CONSTITUTIONAL LAW—ESTABLISHMENT CLAUSE—TAX BENEFITS TO PARENTS WHOSE CHILDREN ATTEND SECTARIAN SCHOOLS NOT VIOLATIVE OF THE FIRST AMENDMENT—*Mueller v. Allen*, 103 S. Ct. 3062 (1983).

The first amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[1] Although this mandate clearly proscribes state support of religion, the prominent role that private institutions have played within the general framework of American education[2] has induced various state attempts to provide indirect forms of aid to sectarian schools.[3] One such state tactic has been the creation of tax benefits for parents who send their children to

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[1] U.S. CONST. amend. I.

[2] The prominent role of religious institutions in American education continues today. The National Center for Education Statistics estimates that, during the current school year (1983-1984), approximately nine percent of the nation's students are enrolled in private schools, the vast majority of which have a sectarian affiliation. Out of a total of 44,275,000 students, 39,100,000 attend public schools, 4,900,000 attend private schools, and 275,000 attend institutions which cater to special educational needs. U.S. Dept. of Educ., News Release, table 1 (Aug. 28, 1983); *see also* P. WEBER & D. GILBERT, PRIVATE CHURCHES AND PUBLIC MONEY: CHURCH-GOVERNMENT FISCAL RELATIONS 103-15 (detailed but dated statistical analysis of education); J. M. O'NEILL, RELIGION AND EDUCATION UNDER THE CONSTITUTION, ch. 9, at 140-52 (1949) (historical perspective on aid to sectarian education by states).

Not all religious sects, however, place the same emphasis on education as an integral part of religious indoctrination. To the Catholic faith, religious education of the young is seen as the responsibility of the Church. *See* Drinan, *Tax Support for Religious Schools: A Catholic's View* in AMERICA'S SCHOOLS AND CHURCHES: PARTNERS IN CONFLICT (1965); *see also Hearings on N.J. A3738 Before the Assembly Education Committee*, 200th Legis. 2d Sess. (Oct. 13, 1983) (statement of Wayne Dibofsky, New Jersey Education Association, alleging that New Jersey bill would overwhelmingly favor Catholic faith because 90% of students attending New Jersey private schools are enrolled in Catholic schools). In contrast, the Presbyterians believe that religious education is the responsibility of the home and church, not of the public schools. *See* Maxson, *Religion in the Schools: A Presbyterian's View* in AMERICA'S SCHOOLS AND CHURCHES: PARTNERS IN CONFLICT (1965).

[3] *See, e.g.*, Committee for Pub. Educ. v. Regan, 444 U.S. 646 (1980) (statute providing for reimbursement of state-mandated testing expenses not violative of establishment clause); Meek v. Pittenger, 421 U.S. 349 (1975) (certain services provided to nonpublic school students under state program held unconstitutional); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973) (system of direct payments to nonpublic schools and tax credits to parents of children attending nonpublic schools held unconstitutional); Lemon v. Kurtzman, 403 U.S. 602 (1971) (statute providing for payment of salary supplements for nonpublic school teachers held unconstitutional); Everson v. Board of Educ., 330 U.S. 1 (1947) (transportation expenses paid by state to parents of public and Catholic school students held constitutional); *see also infra* notes 41-113 and accompanying text.

nonpublic schools.[4] Recently, in *Mueller v. Allen*,[5] the United States Supreme Court found such state tax deductions to be in accord with the precepts of the establishment and free exercise clauses.[6]

In *Mueller*, plaintiffs Van D. Mueller and June Noyes brought an action in federal district court against Clyde E. Allen, Jr., Commissioner of the Department of Revenue for the State of Minnesota.[7] The plaintiffs, certified representatives of state taxpayers,[8] challenged the validity of a Minnesota statute which enabled parents of both public and nonpublic school children to deduct the cost of tuition, textbooks (including instructional materials and equipment), and transportation from their gross income. The statute permitted an expense deduction of up to five hundred dollars for children in kindergarten through sixth grade, and up to seven hundred dollars for those students in grades seven through twelve.[9] The statute provided, however, that

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[4] *See* Mueller v. Allen, 103 S. Ct. 3062 (1983); Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973); Rhode Island Fed'n of Teachers, AFL-CIO v. Norberg, 630 F.2d 855 (1st Cir. 1980). Yet, in the words of Thomas Jefferson, " '[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical.' " Everson v. Board of Educ., 330 U.S. 1, 28 (1947) (Rutledge, J., dissenting).

[5] 103 S. Ct. 3062 (1983).

[6] *Id.* at 3078.

[7] Mueller v. Allen, 514 F. Supp. 998, 999 (D. Minn. 1981), *aff'd*, 676 F.2d 1195 (8th Cir. 1982), *aff'd*, 103 S. Ct. 3062 (1983). Parents who took advantage of the tax deduction intervened as defendants in the suit. *Id.*

[8] *Id.* There were originally five plaintiffs, but the defendants successfully moved for the dismissal of three of the plaintiffs based upon the *res judicata* effect of Minnesota Civil Liberties Union v. Roemer, 452 F. Supp. 1316 (D. Minn. 1978), an earlier suit in which the plaintiffs participated as parties. Mueller v. Allen, 514 F. Supp. 998, 999 (D. Minn. 1981), *aff'd*, 676 F.2d 1195 (8th Cir. 1982), *aff'd*, 103 S. Ct. 3062 (1983). The district court denied defendants' motion to dismiss Mueller and Noyes as plaintiffs, however, because the prior suit was not a representative taxpayers' action. *Id.*

[9] MINN. STAT. ANN. § 290.09(22) (West 1982). The provision allows a taxpayer to deduct from gross income, for the purpose of determining the net income on which state tax must be paid, the following expenses:

> Subd. 22. Tuition and transportation expense. The amount he has paid to others, not to exceed $500 for each dependent in grades K to 6 and $700 for each dependent in grades 7 to 12, for tuition, textbooks and transportation of each dependent in attending an elementary or secondary school . . . wherein a resident of this state may legally fulfill the state's compulsory attendance laws, which is not operated for profit, and which adheres to the provisions of the Civil Rights Act of 1964 [citation omitted] . . . . As used in this subdivision, "textbooks" shall mean and include books and other instructional materials and equipment used in elementary and secondary schools in teaching only those subjects legally and commonly taught in public elementary and secondary schools in this state and shall not include instructional books and materials used in the teaching of religious tenets, doctrines or worship, the

taxpayers could not deduct the cost of textbooks or instructional materials and equipment which could be used to inculcate religious values.[10] The taxpayers alleged that the statute violated the first amendment, as applied to the states through the fourteenth amendment, by advancing an establishment of religion, and restraining the free exer-

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purpose of which is to inculcate such tenets, doctrines or worship, nor shall it include such books or materials for, or transportation to, extracurricular activities including sporting events, musical or dramatic events, speech activities, driver's education, or programs of a similar nature.

Id.

Both the Supreme Court and the circuit court accepted the district court's findings of fact regarding deductible expenses:

Tuition includes:

1. Tuition in the ordinary sense.
2. Tuition to public school students who attend public schools outside their residence school districts.
3. Certain summer school tuition.
4. Tuition charged by a school for slow learner private tutoring services.
5. Tuition for instruction provided by an elementary or secondary school to students who are physically unable to attend classes at such school.
6. Tuition charged by a private tutor or by a school that is not an elementary or secondary school if the instruction is acceptable for credit in an elementary or secondary school.
7. Montessori School tuition for grades K through 12.
8. Tuition for driver education when it is part of the school curriculum.

Textbook deductions include not only secular textbooks but also other necessary equipment, such as:

1. Cost of tennis shoes and sweatsuits for physical education.
2. Camera rental fees paid to the school for photography classes.
3. Ice skates rental fee paid to the school.
4. Rental fee paid to the school for calculators for mathematics classes.
5. Costs of home economics materials needed to meet minimum requirements.
6. Costs of special metal or wood needed to meet minimum requirements of shop classes.
7. Costs of supplies needed to meet minimum requirements of art classes.
8. Rental fees paid to the school for musical instruments.
9. Cost of pencils and special notebooks required for class.

Mueller v. Allen, 514 F. Supp. 998, 1000 (D. Minn. 1981), *aff'd*, 676 F.2d 1195 (8th Cir. 1982), *aff'd*, 103 S. Ct. 3062 (1983).

[10] MINN. STAT. ANN. § 290.09 (22) (West 1982). The wording of the statute seems to require that, not only must the text or other instructional material be used for the teaching of religion, but that it must have been purchased for the purpose of inculcating such religious beliefs. See *supra* note 9. For example, a Bible purchased for a high school "Bible as Literature" course probably would be deductible because it is not being used for the inculcation of religious doctrine.

cise of religion.[11] The defendants contended that the Minnesota provision was entitled to a presumption of validity as it encompassed a broad class of beneficiaries, and therefore did not have the primary effect of advancing religion.[12] The defendants also attacked the accuracy of statistical proofs offered by the plaintiffs to support their legal arguments.[13]

The district court upheld the validity of the statute. Judge Renner reviewed the Minnesota scheme under the three-part establishment clause test articulated in *Lemon v. Kurtzman*,[14] and concluded that the statute satisfied the first requirement, that it have a secular purpose, since it provided "a safe, effective, and varied educational environment."[15] The *Mueller* court also found that the second requirement, that the statute not have the primary effect of advancing religion, was satisfied chiefly because it was neutral on its face, benefiting both public and nonpublic school students and their parents.[16] Although the plaintiffs submitted statistics demonstrating that the actual class benefited was comprised mainly of parents who sent their children to private sectarian schools, the court rejected this evidence as unpersuasive.[17] Judge Renner compared the Minnesota statute with statutory provisions analyzed in two prior Supreme Court decisions,

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[11] Mueller v. Allen, 514 F. Supp. 998, 999 (D. Minn. 1981), *aff'd*, 676 F.2d 1195 (8th Cir. 1982), *aff'd*, 103 S. Ct. 3062 (1983). The free exercise clause argument was rejected by the court because the plaintiffs failed to demonstrate how the statute infringed on their religious beliefs. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398 (1963) (state unemployment benefits could not be denied because recipient's religion precluded Saturday work).

[12] Mueller v. Allen, 514 F. Supp. 998, 1001-02 (D. Minn. 1981), *aff'd*, 676 F.2d 1195 (8th Cir. 1982), *aff'd*, 103 S. Ct. 3062 (1983).

[13] *Id.* at 1002.

[14] 403 U.S. 602 (1971); *see infra* notes 79-90 and accompanying text.

[15] Mueller v. Allen, 514 F. Supp. 998, 1001 (D. Minn. 1981), *aff'd*, 676 F.2d 1195 (8th Cir. 1982), *aff'd*, 103 S. Ct. 3062 (1983).

[16] *Id.* at 1001-02.

