CONSTITUTIONAL LAW—ESTABLISHMENT CLAUSE—NEW YORK STATUTORY SCHEME DIRECTLY REIMBURSING NONPUBLIC SCHOOL PERSONNEL FOR COSTS INCURRED FROM COMPLYING WITH STATE REQUIREMENTS NOT VIOLATIVE OF ESTABLISHMENT CLAUSE OF FIRST AMENDMENT—*Committee for Public Education and Religious Liberty v. Regan*, 100 S. Ct. 840 (1980).

Establishment Clause cases are not easy; they stir deep feelings; and we are divided among ourselves, perhaps reflecting the different views on the subject of the people of this country. [1]

Although the right of parents to send their children to parochial schools in the fulfillment of state educational requirements was firmly established by the Supreme Court in 1925,[2] the ability of these parents to receive government aid remains a controversial issue. The controlling principle to be applied in the determination of the constitutionality of aid programs is expressed in the establishment clause of the first amendment, which provides that "Congress shall make no law respecting the establishment of religion."[3]

The Court's decisions regarding the constitutionality of state aid to nonpublic schools have not been clear or predictable. Instead of pronouncing rigid guidelines, the Court has adopted a more flexible approach; one whose application has resulted in a state of uncertainty among legislators. In a case representative of this trend, *Committee for Public Education and Religious Liberty v. Regan*,[4] the Court validated a New York statutory scheme that provided for direct reimbursement to nonpublic school teachers for costs incurred in complying with state testing and recordkeeping requirements.

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[1] Committee for Public Education and Religious Liberty v. Regan, 100 S. Ct. 840, 851 (1980).

[2] Pierce v. Society of Sisters, 268 U.S. 510 (1925).

[3] U.S. CONST. amend. I. This clause is applicable to the states through the fourteenth amendment due process clause. Cantwell v. Connecticut, 310 U.S. 296 (1940). *See generally* J. NOWAK, HANDBOOK ON CONSTITUTIONAL LAW, ch. 19, at 850-70 (1st ed. 1978) [hereinafter cited as J. NOWAK].

[4] 100 S. Ct. 840 (1980). Chief Justice Burger and Justices Stewart, Powell and Rehnquist joined Justice White supporting the majority opinion. Justice Blackmun filed a dissenting opinion, in which Justices Brennan and Marshall joined. Justice Stevens filed a separate dissenting opinion.

The Committee for Public Education and Religious Liberty is a coalition of thirty-six organizations, including the New York State Council of Churches, the United Federation of Teachers, the American Jewish Congress and the State Congress of Parents and Teachers. N.Y. Times, Feb. 21, 1980, at B1, col. 6.

The Supreme Court first considered the constitutional validity of the New York statute in *Levitt v. Committee for Public Education and Religious Liberty (Levitt I)*,[5] when the Court reviewed a statute authorizing reimbursements to nonpublic schools for complying with state requirements.[6] The Court utilized the *Lemon v. Kurtzman*[7] test to invalidate the statute.[8] The test provides that to avoid conflict with the establishment clause an aid program must have a secular purpose, its primary or principal effect must not advance nor inhibit religion, and it must not result in excessive entanglement between government and religion.[9] Two aspects of the legislation rendered it

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[5] 413 U.S. 472 (1973).

[6] *Id.* Requirements included administering exams and the reporting and recording of information. *Id.* at 474-75.

[7] 403 U.S. 602 (1971).

[8] 413 U.S. at 478-82.

[9] This tripartite test has evolved from numerous Supreme Court cases concerning the permissibility of state legislative enactments. The first step in the evolution was Everson v. Board of Educ., 330 U.S. 1, *rehearing denied*, 330 U.S. 855 (1947), where the Court upheld a statute whereby parents of students using the public transportation system, including those students attending nonpublic sectarian schools, received partial reimbursement for transportation costs. *Id.* at 18. The statutory scheme was characterized as one which benefited the welfare of the general public, rather than one which was designed to further the sectarian mission of religious groups. *Id.*

Subsequent to *Everson*, a constitutional bipartite test addressing the "purpose and effect" of a challenged statute remained the sole criterion for determining the permissibility of state aid to religious schools. In Board of Educ. v. Allen, 392 U.S. 236 (1968), the Court upheld a statute authorizing the loan of secular textbooks to children in grades seven through twelve. *Id.* at 249. The Court reasoned that the books furnished at the request of the pupil benefited the parents and children, not the schools. *Id.* at 243-44. The bipartite test was also applied in Abington School Dist. v. Schempp, 374 U.S. 203 (1963), where the Court declared unconstitutional a statute requiring Bible reading in public schools. *Id.* at 227. The legislation was viewed as having a primary effect of advancing a religion whose tenets were based on the Bible. *Id.* at 224.

A third prong, the excessive entanglement test, was added in Walz v. Tax Comm'n, 397 U.S. 664 (1970), where the Court upheld a New York statute, granting an exemption for property taxes to churches as part of a general exemption for nonprofit institutions. *Id.* at 680. The statutory scheme was perceived as not fostering excessive entanglement between church and state. *Id.* at 675.

