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I. INTRODUCTION

The latest Supreme Court decision in *Meek v. Pittenger*[1] reaffirms recent separationist and accommodationist decisions. To be sure, the Court has more strongly asserted the separationist than the accommodationist[2] stance. The separationist bent was manifested in *Meek* by the Court's overturning of two Pennsylvania Acts providing auxiliary services to nonpublic school children and loaning instructional materials and equipment useful for the education of nonpublic schoolchildren. Both Acts were regarded as violations

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1. Meek v. Pittenger, 421 U.S. 349 (1975).

2. For characterizations of separationism and accommodationism, *see* H. ABRAHAM, FREEDOM AND THE COURT: CIVIL RIGHTS AND LIBERTIES IN THE UNITED STATES, 253-57, 262-71 (2d ed. 1972).

of the Establishment Clause of the First Amendment because predominantly church-related schools benefited from the Acts. Although the ban on auxiliary services and materials was considerably broader than any Court majority had enunciated in the past, the decision did not constitute a shift in the Supreme Court's position on aid to elementary and secondary nonpublic education.[3] These invalidations again contributed to "dashed legislative expectations . . . in the area of aid to church-related elementary and secondary schools"[4] and confirmed the strict separationist attitude taken by the Court since 1971 in its *Lemon, Levitt, Nyquist,* and *Sloan* decisions.[5]

The court further fixed the narrow province of accommodation by upholding the textbook loan provision of one of the two Acts, concluding that the textbook loans were constitutional because they were identical to the loan program approved in *Board of Education v. Allen.*[6]

Meek v. Pittenger demonstrated at least three features that presently characterize the disposition and posture of the Court as it seeks to draw the line in parochiaid decisions. First, Richard E. Morgan noted that the disposition of the Court in *Nyquist, Sloan,* and *Hunt*[7] was three to three to three: an "accommodationist bloc" (Justices White, Burger, and Rehnquist), a "super separationist bloc" (Justices Douglas, Brennan, and Marshall), and a "moderately separationst bloc" (Justices Blackmun, Powell, and Stewart). The moderate separationists accounted for the difference in result between *Nyquist* and *Hunt.*[8] This disposition was retained in *Meek* and accounted for the difference in result between the textbook loans decision and the auxiliary services and instructional materials and equipment decision. Powell, Stewart, and Blackmum continued to be the swing votes.

Second, Norah C. McCann's analysis of the ramifications of the *Nyquist* decision is still relevant for *Meek*:

> The basic proposition which has emerged in the context of public aid to elementary and secondary sectarian schools is that

3. New York Times, May 20, 1975, at 22, col. 2 (city ed.).

4. Wilson, *The School Aid Decisions: A Chronicle of Dashed Expectations,* 3 J. LAW & ED. 101 (1974).

5. Lemon v. Kurtzman, 403 U.S. 602 (1971); Levitt v. Committee for Pub. Educ. & Relig. Lib., 413 U.S. 472 (1973); Committee for Pub. Educ. & Relig. Lib. v. Nyquist, 413 U.S. 756 (1973); Sloan v. Lemon, 413 U.S. 825 (1973).

6. Board of Educ. v. Allen, 392 U.S. 236 (1968).

7. Hunt v. McNair, 413 U.S. 734 (1973).

8. Morgan, *The Establishment Clause and Sectarian Schools: A Final Installment?* 1973 S. CT. REV. 57, 88 (1974).

> any state aid which is necessary to their survival will amount to state sponsorship of their religious character. It is for this reason that the Court, through its tripartite Establishment Clause test, looks not to the mechanics of the government aid, but rather to the substantive impact of the aid upon the church-related institution. "A little aid is all right, but a lot is unconstitutional."[9]

Third, the Court continued to adhere to the tripartite Establishment Clause test which has been a fixture in assessing Establishment Clause issues since the 1971 *Lemon v. Kurtzman* decision:

> First, the statute must have a secular legislative purpose . . . Second, it must have a "primary effect" that neither advances nor inhibits religion . . . . Third, the statute and its administration must avoid excessive government entanglement with religion.[10]

The Court's *Meek* decision used the "primary effect" test to invalidate the Pennsylvania loans of instructional materials and equipment to sectarian schools and "excessive government entanglement" test to void the auxiliary services benefits for children in Pennsylvania's sectarian schools.

The primary object of this comment is to examine the significance of one facet of the tripartite test, the excessive entanglement test. Although it is not possible to completely dissect this rule from the tripartite test, an effort will be made to examine the development of excessive entanglement from *Walz*[11] through *Meek*, to describe its parameters, to assess its nature as a separate test, and to discuss its interactions with the other two elements in the tripartite test. The overall purpose is to examine the Supreme Court in its efforts to draw lines in the delicate area of public aid to sectarian schools.

II. WALZ v. TAX COMMISSION

The *Walz* or New York Tax Exemption Case concerned a legal challenge to the actions of the New York City Tax Commission in granting tax exemptions to religious organizations for religious properties used solely for religious worship. Walz, a New York City taxpayer, claimed that the tax exemption required him to indirectly make a contribution to religious bodies and thereby violated the

9. Note, *Parochial School Aid: A Public Perspective*, 35 OHIO ST. L.J. 104, 131-32 (1974) [hereinafter cited as *Perspective*].
10. Meek v. Pittenger, 421 U.S. 349, 358 (1975).
11. Walz v. Tax Comm'n, 397 U.S. 664 (1970).

First Amendment provision prohibiting an establishment of religion.

Chief Justice Burger, writing for the majority in his first "church-state" opinion,[12] examined the purposes of the Free Exercise and Establishment Clauses. He stated that the framers of the Religion Clauses of the First Amendment believed that the establishment of a religion "connoted sponsorship, financial support, and active involvement of the sovereign in religious activitiy."[13] He noted that the Court had "struggled to find a neutral course between the two clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other."[14] The Chief Justice concluded that the core of the Religion Clauses was, and is, that "there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference."[15]

In assessing the legitimacy of the tax exemption, Burger examined the legislative purpose and effect tests, subsumed under a "legislative purpose" discussion,[16] and held that the New York statute did not attempt to establish religion; it simply spared "the exercise of religion from the burden of property taxation levied on private profit institutions."[17] The Chief Justice further argued that the grant of a tax exemption was not the same as a direct grant and that it didn't comprise sponsorship of religion because the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state.[18]

Chief Justice Burger's decision in *Walz* is important because of the Court's fundamental alteration of the legislative purpose-primary effect test through the rather summary addition of a third Establishment Clause test, the excessive entanglement concept.[19] The

12. Katz, *Radiations from Church Tax Exemption*, 1970 S. Ct. Rev. 93, 94 (1971).

13. 397 U.S. at 668.

14. *Id.*

15. *Id.* at 669.

16. *See* Giannella, *Lemon and Tilton: The Bitter and the Sweet of Church-State Entanglement*, 1971 S. Ct. Rev. 147, 155-56 (1972). Giannella notes that Burger's opinion discussed both the purpose and effect tests, but placed predominant reliance on the excessive entanglement concept.

17. 397 U.S. at 673.

18. *Id.* at 675.

19. *See* R. Morgan, The Supreme Court and Religion, 103-07 (New York Free Press, 1972); Piekarski, *Nyquist and Public Aid to Private Education*, 58 Marq. L. Rev. 247, 253-54 (1975); Giannella, *Lemon and Tilton: The Bitter and the Sweet of Churh-State Entanglement*, 1971 S. Ct. Rev.

Chief Justice's first use of the phrase occurred in his discussion of the fact that an absolute separation of church and state is impossible, for "the very existence of the Religion Clauses is an involvement of sorts—one that seeks to mark boundaries to avoid excessive entanglement."[20] In relating excessive entanglement to the tax exemption, Burger noted the following:

> Determining that the legislative purpose of tax exemptions is not aimed at establishing, sponsoring, or supporting religion does not end the inquiry, however. We must also be sure that the end result—the effect—is not an excessive government entanglement with religion. The test is inescapably one of degree. Either course, taxation of churches or exemption, occasions some degree of involvement with religion. Elimination of exemptions would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of these legal processes.[21]

These two quotations suggest several features of the excessive entanglement concept as it related to *Walz* and could be applied to future cases: (1) the concept was tied to the tension between the Free Exercise and Establishment Clauses; (2) the concept may initially have been regarded as an element in the "primary effect" test, since the word "effect" is used in the second quotation;[22] (3) the test is one of degree, because of the inescapable involvement between church and state; and (4) excessive government entanglement with religion, including religio-government strife, would have resulted if tax exemptions had been eliminated because of inevitable increases in government and church relationships in taxation. As Burger suggests at another point, the exemption created only a "minimal and remote involvement between church and state."[23]

147, 155, 158; Note, *Government Assistance to Church-Sponsored Schools: Tilton v. Richardson and Lemon v. Kurtzman*, 23 SYRACUSE L. REV. 113, 116-17 (1972) [hereinafter cited as *Assistance*]; Katz, *Radiations from Church Tax Exemption*, 1970 S. CT. REV. 93, 98 (1971).

