Urban Law Annual ; Journal of Urban and Contemporary Law

Volume 26

January 1984

Tax Deductions for Parochial School Tuition: Mueller v. Allen {103 S. Ct. 3062}

Gregory K. Allsberry

TAX DEDUCTIONS FOR PAROCHIAL SCHOOL TUITION: *MUELLER v. ALLEN*

Private schools bear a significant share of the burden of education in the United States.[1] Legislators regularly introduce bills to provide state and federal assistance to private education.[2] Courts have struggled to determine which types of public aid to private education pass constitutional muster.[3] In *Mueller v. Allen*,[4] the United States

1. Five million children (11% of all school children) attended private elementary and secondary schools in the 1981-82 school year. *A Boost for Private Schools,* TIME, Apr. 26, 1982, at 21.

2. Many states have enacted private education assistance programs of various types. *See infra* note 3.

At the federal level, Congress has regularly introduced legislation proposing tuition expense relief programs since the 1950's. *Tuition Tax Credits, 1981: Hearings on S.550 Before the Subcomm. on Taxation and Debt Management of the Senate Comm. on Finance,* 97th Cong., 1st Sess. 39 (1981). The Educational Opportunity and Equity Act of 1983, introduced before the Senate in February, 1983, proposed tax credits for 50% of expenses paid to private elementary and secondary schools. The maximum credit would have been $100 per dependent in 1983, increasing to $300 per dependent in 1985 and thereafter. S.528, 98th Cong., 1st Sess., 129 CONG. REC. S1335-38 (daily ed. Feb. 17, 1983). In support of the measure, President Reagan urged Congress to enact the legislation as "a way to lighten the 'double burden' " upon parents supporting both public and private schools. MESSAGE FROM THE PRESIDENT OF THE UNITED STATES, EDUCATIONAL OPPORTUNITY AND EQUITY ACT OF 1983, 98th Cong., 1st Sess. (February 17, 1983).

3. *See* Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646 (1980) (grants for state-prepared tests and services); Wolman v. Walter, 433 U.S. 229 (1977) (textbooks, services and instructional materials); Meek v. Pittenger, 421 U.S. 349 (1975) (textbooks, instructional materials and counseling services); Sloan v. Lemon, 413 U.S. 825 (1973) (tuition reimbursements); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) (tuition tax credits); Levitt v. Committee for Pub. Educ. & Religious Liberty, 413 U.S. 472 (1973) (grants to subsidize testing and record keeping); Hunt v. McNair, 413 U.S. 734 (1973) (revenue bonds for constructing buildings and facilities); Tilton v. Richardson, 403 U.S. 672 (1971) (grants for constructing buildings and facilities); Lemon v. Kurtzman, 403 U.S. 602 (1971) (reimbursements for salaries, textbooks and materials); Earley v. DiCenso, 403 U.S. 602 (1971) (salary supplements); Walz v. Tax Comm'n, 397 U.S. 664 (1970) (tax exemption for religious institutions); Board of Educ. v. Allen, 392 U.S. 236 (1968) (textbook loans); McGowan v. Maryland, 366 U.S. 420 (1961) (Sunday closing laws); Zorach v. Clauson, 343 U.S. 306 (1952) (released time program); Everson v. Board of Educ., 330 U.S. 1 (1947) (reimbursements for bus transportation).

Supreme Court held that a Minnesota statute[5] authorizing a limited tax deduction[6] for public and private education expenses[7] does not

4. 103 S. Ct. 3062 (1983).

5. MINN. STAT. ANN. § 290.09, subd. 22 (West Supp. 1984). The statute provides:

> *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 situated in Minnesota, North Dakota, South Dakota, Iowa, or Wisconsin, 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 and chapter 363. 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 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.

6. The tax deduction may not exceed $500 per dependent in grades kindergarten to six and $700 per dependent in grades seven to twelve. *Id.*

7. The district court in *Mueller* found deductible tuition expenses to include:

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.

Mueller v. Allen, 514 F. Supp. 998, 1000 (D. Minn. 1981).

The district court further determined that deductible transportation expenses included:

> [T]he cost of transporting students in school districts that do not provide free transportation, the cost of transporting students who live in one district but attend school in another, and the cost of transporting students who attend school in their residence district but who do not qualify for free transportation because of proximity to their schools of attendance.

Id.

The district court found that textbook deductions include not only secular textbooks subject to these restrictions, but also certain requisite equipment, including:

1. Cost of tennis shoes and sweatsuits for physical education.
2. Camera rental fees paid to the school for photography classes.

violate the establishment clause[8] of the United States Constitution.[9]

Petitioners[10] sought on behalf of the taxpayers of Minnesota to invalidate a Minnesota tax statute granting taxpayers a limited tax deduction for their dependents' tuition, textbook, and transportation expenditures.[11] Parents whose children attended either public or private elementary and secondary schools qualified for the deduction.[12] Petitioners argued that the statute violated the establishment clause of the first amendment.[13] The district court granted respondents'[14]

---

3. Ice skates rental fee paid to the school.
4. Rental fee paid to the school for calculators for mathematics.
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.

