Nebraska Law Review

Volume 63 | Issue 3 Article 5

1984

Constitutionality of State Tax Deductions for Private School Tuition: A New Door in the Wall of Separation: *Mueller v. Allen*, 103 S. Ct. 3062 (1983)

Keith E. Moxon
University of Nebraska College of Law, kem@vnf.com

Note

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> Two great drives are constantly in motion to abridge, in the name of education, the complete division of religion and civil authority which our forefathers made. One is to introduce religious education and observances into the public schools. The other, to obtain public funds for the aid and support of various private religious schools.[1]

I. INTRODUCTION

A significant decline in private enrollment since 1965,[2] coupled

1. Everson v. Board of Educ., 330 U.S. 1, 63 (1947) (Rutledge, J., dissenting).
2. In the 1980-1981 school year a total of forty-one million students attended public elementary and secondary schools, while enrollment in private schools was five million students. Enrollment levels in 1965 were 37.2 million students in public schools and 5.6 million students in private schools. This

with financial pressure caused by inflation, has caused private schools to seek additional funding through higher tuition charges and various forms of state aid.[3] State legislative responses to the economic distress of private schools have sought to minimize the burden of private school tuition for parents who decide not to enroll their children in "free" tax-supported schools.[4] At the federal level, legislation has regularly been proposed to create tuition tax credits,[5] and the Reagan Administration supports such a bill in the current session of Congress.[6]

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represents a fourteen percent decline in nonpublic school enrollment during a period when attendance in public schools increased by ten percent. NAT'L CENTER FOR EDUC. STATISTICS, UNITED STATES DEP'T OF EDUC., THE CONDITION OF EDUCATION 44 (1982); NAT'L CENTER FOR EDUC. STATISTICS, UNITED STATES DEP'T OF EDUC., DIGEST OF EDUCATION STATISTICS 8 (1982).

The significance of this decline in nonpublic school enrollment is that such schools operate at less than optimal size, resulting in higher per pupil operating costs and inefficient use of capital facilities. Factors such as geographic migration patterns, changes in public attitudes, and changes in the social role of the church and its religious education component have contributed to this enrollment decline. Doerr, *Implications of Supreme Court Decisions for Public Aid to Parochial Schools*, in CONSTITUTIONAL REFORM OF SCHOOL FINANCE 188 (K. Alexander & K. Jordan ed. 1973).

3. In the 1979 to 1980 school year, total receipts for public elementary and secondary schools amounted to over $100.9 billion, of which only $200 million was non-governmental support (primarily student fees and private contributions). In contrast, private elementary and secondary schools received $11.8 billion, all of which was received from student fees, private contributions and other non-governmental sources. NAT'L CENTER FOR EDUC. STATISTICS, UNITED STATES DEP'T OF EDUC., DIGEST OF EDUCATION STATISTICS 19 (1982).
4. *See, e.g.*, Sloan v. Lemon, 413 U.S. 825, 826 (1973) (Pennsylvania statute provided reimbursement, not to exceed tuition paid, for students in private elementary and secondary schools); Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 763 (1973) (New York statute provided tuition grants for low income parents of private school students, not to exceed fifty percent of tuition paid); Grit v. Wolman, 413 U.S. 901 (1973), *aff'g* 353 F. Supp. 744, 749-50 (S.D. Ohio 1972) (Ohio statute allowed tax credit for private school tuition expenses); Rhode Island Fed'n of Teachers v. Norberg, 630 F.2d 855, 857 (1st Cir. 1980) (Rhode Island statute authorized tax deductions for elementary and secondary school educational expenses).
5. *See, e.g.*, S. 311, 95th Cong., 1st Sess., 123 CONG. REC. 1526 (1977) (tax credits for tuition, fees, and other higher education expenses up to $500); S. 2673, 97th Cong., 2d. Sess., 128 CONG. REC. S7406-08 (daily ed. June 23, 1982) (credit only for tuition at elementary and secondary schools). In 1978, separate tuition tax credit bills passed both the Senate and the House of Representatives. Disagreement over credits for elementary and secondary school expenses prevented either measure from receiving conference committee approval. *See* 124 CONG. REC. 37,566-69 (1978) (discussing H.R. 12050, 95th Cong., 2d Sess., 124 CONG. REC. 25378-79 (1978)).
6. *See* S. 528, 98th Cong., 1st Sess., 129 CONG. REC. § 1335-42 (daily ed. Feb. 17, 1983). The proposal, entitled the Educational Opportunity and Equity Act of 1983, provides for tuition tax credits up to a limit of $100 in 1983, $200 in 1984, and $300 in 1985 and subsequent years. The bill also includes a phase out of

The constitutionality of government aid to private schools has been vigorously contested during the past thirty years.[7] Opponents of aid to private schools contend that such aid advances religion or religious institutions in violation of the establishment clause of the first amendment,[8] while proponents argue that the aid is justified or even necessary to avoid infringement of their rights under the free exercise clause of the first amendment.[9] In *Mueller v. Allen*,[10] the United States Supreme Court upheld a Minnesota statute[11] which authorized tax deductions for tuition and other school-related expenses incurred by dependents attending public and private elementary and secondary schools. The Court found that the statute satisfied the three-part establishment clause test[12] of *Lemon v. Kurtzman*.[13]

The decision in *Mueller* may mark the beginning of an accommodationist[14] trend regarding state aid to church-related private schools. On the other hand, such trends are not easily discernible

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tuition tax credit benefits beginning with families earning $40,000 and ending with those earning $50,000. Parents could claim a non-refundable tax credit equal to fifty percent of the qualified tuition expenses paid for any qualified dependent. The bill's sponsor, Sen. Robert Dole, has estimated the cost of the legislation at $800 million a year when fully effective in 1986. *Public Hearing on Tuition Tax Credits, Senate Committee on Finance* (April 27, 1983) (Tax Notes Microfiche Data Base 83-4063 (May 9, 1983)). The current annual federal tax expenditure for *public* school districts has been estimated to be $13.7 billion. CONG. RESEARCH SERV., ESTIMATES OF FEDERAL TAX EXPENDITURE SUBSIDY TO SCHOOL DISTRICTS (April 27, 1983) (Tax Notes Microfiche Data Base 83-4062 (1983)).

7. *See infra* notes 36-96 and accompanying text. Aid to private schools necessarily involves aid to sectarian schools since the vast majority of private school students, currently eighty-four percent, attend church-affiliated schools. NAT'L CENTER FOR EDUC. STATISTICS, UNITED STATES DEP'T OF EDUC., DIGEST OF EDUCATION STATISTICS 49 (1982).

8. The first amendment states in part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ." U.S. CONST. amend. I. The establishment clause is made applicable to the states by the due process clause of the fourteenth amendment. Everson v. Board of Educ., 330 U.S. 1, 15 (1947).

9. *See supra* note 8. The free exercise clause is made applicable to the states by the due process clause of the fourteenth amendment. Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

10. 103 S. Ct. 3062 (1983).

11. MINN. STAT. § 290.09(22) (1982). *See infra* note 98.

12. The three-part establishment clause test was originally enunciated as follows: "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster 'an excessive government entanglement with religion.' " Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

13. *Id.* For a discussion of the development of the three-part test, see *infra*, notes 45-75 and accompanying text.

14. Accommodation refers to a doctrine which favors fewer restrictions on government aid to religious institutions.

since the decisions of the Supreme Court in this area are widely regarded as lacking a consistent, integrated doctrinal approach.[15] The Court's heavy reliance on factual distinctions in parochial school aid decisions has resulted in ad hoc decisionmaking which offers little guidance to state legislatures and makes predictions regarding the constitutionality of various types of aid virtually impossible.[16] Since opponents and proponents of aid to religious schools are uncertain as to the constitutional standards, each side resorts to litigation to resolve the fate of particular aid programs.[17]

This Article will provide a historical overview of the develop-

15. The decisions of the Court regarding state aid to private religious schools have been sharply criticized by commentators. *See, e.g.*, Young, *Constitutional Validity of State Aid to Pupils in Church Related Schools—Internal Tension Between the Establishment and Free Exercise Clauses*, 38 OHIO ST. L.J. 783 (1977). The school aid establishment clause cases have been characterized as "a series of case-by-case compromises rather than the development of constitutional principles of more lasting guidance . . . [where] there seemed to be no logical basis for distinguishing one program from the other." *Id.* at 794. The Court itself on various occasions has admitted the absence of an integrated doctrine in this area. In Committee for Pub. Educ. v. Regan, 444 U.S. 646 (1980), Justice White noted:

> Establishment Clause cases are not easy; . . . we are divided among ourselves, perhaps reflecting the different views on this subject of the people of this country. What is certain is that our decisions have tended to avoid categorical imperatives and absolutist approaches at either end of the range of possible outcomes. This course sacrifices clarity and predictability for flexibility, but this promises to be the case until the continuing interaction between the courts and the States . . . produces a single, more encompassing construction of the Establishment Clause.

Id. at 662. *See also* Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 VILL. L. REV. 3, 23 (1978); Schotten, *infra* note 25, at 248-49.

16. One commentator has characterized this ad hoc weakness as the result of "[i]nadequate craftmanship." Morgan, *The Establishment Clause and Sectarian Schools: A Final Installment?* 1973 SUP. CT. REV. 57, 94 (1973). "The settlements of major issues of Constitutional politics must be acceptable to major interest groupings over the long haul or they will not hold up . . . . Inadequate craftmanship marginally encourages such continuing hostilities and the attendant perceptions of instability in constitutional law." *Id.*

17. The predominant group among proponents of aid for church-related schools has been Catholic educators. During the past thirty years groups such as the U.S. Catholic Conference, Citizens for Educational Freedom, the National Association of Hebrew Day Schools, the National Catholic Conference, the Catholic League for Religious and Civil Rights, and the Knights of Columbus have lobbied or litigated in support of aid to church-related schools. Separationist (no-aid) interests have included the American Civil Liberties Union, the NAACP, the National Council of Churches, local coalitions such as the Committee for Public Education and Religious Liberty (PEARL) in the New York area, and prominent individual separationists such as Leo Pfeffer. *See* Hitchcock, *The Supreme Court and Religion: Historical Overview and Future Prognosis*, 24 ST. LOUIS U.L.J. 183, 193 (1980); Morgan, *supra* note 16, at 59-60.

ment of the three-part establishment clause test for state legislative enactments which aid private religious schools. The *Mueller* decision will be examined in light of previous decisions to determine whether the Court's reliance on certain critical factors is consistent with precedent. Particular emphasis will be placed on identifying the policy bases for these decisions, especially in light of the historical and modern interpretation of the establishment clause. Finally, the implications of *Mueller* will be explored, and an approach will be suggested for judging the constitutionality of various forms of state aid to religious schools.

II. HISTORICAL DEVELOPMENT OF THE THREE-PART ESTABLISHMENT CLAUSE TEST

A. The Religion Clauses of the First Amendment

The religion clauses of the first amendment are cast in absolute,[18] yet undefined, terms designed to protect the autonomy of religious belief and conduct and to ensure the separation of church and state.[19] At times the two religion clauses are compatible and, in some respects, mutually supportive.[20] Generally, when state contact with religion is avoided, the autonomy of private religious choice is preserved.[21] The Supreme Court has followed three major policies in developing the constitutional doctrine of religious liberty: *voluntarism* of religious belief, government *neutrality* toward religion, and *separation* of church and state.[22] Conflicts and inconsistent results have arisen in applying these three principles

18. "The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme would tend to clash with the other." Walz v. Tax Comm'n, 397 U.S. 664, 668-69 (1970).

19. *See* Engel v. Vitale, 370 U.S. 421, 431 (1962); L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-4, at 818 (1978).

20. L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-2, at 814 (1978).

21. *See generally* Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part II, The Nonestablishment Principle*, 81 HARV. L. REV. 513 (1968).

