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Use of Government Funding and Taxing Power to Regulate Schools

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The Use of Government Funding and Taxing Power to Regulate Religious Schools

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I. Introduction

The past two decades in America have witnessed a resurgence of interest in religious-based schooling. Manifestations of this trend are evident in the increased number of primary and secondary students enrolled in religious schools and the rapidity with which new church-affiliated schools are being opened. This growth is even more remarkable considering that the number of school-age children in the United States has declined since 1971, a trend that is expected to continue through 1985.1 Thus, in a period when public school enrollments were declining, private school enrollments increased and are predicted to continue to rise at least through 1989—as far into the future as the National Center for Education Statistics has projected.2 Compilations by the U.S. Department of Education for fall semester 1980 showed that 10.8 percent of school-age children attended nongovernment schools, of which 84 percent (9.1 percent overall) are religious schools.3 Conservative forecasts are that private school enrollment will reach 12.5 percent of the school-age population by 1988, although other estimates range as high as 20 percent.4 The expected

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1 Doyle, A Din of Inequity: Private Schools Reconsidered, 18 Am. Educ. 11 (1982).


increase is due almost entirely to higher enrollment in conservative Protestant schools.5

Concurrent with this increased parental interest in religious-based education has been a shift toward privatism in politics;6 growth in libertarian thinking;7 a widening perception that the public schools no longer operate within the context of a nondenominational "Christian consensus";8 and a budding conviction that no overarching world view or civic faith presently exists in American society that the common schools can confidently draw upon for the values to be fostered in their students.9

One of the many consequences of these sociopolitical undercurrents has

5 It is difficult to obtain accurate enrollment figures on the Christian day school movement of conservative Protestant churches. Some of the schools are so vigorous in their opposition to government involvement that they refuse to participate even in enrollment reporting requirements of state agencies. Using the best available data, James C. Carper estimates that these schools number between 9,000 and 11,000 with a student population of one million. The most dramatic figures on the rapid growth of Christian day schools can be seen in figures provided by the two principal evangelical school associations.

The Western Association of Christian Schools, which in 1978 merged with two smaller organizations—the National Christian School Educational Association and Ohio Association of Christian Schools—to form the Association of Christian Schools International, claimed membership of 102 schools with an enrollment of 14,659 in 1967. By 1973 the figures were 308 and 39,360 respectively, and in 1983 approximately 1,900 and 270,000. The American Association of Christian Schools, a rival organization of a more separatist nature, was founded in 1972 with eighty schools enrolling 16,000 students. In 1983 the association claimed more than 1,100 schools with a student population in excess of 160,000.

Carper, supra note 4, at 136-139.

Selected enrollment trends for 1965-66 compared with periods 1975-76 and 1980-85 appear in the table Appendix A. As the table indicates, Roman Catholic enrollment continues to fall while all others increased during the twenty year period. The most dramatic increases occurred in Protestant schools. These figures are based on a total private school enrollment of 4,961,755 in the fifty states and the District of Columbia. In the same reporting period the public school enrollment was 45,945,848. U.S. Department of Education, National Center for Educational Statistics, THE CONDITION OF EDUCATION 15-16 (1983 edition).


8 Carper, supra note 4, at 139.

9 See Michaelsen, Is the Public School Religious or Secular?, THE RELIGION OF THE REPUBLIC 22 (1971) (J. Wilson, ed.). See also R. MCCARTHY, J. SKILLEN & W. HARPER, DISESTABLISHMENT A SECOND TIME: GENUINE PLURALISM FOR AMERICAN SCHOOLS 4-14, 48-51, 92 (1982). The basic argument of these authors begins with the truism that responsible education is inherently value-laden. All agree that government has a responsibility to educate its citizens. However, government, at least liberal government, should not, through the control of schools, impose on students an ideology on which there is no broad public consensus. If the inculcation of values lies initially and principally with parents, then parents must be able to choose free of economic coercion the type of educational philosophy desired for their children. This point and a belief (hotly contested!) that civic consensus is narrow in America, leads one to accept some form of government assistance to parents (or, at least low-income parents who cannot presently afford private schools), including those who choose religious schools. Id. at 91-106, 124-136.
been an insistence by private school parents on the right to educate their children free of "discriminatory" funding arrangements, meaning the freedom to choose a nongovernment school without having to pay both taxes and tuition. This climate of thought coupled with enrollment shifts to private schools has resulted in an increasing number of spokespersons stepping forward to advocate the use of government funds for private education. Moreover, because the funding debate may no longer be cut short by characterizing it as simply a "Catholic issue," the movement has broader "political clout" at election time.

Arguments in favor of such funding have been calculated to circumvent the separation of church and state issue. In the name of equity, distributive justice, parental choice, educational freedom, healthy competition, consumerism, and the richness of a diverse or pluralistic educational system, proponents have called for legislation that would fund "free choice," "education" or "students," as distinct from "church-related" or "parochial" institutions. In such arrangements, funds would not go directly to nongovernment schools, but to parents via some form of tax benefit or educational voucher. A voucher plan attracts additional proponents as a free market approach to school reform. Advocates of aid for private education have had their aspirations raised to new heights by the Reagan administration's tuition tax credit plan, and more recently a proposed voucher system.

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11 Ross, Tuition Aid: From Tax Credits to Vouchers? 80 Liberty 27 (July/August 1985).

12 In President Reagan's first term several bills pertaining to tuition tax credits were introduced. The major ones were H.R. 6701 and S. 2673, 98th Cong., 1st Sess. (1983). In 1983 Reagan recommended a tuition tax credit plan under his Educational Opportunity and Equity Act. Basically, the plan provided for an amendment to the Internal Revenue Code to allow a person to claim credit for fifty percent of the tuition for full-time elementary or secondary school enrollment of a taxpayer's dependent attending a private school. The credit for each child was limited to $100 in 1983, $200 in 1984, and $300 in each year thereafter. S. 2673.