Id.

8. The establishment and free exercise clauses provide that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. CONST. amend. I. The religion clauses of the first amendment apply to the states under the due process clause of the fourteenth amendment. Cantwell v. Connecticut, 310 U.S. 296 (1940). *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-2, at 814 n.5 (1978) (a discussion of the problems encountered in incorporating the establishment clause into the due process clause of the fourteenth amendment).

9. Although petitioners had formally asserted in the lower courts that the Minnesota statute violated both the establishment and free exercise clauses of the first amendment, Brief for Appellants at 1, Mueller v. Allen, 676 F.2d 1195 (8th Cir. 1982), petitioners' arguments before the Eighth Circuit and the Supreme Court focused exclusively on whether the statute impermissibly advanced religion.

Most cases involving public aid to private education evoke predominantly establishment clause concerns. Occasionally, free exercise claims arise. *E.g.,* Board of Educ. v. Allen, 392 U.S. 236, 248-49 (1968) (a program lending public school textbooks to private school students did not inhibit the free exercise of religion because the program lacked coercive effect).

10. The petitioners brought suit on behalf of all Minnesota taxpayers. 103 S. Ct. at 3065.

11. *Id.*

12. *Id.*

13. *See supra* notes 8-9.

14. Petitioners named Clyde E. Allen, Jr., Commissioner of the Minnesota Department of Revenue, as defendant. The other defendants intervened individually and on behalf of the taxpayers of Minnesota. Mueller v. Allen, 514 F. Supp. 998, 998 (D. Minn. 1981).

cross motion for summary judgment,[15] finding the statute neutral both on its face and in its application.[16] Affirming the district court decision,[17] the Court of Appeals for the Eighth Circuit concluded that the statute primarily effected neither the advancement nor the inhibition of religion.[18] The Supreme Court granted certiorari,[19] and in a five-to-four decision affirmed the court of appeals.[20]

The drafters of the Constitution designed the establishment and free exercise clauses of the first amendment to prevent conflict between civil and religious authorities.[21] In determining the scope and effect of the religion clauses, the Supreme Court initially embraced the concept of separation between church and state as embodied in Jefferson's metaphorical "wall of separation."[22] The Court gradually

15. Respondents cross-motioned for summary judgment upon petitioners' motion for summary judgment. *Id.* at 1003.

16. Petitioners contended that the statute, although facially neutral, assisted parents of public school children. Brief for Petitioners at 5-6, Mueller v. Allen, 103 S. Ct. 3062 (1983). At trial, petitioners submitted affidavits and other evidence showing that during 1979-80, only 4.56% of the 90,954 private school pupils attended nonsectarian schools. Mueller v. Allen, 514 F. Supp. at 1001. Petitioners claimed that the benefits afforded under the statute accrued primarily to parents of children attending sectarian schools. Brief for Petitioners at 15, Mueller v. Allen, 103 S. Ct. 3062 (1983). Respondents attacked the admissibility of the affidavits at trial, Mueller v. Allen, 514 F. Supp. at 999, and disputed the accuracy of petitioners' statistics, claiming that the petitioners ignored part-time and other tuition payments made by public school parents. *Id.* at 1002. The district court did not rule on the validity of respondents' claims. *Id.*

17. Mueller v. Allen, 676 F.2d 1195 (8th Cir. 1982).

18. *See supra* notes 8-9.

19. The Supreme Court granted certiorari because a conflict existed between the circuits on the precise question presented in the case. In Rhode Island Fed'n of Teachers, AFL-CIO v. Norberg, 630 F.2d 855 (1st Cir. 1980), the First Circuit held that a Rhode Island statute identical in all pertinent parts to the Minnesota statute in *Mueller* violated the establishment clause.

20. *See infra* note 61.

21. Everson v. Board of Educ., 330 U.S. 1, 15 (1947). The religion clauses of the first amendment lack a single, clear legislative intent. At least three viewpoints existed prior to the enactment of the Bill of Rights: 1) the Jeffersonian view that a wall of separation should safeguard the state against ecclesiastical interference; 2) the view of Roger Williams that separation would serve largely to protect churches against the state; and 3) the view of James Madison that both religion and government function best when separate from the restrictive sphere of the other. *See* L. TRIBE, *supra* note 8, at § 14-3.

22. Thomas Jefferson wrote the phrase "wall of separation between Church and State" in a letter to the Danbury Baptist Association in 1802. Comment, *Jefferson and the Church—State Wall: A Historical Examination of the Man and the Metaphor,* 1978

modified the goal of separation between church and state, striving instead for state neutrality toward religion.[23] While the Court has frequently considered the constitutionality of state aid programs to private education,[24] it has failed to delineate the degree to which state aid programs may benefit sectarian schools.[25]

Development of modern establishment clause analysis[26] concerning public aid to private education began with *Everson v. Board of Education*.[27] In *Everson*, the Supreme Court upheld a New Jersey statute authorizing reimbursements for bus fares paid by parents of both public and parochial school children for transportation to and

B.Y.U. L. REV. 645 n.1 (*citing* S. PADOVER, THE COMPLETE JEFFERSON 518-19 (2d ed. 1969) *and* THE WORKS OF THOMAS JEFFERSON 346 (P. Ford ed. 1905)).

