Chicago-Kent Law Review

Volume 60 | Issue 3 Article 8

June 1984

Tax Deductions as Permissible State Aid to Parocial Schools - Mueller v. Allen

Hugh F. Smart

TAX DEDUCTIONS AS PERMISSIBLE STATE AID TO PAROCHIAL SCHOOLS

Mueller v. Allen
103 S. Ct. 3062 (1983)

HUGH F. SMART*

With the approach of the 1984 Presidential elections, the debate over the relationship between religion and education has increased sharply.[1] The advocates of permitting prayer in public schools and providing aid to parochial schools have found a champion in President Reagan. These policies are being promoted as a response to the perceived desire of many Americans to return to more traditional social and educational values and to promote freedom of choice in education. Opposed to these policies are those who adhere to the traditional constitutional view which separates the church and state and others who believe that it is the state public school system which provides the best opportunity for a well-educated populace.

The issue of aid to parochial schools is not new, however. In recent years state legislators have frequently taken steps to promote aid to parochial schools in response to the increasing financial pressures experienced by these schools and the concern that if these schools close, the state will have to bear an enormous cost in educating the children.[2] Generally, state aid packages have included one or more of the following features: direct aid to parents in the form of textbook loans or

* B.A. (1975), M.A. (1979), Cambridge University, England; M.A. (1977), Sheffield University, England; Candidate for J.D., IIT Chicago-Kent College of Law, 1985.

1. In the early days of the 1984 Presidential campaign, the issue of church and state has dominated the debate. *See* Time, September 10, 1984, cover story; Wall Street Journal, September 18, 1984, § 1 at 1, col. 1. The arguments over the separation of church and state have largely arisen over the questions of prayer in public schools, tax benefits to parochial schools and abortion. President Reagan's views are strongly supported by the Moral Majority and other Christian Fundamentalist groups. Opposed to the President's view are many Protestant and other churches and Jewish organizations such as B'nai B'Rith. *See, e.g.*, Time, September 17, 1984, at 26, col. 1.

2. The initial impetus for such programs was Bd. of Educ. v. Allen, 392 U.S. 236 (1968) which suggested that broadly based aid schemes would be constitutional. The Court emphasized that "religious schools pursue two goals, religious instruction and secular education" and indicated that aid to the schools' secular education was permissible. *Id.* at 245, 247-48. After *Allen* there was considerable legislative pressure to provide aid to nonpublic schools but this was largely thwarted by the Supreme Court. *See*, Wilson, *The School Aid Decisions: A Chronicle of Dashed Expectations*, 3 J. LAW & EDUC. 101, 102 (1974). After Mueller v. Allen, 103 S. Ct. 3062 (1983) there has been similar pressure to provide aid through the tax system. Gallagher, *Tuition Tax Breaks on Docket*, Chicago Tribune, Jan. 8, 1984, § 1 at 3, col. 1.

transportation expense reimbursement;[3] direct aid to private schools through the provision of instructional materials or reimbursement for testing programs;[4] or indirect aid in the form of tax deductions or credits for tuition and other expenses.[5] All of these programs have been challenged as a violation of the establishment clause of the first amendment, which requires that the state shall not establish a religion.[6] Some programs have been upheld, although the majority have been struck down.[7]

The Supreme Court has considered these aid packages on several occasions but the parameters of what constitutes acceptable aid are far from clear. The Court has developed a three-part test for use in establishment clause cases[8] which provides that a statute does not violate the establishment clause if: it has a valid secular purpose; the primary effect is neither to advance nor hinder religion; and it does not excessively entangle the state in the affairs of religion. Despite the existence of the test, its application has not provided the certainty and guidance to the states that it might suggest. The application of the test has been uneven as the Court has differed over the weight to be accorded the sections. As a result of the confusion, many states have found their programs subject to review under very different standards from when they were enacted.[9] In many such cases, the statutes had been enacted in accordance with the latest Supreme Court decision.

Mueller v. Allen[10] presented an opportunity for the Supreme Court to provide clear and adequate guidelines for the states. In *Mueller*, Minnesota enacted a statute which allowed a deduction when computing state income tax liability for tuition, textbooks and transportation expenses incurred by the parents of all schoolchildren.[11] The statute

3. *E.g.*, Bd. of Educ. v. Allen, 392 U.S. 236 (1968) (textbook loan); Everson v. Bd. of Educ., 330 U.S. 1 (1947) (transportation expenses).

4. *E.g.*, Wolman v. Walter, 433 U.S. 229 (1977) (instructional materials); Comm. for Pub. Educ. and Religious Liberty v. Regan, 444 U.S. 646 (1980) (testing programs).

5. Comm. for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756 (1973); Mueller v. Allen, 103 S. Ct. 3062 (1983).

6. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ." U.S. CONST. amend I. The first amendment is made applicable to the states by the due process clause of the fourteenth amendment. Murdock v. Pennsylvania, 319 U.S. 105, 108 (1943).

7. *See infra* text accompanying notes 17-75.

8. Lemon v. Kurtzman, 403 U.S. 607, 612-13 (1971).

9. *E.g.*, Lemon v. Kurtzman, 403 U.S. 607 (1971), Sloan v. Lemon, 413 U.S. 825 (1973) and Meek v. Pittenger, 421 U.S. 349 (1975) all involved Pennsylvania statutes.

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

11. Section 290.09(22) provides the following deduction from gross income in computing net income:

was challenged by taxpayers as violating the establishment clause[12] because the main beneficiaries of the deduction would be the parents of parochial schoolchildren and the statute, therefore, was a state subsidy for sending children to religious schools. In upholding the statute, the Supreme Court significantly altered the existing three-part test thereby widening the scope of permissible aid. In doing so, the Court stressed that the statute provided benefits to parents of both public and private schoolchildren and that the benefit from this type of tax relief was far removed from the types of involvement envisaged by the original supporters of the establishment clause.

This comment will examine the background to the establishment clause as it has been applied in the area of state aid to private elementary and secondary schools.[13] It will then present the reasoning of the *Mueller* Court and analyze that decision. The analysis will indicate that the Court has adopted a position which disregards the concerns of the establishment clause. By stressing the wide reach of the statute because of its application to both public and nonpublic schools, the Court has relied on a factor which had not previously been considered relevant. Prior decisions had confined their analysis to the impact of the legislation on private sectarian schools. For the first time, the Court regarded the role played by private schools in society as a sufficient justification for state aid to the schools. In upholding such broadly based aid, the Court has eliminated the requirement that aid be re-

> *Tuition and transportation expense.* The amount he has paid to others, not to exceed $500 for each dependent in grades K to 6 and $700 for each dependent in grades 7 to 12, for tuition, textbooks and transportation of each dependent in attending an elementary or secondary school situated in Minnesota, North Dakota, South Dakota, Iowa, or Wisconsin, wherein a resident of this state may legally fulfill the state's compulsory attendance laws, which is not operated for profit, and which adheres to the provisions of the Civil Rights Act of 1964 and chapter 363. As used in this subdivision, "textbooks" shall mean and include books and other instructional materials and equipment used in elementary and secondary schools in teaching only those subjects legally and commonly taught in public elementary and secondary schools in this state and shall not include instructional books and materials used in the teaching of religious tenets, doctrines or worship, the purpose of which is to inculcate such tenets, doctrines or worship, nor shall it include such books or materials for, or transportation to, extracurricular activities including sporting events, musical or dramatic events, speech activities, driver's education, or programs of a similar nature.

