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A Breach in the Impregnable Wall: An Analysis of Tuition Tax Credits and the Establishment Clause

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A Breach in the Impregnable Wall: An Analysis of Tuition Tax Credits and the Establishment Clause

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A Minnesota statute allows taxpayers, in computing their state income tax, to deduct expenses incurred in the education of their children.¹ These expenses include tuition, textbooks, and transportation costs, and are available to parents of all elementary or secondary school students. A group of Minnesota taxpayers brought suit in federal district court against the Minnesota Commissioner of Revenue and against parents who had taken deductions for expenses incurred in sending their children to parochial schools. The taxpayers claimed that the statute violated the establishment clause of the first amendment by providing assistance to sectarian institutions. The district court granted summary judgment for the commissioner,² holding that the statute did not have the primary effect of either advancing or inhibiting religion. The Eighth Circuit Court of Appeals affirmed; it held that the statute was neutral on its face and in its application.³ On certiorari the Supreme Court of the United States affirmed and held: A state statute that provides tax deductions for tuition, textbooks, and transportation expenses incurred by parents of school children who attend public or non-public schools does not violate the establishment clause of the first amendment. *Mueller v. Allen*, 103 S. Ct. 3062 (1983).

I. HISTORICAL ANALYSIS

The Supreme Court of the United States has promulgated a

1. MINN. STAT. ANN. § 290.089 (West Supp. 1982) (the deduction cannot exceed \$500 for each dependent in elementary school and \$700 for each dependent in grades 7-12).

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

3. 676 F.2d 1195 (1982).

three-part test to determine the validity of a statute under the establishment clause. A federal or state statute granting aid to a sectarian institution is constitutional if (1) it has a secular legislative purpose; (2) it does not have the primary effect of either advancing or inhibiting religion; and (3) it does not lead to excessive entanglement between church and state.⁴ The Court developed this test in a series of decisions examining government aid to religious institutions, thereby creating numerous precedents demarcating the parameters of permissible church and state contacts.⁵

The first amendment to the United States Constitution states that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."⁶ These words were drafted in an era taut with religious tension; they reflected the fears of an emerging nation preoccupied with the abridgement of individual freedoms.⁷ The establishment clause embodied the hope that religion would be left to the dictates of the individual's conscience, and not be proscribed or determined by the whims of a sovereign.⁸ It also reflected Thomas Jefferson's hope that a wall of separation between church and state would assure an enduring

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

5. The complexity of the constitutional problems that church and state relations raise, coupled with the recognition that parents have the right to send their children to parochial schools, forced the Court into a series of decisions that seem to have little or no relation to each other. As one commentator described:

Since 1947, the Supreme Court has upheld the following state aid programs for elementary and secondary nonpublic schools: reimbursing the cost of transportation to and from public and nonpublic schools; lending students secular, non-ideological textbooks; providing diagnostic, therapeutic, and remedial services; and reimbursing schools for carrying out state-mandated testing and scoring. At the same time, the Court has struck down aid programs covering field trip transportation; salaries for parochial school teachers; maintenance and repair costs; instructional equipment, supplies, and materials; and some forms of tuition benefits.

Note, *Laus Respecting an Establishment of Religion: An Inquiry into Tuition Tax Benefits*, 58 N.Y.U. L. Rev. 207, 210 (1983). For a discussion of various precedents highlighting the development of establishment clause analysis, see *infra* notes 10-43 and accompanying text.

6. U.S. CONST. amend I.

7. The Supreme Court acknowledged, in *Everson v. Board of Educ.*, 330 U.S. 1 (1947), the environment of fear and apprehension pervasive among the drafters of the Constitution: "These words of the First Amendment reflected in the minds of early Americans a vivid mental picture of conditions and practices which they fervently wished to stamp out in order to preserve liberty for themselves and their posterity." *Everson*, 330 U.S. at 8.

8. See Hunter, *The Continuing Debate Over Tuition Tax Credits*, 7 HASTINGS CONST. L.Q. 523, 528 (1980) (discussing the intentions and motivations of the Framers in drafting the religion clauses).

freedom of conscience.⁹

The first establishment clause challenge to a state statute providing aid to a sectarian institution came before the Supreme Court in 1947, in the case of *Everson v. Board of Education*.¹⁰ A New Jersey statute authorized the provision of funds for the transportation of children to educational institutions, including sectarian private schools.¹¹ The Supreme Court ruled that a state could provide aid to a nonpublic institution if the aid promoted the general welfare and was neutral.¹² The majority emphasized that the nation was no longer fraught with the fear of state religion or with a sovereign's proscription or inhibition of the free expression of an individual's conscience.¹³ The Court developed the secular legislative intent test and ruled that the purpose of the New Jersey statute was to extend welfare benefits to all children.¹⁴ The majority emphasized that the wall of separation between church and state must always be an impregnable barrier, one which does not allow even the most innocuous breach.¹⁵

During the next sixteen years the Court applied the secular purpose test to numerous state statutes.¹⁶ Both opponents and

9. The concept of a wall separating church and state was first articulated in a letter written by Thomas Jefferson in 1802 to the Dansbury Baptist Association. Jefferson used the wall metaphor in a philosophical argument in which he concluded that government could not reach the opinions of men, and in which he argued for a separation between secular and religious entities. See Hutchins, *The Future of the Wall*, in *THE WALL BETWEEN CHURCH AND STATE* 17 (D. Oaks ed. 1963).

