

Another corollary principle often expressed by the courts regarding federal tax laws is that Congress has broad power and discretion in making various kinds of classifications necessary in a tax code. The fact that a classification affects fundamental liberties under the Bill of Rights does not result in unconstitutionality, absent unusual circumstances. That is to say, tax classifications need not be neutral with respect to fundamental rights; the group subject to greater tax burdens does not have its rights infringed, merely because its fundamental rights are involved in the classification scheme.

For example, the Court in the first challenge to the modern income tax, Brushaber v. Union Pacific Railway, supra, at 23, held that there was no unconstitutional discrimination in taxing differently married and single people, and "husbands and wives who are living together and those who are not." More recently, the lower courts have unanimously held that the various "marriage penalty" statutes, which imposed higher taxes on certain

couples who were married than if the same individuals lived together out of wedlock, did not infringe upon the constitutionally protected right to marry. The various federal courts reasoned that the primary purpose of the statutes was to adjust tax rates for various tax purposes (for example, to allow income splitting for families), and that the resulting extra burden on certain married persons was mainly incidental to that tax purpose.[15/]

On similar grounds, the Supreme Court has held that an ordinary and necessary business expense may be disallowed as a deduction if spent for lobbying, without infringing Free Speech constitutional guarantees. The Court reasoned that Congress had solid tax reasons for limiting business deductions to nonlobbying expenses, and that withholding the deduction from lobbying activities did not constitute a penalty for a firm whose business required extensive lobbying. Cammarano v. United States, 358 U.S. 498 (1959).

15/ Johnson v. United States, 422 F. Supp. 958, 971-973 (N.D. Ind. 1976), aff'd per curiam, on District Court opinion, sub nom. Barter v. United States, 550 f.2d 1239 (7th Cir. 1977), cert. denied, 434 U.S. 1012 (1978). The courts have also repeatedly sustained the constitutionality of the income tax provisions which, in some circumstances, tax single persons at a higher rate than married persons, E.g., Kellems v. Commissioner, 58 T.C. 556, 558-560 (1972), aff'd per curiam, 474 F.2d 1399 (2d Cir. 1973), cert. denied, 359 U.S. 925 (1959); Shinder v. Commissioner, 395 F.2d 222 (9th Cir. 1968); Faraco v. Commissioner, 261 F.2d 387, 389 (4th Cir. 1958); Bayless v. Commissioner, 61 T.C. 394, 396 (1973). The Tax Court has followed these decisions and applied the rational basis test in upholding the varying child care deduction standards for persons in different marital situations. E.g., Black v. Commissioner, 69 T.C. 505, 507-511 (1977); Keeler v. Commissioner, 70 T.C. 279, 282-284 (1978); Bryant v. Commissioner, 72 T.C. 757, 763-765 (1979); accord, Cash v. Commissioner, P-H T.C. Memo. para. 77,405 (1977), aff'd, per curiam on lower court opinion, 580 F.2d 152 (5th Cir. 1978).

In order to treat tax statutes as constitutionally neutral, and to preclude their being viewed as advancing or inhibiting constitutionally protected rights, the federal courts have treated almost all exemption, credit and deduction statutes as neutral adjustment mechanisms rather than affirmative subsidies. For example, in McGlotten v. Connolly, 338 F. Supp. 448, 458 (D.C.D.C. 1972)(3-judge court), the court held that the tax exemption of social clubs was not a Congressional subsidy, but rather a technical tax decision by Congress that clubs are not independent taxable entities. The result was that the court did not have to determine whether the social club exemption was an unconstitutional subsidy of the racially discriminatory practices of certain private clubs. The exemption was not deemed to be the functional equivalent of a grant or subsidy.

The Supreme Court applied a similar rationale in Commissioner v. Sullivan, 356 U.S. 27 (1958), and Commissioner v. Tellier, 383 U.S. 687 (1966), which hold that the ordinary and necessary business expense deduction is primarily a tax computation mechanism, and should not normally be disallowed if the expense is illegal or used to further an illegal scheme.

It is widely recognized that virtually all of the provisions in the Internal Revenue Code fall into the category of neutral tax mechanisms. This is as it should be. A contrary rule allowing courts to examine the collateral and practical effects of federal tax statutes, and to implement or impede them on the basis of their ultimate effects on public policy, would intolerably

restrict Congress' legislative power to tax and enlarge the authority of the Judiciary in this area. See United States v. Ptasynski, supra, at 11-12.

This line of cases is frequently viewed as expressing the fundamental principle that the Government is not entitled to all income to begin with, so that when it gives a credit or exemption or deduction, that item does not automatically become a governmental subsidy. Inherent in any tax code is the necessity for foregoing certain revenues, for various reasons of practicality and tax policy. Adjustment of the Code to adjust tax burdens is treated as ideologically neutral, and is not normally viewed as a subsidy to the taxpayers who may be benefitted. For example, under this principle the Congress may legitimately exempt all labor unions from tax, whether or not a particular union misuses the exemption to violate federal or state laws. The tax exemption is merely reflective of a Congressional determination that a labor union is not a suitable taxable entity, and not an express approval of the powers, programs and activities of labor unions. Marker v. Connolly, 485 F.2d 1003 (D.C. Cir. 1973).

It is accordingly clear that in every conceivable situation the Court has given effect to fedeal tax statutes in accordance with their tax forms, and has refused to view them broadly in a manner which would raise a conflict with other Federal Constitutional provisions. Under these principles, the proposed federal tax credit to private school parents must be

viewed as a neutral tax mechanism solely in exercise of Congress' Taxing Power. The fact that it will collaterally benefit private religious schools is simply not material.[16/]

We can safely add the adjective "religious" to Justice Jackson's statement in United States v. Kahriger, 345 U.S. 22, 35 (1953)(concurring op.) that "one cannot formulate a revenue-raising plan that would not have economic and social consequences." Any other approach to federal tax statutes would send the federal courts into endless speculations about the indirect effects of the thousands of tax classifications upon the rights and privileges of the countless classes of persons which are affected.

D. Even If Tuition Tax Credits Were Treated as Tax Subsidies, Like Charitable Tax Benefits, They Do Not Violate The Establishment Clause.

That the Supreme Court would likely view tax statutes like S. 528 as neutral for Establishment Clause purposes is confirmed by the Court's approach to the limited class of tax statutes treated as subsidies. In Regan v. Taxation with Representation of Wash., supra, and Bob Jones University v. United States, supra, the Court recently held that charities' income tax exemptions and eligibility to receive tax deductible contributions, which the Internal Revenue Code allows charities and veterans organizations, "have the same effect as" or "are similar to cash grants." Taxation with Representation of Wash.,

16/ Recently, the Supreme Court implicitly approved the federal statutes providing special unemployment tax benefits to certain religious schools. St. Martin Lutheran Church v. South Dakota, 451 U.S. 772 (1981).

supra, Slip. Op. 3-4. "[T]he very fact of the exemption or deduction for the donor means that other taxpayers can be said to be indirect and vicarious 'donors.'" Bob Jones University, supra, Slip. Op. 16. Nevertheless, the Court expressly recognized its earlier holding in Walz v. Tax Commission, supra, that such tax subsidies do not violate the Establishment Clause. The Court specifically referred to statements in Walz that such tax exemptions are not prohibited by the Establishment Clause, despite the economic benefit which they provide to churches. Taxation with Representation of Wash., supra, Slip. Op. 4, fn.5, citing Walz v. Tax Commission, supra, at 674-676, 690-691 (Brennan, J., concurring), 699 (Op. of Harlan, J.).