20. 397 U.S. at 670.

21. *Id.* at 674.

22. It is also feasible to contend that the "excessive entanglement standard of Walz was probably designed to replace the unsatisfactory 'purpose and effect' verbal formulation" which had left previous cases with no lasting guideline other than the Court's judgment of affirmance or reversal. *See* Lewin, *Disentangling Myth from Reality*, 3 J. LAW & ED. 107, 112 (1974).

23. 397 U.S. at 676.

The excessive entanglement concept has had considerable significance as an independent concept within the tripartite test in subsequent cases. *Lemon v. Kurtzman*[24] and *Tilton v.* Richardson[25] manifest the application of the entanglement test.

III. LEMON AND TILTON

In *Lemon v. Kurtzman* three cases were decided by the Supreme Court in one opinion in May, 1971. The *Lemon, Earley v. Di Censo,* and *Robinson v. Di Censo*[26] cases tested Pennsylvania and Rhode Island statutes that allowed the states to assume a portion of the expenses of nonpublic education. The *Lemon* case considered the constitutionality of a 1968 Pennsylvania Law that allowed the state to purchase[27] secular educational services from nonpublic schools. Under contracts authorized by the statute, the state directly reimbursed nonpublic schools for actual expenses for teachers' salaries, textbooks, and instructional materials. Separate accounting procedures subject to state audit were to be maintained by schools seeking reimbursement. Reimbursement was limited to courses found in public school curriculums; these included only the following secular subjects: mathematics, modern foreign languages, physical science, and physical education. The State Superintendent of Public Instruction had to approve textbooks and instructional materials. No reimbursement could be made for any course containing "any subject matter expressing religious teaching or the morals or forms of worship of any sect."[28] The three-judge federal court that heard the case held that the statute violated neither the Free Exercise nor Establishment Clauses.[29]

The *Di Censo* case tested the constitutionality of a 1969 Rhode Is-

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24. Lemon v. Kurtzman, 403 U.S. 602 (1971).
25. Tilton v. Richardson, 403 U.S. 672 (1971).
26. 403 U.S. 602 (1971).
27. The purchase of secular educational services was necessary to bypass a stringent provision in the Pennsylvania Constitution that forbade appropriations to or use of public funds for the support of any sectarian institution. Under the Pennsylvania law, the nonpublic schools, under a purchase—sale arrangement, would make contracts with the state to sell their secular educational services to the state and deliver these services by teaching secular subjects to the children in their particular schools. The services that were purchased were entirely secular and texts and other instructional materials had to be approved by the State Superintendent of Public Instruction. The purpose and effect was secular and did not advance religion. *See* L. PFEFFER, GOD, CAESAR AND THE CONSTITUTION: THE COURT AS REFEREE OF CHURCH-STATE CONFRONTATION, 276-77 (1975).
28. 403 U.S. at 609-10.
29. *Id.* at 611.

land statute that authorized state officials to supplement the salaries of teachers of secular subjects in nonpublic elementary schools by paying directly to a teacher an amount not exceeding fifteen per cent of his annual salary. The teacher was required to hold a state certificate, teach only those subjects offered in the public school curriculum, use only teaching materials that were used in public schools, and agree not to teach any religion courses. Eligible schools were to submit financial data to the State Commissioner of Education. Only Roman Catholic school teachers had qualified for the salary supplements. The three-judge federal court that heard the case concluded that the Act violated the Establishment Clause, holding that it fostered excessive entanglement between government and religion. Two judges also thought that the statute had the impermissible effect of giving significant aid to a religious enterprise.[30]

Chief Justice Burger began by noting that the "line of demarcation" under the Religion Clauses could only be "dimly perceived" and that the language of the Religion Clauses were "at best opaque."[31] He said that every analysis of the Establishment Clause must begin with examination of the "cumulative criteria" developed by the Court over the years, in other words, the tripartite test. The Chief Justice stated that the Court did not have to decide whether the statutes properly met the principal purpose or primary effect tests. He in effect declared the independent status of the excessive entanglement test by concluding that the cumulative impact of the entire relationship arising under the statute of each state involved an unconstitutional degree of excessive entanglement between government and religion.[32]

Entanglement was to be determined by examination of three criteria: (1) the character and purposes of the institutions which were benefited, (2) the nature of the aid provided by the state, and (3)

30. *Id.* at 607-09. *See* Giannella, *Lemon and Tilton: The Bitter and Sweet of Church-State Entanglement*, 1971 S. CT. REV. 147, 161 (1962), who notes that the trial court equated excessive entanglement with the older concept of undue involvement and used it to refer to all kinds of improper relationships between church and state.

31. 403 U.S. at 612.

32. *Id.* at 613-14. In Tilton v. Richardson, 403 U.S. 672, 685 (1971), Burger explicitly identified the excessive entanglement test as an "independent measure of constitutionality under the Religious Clauses."

the resulting relationship between the government and the religious authority.[33] In assessing the significance of these criteria in the *Di Censo* case, the Court noted that the parochial schools constituted a vital part of the religious mission of the Catholic Church and that the schools were powerful vehicles for transmitting the Catholic faith to future generations. They involved, therefore, substantial religious activity and purpose.[34] The Court also stated that the potential for impermissible fostering of religion was present, because dedicated sectarian teachers of even secular subjects would find it difficult to remain neutral.[35] The state had to be certain that subsidized teachers remained neutral and, therefore, carefully conditioned its aid with pervasive restrictions. Burger noted that a "comprehensive, discriminating, and continuing state surveillance" would "inevitably" be required to ensure obedience to the restrictions and the First Amendment. Teachers, unlike books, could not be inspected once regarding personal beliefs. The continuing surveillance would involve excessive and enduring entanglement between state and church.[36] Excessive entanglement could also be engendered through the state inspections and evaluations that were necessary to determine if specific schools met the criteria for state subsidization of teachers.[37]

The allegations against the Pennsylvania statute were similar to those raised concerning the Rhode Island statute. The church-related elementary and secondary schools were controlled by religious organizations, they had the purpose of promoting a particular religious faith, and their operations were conducted to fulfill that purpose. Excessive entanglement was also fostered by this statute because surveillance was necessary to ensure that teachers played a strictly nonideological role and because the schools seeking reimbursement had to maintain state inspected accounting procedures that separated secular from religious instruction.[38] The Pennsylvania statute had the further defect of providing direct financial aid to the church-related schools. *Everson*[39] and *Allen*,[40] in contrast, provided aid directly to the student and his parents. The Chief Justice warned that cash grants could lay a basis for later comprehen-

33. 403 U.S. at 615.
34. *Id.* at 616. The Court cited Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development*, 81 HARV. L. REV. 513, 574 (1968), as a key source for this assessment.
35. 403 U.S. at 618.
36. *Id.* at 619.
37. *Id.* at 620.
38. *Id.* at 620-21.
39. Everson v. Board of Educ., 330 U.S. 1 (1947).
40. Board of Educ. v. Allen, 392 U.S. 236 (1968).

sive measures of surveillance and controls[41] and the government post-audit power, especially, created an intimate and continuing relationship between church and state.[42]

The Chief Justice introduced the concept of "political divisiveness" to explain a broader base for entanglement. Communities in which a large number of pupils were served by church related schools would also be focal points for considerable political activity. The potential divisiveness of political division along religious lines was one of the principal evils against which the First Amendment was intended to protect.[43] Burger distinguished *Walz* from *Lemon* by stating:

> But in *Walz* we dealt with a status under state tax laws for the benefit of all religious groups. Here we are confronted with successive and very likely permanent annual appropriations which benefit relatively few religious groups. Political fragmentation and divisiveness on religious lines is likely to be intensified.[44]

The Court noted that the deepening economic crisis of parochial schools would inescapably mean greater pressures on government for increased aid.[45]

The Chief Justice also linked the political divisiveness argument closely to the "progression" argument which the Court introduced in *Walz*.[46] In *Walz*, however, the Court said that the tax exemption was not the first step of an "inevitable progression leading to the establishment of state churches and state religion." Tax ex-

41. This statement raises a question that Paul Kauper noted that the Court did not mention, the state agency question. This argument stresses that government institutions that accepted government assistance therefore assumed a public aspect and became subject to Fourteenth Amendment limitations. This meant possibly more entanglement than that resulting from public administrative surveillance of a grant to see whether restrictions in the grant were observed. *See* Kauper, *Public Aid to Parochial Schools and Church Colleges: The Lemon, Di Censo, and Tilton Cases*, 13 ARIZ. L. REV. 567, 589 (1971).

42. Lemon v. Kurtzman, 403 U.S. at 621-22.

43. *Id.* at 622. Burger cited Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1692 (1969), to bolster this point. Freund points out that "while political debate and division is normally a wholesome process for reaching viable accommodations, political division on religious lines is one of the principal evils that the First Amendment sought to forestall."