[17] *Id.* at 1001-03. The plaintiffs alleged that the tuition deduction was most objectionable because it least benefited parents whose children attend public schools. *Id.* at 1001; *see also* MINN. STAT. ANN. § 120.72 (West 1982) (mandating free public education) and § 123.39(5) (West 1982) (listing circumstances under which public school may charge tuition). Through analysis of data provided by the Minnesota Department of Education, the plaintiffs concluded that from 82% and possibly up to 96% of the students who paid tuition during the 1978-79 school year were attending sectarian schools. Mueller v. Allen, 514 F. Supp. 998, 1001 (D. Minn. 1981), *aff'd*, 676 F.2d 1195 (8th Cir. 1982), *aff'd*, 103 S. Ct. 3062 (1983). The defendants attacked the validity of the plaintiffs' conclusion because no statistics were provided as to textbook and transportation deductions. Even more significant was the omission of any statistics showing the benefits conferred by the statute upon parents whose children attended public schools. *Id.* at 1002.

Walz v. Tax Commission[18] and *Committee for Public Education v. Nyquist*,[19] and concluded that in terms of its primary effect, the *Mueller* statute was more similar to the constitutional *Walz* provision than to the unconstitutional *Nyquist* scheme.[20] The court then addressed the last part of the *Lemon* test, which requires that the statute not excessively entangle the state in church affairs.[21] Judge Renner found that the statute could be administered without such entanglement.[22] He therefore concluded that the statute passed constitutional muster under the establishment clause, and the defendants' cross-motion for summary judgment was granted.[23]

The plaintiffs appealed the district court decision,[24] arguing that the statistical evidence clearly demonstrated that the statute's primary effect was to advance religion impermissibly, and that the statute lacked a valid secular purpose.[25] In addition, Mueller alleged that the statute fostered excessive entanglement between church and state.[26] The defendants maintained that the provision constituted a general welfare program which benefited a broad class of students, including those attending public school, and thus had a neutral effect upon religious institutions.[27]

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[18] 397 U.S. 664 (1970) (tax exemption of church property not violative of establishment clause); *see infra* notes 70-78 and accompanying text.

[19] 413 U.S. 756 (1973) (tax benefits to parents whose children attend nonpublic schools held unconstitutional); *see infra* notes 91-111 and accompanying text.

[20] Mueller v. Allen, 514 F. Supp. 998, 1002-03 (D. Minn. 1981), *aff'd*, 676 F.2d 1195 (8th Cir. 1982), *aff'd*, 103 S. Ct. 3062 (1983) (incorporating by reference Minnesota Civil Liberties Union v. Roemer, 452 F. Supp. 1316, 1320-22 (D. Minn. 1978)). Factors considered in support of the statute's validity included the breadth of the benefited class, the relative passivity of a deduction as a form of tax relief, its history of acceptance (having been originally enacted in 1955), and the accepted analogous practice of permitting both federal and state tax deductions for charitable contributions, a portion of which undoubtedly benefits sectarian institutions. *Id.*

[21] *See Lemon*, 403 U.S. at 613.

[22] Mueller v. Allen, 514 F. Supp. 998, 1003 (D. Minn. 1981), *aff'd*, 676 F.2d 1195 (8th Cir. 1982), *aff'd*, 103 S. Ct. 3062 (1983).

[23] *Id.*

[24] Mueller v. Allen, 676 F.2d 1195 (8th Cir. 1982), *aff'd*, 103 S. Ct. 3062 (1983).

[25] *Id.* at 1197.

[26] *Id.*

[27] *Id.* at 1198.

Chief Judge Lay, writing for the Eighth Circuit Court of Appeals, affirmed the lower court's decision,[28] finding that the statute had a valid secular purpose.[29] The appeals court found the textbook and transportation deductions to be valid as they were consistent with established Supreme Court precedent.[30] In addition, the court upheld the tuition expense tax deduction because, unlike the impermissible *Nyquist* deduction which applied only to nonpublic school students,[31] the deduction in *Mueller* applied to students attending both public and nonprofit private schools. Under the *Nyquist* statute, the tax benefits received by parents of public school children consisted of a fixed amount per child depending on the parents' income ranges. The *Nyquist* Court had viewed this benefit, which directly aided each eligible taxpayer to a certain degree, as impermissible state action in support of religion.[32] The *Mueller* appeals court, however, found that the benefit available under the Minnesota statute was constitutionally permissible because it was not dispensed in an amount predetermined by the legislature, but rather operated as a true tax deduction directly related to actual taxpayer expenses.[33] Thus, the appeals court reasoned that the benefits received under the Minnesota statute were based upon individual taxpayer choice rather than state legislative judgments. This distinction, combined with the indirect effect of a deduction on the total tax due, led the appellate court to conclude that the statute was neutral with regard to religion.[34]

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[28] *Id.* at 1196.

[29] *Id.* at 1198.

[30] *Id.* at 1201-02. The transportation deduction was clearly constitutional in light of Everson v. Board of Educ., 330 U.S. 1 (1947), which held that the state could reimburse parents for transportation expenses incurred in sending their children to nonpublic schools. *See infra* notes 41-58 and accompanying text. The *Mueller* appellate court also successfully distinguished the textbook deduction (which included secular instructional materials and equipment) permitted under the Minnesota statute, from similar programs held unconstitutional in Meek v. Pittenger, 421 U.S. 349 (1975). "In [*Meek*] massive loans of instructional materials and equipment were made directly to the institutions themselves." *Mueller*, 676 F.2d at 1201. The *Mueller* court saw the indirect tax deduction, given to the parents and not to the school, as far less objectionable than a direct loan of equipment to the schools themselves. *Id.* at 1202.

[31] Mueller v. Allen, 676 F.2d 1195, 1203 (8th Cir. 1982), *aff'd*, 103 S. Ct. 3062 (1983); *see infra* notes 91-111 and accompanying text for a discussion of *Nyquist*.

[32] *Nyquist*, 413 U.S. at 790.

[33] Mueller v. Allen, 676 F.2d 1195, 1203-04 (8th Cir. 1982), *aff'd*, 103 S. Ct. 3062 (1983).

[34] *Id.* at 1203-05.

Further, the circuit court rejected the idea that the court must consider not only the characteristics of the class *eligible* for benefits based on the wording of the statute (a *de jure* analysis), but that it must also examine the primary characteristics, sectarian or secular, of the actual class of beneficiaries taking advantage of the deductions.[35] Stating that a *de jure* analysis in itself was sufficient,[36] the court found the *Mueller* statute to be neutral on its face, thus satisfying the primary effect requirement.[37] Finally, the court found that the provision did not excessively entangle the state with religion, and thus concluded that the Minnesota statute was constitutional.[38]

The United States Supreme Court, in a five to four decision, affirmed the Eighth Circuit's opinion in *Mueller* and thus resolved a split in the circuits.[39] Justice Rehnquist, delivering the opinion of the Court, held that the statute satisfied all three requirements of the *Lemon* test and therefore did not violate the establishment clause of the first amendment.[40]

Mueller represents the Court's most recent interpretation of the establishment clause doctrine, first applied to the states through the fourteenth amendment more than forty years ago in *Everson v. Board of Education*.[41] *Everson* concerned the validity of a New Jersey statute which permitted the state to reimburse parents whose children used public transportation in traveling to and from public and nonpublic, nonprofit schools.[42] A taxpayer challenged the validity of the statute as

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[35] *Id.* at 1201-05. The defendants asserted that the court should apply a *de facto* analysis of the class benefited only when the statute singles out a narrow class of beneficiaries, as in *Nyquist*. *Id.* at 1199.

[36] *Id.* at 1205.

[37] *Id.*

[38] *Id.* at 1202, 1206.

[39] *Mueller*, 103 S. Ct. at 3071. Joining Justice Rehnquist in the majority opinion were Chief Justice Burger, and Justices White, Powell, and O'Connor. Justice Marshall wrote a dissenting opinion, which Justices Stevens, Blackmun, and Brennen joined. *Id.* at 3071-78; *see infra* note 113.

[40] *Mueller*, 103 S. Ct. at 3066-71.

[41] 330 U.S. 1 (1947). While *Everson* was the first case to address squarely the issue of public aid to private education in the establishment clause context, there were a few earlier cases involving aid to religion. *See* Cochran v. Board of Educ., 281 U.S. 370 (1930) (state's secular interest in education permitted furnishing of books to public and nonpublic students (decided on 14th amendment due process grounds)); Pierce v. Society of Sisters, 268 U.S. 510, 519 (1925) (upholding right of parents to seek private education for their children); Quick Bear v. Leupp, 210 U.S. 50 (1908) (Indian money held in trust by federal government could be given to religious organization); Bradfield v. Roberts, 175 U.S. 291 (1899) (public aid in form of construction grant to church-affiliated hospital not violative of establishment clause).

[42] *Everson*, 330 U.S. at 3. While the New Jersey statute addressed the transportation needs of all students attending nonprofit schools, the Ewing Township resolution, passed pursuant to

an impermissible aid to religion because it involved a disbursement of public funds to parents whose children attended religious schools.[43] The Court rejected this argument, stating that the parochial school students were only incidental beneficiaries of a general program, the purpose of which was to ensure the children's safe transit to and from school.[44] Justice Black, writing for a five-member majority, compared the program to other health, safety, and public welfare programs, such as police and fire protection. He reasoned that if the transportation expense reimbursement statute had been held unconstitutional, the provision of other general services to religious organizations would also be forbidden, resulting in unfair discrimination against religious institutions.[45] *Everson* stressed that the state must strive for neutrality in its dealings with religious entities, and not single out religious institutions for either special benefits or special burdens.[46] Thus, the Court upheld the constitutionality of the New Jersey statute on the ground that it had the valid secular purpose of ensuring the schoolchildren's safety, regardless of their religious beliefs.[47]

Two separate dissenting opinions were filed in *Everson*. Justice Jackson maintained that the statute did not have a secular purpose

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statutory authority, referred only to public and Catholic school students. The narrowed classification of the resolution was not considered by the Court, however, because it was not shown that any of the township's students attended a school that was neither public nor Catholic. *Id.* at 3-4.

[43] *Id.* The plaintiff also alleged that the statute effected an unlawful taking of property (taxing private property for the private use of others) under the 14th amendment due process clause. The Court held that the statute had a valid public purpose (safety of schoolchildren), and thus was not an unconstitutional taking of property. *Id.* at 5-8.

[44] *Id.* at 17.

[45] *Id.* at 17-18. The Court found this program to be consistent with its interpretation of the establishment clause:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion . . . . In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State." [Citation omitted.]

Id. at 15-16.

[46] *Id.* at 18. The Court stated: "[The First] Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them." *Id.* This so-called "neutrality" theory is discussed again in *Walz*, 397 U.S. at 669.

[47] *Everson*, 330 U.S. at 18.

because its language specifically excluded students attending private schools run for profit, in whom the state's safety interest is no less compelling.[48] He also stated that the educational function of a sectarian school is so intertwined with its religious mission that any aid to the school necessarily advances religion.[49] Justice Rutledge, after recounting the historical development of the establishment clause, elaborated on Justice Jackson's position concerning the use of education to advance the overall mission of the Roman Catholic Church.[50] Justice Rutledge reasoned that if the state were able to provide transportation aid to sectarian institutions, it would follow that teachers' salaries, tuition, buildings, equipment, and necessary materials could also be subsidized by the state, as these expenses are equally germane to the educational endeavor.[51] The Justice predicted that if some public aid to religious institutions were granted, various religious groups would clamor for still more aid, and divide the populace along religious lines.[52]

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[48] *Id.* at 20 (Jackson, J., dissenting).