The modern tripartite analysis was adopted in Lemon v. Kurtzman, 403 U.S. 602 (1971), in which the Court invalidated two states' attempts to subsidize costs of parochial school education. A Rhode Island statute permitting direct payment of wage subsidies to teachers in nonpublic schools, and a Pennsylvania legislative enactment providing financial support to nonpublic schools for costs relating to teachers' salaries, textbooks and instructional materials for secular purposes, were found to be violative of the third prong. In addition, the Court introduced "[a] broader base of entanglement" characterized by the "divisive political potential" of the statutory schemes. *Id.* at 622.

Subsequent to *Lemon*, in Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973), the Court utilized the three pronged test to invalidate three forms of nonpublic school aid: tuition reimbursements, tax benefits to parents, and grants for maintenance and repairs for schools. *Id.* at 798. The Court struck down tuition reimbursements once again in Sloan v. Lemon, 413 U.S. 825 (1973).

unconstitutional: the tests were prepared by nonpublic school teachers[10] and the provisions, by authorizing an annual lump sum payment failed to limit reimbursement to the actual costs incurred.[11] Internally prepared tests could potentially foster religious instruction, and the absence of an auditing provision to ensure that monies were spent solely for secular services constituted impermissible aid to religion.[12]

In an attempt to conform to guidelines enunciated by the Supreme Court, the New York legislature amended the statute.[13] The revised statutory scheme included a provision mandating schools applying for aid to submit an accounting of actual costs incurred in performing the required tasks.[14] Once again the statute was challenged on establishment clause grounds.[15] To decide whether the statute

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Aid programs to sectarian colleges are analyzed in a different manner than aid to primary and secondary schools because of less opportunity for religious inculcation. J. NOWAK, *supra* note 3, at 858-61; Kirby, *Everson to Meek and Roemer: From Separation to Détente in Church-State Relations*, 55 N.C. L. REV. 563 (1977); Hilton, *Race, Religion, and Constitutional Restraints on Private Schools*, 30 RUTGERS L. REV. 329 (1977). *See* Roemer v. Board of Pub. Works of Maryland, 426 U.S. 736 (1976); Hunt v. McNair, 413 U.S. 734 (1973); Tilton v. Richardson, 403 U.S. 672 (1971).

[10] 413 U.S. at 474-75. The tests were basically of two types: state-prepared examinations, such as "Regents examinations" and the "Pupil Evaluation Program Tests," and traditional teacher-prepared tests. *Id.* at 475.

[11] *Id.* at 480, 482. The Court stated that the New York statutory scheme contained "some of the same constitutional flaws that led the Court to its decision in Nyquist." *Id.* at 479. The statute was invalidated in *Nyquist* primarily on the ground that no attempt was made to ensure that reimbursement pertained to the upkeep of facilities that were devoted exclusively to secular purposes. *See* note 9 *supra*. In *Levitt I*, the Court analogized to the *Nyquist* statute because both advanced religion. 413 U.S. at 479. The *Levitt* statute lacked any means to ensure that teacher-prepared tests would be free of religious instruction. *Id.* at 479-80.

[12] 413 U.S. at 480-82. Although the Court did not conclude that the teachers would act in bad faith to contravene the establishment clause, Chief Justice Burger stated that "the potential for conflict 'inheres in the situation,' and because of that the State is constitutionally compelled to assure that the state-supported activity is not being used for religious indoctrination." *Id.* at 480 (quoting Lemon v. Kurtzman, 403 U.S. at 617).

[13] Committee for Pub. Educ. and Religious Liberty v. Levitt (Levitt II), 414 F. Supp. 1174, 1176 (S.D.N.Y. 1976). *See* 1974 N.Y. Laws ch. 507, *as amended by* 1974 N.Y. Laws ch. 508. Section 1 states legislative findings and purposes of the legislation. Section 3, describing reimbursable costs, provides in pertinent part:

> Apportionment. The commissioner shall annually apportion to each qualifying school . . . an amount equal to the actual cost incurred by each such school during the preceding school year for providing services required by law to be rendered to the state in compliance with the requirements of the state's pupil evaluation program, the basic educational data system, regents examinations, the statewide evaluation plan, the uniform procedure for pupil attendance reporting, and other similar state prepared examinations and reporting procedures.

Id. § 3. *See* § 7 (regarding auditing procedures).

[14] 1974 N.Y. Laws ch. 507, § 5 *as amended by* 1974 N.Y. Laws ch. 508.