MINN. STAT. § 290.09(22) (1982).

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

13. This comment will consider only aid to sectarian elementary and secondary schools. In considering aid to sectarian higher education facilities the Court has adopted less stringent standards. Unlike primary schools, religious indoctrination is not a principal purpose of higher education facilities. Also, the age of the students and the nature of college courses limit opportunities for sectarian influence. Tilton v. Richardson, 403 U.S. 672, 686 (1971). *See also* Roemer v. Board of Public Works of Maryland, 426 U.S. 736 (1976); Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part II, The Nonestablishment Principle*, 81 HARV. L. REV. 513 (1968). [Hereinafter referred to as Giannella].

stricted to the secular activities of the private schools. Consequently, state aid is now permissible to advance the sectarian functions of religious schools, a clear violation of the first amendment as previously interpreted by the Supreme Court.

HISTORICAL BACKGROUND

The constitutional guarantees of freedom of religion are contained in the first amendment. The establishment clause of the first amendment provides that the government will not establish a religion. The free exercise clause provides that a person's free exercise of religion will not be infringed.[14] The clauses are intended to protect the autonomy of religious belief and conduct and to ensure the separation of church and state.[15]

These goals of the first amendment are implemented through the policies of voluntarism and neutrality.[16] Voluntarism requires that religious bodies survive and prosper on their own merits, as a result of their own endeavors and support of their members, and not as a result of state patronage. Neutrality requires that the state should not prefer one religious sect over another, nor religion over nonreligion, and that it should take no action to deter religious belief.

The first Supreme Court case to apply the establishment clause to the states through the fourteenth amendment was *Everson v. Board of Education.*[17] In *Everson*, the Court upheld a New Jersey program which reimbursed parents for transportation expenses involved in sending their children to public and certain Catholic schools. Justice Black, writing for the majority, extensively reviewed the historical background of the establishment clause and concluded that a "wall of separation" between church and state was mandated by history and experience.[18] Although the legislation provided some benefit to the Catholic schools, it was upheld because the Court found it to be a general welfare program designed to help parents get their children to and from school safely. Transportation was considered to be clearly separate from the religious functions of the schools and if the aid was denied it would be more difficult for the schools to operate. By hindering the operation of these schools, the state would effectively be acting adversely to the reli-

14. For the text of the first amendment see *supra* note 6.

15. *E.g.*, Engel v. Vitale, 370 U.S. 421, 431 (1962).

16. *See* L. Tribe, AMERICAN CONSTITUTIONAL LAW § 14-3 818-19 (1978). [Hereinafter referred to as Tribe]. Gianella, *supra* note 13, at 516-22.

17. 330 U.S. 1 (1947).

18. *Id.* at 16-18.

gious schools and contrary to the policy of neutrality.[19]

Justice Rutledge, in dissent, wrote an extensive historical analysis of the establishment clause; an analysis which has largely been unchallenged in subsequent Supreme Court decisions. Although he reached the same historical conclusion as the majority—that a wall of separation was required—he differed sharply over the application of the conclusion to the facts. In a strict application of the separation of church and state doctrine, he concluded that transportation was an essential part of the cost of education and that state reimbursement of any part of religious education was impermissible.[20]

For 21 years after *Everson*, the Supreme Court did not consider the issue of aid to parochial schools. It did, however, consider several cases involving the establishment clause and religious exercises in public schools. These cases included such issues as religious instruction,[21] school prayer[22] and bible reading.[23] The Supreme Court adopted a policy of benevolent neutrality, recognizing that total separation of church and state was not constitutionally required, nor was it realistic.[24] The Court stressed the requirement of neutrality in relations between the state and religious organizations and, in particular, that no state funds could be used to further religious aims.[25]

It was against this background of non-parochial school religious cases that the Supreme Court developed the three-part establishment clause test that it has applied in analyzing sectarian school aid cases. The first two elements were drawn from *Abington School District v. Schempp*.[26] In *Schempp*, a Pennsylvania statute required that the public school day start with the reading of verses from the Bible and the unison recitation of the Lord's Prayer by the students. By requiring such religious exercises, the Court held that the state was aiding religion. In doing so, the Court found that for a statute to survive scrutiny under the establishment clause, it must meet a two-part test: (1) the

19. *Id.*

20. 330 U.S. at 28. Justice Rutledge's dissent was joined by Justices Frankfurter, Jackson and Burton. Justice Jackson also wrote separately. 330 U.S. at 18. Justice Rutledge's strict application of the separation doctrine is now being advocated by Justice Stevens. *See* Comm. for Pub. Educ. and Religious Liberty v. Regan, 444 U.S. 646, 671 (1980) (Stevens, J., dissenting).

21. McCollum v. Bd. of Educ., 333 U.S. 203 (1948); Zorach v. Clauson, 343 U.S. 306 (1952).

22. Engel v. Vitale, 370 U.S. 421 (1962).

23. School District of Abington Township v. Schempp, 374 U.S. 203 (1963).

24. Zorach v. Clauson, 343 U.S. 306, 313 (1952). The Court stated "[w]e are a religious people whose institutions presuppose a Supreme Being." *Id.*

25. Zorach v. Clauson, 343 U.S. 306, 314 (1952); Abington School Dist. of Abington Township v. Schempp, 374 U.S. 203, 222 (1963).

26. 374 U.S. 203 (1963).

legislation must have a secular purpose; and (2) its primary effect must neither advance nor inhibit religion.[27]

The third element was added in *Walz v. Tax Commission*.[28] *Walz* involved a challenge by a New York taxpayer to a New York statute which permitted property tax exemptions for religious organizations. The Court examined the relationship between the religious organization and the state to ensure that there was no "excessive government entanglement with religion."[29] Balancing the state involvement, the Court found that there was no excessive entanglement in upholding the exemption. The Court noted that if the tax exempt status were denied, the role of the state would expand for it would become involved in tax valuation of church property, tax liens and other tax assessment and collection procedures.[30]

The three elements were drawn together in *Lemon v. Kurtzman*.[31] The *Lemon* Court held that a provision will avoid impermissible state involvement in religion if: it has a legitimate secular purpose; it does not have the primary effect of advancing or hindering religion; and it does not lead to excessive entanglement by the state in the affairs of religion.[32] Subsequent cases focused on different aspects of the *Lemon* test with considerable disagreement over the meaning of the various elements of the test. The three elements of the test will be analyzed separately.