10. 330 U.S. 1 (1947).

11. The township of Ewing instituted a program pursuant to the statute wherein the town reimbursed funds that parents expended for the transportation of their children to and from school. The aid applied to fares paid for transportation by public carrier and was extended to parents of parochial school students.

12. The Court stated that the first amendment "requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them." *Everson*, 330 U.S. at 18.

13. See *id.* at 8.

14. The Court compared the provision of public aid for transportation expenses to the provision of state-paid policemen. It stated that in both cases the state was advancing the welfare of children. "[The] 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.

15. The Court stated: "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach." *Id.*

16. During these years the Court did not examine the issue of public aid to religious institutions. Instead, it focused on activities prevalent in the classrooms. The most celebrated cases during this period dealt with prayers in public schools. See, e.g., *Epperson v. Arkansas*, 393 U.S. 97 (1968) (discussing state statute forbidding the teaching of evolution);

proponents of religious education sought to test the limits of the Court's secular purpose analysis by challenging statutes prefaced by statements of legitimate secular intent. The Supreme Court faced the undesirable chore of judging not only the purpose of state statutes but also the sincerity of state legislatures, thus straining the Court's natural distaste for impugning the motives of legislators. As a result, the Court developed the primary effects test.

The primary effects test states that a statute cannot have the primary effect of advancing or inhibiting religion.¹⁷ In *Board of Education v. Allen*,¹⁸ the Court upheld a statute providing for the loan of textbooks free of charge to public and nonpublic school students.¹⁹ The Court noted that the benefits offered were based neither on religious criteria nor provided aid directly to the schools.²⁰ The majority also emphasized that the books advanced secular education and held that the statute did not have the primary effect of advancing or inhibiting religion.²¹ The Court's analysis no longer focused exclusively on the legislative intent but rather shifted to an examination of the application of the statute.²² The Court was concerned with the scope of the class of beneficiaries as well as with the nature of the aid.²³

The Supreme Court, after validating the *Allen* statute, began to waiver as it saw the erosion of Jefferson's metaphoric wall. In

Abington School Dist. v. Schempp, 374 U.S. 203 (1963) (voiding Bible readings in public schools); *Engel v. Vitale*, 370 U.S. 421 (1962) (voiding the recitation of an official prayer to begin the school day); *McGowan v. Maryland*, 366 U.S. 420 (1961) (discussing Sunday closing laws). See generally F. SORAUF, *THE WALL OF SEPARATION* (1976) (discussing the series of cases that followed *Everson*).

17. See *Meek v. Pittinger*, 421 U.S. 349, 358 (1975).

18. 392 U.S. 236 (1968).

19. New York's Education Law required local school authorities to lend textbooks free of charge to all students in grades seven to twelve. This program was extended to students in both public and nonpublic schools. Before the enactment of the statute, public school boards designated the textbooks to be used in public schools. They then purchased the books with public funds and rented them or resold them to public school students. The legislature amended this statute after taking notice of the public welfare and safety requirements of the state and of the role that education plays in the furtherance of such goals. See *id.* at 238-39.

20. *Id.* at 244. The Court noted that the contents of a textbook could be readily ascertained by government officials. *Id.* at 245.

21. *Id.* at 251. Justice Black, dissenting, argued that the New York statute created impermissible contacts between church and state. He feared that sectarian propagandists would try to assert their own political tenets and cause political bitterness and division. See *id.* at 250 (Black, J., dissenting).

22. *Id.* at 243-49.

23. *Id.*

Walz v. Tax Commission,²⁴ the Court held that a statute granting property tax exemptions to religious organizations was constitutional, ruling that tax exemptions were consistent with the establishment clause and were supported by a long history of implementations.²⁵ Although the decision upheld the exemption statute, it broke new ground in the analysis of the establishment clause. The Court analyzed the statute without relying on either the purpose test or the primary effects test.²⁶ Instead, it examined the resulting contacts between church and state, and developed the excessive entanglement test.²⁷

The Court ruled that a statute or its application must not lead to excessive contacts between church and state, and noted that such contacts are precisely the evil feared by the drafters of the first amendment.²⁸ Although *Walz* was a triumph for the propo-

24. 397 U.S. 664 (1970).

25. Chief Justice Burger noted that "an unbroken practice of according the exemption to churches, openly and by affirmative state action, not covertly and by state inaction, is not something to be lightly cast aside." *Id.* at 678. Such a history of implementation acts in the manner of an experiment, allowing the Court to project past results into a prediction of future effects. The Court is showing deference to tradition while continuing to emphasize an analysis of the primary effects that results from the application of the statute. As the Chief Justice said:

Nothing in this national attitude towards religious tolerance and two centuries of uninterrupted freedom from taxation has given the remotest sign of leading to an established church or religion and on the contrary it has operated affirmatively to help guarantee the free exercise of all forms of religious belief. Thus, it is hardly useful to suggest that tax exemption is but the "foot in the door" or the "nose of the camel in the tent" leading to an established church.

Id.