[15] Committee for Pub. Educ. and Religious Liberty v. Levitt (Levitt II), 414 F. Supp. 1174 (S.D.N.Y. 1976).

contravened the first amendment's prohibition of a law respecting the establishment of a religion, the district court, in *Levitt II*, adopted the three pronged test articulated in *Lemon*.[16] The court accepted the legislature's goal "to provide educational opportunity of a quality which will prepare its citizens for the challenges of American life" as a valid secular purpose, thus not violative of the establishment clause.[17]

In analyzing the principal or primary effect of the statute, however, the court viewed the statutory aid as primarily benefiting sectarian schools.[18] The lower court accepted the aid to enterprise theory set forth in *Meek v. Pittinger*.[19] The theory provides that when secular and religious educational components form one religious enterprise, "[s]ubstantial aid to the educational function . . . necessarily results in aid to the sectarian school enterprise as a whole."[20] Accordingly, the district court classified the statutory aid program as one

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[16] *Id.* at 1177-78. *See* note 9 *supra* and accompanying text.

[17] Committee for Pub. Educ. and Religious Liberty v. Levitt (Levitt II), 414 F. Supp. 1174, 1178 (S.D.N.Y. 1976). The "purpose test" has lost its significance since courts accept the express legislative purpose. *See* Note, *Establishment Clause Analysis of Legislative and Administrative Aid to Religion*, 74 COLUM. L. REV. 1175, 2000 (1974).

[18] Committee for Pub. Educ. and Religious Liberty v. Levitt (Levitt II), 414 F. Supp. 1174, 1180 (S.D.N.Y. 1976). The Court acknowledged that "[a]ccording to defendants' answers to plaintiffs' interrogatories, there [were] 1954 nonpublic schools, eligible to receive reimbursement pursuant to the statute, approximately 85% of which [were] religiously affiliated." *Id.* at 1176. *See* Note, 42 ALB. L. REV. 701, 708-17 (1978); Note, 22 N.Y.L. SCH. L. REV. 1022 (1977).

[19] 421 U.S. 349 (1975).

[20] *Id.* at 366. In *Meek*, the Supreme Court struck down a Pennsylvania statute providing auxiliary services, instructional materials, and equipment. *Id.* at 373. Although the Court upheld the statutory provision authorizing textbook loans to students, primarily based on *stare decisis*, the "aid to enterprise theory" was adopted. *Id.* at 362, 366. The Court concluded that aid to even an ascertainably secular component resulted in aid which had the primary effect of advancing religion. *Id.* at 366. Justice Stewart, writing for the majority in *Meek*, concluded that

> with the substantial amounts of direct support . . . it would simply ignore reality to attempt to separate secular educational functions from the predominantly religious role performed by many of Pennsylvania's church-related elementary and secondary schools and to then characterize [the statute] as channeling aid to the secular without providing direct aid to the sectarian.

421 U.S. at 365.

In addition, Justice Stewart adopted Justice Brennan's philosophical principle that " '[t]he secular education . . . schools provide goes hand in hand with the religious mission that is the only reason for the schools' existence. Within the institution, the two are inextricably intertwined.' " *Id.* at 366 (citing Lemon v. Kurtzman, 403 U.S. 602, 657 (Brennan, J., concurring in part, dissenting in part)).

See Public Funds v. Marburger, 358 F. Supp. 29 (D.N.J. 1973), *aff'd*, 417 U.S. 961 (1974) (New Jersey provision authorizing instructional material and equipment to nonpublic schools had primary effect of advancing religion); *The Supreme Court, 1974 Term*, 89 HARV. L. REV. 47, 104-10 (1975).

which "result[ed] in the direct advancement of religion."[21] Failing to satisfy the second prong of the *Lemon* test the statute was declared to be unconstitutional.[22]

Subsequent to the district court's decision, *Levitt II* was appealed to the Supreme Court.[23] Vacating and remanding the lower court's judgment, the Supreme Court afforded that court an opportunity to reconsider its decision in light of the intervening decision in *Wolman v. Walter*[24] in which the Court upheld an Ohio statutory scheme.[25] On remand, interpreting *Wolman* as representative of a more flexible standard regarding state aid to sectarian schools,[26] the court in *Levitt III*[27] declared the legislative enactment to be in accordance with the constitutional mandate of the establishment clause.[28]

On appeal to the Supreme Court *Levitt III* was referred to as *Committee for Public Education and Religious Liberty v. Regan*.[29] The Court applied the tripartite test to analyze the New York statu-

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[21] Committee for Pub. Educ. and Religious Liberty v. Levitt (Levitt II), 414 F. Supp. 1174, 1180 (1976). The Court concluded, "it is clear that the aid to the secular functions of sectarian schools provided by the statute is in fact aid to the sectarian school enterprise as a whole . . . ." *Id.* For a discussion of the "separability doctrine," see note 20 *supra*.

[22] Committee for Pub. Educ. and Religious Liberty v. Levitt (Levitt II), 414 F. Supp. 1174, 1180 (1976).

[23] 100 S. Ct. at 846. The district court is a special three judge panel that convenes in constitutional matters. The Supreme Court directly reviewed the case, precluding review by the court of appeals. *See* 28 U.S.C. § 1253 (1976).

[24] 433 U.S. 229 (1977).

