Volume 29 | Issue 2 Article 5

1983

Constitutional Law - First Amendment - A Statute That Permits a Tax Deduction for Public as Well as Nonpublic School Tuition and Related Expenses Does Not Violate the Establishment Clause of the First Amendment

J. Edward Goff

Recent Developments

CONSTITUTIONAL LAW—FIRST AMENDMENT—A STATE STATUTE THAT PERMITS A TAX DEDUCTION FOR PUBLIC AS WELL AS NONPUBLIC SCHOOL TUITION AND RELATED EXPENSES DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT

Mueller v. Allen (U.S. 1983)

Section 290.09(22) of the Minnesota Tax Code permits taxpayers to deduct, for purposes of the state income tax, certain expenses incurred in the education of their children.[1] The deduction is limited to expenses for "tuition, textbooks and transportation,"[2] which are actually incurred by taxpay-

1. Mueller v. Allen, 103 S. Ct. 3062, 3064 (1983). Section 290.09 of the Minnesota Code provides in pertinent part as follows:

> SUBDIVISION 1. The following deductions from gross income shall be allowed . . . SUBD. 22. 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 . . . .
>
> 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 or worship, nor shall it include such books or materials for, or transportation to, extracurricular activities including sports events, musical or dramatic events, speech activities, driver's education, or programs of a similar nature.

MINN. STAT. § 290.09 (1982).

2. *See* Mueller v. Allen, 514 F. Supp. 998 (D. Minn. 1981). The district court ruled that deductible expenses include any tuition in the ordinary sense, for public schooling outside the student's district, for summer school, for private tutors for slow learners, for private instruction for those physically unable to attend school, for private tutors who provide education acceptable for credit in elementary or secondary schools, for Montessori schooling in grades K through 12, or for driver education when it is a part of the school curriculum. 514 F. Supp. at 1000. On appeal both the Court of Appeals for the Eighth Circuit and the Supreme Court accepted these findings. *See Mueller*, 676 F.2d 1195, 1196 (8th Cir. 1982), *aff'd*, 103 S. Ct. 3062, 3065 (1983). The district court also concluded that

> textbook deductions include not only secular textbooks but also other necessary equipment, such as:
>
> 1. Cost of tennis shoes.
> 2. Camera rental fees paid to the school for photography classes.
> 3. Ice skates rental fee paid to the school.
> 4. Rental fee paid to the school for calculators for mathematics classes.
> 5. Costs of home economics materials needed to meet minimum requirements.

ers in the elementary or secondary education of their dependents.[3] The deduction is available to all taxpayers regardless of whether their dependents attend public or non-public schools.[4]

Minnesota taxpayers Van Mueller and June Noyes brought suit in the United States District Court for the District of Minnesota against the Commissioner of the Department of Revenue for the State of Minnesota.[5] The taxpayers sought a declaratory judgment invalidating section 290.09(22) and an injunction against its enforcement, claiming it violated the first and fourteenth amendments to the United States Constitution.[6] The district court granted defendants' motion for summary judgment, holding that section 290.09(22) "is neutral on its face and in its application and does not have a primary effect of either advancing or inhibiting religion."[7]

On appeal, the United States Court of Appeals for the Eighth Circuit affirmed, holding that section 290.09(22) has the manifest purpose of enhancing the quality of education in Minnesota and does not have the primary effect of advancing or inhibiting religion.[8] The United States Supreme

---

6. Costs of special metal or wood needed to meet minimum requirements of shop classes.
7. Costs of supplies needed to meet minimum requirements of art classes.
8. Rental fees paid to the school for musical instruments.
9. Cost of pencils and special notebooks required for class.

514 F. Supp. at 1000. *See* MINN. STAT. § 290.09 (22) (1982).

3. 103 S. Ct. 3065 *See* MINN. STAT. § 290.09 (22) (1982).

4. 103 S. Ct. at 3068.

5. 514 F. Supp. at 999. Van D. Mueller and June Noyes, as individuals and taxpayers of the State of Minnesota, sued Clyde E. Allen, Commissioner of the Department of Revenue for the State of Minnesota. *Id.*

6. 514 F. Supp. at 999. *See also* 103 S. Ct. at 3065.