26. *Walz*, 397 U.S. at 675.

27. The development of the excessive entanglement test signaled a new, more restrictive approach to the inquiry into church and state issues. It was an affirmation that the Court had broken sharply with its practice of evaluating legislative purpose and intent. The Court examined the tradition, history, and purpose of tax exemptions. But it did not engage in this examination in order to show deference to tradition and legislative purpose; it did so in order to examine the effects emanating from the application of the statute. *See supra* note 25 and accompanying text. The excessive entanglement test was another attempt to delve into the actual effects emanating from the application of the statute. *See, e.g.*, Hunter, *supra* note 8, at 532.

The Court, in articulating the excessive entanglement test, emphasized that the test was a further application of its inquiry into the effects of a statute. "Determining that the legislative purpose of tax exemptions is not aimed at establishing, sponsoring, or supporting religion does not end the inquiry, however. We must also be sure that the end result—the effect—is not an excessive government entanglement with religion." *Walz*, 397 U.S. at 674.

28. *Id.* at 674. In analyzing a statute under the third prong of the establishment clause test, a court must balance the resulting church and state contacts with the contacts present in the absence of the statute. The *Walz* majority illustrated this principle:

The test is inescapably one of degree. Either course, taxation of churches or exemption, occasions some degree of involvement with religion. Elimination of ex-

nents of government aid to sectarian institutions, the triumph was short lived. *Walz* upheld the principle that church property could be exempt from state taxation.²⁹ It was a narrow decision, firmly setting the boundaries of permissible conduct under the establishment clause.³⁰ It added a new test to the analysis and sought to ensure that clever legislators could not encroach on the verge of permissible conduct by masking the effects of an aid statute.

After *Walz*, the Supreme Court ignored the secular purpose inquiry and emphasized the primary effects and excessive entanglement tests.³¹ In *Committee for Public Education v. Nyquist*,³² the Supreme Court analyzed a New York statute that established financial aid programs for nonpublic schools. The statute created a plan to reimburse parents for a portion of the tuition paid to private elementary or secondary schools.³³ The Court held that the

emption 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 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. In analyzing either alternative the questions are 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.

Id. at 674-75.

29. *Id.* at 680.

30. The majority feared that the wall of separation between church and state was eroding. The excessive entanglement test was a product of this apprehension. For this reason, many commentators have called *Walz* a pyrrhic victory for proponents of government aid to sectarian institutions. The decision affirmed the constitutionality of tax exemptions, but it also established a new and firmly rooted test that must be met before a statute granting aid to a religious institution could be deemed valid. See Hunter, *supra* note 8, at 532; see also *supra* notes 24-29 and accompanying text.

31. See *Wolman v. Walter*, 433 U.S. 229 (1977) (discussing funds for field trip transportation); *Meek v. Pittinger*, 421 U.S. 349 (1975) (examining a statute allowing funds for secular instructional materials); *Sloan v. Lemon*, 413 U.S. 825 (1973) (discussing generally the tripartite test and examining a statute extending auxiliary services to students); *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (discussing salary supplements for teachers of secular subjects in religious schools); see, e.g., Note, *Statute Granting Tax Deduction for Tuition Paid by Parents of Sectarian School Children Does Not Violate the Establishment Clause*, 61 WASH. U.L.Q. 269, 276-81 (1983) (discussing the development and application of the excessive entanglement test).

32. 413 U.S. 756 (1973).

33. The New York statute established three financial aid programs for private elementary and secondary schools. The first section provided for direct grants to certain private schools to be used in maintenance and repair. In order to qualify, the nonpublic school had to serve a high concentration of students from low-income families. The second section established a tuition reimbursement plan for children attending elementary or secondary schools. The reimbursement was only available to parents with an annual income not in excess of \$5,000 and was limited to a \$50 credit per elementary school child and \$100 per high school student. The third section extended financial aid to parents unable to qualify

New York statute was unconstitutional; it ruled that the tuition reimbursements had the primary effect of advancing religion.³⁴

The Supreme Court, analyzing private school tuition reimbursements by the state for the first time, emphasized that a state must maintain an attitude of neutrality.³⁵ It noted that although the reimbursement grants were given directly to the parents, the immediate effect was the same as if the aid had been channelled directly to the schools.³⁶ By allowing the tax credit, the state relieved parents of part of the financial burden of a private education and thus encouraged them to keep their children in nonpublic institutions.³⁷ The effect was to indirectly aid sectarian schools. The Court, in making its establishment clause inquiry, not only analyzed what the statute purported to do on its face, but also examined the effects arising from the application of the program.³⁸ It focused on the impact of the statute rather than on the legislative intent or the secular purpose.

During the late seventies, the Court continued to accentuate the primary effects test and to examine closely the issue of excessive entanglement.³⁹ The primary effects analysis focused on two factors: the actual impact of the statute and the breadth of the benefited class.⁴⁰ The Court was no longer concerned with either statements of legislative purpose or with the apparent effects of a statute. It was instead concerned with a de facto analysis of state programs and with an examination that would probe the actual ef-

for the tax reimbursement.

34. *Nyquist*, 413 U.S. at 783.

35. *Id.*

36. The Court noted that the fact that the aid was disbursed to the parents rather than to the schools was only one of many factors to be considered in determining the validity of the statute. *Id.* at 781.