[25] *Id.* at 255.

[26] Committee for Pub. Educ. and Religious Liberty v. Levitt (Levitt III), 461 F. Supp.1123, 1127 (S.D.N.Y. 1978). Applying the *Wolman* rationale, the court interpreted *Wolman* as

> reviv[ing] the more flexible concept that state aid may be extended to such a school's educational activities if it can be shown with a high degree of certainty that the aid will only have secular value of legitimate interest to the State and does not present any appreciable risk of being used to aid transmission of religious views.

Id. (footnote omitted).

Judge Ward, who authored *Levitt II*, vigorously dissented because he did not view *Wolman* as retreating from *Meek*. *Id.* at 1133. He believed *Meek* was controlling in *Levitt II* and distinguished *Wolman* from *Meek* on the basis of the direct substantial aid afforded by the *Meek* statute. *Id.* Judge Ward concluded that the *Levitt II* statute advanced religion because of the direct flow of funds which advanced a religious mission and because "no attempt ha[d] been made to restrict payments to those expenditures which [were] related exclusively to the schools' secular functions." *Id.* at 1135. In addition, he found it unconstitutional because it fostered excessive entanglement with religion. *Id.*

[27] Committee for Pub. Educ. and Religious Liberty v. Levitt (Levitt III), 461 F. Supp. 1123 (S.D.N.Y. 1978).

[28] *Id.* at 1131.

[29] 100 S. Ct. 840 (1980).

tory scheme authorizing funds to nonpublic schools for performing various mandated tasks.[30] Reviewing the lower court's judgment, Justice White, writing the majority opinion, affirmed the district court's conclusion that *Wolman v. Walter* controlled the instant case.[31] The statute involved in *Wolman* authorized funding for programs that aided primarily sectarian schools.[32] The Ohio statute included a provision for the loaning of secular textbooks, and permitted funding for instructional equipment and materials, standardized testing and scoring, diagnostic services to be performed on nonpublic school premises, therapeutic services and guidance counseling to be offered at public locations, and field trip transportation expenses.[33] The Court upheld diagnostic services classifying them as "general welfare services,"[34] and declared the statutory provisions restricting the performance of therapeutic and guidance services to public locations as not violative of the establishment clause.[35] The textbook loan plan, which extended benefits to all school children, whether enrolled in public or nonpublic schools, was similarly upheld.[36] In addition, the *Wolman* plurality approved the testing and scoring provisions as not fostering excessive entanglement.[37] The Court invalidated the provi-

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[30] *Id.* at 846-51. *See* note 9 *supra*.

[31] 100 S. Ct. at 847. *See* Comment, Wolman v. Walter *and the Continuing Debate over State Aid to Parochial Schools*, 63 IOWA L. REV. 543 (1977). *See generally* Note, *Constitutional Law—First Amendment—Establishment Clause—State Aid to Nonpublic Schoolchildren*, 16 DUQ. L. REV. 253 (1977-78).

[32] 433 U.S. at 234. There were 720 chartered nonpublic schools in Ohio for the 1974-75 year, of which all but 29 were sectarian. *Id.* More than 96% of the students attending nonpublic schools were enrolled in sectarian schools; 92% attended Catholic schools. *Id.*

[33] *Id.* at 233.

[34] *Id.* at 243-44.

[35] *Id.* at 247. The Court distinguished these services from those offered in *Meek* on the basis that the performance there occurred "in the pervasively sectarian atmosphere of the church-related school;" *id.*, while the statute in *Wolman* provided for the performance of services at "religiously neutral locations." *Id.*

[36] *Id.* at 236-38. The plurality stated that:

> Board of Education v. Allen has remained law, and we now follow as a matter of *stare decisis* the principle that restriction of textbooks to those provided the public schools is sufficient to ensure that the books will not be used for religious purposes.

Id. at 252 n.18.

Justice Marshall favored the overruling of *Allen*. 433 U.S. at 257 (Marshall, J., concurring in part, dissenting in part). The textbook provision was upheld on the assumption that the sectarian school's secular educational and religious instruction functions are separable. *Id.* This separability doctrine, however, was rejected in *Meek* in the discussion of the teaching materials and equipment. *Id.* at 257-58. *See* note 20 *supra* and accompanying text.