Reagan's proposal, in a form slightly amended by the Senate Finance Committee, was brought up on the floor November 16, 1983. The bill came up late in the session on a parliamentary maneuver that sought to attach it to a measure already passed by the House. The motion to do so was tabled by a vote of 59 to 38. See Should Congress Enact Legislation to Provide Tax Credits for Nonpublic School Tuition? Pro & Con, 63 Cong. Dig. 3 (1984).

Although S. 2673 failed and H.R. 6701 was not acted on, Secretary of Education, William J. Bennett, and Reagan have said that a tuition tax credit bill is forthcoming this session. See Educating Souls: Bennett Promotes Parochial Schools, 38 Church & State 125 (1985); Editorials, 38 Church & State 15 (1985).

Opponents of nongovernment school funding argue against it on several grounds. It is an unwise use of scarce tax funds claim critics. It militates against the public school—the great common denominator and cohesive factor in American society; it violates the establishment clause of the first amendment by advancing religion. Moreover, opponents say, public aid to non-government schools serves only a small minority of the population; it results in an educational system based on social class—a public one for the poor, handicapped, and disadvantaged, and a private elitist one for the rest; and, finally, it will destroy the uniqueness and diversity of private schools through the regulation that inevitably accompanies government funding.

The latter contention is the immediate focus here. Putting aside questions as to the sincerity of their concern, are opponents of funding for nongovernment schools correct when they postulate that public aid will necessarily result in regulation that will in time destroy the diversity and philosophical character of private education, especially the religious component of church-related schools? Although the precise contours of the law are still unclear, the courts have construed the first amendment as prohibiting states, in the exercise of their general police power over education, from unduly encroaching on the operation of religious schools. Thus, although a state may regulate health, fire, and safety matters at private schools and ensure that these schools provide their

with a voucher redeemable at public and private schools, including religious schools. The voucher will be equal to the approximate amount a school spends to put a child through the Chapter I program. See ch. 1 of the Education Consolidation and Improvement Act of 1981, 20 U.S.C. § 3801 et seq. (Supp. 1 1985). Participating schools will be required to not discriminate on the basis of race, color or national origin. However, other civil rights legislation is circumvented by means of the bill's declaration that a private school's redemption of vouchers does not constitute receipt of "Federal financial assistance." See infra text accompanying notes 87-99.

14 U.S. Const. amend. 1. The establishment and free exercise clauses together read: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ..." Id.


students a minimal education so that pupils may come to function as literate and productive citizens,\textsuperscript{17} the state cannot dictate a curriculum that renders the nongovernment schools almost indistinguishable from the public schools.\textsuperscript{18} The question as yet unanswered is whether the acceptance by religious schools of state or federal funds lowers this first amendment barrier, thereby enabling government to assert even greater control over these schools by virtue of the proverbial "strings" attached to the aid.\textsuperscript{19}

Many who answer this question in the affirmative reflect a deep-seated pragmatism that says whenever government pays for an activity, it cond-

\begin{itemize}
\item ordinance upheld) with City of Sumner v. First Baptist Church, 97 Wash.2d 1, 639 P.2d 1358 (1982) (ordinance struck down where church-sponsored school could not afford to comply and would have to close).
\item Compare Board of Educ. v. Allen, 392 U.S. 236, 245-46 (1968) ("[A] substantial body of case law has confirmed the power of the States to insist that attendance at private schools, if it is to satisfy state compulsory-attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction."); Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925) (states have power to reasonably "regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare;" but due process violated when state orders all-private schools closed); and Meyer v. Nebraska, 262 U.S. 390, 402 (1923) (government has strong interest in competency of students in English language, but means chosen to accomplish that task violated due process) with Wisconsin v. Yoder, 406 U.S. 205, 234 (1972) (Old Order Amish excused from compulsory education law by free exercise clause where public education would endanger separatistic way of life).
\end{itemize}
currently acquires the authority to regulate it. Dispositive of the matter for many is the quip, "If you don't want the regulation, then don't take the money." Indeed, all would agree that it would be irresponsible for government to fund an activity and not exercise the requisite control to ensure that the money is spent for the designated public purpose. As one commentator has said, "It [government] must also take some steps to ensure that the aid is used for the purposes intended. This means in a word, 'regulation,' the inevitable concomitant of public financial support." However, the sort of administrative oversight of concern here goes beyond the obligatory financial audit. Senator Mattingly, in the debate over the Reagan administration's proposed tuition tax credit bill, stated the issue more poignantly:

There is one aspect of the tuition tax debate that puzzles me. I cannot understand why private schools would want to take on the burden of the Federal regulatory process. And Federal regulation of private schools is inevitable if tuition tax credits become law.

Given the growing number of proponents for aid to private schools and the possibility that such funding may become an inroad to eventual government control of religious schools, two other matters should be drawn into the debate: current events in Spain, France, and Malta concerning the regulation of religious schools, and recent developments in the case law of the United States Supreme Court where the spending and taxing power of Congress clashes with first amendment freedoms.

II. European Patterns

Prime Minister Felipe Gonzalez of the Socialist Party in Spain was elected to power in 1982. As part of his program, often dubbed the "Spanish New Deal," Gonzalez proposed the Law of the Right to Educate, by which he sought to reduce the influence of the Roman Catholic Church on the educational system. Nongovernment schools in Spain are predominantly Roman Catholic and educate approximately three million of the eight million students (37.5 percent). According to proponents of the legislation, the Catholic school system was pervaded by "discrimination, obscurantism, and indoctrination," especially during withdrawing school bus transportation for students, withholding textbooks, speech and hearing diagnostic services, physician, nursing, dental and optometric services, and denying tax exempt status to the school. 766 F.2d at 955.