In the Bob Jones University case, moreover, the Court explicitly rejected the taxpayer-schools' argument that the provisions allowing charitable tax-exemptions and deductibility-of-contributions benefits violated the Establishment Clause. Bob Jones University had argued that Congress had no power to enact a statute providing charitable tax benefits solely to nondiscriminating schools, because the purpose and effect of such a provision was to subsidize persons and religions believing in racial integration, and to exhibit "hostility" toward persons and religions holding segregationist beliefs. The University also contended that an enforcement of the statute required prohibited I.R.S. entanglement in its religious activities.[17]

17/ Brief for Petitioner, Bob Jones University v. United States, No. 81-3, pp.33-34.

The Court recognized that the Federal Government could not "'prefer one religion over another'", citing Everson v. Board of Education, 330 U.S. 1 (1947), which allowed school bus transportation for parochial school pupils. Bob Jones University v. United States, supra, Slip. Op. 29, fn.30. The Court refused to give controlling weight to the preferential effect of the statute, however, reasoning that a tax provision "'does not violate the Establishment Clause merely because it happens to coincide or harmonize with the tenets of some or all religions.'" (Ibid.) Citing Gillette v. United States, 401 U.S. 437 (1971), which allowed draft deferment benefits to opponents of war on religious and philosophical grounds, the Court concluded that "The IRS policy at issue here is founded on a 'neutral, secular' basis * * * and does not violate the Establishment Clause." The Court noted that the statute's uniform application to both religious and secular private schools avoids any entanglement problems.

The Bob Jones opinion explicitly refused to consider the collateral effects on religious groups of the tax benefit classifications in determining whether the classifications violate the Establishment Clause. This was so even though the parties made clear to the Court that the major impact of the racial nondiscrimination condition on tax benefits will be to penalize schools whose racial discrimination is an integral part of their supporters' religious beliefs; indeed, it was the massive intrusiveness on religions which would result from a test which would depend on sincerity of religious belief which led the Court

to reject that kind of test. Bob Jones, supra, Slip. Op. 29; see Brown v. Dade Christian Schools, Inc., 556 F.2d 310, 324 (5th Cir. 1977)(Goldberg, J., concurring). Nothing in the tuition credit tax classification proposed here suggests that the collateral effects of the classification are any more material, or have greater impact on religions, than the classification upheld in Bob Jones.[18/]

The Taxation with Representation-Bob Jones rationale was expressly followed by the Court in the Mueller v. Allen tuition tax case. The Court held that the Minnesota statute was a genuine tax adjustment like the deduction for charitable contributions. (Id., Slip. Op. 8 Fn. 6.) It held that "equaliz[ing] the tax burdens of citizens" and "encourag[ing] expenditures for educational purposes" are valid secular functions of a legislature, and that such bodies should be given "broad latitude" and substantial deference" in creating tax classifications and distinctions to achieve these goals. Id., Slip. Op. 7-8. The Court sharply distinguished such a genuine tax adjustment for secular purposes from direct governmental grants to religious

---

18/ The right to tax exemption and deductibility of contributions was also treated as a government subsidy in Green v. Connally, 330 F. Supp. 1150 (D.D.C. 1970), aff'd mem. sub nom. Coit v. Green, 404 U.S. 997 (1971). McGlotten v. Connally, supra, treated the exemption of fraternal societies from tax on their private investment income (26 U.S.C. § 501(c)(8)) as a government subsidy. Professor Boris Bittker has severely criticized the McGlotten holding. He would apparently limit subsidy treatment to exemptions provided by 26 U.S.C. §§ 170(c)(2) and 501(c)(3), respectively. B. Bittker and K. Kaufman, "Taxes and Civil Rights: 'Constitutionalizing' the Internal Revenue Code," 82 Yale L.J. (1972).

schools or their supporters, which are prohibited because they are not part of the secular tax adjustment function of the legislative body.[19/]

E. Tax Classifications Incidentally Benefitting Religions Should Be Upheld for the Same Reasons that Religious Draft Deferments Have Been Approved.

The relationship of the Congressional Taxing Power and the Establishment Clause has been held to be similar to the relationship between the War Power and the Religion Clauses. The Court of Appeals' opinion[20/] in the Bob Jones University case held that the charitable tax provision did not unconstitutionally subsidize nondiscriminatory private schools, on the grounds that the secular purposes of the charitable exemption and deduction statutes were "unassailable;" that "certain governmental interests are so compelling that conflicting religious practices must yield;" and that "the principle of neutrality embodied in the Establishment Clause does not prevent government from enforcing

19/ The Mueller opinion noted that the statutory program held unconstitutional in Committee for Public Education v. Nyquist, supra, was not a genuine tax statute, but merely a disguised subsidy. The Nyquist Court emphasized that the New York tax benefit statute in issue had no "historical precedent," unlike the charitable tax exemption and deduction statutes upheld in Walz v. Tax Commission, supra. Cautioning that "historical acceptance" alone would not satisfy the Establishment Clause, the Court stated that such a factor could indeed reflect that the supposed "'aid' was a product not of any purpose to support or to subsidize, but of a fiscal relationship designed to minimize involvement and entanglement between Church and State. * * * [A]n indirect and incidental effect beneficial to religious institutions has never been thought a sufficient defect to warrant the invalidation of * * * law." Nyquist, supra, 413 U.S. at 771, 775, 792-793. The partial tax credit provided by S. 528, like the provisions in Walz, is a true tax adjustment in accord with historical Internal Revenue Code mechanisms.

20/ 639 F.2d 147 (4th Cir. 1981).

its most fundamental constitutional and societal values." In so holding, the court relied equally on Walz v. Tax Commission, supra, as well as on the opinion in Gillette v. United States, 401 U.S. 437 (1971). The latter case holds that the Government may grant draft exemption solely to persons whose religious or philosophical beliefs object to all wars, despite the fact that such a classification may deny such exemption to members of religious or other groups whose beliefs are of a different character. The Supreme Court's opinion in Bob Jones University similarly cited Gillette on this issue. Slip. Op. 29, fn.30.

In Gillette, the Court set forth a rationale similar to that in Walz, concluding that Congress may properly provide draft exemptions to religious adherents without contravening the neutrality required by the Establishment Clause. The Court noted that conscientious objector exemptions had been present since the earliest days of the draft and had always been grounded on individual belief rather than sectarian affiliation; that in an early case the Court itself had summarily held such exemptions proper undr the First Amendment;[21/] that some exemption was justified on pragmatic grounds; that Congress had considerable latitude in fashioning a practicable classification; and that such an exemption promoted Free Exercise Rights. Id., 401 U.S. at 452, 453-460. Specifically referring to the "Nation['s] * * * enormous heterogeneity in respect of political views, moral codes, and religious persuasions," the Court held that the burden was on the complainant "to show the absence of a neutral, secular basis for

---

21/ The Court cited the Selective Draft Law Cases, 245 U.S. 366, 389-390 (1918).

the lines government has drawn." The Court concluded that Congress' classification did not establish religion any more than any other exemption classification scheme that could be devised.

The Supreme Court in Bob Jones expressly relied on the Gillette case in holding that classifying schools on the basis of their racial policies did not violate the Establishment Clause,[22/] even though the effect of the classification was to favor certain religions and disfavor others. In other words, Bob Jones University teaches that, just as Congress, in furtherance of its War Power, may establish draft exemption classifications even though they incidentally benefit adherents of certain religions, so also may Congress, in furtherance of its Taxing Powers, establish tax benefit classifications which incidentally reward or harm certain religious groups.