44. Lemon v. Kurtzman, 403 U.S. at 623.

45. *Id.* at 623-24.

46. *See* Duffy, *A Review of Supreme Court Decisions on Aid to Nonpublic Elementary and Secondary Education*, 23 HAST. L.J. 984 (1972).

emptions had stood the test of two hundred years without leading to the establishment of religion.[47] The progression argument was more persuasive for the Court in *Lemon* because of the absence of the lessons of history and because of the newness of the state programs.[48]

Burger concluded by extolling the merits and deploring the economic problems of parochial schools. These matters, however, were not the issue. The "sole question" was "whether state aid to these schools" could "be squared with the dictates of the Religion Clauses." Burger's answer was as follows:

> Under our system the choice has been made that government is to be entirely excluded from the area of religious instruction and churches excluded from the affairs of government. The Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that while some involvement and entanglement is inevitable, lines must be drawn.[49]

The Chief Justice exercised further his propensity for line drawing in a plurality opinion in *Tilton v. Richardson*,[50] reported the same day as *Lemon*. In a five to four decision the Court upheld the constitutionality of the federal Higher Educational Facilities Act of 1963 except for a portion of the act that provided for a twenty year limitation on the religious use of the facilities built with federal funds. The Act authorized federal grants and loans to colleges and universities for the construction of a wide variety of academic facilities. The act excluded funds for divinity schools or facilities for sectarian instruction or religious worship. The United States Commissioner of Education was responsible for administering the Act and his office enforced the statutory restrictions, primarily by way of on-site inspections.

Four Catholic colleges and universities in Connecticut received funds for library, science, and other buildings under the Act. Their receipt of these grants was challenged in a three-judge federal district court by Connecticut residents and by United States taxpayers who contended that the four institutions were sectarian. The schools introduced testimony to demonstrate their full compliance with the statutory conditions and to show the noninterference of

47. Lemon v. Kurtzman, 403 U.S. at 624.
48. *Id.*
49. *Id.* at 625.
50. 403 U.S. 672 (1971). Justices Blackmun, Harlan, and Stewart joined the Burger opinion for the Court. Justice White concurred in a separate opinion. Justice Brennan filed a dissenting opinion and Douglas, joined by Marshall and Black, filed a dissenting opinion. *See also* Whelan, *School Aid Decisions*, 125 AMERICA 8 (no. 1, July 10, 1971).

religious affiliations with the performance of secular educational functions. The court held that the Higher Education Act authorized grants to church-related colleges and universities and sustained the constitutionality of the act.[51]

The Supreme Court agreed with the three-judge court that church-related colleges and universities could receive funds under the Act, stating that this conclusion was fully supported by the legislative history of the Act.[52] Burger employed the secular purpose, primary effect, excessive entanglement, and free exercise tests as guidelines to examine the constitutionality of the Act.[53] The Court maintained that it fulfilled a legitimate secular objective and that its principal or primary effect did not advance religion.[54] The colleges and universities did not violate the statutory restrictions, since there had been no religious services or worship in the federally financed facilities, they had been used solely for nonreligious purposes, and there were no religious symbols or plaques in or on them.[55] The Court also noted that religiosity did not permeate the secular education of the colleges and universities. The teachers adhered to their concepts of professional standards and to the academic requirements intrinsic to the subject matter of their particular courses. The schools were characterized by an atmosphere of academic freedom rather than religious indoctrination.[56]

Burger's examination of the presence of excessive entanglement both recognized excessive entanglement as an "independent measure of constitutionality under the Religion Clauses"[57] and contrasted the degrees of entanglement in *Lemon* and *Tilton*. The Chief Justice stated that three factors substantially diminished the extent and potential danger of entanglement in *Tilton*. First, there was less danger in colleges and universities than in sectarian elementary and

51. 403 U.S. at 675-76.
52. *Id.* at 676-77.
53. *Id.* at 678.
54. *Id.* at 679.
55. *Id.* at 680.
56. *Id.* at 681-82. Burger also suggested at 682 that ad hoc adjudication with respect to individual colleges would be necessary to see whether or not colleges were too sectarian to fall under the Tilton rationale. *See also* Kauper, *Public Aid to Parochial Schools and Church Colleges: The Lemon, Di Censo, and Tilton Cases*, 13 ARIZ. L. REV. 597, 592-93 (1971).
57. 403 U.S. at 685.

secondary schools dealing with impressionable children that religion would permeate the area of secular education, since religious indoctrination and proselytizing were not substantial purposes or activities at church-related colleges. This reduced the need for intensive government surveillance of higher education.[58] Second, the entanglement between church and state was lessened in higher education by the nonideological, secular, and neutral character of the aid provided by the government.[59] Third, government entanglements with religion were reduced at the level of higher education because the federal government's aid was a one-time, single-purpose construction grant. No continuing financial relationships were present. Inspection as to use was a minimal contact.[60] Cumulatively, these factors shaped a narrow and limited relationship with government which involved fewer and less significant contacts than were involved in *Lemon* and *Di Censo*. Cumulatively, these factors substantially lessened the possibility of political divisiveness, since the "essentially local problems" of elementary and secondary schools were "significantly less with respect to a college or university whose student constituency" was "not local but diverse and widely dispersed."[61] The Court quickly disposed of the free exercise question by stating that no violation of the free exercise of religion existed in *Tilton* because the applicants were unable to show any coercion aimed at the practice of their religious beliefs.[62]

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58. *Id.* at 685-87. Also, in note 2, at 685, Burger again cites Paul Freund as a source for his argument. Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1691 (1969), states the following: "Institutions of higher learning present quite a different question, mainly because church support is less likely to involve indoctrination and conformity at that level of instruction."

59. 403 U.S. at 687-88.

60. *Id.* at 688. Justice White's dissenting opinion in *Di Censo* and his concurring opinion in *Tilton*, 403 U.S. at 668, notes that he cannot understand why the Court could declare that excessive entanglement existed in *Di Censo* and not in *Tilton*. Both involved situations where teachers of secular subjects were not to indulge in religious teaching. Both involved continuing enforcement procedures. Clerics on the college level weren't necessarily more reliable in keeping promises than their counterparts on elementary and secondary levels. White approved the *Tilton* decision and would have upheld *Di Censo* on the grounds of his decision in Board of Educ. v. Allen, 392 U.S. 236 (1968).

61. 403 U.S. at 688-89. *See also* Note, *Excessive Entanglement: A New Dimension to the Parochial Aid Controversy Under the First Amendment*, 3 LOYOLA U. CHI. L.J. 73, 86-87 (1972) [hereinafter cited as *Entanglement*]; Pfeffer, *Uneasy Trinity: Church, State, and Constitution*, 2 CIV. LIB. REV. 138, 159 (1975); Kauper, *Public Aid to Parochial Schools and Church Colleges: The Lemon, Di Censo, and Tilton Cases*, 13 ARIZ. L. REV. 567, 587, 589 (1971).

62. 403 U.S. at 689.

Lemon and *Tilton* suggest several features and considerations respecting the excessive entanglement test. First, Burger fully recognized the test as an independent measure of constitutionality under the Religion Clauses. The test was applied as the dominant consideration in *Lemon* and the paramount consideration in *Tilton*. The use of excessive entanglement as an independent concept raises a number of questions. Was the Court's use of excessive entanglement in *Lemon* an effort to scramble back from going beyond the verge of constitutionality in *Allen* and to seize this test, recently enunciated in *Walz*, as a basis for its decision?[63] Is it a vague standard because the line between permissible and impermissible government entanglement can not be adequately described?[64] Can the entanglement test be anything more than a guide to determine the *effect* of a statute? Should the constitutionality of a statute turn on entanglement alone?[65] Can a reasonable argument be made that all of the tripartite tests discuss substantially the same factors, merely utilizing different terms?[66] Should the excessive entanglement doctrine be used for anything more than examining the duration and intimacy of supervisory contacts between government and religious agencies?[67] Did the Court turn to the excessive entanglement concept because the secular purpose and primary effect tests were not well suited to resolve the free exercise aspects of the issues confronting it?[68] Did the decision subordinate the neutrality doctrine[69] to excessive entanglement, in that a state con-

63. *See* Giannella, *Lemon and Tilton: The Bitter and the Sweet of Church-State Entanglement*, 1971 S. CT. REV. 147, 148 (1972).

64. *See Assistance*, at 122-23; and *Entanglement*, *supra* at 93.

65. *See* Note, *Lemon v. Kurtzman: First Amendment Religion Clauses Reexamined*, 33 U. PITT. L. REV. 330, 339 (1971); Note, *Financial Aid for Nonpublic Education: A Decision for the Courts or Legislature?* 49 NOTRE DAME LAWYER 366, 372 (1973) [hereinafter cited as *Financial Aid*]; Note, *Constitutional Law—State Aid to Nonpublic Elementary and Secondary Schools Held Violative of Establishment Clause of First Amendment—Federal Statute Authorizing Construction Grants to Nonpublic Colleges and Universities Held Constitutional*, 17 VILL. L. REV. 574, 581 (1972).