19 Finn, Public Support for Private Education, Part I, 18 AM. EDUC. 4, 5-6 (1982).
21 UNITED PRESS INTERNATIONAL, Dec. 3, 4, 1983 (available on the computerized research service DIALOG) [hereinafter cited as UPI].
the rule of Dictator Francisco Franco that ended with his death in 1975.\textsuperscript{23} The private school system was supported by state subsidies and enjoyed considerable educational autonomy.\textsuperscript{24} To rectify what the socialists perceived as a problem and in turn to ensure free basic education for all children,\textsuperscript{25} the government proposed to "standardize" the schools. That is, Gonzalez sought to reduce and eventually eliminate the differences between Spain's public and private schools.\textsuperscript{26}

Many in the Spanish population, ninety-five percent of which are members of the Roman Catholic Church,\textsuperscript{27} protested with demonstrations and petitions maintaining that the proposal would create a monolithic educational system, infringe on freedom of religion, violate the Constitution's guarantee of freedom of education, and give the state too much control over teaching.\textsuperscript{28} Nevertheless, in March, 1984, the socialist majority in the Congress of Deputies passed the law without difficulty.\textsuperscript{29} The Law of the Right to Educate requires all nongovernment schools receiving state funds:

1. to have their curricula approved by the government;
2. to be governed by a council of teachers, parents, and students with the authority to select the principal of the school;
3. to make attendance at religious classes optional with each student; and
4. to make the schools tuition-free within three years.\textsuperscript{30}

The new legislation took effect as schools opened in the fall of 1984. Opposition groups held mass demonstrations, the largest since the socialists came to power. Despite stiff resistance by parents, opposition parties, and the Catholic Church, the Minister of Education announced that the government would not relent from its effort to put in place free "democratic education."\textsuperscript{31} Both the Catholic Church and an opposition party filed legal appeals with Spain's highest court, the Constitutional Tribunal, that sought to overturn the legislation as violative of religious freedom.\textsuperscript{32} In June 1985 the court sustained the constitutionality of the

\textsuperscript{23} Reuters North European Service, July 25, 1983 (available on the computerized research service NEXIS) [hereinafter cited as Reuters].
\textsuperscript{24} UPI, Sept. 26, 1983; Reuters, Mar. 18, 1984.
\textsuperscript{25} Reuters, July 25, 1983.
\textsuperscript{27} UPI, Sept. 26, 1983.
\textsuperscript{28} UPI, Feb. 25 and Mar. 15, 16, 1984.
\textsuperscript{29} UPI, Mar. 15, 16, 1984; N.Y. Times, Mar. 18, at L7, col. 5.
\textsuperscript{31} Reuters, Nov. 18, 19, 1984.
\textsuperscript{32} Reuters, Oct. 11 and Nov. 18, 1984.
statute.33

Similar legislation was under way in France, but the effort is presently stalled due to public and political party opposition. When the Socialist Party came to power in 1981 under President Francois Mitterand, it sought to implement an election promise to create a "single, unified, lay education system"34—a means toward reducing the influence of Roman Catholic schools that socialists regard as bastions of economic and social conservatism.35 Ninety-three percent of France's nongovernment schools are Catholic.36 Legislation was immediately proposed to repeal the existing laws whereby nongovernment schools negotiated their subsidies with the state and yet enjoyed minimal regulation.37 The proposed legislation embodies four major points:

1. it sets limits on the number of teaching positions in private schools;
2. it requires that private school teachers become civil servants;38
3. it brings the budgets of private schools under regional government control; and
4. it makes private school administration subject to governmental review.39

Noncompliance would result in loss of government funds.

Although only 15 percent (in contrast to 37.5 percent in Spain) of France's children are educated in nongovernment schools,40 a furious round of protest was raised by clerics and opposition political parties. Central to the resistance is a belief that such a move is the first step toward integration of the public and private educational systems and as such violates fundamental rights—primarily freedom of education for children, freedom of choice for parents, and freedom of the Catholic Church to teach children and to manage its schools.41

Opponents of the proposed legislation organized mass demonstrations, the size of which had not been seen in France since the student uprisings

33 Reuters, June 27, 1985. The Constitutional Tribunal did overturn three articles of the legislation that required those operating a private school to submit a definition of the school's character for the approval of government officials. Id.
35 UPI, Feb. 25, 1984; N.Y. Times, Mar. 5, 1984, at A3, col. 4. Teachers in the state schools are staunch supporters of the socialist program. Concerning protesters against the proposed legislation, one government teacher is quoted as saying, "These are mainly well-off people proclaiming the right to freedom, but who are trying to cushion their children by sending them to schools where there is less social tension, with fewer immigrants and less political activity." UPI, Feb. 25, 1984.
40 UPI, Feb. 25 and July 18, 1984.
41 UPI, Jan. 28 (family rights) and Feb. 25, 1984; Reuters, Mar. 4, 1984; N.Y. Times, Mar. 5, 1984, at A3, col. 4 (right to teach).
in the late 1960's and the Allied liberation in 1944.\(^4\) The demonstrations coupled with maneuvering by the political opposition, division within the Socialist Party,\(^4\) and erosion of popular support for the socialists, resulted in Mitterand's withdrawal of the controversial legislation in July 1984.\(^4\) Nonetheless, the issue remained alive. President Mitterand announced that he would submit the legislation to popular referendum if voters first approved an amendment to the Constitution that would permit a plebiscite on issues affecting individual liberties.\(^5\) In late summer 1984, the combined forces of the French communists and conservative parties tied up the constitutional amendment in the Senate where the socialists do not hold a majority.\(^6\)