[49] *Id.* at 22-26 (Jackson, J., dissenting). In Justice Jackson's opinion, "Catholic education is the rock on which the whole structure rests, and to render tax aid to its Church school is indistinguishable to me from rendering the same aid to the Church itself." *Id.* at 24 (Jackson, J., dissenting). Advocating a separationist position, he also dismissed as irrelevant several factors often used in later Court opinions to justify decisions that have been criticized as somewhat less than logically consistent:

> It is of no importance in this situation whether the beneficiary of this expenditure of tax-raised funds is primarily the parochial school and incidentally the pupil, or whether the aid is directly bestowed on the pupil with indirect benefits to the school. The state cannot maintain a Church and it can no more tax its citizens to furnish free carriage to those who attend a Church. The prohibition against establishment of religion cannot be circumvented by a subsidy, bonus or reimbursement of expense to individuals for receiving religious instruction and indoctrination.

Id.

[50] *Id.* at 46-48 (Rutledge, J., dissenting). Justice Rutledge also gave a lengthy historical analysis of the foundations of the religion clauses. He posited that, by using the word "religion" only once in both clauses, the Framers must have intended the same meaning in both—that the state was to broadly protect free exercise, and just as broadly prohibit an establishment of religion. *Id.* at 31-43 (Rutledge, J., dissenting). This approach has not been adopted by the Court, however. At least one commentator has noted that the Court apparently is willing to apply a broader definition of what encompasses religion for free exercise clause purposes than it will apply in establishment clause analyses. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 14-16, at 826-33.

[51] *Everson*, 330 U.S. at 47-48 (Rutledge, J., dissenting). Such types of aid would clearly support the religious function of the schools to greater or lesser degrees. The amount of assistance is not a legitimate demarcation for a constitutional test, says Justice Rutledge, it is instead "the principle of assessment" that is wrong. *Id.* at 48-49 (Rutledge, J., dissenting). The Framers intended that religion remain a private function beyond the reach of the state. *Id.* at 52 (Rutledge, J., dissenting).

[52] *Id.* at 53 (Rutledge, J., dissenting).

In the 1968 decision of *Board of Education v. Allen*,[53] the Court expanded its establishment clause analysis by holding that to satisfy the first amendment a statute must not only have a secular purpose; it must also not have the primary effect of either aiding or inhibiting religion.[54] Justice White, writing for a six-member majority, held that New York's secular textbook loan program, which benefited both public and nonpublic school pupils,[55] did not impermissibly aid religion. The Court found that the program furthered "the educational opportunities available to the young" and thus had a proper secular purpose.[56] The majority analogized the program to the transportation expense provision upheld in *Everson*, reasoning that the textbook loan program was a general plan which made books available to all schoolchildren free of charge.[57] The Court considered the primary effect of the statute and found that since only secular books were provided, the aid did not further the schools' religious teachings.[58] The books were not furnished to the nonpublic schools themselves, but rather were given to the parents and students; additionally, the state approved the book selections and retained ownership of them. In the Court's view, the combination of these factors sufficiently limited the parochial school's involvement in the program.[59] The Court also recognized the

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[53] 392 U.S. 236 (1968). Several boards of education and individuals sued Allen, State Commissioner of Education, challenging the validity of a New York statute that required local school districts to provide secular textbooks to all children in grades seven through 12, including both public and nonpublic schoolchildren.

[54] *Id.* at 243. This element of the three-part test was first articulated in Abington School District v. Schempp, 374 U.S. 203 (1963) (law requiring recitation of Bible passages or Lord's Prayer at beginning of public school classes held unconstitutional). The facts in *Abington* illustrate the other situation in which the establishment clause has been applied in the educational context: where religious activities take place in the public schools. *See Nyquist*, 413 U.S. at 772; *see also* Note, *Rebuilding the Wall: The Case for a Return to the Strict Interpretation of the Establishment Clause*, 81 COLUM. L. REV. 1463, 1464 (1981). Because public schools are state instrumentalities, and since religious activity allowed to take place there would carry the imprimatur of state approval, the Court decisions in this area have uniformly prohibited devotional activities in the public schools. *See, e.g.*, May v. Cooperman, 572 F. Supp. 1561 (D.N.J. 1983) (New Jersey "moment of silence" bill held unconstitutional as disguised resurrection of school prayer); *see also* Note, *The Unconstitutionality of State Statutes Authorizing Moments of Silence in the Public Schools*, 96 HARV. L. REV. 1874, 1877-78 (1983). *See generally* J. NOWAK, R. ROTANDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL, CH. 19, § II, AT 868-71 (summary of leading cases on religion and public schools).

[55] *Allen*, 392 U.S. at 238-39.

[56] *Id.* at 243.

[57] *Id.*

[58] *Id.* at 244-45.

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

state's valid interest in the regulation of private schools for the purpose of ensuring compliance with state educational requirements,[60] and acknowledged the contributions of private education to the achievement of the broader national goal of an educated citizenry.[61] The majority also rejected the notion that the school's educational curriculum would be so permeated by the religious environment of the institution as to render the loan of secular textbooks an impermissible aid to religion.[62]

Three justices dissented in *Allen*. Justice Black criticized the majority's interpretation of the *Everson* decision, which he had authored twenty-one years earlier.[63] While the majority likened the *Allen* program to the one upheld in *Everson*, Justice Black noted a critical distinction: Whereas books are critical learning tools necessary to the educational mission of the school itself, the reimbursement of transportation expenses represented a general welfare program in no way connected to the educational function of the school.[64] The Justice reasoned that in the case of a parochial school, the educational mission of the school was inseparable from its religious mission.[65] Thus, he found any assistance to the educational program to be an impermissible advancement of religion.[66] Justice Douglas focused on the

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[60] *Id.* at 245-47. State regulation presents the threat of excessive entanglement as well as loss of autonomy for the religious institutions. *See Lemon*, 403 U.S. at 637 (Douglas, J., concurring); *see also infra* notes 84-89 and accompanying text.

[61] *Allen*, 392 U.S. at 247-48.

[62] *Id.* at 248. While the appellants also asserted that the program violated their free exercise rights, the Court dismissed their contention because the individual appellants failed "to show the coercive effect of the enactment as it operates against [them] in the practice of [their] religion." *Id.* at 248-49.

In his concurring opinion, Justice Harlan espoused the following neutrality test for establishment clause cases:

> [W]here the contested governmental activity is calculated to achieve nonreligious purposes otherwise within the competence of the State, and where the activity does not involve the State "so significantly and directly in the realm of the sectarian as to give rise to . . . divisive influences and inhibitions of freedom [citation omitted]," it is not forbidden by the religious clauses of the First Amendment.

Id. at 249 (Harlan, J., concurring).

[63] *Id.* at 252 (Black, J., dissenting).

[64] *Id.* at 252-53 (Black, J., dissenting).

[65] *Id.*

[66] *Id.* Reiterating part of Justice Rutledge's dissenting opinion in *Everson*, see *supra* note 51 and accompanying text, Justice Black declared that:

> [T]ax-raised funds cannot constitutionally be used to support religious schools, buy their school books, erect their buildings, pay their teachers, or pay any other of their

fact that the private school initially chose the textbooks that the students would be required to use.[67] He predicted that the various religious groups receiving aid under the program would seek to control, or at least influence, the approval process. The Justice also foresaw that the need for an approval process could lead to increased state surveillance of parochial education, which would ultimately burden not only the state but the schools as well.[68] Justice Fortas found the majority's characterization of the textbook program as a general welfare provision to be implausible because rather than restricting private schools to selecting the same books used by the public schools, the program gave private schools freedom of choice as to the books to be used, and thus was a special program tailored to their needs.[69]

In the 1970 decision of *Walz v. Tax Commission*,[70] the Court upheld the two validity of a New York constitutional amendment that permitted the state to grant property tax exemptions to a broad range of nonprofit organizations, including religious entities.[71] Chief Justice Burger, writing for the Court, found that the provision had the two valid secular purposes of contributing to the moral and mental improvement of the community and of fostering community stability.[72] Considering whether the tax exemptions constituted excessive entanglement between government and religious institutions, the Court

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> maintenance expenses, even to the extent of one penny . . . . [T]he only way to protect minority religious groups from majority groups in this country is to keep the wall of separation between church and state high and impregnable as the First and Fourteenth Amendments provide.

Allen, 392 U.S. at 253-54 (Black, J., dissenting).

[67] *Id.* at 254-55 (Douglas, J., dissenting). Justice Douglas cited several examples of how in subjects like history, science, and even mathematics, books supporting a Catholic viewpoint can be chosen. *Id.* at 257-62 (Douglas, J., dissenting).

[68] *Id.* at 262 (Douglas, J., dissenting).

[69] *Id.* at 271 (Fortas, J., dissenting). In later cases, *Allen* has been said to have approached "the verge of the constitutionally impermissible" and the holding has been limited to its facts and upheld in subsequent cases based primarily upon *stare decisis*. Sloan v. Lemon, 413 U.S. 825, 832 (1973). It has been suggested that *Allen* should be overruled. *See, e.g.*, Wolman v. Walter, 433 U.S. 229, 257 (1977) (Marshall, J., concurring in part, dissenting in part); *id.* at 264-66 (Stevens, J., concurring in part, dissenting in part).

[70] 397 U.S. 664 (1970).

[71] *Id.* at 666-67. Walz, a private real estate owner, sought an injunction to prevent the tax commissioner from granting tax exemptions to properties owned by religious organizations and used solely for religious purposes. The exemption was authorized by New York's constitution, which excluded from taxation property (real and personal) used for religious, charitable, or educational purposes. Walz argued that, as a private taxpayer, he was forced to subsidize religion indirectly. *Id.*

[72] *Id.* at 672-73.

concluded that "the grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state."[73] Further, the *Walz* majority found "no genuine nexus between tax exemption and establishment of religion."[74]

Justice Douglas, in a dissenting opinion, expressed doubt about his prior approval of aid to religious schools in *Everson*. He distinguished *Walz* from *Everson*, finding that the tax exemption in *Walz* represented aid to the religious institution itself.[75] The Justice reasoned that by aiding religion, the government discriminated against nonbelievers and violated the historical principles behind the establishment clause.[76] Justice Douglas concluded that despite an organization's function of providing secular community services, the institution remained essentially a church and thus could not constitutionally be granted a tax exemption.[77] While the tax exemption granted in *Walz* may seem to constitute minimal state involvement, Justice Douglas warned that the majority's holding would only promote greater interaction between church and state, and would further erode the state's position with regard to neutrality towards religion.[78]

In 1971, the Court in *Lemon v. Kurtzman* developed a three-part test to analyze establishment clause challenges.[79] The *Lemon* Court considered the constitutionality of two different state statutory schemes, one of which provided direct payments to private schools for teachers' salaries, and another which made direct payments to such schools for the cost of textbooks and instructional materials.[80] Chief

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[73] *Id.* at 675. In fact, Chief Justice Burger asserted that tax exemption *avoided* excessive entanglement because taxation would necessitate assessment of church properties and would generate inevitable disagreements as to property values. *Id.* at 674.