22. *See* Note, *Government Neutrality and Separation of Church and State: Tuition Tax Credit*, 92 HARV. L. REV. 696, 697-99 (1979). *Voluntarism* embodies the belief that religious conviction should not result from government coercion, but from private individual choice. The principle of government *neutrality* follows, and is a means of preserving, individual voluntarism in religious belief. The *purpose* and the *effect* of a government enactment must be neutral toward religion, avoiding either "advancement or inhibition of religion." Abington School Dist. v. Schempp, 374 U.S. 203, 222 (1963). *Separation* of church and state involves removing religion from the political sphere, a goal which reinforces the policies of neutrality and voluntarism. A fourth policy, *absolutism*, or the "no-aid" doctrine, has been rejected by the Court. *See infra* note 41 and accompanying text.

as the government's role in providing services has expanded. "A system of government that makes itself felt as pervasively as ours could hardly be expected never to cross paths with the church."[23] For example, a strict separationist approach, denying any general government services, such as police and fire protection to religious institutions, would be hostile toward, and would discourage, the free exercise of religion; thus, the separationist approach, if carried to the extreme, would result in the infringement of voluntarism and neutrality.[24]

These three conflicting policy considerations (voluntarism, neutrality, and separation) have largely frustrated the development of clear constitutional principles to be applied when the government gives assistance to private elementary and secondary schools.[25] Nonetheless, the Supreme Court has developed a three-part test as "a guide with which to identify instances in which the objectives of the establishment clause have been impaired."[26] The tripartite test appears to serve "more as a framework for structuring opin-

23. Roemer v. Board of Pub. Works, 426 U.S. 736, 745 (1976).

24. *See* Giannella, *supra* note 21, at 520.

25. *See* Schotten, *The Establishment Clause and Excessive Governmental-Religious Entanglement: The Constitutional Status of Aid to Nonpublic Elementary and Secondary Schools*, 15 WAKE FOREST L. REV. 207 (1979). "In no area of constitutional law has the lack of principle appeared so obvious as in recent Supreme Court opinions interpreting first amendment establishment clause restrictions upon governmental funding of nonpublic elementary and secondary schools." *Id.* at 209.

26. Young, *supra* note 15, at 787-80. However, in the recent case of Marsh v. Chambers, 103 S. Ct. 3330 (1983), the Court refused to apply the tripartite test to an establishment clause question. In *Marsh*, the Court upheld the constitutionality of Nebraska's use of a paid chaplain to open legislative sessions with prayers which were recorded and subsequently published at public expense. The Court relied extensively on the fact that the practice of opening sessions of Congress with prayer had continued for 200 years and a similiar practice had been followed in Nebraska's legislature for over 100 years. *Id.* at 3336. This holding appears to carve out a significant exception to the application of the tripartite test in establishment clause questions: Where history reveals that the challenged activity was accepted by the framers of the constitution, the Court will not interpret the establishment clause to impose more stringent limits on the states than the framers had originally imposed on the federal government.

This rejection of the tripartite test where the government activity is supported by "unique history" suggests that historical patterns of government conduct can justify contemporary violations of the establishment clause. The importance of such historical evidence had also been suggested in Walz v. Tax Comm'n, 397 U.S. 664, 673-80 (1970). *See infra* notes 54-64 and accompanying text. However, in *Walz* the Court applied the tripartite analysis and relied substantially on free exercise consideration to reach its decision upholding tax exemptions for church property. *Id.* at 674-75. Such balancing of the religion clauses was absent in *Marsh*.

ions than as a guidepost for determining the outcome."[27] Since the objectives of the establishment clause are too vague to be outcome-determinative,[28] the Court has relied on the tripartite test primarily as a means of evaluating various forms of aid,[29] while engaging in factual comparisons with prior cases to determine the constitutionality of such aid.[30] A review of the historical development of the three-part test is helpful to understand how the elements of the test are applied and to see which particular forms of aid have been judged unconstitutional under the tripartite framework.

B. Building and Breaching the Wall of Separation—Aid to Sectarian Schools

At the time the first amendment was adopted no public schools existed in the United States. The structure of American education has changed markedly since then. The religion clauses also preceded any general acknowledgment of the need for universal formal education.[31] In 1925, the Supreme Court, in *Pierce v. Society of Sisters*,[32] found that an Oregon statute requiring compulsory attendance at public schools was unconstitutional. The Court held that parents had the right to choose whether to send their children to public or private schools.[33] *Pierce* did not hold that the state must provide financial assistance to parents who wish to educate

27. Young, *supra* note 15, at 788.
28. *Id.*
29. The Court in Meek v. Pittenger, 421 U.S. 349, (1975), explained:
> These tests constitute a convenient, accurate distillation of this Court's efforts over the past decades to evaluate a wide range of governmental action challenged as violative of the constitutional prohibition against laws 'respecting an establishment of religion,' and thus provide the proper framework of analysis for the issues presented in the case before us.

Id. at 358.
30. At least one commentator has claimed that the Court's holdings under such an approach resemble a legislative process without the benefit of hearings, contacts with interested constituents and lobbyists, and policy studies. "Thus the Court's decisions have been determined, not by the weighing of policy alternatives, but by the contested program's ability or inability to pass the series of legal tests previously outlined." Schotten, *supra* note 25, at 214-15.
31. Wisconsin v. Yoder, 406 U.S. 205, 214 (1972). For a comprehensive discussion of the development of public and private educational systems in the United States, see L. PFEFFER, GOD, CAESAR, AND THE CONSTITUTION 168-297 (1975). For a history of public and private education from a judicial perspective, see Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 212-32 (1948) (Frankfurter, J., separate opinion).
32. 268 U.S. 510 (1925).
33. The decision in *Pierce* was not based on the first amendment religion clauses, since neither clause had been held applicable to the states at the time *Pierce*

their children in parochial schools, or even that the state may do so;[34] rather, *Pierce*'s significance lies in its recognition that private schools perform important and manifestly public functions.[35]

The first establishment clause case challenging governmental aid to private schools to reach the Supreme Court was *Everson v. Board of Education*.[36] Justice Black wrote, in sweeping separationist terms, that: "No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called."[37] Yet, while contending that the purpose of the establishment clause was to enact "a wall of separation between church and State,"[38] Black upheld a statute which authorized the payment of bus fares for students attending private religious schools. This "public welfare legislation"[39] did not violate the establishment clause since the aid benefited the church-affiliated schools only incidentally.[40] The court reasoned that to prohibit the state from providing general welfare benefits to *all* children would violate the neutral position required by the first amendment.[41] The tension in *Everson* between the Court's "wall of separation" doctrine and the holding in the decision was duly noted in Justice Jackson's dissent.[42] The effect of the holding was

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was decided. Instead, the Court relied on the economic due process concept of the fourteenth amendment.

34. Schotten, *supra* note 25, at 230.
35. *Id.* at 231.
36. 330 U.S. 1 (1947).
37. *Id.* at 16.
38. *Id.* Justice Black relied on Reynolds v. United States, 98 U.S. 145 (1878), for this Jeffersonian view of the establishment clause.
39. Everson v. Board of Educ., 330 U.S. 1, 16 (1947).
40. The Court emphasized the indirect nature of the aid to religious schools which were in compliance with *secular* educational requirements imposed by the state. "The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools." *Id.* at 18. The holding in *Everson* was consistent with prior Supreme Court opinions upholding general welfare programs that incidentally benefited religion. *See* Quick Bear v. Leupp, 210 U.S. 50, 81-82 (1908) (fund for education of Indian children may be used for church-related schools); Bradfield v. Roberts, 175 U.S. 291, 299-300 (1899) (government financial assistance to church-affiliated hospital was not a violation of the first amendment).
41. This was an important acknowledgment that absolute separation of church and state is not required by the establishment clause of the first amendment. Denying general governmental services to religious institutions would create an infringement of free exercise rights. "[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." Everson v. Board of Educ., 330 U.S. 1, 18 (1947).
42. "The case which irresistibly comes to mind as the most fitting precedent is

to swell the hopes of accommodationists: although the bus plan "approache[d] the verge"[43] of impermissible aid to church schools, the plan was saved by the fact that the immediate beneficiaries were individuals. This was the beginning of the individual-benefit theory.[44]

The development of the establishment clause doctrine during the next sixteen years[45] culminated in the test announced in *School District of Abington Township v. Schempp*.[46] In striking down state-mandated Bible reading and recitation of the Lord's Prayer in public schools, the Court held that, in order for legislation "to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[47]

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that of Julia who, according to Byron's reports, 'whispering "I will ne'er consent,"—consented.' " *Id.* at 19 (Jackson, J., dissenting).

43. *Id.* at 16.

44. Under this theory, a state may provide financial assistance or educational benefits to the individual student, but may not do so directly to the church-related school. *See* Giannella, *supra* note 21, at 576. The child-benefit theory has been criticized because it "places form over substance," Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 CALIF. L. REV. 260, 313 (1968), and because it permits public funds to be used "for strictly religious purposes . . . in contravention of a basic thrust of the establishment clause" whenever the amount of aid received "exceeds the value of secular education service." *Id.* at 315-16. *See also infra* note 131 and accompanying text.

45. From 1947 to 1963, the Court decided five establishment clause cases: Engel v. Vitale, 370 U.S. 421 (1962) (recitation of nondenominational prayer in public school system found unconstitutional, applying a primary effect test); Torcaso v. Watkins, 367 U.S. 488 (1961) (statute requiring state appointees to declare a belief in God held unconstitutional, applying both secular purpose and primary effect tests); McGowan v. Maryland, 366 U.S. 420 (1961) (Sunday closing laws upheld solely on basis of secular purpose); Zorach v. Clauson, 343 U.S. 306 (1952) (off-premises released time program for religious instruction upheld, applying a primary effect test); Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (1948) (on-premises religious instruction at tax-supported public school system found unconstitutional, applying only a primary effect test).

46. 374 U.S. 203, 222 (1963).

47. *Id.* at 222. Secular purpose and primary effect were the first two parts of the tripartite test. The final criterion was supplied seven years later in Walz v. Tax Comm'n, 397 U.S. 664, 675 (1970). *See infra* notes 54-64 and accompanying text. The earliest decisions of the Court under the establishment clause contained no evaluation of legislative purpose. *See, e.g.*, Zorach v. Clauson, 343 U.S. 306 (1952); Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (1948). The secular purpose test permits the Court to ascertain the legislature's purpose where it has failed to enunciate one, or to judge the credibility of a purpose stated within the enactment. The Court is reluctant to search for an unarticulated religious purpose so long as a secular purpose has been established. *See, e.g.*, Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 782 n.38 (1973) (stated secular purposes were accepted despite existence of religious purposes revealed by the *effect* of the enactment). Perhaps

Advocates of aid to religious schools received a boost in *Board of Education v. Allen*,[48] which upheld a New York statute requiring school boards to loan approved textbooks to all secondary school children, including students in parochial schools.[49] The Court found that the enactment passed the secular purpose/primary effect test by concluding that the "processes of secular and religious training [in church-related schools] are [not] so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion."[50] Thus, the Court found that parochial schools serve two separable functions, religious training and secular education—only the latter of which may be funded by the state.[51] Reinforcing its finding that the statute was secular in purpose and effect,[52] the *Allen* Court further recognized that private education provided a valuable service to society.[53]

The Supreme Court announced the third element of the tripar-

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the best formulation of the secular purpose test is that a religious purpose will invalidate legislation "only . . . if the absence of any substantial legislative purpose, other than a religious one, is made to appear." McGowan v. Maryland, 366 U.S. 420, 468 (1960) (Frankfurter, J., concurring).

The primary effect test has been described as a two step analysis which is designed to ensure that the aid will not be used to advance or inhibit religion. Note, *Laws Respecting an Establishment of Religion: An Inquiry into Tuition Tax Benefits*., 58 N.Y.U. L. REV. 207, 227-28 (1983). *See also* Note, *Establishment Clause Analysis of Legislative and Administrative Aid to Religion*, 74 COLUM. L. REV. 1175, 1182-86 (1974). First, an inquiry is made into the nature of the aid and the service or activity which is subsidized. In parochial school aid cases, this determination focuses on whether the aid substantially benefits the secular educational function of the school and whether the aid is capable of being separated from the religious function of the school. Second, the Court looks at the "narrowness of the benefitted class." Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 794 (1973). If the aid is substantial and cannot be separated from the school's religious function, the Court looks to the characteristics of the *actual* beneficiaries to determine whether the effect is to aid a primarily sectarian class. However, the Court, in *Mueller v. Allen*, has rejected such a *de facto* analysis of the benefited class. *See infra* notes 166-172 and accompanying text.