THE SECULAR PURPOSE REQUIREMENT

The first requirement is that the legislation must have a valid secular purpose. Unlike the other two parts of the *Lemon* test, the Court has been willing to defer to the judgment of the legislature in determining whether a statute has a secular purpose.[33] In the absence of strong evidence to the contrary, the Court will presume that the legislation in question had a secular purpose. Thus, purposes such as the furtherance of educational opportunities for the young[34] or the state concern for

27. *Id.* at 222.
28. 397 U.S. 664 (1970).
29. *Id.* at 674.
30. *Id.*
31. 403 U.S. 602 (1971).
32. *Id.* at 612-13.
33. *E.g.*, Lemon v. Kurtzman, 403 U.S. 602, 613 (1971). The Court stated "the statutes themselves clearly state that they are intended to enhance the quality of the secular education in all schools covered by the compulsory attendance laws. There is no reason to believe the legislatures meant anything else."
34. Bd. of Educ. v. Allen, 392 U.S. 236, 243 (1968).

maintaining minimum standards in schools operated in the state[35] have been upheld even if the statute has subsequently been struck down on the basis of one of the other parts of the *Lemon* test. In many cases, there has been no express legislative statement of purpose relating to the challenged section and no legislative history. Nevertheless, the Court has been willing to find a valid purpose if it was plausible from the statute's face. Usually this part of the test has been quickly disposed of and in no recent establishment clause case involving aid to religious schools has it been determinative.[36]

THE PRIMARY EFFECT INQUIRY

Of the three parts of the *Lemon* test, the requirement that the statute must not have the primary effect of advancing or inhibiting religion has caused the most difficulty. Unlike the "secular purpose" requirement, the Supreme Court will not defer to legislative judgment as to the effect of the statute. In the early cases, the Court considered such factors as whether parents or schools were the primary beneficiaries,[37] whether the aid was direct or indirect,[38] and whether the aid was directed to both public and nonpublic schools or only to nonpublic schools.[39] Subsequently, the emphasis has shifted more towards a consideration of whether the state or the school controlled the program.[40]

In the first case to consider the primary effect in the context of religious schools, *Board of Education v. Allen*,[41] the Court stressed the fact that the financial beneficiaries of the program were the parents of both public and nonpublic schoolchildren and that the program was restricted to the secular education programs.[42] A New York statute provided for textbook loans to students at both private and public schools. The textbooks were restricted to secular subjects and were lent

35. Lemon v. Kurtzman, 403 U.S. 602, 613 (1971).

36. In an establishment clause case not involving aid to schools, the Court accepted that the law as a whole had a valid secular purpose but found that the provision in question did not. Larson v. Valente, 456 U.S. 228, 248, 254-55 (1982). The provision in question exempted from certain registration and reporting requirements religious organizations which received more than 50% of their contributions from their members. The provision appeared to be directed solely at the Unification Church.

37. *See, e.g.*, Everson v. Bd. of Educ., 330 U.S. 1, 17-18 (1947); Bd. of Educ. v. Allen, 392 U.S. 236, 244 (1968).

38. *See, e.g.*, Comm. for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 774-76 (1973).

39. *See, e.g.*, Bd. of Educ. v. Allen, 392 U.S. 236, 242 (1968).

40. *See, e.g.*, Wolman v. Walter, 433 U.S. 229 (1977); Comm. for Pub. Educ. and Religious Liberty v. Regan, 444 U.S. 646 (1980).

41. 392 U.S. 236 (1968).

42. *Id.* at 243-45.

to the parents rather than the schools. Although books were considered to be a much more integral part of education than the transportation expenses reimbursed in *Everson*, there was no violation of the establishment clause because the Court concluded that the secular and religious education functions of sectarian schools could be separated. As long as aid was restricted to secular programs, it was permissible.[43]

In 1973, in *Committee for Public Education and Religious Liberty v. Nyquist*,[44] the Court used the primary effect inquiry to strike down another New York statute.[45] The New York statute provided both direct aid to the private schools in the form of maintenance and repair grants and indirect aid in the form of tuition reimbursement and tax deductions for parents. The Court found that any direct aid which was not restricted to secular purposes was forbidden as it operated as a direct subsidy for religious activities.[46] Similarly, indirect aid which was not restricted to secular purposes acted as a subsidy and was forbidden.[47] The fact that the indirect aid would benefit parents rather than the schools was not sufficient to overcome its impermissible effect. Furthermore, the Court rejected the argument that it was required to distinguish between primary and secondary effects of the questioned programs and concluded that any law which has the "direct and immediate effect of advancing religion" should be struck down under this inquiry.[48]

In *Meek v. Pittenger*,[49] a divided Court struck down part of a

43. *Id.* Justice Black, who wrote the majority opinion in *Everson*, dissented strongly, stating that the New York law was a "flat, flagrant and open violation of the First and Fourteenth Amendments." *Id.* at 250. (Black, J., dissenting). He argued that books, unlike transportation, go to the heart of the educational process and are inevitably used to disseminate the views of the sect.

Justice Douglas also dissented, stressing the inevitable conflicts which he felt were likely to arise as sectarian schools sought to have their choice of sectarian based books approved by local school boards. Despite the law's apparent neutrality, the realistic effect was that it would be used to supply sectarian books for sectarian schools. *Id.* at 256. (Douglas, J., dissenting).

44. 413 U.S. 756 (1973).

45. Between 1968 and 1973 the cases had been heavily influenced by the excessive entanglement test as set forth in Walz v. Tax Comm'n., 397 U.S. 664 (1970) and Lemon v. Kurtzman, 403 U.S. 602 (1971).

46. 413 U.S. at 774.

47. *Compare* Bd. of Educ. v. Allen, 392 U.S. 236 (1968) (textbooks limited to texts suitable for use in state schools); Everson v. Bd. of Educ., 330 U.S. 1 (1947) (transportation not related to religious aims of school).

48. 413 U.S. at 783-84 n.39. Justice Rehnquist dissented from the striking down of the tax deduction and tuition reimbursement provisions. *Id.* at 805. (Rehnquist, J., dissenting in part). He noted the similarity between the tax deduction provision and other fixed amount federal tax deductions and disagreed that the effect was necessarily to encourage parents to send their children to private schools. Furthermore, he considered that the statute could be upheld under the concept of "benevolent neutrality" as all the state was doing was equalizing the cost of education between public and private schools. 413 U.S. at 810.

49. 421 U.S. 349 (1975). *Meek* was a plurality decision with the Court divided into three

Pennsylvania statute which allowed the state to lend instructional materials and equipment[50] directly to nonpublic schools. The primary effect of the statute was to advance religion as 75% of Pennsylvania's nonpublic schools were church related or religiously affiliated,[51] and the aid was direct and substantial in amount.[52] In a reversal of its earlier position, established in *Allen*, the Court found that religious education was so pervasive in sectarian schools that aid, even if ostensibly limited to secular programs, would inevitably support the religious mission of the schools.[53] Rather than overrule *Allen*, the textbook loan program was upheld as it was constitutionally indistinguishable from the program in *Allen*. In this case, however, the financial beneficiaries were the parents rather than the schools.[54]

Two years later, in 1977, a much more divided Court decided *Wolman v. Walter*.[55] In *Wolman*, the Ohio legislature had enacted an aid package after the decision in *Meek* and had attempted to conform its new legislation to meet the standard enunciated in that decision. A variety of programs, including standardized testing services and diagnostic and therapeutic services for students, were upheld. In approving these programs, the Court found that the school had no control over

blocks of three. Justice Stewart wrote the opinion which was joined by Justices Blackmun and Powell. Justices Brennan, Marshall and Douglas joined the parts of the decision striking down the loan of instructional materials and the provision of auxiliary services. Justices Rehnquist, White and the Chief Justice joined the decision in upholding the textbook loan provision.

50. 421 U.S. at 365. The materials and equipment included such items as periodicals, maps, charts and projection, recording and laboratory equipment. The Court recognized that most of the instructional materials were self-policing, non-ideological and neutral. However, because of the all-pervading religious mission of parochial schools, the aid necessarily results in the direct and substantial advancement of religion. *Id.* at 366.

51. *Id.* at 364. The use of the percentage of religious schools in the benefited class was sharply criticized by Justice Rehnquist because of the lack of consistency in its application. While the percentage was found to be significant for the purposes of the instructional material program, it was not considered significant for the purposes of the textbook loan provision which was part of the same Act. *Id.* at 388-90 (Rehnquist, J., dissenting in part).