[37] *Id.* at 240-41. The Court distinguished the *Levitt I* statute because the Ohio plan did not authorize reimbursements to nonpublic school personnel for the costs of administering or grading the tests. *See id.* at 239 n.7. Furthermore, the tests were not teacher-prepared. *Id.* at 240.

sions authorizing the purchase and loan of instructional equipment and materials and reimbursement for field trip transportation costs.[38] Viewing the sectarian schools, not the students, as the true recipients of the aid, the Court struck down the field trip expenses reimbursement on excessive entanglement grounds, concluding that the funding would demand close supervision of teachers to ensure trips of a secular nature.[39]

In the instant case, Justice White analogized to the *Wolman* statute; both the New York and Ohio enactments provided for state-prepared tests administered by nonpublic school personnel on nonpublic school premises.[40] Noting that in contrast to the Ohio statutory scheme, in which all of the tests were state-graded, the New York plan provided for two nonpublic school-graded tests and one state-graded test, the Court reasoned that because the tests were composed of primarily objective type questions, the district court accurately concluded that there was an absence of any "substantial risk that the examinations could be used for religious educational purposes."[41] Furthermore, the Supreme Court affirmed the lower court's reasoning regarding the reimbursement provisions for recordkeeping and reporting services.[42] The New York statute required the submission of attendance records for minors in addition to the Basic Educational Data System report, which includes information regarding faculty, support staff, student body, physical facilities, and

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[38] *Id.* at 255. The appellees tried to distinguish the instructional materials and equipment provisions from those held unconstitutional in *Meek* by emphasizing that these materials were not loaned to the nonpublic schools, as in *Meek*, but rather to the pupil or his parents. *Id.* at 250-51. The Court refused to accept the distinction, interpreting it as "exalt[ing] form over substance." *Id.* at 250.

[39] *Id.* at 252-55.

[40] 100 S. Ct. at 846-48.

[41] *Id.* at 848. There were three types of state-prepared tests. *Id.* The pupil evaluation program (PEP) tests, offered in grades three and six, and optionally in grade nine, were graded by nonpublic school personnel, and the examinations were composed entirely of objective questions. *Id.* The Comprehensive Achievement Tests, administered in grades nine through twelve, were also graded by nonpublic school personnel and consisted essentially of objective type questions with multiple choice answers. The Court, however, acknowledged that some of these tests had the possibility of including one or two essays. *Id.* The third type of test, The Regents Scholarship and College Qualifications Tests (RSCQT), was state-graded. *Id. See id.* at 847 n.4.

[42] 100 S. Ct. at 848-49. The district court explained that "since record-keeping is essentially a ministerial task lacking ideological content or use, it is not challengeable on *Meek*'s theory that any state assistance to the educational process advances religion." Committee for Pub. Educ. and Religious Liberty v. Levitt (Levitt III), 461 F. Supp. 1123, 1130 (S.D.N.Y. 1978).

The district court analogized the recordkeeping function to the bus transportation expenses in *Everson*. *Id.* Furthermore, the Court rejected the "freeing up" argument that since schools would be required to expend their own funds for performing these tasks, the school benefited because state reimbursement "frees up" funds for religious purposes. *Id. See* Nyquist, 413 U.S. at 775. *See* note 9 *supra*.

curriculum of the school.[43] Characterizing these functions as primarily secular in purpose and effect, the Court concluded that provisions authorizing aid were not violative of the establishment clause.[44]

A significant distinction existed between the Ohio and New York statutes. The New York statute authorized direct cash reimbursement to the nonpublic schools for grading and administering the tests, whereas the Ohio statute authorized payment to an independent testing service for expenses associated with the grading of nonpublic school tests.[45] Because the *Regan* Court previously characterized the grading of the examinations as a function which had a secular purpose and primarily secular effect, Justice White, in accord with the lower court, refused to categorize this distinction as one of constitutional significance.[46] Noting that it was illogical to distinguish between grading services performed by a nonpublic school employee and a state employee or independent testing service, Justice White "decline[d] to embrace a formalistic dichotomy that b[ore] so little relationship either to common sense or to the realities of school finance."[47] In addition, the majority emphasized that safeguards included in the statutory scheme aided to guard against reimbursement for sectarian services.[48]

To determine whether or not the legislation fostered excessive entanglement between the state and religion, the Court analyzed the statutory procedure for reimbursement.[49] Nonpublic schools receiving aid must maintain a separate account for reimbursable expenses and are required to submit an application for reimbursement to the

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[43] 100 S. Ct. at 848.

[44] *Id.* The Court noted the lower "[c]ourt's finding that '[t]he lion's share of the reimbursements to private schools under the Statute would be for attendance-reporting.' " *Id.* n.5. It was estimated that reimbursements to nonpublic schools would amount to $8,000,000 to $10,000,000 a year. Committee for Pub. Educ. and Religious Liberty v. Levitt (Levitt III), 461 F. Supp. 1123, 1126 (S.D.N.Y. 1978). In addition, between 85% and 95% of the total reimbursement would be accounted for by the costs attributable to attendance-taking. *Id.*

[45] 100 S. Ct. at 848.

[46] *Id.* at 848-49. The district court stated:

> there does not appear to be any reason why payments to sectarian schools to cover the cost of specified activities would have the impermissible effect of advancing religion if the same activities performed by sectarian school personnel without reimbursement but with State-furnished materials have no such effect.

Committee for Pub. Educ. and Religious Liberty v. Levitt (Levitt III), 461 F. Supp. 1123, 1129 (S.D.N.Y. 1978).

[47] 100 S. Ct. at 849. Compare this reasoning to the aid to sectarian school enterprise theory at note 20 *supra*. *See* Meek v. Pittenger, 421 U.S. at 365-66; Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. at 781-83 and 783 n.39.