23. Total separation between church and state is a practical impossibility. "We are a religious people whose institutions presuppose a Supreme Being." Zorach v. Clauson, 343 U.S. 306, 313 (1952). Advocates of church-state separation advanced a "no aid" approach in which the state could do nothing to aid religion. This approach, however, creates a constitutional dilemma. By providing fire and police protection to churches and religious institutions, the state aids religion; yet, due process and equal protection require the state to provide such services. Giannella, *Religious Liberty, Non-Establishment, and Doctrinal Development Part II. The Non-Establishment Principle,* 81 HARV. L. REV. 513, 520-21 (1968).

The establishment clause must be interpreted in light of the free exercise clause, and vice versa. Either clause, carried to its extreme, would negate the other clause. In the area of released time programs, for example, the establishment clause concern that the state not advance religion must be weighed against the right of citizens to freely participate in religious activities. *Compare* Zorach v. Clauson, 343 U.S. 306 (1952) (the free exercise clause compelled upholding a released time program held *off campus* despite establishment clause objections) *with* McCollum v. Board of Educ., 333 U.S. 203 (1948) (the free exercise clause did not overcome the establishment clause disposition against released time programs held *on campus*). To accommodate both clauses, the Supreme Court adopted "neutrality" as a more appropriate description of the proper state attitude toward religion. Chief Justice Burger explained:

> The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a *benevolent neutrality* which will permit religious exercise to exist without sponsorship and without interference.

Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970) (emphasis added).

24. *See supra* note 3.

25. *See infra* note 52.

26. *See generally* Weber, *Building on Sand: Supreme Court Construction and Educational Tax Credits,* 12 CREIGHTON L. REV. 531 (1978-79) (a concise overview of the background and development of establishment clause interpretation in cases of public assistance for private schools).

27. 330 U.S. 1 (1947).

from school.[28] Although the Court unanimously agreed that the first amendment required strict separation between church and state, a majority held that the transportation program did not foster an establishment of religion.[29] Recognizing that the program approved in *Everson* benefited sectarian schools, the Court established the principle that benefits derived from public welfare legislation which flow indirectly to religious organizations do not violate the establishment clause.[30]

The Court next addressed the issue of public aid to private education twenty-one years later in *Board of Education v. Allen*.[31] In upholding a state law requiring public schools to lend textbooks to both public and private school students,[32] the *Allen* Court articulated a two-part test: an enactment must have a *secular legislative purpose*[33] and a *primary effect*[34] that neither advances nor inhibits religion.[35]

---

28. *Id.* at 17.

29. *Id.* at 18. *Everson* illustrates the shift in the Court's position from "no aid" separation to neutrality. The majority opinion stated that the first amendment precludes the government from passing "laws which aid one . . . [or] all religions," *id.* at 15, and that the amendment "has erected a wall between church and state." *Id.* at 18. Elsewhere, however, the majority stated that the first amendment "requires the state to be a neutral" toward religious groups. *Id.* The result reached in the case confirms that the majority relied on the neutrality rationale. In dissent, a bewildered Mr. Justice Jackson marveled that the majority opinion reminded him "of Julia who, according to Byron's reports, whispering 'I will ne'er consent'—consented." *Id.* at 19.

30. Justice Black, writing on behalf of the majority, stated: "It is undoubtedly true that children are helped to get to church schools. There is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets. . . ." *Id.* at 17.

31. 392 U.S. 236 (1968).

32. The statute required public school officials to lend only secular textbooks. *Id.* at 245.

33. In *Allen*, the New York Legislature provided that the purpose of the statute was to further "the educational opportunities available to the young." *Id.* at 243.

Courts rarely question the sufficiency of the secular purpose of statutes aiding private education. *See* Wolman v. Walter, 433 U.S. 229 (1977); Sloan v. Lemon, 413 U.S. 825 (1973); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973); Lemon v. Kurtzman, 403 U.S. 602 (1971); Earley v. DiCenso, 403 U.S. 602 (1971); Rhode Island Fed'n of Teachers, AFL-CIO v. Norberg, 630 F.2d 855 (1st Cir. 1980); Buchanan, *Governmental Aid to Sectarian Schools: A Study in Corrosive Precedents,* 15 HOUS. L. REV. 783 (1978). *But cf.* Epperson v. Arkansas, 393 U.S. 97 (1968) (no secular purpose found in a statute prohibiting teaching of evolution in public schools).

34. 392 U.S. at 243.