52. 421 U.S. at 365.

53. *Id.* at 365-66.

54. 421 U.S. at 361 (Opinion of Stewart, J.). Justice Stewart considered the fact that one statute was used in *Allen* and two in *Meek* to provide textbooks to both public and nonpublic schoolchildren to be insignificant. 421 U.S. at 360 n.8.

55. 433 U.S. 229 (1977). Justice Blackmun's opinion was joined by the Chief Justice and Justices Stewart and Powell. Justices Rehnquist and White joined in upholding the textbook, testing and scoring, diagnostic and therapeutic services provisions. Justice Brennan joined in striking down the instructional materials and field trip transportation provisions. Justices Marshall and Stevens joined in upholding the diagnostic services provision and in striking down the instructional materials and field trip provisions. Chief Justice Burger, Justices Rehnquist and White dissented from the decision to strike down the instructional materials and field trip transportation provisions. Justice Powell's opinion is evidence of a significant change of position. He is now much more receptive to programs to aid private schools and much less concerned with the historical background of the establishment clause. This shift in position has formed the basis of the subsequent majority decisions in school aid cases.

the substance of the testing services; the diagnostic services were part of public welfare services which had no educational content; and the therapeutic services were outside the control of the sectarian schools because they were to be provided on neutral sites by public school personnel.[56] However, the programs to provide instructional materials and transportation expenses for field trips were struck down under the primary effect inquiry.

The instructional materials provision was struck down for the same reasons as the program in *Meek*. Ohio had sought to avoid the result in *Meek* by providing that the equipment and materials would be loaned to the parents rather than the school. The Court rejected this as a mere technicality and found that the primary effect was to advance religious teaching.[57] Once again, the Court stressed that it was impossible to separate the religious and secular functions of sectarian schools, so that all instructional materials could be diverted to religious uses.[58]

The field trip transportation provision also failed under the primary effect inquiry.[59] Although the provision paralleled a similar provision for public schools, the Court found that private school staff had control over the timing and selection of the trips, and that such trips could be used for sectarian rather than secular purposes. With the amount of control exercised by the schools, it was the schools rather than the children who received the benefit from such a provision.[60]

In 1980, a New York statute providing for direct cash reimbursements to parochial schools for performing various state mandated testing and reporting services was upheld in *Committee for Public Education and Religious Liberty v. Regan*.[61] The testing services were characterized as being similar to those upheld in *Wolman v. Walter*.[62]

56. 433 U.S. at 238-48.

57. "Despite the technical change in legal bailee, the program in substance is the same as before: The equipment is substantially the same; it will receive the same use by the students; and it may still be stored and distributed on the nonpublic school premises." 433 U.S. at 250.

58. The Court recognized that its finding that the secular and religious functions could not be separated caused tension with *Allen* which had found the functions to be separable. *Allen* was followed as a matter of *stare decisis*, although it probably should have been overruled. *Id.* at 251 n.18. For a discussion of whether the secular and religious aspects of education can be separated see Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680, 1689-91 (1968).

59. 433 U.S. at 252-55.

60. *Id.* at 252-54. The Court also noted that it is the teacher who would make the field trip meaningful and as the teacher works within a sectarian institution, there is an unacceptable risk of fostering religion on such trips. *Id.*

61. 444 U.S. 646 (1980). The majority consisted of the Chief Justice, Justices Stewart, Powell, Rehnquist and White.

62. *Id.* at 654. In *Wolman*, the tests were prepared by the state and graded by public school personnel. In *Regan*, three types of tests were involved, only one of which was graded by the State, the others were graded by nonpublic school personnel. Because of the objective nature of

Following the reasoning in *Wolman*, the primary effect was found not to advance religion because the schools had no control over the examinations or the grading. Moreover, the fact that the reimbursement was in the form of a direct cash payment was considered of no consequence once the secular purpose and primary effect inquiries were satisfied.[63]

In the years between the *Allen* and *Regan* decisions there have been two major shifts in the thinking of the Supreme Court on the primary effect inquiry. First, the Court has rejected the initial *Allen* position that the secular and educational functions of sectarian schools could be separated. Second, the *Regan* Court now appears to be willing to permit direct aid to sectarian schools if the primary effect of the program is not to advance religion. Prior Supreme Court decisions had considered that direct aid inevitably advanced the religious mission of the schools regardless of whether the program was restricted to secular purposes or not.[64] Overall, the more recent cases have stressed the issue of who has control over implementation of the program: if the school has control, the program is likely to be impermissible; if the state, through public school personnel, has control then it will probably be upheld.

THE EXCESSIVE ENTANGLEMENT INQUIRY

Under the third part of the *Lemon* test, the Court is seeking to avoid excessive entanglement by the state in the affairs of religious organizations. The Court has considered two different types of entanglement, administrative and political. Administrative entanglement may occur when the state is involved in administering an aid program which results in supervising or regulating the affairs of a religious organization.[65] Political entanglement or "divisive political potential"[66] may arise when religion becomes involved in politics and the affairs of state, usually to ensure the continued existence or expansion of an aid pro-

the testing, the Court found that the differences between the two schemes to be insignificant. *Compare* Levitt v. Comm. for Pub. Educ. and Religious Liberty, 413 U.S. 472 (1973) (New York provision to provide aid for teacher prepared tests was denied).

63. 444 at 657-58. Justice Blackmun dissented, arguing that direct aid to religious schools of any type was prohibited and that this had been firmly established in *Wolman* and prior cases. *Id.* at 666-67. (Blackmun, J., dissenting). Without a specific accounting to ensure that the money was not used for sectarian purposes, the primary effect of the provision was to advance religion. Part of the money was used to enforce attendance requirements which were required by the state and the schools themselves. Unless the money was restricted to enforcing state requirements for attendance, the aid impermissibly benefited the religious function of the school.

64. *E.g.*, Comm. for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. at 795-98.

65. Walz v. Tax Comm'n., 397 U.S. 664, 675 (1970).

66. Lemon v. Kurtzman, 403 U.S. 602, 622-23 (1971).

gram.[67] Some decisions have not distinguished between the administrative and political elements, while Justice Brennan has suggested that political entanglement inquiry should be a fourth part of the establishment clause test.[68]

In *Lemon v. Kurtzman*,[69] the administrative entanglement part of the test was used to strike down two separate private school aid programs which were consolidated on appeal. Rhode Island provided salary supplements for teachers who taught only secular subjects and Pennsylvania reimbursed the schools for teachers' salaries, textbooks and materials used in teaching certain secular subjects.[70] The Court held that both programs involved excessive entanglement between the state and the nonpublic schools because the statutes required states to continuously supervise the programs to ensure that the religious schools followed the restrictions imposed. In determining whether a program involved excessive entanglement with religion, the factors to be considered are "the character and purpose of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority."[71]

In *Meek v. Pittenger*,[72] Pennsylvania had attempted to correct the problems of the private school aid package struck down in *Lemon*.

67. *Id.* In *Lemon*, Justice Burger considered this inquiry to be part of the broader concern about entanglement. His concern was that the need for annual appropriations would lead to political divisiveness. A similar concern was expressed by the majority in *Meek* about the auxiliary services program and its need for annual appropriations. For the first year the appropriation was over $14 million for all schemes except instructional materials and equipment and textbooks. In the second year the appropriation increased to $17,880,000. 421 U.S. at 369 n.19. Although the Court did not need to examine the entanglement question in *Nyquist*, it did issue warnings about the divisive nature of the provisions, including the tax deduction provision which did not require annual reassessment. 413 U.S. at 794-97.