7. 514 F. Supp. at 1003. The district court upheld the statute based on the establishment clause analysis set forth in the three-pronged test of *Lemon v. Kurtzman*. *Id.* at 1001 (citing Lemon v. Kurtzman, 403 U.S. 602 (1971)). The court focused on the primary effect of the statute and concluded that the statute was not unconstitutional because it was facially neutral and because religious institutions benefited only incidentally and indirectly. *Id.* at 1002. The court found that the broad class of persons to whom the deduction was available and the long-standing acceptance of the analogous deduction for charitable contributions under both state and federal laws also supported its conclusion. *Id.* at 1002-03.

The court declined to discuss the secular purpose of the statute because the plaintiffs failed to actively challenge the statute on that prong of the test. *Id.* at 1001. However, the court did examine the question of excessive entanglement. *Id.* at 1003. On this issue, it found that the lack of any contact other than normal tax administration procedures and individual audits, failed to establish any likelihood of excessive entanglement. *Id.* For a discussion of the three-pronged test of *Lemon v. Kurtzman*, see notes 16-29 and accompanying text *infra*.

8. 676 F.2d at 1196. The Court of Appeals for the Eighth Circuit applied the three-pronged test of *Lemon v. Kurtzman* to affirm the decision of the district court. The court found that the statute satisfied the secular purpose requirement because its manifest purpose was to enhance the quality of education in both public and private schools. *Id.* at 1198.

The primary focus of the court, however, was on the question of the provision's primary effect. On this issue the court held that deductions for textbooks and transportation were clearly not violative of the establishment clause, since direct loans of

Court affirmed, *holding* that a state statute that permits all taxpayers a state tax deduction for tuition, textbook and transportation expenses does not violate the establishment clause of the first amendment. *Mueller v. Allen*, 103 S. Ct. 3062 (1983).

The establishment clause of the first amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion. . . ."[9] This clause has been held to apply to the states

---

textbooks and direct payments for transportation had been upheld in earlier Supreme Court cases. *Id.* at 1201 (citing Everson v. Board of Educ., 330 U.S. 1 (1947) (transportation subsidies); Board of Educ. v. Allen, 392 U.S. 236 (1968) (textbook loans)). In order to uphold the decision for other instructional materials, however, the court distinguished a series of cases invalidating loans of instructional materials to private schools. *Id.* at 1201-02 (citing Wolman v. Walter, 433 U.S. 229 (1977); Meek v. Pittinger, 421 U.S. 349 (1975); Public Funds for Pub. Schools v. Marburger, 358 F. Supp. 29 (D.N.J. 1973), *aff'd mem.*, 417 U.S. 961 (1974)). The court distinguished § 290.09 (22) from provisions for the loan of instructional materials to nonpublic schools on the ground that the benefit to sectarian institutions was only indirect, since the aid was in the form of a deduction to the parent of a dependent who attended a parochial school. *Id.* at 1202. The court also distinguished section 290.09 (22) on the ground that the deduction allowed by that section would not require any excessive entanglement, unlike the programs which involved direct loans to the sectarian schools. *Id.*

The court dealt with the more difficult aspect of the statute, the deduction for tuition, by emphasizing that the statute's benefits are neutrally available to all taxpayers regardless of the type of school their dependents attend. *Id.* at 1202-05. The court distinguished an earlier decision in which the Supreme Court had found unconstitutional a New York state tax deduction for tuition on the grounds that the tax deduction was really a *tax credit. Id.* at 1203 (citing Commission for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756 (1973)). The court also distinguished *Nyquist* on the grounds that the benefit there was limited to taxpayers with dependents in nonpublic schools, unlike the Minnesota deduction which was open to taxpayers with dependents in both public and nonpublic schools. *Id.* Thus, the court of appeals found that the primary effect of the tuition deduction was not the advancement of religion, and it upheld the statute. *Id.* at 1205-06.

