TELEGRAM

RCA ALASKA COMMUNICATIONS, INC.

PHONE 586-6442

JUNEAU, ALASKA 99802

1979 FEB 27 PM 12 11

#

02013 POM ANCHORAGE ALASKA 15 02-27 940A AST

PMS SENATOR GLENN HACKNEY

1123

JUNEAU AK

PLEASE PASS SB48. WE NEED DLRS500 TUITION TAX

CREDIT TO FIGHT INFLATION.

HEDY F MALIN 7420 TUTNA CIRCLE ANCHORAGE AK 99504

TELEGRAM

RCA ALASKA COMMUNICATIONS, INC.
PHONE [illegible]
JUNEAU, ALASKA [illegible]

02131 NL ANCHORAGE ALASKA 50 02-26 548P AST

PMS SEN GLEN HACKNEY

JUN

WHEN ALASKA PROVIDES GOOD EDUCATION INSTITUTIONS FOR OUR CHILDREN, WE WILL SEND OUR CHILD TO PUBLIC SCHOOL. UNTIL THEN HE WILL STAY IN A PRIVATE INSTITUTION. ALASKAN SCHOOLS ARE THE PITS FOR AN EDUCATIONAL WASTELAND. PASS FB48 IF YOU CARE ABOUT OUR CHILDREN AND ALASKAS FUTURE.

RAYMOND WIBERG 604 EAST 7RTH AVENUE

ANCHORAGE ALASKA 99502

TELEGRAM

RCA ALASKA COMMUNICATIONS, INC.
PEONE: 586-6442
JUNEAU, ALASKA 99802

1979 FEB 26 PM 1 32

02042 POM ANCHORAGE ALASKA 15 02-26 [illegible]0A AST

PMS SENATOR GLENN HACKNEY

JUN 1972

DO PASS SB48 DLRS500 TUITION CREDIT NEEDED TO HELP

FIGHT FAMILY INFLATION

BURDUS FAMILY 2601 MELVIN ANCHORAGE AK 99503

TELEGRAM

RCA ALASKA COMMUNICATIONS, INC.
PHONE: 586-6442
JUNEAU, ALASKA 99802

#

02010 POM TDA EAGLE RIVER ALASKA 15 02-27 945A AST

PMS SENATOR GLENN HACKNEY

JUNEAU 1124

PLEASE PASS SB48. WE NEED DLRS500 TUITION TAX CREDIT TO

FIGHT INFLATION.

JAMES GLASPELL 610 MEADOWCREEK EAGLE RIVER AK

TELEGRAM

RCA ALASKA COMMUNICATIONS, INC.
PHONE: 586-6442
JUNEAU, ALASKA 99802

1979 FEB 27 PM 1 41

02016 POM ANCHORAGE ALASKA 02-27 1042A AST

PMS SENATOR GLEN HACKNEY

1126

JUNEAU AK

PASS SB48. NEED TUITION CREDIT NOW.

JOHN AUFRECHT MA AUDIOLOGIST 2137 EAST 37TH AVE

ANCHORAGE ALASKA 99504

TELEGRAM

RCA ALASKA COMMUNICATIONS, INC
PHONE: 586-6442
JUNEAU, ALASKA 99802

1979 FEB 27 PM 2 08

02027 NL ANCHORAGE ALASKA 50 02-27 1135A AST

PMS SENATOR GLEN HACKNEY

JUNEAU 1127

PLEASE PASS SB48. THE TAX CREDIT WOULD HELP TO KEEP MY DAUGHTER IN A SCHOOL WHICH HAS ALLOWED HER TO DEVELOP AT HER OWN SPEED. WHICH FAR EXCEEDS CHILDREN HER OWN AGE IN PUBLIC SCHOOLS AND STILL REMAIN WITH CHILDREN OF HER OWN AGE

TERRY BEDARD

Please file with SB 48

(B)

Tues 28 Feb.

Questions: what do you think the retroactive provision will do to the 80 budget and where do you think the $ is should cut to make up for the revenue loss

→ Karen Lundgren
S 123-26

Burton Carney - Harvester Foundation - [illegible]
[illegible] opposed
23-26 "opposed as written for [illegible]

Jerry O'Brien

Lou Kenney

Pete Kinney

Charles Harmon

Jerry Pollard
[illegible]
"Bill Chandler" [illegible]

Bill Tyrrell

Glenn Henry

Kay Foster

[illegible]

Margaret Green - Montessori
(would not oppose addition of church)

Betty Burroughs - also Montessori

Fred Morgan

Jack Barker

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

Marshall Fund
Speaking for State Rd. - opposed to bill
3200 in private & dev. roads
220/90 elem secondary

Point out that underwriting of bill dept would have to get outside interest.

Jenkins

Bond [illegible] - 2 consultants agreed
DOT, Council
[illegible]

Hagerstown
Will provide profit for other State
connection until 2b bill

- Family -

- 140 -

Introduced: 1/16/79
Referred: Health, Education & Social Services and Finance

IN THE SENATE BY BRADLEY

SENATE BILL NO. 48

IN THE LEGISLATURE OF THE STATE OF ALASKA

ELEVENTH LEGISLATURE - FIRST SESSION

A BILL

For an Act entitled: "An Act establishing a tuition credit under the Alaska net income tax; and providing for an effective date."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 43.20 is amended by adding a new section to read:

Sec. 43.20.037. EDUCATIONAL TUITION CREDIT. (a) An individual is allowed as a credit against the tax due under this chapter 50 per cent of the money paid by him during the year to eligible educational institutions as tuition for the individual, the individual's spouse, or of any dependents the individual is entitled to claim as personal exemptions under Internal Revenue Code sec. 151(e).

(b) The credit allowed under this section may not exceed $500 for each individual whose tution is paid by the taxpayer.

(c) No credit is allowable under this section for amounts paid during the year for the education of the spouse of a taxpayer unless the taxpayer is entitled to a personal exemption for the spouse under Internal Revenue Code sec. 151(b) or the taxpayer files a joint return with the spouse.

(d) In this section "eligible educational institution" means an institution of higher education, a vocational school, a secondary school or an elementary school which meets accreditation or approval criteria established by the department by regulation. OR A CHURCH SCHOOL

* Sec. 2. This Act is retroactive to January 1, 1978. 1979

* Sec. 3. This Act takes effect immediately in accordance with AS 01.10.-070(c).

SB 48

MEMO

TO: SEN. HACKNEY

FROM: PAUL

FEB 28

RE: Today's Committee Bills
SB 48
SJR 14
SB 214

SB 48

What Sen. Bradley wants to do with this bill is provide some relief for taxpayers who are paying the astronomical costs of tuition to send either themself, spouse, or kids to school. His means of obtaining this objective is by allowing for a tax credit (sec 1 (a)) to the individual on his income tax of 50% of the amount of tuition paid during that year not to exceed $500 for each individual (sec 1 (b)) (i.e. if he's going to school, his wife is going to school and his son is going to school, he could possibly get a tax credit of up to $1500, dependent on the amount of the tuition paid out for that year -- remember, according to this bill the tax credit is for 50% of the tuition paid not exceeding $500 for each individual).

A safeguard is provided in section 1(c) making sure that the credit is not granted twice when it can only be used once.. i.e. its saying that the only time that an individual can claim the spouse's tuition costs is when the taxpayer (individual) is entitled to a personal exemption for the spouse or they file jointly. This is to prevent a couple who has separated and who are filing separately from both using this tax credit when filing.

Section 1(d) defines "eligible education institutions" that this bill would deal with. It should be noted that Sen. Bradley includes elementary & secondary schools, as well as, institutions of higher education in this bill. So he is seeking relief for those parents who pay to have their kids go to private grade school and high school, and not just coming to the aid of those burdened with the high costs of college tuition.

Section 2 of the bill makes the bill retro to Jan '78.

Section 3 of the bill stipulates that the Act will take effect immediately.

Regarding this bill, I spoke with Paul Taylor, an acquaintance of mine, who is an auditor with the Audit Division, Dept of Revenue, in reference to the mechanics of this bill and he had these comments:

Section 1(a) - he said the only change he would make here would be to delete the word "personal" on line 14 and have it read simply "and dependents the individual is entitled to claim as exemptions under Internal Revenue Code (IRC) 151 (e)." The reason for this is

because the individual claims himself as a "personal" exemption (in which he can exempt $750 for himself personally) and his spouse and kids are his "additional" (not personal) exemptions (see IRC 151 (b) & (e) attached). He said this is just a technical change and not that big of a deal. He said "I guess you could read the language in such a way that his spouse and kids could be classified as personal exemptions without much difficulty.

Section 1(b) - He said he would insert the words on line 17, between individual and whose, the language "specified in section 1(a)", to clarify that this credit is for himself, spouse and dependents as stated in section 1(a). Credit would not apply if the individual is paying the neighbor kid's tuition or something like that. It has to apply to the individual or his spouse or kids.

Section 1(c) - He says as far as he is concerned this language is redundant. According to him, the only time an individual is entitled to claim his spouse as a personal exemption is when they file jointly (so there is no need to make the distinction). He said you might have a situation where a married man is the only one working and the wife is taking care of the kids and the husband files separately, claiming his wife as a dependent (which he doesn't think he can do), but, if he could, it would be to his disadvantage to file this way because he would be losing money, so he doesn't see why anyone would do it. So he says that you could just have it read "unless the taxpayer files a joint return with the spouse", instead of the language on line 20 stating "taxpayer is entitled to a personal exemption for the spouse under IRC sec. 151(b) or the taxpayer files a joint return with the spouse.

SJR 14

This resolution urges the IRS to delay promulgation of its regulations which would remove the tax-exempt status of private schools which do not meet stringent and capricious affirmative action requirements and quotas. Also, it urges Congress to weigh the effects of such regulations and take appropriate action.

SB 214

Your bill, providing financial assistance to elderly people who need emergency dental service or denture services and are not eligible to receive financial assistance under current federal programs such as medicaid or medicare.

NOTE: REMEMBER, WE ARE TELECONFERENCING TODAY.

Sec. 151. Allowance of deductions for personal exemptions.

(a) Allowance of deductions.

In the case of an individual, the exemptions provided by this section shall be allowed as deductions in computing taxable income.

(b) Taxpayer and spouse.

An exemption of $750 for the taxpayer; and an additional exemption of $750 for the spouse of the taxpayer if a joint return is not made by the taxpayer and his spouse, and if the spouse, for the calendar year in which the taxable year of the taxpayer begins, has no gross income and is not the dependent of another taxpayer.

(c) Additional exemption for taxpayer or spouse aged 65 or more.

(1) For taxpayer. An additional exemption of $750 for the taxpayer if he has attained the age of 65 before the close of his taxable year.

(2) For spouse. An additional exemption of $750 for the spouse of the taxpayer if a joint return is not made by the taxpayer and his spouse, and if the spouse has attained the age of 65 before the close of such taxable year, and, for the calendar year in which the taxable year of the taxpayer begins, has no gross income and is not the dependent of another taxpayer.

(d) Additional exemption for blindness of taxpayer or spouse.

(1) For taxpayer. An additional exemption of $750 for the taxpayer if he is blind at the close of his taxable year.

(2) For spouse. An additional exemption of $750 for the spouse of the taxpayer if a separate return is made by the taxpayer, and if the spouse is blind and, for the calendar year in which the taxable year of the taxpayer begins, has no gross income and is not the dependent of another taxpayer. For purposes of this paragraph, the determination of whether the spouse is blind shall be made as of the close of the taxable year of the taxpayer; except that if the spouse dies during such taxable year such determination shall be made as of the time of such death.

(3) Blindness defined. For purposes of this subsection, an individual is blind only if his central visual acuity does not exceed 20/200 in the better eye with correcting lenses, or if his visual acuity is greater than 20/200 but is accompanied by a limitation in the fields of vision such that the widest diameter of the visual field subtends an angle no greater than 20 degrees.

(e) Additional exemption for dependents.

(1) In general. An exemption of $750 for each dependent (as defined in section 152)—

(A) whose gross income for the calendar year in which the taxable year of the taxpayer begins is less than $750, or

(B) who is a child of the taxpayer and who (i) has not attained the age of 19 at the close of the calendar year in which the taxable year of the taxpayer begins, or (ii) is a student.

(2) Exemption denied in case of certain married dependents. No exemption shall be allowed under this subsection for any dependent who has made a joint return with his spouse under section 6013 for the taxable year beginning in the calendar year in which the taxable year of the taxpayer begins.

(3) Child defined. For purposes of paragraph (1)(B), the term "child" means an individual who (within the meaning of section 152) is a son, stepson, daughter, or stepdaughter of the taxpayer.

(4) Student defined. For purposes of paragraph (1)(B)(ii), the term "student" means an individual who during each of 5 calendar months during the calendar year in which the taxable year of the taxpayer begins—

(A) is a full-time student at an educational organization described in section 170(b)(1)(A)(ii); or

(B) is pursuing a full-time course of institutional on-farm training under the supervision of an accredited agent of an educational organization described in section 170(b)(1)(A)(ii) or of a State or political subdivision of a State.

In '76, P. L. 94-455, Sec. 1901(a)(23), amended para. (e)(4), for tax. yrs. begin. after '76. "rior to amendment para. (e)(4) read as follows:

"(4) Student and educational institution defined. For purposes of paragraph (1)(B)(ii), the term 'student' means an individual who during each of 5 calendar months during the calendar year in which the taxable year of the taxpayer begins—

"(A) is a full-time student at an educational institution, or

"(B) is pursuing a full-time course of institutional on-farm training under the supervision of an accredited agent of an educational institution or of a State or political subdivision of a State.

For purposes of this paragraph, the term 'educational institution' means only an educational institution which normally maintains a regular faculty and curriculum and normally has a regularly organized body of students in attendance at the place where its educational activities are carried on."

In '71, P. L. 92-178, Secs. 201(a)(1) and (b)(1) changed the personal exemption, additional exemptions, exemptions for dependents, and allowable gross income for dependents in subsecs. (b), (c), (d), and (e) as listed in the caution, above. The amendment provided that wherever it appeared in Code Sec. 151, $650 was to be changed to $675 for tax. yrs. begin. after 12/31/70 and before 1/1/72, and $750 for tax. yrs. begin. after 12/31/71.

In '69, P. L. 91-172, Secs. 801(a)(1), (b)(1), (c)(1) and (d)(1) changed the personal exemption, additional exemptions, exemption for dependents, and allowable gross income for dependents in subsecs. (b), (c), (d), and (e) as listed in the caution, above. The amendment provided that wherever it appeared in Code Sec. 151 $600 was to be changed to $625 for tax. yrs. begin. in '70, $650, for tax. yrs. begin. in '71, $700 for '72, and $750 for '73 and thereafter. Prior to amendment the figure for tax. yrs. begin. before '70 was $600.

P. L. 91-172, Sec. 941(b), substituted "if a joint return is made by the taxpayer and his spouse" for "if a separate return is made by the taxpayer" in subsecs. (b) and (c)(2), for tax. yrs. begin. after 12/31/69.

Sec. 152. Dependent defined.

(a) General definition.

For purposes of this subtitle, the term "dependent" means any of the following individuals over half of whose support, for the calendar year in which the taxable year of the taxpayer begins, was received from the taxpayer (or is treated under subsection (c) or (e) as received from the taxpayer):

(1) A son or daughter of the taxpayer, or a descendant of either,

(2) A stepson or stepdaughter of the taxpayer,

(3) A brother, sister, stepbrother, or stepsister of the taxpayer,

(4) The father or mother of the taxpayer, or an ancestor of either,

(5) A stepfather or stepmother of the taxpayer,

(6) A son or daughter of a brother or sister of the taxpayer,

(7) A brother or sister of the father or mother of the taxpayer,

(8) A son-in-law, daughter-in-law, father-in-law,

mother-in-law, brother-in
taxpayer or,

(9) An individual (other
any time during the ta
determined without reg
taxpayer) who, for the t
has as his principal plac
taxpayer and is a mem
hold.

(b) Rules relating to genera

For purposes of this sect

(1) The terms "brothe
brother or sister by the h

(2) In determining whet
specified in subsection (
subsection exists, a legal
vidual (and a child who
al's household, if placed
authorized placement ag
such individual), or a fo
such child satisfies the
(a)(9) with respect to
treated as a child of such

(3) The term "depend
individual who is not
United States unless suc
the United States or of
United States. The prec
clude from the definition
the taxpayer legally ad
taxable year of the tax
principal place of abode
is a member of the taxp
taxpayer is a citizen or n

(4) A payment to a wif
gross income of the wife
not be treated as a payr
support of any dependen

(5) An individual is not
household if at any tim
the taxpayer the relation
and the taxpayer is in vi

(c) Multiple support agreem

For purposes of subsec
support of an individual
treated as received from the

(1) no one person co
support;

(2) over half of such
persons each of whom,
not contribute over half
been entitled to claim su
for a taxable year beginn

(3) the taxpayer contrib
support, and

(4) each person describ
than the taxpayer) who
of such support files a
manner and form as the
prescribe) that he will n
dependent for any taxa
calendar year.