It is thus apparent that it would constitute a radical departure from Supreme Court precedent for the Court to hold unconstitutinal S. 528, one of many tax provisions dealing with the tax burdens of schools and their supporters, on the basis of a strained analysis magnifying the purported benefit to religion of this one provision. There are more than twenty federal tax provisions[23/] dealing with private educational organizations which

---

22/ Bob Jones University v. United States, supra, Slip. Op. 29, fn.30.

23/ The provisions in the Internal Revenue Code are: § 44(c)(2)(A); § 44F; §§ 103(c)(3) and 103(b)(3); § 117; § 151(e)(1)(B)(ii) and 151(e)(4); § 152(d); § 163(b)(1); § 170(b)(1)(A)(ii); § 403; § 415(c)(4); § 501(c)(3); § 508; § 511(a)(2); § 512(b)(15); § 512(b)(8); § 1303(c)(2)(A); § 2503(e)(2)(A); § 4041(g); § 4221; § 4253(i) and (j); § 4941(d)(2)(G)(ii); § 4945(g)(1); § 5214(a)(2) and (a)(3)(A); § 6033(a)(2)(C)(ii). See also Treas. Regs. on Income Tax
(footnote continued)

implicitly benefit religious schools. In addition, approximately a dozen other provisions in the Internal Revenue Code involve religious organizations or individuals of other kinds, and their employees and supporters.[24/] While no detailed analysis has been done, we believe that at least half of these statutes provide benefits to persons and organizations on the basis of their religious status. Indeed, we submit that it would be virtually impossible to administer the Code as currently structured without special provisions dealing with religious organizations. Such classifications would become impossible to draft if, wherever some direct or indirect monetary benefit to a religious group resulted, they were viewed as a prohibited establishment of religion rather than as a neutral tax computation mechanism.

F. In Fact as Well as in Theory, S. 528 Has Far More Neutral Elements Than the State Tuition Credit Statutes Which Have Come Before the Federal Courts.

This presumption of neutrality to which S. 528 is entitled under tax theory is plainly reflected in the actual neutral effects of the federal S. 528 here, as contrasted with the effects of the New York state statutes involved in Nyquist, the state tuition tax credit statutes overturned in subsequent lower court decisions disallowing tuition tax credits in Ohio[25/] and New

---

(footnote continued from previous page)
§ 1.6033-2(g)(5)(iv); I.R.C. §§ 3121(b)(8)(A); 1402(c) and (e)(1); Revenue Act of 1942, c.619, 56 Stat. 798, § 152(c); Act of October 4, 1961, P.C. 87-370, 75 Stat. 796, § 3(a).

24/ E.g., I.R.C. §§ 170, 501(c), (3), 642(c), 2055(a), 2523.

25/ Kosydar v. Wolman, 353 F. Supp. 744 (S.D. Ohio 1972), aff'd mem. sub nom. Grit v. Wolman, 413 U.S. 901 (1973).

Jersey,[26/] and even the tax credit statute sustained in Minnesota.[27/] In those states, as is usually the case, education represented the largest budget expenditure. In the federal budget, however, education is a relatively minor item. constituting less than 5 percent of the budget.

In the three overturned statutes, moreover, the tax credits were part of comprehensive direct and indirect assistance packages for private schools, which would have constituted a substantial part of the support of the recipient churches. The Roman Catholic Church was particularly predominant in these states, and would have received a substantial part of its educational revenues directly and indirectly from the state programs. By contrast, at the federal level, the credits involved in S. 528 are not a part of a total package of aid to religious groups. Viewed nationally, diverse religious groups, no one of which claims even 25 percent of the population as adherents, are scattered over the country.[28/]

26/ Public Funds for Public Schools of N.J. v. Byrne, 590 F.2d 514 (3d Cir. 1979), aff'd mem., 442 U.S. 907 (1979).

27/ Mueller v. Allen, 676 F.2d 1195, 1202-1206 (8th Cir. 1982), aff'd, No. 82-195, decided June 29, 1983.

28/ The opinions of the courts in the various tuition tax credit cases do not furnish statistics as to Catholic predominance which can be meaningfully compared with each other and the Nation as a whole. However, readily comparable statistics by state exist for 1980. These statistics show that, nationwide, religious school students constituted a smaller percentage of all private school students, and Catholic school students constituted a smaller percentage of private school students, than in New York, New Jersey, or Ohio. Even in Minnesota, whose tax deduction statute was approved by the Supreme Court, religious schools and Catholic schools constituted greater proportions of all students than in the Nation as a whole:

(footnote continued)

Even within the Roman Catholic Church, the importance of Church schools varies in various geographic areas of the Nation, and approximately two-thirds of Catholic children in the country as a whole attend public schools. The political impact of the large Catholic population is muted by the representation-by-state system in the Senate, which tends to increase the voting power of Western and Southern states with proportionately smaller Catholic populations.

Accordingly, at the federal level diversity of interest groups is so large, and the demands on the budget are so diverse, that any single religion, or group of religions, will find it impossible to use the federal tax system as a vehicle for

---

(footnote continued from previous page)

	Total public elementary and secondary school students	Total private school students	Private school students as percentage of all students	Total all religious school students	Religious school students as percentage of all students	Religious school students as percentage of all private school students	Total all Catholic school students	Catholic school students as percentage of all students	Catholic school students as percentage of all private school students	Catholic school students of all religious school students
U.S. (50 states)	46,012,158	5,028,865	10.9	4,226,491	9.1	84.0	3,190,887	6.9	63.5	75.5
N.Y.	3,455,001	583,997	16.9	512,951	14.8	87.8	429,241	12.4	73.5	83.7
N.J.	1,479,593	233,585	14.8	209,916	14.2	89.9	193,287	13.1	82.7	92.1
OHIO	2,226,176	268,795	12.1	254,501	11.4	94.7	228,326	10.3	84.9	89.7
MINN.	844,875	90,557	10.7	85,016	10.1	93.8	64,909	7.7	71.6	76.3

Source: National Center for Education Statistics, Digest of Education Statistics 1982, Tables 39, 40, Appendix A, *infra*.

Moreover, in at least eleven states, nonreligious private school students constituted 25 percent or more of private school enrollment. In eighteen states, more than 50 percent of all private school enrollment is in non-Catholic schools. Ibid.

achieving federal support of religion. Cf. Roemer v. Maryland Public Works Bd., 426 U.S. 736, 763 (1976); Wolman v. Walter, 433 U.S. 229, 263 (1977)(Powell, J., concurring and dissenting).

Moreover, in Mueller, approximately 96 percent of the students for whom tuition deductions were taken were from religious private schools,[29/] although the approximately 754,000 public school students were eligible for tuition and other deductions.[30/] S. 528 would similarly aid a broad class of secular school students, making available tuition credits for the more than 800,000 students in the United States who attend secular private schools.[31/] In light of these facts, S. 528 meets the Mueller requirement for primarily secular effect--that the statute "neutrally provide * * * assistance to a broad spectrum of citizens * * *."[32/]

The core of the Establishment Clause has been said to be "mutual abstention" by church and governmental officials from interference with each other's domains. Freund, "Public Aid to Parochial Schools," 82 Harv. L.Rev. 1680, 1684 (1969). Federal tax credits to private school parents for tuition clearly do not endanger that goal at the federal level, any more than contribution deductibility for parents and other supporters of churches and church schools. Decades of experience with federal

---

29/ Mueller v. Allen, supra, Slip. Op. 12.

30/ Supra, note 28.

31/ Ibid.