9. U.S. CONST. amend. I. The establishment clause was enacted to prevent governmental persecution of heretics and to end the practice of raising taxes to support state-approved churches. *See* Everson v. Board of Educ., 330 U.S. 1, 9-11 (1947); C. ANTIEAU, A. DOWNEY & E. ROBERTS, FREEDOM FROM FEDERAL ESTABLISHMENT 204-07 (1964); R. MORGAN, THE SUPREME COURT AND RELIGION 1-24 (1972)).

Virginia played a crucial role in evolution of the notion of separation of church and state. L. PFEFFER, CHURCH, STATE AND FREEDOM 93 (1953). In 1785, Thomas Jefferson and James Madison led a fight against a tax levy for the support of the established church then under consideration in the Virginia legislature. *Id.* at 97-102. Madison's famous "Memorial and Remonstrance" was instrumental in the defeat of the Virginia tax levy. *Id. See also* Madison, *A Memorial and Remonstrance on the Religious Rights of Man* (1784), *reprinted in* J. BLAU, CORNERSTONES OF RELIGIOUS FREEDOM IN AMERICA 84 (1964). Shortly thereafter, the Virginia assembly adopted Jefferson's "Bill for Religious Liberty" which established the complete separation of church and state in Virginia. L. PFEFFER, *supra*, at 102. Thus, Madison and Jefferson are remembered as ardent advocates of the complete separation of church and state. *See id.* at 93-102. This was the view subsequently adopted by the Court in *Everson*. 330 U.S. at 8-16.

However, this "broad interpretation" of the historical background of the establishment clause has recently been criticized as "historically faulty if not virtually unfounded. . . ." R. CORD, SEPARATION OF CHURCH AND STATE: HISTORICAL FACT

through the due process clause of the fourteenth amendment.[10] The establishment clause was originally conceived as an attempt to build a "wall of separation between Church and State."[11] Although judicial interpretation of the scope of the establishment clause was slow to develop,[12] the numerous opinions of the United States Supreme Court have afforded "no 'bright line'

AND CURRENT FICTION 47 (1982). Professor Cord analyzes the lives and writings of Madison, Jefferson, and other founders to conclude that the traditional historical interpretation that has been adopted by the Court is far more separationist than Madison or Jefferson intended. *Id.* at 17-47. *See generally* Jefferson, *An Act for Establishing Religious Freedom* (1779), *reprinted in* J. BLAU, *supra*, at 77; Madison, *A Memorial and Remonstrance on the Religious Rights of Man* (1784), *reprinted in* J. Blau, *supra*, at 84.

10. Everson v. Board of Educ., 330 U.S. 1 (1947). Prior to the adoption of the fourteenth amendment, the first amendment's religion clauses did not provide a restriction on the states. *See* Permoli v. New Orleans, 44 U.S. (3 How.) 589 (1845). Once the fourteenth amendment was adopted, however, the Court held that the first amendment applied to the states. *See* Cantwell v. Connecticut, 310 U.S. 296 (1940). In *Cantwell*, the Court sustained a free exercise challenge to a state statute which prohibited the distribution of religious materials and solicitation of donations without a permit. *Id.* at 301-03. The court declared that the religion clauses apply to the states: "The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws." *Id.* at 303.

For a thorough evaluation of the incorporation of the rights in the Bill of Rights into the fourteenth amendment, see Cord, *Neo-Incorporation: The Burger Court and the Due Process Clause of the Fourteenth Amendment*, 44 FORDHAM L. REV. 215 (1975); Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949).

11. Everson v. Board of Educ., 330 U.S. 1, 16 (1947); Reynolds v. United States, 98 U.S. 145, 264 (1879). The Court has refused to interpret the establishment clause as an absolute bar to government aid to religion. *See, e.g.*, Board of Educ. v. Allen, 392 U.S. 236 (1968) (loans of textbooks to students in sectarian schools is permissible). *See also* McGowan v. Maryland, 366 U.S. 420 (1961) (Sunday closing laws do not violate establishment clause); Zorach v. Clauson, 343 U.S. 306 (1952) (noncoercive "released time" program for religious instruction off school grounds is permissible); Everson v. Board of Educ., 330 U.S. 1 (1947) (transportation of non-public school students to and from school does not violate establishment clause). *But see* School Dist. of Abington Township v. Schempp, 374 U.S. 203 (1963) (prayer in public school violates establishment clause). *See generally* Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part II. The Nonestablishment Principle*, 81 HARV. L. REV. 513 (1968); Kauper, *The Warren Court: Religious Liberty and Church-State Relations*, 67 MICH. L. REV. 269 (1968); Kurland, *The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court*, 24 VILL. L. REV. 3, 15-24 (1979).

