1984

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COMMENT

FACIALLY NEUTRAL TAX DEDUCTIONS FOR EDUCATIONAL EXPENSES AND THE ESTABLISHMENT CLAUSE


I. INTRODUCTION

The realm of religion . . . is where knowledge leaves off, and where faith begins, and it has never needed the arm of the State for support, and wherever it has received it, it has harmed both the public and the religion that it would pretend to serve.1 Notwithstanding Clarence Darrow's warning, in recent years a number of state legislatures have attempted to provide some form of financial assistance to parochial elementary and secondary schools.2 Most of the devices by which states have attempted to provide such assistance have been held by the United States Supreme Court to violate the establishment clause of the first amendment.3 As the Court has charted the constitutional limits of such aid, states have responded to the decisions by


2. See infra note 3 and accompanying text (citing Supreme Court decisions upholding or striking down various aid programs). A summary of the various types of aid to nonpublic schools provided by states as of February 1, 1972 is set out in Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 815 n.2, 818 n.6 (1973) (White, J., dissenting). As of that date, 16 states provided direct aid to parochial schools and 33 provided "auxiliary services or benefits." See id. at 816 n.2.

Bills to amend the Internal Revenue Code of 1954 to provide a federal tuition tax credit are currently being considered by the United States Senate and House of Representatives. Both bills would provide a limited tax credit for tuition paid by a taxpayer for the elementary or secondary education of a dependent, and would disallow such a credit for tuition paid to schools found to maintain racially discriminatory policies. See S. 528, 98th Cong., 1st Sess., 129 CONG. REC. 1335-40 (1983); H.R. 1730, 98th Cong., 1st Sess. (1983).

3. See Wolman v. Walter, 433 U.S. 229 (1977) (loans of "instructional materials and equipment" and provision of field trip transportation and services to nonpublic schools held unconstitutional); Meek v. Pittenger, 421 U.S. 349 (1975) (loans of "instructional materials and equipment" and provision of "auxiliary services" to nonpublic schools held unconstitutional); Sloan v. Lemon, 413 U.S. 825 (1973) (tuition reimbursement plan held unconstitutional); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) ("maintenance and repair" grants to nonpublic schools, tuition grants for low income families, and tuition tax credits held unconstitutional); Levitt v. Committee for Pub. Educ. & Religious Liberty, 413 U.S. 472 (1973) (reimbursement of funds for testing and record keeping held unconstitutional where no means available to assure that tests were free of religious instruction); Lemon v. Kurtzman, 403 U.S. 602 (1971) (state supplement

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enacting new programs in an attempt to find a constitutionally permissible way to ease the financial burdens on private schools. State legislatures are not assisted by the Court's notably inconsistent decisions in this sensitive area.

Some of the most recent cases involve attempts by states to provide some form of tax relief for the parents of children attending parochial schools. The Supreme Court twice has considered the constitutionality to salaries of teachers of secular subjects in private schools and "purchase" by state of "secular educational services" from nonpublic schools held unconstitutional.

The Court has upheld aid programs in five of the 11 major decisions regarding state aid to parochial schools. See Mueller v. Allen, 103 S. Ct. 3062 (1983) (tax deduction for educational expenses upheld); Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646 (1980) (reimbursement of funds for testing and record keeping upheld where adequate safeguards available to assure that tests were free of religious instruction); Wolman v. Walter, 433 U.S. 229 (1977) (provision of diagnostic, therapeutic, and remedial services to parochial school children upheld); Board of Educ. v. Allen, 392 U.S. 236 (1968) (loan of secular textbooks to parochial schools upheld); Everson v. Board of Educ., 330 U.S. 1 (1947) (provision of bus transportation of children to and from parochial schools upheld).

The first amendment provides in relevant part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. Const. amend. I. The first amendment applies to the states through the fourteenth amendment. Murdock v. Pennsylvania, 319 U.S. 105, 108 (1943).

4. In 1971, Catholic elementary schools were closing at the rate of 50 per month. F. SORAIUF, THE WALL OF SEPARATION 14 (1976). Several reasons have been advanced to explain the crisis in parochial schools. One major reason has been the decreasing number of priests, nuns, and brothers to staff the schools. In 1970, a majority of the teachers in Catholic elementary schools were lay people; ten years earlier, one third were lay people. Id. at 15. Catholic schools in the older cities have been faced with the problem of deteriorating physical plants and the migration of families to the suburbs. Id. Finally, the general decline in support for organized religion has resulted in a decline in charitable giving to religious schools. Id.


of such tax relief. In 1973, the Court held that tuition tax credits for parents of children attending nonpublic schools violated the establishment clause. In so holding, the Court expressly reserved the issue of the constitutionality of "true" tax deductions. The Eighth and First Circuits, confronting nearly identical tax deduction statutes, reached con-


8. Id. at 790 n.49. The distinction between a tax deduction and a tax credit is that a deduction is a subtraction from gross income, before computation of actual tax liability, while a credit is a reduction of the tax itself, after computation of tax liability. The dollar value of a deduction thus depends on the particular taxpayer's applicable tax rate after deductions are subtracted from gross income (so that the value is greater for higher-bracket than for lower-bracket taxpayers, and worthless to taxpayers who do not itemize their deductions), while a credit has a dollar value which is the same for all taxpayers entitled to use it. See infra notes 80-85 and accompanying text. See generally J. Rabkin & M. Johnson, Federal Income, Gift and Estate Taxation § 1.01(2), (3) (1982).

9. Minn. Stat. § 290.09(22) (1982). The Minnesota statute provides for the following deduction from gross income in computing net income:

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 for 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. (footnote omitted); cf. R.I. Gen. Laws § 44-30-12(c)(2) (1980).

The Rhode Island statute provided a deduction for:

amounts paid to others, not to exceed five hundred dollars ($500) for each dependent in kindergarten through sixth (6th) grade and seven hundred dollars ($700) for each dependent in grades seven (7) through twelve (12) inclusive, for tuition, textbooks, and transportation of each such dependent attending an elementary or secondary school situated in Rhode Island, Massachusetts, Connecticut, Vermont, New Hampshire, or Maine, 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. As used in this section, '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.