[48] 100 S. Ct. at 849.

[49] *Id.* at 849-50.

Commissioner of Education.[50] The Commissioner is empowered and mandated to audit vouchers prior to the approval of releasing authorized funds.[51] Furthermore, the statute provides for the inspection of accounts by the State Department of Audit and Control for verification of costs.[52] Describing the reimbursement process as "straightforward and susceptible to the routinization that characterizes most reimbursement schemes,"[53] Justice White concluded that the statutory scheme did not violate the third prong of the constitutional test.[54] The majority refused to address an additional aspect related to excessive entanglement—the issue of political divisiveness along religious lines.[55] This concept concerns division among religious factions resulting from public debate regarding aid to nonpublic schools.[56]

In an attempt to clarify the standard enunciated in *Meek* the majority rejected the contention that any aid to sectarian schools, even funds designated for secular functions, must be invalidated because these sectarian institutions are religion pervasive.[57] In his endeavor to maintain the vitality of *Meek*, Justice White asserted that the *Wolman* decision, rendered subsequent to *Meek*, presented proof of the repudiation of such a broad doctrine.[58]

Justice Blackmun, writing a dissenting opinion, in which Justices Brennan and Marshall joined, argued that the significance of the establishment clause demanded a more detailed analysis of the New York legislative enactment.[59] Accepting the majority's view that the statute revealed a secular purpose, Justice Blackmun analyzed the primary effect and the potential for excessive entanglement.[60] The

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[50] *Id.* at 849. *See* 1974 N.Y. Laws ch. 507, § 7, *as amended by* 1974 N.Y. Laws ch. 508.

[51] 100 S. Ct. at 850.

[52] *Id.*

[53] *Id.*

[54] *Id.* Justice White described the tasks for which nonpublic schools would be reimbursed as " 'discreet and clearly identifiable.' " *Id.* (quoting Committee for Pub. Educ. and Religious Liberty v. Levitt (Levitt III), 461 F. Supp. 1123, 1131 (1978)). Furthermore, the majority concluded that "[o]n its face, therefore, the New York plan suggests no excessive entanglement, and we are not prepared to read into the plan as an inevitability the bad faith upon which any future excessive entanglement would be predicated." 100 S. Ct. at 850 (footnote omitted).

[55] 100 S. Ct. at 850 n.8.

[56] J. NOWAK, *supra* note 3, at 854. *See* note 93 *infra* and accompanying text.

[57] 100 S. Ct. at 850-51. *See* note 20 *supra* and accompanying text.

[58] 100 S. Ct. 850-51.

[59] *Id.* at 852 (Blackmun, J., dissenting).

[60] *Id.* (Blackmun, J., dissenting).

dissent emphasized that most of the direct financial assistance afforded to sectarian schools was associated with attendance reporting costs.[61] The fundamental difference between the Ohio statute in *Wolman* and the plan in the instant case concerned direct financial aid; the Ohio plan did not include an authorization for direct financial assistance, instead it allocated funds for tests to be distributed to other than nonpublic school personnel.[62] Moreover, the dissent disagreed with the majority's interpretation of *Wolman*.[63] Justice Blackmun viewed *Wolman* as reaffirming the *Meek* principle that direct aid to the religious function of a sectarian school necessarily aided the sectarian institution.[64] The invalidation, in *Wolman*, of the loan of instructional materials and equipment and the reimbursement for field trip transportation costs reinforced the constitutional unacceptability of aid to a sectarian school; therefore, *Wolman* necessitated a characterization of the New York scheme as one which advanced religion.[65]

The reimbursement for expenses incurred from the reporting and testing requirements, which were necessary functions for maintaining accreditation status, was viewed by Justice Blackmun as a subsidy " 'to the sectarian school enterprise as a whole.' "[66] Furthermore, the maintaining of pupil attendance records was considered "essential to the religious mission of sectarian schools."[67] Therefore, the failure of the legislature to include a provision mandating the separation of attendance taking expenses for religious purposes from those incurred

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[61] *Id.* (Blackmun, J., dissenting). *See* note 44 *supra* and accompanying text.

[62] 100 S. Ct. at 853 (Blackmun, J., dissenting). *See* Wolman, 433 U.S. at 238-39 & 239 n.7. *See* text accompanying note 45 *supra*.

[63] 100 S. Ct. at 852-54 (Blackmun, J., dissenting).

[64] *Id.* at 853-54 (Blackmun, J., dissenting).

[65] *Id.* (Blackmun, J., dissenting).