The situation in the tiny Mediterranean island-nation of Malta has many similarities to what has transpired in Spain and France; however, the situation is more advanced and the church-state clash more heated. Once again a socialist government, in this instance the Labor Party that assumed power in 1971, has sought to reduce the influence of the Roman Catholic Church.\(^4\) Despite the population of 400,000 being ninety percent Roman Catholic,\(^4\) Prime Minister Dom Mintoff has attacked the Church as "anachronistic, money grabbing, and over mighty."\(^5\) Mintoff set out to loosen the Catholic hold on nongovernment education by altering how the Church funds its elementary and secondary schools. In 1977 the government ceased direct subsidies to nongovernment schools,\(^5\) and in 1980 Mintoff discontinued government grants to private school students.\(^5\)

For the next two years religious schools continued to operate by charging tuition. Mintoff responded by unfurling the populist appeal that "all education must be free."\(^5\) So long as the religious schools charged tuition, they were viewed as "a source of social injustice since they cater only

\(^4\) UPI, July 12, 17, 1984.
\(^6\) UPI, Aug. 7, 8, 1984 (the Communist Party opposed the proposal because in their view the socialist had not gone far enough in creating a single, unified educational system). For a brief history of the situation in France by one sympathetic to the position of the Socialist Party, see Fowler, The "French Connection": Public funding of private schools has been tried in France—and failed, 3 NEA TODAY 9 (May 1985).
\(^7\) Notes On Church-State Affairs (Malta), 25 J. OF CHURCH & STATE 579, 585 (1983).
\(^8\) School's Out: Mintoff takes on an old enemy, TIME MAGAZINE 43 (Sept. 24, 1984); N.Y. TIMES, Oct. 5, 1984, at A9, col. 5.
\(^11\) Id.
\(^12\) Notes on Church-State Affairs (Malta), 25 J. OF CHURCH & STATE 579, 585 (1983).
to those who can pay.” Having wrapped itself in this equalitarian banner, in 1982 the Labor Party froze private school tuition at existing levels. Additionally, the government gave graduates of state-operated secondary schools an admission preference over Catholic school students at the University of Malta, the nation’s only school of higher education. Anticipating that parents would respond to the tuition freeze with donations to religious schools to keep them in operation, a directive forbade private contributions until the fee system was abolished.

In May 1984, Mintoff decreed that religious schools would not be permitted to charge any tuition as of the next school year beginning in October. The government also revoked the licenses of eight church-operated academies and announced the opening of four state-operated substitutes. The Minister of Education defended the move by insisting that the Church was wealthy enough to operate the schools without charging tuition or fees. The Roman Catholic Archbishop to Malta, Joseph Mercieca, denied that the Church could provide free education and protested that if the tuition ban were allowed to stand, “education will surrender to indoctrination.”

In September 1984, when the eight Roman Catholic academies reopened in defiance of the state, Mintoff ordered them closed and placed them under police guard. The Church reacted to the closings and the tuition ban by ordering all other Catholic schools not to reopen in October as scheduled. This caused more than 20,000 Catholic children, a third of the Maltese student population, to be unable to begin classes. Because education is compulsory in Malta, the parents of all 20,000 students were thereby in mass civil disobedience. The government appeared to harden its stand by threatening to “requisition” all the Catholic schools and reopen them as state schools. In November 1984, as an interim compromise while talks continued, the Church agreed to provide tuition-free schools through September 1985.

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54 School’s Out: Mintoff takes on an old enemy, TIME MAGAZINE 43 (Sept. 24, 1984); Notes On Church-State Affairs (Malta), 25 J. OF CHURCH & STATE 579, 585 (1983).
57 School’s Out: Mintoff takes on an old enemy, TIME MAGAZINE 43 (Sept. 24, 1984).
58 Id. See generally, Notes On Church-State Affairs (Malta), 27 J. OF CHURCH & STATE 150, 156 (1985).
Following direct negotiations between the Maltese government and the Vatican, an agreement was finally reached in April 1985. The settlement provides that Catholic schools will phase out all tuition charges over the next four years, beginning in September 1985 with free tuition at church-operated secondary schools. Thus, by September 1988 all primary and secondary Catholic schools will be free. In addition, the agreement provides that:

(1) the Catholic Church will be allowed to collect voluntary contributions designated for educational purposes;
(2) a joint church-state commission will decide the portion of each private school budget to be paid by the Church and the state;
(3) admission at Catholic secondary schools will be by national examination administered jointly by the Church and the state; and
(4) religious schools will comply with general state education laws, but retain separate administration as well as their Catholic identity and teaching. 

The Roman Catholic Church was moved in part to make these concessions in order to restore direct state funding for its schools.