66. *See* L. PFEFFER, *supra* note 27, at 39.

67. Note, *Establishment Clause Analysis of Legislative and Administrative Aid to Religion*, 74 COLUM. L. REV. 1175, 1188 (1974) [hereinafter cited as *Establishment Clause*].

68. *See* Giannella, *Lemon and Tiltton: The Bitter and the Sweet of Church-State Entanglement*, 1971 S. CT. REV. 147, 156-57 (1972). *See also Establishment Clause*, *supra* at 1186.

69. *See* P. KAUPER, RELIGION AND THE CONSTITUTION, 64-67 (1964); H. ABRAHAM, *supra* at 257-62.

ceivably could grant direct aid to all private schools at the elementary and secondary school levels except parochial schools?[70] Did Burger, in effect, trap the states of Rhode Island and Pennsylvania between the primary effect and excessive entanglement tests in *Lemon* and *Di Censo*? If the states were to avoid advancing religion, they must inspect parochial schools to make certain that state funds were used only for secular ends; however, if they conducted such inspections, they would be causing excessive entanglement of government with religion.[71] Did the Court's application of the excessive entanglement standard in *Lemon* in terms of a "cumulative impact" imply that the relationship that the fostered by the legislation at issue consisted of elements sufficient to invalidate it in the aggregate but perhaps not individually?[72]

Second, the Court also defined excessive entanglement in terms of "political divisiveness"[73] as a broader element of entanglement. The Court noted that considerable political activity would occur in communities in which large numbers of pupils were served by church-related schools. State legislative debates, lobbying efforts, and electoral campaigns would be marked by conflicts over aid to church-related schools, especially if annual appropriations for existing or potential programs were under consideration. Closely linked to political divisiveness was the "progression" argument, which the Court introduced in *Walz*. The argument was not significant in *Walz* because of the long existence of tax exemptions. The Court did find the argument more persuasive in *Lemon*, noting that the newness of the program and the absence of historical experience under the program could lay a basis for the eventual establishment of religion, due to the "self-perpetuating and self-expanding propensities" of modern governmental programs.[74]

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70. *See* Kauper, *Public Aid to Parochial Schools and Church Colleges: The Lemon, Di Censo and Tilton Cases*, 13 ARIZ. L. REV. 567, 582-83 (1971).

71. *See* Kelley, *Tax Credits and the Tests of Establishment: Are Tax Credits for the Parents of Parochial School Students Unconstitutional?* 90 CHRISTIAN CENTURY 1024 (Oct. 17, 1973).

72. *See* Note, *Educational Vouchers: The Fruit of the Lemon Tree*, 24 STAN. L. REV. 687, 697 (1972).

73. For a discussion of the divisiveness issue before its actual use in *Lemon*, *see* Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 CALIF. L. REV. 260, 273 (1968). Choper suggests that church groups are frequently on opposing sides on church-state issues and that political ruptures might intensify as parents of parochial school children object to increased aid to public schools, since this raises their taxes without direct personal benefit, decreases their ability to financially support parochial schools, and hampers parochial schools in their efforts to maintain qualitative parity with improved public schools.

74. Lemon v. Kurtzman, 403 U.S. 602, 624 (1971).

Third, the Court used three criteria as bases to determine entanglement: (1) the character and purposes of the institutions which were benefited, (2) the nature of the aid provided by the state, and (3) the resulting relationship between the government and religious authority.[75] These criteria were crucial in ascertaining the *degree* of excessive governmental entanglement in *Lemon, Di Censo* and *Tilton*. The Court used the "permeation" or "degree of religiosity" argument to determine the character and purposes of the elementary and secondary schools and the colleges and universities. In order to differentiate the nature of the aid, the Court examined the degree of secularity and neutrality of the aid given by the state to schools. The durability and intimacy of the financial relationships were crucial matters in assessing the resulting relationships between church-related schools and the state. In essence, the Court appeared to stress the following as key determinations:

> Direct forms of state aid to sectarian education institutions are constitutionally permissible provided that three precedent conditions are satisfied: (a) the primary mission of the school is secular education rather than religious training; (b) the aid given possesses inherent religious neutrality easily ascertainable and controlled; and (c) such aid does not require complex regulatory and auditing procedures on a perpetual basis.[76]

Fourth, the use of the three *Lemon* criteria demonstrate again that excessive entanglement turns largely on matters of degree, raising significant questions of precise definition.[77] "The question is no longer whether the state may involve itself with religion," but of "only to what degree may its entanglement extend."[78]

Fifth, the administrative entanglements discussed in *Lemon* can be separated into active and potential involvement. Active involvement applies to the actual supervision which the state program provided. Potential government involvement with church-related institutions in assuring compliance with the Establishment Clause was

75. *Id.* at 615.

76. Comment, *Parochial School Aid—From Allen to Lemon to Tilton—Out at Second, Safe at First*, 3 SETON HALL L. REV. 61, 79 (1971).

77. *See* Giannella, *Lemon and Tilton: The Bitter and the Sweet of Church-State Entanglement*, 1971 S. CT. REV. 147, 171 (1972). *See also* Comment, *Constitutional Law: Establishment of Religion Clause—Display of Religious Symbolism Upon Public Lands Restricted Through Excessive Entanglement*, 8 SUFFOLK U.L. REV. 815, 821 (1974).

78. Mott & Edelstein, *Church, State, and Education—The Supreme Court and its Critics*, 2 J. LAW & ED. 591 (1973).

a significant consideration in *Lemon*, even though the necessary surveillance was not included in or contemplated by the Pennsylvania statute that granted direct subsidies to the elementary and secondary schools. The reason for the Court's selection of potential involvement to invalidate the Pennsylvania statute may be related to the Court's desire to further develop the entanglement concept or its inability to determine whether aid had been diverted to religious purposes.[79]

Sixth, the *Lemon* and *Di Censo* cases introduced the tripartite test.[80] Various persons have commented on these bases for assessing permissible and impermissible church-state relations. One commentator has stated that the tests may have created a paradoxical constitutional requirement. State statutes attempting to provide a primarily secular effect may at the same time create excessive entanglement of government and religion. Conversely, laws drafted to avoid an unconstitutional degree of state involvement with religion may effectuate a primarily religious purpose.[81] Another notes that "it is doubtful the three-pronged test descended from *Schempp* and *Walz* will be changed. These are sound standards which protect the full interest of both church and state." The commentator stresses that free exercise rights must be re-emphasized when the Court "seeks to ascertain the secular purpose, primary effect, and entanglement standards essentially created as establishment clause criteria."[82] Still another writer states that the conceptual underpinnings and operations of these tests are far from ideal, but that the tests provide a useful analytical framework for systematic scrutiny of government aid to religions.[83] Finally, one of the lawyers for Jewish Day School, appellant in *Levitt v. Committee for Public Education and eligious Liberty*,[84] asserts the following:

> The constitutional task is almost ministerial. Poke the local law with three probes, and only if the answers are, respectively, yes (Is there a secular legislative purpose?), no (Does it have a primary effect to advance religion?), and no (Does the statute create

79. *See* Comment, *The Sacred Wall Revisited—The Constitutionality of State Aid to Nonpublic Education Following Lemon v. Kurtzman and Tilton v. Richardson*, 67 Nw. U.L. Rev. 118, 121-22 n.20 (1972).

80. The test was also used in Tilton, but it was augmented by a fourth test inquiring whether the federal act violated the free exercise clause of the First Amendment.

81. Comment, *Constitutional Law: State Aid to Parochial Schools—Excessive Entanglement Revisited*, 24 U. Fla. L. Rev. 378, 383 (1972).

82. *Financial Aid*, at 383.

83. *Establishment Clause*, at 1201-02.

84. 413 U.S. 472 (1973).

> excessive government entanglement?) does the statute "pass constitutional muster."[85]

Although varying viewpoints may be presented concerning the tripartite tests, their significance was demonstrated through verbal references and actual application in church-state cases considered by the Supreme Court in 1973 and 1975. Chief Justice Burger referred to them as "guidelines" in *Tilton*.[86] As long as the three prongs of the tripartite test do not stand as ends in themselves and as long as they "effectuate what the Court perceives to be the heart of the Establishment Clause, that is, protection against sponsorship by and active involvement of the state in religious activities,"[87] the tests may be useful guidelines for assessing acceptable and unacceptable interrelationships between church and state.

In summary, the *Lemon, Di Censo* and *Tilton* cases loosely outlined some features of the excessive entanglement doctrine, introduced the permeation argument and the tripartite test, specifically applied the excessive entanglement standard, distinguished higher from lower educational facilities in terms of legitimate and illegitimate direct aid to church-related institutions, and demonstrated that the "wall of separation" was not "high and impregnable,"[88] but was a slightly less "blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship."[89] The 1973 cases of the Supreme Court made the wall somewhat more visible.