[66] *Id.* at 854 (Blackmun, J., dissenting) (quoting Lemon v. Kurtzman, 403 U.S. at 657 (Brennan, J., concurring)). Justice Blackmun reasoned that it was necessary for sectarian schools to perform the tasks required in § 3 of Chapter 507 or lose accreditation. *Id.* (Blackmun, J., dissenting). Justice Blackmun stated that

> [t]hese reporting and testing requirements would be met by the schools whether reimbursement were available or not. As such, the attendance, informational, and testing expenses compensated by Chapter 507 are essential to the overall educational functioning of sectarian schools in New York in the same way instruction in secular subjects is essential. Therefore, just as direct aid for ostensibly secular purposes by provision of instructional materials or direct financial subsidy is forbidden by the Establishment Clause, so direct aid for the performance of recordkeeping and testing activities that are an essential part of the sectarian school's functioning also is interdicted.

Id. (Blackmun, J., dissenting).

[67] *Id.* (Blackmun, J., dissenting).

for state purposes constituted a violation of the establishment clause.[68] Justice Blackmun concluded that the New York plan was not constitutionally acceptable because the direct financial assistance aided the sectarian institution and advanced religion.[69]

According to the dissent, because the New York statute fostered excessive entanglement by requiring state surveillance to ensure judgments of a secular nature by teachers grading the examinations, the plan failed the third prong of the constitutional test.[70] Other potentially troublesome aspects of the statute concerned the state's ability to determine whether nonpublic school teachers' time was devoted solely to secular activities and the state's need to review exams which vary annually to ensure secular content.[71]

Justice Stevens, filing a separate dissent, characterized the majority position as one in a long line of "ad hoc decisions."[72] Rather than justifying aid to sectarian institutions, Justice Stevens recommended a strict construction of the establishment clause; he "would resurrect the 'high and impregnable' wall between church and state constructed by the Framers of the First Amendment."[73]

Subsequent to the *Meek* decision, commentators concluded that the Court would strike down provisions authorizing aid to the educational function of sectarian schools except those involving textbook loans and basic incidental services.[74] Prior to *Regan*, it appeared as though *Wolman* confirmed this conclusion.[75] One commentator specifically attributed the validation of the standardized testing and scoring provisions of the *Wolman* statute to language in *Meek* which referred to "substantial aid," and that a plan authorizing less than substantial aid would only result in an incidental benefit to sectarian institutions.[76] Therefore, the provisions authorizing the loan of instructional materials and equipment and reimbursement for field trip transportation expenses were invalidated as aiding the sectarian enterprise and unconstitutionally advancing religion.[77]

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[68] *Id.* (Blackmun, J., dissenting).

[69] *Id.* at 855 (Blackmun, J., dissenting).

[70] *Id.* (Blackmun, J., dissenting).

[71] *Id.* (Blackmun, J., dissenting).

[72] *Id.* (Stevens, J., dissenting).

[73] *Id.* at 856 (Stevens, J., dissenting) (quoting Everson v. Board of Educ., 330 U.S. 1, 18, *rehearing denied*, 330 U.S. 855 (1947)).

[74] Nowak, *The Supreme Court, The Religion Clauses and the Nationalization of Education*, 70 NW. U.L. REV. 883, 889 (1976); Hilton, *supra* note 9, at 333, 342; Comment, *supra* note 31, at 544.

[75] *See* Wolman, 433 U.S. at 255, 251 n.18; note 74 *supra* and accompanying text.

[76] Comment, *supra* note 31, at 555. *See generally* Hilton, *supra* note 9.

[77] Comment, *supra* note 31, at 555.

The *Regan* majority rejected the contention that *Meek* stood for the broad proposition "that any aid to even secular educational functions of a sectarian school is forbidden."[78] The Court reiterated Justice Powell's statement in *Wolman* that the *Wolman* and *Meek* holdings were consistent because " 'Meek [did not] hold that all loans of secular instructional material and equipment' inescapably have the effect of direct advancement of religion."[79] Therefore, the *Wolman* testing services were constitutionally acceptable because they did not have the primary effect of advancing the sectarian enterprise.[80] Even Judge Ward, who dissented in the district court *Levitt III* decision, argued that *Wolman* did not *sub silentio* reject the *Meek* rationale and disallow all aid to the educational function of religiously affiliated schools; rather the *Wolman* plurality affirmed the *Meek* rationale that substantial direct aid violated the establishment clause of the first amendment.[81] This reasoning is further reinforced by a close analysis of the Ohio statute under review in *Wolman* which did not authorize payments to the nonpublic school personnel; hence no direct aid was afforded to sectarian schools.[82]

The majority's analysis, upholding the consistency of *Meek* and *Wolman*, fails, however, in light of the "substantial aid" afforded by the statutory scheme in *Regan*. In *Meek*, the Court characterized the twelve million dollars authorized to be distributed to 1,320 nonpublic schools in Pennsylvania, of which seventy-five percent were religiously affiliated, as "massive . . . [and] neither indirect nor incidental."[83] Surely, the New York statute's eight to ten million dollar allotment to predominantly religion pervasive institutions requires a similar characterization. Concluding that the legislative enactment was unconstitutional, the Court in *Levitt II* did not discern any "legally relevant distinction between the $12 million of public funds involved in *Meek* and the $8-$10 million at issue [in *Levitt II*]."[84]

If the holdings in *Meek* and *Wolman* are compatible, as the Court declared, then the *Wolman* philosophy should not have been considered controlling in the instant case. Justice Blackmun, in his

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[78] 100 S. Ct. at 850.