III. Federal Spending Power and the First Amendment

Although there were private schools in America long before there were public schools, in the nineteenth century primary and secondary education came to be understood as principally the duty of local and state government. Occasionally litigation has broken out when educational bureaucrats have sought to assert some regulatory control over nongovernment schools pursuant to this authority to act on behalf of the public’s interest in an educated citizenry. As of late these disputes have involved Christian fundamentalists and Amish schools, as opposed to mainline Protestant and Roman Catholic schools who have voiced no objection to (indeed, have often eagerly sought) laws requiring school accreditation, teacher certification, and the like. Moreover, because of first amendment interpretations banning many forms of aid to religious schools, these legal flareups banning many forms of aid to religious schools, these legal flareups with fundamentalist and Amish schools

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64 Reuters, Apr. 27, 28, 1985.
65 See, e.g., Farrington v. Tokushige, 273 U.S. 284 (1927) (Japanese parents have right to direct education of their child including selection of linguistic and cultural aspects thereof); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (same; selection of parochial school); Meyer v. Nebraska, 262 U.S. 390 (1923) (same; selection of foreign language study by German parents).
66 See Wisconsin v. Yoder, 406 U.S. 205 (1972) and cases cited supra note 18.
67 Roman Catholic and mainline Protestant schools have not entirely avoided entanglements with federal administrators including some that had to be sorted out in the courts. See, e.g., St. Martin Lutheran Church v. South Dakota, 451 U.S. 772 (1981) (federal unemployment taxes assessed against church-affiliated schools); NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979) (federal regulation of collective bargaining activities of teachers at religious schools).
68 At the primary and secondary level, as a general rule the Supreme Court has invalidated public
have not raised the issue concerning the scope of regulatory power that is tied to the government’s authority to financially aid these religious schools. Indeed, the legal question could never arise so long as the United States Supreme Court continued to interpret the first amendment as prohibiting most forms of parochial school aid.

The Supreme Court’s 1982-83 term witnessed the first real doctrinal break from the ban on government aid to primary and secondary religious schools. In sustaining Minnesota’s tuition tax deduction plan in *Mueller v. Allen*, the Court sought to distinguish prior cases on principally two bases. First, the choice of “spending” the tax benefit on religious schooling, as opposed to choosing a free public school or a tuition-charging nonreligious school, rests entirely in the hands of the taxpayer-parents. Not only did the aid avoid placing the state and religious schools in direct contact, but parents were not mere unthinking conduits for the channeling of public aid to religion by indirect means. “[U]nder Minnesota’s arrangement public funds become available only as a result of numerous, private choices of individual parents of school-age children,” observed the Court. Thus, the statute in *Mueller* was likened to the familiar tax deduction for charitable contributions, including donations to religious organizations, that is not thought to violate the establishment clause. Second, the tax benefit was available

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70 Id. at 396-400.
71 Id. at 399. This “parental choice” feature of *Mueller* was the basis for distinguishing it from the “shared time” program struck down in *Grand Rapids School Dist. v. Ball*, 105 S.Ct. 3216, 3229 n.13 (1985).
72 463 U.S. at 396 n. 5. A more apt analogy would be to the child care credit given to working
to all taxpayer-parents of school-age children, whether the pupils attended public or nongovernment schools, thus distinguishing the statute from New York tax legislation earlier struck down by the Court. This latter difference is more apparent than real, however, because in application the Minnesota statute benefited public school parents very little.

The tuition tax deduction upheld in *Mueller* did not carry with it onerous screening requirements for qualifying religious schools. Minnesota did not attempt to use its police power over education to confer tax benefits on private school parents as a "backdoor" means of controlling religious schools. Accordingly, the question concerning the scope of government authority that is tied to the power to spend and tax still lingers. *Mueller*’s validation of aid to religious school parents, however, makes litigation over this issue imminent.

### A. The Religious Liberty Cases

Congress is empowered by the Constitution to raise revenue and to spend these funds for the general welfare. This taxing and spending power has been broadly construed. What it encompasses is discretionary with Congress, subject to judicial review only when it is determined that the legislation conflicts with a limitation found elsewhere in

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17 *Id.* at 398-399.

14 The prior case most in point is *Committee for Public Educ. v. Nyquist*, 413 U.S. 756 (1973). *Nyquist* held unconstitutional several New York laws. One statute provided outright tuition grants to low-income parents that enroll their children in nongovernment schools. Thus, the aid did not take the form of a tax benefit, although a parent had to file a state tax return to obtain the grant. *Id.* at 764. A second statute provided a tuition tax credit based on income only to parents of children in private schools. *Id.* at 765-766.

15 *Mueller v. Allen*, 463 U.S. at 408-411 (Marshall, J., dissenting) (over ninety percent of tuition-charging schools are religious and approximately ninety-six percent of taxpayers eligible for deduction enrolled children in religious schools).


17 "The Congress shall have the Power to Lay and Collect Taxes, Duties, Imports, and Excises, to pay the Debts and provide for the common Defense and general Welfare..." *U.S. Const.* art. 1, § 8, cl. 1.

18 United States v. Butler, 297 U.S. 1, 64-65 (1936) (what constitutes general welfare has been "liberally construed to cover anything conducive to national welfare").


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the Constitution such as the first amendment.\textsuperscript{80}

The consolidated cases of Bob Jones University v. United States and Goldsboro Christian School, Inc. v. United States,\textsuperscript{81} have already given the Supreme Court's assent to conditioning federal tax exempt status of private schools on the absence of racial discrimination in admissions and other policies toward students. Although the justices were divided on other issues,\textsuperscript{82} the Court was unanimous in turning back claims by the schools that their first amendment religious liberty was denied by the antidiscrimination requirement of the Internal Revenue Service.\textsuperscript{83} Since most religious-based schools voluntarily eschew racial discrimination,\textsuperscript{84} the practical effect (as distinct from the significant symbolic implications for race relations) of Bob Jones and Goldsboro is marginal. It is the legal principle established by these cases concerning the scope of federal power that has some in the religious community worried.\textsuperscript{85}