68. Meek v. Pittenger, 421 U.S. 349, 374 (1975) (Brennan, J., concurring in part and dissenting in part). While concurring with the majority in *Meek* as to the divisive political potential of the auxiliary services program, Justice Brennan found that this element was sufficient to hold the other elements of the scheme unconstitutional. The textbook programs should have been invalidated because of the size of the appropriations involved ($4,670,000 in 1972-73) and *Allen* should have been overruled as it did consider the divisive political potential of the scheme. *Id.* at 377-79. Similarly, in his opinion in *Wolman*, he dissented from the parts of the decision which upheld parts of the scheme because the Court did not consider the divisive political potential caused by the aid schemes and because of the amount of aid involved. For the first two years $88,000,000 had been appropriated. Wolman v. Walter, 433 U.S. 229, 256 (1977).

69. 403 U.S. 602 (1971).

70. The Rhode Island statute provided for a 15% salary supplement for teachers at nonpublic schools where expenditure per pupil was less than the average expenditure at public schools. The aid was restricted to teachers teaching only courses available in public schools and they had to agree not to teach courses in religion. The Pennsylvania statute authorized the Superintendent of Public Instruction to purchase certain secular educational services from nonpublic schools, directly reimbursing those schools solely for teachers' salaries.

71. 403 U.S. at 615.

72. 421 U.S. at 349 (1975).

However, the Court found that the provision of "auxiliary services," including remedial and accelerated instruction, guidance counseling and testing services still involved excessive entanglement.[73] In the revised scheme, the services were only to be provided by public school personnel rather than by parochial school personnel. However, the services were to be provided at the request of the private schools and on their premises. While the Court found that the risk of a public school teacher crossing the line from secular to sectarian teaching in remedial subjects was slight, the risk remained because the services were to be performed on private school premises and constant surveillance was required to ensure that this did not happen.[74] The Court considered the question of political entanglement separately and found that there were serious concerns about such entanglement. There was a real danger of repeated confrontations between the state and the parochial school supporters because of the need for annual reconsideration of the appropriation requests.[75]

MUELLER V. ALLEN

The Lower Court Decisions

A Minnesota tax statute allowed state taxpayers, in computing their state income tax liability, to deduct expenses incurred in providing tuition, textbooks and transportation for their children in elementary or secondary schools.[76] The deduction was available to all taxpayers, whether the children attended public or nonpublic schools,

73. The auxiliary services included guidance, counseling and testing services; psychological services; remedial and therapeutic services and "such other secular, neutral, non-ideological services as are of benefit to nonpublic schools and are presently or hereafter provided for public school children of the Commonwealth." *Id.* at 352-53 n.2. "Instructional materials" includes projection, recording and laboratory equipment, maps, charts, globes, videotapes and filmstrips. The term also included any materials provided to public school children. *Id.* at 354-55 n.4.

74. *Id.* at 371-72. A similar scheme was upheld in Wolman v. Walter, 433 U.S. 229 (1977). However, in this case the counseling and therapeutic services were to be provided on neutral sites. While noting the concern of the *Meek* Court that the pressure of the environment might cause an employee to change his behavior from its normal course, the *Wolman* Court concluded the "supervision of public employees performing public functions on public property [does not create] an excessive entanglement between church and state." *Id.* at 248.

75. 421 U.S. at 372. The problem with the political entanglement inquiry, if based on the need for annual appropriations, is that any program requires legislative action to be enacted. While the amounts involved in many of the programs have been large, see *supra* note 68, the size of the program should not matter. The concern should arise because of the nature of the program and the constitutional issues raised. Even so, because the religion clauses of the first amendment are implicated in these programs it is difficult to foresee any case in which the political entanglement inquiry would not be present and significant. The inquiry, therefore, may not add anything to the determination of the validity of the program.

76. MINN. STAT. § 290.09(22) (1982). For text of statute see *supra* note 11.

and the amount of the deduction was limited to the lesser of the amount spent or a statutory limit determined by the child's school grade. Minnesota taxpayers challenged the constitutionality of the statute on the grounds that it violated the establishment clause by providing state aid to religious schools, thus involving the state in the affairs of religion.

The district court upheld the statute,[77] finding that the statute did not have the primary effect of advancing religion. It found that the statute was facially neutral and that because the benefit was indirect it was permissible.[78] The statute, therefore, was closer to the permitted tax exemptions in *Walz* than the so-called "tax deductions" in *Nyquist.* The critical element was that the statute provided widely distributed tax relief, available to all parents, irrespective of the schools attended by their dependents.[79] The court found that there was no excessive entanglement as normal tax administration procedures do not give rise to unconstitutional involvement in the affairs of religion.

The Eighth Circuit affirmed[80] the lower court, recognizing that its decision to uphold the statute would create a conflict with the First Circuit which had struck down an identical provision in *Rhode Island Federation of Teachers v. Norberg.*[81] However, because of the importance of the issue, the court felt it necessary to consider the constitutionality of the different provisions and to disagree with *Norberg.*

Considering the different elements of the provision separately, the court upheld the transportation deduction as similar to the reimburse-

77. 514 F. Supp. 998 (D. Minn. 1981). The statute had been upheld in a prior district decision, Minnesota Civil Liberties Union v. Roemer, 452 F. Supp. 1316 (D. Minn. 1978). However, the prior decision was not binding as it was not a representative taxpayers' suit. The MCLU had challenged the primary effect part of the test but had not produced any statistical evidence to support their claim. In *Mueller* the taxpayers produced statistics from the Department of Revenue attempting to show that the majority of the beneficiaries under the scheme were parents of children in nonpublic schools. 514 F. Supp. at 1001-02. There was considerable dispute as to the accuracy of the statistics at all levels of decision. The district court noted that the state produced statistics showing that public school tuition expenses of $2 million were eligible for tax relief, that these amounts were not included in the statistics and that the amounts for textbook and transportation expenses were not *de minimis. Id.* at 1002.

78. 514 F. Supp. at 1003.

79. *Id.* at 1002-3.

80. 676 F.2d 1195 (8th Cir. 1982).

81. 630 F.2d 855 (1st Cir. 1980). In *Norberg,* a Rhode Island scheme providing for tuition, transportation and textbook aid was struck down. The statute provided for tax deductions for such expenses incurred by parents up to a statutory maximum. This scheme was found to have the primary effect of advancing religion because it conferred a special benefit on those parents choosing to send their children to nonpublic schools. The court then used a statistical analysis to find that the overwhelming majority of parents eligible for this deduction sent their children to sectarian schools. Thus, it concluded, the benefit would result in nearly "solid sectarian lines." *Id.* at 860.

ment of transportation expenses in *Everson v. Board of Education*.[82] The benefit was available to all parents and the fact that the benefit was through the tax system rather than direct reimbursement was considered unimportant. The court upheld the textbook provision as being similar to *Board of Education v. Allen*.[83] The provisions for "instructional materials and equipment" presented more problems, but the court distinguished the cases which had struck down similar programs by finding that the benefit was directed to the student and the parent rather than the school.[84]

The court considered that the constitutionality of the tuition deduction depended on whether *Committee for Public Education and Religious Liberty v. Nyquist*[85] could be distinguished. The court in *Norberg* decided that it could not and struck down the Rhode Island program.[86] The *Mueller* court, however, distinguished *Nyquist* on the grounds that the statute in *Nyquist* operated as a tax credit and not a true tax deduction, and the tax benefits were limited to the narrow class of parents of nonpublic schoolchildren, as opposed to the broad class of all parents with children in both public and nonpublic schools in Minnesota.[87] The court stressed that the statute was neutral on its face and there was sufficient evidence that the neutrality was not mere window dressing. The court also analogized the deduction to charitable deductions under Minnesota tax law and the diffused nature of the tax benefit.[88] The court concluded that the tax policy was neutral toward religion by providing a tax benefit which is available to all taxpayers who incur deductible expenses in sending their children to school.[89]

82. 330 U.S. 1 (1947).