35. Courts have particular difficulty assessing the primary effect of legislation assisting sectarian schools. The judiciary has long recognized that parochial schools

As in *Everson*, the Court concluded that the state aid program had the primary effect of assisting parents and children rather than sectarian schools.[36] Moreover, *Allen* affirmed the *Everson* rationale that statutes benefiting all students without regard to religious affiliation tend to satisfy the neutrality requirement of the first amendment.[37]

Supreme Court decisions following *Allen* added a third element to the *secular purpose-primary effect* test: a statute or program must not foster an *excessive government entanglement* with religion.[38] Excessive administrative entanglement may occur when government must

---

serve both secular and religious purposes. *See, e.g.,* Cochran v. Louisiana State Bd. of Educ., 281 U.S. 370 (1930) (parochial schools benefit the state as well as instruct in religion); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (parochial schools sufficiently serve the state's interest in education). Whether public aid directed toward the *secular* function of sectarian schools impermissibly advances the *religious* function constitutes a major issue in establishment clause analysis.

36. The Court recognized that sectarian schools benefited to the extent that the schools did not have to purchase textbooks for their students. This benefit, however, did not impermissibly advance religion. 392 U.S. at 244. A commentator has pointed out the futility of trying to differentiate between benefit to students and benefit to schools by comparing it to the outdated attempt to classify local pilotage laws as either safety regulations or commerce regulations. "It was the beginning of wisdom when the Court candidly recognized that such measures were regulations of both. . . ." Freund, *Public Aid to Private Schools,* 82 HARV. L. REV. 1680, 1682-83 (1969).

37. The statute in both *Everson* and *Allen* extended assistance to all students without regard to the religious orientation of the schools attended. 392 U.S. at 242-43. Such statutes carry a greater presumption of neutrality than those benefiting only private school students.

Other factors influencing a statute's neutrality toward religion include historical acceptance of the benefit's propriety, Walz v. Tax Comm'n, 397 U.S. 664, 678 (1970); the nature of the religious organizations benefited, see *infra* note 57; the nature of the assistance provided, see *infra* note 59; and whether the aid necessitates excessive entanglement between church and state, see *infra* notes 38-42 and accompanying text.

38. *See* Lemon v. Kurtzman, 403 U.S. 602 (1971); Walz v. Tax Comm'n, 397 U.S. 664 (1970). In *Walz*, the Court upheld state tax exemption of religious institutions. Writing for the majority, Chief Justice Burger noted that such exemption is "deeply embedded in the fabric of our national life," 397 U.S. at 676, and that "[t]here is no genuine nexus between tax exemption and establishment of religion." *Id.* at 675. Eliminating the tax exemption would create increased government involvement in "tax valuation of church property, tax liens, tax foreclosures and the direct confrontations and conflicts that follow in the train of these legal processes." *Id.* at 674. The Court distinguished tax exemption from a direct money subsidy to religious organizations, which would be "pregnant with involvement. . . ." *Id.* at 675. *Contra* Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646 (1980), discussed *infra* notes 54-60 and accompanying text (upheld direct money subsidies to private secular and nonsecular elementary schools).

Private education advocates also wish to avoid excessive entanglement and the re-

maintain surveillance of religious institutions and employees or resolve religious disputes.[39] Excessive political entanglement can result from state aid programs that tend to polarize public opinion along religious lines.[40] Although church-state entanglement inevitably exists to some degree,[41] courts must determine whether excessive entanglement exists on a case-by-case basis.[42]

---

strictions on freedom which may follow. Note, *Aid to Private Education: Persistent Lawmakers and the Court,* 16 GONZ. L. REV. 171, 174 n.24 (1980).

39. In Lemon v. Kurtzman, 403 U.S. 602, 609 (1971), the Court struck down a Pennsylvania law providing private schools direct reimbursement for salaries, textbooks and instructional materials. The statute restricted the cash grants to secular uses and prescribed procedures to audit and inspect schools' financial records. The Court ruled that the contacts necessary to ensure secular use of the grants involved excessive and enduring entanglement between church and state. *Id.* at 619. The Court distinguished Everson v. Board of Educ., 330 U.S. 1 (1947) and Board of Educ. v. Allen, 392 U.S. 236 (1968) as cases aiding students rather than schools. *But see supra* note 36. The Court further stated that dedicated religious teachers would "inevitably experience great difficulty in remaining religiously neutral." 403 U.S. at 618. The Court later found this propensity to inculcate religion inherent in cases involving other forms of aid. *See, e.g.,* Wolman v. Walter, 433 U.S. 229 (1977) (possibility that instructional materials and equipment would be used to teach religious values); Meek v. Pittenger, 421 U.S. 349 (1975) (possibility that testing and counseling on sectarian school premises would convey religious values).