Id. The Rhode Island statute was held unconstitutional in Rhode Island Fed'n of Teachers v. Norberg, 630 F.2d 855 (1st Cir. 1980).
trary results on this issue. Last term, in *Mueller v. Allen*, a sharply divided Court held that a Minnesota state income tax deduction for educational expenses did not violate the establishment clause where the deduction was available to all parents, including those whose children attended public schools and those whose children attended private schools. The Court in *Mueller* expressly refused to consider, however, statistical evidence which indicated that, notwithstanding its facial neutrality, the statute primarily benefited the parents of children in parochial schools. The *Mueller* decision marks a significant shift in constitutional doctrine regarding aid to parochial schools and the establishment clause.

The purpose of this Comment is to examine, within the context of the *Mueller* decision, the constitutionality of tax relief for parents of children attending parochial schools. The author first reviews the Minnesota statute and the three-part analysis which the Court purportedly has applied to statutes challenged on establishment clause grounds. The author then examines the *Mueller* decision, showing the minimal scrutiny


12. The vote in *Mueller* was 5-4. Justice Rehnquist wrote the majority opinion, in which Chief Justice Burger and Justices White, Powell, and O'Connor joined. 103 S. Ct. at 3064. Justice Marshall filed a dissenting opinion in which Justices Brennan, Blackmun, and Stevens joined. *Id.* at 3071. Until Justice O'Connor replaced Justice Stewart, the Court generally followed a 3-3-3 split in aid to parochial school cases. G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 1568 (10th ed. 1980). At one extreme, Justices White and Rehnquist, often joined by Chief Justice Burger, have taken the most tolerant position regarding the permissible scope of aid to parochial schools. *Id.* Justice O'Connor's vote in *Mueller* seems to indicate that she has joined this group. At the other extreme, Justices Stevens, Brennan, and Marshall have generally taken a strict separationist position. Justice Stevens has replaced Justice Douglas in this group. These Justices appear to believe the current three-part test permits too much aid to parochial schools. Justices Blackmun, Powell, and Stewart have generally taken a position between the two extremes; these Justices have often differed among themselves regarding the constitutionality of particular aid programs. *Id.*

13. MINN. STAT. § 290.09(22) (1982). For the full text of the Minnesota statute, see *supra* note 9.


15. *See id.* at 3070.

16. The cases discussed in this Comment deal primarily with public aid to primary and secondary rather than higher education. The Supreme Court has generally been more tolerant of efforts to assist higher education. *See, e.g.*, *Widmar v. Vincent*, 454 U.S. 263 (1981) (establishment clause does not preclude use of state university facilities by registered student religious organization); *Roemer v. Board of Pub. Works*, 426 U.S. 736 (1976) (direct grants to church-related colleges to be used only for secular purposes upheld); *Hunt v. McNair*, 413 U.S. 734 (1973) (grants to religious colleges through revenue bonds for construction of buildings used for secular purposes upheld); *Tilton v. Richardson*, 403 U.S. 672 (1971) (grants to religious colleges for construction of buildings used for religious purposes upheld).
the Court applied to the Minnesota statute. The author argues that the tax deduction upheld in\textit{Mueller} is not sufficiently distinguishable from the program of tax credits previously struck down by the Court; that the \textit{Mueller} Court's refusal to look beyond the facial neutrality of the statute creates a troublesome precedent; and that the statute does not provide an adequate guarantee that the state aid derived from public funds will be used for exclusively secular purposes. In conclusion, the author suggests that the Court might have better supported its policy of neutrality toward religion by resting its decision on the "passive effect" rationale previously utilized in upholding tax exemptions for religious institutions.

II. THE CHALLENGED STATUTE

The Minnesota statute at issue in \textit{Mueller} provides an income tax deduction for a variety of educational expenses incurred by parents of elementary and secondary school students.\footnote{MINN. STAT. \textsection 290.09(22) (1982) (set out in full at \textit{supra} note 9).} The statute provides that deductions can be claimed for expenditures made in conjunction with all schools which enable a Minnesota resident to fulfill state compulsory attendance laws.\footnote{Id.} The statute allows deductions of up to $700 per year.\footnote{Id.} Deductions can be claimed for tuition,\footnote{Id.} textbooks,\footnote{Id.} and transporta-

\begin{itemize}
\item Tuition in the ordinary sense.
\item Tuition to public school students who attend public schools outside their residence school districts.
\item Certain summer school tuition.
\item Tuition charged by a school for slow learner private tutoring services.
\item Tuition for instruction provided by an elementary or secondary school to students who are physically unable to attend classes at such school.
\item 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.
\item Montessori School tuition for grades K through 12.
\item Tuition for driver education when it is part of the school curriculum.
\end{itemize}

514 F. Supp. at 1000. Both the Eighth Circuit and the Supreme Court accepted this finding. See 676 F.2d at 1196; 103 S. Ct. at 3065 n.2.

\begin{itemize}
\item Cost of tennis shoes and sweatsuits for physical education.
\item Camera rental fees paid to the school for photography classes.
\item Ice skate rental fee paid to the school.
\item Rental fee paid to the school for calculators for mathematics classes.
\item Costs of home economics materials needed to meet minimum requirements.
\item Costs of special wood or metal needed to meet minimum requirements of shop classes.
\end{itemize}

21. MINN. STAT. \textsection 290.02(22) (1982). The district court in \textit{Mueller} found that the statutory deduction for "textbooks" included not only "secular textbooks" but also:
tion expenditures. Expressly excluded are expenditures for books used in courses not taught in public schools or whose purpose is to teach or inculcate religious doctrines. The law is thus neutral on its face—its benefits are available to all parents of school-age children, including those whose children attend public schools.

The plaintiffs in *Mueller* challenged the statute’s constitutionality,
despite its facial neutrality, because the most substantial monetary benefits afforded by the statute flow almost exclusively to the parents of children in private schools charging tuition.\textsuperscript{25} Tuition is the single largest deductible expense allowed by the statute.\textsuperscript{26} Since Minnesota public schools are generally prohibited by law from charging tuition,\textsuperscript{27} the parents of public school children are unable to claim the full tax benefit allowed to parents of children in private schools.

III. \textbf{THE ESTABLISHMENT CLAUSE AND AID TO PAROCHIAL SCHOOLS}

The issue of state aid to parochial schools\textsuperscript{28} has generated strong emo-
Underlying the Court's constitutional deliberations in this area are serious issues of educational policy. It is generally undisputed that parochial schools provide quality education to a large percentage of school children at little or no cost to the taxpayer. Parochial schools also provide educational and cultural diversity, ends desirable in themselves. Those who support state aid to parochial schools have argued

the school can inculcate all needed temporal knowledge and also maintain a strict and lofty neutrality as to religion.