[74] *Id.*

[75] *Id.* at 704 (Douglas, J., dissenting).

[76] *Id.* at 700-09, 716 (Douglas, J., dissenting).

[77] *Id.* at 710 (Douglas, J., dissenting).

[78] *Id.* at 716 (Douglas, J., dissenting). Justice Douglas' fear appears to have been well-founded since the *Mueller* district court opinion used *Walz* as a favorable point of comparison in upholding the tuition tax deduction program. *See supra* note 20 and accompanying text.

[79] 403 U.S. 602 (1971).

[80] *Lemon* consisted of three cases joined for consideration by the Supreme Court. *Id.* at 602. The Rhode Island statute provided a teachers' salary supplement (of up to 15% of the teachers' current annual salaries) to nonpublic school teachers who taught secular subjects. *Id.* at 607. The receipt of the subsidy was conditioned upon several factors, one being that the subsidy must not bring the private school's expenditures for each pupil above the amount expended for each public school student, to be verified by submission of financial figures to the state. Also, the teachers benefited by the statute could not teach religion courses. *Id.* at 603. The Pennsylvania statute reimbursed private schools for actual expenditures for teachers' salaries, textbooks, and instruc-

Justice Burger, writing for the Court, identified three criteria which a statute must meet in order to satisfy the requirements of the establishment clause: "[F]irst, 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.' "[81]

Applying this three-part test, the Court concluded that the statutes satisfied the first requirement by having the secular purpose of enhancing the quality of private education.[82] The majority accepted the legislative determination that the secular and sectarian functions of the religious schools covered by the statutes could be separated, and that one function could be given state aid without helping the other.[83] The Court did not reach the question of the statute's primary effect, because it determined that the administrative controls, which were created by the statute to ensure that only the schools' secular objectives were aided by the statutory programs, fostered excessive entanglement between government and religion.[84]

The *Lemon* majority rejected the view that there must be total separation between church and state, acknowledging that "[s]ome relationship between government and religious organizations is inevitable."[85] The Court instead opted for a flexible approach in determining whether excessive entanglement exists—one that "examine[s] the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority."[86] Applying this

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tional materials. *Id.* at 609. Books and materials used were approved by the state, and religious courses were excluded from the coverage of the statute. The schools were required to keep financial records, subject to state audit, that identified expenses made to support the secular educational function of the school. *Id.* at 610.

[81] *Id.* at 612-13 (citations omitted). The Court, while articulating a three-part test, acknowledged the difficulty of rendering clearcut decisions in an area of law where the Court "can only dimly perceive the lines of demarcation." *Id.* at 612. The Court, in Hunt v. McNair, 413 U.S. 734, 741 (1973), characterized the criteria in the test as only "helpful signposts" in the adjudication of establishment clause cases.

[82] *Lemon*, 403 U.S. at 613.

[83] *Id.*

[84] *Id.* at 613-14.

[85] *Id.* at 614. Chief Justice Burger noted: "[J]udicial caveats against entanglement must recognize that the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." *Id.*

[86] *Id.* at 615. There are two types of entanglement implicit in the excessive entanglement test. Administrative entanglement involves the specter of increasing state surveillance and con-

test to both statutes, the Court held the teachers' salary supplements unconstitutional because, unlike the inanimate textbooks in *Allen* which could be evaluated for religious neutrality, teachers could not be so monitored without an extraordinary and impermissible degree of state surveillance.[87] The Court also found it objectionable that both statutes entailed direct payments to the schools, unlike the aid upheld in *Everson* and *Allen* which was distributed to the students and parents.[88] Chief Justice Burger noted the self-perpetuating tendencies of government subsidies and predicted that such subsidies were likely to produce political fragmentation along religious lines.[89] The *Lemon*

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trol over the operations of the entity receiving funds. L. TRIBE, *supra* note 50, § 14-12, at 866, 869-70. Political entanglement or divisiveness is the political taking of sides along religious lines that may occur if the state compromises its "neutral" stance towards religion. *Id.* There is some confusion as to whether the threat of political divisiveness is a full-fledged part of the entanglement test itself, in which case its presence would invalidate the provision under examination; *see* J. NOWAK, *supra* note 54, ch. 19, § II(A), at 851, or whether it is an additional factor, the presence of which will prompt stricter judicial review of the provision under the three-part test. *See* L. TRIBE, *supra* note 50, § 14-12, at 866; *see also Nyquist*, 413 U.S. at 797-98 (presence of political divisiveness does not alone invalidate law, but does act as warning signal). For an analysis of the entanglement concept, see Giannella, Lemon *and* Tilton: *the Bitter and the Sweet of Church-State Entanglement*, 1971 SUP. CT. REV. 147, 162-85. Giannella sees permissible levels of entanglement as "essentially a matter of degree." He contends that greater entanglement is tolerable when necessary to protect free exercise rights, and that different situations will constitutionally allow different levels of government interaction with religion. *Id.*

[87] *Lemon*, 403 U.S. at 615-21.

[88] *Id.* at 621.

[89] *Id.* at 625. Justice Douglas, with whom Justice Black joined, concurred in the opinion of the Court. Justice Douglas first traced the history of religious influence on the development of educational institutions in this country. *Id.* at 628-30 (Douglas, J., concurring). While readily admitting that a disadvantage to public education is that "a state system may attempt to mold all students alike according to the views of the dominant group and to discourage the emergence of individual idiosyncrasies" he asserted that sectarian education does not remedy this problem. *Id.* at 630-31 (Douglas, J., concurring). Quoting provisions from a regulations handbook for use by parochial schools in Rhode Island, Justice Douglas illustrated the pervasively sectarian character of these schools. *Id.* at 637-40 (Douglas, J., concurring). He characterized the state's dilemma as follows:

> If the government closed its eyes to the manner in which these grants are actually used it would be allowing public funds to promote sectarian education. If it did not close its eyes but undertook the surveillance needed, it would, I fear, intermeddle in parochial affairs in a way that would breed only rancor and dissension.

Id. at 640 (Douglas, J., concurring). He dismissed the notion of the severability of the religious from the educational functions of the parochial schools, stating that this technical approach was merely a sophisticated attempt to save an unconstitutional program. *Id.* at 641 (Douglas, J., concurring). Justice Marshall, while not taking part in the consideration of the Pennsylvania case, concurred with Justice Douglas' opinion as it applied to the two Rhode Island cases. *Id.* at 642 (opinion of Marshall, J.).

Court concluded that: "[T]he Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that while some involvement and entanglement are inevitable, lines must be drawn."[90]

Two years after *Lemon*, the Supreme Court decided four more cases requiring establishment clause interpretation. One of these cases, *Committee for Public Education v. Nyquist*,[91] concerned a New York statute which provided three types of benefits to the private

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In another case decided the same day, Tilton v. Richardson, 403 U.S. 672 (1973), Chief Justice Burger, in a plurality opinion, upheld the constitutionality of a federal program that provided construction grants for buildings at higher education facilities, including church-affiliated institutions, with the restriction that the buildings constructed under the program not be used for religious purposes. *Id.* at 672. The relative unimpressionability of college-age students, and the freer, less sectarian environment of church-affiliated universities and colleges, were the major factors that led the Chief Justice to use a different standard in evaluating the constitutionality of aid to higher sectarian education. *Id.* at 685-87.

Justice White dissented from both *Lemon* and *Tilton*. In *Lemon*, he dissented from the Court's invalidation of the Rhode Island statute because the Court seemed to have presumed the pervasive sectarian nature of the benefited institutions without the necessary supporting facts in the record. *Id.* at 665-68 (White, J., dissenting). He also found the Court's holding in *Lemon* to be totally at odds with the plurality in *Tilton*: The assertion that college students are less impressionable than elementary and secondary school students does not seem to be an important enough factor to merit a different constitutional result. Likewise, Justice White maintained that the Court's finding in *Tilton* of an extremely low sectarian profile in the four colleges under review may be no more representative of other sectarian institutions benefiting under the program than is the Court's assumption, without supporting evidence, of the pervasively sectarian nature of the schools benefited in *Lemon*. *Id.* at 667-68 (White, J., dissenting in part, concurring in part). Justice Brennan concurred in the result in *Lemon*, but dissented in *Tilton*, rejecting the idea that the secular function of a religious school (on any educational level) can be aided without impermissibly aiding the religious mission of the institution itself. *Id.* at 653-55 (Brennan, J., concurring in part, dissenting in part).

[90] The four cases decided were *Nyquist*, 413 U.S. at 756; see *supra* notes 91-111 for a discussion of *Nyquist*; Levitt v. Committee for Pub. Educ., 413 U.S. 472 (1973) (direct reimbursement by state to nonpublic schools for the cost of administering state-mandated programs, including both standardized tests and those prepared internally, which are likely to have religious overtones, held unconstitutional because reimbursements were a lump sum and not reflective of actual expenditures); Hunt v. McNair, 413 U.S. 734 (1973) (construction aid to higher education facilities, including secular buildings of sectarian schools, in form of bond issue sponsored by state instrumentality because of lower interest rates available to state, but for which the private institutions would be legally liable, was not impermissible aid to religion); Sloan v. Lemon, 413 U.S. 825 (1973) (state reimbursements in fixed amounts to parents of students attending nonpublic schools held unconstitutional).

The Court, in a fifth case, Grit v. Wolman, 413 U.S. 901 (1973), *aff'ing mem. sub nom.* Kosydar v. Wolman, 353 F. Supp. 744 (S.D. Ohio 1972), found unconstitutional a complicated Ohio tax credit scheme intended to benefit nonpublic school students. *See generally* Morgan, *The Establishment Clause and Sectarian Schools: A Final Installment?*, 1973 SUP. CT. REV. 57, 71-88 (summary and analysis of *Levitt*, *Sloan*, and *Nyquist*).

[91] 413 U.S. 756 (1973).

school sector. The assistance program consisted of partial grants for the maintenance and repair of school facilities, and tuition grants for low income families.[92] Parents ineligible for the grants were allowed, under the statute, to take a deduction which decreased as income levels rose.[93] This fixed sum, having no relation to actual expenditures, was to be deducted from gross income for the purposes of calculating New York state taxes owed.[94]

Justice Powell, writing for the majority, utilized the *Lemon* test and concluded that all three types of aid had the secular purpose of "preserving a healthy and safe educational environment for all of [New York's] schoolchildren."[95] Nevertheless, the *Nyquist* Court concluded that all three types of aid had the primary effect of advancing religion. The majority reasoned that the grant, given without restriction and thus capable of use for the repair and maintenance of religious facilities, had the primary effect of subsidizing the religious activities of the schools.[96] The Court found that the tuition grants to lower income families also failed the primary effect test.[97] Although

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[92] *Id.* at 762-66.

[93] *Id.*

[94] *Id.* at 765-66.

[95] *Id.* The Court rarely uses the secular purpose requirement to strike down a statute, primarily because of the deference given to a state's legislative determinations by the federal government, and also because no legislator wishing to write a constitutional aid-to-education statute would word it explicitly in religious terms. *See* Larson v. Valente, 452 U.S. 904 (1982) ("strict scrutiny" test applied to law which discriminates among religious groups). Therefore, many of these statutes are facially neutral and can thus have an arguably secular purpose. One of the rare times when the secular purpose requirement was used to invalidate a statute was in Epperson v. Arkansas, 393 U.S. 97 (1968) (statute forbidding teaching of theory of evolution in public schools held invalid on secular purpose grounds because it clearly favored Christian view on human development). *See* L. TRIBE, *supra* note 50, § 14-18, at 836-37.