37. *Id.* at 783.

38. The Court's discussion and analysis focused on the effects of providing financial assistance to the parents, the impact of relieving such taxpayers of a substantial monetary burden, and the ability of New York to separate the educational and religious educational functions of private schools. *See id.*

39. In *Wolman v. Walter*, 433 U.S. 229 (1977), the Court analyzed an Ohio statute that authorized various forms of state aid to nonpublic schools. The aid included textbooks, standardized tests, speech and hearing diagnostic services, therapeutic guidance and instructional equipment. The Court upheld the first three programs but argued that the therapeutic and diagnostic services violated the establishment clause because they advanced religion and created excessive entanglement. The Court emphasized the administrative and bureaucratic contacts that these programs entailed and ruled that this was sufficient to invalidate the aid. *Id.* at 255.

40. *See Note, Tax Deduction for Parents of Children Attending Public and Non-public Schools: Mueller v. Allen*, 71 Ky. L.J. 686, 687-89 (1983) (discussing the primary effects test and its application prior to *Mueller v. Allen*).

fects of a statute.⁴¹ The Court was also preoccupied with the political activities of sectarian propagandists and was concerned with the resulting contacts between church and state.⁴² It was in this context that *Mueller v. Allen* came before the Supreme Court.⁴³

II. *Mueller v. Allen*

In *Mueller v. Allen*, the Supreme Court examined a Minnesota statute that allowed taxpayers to deduct tuition, textbooks, and transportation expenses from their state income taxes.⁴⁴ These deductions were available to all parents with dependent children attending elementary or secondary schools and constituted a deduction from gross income. The Court, after analyzing the statute's compatibility with the tripartite test of *Lemon*, held that Minnesota's tuition reimbursement program did not violate the establishment clause of the first amendment.⁴⁵

The Supreme Court ruled that Minnesota had a legitimate secular purpose in enacting the statute.⁴⁶ The majority emphasized the presumed quality of educational services rendered by private schools and the legitimate concern of the state in promoting quality education.⁴⁷ The Court acknowledged that states have an overriding interest in an educated populace and must thus take steps to ensure the continued vitality and competitiveness of the private school system.⁴⁸ To this end states can enact programs that not

41. See, e.g., Comment, *Rebuilding the Wall: The Case for a Return to the Strict Interpretation of the Establishment Clause*, 81 COLUM. L. REV. 1463 (1981) (discussing the Court's analysis under the primary effects test).

42. See *supra* note 21 and accompanying text.

43. *Mueller* was also the product of a changing political and economic environment. Inflation spiraled in the late seventies, thereby increasing the cost of private education. The high cost of living created a new fervor for tax relief and legislators sought new and innovative ways to reduce the tax burden. The quality of education also became an important political concern. Advocates of tuition tax credits argued that tuition reimbursements were an efficient and politically acceptably answer that addressed all three concerns.

44. For a discussion of the Minnesota statute, see *supra* note 1 and accompanying text.

45. *Mueller*, 103 S. Ct. at 3074.

46. *Id.* at 3067.

47. The majority argued:

Minnesota, like other states, could conclude that there is a strong public interest in assuring the continued financial health of private schools, both sectarian and non-sectarian. By educating a substantial number of students such schools relieve public schools of a correspondingly great burden—to the benefit of all taxpayers. In addition, private schools may serve as benchmark for public schools, in a manner analogous to the "TVA yardstick" for private power companies.

Id.

48. *Id.*

only promote and foster the health of the overall system, both public and nonpublic, but that also assist in defraying the costs of educating the citizenry.⁴⁹ The majority, cognizant of the rich tradition of private schools in America, also expressed its reluctance "to attribute unconstitutional motives to the states, particularly when a plausible secular purpose for the state's program may be discerned from the face of the statute."⁵⁰

The Supreme Court, turning its attention to the second prong of the tripartite test, also ruled that the Minnesota statute did not have the primary effect of either advancing or inhibiting religion.⁵¹ The majority pointed out that the educational tax credit was one of many deductions and that the statute also allowed tax credits for medical and charitable expenses.⁵² The Court noted that legislatures have broad latitude in classifying and defining tax statutes and found that the Minnesota legislature had classified its tuition reimbursement program as a measure of tax relief.⁵³ The Court said that the legislature's decision to equalize the tax burden and to reduce the comparative costs of education, both public and nonpublic, was entitled to substantial deference.

The Court's primary effects analysis emphasized the breadth of the benefited class.⁵⁴ The majority noted that the tuition deduction was available to all parents⁵⁵ and that the provision of tax benefits to such a broad spectrum of beneficiaries was an important indicator of the program's neutrality.⁵⁶ The Court distinguished *Committee for Public Education v. Nyquist*⁵⁷ on the ground that the New York tuition tax credit program in *Nyquist*

49. Justice Rehnquist, writing for the majority, stated: "An educated populace is essential to the political and economic health of any community, and a state's efforts to assist parents in meeting the rising cost of educational expenses plainly serves this secular purpose of ensuring that the state's citizenry is well-educated." *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. Justice Rehnquist noted that prior decisions "consistently have recognized that traditionally '[l]egislatures have especially broad latitude in creating classifications and distinctions in tax statutes,' . . . in part because the 'familiarity with local conditions' enjoyed by legislators especially enables them to 'achieve an equitable distribution of the tax burden.'" *Id.* (citations omitted).