12. Cases involving the religion clauses or separation between church and state were relatively rare prior to World War II. Between the time of the adoption of the first amendment in 1790 and 1945, the Court decided only three cases that dealt with the issue of the separation of church and state. F. SORAUF, THE WALL OF SEPARATION 18-19 (1976). First in 1899, the Court held that government payments to a religious hospital did not violate the first amendment. Bradfield v. Roberts, 175 U.S. 291 (1899). Then, in 1908, the Court upheld payments to a religious school on an Indian reservation. Quick Bear v. Leupp, 210 U.S. 50 (1908). Then, in 1930, the Court rejected a taking argument under the fourteenth amendment to uphold the state of Louisiana's purchase of secular textbooks for all schools, including religiously-affiliated schools. Cochran v. Louisiana Bd. of Educ., 281 U.S. 370 (1930). However,

[of] guidance" for determining the constitutionality of particular statutes.[13]

In its attempt to effectuate the metaphorical wall of separation, the Supreme Court has formulated a three-pronged test designed to assess the constitutionality of certain types[14] of legislation facing an establishment clause challenge.[15] This test, first fully articulated by the Court in *Lemon v.*

---

the Court's decisions in these cases were either narrowly or ambiguously framed. F. SORAUF, *supra*, at 10 n.6.

The modern era of constitutional decisions in the establishment clause arena began in 1947 when the court upheld reimbursements for the costs of bus transportation for parochial school students. *Id.* at 19 (citing Everson v. Board of Educ., 330 U.S. 1 (1947)). Since *Everson*, there has been a steady stream of cases in which the Court has attempted to define the limits of constitutionality under the establishment clause. *Id.* at 19-25.

13. Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 761 n.5 (1973). In *Lemon v. Kurtzman*, the Court noted that it "can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law." 403 U.S. 602, 612 (1971). The *Lemon* Court also noted that "[t]he line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship." *Id.* at 614.

There has been no dearth of scholarly comment on the lack of clear precedent in this area of constitutional law. After reviewing the decisions of the Supreme Court, one scholar has commented that analysis of the constitutionality of aid programs to nonpublic schools in future cases requires powers of prophesy more than skillful legal analysis. Giannella, Lemon *and* Tilton: *The Bitter and the Sweet of Church-State Entanglement*, 1971 SUP. CT. REV. 147, 191. Another scholar has simply chastized the Court for its failure to ground its decisions in these cases on some principled analysis of the religion clauses. Kurland, *supra* note 11, at 24-25. *See also* Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959) (calling for reasoning and principled analysis in Constitutional cases).

Much of the scholarly comment on the lack of cogency and rationality in establishment clause cases included suggested frameworks for analysis so that future cases *will* afford a "bright line." A former Dean of the Boston College Law School has suggested that the free exercise right of parents to choose religious schools for their children should be interpreted to include the right to be free from the dual burden of parochial school tuition and his share of the expense of maintaining the public school system. R. DRINAN, RELIGION, THE COURTS, AND PUBLIC POLICY 127-35 (1963). *See also* Pierce v. Society of Sisters, 268 U.S. 510 (1925) (recognizing rights of parents to choose religious education for their children). Other scholars have suggested that aid should be allowed up to the value of the secular educational services that nonpublic schools perform. Choper, *The Establishment Clause and Aid to Parochial Schools*, 56 CALIF. L. REV. 260 (1968). Viewing both religion clauses as embodying a unitary principle that religion may not be used as a basis for classification in either aid or regulation has also been suggested. *See* P. KURLAND, RELIGION AND THE LAW 15-18 (1962). One scholar has argued that public policy will require embracing all nonpublic schools to ensure that American school systems are diversified, responsive, and integrated. A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS 103-81 (1970). *See also* V. BLUM, FREEDOM IN EDUCATION (1965) (arguing that aid to parochial schools is desirable and constitutional).