IV. THE 1973 CHURCH-STATE CASES

The 1973 church-state opinions were *Lemon v. Kurtzman* (*Lemon* II),[90] *Levitt v. Committeee for Public Education and Religious Liberty* (PEARL),[91] *Hunt v. McNair*,[92] *PEARL v. Nyquist*,[93] and

85. Lewin, *Disentangling Myth from Reality*, 3 J. LAW & ED. 107, 108 (1974).
86. 403 U.S. at 678.
87. *Perspective*, at 133.
88. Everson v. Board of Educ., 330 U.S. 1, 18 (1947).
89. Lemon v. Kurtzman, 403 U.S. 602, 614 (1971). *See also* Note, *Constitutional Law: State Aid to Nonpublic Schools: The Lemon Test*, 25 ARK. L. REV. 535, 538-40 (1972).
90. Lemon v. Kurtzman, 411 U.S. 192 (1973).
91. 413 U.S. 472 (1973).
92. 413 U.S. 734 (1973).
93. 413 U.S. 756 (1973).

Sloan v. Lemon.[94] Although the excessive entanglement factor did not take a prominent role in most of these cases, they are especially important because they represent the heightening of the wall of separation between church and state, the Court's increasing retrenchment toward the "no aid" dictum of *Everson*, Chief Justice Burger's increasing alienation from the Court's hardening line respecting public aid to sectarian schools, the significance of the primary effect test in at least three of the cases, the retention of the tripartite test, and the reaffirmation of the *Tilton distinction* between aid given to higher and lower sectarian educational facilities.

Lemon II concerned a challenge to the actions of the three-judge federal court to which *Lemon v. Kurtzman (Lemon I)*[95] had been remanded. The federal court permitted sectarian schools to receive payments for services rendered before the Supreme Court decision in *Lemon I*, but enjoined any payments for services rendered thereafter. Chief Justice Burger, speaking for the Court in a five to three decision, held that the schools could receive the funds that were owed them before the Pennsylvania statute was declared unconstitutional.[96] The Court stated that "statutory or even judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct." Unconstitutional statutes are not absolutely and retroactively void.[97] Further, the Court held that the single and final post-audit would not present a risk of "significant intrusive administrative entanglement" and that the very process of oversight assured that state funds would not be used for sectarian purposes.[98] In summation, the Court maintained that the District Court's action was legitimate and that state officials and those with whom they deal were "entitled to rely on a presumptively valid state statute, enacted in good faith and by no means plainly unlawful."[99]

While *Lemon II* resolved old business for the Court, *Levitt v. PEARL* introduced the question whether public funds could be used to directly reimburse nonpublic schools for the costs of carrying out mandated state services. Chapter 138 of New York Laws of 1970 permitted the state to reimburse nonpublic schools for performing state-mandated services such as administering, grading, compiling, and reporting the results of both state-prepared and teacher-pre-

94. 413 U.S. 825 (1973).
95. 403 U.S. 602 (1971).
96. 411 U.S. at 193-94.
97. *Id.* at 198-99.
98. *Id.* at 202-03.
99. *Id.* at 208-09. *See also* Morgan, *The Establishment Clause and Sectarian Schools: A Final Installment?* 193 S. Ct. Rev. 57, 70 (1974).

pared examinations, administering and reporting pupil enrollment data, and maintaining pupil health records. The New York legislature in 1970 appropriated $28 million for reimbursement purposes. While the money could not be used for religious instruction, sectarian schools could receive money under this law. They were not required to account for the money received, submit to state audits of financial records, or return reimbursements exceeding actual expenses.[100] The state legislature hoped in this manner to circumvent any possible grounds for entanglements between parochial schools and New York state. The three-judge federal court that heard the challenge to this law permanently enjoined enforcement of the Act.

Chief Justice Burger, speaking for the Court in an eight to one decision, held that the law constituted an impermissible aid to religion because no attempt was made or could be made to assure that internally teacher-prepared tests were free from religious instruction. Aid devoted to secular functions could not be separated from aid to sectarian activities.[101] The Act fell on primary effect grounds, though an entanglement issue could be implied from Burger's discussion in *Levitt* of *Lemon I* and his statement that the "potential for conflict 'inheres in the situation'."[102] The potential for impermissible administrative and political entanglement was great if the state carried out its constitutional compulsion "to assure that state-supported activity is not being used for religious indoctrination."[103] Burger also held that the Court had to reject the contention that the state should be allowed to pay for any activity mandated by state law or regulations. One essential question in these situations was "whether the challenged state aid has the primary purpose or effect of advancing religion or religious education or whether it leads to excessive entanglement by the State in the af-

100. Levitt v. Committee for Pub. Educ. & Relig. Lib., 413 U.S. at 474-78.
101. *Id.* at 479-80.
102. *Id.* at 480.
103. *Id. See also* Morgan, *The Establishment Clause and Sectarian Schools: A Final Installment?* 1973 S. CT. REV. 57, 72-73 (1974); Pfeffer, *Uneasy Trinity: Church, State and Constitution*, 2 CIT. LIB. REV. 138, 157 (1975); Kauper, *The Supreme Court and the Establishment Clause: Back to Everson?* 25 CASE W. RES. L. REV. 107, 118 (1974); Note, *State Aid to Private Schools: Reinforcing the Wall Of Supervision*, 38 ALBANY L. REV. 611, 618 (1974) [hereinafter cited as *State Aid*].

fairs of the religious institution."[104] Burger did leave the door open for states granting aid directly to parochial schools for clearly identifiable secular purposes, provided it was separable from aid to sectarian activities.[105] For example, aid for administation of Regents' and state-prepared examinations might be acceptable whereas aid for internally teacher-prepared exams would not be.[106]

While *Levitt v. PEARL* hinted that states might constitutionally give direct aid to parochial schools for some state mandated services, provided the aid concerned secular activities, *Hunt v. McNair*[107] followed the arguments in *Tilton v. Richardson*[108] and upheld direct state aid to a church-related college. The *Hunt* case challenged the South Carolina Educational Facilities Authority Act as violative of the Establishment Clause of the First Amendment insofar as it authorized a proposed financial transaction involving the issuance of tax free revenue bonds for the Baptist College of Charleston. The Act allowed the Educational Facilities Authority to assist colleges and universities to construct, finance, and refinance projects of varying sorts so long as no assistance was granted to facilities used for sectarian instruction, religious worship, or divinity schools or departments. Any lease agreement between the Authority and a college had to include a restriction against use of the funds for sectarian purposes. In order to insure that the agreement was honored, each lease allowed the Authority to conduct inspections.[109] Both the trial court and the Supreme Court of South Carolina upheld the act and the proposed aid to Baptist College.

Associate Justice Powell, speaking for a six to three majority, utilized the components of the tripartite test as "helpful signposts"[110] to affirm the constitutionality of the statute and the proposed transaction. First, Powell accepted the state legislature's declaration of purpose as manifesting a secular legislative purpose.[111] Second, in order to identify the primary effect of the legis-

104. 413 U.S. at 481.

105. *Id.* at 482. Burger said that it was a "legislative not a judicial function" to determine "actual costs incurred in performing reimbursable secular services."

106. *See* Kauper, *The Supreme Court and the Establishment Clause: Back to Everson?* 25 CASE W. RES. L. REV. 107, 119 (1974); and Morgan, *The Establishment Clause and Sectarian Schools: A Final Installment?* 1973 S. CT. REV. 57, 73 (1974).

107. 413 U.S. 734 (1973).

108. 403 U.S. 672 (1971).

109. 413 U.S. at 736-40.

110. *Id.* at 741.

111. *Id.* at 741-42.

lation, the Court considered only the transaction between the Authority and Baptist College. Powell noted that Baptist College was not pervasively sectarian in that there were no religious qualifications for either faculty or the student body and only sixty per cent of the College student body was Baptist, a percentage roughly equivalent to the proportion of Baptists in that part of South Carolina. The fact that the proposed lease agreement between the Authority and Baptist College included a religious exclusion clause and periodic inspections to enforce the agreement convinced the Court majority that the proposal would not have the primary effect of advancing or inhibiting religion.[112]

Third, Powell examined the question of entanglement. The appellant and Justice Brennan, in his dissenting opinion, urged that periodic inspections, the continuing financial relationships and annual audits required by the act, and government analysis presented the very kind of excessive entanglements that were lacking in *Tilton*.[113] Powell agreed that the Authority's powers were sweeping under the statute; however, his examination of the proposed lease agreement convinced him that the college would continue to have the responsibility for making the detailed decisions regarding the government of the campus and the fees to be charged for specific services. Neither the Authority nor a trustee bank could take any action until the college failed or refused to make its rental payments. The Court concluded that excessive entanglement did not arise from this transaction.[114]

Two other "church-state" decisions were reported on the same day as *Levitt* and *Hunt*. *PEARL v. Nyquist*[115] was the most extensive and important church-state decision in 1973 while *Sloan v. Lemon*[116] concerned the latest effort of the Pennsylvania legislature to aid church-related schools. Although excessive entanglement did not constitute a significant test in either case, the further

112. *Id.* at 742-45.
113. *Id.* at 752-55.
114. *Id.* at 747-49. *See also* Kauper, *The Supreme Court and the Establishment Clause: Back to Everson?* 25 CASE W. RES. L. REV. 107, 118-20 (1974); *State Aid*, at 618-19; Morgan, *The Establishment Clause and Sectarian Schools: A Final Installment*, 1973 S. CT. REV. 57, 84-85 (1974).
115. 413 U.S. 756 (1973).
116. 413 U.S. 825 (1973).

development of the primary effect element of the tripartite test justifies examination of these two cases.