[96] *Nyquist*, 413 U.S. at 794.

[97] *Id.* at 774. The Court analogized the grants here to the only feature of the program in *Tilton* that was held unconstitutional. Tilton v. Richardson, 403 U.S. 672 (1973). In *Tilton*, the statute originally forbade sectarian use of the constructed buildings for only a 20-year period. This eventually would have left the college with a perfectly usable building in which it could hold religious activities. The Court held that this result would clearly violate the establishment clause since "an unconstitutional benefit does not become constitutional with age." *Tilton*, 403 U.S. at 683-84. In *Nyquist*, the Court stated:

> If tax-raised funds may not be granted to institutions of higher learning where the possibility exists that those funds will be used to construct a facility utilized for sectarian activities 20 years hence, *a fortiori* they may not be distributed to elementary and secondary sectarian schools for the maintenance and repair of facilities without any limitations on their use. If the State may not erect buildings in which religious activities are to take place, it may not maintain such buildings or renovate them when they fall into disrepair.

Nyquist, 413 U.S. at 776-77.

The *Nyquist* Court also asserted that a statistical assurance that the money would not be diverted to religious facilities (i.e., through limiting the reimbursement to no more than 50% of

the money was given to the parents rather than directly to the school, the Court noted that this factor alone failed to establish the provision's constitutionality.[98] The majority held that unrestricted cash payments which reward parents for sending their children to nonpublic schools are constitutionally objectionable regardless of whether they are characterized as "reimbursements," "rewards," or "subsidies."[99] Turning to the tax relief program aimed at higher income families, the Court observed that the tax deduction was keyed to income levels through a formula which bore absolutely no relation to the parents' actual tuition expenses.[100] As with the tuition grants examined earlier, the Court dismissed the State's argument that the tax relief would not go directly to the schools, but instead would be given to the parents.[101] The Court also perceived the overall statutory scheme as defining a narrow class of beneficiaries (nonpublic school students), a factor supporting its invalidation.[102]

Chief Justice Burger, Justice Rehnquist, and Justice White wrote separate dissenting opinions.[103] The Chief Justice argued that "the Establishment Clause does not forbid governments, state or federal, to enact a program of general welfare under which benefits are distributed to private individuals, even though many of those individuals may elect to use those benefits in ways that 'aid' religious instruction or worship."[104] The Chief Justice saw this as an indirect assistance

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the amount expended for public school upkeep) was not a sufficient guarantee that the money would not be used to aid religion. *Id.* at 777-78.

[98] *Nyquist*, 413 U.S. at 781.

[99] *Id.* at 786.

[100] *Id.* at 790. In a footnote, the Court reserved for consideration the issue of whether a tax relief program with elements of a true tax deduction, i.e., with deductions keyed to actual expenses incurred by the taxpayer, would pass constitutional muster under the concept of "neutrality" emphasized in *Walz*. *Id.* at 790 n.49.

[101] *Id.* at 791.

[102] *Id.* at 794. In dicta, the Court noted that the *Nyquist* scheme carried with it great potential for political divisiveness. *Id.* at 794-98. The self-perpetuation of aid, once granted, was also seen as a problem which arises when government starts up programs of assistance. *Id.* at 797.

[103] The dissenting views of Chief Justice Burger, and that of Justices Rehnquist and White in *Nyquist*, became the majority view 10 years later in *Mueller*, in which the statutory scheme resembled (in some respects) the one struck down by the majority in *Nyquist*. *See infra* notes 115-30 and accompanying text.

[104] *Nyquist*, 413 U.S. at 799 (Burger, C. J., concurring in part, dissenting in part). Justice Rehnquist joined the Chief Justice's opinion, while Justice White only partially joined the Chief Justice's opinion. Chief Justice Burger's assertion seems to miss the critical point: the benefit in *Nyquist* was *not* generally available, but was instead directed only at nonpublic schoolchildren.

program which enabled individuals to exercise religious freedom.[105] Since the state's involvement in such cases is so attenuated, he maintained that, where they conflict, the right of free exercise should take precedence over establishment clause considerations.[106] The Chief Justice also attacked the majority's apparent adoption of a numerical approach in determining whether a statute has a primary effect of aiding religion,[107] dismissing it as an "irrelevant" factor when considering a general program aiding private individuals.[108] Justice Rehnquist viewed the *Nyquist* scheme as no more beneficial than the property tax exemptions upheld in *Walz*.[109] He concluded by noting that the *Nyquist* statute presented a sound legislative judgment aimed at compensating parents who pay taxes to support public schools their children do not use.[110] Justice White emphasized that parents who exercise their constitutional right of securing private education for their children are being doubly penalized because they must not only pay private school tuition, but must also pay taxes to support the public school system. Thus Justice White reasoned that some form of reimbursement for parents of private school children appeared fair.[111]

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[105] *Id.* at 802 (Burger, C.J., concurring in part, dissenting in part). Chief Justice Burger noted that this freedom of educational choice is guaranteed by the Constitution, and that aid toward fulfilling this right may be curtailed only when the religious educational institution chosen by the parents also discriminates along some impermissible line, such as race. *See* Pierce v. Society of Sisters, 268 U.S. 510 (1925); *see, e.g.*, Norwood v. Harrison, 413 U.S. 455 (1973) (textbook loan program to racially discriminatory school violated equal protection clause). *See generally* UNITED STATES COMMISSION ON CIVIL RIGHTS, DISCRIMINATORY RELIGIOUS SCHOOLS AND TAX EXEMPT STATUS (Clearinghouse Publ. 75, Dec. 1982).

[106] *Nyquist*, 413 U.S. at 802 (Burger, C.J., concurring in part, dissenting in part).

[107] *Id.* at 804 (Burger, C.J., concurring in part, dissenting in part).

[108] *Id.* Chief Justice Burger recognized the role of private education in relieving the public school system of extra students it could not handle, and also acknowledged private education's contribution to educational diversity. For a summary of these and other public policy arguments for and against aid to religious education, see Note, *Public Funding of Private Education: A Public Policy Analysis*, 10 J. LEGIS. 146, 153-59 (1983).

[109] *Nyquist*, 413 U.S. at 805-08 (Rehnquist, J., dissenting in part). The Chief Justice and Justice White concurred in Justice Rehnquist's separate opinion. Justice Rehnquist thought that the tax relief program in *Nyquist* displayed the same features of "benevolent neutrality" as the statutes in *Everson* and *Allen*, both of which attempted to make equal benefits available to students regardless of whether the school they attended was secular or sectarian. *Id.* at 810-13 (Rehnquist, J., dissenting in part).

[110] *Id.* at 813 (Rehnquist, J., dissenting in part).

[111] *Id.* at 815 (White, J., dissenting). Chief Justice Burger and Justice Rehnquist joined Justice White's opinion. Given the deep financial troubles often encountered by nonpublic schools, Justice White reasoned that the state has an inherent interest in keeping private education viable, not only because of the quality and low cost of the education delivered by the private institu-

Rather than clarifying the area of establishment clause jurisprudence, the courts' confusion in the years following *Nyquist* illustrates the consequences of sacrificing consistency for flexibility.[112] A graphic demonstration of this confusion occurred when two circuit courts, applying the same constitutional principles,[113] reached opposite conclusions as to the constitutionality of nearly identical tax deduction programs. This split in the circuits resulted in the Supreme Court's grant of certiorari to review the Eighth Circuit's decision in *Mueller v. Allen*.[114]

Preliminarily, Justice Rehnquist, writing for the *Mueller* Court, noted that not all programs which in some way aid religion are constitutionally objectionable.[115] The Court accepted the premise that

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tions, but also because of the burden of extra pupils which is taken off the equally financially troubled public school systems. *Id.* at 815-16, 823-24 (White, J., dissenting). Justice White indicated that he would even validate the maintenance and repair grant feature of the New York program, *id.* at 820-22 (White, J., dissenting), comparing the maintenance and repair grants to the construction grant program upheld in *Tilton*. *Id.* at 820-22 (White, J., dissenting); *see also supra* note 89. He also reiterated the second criterion of the establishment clause test which is *not* whether aid has *any* effect on religion, but whether the *primary* effect of the aid is to advance or inhibit religion. *Nyquist*, 413 U.S. at 822-23 (White, J., dissenting). Since the aid here was not a direct taxation by the state in support of religion, he concluded that all of the assistance held invalid in the *Nyquist* majority opinion was, in fact, fully constitutional under the establishment clause. *Id.* at 823 (White, J., dissenting).

[112] *See, e.g.*, Committee for Pub. Educ. v. Regan, 444 U.S. 646 (1980), in which Justice White aptly described the difficulties in adjudicating establishment clause issues:

> But Establishment Clause cases are not easy; they stir deep feelings; and we are divided among ourselves, perhaps reflecting the different views on this subject of the people of this country. What is certain is that our decisions have tended to avoid categorical imperatives and absolutist approaches at either end of the range of possible outcomes. This course sacrifices clarity and predictability for flexibility, but this promises to be the case until the continuing interaction between the courts and the States—the former charged with interpreting and upholding the Constitution and the latter seeking to provide education for their youth—produces a single, more encompassing construction of the Establishment Clause.

Id. at 662.

[113] *See* Rhode Island Fed'n of Teachers, AFL-CIO v. Norberg, 630 F.2d 855 (1st Cir. 1980) (Rhode Island tax deduction for tuition, books, and instructional materials available to parents of public and nonpublic schoolchildren had primary effect of advancing religion and fostered excessive entanglement); Mueller v. Allen, 676 F.2d 1195 (8th Cir. 1982) (virtually identical Minnesota provision held constitutional as general program in which benefits were available to broad class of beneficiaries), *cert. granted*, 103 S. Ct. 3062 (1983).

[114] *Mueller*, 103 S. Ct. at 3062.

[115] *Id.* at 3065-66. None of the cases cited by the Court, however, involved public aid to private education on the elementary and secondary school level. *Id.* at 3066 (citing Hunt v. McNair, 413 U.S. 734, 742 (1973); *Walz*, 397 U.S. at 664; Bradfield v. Roberts, 175 U.S. 291 (1899)).

the Minnesota statute had the valid secular purpose of ensuring an educated citizenry.[116] Although noting that the statute itself contained no express declaration of legislative intent,[117] the Court followed its established practice of not scrutinizing the express statutory language too closely as long as a plausible secular purpose was evidenced.[118] The Court applied the three-pronged *Lemon* test to determine whether the Minnesota program more closely resembled the unconstitutional New York tax benefit scheme in *Nyquist*, or the aid programs held constitutional in prior Court decisions.[119]

Examining the statute's primary effect, Justice Rehnquist noted that the tax deduction for educational expenses was only one of many deductions available to Minnesota taxpayers.[120] The majority reasoned that the mere fact that some religious institutions benefited from these deductions did not automatically render them unconstitutional.[121] Justice Rehnquist pointed out that unlike the New York statute in *Nyquist*, which only addressed the financial needs of parents of nonpublic school students, the Minnesota statute made benefits available to all parents, and therefore was neutral on its face.[122] The

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[116] *Id.* at 3066-67. The Court noted that "[a]n educated populace is essential to the political and economic health of any community, and a state's efforts to assist parents in meeting the rising cost of educational expenses plainly serves this secular purpose of ensuring that the state's citizenry is well-educated." *Id.* at 3067. By accepting this premise, the Court is also implicitly accepting the theory that the educational and religious missions of an elementary or secondary sectarian school are in fact separable and that the educational function can be aided without aiding the sectarian function of the school. While this premise was also accepted in *Allen*, *supra* notes 53-62 and accompanying text, the aid in *Allen* (textbooks) had a very specific and limited use, unlike the monetary aid discussed in *Nyquist* and *Mueller*. *See supra* notes 60-69 and accompanying text; *infra* notes 139-43 and accompanying text.