(d) Special support test in

For purposes of subsec
individual who is—

(1) a son, stepson, dau
taxpayer (within the mea

TED STEVENS
ALASKA

THE ASSISTANT MINORITY LEADER

COMMITTEES:
APPROPRIATIONS
COMMERCE, SCIENCE AND TRANSPORTATION
GOVERNMENTAL AFFAIRS

United States Senate

WASHINGTON, D.C. 20510

January 19, 1979

Pastor George W. McNeven
Bethel Assembly of God
24 Fourth Street
Juneau, Alaska 99801

Dear George:

During the week of December 5th the IRS held hearings on these proposed regulations which would change the tax-exempt status of private schools. The opposition has been so overwhelming that the IRS is expected to revise these regulations after the House Ways and Means Committee holds hearings in January.

Last year I advised the Commissioner of the Internal Revenue Service of my strong objections to these proposed regulations and urged that they not be implemented.

With best wishes,

Cordially,

Ted

TED STEVENS
United States Senator

LIST OF WITNESSES FOR SENATE HESS TELECONFERENCE ON 2/28, as of 3:30pm - 2/27

Anchorage:

Dean Zinck, re: SB 48	student at University
Rob Moran, re: SB 48	Alaska Student Lobby Assn.
Kay Frank (Palmer)	Chairman, Citizens Legislative Committee
Burton Carney	
Janice Bigelow	
Rev. Jerry Prevo	
Albert Keyes	
Elaine Dollar	
Ludwig Zerbe	
Ed Rinner	
Jack Jocher	
Joseph Sternmetz	
Richard Soverns	parent of child attending Harvester Christian Academy

THESE FOUR PEOPLE, EITHER ADMINISTRATORS OR TEACHERS OF THE ANCHORAGE CHRISTIAN SCHOOL, WILL BE TESTIFYING:

MR. OBRIEN
MR. HOVEY
MR. ~~MORELAND~~ RON KING
MISS HANSEN

PASTOR MCNEVEN - SB48
GARY JENKINS - REV. DEPT. SB48
JANICE GATES

[illegible] Hatfield SB48 SB14

[illegible] Lundgren SB48

ROBERT HEMENWAY SB14

[illegible] SB48

SHIRLEY HEMINGWAY SB14

[illegible] Townsend SB14

Denise Knapp SB214
(Child Welfare)

Jana Varrati SB214

Please sign to testify

[illegible]	[illegible]	[illegible]
[illegible] LISA		[illegible]
CARL JENKINS	Alaska	SB 8
KEN KOHNEN	AHSA; ACSA	SB-~~45~~
BOB [illegible]	"	SB-48

More names of people testifying on today's bills via Teleconference:

James Stevens Alaska Pacific Univ SB 48

Patricia Steinmetz SB 48
SJR 14

Bill Leight SB 48
SJR 14

Glenn Clary SB 48
SJR 14

Nancy Markley will be observing -
She is from Gruenel's office

STATE OF ALASKA
THE LEGISLATURE

POUCH Y · STATE CAPITOL
JUNEAU, ALASKA 99811
907-465-3800

LEGISLATIVE AFFAIRS AGENCY

M E M O R A N D U M

January 25, 1979

SUBJECT: State Aid to Private Education
(Work Order No. 6089)

TO: Representative Terry Martin

FROM: Kenneth E. Vassar
Legislative Counsel

Here are the documents I believe you were referring to this morning, with an extra. I have numbered them (1) - (3). Number 1 is the constitutional provision as it exists today. The last sentence of Article VIII, sec. 1, is the prohibition against state aid to private schools. Number 2 is the amendment that was before the voters in 1976. This section of the constitution has been subject to many attempted amendments in the past. To the best of my knowledge, the amendment proposed by Number 2 (HJR 73 -1976) is the only one to actually pass the legislature and be placed on the ballot. Number 3 is another attempted amendment which did not pass the legislature. It was also introduced in 1976. I have included it just to give you an idea of some of the alternatives that are available. The resolution I drafted for you would simply eliminate the last sentence of Article VIII, sec. 1. This, in my opinion, would remove any state constitutional obstacles and place us directly under the controlling language of the United States Constitution. If there is anything else I can do for you, let me know.

Incidentally, your tax credit bill has been prepared and should be delivered to you within the next day or two with a memo explaining the constitutional problems I see with the bill.

KEV:jdn

Enclosures

Enforcement

SECTION 11. Any qualified voter may apply to the superior court to compel the governor, by mandamus or otherwise, to perform his reapportionment duties or to correct any error in redistricting or reapportionment. Application to compel the governor to perform his reapportionment duties must be filed within thirty days of the expiration of either of the two ninety-day periods specified in this article. Application to compel correction of any error in redistricting or reapportionment must be filed within thirty days following the proclamation. Original jurisdiction in these matters is hereby vested in the superior court. On appeal, the cause shall be reviewed by the supreme court upon the law and the facts.

ARTICLE VII

HEALTH, EDUCATION, AND WELFARE

Public Education

SECTION 1. The legislature shall by general law establish and maintain a system of public schools open to all children of the State, and may provide for other public educational institutions. Schools and institutions so established shall be free from sectarian control. No money shall be paid from public funds for the direct benefit of any religious or other private educational institution.

State University

SECTION 2. The University of Alaska is hereby established as the state university and constituted a body corporate. It shall have title to all real and personal property now or hereafter set aside for or conveyed to it. Its property shall be administered and disposed of according to law.

Board of Regents

SECTION 3. The University of Alaska shall be governed by a board of regents. The regents shall be appointed by the governor, subject to confirmation by a majority of the members of the legislature in joint session. The board shall, in accordance

Introduced: 5/7/76
Referred: Judiciary

IN THE HOUSE BY THE SELECT COMMITTEE ON EDUCATION

HOUSE JOINT RESOLUTION NO. 73 am S

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINTH LEGISLATURE - SECOND SESSION

Proposing an amendment to the Constitution of the State of Alaska relating to state aid to private educational institutions.

BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. Article VII, sec. 1, Constitution of the State of Alaska, is amended to read:

SECTION 1. PUBLIC EDUCATION. The legislature shall by general law establish and maintain a system of public schools open to all children of the State, and may provide for other public educational institutions. Schools and institutions so established shall be free from sectarian control. No money shall be paid from public funds for the direct benefit of any religious or other private educational institution, however nothing in this section shall prevent direct aid to students in accordance with the law.

* Sec. 2 The amendment proposed by this resolution shall be placed before the voters of the state at the next general election in conformity with art. XII, sec. 1, Constitution of the State of Alaska, and the election laws of the State.

This was voted down by the public in the 1976 election.

-1- HJR 73 am S

[illegible] 5/7/76
[illegible] Judiciary

IN THE HOUSE BY THE SELECT COMMITTEE ON EDUCATION

HOUSE JOINT RESOLUTION NO. [illegible] 5

IN THE LEGISLATURE OF THE STATE OF ALASKA

NINTH LEGISLATURE - [illegible] SESSION

Proposing an amendment to the Constitution of the State of Alaska relative to state aid to private educational institutions.

BE IT RESOLVED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. Article VII, sec. 1, Constitution of the State of Alaska, is amended to read:

SECTION 1. PUBLIC EDUCATION. The legislature shall by general law establish and maintain a system of public schools open to all citizens of the State, and may provide for other public educational institutions which it and libraries as it deems desirable. No money shall be paid from public funds for the direct benefit of any religious or other private educational institution.

* Sec. 2. The amendment proposed by this Act shall be submitted to the voters of the State at the [illegible] election in which [illegible] is submitted, and shall become effective [illegible] if ratified by a majority of the votes cast thereon at the election.

This was defeated by the voters in 1976 election.

ALASKA'S CONSTITUTIONAL CONVENTION

GOVERNMENTAL FUNCTIONS AND RESPONSIBILITIES

Health, Education, and Welfare

Article VII, on health, education, and welfare, is the briefest in the constitution. One section covers public education, two sections establish the University of Alaska as a single unified system of higher education, and two one-sentence sections provide for public health and welfare. Except for the proposed prohibition of public funds being used for direct benefit of private educational institutions, the article was not controversial. Lack of disagreement was due to the fact that the functions covered by the article were already being carried out under the territorial government.

Responsibility for Article VII was given to the Committee on Preamble and Bill Rights, primarily because the social services covered by the article were extensions of the rights and privileges of the people. The final draft was a series of concise statements requiring the legislature to provide for public education, health, and welfare.

In drafting the section on education, the committee included language that covered a standard feature of past and present statehood enabling bills, namely that "provision shall be made for the establishment and maintenance of a system of public schools which shall be open to all children of said state and free from sectarian control."

The only significant point raised in plenary consideration of the committee proposal was a suggested amendment to insert the words "and indirect" after "direct" in the draft provision "No money shall be paid from public funds for the direct benefit of any religious or other private educational institution." Proponents of the proposed amendment stressed the importance of protecting the integrity of public education, while its opponents argued for the provision of services to the individual student if otherwise in keeping with the constitution. The proponents of the amendment to prohibit "direct and indirect" aid to parochial and other private schools held that sectarian segregation in education is bad for school children and that inadequate restriction could lead to diversion of funds and weakening of public education. A majority (thirty-four to nineteen) opposed the amendment, agreeing with those who argued that more important than these considerations was the need to help each child attain the fullest level of individual development through programs such as free lunches, bus transportation, and even payment by the state welfare agency of room and board to parentless children, so long as the basic principle of separation of church and state was maintained.

A floor amendment to provide for a unified state library service was rejected by the delegates as falling into the area of legislation and therefore not being proper constitutional material.

A proposal to altogether strike the health and public welfare provisions was made by Seaborn Buckalew of Anchorage on the grounds that they were already covered by the general welfare clause and were also unnecessary in the constitution. However, Rolland Armstrong of Sitka and others argued for their inclusion as a matter of philosophy, and on a voice vote the amendment was defeated.

Before final adoption of the constitution, the convention added the two sections providing for the state university and its board of regents. Provisions for the university had been part of the executive article dealing with boards and commissions of that article. It was suggested during consideration of the executive branch proposal that the requirement for approval by the governor of the appointment of executive officers of principal departments headed by boards and commissions would not be appropriate to the university and the board of regents. As a result, a separate proposal on the unversity was offered by the Committee on the Executive Branch for inclusion in the article on general provisions. It was later transferred by the Style and Drafting Committee to the article dealing with education.

The provisions for a single state university system, established as a separate corporate body, and for a board of regents appointed by the government and confirmed by the legislature was modeled on the Hawaii constitution. As approved, the university was given constitutional status and removed from direct supervision of the governor.

OHIO STATE LAW JOURNAL

Volume 38
Number 4
1977

Terry Martin
465-4943-Jewett
333-7432-Anch.

Constitutional Validity of State Aid to Pupils in Church-Related Schools—Internal Tension Between the Establishment and Free Exercise Clauses

DAVID J. YOUNG

Constitutional Validity of State Aid to Pupils in Church-Related Schools—Internal Tension Between the Establishment and Free Exercise Clauses

DAVID J. YOUNG*

I. INTRODUCTION

The Supreme Court's recent decision in *Wolman v. Walter*[1] raises again the question whether the "final page" has been written with respect to a troublesome period in the constitutional development of religion clause[2] principles. The United States Supreme Court has now addressed itself to a complete array of state aid programs designed to assist pupils attending church-sponsored educational institutions. After thirty years of intensive litigation the slate looks something like this:

Year	*Programs in Conformity with First Amendment*	*Programs Violative of First Amendment*
1947	School bus transportation[3]	
1968	Textbook loans[4]	
1970	Real property tax exemption for religious organizations[5]	
1971	Federal construction grants for church-related colleges[6]	Salary supplements for lay teachers[7] Secular education service contracts calling for state to pay nonpublic school for providing secular education[8]

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1. 97 S. Ct. 2593 (1977).

2. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. CONST. amend. I. The religion clause comprises two parts: the establishment clause prohibits the government from promoting religion and the free exercise clause prohibits the government from inhibiting religion.

3. Everson v. Board of Educ., 330 U.S. 1 (1947).

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

5. Walz v. Tax Comm'n, 397 U.S. 664 (1970).

6. Tilton v. Richardson, 403 U.S. 672 (1971).

7. Lemon v. Kurtzman [Early v. DiCenso], 403 U.S. 602 (1971) (*Early* was a case arising out of Rhode Island that was consolidated with the Pennsylvania case, *Lemon v. Kurtzman*, for purposes of appeal).

8. Lemon v. Kurtzman, 403 U.S. 602 (1971) (Pennsylvania statute declared unconstitutional).

1973	Tax-exempt bond assistance for construction at church-related colleges[9]	Grants to schools for cost of general testing and record-keeping[10]
		Tuition reimbursement for low income parents[11]
		Parental tax credits[11]
		Grants to schools for maintenance and repair[11]
		Parental reimbursement grants[12]
1975		Instructional equipment and material loaned to schools[13]
		On-premises health and remedial services[13]
1976	Direct, per-student grants to church-related colleges[14]	
1977	Standardized tests and scoring services[15]	Instructional equipment and material loaned to pupil[15]
	Speech and hearing diagnostic services[15]	Field trip transportation[15]
	Physician, dental, and optometric services[15]	
	Neutral-site therapeutic services[15]	
	Neutral-site remedial education services[15]	
	Programs for handicapped[15]	
	Neutral-site guidance and counseling[15]	
	Assistance grants for students attending church-related colleges[16]	

In its 1976 decision in *Roemer v. Board of Public Works*[17] the Supreme Court intimated that the end of the line was near:

> [T]he slate we write on is anything but clean. Instead, there is little room

9. Hunt v. McNair, 413 U.S. 734 (1973).
10. Levitt v. Committee for Pub. Educ., 413 U.S. 472 (1973).
11. Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973).
12. Sloan v. Lemon, 413 U.S. 825 (1973).
13. Meek v. Pittenger, 421 U.S. 349 (1975).
14. Roemer v. Board of Pub. Works, 426 U.S. 736 (1976).
15. Wolman v. Walter, 97 S. Ct. 2593 (1977).
16. Americans United for Separation of Church and State v. Blanton, 433 F. Supp. 97 (M.D. Tenn. 1977), *aff'd mem.*, 98 S. Ct. 39 (1977).
17. 426 U.S. 736 (1976).

> for further refinement of the principles governing public aid to church-affiliated private schools. Our purpose is not to unsettle those principles . . . or to expand upon them substantially, but merely to insure that they are faithfully applied in this case.[18]

Similarly in *Wolman*, Justice Blackmun observed: "Nonetheless, the Court's numerous precedents 'have become firmly rooted, . . .' and now provide substantial guidance."[19] Justice Stewart, the author of the majority opinion in *Meek v. Pittenger*,[20] saw himself as applying tests which constituted a distillation of the past decades of effort:

> These tests constitute a convenient, accurate distillation of this Court's efforts over the past decades to evaluate a wide range of governmental action challenged as violative of the constitutional prohibition against laws "respecting an establishment of religion," and thus provide the proper framework of analysis for the issues presented in the case before us.[21]

Notwithstanding these assurances by the Court that this area of the law is settled, the question still remains: has the thoughtful scholarship of the Supreme Court's most respected Justices provided a framework that will avoid continued controversy? This article will show that they have not. Despite the strong assertions in recent decisions by the Court that religion clause principles are well defined, the fact is that there have been periodic major shifts in the factors the Court considers in judging the constitutionality of a state aid program. These shifts have had a divisive impact on the Court. In recent years this division has resolved itself into a three-way split. This article attempts to identify the current trend of the Court in state aid cases by analyzing this split and the recent movement of the swing group of Justices.

II. Charting a Neutral Course Between the Free Exercise and Establishment Clauses—The Tripartite Split in the Court

Two issues must be addressed any time a state aid program is presented to the Court. The first, which may be called the establishment issue, is raised by opponents of state aid to sectarian schools. The argument is that such aid constitutes a prohibited "establishment of religion," or at least the first step toward such an establishment. The second issue, which may be called the free exercise issue, is advanced by proponents of the state assistance program. The proponents feel that since they pay education taxes a portion of the tax

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18 *Id.* at 754.

19 Wolman v. Walter, 97 S. Ct. 2593, 2599 (1977).

20 421 U.S. 349 (1975).

21 *Id.* at 358.

proceeds should be used to help finance their children's education. Without an allocation of tax funds toward the education of their children, they are forced either to bear the financial burden of paying twice for their children's education—once through taxes and once through tuition—or to send their children to the public school. This, proponents assert, restricts their freedom of choice and inhibits their "free exercise" of religion.