32/ Mueller v. Allen, supra, Slip. Op. 10.

tax exemption provisions respecting religious organizations have not caused any untoward divisiveness or interference between churches and the government.

Moreover, in considering whether tuition tax credits have the primary effect of advancing religion, one must take into account the enormous changes in private education in the decade since the decision in Nyquist. In that case, Roman Catholic schools comprised 69 percent of all elementary and secondary schools in New York schools.[33/] Today, Catholic schools comprise 46 percent of all private elementary and secondary schools nationwide,[34/] and the proportion steadily decreases.[35/]

Moreover, the enrollment and staff of the Roman Catholic schools has changed dramatically. In 1969-1970, only 2.7 percent of Catholic school students were non-Catholic, while by 1982-1983 that percentage had risen to 10.7 percent.[36/] Approximately 20.4 percent of enrollment consists of minority children,[37/] most of whom are non-Catholic. Today the motivation of parents in sending their children to religious schools is more likely to center around obtaining a sound and structured secular education, as contrasted with the receipt of religious instruction.[38/] Indeed,

---

33/ Nyquist, supra, at 768, fn.23.

34/ Digest of Education Statistics-1982, supra, at 48, Appendix A, infra.

35/ National Catholic Education Association, United States and Secondary Schools 1982-1983, at 6, Appendix B, infra.

36/ Id., table 16.

37/ Id., at 15-16.

38/ Id., at 15, 17; Catholic League for Religion and Civil Rights, Inner City Private Education-A Study, 9-13 (1982).

it is largely the rise in the proportion of nonclerical teachers, and the attendant increase in salary and tax burdens,[39/] which caused a precipitous decline in enrollment in Catholic schools from 1965 to the present.[40/]

In non-Catholic religious schools also, primary and secondary education is generally following the historical pattern of religious colleges and universities. Enrollment is more likely to be religiously heterogeneous or unaffiliated, and school purposes are increasingly centered on educational excellence rather than religious orthodoxy. These factors are important because they decrease the chance that tax assistance for private school parents will primarily benefit religion rather than education. Cf. Tilton v. Richardson, 403 U.S. 672, 686-687 (1971).

We do not contend that federal tax statutes are immune from judicial review for compliance with the Establishment Clause. It is always possible that religious sectarianism could become a moving force in Congress, resulting in statutory tax benefits whose purpose was more religious advantage than fiscal integrity, equity and practicality. However, a critical look at the economic and educational conditions which give rise to the tax credit here,

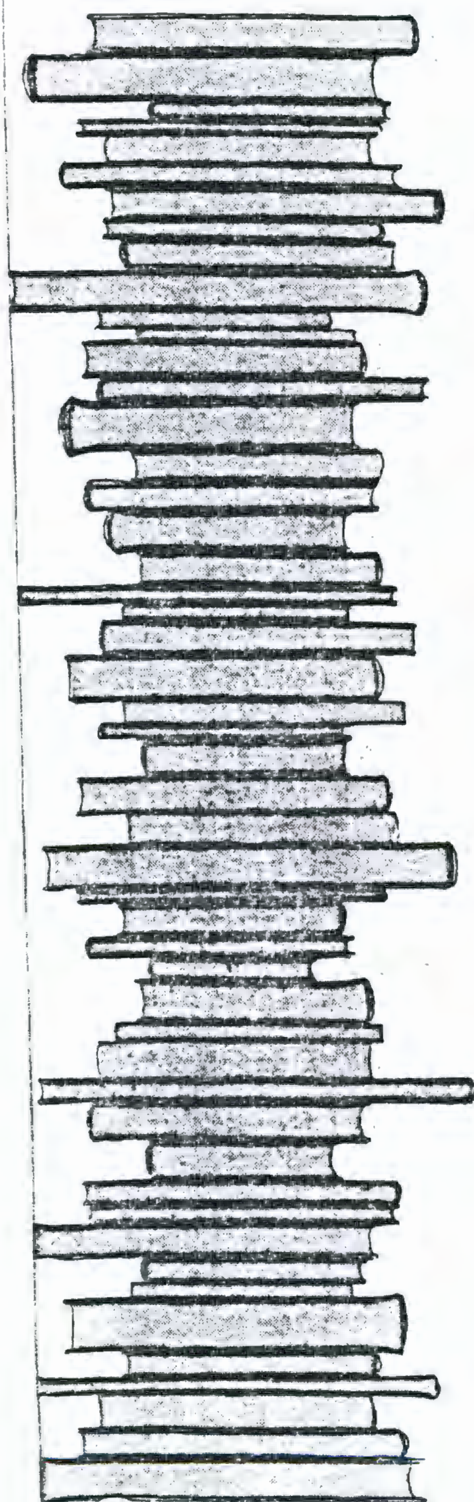
---

39/ Members of religious orders may be exempt under FICA and self-employment taxes. I.R.C. §§ 3121(b)(8), 1402(e). Such taxes must be paid respecting lay teachers in religious schools, however.

40/ In 1964, Catholic elementary and secondary schools enrolled 4,533,771 students. In 1981, enrollment had declined to 2,269,000. Digest of Education Statistics 1982, supra, Table 42, Appendix A, infra.

and the practical effects of that credit, plainly reveals that such advancement of religion is not its primary or even substantial effect.

APPENDIX A



Digest of Education Statistics 1982

National Center for Education Statistics

by
W. Vance Grant
and
Leo J. Eiden
Specialists in Education Statistics
National Center for Education Statistics

Table 39.—Enrollment, average daily attendance, and classroom teachers in public elementary and secondary schools, by State: 1980–81