Yet another troubling step for religious educators was taken by the Supreme Court in Grove City College v. Bell.\textsuperscript{86} Grove City College, a Presbyterian liberal arts school, sought to maintain its institutional freedom by refusing all state and federal financial assistance.\textsuperscript{87} However, Grove City College did enroll students that received educational grants and loans directly from the Department of Education (DOE).\textsuperscript{88} Because of this student aid, DOE claimed that Grove City was a "recipient" of "Federal financial assistance,"\textsuperscript{89} as those terms appear in Title IX of the Educational Amendments of 1972,\textsuperscript{90} a statute prohibiting discrimination

\textsuperscript{80} Buckley v. Valeo, 424 U.S. at 91.
\textsuperscript{81} 471 U.S. 574 (1983).
\textsuperscript{82} Id. at 606 (Powell, J., concurring in part) (troubled by power of the Internal Revenue Service); id. at 612 (Rehnquist, J., dissenting) (differing statutory interpretation).
\textsuperscript{83} Id. at 606 (Powell, J., concurring in part); id. at 622 n. 3 (Rehnquist, J., dissenting).
\textsuperscript{84} Blum, Private Elementary Education in the Inner City, 66 PHI DELTA KAPPA 643 (1985); Carper, supra note 4, at 142; Doyle, A Din of Inequity: Private Schools Reconsidered, 18 AM. EDUC. 11, 12-13 (1982).
\textsuperscript{85} See, e.g., Kelley, A New Meaning for Tax Exemption, 25 J. OF CHURCH & STATE 415 (1983); Gavin & Devins, A Tax Policy Analysis of Bob Jones University v. United States, 36 VANDERBILT L. REV. 1353 (1983); Nixon, A Classic Confrontation—The Jones University and Goldsboro Christian School Cases, 78 LIBERTY 11 (1983). The primary objection has been to granting the IRS authority to determine "public policy" and then to deny tax benefits to organizations not aligned with the IRS's orthodoxy. Indeed, Justice Powell shared this very concern about a possible abusive role by the IRS and the sweeping language of the majority's opinion being subject to just such an application. Bob Jones Univ. v. United States, 461 U.S. at 606 (Powell, J., concurring).
\textsuperscript{87} Id. at 1214; id. at 1223 (Powell, J., concurring in part).
\textsuperscript{88} Id. at 1214.
\textsuperscript{89} Id. at 1215.
\textsuperscript{90} 20 U.S.C. § 1681 et seq. (1982). The Title IX regulations are codified at 34 C.F.R. pt. 106 (1985). "Federal financial assistance" is defined in 34 C.F.R. § 106.2(g)(1) (1985) to include:
A grant or loan of Federal financial assistance, including funds made available for:

(ii) Scholarships, loans, grants, wages or other funds extended to any entity for pay-
on the basis of sex in post-secondary educational institutions. When DOE requested the college to execute an Assurance of Compliance, school officials refused and a lawsuit ensued. The Supreme Court held that the student aid was federal financial assistance to the college, even though paid directly to the students, and that the college’s student financial aid program was subject to Title IX.

Of greater interest for present purposes was Grove City College’s final argument: that conditioning federal financial assistance on compliance with Title IX violates the first amendment rights of both its students and the college. The Court summarily brushed aside the defense:

   Congress is free to attach reasonable and unambiguous conditions to federal financial assistance that educational institutions are not obligated to accept. [Citation omitted.] Grove City may terminate its participation in the [student aid] program and thus avoid the requirements. . . . Students affected by the Department’s action may either take their [federal aid] elsewhere or attend Grove City without federal financial assistance.

On its face, the Grove City decision appears to hold that federal spending power supersedes first amendment rights that in other circumstance would provide a colorable defense to excessive governmental interference. Conceivably, then, acquiescence by religious schools to federal assistance, even when that assistance is given indirectly through grants to students or their parents, could shackle religious schools to an unwelcome host of federal regulations. By analogy, other antidiscrimination legislation presently tied to federal spending power such as Title VI of the Civil Rights Act of 1964 (race, color and national origin), Section

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91 An Assurance of Compliance is required by 34 C.F.R. § 106.4 (1985). If Grove City College had signed the assurance, it would have agreed to [c]omply, to the extent applicable to it, with Title IX . . . and all applicable requirements imposed by or pursuant to the Department’s regulation . . . to the end that . . . no person shall, on the basis of sex, be . . . subjected to discrimination under any education program or activity for which [it] receives or benefits from Federal financial assistance from the Department.

Grove City, ____ U.S. ____ 104 S.Ct. at 1215.

92 Id.
93 Id. at 1216-1220.
94 Id. at 1220-1222.
95 Id. at 1223.
96 Id.
504 of the Rehabilitation Act of 1973 (handicap),\(^9\) and the Age Discrimination Act of 1975,\(^9\) would automatically come to bear on religious schools.

The *Grove City* decision must be probed deeper, however. Although Grove City College is a Presbyterian school, it did not argue any first amendment religious liberty defenses. Section 901(a)(3) of Title IX\(^{100}\) exempts religious educational institutions having religious tenets contrary to the thrust of Title IX. Presumably Grove City College did not rely on this statutory exemption because it had no religious tenet requiring sex discrimination. It must not be assumed, however, that the exemption in § 901(a)(3) exhausts the full scope of the first amendment’s protection of religious liberty of church-related schools.\(^{101}\) Since the institutional integrity of Grove City College in fulfilling its religious mission, however perceived, was never placed in issue, it is not possible to say what the Court’s disposition would have been if the case presented a clear clash of federal spending power versus the first amendment liberty of the college. For example, the Court would have an altogether different case if the regulation intruded into the college’s educational curricula where integrated with religious beliefs.