In an attempt to reconcile the constitutional conflict between the establishment and free exercise clauses the Court developed a three-part test for judging the various state programs. "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster 'an excessive government entanglement with religion.' "[22]

Careful analysis reveals that the relative significance of the establishment clause and the free exercise clause in first amendment cases is sometimes ignored. Justice Brennan, who now maintains that almost all forms of assistance to pupils at church-related schools is violative of the establishment clause, recognized a place for the free exercise doctrine in his concurring opinion in *Abington School District v. Schempp*.[23]

> Attendance at the public schools has never been compulsory; parents remain morally and constitutionally free to choose the academic environment in which they rear their children to be educated. The relationship of the Establishment Clause of the First Amendment to the public school system is preeminently that of reserving such a choice to the individual parent, rather than vesting it in the majority of voters of each State or school district. The choice which is thus preserved is between a public secular education with its uniquely democratic values, and some form of private or sectarian education, which offers values of its own. In my judgment the First Amendment forbids the State to inhibit that freedom of choice by diminishing the attractiveness of either alternative—either by restricting the liberty of the private schools to inculcate whatever values they wish, or by jeopardizing the freedom of the public schools from private or sectarian pressures. The choice between these very different forms of education is one—very much like the choice of whether or not to worship—which our Constitution leaves to the individual parent. It is no proper function of the state or local government to influence or restrict that election.[24]

In spite of his recognition of free exercise values, Justice Brennan has been unwilling to concede that placing a condition—attendance at the *public* schools—upon a gratuitous state benefit can discourage the free exercise of religion by "diminishing the attractiveness" of the

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22. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971) (citation omitted).
23. 374 U.S. 203 (1963).
24. *Id.* at 242 (Brennan, J., concurring).

church-related school. Such an attitude toward free exercise objectives led to Chief Justice Burger's plea:

> One can only hope that, at some future date, the Court will come to a more enlightened and tolerant view of the First Amendment's 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—at least while this Court sits.[25]

The Court's difficulty with this perplexing question has been aggravated by its necessity of fashioning majority votes on a patchwork, case-by-case basis. The opinion of the Court in *Walz v. Tax Commission*[26] reflects the difficulty encountered in attempts to fashion sweeping religion clause principles:

> The Establishment and Free Exercise Clauses of the First Amendment are not the most precisely drawn portions of the Constitution. The sweep of the absolute prohibitions in the Religion Clauses may have been calculated; but the purpose was to state an objective, not to write a statute. In attempting to articulate the scope of the two Religion Clauses, the Court's opinions reflect the limitations inherent in formulating general principles on a case-by-case basis. The considerable internal inconsistency in the opinions of the Court derives from what, in retrospect, may have been too sweeping utterances on aspects of these clauses that seemed clear in relation to the particular cases but have limited meaning as general principles.
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> The Court has struggled to find a neutral course between the two Religion 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.[27]

In an amicus brief, Leo Pfeffer, who has argued a great number of the religion clause cases before the Supreme Court of the United States, described the past decades of constitutional history in this area as a "historic game of chess." Although cases were won or lost and governing principles seemed well defined, the fact is that the pieces of the jigsaw puzzle were being "forced together."[28] The compromise, case-by-case approach utilized by the Court has misled both proponents and opponents of state assistance to nonpublic pupils and has fostered continued litigation. Legislation was drafted in reliance on sweeping utterances that in retrospect proved to be illusory.

In practice the tripartite test articulated by the Court does little to balance the competing interests embodied in the two religion clauses. The Court itself now speaks of the test only as a guide with

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25 Meek v. Pittenger, 421 U.S. 349, 387 (1975).

26 397 U.S. 664 (1970).

27 *Id.* at 668-69.

28 Brief of National Coalition for Public Education and Religious Liberty Amicus Curiae at 10, Wolman v. Walter, 97 S. Ct. 2593 (1977).

which to identify instances in which the objectives of the establishment clause have been impaired. This tripartite test, however, serves more as a framework for structuring opinions than as a guidepost for determining the outcome. The objectives of the establishment clause, likewise, are too vague to be outcome-determinative. An analysis and understanding of the three-way split among the Supreme Court Justices,[29] however, may be more productive in predicting whether a given aid program will withstand religion clause challenge. Chief Justice Burger and Justices Rehnquist and White seem prepared to approve a broad range of meaningful child benefit programs in the form of grants, credits, scholarships, loans, and vouchers.[30] On the other hand, it is with a great deal of reluctance that Justices Brennan, Marshall, and Stevens approve even health-related services.[31] The middle is comprised of Justices Blackmun, Powell, and Stewart, and the outcome of future constitutional challenges will depend on the direction in which they lean.[32]

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29. The tension among the members of the Court is perhaps not fully revealed by the opinions themselves. The depth and intensity of these tensions may very well stand currently as a barrier to the formation of a predictable and stable five-Justice coalition. This internal tension is explainable in part by the frustration that must flow from the Court's apparent inability to formulate a comprehensive analysis in this troublesome area, and also by the compromises required to obtain five votes. The internal tension is also a natural by-product of a case-by-case legislative approach that has backfired because of a failure to consider fully the implications of pronouncements in a given case upon future challenges.

The tension and frustration within the Court is undoubtedly aggravated by the fact that the Court has had to make decisions that vitally affect the inculcation of religious belief, the extension of knowledge, and the education of children on the basis of abbreviated stipulations of fact, facial challenges, or evidentiary transcripts that barely pierce the surface of relevant educational and religious developments. The difficulties arising from inadequate factual development are further compounded by the lack of historical record or legislative history with respect to the religion clause. There were no public schools when the first amendment was adopted, and the structure of American education has changed markedly since then. The religion clause preceded general acknowledgment of the need for universal formal education. *See* Wisconsin v. Yoder, 406 U.S. 205, 214 (1972). Thus, the Court for decades has been forced into a situation of attempting to apply vaguely defined principles to an ever-shifting set of circumstances and considerations from which it has not yet been able to extricate itself.

30. *See, e.g.*, Wolman v. Walter, 97 S. Ct. 2593 (1977) (Burger, C.J., and White and Rehnquist, JJ., voted to uphold all six categories of aid presented to the Court); Roemer v. Board of Pub. Works, 426 U.S. 736 (1976) (Burger, C.J., and White and Rehnquist, JJ., voted to uphold direct, per-student grants to church-related colleges); Meek v. Pittenger, 421 U.S. 349 (1975) (Burger, C.J., and White and Rehnquist, JJ., voted to uphold all three types of aid presented to the Court).

31. *See, e.g.*, Wolman v. Walter, 97 S. Ct. 2593 (1977) (Brennan and Marshall, JJ., voted to strike down all six categories of aid presented to the Court; Stevens, J., voted to strike down four categories of aid and to uphold diagnostic and therapeutic services, the latter two with "misgivings"); Roemer v. Board of Pub. Works, 426 U.S. 736 (1976) (Brennan, Marshall, and Stevens, JJ., voted to strike down direct, per-student grants to church-related colleges); Meek v. Pittenger, 421 U.S. 349 (1975) (Brennan and Marshall, JJ., voted to strike down all three types of aid presented to the Court).

32. *See, e.g.*, Wolman v. Walter, 97 S. Ct. 2593 (1977) (Blackmun and Stewart, JJ., voted to uphold four of the six categories of aid presented to the Court and to strike down loans of instructional material and field trip transportation; Powell, J., voted to uphold five categories and to strike down loans of instructional material); Roemer v. Board of Pub. Works, 426 U.S. 736 (1976) (Blackmun and Powell, JJ., voted to uphold and Stewart, J., voted to strike down direct, per-student grants to church-related colleges); Meek v. Pittenger, 421 U.S. 349 (1975) (Stewart, Powell, and Blackmun, JJ., voted to uphold textbook loans and to strike down loans

In order to appreciate the current alignment of the Justices and the state of the law after *Wolman* it is necessary to consider the historical positions of the Court. It is important to note that prior to 1971 the Court generally affirmed state aid to church-related schools. In that year the Court abruptly shifted its position regarding aid to elementary and secondary schools. Now, after *Wolman*, it appears that the Court is swinging back toward approval of some programs.[33] This article focuses on these swings and pays particular attention to the pivotal cases *Walz v. Tax Commission*[34] and *Wolman v. Walter*.[35] As will be seen, *Walz* marked the end of Supreme Court approval of state aid to church-sponsored schools and began a period in which every state program, with the exception of aid to sectarian colleges, was struck down. *Wolman* is now the first case to turn away from the strict position the Court has held since *Walz*.

III. Pre-*Walz* Criteria: Secular Purpose and Effect

The first case to consider the relationship between state aid to church-sponsored education and the religion clause was *Everson v. Board of Education*.[36] New Jersey had enacted a law that would reimburse parents for the expense of busing their children to public and parochial schools. The *Everson* Court said that "the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'"[37] The Court held that the New Jersey program had not made the slightest breach in the wall of separation. The Court further held that to prohibit the state from extending general welfare benefits to *all* of its children would be to violate the neutral position required by the first amendment.[38]

Between 1947 and 1968 *Everson* stood as the leading case in the religion clause field. The principles first set forth in *Everson* were further refined during the two decades following its decision[39] and were applied again to a nonpublic school aid case in the form of a two-part purpose-and-effect test[40] in *Board of Education v. Allen*.[41]

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of instructional material and on-premises health and remedial services). Note that the positions taken by these Justices have determined the holding of the Court.

33. For a graphic representation of the swings in the Court, see the chart in section I of this article.

34. 397 U.S. 664 (1970).

35. 97 S. Ct. 2593 (1977).

36. 330 U.S. 1 (1947).

37. *Id.* at 16.

38. *Id.* at 18.

39. *See, e.g.*, McGowan v. Maryland, 366 U.S. 420 (1961), which upheld the constitutionality of Sunday sales prohibition laws; Zorach v. Clauson, 343 U.S. 306 (1952), which upheld the constitutional validity of programs permitting public schools to release students during the school day who desire to attend off-premises religion courses.

40. The two-part test was first laid down in the context of a school prayer case, Abington School Dist. v. Schempp, 374 U.S. 203 (1963).

41. 392 U.S. 236 (1968).

> The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.[42]

In *Allen* the Court upheld a New York program whereby local school boards loaned approved textbooks to all children, including sectarian school students, in grades seven through twelve. Before the Court was able to find "a secular legislative purpose and a primary effect that neither advances nor inhibits religion,"[43] it was necessary for the Court to declare that the "processes of secular and religious training [in church-sponsored schools] are [not] so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion."[44]

The *Allen* Court's recognition of the valuable role played by nonpublic education was obviously a key factor in the decision. Justice White, writing for the majority, utilized language that greatly increased the hope and expectations of proponents of aid to nonpublic school pupils:

> Underlying these cases, and underlying also the legislative judgments that have preceded the court decisions, has been a recognition that private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience. Americans care about the quality of the secular education available to their children. They have considered high quality education to be an indispensable ingredient for achieving the kind of nation, and the kind of citizenry, that they have desired to create. Considering this attitude, the continued willingness to rely on private school systems, including parochial systems, strongly suggests that a wide segment of informed opinion, legislative and otherwise, has found that those schools do an acceptable job of providing secular education to their students. This judgment is further evidence that parochial schools are performing, in addition to their sectarian function, the task of secular education.[45]

Many nonpublic school parents, educators, and administrators read *Allen* as saying that carefully drafted aid programs that have the primary effect of aiding the secular educational functions in their schools would satisfy establishment clause restraints. It is difficult to quarrel or find fault with this interpretation. This is obviously why opponents of nonpublic school aid have sought repeatedly during the past nine years to convince the Supreme Court that *Allen* should be reversed. In recent years, however, the Court has given little

42 *Id.* at 243 (quoting Abington School Dist. v. Schempp, 374 U.S. 203, 222 (1963))
43 *Id.*
44 *Id.* at 248.
45 *Id.* at 247-48.

more than lip service to the *Allen* principles[46] and has in fact emasculated its underpinnings. The two-part test has been accompanied by a third ingredient that has proved dominant in recent cases.

IV. Introduction of the Entanglement Test—The Impact of *Walz v. Tax Commission*

In 1970, the Supreme Court handed down a decision that has had perhaps a greater impact upon the education cases than any case since *Everson*. *Walz v. Tax Commission*[47] questioned the constitutional validity of real property tax exemptions for property used exclusively for religious purposes. The plaintiff, a real property owner, sought an injunction to prevent the granting of property tax exemptions to religious properties, arguing that such exemptions forced him to make a contribution to religious bodies contrary to the establishment clause. In determining the constitutional validity of such exemptions, the Court looked to whether taxation or exemption occasioned a greater degree of involvement between government and religion, thus evidencing its concern with the amount of entanglement between secular and sectarian interests. The Court commented in dictum: "Obviously a direct money subsidy would be pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards."[48] Although the Supreme Court had in prior decisions showed a concern about the degree of involvement between government and religion, this dictum gave birth to a third and separate constitutional test for judging religion clause cases. Now, in addition to determining that the legislative purpose and effect of a state program did not promote or inhibit religion, it became necessary for a court to inquire whether the administration of the program fosters "excessive government entanglement with religion."[49]

The first state aid to nonpublic school statutes to be tested subsequent to *Walz* were the Pennsylvania statute considered in *Lemon v. Kurtzman*,[50] and the Rhode Island statute considered in the companion case, *Earley v. DiCenso*.[51] The Rhode Island statute called for a salary supplement to lay instructors teaching secular subjects in the Rhode Island parochial schools. The Pennsylvania statute called for a contractual relationship between the nonpublic school and the state under which the state reimbursed the nonpublic schools for providing

46 *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602 (1971).
47 397 U.S. 664 (1970).
48 *Id.* at 675.
49 *Id.* at 674.
50 403 U.S. 602 (1971).
51 *Id.*

teacher salaries, textbooks, and instructional materials in specified secular subjects. Both statutes were declared violative of the first amendment. Chief Justice Burger, who had authored the *Walz* opinion, delivered the opinion of the Court in which the purpose and effect test in *Allen* became a tripartite inquiry:

> Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster "an excessive government entanglement with religion."[52]

Both statutes passed the first prong of the tripartite inquiry; in neither the Pennsylvania nor the Rhode Island statutes did the Court find a nonsecular legislative purpose. The second inquiry, whether the principal or primary effect of the statutes was one that did not promote or inhibit religion, was a more difficult one for the Court to answer. Chief Justice Burger reasoned that it was possible for the legislatures of the respective states to identify secular aspects of a church-sponsored education and to design restrictions to insure that the state aid would benefit only the secular. The Court did not decide, however, whether the specific safeguards in the Pennsylvania and Rhode Island programs were sufficient to meet the primary effect test. Instead the Court condemned the programs because of the intrusiveness of the safeguards into the church-sponsored school: "This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids. It is a relationship pregnant with dangers of excessive government direction of church schools and hence of churches."[53]

If meaningful assistance to the nonpublic educational sector appeared dead as a result of the *Lemon* decision, *Committee for Public Education v. Nyquist*[54] seemed to complete the process and seal the coffin. The Supreme Court in *Nyquist* declared unconstitutional, as violative of the establishment clause, direct grants to nonpublic schools for maintenance and repair of school facilities and equipment, tuition reimbursement to low income parents of children attending nonpublic schools, and income tax relief to all such parents. On the same day as *Nyquist*, the Court also announced *Sloan v. Lemon*,[55] which declared Pennsylvania's parental reimbursement

52 *Id.* at 612-13 (citation omitted)
53 *Id.* at 620
54 413 U.S. 756 (1973)
55 413 U.S. 825 (1973)

grants unconstitutional, and *Levitt v. Committee for Public Education*,[56] which declared unconstitutional the New York statute providing state reimbursement to nonpublic schools for testing and record-keeping. The cumulative impact of these decisions and that in *Lemon v. Kurtzman* was to place those who would seek to draft legislation providing nonpublic school assistance on the horns of a dilemma. If they included safeguards and procedures to insure that the assistance was limited to the secular aspects of nonpublic education, the restrictions would be classified as prophylactic contacts involving excessive government entanglement with religion. If the restrictions were removed, the program would fail because of the absence of assurance against advancement of religion.

Program safeguards and regulations were not the only kinds of church-state "entanglements" envisioned by the Court. In addition it saw a danger of "political divisiveness"[57] arising from the natural inclination of nonpublic schools to lobby in the legislatures for additional funds. Although he recognized that political debate and differences are normal and healthy manifestations of the democratic system of government, Chief Justice Burger declared that political division along religious lines was "one of the principal evils against which the First Amendment was intended to protect."[58] This test seemed based upon the assumption that as more assistance became available to nonpublic education, a greater demand would arise, and this demand would inevitably lead to political division along religious lines.