48. 392 U.S. 236 (1968).
49. This decision was consistent with Cochran v. State Bd. of Educ., 281 U.S. 370, 375 (1930), which upheld state loans of secular textbooks to students in religious schools under the due process clause of the fourteenth amendment.
50. Board of Educ. v. Allen, 392 U.S. 236, 248 (1968).
51. This notion of separability was rejected in subsequent decisions in favor of the permeation theory, i.e., that the religious mission of the church-related school makes its educational function pervasively sectarian. *See, e.g.*, Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 779-80 (1973).
52. Board of Educ. v. Allen, 392 U.S. 236, 248 (1968).
53. "[P]rivate education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience. . . . [A] wide segment of informed opinion, legislative and otherwise, has found that

tite test in *Walz v. Tax Commission*.[54] Chief Justice Burger applied the two-part test enunciated in *Schempp* to uphold New York tax exemptions on properties used exclusively for religious worship.[55] The grant of exemption was found to have a proper legislative purpose, as its aim was neither to advance nor inhibit religion.[56] In determining the *effect* of the exemption, the *Walz* Court found that taxation of religious property would result in a greater degree of involvement between government and religion than granting exemptions.[57] The Court noted that the primary issue was "whether the involvement is excessive, and whether it is a continuing one calling for official and continuing surveillance leading to an *impermissible degree of entanglement*."[58] In dictum, Burger commented: "Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards."[59]

Several critical factors stand out in the *Walz* evaluation of the

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[religious] schools do an acceptable job of providing secular education to their students." *Id.*

54. 397 U.S. 664 (1970).

55. The Supreme Court had not previously considered this question. In Gibbons v. District of Columbia, 116 U.S. 404, 406-07 (1886), the Court had decided that certain church property, which was used to produce income, came within a property tax exemption created by Congress. The Court in *Gibbon* implicitly accepted that Congress had the power to grant exemptions to religious organizations.

56. The Court concluded that the legislative purpose of a property tax exemption was neither the advancement nor the inhibition of religion.

> [I]t is neither sponsorship nor hostility. New York, in common with the other states, has determined that certain entities that exist in a harmonious relationship to the community at large, and that foster its "moral or mental improvement," should not be inhibited in their activities by property taxation or the hazard of loss of those properties for nonpayment of taxes.

Walz v. Tax Comm'n, 397 U.S. 664, 672 (1970).

57. *Id.* at 674. The Court compared the involvement resulting from taxation with that resulting from exemption:

> Elimination of exemption would tend to expand the involvement of government by giving rise to tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes. Granting tax exemptions to churches necessarily operates to afford an indirect economic benefit and also gives rise to some, but yet a lesser, involvement than taxing them.

Id. at 674-75.

58. *Id.* at 675 (emphasis added).

59. *Id.* The focus of inquiry in *Walz* was on excessive *administrative* entanglement. In subsequent decisions the Court considered a separate element—political divisiveness. *See infra* notes 71-75 and accompanying text.

constitutionality of the property tax exemptions: the breadth of the benefited class,[60] the form of the tax benefit,[61] and the social benefits conferred on society by the benefited religious institutions.[62] The *Walz* Court also stressed the fact that 200 years of freedom from taxation had not led to an established state church or religion; instead, it had fostered the free exercise of all forms of religious belief.[63] This emphasis on historical patterns of government conduct has recently been used to override the traditional tripartite test in other establishment clause questions.[64]

Although the *Walz* decision introduced the concept of "excessive entanglement" as a part of the "primary effect" criterion, it was not until *Lemon v. Kurtzman*[65] that the entanglement issue took on the dimensions of a separate constitutional test. Invalidating state subsidies for parochial school teachers' salaries, the Court in *Lemon* seized the opportunity to describe two elements of the entanglement criterion. Administrative entanglement analysis focused on the form of the aid to determine whether it would result in "a relationship pregnant with dangers of excessive government direction of church schools and hence of churches."[66] The Court found that "comprehensive, discriminating and continuing state

60. The Court did not rely upon any statistical evidence of the actual beneficiaries under the tax exemption, but rather acknowledged the breadth of the benefited class in evaluating the secular legislative purpose of the exemption:

> [The state] has not singled out one particular church or religious group or even churches as such; rather, it has granted exemption to all houses of religious worship within a broad class of property owned by non profit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical and patriotic groups.

Walz v. Tax Comm'n, 397 U.S. 664, 673 (1970).

61. The Court conceded that granting tax exemptions to churches necessarily resulted in some indirect economic benefit to religion, but found that the restricted nature of the fiscal relationship tended to reinforce the separation of church and state: "The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenues to churches but simply abstains from demanding that the church support the state." *Id.* at 675.

62. This consideration was part of the Court's secular legislative purpose inquiry. "The State has an affirmative policy that considers these groups as beneficial and stabilizing influences in community life and finds this classification useful, desirable, and in the public interest." *Id.* at 673. In a concurring opinion, Justice Brennan stated that tax exemptions to religious institutions encouraged public service activities for the well-being of society and contributed to the pluralism of American society. *Id.* at 692 (Brennan, J., concurring). However, it is not clear that the finding of social contributions to society by religious institutions should preclude a finding that the state aid resulted in an impermissible establishment of religion.

63. *Id.* at 674-76.

64. *See supra* note 26.

65. 403 U.S. 602 (1971).

66. *Id.* at 620.

surveillance [would] inevitably be required" to ensure that support of "a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets" resulted in aid to only the secular teaching component and not to advancement of religious doctrine.[67] Direct salary aid to parochial schools was impermissible because it would require extensive state surveillance and control to ensure that only secular educational functions would be aided.[68] This relationship between the secular effects test and the entanglement test has been described as an "insoluable paradox"[69] and as a "Scylla and Charybdis" dilemma;[70] it is difficult to satisfy one without violating the other. In order to pass the primary effect test, legislation providing direct aid to parochial schools must include a mechanism to ensure that religion is not aided. Yet, the very procedures which are required to prevent aid from going to nonsecular functions, are also likely to impermissibly entangle the government in the operation of religious schools.

The *Lemon* decision described a second aspect of entanglement—"political divisiveness."[71] The Court feared that partisans of parochial schools, and those who opposed state aid, would "inevitably champion [their] cause and promote political action to achieve their goals."[72] This struggle could, in turn, threaten the normal political process if votes on such issues aligned with religious faith.[73] Chief Justice Burger, writing for the majority, ob-

67. *Id.* at 618 Clearly the notion in *Allen* of dual and separable secular and religious functions in parochial schools was replaced in *Lemon* with a strong presumption that parochial schools are pervasively religious institutions. "[C]hurch-related elementary and secondary schools are controlled by religious organizations, have the purpose of propogating and promoting a particular religious faith, and conduct their operations to fulfill that purpose." *Id.* at 620.

68. *Id.* at 621.

69. As the lone dissent in *Lemon*, Justice White described the dilemma posed by the primary effect and entanglement prongs of the establishment clause test:

> The state cannot finance secular instruction if it permits religion to be taught in the same classroom; but if it exacts a promise that religion not be so taught—a promise the school and its teachers are quite willing and on this record able to give—and enforces it, it is then entangled in the "no entanglement" aspect of the Court's Establishment Clause jurisprudence.

Id. at 668 (White, J., dissenting).

70. Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 788 (1973).

71. 403 U.S. 602, 623 (1971).

72. *Id.* at 622. The Court noted that the *Lemon* case involved "successive and very likely permanent annual appropriations which benefit relatively few religious groups." *Id.* at 623.

73. The Court reasoned that religious political strife would "tend to obscure and confuse other issues of great urgency" diverting legislative attention from

served that "political division along religious lines was one of the principal evils against which the First Amendment was intended to protect."[74] This pronouncement by Chief Justice Burger was somewhat ironic since, only one year earlier in *Walz v. Tax Commission*, he had noted the right of religious institutions to take strong political stands in public controversies.[75]

Two years after *Lemon*, in *Committee for Public Education & Religious Liberty v. Nyquist*,[76] the Supreme Court invalidated a New York statute[77] which provided three categories of aid to parochial schools: direct grants to parochial schools in low-income ar-

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"the myriad issues and problems which confront every level of government." *Id.* at 623.

74. *Id.* at 622. The Court cited Professor Paul A. Freund for this proposition. Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1692 (1969). Freund attempted to reconcile his preference for political activism and judicial restraint with his desire for the Court to play an active role in limiting parochial schools:

> Ordinarily I am disposed, in grey-area cases of constitutional law, to let the political process function. Even in dealing with basic guarantees I would eschew a single form of compliance and leave room for different methods of implementation, whether in pre-trial interrogation under the privilege against self-incrimination, or libel of public figures under freedom of the press, or exclusion of evidence under the search and seizure guarantee. The religious guarantees, however, are of a different order. While political debate and division is normally a wholesome process for reaching viable accommodations, political division on religious lines is one of the principal evils that the first amendment sought to forestall.

Id. at 1691-92.

A full-scale challenge to Freund's position can be found in Valente & Stanmeyer, *Public Aid to Parochial Schools—A Reply to Professor Freund*, 59 GEO. L.J. 59 (1970). *See also* Schotten, *supra* note 25, at 222-28. Schotten contends that Freund's view is contrary to the ideas of James Madison, who was the father of the Constitution and Bill of Rights. *Id.* at 224. Madison believed that the protection of religious liberty depended on the multiplicity of religious sects and that by encouraging religious diversity the dangers of political fragmentation along religious lines, persecution, and strife would be minimized. *Id.* at 225. Such a position is inconsistent with the notion of prohibiting legislative consideration of an issue affecting religion under the first amendment.

75. In *Walz*, Chief Justice Burger observed:

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

397 U.S. 664, 670 (1970).

76. 413 U.S. 756 (1973).

77. Health and Safety Grants for Nonpublic School Children, 1972 N.Y. LAWS ch. 414, § 1 (amending N.Y. EDUC. LAW art. 12, §§ 549-53 (McKinney 1972)).

eas for maintenance and repair of equipment and facilities; tuition reimbursement grants for parents of parochial school students with an annual taxable income less than $5000;[78] and a tax benefit program to provide tax relief for parents who failed to qualify for tuition reimbursement.[79] The New York legislature had structured the program to avoid the "insoluable paradox" referred to by Justice White in *Lemon v. Kurtzman*[80] by providing funding in a manner which offered "a statistical guarantee of neutrality."[81] The *Nyquist* Court, however, rejected this argument. Justice Powell, writing for the majority, noted: "Our cases have . . . long since foreclosed the notion that mere statistical assurances will suffice to sail between the Scylla and Charybdis of 'effect' and 'entanglement.' "[82] Instead, the Court concluded that the maintenance/repair grants, and the tuition reimbursement grants, failed the primary effect test, since neither were limited to the secular functions of parochial schools.[83] Distinguishing the tax benefit program from the situation in *Walz v. Tax Commission*,[84] Justice

78. The "reimbursements" were actually fixed at a flat rate of 50 dollars per grade school student and 100 dollars per high school student, limited to fifty percent of actual tuition paid.

79. The tax relief plan authorized a deduction for state income tax purposes of a designated amount unrelated to the amount of tuition actually paid. The allowable deduction decreased as income increased, so that no deductions were available for parents with a gross income in excess of $25,000.

80. 403 U.S. 602 (1971). *See supra* note 69 and accompanying text.

81. Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 787 (1973). The State of New York argued that, since tuition reimbursements were funded at only fifty percent of actual expenses, and since nonsecular educational costs were calculated to be thirty percent of the total cost of parochial education, the maximum tuition reimbursement by the State was only fifteen percent of total education costs. It was argued that this amount of aid was statistically neutral since the state's compulsory education laws required more than fifteen percent of resources to be devoted to secular instruction. *Id.*

82. *Id.* at 787-88.

83. The maintenance/repair grants were found to be unlike the "neutral, nonideological aid, assisting only the secular function" which had been upheld in *Everson* and *Allen*. Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 775 (1973).

While the tuition reimbursement grants in *Nyquist* were delivered to parents rather than schools, the Court found that the indirect nature of the aid was "only one among many factors to be considered", *id.* at 782, and that the unmistakable effect of the aid was to impermissibly support sectarian institutions. *Id.* at 783.