In May, 1972, the Governor of New York signed into law several amendments to the state's Education and Tax Laws. The first five sections established three distinct financial aid programs for nonpublic elementary and secondary schools. These were challenged almost as soon as they were signed, culminating in the Supreme Court decision known as *PEARL v. Nyquist.* The first section of the challenged enactment provided for direct money grants to qualified nonpublic schools to be used for the maintenance and repair of school facilities and equipment to insure the health, safety, and welfare of enrolled pupils. A "qualifying school" was any non-public, non-profit elementary and secondary school that had served a high concentration of pupils from low-income families during the immediately preceding year. Such schools were entitled to receive a grant of $30 per pupil per year, or $40 per pupil if the facilities were more than 25 years old. Grants were not to exceed 50 per cent of the average per-pupil cost for equivalent maintenance repair services in the public schools.[117]

Section 2 of the challenged legislation established a tuition reimbursement for parents of children attending elementary and secondary nonpublic schools. Only parents with an annual taxable income of less than $5000 qualified under this section. The amount of reimbursement was limited to $50 for each grade school child and $100 for each high school child. State reimbursements could not exceed 50 per cent of the total tuition bill. No restrictions were placed on the use of the funds by the parents.[118]

Sections 3, 4, and 5 of the challenged legislation were designed to provide tax relief for parents who failed to qualify for tuition reimbursements because their incomes exceeded $5000. Under these sections parents whose incomes ranged between $5000 and $25000 could subtract from their adjusted gross incomes for state income tax purposes a designated amount for each dependent for whom they paid at least $50 in nonpublic school tuition. This deduction was unrelated to the amount that the taxpayer actually paid for nonpublic school tuition.[119]

The federal district court invalidated Sections 1 and 2, but not Sections 3, 4, and 5. The Supreme Court affirmed the invalidations,

117. 413 U.S. at 761-63.
118. *Id.* at 764.
119. *Id.* at 765-66.

but overturned the District Court's decision on Sections 3, 4, and 5.

The Court divided six to three. Justice Powell, speaking for the majority, briefly reviewed the subjects of the Establishment Clause cases and stated that the tripartite test provided the basic criteria for determining whether the New York laws passed "muster" under the Establishment Clause. The Court quickly disposed of the secular legislative purpose test, holding that each challenged section was adequately supported by legitimate, non-sectarian state interest.[120]

In considering the constitutionality of the maintenance and repair grants, the Court asserted that no attempt was made in the statute to restrict reimbursement to expenditures related to the maintenance of facilities used exclusively for secular purposes and that nothing in the statute would bar a qualifying school from using state funds to pay the salaries of employees who maintained the school chapel or to pay the costs of renovating classrooms in which religion was taught.[121] Further secularity of state aid was not guaranteed by limiting the grants to 50 per cent of the amount spent for comparable services in public schools. The religious mission of sectarian schools could still be furthered through these unrestricted grants.[122] Powell held that "it simply cannot be denied that this section has a primary effect that advances religion in that it subsidizes directly the religious activities of sectarian elementary and secondary schools."[123] Since these grants fell on the basis of the primary effect test, the Court didn't consider the entanglement aspect of the tripartite test. It did leave the implication that these provisions could fail the administrative entanglement test because assuring the secular use of all funds required too "intrusive and continuing a relationship between Church and State."[124]

The Court held that the New York tuition reimbursement also failed the "effect" test for virtually the same reasons as did the

120. *Id.* at 773.
121. *Id.* at 774.
122. *Id.* at 777-78.
123. *Id.* at 774.
124. *Id.* at 780. *See also State Aid*, at 621-22; *Financial Aid*, at 374; Kauper, *The Supreme Court and the Establishment Clause: Back to Everson?* 25 CASE W. RES. L. REV. 107, 113 (1974); Comment, *Aid to Parochial Schools: A Lid on the Public Coffer*, 19 ST. LOUIS U.L.J. 56, 72-73 (1974) [hereinafter cited as *Schools*].

maintenance and repair grants. Justice Powell noted that direct aid to sectarian schools would be invalid in whatever form.[125] The controlling question for the Court was whether the fact that the grants were delivered to the parents rather than to the schools was of such significance as to compel a contrary result. The Court answered the question by stating that the precise function of the New York law was to provide assistance to private schools, the great majority of which were sectarian. Partial tuition reimbursements for parents were a means of sufficiently relieving their financial burdens to assure that they would continue to have the option to send their children to parochial schools. The Court said that the effect of the aid was "unmistakably to provide desired financial support for nonpublic, sectarian institutions."[126] In answer to the state's argument that its program of tuition grants should survive because it was designed to promote the free exercise of religion, Powell stated that the Court had repeatedly recognized the tension between the Free Exercise and Establishment Clauses and that it might not be possible to promote the former without offending the latter. He went further, stating as follows:

> As a result of this tension, our cases require the State to maintain an attitude of "neutrality," neither "advancing" nor "inhibiting" religion. In its attempt to enhance the opportunities of the poor to choose between public and nonpublic education, the State has taken a step that can only be regarded as one "advancing" religion.[127]

The Court through this holding maintained that neutrality occasionally necessitates the subordination of Free Exercise considerations to Establishment Clause matters.

The invalidation of the tuition reimbursement program in *Nyquist* laid the basis for voiding the Pennsylvania tuition reimbursement program presented to the Court in *Sloan v. Lemon*.[128] The Court found no constitutionally significant difference between two programs. Qualified parents in Pennsylvania were to receive $75 for each elementary school child and $150 for each secondary school dependent, unless that amount exceeded the amount of tuition paid.[129] The Court stated that it was required to look at the substance of programs; no matter how the program was characterized, the state had singled out a special class of citizens for an economic benefit. At bottom the intended consequence of the stat-

125. 413 U.S. at 780.
126. *Id.* at 781-83.
127. *Id.* at 788.
128. 413 U.S. 825 (1973).
129. *Id.* at 828.

ute was to preserve and support religious oriented institutions. The tuition grant scheme, therefore, violated the constitutional mandate against the "sponsorship" or "financial support" of religion or religious institutions.[130]

The third New York aid program provided a system of income tax benefits for parents of nonpublic school children whose incomes ranged between $5000 and $25000. The Court saw little practical difficulty for purposes of determining whether this aid program advanced religion, between the tax benefit and the tuition reimbursement. The qualifying parent under either program received the same kind of encouragement and reward for sending his children to nonpublic schools. The key difference was that one parent received an actual cash reimbursement while the other could reduce by an arbitrary amount the sum he would otherwise be obliged to pay in taxes to New York. The Court rejected the contention that aid was given to parents rather than schools for the same reasons advanced in the tuition reimbursement sections of *Nyquist*[131] and *Sloan*. The Court also refused to accept the appellees' contentions that the *Walz* case[132] provided a controlling analogy for this case, especially in the sense that the tax exemption lessened involvement and entanglement between church and state. Powell asserted that the granting of tax benefits to parents of nonpublic school children would tend to increase rather than limit the involvement between church and state. The Court held that neither the tax benefit nor the tuition reimbursement program was "sufficiently restricted to assure" that it would "not have the impermissible effect of advancing the sectarian activities of religious schools."[133]

Although Powell did not consider whether the New York and Pennsylvania aid programs violated the excessive entanglement test, he did state that assistance of the sort involved in *Nyquist* carried "grave potential for entanglement in the broader sense of con-

130. *Id.* at 832-33. *See also State Aid*, at 619-20; and *Financial Aid*, at 375-76.

131. 413 U.S. at 791-92.

132. 397 U.S. 664 (1970).