The negative attitude of the Supreme Court towards the "self-perpetuating and self-expanding propensities"[59] of state assistance to pupils at church-related educational institutions is reflected in Chief Justice Burger's belief that "[a] certain momentum develops in constitutional theory, and it can be a 'downhill thrust' easily set in motion but difficult to retard or stop."[60] The Court was obviously alarmed at the rapid step from *Allen* to *Lemon* and *DiCenso*. It was willing to allow bus rides and textbooks, but saw the prospect of much broader scale assistance when it looked at the teacher salary supplement program in *DiCenso* and the educational contract program in *Lemon*. The momentum was too much; the Court refused to adopt the philosophy of Justice Harlan that "[i]t is always possible to shrink from a first step lest the momentum will plunge the law into pitfalls

56 413 U.S. 472 (1973)
57 Lemon v. Kurtzman, 403 U.S. 602, 623 (1971)
58 *Id.*
59 *Id.* at 624
60 *Id.*

that lie in the trail ahead. I, for one, however, do not believe that a 'slippery slope' is necessarily without a constitutional toehold."[61]

The repressive constitutional doctrine that was based on a fear of political divisiveness was spawned by the Court during its "momentum blocking" stage of development. Chief Justice Burger's enunciation of this doctrine in *Lemon* was surprising, if not shocking, in view of fact that just one year earlier in *Walz*, he had espoused the right of religious organizations and churches to take strong positions on public issues without the slightest suggestion that this would disqualify their adherents from participating in public benefits. The Chief Justice had written:

> Adherents of particular faiths and individual churches frequently take strong positions on public issues including, as this case reveals in the several briefs *amici*, vigorous advocacy of legal or constitutional positions. Of course, churches as much as secular bodies and private citizens have that right. No perfect or absolute separation is really possible; the very existence of the Religion Clauses is an involvement of sorts—one that seeks to mark boundaries to avoid excessive entanglement.[62]

It is perhaps understandable that the Court was concerned by the momentum that had gathered between *Allen* and *Lemon*; it is unfortunate, however, that the response between 1971 and 1975 was a series of case-by-case compromises rather than the development of constitutional principles of more lasting guidance. Beginning in 1971, the Court began a cut and paste process in deciding how far the program could proceed without reaching the verge of forbidden territory under the religion clauses. It refused to accept the invitation of opponents of such educational programs to declare them all violative of the establishment clause. On the other hand, there seemed to be no logical basis for distinguishing one program from the other. Sweeping utterances, seemingly clear in one case, had to be altered to meet the Court's attitudes concerning the verge of forbidden territory in another. This seemed the result of judicial legislation. It was in recognition of these problems that Justice Rehnquist in his dissent in *Committee for Public Education v. Nyquist* noted that "[w]ithin the limits permitted by the Constitution, these decisions are quite rightly hammered out on the legislative anvil."[63]

Additional doctrines were developed by the Court that had the effect of further emasculating the theoretical underpinnings of *Allen*. The acceptance of dual and separable secular and religious roles in nonpublic education was replaced with a presumption that these are

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61. Walz v. Tax Comm'n, 397 U.S. 664, 699-700 (1970) (Harlan, J., concurring).

62. *Id.* at 670.

63. 413 U.S. 756, 813 (1973).

"religious-pervasive institutions,"[64] and that aid to the secular functions of the schools cannot be separated from the religious functions. Justice Stewart, writing for the majority in a later case, concluded:

> [I]t 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 Act 195 as channeling aid to the secular without providing direct aid to the sectarian. Even though earmarked for secular purposes, "when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission," state aid has the impermissible primary effect of advancing religion.[65]

V. Dissenters' Reaction to the Harsh Impact of *Lemon* and *Nyquist*

The dissenting opinion of Chief Justice Burger in *Nyquist* reveals that the entanglement test, which he set forth in *Walz* and expanded in *Lemon*, had in *Nyquist* gone much further than he had anticipated. It was being utilized to bar forms of assistance that he felt provided benefits to children rather than churches and thus met constitutional standards. The tolerant attitude expressed by Chief Justice Burger in his *Nyquist* dissent may very well be attributable to a reconsideration of the potential tensions between the establishment and free exercise clauses. While commenting upon the application of the two clauses the Chief Justice stressed free exercise principles: "[T]he balance between the policies of free exercise and establishment of religion tips in favor of the former when the legislation moves away from direct aid to religious institutions and takes on the character of general aid to individual families."[66] Chief Justice Burger also reflected a different reaction to "momentum blocking" when he noted that "[i]t is no more than simple equity to support partial relief to parents who support the public schools they do not use."[67]

Justice White's dissent in *Nyquist* stated the free exercise argument even more forcibly:

> Under state law these children have a right to a free public education and it would not appear unreasonable if the State, relieved of the expense of educating a child in the public school, contributed to the expense of his education elsewhere. The parents of such children pay taxes, including school taxes. They could receive in return a free education in the public schools. They prefer to send their children, as they have the right

64. Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 783 n.39 (1973).

65. Meek v. Pittenger, 421 U.S. 349, 365-66 (1975) (quoting Hunt v. McNair, 413 U.S. 734, 743 (1973)).

66. Committee for Pub. Educ. v. Nyquist, 413 U.S. 756, 802 (1973) (Burger, C.J., dissenting).

67. *Id.* at 803.

> to do, to nonpublic schools that furnish the satisfactory equivalent of a public school education but also offer subjects or other assumed advantages not available in public schools. Constitutional considerations aside, it would be understandable if a State gave such parents a call on the public treasury up to the amount it would have cost the State to educate the child in public school, or, to put it another way, up to the amount the parents save the State by not sending their children to public school.
>
> In light of the Free Exercise Clause of the First Amendment, this would seem particularly the case where the parent desires his child to attend a school that offers not only secular subjects but religious training as well. A State should put no unnecessary obstacles in the way of religious training for the young. "When the state encourages religious instruction . . . it follows the best of our traditions."[68]

Justice Rehnquist's dissent in *Nyquist* reveals that he likewise would have upheld the tuition reimbursement and tax relief provisions of the New York statute in recognition of the "benevolent neutrality"[69] required in order to reconcile the tension between the free exercise and establishment clauses. His dissent recognized that financial restraints to free exercise exist when nonpublic school parents are compelled to pay for their own children's education as well as support public school services unused by them.

Notwithstanding the Chief Justice's shift in attitude and the strength of the Rehnquist and White dissents, an even more extreme and restrictive application of the tripartite test was made in the 1975 case *Meek v. Pittenger*.[70] *Meek* struck down a program that involved loaning equipment and providing health services to nonpublic schools. It was the culmination of the era of persistent Supreme Court disapproval of state aid to church-sponsored schools. Strangely, though, this disapproval did not extend to state aid to church-sponsored colleges. These cases, by their contrast, illuminate the hostility the Court's majority held toward religious education.

VI. Approval of State Aid in Higher Education Cases: A Religion-Effectiveness Test?

If a lawyer in 1971, after reviewing the *Lemon* opinion, were called upon to opine as to the constitutionality of federal legislation providing grants for the construction of buildings at church-related colleges, the thrust of his opinion would be quite predictable. After reciting the tripartite test, the lawyer would advise that it would be necessary to establish comprehensive restrictions in order to insure that the legislation did not result in advancement of religion. Absent restrictions, the legislation would fail the primary effect test because of the danger that the

68 *Id.* at 814 (White, J., dissenting) (quoting Zorach v. Clauson, 343 U.S. 306, 313-14 (1952))

69 *Id.* at 810 (Rehnquist, J., dissenting)

70 421 U.S. 349 (1975). See notes 77-86 *infra* and accompanying text.

mandated aid could be applied to a sectarian purpose. On the other hand, if the legislation contained adequate restrictions it would fail because of excessive government entanglement with religion. At least this would be the likely content of the opinion if that lawyer had not read *Tilton v. Richardson*,[71] which was announced the same day as *Lemon*. The tests and guiding principles read the same in *Tilton* as in *Lemon*, but the same tests apparently have different meanings when applied at different levels of education.

In sustaining the constitutionality of construction grants to church-related colleges, the Court was impressed by the fact that churches are less successful in the accomplishment of their religious missions in colleges than in elementary or secondary schools: "There is substance to the contention that college students are less impressionable and less susceptible to religious indoctrination."[72] Although many of the church-state cases relating to elementary and secondary education are decided on the basis of an assumed composite profile of church-related schools, the court in *Tilton* rejected that approach: "We cannot . . . strike down an Act of Congress on the basis of a hypothetical 'profile.' "[73] A comparison of *Tilton* and *Lemon* simply confirms the ad hoc approach that has been used by the Court in this area of the law. The Court seems more skeptical of the possibility of religious inculcation in church-related colleges and thus more tolerant of aid programs to them.

After approving federally funded construction grants to church-related colleges in *Tilton*, the Supreme Court next approved a state program for construction of church-related colleges with state-issued, tax-exempt bonds in the case *Hunt v. McNair*.[74] In *Hunt* the state-created authority that issued the bonds would take title to the facility and lease it back to the college, with reconveyance to the college upon full repayment of the bonds. The *Hunt* decision was announced the same day as *Nyquist*. The same words were used in describing the tests but these words again were applied differently. The Court refused to adopt a composite profile of the religious nature of post-secondary institutions and differentiated the colleges from the church-related elementary schools on the basis of the differing religious character of the institutions.

Perhaps the most surprising of all of the recent higher education cases was *Roemer v. Board of Public Works*.[75] The Court upheld a Maryland statute that provided direct annual subsidies to church-re-

71. 403 U.S. 672 (1971).
72. *Id.* at 686.
73. *Id.* at 682.
74. 413 U.S. 734 (1973).
75. 426 U.S. 736 (1976).

lated colleges in an amount equal to fifteen percent of the state's expenditure for students in state colleges. The Court again stressed the secular functions of the religious colleges and the religious function of church-related elementary and secondary schools.

Although colleges undoubtedly seek to accomplish their religious goals differently from elementary and secondary schools, it is indeed doubtful that a religious organization would sponsor and administer a church-related college if it did not consider it to be part of its religious mission. It seems obvious that the extent to which a religious organization is able to inculcate religious values or religious doctrine in students attending its colleges varies from college to college. In a recent case a district court in Tennessee observed:

> It should be noted here that the evidence adduced established that some, but not all, of the private schools [colleges] whose students benefitted from this program are operated for religious purposes, with religious requirements for students and faculty and are admittedly permeated with the dogma of the sponsoring religious organization.[76]

The Supreme Court has purportedly refused to use composite profiles in higher education cases, but the truth is that it has used standard profiles in evaluating the nonsectarian nature of colleges, just as it did in cases concerning aid to elementary and secondary schools. It assumes as a general proposition that church-related colleges are not as effective in their religious goals as elementary and secondary schools. Coupled with the Court's assumption that elementary and secondary sectarian schools are "religious-pervasive institutions," this presents a question whether the Court is establishing a preferred religion based on the effectiveness of its mission to inculcate religious values during the education process.

The difficulty with such an analysis is that it acts as a restraint upon the free exercise of religion. Simply put, the test seems to be that an educational institution may receive a share of education tax dollars only if it is ineffective in its religious mission. The trouble with this approach is that it places the Court in the position of making value judgments as to the desirability and effectiveness of religious beliefs and religious missions. The Court found a rationale to justify its compromise, but it may again find that it has entered an extremely uncomfortable thicket. This sort of evaluation of the "religion-effectiveness" of the institutions involved does not represent the neutrality that the free exercise clause requires. When the Court approves direct state aid to a Catholic college but denies a cultural field trip bus ride to a child attending a Jewish grade school it is advancing one form of religious activity and impeding another. Does this approach not establish a

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76. Americans United for Separation of Church and State v. Blanton, 433 F. Supp. 97, 100 (M.D. Tenn. 1977), *aff'd mem.*, 98 S. Ct. 39 (1977).

Court-preferred method of teaching religion, and place financial obstacles in the way of religious training that does not comply with the Court's preference?

VII. Strangling Entanglement—The Court's Shift from Strict Disapproval to Balancing

It must be recalled that for some time before *Wolman* no state aid to church-related elementary or secondary schools had been approved by the Court. The religion-effectiveness approach that apparently emerged in the higher education cases indicated a hostility of the Court towards effective religious education. The culmination of this period of strict disapproval of elementary and secondary aid came in the case *Meek v. Pittenger*.[77]

In *Meek* the Court was presented with a state program that loaned textbooks and instructional equipment and materials to the schools and provided on-premises health and remedial service to the students. Justice Stewart authored an opinion in *Meek* that brought himself and his fellow swing Justices, Blackmun and Powell, together in a coalition with the three Justices who were then most opposed to state aid to parochial schools—Justices Douglas, Brennan, and Marshall. His effort to state principles that would be guiding or controlling in future litigation, however, proved to be disastrous, as it brought internal tensions within the Court to a high point. Chief Justice Burger's dissent contained a bitter and stinging rebuke, reflecting his conviction that the Court was ignoring the free exercise clause and discriminating against children because of the exercise of religious choice by their parents. He charged that the consequence of the Court's holding was to "penalize *institutions* with a religious affiliation," to "affirmatively stifle . . . religious activity," and to "penalize *children* . . . who have the misfortune to have to cope with the learning process under extraordinarily heavy physical and psychological burdens." According to the Chief Justice, the *Meek* ruling "literally turns the Religion Clauses on their heads."[78]

Insofar as the legislative program in *Meek* provided auxiliary health and remedial services to nonpublic school children on the same basis as public school children, the free exercise implications of excluding the nonpublic school children were apparent. Should a child be denied an inherently secular diagnostic or remedial service simply because his parents had selected a church-related school? The Supreme Court had already held that "no State may 'exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of*

77 421 U.S. 349 (1975).

78 *Id.* at 386-87 (Burger, C. J., dissenting).

their faith, or lack of it, from receiving the benefits of public welfare legislation.' "[79] Nevertheless, Justice Stewart stressed the establishment rather than the free exercise clause when he concluded that the services would be provided "in schools in which education is an integral part of the dominant sectarian mission and in which an atmosphere dedicated to the advancement of religious belief is constantly maintained."[80] He found that the state would be required to engage in unconstitutional surveillance to insure that a speech and hearing therapist, hired and controlled by the local public school district, would not sneak religion into speech therapy. It was obviously in response to Chief Justice Burger's stinging rebuke that a footnote to Justice Stewart's opinion[81] indicated that the Court did not challenge the right of the state to make free auxiliary services available to all students in the Commonwealth, including those who attended church-related schools. The footnote, however, failed to specify the constitutionally acceptable mechanism for providing such services to all children.

Meek reaffirmed *Allen* by upholding the constitutional validity of the textbook aid, but declared the supply of instructional material and equipment to be unconstitutional. The Court again justified this result on the basis of the "predominantly religious character of the schools benefiting from the Act."[82] A question arises, however, with respect to this rationale because the Court recognized that the materials and equipment were "self-polic[ing], in that starting as secular, nonideological and neutral, they will not change in use."[83] The Court did not explain how a secular piece of equipment that could not be used for religious purposes would have the primary effect of advancing religion in a church-related school. Neither did it explain how the lending of a secular package of math cards advanced religion when a math textbook containing the same information did not. Justice Rehnquist in his dissent pointed out that "[o]nce it is conceded that no danger of diversion exists, it is difficult to articulate any principled basis upon which to distinguish the two Act 195 programs."[84] The extent to which the entanglement test as enunciated in *Walz* had been expanded in *Meek* led Justice Rehnquist to observe: "[A]ppellees are left to wonder, with good reason, whether the possibility of meeting the entanglement test is now anything more than 'a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will.' "[85]

79. Sherbert v. Verner, 374 U.S. 398, 410 (1963) (quoting Everson v. Board of Educ., 330 U.S. 1, 16 (1947))

80. Meek v. Pittenger, 421 U.S. 349, 371 (1975).

81. *Id.* at 368 n.17.

82. *Id.* at 363.

83. *Id.* at 365.

84. *Id.* at 391 (Rehnquist, J., dissenting).

85. *Id.* at 374 (quoting Edwards v. California, 314 U.S. 160, 186 (1941)(Jackson, J., concurring)).

Justice Rehnquist also took the majority to task for "throwing its weight" on the side of those who believe that society as a whole should be secular rather than religious.

> We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.[86]

Since *Meek* had stretched the entanglement test beyond the breaking point and aggravated the inherent tension between the free exercise and establishment clauses, it was inevitable that a case like *Wolman v. Walter*[87] would follow on its heels. The Ohio legislation before the Court in *Wolman* was drafted for the specific purpose of testing the limits of *Meek*. It was suggested in *Meek* that some of the services may have been constitutional but the Court refused to treat the legislation as being severable.[88] The Ohio legislature sought to avoid having the Court strike down its entire program by enacting twelve separate categories of aid, in separately labeled paragraphs,[89] specifically designated as independent and wholly severable.[90] The Supreme Court acceded to the wishes of the legislature and treated the various aid provisions as severable, sustaining nine sections while rejecting the constitutionality of three.

The *Wolman* Court dealt with the various types of aid in separately numbered portions of its opinion, and not all portions mustered the same majority of the Justices. State aid categories approved by the Court are (1) textbook loans to pupils,[91] (2) standardized testing and

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86. *Id.* at 395-96 (quoting Zorach v. Clauson, 343 U.S. 306, 313-14 (1952)).

87. 97 S. Ct. 2593 (1977).

88. Meek v. Pittenger, 421 U.S. 349, 371 n.21 (1975).

89. OHIO REV. CODE ANN. § 3317.06(A)-(L) (Page Supp. 1976).

90. *Id.* § 3317.06 (Page Supp. 1976) states: "Moneys paid . . . shall be used for the following independent and fully severable purposes . . ."

91. Wolman v. Walter, 97 S. Ct. 2593, 2599-2600 (1977) (upheld by six Justices).

scoring,[92] (3) diagnostic services—speech, hearing, and psychological testing—provided on premises by professional employees of the local boards of education,[93] and (4) therapeutic services—speech, hearing, and psychological therapy, and programs for emotionally disturbed and handicapped children—provided off-premises by professional employees of the board of education.[94]

Programs whose constitutionality were rejected are (1) loans to pupils of instructional materials and equipment incapable of diversion to religious use[95] and (2) transportation for field trips that are the same as those provided in public schools.[96]

The Ohio statute sought to test the abuse of free exercise concepts in *Meek* by calling for the remedial educational services, provided to public school pupils, to be provided to nonpublic school pupils either at a public school, a public center, mobile home or a similar neutral site. Services less susceptible to the inculcation of religious beliefs such as health and diagnostic services were to be provided in the nonpublic school. It was difficult for the Court to ignore the free exercise implications of a denial of these services under such circumstances. Would the Court label a nonpublic school pupil as a sectarian citizen even when he was led off the school premises? Would the sectarian badge stand as a barrier to the receipt of secular, neutral, and nonideological services even in public facilities?