83. 392 U.S. 236 (1968).

84. 676 F.2d at 1201-02. The instructional materials eligible for tax deduction were strictly limited and included such items as the cost of tennis shoes and sweatsuits for physical education, rental fees for cameras, ice skates, calculators, musical instruments and pencils and special notebooks required for class. *Id.* at 1197.

85. 413 U.S. 756 (1973).

86. Rhode Island Federation of Teachers v. Norberg, 630 F.2d 855, 861 (1st Cir. 1980).

87. 676 F.2d at 1203.

88. *Id.* at 1205.

89. The Court of Appeals adopted the District Court's incorrect understanding of the Minnesota tax system. By reducing adjusted gross income taxpayers get a reduction in their tax liability in proportion to the reduction. The system is not banded where tax is payable according to income bands. In these systems a deduction would only provide a tax benefit if it was sufficient to move the taxpayer to a lower tax band. *See* Comment, *Mueller v. Allen: Do Tuition Tax Deductions Violate the Establishment Clause*, 68 IOWA L. REV. 539, 552-53 (1983).

THE SUPREME COURT OPINION

Reasoning of the Court

Justice Rehnquist's majority decision began by recognizing the difficulty which the Court has experienced in trying to interpret the establishment clause because "we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law."[90] To illustrate the difficulty, the decision pointed out that although some schemes have been consistently upheld, such as expenses for transportation and textbook loans, other arrangements have been struck down. In light of this confusion, Justice Rehnquist restated the issue in the case as whether the Minnesota statute was closer to the schemes approved in *Everson* and *Allen* or to that struck down in *Nyquist*.[91]

The Court then reiterated the three-part test established in *Lemon* and proceeded to apply it to the facts. Before starting, the Court repeated the caveat that the test is only a "signpost" and not determinative.[92] The Court found that the statute easily passed the secular purpose test, although there was no explicit stated legislative purpose. The Court reasoned that a desire for a well educated populace was clearly a legitimate legislative concern and the Court was unwilling to attribute unconstitutional motives to States when a secular interpretation of the statute was plausible. Furthermore, by encouraging private schools the State was relieving itself of the burden of providing public education for those pupils. Private schools may also be used as benchmarks of excellence against which the performance of public schools may be compared.[93]

The Court then turned to the more difficult question of whether the primary effect of the statute was to advance the sectarian aims of the nonpublic schools. In deciding that this was not so, the court found several features of Minnesota's program significant. First, it noted that the deduction was essentially neutral because it was only one of the many tax deductions permitted by Minnesota's tax laws. States have considerable latitude in creating tax deductions because of their knowledge of local conditions and this was not clearly outside Minnesota's taxing power.[94]

90. 103 S. Ct. at 3065 *quoting* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).
91. *Id.* at 3066.
92. *Id. quoting* Hunt v. McNair, 413 U.S. 734, 741 (1973).
93. *Id.* at 3067.
94. *Id.* This point is unclear. The court of appeals suggested an analogy to charitable deduc-

Second, the Court stressed that the deduction was available to parents of children in both public and nonpublic schools. The Court found that "the provision of benefits to so broad a spectrum of groups is an important index of secular effect."[95] *Nyquist* was, therefore, distinguishable because it provided benefits only to parents of nonpublic schoolchildren. The Court concluded that the instant provision was more like the programs in *Everson* and *Allen* which also benefited all children because of the broad group benefited. Any establishment clause objections were reduced because the aid went to the parents rather than the schools. Although the Court acknowledged that to whom the aid was directed was only one of many features to be considered, it assumed greater weight when all the recent cases invalidating aid had involved direct grants to schools.[96]

Concluding that the financial benefit to the nonpublic schools was attenuated, the Court turned to a consideration of the evils against which the establishment clause was intended to protect. The evil was described as the kind of policy of government involvement in religious life which is likely to lead to strife and to strain the political system.[97] The Court then warned that it is necessary to keep such matters in perspective and adopted Justice Powell's position in *Wolman* that the present day is far removed from these dangers. The Court concluded that "[t]he historic purposes of the clause simply do not encompass the sort of attenuated financial benefit . . . at issue in this case."[98]

The Court then turned to the petitioners' claims. It rejected the claim that, notwithstanding the facial neutrality of the statute, its application primarily benefited religious institutions. The statistical data produced to support this claim was described as "plainly mistaken" for failing to take account of the deductions available to parents of public school children.[99] Furthermore, the Court refused to look beyond a facially neutral law to determine its actual statistical application. "Such an approach would scarcely provide the certainty that this field stands in need of."[100]

tions to show that religious institutions derived considerable benefit from the tax system. 675 F.2d at 1205.

95. 103 S. Ct. at 3068.

96. The Court recognized *Nyquist* as the only exception. *Id.* at 3069. However, parts of the statute invalidated in *Meek* also involved loans to parents. *See supra* note 63.

97. *Id. quoting* Walz v. Tax Comm'n., 397 U.S. 664, 694 (1970) (Harlan, J., concurring).

98. *Id.*

99. The petitioners had argued that the deductions for public school children were *de minimus.* The Court dismissed this argument by noting that such parents could deduct summer school tuition and various other tuition expenses. *Id.* at 3069-70.

100. *Id.* at 3070.

The Court concluded its analysis of the primary effect by paying tribute to private schools and noting their contribution to society. Any unequal effect that might result from state aid through tax deductions was more than outweighed by the contribution of private schools to society.

In a brief overview of the excessive entanglement part of the test, the majority had no difficulty in finding that the statute did not excessively entangle the state in religion. The only potential involvement was in deciding whether the books for which a deduction had been claimed were devoid of sectarian content. Because this was similar to the state involvement in *Allen*, which also required the state to ensure that the books were suitable for use in public schools, it was found to be permissible.

The Court dismissed the political divisiveness concern in a footnote. Noting that the test was first articulated in *Lemon* and that it had been interpreted differently in subsequent cases, the Court concluded that it should be confined to the facts of *Lemon* and would only apply where direct financial subsidies were paid to parochial schools or teachers in parochial schools.[101]

THE DISSENTING OPINION

Justice Marshall's dissenting opinion[102] started with the premise that a state may not support religious education either through direct grants to schools or financial aid to parents and that financial aid to parents is no more permissible if it is provided as tax credits rather than cash payments.