Id. at 23-24 (footnote omitted). Justice Douglas had a more idealistic view of the public schools: "The public school was the true melting pot . . . . The youngsters who came to maturity through our public school system lost their racial identity and became plain Americans, standing on their merits before their fellow men, and winning or losing according to their abilities." W. DOUGLAS, WE THE JUDGES 18-19 (1956).

29. The Catholic Church's efforts to create parochial schools intensified anti-Catholic prejudices which were prevalent in the late nineteenth and early twentieth centuries. See R. MILLER & R. FLOWERS, supra note 28, at 423. During and just after World War I, these prejudices, combined with nationalism, gave rise to a movement to abolish parochial schools in America. Id. The Supreme Court upheld the right of parochial schools to exist in Pierce v. Society of Sisters, 268 U.S. 510 (1925). Pierce involved an Oregon law requiring all children, with limited exceptions, to attend only public schools. The law was enacted by popular petition and referendum, following a campaign organized by the Ku Klux Klan and Scottish Rite Masons. See L. PFaffer, supra note 28, at 515; Note, supra note 28, at 797 n.21. The purpose of the act was to eliminate parochial and private schools. L. PFaffer, supra note 28, at 515. The Court struck down the statute on the ground of substantive due process, recognizing the statute's interference with the economic interests of the schools. See Pierce, 268 U.S. at 535-36. At the time the case was decided, the Court had not yet incorporated the first amendment into the fourteenth amendment as a restraint on state action. The first amendment was made applicable to the states through the fourteenth amendment in Murdock v. Pennsylvania, 319 U.S. 105, 108 (1943). See supra note 3.


31. Id. at 764; Pierce v. Society of Sisters, 268 U.S. at 535 ("The fundamental theory of liberty upon which all governments in this union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only."); Haskell, The Prospects for Public Aid to Parochial Schools, 56 MINN. L. REV. 159 (1971).

Perhaps the most compelling argument in opposition to state aid to parochial schools is that such aid endangers the cultural and religious independence which these schools have enjoyed in the past. If government aid is conditioned on a showing of the secular nature of the school, a strong incentive is provided for the school to become more secular.

Note, Government Neutrality and Separation of Church and State: Tuition Tax Credits, 92 HARV. L. REV. 696, 703 (1979). The danger of government influence over the institutional decisions of religious schools becomes serious if the schools are dependent on government assistance. Id.

The transformation of Fordham University in New York from a Jesuit university to an essentially nonsectarian institution provides a dramatic example of how government aid can encourage religious schools to compromise their religious mission. The state of New York adopted an aid program providing aid to religiously affiliated colleges, if they were found to be essentially nonsectarian. See N.Y. EDUC. LAW § 6401(2)(d) (McKinney Supp. 1978-1979). Aid could be granted on the basis of responses to a questionnaire sent out by the Commissioner of Education. The questionnaire sought information regarding
that it is wholly acceptable for the state to contribute to the secular education of children attending these schools. These children, they argue, have a right to a free education in the public schools, and the state relieved of the burden of educating them, should contribute to the cost of their education elsewhere. 32 Those who oppose such aid have argued that parochial schools are culturally divisive, isolating their students from exposure to members of different ethnic and religious groups. 33 The foremost argument in opposition to state aid to parochial education is that any such aid, no matter how indirect or slight, constitutes an establishment of religion in violation of the first amendment. 34 It was this constitutional argument that the Court confronted in Mueller v. Allen. 35

The establishment and free exercise clauses of the first amendment seek to protect religious belief and practice from the influence of the state. The free exercise clause protects the individual's right, in matters of religion, to "choose his own course . . . free of any compulsion from the state." 36 The establishment clause is intended to preclude the

the "stated purposes of the school; the amount of financial assistance received from sponsoring churches; religious considerations in the selection of the governing board, faculty, officers and students; the manner of teaching religion; the nature of any college connection with a religious seminary; and the types of degrees awarded by the school." Note, supra, at 704 n.47 (citations omitted). Fordham University was initially denied aid, and made major changes to convince state officials that it was no longer a sectarian institution. Id. at 704. "Fordham lessened Jesuit control of the governing board and the presidency of the university; the rectorship of the Jesuit Community was split from the university, and university facilities were made available to groups on a more denominationally neutral basis . . . ." Id. at 704 n.51 (citations omitted). In 1970, Fordham received a $100,000 grant from New York. Id. at 705 n.52. Many other institutions made the necessary changes in order to receive government funds; state officials expressed surprise at the number of changes that took place in religious colleges during this period. See id. at 704-05. Programs similar to the New York program were upheld in several states. See, e.g., Clayton v. Kervick, 59 N.J. 583, 285 A.2d 11 (1971); Miller v. Ayers, 214 Va. 171, 198 S.E.2d 634 (1973); Weiss v. Bruno, 82 Wash. 2d 199, 509 P.2d 973 (1973). See generally Smith, Emerging Consequences of Financing Private Colleges with Public Money, 9 VAL. U.L. REV. 561 (1975).

In Tilton v. Richardson, 403 U.S. 672 (1971), the Supreme Court held that the federal government could constitutionally give construction aid to all private colleges, except religiously affiliated schools where "religious indoctrination" is a "substantial purpose or activity." Id. at 687. The Tilton Court listed factors that distinguished colleges that could constitutionally be subsidized from those that could not: the extent of religious discrimination in admission and faculty appointments, the existence of mandatory religious observances, the nature—academic or doctrinal—of the college's theology department, and the school's policy on academic freedom. See id. at 686-87. Lower courts have also developed standards to determine the degree of religious permeation of a college. See, e.g., Americans United for Separation of Church & State v. Bubb, 379 F. Supp. 872, 892-93 (D. Kan. 1974); Horace Mann League v. Board of Pub. Works, 242 Md. 645, 672, 220 A.2d 51, 65-66, cert. denied, 385 U.S. 97 (1966).

32. See, e.g., Nyquist, 413 U.S. at 814-15 (White, J., dissenting).
33. See L. Pfeffer, supra note 28, at 514, 524-25.
34. See id. at 524.
“sponsorship, financial support and active involvement of the sovereign in religious activity.” 37 Both clauses are drawn in absolute terms and when either is carried to its logical extreme it conflicts with the other. 38 The Court has therefore attempted to steer a course between the two clauses by adopting a policy of neutrality toward religion, stating that 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.” 39

In carrying out this policy of neutrality, the Court has conceded that “[c]andor compels acknowledgment . . . that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law.” 40 Consequently, the Court has adopted a case-by-case approach, stating that the wall of separation between church and state is “a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.” 41 Thus, although neutrality can be infringed upon by minor encroachments, 42 there remains room for the kind of “play in the joints” 43 that will promote the general policy of neutrality.