84. The Court noted that the property tax exemption which was approved in *Walz* could be distinguished in three important ways from the legislation challenged in *Nyquist*. First, property tax exemptions had enjoyed a long history of political approval, whereas the tax benefits for parents of parochial school students were a "recent innovation." Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 792 (1973). Second, the tax benefits in *Nyquist* flowed to a narrow class of beneficiaries comprised predominantly

Powell concluded that "insofar as such benefits render assistance to parents who send their children to sectarian schools, their purpose and inevitable effect are to aid and advance those religious institutions."[85]

Although finding the state aid in *Nyquist* unconstitutional under the "primary effect" test, the Court went on to observe that the aid in question "carried grave potential for entanglement in the broader sense of continuing political strife over aid to religion."[86] This danger was further aggravated by the recurring annual appropriation process and the likelihood of demands for increased amount of aid.[87] Thus, the political divisiveness element of the entanglement criterion was sustained as a viable test regarding the permissibility of state aid to parochial schools.[88]

In *Wolman v. Walter*,[89] the Supreme Court approved programs of substantial aid to elementary and secondary parochial school students.[90] Although not involving direct aid to parents of parochial school students, the decision in *Wolman* is an important part of the historical development leading to the *Mueller v. Allen* decision for a number of reasons. First, the *Wolman* opinion reveals the underlying tensions within the Court which result in a fragmented and compromised approach to parochial school aid.[91] Sec-

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of parents of children attending parochial schools, unlike the *Walz* exemption which broadly "covered all property devoted to religious, educational, or charitable purposes." *Id.* at 794. Finally, the Court concluded that the tax benefit in *Nyquist* did not have "the elements of a genuine tax deduction, such as for charitable contributions," *id.* at 790 n.49, and was, therefore, unrelated to deductions for charitable contributions to religious institutions which were found acceptable under the "benevolent neutrality" test of *Walz*.

85. *Id.* at 793.

86. *Id.* at 794.

87. *Id.* at 795-97.

88. The dissent, however, argued that the entanglement criterion "is of remote relevance . . . with respect to the validity of tuition grants or tax credits involving or requiring no relationships whatsoever between the State and any church or any church school." *Id.* at 822.

89. 433 U.S. 229 (1977).

90. *Wolman* involved a challenge to an Ohio statute which authorized $88 million per biennium (enacted as twelve separate and severable categories of aid) for parochial schools. The Court upheld nine aid categories: textbooks loans to pupils; standardized testing and scoring; diagnostic services (speech, hearing and psychological testing) provided *on* the school premises by non-parochial school employees; therapeutic services (speech, hearing, and psychological therapy) provided *off* of school premises; and programs for emotionally disturbed mentally handicapped children. The Court invalidated aid for the purchase and loan of instructional aids and transportation for field trips limited to trips the same as those provided in public schools. Wolman v. Walter, 433 U.S. 229, 235-55 (1977).

91. Six Justices voted to uphold the loan of secular textbooks under the principle of *Board of Educ. v. Allen*; yet, only three Justices voted to approve the ex-

ond, the Court demonstrated a willingness to place considerably less emphasis on the political divisiveness test.[92] Third, the Court was willing to permit substantial amounts of aid to parochial schools by emphasizing that the benefits accrued to the students, not the schools,[93] and that the forms of aid lacked the potential for fostering ideological views.[94] In addition, the *Wolman* decision suggested that Justice Powell was ready to join the accommodationist voting block of Chief Justice Burger, Justice Rehnquist, and Justice White.[95] Finally, the opinion in *Wolman* revealed the reluctance of several Justices to affirm the application of the three-part establishment clause test.[96]

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penditure of state funds for the purchase and loan of instructional aids. Such inconsistent results regarding forms of aid which are virtually indistinguishable has led one commentator to characterize the *Wolman* decision as "either judicial indecision or hair-splitting." Schotten, *supra* note 25, at 245. The Court acknowledged the apparent inconsistency regarding textbooks and instructional materials, noting that *Allen* was being followed simply as a matter of *stare decisis*. "When faced . . . with a choice between extension of the unique presumption created in *Allen* and continued adherence to the principles announced in our subsequent cases, we choose the latter course." Wolman v. Walter, 433 U.S. 229, 252 n.18 (1977).

92. In *Wolman* the Court's emphasis was on the extent to which the various forms of aid would give rise to *administrative* entanglement as a result of state monitoring and surveillance of the aid programs. Only Justice Brennan, dissenting from the portions of the Court's opinion which invalidated aid for field trips and loans of instruction aids, mentioned this criterion, concluding that the Ohio program posed "a divisive political potential of unusual magnitude." Wolman v. Walter, 433 U.S. 229, 256 (1977). (Brennan, J., concurring in part and dissenting in part).

93. The "child-benefit" principle was applied in upholding aid for testing and scoring, diagnostic and therapeutic services, and was applied in striking down aid for field trips. *See supra* note 44 and accompanying text.

94. The inapplicability of the aid for religious ideological advancement was emphasized in upholding aid for textbooks, testing and scoring, diagnostic and therapeutic services, Wolman v. Walter, 433 U.S. 229, 236-48 (1977), and in striking down aid for instructional materials. *Id.* at 248-51.

95. For an extensive review and analysis of the voting patterns and reasoning of individual Justices in establishment clause decisions through 1973, see Morgan, *supra* note 16. In *Wolman*, Justice Powell, who authored the Court's opinion in striking down aid in *Nyquist*, praised the educational and social value of parochial schools for offering "an educational alternative for millions of young Americans; . . . wholesome competition with our public schools; and . . . [substantial relief from] the tax burden incident to the operation of public schools." Wolman v. Walter, 433 U.S. 229, 263 (1977) (Powell, J., concurring). Retreating from his concern in *Nyquist* over religious/political strife, *see supra* note 86 and accompanying text, Powell in *Wolman* observed: "The risk of significant religious or denominational control over our democratic processes—or even of deep political division along religious lines—is remote, and when viewed against the positive contributions of sectarian schools, any such risk seems entirely tolerable in light of the continuing oversight of this Court." 433 U.S. 229, 263 (1977).

96. Section II of the *Wolman* opinion consisted of a summary of the three-part

Thus, the stage was set for the Court's review of state aid to parents of parochial school children in the form of tax deductions for educational expenses.

III. THE *MUELLER* DECISION

A. Lower Court Opinions

Individual Minnesota taxpayers filed suit in federal district court[97] challenging the constitutionality of a Minnesota statute[98] which authorized state taxpayers to deduct expenditures for their dependents' tuition,[99] textbooks[100] and transportation.[101] The

establishment clause test; yet, this three paragraph portion of the opinion gained the adherance of only four Justices—Blackman, Burger, Powell and Stewart. 433 U.S. 229, 235-36 (1977). Both Justice Stevens and Justice Brennan dissented from this section of the opinion, while the remaining Justices failed to join in it. Such reservations about the three-part test indicate the serious instability of the historical establishment clause doctrine.

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

98. MINN. STAT. § 290.09(22)(1982). Section 209.09(22) authorizes the following deductions from gross income in computing net income:

> *Tutition 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.

99. The district court determined that "tuition," under the Minnesota statute, included: tuition in the ordinary sense; tuition to public school students who attend public schools outside their residence school districts; tuition for slow learner private tutoring services; tuition for students who are physically unable to attend classes; tuition charged by private schools or tutors if the instruction is acceptable for elementary or secondary school credit; Montessori School tuition for grades K through 12; and tuition for driver education when it is part of the school curriculum. Mueller v. Allen, 514 F. Supp. 998, 1000 (D. Minn. 1981).

100. The district court concluded that "textbook" deductions included not only secular textbooks but also other school related equipment, including: (1) the cost of tennis shoes and sweatsuits for physical education, (2) camera rental fees paid to the school for photography classes, (3) rental fees paid to the

challengers asserted that the statute advanced the establishment of religion and restrained the free exercise of religion.[102] The district court concluded that an earlier action[103] against the same statute was dispositive regarding the secular purpose and entanglement prongs of the three-part test; still, the court agreed that new statistical evidence relating to the statute's "primary effect" warranted a new analysis of the enactment.[104]The challengers introduced statistical data from the Minnesota Department of Education showing that ninety-six percent of the pupils attending nonpublic schools were attending sectarian schools. Thus, argued the challengers, the statute failed the establishment clause standards since the tax was directed at, and had the primary effect of, advancing religion.[105]

The district court found that the statistical evidence regarding the statute's primary effect "lack[ed] credibility by reason of omissions of serious significance,"[106] and concluded that the facially neutral statute was also neutral in its application since it neither advanced nor inhibited religion. In granting summary judgment for the defendants, the court relied heavily on factors established in *Walz v. Tax Commission*: absence of direct financial aid to the religious institutions,[107] absence of direct subsidy of any religious activity,[108] and the remote nature of the benefit as a deduction

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school for ice skates, (4) calculator rental fees paid to the school for mathematics classes, (5) expenses for home economic materials needed for minimum requirements, (6) expenses for special metal or wood to meet minimum shop class requirements, (7) costs of art supplies need to meet minimum requirements, (8) rental fees paid to the school for musical instruments, and (9) the cost of pencils and special notebooks required for class. *Id.*

101. The district court defined "transportation" to include the 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.*

102. The free exercise argument was dismissed by the court for failure to allege the manner in which religious beliefs had been infringed. *Id.* at 1003.

103. Minnesota Civil Liberties Union v. Roemer, 452 F. Supp. 1316 (D. Minn. 1978).

104. Mueller v. Allen, 514 F. Supp. 998, 1001. (D. Minn. 1981).

105. *Id.*

106. The challengers had argued that the statute provided, at most, only fourteen to eighteen percent of the tax relief benefits to taxpayers who use the public school system. *Id.* at 1002. The defendants countered that the statistics used by the challengers were based only on full-time tuition payments and ignored items such as tuition for summer school and tuition for other courses like driver's education. Additionally, the defendants contended that the challenger's evidence failed to include over two million dollars in tuition expenses paid to *public* schools. *Id.*

107. *Id.* at 1000.

108. *Id.*

rather than a credit.[109] The court found that the availability of tax relief to *all* parents was of critical importance since "a law does not advance religion when its benefits are neutrally and widely distributed and from which religious institutions benefit only incidently and indirectly."[110]

On appeal, the Court of Appeals for the Eighth Circuit affirmed the judgment of the district court.[111] The court of appeals applied the three-part establishment clause test but, like the district court, concentrated on the "primary effect" of the statute.[112] State aid in the form of a deduction for transportation expenses was upheld under the authority of *Everson v. Board of Education*.[113] The textbook deduction was upheld as falling within the constitutional protection of *Board of Education v. Allen*,[114] while the permitted deduction for instructional material and equipment was distinguished from that which was invalidated in *Wolman v. Walter*.[115] The court upheld the tuition deduction by distinguishing the statute in *Committee for Public Education & Religious Liberty v. Nyquist*[116] on two grounds. First, the statute in *Nyquist* operated as a tax credit, not as a "genuine tax deduction."[117] Second, the Minnesota statute did not limit tax benefits to the parents of private school students, in contrast to the statute in *Nyquist*, but benefited a "broad class of parents with dependents in both public and non-

109. *Id.* at 1002.

110. *Id.*

111. Mueller v. Allen, 676 F.2d 1195, 1206 (8th Cir. 1982).

112. The court found that the secular legislative purpose requirement was satisfied since 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." *Id.* at 1198. Only brief mention was made of the "entanglement" criterion in limited reference to the textbook aid. The circuit court simply restated the district court's conclusion that potential for entanglement was lessened by the fact that the primary enforcement tool would be an audit of an individual taxpayer, not an in-depth analysis of a school's religious function. *Id.* at 1202.

113. 330 U.S. 1 (1947). *See supra* notes 36-44 and accompanying text.

114. 392 U.S. 236 (1968). *See supra* notes 48-53 and accompanying text.