133. 413 U.S. 792-94. *See also Financial Aid*, at 376-77; Kauper, *The Supreme Court and the Establishment Clause: Back to Everson?* 25 CASE W. RES. L. REV. 107, 116-17; Morgan, *The Establishment Clause and Sectarian Schools: A Final Installment?* 1973 S. CT. REV. 57, 79-80 (1974).

tinuing political strife over aid to religion."[134] Potentially divisive political strife could have occurred because of the annual appropriations necessary for the maintenance grants and the tuition reimbursements. The tax relief provisions didn't require annual reexamination, but the pressure for frequent expansion of the benefits was predictable.[135]

The *Nyquist* case was marked by the appearance of a strongly dissenting trio of accommodationist Justices rather than the single voice of Justice White. White was joined by Justice Rehnquist and Chief Justice Burger. Burger, the author of excessive entanglement and the first Justice to use the tripartite test, was incensed because the Court ignored *Everson* and *Allen* and invalidated general welfare programs of aid to individuals. For Burger the tuition reimbursement and tax relief programs were general welfare programs of government aid to individuals which generally stood "on an entirely different footing from direct aid to religious institutions."[136] He further asserted that it was "no more than simple equity to grant partial relief to parents who support the public schools they do not use."[137] The *Nyquist* and *Sloan* dissenters continued their disenchantment with the Court's hardened line toward public aid to sectarian schools in *Meek v. Pittenger*.[138]

In summary, the cases demonstrated the following. *Lemon II* resolved a problem stemming from the Court's earlier excessive entanglement decision in *Lemon I*. *Hunt v. McNair* applied the tripartite test and reaffirmed the Court's acceptance, though on a case-by-case basis, of direct governmental aid for church-related higher as opposed to elementary and secondary educational facilities. *Levitt* demonstrated that open-ended direct aid programs for church-related elementary and secondary schools could run counter to the primary effect test.

Nyquist and *Sloan*, especially the former, illustrated several matters. First, although the Court did not apply the excessive entanglement test, it asserted its validity through references to the tripartite test and to the broader possibilities of political divisiveness. Second, the Court placed dominant reliance on the primary effect test. For one thing, this may show that while the Court finds the traditional purpose test no longer useful, *Nyquist* and *Sloan* may be re-introducing effective scrutiny of legislative intent by way of

134. 413 U.S. at 794.
135. *Id.* at 796-97.
136. *Id.* at 799-801.
137. *Id.* at 803.
138. 421 U.S. 349 (1975).

the effect test.[139] These cases may also be demonstrating that the primary effect test may be undergoing a significant reformulation from a primary effect that neither "advances nor inhibits religion" to require that aid not have "the *direct* and *immediate* effect of advancing religion."[140] This may mean that the new criterion extends effect inquiry beyond *primary* effect to secondary effects of a broad and immediate nature. Powell also stated that the maintenance and repair grants and the tax benefits had the "inevitable effect" of aiding and advancing religious institutions.[141] The use of terms like "direct and immediate effect" and "inevitable effect" signifies greater hardening of the line against state aid to sectarian schools and a shoring up of the "no aid to religion" limitation found in *Everson.*[142] Further, Paul Kauper noted that the Court used "neutrality" in *Nyquist* in a much more ambiguous way than Kurland and Katz to restate the idea that the government can do nothing to support or hinder religion in the *absolute*, a viewpoint that is a substantial departure from Kurland's "evenhandedness" neutrality and Katz's conception of "neutralizing aids."[143] *Nyquist* and *Sloan* did not completely cut off public aid to sectarian schools, but they did demonstrate that the avenues of permissible aid were few and narrow. Massive governmental assistance to sectarian elementary and secondary schools, whether direct or indirect, whatever shape or form, would not be countenanced by the Court. *Everson, Allen, Tilton,* and *Walz* were not overruled; rather, they were "channeled into the confines of their own fact situations" and, therefore, have been limited as precedents for future aid programs.[144]

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139. *Establishment Clause*, at 1180.

140. Committee for Pub. Educ. & Relig. Lib. v. Nyquist, 413 U.S. 756, 783-85 & n.39 (1973). *See also Establishment Clause*, at 1181.

141. 413 U.S. at 779, 793.

142. 330 U.S. at 15-16. *See* Kelley, *supra* note 71, at 1025-26; and Kauper, *The Supreme Court and the Establishment Clause: Back to Everson?* 25 CASE W. RES. L. REV. 107, 121 (1974).

143. *See* Kauper, *The Supreme Court and the Establishment Clause: Back to Everson?* 25 CASE W. RES. L. REV. 107, 122 (1974); P. KURLAND, RELIGION AND THE LAW: OF CHURCH AND STATE AND THE SUPREME COURT, (1962), *supra* note 12, at 101-02; Comment, *Constitutional Law: Public Aid to Parochial Schools Held Unconstitutional*, 58 MINN. L. REV. 657, 664-65 (1974) [hereinafter cited as *Public Aid*].

144. *See Schools*, at 75; *Public Aid*, at 665; Rabinove, *Does 'Dual Enrollment' Violate the First Amendment?* 3 J. LAW & ED. 129 (1974).

Nyquist, Sloan, and *Levitt* placed principal reliance on the primary effect test. *Meek v. Pittenger*[145] again demonstrated that the "Court's double-edged sword of 'effect' and 'entanglement' standards may be a way of saying that a little aid is alright, but a lot is unconstitutional."[146]

V. MEEK V. PITTENGER

This latest case concerning public aid to nonpublic schools constituted a challenge to two 1972 acts of the Pennsylvania General Assembly. Act 194 authorized the provision of auxiliary services to all children enrolled in nonpublic elementary and secondary schools meeting Pennsylvania's compulsory attendance requirements. The auxiliary services for exceptional, remedial, and educationally disadvantaged children, and other secular, neutral, and nonideological services beneficial for nonpublic school children. The teaching and services were to be provided by public school personnel in the nonpublic schools.[147]

Act 195 authorized the State Secretary of Education to lend textbooks without charge to children attending nonpublic elementary and secondary schools that met Pennsylvania's compulsory attendance requirements. Only textbooks acceptable for use in the public elementary and secondary schools could be lent to nonpublic school children.[148]

Act 195 also authorized the Secretary of Education, acting in accordance with requests from nonpublic school officials, to lend directly to the nonpublic schools instructional materials and equipment, useful to the education of nonpublic school children. Instructional material included periodicals, photographs, maps, charts, sound recordings, films, and other printed and published materials of a similar nature. Instructional equipment included projection, recording, and laboratory equipment.[149]

A three-judge federal court unanimously upheld the contitutionality of textbook loans, narrowly upheld auxiliary services and the instructional materials loans, and unanimously invalidated the loans of instructional equipment, purchased with state funds for nonpublic schools, to the extent that the equipment could be diverted to religious purposes.[150]

145. 421 U.S. 349 (1975).
146. *Financial Aid,* at 383.
147. 421 U.S. at 352-53.
148. *Id.* at 353-54.
149. *Id.* at 354-55.
150. *Id.* at 356-57.

Justice Potter Stewart spoke for the Court in this decision. He stated that the tripartite test provided the "guidelines" with which to identify whether Acts 194 and 195 impaired the objectives of the Establishment Clause.[151]

By a six to three margin[152] the Court began by upholding the textbook loan provisions of Act 195. These were described as being constitutionally indistinguishable from the New York textbook loan program approved in *Board of Education v. Allen.*[153] The financial benefit of the Pennsylvania program ran to the parents and children—not nonpublic schools, the books were used for strictly secular purposes, and the general nature of the program benefited all school children in Pennsylvania.[154]

By an identical six to three margin[155] the Court invalidated the direct loans of instructional materials and equipment because they had the "unconstitutional primary effect of advancing religion because of the predominantly religious character of the schools benefiting from the Act."[156] The Court especially noted that more than 75 per cent of the nonpublic schools that qualified for aid were church-related or religious-affiliated educational institutions. The massive aid was neither indirect nor incidental.[157] Although aid was earmarked for secular purposes, the fact that it was given to pervasively religious institutions inescapably resulted in the "direct and substantial advancement of religious activity" and thus constituted an impermissible establishment of religion.[158]

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151. *Id.* at 358.
152. Brennan, Marshall, and Douglas were dissenters.
153. 392 U.S. 236 (1968).
154. 421 U.S. at 361-62.
155. Burger, White and Rehnquist were dissenters.
156. 421 U.S. at 363.
157. *Id.* at 364.
158. *Id.* at 365-66. Justice Stewart made special note that Public Funds for Pub. Schools v. Marburger, 358 F.Supp. 29 (D. N.J. 1973) *aff'd*, 417 U.S. 961 (1974), was entitled to precedential weight for Meek, since the Supreme Court upheld the New Jersey District Court's invalidation of a New Jersey law providing instructional material and equipment to nonpublic elementary and secondary schools. New Jersey's program did not differ in any material respect from the loan provisions of Act 195. *See also* Pfeffer, *Aid to Parochial Schools: The Verge and Beyond*, 3 J. LAW & ED. 115, 117-20 (1974), for a discussion of Marburger and Pfeffer's knowledgeable predictions how auxiliary services and other aid programs would fare in the future.