The Mueller Court applied a three-part analysis developed in past cases for determining the constitutionality of statutes under the establishment clause. 44 To withstand constitutional scrutiny, a challenged enactment first must have a secular legislative purpose. 45 Second, it must have a primary effect which neither advances nor inhibits religion. 46 Third, the end result must not be an excessive government entanglement with religion. 47

In cases involving aid to parochial schools, the Court has generally had little trouble finding a valid secular purpose before addressing the re-

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38. Id. at 668-69.
41. Id. at 614.
42. See Schempp, 374 U.S. at 222.
43. Walz, 397 U.S. at 669.
45. Id. The “secular purpose” and “primary effect” tests first appeared in Abington School Dist. v. Schempp, 374 U.S. 203, 222 (1963), a case involving prayer in public schools.
46. Lemon, 403 U.S. at 612; see supra note 45.
47. 403 U.S. at 613. The “excessive entanglement” test was first set forth in Walz v. Tax Comm'n, 397 U.S. 664, 676 (1970), a case involving state property tax exemptions for religious institutions.
The pattern reflects, in part, the Court’s reluctance to attribute unconstitutional motives to state legislatures. The “primary effect” test has emerged as the most important prong of the three-part test. The Court has relied on the “primary effect” test in the majority of cases in which it has ruled aid programs unconstitutional. Until the Mueller decision, the Court had increasingly declined to determine whether the effect of advancing religion in a particular case was “primary” or “secondary.” Although the Court retained the “primary effect” label, the test actually applied was whether an effect of aiding religion was direct and immediate, or remote, indirect, and incidental. This standard effectively compelled a more intensive scrutiny and was closer to an “any effect” test than a “primary effect” test.

48. See, e.g., Wolman v. Walter, 433 U.S. 229, 236 (1977) (“In the present case we have no difficulty with the first prong of this three-part test. We are satisfied that the challenged statute reflects Ohio’s legitimate interest in protecting the health of its youth and in providing a fertile educational environment for all the schoolchildren of the State.” (footnote omitted)); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 773 (1973) (“As the recitation of legislative purposes appended to New York’s law indicates, each measure is adequately supported by legitimate interests.”); Lemon v. Kurtzman, 403 U.S. 602, 613 (1971) (“The statutes themselves clearly state that they are intended to enhance the quality of secular education in all schools covered by the compulsory attendance laws. There is no reason to believe the legislatures meant anything else.”); see also Mueller v. Allen, 676 F.2d 1195, 1198 (8th Cir. 1982), aff’d, 103 S. Ct. 3062 (1983) (“The manifest purpose of the challenged statute is to provide all taxpayers a benefit which will operate to enhance the quality of education in both public and private schools.”). The Supreme Court in Mueller also had little trouble with the “secular purpose” test. See infra notes 67-68 and accompanying text.

49. See Mueller, 103 S. Ct. at 3066.


51. See Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 783 n.39 (1973). In Nyquist, the Court stated that “we do not think that such metaphysical judgments are either possible or necessary.” Id. at 783 n.39; see also L. Tribe, American Constitutional Law § 14-9 (1978).

52. See 413 U.S. at 783 n.39; L. Tribe, supra note 51, § 14-9.

53. See Nyquist, 413 U.S. 756, 783 n.39 (1973). The Nyquist Court stated, “Our cases simply do not support the notion that a law found to have a ‘primary’ effect to promote some legitimate end . . . is immune from further examination to ascertain whether it also has the direct and immediate effect of advancing religion.” Id. at 783 n.39. In Nyquist, the Court struck down a New York program of aid to nonpublic schools. Justice White maintained in his dissent that “the test is one of ‘primary’ effect not any effect.” Id. at 823 (White, J., dissenting). The Minnesota Supreme Court echoed Justice White’s argument when it reluctantly followed Nyquist and struck down Minnesota’s tuition tax credit provision. Minnesota Civil Liberties Union v. State, 302 Minn. 216, 232-33, 224 N.W.2d 344, 353 (1974), cert. denied, 421 U.S. 988 (1975). The Minnesota Supreme Court stated that
The Court has set forth few definitive guidelines for applying the "primary effect" test. Nevertheless, it has considered several factors in determining whether challenged statutes violate this test. These factors include the breadth of the class benefited by the statute; the degree to which any benefit provided by the statute is "passive," or an affirmative grant of aid; and whether the benefits flow to individuals or directly to religious institutions.

The "excessive entanglement" test embodies the beliefs that "a union of government and religion tends to destroy government and degrade religion," and that government and religion can best achieve their aims and maintain their integrity when they do not "interfere excessively with one another's respective spheres of choice and influence." The

"in applying the primary effects test, we must be guided by the realization . . . that this is no longer a primary effects test, but an 'any effects' test." Id.

54. See Mueller v. Allen, 103 S. Ct. 3062, 3068-69 (1983); Board of Educ. v. Allen, 392 U.S. 236, 242-43 (1968); Everson v. Board of Educ., 330 U.S. 1, 16-18 (1947). In these cases, the fact that the benefited class included parents of children in both public and private schools was central to the Court's upholding the statutes. In Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973), on the other hand, the Court distinguished Allen and Everson on the ground that parents of public school children were excluded from the class of beneficiaries under the statute. Id. at 782 n.38; see also Sloan v. Lemon, 413 U.S. 825, 832 (1973) (tuition reimbursement scheme held unconstitutional where "[t]he State has singled out a class of its citizens for a special economic benefit"). In Mueller, the Court distinguished Nyquist on this basis. See infra notes 75-79 and accompanying text.


56. See, e.g., Meek v. Pittenger, 421 U.S. 349, 371 n.21 (1975) (general welfare services may be provided to children regardless of any incidental benefit that may accrue to parochial school); Board of Educ. v. Allen, 392 U.S. 236, 243-45 (loan of secular textbooks to parochial school children directly benefits children and their parents, not schools); Everson v. Board of Educ., 330 U.S. 1, 18 (1947) (statute providing free bus transportation to parochial school students aids parents in getting children safely to school, and does not aid school itself). But see Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 781 (1973) ("the fact that aid is disbursed to parents rather than to the schools is only one among many factors to be considered").