40. In Lemon v. Kurtzman, 403 U.S. 602 (1971), the Court extended its political entanglement analysis in Walz v. Tax Comm'n, 397 U.S. 664 (1970). *See supra* note 38. After assuming that citizens in communities served by parochial schools would campaign and vote on measures supporting private schools in a manner consistent with their religious beliefs, the Court concluded that "[t]he potential divisiveness of such conflict is a threat to the normal political process." *Lemon,* 403 U.S. at 622 (*quoting Walz*, 397 U.S. at 695) (separate opinion of Harlan, J.). "It conflicts with our whole history and tradition to permit questions of the Religion Clauses to assume such importance in our legislatures and in our elections that they could divert attention from the myriad issues and problems that confront every level of government." *Lemon,* 403 U.S. at 623. In the Court's opinion, aid requiring annual appropriations seemed particularly divisive. The Court's reasoning, however, is dubious. The first amendment does not preclude persons and organizations from attempting to bring about legislation consistent with their religious convictions. By recognizing that ordinary political debate is "normal and healthy," *Lemon,* 403 U.S. at 622, the Court implied that religious debate is undesirable. Weber, *supra* note 26, at 551.

Considering the current legislative interest in providing assistance for private education, see *supra* note 2, failure to provide some form of aid to private education may generate as much political activism along religious lines as do actual assistance programs.

41. *See supra* note 23.

42. Addressing the question of excessive church-state entanglement, the Eighth Circuit in Bogen v. Doty concluded: "Thus where there is some peripheral effect or entanglement of government with religion, it does appear to be a matter of degree. We must consider both the actual impact of the practice in modern society as well as

In *Committee for Public Education and Religious Liberty v. Nyquist*,[43] the Supreme Court appeared to narrow the primary effect element of the establishment clause test.[44] *Nyquist* involved a statute providing direct money grants for maintenance and repair to private schools[45] and tuition tax credits to parents of private school children.[46] In determining that the grants and tax credits impermissibly advanced religion, the Court suggested that some forms of public aid are impermissible if they provide *any* assistance to religious schools.[47] The *Nyquist* court concluded that tax benefits for parents paying sectarian school tuition inevitably aid and advance religious institutions.[48] The fact that only parents of private school children benefited under the statute bolstered the Court's finding of an impermissible effect.[49]

The *Nyquist* decision left several questions unanswered. Although the Court narrowed the scope of the primary effect test, it explicitly declined to address the question whether public assistance made

---

the historical basis for the activity." 598 F.2d 1110, 1113 (8th Cir. 1979). Because courts consider essentially the same facts when assessing primary effect and entanglement, some observers believe that primary effect and excessive entanglement constitute a single test. *See generally* L. TRIBE, *supra* note 8, at § 14-12 (historical background of the excessive entanglements issue).

43. 413 U.S. 756 (1973).

44 *Id.* at 804.

45. The grants, provided to ensure the health and welfare of students, could not exceed 50% of comparable expenses in public schools. *Id.* at 763.

46. The tuition tax benefit program consisted of two parts: 1) a tuition reimbursement plan for parents having children in private schools and having an annual income of less than $5,000; 2) a tax deduction of a stipulated sum per child, unrelated to the actual tuition paid. 413 U.S. at 756-57.

47. The Court decided that a judgment whether the assistance program satisfied the "metaphysical" primary effect test would be impossible and unnecessary. *Id.* at 783-84 n.39. The Court recalled that it had struck down federal construction grants for religious colleges and universities "because the grant[s] might *'in part* have the effect of advancing religion.' " 413 U.S. at 783-84 n.39 (quoting Tilton v. Richardson, 403 U.S. 672, 683 (1971)) (emphasis in *Nyquist*).

48. 413 U.S. at 793.

49. *Id.* at 782-83 n.38.

Justice Rehnquist (concurring in part and dissenting in part) found the benefit to parents in *Nyquist* no more offensive than the aid to parents in *Allen* (lending of public textbooks), see *supra* notes 31-37 and accompanying text, or in *Everson* (state funded transportation of students), see *supra* notes 27-30 and accompanying text. 413 U.S. at 810. Chief Justice Burger, concurring in part and dissenting in part, wrote: "It is no more than simple equity to grant partial relief to parents who support the public schools they do not use." *Id.* at 803.

available to both public and private school students satisfied constitutional strictures.[50] Further, the Court specifically reserved judgment concerning the constitutionality of genuine tax deductions as opposed to tax credits.[51] Decisions subsequent to *Nyquist* failed to provide specific guidelines to assess the constitutionality of private school assistance legislation.[52]

In contrast to the narrow restrictions imposed by *Nyquist* upon the *primary effect* element of the establishment clause test,[53] the Supreme Court in *Committee for Public Education and Religious Liberty v. Regan*[54] expanded the degree of government entanglement with religion acceptable under the test. In *Regan*, the Court addressed whether use of public funds to reimburse private schools for conducting state mandated tests and services violated the establishment clause.[55] Finding that the statute[56] satisfied establishment clause re-

50. 413 U.S. at 782-83 n.38.

51. *Id.* at 790 n.49. The Court observed that the tax benefit in *Nyquist*, though technically a tax deduction, was "in effect a tax credit" and a tax "forgiveness." *Id.* at 789.