State or other area	Enrollment[1]	Estimated average daily attendance	Classroom teachers[1]	Pupils per teacher based on enrollment	Pupils per teacher based on average daily attendance
1	2	3	4	5	6
United States	**40,984,093**	**37,696,982**	**2,183,538**	**18.8**	**17.3**
Alabama	758,721	713,450	36,172	21.0	19.7
Alaska	86,514	80,701	5,225	16.6	15.4
Arizona	513,790	[2]483,000	25,713	20.0	18.8
Arkansas	447,700	418,510	24,078	18.6	17.4
California	4,118,022	4,045,317	193,846	21.2	20.9
Colorado	546,033	508,982	29,840	18.3	17.1
Connecticut	531,459	491,600	34,584	15.4	14.2
Delaware	99,403	89,880	5,626	17.7	16.0
District of Columbia	100,049	85,966	5,238	19.1	16.4
Florida	1,510,225	1,389,407	73,983	20.4	18.8
Georgia	1,068,737	983,900	56,514	18.9	17.4
Hawaii	165,068	148,696	7,185	23.0	20.7
Idaho	203,247	189,844	9,938	20.5	19.1
Illinois	1,983,463	1,736,624	108,064	18.4	16.1
Indiana	1,055,589	935,245	53,099	19.9	17.6
Iowa	533,857	497,400	32,745	16.3	15.2
Kansas	415,291	362,223	26,366	15.8	13.7
Kentucky	669,798	613,050	32,892	20.4	18.8
Louisiana	777,560	710,000	43,930	17.7	16.2
Maine	222,497	206,000	11,775	18.9	17.5
Maryland	750,665	662,462	40,883	18.4	16.2
Massachusetts	1,021,885	918,344	64,987	15.7	14.1
Michigan	1,863,419	1,712,739	84,377	22.1	20.3
Minnesota	754,318	705,069	44,142	17.1	16.0
Mississippi	477,059	449,000	25,933	18.4	17.3
Missouri	844,648	777,054	48,878	17.3	15.9
Montana	155,193	140,100	9,370	16.6	15.0
Nebraska	280,430	263,600	16,796	16.7	15.7
Nevada	149,481	140,244	7,129	21.0	19.7
New Hampshire	167,232	160,099	8,448	19.8	19.0
New Jersey	1,246,008	1,138,580	76,550	16.3	14.9
New Mexico	271,198	257,638	14,089	19.2	18.3
New York	2,871,004	2,527,340	155,320	18.5	16.3
North Carolina	1,129,376	1,054,277	56,222	20.1	18.8
North Dakota	116,885	111,759	7,375	15.8	15.2
Ohio	1,957,381	1,804,800	100,527	19.5	18.0
Oklahoma	577,807	545,000	33,901	17.0	16.1
Oregon	464,599	417,600	22,596	20.6	18.5
Pennsylvania	1,909,292	1,738,000	109,928	17.4	15.8
Rhode Island	148,320	136,522	9,192	16.1	14.9
South Carolina	619,223	580,648	32,214	19.2	18.0
South Dakota	128,507	120,000	7,964	16.1	15.1
Tennessee	853,569	806,696	41,162	20.7	19.6
Texas	2,900,073	2,612,860	159,531	18.2	16.4
Utah	343,618	322,388	13,894	25.1	23.5
Vermont	95,815	90,569	6,476	14.8	14.0
Virginia	1,010,371	932,152	57,027	17.7	16.3
Washington	757,639	704,332	35,514	21.3	19.8
West Virginia	383,503	363,951	21,668	17.7	16.8
Wisconsin	830,247	722,604	48,491	17.1	14.9
Wyoming	98,305	[2]91,800	6,361	15.5	14.4
Outlying areas	**808,464**	---	---	---	---
American Samoa	9,647	---	559	17.3	---
Guam	26,420	---	1,466	18.0	---
Northern Marianas	[3]4,407	---	---	---	---
Puerto Rico	712,880	---	31,964	22.3	---
Trust Territory of the Pacific	[4]29,909	---	---	---	---
Virgin Islands	25,201	---	1,567	16.1	---

[1]Data are for fall 1980.
[2]Data estimated by the National Center for Education Statistics.
[3]Data for fall 1979.
[4]Data for the 1979–80 school year.
SOURCE: U.S. Department of Education, National Center for Education Statistics, Common Core of Data, Part II and Part IV.

Private Elementary and Secondary Schools

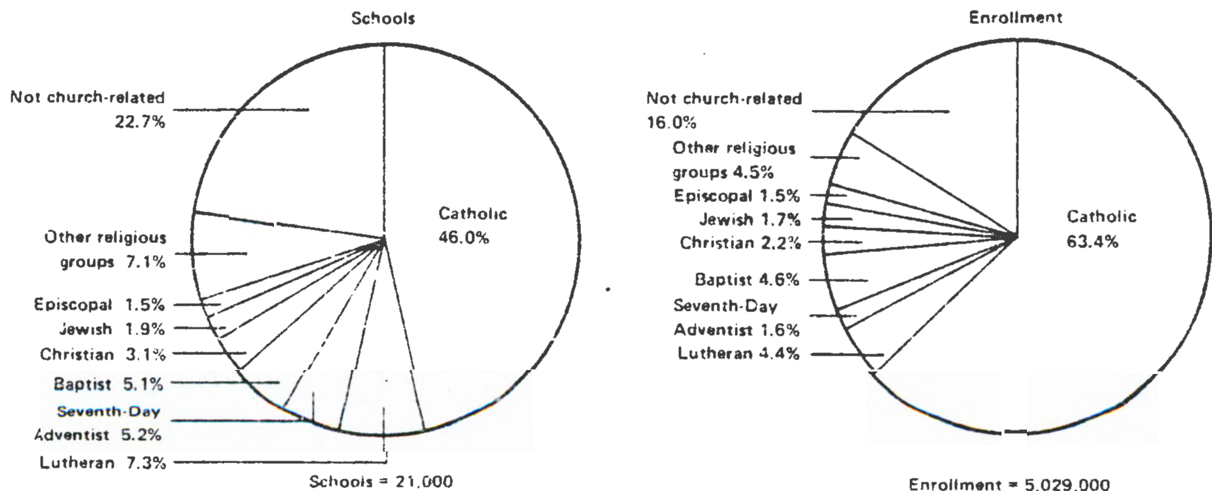
The National Center for Education Statistics (NCES) has recently conducted a survey of private elementary and secondary schools in the United States. The data from the new survey indicate that private education is a highly significant part of the American education system. In school year 1980–81 there were 21,000 private schools with an enrollment of 5,029,000 and employing a staff of 281,000 teachers. About one pupil out of every nine attended a private school in 1980–81.

As private schools are less easily identified, it is difficult to contrast their numbers and enrollments with public institutions. However, some generalizations are possible. Comparing data from 1980–81 with two prior NCES surveys, it appears that the number of private schools has remained stable or increased slightly since 1970–71. By contrast, there was a downward trend in the number of public schools. NCES surveys counted about 89,400 public schools in 1970–71, 88,000 in 1976–77, and 86,200 in 1980–81.

During the decade of the 1970's both the school-age population and school enrollments declined. However, private institutions retained more of their enrollment between 1970 and 1980 than did public schools. While the enrollments in public schools declined by 10.7 percent in the 1970's, the number of pupils in private institutions decreased by only 6.4 percent. Private schools accounted for 10.5 percent of all pupils in 1970 and 10.9 percent in 1980.

As the accompanying chart indicates, most of the private schools in 1980–81 were affiliated with some religious group. Only 23 percent of the schools were not church-related, and these tended to be relatively small schools that enrolled only 16 percent of the pupils. Among the affiliated schools, Catholic schools predominated in number and in size of enrollment, but there were also substantial numbers of pupils in Baptist, Lutheran, Christian, Jewish, Seventh-Day Adventist, and Episcopal schools.

Figure 5. – Private elementary and secondary schools and their enrollment, by affiliation of school: United States, 1980-81



NOTE –Because of rounding, percentages do not add to 100.0.

SOURCE: U.S. Department of Education, National Center for Education Statistics, preliminary data from the survey of private elementary and secondary schools, 1980-81.

Table 40.—Enrollment in private elementary and secondary schools[1], by affiliation of school and by State: Fall 1980