115. 433 U.S. 229 (1977). *See supra* notes 89-96 and accompanying text. The court distinguished *Wolman* by observing that the Ohio statute had involved massive loans of instructional material directly to the school, while the Minnesota statute involved deductions permitted for the parents. Mueller v. Allen, 676 F.2d 1195, 1201 (8th Cir. 1982). "The difficulties regarding the Establishment Clause evident in . . . massive loan programs are much different than those in the instant case where the effect of a possible tax deduction for the purchase of defined secular school materials is much more indirect." *Id.* at 1202.

116. *See supra* notes 76-88 and accompanying text.

117. Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 790 n.49 (1973).

public schools."[118] The court reasoned that the breadth of the benefited class, evident on the face of the statute, supported the conclusion that "the Minnesota statute has not singled out a class of citizens for a special economic benefit."[119] In spite of statistical evidence which indicated that "the greater number of the class benefited are parents of church school children," the court found that there were "substantial benefits flowing to *all* members of the public."[120] The court acknowledged that the statute "bestow[ed] *some* benefit to church-affiliated schools,"[121] but found that such "benefit to religion or involvement between church and state is so remote and incidental that the challenged deduction does not violate the constitutional wall separating church and state."[122]

B. Supreme Court Decision

1. The Majority Opinion

The United States Supreme Court granted certiorari to resolve a conflict between the decision of the Court of Appeals for the Eighth Circuit in *Mueller*, and that of the Court of Appeals for the First Circuit in *Rhode Island Federation of Teachers v. Norberg*.[123] The Court affirmed the decision of the Eighth Circuit in *Mueller* and upheld the constitutionality of the Minnesota statute.[124]

Writing the opinion for a 5-4 majority,[125] Justice Rehnquist first acknowledged the difficulty in interpreting and applying the establishment clause, particularly with regard to government programs of financial aid to sectarian schools or to parents of children attending secular schools. Justice Rehnquist restated the familiar three-part test but qualified the use of the test by emphasizing that "it provides 'no more than [a] helpful signpost' in dealing with Establishment Clause challenges."[126]

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118. Mueller v. Allen, 676 F.2d 1195, 1203 (8th Cir. 1982).
119. *Id.* at 1204.
120. *Id.* at 1205 (emphasis added).
121. *Id.* (emphasis added).
122. *Id.* at 1206.
123. 630 F.2d 855 (1st Cir. 1980). In *Norberg* the First Circuit applied the three-part establishment clause test to a Rhode Island statute which was nearly identical to the Minnesota statute. In finding the Rhode Island statute unconstitutional, the court relied heavily on statistical evidence demonstrating that the tax benefit favored the ninety-four percent of nonpublic students who attended sectarian schools. The court concluded that the primary effect of the Rhode Island statute was to aid religion. *Id.* at 860.
124. Mueller v. Allen, 103 S. Ct. 3062 (1983).
125. Chief Justice Burger and Justices White, Powell and O'Connor joined Justice Rehnquist in upholding the Minnesota statute. Justice Marshall filed a dissenting opinion in which Justices Brennan, Blackmun, and Stevens joined.
126. Mueller v. Allen, 103 S. Ct. 3062, 3066 (1983) (quoting Hunt v. McNair, 413 U.S. 734, 741 (1973)).

The question of secular legislative purpose was promptly resolved. The Court found that defraying the cost of educational expenses, whether incurred at private or public schools, was a legislative purpose that was "both secular and understandable,"[127] since the overall objective of such aid was "ensuring that the state's citizenry is well-educated."[128]

The majority devoted much of its attention to evaluating the Minnesota statute's effect on advancing the sectarian aims of nonpublic schools. After observing that state tax statutes are "entitled to substantial deference,"[129] the Court identified several factors which supported a finding that the Minnesota statute was constitutional. First, the deduction was "available for educational expenses incurred by *all* parents."[130] Second, by channeling whatever assistance may be provided to parochial schools through individual parents, establishment clause objections were "reduced."[131] Third, private educational institutions make special contributions to society,[132] and the tax relief provided to parents sending their children to parochial schools "can be fairly regarded as a rough return for the benefits."[133] Finally, the Court bluntly refused to consider statistical evidence of which citizens benefited under the law.[134]

The majority dismissed the entanglement criterion in a paragraph, concluding that the involvement of the state in determining whether particular books and instructional material were secular, and therefore eligible for the tax deduction, did not differ from the decisions and involvement approved in *Board of Education v.*

127. *Id.* at 3067.
128. *Id.*
129. *Id.* The Court distinguished *Nyquist* in a footnote by stating that there was considerable doubt as to whether the "tax benefits" provided by New York law in *Nyquist* could be properly regarded as parts of a genuine system of tax laws. *Id.* at 307 n.6.
130. *Id.* at 3068 (emphasis in original). The Court noted that the assistance program in *Nyquist* involved tuition grants which were provided *only* to children in *nonpublic* schools.
131. *Id.* at 3069. The Court found that when public funds became available only as a result of private choices of individual parents, the resulting benefits to parochial schools were "attenuated" and posed no risk of government involvement which would cause political strife along religious lines. *Id.* at 3070. Further, channeling such aid through parents was found to avoid any "imprimatur of State approval." *Id.*
132. *Id.* at 3070. The Court quoted from Justice Powell's concurring opinion in *Wolman*. *See supra* note 95.
133. Mueller v. Allen, 103 S. Ct. 3062, 3070 (1983).
134. *Id.* The Court stated that relying on annual statistics to judge the constitutionality of a facially neutral law "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." *Id.*

Allen.[135]

2. The Dissenting Opinion

The principal position of the dissenting Justices in *Mueller* was that the establishment clause prohibits any subsidy of religious education, directly or indirectly. According to the dissent, the Minnesota statute was unconstitutional for the same reason that the New York statute was struck down in *Committee for Public Education & Religious Liberty v. Nyquist*:[136] it had the "direct and immediate effect of advancing religion."[137] The dissent cited *Nyquist* for the proposition that the controlling consideration should not be the form of the aid (tax credit or tax deduction); instead, the focus should be on the "substantive impact" of the financial aid.[138] Responding to the majority's attempt to distinguish *Nyquist*, the dissent disagreed with each of the majority's findings. The dissenters argued that the deduction was not effectively available to *all* parents,[139] the statistical evidence of primary effect should not be ignored,[140] the form of the tax benefit was not controlling,[141] and

135. *Id.* at 3071. In a footnote the Court suggested that the "political divisiveness" aspect of the entanglement inquiry should be limited to cases where direct financial assistance is provided to parochial schools or teachers in parochial schools. *Id.* at 3071 n.11.

136. *See supra* notes 76-88 and accompanying text.

137. Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 783 n.39 (1973).

138. Mueller v. Allen, 103 S. Ct. 3062, 3073 (1983).

139. Justice Marshall conceded that parents of public school children could take deductions for non-tuition expenses, such as gym clothes, pencils and notebooks, but found that such deductible expenses were *de minimus* in comparison to the tuition expenses deductible by parents of private school children.

> That the Minnesota statute makes some small benefit available to all parents cannot alter the fact that the most substantial benefit provided by the statute is available only to those parents who send their children to schools that charge tuition. . . . The statute is little more than a subsidy of tuition masquerading as a subsidy of general educational expenses.

Id. at 3074.

140. The dissent referred to the decisions in Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973), and Sloan v. Lemon, 413 U.S. 825 (1973), to support the position that statistical evidence should be considered regarding the extent to which parents sending their children to sectarian schools benefited from the statute. Mueller v. Allen, 103 S. Ct. 3062, 3074-75 (1983).

141. While the majority had concluded that the Minnesota statute was a "genuine tax deduction," Mueller v. Allen, 103 S. Ct. 3062, 3068 n.6 (1983), and had characterized the scheme in *Nyquist* as a tax credit, the dissent found this to be "a distinction without a difference." *Id.* at 3075. The dissent reasoned that the economic consequence of either program was the same: to grant a tax benefit "in exchange for performing a specific act which the state desires to encourage"—attendance at private schools. *Id.* at 3076.

neither *Board of Education v. Allen* nor *Everson v. Board of Education* were applicable precedent.[142]

Although the majority failed to differentiate the various types of deductions available under the Minnesota statute, the dissent specifically considered the deduction for textbooks and instructional materials.[143] The dissent primarily complained that the textbook/instructional materials deduction was not restricted to the secular functions of the parochial schools,[144] and argued that the statute provided substantial aid to the educational function of the church-affiliated schools which "necessarily result[ed] in aid to the sectarian school enterprise as a whole."[145] According to the dissent, the Court's decision in *Mueller* was "flatly at odds with the fundamental principle that a state may provide *no* financial support whatsoever to promote religion."[146]

142. The dissent found both *Allen* and *Everson* to be inapposite, since those cases involved indirect and incidental benefits which were carefully restricted to the secular side of the church-related schools, whereas the tuition deductions authorized in the Minnesota statute were not similarly restricted. *Id.* at 3076.

143. Neither the majority nor the dissenting opinion mentioned the transportation deduction, an apparently uncontested portion of the Minnesota statute. *See* Mueller v. Allen, 676 F.2d 1195, 1201 (8th Cir. 1981) ("No one seriously challenges the transportation deduction.") In *Norberg* the transportation deduction was found constitutional, but the court concluded that it could not be severed from the unconstitutional portions of the statute. Rhode Island Fed'n of Teachers v. Norberg, 630 F.2d 855, 862 (1st Cir. 1980).

144. Mueller v. Allen, 103 S. Ct. 3062, 3077 (1983). The dissent cited Meek v. Pittenger, 421 U.S. 349 (1975), for the proposition that even neutral, completely secular instructional material furnished to church-affiliated schools contributes to religious instruction because the religious mission is the only reason for the school's existence. *Id.* at 366. *Wolman* was cited by the dissent as supporting a similar conclusion regarding aid furnished to the student or his parent rather than directly to the schools. *See* Wolman v. Walter, 433 U.S. 229, 249-50 (1977).

Regarding the textbook deduction, the dissent criticized the majority's reliance on *Board of Educ. v. Allen*, a decision in which the Court assumed the textbooks would only be used for secular education because the books had been selected by the state for use in the public schools. The dissent reasoned that, since the Minnesota statute did not limit the deduction to state-approved books (those used in public schools), the statute would impermissibly allow parochial schools to choose the textbooks to be purchased by parents. Mueller v. Allen, 103 S. Ct. 3062, 3077 (1983). This conclusion was bolstered by the fact that other Minnesota statutes, MINN. STAT. §§ 123.932, 123.933, authorize the state to loan to private schools textbooks used in public schools. Therefore, parents would have no need to purchase and claim a deduction for such books.

145. Mueller v. Allen, 103 S. Ct. 3062, 3078 (1983) (quoting Meek v. Pittenger, 421 U.S. at 366).

146. *Id.*

IV. ANALYSIS

The decision in *Mueller* suggests that important changes have been made in the three-part establishment clause test as it is applied to the issue of state aid to parochial schools. Both the majority and dissenting opinions gave only fleeting consideration to the secular purpose criterion.[147] It is likely that the secular purpose prong of the three-part test will continue to be only minimally restrictive on state legislation aiding private schools.[148] The decision in *Mueller* reaffirms the familiar principle that an unconstitutional motive will not be attributed to a state enactment challenged under the establishment clause, especially where a plausible secular purpose is evident on the face of the statute.[149]

Furthermore, the decision in *Mueller* signals a retreat from a vigorous application of the excessive entanglement prong of the establishment clause test.[150] The Court found that administrative

147. The secular purpose requirement is a low-threshold test, since the courts will usually find in the statutory language or in the nature of the enacted program a secular purpose. At least one commentator has suggested that the secular legislative purpose requirement completely lacks substance as a constitutional test, arguing that it is merely a "judicial rite" consisting of a "verbal formula hurriedly mumbled." Buchanan, *Governmental Aid to Sectarian Schools: A Study in Corrosive Precedents*, 15 HOUS. L. REV. 783, 820 (1978).

148. The Court in *Mueller* was consistent with precedent in deciding that state legislatures have a legitimate secular interest and purpose in promoting pluralism and diversity among public and private schools, creating a healthy and safe educational environment, and protecting already overburdened public school systems against an influx of private school students should they decide to abandon private school in favor of public schools. *See, e.g.*, Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 773 (1973).