[117] *Mueller*, 103 S. Ct. at 3067 n.4.

[118] *Id.* at 3066. In addition, because MINN. STAT. ANN. § 290.09(22) (West 1982) was a taxation provision, the Court was required to give the appropriate deference to the broad classification powers given to the state in taxation matters. *Mueller*, 103 S. Ct. at 3067.

[119] *Mueller*, 103 S. Ct. at 3067.

[120] *Id.*

[121] *Id.* at 3067 n.5. Deductions for medical expenses and charitable contributions were two examples of deductions that could substantially benefit religious institutions (i.e., church-affiliated hospitals, sectarian schools, and churches themselves). *Id.* at 3067.

[122] *Id.* at 3068. The Court analogized this case to Widmar v. Vincent, 454 U.S. 263 (1981), where the Court held that a state university's provision of campus space to various campus organizations, including religious groups, did not carry the "imprimatur of State approval" so as to violate the establishment clause. "[N]eutrally provide[d] state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause." *Mueller*, 103 S. Ct. at 3069.

majority found that the Minnesota scheme did not provide for affirmative state action, such as the bestowal of direct grants to the schools themselves, but rather mandated state tax deductions that were triggered by the individual parent's decision to send their children to nonpublic schools.[123] This attenuated financial benefit, reasoned Justice Rehnquist, did not constitute the type of governmental aid furthering the establishment of religion that was so feared by the Framers.[124]

The Court rejected Mueller's argument that a statistical analysis of the actual class of beneficiaries under the statute must be made, reasoning that the constitutionality of a facially neutral statute should not be determined on the basis of annual statistical compilations.[125] The majority noted that the statistics offered by the petitioners ignored the substantial benefits which accrued under the statute to parents sending their children to public schools.[126] The *Mueller* Court concluded its primary effect discussion by acknowledging the important contributions that private schools have made to the educational system in America. The Court also asserted that any benefits accruing under the Minnesota statute were simply small tax refunds to parents who are taxed for public school systems their children do not use.[127]

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[123] *Mueller*, 103 S. Ct. at 3069. The Court admitted, however, "that financial assistance provided to parents ultimately has an economic effect comparable to that of aid given directly to the schools attended by their children." *Id.* Nevertheless, the Court saw the form of the aid as an important distinguishing factor, noting that in all of the recent prior cases, except *Nyquist*, those programs found unconstitutional all granted aid to the schools directly. *Id.*

[124] *Id.* Justice Rehnquist stated: " 'The risk of significant religious or denominational control over our democratic processes—or even of deep political division along religious lines—is remote, and when viewed against the positive contributions of sectarian schools, and [sic] such risk seems entirely tolerable in light of the continuing oversight of this Court.' " *Id.* (quoting Wolman v. Walter, 433 U.S. 229, 263 (1977) (Powell, J., concurring in part, dissenting in part)).

[125] *Id.* at 3069-70. The class of actual beneficiaries of a statute is not an important factor as long as the class of persons *eligible* for the benefits is within the parameters of the Constitution. *Id.* This approach was seen by one critic as emasculating the primary effect test, reducing it to another secular purpose inquiry. *See* Note, Mueller v. Allen: *Do Tuition Tax Deductions Violate the Establishment Clause?*, 68 IOWA L. REV. 539, 550 (1983).

[126] *Mueller*, 103 S. Ct. at 3070. The respondents asserted that parents of public school students paid over one million dollars in fees and over two million dollars in tuition to the state. Brief for Respondent Clyde E. Allen, Jr., at 16, Mueller v. Allen, 103 S. Ct. 3062 (1983). The respondents also noted that 68% of the deductions taken under MINN. STAT. ANN. § 290.09 (22) (West 1982) were for sums below the national average tuition for sectarian elementary ($420) and secondary ($976) schools. Brief for Respondent Clyde E. Allen, Jr., at 18 n.9. Fifty-two percent of the deductions were for less then $200 and 34% totalled less than $100. *Id.*

[127] *Mueller*, 103 S. Ct. at 3070. The Court noted that "[p]arochial schools, quite apart from their sectarian purpose, have provided an educational alternative for millions of young Americans; they often afford wholesome competition with our public schools; and in some States they

Finally, the majority did not find that the statute excessively entangled government and religion.[128] Justice Rehnquist stated that the only significant state involvement engendered by the statute was the review of deductions for textbooks and instructional materials to ensure their secular nature, a level of involvement that had been held constitutional in earlier cases.[129] In a footnote, the Court mentioned that the second aspect of entanglement, political divisiveness, becomes important only in those cases where "direct financial subsidies are paid to parochial schools or to teachers in parochial schools."[130]

Justice Marshall, joined by Justices Brennan, Blackmun, and Stevens, dissented from the majority's opinion.[131] Reasoning that "[t]he Establishment Clause of the First Amendment prohibits a State from subsidizing religious education, whether it does so directly or indirectly,"[132] the dissent found the Minnesota tax deduction scheme to be no different from the one struck down in *Nyquist*.[133]

Although the dissent did not question the statute's secular purpose,[134] Justice Marshall stated that even if a statute had the primary effect of achieving a secular goal, it was nonetheless unconstitutional if it also had the "direct and immediate effect of advancing religion."[135] The dissent viewed the lack of restrictions on the use of funds received by virtue of the deduction as a major flaw in the statute.[136]

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relieve substantially the tax burden incident to the operation of public schools." *Id.* (citing Wolman v. Walter, 433 U.S. 229, 262 (1977)). See *infra* note 169 for a discussion of the "double taxation" argument.

[128] *Mueller*, 103 S. Ct. at 3071. The Court cited *Allen*, 392 U.S. 236, where the state was required to approve the textbooks that were loaned to the private schools under the New York statute in question in that case.

[129] *Mueller*, 103 S. Ct. at 3071.

[130] *Id.* at 3071 n.11. The Court noted that none of the parties to the litigation had raised the political divisiveness argument. It reached its conclusion by observing that political divisiveness, found to be present in *Lemon*, 403 U.S. at 602, distinguished *Lemon* from two earlier aid to education cases, *Everson* and *Allen*. *Mueller*, 103 S. Ct. at 3071 n.11.

[131] *Mueller*, 103 S. Ct. at 3071 (Marshall, J., dissenting).

[132] *Id.* This premise is consistent with the principle that a tax deduction is a subsidy rewarding economic behavior which qualifies for the deduction. *See* J. FREELAND, S. LIND & R. STEVENS, CASES AND MATERIALS ON FUNDAMENTALS OF FEDERAL INCOME TAXATION, ch. 17, at 491-92 (4th ed. 1982).

[133] *Mueller*, 103 S. Ct. at 3072 (Marshall, J., dissenting).

[134] *Id.*

[135] *Id.* (citing *Nyquist*, 413 U.S. at 773-74).

[136] *Id.* at 3072-73 (Marshall, J., dissenting). The dissent adhered to the notion that the educational and religious missions of the sectarian schools could not be separated into distinct functions—aid to one function necessarily aided the whole enterprise. *Id.* Justice Marshall noted that aid which was "marked off from the religious function," such as police and fire protection,

Justice Marshall pointed out that there was no way of ensuring that the funds given to parents under the deduction would not be channelled to sectarian uses.[137]

Further, the dissent argued that the majority had erred in attempting to distinguish the Minnesota tuition deduction from the New York plan struck down in *Nyquist*.[138] The majority had noted that the Minnesota statute was facially applicable to all students attending nonprofit institutions, unlike the statute in *Nyquist* which applied only to students attending nonpublic schools.[139] Yet Justice Marshall reasoned that since tuition is the single largest educational expense, parents of children in nonpublic schools still receive the most substantial benefits.[140] In fact, ninety-five percent of the eligible nonpublic school students were attending sectarian schools.[141] The Justice contended that the inquiry as to who actually benefits under the statute may not be overlooked, even if the statute is neutral on its face.[142] Therefore, the dissent concluded that the Minnesota statute's broad classification did not distinguish it from the more narrowly classified New York statute in *Nyquist* if the effect of both statutes was to advance religion.[143]

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and the transportation expense reimbursement upheld in *Everson*, were constitutionally permissible. *Id.* at 3073 (Marshall, J., dissenting) (citing *Nyquist*, 413 U.S. at 780-82).

[137] *Id.* at 3073 (Marshall, J., dissenting). A tax refund received by parents under the statute can be viewed as state money because the sum would be owed to the state in the absence of the deduction. *Id.* The Justice further stated: "Indirect assistance in the form of financial aid to parents for tuition payments is similarly impermissible because it is not 'subject to . . . restrictions' which 'guarantee the separation between secular and religious educational functions and . . . ensure that State financial aid supports only the former.' " *Id.* (citing *Nyquist*, 413 U.S. at 783 (quoting *Lemon*, 403 U.S. at 613)).

[138] *Id.* at 3073-74 (Marshall, J., dissenting).

[139] *Id.* at 3074 (Marshall, J., dissenting).

[140] *Id.* The dissent also contended that the statute's primary effect was apparent even without rigid statistical analyses, because the largest eligible expense under the statute, tuition, is incurred primarily by parents who send their children to private (and overwhelmingly sectarian) schools.

[141] *Id.* at 3072 (Marshall, J., dissenting).

[142] *Id.* at 3074 (Marshall, J., dissenting). Justice Marshall wrote: "In *Nyquist* we unequivocally rejected any suggestion that, in determining the effect of a tax statute, this Court should look exclusively to what the statute on its face purports to do and ignore the actual operation of the challenged provision." *Id.* The dissent also attacked the majority's reliance on the form of the aid in determining its constitutionality: "It is . . . irrelevant whether a reduction in taxes takes the form of a tax 'credit', a tax 'modification', or a tax 'deduction.' " *Id.* at 3073 (Marshall, J., dissenting) (citing *Nyquist*, 413 U.S. at 789-90). Justice Marshall also stated that the fact "[t]hat parents receive a reduction of their tax liability, rather than a direct reimbursement, is of no greater significance here than it was in *Nyquist*." *Id.*

[143] *Id.* at 3071-78 (Marshall, J., dissenting).