*Grove City* is an unsatisfactory case from which to draw general principles for an additional reason. Many religious schools voluntarily practice policies against discrimination on the bases of race, national origin, and sex. Indeed, no one accused Grove City College of sex discrimination and the school had an internal policy against it.\(^{102}\) Rather, the case was simply over whether Title IX in principle applied to the college. It is unlikely that antidiscrimination legislation will ever be the vehicle for hampering in any real or material way the educational philosophy of a religious school as evidenced by altered curricula or teaching methodology.\(^{103}\)

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\(^{9}\) [29 U.S.C. § 794 (1982).]

\(^{9}\) [42 U.S.C. § 6101 et seq. (1982).]


\(^{102}\) *Grove City*, ____ U.S. at ____, 104 S.Ct. at 1224 (Powell, J., concurring).

Accordingly, *Grove City* cannot be taken as a clear sign that first amendment rights may be bulldozed aside by federal taxing and spending power. Fairly stated, *Grove City* holds that the acceptance of federal assistance by a private school, even when the aid is indirect, concomitantly entails relinquishing part of the autonomy the school otherwise enjoys from federal regulation. Although some autonomy is lost, the degree of first amendment rights still retained is not at all certain, beyond the specific case of federal antidiscrimination legislation.104

**B. The Freedom of Expression Cases**

First amendment expressional rights entail the freedoms of speech, press, assemblage, and petition.105 When an individual has a clearly recognized expressional right to engage in certain activity, the Supreme Court has consistently held that the government does not violate the constitution if it declines to make easier the exercise of that expression by refusing to subsidize the desired activity.106 The difficult issue arises when

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104 Consider the distinction drawn by the Supreme Court in *Runyon v. McCrary*, 427 U.S. 160 (1976). *Runyon* held that the Reconstruction era civil rights statute, 42 U.S.C. § 1981 (1982), prohibited private schools from discrimination on the basis of race. The school authorities argued that compelling private schools to admit black students violated the first amendment right of freedom of association and the parental right to direct the upbringing of their children including their education. The Court rejected these defenses. Although acknowledging that these rights exist, the Court held that they were not violated by the antidiscrimination statute. For example, these private schools could continue to teach that racial segregation is desirable; but it did not follow that the schools had a first amendment right to place that belief into practice by excluding minorities enrolling altogether. Thus, the schools remained presumptively free to inculcate whatever values or standards the schools or parents deem desirable. 427 U.S. at 175-179. *Runyon*, accordingly, does not require segregationist academies to alter their curricula or educational philosophy. Admittedly, inability to act on their segregationist beliefs when it comes to admissions does place constraints on these schools. On the other hand, it is unlikely that many minority parents will enroll their children in schools that inculcate belief in division of the races. The principal virtue of the result in *Runyon* is symbolic: racist academies may not exist, though people retain the right to believe in them. See *Brown v. Dade Christian Schools, Inc.*, 556 F.2d 310 (5th Cir. 1977) (en banc) (by 7 to 6 vote sustaining racial antidiscrimination mandate of § 1981 in religious schools).

105 "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. 1.

106 Cammarano v. United States, 358 U.S. 498 (1959) (lobbying activities did not have to be tax deductible business expense even if protected first amendment activity); see *Harris v. McRae*, 448
government elects to fund an activity, but conditions the aid by imposing limits on the recipient’s expressional activity. The two principal cases addressing this point evidence ambivalence by the Court toward a rule of “unconstitutional conditions” in taxing and spending power cases.107

In Regan v. Taxation With Representation,108 a nonprofit corporation (TWR) had as its chief purpose the influencing of congressional tax legislation.109 Section 501(c)(3) of the Internal Revenue Code110 grants tax-exempt status to nonprofit organizations, provided that lobbying does not comprise a substantial portion of their activity.111 A nonprofit organization that engages in considerable lobbying may register with the IRS under § 501(c)(4).112 Because it is nonprofit, a § 501(c)(4) organization does not pay federal income tax, but its donors may not deduct their contributions on their individual federal tax returns.113 However, the tax code allows a § 501(c)(4) organization to affiliate with a § 501(c)(3) corporation. The § 501(c)(4) affiliate may lobby without impairing the tax-exempt status of the parent organization, so long as separate financial records are kept including whether donations were received by the parent or by the non-exempt affiliate.114

The Court had previously held that lobbying is an expressional activity protected by the first amendment.115 TWR brought this action seeking to obtain both tax-exempt status and the freedom to engage in substantial lobbying without being disqualified from a § 501(c)(3) exemption.

The Court upheld the statutory restriction on lobbying activity. The tax deduction accorded to donors of § 501(c)(3) organizations was viewed

U.S. 297 (1980) (upholding Hyde Amendment, which denied federal funding of abortions, even though activity is protected by first amendment).


110 Id. at 541-542.
111 Id. ("no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation").
113 Id. § 170(b)(1)(A) (1982) (individual may generally deduct up to thirty percent of adjusted gross income in contributions to § 501(c)(3) organizations).
114 Taxation With Representation, 461 U.S. at 544; id. at 552-553 (Blackmun, J., concurring).
as an "indirect subsidy" that Congress had the power to grant or withhold. By denying tax-exempt status to legislation-influencing groups, the Court characterized the congressional act as simply a refusal to subsidize lobbying with public funds, a legitimate exercise of its spending and taxing powers.\(^\text{116}\)

A concurring opinion by three justices appended what turned out to be an important refinement. If a § 501(c)(3) organization was prohibited from creating its own § 501(c)(4) affiliate for lobbying purposes, the concurring justices believed the tax provision would violate the first amendment. Because they understood the restriction to only prevent tax deductible contributions from being spent on lobbying, the concurring justices accepted the constitutionality of § 501(c)(3).\(^\text{117}\)