The Court in Mueller held that constitutional objections to the Minnesota tax deduction statute were reduced by the fact that the financial assistance was made available to individual parents and not directly to the schools. See 103 S. Ct. at 3069; infra notes 86-87 and accompanying text.


58. L. Tribe, supra note 51, § 14-12. Some Justices have criticized the "excessive entanglement" test as an unnecessary restatement of the "primary effect" test. In Roemer v. Board of Pub. Works, 426 U.S. 736, 768 (1976), Justice White, joined by Justice Rehnquist, attacked the entanglement test as "superfluous," stating: "as long as there is a secular legislative purpose, and as long as the primary effect . . . is neither to advance nor inhibit religion, I see no reason . . . to take the constitutional inquiry further." Id. (White, J., concurring); see also Lemon v. Kurtzman, 403 U.S. 602, 665-66 (White, J., concurring in part and dissenting in part).
Supreme Court has identified two forms of impermissible entanglement of church and state: administrative and political. The concept of excessive administrative entanglement focuses on the problem of government intrusion into the religious sphere. Regarding aid to parochial schools, the Court has held that administrative entanglement can take the form of continuing government surveillance of the expenditure of public funds by the schools. In a 1971 case, the Court relied on this test and ruled two aid programs unconstitutional, finding that such surveillance would inevitably be necessary to ensure that funds were not spent for religious purposes.

The concept of excessive political entanglement reflects the Jeffersonian fears of religious interference with secular politics and of political division along religious lines. While the free exercise clause requires that religious groups remain free to take ideological positions on public issues, the Court has indicated that, under the establishment clause, the role of organized religion must be more limited when it seeks to use the political forum to obtain political and economic resources for its own ends. Thus, the Court has held that where a statute creates a serious potential for repeated political confrontation between supporters and opponents of aid to parochial schools, it violates the establishment clause. Political division along religious lines, the Court has observed, is "one of the principal evils against which the Establishment Clause was intended to protect."

59. See L. Tribe, supra note 51, § 14-12.
60. See id.
62. See id. In Lemon, the Court struck down a Rhode Island statute which provided a fifteen percent supplement to the salaries of teachers of secular subjects in nonpublic schools, and a Pennsylvania statute which authorized the "purchase" by the state of "secular educational services" from nonpublic schools. The Court held that enforcement of the Rhode Island statute, which required that the teachers being reimbursed teach only secular subjects, would involve an impermissible entanglement between Church and State: "A comprehensive, discriminating and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed . . . . Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal belief . . . ." Id. at 619. The Court also found excessive entanglement in the requirement that the government examine the schools' records to determine how much of the total expenditures are spent on secular education and how much on religious activity. Id. at 620. The Court held that the Pennsylvania statute fostered excessive entanglement for the same reasons. Id. at 620-21.
63. See L. Tribe, supra note 51, § 14-12.
64. See id.
IV. THE MUELLER DECISION

The Supreme Court in Mueller, as in past cases, had no difficulty with the “secular purpose” aspect of the three-part establishment clause test. Justice Rehnquist, writing for the majority, stated that the Minnesota statute “plainly serves [the] secular purpose of ensuring that the state’s citizenry is well-educated.” The majority held that Minnesota could validly conclude “that there is a strong public interest in assuring the continued financial health of private schools,” because private schools educate a substantial number of students at no cost to the taxpayer and in addition “may serve as a benchmark [of quality] for public schools.”

The Mueller decision reaffirms the precedence of the “primary effect” test over the other two prongs of the three-part test, but simultaneously allows minimal scrutiny of challenged statutes under the test where the statutes are facially neutral. The plaintiffs in Mueller relied mainly on the “primary effect” test in challenging the Minnesota tax deduction. They argued that, although the statute on its face provided a deduction for expenses related to both public and nonpublic education, the overwhelming effect of the law was to aid taxpayers with dependents in sectarian schools. In support of this contention, the plaintiffs offered statistical evidence indicating that only four percent of the students attending Minnesota private schools in 1978-79 attended non-sectarian schools. Therefore, they argued, the primary effect of the statute was

67. See supra note 48 and accompanying text.
68. 103 S. Ct. at 3066-67. The district court and the Eighth Circuit also dealt rather summarily with the plaintiffs’ argument in Mueller that the challenged statute did not satisfy the “secular purpose” test. The defendants argued that the statute had the secular purpose of assisting Minnesota taxpayers in “providing dependents with a safe, effective and valid educational environment.” Mueller, 514 F. Supp. at 1001. The district court relied on Lemon v. Kurtzman, 403 U.S. 602, 613 (1971), holding such a legislative purpose presumptively valid, and found that the plaintiffs had not indicated any circumstances to rebut the presumption. 514 F. Supp. at 1007. The Eighth Circuit concurred. 676 F.2d at 1198.
69. 103 S. Ct. at 3067.
70. Id.
72. 103 S. Ct. at 3069-70.
73. Id. at 3070. The defendants in Mueller argued that the plaintiffs’ statistical argument contained serious omissions and faulty assumptions. According to the defendants, the plaintiffs incorrectly assumed that only full-time tuition payments were deductible, and failed to account for deductions available for such items as summer school tuition, driver’s education tuition, textbooks, and transportation expenses at public and non-sectarian private schools. Brief for Respondent at 16.

The district court agreed with the defendants, finding that the plaintiffs’ statistical analysis “lack[ed] credibility by reason of omissions of serious significance.” 514 F. Supp. at 1003. The Eighth Circuit also rejected the plaintiffs’ statistical argument, finding that the statute created “substantial benefits flowing to all members of the public.” 676 F.2d at
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the support and advancement of religion. The Supreme Court rejected the plaintiffs’ argument, holding that “a program, like [the Minnesota statute] that neutrally provides state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause.” The majority held that the statute’s facial neutrality was sufficient to meet the requirements of the establishment clause, and that the plaintiffs’ statistical analysis was constitutionally irrelevant. In the Court’s words: “We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law.” Thus, the Court distinguished Committee for Public Education and Religious Liberty v. Nyquist, the 1973 case in which the Court invalidated a New York statute providing tuition grants and tax credits only for the parents of parochial school children. The

1205. Because the Supreme Court held the statistical evidence constitutionally irrelevant, it did not reach the questions of its credibility. 103 S. Ct. at 3070. Justice Marshall pointed out in his dissent, however, that in the 1978-79 school year, 90,000 students were enrolled in nonpublic schools charging tuition, and that over 95% of those students attended sectarian schools. Id. at 3072 (Marshall, J., dissenting).