[79] *Id.* at 851 (quoting Wolman, 433 U.S. at 263 (Powell, J., concurring in part, dissenting in part)).

[80] Wolman, 433 U.S. at 240.

[81] Committee for Pub. Educ. and Religious Liberty v. Levitt (Levitt III), 461 F. Supp. 1123, 1131-38 (1978).

[82] *See* Wolman, 433 U.S. at 238-39 & 239 n.7; text accompanying notes 45 & 62 *supra*.

[83] Meek, 421 U.S. at 365. *See* note 20 *supra* and accompanying text.

[84] Committee for Pub. Educ. and Religious Liberty v. Levitt (Levitt II), 414 F. Supp. 1174, 1180 (S.D.N.Y. 1976).

dissenting opinion, articulated the fundamental differences between the Ohio plan in *Wolman* and the New York statute.[85] The state aid to sectarian schools afforded by the Ohio plan consisted of standardized tests and scoring services performed by "neutral testing organizations."[86] In contrast, the New York scheme authorizes direct financial aid to the nonpublic school employees for costs incurred in administering and grading the tests.[87] None of the forms of assistance upheld in *Wolman* authorized direct financial assistance to the sectarian institutions; rather the constitutionally permissible provisions provided public health services, and therapeutic, remedial, and guidance programs.[88] Therefore, just as the loans of instructional equipment and field trip transportation reimbursements were invalidated in *Wolman* because the direct aid resulted in the advancement of the sectarian enterprise,[89] the reimbursement for nonpublic school personnel costs incurred from complying with state reporting and testing requirements, which are mandated by state accreditation provisions, have the same impermissible effect.

Furthermore, two of the New York examinations are graded by nonpublic school employees, with one test "includ[ing] an essay question or two."[90] Assuming that there is "no substantial risk that the examinations could be used for religious educational purposes,"[91] it will still be necessary for the state to intervene to ensure the absence of propagation of religious views. This surveillance, in addition to the difficult task of ascertaining that reimbursed personnel expenses are devoted only to secular activities, necessitates excessive government entanglement with religion.[92] Addressing this argument, the Court justified its refusal to analyze the effect of the New York statutory scheme in terms of the potential danger for political divisiveness by noting that the *Wolman* decision did not discuss the issue.[93]

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[85] 100 S. Ct. at 852-55 (Blackmun, J., dissenting).

[86] *Id.* at 853 (Blackmun, J., dissenting).

[87] *Id.* at 852 (Blackmun, J., dissenting).

[88] *See* notes 32-39 *supra* and accompanying text.

[89] 433 U.S. at 255.

[90] 100 S. Ct. at 848. *See* note 41 *supra*.

[91] 100 S. Ct. at 848.

[92] *Id.* at 855 (Blackmun, J., dissenting).

[93] *Id.* at 850 n.8. *See* text accompanying notes 55 & 56 *supra*. The political divisiveness argument has been raised in prior establishment clause cases. *See* Walz v. Tax Comm'n, 397 U.S. 664, 695 (1970) (separate opinion of Harlan, J.); Board of Educ. v. Allen, 392 U.S. 236, 249 (1968) (Harlan, J., concurring); Abington School Dist. v. Schempp, 374 U.S. 203, 307 (1963) (Goldberg, J., concurring). Justice Brennan has declared the political divisiveness issue as significant entanglement to invalidate a statutory scheme. Wolman, 433 U.S. at 256 (Brennan, J., concurring in part, dissenting in part). In *Nyquist* the Court described the potential of the

Should the *Regan* analysis be interpreted as an abandonment of the political divisiveness factor for testing the potential entanglement between government and religion? Is the Court's acceptance of the New York statute's "ample safeguards" to ensure against "excessive or misdirected reimbursements" a signal that a more liberal attitude has been adopted concerning the constitutional permissibility of direct financial aid to sectarian schools? Has the Court, in effect, nullified the rationale of *Meek*? If controversy concerning permissible forms of state aid to parochial schools is to be resolved, and the aforementioned questions are to be answered, a new constitutional test must be formulated that will be consistently applied. The *Regan* decision fails to delineate a clear mode of analysis—one is needed to provide legislators and parents with specific constitutional guidelines to ensure that the application of a new standard will serve "as a guidepost for determining the outcome" rather than "as a framework for structuring opinions."[94]

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danger as "a 'warning signal' not to be ignored." 413 U.S. at 798 (quoting Lemon v. Kurtzman, 403 U.S. at 625).

[94] Young, *Constitutional Validity of State Aid to Pupils in Church-Related Schools—Internal Tensions Between the Establishment and Free Exercise Clauses*, 38 OHIO ST. L.J. 783, 788 (1977).