The dissent examined the history of the principles underlying the decisions relating to aid in parochial schools and noted that the reason direct aid is prohibited is that it "necessarily results in aid to the sectarian enterprise as a whole."[103] Consequently, any aid which has been permitted before has been restricted to the secular purposes of the school. Services such as police and fire protection may be provided

101. The matter was dealt with in a footnote because it had been raised by amicus National Comm. for Pub. Educ. and Religious Liberty, rather than by a party to the proceeding. *Id.* at 3071 n.11. The Court's somewhat curious conclusion that the political entanglement test should be confined to the facts of *Lemon*, arose because the Court considered that *Lemon* had distinguished *Everson* and *Allen* and not found that this concern was present in those cases. This, however, was not the case as the *Lemon* Court noted the concern of Justice Harlan in *Allen* that the potential for political entanglement was present. Lemon v. Kurtzman, 403 U.S. 602, 622-23 (1971). Even if the concern was not present in *Allen* and *Everson*, it has been raised in several subsequent cases. *See supra* note 68.

102. The dissent was joined by Justices Brennan, Blackmun and Stevens.

103. 103 S. Ct. at 3072-73. (Marshall, J., dissenting).

because this type of assistance is clearly separate from the religious function of the school. If any aid cannot be guaranteed to be free from sectarian influence, it should be denied. Indirect aid, therefore, is impermissible if it is not subject to restrictions which guarantee separation from religious aims.

The majority's attempts to distinguish *Nyquist* were sharply criticized. The dissent argued that tuition expense is the most significant deduction and that this deduction was not available to most public school parents because public education in Minnesota is free. Consequently, the only parents who can benefit to any significant extent are those with children in private schools. By providing tax relief to these parents, the general taxpayer is paying part of the cost of such education and providing an incentive to send children to parochial school.[104]

The dissent stated that the only necessary inquiry for determining primary effect of the statute is whether the deductions primarily benefit private schools. If an examination of the statute on its face is insufficient, it is necessary to look at the actual operation of the statute. When such an inquiry has been made, the majority of private schools have been found to be sectarian. Minnesota is no exception as over 90% of the children enrolled in nonpublic schools are attending sectarian schools.[105]

The dissent also rejected the majority's reliance on the genuine tax deduction nature of the tax scheme. Such a difference was considered to be a "distinction without a difference" and not supported by prior cases in which the Court had affirmed the striking down of both tax deduction and tax credit schemes.[106] The majority's assertion that the Minnesota scheme was more like the programs in *Everson* and *Allen* than *Nyquist* was also considered to be incorrect. Allowances for tuition are unlike indirect aid for transportation and textbooks as they provide much more direct benefit to the school. As the indirect aid for transportation approached the "verge" of constitutionality in *Everson*, any more direct aid was clearly impermissible. Furthermore, even if tuition aid was permissible it would still fail in this case because it was not restricted to the secular purposes of the schools.

Turning to the other items which qualify for tax relief, such as the cost of textbooks and other instructional materials, Justice Marshall concluded that they were similarly unconstitutional. The problem,

104. The form of the aid is not controlling, the relevant inquiry is to the impact of the aid. *Id.* at 3073.

105. *Id.* at 3075.

106. *Id.* at 3075-76.

once again, was that the deductions were allowed to offset expenditures which were not restricted to the secular side of school activities. The direct result is that such aid leads to a benefit to the whole enterprise and releases more funds for sectarian purposes. The textbook deduction can be distinguished from the textbook loan program in *Allen* as the Minnesota program does not limit the textbooks to those texts that can be used in public school.[107]

ANALYSIS

In its reinterpretation of the establishment clause test stated in *Lemon*, the *Mueller* Court has significantly altered the balance in favor of state aid to religion and away from the constitutional concerns which the test was designed to protect first. By finding that many of the concerns of the framers are no longer a concern today, the Court is eroding the very freedoms that the first amendment was intended to protect. The revised test no longer guarantees that, at least with respect to state aid to religious schools, the state will not be involved in religious affairs. The state is now free to provide aid for the religious aims of sectarian schools.

Historically, the Supreme Court's analysis has generally been in terms of the concerns of the *Lemon* tripartite test, although the Court's decisions in establishment clause cases have been far from consistent. The test is concerned with traditional historical notions of the establishment clause and a broader constitutional analysis. In *Mueller*, the test has been modified by the Court. The importance of the constitutional analysis has been downgraded and the historical concerns replaced by a "benefit to society" analysis.[108] The change in the structure of the test can be seen by considering each part of the test separately.

The secular purpose part of the *Lemon* test remains largely unchanged. The statute must have a legitimate secular purpose to survive scrutiny. However, the *Mueller* Court has broadened the permissible secular purpose by indicating that it would find a more limited purpose of ensuring the financial wellbeing of private schools to be acceptable.[109] The Court justified such a purpose by noting that the state is relieved of a considerable educational burden by the existence of pri-

107. *Id.* at 3077. Minnesota already had a textbook loan program similar to that authorized in *Allen*. MINN. STAT. §§ 123.932 and 123.933 (1980).

108. 103 S. Ct. at 3070.

109. "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." 103 S. Ct. at 3067.

vate schools. While such a purpose may seem acceptable on its face, a large proportion of private schools are sectarian so that the Court is effectively sanctioning aid to religious schools as a legitimate secular purpose. Given the sectarian purposes of these schools this would be directly contrary to prohibitions of state establishment of religion.

It is the primary effect part of the test which has been most significantly altered in *Mueller*. By placing the greatest reliance on the facial neutrality of the statute,[110] the Court is providing legislators with an easy way to channel aid to private schools. As long as the statute apparently provides aid to a wide group of persons, it will be acceptable, even if the large majority of the beneficiaries are private sectarian schools. The Court stated that to look beyond the statute would be to ground constitutional analysis on statistics which could change from year to year. While this would be valid if the statistics were in fact likely to change significantly from year to year, the ratio of sectarian schools to nonsectarian private schools is not subject to such change.[111]

The facial neutrality analysis is the most arbitrary of the concerns under the primary effect test. Some of the statutes presented to the Court have involved aid to both public and private schools, while others have provided aid to private schools alone.[112] In the latter case, the statutes often have been direct counterparts of provisions for public schools. While the Court has acknowledged that it is immaterial whether the aid was made available to all schools through one statute or two, it has only looked closely at the sectarian dominance of private schools when aid was provided to private schools alone.[113] This has enabled legislators to draft statutes widely thereby avoiding detailed scrutiny of the effect of the statute on private schools. However, to be consistent and more faithful to the concerns of the establishment clause, the Court should subject the private schools to the same scrutiny regardless of the number of statutes used. Thus, the Court should consider separately the effect of the statute on public and private schools when only one statute is used. The reason why the statute is

110. *Id.* at 3068.

111. In cases where a statistical analysis has been employed the percentage of private schools which were sectarian exceeded 75%. *See, e.g.*, Meek v. Pittenger, 421 U.S. at 363. In New York, at least, the proportion remained stable at 85% between 1973 and 1980. *Compare* Comm. for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 768 (1973) with Brief for Appellants at 10, Comm. for Pub. Educ. and Religious Liberty v. Regan, 444 U.S. 646 (1980).

112. *Everson* and *Allen* are examples of statutes addressed to all children while *Meek, Wolman, Nyquist* and *Lemon* were directed only to private schools.

113. *See supra* note 111.

under attack is because it extends aid to private schools, the majority of which are sectarian, not because it supports public schools.