14. Only legislation that affords "a uniform benefit to *all* religions" are subject to the three-pronged test. Larson v. Valente, 102 S. Ct. 1673, 1687 (1982) (footnote omitted). Legislation that discriminates *among* religions must be "justified by a compelling governmental interest, and . . . closely fitted to further that interest." *Id.* at 1685 (citing Widmar v. Vincent, 102 S. Ct. 269 (1981); Murdock v. Pennsylvania, 319 U.S. 105 (1943)).

15. Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971). There has been extensive

Kurtzman,[16] mandates that to pass constitutional muster a statute must have a secular legislative purpose, it must not have the primary effect of either advancing or inhibiting religion, and it must not foster excessive state entanglement with religion.[17]

---

commentary on the theories which underlie the Court's evaluation of establishment clause cases. For example, it has been argued that the Court's interpretation of the religion clauses of the first amendment reflects a theory of separationism which holds that "the state is and must be neutral in matters of religion." Hitchcock, *Church, State and Moral Values: The Limits of American Pluralism*, 44 LAW & CONTEMP. PROBS. 3, 14 (1981). The strict separationist argument that neutrality prohibits government aid to sectarian schools rests on the abstract principle that such aid is inherently bad and not on arguments that aid would have serious adverse effects on our society: "It would be difficult to show that concrete harm comes to the body politic as a result of such aid, or that such aid necessarily would deprive religious schools of their independence." *Id.* at 12. The Court has been reluctant to allow aid to nonpublic elementary and secondary schools even though the denial of aid could arguably conflict with free exercise rights by effectively preventing religious education. *Id.* This is uncharacteristic for a Court that has tended to hold that people without the financial means to exercise their rights have been denied their rights, as with the rights of indigent defendants to counsel. *Id.* Thus, the reluctance of the Court to allow aid to nonpublic schools reflects its commitment to a theory of strict separationism. *Id.* at 11-14.

16. 403 U.S. 602 (1971). In *Lemon*, the Supreme Court considered a Rhode Island statute which provided for state-funded salary supplements to nonpublic school teachers and a Pennsylvania statute which provided for direct reimbursement by the state for the costs of teachers' salaries, textbooks, and other instructional materials in nonpublic schools. *Id.* at 607-11. Both statutes provided that only expenses for teachers and materials used in purely secular courses could be reimbursed. *Id.* at 608, 610. The Court then formulated and applied a three-pronged test to determine whether the Rhode Island and Pennsylvania statutes violated the establishment clause. *Id.* at 612-13. For commentary on *Lemon*, see Ellington, *The Principle of Nondivisiveness and the Constitutionality of Aid to Parochial Schools*, 5 GA. L. REV. 429 (1971); Haskell, *Prospects for Public Aid to Parochial Schools*, 56 MINN. L. REV. 159 (1971); Kauper, *Public Aid for Parochial Schools and Church Colleges*: The Lemon, DiCenso *and* Tilton *Cases*, 13 ARIZ. L. REV. 567 (1971); Significant Developments, *Constitutionality of Tax Credits as a Means of Providing Financial Assistance to Parochial Schools*, 52 B.U.L. REV. 871 (1971); Note, *State Aid for Teachers' Salaries in Church-Related Elementary and Secondary Schools Held Unconstitutional*, 40 FORDHAM L. REV. 371 (1971); Comments, *Aid to Parochial Schools—Income Tax Credits*, 56 MINN. L. REV. 189 (1971); Note, *State Aid to Nonpublic Elementary and Secondary Schools Held Violative of Establishment Clause of First Amendment—Federal Statute Authorizing Construction Grants to Nonpublic Colleges and Universities Held Constitutional*, 17 VILL. L. REV. 574 (1972).