The plaintiffs in *Wolman* argued that even when nonpublic school children were off school premises, they were "an identifiable sectarian group," and that aid could not be provided to such a sectarian class. Did such an argument mean that these children were identifiable sectarian children when they went to the movies, when they went to a grocery store, when they participated in dances with other children, or when they went to a public library? The Supreme Court had already rejected programs that provided identical services to church-related school children at their school. The free exercise clause of the first amendment would have become meaningless if the Court had held that children must be denied therapeutic and remedial services by public employees, under control of the local public school district, at public facilities simply because they are registered pupils at church-related schools. Although the Court again passed up the opportunity to speak directly to the tension between the establishment and free exercise clauses, it upheld the constitutional validity of providing educational and therapeutic services at neutral sites and the constitutional

92 *Id.* at 2600-01 (upheld by six Justices)

93 *Id.* at 2601-03 (upheld by eight Justices)

94 *Id.* at 2603-05 (upheld by seven Justices)

95 *Id.* at 2605-07 (invalidated by six Justices)

96 *Id.* at 2607-09 (invalidated by five Justices)

validity of providing health and diagnostic services at the church-related school.

The Court in *Wolman* did not base its decision on free exercise principles, but seemed to adopt Chief Justice Burger's child benefit approach in noting that "[t]he dangers perceived in *Meek* arose from the nature of the institution, not from the nature of the pupils."[97]

VIII. Realignment of the Justices: A More Permissive Approach to Nonpublic School Aid

The *Wolman* decision was the first case since *Allen* in which the Court upheld meaningful assistance to children attending church-related elementary and secondary schools. Since the *Wolman* decision allowed $88,800,000 per biennium to continue to flow under the Ohio plan, it dispelled the notion created by *Meek* that any attempt to provide substantial aid to nonpublic school children would be blocked.[98] Although the $88,800,000 per biennium assistance is of extreme importance to children attending Ohio's nonpublic schools, the long-range implications of *Wolman* in the continuing development of first amendment principles relating to nonpublic school aid are of much greater import. For one thing, the *Wolman* decision suggests that Justice Powell is ready to join the Burger-Rehnquist-White voting block. Justice Powell's concurring opinion in *Wolman* reflects one of the most enlightened views expressed in this troublesome constitutional area.

Justice Powell noted that we have reached a point in the twentieth century far removed from the dangers that prompted the framers to include the establishment clause in the Bill of Rights. He argued that the risk of religious control over democratic processes or deep political divisiveness along religious lines was quite small when viewed against the contributions of the sectarian schools. The following extract from Justice Powell's concurring opinion indicates that *Wolman* does not present the final word, and that properly drafted legislation providing secular assistance to pupils rather than institutions may yet find a receptive court:

> Our decisions in this troubling area draw lines that often must seem arbitrary. No doubt we could achieve greater analytical tidiness if we were to accept the broadest implications of the observation in *Meek* v. *Pittenger* . . . that "[s]ubstantial aid to the educational function of [sectarian] schools . . . necessarily results in aid to the sectarian enterprise as a whole." If we took that course, it would become impossible to sustain state aid of any kind—even if the aid is wholly secular in character and is supplied to the pupils rather than the institutions. *Meek*

97 *Id.* at 2605.

98 *Id.* at 2610 (Brennan, J., dissenting).

> itself would have to be overruled, along with *Board of Education v. Allen*, . . . and even perhaps *Everson v. Board of Education* . . . . The persistent desire of a number of States to find proper means of helping sectarian education to survive would be doomed. This Court has not yet thought that such a harsh result is required by the Establishment Clause. Certainly few would consider it in the public interest.[99]

Justice Powell would have approved field trip transportation under the Ohio program and also a more restricted program of lending instructional materials and equipment to the pupils. This places him very close conceptually to the position advanced by Chief Justice Burger since 1973. Justice Blackmun's opinion for the Court[100] in *Wolman* may also be interpreted as setting the stage for a new approach in the area. It approves programs calling for substantial assistance to elementary and secondary school children, differentiates between children and the religious school they attend, and places greatly reduced stress upon the political divisiveness doctrine.

Those who saw *Wolman* as opening the door to a new and more permissive approach to aid to nonpublic school programs found their view supported by the October 3, 1977 Supreme Court affirmance of *Americans United for the Separation of Church and State v. Blanton*.[101] The legislation challenged in *Blanton* was a Tennessee program of assistance grants for pupils at public and church-related colleges. The three-judge district court sustained the Tennessee legislation on the basis of the child benefit theory promulgated in *Everson* and *Allen*, and on the basis of the "broad class of recipients" theory suggested in *Nyquist*.[102] Thus, precedent was found in the elementary and secondary school cases. Although the three-judge district court in *Blanton* did not specifically address the internal tension between the establishment and free exercise clauses, it noted that the purpose of the Tennessee program was to "provide needy students with the opportunity to attend the higher education institution of their choice, be it public, private, sectarian, or nonsectarian."[103] It also relied to a substantial degree upon the Supreme Court's dismissal of an appeal from a South Carolina decision for want of a substantial federal question. The South Carolina Supreme Court had approved a loan program to students at public and nonpublic colleges.[104] It sustained the legislation on the grounds that it was "scrupulously neutral as between religion and non-religion and as between various religions."[105]

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99. *Id.* at 2613 (Powell, J., concurring) (citations omitted).

100. *Id.* at 2597-609.

101. 433 F. Supp. 97 (M.D. Tenn. 1977), *aff'd mem.*, 98 S. Ct. 39 (1977).

102. *Id.* at 102-03 (citing Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973)).

103. *Id.* at 105.

104. Durham v. McLeod, 259 S.C. 409, 192 S.E.2d 202 (1972), *appeal dismissed*, 413 U.S. 902 (1973).

105. *Id.* at 413.

Does the Court's affirmance of *Blanton* mean that legislative programs providing loans, grants, scholarships, vouchers or tax credits to pupils at nonpublic educational institutions will be sustained if (1) such benefits are provided to a broad base of recipients, (2) the grants are to the pupils or their parents and not to the institutions, and (3) the legislative program is scrupulously neutral with respect to religion? Does the fact that Justices Marshall, Brennan, and Stevens would have noted probable jurisdiction in *Blanton* lend support to the theory that Justices Powell, Stewart, and Blackmun are leaning more in the direction of the Burger-Rehnquist-White bloc than in the direction of the Brennan-Marshall-Stevens bloc? The answer to these questions is not yet clear.

IX. Conclusion

Although the United States Supreme Court has now considered constitutional challenges to almost every conceivable form of legislation providing assistance to nonpublic school pupils, it does not appear that the final page has been written. The inherent tension between the free exercise and establishment clauses remains. The slate is "anything but clean" with respect to the criteria to be applied in future cases, but the criteria leave substantial room for "play in the joints" and new developments can be anticipated.

Public school financing is in a state of upheaval. Federal court remedies ordered in racial desegregation cases have caused short-range chaos. Some local school districts are uncertain whether to look to the local property tax, state funding, or the federal courts for resolution of their financial problems. School districts throughout the country are embroiled in litigation challenging the constitutionality of their formulae for public school financing. Public schools and nonpublic schools in some states have joined hands to search for common solutions.

Such joint efforts will undoubtedly look to decisions like *Wolman* for guidance. Public schools may want to move in the direction of per-pupil funding. Nonpublic schools would be well advised to concentrate upon child benefit assistance and upon legislation directed toward a broad class of beneficiaries. Thus, joint solutions for financial problems confronting public and nonpublic schools may lie ahead. Although these educational, financial, and constitutional problems are indeed perplexing, thoughtful scholarship directed toward the internal tensions in the first amendment between the establishment and free exercise clauses may bring a firmly rooted solution.

STATE OF ALASKA
THE LEGISLATURE

POUCH Y STATE CAPITOL
JUNEAU ALASKA 99811
907 465 3800

LEGISLATIVE AFFAIRS AGENCY

M E M O R A N D U M January 24, 1979

SUBJECT: Tuition Tax Credit
(Work Order #5843)

TO: Representative Terry Martin

FROM: Kenneth E. Vassar, Legislative Counsel KEV

Enclosed is the bill you requested allowing taxpayers to take a credit against their state income tax for amounts paid for tuition costs at private schools. As I discussed with you earlier, I believe this is in violation of Article VII, sec. 1, Constitution of the State of Alaska. That section provides in part:

> No money shall be paid from public funds for the direct benefit of any religious or other private educational institution.

It may be questioned whether the allowance of a tax credit is the same as a payment from public funds. Most courts which have faced the issue have found that tax exemptions do constitute such a payment. In considering Article IV, sec. 31, of the California state constitution, which prohibits the appropriation of public money except for a public purpose, the California Supreme Court has held that their constitution prohibits any plan by which the credit of the state is given or loaned, regardless of the form which the transaction takes. Veterans Welfare Board v. Jordan, 208 P. 284 (1922). Another california case found the cancellation of taxes to be a "thing of value" which came within Article IV, sec. 31; so far as procedure was concerned, the act of cancellation was the making of a gift. Ojai v. Chaffee, 140 P.2d 116 (1943). Finally, in Committee for Public Education v. Nyquist, 413 U.S. 756 (1973), the United States Supreme Court discussed New York's programs of tuition grants and tax relief for parents of children attending elementary and secondary nonpublic schools. At 413 U.S. 756, 791, the court stated:

> We see no answer to Judge Hays' dissenting statement below that '[i]n both instances [tuition grants and tax relief] the money involved represents a charge made upon the state for the purpose of religious education.'

In view of these cases, it seems certain that a tax credit is a payment of public funds. The next question under Article VII, sec. 1, is whether the credit would constitute a "direct" benefit to the private schools.

The delegates to Alaska's constitutional convention debated whether to use the phrase "direct or indirect benefit" rather than "direct benefit." The report of the Health, Education and Welfare committee to the convention would indicate that "indirect" benefits were meant to be limited to basic health and welfare benefits, provided to children attending the private schools. In its report, the committee stated:

> We feel that the words 'or indirect' would reach out into infinity practically.....We did feel it would shut out certain things that should not be prohibited. For instance, the welfare department was giving free care to the children of the community and it might be administered through the schools. We feared that 'indirect' would make it impossible to give any of these welfare benefits, for instance to children who were in private schools, and we do not feel that any prohibition should go that far. Alaska Constitutional Convention Proceedings, p.1517.

The decision of the Alaska Supreme Court in Matthews v. Quinton, 362 P.2d 932 (1961), reflects the broad interpretation of "direct" and narrow interpretation of "indirect" implied by the passage above from the constitutional convention. In Matthews, the court found that the expenditure of public funds to provide transportation for students at private elementary and secondary schools constituted a direct benefit to the schools. An interpretation of "direct benefit" consistent with Matthews and the report of the Health, Education and Welfare committee of the convention, would seem to require classifying a tax credit plan which is tied to tuition payments at private schools as a direct benefit to the schools.

Beyond any problem with Alaska's constitution, this bill also suffers from severe federal constitutional problems. The First Amendment to the United States Constitution prohibits laws "respecting an establishment of religion." In Nyquist, supra, the United States Supreme Court stated:

> A proper respect for both the Free Exercise and the Establishment Clauses compels the State to pursue a course of "neutrality" toward religion.....Special tax benefits, however, cannot be squared with the principle of neutrality established by the decisions of this Court. To the contrary, insofar as such benefits render assistance to parents who send their children to sectarian schools, their purpose and inevitable effect are to aid and advance those religious institutions. 413 U.S. at 793.

In summary, it is quite likely that this bill would be found unconstitutional, whether decided under the state or federal constitution.

KEV:nem

Enclosure

SB

49

SB 49 "An Act relating to the possession & control of Marijuana"

Introduced 1-16-79
Logged 1-16-79
Referred Judiciary
Comm. meeting 2-9-79 - held
" action

Notified
John Coffey
Chief Bordley
Peace Officers Assoc (Cris. Prosecution)
Dept of HESS
Dan Hickey (AK. Dept of Law Criminal Div.)
Louie Bencardino (Chief of Police Seward) Seward
Comm. Dept of State Troopers

Allan J. Holt
1752 Cottonwood
Fairbanks, Alaska - 99701

W. F. Brad Bradley
Pouch "V"
Juneau, Alaska - 99811

Dear Sir;

In support of your legislation to again control Marijuana I'm sending you a note I found and removed from my fourteen year old daughter. She is a high school student here in Fairbanks. The letter should speak for itself.

I checked into the matter and it seems that drug use among teenagers as a major problem here in Fairbanks schools.

At a few drops in my accident area to [illegible] her own type but when it starts affecting my family as before the decision for legalizing the use of marijuana should be ignored. Common sense would indicate that the substance is not [illegible] for the private use of [illegible] but [illegible] problem in our schools.

[illegible] the matter and recommend actions [illegible] that these can be done

4

the lives that drugs have ruined. Have spent fifteen years in various prisons. my knowledge is first hand, not something I've read.

I appeal to you and the legislators of Alaska. Give our children a chance and let police officials deal with this problem before it gets completly out of hand.

Respectfully

Allan J. Hoth
Beulah M Hoth

Hey Whats up Charbee!

hey I was buzzing but that was it I wasn't really really stoned cause I've been smoking it and alot of it lately.

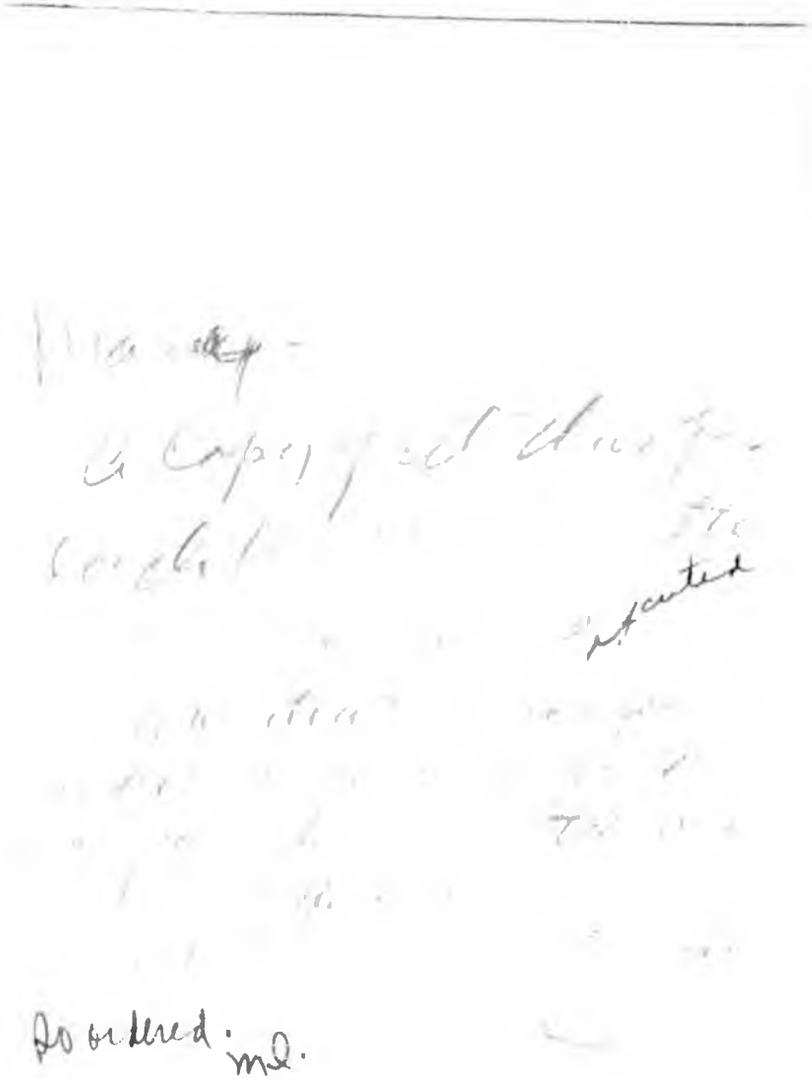
I am gonna take a couple ~~[illegible]~~ tranquilizers that will fuck me up alot. I am texting 2 for a bud.

Shit so many people are following me now cause it finally got week and that don't get done. Shit when I don't have none they don't get me right or give me speed so I am just getting people high that are cool like you and Sonny, Kelly, Michelle your guys are cool!

Well I'll write you back after you write me back Charbee?

I'll probably get you high again if not too many people follow me.

Your friend always
Beth



The Anchorage Times, Thursday, December 14, 1978

Drug Confiscations Low

This is another in a series of stories on the local drug scene.

By PATTI DePRIEST
Times Staff Writer

Drug enforcement officials here last year seized a variety of drugs, worth about $1.8 million dollars on the street.