State	Total	Not church-related	Church-related: Total	Baptist	Catholic	Christian	Episcopal	Jewish	Lutheran	Seventh-Day Adventist	Other
1	2	3	4	5	6	7	8	9	10	11	12
United States	**5,028,885**	**802,374**	**4,226,491**	**233,334**	**3,190,687**	**112,906**	**76,973**	**85,231**	**219,963**	**82,609**	**224,788**
Alabama	62,904	24,888	38,016	7,016	14,720	3,206	1,058	62	1,319	988	9,647
Alaska	3,800	568	3,232	830	1,029	731	---	---	64	161	417
Arizona	40,544	10,989	29,555	1,248	18,536	2,885	551	316	2,072	1,267	2,680
Arkansas	18,803	5,195	13,608	1,340	7,603	153	642	---	626	798	2,446
California	520,440	104,464	415,976	28,198	267,071	30,177	6,984	6,624	24,458	18,811	33,653
Colorado	35,328	7,335	27,993	2,244	17,120	1,087	193	550	2,783	1,459	2,557
Connecticut	89,036	21,161	67,875	250	62,129	372	1,873	885	814	381	1,171
Delaware	23,374	4,352	19,022	1,700	14,725	554	230	114	---	39	1,660
District of Columbia	21,203	4,636	16,567	152	12,214	210	2,184	--	---	499	1,308
Florida	205,168	50,204	154,964	31,764	74,268	7,580	9,072	3,791	9,337	3,688	15,464
Georgia	84,187	45,298	38,889	12,435	13,297	4,390	1,206	655	433	2,417	4,056
Hawaii	37,147	13,166	23,981	2,570	15,059	1,283	1,731	---	1,337	939	1,062
Idaho	5,839	377	5,462	65	2,189	524	---	---	620	1,200	864
Illinois	360,614	26,578	334,036	4,933	288,130	2,951	212	2,587	26,935	2,154	6,134
Indiana	100,363	7,433	92,930	8,629	63,366	2,887	455	359	9,226	1,229	6,779
Iowa	55,701	1,342	54,359	1,071	45,256	207	---	18	2,640	301	4,866
Kansas	34,431	3,514	30,917	320	26,152	1,021	183	167	1,759	408	907
Kentucky	71,153	11,316	59,837	3,977	51,368	1,737	82	132	179	735	1,627
Louisiana	166,464	30,176	136,288	4,451	119,642	649	4,642	110	1,994	1,284	3,516
Maine	17,740	8,202	9,538	867	6,733	591	---	33	---	291	1,023
Maryland	107,638	19,073	88,565	4,755	68,645	1,429	1,897	3,082	2,979	2,937	2,841
Massachusetts	140,865	28,405	112,460	316	107,252	386	901	1,582	---	1,088	935
Michigan	215,086	16,609	198,477	13,300	131,363	1,994	491	871	25,705	5,587	19,166
Minnesota	90,557	5,541	85,016	2,811	64,909	1,845	939	249	10,909	662	2,692
Mississippi	50,116	30,336	19,780	3,105	11,342	626	2,008	---	---	474	2,025
Missouri	130,302	8,857	121,445	2,666	99,177	1,104	300	312	11,399	1,335	5,152
Montana	7,668	925	6,743	201	4,684	16	---	---	535	528	779
Nebraska	39,734	1,367	38,367	245	31,329	261	315	25	4,944	955	293
Nevada	6,641	944	5,697	274	4,347	248	---	63	330	215	220
New Hampshire	20,721	5,886	14,835	838	11,239	555	852	---	---	71	1,280
New Jersey	233,585	23,869	209,916	1,701	193,287	1,764	408	6,427	1,341	1,059	3,929
New Mexico	18,402	5,173	13,229	796	9,585	740	20	80	224	530	1,264
New York	583,997	71,046	512,951	4,303	429,241	2,336	5,296	48,130	10,916	3,883	8,846
North Carolina	58,592	24,605	33,987	16,452	9,323	2,270	1,071	101	797	1,840	2,133
North Dakota	10,659	1,571	9,088	---	8,230	---	---	---	538	255	65
Ohio	268,795	14,294	254,501	6,336	228,326	6,318	117	2,064	5,569	1,700	4,071
Oklahoma	16,335	2,218	14,117	237	7,381	1,206	2,494	39	657	1,077	1,026
Oregon	28,189	4,059	24,130	775	14,357	2,375	551	118	744	3,968	1,242
Pennsylvania	407,281	40,473	366,808	8,880	319,049	8,175	2,361	2,684	1,676	1,492	24,491
Rhode Island	29,875	2,643	27,232	70	25,015	17	380	284	110	---	1,356
South Carolina	49,619	24,354	25,265	9,448	7,555	2,947	2,899	153	508	194	1,781
South Dakota	10,898	1,790	9,108	72	6,882	471	59	---	510	146	968
Tennessee	72,639	20,854	51,785	13,636	15,912	2,256	2,132	356	1,543	3,442	12,508
Texas	152,463	17,994	134,469	11,102	83,652	3,058	13,562	1,475	8,480	2,799	10,341
Utah	5,555	1,862	3,693	---	3,055	---	---	---	371	148	119
Vermont	7,555	3,264	4,291	69	4,082	35	46	---	---	59	---
Virginia	76,084	26,807	49,277	10,961	23,060	2,053	6,039	260	2,203	1,177	3,524
Washington	55,950	8,901	47,049	3,047	27,356	2,958	582	228	2,401	4,355	6,122
West Virginia	12,622	840	11,782	1,865	8,466	876	---	---	---	343	232
Wisconsin	163,167	6,060	157,107	2,485	110,592	1,192	155	245	37,769	1,099	3,570
Wyoming	3,036	760	2,276	538	1,387	---	---	---	209	142	---

[1]Includes enrollment in special education, vocational/technical, and alternative schools.

SOURCE: U.S. Department of Education, National Center for Education Statistics, preliminary data from the survey of private elementary and secondary schools, 1980–81.

Table 41.—Summary statistics on private schools, by type of school: United States, 1976–77 to 1980–81

Item	Total	Type of school			
		Elementary	Secondary	Combined [1]	Other [2]
1	2	3	4	5	6
Schools:					
1976–77	20,081	12,965	2,484	3,420	1,212
1977–78	20,071	12,934	2,462	3,465	1,210
1978–79	19,663	12,749	2,418	3,348	1,148
1980–81	21,000	13,363	2,199	3,408	2,030
Enrollment:					
1976–77	5,166,858	3,080,702	1,080,385	905,081	100,690
1977–78	5,139,540	3,025,494	1,064,408	951,900	97,738
1978–79	5,084,297	2,988,834	1,068,579	936,554	90,330
1980–81	5,028,865	2,925,313	999,848	933,357	170,347
Teachers:					
1976–77	268,908	133,307	62,121	61,244	12,236
1977–78	278,150	134,583	62,885	66,661	14,021
1978–79	272,664	133,031	62,604	64,448	12,581
1980–81	281,150	133,826	61,786	64,888	20,650

[1] Schools that provide both elementary and secondary instruction.

[2] Includes special education, vocational/technical, and alternative schools.

NOTE.—Data for combined schools in 1978–79 have been revised slightly since originally published.

SOURCE: U.S. Department of Education, National Center for Education Statistics, *Private Schools in American Education;* and *Selected Statistics in Private Elementary and Secondary Schools, Fall 1980* (early release dated December 4, 1981).

Table 42.—Summary statistics on Catholic elementary and secondary schools: United States, selected years, 1919–20 to 1980–81

School year	Number of schools		Enrollment		Instructional staff [1]	
	Elementary	Secondary	Elementary	Secondary	Elementary	Secondary
1	2	3	4	5	6	7
1919–20	6,551	1,552	1,795,673	129,848	41,592	7,924
1929–30	7,923	2,123	2,222,598	241,869	58,245	14,307
1939–40	7,944	2,105	2,035,182	361,123	60,081	20,976
1949–50	8,589	2,189	2,560,815	505,572	66,525	27,770
Fall 1960	10,501	2,392	4,373,422	880,369	108,169	43,733
Fall 1962	10,646	2,502	4,485,221	1,009,126	112,199	46,880
Fall 1964	10,832	2,417	4,533,771	1,066,748	117,854	53,344
1967–68	10,350	2,277	4,105,805	1,092,521	[2] 129,800	[2] 58,000
1968–69	10,113	2,192	3,859,709	1,080,891	[2] 131,200	[2] 59,400
1969–70	9,695	2,076	3,607,168	1,050,930	[2] 133,200	[2] 62,200
1970–71	9,370	1,980	3,355,478	1,008,088	112,750	53,458
1971–72	8,982	1,859	3,075,785	959,000	106,686	52,397
1972–73	8,761	1,743	2,871,000	919,000	105,384	50,580
1973–74	8,569	1,728	2,714,000	907,000	102,785	51,098
1974–75	8,437	1,690	2,602,000	902,000	100,011	50,168
1975–76	8,340	1,653	2,525,000	890,000	99,319	49,957
1976–77	8,281	1,623	2,483,000	882,000	100,016	50,594
1977–78	8,204	1,593	2,421,000	868,000	99,739	50,909
1978–79	8,159	1,564	2,365,000	853,000	98,539	49,409
1979–80	8,100	1,540	2,293,000	846,000	97,724	49,570
1980–81	8,043	1,516	2,269,000	837,000	96,739	49,038

[1] Beginning in 1970–71, includes full-time teaching staff only.