In theory, a tax deduction is inherently more limited as a benefit. Unlike a tax credit, a tax deduction cannot reimburse to the taxpayer all of his or her parochial school expenses. Mueller v. Allen, 103 S. Ct. 3062, 3076 n.5 (1983) (Marshall, J., dissenting).

52. " 'Corrosive precedents' have left us without firm principles on which to decide these cases." Wolman v. Walter, 433 U.S. 229, 266 (1977) (quoting Everson v. Board of Educ., 330 U.S. 1, 63 (1947)). Instead, courts have drawn narrow, technical legal distinctions. *Compare* Roemer v. Board of Pub. Works of Md., 426 U.S. 736 (1976) (allowed direct, unrestricted cash grants to sectarian colleges and universities) *with* Lemon v. Kurtzman, 403 U.S. 602 (1971) (disallowed cash supplements to sectarian elementary and secondary schools for supplementing salaries). *Compare* Wolman v. Walter, 433 U.S. 229 (1977) (upheld a program providing remedial tutoring and guidance counseling off campus) *with* Meek v. Pittenger, 421 U.S. 349 (1975) (overruled a similar program conducted on campus).

The Supreme Court Justices frequently disagree over the extent to which states may extend assistance to sectarian schools. In *Meek*, a case involving a state program providing textbooks, educational materials and human services for private school students, Justices Brennan, Douglas and Marshall found none of the aid acceptable. Justices Blackmun, Powell and Stewart found only the textbooks acceptable. Justices Burger, Rehnquist, and White found all of the aid acceptable. For a breakdown of the opinions in *Wolman*, involving an Ohio statute which authorized six forms of aid to private schools, see Weber, *supra* note 26, at 548-49 nn.99-100.

53. *See supra* note 47 and accompanying text.

54. 444 U.S. 646 (1980).

55. The Court had previously held a similar statute unconstitutional in Levitt v. Committee for Pub. Educ. & Religious Liberty, 413 U.S. 472 (1973). The New York Legislature enacted the statute upheld in *Regan* in an attempt to overcome the consti-

straints, the Court upheld for the first time direct financial aid to private elementary and secondary schools.[57] Because the state prepared the tests administered by the private schools, the Court reasoned that no sectarian purposes could be furthered,[58] even though private school employees administered the tests.[59] Despite a prescribed state auditing procedure and the need for regular appropriation of funds, the Court did not find an excessive entanglement of state with religious institutions.[60]

---

tutional deficiencies of the earlier one overruled in *Levitt*. The earlier statute reimbursed sectarian schools for preparing and grading teacher-prepared tests. The statute failed, however, to provide a means to audit school financial records, thus failing to guarantee use of the reimbursements for secular purposes only.

56. The statute reimbursed sectarian schools for the costs of administering and keeping records of state-prepared tests. In addition, the statute provided an auditing procedure to ensure the use of state funds for secular purposes only. 444 U.S. at 651-52

57 The Court has long distinguished direct money grants to sectarian colleges and universities from grants to sectarian elementary and secondary schools. In the Court's view, sectarian institutions of higher learning are less pervasively sectarian than parochial elementary and secondary schools, and college students are less impressionable than younger students. *E.g.*, Roemer v. Board of Pub. Works of Md., 426 U.S. 736 (1976) (upheld direct, unrestricted cash grants to sectarian colleges and universities); Hunt v. McNair, 413 U.S. 734 (1973) (upheld issuance of revenue bonds assisting construction projects at private colleges); Tilton v. Richardson, 403 U.S. 672 (1971) (upheld one-time grants for construction on private college campuses) (remanded on other grounds). *See generally* Kirby, Everson *to* Meek *and* Roemer: *From Separation to Detente in Church-State Relations,* 55 N.C.L. REV. 563 (1977) (analysis of the development of establishment clause rationale in cases of public aid to private colleges and universities).

58. Two of the tests consisted of multiple choice questions. A third test contained some essay questions on secular subjects. 444 U.S. at 655-56.

59 The nature of the aid proffered by the state to religious schools figures dramatically in cases of aid for private education. In Wolman v. Walter, 433 U.S. 229 (1977), the Court upheld a statute authorizing the expenditure of state funds to supply standardized tests to private schools. *Id.* at 238-39. Because sectarian school teachers could not use the tests for religious purposes, thus eliminating the need for state supervision, the statute satisfied the primary effect and excessive entanglement tests. In marked contrast to *Regan* and *Wolman,* the Court in Meek v. Pittenger, 421 U.S. 349 (1975), invalidated portions of a Pennsylvania statute providing state subsidized guidance counseling and remedial speech and hearing services. Although public teachers and counselors provided the services, the Court feared "inadvertent fostering of religion" in an "atmosphere dedicated to the advancement of religious belief. . . ." 421 U.S. at 370-71.