74. 103 S. Ct. at 3069-70.
75. Id. at 3069.
76. Id. at 3070. In Rhode Island Fed’n of Teachers v. Norberg, 630 F.2d 855 (1st Cir. 1980), a similar statistical argument was central to the court’s holding that a Rhode Island state tax deduction, almost identical to the Minnesota statute upheld in Mueller, was unconstitutional. Id. at 859-60; see supra notes 9-10 and accompanying text. The district court in Norberg found that the fact that the deduction was available to parents of children in both public and private schools was “mere window dressing” where the overwhelming majority of taxpayers eligible for the deduction sent their children to parochial schools. 479 F. Supp. 1364, 1371 (D.R.I. 1979).

77. 413 U.S. 756 (1973).
78. Id. The statute struck down in Nyquist provided three financial aid programs for nonpublic elementary and secondary schools. The first program provided direct money grants to “qualifying” nonpublic schools to be sued for “maintenance and repair” of facilities and equipment to ensure the students’ “health, welfare and safety.” A “qualifying” school was a nonpublic, non-profit elementary or secondary school serving a high concentration of students from low-income families. Id. at 762-63. The second program established a tuition reimbursement plan for parents of children attending nonpublic elementary or secondary schools. To qualify, a parent’s annual taxable income had to be less than $5,000. Id. at 764. The third program was designed to give tax relief to parents failing to qualify for tuition reimbursement. Each eligible parent was entitled to deduct a stipulated sum from his adjusted gross income for each child attending a nonpublic school. The amount of deduction was unrelated to the amount of tuition actually paid and decreased as the amount of taxable income increased. Id. at 765-66.

The Court held in Nyquist that each of the programs had a valid secular purpose. Id. at 773. The Court found all of the programs invalid, however, because they had the primary effect of advancing the religious activities of the parochial schools. The Court held that the maintenance and repair program inevitably had the effect of subsidizing religious activity, because no attempt was made to restrict payments to those expenditures related to the upkeep of facilities used exclusively for secular purposes. Id. at 774. The tuition reimbursement plan also failed the “primary effect” test because, as the Court
Court in *Nyquist* found crucial the fact that the tax benefits authorized by the New York law were made available only to the parents of children in nonpublic schools.\(^7\) The majority in *Mueller* distinguished the Minnesota statute from the statute struck down in *Nyquist* in another respect: the Minnesota statute was a "genuine tax deduction," whereas the New York statute, while stated, "in the absence of an effective means of guaranteeing that the state aid derived from public funds will be used exclusively for secular, neutral and nonideological purposes, it is clear from our cases that direct aid in whatever form is invalid." *Id.* at 780. The Court found no significant difference between the third program, which provided tax credits to middle-income parents, and the tuition reimbursement program. *Id.* at 790-91. The Court held the tax credit invalid, stating that "neither form of aid is sufficiently restricted to assure that it will not have the impermissible effect of advancing the sectarian activities of religious schools." *Id.* at 794. Because the Court held that the challenged statute had the primary effect of advancing religion, it did not reach the "excessive entanglement" test. *Id.* The Court noted in dictum, however, that government aid of this type carries grave potential for creating political divisions along religious lines. *Id.*

On the same day that the Court decided *Nyquist*, it decided *Sloan* v. *Lemon*, 413 U.S. 825 (1973). *Sloan* involved a Pennsylvania tuition reimbursement law enacted after the previous Pennsylvania aid to nonpublic schools program was struck down in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). The tuition reimbursement program in *Sloan* was similar to the New York program struck down in *Nyquist* except that reimbursements were authorized for all parents regardless of their income level. The State argued in *Sloan* that the tuition reimbursement program clearly would not be unconstitutional if it applied only to parents of children in nonsectarian private schools and that by extending it to the parents of children in sectarian schools, Pennsylvania was affording all private school parents the equal protection of the laws. 413 U.S. at 834. The Supreme Court rejected this argument, holding that there was no "constitutionally significant difference" between the primary effect of the Pennsylvania program and the New York program struck down in *Nyquist*. *Id.*

The Minnesota Supreme Court followed the *Nyquist* decision when it reluctantly struck down Minnesota's tax credit provision in *Minnesota Civil Liberties Union v. State*, 302 Minn. 216, 224 N.W.2d 344 (1974), cert. denied, 421 U.S. 988 (1975). The challenged provision provided that tax credits could be claimed by the parents of children in private kindergarten, elementary, and secondary schools. M.N. STAT. § 290.086(3) repealed by Act of March 31, 1980, ch. 419, § 46, 1980 Minn. Laws 159, 196. The maximum available credits were $50.00 per year for a kindergarten student, $100.00 for an elementary school student, and $140.00 for a secondary school student. *Id.* The Minnesota Supreme Court stated, "In applying the 'primary effects test,' we must be guided by the realization . . . that this is no longer a primary effects test, but an 'any effects' test." 302 Minn. at 232. 224 N.W.2d at 353. The court further stated that: "The majority opinion in *Nyquist* disregarding the balancing of *Walz* and related cases has chartered a new course, giving clear preference to the Establishment Clause . . . of the First Amendment." *Id.* at 233, 224 N.W.2d at 353. Justice Yetka, concurring specially, stated that:

The strict scrutiny that legislation, such as that struck down today, must undergo appears far beyond the degree of protection necessary to insure that our nation will be free from a 'state religion' or religious persecution of its citizens. Rather, our legislature appears now to be barred from making any reasonable effort to assure that nonpublic education will survive except for the very wealthy. However, the highest court in our land has spoken, and this court and our legislature must adhere to its word. *Id.* at 236, 224 N.W.2d at 354-55.

79. 413 U.S. at 782 n.38; see *Mueller*, 103 S. Ct. at 3067.
nominally a deduction, was in effect a tax credit. Under the New York law, the amount of the deduction was unrelated to the amount of tuition actually paid, but decreased as the amount of taxable income increased. Low-income parents were eligible for outright tuition grants. The Nyquist Court noted that the benefits afforded by the New York law did not take the form of ordinary tax benefits and expressed doubt that they could be regarded as part of a genuine system of tax laws. Under the Minnesota law, on the other hand, the amount of the benefit was directly related to the amount of the expenditure. The majority in Mueller found this fact to be "of some relevance . . . considering the traditional rule of deference accorded legislative classifications in tax statutes."