[2] Includes estimates for the nonreporting schools.

SOURCES: National Catholic Educational Association, *A Statistical Report on Catholic Elementary and Secondary Schools for the Years 1967–68 to 1969–70*, as compiled from the *Official Catholic Directory.* (Copyright © 1970 by the National Catholic Educational Association. All rights reserved); *Catholic Schools in America* (1978 edition copyright © 1978 by the Franklin Press. All rights reserved); and *A Statistical Report on U.S. Catholic Schools, 1980–81*.

Table 49.—Estimated average annual salary of classroom teachers in public elementary and secondary schools: United States, 1959–60 to 1980–81

School year	Unadjusted dollars			Adjusted dollars (1980–81 purchasing power)[1]		
	All teachers	Elementary teachers	Secondary teachers	All teachers	Elementary teachers	Secondary teachers
1	2	3	4	5	6	7
1959–60	$4,995	$4,815	$5,276	$14,723	$14,193	$15,552
1961–62	5,515	5,340	5,775	15,885	15,381	16,634
1963–64	5,995	5,805	6,266	16,825	16,292	17,586
1965–66	6,485	6,279	6,761	17,589	17,030	18,337
1967–68	7,423	7,208	7,692	18,897	18,350	19,582
1969–70	8,635	8,412	8,891	19,801	19,290	20,388
1970–71	9,269	9,021	9,568	20,212	19,671	20,864
1971–72	9,705	9,424	10,031	20,426	19,835	21,112
1972–73	10,176	9,893	10,507	20,587	20,015	21,257
1973–74	10,778	10,507	11,077	20,014	19,510	20,569
1974–75	11,690	11,334	12,000	19,547	18,952	20,065
1975–76	12,591	12,282	12,947	19,658	19,176	20,214
1976–77	13,355	12,988	13,776	19,709	19,168	20,331
1977–78	14,213	13,864	14,610	19,654	19,171	20,203
1978–79	15,043	14,692	15,455	19,017	18,574	19,538
1979–80	15,966	15,576	16,433	17,812	17,377	18,333
1980–81	17,602	17,204	18,082	17,602	17,204	18,082

[1] Based on the Consumer Price Index, prepared by the Bureau of Labor Statistics, U.S. Department of Labor.

SOURCE: National Education Association, annual *Estimates of School Statistics*. (Latest edition 1981–82 copyright © 1982 by the National Education Association. All rights reserved.)

Table 50.—Average annual salary of instructional staff in public elementary and secondary schools, and average annual earnings of full-time employees in all industries, United States, 1929-30 to 1980-81

School year	Unadjusted dollars		Adjusted dollars (1980-81 purchasing power)[1]	
	Salary per member of instructional staff	Earnings per full-time employee working for wages or salary[2]	Salary per member of instructional staff	Earnings per full-time employee working for wages or salary[2]
1	2	3	4	5
1929-30	$1,420	$1,386	$7,185	$7,013
1931-32	1,417	1,198	8,513	7,198
1933-34	1,227	1,070	8,024	6,997
1935-36	1,283	1,160	8,091	7,315
1937-38	1,374	1,244	8,316	7,529
1939-40	1,441	1,282	8,930	7,944
1941-42	1,507	1,576	8,378	8,762
1943-44	1,728	2,030	8,597	10,099
1945-46	1,995	2,272	9,478	10,794
1947-48	2,639	2,692	9,805	10,002
1949-50	3,010	2,930	11,008	10,715
1951-52	3,450	3,322	11,365	10,943
1953-54	3,825	3,628	12,313	11,679
1955-56	4,156	3,924	13,389	12,642
1957-58	4,702	4,276	14,247	12,956
1959-60	5,174	4,632	15,251	13,653
1961-62	5,700	4,928	16,418	14,194
1963-64	6,240	5,373	17,513	15,079
1965-66	6,935	5,838	18,809	15,834
1967-68	7,630	6,444	19,424	16,405
1969-70	8,840	7,334	20,271	16,818
1971-72	10,100	8,334	21,257	17,541
1973-74	11,185	9,647	20,769	17,914
1975-76	[3]13,120	11,218	[3]20,484	17,515
1977-78	[3]14,709	12,840	[3]20,340	17,755
1979-80[3]	16,780	14,870	18,720	16,589
1980-81[3]	18,409	16,050	18,409	16,050

[1] Based on the Consumer Price Index, prepared by the Bureau of Labor Statistics, U.S. Department of Labor.

[2] Calendar-year data from the U.S. Department of Commerce have been converted to a school-year basis by averaging the two appropriate calendar years in each case. Estimates for 1980 and 1981 were made by the National Center for Education Statistics.

[3] Estimated.

SOURCES: (I) U.S. Department of Education, National Center for Education Statistics, *Statistics of State School Systems.* (2) National Education Association, *Estimates of School Statistics 1981-82.* (Copyright © 1982 by the National Education Association. All rights reserved.) (3) U.S. Department of Commerce, *Survey of Current Business*, July issues; and *National Income and Product Accounts, 1976-79*, July 1981.

APPENDIX B

UNITED STATES CATHOLIC ELEMENTARY AND SECONDARY SCHOOLS 1982-1983

A STATISTICAL REPORT
ON SCHOOLS, ENROLLMENT, & STAFFING

Special Focus on
Minority and Non-Catholic Enrollment

Frank H. Bredeweg, C.S.B.
DATA BANK CONSULTANT

NATIONAL CATHOLIC
EDUCATIONAL ASSOCIATION

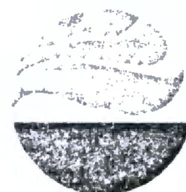


Table No. 4
Private Education--by Religious Affiliation
1965-66 and 1978-79

	1965-66		1978-79	
	Schools	Pupils	Schools	Pupils
Roman Catholic	13,484	5,481,300	9,849	3,269,800
Lutheran	1,457	188,500	1,485	217,400
7th Day Adventist	1,149	62,600	1,106	148,200
Baptist	145	25,200	858	204,100
Jewish	272	52,600	406	101,800
Episcopal	320	48,600	314	76,500
Methodist	46	5,600	60	11,200
Presbyterian	36	4,800	60	12,800
Friends	56	10,600	50	14,600
Other Church-Related	612	83,700	1,531	281,200
Total Church-Related	17,577	5,963,500	15,719	4,337,600
Not Church-Related	2,369	341,300	3,947	746,700
Total Private	19,946	6,304,800	19,666	5,084,300

Source: Statistics of Nonpublic Elementary and Secondary Schools, 1965-66, National Center for Education Statistics, p. 7

The Condition of Education, 1981 Edition, NCES, p. 66

Catholic school enrollments today constitute a far smaller sector of private elementary and secondary education than they did at their highpoint in the mid-1960's.