149. *See, e.g.*, Wolman v. Walter, 433 U.S. 229, 236 (1977); Meek v. Pittenger, 421 U.S. 349, 363 (1975); Lemon v. Kurtzman, 403 U.S. 602, 613 (1971).

150. The development and application of the excessive entanglement inquiry has sparked considerable discussions regarding the validity and usefulness of this element of the establishment clause test. Much of the commentary has been critical of this criterion because of the weak historical grounds for the political divisiveness inquiry and because of the inconsistent application of the test. *See, e.g.*, Choper, *supra* note 44, at 273 ("[T]o make 'divisiveness' determinative of constitutionality, despite the secular nature of the governmental program in controversy, is neither a desirable or workable approach to the problem" in view of the considerable and valid political involvement of churches and religious groups in national and state legislation on matters such as gambling, marriage, abortion, integration, divorce, birth control and prohibition.); Gaffney, *Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy*, ST. LOUIS U.L.J. 205, 212-24, 232 (1980) (The political entanglement test ought to be abandoned because of weak historical basis for its application, and because its use endangers the important civil liberty of citizens' full participation in political decision-making.); Kurland, *supra* note 15, at 19-20 ("[The entanglement criterion] is either empty or nonsensical . . . . The word entanglement is only an antonym for separation. The former assures no more guidance

entanglement did not arise from the state's determination of eligible textbooks.[151] However, the validity of this conclusion is seriously weakened by Rehnquist's reliance on the questionable precedent of *Board of Education v. Allen*.[152] The Court's suggestion, that the "political divisiveness" inquiry be limited to "cases where direct financial subsidies are paid to parochial schools or to teachers in parochial schools,"[153] represents an attempt to avoid any significant use of this inquiry. In fact, the "political divisiveness" inquiry is most appropriate in cases such as *Mueller* where the provision of direct aid to parents created serious risks of political division along religious lines.[154]

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than the latter . . . ."); Nowak, *The Supreme Court, the Religion Clauses and the Nationalization of Education*, 70 NW. U.L. REV. 883, 906 (1976) (The application of the political divisiveness test is "unprincipled and futile."); Schotten, *supra* note 25, at 235 (Because of inconsistent application, the excessive entanglement criterion is "more a piece of putty than a yardstick.")

However, excessive entanglement has been praised by other commentators as a valid and useful establishment clause inquiry. *See, e.g.*, Buchanan, *supra* note 147, at 821 (The excessive entanglement criterion is "the most credible guiding principle" of the three-part test since the primary effect element lacks "desirable specificity" and is "more conclusion of law than guiding principle."); Shortt, *The Establishment Clause and Religion—Based Categories: Taking Entanglement Seriously*, 10 HASTINGS CONST. L.Q. 145, 182-84 (1982) (Proper application of the entanglement test to prohibit the creation and use of religion-based categories would provide a principled basis for deciding cases under the establishment clause and would advance the values of separation and neutrality.).

151. Mueller v. Allen, 103 S. Ct. 3062, 3071 (1983). It is significant that the majority in *Mueller* did not apply the secular purpose or primary effect tests to the textbook deduction. Doing so would have required that the Court confront a difficult issue raised by the dissent. *Id.* at 3077. Since other Minnesota statutes, MINN. STAT. §§ 123.932 & 123.933 (1982), authorize the state to provide textbooks used in public schools to nonpublic school students, the only reason for parents to purchase books deductible under § 290.09(22) would be to acquire books chosen by the parochial schools. MINN. STAT. § 290.09(22) (1982). Thus, § 290.09(22) has indicia of both non-secular purpose and a primary effect which advances religion. *Id.*

152. *See supra* note 91. The Court observed in *Wolman* that the *Allen* decision regarding textbooks was being followed simply as a matter of *stare decisis*. *See* Wolman v. Walter, 433 U.S. 229, 251 n.18 (1977). In an earlier opinion, three Justices indicated that *Allen* might be decided differently today under the entanglement prong of the establishment test, a criterion which was not applied by the Court when *Allen* was decided. Meek v. Pittenger, 421 U.S. 349, 378 (1975) (Brennan, J., joined by Douglas and Marshall, J.J., concurring and dissenting).

153. Mueller v. Allen, 103 S. Ct. 3062, 3071 n.11 (1983).

154. Political campaigns to raise or lower the amount of indirect state aid to religious schools (such as tuition tax deductions) can generate significant political strife along religious lines, creating no less social disturbance than strife resulting from direct administrative confrontations.

A number of commentators have suggested that denying state aid to private religious schools is not likely to mitigate political strife along religious

The *Mueller* decision rested primarily on an analysis of whether the Minnesota statute had "the primary effect of advancing the sectarian aims of the nonpublic schools."[155] The majority concentrated on four characteristics of the Minnesota tax deduction in concluding that the establishment clause was not violated. First, the Court noted that the deduction under the Minnesota statute was only one of many deductions allowable under Minnesota tax laws.[156] The significance of this fact was overstated, however, since the deference given to state legislatures in creating classifications

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lines, but would merely shift the source of controversy. It is contended that the denial of aid would cause those in favor of parochial school aid to actively press for favorable legislation, or to oppose governmental aid programs for public schools, in an attempt to equalize a perceived funding imbalance. Both responses would create political strife along religious lines. *See, e.g.*, Choper, *supra* note 44, at 273; Morgan, *supra* note 16, at 96; Nowak, *supra* note 150, at 907; Schwarz, *infra* note 208, at 711.

Although this is a compelling argument, at least one commentator has suggested that a "no aid" approach would engender less political strife over time, since there would be little incentive for religious groups to press the legislature for new or renewed funding appropriations. "Blocked by a potent constitutional barrier, the proponents of governmental aid to sectarian schools would come to recognize the futility of roiling the political waters; their enthusiasm for political battle would wane appreciably as they came to realize that the keys to the public treasury were beyond their grasp." Buchanan, *supra* note 147, at 834.

155. Mueller v. Allen, 103 S. Ct. 3062, 3067 (1983) (quoting Committee for Pub. Educ. v. Regan, 444 U.S. 646, 662 (1980)).

156. *Id.* The Court cited § 290.09(10), MINN. STAT. § 290.09(10)(1982) (deductions for medical expenses), and § 290.21, MINN. STAT. § 290.21(1982) (deduction for charitable contributions). In a footnote, the court added § 272.02 (exemptions from property tax for property used for religious purposes) and stated that the holding in *Walz v. Tax Comm'n* "does not require the conclusion that such provisions of a state's tax law violate the Establishment Clause." Mueller v. Allen, 103 S. Ct. 3062, 3067 n.5 (1983). This is an imaginative interpretation of *Walz* since the holding in *Walz* was expressly limited to tax exemptions and cannot reasonably be read as an approval of charitable deductions. Moreover, federal courts have never found tuition payments to schools to be classified as charitable contributions. *See, e.g.*, Oppewal v. Commissioner, 468 F.2d 1000 (1st Cir. 1972) (payment to religious school attended by taxpayer's children not deductible). The Internal Revenue Service will disallow any contribution to a qualified charitable institution to the extent that it is offset by the fair market value of services received from the institution. The I.R.S. has interpreted § 170(c) of the Internal Revenue Code (defining charitable contribution) as follows:

> [I]t is immaterial that the payments . . . were not explicitly designated as tuition . . . However the payment is designated, and whatever the taxpayer's motive in making it, the test to be applied is whether the payment was, to any substantial extent, offset by the fair market value of services rendered to the taxpayer in the nature of tuition. If so, the payment, to the extent of the offset, should be regarded as non-deductible tuition.

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in tax statutes does not immunize a tax scheme which violates the establishment clause.[157] Moreover, the Court's grant of "substantial deference"[158] to the Minnesota legislature's judgment is properly a secular purpose consideration, not part of the primary effects analysis.[159]

Second, the majority placed considerable emphasis on the fact that the Minnesota deduction was "available" for "*all* parents, including those whose children attend public schools."[160] In distinguishing *Nyquist*, where public assistance was provided *only* to parents of children in private schools, the Court in *Mueller* recalled that the question of the validity of state aid "made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited" had not been decided in *Nyquist*.[161] *Mueller*, however, is clearly not a case where aid was provided without regard to the nature of the institution benefited; the Court explicitly recognized that the purpose of the aid was to "[assure] the continued financial health of *private* schools."[162]

Although the Court properly stated that a program which "neutrally provides state assistance to a broad spectrum of citizens" does not violate the establishment clause,[163] this conclusion is not

157. *See, e.g.*, Byrne v. Public Funds for Pub. Schools, 442 U.S. 907 (1979), *aff'g* 590 F.2d 514, 520 n.11 (3rd Cir. 1979) (striking down program of tax *deductions*); Grit v. Wolman, 413 U.S. 901 (1973), *aff'g* 353 F. Supp. 744, 767 (S.D. Ohio 1972) (striking down a program of tax *credits*).

158. Mueller v. Allen, 103 S. Ct. 3062, 3067 (1983).

159. Under the secular purpose analysis it is appropriate to defer to the legislature's judgment, expressed or implicit in the enactment. *See supra* notes 47 & 147. However, prior to *Mueller* no such deference was due under the primary effect test. As the Court noted in *Nyquist*, "the propriety of a legislature's purpose may not immunize from further scrutiny a law which either has a primary effect that advances religion, or which fosters excessive entanglements between Church and State." Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 774 (1973). Even a law found to have a primary effect which "promote[s] some legitimate end under the State's police power is [not] immune from further examination to ascertain whether it also has the *direct and immediate* effect of advancing religion." *Id.* at 783 n.39 (emphasis added).

160. Mueller v. Allen, 103 S. Ct. 3062, 3068 (1983).

161. Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 782 n.38 (1973).

162. Mueller v. Allen, 103 S. Ct. 3062, 3067 (1983) (emphasis added).

163. *Id.* at 3068. The Court relied on Widmar v. Vincent, 454 U.S. 263 (1981), and "other decisions" for this proposition. Mueller v. Allen, 103 S. Ct. 3062, 3068 (1983). However, *Widmar* clearly focused on the *actual* (not facial) availability of state assistance to a "broad class of non-religious as well as religious [beneficiaries]." Widmar v. Vincent, 454 U.S. 263, 274 (1981). The Court in *Widmar* explicitly noted that "[t]he provision of benefits to so broad a spectrum of groups is an important index of secular effect," but only "*in the ab-*

applicable to the facts of *Mueller* for two reasons. First, although the statute is facially neutral to all parents, in application the benefit is clearly targeted to parents of children attending private schools.[164] Therefore, the requirement of neutrality was not satisfied. Second, the state assistance is neither broadly "available," nor "provided," to all parents, since the bulk of the tax benefits are conferred upon parents whose children attend religious schools.[165]

The Court in *Mueller* ignored the essential inquiry of the primary *effect* test, focusing instead on the facial neutrality of the statute without regard to contradictory empirical evidence of the statute's effect.[166] Whereas previous establishment clause decisions had recognized the relationship between the state aid program and the extent of benefits conferred upon the parochial school or parents whose children attend parochial schools,[167] the *Mueller* Court retreated from any inquiry into the composition of the benefited class.[168] Justice Rehnquist cited two reasons for avoiding reliance on "statistical analysis" of the benefited class: first, the lack of certainty needed for establishment clause questions;[169] and, second, the absence of "principled standards" by

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sence of empirical evidence that religious groups will dominate [the state assistance]." *Id.* at 275(emphasis added).

164. The Court acknowledged the stipulated facts that 820,000 students in Minnesota attended public elementary and secondary while 91,000 attended private elementary and secondary schools. About ninety-five percent of these private school students attended religious schools. Mueller v. Allen, 103 S. Ct. 3062, 3064-65 (1983). The dissent pointed out that only seventy-nine students attending public schools were charged tuition for out-of-district attendance. The balance of the public school students were charged no tuition. *Id.* at 3072.

165. The challengers of the statute contended that the State of Minnesota loses 2.4 million dollars in annual revenue from the tuition deduction and that seventy-one percent of the amount is given to parents with dependent children in religious schools, a group comprising less than ten percent of the total elementary and secondary school enrollment. Mueller v. Allen, 676 F.2d 1195, 1198-99 (8th Cir. 1981).