The Court considered two other factors in holding that the Minnesota statute met the "primary effect" test. First, the Court held that establishment clause objections were reduced because the financial assistance, in the form of tax deductions, was made available to the parents and not directly to the schools. Thus, the Court reasoned, aid to parochial schools was available "only as a result of numerous, private choices of individual parents," and "no 'imprimatur of State approval' [could] be deemed to have been conferred on any particular religion, or on religion

80. 103 S. Ct. at 3067 n.6; Nyquist, 413 U.S. at 766-67.
81. 413 U.S. at 765-67.
82. Id. at 764-65.
83. Id. at 792.
84. See 103 S. Ct. at 3065 (construing MINN. STAT. § 290.09(22) (1982)).
85. Id. at 3068 n.6. In Nyquist, the Court made clear that its decision did not turn on this distinction between tax credits and tax deductions, stating that "the constitutionality of this hybrid benefit does not turn in any event on the label we accord it." 413 U.S. at 789.

The Eighth Circuit in Mueller distinguished the statute struck down in Nyquist from the Minnesota statute on this basis. 676 F.2d at 1203. The First Circuit in Norberg, on the other hand, found the distinction unimportant, concluding that under the Rhode Island deduction, R.I. GEN. LAWS § 44-30-12(c)(2) (1980), a tax benefit would result for any parent who owed federal income tax and paid tuition at a qualifying private school. Norberg, 630 F.2d at 859. Rhode Island taxpayers' state income tax liability is directly related to a percentage of federal income tax. The amount of tax benefit from the challenged deduction depended on the amount of the deduction and the federal income tax bracket. The Norberg court concluded that eligible taxpayers in Rhode Island would receive an annual tax benefit of $33 from the deduction. Id. Thus, the First Circuit concluded, the deduction "would confer a tax benefit along nearly solid sectarian lines." Id. at 860. Under the Minnesota statute, on the other hand, the state income tax is not related to the federal income tax and whether a parent obtains a tax benefit depends on whether the deduction is sufficient to move the taxpayer from a higher tax bracket to a lower one. Mueller, 676 F.2d at 1204; MINN. STAT. § 290.02(22) (1982). The Eighth Circuit concluded: "Unlike the statute in Nyquist, there is within the Minnesota statute 'no legislative attempt to assure that each family would receive a carefully estimated net benefit.'" 676 F.2d at 1204.

86. 103 S. Ct. at 3069.
generally." Second, the Court found the benefit to parochial schools insubstantial and attenuated in light of the evils against which the establishment clause was designed to protect.  

Mueller reaffirms the secondary role now played by the "excessive entanglement" test in establishment clause cases. The Court stated that the only plausible source of entanglement lay in the requirement that state officials determine whether particular textbooks qualify for a deduction. The statute expressly disallows deductions for the cost of books and instructional materials whose purpose is "to inculcate [religious] tenets, doctrines or worship." The majority held that this provision of the challenged statute was controlled by the Court's prior decision in Board of Education v. Allen. In Allen, the Court upheld the loan of secular textbooks to parents of children attending nonpublic schools. The requirement that state officials determine whether particular books were secular, however, was not considered by the Court in Allen.  

87. Id. (citation omitted).  
88. Id.  
89. See supra note 58.  
90. The Court noted that no party to the Mueller litigation had argued that the Minnesota statute ran afoul of the "political entanglement" test set forth in Lemon v. Kurtzman, 403 U.S. at 622. Mueller, 103 S. Ct. at 3071 n.11; see supra notes 62-65 and accompanying text. The Court in Mueller held that the "political divisiveness" language of Lemon "must be regarded as confined to cases where direct financial subsidies are paid to parochial schools or to teachers in parochial schools." 103 S. Ct. at 3071 n.11.  
91. MINN. STAT. § 290.09(22) (1982); see supra note 9.  
93. Id.  
94. Id. The "excessive entanglement" test had not yet emerged at the time Allen was decided. The test first appeared in Walz v. Tax Comm'n, 397 U.S. 664, 676 (1970).  

The dissenters in Mueller argued that the deduction for textbooks and other instructional materials violated the establishment clause. 103 S. Ct. at 3076-77 (Marshall, J., dissenting). Although the Court had upheld the loan of secular textbooks to parochial schools in Allen, 392 U.S. at 236, the dissenters in Mueller argued that even the use of wholly secular, non-ideological books and materials contributes to the religious mission of parochial schools, because the process of secular education is so permeated with religion at these schools. Id. at 3077. Justice Douglas relied on this "permeation" argument in his dissent in Allen. See 392 U.S. at 254-66 (Douglas, J., dissenting). Justice Douglas stated:

[T]he statutory system provides that the parochial school will ask for the books it wants. Can there be the slightest doubt that the head of the parochial school will select the book or books that best promote its sectarian creed? . . . The textbook goes to the very heart of education in a parochial school. It is the chief, although not solitary, instrumentality for propagating a particular religious creed or faith. Id. at 256-57 (Douglas, J., dissenting).

The argument is not universally accepted. According to one author, "Catholic educators . . . as a whole, do not favor textbooks in which dabs of spurious religion serve only to distort the essential subject matter . . . ." Choper, The Establishment Clause and Aid to Parochial Schools, 56 Calif. L. Rev. 260, 291-95 (1968) (quoting Ball, Federal Aid--1964, 61 Nat'l Catholic Educ. Ass'n Bull. 228, 229 (1968)); see also Board of Educ. v. Allen, 392 U.S. 236, 245 (1968) ("[T]his Court has long recognized that religious schools pursue
V. Analysis

The majority opinion in *Mueller* is troublesome for several reasons. First, the Minnesota tax deduction is not sufficiently distinguishable from the program struck down in *Nyquist* to justify the *Mueller* holding. The distinction between the New York tax credit program and the Minnesota tax deduction was, as Justice Marshall stated in his dissent, “a distinction without a difference”; in both cases taxpayers in general were required to pay for the cost of parochial education, and the state provided a financial incentive for parents to send their children to parochial schools. The only real difference between the two programs was that the New York program provided aid only to the parents of children in private schools, whereas the Minnesota statute allowed the parents of children in both public and nonpublic schools to deduct the expenses of their children’s education. As the dissenters pointed out, however, the most substantial benefit provided by the statute—the tuition deduction—is simply not available to parents who send their children to public schools. It is unlikely, as Justice Marshall stated, “that [these parents] will buy $700 worth of pencils, notebooks, and bus rides for their school-age children.”

