FROM: Phyllis Schlafly

68 FAIRMOUNT, ALTON, ILLINOIS 62002 / (618) 462-5415

RELEASE: AUGUST 14, 1981

TUITION TAX CREDITS

The Reagan Administration's plan to cut back on federal loans to college students from middle-income families has brought renewed interest in the drive for tuition tax credits. One such bill nearly passed Congress in 1978, and the Packwood-Moynihan bill is presumed to have a better chance in the new conservative Congress, especially since Ronald Reagan campaigned in favor of tuition tax credits.

The bill would apply to tuition paid to elementary, secondary, vocational and college institutions. It would give a 50 percent credit against federal income tax up to a maximum of $500 in the first year, and up to $1,000 per year thereafter.

The usual liberal organizations, which want all education to be controlled by the government rather than the parents, can be counted on to challenge the constitutionality of the tuition tax credit bill under the "establishment clause" of the First Amendment. That clause says "Congress shall make no law respecting an establishment of religion."

Until 1947, that clause meant exactly what it says. In Everson v. Board of Education that year, the Supreme Court extended it to apply to the states, too. Holding that local boards of education can reimburse parents for the cost of having their children ride public buses to private schools, the Court defined the clause as intending (in Jefferson's words) "a wall of separation between church and state."

In Lemon v. Kurtzman (1971), the Supreme Court developed a three-pronged test: whether there is a secular legislative purpose, whether the primary effect is to advance or to inhibit religion, and whether the action fosters an excessive government entanglement with religion. The Burger Court later introduced a fourth test: political divisiveness. The Court did not explain why divisiveness is a threat in religious issues and not in other public policy issues, where freedom of speech overrides any danger of factionalism.

Since erecting the famous "wall of separation" in Everson, the Supreme Court has decided nearly 50 cases pertaining to school aid and the religion clause. Justice Jackson observed in 1948 that the "wall" has been as serpentine as the walls designed by Jefferson for the University of Virginia. Since then, the "wall" has been even more inconsistent.

(more)

The Court allowed the state to provide busing for parochial students to and from school (Everson) but not to and from field trips (Wolman v. Walter, 1977), loans of textbooks (Board of Education v. Allen, 1968) but not other instructional material (Wolman), church property tax exemptions (Walz v. Tax Commission, 1970) but not tuition tax benefits (Committee for Public Education v. Nyquist, 1973), funds for administering state-required tests (Committee for Public Education v. Regan, 1980) but not where the teachers could devise and grade the tests (Levitt v. Committee for Public Education, 1973).

The one sharp line in the last ten years has been drawn between state aid to colleges and universities and aid to elementary and secondary schools. The Court was fairly frank in its reason for this difference in Tilton v. Richardson (1971): there is less danger in college that the student will have his values formed by religious teaching.

Will the Packwood-Moynihan tuition tax credit bill be constitutional? In view of the Court's lenient view of aid to higher education, a national tuition tax credit bill would probably encounter little difficulty insofar as it applies to colleges.

In regard to elementary and secondary schools, at first glance the tuition tax scheme would appear to be legally the same as the New York tax benefit knocked out in Nyquist. However, the Packwood-Moynihan bill would be stronger for several reasons. First, it would be an act of Congress and, since Marbury v. Madison (1803), only one act of Congress has been stricken under the establishment clause (Tilton), and second, the Court in modern times has been extremely deferential to Congressional tax legislation.

The tuition tax credit bill enjoys the support of President Reagan and thus, if passed by Congress, would be backed by two branches of the government, as well as by many state legislatures. Such a strong political consensus should not be discounted.

The tuition tax credit bill would be constitutionally stronger than the bill in Nyquist because it applies to virtually all private education all across the country. This would greatly reduce the alleged possibility for domination of education by one church or even by all churches.

The establishment cases of the last 30 years have failed to formulate any principle other than a case-by-case approach. When the Constitution's meaning is so obscure to the Justices themselves, it's time for them to defer to the judgment of Congress.

(end)