166. As noted by the Court in *Nyquist*, the establishment clause requirement of neutrality is infringed by special tax benefits: "[I]nsofar as such benefits render assistance to parents who send their children to sectarian schools, their purpose and inevitable effect are to aid and advance those religious institutions." Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 793 (1973). By refusing to acknowledge the characteristics of the benefited class of parents, the Court avoided finding such inevitable effect.

167. *See, e.g.*, Sloan v. Lemon, 413 U.S. 825, 830 (1973) (recognition that over ninety percent of the children attending private schools in Pennsylvania were enrolled in religious schools); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 768 (1973) (recognition that over eighty-five percent of the private schools benefited under the New York statute were church-affiliated).

168. Mueller v. Allen, 103 S. Ct. 3062, 3070 (1983).

169. Perhaps the most illuminating aspect of the "lack of certainty" argument is

which the empirical evidence could be evaluated.[170] In fact, reliance on detailed statistical evidence regarding classifications of aid and classes of persons benefited would be superfluous since the only inquiry needed is a general one: whether the tax benefit for educational expenses primarily benefits parents who send their children to religious schools.[171] Since over ninety-five percent of *all* private school students in Minnesota attend sectarian schools, finding a primary effect of advancing religion should be clear and direct where the aid has not been effectively restricted to secular functions.[172]

Although not a major consideration of the majority in *Mueller*, the Court attempted to create a distinction between the Minnesota tax relief as a "genuine tax deduction,"[173] and the New York scheme of "tax benefits" struck down in *Committee for Public Education and Religious Liberty v. Nyquist*.[174] As the dissent in *Muel-*

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the implicit recognition that the Court's decisions in establishment clause cases have become virtually impossible to predict. *See supra* notes 15-16 and accompanying text. It is difficult to accept the Court's contention that a primary effect analysis under the establishment clause, aided by the use of statistical evidence regarding the benefited class, lacks any more certainty than the standards of "disproportionate impact" and "discriminatory motive" in cases under the equal protection clause. *See, e.g.*, Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976).

170. This argument, like the "lack of certainty" contention, is unconvincing. The obvious conclusion to be drawn from statistical data (showing that seventy-one percent of the benefits are flowing to religious school attendees constituting only ten percent of the state's total enrollment) is that the funds are not being used "exclusively for secular, neutral, and nonideological purposes." Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 780 (1973). The Court's concern that a "statistical analysis" might be misleading because it would fail to account for persons "entitled" to tax relief who fail to claim the deductions is an unwarranted concern. It is well established that the primary effect analysis focuses on the class of *actual* beneficiaries, not on those who *might* benefit from the state assistance. *See supra* note 167 and accompanying text.

171. *See supra* note 166.

172. *Everson* and *Allen* are the only prior Supreme Court cases in which the benefits were facially available to all parents and students. However, the Court subsequently distinguished these cases from aid in the form of tuition reimbursement which is "quite unlike the sort of 'indirect' and 'incidental' benefits that flowed to sectarian schools from programs aiding *all* parents by supplying bus transportation and secular textbooks for their children. *Such benefits were carefully restricted to the purely secular side of church-affiliated institutions* . . . ." Sloan v. Lemon, 413 U.S. 825, 832 (1973) (emphasis added).

173. Mueller v. Allen, 103 S. Ct. 3062, 3067 n.6 (1983) (quoting Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 790 n.49).

174. Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 790-91 (1973). In *Nyquist*, the challengers of the statute contended that the statute established a system of tax "credits," *id.* at 789, while the state contended that the statute created tax "modifications." *Id.* The Court found that, in ef-

ler observed: "This is a distinction without a difference."[175] Even the majority in *Mueller* conceded that the economic *consequences* of the programs in *Nyquist* and *Mueller* were the same,[176] thereby considerably weakening this argument which improperly elevated form over substance.

A fourth factor cited by the *Mueller* Court, was that providing aid directly to parents, not directly to the sectarian schools, contributed to the statute's validity because any aid to religious schools would result only from "numerous, private choices of individual parents."[177] Yet the Court failed to reconcile this conclusion with its warning in *Nyquist* that "if the grants are offered as a incentive to parents to send their children to sectarian schools by making unrestricted cash payments to them, the Establishment Clause is violated whether or not the actual dollars given eventually find their way into the sectarian institutions."[178] The Court in *Nyquist* had also concluded that channeling the aid through parents did not provide a "per se immunity from examination of the substance of the State's program,"[179] as the aid in that case was found to be advancement of religion.

Perhaps the most revealing portion of Rehnquist's primary effect analysis dealt with the indirect nature of the assistance provided by the Minnesota program. Justice Rehnquist observed that the main thrust of the establishment clause was to prevent government involvement in religion which is likely to lead to severe political strife.[180] Thus, Justice Rehnquist introduced the notion of

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fect, the statute created a tax credit, but noted that the constitutionality of the tax benefit "does not turn in any event on the label we accord it." *Id.*

175. 103 S. Ct. 3062, 3075 (1983).

176. *Id.* at 3067 n.6.

177. 103 S. Ct. 3062, 3069 (1983).

178. Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 786 (1983). On the same day as the decision in *Nyquist*, the Court summarily affirmed an Ohio district court decision which struck down a tax credit for tuition expenses. The lower court had reasoned that channeling the aid through parents did not avoid the primary effect of advancing religion:

> Such aid may be less direct and less capable of precise measurement than a grant to the schools themselves; yet if some parents will now be able to send their children to these schools or if fewer parents already utilizing them will be forced to withdraw their children, [the schools] will be aided.

Kosydar v. Wolman, 353 F. Supp. 744, 762 (S.D. Ohio 1972), *aff'd mem. sub nom.* Grit v. Wolman, 413 U.S. 901 (1973).

179. 413 U.S. 756, 781 (1973). The Court in *Nyquist* made clear that delivering grants to parents rather than to the schools was not conclusive regarding the primary effect of the aid but was "only one among many factors to be considered." *Id.*

180. Mueller v. Allen, 103 S. Ct. 3062, 3069 (1983). The contention that avoidance of political strife along religious lines is a primary evil targeted by the establishment clause is a weak constitutional proposition. The contention lacks his-

political entanglement into the primary effect analysis, and concluded that the risk of serious political division along religious lines is remote.[181] This conclusion stressed the issue of political strife, thus avoiding the otherwise obvious finding that the financial assistance given to parents had the same ultimate *effect* as aid given directly to the schools—the advancement of religion. This approach to the primary effect analysis reveals the Court's reluctance to adopt the permeation doctrine[182] regarding aid to parochial schools, and indicates that the potential danger of political strife resulting from state aid will be viewed as remote so long as the aid is provided indirectly.

The majority in *Mueller* appears to be willing to abandon the traditional three-part establishment clause test for evaluating state aid to parochial schools in favor of a "factor analysis" approach.[183] The "factor analysis" approach weighs the risk of harm to establishment clause values against the positive social contributions made by private sectarian schools. The Court justified this balancing process as being necessary to relieve parents of parochial school children from the "particularly great financial burden [which they bear] in educating their children."[184] Further, the

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torical support and threatens public participation in the democratic process. *See supra* notes 74-75 & 150 and accompanying text.

181. Paradoxically, the Court cited Justice Powell's opinion in *Wolman* to support the proposition that the threat of government intrusion into religious life is remote. *See infra* text accompanying notes 195-96.

182. The permeation doctrine was acknowledged by the Court in Meek v. Pittenger, 421 U.S. 349 (1975). "Even though earmarked for secular purposes, 'when it flows to an institution in which religion is so pervasive that a substantial portion of its functions are subsumed in the religious mission,' state aid has the impermissible primary effect of advancing religion." *Id.* at 365-66 (quoting Hunt v. McNair, 413 U.S. 734, 743 (1973)).

183. The Court's application of the three-part establishment clause test has involved consideration of a number of diverse factors including: whether the state's purpose is religious or secular; the relative importance of this public purpose; the likelihood of achieving the purpose; the type and amount of aid given to religion; the proportion of secular functions within the religious institution; the relationship between the aid and the religious functions of the institution; the involvement of the state in selecting the benefited institutions; and the existence and adequacy of alternative means of assistance. *See* Choper, *supra* note 44, at 324.

184. Mueller v. Allen, 103 S. Ct. 3062, 3070 (1983). The argument that a system of tax relief for private school tuition fairly equalizes the "benefit" of free public education was raised by Chief Justice Burger and Justice Rehnquist in dissenting opinions in Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 803, 812 (1973). The majority in *Nyquist* rejected this equality argument, reasoning that all students have equal access to public schools "totally at state expense," *id.* at 782 n.38, and that granting an extra benefit to private school students could lead to "*complete subsidization* of all religious schools . . .—a result wholly at variance with the Establishment Clause." *Id.* (emphasis in original).

Court argued that "whatever unequal effect may be attributed to the statutory classification can be fairly regarded as a rough return for the benefits . . . provided to the state and all taxpayers by parents sending their children to parochial schools."[185] However, a utilitarian weighing of various social benefits against the establishment clause may lead to legislative encroachments on both separatism and religious liberty. Prior to *Mueller*, recognition of the social value of private and sectarian educational institutions was never sufficient to validate aid which was not restricted to a secular purpose.[186] Now the "special contributions" of parochial schools apparently can be used to overcome objections that the aid's ultimate effect is the establishment/advancement of religion.

The Court's inability to define clear and consistent principles for application of the establishment clause to cases involving state aid to parochial schools stems in part from a failure to develop a proper definition of the values served by the religion clauses of the first amendment. The majority's allegiance to a mechanical purpose-effect-entanglement test, or reliance upon a balancing of social interests, without properly focusing on the purposes to be served by both religion clauses, necessarily results in decisions which lack constitutional guidance for state legislatures and others interested in aid to parochial schools.[187]

Although commentators have often suggested that religious liberty is the central purpose served by the religion clauses,[188] the Court's analyses of aid to private schools have generally failed to define and balance the often conflicting purposes of the establishment clause and the free exercise clause.[189] In *Mueller*, this failure was repeated. The Court avoided any direct reliance on the free exercise clause as the provision which promotes voluntarism and

185. Mueller v. Allen, 103 S. Ct. 3062, 3070 (1983). However, even if this is a secular legislative purpose of the statute it will not immunize the aid under the primary effect analysis. *See supra* note 159 and accompanying text.

186. *See supra* note 132 and accompanying text.

187. *See supra* notes 15-17 and accompanying text.

188. *See, e.g.*, P. KAUPER, FRONTIERS OF CONSTITUTIONAL LIBERTY 129 (1956); P. KAUPER, RELIGION AND THE CONSTITUTION 77 (1964) [hereinafter cited as RELIGION]; Choper, *supra* note 44, at 267. For a comprehensive analysis of the problems of defining and protecting religion and religious liberty in the context of contemporary religious pluralism, see RELIGION, *supra* at 13-14.

189. An exception is the decision in *Walz v. Tax Comm'n*, which has been referred to as "the paradigm of balancing" between the separation value of the establishment clause and the neutrality value of the free exercise clause. Note, *supra* note 22, at 710. In *Walz* the Court noted that the first amendment prohibited either "governmentally established religion" or "governmental interference with religion." 397 U.S. 664, 669 (1970). "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." *Id.*

neutrality required for the effective exercise of religious liberty.[190] Were the Court to adopt an approach for balancing the establishment clause's principle of separation against the free exercise clause's principle of neutrality,[191] the primary focus would be whether the state has properly relieved the burdens created by tax-supported public school financing[192] without creating an undue danger of church-state involvement.[193] The majority in *Mueller* did impliedly use this notion of "benevolent neutrality"[194] (i.e., avoidance of hostility toward religion), but based its decision on general concepts of social equalization and rewarding social contribution, rather than a more appropriate constitutional balancing of the two religion clauses. In short, the Court's decisions in establishment clause cases lack effective definition and application of the purposes and values inherent in the religion clauses.