The dissent also criticized the majority's characterization of the aid provided by the Minnesota plan as a "genuine tax deduction," which the majority had contrasted with the impermissible New York aid in *Nyquist* which was deemed to be a tax credit.[144] In the dissent's view, this was a distinction without a difference.[145] Justice Marshall focused on the majority's concession that the " 'economic consequence[s]' of these programs is the same, . . . for in each case the 'financial assistance provided to parents ultimately has an economic effect comparable to that of aid given directly to the schools.' "[146] Justice Marshall stressed that the substantive impact of the aid, and not its form, determines its constitutionality.[147]

The dissent found the deductions for textbooks and instructional materials to be equally objectionable.[148] Justice Marshall reasoned that these materials, even if secular in nature, and regardless of whether they are loaned to the schools or to parents and students, are capable of being used to inculcate religious values.[149] The Justice perceived the textbook provision in *Mueller*, although restricted to secular texts, as encouraging the selection of books that would be chosen by parochial schools. Justice Marshall based this perception on the fact that Minnesota already had a statute modeled upon the provision upheld in *Board of Education v. Allen*[150] that provided to nonpublic schools the same texts used in public schools.[151] He observed that because of this previous statute, Minnesota parents would have

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[144] *Id.* at 3075 (Marshall, J., dissenting). In *Nyquist*, the Court had specifically reserved the question of whether aid with the characteristics of a "genuine tax deduction" would be constitutionally permissible. *Nyquist*, 413 U.S. at 790 n.49.

[145] *Mueller*, 103 S. Ct. at 3075 (Marshall, J., dissenting). Distinctions based on form rather than substance have been rejected in several prior decisions. *See* Byrne v. Public Funds for Pub. Schools, 442 U.S. 907 (1979) ($1,000 per dependent fixed tax deduction held unconstitutional), *aff'g*, 590 F.2d 514 (3d Cir. 1979); Grit v. Wolman, 413 U.S. 901 (1973) (system of tax credits proportional to tuition paid held unconstitutional), *aff'g mem. sub. nom.* Kosydar v. Wolman, 353 F. Supp. 744 (S.D. Ohio 1972). Therefore, the questions of whether aid is in the form of a deduction (reducing taxable income) or a credit (reducing the amount of tax owed), or whether it bears a relation to the amount of money actually expended, are irrelevant considerations if the primary effect of that aid, in whatever form, is to aid religion. *Mueller*, 103 S. Ct. at 3075-76 n.5.

[146] *Mueller*, 103 S. Ct. at 3076 (Marshall, J., dissenting) (citing *id.* at 3068-69). The very nature of tuition payments differs from those expenses incurred for textbooks or transportation. Tuition payments become part of the school's general revenues and can therefore be used to directly support the school in both its secular and sectarian functions. *Id.*

[147] *Id.*

[148] *Id.* at 3076-77 (Marshall, J., dissenting).

[149] *Id.* at 3077 (Marshall, J., dissenting).

[150] *Id.* (relying on *Allen*, 392 U.S. at 254 (Douglas, J., dissenting)).

[151] *Id.*

little incentive to purchase texts that were already available on loan from the state.[152] Thus, the dissent foresaw the increased subsequent possibility that the deductions claimed for textbooks under the Minnesota statute would be taken for books which had a potential sectarian bias and were not available to public school students.[153]

Justice Marshall concluded that the Minnesota statute clearly provided significant aid to sectarian education, and that any aid to the educational aspect of the sectarian enterprise necessarily aided the religious element as well.[154] In the dissent's view, the admittedly secular motivations of the Minnesota legislature and the legitimate educational contributions of private schools, even taken together, could not justify the existence of a program that advances religion in violation of the establishment clause.[155]

Nearly forty years ago, Justice Rutledge predicted the constitutional difficulties that arise when aid to religion is judged as a matter of degree rather than as a matter of principle.[156] The *Mueller* majority, instead of "examin[ing] the form of the relationship for the light it casts on the substance,"[157] seems to have regarded the statutory form and the indirect nature of the tax deduction as more important than the substantive impact of the program in question.[158] While the indi-

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[152] *Id.*

[153] *Id.*; *see Allen*, 392 U.S. at 254 (Douglas, J., dissenting); *supra* notes 67-68 and accompanying text.

[154] *Mueller*, 103 S. Ct. at 3078 (Marshall, J., dissenting).

[155] *Id.* The dissent concluded:

> For the first time, the Court has upheld financial support for religious schools without any reason at all to assume that the support will be restricted to the secular functions of those schools and will not be used to support religious instruction. This result is flatly at odds with the fundamental principle that a State may provide no financial support whatsoever to promote religion.

Id.

[156] *See Everson*, 330 U.S. at 63 (Rutledge, J., dissenting).

[157] *Lemon*, 403 U.S. at 614. While the Court stated this principle in the context of discussing excessive entanglement, the primary effect of a statute also often depends upon the form of the assistance granted by the provision. In Sloan v. Lemon, 413 U.S. 825 (1973) (fixed-amount state reimbursement to parents whose children attend nonpublic schools), Justice Powell wrote:

> [W]e look to the substance of the program, and no matter how it is characterized its effect remains the same. The State has singled out a class of its citizens for a special economic benefit. Whether that benefit be viewed as a simple tuition subsidy, as an incentive to parents to send their children to sectarian schools, or as a reward for having done so, at bottom its intended consequence is to preserve and support religion-oriented institutions.

Id. at 832.

[158] *See Mueller*, 103 S. Ct. at 3068-69.

vidual distinctions cited by the majority were used to uphold programs considered in earlier cases, these variations were not unanimously approved but were, on the contrary, the subject of vigorous dissents.[159] By applying those weak precedents to individual features of the Minnesota statute, the Supreme Court has strayed from the original purpose and meaning of the establishment clause.

It will be worthwhile to examine briefly two distinctions made by the *Mueller* majority. First, the Court in *Nyquist* specifically rejected the idea that the validity of a statute whose primary effect is to advance religion will depend on the identity of the party to whom the tax relief is given. The *Nyquist* statute was invalidated because it provided benefits only to nonpublic school students, whereas the *Mueller* statute was upheld because it was worded broadly to include both public and nonpublic school students.[160] Considering the fact that tuition is the single largest eligible expense,[161] and that the vast majority of tuition-paying students attend nonpublic schools,[162] the Minnesota statute, rather than providing neutral benefits for all, appears to be "mere window dressing" intended to conceal a program that advances religion.[163] While both sides in *Mueller* vigorously challenged the merits of the statistics offered in support of their respective positions,[164] the Court sidestepped entirely the issue of whether a

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[159] *See supra* note 5, at 115-30 and accompanying text.

[160] *Mueller*, 103 S. Ct. at 3068.

[161] *Id.* at 3076 (Marshall, J., dissenting).

[162] *Id.* at 3072 (Marshall, J., dissenting). In the 1978-79 school year, only 79 public school students out of 815,000 paid tuition to a local school district. *Id.*

[163] Mueller v. Allen, 676 F.2d 1195, 1204 (1981) (citing Rhode Island Fed'n of Teachers, AFL-CIO v. Norberg, 479 F. Supp. 1364, 1371 (D.R.I. 1979), *aff'd*, 630 F.2d 855 (1st Cir. 1980)), *aff'd*, 103 S. Ct. 3062 (1983). A good example of such "window dressing" was seen in Kosydar v. Wolman, 353 F. Supp. 744 (S.D. Ohio 1972), *aff'd mem. sub nom.* Grit v. Wolman, 413 U.S. 901 (1973). An earlier case, Wolman v. Essex, 342 F. Supp. 399 (S.D. Ohio 1972), *aff'd mem.* 409 U.S. 808 (1973), had held unconstitutional a state program that gave $90 to parents for each child attending a nonpublic school in Ohio. *Kosydar*, 353 F. Supp. at 748. In response to this decision, the Ohio legislature enacted tax credit provisions applicable not only to nonpublic school students, but to a "broader" class of recipients: home study program enrollees, persons taking adult education courses offered at high schools, students in special literacy and vocational programs, and students in programs for the handicapped. The Court still found the provisions to be unconstitutional because, among other reasons, "[i]n relation to the size of the original and overwhelmingly sectarian subclass of nonpublic school parents in Ohio, the aggregate of new beneficiaries [would] not alter in a meaningful fashion the sectarian nature of the recipient class taken as a whole." *Id.* at 761. The statute therefore continued to have the primary effect of advancing religion.

[164] The petitioners determined that 96% of the nonpublic school students attended sectarian schools. Brief for Petitioners at 39-40, Mueller v. Allen, 103 S. Ct. 3062 (1983). Using assumptions most favorable to the respondents, the petitioners calculated that 73% of the dollars

statistical approach should be used in determining the constitutionality of the statute.[165] As one commentator has noted, the primary effect of a statute cannot be determined without some sort of factual inquiry as to who actually benefits from the operation of the statute. Without this inquiry, the primary effect test is reduced to a facial analysis of the classifications drawn by the wording of the statute, which analysis is very similar to the consideration of the statute's secular purpose.[166]

Second, the *Mueller* majority likened the Minnesota statute to a similar statute providing tax deductions for charitable contributions in the sense that both provide substantial benefits to sectarian institutions.[167] Nevertheless, there is a critical distinction between the two.

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deductible under the statute were spent for sectarian education. *Id.* at 42-44. Blaming the respondents' poor design of its tax form for the petitioners' inability to get more accurate calculations, the petitioners alleged that the state should produce proof concerning the broad availability of benefits under the statute. *Id.* at 45-50. The respondents countered by attacking the evidentiary foundation of statistics summarized from state records, an objection that was ignored by the district court. *See* Mueller v. Allen, 514 F. Supp. 998, 999 (D. Minn. 1981), *aff'd*, 676 F.2d 1195 (8th Cir. 1982), *aff'd*, 103 S. Ct. 3062 (1983). The state contended, in its Supreme Court brief, that the inquiry advocated by the petitioners as to dollars spent on sectarian and nonsectarian education has never been required in earlier decisions. Brief for Respondent Clyde E. Allen, Jr. at 13, Mueller v. Allen, 103 S. Ct. 3062 (1983). The state also faulted the petitioners for allegedly failing to consider expenses (other than tuitions) generated by public school students, asserting that as long as "substantial" benefits were available to all, the fact that some of the tax deduction was to refund monies paid to sectarian institutions was not impermissible. *Id.* at 15-17. It is interesting to note that the respondents submitted an alternate argument: "Even if the Minnesota tax deduction is not constitutional in its entirety, the transportation and textbook portion of the statute may properly be severed and upheld." *Id.* at 32. It can be inferred, therefore, that despite the respondents' assertions of "substantial benefits to all," they implicitly acknowledged that benefits to nonsectarian parents attributed to *tuition* expenses may indeed be less than "substantial."

[165] *Mueller*, 103 S. Ct. at 3070. Statistics have played important roles in prior cases. *See, e.g.*, Widmar v. Vincent, 454 U.S. 263, 274 (1981) (number of student groups on campus); Meek v. Pittenger, 421 U.S. 349, 364-65, 369 (1975) (percentage of nonpublic school students attending sectarian schools; dollar appropriations under statutes); *Nyquist*, 413 U.S. at 768 (statistics on percentage of students attending sectarian institutions); *Allen*, 392 U.S. at 248 n.9 (number of students attending nonpublic schools); Kosydar v.Wolman, 353 F. Supp. 744, 748 (S.D. Ohio 1972) (characteristics of class of nonpublic school students), *aff'd mem. sub nom.* Grit v. Wolman, 413 U.S. 901 (1973).