60. "[T]he services for which the private schools would be reimbursed are discrete and clearly identifiable" and the reimbursement process is "straightforward." 444 U.S. at 660. "[W]e are not prepared to read into the plan as an inevitability the bad

In *Mueller v. Allen*,[61] the Supreme Court held that tax deductions made available to public and private school parents for transportation, textbook and tuition expenses do not violate the establishment clause. As in earlier decisions, the Court readily found a sufficient secular purpose for the assistance program.[62] The Court next analyzed the primary effect of the program, noting that the availability of the tax deduction to all parents avoided the appearance of governmental approval of religious organizations.[63] More significantly, the Court found that the program directly assisted parents. Parochial schools benefited only indirectly as a result of private choices made by parents.[64] The Court rejected the petitioners' argument that statistical evidence demonstrated that parochial school parents comprised the principal class of beneficiaries under the statute. The *Mueller* court concluded that reliance on local statistics to assess the constitu-

---

faith upon which any future excessive entanglement would be predicated." *Id.* at 660-61.

For an extensive discussion of the church-state entanglement theory and an opinion that *Regan* weakened the entanglement theory beyond usefulness, see Note, *The Forbidden Fruit of Church-State Contacts: The Role of Entanglement Theory in its Ripening,* 16 SUFFOLK U.L. REV. 725 (1982).

61. 103 S. Ct. 3062 (1983) (5-4 decision). Justice Rehnquist wrote the majority opinion in which Chief Justice Burger, Justice White, Justice Powell and Justice O'Connor joined. Justice Marshall was joined by Justice Brennan, Justice Blackmun and Justice Stevens in dissent.

62. The Court discerned from the face of the statute an intent by the state legislature to ensure a well-educated citizenry and to help sectarian schools meet their share of the educational burden. *Id.* at 3066-67.

63. *Id.* at 3068-69. The majority distinguished Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973). *Id.* In *Nyquist*, the Court invalidated a New York statute that made tax credits for school expenses available only to parents of private school children. Although *Nyquist* expressly reserved the question whether benefits made available to students without regard to the public-private nature of the schools could withstand constitutional attack, see *supra* note 50 and accompanying text, the distinction appears to be superficial. In *Mueller*, only 4% of the parents who could actually deduct tuition expenses sent their children to nonsecular schools, as opposed to 15% in *Nyquist*.

64. 103 S. Ct. at 3069. The Court has long considered state programs benefiting sectarian education to be a factor in establishment clause analysis. In Lemon v. Kurtzman, 403 U.S. 602 (1971), the Court struck down a Pennsylvania program of teacher salary supplements paid directly to the schools. The Court distinguished Everson v. Board of Educ., 330 U.S. 1 (1947) and Board of Educ. v. Allen, 392 U.S. 236 (1968), as cases where "state aid was provided to the student and his parents—not to the church-related school." *Lemon*, 403 U.S. at 621. *But see* Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646 (1980) (upholding reimbursements for test and services paid directly to private schools).

tionality of a facially neutral law would require arbitrary line-drawing[65] and would fail to recognize the public benefit attributable to parochial schools' function in the education system.[66] Finally, the Court found that government entanglement with religion did not exceed the degree of entanglement upheld in prior decisions.[67]

The *Mueller* dissent found that the neutrality principle underlying the establishment clause prohibited the entire statute.[68] According to the dissent, the Constitution proscribes any direct or indirect government assistance to parochial schools,[69] unless the assistance is restricted to the schools' purely secular functions.[70] Because tax deductions for parochial school expenses provide an incentive for parents to send their children to parochial schools,[71] the entire sectarian enterprise benefits from the financial assistance.[72] The dissent looked beyond the breadth of beneficiaries on the face of the statute and relied upon statistical data in determining that parents of parochial school children received the most benefit.[73] The dissent did not suggest any excessive entanglement problem, possibly because it fore-

65. Commenting on the use of local statistics to assess the constitutionality of the tax deduction, Justice Rehnquist stated that "[s]uch an approach would scarcely provide the certainty that this field stands in need of, nor can we perceive principled standards by which such statistical evidence might be evaluated." 103 S. Ct. at 3070.

66. *Id. See generally* Note, *Public Funding of Private Education: A Public Policy Analysis*, 10 J. LEGIS. 146, 153-59 (1983) (a discussion of policy arguments for and against increased government funding of private elementary and secondary schools).

67. 103 S. Ct. at 3071. The Court foresaw no problem with state officials deciding which textbooks and materials were nonsecular in nature. *Id. Cf.* Wolman v. Walter, 433 U.S. 229 (1977) (upholding textbook loans to nonpublic school students); Meek v. Pittenger, 421 U.S. 349 (1975) (upholding textbook loans to non-public school students). Board of Educ. v. Allen, 392 U.S. 236 (1968) (upholding textbook loans to nonpublic school students).

68 103 S. Ct. at 3071.

69 *Id.*

70. *Id.* at 3072-73.