But that's only about 5 percent of the total drug sales in Alaska, they say, estimating about $35 million worth of drugs were sold to Alaskan buyers.

Marijuana and cocaine were the most prevalent in investigations and seizures. Marijuana seizures totaled $836,704 in street value with cocaine coming to $816,600, said Alaska State Trooper Joe Turner. A 12-year veteran of narcotics investigations, Turner coordinates statewide operations.

Drug enforcement officials arrived at those figures by estimating marijuana at $20 per ounce and cocaine at $100 per gram, Turner said. Some 2,614 pounds of marijuana were seized and 8,166 grams — about 300 ounces — of cocaine.

Although drug buyers and dealers agree cocaine sells for about $100 an ounce on the Anchorage market, they disagree with the $20 per ounce figure for marijuana, placing an average per ounce price at about $45. At $45, the street value of marijuana seized would more than double.

Amphetamines, known as speed on the street market, resulted in the seizure of 18,550 tablets, Turner said.

Other drugs seized included LSD, hashish and heroin, he said.

Most of the marijuana sold in Alaska comes from Mexico and South America, with some coming in from Hawaii, Turner and Donald Trudeau, head of the Anchorage Metropolitan Drug Enforcement Unit, said.

And another narcotics investigator said Seattle, California and Ore-

(See Page 4, Col. 1)

Police Cite Variety Of Drugs

(Continued from Page 1)

gon are major shipping points for Alaska-bound drugs.

The largest shipment of marijuana seized in Alaska was 1,100 pounds with an additional 600 pounds found at the residence of the suspect, Trudeau said.

In Anchorage, drugs find their way into the city through a number of entry points including the airport, persons driving up the Alaska Highway, trucking companies, air freight companies, the Anchorage port and the U.S. mail, the investigators said.

In Southeastern Alaska, investigators must contend with the ferry system and fishing boats as well, while in Fairbanks most drugs are flown or driven in, they said.

Customs officials seize drugs at the Alaska border, although they, too, estimate only about 5 percent of the drugs brought in are confiscated. There are no customs checks for air travelers.

The heroin problem has been dropping steadily in the last few years because of a crackdown by federal officials. It is "extremely hard to come by" and is limited to certain groups in Anchorage, Turner said, while the quality and percentage of heroin has dropped.

One state-funded study of heroin in Alaska estimated Anchorage to have about 700 heroin addicts in 1977.

But since addicts cannot find heroin of a high enough quality to keep their habit going, they have recently turned to the use of pharmaceutical drugs such as Percodan or morphine-based drugs, drug treatment counselors and police officials said.

For marijuana users, pot is easier to come by since it is legal to grow pot for personal use in Alaska. However, the majority of marijuana sold in Alaska is not homegrown but a brand known as Colombian which is exported from that South American country, investigators said.

One reason, Trudeau said, is that stronger marijuana is grown in other countries. Seeds from those plants may be grown in Alaska but after two or three seasons, the marijuana adopts the genes of the Alaska variety which is not as potent, he said.

The investigators said they think there is a definite drug problem in the schools and among young people. "They normally run to the lower end of the money scale or some medium price range," Trudeau said, because youths generally do not have as much money to spend on drugs.

Where do young people get their drug money? "Some have legitimate jobs, of course," Trudeau said, "But some get it by shoplifting and burglaries then selling the merchandise or by dealing other drugs. Some kids get an allowance."

The investigators said they have found dealers who sell only to juveniles and have found some young adults — "drop outs" — who hang around the schools and deal to the students. "But there is no tight, organized group working the schools that I've been able to find," Trudeau said.

Law enforcement officials uniformly cite what they think are lax drug laws as being one cause for their enforcement problems. In fact, they said, they have stopped prosecuting "small-time" marijuana possessors and try to get to the larger dealers.

Additionally, a recent Alaska Supreme Court decision that prohibts electronic "bugging" of suspects without a search warrant has hindered drug investigations, Turner and Trudeau said.

That decision, said Turner, "will hurt law enforcement in Alaska more than any other decision we've ever been hit with."

Elected pope in 752, Stephen died three days later.

Drug Hearing Is Postponed

VICTORIA, B.C. (AP) — A preliminary hearing for 17 persons charged with conspiracy to import 13 tons of marijuana into Canada has been adjourned to Jan. 4.

The hearing, which began Nov. 20 in Provincial Court, was expected to last six weeks.

On Wednesday, Judge Reg Moir refused to deal with an application by one of the defendants, Robert Sherman Miller, 34, of North Vancouver, for the return of the vessels Sunfish and Weatherly.

The vessels were seized by Royal Canadian Mounted Police in connection with a July 15 raid off the west coast of Vancouver Island near Tofino.

Marijuana: No Small-Time Operation

Gone are the counterculture days of the 1960s when marijuana dealers had long-hair, wore dirty bluejeans and drove dented vans.

And gone are the days when 100 pounds of marijuana was considered a "big deal."

Enter the new look and the bigger deal.

According to an investigative article in the November issue of Penthouse magazine, organized syndicates assisted by attorneys and accountants use trailer trucks, large multi-engine aircaft and ocean freighters to deliver at least 45,000 pounds of marijuana each day to the United States.

The business netted $12 billion retail last year, compared to a $15.8 billion cigarette market and a $7 billion beer business, writer Ed Rasen reported in Penthouse.

And Peter Bensinger, administrator of the Drug Enforcement Administration, puts the figure even higher. In a September speech to the International Association of Chiefs of Police in New York City, Bensinger said, "The money to be made is awesome, we estimate in excess of $15 billion.

"So far this year, in marijuana alone, we have seized over 2,000 tons, more than the total amount seized in the last three years combined."

Rasen, in the Penthouse article, said the "hippy dope dealers" of the 1960's have been replaced by "hip businessmen who sport short-hair, three-piece suits and college degrees."

"The new breed of traffickers are young, intelligent and upper middle class. They operate outside traditional crime families and ghetto areas, though, by any standard, large scale marijuana suggling can be considered organized crime."

"The typical new dope businessman is an attorney," Rasen said. He quotes a Miami drug enforcment official as saying large suggling operations have lawyers who provide them "with all the advice they need to operate."

"As marijuana dealing becomes a white-collar crime, the point of entry and country of origin are also changing," Rasen said. "Most grass used to come from Mexico by light plane, truck or car across the 2,000-mile Southwestern border. Now it's coming increasingly from Colombia and it's new point of entry is South Florida."

Rasen said one "marijuana broker" told him large deals are no longer cash transctions and there are no "hand-to-hand transfers."

"Now offshore corporations are formed and accounts are opened at banks in tax havens," Rasen said. "The funds are placed in escrow with release powers placed in the hands of bankers or trustees; they are governed by contracts written by attorneys. Then the monies are drawn back through holding companies which filter them through other banks to offshore corporations."

COACH QUITS—Citing drug prevalence, West Anchorage High School football coach Don Larson resigned Thursday. Larson says 60 to 75 per cent of his team uses drugs on a regular basis. *(AP wirephoto)*

Drug issue forces West coach to quit

ANCHORAGE, Alaska (AP)—A high school football coach has quit, saying he cannot coach a team infected by drugs and alcohol.

"Drug use has infected our schools and society. Its use extends from our elementary schools to a former school board member. I can't accept the fact that it has crept into our football program," said West Anchorage High School Coach Don Larson in a letter of resignation.

Larson said he discovered that players smoked marijuana at lunch, before practice and after games. "I just can't handle this sort of thing," he said.

School district officials denied drug use was a problem, but Larson, who led his teams to 11 winning seasons, said 60 to 75 percent of the varsity team used drugs "on a weekly basis during the season."

After accepting Larson's resignaton Friday "with regret," the district said it would investigate the coach's charges.

"I am resigning, not because of something as trivial as a won-lost record, but because my attitude toward our next year's team would be one of mistrust and suspicion," said Larson.

"The number one thing I want to develop in a football player is a positive attitude, and I can't coach when I have lost mine."

Alcohol and marijuana were most commonly used, he said, but "I've been told cocaine, PCP (Angel Dust) and Quaaludes" are used.

"After discussions with 11 players, ranging from 10th through 12th grade, I have drawn the conclusion that the use of drugs is too prevalent for my continuation as a football coach," Larson said in his letter to Principal Larry Graham.

"I cannot compromise my personal beliefs and principles on what I feel an athlete should be," the coach added.

Larson's teams have compiled the best overall record in the local Cook Inlet Conference over the past nine years, and his 34-member 1978 team finished second in the conference with a 5-2 record.

Graham said school officials initially did not accept the coach's resignation, hoping he would change his mind.

"There is no widespread use of drugs in the Anchorage School District," said school Superintendent John Peper.

"Sure, kids may smoke out in the woods, but there aren't any drugs on the school grounds," said district information officer Bill Blessington.

Anchorage police disagree, however. "If they don't think drugs are in the school, they're blind," said an Anchorage Metropolitan Drug Enforcement Unit official. "Kids have told me any drugs you want are in the schools."

DAILY NEWS MINER
SAT. DEC. 9, 1978

ALASKA PEACE OFFICERS ASSOCIATION

February 6, 1979

Senator Glenn Hackney
Pouch "V"
Juneau, Alaska 99811

Dear Senator Hackney:

In response to your message informing me of the Hess Meeting on SB 49, I sincerely appreciate your keeping me informed of this Hearing. Unfortunately, I will not be able to attend; however, I am attempting to locate an APOA member that can make the meeting and testify on behalf of the Alaska Peace Officers Association.

Aside from being the President of the Alaska Peace Officers Association, I am a Detective with the Fairbanks Police Department and Supervisor of the Areawide Narcotics Team.

Just today, officers under my supervision were successful in obtaining a Grand Jury indictment for an individual that has been a Marijuana dealer in the Fairbanks area for a large number of years. During the Grand Jury proceedings, a young man, eighteen years old, testified to having assisted the Areawide Narcotics Team in purchasing Marijuana from this dealer and obtaining needed information for a search warrant. During his testimony, a Grand Jury member asked the young man why he was motivated to help the police. The young man stated that he could see that the use of Marijuana was ruining his life and that since he had been using Marijuana, he found himself to be lazy and run-down.

Approximately three weeks ago, a Mr. Joe Hergenreter, of 515 7th Avenue, Fairbanks, Alaska 99701, came to my office and reported that his seven and nine year old sons were using Marijuana. He reported that they were getting the Marijuana from a nine year old neighbor boy whose parents permitted the use of Marijuana. I explained the difficulty in prosecuting any violations under these circumstances to Mr. Hergenreter. As you can see, there would be no effective way to handle this case without the involvement of Mr. Hergenreter and his two sons. Mr. Hergenreter may, himself, be willing to assist by testifying; however, he was not willing to subject his children to court proceedings. As you can see, an attempt to investigate and prosecute either the nine year old neighbor boy or his parents would become a "bucket of worms" and I am not sure that we could ever reach a court proceeding at all.

About a week prior to Mr. Hergenreter's report, I had conversation with a person whose name I have forgotten; however, he is the owner of the Giant Grinder restaurants here in Fairbanks. He reported to me that his thirteen year old daughter was getting Marijuana at school and from a young man in the neighborhood. I explained the necessity for a statement from his daughter in an effort to obtain information that would allow us to prosecute or obtain a search warrant for this individual's residence. After a lengthy explanation of the requirements of the police, this individual was ready to take care of matters himself.

These types of complaints are very common and there is little that the police can do to assist in these frustrating situations. It is disheartening to have to inform parents that there is very little that can be done without statements from juveniles and a lengthy court process.

Our statistics on the use of Marijuana in the schools is limited because we have no means of monitoring the activities in the schools. Our officers are too old to fit in or around schools. Most surveillance efforts are useless as officers in the areas are soon detected. As a practical matter, very few cases that involve juveniles are prosecuted through the District Attorney's Office. It is required that most juvenile offenses are handled through the Juvenile Intake Office and in many cases, there is no actual criminal prosecution. In the event that there can be some sort of criminal prosecution on the part of the juvenile, there is a low priority with reference to Marijuana cases where juveniles are involved in the District Attorney's Office. There may be some prosecution, should we be involved, with an adult selling to juveniles however.

I understand the District Attorney's position in these matters as it is my experience that my office can provide felony cases involving the sale of Cocaine and Heroin involving adults with very little difficulty. It has been my experience that the Areawide Narcotics Team has effectively clogged the court calendar on numerous occasions in the last four years.

The decriminalization of Marijuana in 1975 has finally had an effect on the populace. It can be observed that there is a definite problem within the school systems because of this decriminalization. It is evident by the problem in the Anchorage area where the football coach quit because of the students involved in drugs in that school. I have recently heard, while in Juneau, legislators making the comment that this situation had been blown out of proportion and that they are taking an adverse reaction to the publicity that has been raised. It is my opinion that these particular individuals are irresponsible and it is a shame that they are representing people of Alaska in their positions as legislators.

Prior to the decriminalization of Marijuana, a different set of circumstances existed concerning the involvement of juveniles with alcohol. During school hours, if a juvenile was involved with alcohol, it could be more easily detected than the use of Marijuana today. The individual who was intoxicated by alcohol could be identified by his particular actions and the strong odor of alcohol itself. It was also difficult to consume alcohol in the lavatories or other areas on the school grounds as the alcohol was not quite as easily concealed. Today, however, a "joint" of Marijuana or Marijuana cigarette can be easily concealed and quickly digested during a brief class break.

I feel that it is reasonable to assume that if Cocaine was decriminalized, it would be as prevalent in the schools as Marijuana is today. We already have a problem with Cocaine in our schools. I feel that the public is finally concerned that an action like this might happen. You should be aware that in the Supreme Court Decision in the Erickson Case, the Supreme Court suggested that the legislature take a closer look at the classification of Cocaine as there were some types of new scientific information that might lead one to believe that Cocaine was not as harmful as originally thought. I would submit that this was an irresponsible opinion by the Supreme Court in this matter. Once reading the Opinion, it is evident that the Supreme Court went beyond its duties of interpreting the law, but rather it suggested some liberal change in the law. It is also evident that the Supreme Court selected the scientists that would come up with findings that would satisfy the position they would like to take.

I believe that as time goes on, we will see that the Supreme Court will continue to circumvent the legislature and, therefore, continue the liberal decay in our criminal justice system.

Needless to say, I support SB 49 and any other legislation that would strictly prohibit possession of Marijuana. It would be appreciated if you would disseminate this letter amongst your colleagues. If I can be of any further assistance concerning this matter, please contact me and I will attempt to provide you with the necessary information.

Sincerely,

Craig A. Forster

Craig A. Forster, President
Alaska Peace Officers Association
656 7th Avenue
Fairbanks, Alaska 99701

Board members ponder pot law

A resolution proposing that Alaska's marijuana possession law be tightened did not pass, but Alaskan school board members have expressed their concern about growing drug and alcohol abuse among youngsters.

The Association of Alaska School Board members voted on a variety of resolutions during their conference Sunday in Fairbanks.

Originally a proposed resolution urged the Legislature to make illegal all sale, use or possession of marijuana. State law provides a civil penalty for possessing up to one ounce in public.

While members supported resolutions expressing AASB concern over drug and alcohol abuse, the change in marijuana laws was controversial.

Opponents said supporters were "moralizing" on that stand, and after a lengthy discussion the resolution was amended to drop the phrasing. Members from villages expressed concern about growing marijuana use in their areas.

In final form, the AASB "urges the Legislature to consider all possible means to reduce and eliminate drug and alcohol abuse particularly as it relates to schools."

Other resolutions include:

- Urging the Legislature to state that borough assemblies have no powers with respect to education except those granted by statute.
- Supporting school board elections at-large rather than by district.
- Continued opposition to binding arbitration with teachers.
- Asking that workman's compensation laws exclude as cumulative injury claims ulcers, hypertension and heart-related diseases and nervous conditions.
- Asking the Legislature to more clearly define the process for recalling school board members, to include misconduct, incompetence and failure to perform as reasons for recall and to outline a procedure for the accused to respond.
- Supporting full state funding for busing and pupil transportation.
- Supporting a change in the state's formula for giving money to school districts and increasing those funds.
- Continued opposition to giving unemployment compensation benefits to professional and non-professional employees during the summer.
- Urging that teacher tenure in Alaska be increased from two years to three years.
- Asking the Department of Education to investigate self-insurance on a district-sharing basis or other alternatives to the increasing costs of insurance.
- Asking the department to train teachers of gifted students.
- Supporting a 30-day grace period for students to show proof or receive immunizations.
- Urging that general equivalency degree applicants be at least 18 years old and out of school at least six months. Applicants now must be at least 17.

Daily News-Miner, Fairbanks, Alaska, Friday, Dec. 15, 1978—23

Coacl. respected

2577 Riverview Drive
Fairbanks, Alaska
Dec. 12, 1978

Dear Editor,

I recently read that the football coach of West Anchorage High School presented his letter of resignation to the district school board.

I, for one, am very proud of this man who is a very successful coach and who led his team to 11 winning seasons, yet is willing to give up a successful coaching job to point out to his school district and to the public that they have a serious drug problem in their school system.

He will not compromise his personal beliefs and principles regarding his athletes and is willing to resign. The only reply from the school superintendent, John Peper, is that there is no widespread use of drugs. Perhaps this would be an appropriate answer to protect his position and to take the heat from the district that might be generated from the parents, who just might wake up long enough to say "What's going on?" or "Why didn't someone tell us?"