17. 403 U.S. at 612-13. The test articulated in *Lemon* derives from several earlier Supreme Court decisions on establishment clause issues. The secular purpose and primary effect inquiries were first developed in a case which held unconstitutional the practice of opening the school day with bible readings or prayer. *See* School Dist. of Abington Township v. Schempp, 374 U.S. 203, 222 (1963). This analysis was subsequently applied to uphold a program for textbook loans to children in nonpublic schools. *See* Board of Educ. v. Allen, 392 U.S. 236, 242-43 (1968). However, the *Lemon* Court gave only cursory consideration to these first two prongs since it held the statutes unconstitutional on other grounds. 403 U.S. at 613-14. The *Lemon* Court found that both statutes would require continuing state surveillance to ensure that the statutory restrictions and the first amendment were obeyed. *Id.* at 619-21. The Court then concluded that such "prophylactic contacts will involve excessive and enduring entanglement between state and church." *Id.* at 619.

The inquiry into the "excessive entanglement" between government and religion had been developed in an earlier case which upheld state tax exemptions for

The first prong of the *Lemon* test is an inquiry into the legislative purpose of the enactment in question.[18] In this analysis, it is required that the

religious institutions. *See* Walz v. Tax Comm'n, 397 U.S. 664, 674-75 (1970). Having combined the secular purpose and primary effect analyses of *Abington Township* and *Allen* with the excessive entanglement inquiry of *Walz*, the *Lemon* Court thus developed the three-pronged test for which it has become famous. *See Lemon*, 403 U.S. at 612-13; Giannella, *supra* note 11, at 147 (tracing the origins and evolution of the three-prong test and analyzing each prong as articulated by the *Lemon* Court).

Having articulated the test, the Court then distinguished two cases in which aid programs to nonpublic schools had been upheld on the ground that the aid in each of those cases only *indirectly* benefited the nonpublic schools. *Id.* at 621 (citing Board of Educ. v. Allen, 392 U.S. at 243-44 (textbook loans); Everson v. Board of Educ., 330 U.S. at 18 (transportation)). Thus, the *Lemon* Court emphasized the extent as well as the directness of state involvement in nonpublic schools in its analysis of the excessive entanglement issue.

The *Lemon* Court also noted that a broader base for its finding of excessive entanglement existed in the divisive political potential of the Rhode Island and Pennsylvania statutes:

> Partisans of parochial schools . . . will inevitably [lobby for increased state assistance] and promote political action to achieve their goals. Those who oppose state aid, whether for constitutional, religious, or fiscal reasons, will inevitably respond and employ all of the usual political campaign techniques to prevail. . . .
>
> Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect.

Id. at 622.

The *Lemon* Court concluded its analysis by distinguishing Walz v. Tax Comm'n, 397 U.S. 664 (1970). In that case, the Court had considered an argument that allowing a tax-exempt status for places of religious worship would set in motion a progression which would inevitably lead to the establishment of state religion. *Id.* at 707-08. The *Walz* Court rejected that argument on the grounds that a tax-exempt status had existed for religious institutions for more than 200 years without any noticeable progression towards state established religion. *Id.*

The *Lemon* Court then found that unlike the tax exempt status for places of worship, state aid to church-related schools did not have a long history of acceptance. 403 U.S. at 624-25. The *Lemon* Court then distinguished *Walz*, noting that the progression argument that state aid would set in motion a progression leading to an establishment of religion is much more persuasive in the case of newly-initiated programs of direct aid to nonpublic schools than it had been in the case of tax exemptions for religious institutions. *Id.*

18. *See, e.g., Lemon*, 403 U.S. at 613 (statutes evince an acceptable secular legislative purpose in that they "clearly state that they are intended to enhance the quality of secular education in all schools . . ."). For an example of a decision in which the Court held that a statute did not have a legitimate secular purpose, see Epperson v. Arkansas, 393 U.S. 97 (1968). In *Epperson*, a school teacher challenged an Arkansas anti-evolution statute which made it illegal to teach any theory that mankind descended from a lower order of animals. *Id.* at 98-100. The *Epperson* Court ruled that the Arkansas statute was an attempt to protect religions from views distasteful to them, and that such an attempt was beyond the purview of the state's legitimate interest. *Id.* at 107-09. The Court reasoned that