54. *Id.* at 3068.

55. *Id.* Section 290.09(22), which created the tuition tax credits, extended these benefits to children in public and nonpublic schools. *See supra* notes 1 and 44 and accompanying text.

56. 103 S. Ct. at 3068.

57. 413 U.S. 756 (1973). *See generally supra* notes 32-38 and accompanying text (discussing particularly the *Nyquist* decision and generally tuition tax credits).

was available only to parents with children attending nonpublic schools, thereby conferring special economic benefits to a single class of citizens.⁵⁸ The narrow class of beneficiaries under the statute in *Nyquist* allowed sectarian activities to be aided directly and meant that the tax credit had the primary effect of advancing religious purposes.⁵⁹

The *Mueller* Court observed that Minnesota's reimbursement program served to channel public aid to the parents rather than provide financial assistance directly to the schools.⁶⁰ The majority reasoned that such a distribution was a significant factor in establishment clause analysis because parochial schools were benefited as a result of the individual choices of parents and not as a result of direct state aid.⁶¹

The Supreme Court, after determining that the reimbursement program violated neither the first nor the second prong of the establishment clause test,⁶² ruled that Minnesota's tuition tax credit proposal did not lead to excessive entanglement between church and state.⁶³ The Court noted that the only aspect of the program that could lead to impermissible contacts was the textbook deduction, in that state officials would have to determine which textbooks qualify for the deduction, but ruled that such contacts were insufficient to invalidate any part of the statute.⁶⁴ The majority's excessive entanglement analysis was brief and cursory; it ignored potential administrative contacts stemming from tuition tax reimbursements.⁶⁵ The analysis also failed to take notice of

58. *Mueller*, 103 S. Ct. at 3069. In *Nyquist*, the tuition reimbursement was available only to parents of children attending private schools, as long as their annual taxable income did not exceed \$5,000. Non-qualifying parents were extended other forms of benefits, including direct financial aid. See *supra* note 33 and accompanying text.

59. *Mueller*, 103 S. Ct. at 3069.

60. Justice Rehnquist argued that "a program, like § 290.09(22), that neutrally provides assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause." *Id.*

61. Justice Rehnquist recognized the insidious effects of tuition credits. "It is true, of course, that financial assistance provided to parents ultimately has an economic effect comparable to that of aid given directly to the schools attended by their children." *Id.* He argued that this was not dispositive of the primary effects issue. Instead, he noted, "[a]ll but one of our recent cases invalidating state aid to parochial schools have involved the direct transmission of assistance from the state to the schools themselves." *Id.*

62. See *supra* notes 51-61 and accompanying text.

63. *Mueller*, 103 S. Ct. at 3071.

64. *Id.*

65. The Court did not adequately address the entanglement test issue with regard to tuition tax credits. Its one-paragraph treatment of the third prong of the tripartite test dealt exclusively with the textbook deduction, which was only one element of the tuition tax credit.

ominous political and economic entanglements, as well as of possible administrative and bureaucratic contacts.⁶⁶

III. AN ANALYSIS OF *Mueller v. Allen*

A. *Secular Legislative Purpose*

When a court analyzes whether a secular legislative purpose exists, it must examine the overt motives and purpose of the state legislatures that enact the aid statutes.⁶⁷ The analysis under the first prong of the establishment clause test is a threshold examination that concentrates on legislative statements of secular purpose.⁶⁸ The courts are reluctant to attribute unconstitutional motives to state legislators.⁶⁹ As a result, the courts consistently find that challenged statutes do not violate the secular purpose test.⁷⁰ Minnesota's tax credit proposal, like most tuition reimbursement statutes, has the overt purpose of furthering secular legislative goals.⁷¹

Drafters of tuition reimbursement statutes are well aware of and are overtly motivated by, the positive aspects of a nonpublic education.⁷² The public benefit of private, sectarian schools is not

66. These contacts had long been feared as a potentially troublesome entanglement. Tuition tax credit proponents, for example, are usually adherents of the Catholic faith or of other Christian denominations. The debate on the subject, therefore, may well be conducted along sectarian lines. This increases religious tensions and sectarian antagonism. The Court previously saw such strife as sufficient to invalidate a statute under the third prong of the establishment clause test. See *Nyquist*, 413 U.S. at 784-88; see also *supra* note 21 and accompanying text.

67. See *Sloan v. Lemon*, 413 U.S. 825, (1973); *Lemon v. Kurtzman*, 403 U.S. 602, (1971); *Epperson v. Arkansas*, 393 U.S. 97, (1968); *Abington School Dist. v. Schempp*, 374 U.S. 203, (1963); *Engle v. Vitale*, 370 U.S. 421, (1962); *Everson v. Board of Educ.*, 330 U.S. 1 (1947); see also *supra* notes 10-15 and accompanying text (discussing the development and evolution of the secular purpose test).

68. The treatment of the secular purpose inquiry has usually been brief and cursory. As a general practice, the Court has accepted the "legislative statements of secular purpose at face value and has not struck down any legislation authorizing aid to nonpublic schools on this ground." Note, *supra* note 40, at 687.