Another factor that the Court found significant under the primary effect test is that the tax deduction is one of many under Minnesota's tax laws.[114] While there is no dispute that state legislatures have broad latitude in creating classifications in tax statutes, or that religious institutions may benefit from other deductions such as those for charity or exemption from property tax, these factors do not make this deduction acceptable. Clearly, state tax classifications are subject to the same Constitutional scrutiny as any other activity, and the state could no more authorize a tax deduction for an improper purpose than they could pass laws permitting such an activity. Thus, although tax deductions may be a reasonable means of achieving stated ends, they do not imply anything about the validity of the end or its effect in practice and, therefore, add nothing to the analysis of the effect of the statute. By giving prominence to such an argument, the Court succeeded in obscuring the principal issue of whether the tax deduction was for a legitimate secular purpose.

The third theme stressed by the *Mueller* Court is that the benefit resulting to private schools is attenuated, and not one of the dangers against which the establishment clause was designed to protect.[115] The Court describes the benefit as attenuated because it is available to parents rather than the schools, and to all parents, rather than just the parents of private schoolchildren. While providing the benefit to parents rather than the school serves to make the aid less easily identifiable as state aid to religion,[116] the benefit, as the Court recognizes, is equivalent to giving the aid to the school.[117] The dissent criticized the majority's finding that the benefit was attenuated because such a position was not being supported by prior decisions. Citing both *Meek* and *Wolman*, the dissent pointed out that loans of wholly neutral secular instructional materials had been prohibited because they contribute to the schools' religious as well as secular teaching.[118]

It is equally difficult to justify describing the benefit as attenuated merely because it is an indirect benefit through the tax system rather than a direct benefit to parents or the schools. The relationship be-

114. *See supra* text accompanying note 94.

115. 103 S. Ct. at 3069.

116. Professor Tribe suggests that the Court is trying to avoid any scheme which symbolically identifies the aid with support for religion. Tribe *supra* note 16, at § 14-9 843-45.

117. *See, e.g.*, Comm. for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. at 790-91.

118. 103 S. Ct. at 3077.

tween tax deductions or credits and their subsequent effect on certain types of expenditure is well known and understood. While tax deductions may be more acceptable than tax credits because they will never fully reimburse parental expenditure, states should not be allowed to do indirectly that which they could not do directly. If direct parental reimbursement of tuition is unacceptable, tax deductions or credits for the same purpose are equally impermissible.

After stating that the benefit is attenuated, the Court compares it to the dangers which the establishment clause was designed to prevent. These dangers are described as those types of government involvement which tend to lead to strife and political strain.[119] However, the Court finds that these dangers should be kept in perspective; the opportunity for modern sectarian control of the democratic processes is slight, and may be tolerable in light of the benefits of private schools.[120] The Court recognized that the establishment clause goes beyond the establishment of a state church and prohibition of direct payments. However, the Court's conclusion that attenuated tax benefits are not prohibited is stated without any attempt at justification. The position is not supportable given the wider role of the tax system today. It would seem that today's indirect tax aid is very much equivalent to direct levies prior to the passage of the first amendment.[121]

The fourth theme which the *Mueller* Court found persuasive was that private schools play an important role in the education system by removing from public rolls considerable numbers of children[122] and by providing a possible yardstick of excellence against which other schools can be measured. There is no doubt that if private schools were to close, the public school system would be put under enormous strain to accommodate the additional pupils. The Court then goes on to suggest

119. *Id.* at 3069. *See supra* note 68.

120. The fact that the breaches of the first amendment may be relatively minor has never before been accepted as a defense. Once relatively minor violations are permitted, it is only a question of time before major abuses occur. *See* Abington School Dist. v. Schempp, 374 U.S. 204, 225 (1963).

121. Many of the federal tax deductions and credits were adopted by Congress in order to stimulate various expenditures or behaviors. For example, the investment credit was intended to encourage the purchase of machinery and equipment and its rate has been changed to either speed up or slow down business expenditure. Similarly, the charitable deduction was intended to stimulate philanthropy. It is Congress' belief that aid through the tax system is more effective than direct expenditure which is why it is the preferred method of aid in many areas today. *See, e.g.*, Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705 (1970) reprinted in W. Klein, POLICY ANALYSIS OF THE FEDERAL INCOME TAX 485 (1976).

122. There were approximately 91,000 students enrolled in Minnesota's 500 private schools in 1981. 103 S. Ct. at 3064.

that the benefit of these schools to the community outweighs any benefit they might receive from the state through the tax system.

This factor is clearly designed to reduce the significance of any aid to religious schools. However, the implication of such a test is that the constitutional concerns of the establishment clause are to be balanced against the state's interest in preserving the private schools to relieve a potential burden on the public school system and to provide a potential benchmark of excellence. Such a balancing test, which is heavily weighted in favor of the states and against the constitutional interest in the establishment clause, is inappropriate. If such a test is adopted, more factors will be added to the state's side and the state's interest will always prevail. There is nothing about the balancing test which suggests that it will be restricted to indirect aid packages, and, with the shift towards greater accommodation of sectarian schools in the recent cases, its reach is likely to be extended. Indeed, it was in a non-tax direct aid case that the balancing test was first proposed by Justice Powell.[123]

Finally, the Court dismissed the excessive entanglement inquiry in a few sentences. The Court found that the only possible entanglement would arise from making a determination that no deduction had been taken for instructional books and materials used for religious purposes.[124] This inquiry was similar to that upheld in *Allen*, where the textbooks had to be suitable for use in public schools, and the Court found that there would be no excessive entanglement. In following *Allen* in this respect, the Court has impliedly re-adopted the premise that the sectarian and secular functions of religious schools can be separated.[125] This position was rejected by the Court in *Meek* and *Wolman*.[126] The need for surveillance to ensure that no deduction is taken for instructional books or materials used for sectarian purposes is greater than the majority suggests. Minnesota already has a loan program which provides textbooks used in public schools to nonpublic schoolchildren, a point ignored by the majority.[127] Consequently, parents are not likely to purchase books and materials available in public schools, because these are available through the loan program. The money spent, therefore, is much more likely to be spent on books and materials with sectarian content.

123. Wolman v. Walter, 433 U.S. 229, 262-63 (1977) (Powell, J., concurring).
124. 103 S. Ct. at 3071.
125. 392 U.S. at 243-45.
126. *See supra* text accompanying notes 57-58.
127. *See supra* note 107.

By limiting its consideration of excessive entanglement,[128] the Court has abandoned the requirement that aid be restricted to the secular purposes of the school. This is a major change because it is the first time that the Court has not restricted the aid to secular purposes. In earlier cases, it was the need for surveillance to ensure that no aid was being used for sectarian purposes that led to statutes being struck down.[129] If aid is no longer to be restricted to secular activities in private schools, the door would seem to be open for unlimited aid to sectarian schools and an abandonment of the concerns of the establishment clause.

CONCLUSION

After *Mueller v. Allen*, the potential for state aid to religious schools has been greatly increased and the concern over the Constitutional protections of the establishment clause has been greatly reduced. The focus of the *Lemon v. Kurtzman* test has been significantly altered; if a statute is facially neutral that is now sufficient to pass the primary effect part of the test. That is effectively the end of the inquiry as the requirement that aid be restricted to secular activities has been abandoned. By stressing the importance of private schools to society, the Court has allowed the benefit to society test to overcome clear constitutional prohibitions. The *Mueller* decision represents a dangerous disregard for the protection of society afforded by the establishment clause as a state is now free to aid religious activities at sectarian schools.

128. 103 S. Ct. at 3071.
129. *See supra* text accompanying notes 69-75.