> there can be no doubt that Arkansas has sought to prevent its teachers from discussing the theory of evolution because it is contrary to the belief of some that the Book of Genesis must be the exclusive source of doctrine as to the

state legislature intended to effectuate some secular policy.[19] Since the Court has hesitated to impute unconstitutional intent to state legislatures when reviewing state statutes on non-first amendment grounds,[20] this prong has rarely formed the basis for invalidating a statute on establishment clause grounds.[21]

Under the primary effect inquiry of the *Lemon* test, a court seeks to de-

---

origin of man. . . . Arkansas law [cannot] be justified by considerations of state policy other than the religious views of some of its citizens.

Id. at 107. *See also* Stone v. Graham, 449 U.S. 39 (1980), *reh'g denied*, 449 U.S. 1104 (1981) (statute that the Ten Commandments be posted in public schools had no secular purpose).

19. *See Lemon*, 403 U.S. at 612-13. For a criticism of the Court's use of the secular purpose requirement, see Ely, *Legislative and Administrative Motivation In Constitutional Law*, 79 YALE L. J. 1205 (1970). In his extensive work on the Court's use of motive and purpose in constitutional law, Professor Ely examined what has now become the secular purpose requirement of the three-pronged *Lemon* test. *Id.* at 1313-27. He argues that the motivation analysis is overshadowed by the impact analysis of the effect test, and that the idea of governmental neutrality underlying the religion clauses should require that the Court disregard impact and rely solely on motivation. *Id.* at 1313-18. This analysis would require a finding of unconstitutionality only when the motive or purpose of the law was the advancement of religion. *Id.* He then notes that a proper motivation analysis would require the Court to examine evidence of unconstitutional motivation more closely than it has done in the past. *Id.* at 1322-24. Professor Ely then concluded with an argument that legislation with legitimately justifiable non-religious goals should not even require motivation analysis and should be upheld. *Id.* at 1324-27. In a more recent article, Professor Ely was criticized for disregarding the importance of the impact or the primary effect test. Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U. L. REV. 36, 162-66 (1977). Mr. Eisenberg notes that the Court has left no uncertainty as to whether a primary effect or impact analysis is required, and concludes that Professor Ely's concept of motivation analysis is unduly limited by his exemption of legislation with justifiable nonreligious goals. *Id.* at 164-68.

20. *See, e.g.*, Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333 (1977) (refusing to rule on the basis of legislative intent despite evidence of impermissible motives); Palmer v. Thompson, 403 U.S. 217 (1971) (refusing to find equal protection violation despite evidence of racially discriminatory motive); United States v. O'Brien, 391 U.S. 367 (1968) (refusing to treat act of Congress as content-based restriction on free speech even though evidence indicated intent to suppress one viewpoint). *But see* Gomillion v. Lightfoot, 364 U.S. 339 (1960) (holding unconstitutional legislation that was "solely concerned with segregating white and colored voters. . . .").

21. *See, e.g.*, Wolman v. Walter, 433 U.S. 229 (1977). In *Wolman*, the Court noted that the secular purpose inquiry usually presents no great obstacle to the challenged statute: "[W]e have no difficulty with the first prong of this three-part test. . . . As is usual in our cases, the analytical difficulty has to do with the effect and entanglement criteria." *Id.* at 236 (Blackmun, J., plurality opinion).

Similarly, in *Minnesota Civil Liberties Union v. Roemer*, the court states as follows:

> We could not discover any case involving state aid to parochial schools and/or their students in which the court found that the legislative motive for enacting the aid program was secular in nature. Courts regularly recognize that school aid statutes are prompted by a legislative concern that all schools in the state comply with minimum educational standards. This motive is presumptively valid.