69. See *supra* note 50 and accompanying text.

70. See *supra* note 68 and accompanying text.

71. For a discussion of the secular goals of the Minnesota legislature, see *supra* notes 46-50 and accompanying text.

72. The Supreme Court has consistently recognized this principle. See *supra* note 47 and accompanying text. Justice Powell once commented on the benefits of nonpublic schools:

Parochial schools, quite apart from their sectarian purpose, have provided an educational alternative for millions of young Americans; they often afford wholesome competition with our public schools; and in some states they relieve substantially the tax burden incident to the operation of public schools. The State

manifested solely in an overriding concern for religious indoctrination. Sectarian schools foster civic as well as religious virtue and promote both religious and nonreligious public involvement. The schools are concerned with the integral growth of the child; towards that end, they provide stimulus not only for religious and spiritual growth but also for educational and social development. The Supreme Court has often emphasized this overriding public benefit,⁷³ even as it has acknowledged the sectarian nature of such institutions.⁷⁴ Such concern with, as well as awareness of, the public benefit of a private education allows state statutes that provide aid to private schools to pass this threshold test of establishment clause analysis. The *Mueller* decision is consistent with such precedents.⁷⁵

B. *Primary Effects Analysis*

The Supreme Court's primary effects test is more difficult to analyze. This test requires a court to look beyond stated motives and purposes in order to examine the actual impact of the statute.⁷⁶ Thus, courts must make a de facto analysis of challenged state programs rather than simply make a de jure examination.⁷⁷ Such a de facto analysis forces a trier of facts to probe the actual effects emanating from the application of the legislation rather than to remain content with discerning the effects apparent on the face of the statute.

The primary effects test also requires a court to examine the breadth of the benefited class.⁷⁸ States cannot provide aid directly

has, moreover, a legitimate interest in facilitating education of the highest quality for all children within its boundaries, whatever school their parents have chosen for them.

Wolman v. Walter, 433 U.S. 229, 262 (1977) (Powell, J., concurring in part, concurring in judgment in part, and dissenting in part).

73. See *supra* note 67 and accompanying text.

74. *Id.*

75. The *Mueller* decision is also an affirmation of the prevailing social and political environment. See *supra* note 43 and accompanying text.

76. For a discussion of the development and evolution of the primary effects test, see *supra* notes 17-43 and accompanying text.

77. A de jure analysis is one in which the court looks at the statute and examines whether the class of beneficiaries is drawn along religious lines. In a de jure analysis the court will generally examine what is apparent on the face of the statute, rather than delve into the effects of different state programs. Such an analysis does not examine the application of a statute. See Comment, *Mueller v. Allen: Do Tuition Tax Deductions Violate the Establishment Clause?*, 68 Iowa L. Rev. 539, 549 (1983).

78. See *Committee for Pub. Educ. v. Nyquist*, 413 U.S. 756, 794 (1973); *Sloan v. Lemon*, 413 U.S. 825, 832 (1973).

to the religious institutions but may channel the aid through the parents. The impact on the school of such indirect aid is more attenuated, masking the discernible effects of the state program.⁷⁹ Financial assistance that is provided to a broad class of taxpayers is also less likely to inure to the benefit of a particular religious group.⁸⁰ The scope of beneficiaries, though not dispositive of the primary effects issue, is nonetheless a strong indicator of the actual impact of a statute. Together with the de facto examination, it requires an analysis of more than one primary or solitary effect and can thus determine more effectively whether a statute promotes or inhibits religion.⁸¹

A corollary of a de facto analysis is that the religious and secular impacts of a statute must be separable.⁸² In *Committee for Public Education v. Nyquist*,⁸³ the Court held that a New York tuition reimbursement program violated the establishment clause of the first amendment because it had the primary effect of promoting religion.⁸⁴ The Court said that the state can provide aid to parochial schools in order to promote secular education but that there must be a separation between secular and religious educational functions.⁸⁵ Only in this manner can the state ensure that "[s]tate financial aid supports only the former."⁸⁶ By providing the

79. See *Mueller*, 103 S. Ct. at 3067-70.

80. This is in fact a major reason why the Court emphasizes that the class of beneficiaries must be broad. A broader spectrum of beneficiaries is less likely to be composed entirely of adherents of one faith, while statutes that narrowly define the recipients of aid may have the effect of directly aiding a specific sectarian group. See *id.*

81. In order to determine the primary effects of a statute, a court cannot focus narrowly on one primary effect. A de facto analysis presupposes that the examining court will delve beyond a single impact in order to discern *all* immediate effects. Certainly, some effects are attenuated and not primary, but the actual impact of a statute is almost always broader than that envisioned by the legislature in its statement of legislative purpose. That is precisely the reason why the Court abandoned the secular legislative test as the sole determinant of a statute's constitutionality, and why it developed the primary effects and excessive entanglement tests. See *Walz v. Tax Comm'n*, 397 U.S. 664, 672-80 (1970); *Board of Educ. v. Allen*, 392 U.S. 236, 243-49 (1968).

82. For a discussion of this criteria, see Note, *supra* note 40 at 688-89.

83. 413 U.S. 756 (1973).