The majority’s refusal to look beyond the facial neutrality of the statute is the most questionable aspect of the *Mueller* decision. Justice Marshall pointed out that in previous aid to parochial schools cases the Court based its decisions on the actual effect of the challenged statute. The State’s interest in education would be served sufficiently by reliance on the secular teaching that accompanied religious training in [religious] schools”). But see *Everson v. Board of Educ.*, 330 U.S. 1, 47 (1947) ( Rutledge, J., dissenting); *Note, supra* note 31, at 700 n.29; *Note, Aid to Parochial Schools: Income Tax Credits*, 56 MINN. L. REV. 189, 201 (1971); *Pope Leo XIII, Militantis Ecclesiae (1897); Pope Pius XI, Rappresentanti in Terra (1929) (both arguing that every subject taught in Catholic schools be “permeated with Christian piety”).

95. 103 S. Ct. at 3075.

96. See *id.* at 3076 (Marshall, J., dissenting).

97. See *supra* notes 78-79 and accompanying text.

98. *Minn. Stat.* § 290.09(22) (1982); see *supra* notes 18-23 and accompanying text.

99. 103 S. Ct. at 3076 (Marshall, J., dissenting).

100. *Id.* at 3074.

101. *Id.* Justice Marshall pointed out that in *Nyquist*, 413 U.S. at 756, and in *Sloan v. Lemon*, 413 U.S. 825 (1973), the Court had in fact made the kind of factual inquiry that the majority in *Mueller* refused to enter into. 103 S. Ct. at 3074 (Marshall, J., dissenting).

In *Nyquist*, the Court emphasized that “virtually all” of the schools receiving direct grants were Roman Catholic schools, 413 U.S. at 774; that reimbursements were given to parents “who send their children to nonpublic schools, the bulk of which is concededly sectarian in orientation,” *id.* at 780, that it is “precisely the function of New York’s law to provide assistance to private schools, the great majority of which are sectarian,” *id.* at 783; and that “tax reductions authorized by this law flow primarily to the parents of children attending sectarian, nonpublic schools.” *Id.* at 794.

In *Sloan v. Lemon*, 413 U.S. at 830, the Court considered the fact that “more than 90% of the children attending nonpublic schools in the Commonwealth of Pennsylvania...
Mueller holding apparently enables states to channel as much aid as they wish to the parents of children in parochial schools with one qualification: the aid must be available at least nominally to the parents of public school children. This would be true regardless of how great the deductible expenses of parents of parochial school children, or how nominal the expenses of parents of public school children were. The Court effectively has declared that it will no longer consider the "primary effect" of an aid program if some minimal benefit is available to the parents of children attending public schools.

Finally, the Minnesota statute does not provide an adequate guarantee that the state aid derived from public funds will be used for exclusively secular purposes and not to further the religious missions of parochial schools. Past Supreme Court cases strongly indicate that, in the absence of such a guarantee or restriction, state aid is invalid. In this respect, the Mueller decision represents a significant departure from precedent.

The majority in Mueller chose not to overrule Nyquist, but instead rested its decision on a rather narrow distinction of that case. The result is two sharply inconsistent decisions regarding the constitutionality of tax relief for the parents of children attending parochial schools.

The Mueller majority could have rested its decision on sounder constitutional principle by relying on the "passive effect" rationale utilized by the Court in Walz v. Tax Commission. In Walz, a New York property tax exemption for religious institutions was held constitutional. The Court in Walz observed that, although tax exemptions give an indirect economic benefit to churches, they give rise to a lesser government entanglement with religion than would taxation, with its attendant problems of valuation of church property, liens, foreclosures, and other confronta-
tions and conflicts. In *Nyquist*, on the other hand, an affirmative tax benefit scheme was held unconstitutional.

The majority in *Mueller* could have held that the Minnesota deduction is more analogous to the passive abstention from taxation upheld in *Walz* than to the affirmative grant of aid struck down in *Nyquist*. In *Nyquist*, the Court found that the tax benefit was unrelated to the amount of tuition actually paid. In contrast, the Minnesota statute challenged in *Mueller* provides deductions based only on actual expenditures and involves no affirmative payment or grant.

### VI. Conclusion

There can be little doubt that parochial schools in America have made significant contributions to the communities in which they operate and to the nation as a whole. As Justice Powell stated in a previous opinion, "Parochial 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 relieve substantially the tax burden incident to the operation of public schools."

Notwithstanding these contributions, however, our nation was established on the premise that government support of religion, however slight, indirect or attenuated, is detrimental to both government and religion. This is the principle embodied in the establishment clause of the first amendment. Minnesota has provided a tax benefit to parents for

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106. *Id.* at 674.

107. 413 U.S. 756.

108. The Eighth Circuit in *Mueller* relied in part on this argument, holding that the Minnesota deduction was analogous to section 170 of the Internal Revenue Code, which provides a federal income tax deduction for contributions to religious and charitable institutions. *See* 676 F.2d at 1205; I.R.C. § 170 (1983). The constitutionality of section 170 has never been considered by the Supreme Court. Its validity, however, was strongly suggested by the Court in *Walz*, 397 U.S. at 676 n.4 (discussion of I.R.C. § 501, which exempts religious and charitable institutions from payment of federal income tax). One commentator has made a compelling argument for the validity of section 170. His argument is equally applicable to Minnesota Statutes section 290.09(22):

The deduction is not structured to encourage contributions to religion, as would a tax credit that reduced the taxpayer's bill by the amount of his contribution. Taxpayers are left with less money in their pockets after making a religious donation and paying the reduced tax bill than if they made no contribution and paid only the higher taxes.

... The deduction can therefore be properly rationalized as part of a fiscal policy that seeks to do no more than neutralize the dampening effect of taxes on voluntary religious giving, a policy well within the doctrine of political neutrality.


109. 413 U.S. at 761-67.

110. MINN. STAT. § 290.09(22) (1982); *see infra* note 84 and accompanying text.

the expenses of parochial school education without sufficient restrictions to ensure that the public funds thus channeled to the schools will be used for exclusively secular purposes. By upholding this program, the Supreme Court has departed from its policy of neutrality toward religion and created a breach in the "wall of separation" between Church and State guaranteed by the first amendment.