[166] *See* Comment, *supra* note 125, at 550.

[167] *See* MINN. STAT. ANN. § 290.21 (West 1982) (deduction from state gross income for charitable contributions). The Eighth Circuit in *Mueller* cited 26 U.S.C. § 170(c) (West 1978) for the same proposition. Mueller v. Allen, 676 F.2d 1195, 1205 (8th Cir. 1982), *aff'd*, 103 S. Ct. 3062 (1983). The constitutionality of charitable contributions has never been considered by the Court; it is believed that this long-accepted practice would probably be held constitutional. *See* Public Funds for Pub. Schools v. Byrne, 590 F.2d 514, 521 n.1 (3d Cir. 1979) (Weiss, J., concurring); *see also* Note, *Laws Respecting an Establishment of Religion: An Inquiry Into*

Tuition payments, unlike charitable contributions, are not motivated by "detached and disinterested generosity."[168] Since the taxpayer making charitable contributions has no expectation of receiving a tangible and immediate return, a tax deduction is allowed as a matter of social policy to offer some incentive to engage in gratuitous economic behavior.[169] Also, the taxpayer is supporting worthy organizations that otherwise would require public funding.[170] The dynamics of the eco-

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Tuition Tax Benefits, 58 N.Y.U. L. REV. 207, 232 n.138 (1983) (discussion of Internal Revenue Code § 170(c) (1976)).

[168] Commissioner v. Duberstein, 363 U.S. 278, 285 (1960) ("gift" of Cadillac held to be compensation).

[169] *See* Committee for Pub. Educ. v. Nyquist, 350 F. Supp. 655, 672 (S.D.N.Y. 1972), *aff'd*, 413 U.S. 756 (1973). Other policy considerations were also offered by the *Mueller* majority to support their constitutional analysis, and while detailed discussion of these policy questions are beyond the scope of this Note, they nevertheless deserve mention here.

First, while there were no restrictions placed on the use of the tax refunds received by parents, there remains the possibility that the funds will wind up in the school's treasury. This fact troubled the dissent in *Mueller*. *Mueller*, 103 S. Ct. at 3073 (Marshall, J., dissenting). The school could either raise its tuition by an amount equal to the average refund given to parents under the provision, or otherwise "encourage" parents to donate their refund to the sectarian cause. *See generally Nyquist*, 350 F. Supp. at 672.

Second, while private education has been characterized as offering healthy competition for the public school systems, this is an inaccurate characterization. *See Mueller*, 103 S. Ct. at 3070 (citing Wolman v. Walter, 433 U.S. 229, 262 (1977) (Powell, J., concurring in part, dissenting in part)). The public schools cannot selectively choose students as can the private schools, since the public schools are under a state constitutional mandate to provide a free education for all students. *See Hearings on N.J. A3738 before the Assembly Education Committee*, 200th Legis. 2d Sess. (Oct. 13, 1983) (statement of Laurie Fitchett, New Jersey PTA). Assembly Bill 3738 was an unsuccessful attempt to amend the state income tax statute to allow taxpayers a $1000 exemption for each dependent attending nonpublic nonprofit schools. Similarly, the public schools must work with funding limited by available tax revenues, whereas the private schools can adjust their funding needs through tuition increases which are limited only by the parents' financial means. *See generally id.* (statement of Raymond Peterson, President, New Jersey State Federation of Teachers).

Another policy argument which has been raised is the double taxation issue. By not using schools supported with public taxes and by incurring the additional expenses associated with paying private school tuition, the taxpayer is incurring a double financial burden. *See generally id.* at 3 (statement of Octavius T. Reid, New Jersey School Boards Association). If this argument were accepted, however, it would follow that community residents without children could demand to be reimbursed for the portion of their taxes that go to the support of public schools they do not use. Clearly, this result would drain the community of needed tax revenues and cripple its ability to function. The state-supported public schools are for all to use. If an individual decides to spend part of his personal income for an alternate form of education because of religious belief, the populace at large, both believers of other faiths and nonbelievers alike, should not be required to subsidize the taxpayer's individual choice. *See Walz*, 397 U.S. at 716 (Douglas, J., dissenting).

[170] B. BITTKER, FUNDAMENTALS OF FEDERAL INCOME TAXATION, ch. 19, at 19-1 (student ed. 1983).

nomic behavior involving parochial schools is different: Tuition for sectarian education is paid in exchange for the receipt of specified services. Further, as the taxpayer is motivated by religious belief, he does not require an economic incentive. It would be hypocritical for a taxpayer to refrain from sending his children to parochial school solely because the government would not give him a tax deduction for doing so.[171]

Chief Justice Burger also has reasoned that the invalidation of aid to sectarian schools denies parochial school students equal protection of the laws.[172] Even if an equal protection analysis were required, there would be no denial of equal protection between public and nonpublic students because the state has a compelling reason for excluding sectarian activities from statutes which provide public aid to education: the mandate of the establishment clause.[173] Whereas *Mueller* was a difficult case because the tax refunds therein were made to individuals and not to the schools directly, the Chief Justice's equal protection theory would permit such direct aid to parochial schools, a position clearly rejected in prior Court decisions.[174]

Proponents of aid to private education view parochial schools as performing a secular role apart from their sectarian function, and contend that as the state has an interest in the education of its populace, parochial schools can be aided without furthering their sectarian missions.[175] Nevertheless, this assertion negates an important reason for the existence of sectarian schools. It is in many cases the lack of sectarian orientation in the public schools that prompts parents to choose parochial schools for their children. Although parents certainly have the constitutional right to make this choice, this right does not carry with it an affirmative governmental obligation of financial support.[176]

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[171] *See* Note, *State Aid to Parochial Schools: A Quantitative Analysis*, 71 GEO. L.J. 1063, 1085 n.181-82 (1983).

[172] *See* Meek v. Pittenger, 421 U.S. 349 (1975).

[173] *See* J. NOWAK, *supra* note 54, ch. 16, § XI(B), at 675-80.

[174] *See, e.g.*, *Nyquist*, 413 U.S. at 781-87; *Walz*, 397 U.S. at 675; *Lemon*, 403 U.S. at 621-22.

[175] The "dual-function" argument has been favored by the Court in past decisions. *See, e.g.*, *Allen*, 392 U.S. at 245; Hitchcock, *Church, State, and Moral Values: The Limits of American Pluralism*, 44 LAW & CONTEMP. PROBS. 3 (1981) (supporting validity of dual function theory).

[176] *See* Pierce v. Society of Sisters, 268 U.S. 510 (1925); *see* Freund, *Public Aid to Parochial Schools*, 86 HARV. L. REV. 1680, 1688-89 (1969). In Brusca v. Missouri *ex rel.* State Bd. of Educ., 332 F. Supp. 275, 277 (E.D. Mo. 1971), *aff'd mem.*, 405 U.S. 1050 (1972), the court said that "a parent's right to choose a religious private school for his children may not be equated with a right to insist that the state is compelled to finance his child's non-public school education in whole or

Mueller represents the latest effort by the Supreme Court to balance the individual's right to choose religious education against the appropriate level of state involvement in that endeavor. The language of the Framers would seem to indicate that the only permissible level of government involvement in religious matters is *no* involvement, and a sizable number of constitutional scholars still advocate such absolute separation of church and state. It is highly unlikely, however, that all support of religion will be declared unconstitutional in the near future, given the support already upheld by the Court, the increased government involvement with private institutions generally, and the current national mood.[177] Moreover, it is not here asserted that such a declaration would be entirely favorable or, in light of free exercise clause considerations, even constitutionally permissible.

Rather than striking a balance, however, *Mueller* impermissibly tips the scales toward active governmental support of religion. While sectarian institutions are not receiving direct grants, a tax deduction does represent a state's judgment that certain economic behavior is to be encouraged through the allowance of such deductions. The ultimate result, state support, is the same.[178] The strength and coercive nature of the taxation power makes its use in support of religious education all the more threatening to the preservation of an individual's free exercise rights.[179] Justice Black, dissenting in *Allen*, recognized that the *Everson* rationale has been extended to support programs never contemplated by the Court.[180] *Mueller* represents yet another effort to weaken the "high and impregnable" wall that is supposed to separate church and state.

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in part in order that he may obtain a religious education." *See also* Regan v. Taxation with Representation, 103 S. Ct. 1997 (1983)(denial of tax exempt status to organizations engaging in substantial lobbying activities not violative of first amendment rights; granting of exempt status to veterans organizations engaged in similar activities not denial of equal protection under fifth amendment).

[177] President Reagan is an avid supporter of public aid to private education. *See* S. 528, 98th Cong., 1st Sess. § 2(b), 129 CONG. REC. S1336 (daily ed. Feb. 17, 1983); *Ruling Touches Off New Debate On Prospects of Tuition Tax Credit*, N.Y. Times, June 30, 1983, at D23, col. 1 (when asked about reaction to *Mueller* decision, Reagan replied, "I'm happy about it."). In his recent State of the Union Address, President Reagan, alluding to the fact that chaplains are constitutionally permitted to open legislative sessions with a prayer, stated: "I must ask, if you can begin your day with a member of the clergy standing here leading you in prayer, then why can't freedom to acknowledge God be enjoyed again by children in every schoolroom across the land?" *Transcript of Message by President in State of the Union Address*, N.Y. Times, Jan. 26, 1984, at B8, col. 1.

[178] *See supra* text accompanying note 157.

[179] *See supra* note 4.

[180] *See Allen*, 392 U.S. at 252-53 (Black, J., dissenting).

Justice Black's approach in *Everson* appears to be a reasonable balancing of the competing interests at stake. Programs intended to promote general health, safety, and welfare, such as the provision of transportation and medical services, should be extended to religious school students if they are provided to all students generally.[181] Direct grants to the schools for any purpose, and aid that furthers the religious school's purpose in educating and indoctrinating its students, however, should be prohibited. It would follow from this view that *Board of Education v. Allen* should be overruled, or at the very least, limited to its facts and not used as the justification for further aid to sectarian education.

Aid which supports the educational function of a sectarian school, such as the providing of textbooks, "actively and directly assists the teaching and propagation of sectarian religious viewpoints in clear conflict with the First Amendment's establishment bar."[182] An indirect subsidy of tuition via a tax deduction, as in *Mueller*, has the same impermissible effect of supporting religion. Justice Rutledge, dissenting in *Everson*, expressed the principle that "[t]he realm of religious training and belief remains, as the [First] Amendment made it, the kingdom of the individual man and his God. It should be kept inviolately private, not entangled . . . in precedents or confounded with what legislatures legitimately may take over into the public domain."[183] His warning should not be ignored.

Susan B. Joseph

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[181] *See supra* notes 43-47 and accompanying text.

[182] *Allen*, 392 U.S. at 253 (Black, J., dissenting).

[183] *Everson*, 330 U.S. at 57-58 (Rutledge, J., dissenting) (citation omitted).