The same six Justices who invalidated the direct loans of instructional materials and equipment also voided the auxiliary services provided in the nonpublic schools by public school personnel. The Court said that the District Court erred in relying entirely on the good faith and professionalism of the public school teachers and counselors in church related schools to ensure that a strictly nonideological posture was maintained. Some sort of continuing surveillance would be necessary to insure that auxiliary teachers and counselors remained religiously neutral.[159] Broader political strife also was probable because of the recurrent nature of the appropriations process. The Court held that:

> [The] potential for political entanglement, together with the administrative entanglements which would be necessary to ensure that auxiliary services personnel remain strictly neutral and nonideological when functioning in church-related schools, compels the conclusion that Act 194 violates the constitutional prohibition against laws "respecting an establishment of religion."[160]

Meek produced dissenting opinions from Justice Brennan, Chief Justice Burger, and Justice Rehnquist. Justice Brennan's dissent on the textbook loan provision was significant because he had supported the Court's decision in *Board of Education v. Allen*, the New York textbook loan case. Brennan noted that *Allen* was decided before *Lemon v. Kurtzman* (*Lemon I*) had "ordained that the political divisiveness factor must be involved in the weighing process . . . ."[161] He stressed that the Court should have examined the political divisiveness factor in judging the permissibility of textbook loans and should have taken the pervasively religious nature of the elementary and secondary schools into account when it judged the constitutionality of textbook loans.[162]

Chief Justice Burger also wrote a strong dissent, but he had dissented in the decisions invalidating the instructional materials and equipment and, especially, the auxiliary services. Burger sharply asserted the following:

> Certainly, there is no basis in "experience and history" to conclude that a State attempt to provide—through the services of its own state-selected professionals—the remedial assistance necessary

159. 421 U.S. at 367-72.

160. *Id.* at 372. Giannella, *Lemon and Tilton: The Bitter and the Sweet of Church-State Entanglement*, 1971 S. Ct. Rev. 147, 175 (1972), served as a judicial soothsayer when he warned that the Supreme Court's failure in Lemon I, to preserve state aid to sectarian physical education teachers, despite a broad severability clause in the statute, probably dealt a blow to "other auxiliary aids widely accepted as welfare benefits to the child."

161. 421 U.S. at 378, Brennan, J., dissenting.

162. *Id.* at 379-385.

> for *all* its children poses the same potential for unnecessary administrative entanglement or divisive political confrontation which concerned the Court in *Lemon v. Kurtzman, supra.* Indeed, I see at least as much potential for divisive political debate in opposition to the crabbed attitude the Court shows in this case.[163]

Burger expressed the hope that at some future date the Court would come to "a more enlightened and tolerant view of the First Amendment guarantee of free exercise of religion, thus eliminating the denial of equal protection to children in church-sponsored schools, and take a more realistic view that carefully limited aid to children is not a step toward establishing a state religion."[164]

Burger's strongly accommodationist views are evident in these quotes and throughout his dissenting opinion. His accommodationism should be viewed in the light of his decisions in *Lemon I, Lemon II, Tilton,* and *Levitt,* for in each case, as in his *Meek* dissent, an effort is made to hedge, to state that "carefully limited aid" to children, or to parents, or to sectarian colleges is constitutionally permissible.

Justice Rehnquist's dissent scored the Stewart opinion for its "demonstration of the arbitrariness of the percentage approach to primary effect" in striking down the loans of instructional materials and equipment because more than 75 per cent of the non-public schools were church-related or affiliated.[165] He also noted that the auxiliary services in *Meek* were different from the impermissible factual circumstances in *Lemon I* in both kind and degree, for *public,* not parochial school personnel carried out the auxiliary services, and the opportunities for religious instruction were much more limited than in *Lemon I.*[166] He asserted that the Court had thrown "its weight on the side of those who believe our society should be a purely secular one."[167]

Meek v. Pittenger suggests several matters relating to church state decisions since *Walz* and *Lemon I.* First, the tripartite test continues to be a significant set of guidelines for the Court. The continued usefulness of the secular purpose test may be questioned, for the Court has rather perfunctorily examined the test and as-

163. *Id.* at 385-86, Burger, C.J., dissenting.
164. *Id.* at 387.
165. *Id.* at 389, Rehnquist, J., dissenting.
166. Id. at 393-94.
167. *Id.* at 395.

serted that statutes establishing public aid to sectarian education met its requirements in cases after *Lemon I*. The primary effect test appears to be a "direct and substantial effect" test, as it was used in *Nyquist*, and is still being employed to make the wall of separation increasingly visible and less opaque. The excessive entanglement test is being employed to examine excessive administrative entanglement and political divisiveness. The test still is a means of assessing the degree of permissible or impermissible entanglement in statutes providing aid for sectarian education. The primary effect and entanglement tests provide a "two-edged sword" to examine whether the Establishment Clause has been breached. The danger of using the tripartite tests for their own sake still exists,[168] especially if the Free Exercise Clause is subordinated to the Establishment Clause, as it was in *Nyquist*. Perhaps the tripartite test would better be a quadpartite test, as it was used in *Tilton*. Examinations of breaches of the Free Exercise Clause should be a part of virtually every case pertaining to state aid to sectarian education.

Second, the Court invalidated programs in *Meek* that had some similarities with past cases. Direct aid to sectarian elementary and secondary schools was voided, as it had been in several cases since *Lemon I*. Auxiliary services, however, were also banned in Meek. These had generally been regarded as indirect aids to sectarian schools. *Nyquist* and *Sloan*, however, in examining tax benefits and/or tuition reimbursements, laid the foundation for voiding matters that were generally considered to be indirect aids to sectarian schools. The pervasively sectarian nature of the elementary and secondary schools was a prime factor in compelling the Court to examine whether aids to parents or children were permissible or impermissible. The future of existing or potential indirect or general welfare aids such as public health services, shared time or dual enrollment programs, voucher systems, and bona fide tax deductions is threatened by the Court's decisions in *Meek*, *Nyquist*, and *Sloan*, among others.

Third, *Meek* demonstrated that the lineup of the Court that was manifest in *Hunt*, *Nyquist*, and *Sloan* still existed. The breakdown was still three to three to three. Brennan, Marshall, and Douglas were super separationists, Burger, Rehnquist, and White were accommodationists, and Blackmun, Stewart, and Powell remained the moderate separationists and the swing jurists.[169]

168. Comment, *A Workable Definition of the Establishment Clause: Allen v. Morton Raises New Questions*, 62 GEO. L.J. 1461, 1481-82 (1974).

169. Morgan, *The Establishment Clause and Sectarian Schools: A Final Installment?* 1973 S. CT. REV. 57, 88 (1974), provided the terms describing the blocs on the Court.

VI. CONCLUSION

This comment comprises an effort to examine the Court in its efforts to draw the line in the area of public aid to church-related education. The primary focus of the Comment was on the development of the excessive entanglement doctrine as an element in the tripartite test employed by the Court to assess permissible and impermissible aids to sectarian education. The excessive entanglement test was identified in *Walz* as an element in the effect test. In *Lemon I* and *Tilton* it was fully established as an independent measure of constitutionality under the Religion Clauses. The test was used in conjunction with the primary effect test in *Hunt v. McNair* and not employed in *Levitt, Nyquist,* and *Sloan* as an independent test. In *Meek* the concept was independently used to invalidate the auxilliary services program in Pennsylvania.

It is evident that the Court will continue to develop and use the concept on a case by case basis. This concept has been characterized as vague, hastily conceived, better used as an element in the effect test, not capable of standing as an independent concept, useful for assessing the existence of impermissible continuing and close administrative relationships between church and state, and as a good substitute for the secular purpose and primary effect tests. The excessive entanglement and primary effect tests comprise an impressive "two-edged sword" for determining the boundaries of permissible and impermissible church-state involvements. These tests have been significant tools in setting the strongly separationist course of the Court in recent cases involving public aid to church-related education.

Yet, the writer cannot help but intercede with a caveat or two. Both caveats are well stated by the late Paul Kauper, speaking about *Nyquist.* The statements are as relevant for 1976 as for 1973.

> The Court's opinion in *Nyquist* is respectable, scholarly, and plausible. It finds support in prior utterances by the Court. But in sweeping with a wide brush and categorically rejecting every argument made in support of the program before it, the opinion reveals a dogmatic and authoritarian quality which comes as a surprise at this stage in the interpretation of the establishment clause . . .[170]

170. Kauper, *The Supreme Court and the Establishment Clause: Back to Everson?* 25 CASE W. RES. L. REV. 107, 129 (1974).

A distressing feature of the Court's approach to the establishment clause is its unwillingness to recognize that it does have options in its interpretation of the establishment clause, that the results are by no means dictated, and that policy considerations consciously or unconsciously play a part . . . . The policy of the Establishment Clause is what the Court has made it to be.[171]

171. *Id.* at 128.