84. *Id.* at 779-80.

85. Justice Powell explained:

In *Everson*, the Court found the bus fare program analogous to the provision of services such as police and fire protection, sewage disposal, highways, and sidewalks for parochial schools. . . . Such services, provided in common to all citizens, are 'so separate and so indisputably marked off from the religious function,' . . . that they may fairly be viewed as reflections of a neutral posture toward religious institutions.

Id. at 781-82 (citations omitted).

86. *Id.* at 783 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971)).

tuition reimbursement program, New York relieved parents of their financial burdens sufficiently "to assure that they continue to have the option to send their children to religion-oriented schools."⁸⁷

Minnesota's tuition reimbursement statute suffers from many of the same defects that plagued New York's program. Although the statute allows a deduction for tuition expenses incurred in public and nonpublic schools,⁸⁸ a de facto analysis shows that parents of private school students will claim the bulk of the deductions.⁸⁹ The majority of these parents send their children to sectarian religious schools, where the line between secular and religious instruction is often blurred.⁹⁰ The state, by allowing the tuition credit, in fact lessens the financial burden of a private sectarian education. This allows a greater number of parents to continue to send their children to such religious schools, where they will be infused with sectarian doctrines. Because the aid to secular and religious functions are inseparable, such support fails the second prong of the establishment clause test. It would be impossible, in administering Minnesota's tuition tax credit program, to target such reimbursements so they inure solely to the benefit of secular education. Yet, the *Mueller* majority found that the state's tuition tax credits program did not have the primary effect of either promoting or inhibiting religion.⁹¹

In *Mueller*, the Supreme Court failed to make a de facto analysis of the tax credit program.⁹² The Court chose to limit the pri-

87. *Id.*

88. See *supra* note 1 and accompanying text.

89. Justice Marshall, dissenting, argued vigorously for a de facto analysis of Minnesota's program. As part of his examination of the application of the statute, Justice Marshall stated:

Although this tax benefit is available to any parents whose children attend schools which charge tuition, the vast majority of the taxpayers who are eligible to receive the benefit are parents whose children attend religious schools. In the 1978-1979 school year, 90,000 students were enrolled in nonpublic schools charging tuition; over 95% of those students attended sectarian schools. Although the statute also allows a deduction for the tuition expenses of children attending public schools, Minnesota public schools are generally prohibited by law from charging tuition.

Mueller, 103 S. Ct. at 3072 (J. Marshall, dissenting).

90. Justice Marshall argued that "direct government subsidization of parochial school tuition is impermissible because 'the effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions.'" *Id.* (quoting *Nyquist*, 413 U.S. at 783).

91. *Mueller*, 103 S. Ct. at 3067.

92. See *supra* notes 51-61 and accompanying text. In his dissent, Justice Marshall argued for such a de facto inquiry. He stated that:

mary effects test to an examination of legislative purposes and to the scope of the benefited class. It distinguished *Nyquist* by noting that the Minnesota statute provided aid to all parents rather than exclusively to the parents of private school students.⁹³ Such an analysis ignored two salient principles of the *Nyquist* decision: the inability to separate the secular and religious effects⁹⁴ and the impact of a reduction in the cost of a religious education.⁹⁵

The *Mueller* decision narrowed the application of the primary effects analysis by concentrating on one ultimate effect while ignoring all immediate economic benefits.⁹⁶ The Court thus contravened its own tradition of analyzing the de facto impact of a statute, opting instead for a de jure examination of Minnesota's tax credit proposal.⁹⁷ Such an analysis also has the ultimate effect of giving new validity to the secular purpose test. The Court limited the second prong to an examination of one primary effect, and it discerned this effect by utilizing the same test employed under the first prong of the establishment clause inquiry. The majority, after examining the legislative history and the legislative purpose of the statute, said that the Minnesota legislature contemplated a general

The only factual inquiry necessary is the same as that employed in *Nyquist* and *Sloan v. Lemon* . . . : whether the deduction permitted for tuition expenses primarily benefits those who send their children to religious schools. In *Nyquist* we unequivocally rejected any suggestion that, in determining the effect of a tax statute, this Court should look exclusively to what the statute on its face purports to do and ignore the actual operation of the challenged provision.

Id. at 3074 (Marshall, J., dissenting) (citation omitted).

93. *Id.* at 3068-69.

94. Justice Powell, writing for the majority, argued that in enacting the tuition tax credit program, New York failed to "endeavor 'to guarantee the separation between secular and religious educational functions and to insure that State financial aid supports only the former.'" *Nyquist*, 413 U.S. at 783. See also *supra* note 38 and accompanying text. There are different criteria to determine whether a statute does or does not have the primary effect of aiding religion.

First, and more important, the type of activity aided must be such that its secular aspects are 'identifiable and separable' from its religious aspects. . . . Because parochial schools teach and promote a particular religious faith and are an integral part of the mission of a sponsoring church, the secular and the religious aspects of education are inseparable, thus making it impossible to aid only the secular aspects.

Note, *supra* note 40, at 688.