Clear evidence of the Court's uncertainty about which evils the establishment clause was designed to prevent exists in *Mueller*. Justice Rehnquist cited *Nyquist* for the proposition that the purpose of the establishment clause was to prevent " . . . government involvement in religious life";[195] yet, in the next sentence Rehnquist quoted *Wolman v. Walter* to define the historic purpose of the establishment clause as being to deminish "the risk of significant religious or denominational control over our democratic processes."[196]

The significance of *Mueller* for future programs of state aid to parochial schools can hardly be underestimated. The Court has departed sharply from precedent by upholding state aid which is channeled through parents, despite the fact that it primarily bene-

190. *See* Note, *supra* note 21.

191. Several commentators have already proposed such a balance. *See, e.g.*, P. KAUPER, *supra* note 188, at 130-33; Note, *supra* note 22; Young, *supra* note 15, at 787-88.

192. Although the Court in *Mueller* seemed to agree with commentators who suggest that pupils who choose to attend free public schools actually receive a state subsidy "in-kind," *see, e.g.*, Nowak, *supra* note 150, at 896, it is clear that there is no "general principle that requires the state to compensate those who out of religious conviction incur a handicap under law." Freund, *supra* note 74, at 1687. Thus, in *Mueller* there existed no "burden" upon the free exercise of religion because of tax-supported public schools. "If your religion prevents you from availing yourself of the public facility and impels you to make a financial sacrifice for the sake of your faith, surely the spirit of religion is the better served by your act." *Id. See also supra* note 184.

193. The establishment clause would be violated if the tax relief had the primary effect of advancing religion, *see supra* note 47, or resulted in excessive entanglement of the state in religious affairs, *see supra* note 150.

194. *See* Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970).

195. Mueller v. Allen, 103 S. Ct. 3062, 3069 (1983).

196. *Id.* (quoting Wolman v. Walter, 433 U.S. 229, 263 (1977) (Powell, J., concurring in the judgment in part and dissenting in part)).

fits parochial schools and is not limited to secular functions. This holding was not a breach of the church-state wall of separation compelled by the free exercise clause, since there was no contention that the absence of the tax deduction violated the principles of voluntarism and neutrality.[197] In effect, the Court in *Mueller* held that a state may risk establishment of religion in order to compensate parents who choose religious education for their children.[198]

Although *Mueller*-type aid to parochial schools does not directly establish a state religion, it is clearly legislation *respecting* an establishment of religion. Chief Justice Burger emphasized in *Lemon v. Kurtzman* that legislation which falls short of actually establishing a religion may still violate the establishment clause: "A given law might not establish a state religion but nevertheless be one 'respecting' that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment."[199] *Mueller*-type aid favors religions which provide religious education over those which do not (including non-religions), and, thus, offends the neutrality principle of the establishment clause.[200] If *Mueller* marks the beginning of a significant accommodationist phase in aid to parochial schools, far-reaching adverse results will inevitably follow. To the extent that religious institu-

197. *See supra* notes 189-93 and accompanying text.

198. This holding may be contrasted with the dissenting opinions of Chief Justice Burger, Justice White, and Justice Rehnquist in *Nyquist*, where the balance between the free exercise clause and the establishment clause was clearly addressed: "In light of the free Exercise Clause . . . [a] State should put no unnecessary obstacles in the way of religious training for the young." Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 814 (1973) (White, J., dissenting). The tax benefits in *Nyquist* were judged by Justice Rehnquist to be "surely consistent with the 'benevolent neutrality' we try to uphold in reconciling the tension between the Free Exercise and Establishment Clauses." *Id.* at 810 (Rehnquist, J., dissenting). It is possible that the majority in *Mueller* chose to avoid the free exercise analysis in order to lend support to the contention that the Minnesota aid was secular in purpose and effect and would not significantly assist beneficiaries in the exercise of religious beliefs.

199. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

200. As of the 1980-1981 school year, 75.5 percent of all private sectarian elementary and secondary school students attended Catholic schools. NAT'L CENTER FOR EDUC. STATISTICS, UNITED STATES DEP'T OF EDUC., DIGEST OF EDUCATION STATISTICS 49 (1982). Religions which do not provide religious educational functions necessarily receive no benefits from the tax relief measures. In the *Mueller* type of aid "the government can express official approval or disapproval of certain religious practices and beliefs through its power either to grant or withhold [tax relief]. . . . The assumption of this power constitutes the most fundamental and obnoxious form of entanglement." Shortt, *supra* note 150, at 156. As noted by the Court in Zorach v. Clauson, 343 U.S. 306, 313 (1952), the government's attitude toward religion should be one which "shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma."

tions become dependent upon government assistance, religion will risk loss of integrity and spiritual freedom.[201] "The ultimate strength of our religious establishment is derived . . . not from the favoring acts of government, but, in largest measure, from the continuing force of the evangelical principle of separation."[202]

Although some commentators have expressed concern that the acceptance of government aid will result in government control of parochial schools,[203] this argument is weakened by the fact that significant state control over private (including sectarian) schools is often unrelated to a state's grant of financial aid.[204] More serious is the concern that granting aid for parochial school education will have an adverse effect on the public school system. Diversity will be lost as students of various faiths are attracted into separate school systems. The enrollment and financial consequence of widespread state adoption of tuition tax deductions could irreversibly imperil public support for the public education system.[205] While it recognized the social value of private schools, the *Mueller* Court failed to address these fundamental social concerns arising from grants of government aid to parochial schools.

V. CONCLUSION

Options available to the Court for deciding establishment clause cases are limited, especially with regard to grants of aid to parochial schools. The "no-aid," or "absolutism," approach has been properly rejected by the Court as resulting in impermissible

201. With the emphasis on religious liberty has come a recognition that the best interests of both church and state are served when each is true to its own functions. With regard to government aid and religious freedom one commentator has said:

> Religion is not true to itself if it depends upon governmental prescription and coercion. The churches cannot look to the government to perform their tasks. Some of the current discussions fail to recognize that the churches are free only when they can depend upon their own spiritual resources both in ministering to the lives of their communicants and in bearing witness to this in the life of the community.

RELIGION, *supra* note 188, at 82. This freedom is impaired when government uses its coercive power to sanction religious faith.

202. M. HOWE, THE GARDEN AND THE WILDERNESS 11 (1965).

203. *See, e.g.*, RELIGION, *supra* note 188, at 117; Rossmiller, FULL STATE FUNDING: AN ANALYSIS AND CRITIQUE, in CONST. REFORM OF SCH. FIN. 47 (K. Alexander & K. Jordan ed. 1973); Buchanan, *supra* note 147, at 838; Hunter, *The Continuing Debate over Tuition Tax Credits*, 7 HASTINGS CONST. L.Q. 523, 524 (1980).

204. Pierce v. Society of Sisters, 268 U.S. 510, 534 (1925) (recognizing the states' authority to reasonably regulate public and private schools). *See supra* notes 32-33 and accompanying text.

205. *See* Buchanan, *supra* note 147, at 825-827.

burdens on the free exercise of religion.[206] Aid should be permitted for general welfare or public safety purposes where the statutory vehicle for aid is neutral both on its face *and* in application. The Supreme Court's continued reliance on narrow factual distinctions in establishment clause cases has created a mounting confusion,[207] which can only be remedied by adopting a new approach. The area could be greatly clarified by adopting a constitutional balancing of the free exercise and establishment clauses. Such a balance would preserve unfettered exercise of religion by allowing governmental assistance to religious institutions, but only to the extent that the effect of such aid does not favor one religious group over another. So long as the aid works to advance the interests of particularized religious groups, however, it cannot be justified by the utilitarian argument that the benefited institutions contribute to social value.[208]

Balancing the two religion clauses further requires that the Court evaluate the actual primary effect of the aid in question, thus giving at least some consideration to generalized data regarding the benefited class. A statistical guarantee of neutrality,[209] assuring that the amount of aid does not exceed the value of the

206. *See supra* notes 183-186 and accompanying text. *But see* Note, *Rebuilding the Wall: The Case for a Return to the Strict Interpretation of the Establishment Clause*, 81 COLUM. L. REV. 1963 (1981) (proposing application of a strict neutrality standard barring all state aid of whatever amount and form which results in advancing religion, even indirectly).

207. In addition to *Mueller*, the Court decided Marsh v. Chambers, 103 S. Ct. 3330 (1983), and Larken v. Grendel's Den, Inc., 103 S. Ct. 505 (1982). In *Larkin* the Court held that a Massachusetts zoning law which permitted churches and schools to "veto" the granting of liquor licenses within 500 feet of such institutions was unconstitutional. In contrast to *Mueller*, the *Larkin* Court concluded that the statute's effect exceeded the strict standard applied in *Nyquist* of "*remote* and *incidental* effect advantageous to religious institutions." Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 784 n.39 (1973) (emphasis added). *Marsh* raises the possiblity that the tripartite test will be avoided entirely when the Court chooses to carve out an exception to establishment clause doctrine based on historical (and perhaps other) reasons. *See supra* note 26.

These most recent decisions strongly reinforce the characterization of the Court's approach to establishment clause questions as an "analytical subterfuge permitting the court to justify its holdings in the name of judicial standards, but without forcing the [C]ourt to have any enduring standards." Devins, *Inconsistent Standard of Review in Last Term's Establishment Cases*, NAT'L L.J., Oct. 3, 1983, at 24 col. 3.

208. *See supra* notes 184-86 and accompanying text.

209. *See supra* note 81 and accompanying text. *See also* Choper, *supra* note 44 (proposing a constitutional standard under which governmental aid to parochial schools is constitutional to the extent that it does not exceed the value of secular services provided). *Cf.* Schwarz, *No Imposition of Religion: The Establishment Clause Value*, 77 YALE L.J. 692 (1968) (proposing that the establishment clause be read to prohibit only aid which has as its motive or

secular benefits provided, would affirm the separation and neutrality principles of the establishment clause.

The recommended balancing test would also enable the Court to fully develop a posture of "benevolent neutrality." On the one hand, the Court would preserve the free exercise of religion through secular aid, while restricting aid which results in favoring particular religions or which results in government interference with the exercise of religion, on the other.

In order to properly apply this balancing test, the Court should adopt a more intrusive inquiry into the secular purpose criterion of the three-part test. By duly recognizing the non-secular purposes of programs which aid religious institutions, the Court will be forced to weigh legitimate benefits of free exercise of religion against the dangers, under the establishment clause, of contact between church and state. The Court's present cursory analysis under the secular purpose prong threatens to misstate, understate, or even ignore proper free exercise interests.

This balancing approach is further based on consistent identification of establishment clause values, which will result in greater certainty and guidance to the states in formulating aid programs. The proposed approach would allow states to focus on the substance and effect of a particular aid program rather than on the form and manner of distributing the aid. Most importantly, however, a balancing approach will require that any aid which advances identifiable religious groups must be justified and compelled by overriding free exercise interests. Free exercise interests would compel aid where necessary to preserve religious autonomy, and where governmental interference in religion can be avoided. The majority in *Mueller* failed to require proponents of aid to demonstrate such compelling free exercise interests. Proper consideration of free exercise burdens in a constitutional balancing with establishment clause objectives will avoid improper Court excursions into legislative and social policy development based on adjudicatory facts.[210] To the extent that balancing the principles of separation and neutrality results in restrictions on *Mueller*-type aid, the separation which is gained will serve to strengthen religious institutions[211] and redirect government programs toward le-

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substantial effect the imposition of religious belief or practice, and that aid which helps implement privately made religious choice is lawful).

210. *See supra* note 29. *See also* M. HOWE, *supra* note 202, at 168; Schotten, *supra* note 25, at 238-40.

211. *See supra* notes 201-202 and accompanying text. *See also*, P. KAUPER, *supra* note 188, at 143. Kauper suggests that this religious freedom is directly supportive of the national strength of the United States:

> The inner strength and vitality of religious societies and of religious life generally in the United States . . . demonstrates that the free

gitimate secular ends.[212]

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church, deriving its strength from voluntary adherence and support, assures the maximum of religious liberty and offers the greatest promise for the cultivation and release of the spiritual power and moral insights that constitute a nation's inner strength.

Id. at 142-43.

212. The cost of federal tuition tax credits, *see supra* note 6, has been estimated at $726 million to $779 million by 1987. EDUC. AND WELFARE DIV., CONG. RESEARCH SERV. 11, TUITION TAX CREDITS ISSUE BRIEF NO. 1B81075 (updated Sept. 13, 1983).