Well, you have been told by a man who is willing to sacrifice his job for you!

No, either tell Superintendent John Peper, District Information Officer Bill Blessington and Principal Larry Graham to wake up and do their job along with the Anchorage School District or make some job changes. At first glance, I would send them packing because if you deny without considering the possibilities of a drug problem, then you are no use to anyone.

Parents, you are the ones to suffer along with your children. Don't let Coach Larson's sacrifice go for naught. It might be wise for our own school district to consider the possibilities of a drug problem. We might not have a person willing to sacrifice his job to tell the parents and public this fact.

Paul J. Wagner

Letters To The Editor

Coach Larson

Dear Editor:

Concerned ' parents here in Anchorage owe congratulations and thanks to Don Larson of West High. Because of his admirable dedication to atheletic purity, a vicious, and heretofore latent cancer has been exposed. It is high time somebody stood up against those, young and adult, who in their sordid quest for a dollar, willingly savage the lives of our young people.

I played football under Coach Larson for three years at West and I am well aware of his outstanding contribution to the positive growth of so many young men. However, if he is convinced that drug use is pervasive among his atheletes, then I support his decision to resign 100 percent. I'm convinced Larson's suspicious are accurate, having seen and heard much to support them.

Just as I am proud of Don Larson, I am disappointed with Superintendent Peper. The single fact that Dr. Peper has the utter audacity to imply that, by some stretch of the imagination, Larson has acted improperly, outrages my sense of ethics and fair play. In no way did Larson solicit the publicity his letter of resignation received. I know for a fact that it not been fo .he sensitive ear of a Times reporter, the reasons behind Larson's resignation might have gone unpublished.

Our school administration should thank Don Larson and do some serious soul searching in this matter. We need no-nonsense action, not defensive recrimination. Finally, we need coaches like Don Larson to help guide our young people.

John B. Thorsness
2315 Loussac Drive

The Anchorage Times welcomes letters from its readers on issues of the day. Letters must be exclusively addressed to the Anchorage Times and should be kept as brief as possible. All letters are subject to condensation. They must include signature and valid mailing address.

Cocaine may remain an issue

AP News Analysis

JUNEAU—When Gov. Jay Hammond bowed to growing political pressure and withdrew his proposal for revising Alaska's drug laws, many members of the Legislature breathed a sigh of relief.

Most had concluded that the bill, which would have lowered the penalty for first-time possession of small amounts of cocaine from a felony to a misdemeanor, was too sensitive of an issue to tackle during the current election-year session.

However, Friday's state Supreme Court decision upholding the constitutionality of Alaska's cocaine laws raised the prospect of renewed debate on the whole drug question, including a fresh attack on a 1975 law legalizing the possession of marijuana in the home.

While holding that the Legislature was within its constitutional rights to outlaw possession of cocaine, the high court took an unusual step in urging state lawmakers to take a fresh new look at the issue.

In a caveat at the end of a 65-page opinion written by Chief Justice Robert Boochever, the justices said that despite their unanimous decision "we do recommend that the Legislature review its treatment of cocaine in light of modern scientific evidence."

"In our analysis," the court said, "we have emphasized the harmful effects of the drug, as we endeavored to ascertain whether the legislation could be sustained.

"Our overall impression is that cocaine as presently used is less harmful to the health and welfare of society than opiates (such as heroin) and also may be less harmful than barbitrates and amphetamines, alcohol and, as to the physical harm, tobacco."

Daniel Hickey, the Department of Law's chief prosecutor, called the Supreme Court recommendation a "fairly strong statement for an appeals court" and "somewhat unusual in a criminal case."

"Every now and then you see a court express dissatisfaction on some state of affairs, but note that, as a matter of law, what they are concerned about is not something they cannot get involved in," Hickey said.

"That was our position throughout the entire matter," Hickey said. "The issue was not a judicial question but a matter of social policy."

Some House and Senate leaders reacted quickly to the decision, doubting the Supreme Court recommendation would prompt the Legislature to action. Others were reluctant to even discuss the issue.

"I think we'll follow the governor's lead and drop the whole thing," said Rep. Terry Gardiner, D-Ketchikan and chairman of the House Judiciary Committee. "I think most legislators agree."

In the Senate, Judiciary Chairman George Hohman, D-Bethel, dismissed questions about the likelihood of legislative action on the high court recommendation with the observation that: "I'm not in a position to say one way or another."

Some legislators, however, said they were anxious to raise the drug issue again, but not along the lines suggested by the Supreme Court.

Rep. Ed Dankworth, R-Anchorage, said he was preparing legislation in cooperation with the Alaska Police Officers Association for a wholesale revision of the state's drug laws.

"It's designed to put us back in the drug enforcement business," said Dankworth, a former head of the Alaska State Troopers.

Seldovia Considers Toughening Drug Laws

By DON HUNTER
Times Staff Writer

Seldovia city officials, concerned about reports of increased marijuana use among school-aged children, are looking into ways to strengthen local laws.

Acting on suggestions from police chief Gary Gunkel, the Seldovia City Council Wednesday appropriated $400 for a legal opinion on the chances for enacting local laws to better control the substance.

Gunkel argues that Seldovia's problem is rooted in state laws which make possession of up to one ounce of marijuana a misdemeanor punishable by a civil fine. And the state Supreme Cou . has ruled that possession of marijuana for personal use in the home is legal.

Some Seldovia residents grow marijuana plants in their greenhouses, which are burglarized by youngsters, Gunkel says.

The police chief believes that as many as "90 percent" of the school-age children "from the sixth grade on up" have at least experimented with the drug.

Gunkel feels that stricter local laws may be the answer.

At least one member of the city council disagrees, however. City Councilwoman Cheryl Reynolds says better education on drugs and drug use may be a better route.

Mrs. Reynolds cast the dissenting vote in the council's 4-1 decision to make the appropriation.

"Really, I feel quite mixed" about the police chief's argument, Mrs. Reynolds said. "I feel we're getting very emotional about an issue we should stay objective about.

"I don't think it is as serious as some people think," she said. "I haven't seen a major dr. g problem since I've been here." Gunkel's statistics are in her opinion "far out of line."

"Approaching it in a manner of making it illegal" may end up making criminals of people who really aren't criminals, Mrs. Reynolds said.

Council member Billy Kaho said Gunkel's report "was a bit of a shock to me."

The police chief "has come to the council three consecutive weeks" with reports of drug problems including "not only marijuana but also cocaine and other hard drugs," she said.

Mrs. Kaho compares the question of harsher local drug laws to the hours bars are allowed to stay open. State laws allow bars to stay open until 5 a.m., she said, but Seldovia's local laws require them to close at midnight.

She said the drug issue is a community concern, at least among her friends.

"I took a poll of my particular friends and they're scared to dea th for their kids," she said.

Hammond Changes On 'Grass' Stance

The Anchorage Times

This is another in a series of interviews with Alaska gubernatorial candidates and their stances on the state issues.

By RAY TYSON
Times Staff Writer

If he could do it over again, Gov. Jay Hammond says he would veto the liberal marijuana bill he let pass into law three years ago.

And, the incumbent Republican candidate for governor agrees with the Anchorage Parent-Teacher Association that proposed drug bills — one of which would make stiffer penalties for pushers — lack political support among lawmakers.

"Let me say that I have been disturbed over that same lack of action to date," Hammond said.

The parents' group was among eight organizations which submitted questions to the Anchorage Times for gubernatorial candidates.

The other organizations with specific concerns are the Alaska Bar Association, Older Persons Action Group, Anchorage Chamber of Commerce, Alaska Peace Officers Association and the Alaska Black Caucus.

"In regard to whatever drug abuse you're talking about, be it alcohol or other types of narcotics, I think there should be swift justice," Hammond said. "I don't care whether it is the bootlegger in the village or the guy who's hawking cocaine or smack on the street corner."

Hammond came under public criticism in 1975 when he declined to veto a legislative bill "decriminalizing" possession of marijuana. The law reduced the penalty for possession from a felony to a civil offense.

The Alaska Supreme Court later ruled the constitution guaranteed a person's right to smoke pot in the privacy of his home. Hammond suggested the public mistook that to mean the Legislature and governor "legalized" marijuana.

"They (public) feel the current status quo is the result of legislative action," Hammond said. "Not so. The Legislature still had the use of marijuana (being) illegal.

"In other circumstances it prescribed civil penalties in those instances of private use and possession of a small quantity — but (it was) still illegal.

"Had I vetoed that bill you would have removed any question as to whether the state law accommodated private use of marijuana...because we would have had nothing in the statutes even suggesting it was a civil penalty. The veto would have further liberalized it."

Hammond also has said he felt obligated to support the pot bill because the Legislature made every amendment to the legislation he suggested.

(See Page 3, Col. 1)

community organizations.

Do you support Sen. John Huber's amendment to have judges and attorneys general elected? — Alaska Bar Association.

"At one time I thought this might have some merit," Hammond said. "But I do not favor it. It seems you would further politicize (the situation).

"In many states which have had election (of attorneys general). . . . there has been a conflicting posture," where the attorney general competes with the governor for high office.

But Hammond suggested he would support placing an initiative on the ballot asking voters whether they support election of judges and attorneys general.

"I am a great supporter of the initiative process," Hammond said. "An initiative advisory would be helpful. I would welcome one."

Hammond said he personally supports the current system of selecting judges based on the lawyers' poll.

The poll provides the Judicial Council with possible candidates for judgeships. The nominees are submitted to the governor who makes

"Extreme demands would be immediately rejected by the electorate. How can someone from New York tell whether or not...the administration or school teacher or electorate will be impacted?"

Representatives of the collective bargaining unit, administration and the general public could serve on an arbitration panel, the governor said. The panel would take the last, best offer of each side and then draft a final package to be submitted to the voters.

But Hammond said public employees should be guaranteed certain basics, such as cost of living adjustments, before the issue goes on the ballot.

"I'm not saying this (arbitration) should be done," Hammond said. "But the question should be conveyed to the public."

The teachers' group also asked whether gubernatorial candidates favored 100 percent state funding of school operations and 80 percent funding of school construction.

"I introduced the bill for 80 percent funding," Hammond said. "As far as 100 percent funding, you bet I support it. It's constitutionally man-

Group.

Hammond said he supports such state financed aid programs for Alaska's elderly "because most older persons groups I've spoken to agree such is the case."

Hammond said he has built five times more residential housing for the elderly than any administration since statehood and has bolstered nutrition programs.

And since he took office nearly four years ago, the governor said six multi-purpose senior centers have been built. He said he hopes to keep the pace up.

"My concern is that we have appropriate funds to provide for whatever programs," Hammond said. "I'm certainly willing to provide the services as long as we have the funds."

What is your position on repeal of the state business license gross receipts tax? — Anchorage Chamber of Commerce.

"It is certainly an unfair tax," Hammond said. "It is a hidden sales tax and doesn't necessarily relate to profits or earnings."

The state Senate repealed the tax after the Times interviewed Hammond. The House and governor are expected to uphold Senate action.

Hammond's only concern was to find a source of revenue to replace the gross receipts tax, which goes mostly to local municipalities through state revenue sharing programs.

"Otherwise, we would be throwing a real curve ball at municipal entities," Hammond said.

...aw Stanc

Alaska Federation of Native

Hammond said subsiste... should have first pick of Ala... and game when there is ... and there are inadequate st...

"That doesn't mean ... use," Hammond said. "... there is a priority when t... conflict."

The governor defined su... as "that which sustains ... soul."

"It's a matter of degree. ... "Who is most dependent o... ing body and soul? When ... conflicts the least depende... be screened out.

"But I can't tell you w... guy who lives here in Ancho... would rather blow out his b... hang up his fly rod should be... chance to go down and cat... bow trout somewhere."

Hammond did not sug... specific program to assure ... ence users get first choice o... game.

"The state policy has b... number of years — as stru... the fish and game board — ... subsistence as the priority ... such conflicts occur," he sa...

How would you make ... ministration more respons... press concerns of Alaska's ... population...as meaningful ... ants in the state decisio... process? — Alaska Black C...

The Alaska Black Cauc... edly has accused Hammo... ing to appoint minorities to ... making positions in state ... ment.

And Hammond repeated ... sisted his record on minori... better than previous a... tions.

"We have had a 90 p... crease in black hire since t... of this administration, and ... cent increase in female ... governor said. "And while ... not be particularly good, ... it's a vast improvement o... ous actions."

Hammond said he offe... minorities deputy com... positions and two minori... missioner slots.

"They all refused them," Hammond said. "Now I can't d... in, kicking and screaming ... problems is that many of ... not want to go to Juneau ... there is not a significant bl... munity there."

The governor said he ha... with minority groups t... names to him for possible ... ment to decision-making po...

"I did this early on wh...

Incumbent Governor Changes Drug Law Stanc

(Continued From Page One)

But because of his personal opposition to drugs and because of the "imagery involved," Hammond said he would veto the same marijuana bill today.

"Frankly, if I had to do it over again, to demonstrate clearly that, hey, if you guys want to liberalize marijuana put it on the ballot or something of that nature, but don't ask me to support something that I happen to be morally opposed to...I would have vetoed the bill."

On another issue of concern to the parents' group, Hammond agreed federally-mandated programs often do not include enough money for the state and local communities to administer them.

The governor said he has taken steps to get more federal support "through personal lobbying and correspondence and . . . resolutions emerging from the (Western) governors' conference."

Hammond also responded to questions drafted by seven other community organizations.

Do you support Sen. John Huber's amendment to have judges and attorneys general elected? — Alaska Bar Association.

"At one time I thought this might have some merit," Hammond said. "But I do not favor it. It seems you would further politicize (the situation).

"In many states which have had election (of attorneys general). . . there has been a conflicting posture," where the attorney general competes with the governor for high office.

But Hammond suggested he would support placing an initiative on the ballot asking voters whether they support election of judges and attorneys general.

"I am a great supporter of the initiative process," Hammond said. "An initiative advisory would be helpful. I would welcome one."

Hammond said he personally supports the current system of selecting judges based on the lawyers' poll.

The poll provides the Judicial Council with possible candidates for judgeships. The nominees are submitted to the governor who makes the final appointments.

"This is one means of determining qualifications," Hammond said.

Do you support legislation which would allow voters to choose either binding arbitration or a teacher's clear right to strike as a means of resolving impasse situations? — National Education Association of Alaska.

Hammond said he would support putting the labor questions to the public. And he said the public itself could serve as the arbitrator, or third party which settles contract disputes when labor and management cannot reach agreement.

"I think if you had the binding arbitration procedure you would very seldom have irrational demands," Hammond said. "I don't think you would ever be confronted with strike circumstances."

Extreme demands could be avoided if the public voted on the final wage package, Hammond said.

"They would assess what the true monetary impact would be," he said. "Extreme demands would be immediately rejected by the electorate. How can someone from New York tell whether or not...the administration or school teacher or electorate will be impacted?"

Representatives of the collective bargaining unit, administration and the general public could serve on an arbitration panel, the governor said. The panel would take the last, best offer of each side and then draft a final package to be submitted to the voters.

But Hammond said public employees should be guaranteed certain basics, such as cost of living adjustments, before the issue goes on the ballot.

"I'm not saying this (arbitration) should be done," Hammond said. "But the question should be conveyed to the public."

The teachers' group also asked whether gubernatorial candidates favored 100 percent state funding of school operations and 80 percent funding of school construction.

"I introduced the bill for 90 percent funding," Hammond said. "As far as 100 percent funding, you bet I support it. It's constitutionally mandated."

The governor said the state constitution "says you have to give fair and equitable education to everyone..."

"The best way you can determine that is to ask what is the average cost of providing education of the citizen of the state," he said. "And what ever that translates into is the basic need."

But Hammond said those "extra enrichments" beyond basic education, such as swimming pools, for example, should be paid for by local school districts.

"The obligation in the state constitution for basic education is 100 percent...(but that) doesn't mean everything the district might want..."

Do you believe money spent on home health-home support services would not only be better for Alaska's elderly but also would tend to reduce institutionalization and medical costs? What would you do to reduce such costs? — Older Persons Action Group.

Hammond said he supports such state financed aid programs for Alaska's elderly "because most older persons groups I've spoken to agree such is the case."

Hammond said he has built five times more residential housing for the elderly than any administration since statehood and has bolstered nutrition programs.

And since he took office nearly four years ago, the governor said six multi-purpose senior centers have been built. He said he hopes to keep the pace up.

"My concern is that we have appropriate funds to provide for whatever programs," Hammond said. "I'm certainly willing to provide the services as long as we have the funds."

What is your position on repeal of the state business license gross receipts tax? — Anchorage Chamber of Commerce.

"It is certainly an unfair tax," Hammond said. "It is a hidden sales tax and doesn't necessarily relate to profits or earnings."

The state Senate repealed the tax after the Times interviewed Hammond. The House and governor are expected to uphold Senate action.

Hammond's only concern was to find a source of revenue to replace the gross receipts tax, which goes mostly to local municipalities through state revenue sharing programs.

"Otherwise, we would be throwing a real curve ball at municipal entities," Hammond said.