In 1965-66, Catholic school enrollments constituted about 87% of the private school sector. By 1978-79, this figure had fallen to 64%. While Catholic schools were undergoing re-evaluation and decline, other private schools were gradually increasing their enrollments. Catholic schools lost over two million students in that decade, but other church-related schools, as well as those not church-related, serve larger enrollments today than they did in the mid-1960's. Since Catholic schools are no longer declining as they were, the nonpublic sector should be more statistically significant in the future.

A comment is in order regarding the "other church-related" schools, and those which are "not church-related." Since these are schools which sometimes do not report to state agencies nor belong to national associations, it is impossible to know exactly how many exist. Great effort has been made to identify and include these schools statistically, but the figures given here should be viewed as the best estimate available. Federal efforts to collect data on private schools have been sporadic, but the National Center for Education Statistics recently gathered three consecutive years of private school data (1976-77 through 1978-79).

Ethnic Minorities

The role and contribution of Catholic schools in ethnic minority issues has been and is extremely important. The ability of Catholic schools to help has been complicated by the explosion of many factors, e.g., the startling declines in the number of religious community members, inflation, the increase in lay teacher salaries, and the movement of so many people to the suburbs in the 1960s. Through it all, however, Catholic schools remain integrally involved with minority education and urban problems in the United States.

It should be remembered that Catholic schools naturally tend to service those who support the schools. Also, Christian doctrine culturally attracts one ethnic group more than another. For example, the Black, Indian, and Oriental races have not historically embraced the Catholic religion, while the Spanish culture has a tradition of many centuries. It is also important to keep in mind that most Catholic schools were built in major cities and that the large dioceses have made an outstanding effort to keep urban schools open. The rural schools, not the urban, have closed at the faster rate.

Comparison of Enrollment Data

As Tables 14 and 15 show, the percentage of ethnic minority students in elementary and secondary schools combined has increased from 10.8% in 1970-71 to 18.4% in 1980-81, and to 20.4% in 1982-83. Primarily, this reflects increased Hispanic and black enrollment. Hispanic student enrollment has increased from 177,900 in 1970-71 to 216,800 in 1982-83, and black enrollment from 172,000 to 208,800. Asian American enrollment has increased from 18,300 in 1970-71 to 51,300 in 1982-83. Only American Indian enrollment has declined. These enrollments are estimates based upon 96% of total enrollment, the strongest reporting to NCEA by dioceses in many years.

American Enterprise Institute for Public Policy Research

In 1982, the American Enterprise Institute in Washington published Meeting Human Needs: Toward A New Public Policy. In the section on education, "Private Meets Public: An Examination of Contemporary Education," the authors state:

> The growth of private schooling in the face of public school decline is a challenge of such consequence that policy analysts, policy makers, and public school educators cannot afford to ignore it.
>
> . . . analysis of the motives for attending private schools is necessarily speculative but no less useful for that. Among the motives are such obvious reasons as the desire for physical safety and a disciplined environment. Of great importance to many parents is a school that imparts religious and moral values.
>
> There is a final word on motivation: is it linked to antisocial desires for socioeconomic and racial isolation? Here the evidence is mixed: there are, of course, ignoble motives at work in any social institution, but no evidence supports the idea that established private schools are havens for whites escaping their social responsibilities. The evidence suggests that many private schools have met their social obligations more successfully than their public counterparts.

There is every reason to believe that Catholic schools are positively and constructively involved in the discernment of current values in American education.

Table No. 14
Catholic School Enrollment--by Ethnic Background
1970-71, 1980-81, 1982-83

Elementary	1970-71	1980-81	1982-83
Black Americans	172,000	200,300	208,800
Hispanic Americans	177,900	199,300	216,800
Asian Americans	18,300	42,000	51,300
American Indians	18,000	7,300	7,600
All Others	2,969,300	1,820,400	1,740,400
Total	3,355,500	2,269,300	2,224,900
Secondary			
Black Americans	37,500	52,600	57,400
Hispanic Americans	38,600	56,700	57,900
Asian Americans	5,200	10,100	12,300
American Indians	2,400	2,400	3,100
All Others	924,400	715,200	670,600
Total	1,008,100	837,000	801,300
All Schools			
Black Americans	209,500	252,900	266,200
Hispanic Americans	216,500	256,000	274,700
Asian Americans	23,500	52,100	63,600
American Indians	20,400	9,700	10,700
All Others	3,893,700	2,535,600	2,411,000
Total	4,363,600	3,106,300	3,026,200

Table No. 15
Catholic School Ethnic Enrollment--by Percentages
1970-71, 1980-81, 1982-83

Elementary	1970-71	1980-81	1982-83
Black Americans	5.1%	8.8%	9.4%
Hispanic Americans	5.3	8.8	9.7
Asian Americans	0.5	1.9	2.3
American Indians	0.5	0.3	0.4
All Others	88.6	80.2	78.2
Total	100.0%	100.0%	100.0%
Secondary			
Black Americans	3.7%	6.3%	7.2%
Hispanic Americans	3.8	6.8	7.2
Asian Americans	0.5	1.2	1.5
American Indians	0.2	0.3	0.4
All Others	91.8	85.4	83.7
Total	100.0%	100.0%	100.0%
All Schools			
Black Americans	4.8%	8.1%	8.8%
Hispanic Americans	5.0	8.3	9.1
Asian Americans	0.5	1.7	2.1
American Indians	0.5	0.3	0.4
All Others	89.2	81.6	79.6
Total	100.0%	100.0%	100.0%

Table No. 16
Catholic/Non-Catholic Enrollment--by Percentages
1969-70 and 1982-83

	1969-70		1982-83	
	Catholic	Non-Catholic	Catholic	Non-Catholic
Elementary				
New England	98.5%	1.5%	93.1%	6.9%
Mideast	98.0	2.0	90.0	10.0
Great Lakes	97.2	2.8	89.7	10.3
Plains	98.2	1.8	94.5	5.5
Southeast	92.0	8.0	83.5	16.5
West/Far West	97.0	3.0	88.9	11.1
United States	97.2	2.8	89.6	10.4
Secondary				
New England	98.5%	1.5%	92.4%	7.6%
Mideast	98.5	1.5	92.2	7.8
Great Lakes	97.8	2.2	88.2	11.8
Plains	98.6	1.4	94.9	5.1
Southeast	92.9	7.1	83.5	16.5
West/Far West	95.1	4.9	83.1	16.9
United States	97.4	2.6	88.8	11.2
All Schools				
New England	98.5%	1.5%	92.9%	7.1%
Mideast	98.1	1.9	90.6	9.4
Great Lakes	97.3	2.7	89.3	10.7
Plains	98.3	1.7	94.6	5.4
Southeast	92.2	7.8	83.5	16.5
West/Far West	96.6	3.4	87.4	12.6
United States	97.3	2.7	89.4	10.6

Table No. 17
Enrollment by Grade Levels--as Percentage of Total
1967-68, 1973-74, 1982-83

Grade Level	1967-68	1973-74	1982-83
Grade 1	12.6%	11.2%	12.7%
2	13.0	11.5	12.5
3	13.0	12.1	12.2
4	13.1	12.8	12.0
5	13.0	13.1	12.3
6	12.5	13.4	13.0
7	11.6	13.1	13.0
8	11.2	12.8	12.3
Elementary	100.0%	100.0%	100.0%
Grade 9	27.6%	27.7%	26.9%
10	26.1	25.6	25.4
11	23.9	24.1	24.1
12	22.4	22.6	23.6
Secondary	100.0%	100.0%	100.0%