More recently in *FCC v. League of Women Voters*,\(^\text{118}\) the Court sided with expressional rights over the spending power. The case called into question the constitutionality of § 399 of the Public Broadcasting Act of 1967.\(^\text{119}\) The act created the Corporation for Public Broadcasting (CPB), with the purpose of dispersing funds to noncommercial broadcasting stations to partially defray their operational and programming expenses. Section 399 prohibits stations receiving CPB grants from airing opinions or editorials on public issues.\(^\text{120}\) Pacifica, whose station-licensees were receiving CPB subsidies, brought suit challenging the ban on editorializing.\(^\text{121}\)

Although the government raised several defenses, of particular interest here is the government's final argument. Citing *Taxation With Representation*, the Department of Justice maintained that § 399 was simply an exercise by Congress in refraining from spending public money that would effectively subsidize Pacifica's editorials.\(^\text{122}\) The Supreme Court, however, distinguished § 399 from the § 501(c)(3) restriction on lobbying upheld in *Taxation With Representation*. Section 399 totally barred a station from editorializing if it received any CPB funds. Because a noncommercial station cannot segregate its funding by source, it is even barred from using funds from private donors to produce and broadcast.

\(^{116}\) *Taxation With Representation*, 461 U.S. at 544, 546.

\(^{117}\) *Id.* at 552-554 (Blackmun, J., concurring).

\(^{118}\) *Id.* at 3113.


\(^{120}\) Section 399 provides:

No noncommercial educational broadcasting station which receives a grant from the Corporation [for Public Broadcasting] under subpart C of this part may engage in editorializing. No noncommercial educational broadcasting station may support or oppose any candidate for public office.

\(^{121}\) 104 U.S. at 3113.

\(^{122}\) *Id.* at 3127-3128.
editorials.\textsuperscript{123} Thus, \textit{FCC v. League of Women Voters} adopts the caveat in the concurring opinion of \textit{Taxation With Representation} as the distinguishing principle. Plainly, § 399 would be constitutional if the act was amended to permit noncommercial stations to establish privately funded affiliates that could produce and air editorials.\textsuperscript{124}

\textit{Taxation With Representation} reaffirms the rule that "the government may not deny a benefit to a person because he exercises a constitutional right."\textsuperscript{125} That is to say, Congress cannot have as its legislative purpose the suppression of first amendment rights. These cases also reject the argument that because Congress has the power to grant or deny a subsidy (or tax benefit), it thereby has the \textit{unfettered} power to attach conditions that impinge—even unintentionally—on first amendment rights.\textsuperscript{126} Finally, alternative outlets for the exercise of first amendment rights that are unintentionally restrained by federal taxing or spending legislation must be palpable and meaningful.\textsuperscript{127} Beyond these outer parameters, it is difficult to generalize from these two cases concerning the future path of constitutional law. Predicting the outcome of litigation concerning the exercise of government direction, supervision, or control over the curriculum, program of instruction, administration, or personnel of a religious school, tied to the acceptance of federal aid, will have to await future case development.

\textbf{IV. Conclusion}

Whether access to government funding could be the means whereby a host of unwanted and obtrusive regulations come to bear on America's religious schools cannot be determined with certainty from this study. Admittedly the historical, social, and political circumstances in Europe differ from those in the United States, and these lessons learned elsewhere are not transferable to America without qualification. Nevertheless, government funding in Spain, France, and Malta was the mechanism by which those governments worked to extend control over church-related schools—controls which went far beyond issues of health, fire, safety, and minimal literacy. The possibility that a similar pattern could occur in the United States cannot be easily dismissed knowing what

\textsuperscript{123} Id. at 3128.

\textsuperscript{124} Id.

\textsuperscript{125} 461 U.S. at 545. \textit{See} Perry v. Sindermann, 408 U.S. 593 (1972) (forbade withholding of state college teaching job because of exercising free speech); Speiser v. Randall, 357 U.S. 513 (1958) (striking down state law requiring anyone who sought property tax exemption to sign declaration that he did not advocate forcible overthrow of government).

\textsuperscript{126} FCC v. League of Women Voters, \textit{\ldots} U.S. \textit{\ldots}, 104 S.Ct. at 3128.

\textsuperscript{127} Id.; Taxation With Representation, 461 U.S. at 552-554 (Blackmun, J., concurring).
has transpired in these other Western democracies. If the present political climate in America is perceived as favoring considerable autonomy for religious schools, then who can say how things might be fifteen or twenty years from now should nongovernment schools become financially dependent on federal aid.

The status of the case law in the Supreme Court concerning congressional spending and taxing power versus first amendment rights is inadequately developed at present. Accordingly, it is speculative to say whether the first amendment provides sure protection for the philosophical integrity of religious schools should they begin receiving substantial government aid. It should not go unnoticed that those justices on the Supreme Court that are most inclined to uphold aid to religious schools are the same judges who are unwavering in sustaining federal taxing and spending power in the face of claimed first amendment violations. The operative principle followed by these justices appears to be a less "activist" approach to individual liberties and greater deference to the will of the majority as evidenced in legislation. Thus, any future conservative trend as a result of personnel changes on the Supreme Court actually heightens the danger that the diverse character of religious schooling cannot be guaranteed by the first amendment. Unless safeguards for shielding the educational freedom of religious schools are written into the funding (or tax benefit) legislation, acceptance of federal benefits could compromise the very schools in which so much effort is presently being invested to insure their continued vitality.

### Appendix A

(See footnote 5)

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*The dates for enrollment year varies depending on the source and the date indicated in parenthesis.

**Merged with National Christian School Association and Ohio Association of Christian Schools in 1978 to become the Association of Christian Schools International.