95. See *supra* notes 88-90 and accompanying text.

96. In *Nyquist*, the appellees argued that "primary effect" meant one principal effect. The Court rejected this argument and stated: "Our cases simply do not support the notion that a law found to have a 'primary' effect to promote some legitimate end under the State's police power is immune from further examination to ascertain whether it also has the direct and immediate effect of advancing religion." *Nyquist*, 413 U.S. at 783, n. 39.

97. See *supra* note 92 and accompanying text.

program of tax relief.⁹⁸ The Court concluded that the primary effect of the statute was a reduction of the tax burden and found all other effects were indirect and attenuated.⁹⁹ By concerning itself with only one primary effect, the Court effectively fused the first two prongs of the establishment clause inquiry, thereby resurrecting the secular legislative purpose test as a valid part of the establishment clause analysis.¹⁰⁰

C. *Excessive Entanglement Test*

The Supreme Court, after examining the third prong of the establishment clause test, ruled that Minnesota's tuition tax credit proposal did not lead to excessive contacts between church and state.¹⁰¹ But the majority's excessive entanglement analysis failed to consider important precedent. In *Walz v. Tax Commission*,¹⁰² the Court considered the issue of tax exemptions and ruled that the statute granting such exemptions actually diminished the contacts between church and state.¹⁰³ The Court emphasized that taxing church property exacerbated the contacts between secular and religious entities by forcing the state to assess religious properties.¹⁰⁴ A tax exemption statute, therefore, diminished the administrative and bureaucratic relations between governmental and religious institutions because it proscribed the taxing of religious property. But tuition tax credits have the opposite effect. Tax credits engage the state in new assessments and calculations. They force secular authorities to examine the records of religious schools and to maintain bureaucratic contacts with sectarian officials. These effects, unlike tax exemptions, promote greater contacts between secular and religious authorities and verge on impermissible

98. *Mueller*, 103 S. Ct. at 3067.

99. *Id.*

100. The Court employed a de jure analysis to discern the effect of the statute. In doing so, it emphasized the effects apparent on the face of the statute and weighed heavily the stated legislative purpose of promoting quality education and providing a measure of tax relief. Such an analysis necessarily limits the Court in examining the effects of a statute and accentuates the deference to state legislators that is so pervasive in the secular legislative purpose test. See *supra* note 77 and accompanying text. Some commentators, in analyzing the decision of the Eighth Circuit Court of Appeals in *Mueller*, argued that a de jure analysis could give undue weight to the secular purpose inquiry. See *generally* Note, *supra* note 5 (discussing the decision of the Eighth Circuit and analyzing the implications of a de jure analysis).

101. *Mueller*, 103 S. Ct. at 3071.

102. 397 U.S. 664 (1970).

103. *Id.* at 674.

104. *Id.*; see *supra* note 28.

entanglement between church and state.¹⁰⁵

In *Nyquist*, the Supreme Court emphasized that tuition reimbursements have an insidious impact on the broader issue of entanglement. The question of tuition tax credits is an emotional social issue, one replete with potentially grave and explosive political questions. The *Nyquist* Court feared that tuition reimbursements were politically divisive and intimated that this would suffice to invalidate the statute under the excessive entanglement test.¹⁰⁶ *Mueller* ignored these potentially onerous political contacts.¹⁰⁷ In doing so, the Supreme Court signaled that it was limiting the scope of the excessive entanglement test. It was not concerned with potential political strife; the Court was restricting its analysis to the narrower concept of administrative contacts. This not only limited the third prong of the establishment clause test but also illustrated a willingness to dwell on apparent and immediate effects at the expense of broader and equally insidious contacts.

IV. CONCLUSION

Mueller v. Allen is a significant step in the evolution of establishment clause analysis. For thirty-seven years after *Everson v. Board of Education*,¹⁰⁸ the Supreme Court struggled to demarcate clear and indelible parameters of permissible state action. The results have been mixed. The parameters have been blurry, not easily discernible, and often confusing. But they have evolved in a manner consistent with one overriding principle: a court must examine the *actual* impacts of a statute; it cannot be satisfied with merely probing the intended or apparent effects.¹⁰⁹ This mode of analysis applied to both the primary effects and excessive entanglement tests. Because *Mueller v. Allen* limits the primary effects test, it creates a sharp and distinct break in the evolution of the tripartite establishment clause test.

The *Mueller* decision evidences a Court more deferential to state legislatures, one more trusting of the overt motives of state legislators. *Mueller* also resurrects the secular legislative purpose test,¹¹⁰ long dormant and inconsequential. It does this not as part of the first-prong analysis, but by demarcating the clear param-

105. For a general discussion of permissible contacts see Note, *supra* note 40, at 689-91.

106. See *supra* note 66 and accompanying text.

107. See *id.*

108. 330 U.S. 1 (1947); see *supra* notes 10-15 and accompanying text.

109. See *supra* notes 15-43 and accompanying text.

110. See *supra* notes 98-100 and accompanying text.

ters of the primary effects inquiry. The Court discerned the impact of the statute not by examining the actual effects emanating from its application but by analyzing the legislative intent and the effects apparent on the face of the statute. Such analysis portends a Court less probing in its review of challenged programs and more limited in its examination of state statutes that grant aid to sectarian institutions. *Mueller* also evidences a Court less demanding in the area of church and state relations and more tolerant of breaches in the once impregnable wall.

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