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"Otherwise, we would be throwing a real curve ball at municipal entities," Hammond said.

The gross receipts tax will be replaced by an increased corporate tax on the oil industry, the Legislature decided this week.

Should the first priority for fish and wildlife resources be for subsistence purposes? As governor, what would you do to assure that subsistence maintains a high priority? — Alaska Federation of Natives.

Hammond said subsistence users should have first pick of Alaska's fish and game when there is a conflict and there are inadequate stocks.

"That doesn't mean exclusive use," Hammond said. "It means there is a priority when there is a conflict."

The governor defined subsistence as "that which sustains body and soul."

"It's a matter of degree," he said. "Who is most dependent on sustaining body and soul? When there are conflicts the least dependent should be screened out.

"But I can't tell you whether a guy who lives here in Anchorage who would rather blow out his brains than hang up his fly rod should be denied a chance to go down and catch a rainbow trout somewhere."

Hammond did not suggest any specific program to assure subsistence users get first choice of fish and game.

"The state policy has been for a number of years — as structured by the fish and game board — to place subsistence as the priority use when such conflicts occur," he said.

How would you make your administration more responsive to express concerns of Alaska's minority population...as meaningful participants in the state decision-making process? — Alaska Black Caucus.

The Alaska Black Caucus repeatedly has accused Hammond of failing to appoint minorities to decision-making positions in state government.

And Hammond repeatedly has insisted his record on minority hire is better than previous administrations.

"We have had a 90 percent increase in black hire since the advent of this administration, and a 97 percent increase in female hire," the governor said. "And while that may not be particularly good, mind you it's a vast improvement over previous actions."

Hammond said he offered seven minorities deputy commissioner positions and two minorities commissioner slots.

"They all refused them," Hammond said. "Now I can't drag them in, kicking and screaming. One of the problems is that many of them do not want to go to Juneau because there is not a significant black community there."

The governor said he has pleaded with minority groups to submit names to him for possible appointment to decision-making posts.

"I did this early on when I was appointing my cabinet," Hammond said. "I got one black name proposed and it was opposed by more Blacks than it was supported by."

Craig A. Forster
656 7th Ave.
Fairbanks, Alaska 99701

Senator Glenn Hackney
Pouch V
Juneau, Alaska 99811

STATE OF ALASKA

JAY S. HAMMOND, Governor

DEPARTMENT OF LAW

OFFICE OF THE ATTORNEY GENERAL / POUCH K — STATE CAPITOL
JUNEAU 99801

July 22, 1975

Mr. Charles G. Anderson
Chief of Police
Anchorage Police Department
P.O. Box 400
Anchorage, Alaska 99510

Re: Enforcement and Prosecution of Marijuana Offenses

Dear Chief Anderson:

During the Crime Conference in Fairbanks last month, it was suggested that the Attorney General prepare and circulate a letter which outlines the department's interpretation of the recent Supreme Court decision in Ravin v. State, ____ P.2d _____, Opinion No. 1156 (Alaska 1975), as well as the recent amendments to AS 17.12.110, which now appear as ch 110 SLA 1975 and which will become effective on September 2, 1975. We have attempted to do so in this rather extensive letter. Please feel free to distribute the letter to whichever departments or individual officers you feel would benefit from it. I will, however, provide the Commissioner of Public Safety, as well as the District Attorneys throughout the State with a copy and will request that the District Attorneys forward copies to police agencies within their jurisdiction.

I realize that all of the law enforcement questions which might arise regarding possession of marijuana cannot be touched upon in this letter, but I will try to address those questions which arose in your discussion with the Attorney General as well as additional points that might not have been covered but which have come to our attention in recent weeks. The Department of Law through individual District Attorneys will, of course, be available to assist any police officer in a determination in a particular case.

I. Ch. 110 SLA 1975 (FCCS HCS SSSB 350)

The amendments to AS 17.12.110 can be broken into three basic areas each of which will be dealt with separately:

(1) Sale or Distribution: The above-referenced legislation does not affect statutes prohibiting the sale or distribution of marijuana. Sale of any amount of marijuana is still a felony and no modification of present enforcement

procedures should occur as a result of the amendments to AS 17.12.110.

(2) Possession for Purpose of Sale: Prior to enactment of the referenced amendments, possession for purpose of sale was a felony. In most respects, enforcement procedures should not be modified under the amendments. However, where marijuana is held for sale within a home, evidence of intent to sell must be strong in order to support an entry into a home solely to make an arrest or conduct a search for marijuana.

Courts in the past have decided on a case-by-case basis what amount of marijuana was sufficient to raise an inference that marijuana was possessed for purpose of sale. Any amount that a court decided was possessed for personal use constituted a misdemeanor. Any amount that a court decided was possessed for purpose of sale was a felony. That is still the law in spite of the recent amendments to AS 17.12.110, except that possession for personal use is no longer a misdemeanor offense under circumstances discussed below.

Confusion has apparently arisen over the provision in the act which states that possession or control of any amount in a private place for personal use is a civil offense. Commissioner Burton has inquired, for example, whether this gives an individual license to possess large quantities of marijuana in his own home. The answer is generally no. If a police officer has evidence which establishes that probable cause exists to believe that any amount of marijuana is being held anywhere for the purpose of sale, he should act just as he has in the past. Whether a given amount is possessed for purpose of sale will be determined by the same standards that have always been applied at trial, e.g., the actual amount possessed; the circumstances surrounding possession, such as possession of paraphernalia associated with the packaging, sale and distribution of marijuana (scales, baggies, etc.); whether the marijuana is already individually packaged for sale; and evidence of other sales contemporaneous with the charge under consideration.

(3) Possession for Personal Use: The major change made by ch. 110 SLA 1975 relates to possession or control of marijuana for personal use. It should be emphasized that public use of marijuana remains a misdemeanor offense. Consequently, when a police officer observes an individual smoking marijuana in public, an arrest may be made and a search of the arrestee and the area within his immediate control may lawfully be conducted as an incident to the arrest. Additionally, possession of any amount of marijuana by an individual while operating a motor vehicle or airplane continues to be a misdemeanor. A question has arisen with respect to the omission of the word "control" from the language of the act which continues to make it a misdemeanor to possess marijuana while operating a motor vehicle or airplane. That provision which is embodied in the statute as AS 17.12.110(d)(3) reads as follows:

> (d) A person who: . . . (3) possesses any amount of marijuana while operating a motor vehicle or airplane . . . is, upon conviction, guilty of a misdemeanor. . . .

Different language is used in AS 17.12.110(d)(2) which provides that:

> (d) A person who: . . . (2) possesses or controls more than an ounce of marijuana on a public street or sidewalk or on the premises of a public carrier or business establishment or any other public place . . . is, upon conviction, guilty of a misdemeanor. . . .

(emphasis added). The reference in AS 17.12.110(e), which is the subsection setting out those situations which give rise to a civil fine, is also to "possession or control". Furthermore, AS 17.12.010 continues to provide that:

> Except as otherwise provided in this chapter, it is unlawful for a person to . . . possess, have under his control. . . a depressant, hallucinogenic or stimulant drug.

The only portion of the act that does not contain the dual reference to "possession or control" is that portion which preserves a misdemeanor offense for possession of marijuana while operating a motor vehicle or airplane. In that respect, it is instructive that the second to the last or fifth version of the bill out of a total of six, which appears as HCS SSSB 350 am H and which is the version that originally passed the Alaska House of Representatives, contained the following language.

> (d) A person who: . . . (3) possesses any amount of marijuana on his person while operating a motor vehicle or airplane. . . .

(emphasis added). The underlined portion of the 5th proposed version of AS 17.12.110(d)(3) was specifically deleted from FCCS HCS SSSB 350, which now appears as ch. 110 SLA 1975, but the words "or control" were not inserted. The letter of legislative intent accompanying FCCS HCS SSSB 350 specifically addresses an aspect of this problem. In discussing the removal of the language "on his person" from the bill, the letter of intent stated that:

> . . . The conferees feel that the the language "on his person" . . . should be omitted. Otherwise a person in violation of this section could be openly smoking marijuana while driving, and then could quickly place the marijuana cigarette in the ash tray of the automobile or on the seat or floor, when approached by a police officer. He would then argue that he was not in violation of this section.

Senate Journal, Alaska State Senate, May 15, 1975, at 1121. Thus, in terms of the operator, himself, it is clear that the act is designed to preserve the misdemeanor label for possession of marijuana beyond possession "on his

person" and is intended to extend to possession within the immediate reach of the operator. The question remains, however, whether the omission of the word "control" also restricts those situations under which a person can be charged with a misdemeanor as either the operator or a passenger in a motor vehicle or an airplane. I am of the view that it does and further, that its omission indicates a specific legislative intent to restrict the applicability of AS 17.12.110(d)(3) to factual situations where a person while actually operating a motor vehicle or an airplane either physically possesses marijuana on his person or possesses it within his immediate reach while operating the vehicle.

The term "possession" as used in the criminal law has traditionally been regarded as narrower than the term "control". Possession requires having a thing with you or within your immediate reach. "Control", on the other hand, is broader in scope and includes those situations where a person simply has "constructive possession" or the right and ability to exercise control or management over a thing not in his actual physical possession.

Consequently, under AS 17.12.110(d)(3), the following general principles are applicable: first, if marijuana is lawfully discovered in the actual physical possession of an individual while he is operating a motor vehicle or an airplane either on his person or within his immediate reach while operating, then he may be charged and prosecuted for the misdemeanor offense; second, if marijuana is lawfully discovered in his control while operating a vehicle, but outside of his person or the area within his immediate reach while operating the vehicle, then he is subject to a civil fine under AS 17.12.110(e); and third, if marijuana is lawfully discovered in the possession or control of a passenger in a motor vehicle or airplane, then he is also subject to a civil fine under AS 17.12.110(e).

Prior Alaska Supreme Court decisions have interpreted existing statutes prohibiting the possession of a substance to require proof beyond a reasonable doubt that an individual charged with a "possesaion" offense knew what the substance was and had the ability to exercise control over it. Within that context, I should emphasize that the rule set forth in Egner v. State, 495 P.2d 1271 (Alaska 1971), will continue to apply to the prosecution of marijuana offenses whether criminal or civil. Egner is, of course, on its facts, particularly applicable to the "possession in a motor vehicle" situation and holds that "mere presence at the scene" is insufficient to prove knowing possession or control of a prohibited substance. For example, if a quantity of marijuana has lawfully been discovered in the trunk of a motor vehicle, the State must still be able to prove beyond a reasonable doubt that the person charged knew or had reason to know (e.g., where the defendant is the owner and only he has access to the trunk) that the trunk contained marijuana and that he either exercised or had the right to exercise control over it.

Another question which has arisen under the language of the act applicable to motor vehicles and airplanes is what, if any, significance can be attached to the omission of vessels. Consistent with the discussion of Ravin v. State,

supra, in Part II of this letter, I am of the view that the Supreme Court would have upheld the preservation of a misdemeanor offense for possession of marijuana while operating a vessel if vessels had been included within AS 17.12.110(d)(3) because it represents that type of activity which potentially "interferes in a serious manner with the health, safety, rights and privileges of others or with the public welfare." An argument could have been made that there is a close and substantial relationship between the public interest in the safe operation of a vessel and the prohibition against possession of marijuana while operating a vessel when used as a vehicle for transportation. This argument is still applicable, however, because the omission of vessels under AS 17.12.110(d)(3) simply means that possession of marijuana in a vessel while it is operated as a vessel is subject to a civil fine under AS 17.12.110(e). Again, however, the limitations imposed through Egner will apply equally to possession or control of marijuana while operating a vessel.

The major change effectuated by the act addresses the private possession of marijuana for personal use in a purely non-commercial context. Under the act, possession or control of any amount of marijuana for personal use in a non-public place by a person eighteen years of age or older is subject to a civil fine of not more than $100. The decision in Ravin, however, alters the thrust of this provision to a substantial extent. Consequently, I will reserve discussion of the question of private possession of marijuana until Part II of this letter.

The most difficult questions under the act and under Ravin concern possession in public. Under the act, possession or control of more than an ounce of marijuana "on a public street or sidewalk or on the premises of a public carrier or business establishment or any other public place" remains a misdemeanor offense. Possession of an ounce or less in a "public place" by a person 18 years of age or older is subject to a civil fine of not more than $100. Under the legislative amendments to AS 17.12.110 a police officer who sees someone use marijuana in a "public place" may arrest the person for the misdemeanor offense of possession. If, on the other hand, he simply observes an individual in possession of an ounce or less, he may seize it and issue a civil citation, assuming that we are able to initiate a civil citation system in conjunction with the court system which will require some amendment to the Rules of Civil Procedure. Conversely, where a police officer observes an individual in possession of more than an ounce, he may arrest the person, seize the marijuana and conduct a search as an incident to the arrest as he would under present law. Thus, under both the recent amendments to AS 17.12.110 and Ravin v. State, supra, public use remains a misdemeanor, public possession of an ounce or less is subject to a civil penalty and public possession of more than an ounce remains a misdemeanor.

The above analysis, however, omits at least four commonly occurring factual variations. Under ch 110 SLA 1975, if a police officer discovers an ounce or less of marijuana in the possession of a person who has been arrested in a

public place for another offense or otherwise lawfully taken into custody, then that person would be subject to the civil penalty under AS 17.12.110(e). Conversely, where a police officer lawfully discovers more than an ounce of marijuana in the possession of a person in a public place who has been arrested for another offense or otherwise lawfully taken into custody, then under the act that person would remain the subject of a misdemeanor prosecution for possession. However, if a police officer has not actually observed marijuana in an individual's possession, but has probable cause to believe that an individual possesses an ounce or less of marijuana on his person in a public place or that marijuana is possessed in an automobile either by a passenger or beyond the immediate reach of the operator, then a problem exists in terms of potential action that may be taken by an officer inasmuch as possession under these circumstances no longer constitutes a criminal offense. Consequently, a police officer may not arrest [which he presently cannot do for a misdemeanor not committed in his presence] and may not conduct a search unless he has independent justification to search. Furthermore, it will not be possible to obtain a search warrant, the subject of which is an ounce or less of marijuana possessed or controlled in other than a public place which gives rise to a civil penalty because AS 12.35.020 restricts the issuance of search warrants to essentially the recovery of evidence of a crime. On the other hand, when a police officer has not actually observed marijuana in an individual's possession, but has probable cause to believe that an individual possesses more than an ounce of marijuana on his person in a public place, then under the act the officer would proceed as he always has under existing law. The same, of course, holds true with respect to possession of marijuana for purpose of sale under any circumstances, as has been previously noted.

One final point should be noted with respect to ch. 110 SLA 1975. The letter of legislative intent accompanying FCCS HCS SSSB 350 specifically defines an "ounce" for purposes of the amendments to AS 17.12.110 as follows:

> To avoid possible confusion, the conferees believe that one ounce should be considered 30 grams for the purpose of prosecutions under this Act.

II. Ravin v. State, ___P.2d___, Opinion No. 1156 (Alaska 1975)

On its face, the case of Ravin v. State, supra, applies to a very limited set of circumstances. Construed as narrowly as possible in its potential application, Ravin stands for the proposition that:

> . . . [c]itizens of the State of Alaska have a basic right to privacy in their homes under Alaska's constitution. This right to privacy would encompass the possession and ingestion of substances such as marijuana in a purely personal, non-commercial context in the home unless the state can meet its substantial burden and show that proscription of possession of marijuana in the home is supportable by achievement of a legitimate state interest.

Ravin v. State, supra at 21. The court was careful to explain that its analysis focused not on any right to possess or use marijuana per se but rather, on the right to privacy found within Article I, Section 22 of the Alaska Constitution, particularly within the context of the home. The standard which the court has adopted in conducting this analysis is twofold.

> . . . [W]hether the State has demonstrated sufficient justification for the prohibition of possession of marijuana in general in the interest of public welfare; and further whether the State has met the greater burden of showing a close and substantial relationship between the public welfare and control of ingestion or possession of marijuana in the home for personal use.

Id. at 22.

After a lengthy analysis of the effects of marijuana use and the arguments advanced by the State in support of a total prohibition, the court held as follows:

> . . .Thus we conclude that no adequate justification for the states' intrusion into the citizen's right to privacy by its prohibition of possession of marijuana by an adult for personal consumption in the home has been shown. The privacy of the individual's home cannot be breached absent a persuasive showing of a close and substantial relationship of the intrusion to a legitimate governmental interest. Here, mere scientific doubts will not suffice. The state must demonstrate a need based on proof that the public health or welfare will in fact suffer if the controls are not applied.

Id. at 40. This grant of a right to privacy even in the home is not absolute, however. The majority opinion in Ravin carefully places two "important" restrictions upon it: first, the right to privacy remains absolute so long as it is a purely private, non-commercial expression of an Alaska citizen's individuality; second, the right to privacy "must yield when it interferes in a serious manner with the health, safety, rights and privileges of others or with the public welfare." Id. at 21. The following language in this regard is, I think, instructive:

> No one has an absolute right to do things in the privacy of his own home which will affect himself or others adversely. Indeed, one aspect of a private matter is that it is private, that is, that it does not adversely affect persons beyond the actor, and hence is none of their business.