71. *Id.* at 3073 (quoting Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 786 (1973)). The degree to which the tax benefit actually stimulates parents to send their children to parochial schools is questionable. In Rhode Island Fed'n of Teachers, AFL-CIO v. Norberg, 630 F.2d 855 (1st Cir. 1980) where the First Circuit considered a Rhode Island statute nearly identical to the Minnesota statute in *Mueller*, the court hypothesized a family of four having a federal taxable income of $8,000 and paying a total tuition of $1,400 for two children attending parochial high schools. In 1979, the family's net tax savings under the statute would have amounted to only $44.08. *Norberg,* 630 F.2d at 859 n.6.

72. 103 S. Ct. at 3072-73, *quoting* Meek v. Pittenger, 421 U.S. 349, 366 (1975).

73. 103 S. Ct. at 3072-74.

saw no attempt by the state to restrict the financial support to secular uses.[74]

The closely divided *Mueller* decision exemplifies the difficulty the Court has experienced applying the establishment clause to particular state assistance programs. The majority deemed the tax benefits acceptable because they were available to all parents and assisted schools only indirectly. The dissent, in contrast, focused upon whether the sectarian as well as the secular functions of the schools benefited. Previous decisions support both viewpoints.[75]

Although both *Mueller* and *Nyquist* involved statutes granting tax benefits for tuition expenses, the Court distinguished *Nyquist* on the grounds that parents of only private school children qualified for the benefits.[76] Significantly, *Nyquist* had expressly distinguished both *Everson* and *Allen* in which the statutes facially benefited both public and private school students.[77] Thus, *Mueller* is consistent with *Everson* and *Allen* in holding that a broad class of beneficiaries tends to indicate state neutrality toward religion.[78]

The tax deduction in *Mueller* bore a direct relation to the amount actually spent by parents for qualifying expenses. The Court specifically refrained from determining the constitutionality of a tuition credit statute in *Nyquist*, where the tax benefit bore no relation to the amount actually paid.[79] The Minnesota statute provided relief to a broad spectrum of citizens and in direct proportion to parents' expenditures, thereby avoiding the implication that the state offered the tax benefit as an incentive to send children to sectarian schools rather than as a genuine attempt to ease the financial burden of educating children.[80] The *Mueller* dissent interpreted *Nyquist* as prohibiting any benefits offered directly to parents who send their children to sectarian schools.[81] In rejecting this interpretation, *Mueller* remains

74. *Id.* at 3078.

75. For example, both Everson v. Board of Educ., 330 U.S. 1 (1947), and Board of Educ. v. Allen, 392 U.S. 236 (1968), upheld statutes making assistance generally available to all school children. In both cases, however, the assistance was strictly secular in nature. *See supra* notes 27-37 and accompanying text.

76. 103 S. Ct. at 3068-69.

77. *Nyquist,* 413 U.S. at 782 n.38.

78. *See supra* note 37.

79. *See supra* note 51 and accompanying text.

80. The statute does not "confer any imprimatur of State approval." 103 S. Ct. at 3068 (quoting Widmar v. Vincent, 454 U.S. 263 (1981)).

81. Justice Marshall, in his dissent, stated: "*Nyquist* made clear, however, that

consistent with the *Everson* and *Allen* view that sectarian benefit incidental to a neutral public assistance statute does not render the statute unconstitutional.

Neither the majority nor the dissent in *Mueller* voiced serious concern regarding excessive entanglement with religion. Although little risk of political entanglement exists,[82] the administrative procedures necessary to police the secular textbook and materials provision pose potential entanglement problems. The court in *Regan* clearly held that, in some circumstances, the state may utilize auditing procedures to guarantee that sectarian schools use state funds for secular purposes only.[83] In *Regan*, the state-prepared student tests remained immutably secular in nature;[84] textbooks, however, lend themselves more readily to sectarian purposes. Similarly, in *Allen*, public school officials certified the secular nature of the textbooks lent to parochial school students.[85] In *Mueller*, however, religious schools or parents themselves determined which textbooks the students bought. Both *Regan* and *Mueller* demonstrate the Court's decreasing emphasis upon the excessive entanglement element of establishment clause analysis.

Mueller brought into sharp focus the predominant issue concerning public assistance for private education: whether legislation intended to support the secular functions of sectarian schools contravenes government neutrality toward religion. In upholding a state statute which permits parents of both public and private school children to deduct tuition and other educational expenses, the Supreme Court in *Mueller* found that the benefit to society from such legislation exceeds the dangers which may result. Legislators will continue to formulate programs to support both public and private education.[86] *Mueller* provides a sensible framework for achieving that objective.

Gregory K. Allsberry

---

absolutely no subsidization is permissible unless it is restricted to the purely secular functions of those schools." 103 S. Ct. at 3076 n.5 (emphasis added).

82. Because the benefit to parents comes in the form of a tax deduction, the benefit does not require annual appropriation of funds.

83. *See supra* notes 55, 56 & 60 and accompanying text.

84. *See supra* note 58.

85. Board of Educ. v. Allen, 392 U.S. 236, 245 (1968).

86. *See supra* note 2.