Minnesota Civil Liberties Union v. Roemer, 452 F. Supp. 1316, 1318 n.1 (D.Minn. 1978).

termine if the primary effect of the statute would be either to advance or to inhibit religion.[22] Although the "inhibit" language in this aspect of the test has been criticized,[23] this prong generally requires that the challenged statute must not have the direct and immediate effect of advancing religion.[24]

22. *See, e.g.*, Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 773 (1973). The primary effect test after *Nyquist* is seen by commentators as requiring that any state aid must be substantively distinguishable from direct aid to sectarian schools and must provide "assurances of secular use." Sugarman, *Family Choice: The Next Step in the Quest for Equal Educational Opportunity*, 38 LAW & CONTEMP. PROBS. 513, 524 (1974). The requirement that the aid must be distinguishable from direct aid will apparently not be satisfied unless the actual class of beneficiaries is larger than the class of religious school users. *Id.* at 526. The fact that the eligible class is not limited to users of religious schools is not enough. *Id.* Under the assurance of secular use requirement, the aid must be "inherently secular," as bus rides or secular textbooks and the aid must neutrally be available to all students, both public and nonpublic school users. *Id.* at 525. Under the strict secular use requirement, aid which is limited to the value of secular services performed by a religious school will not pass muster. *Id.* However, all of the requirements of the effect test are seen as including some flexibility according to the nature and specificity of the particular program and according to the identity of the beneficiaries. *Id.* at 527.

23. The requirement that government aid must not "inhibit" religion as an aspect of the primary effect test under the establishment clause has come under severe criticism for expanding the establishment clause to the point where it "threatens to swallow the free exercise clause." Laycock, *Towards A General Theory of the Religion Clauses: The case of Church Labor Relations and the Right to Church Autonomy*, 81 COLUM. L. REV. 1373, 1380-88 (1981). For example, it has sometimes been read by lower courts to require establishment clause analysis for any program that in any way inhibits religion. *See, e.g.*, Chess v. Widmar, 635 F.2d 1310, 1317 (8th Cir. 1980), *aff'd sub. nom.* Widmar v. Vincent, 454 U.S. 263 (1981). One Supreme Court Justice has also read the non-inhibiting requirement to raise an establishment clause question. McDaniel v. Paty, 435 U.S. 618, 636-42 (1977) (Brennan, J., concurring).

It has been asserted that the "inhibits" language was the result of an inaccurate paraphrase of Thomas Jefferson, and that the misquotation has been perpetuated by repetition in the case law. Laycock, *supra*, at 1380-81. As currently used, the "inhibits" language is at odds with the origins and purpose of the establishment clause because it was intended to refer to inhibiting a religion by favoring another religion over it, or to inhibiting religion by making government support contingent on something that would limit religious autonomy. *Id.* at 1381-83. Other cases where governmental action inhibits religion could more appropriately be dealt with under free exercise guarantees, and unless the "inhibits" language of the primary effect test is so limited, it threatens to "swallow the free exercise clause." *Id.* at 1380, 1384-88.

24. Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 783 n.39 (1973). The Court in *Nyquist* noted that the primary effect analysis would not be satisfied by a finding that the legislation promoted some acceptable secular objectives. *Id.* "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." *Id.*

In a companion case to *Lemon*, the Court reflected a similar reasoning in its primary effect analysis. *See* Tilton v. Richardson, 403 U.S. 672 (1971). In *Tilton*, federal taxpayers brought an establishment clause challenge to a federally funded program which provided construction grants for buildings and facilities at church-related colleges and universities. *Id.* at 674-75. The program also provided that the constructed buildings or facilities could only be used for secular purposes during the first 20 years of their existence. *Id.* The *Tilton* Court invalidated the aid program because it presumably would have permitted the use of the buildings for religious

However, the proposition that the Establishment Clause prohibits any program which in some manner aids an institution with a religious affiliation has consistently been rejected.[25] State statutes which only remotely and incidentally benefit religious institutions have been upheld.[26]

The third part of the *Lemon* test examines the entanglement of church and state that may result from the application of the statute.[27] The "administrative entanglement" aspect of the test focuses on whether the state aid program in question will require "comprehensive, discriminating, and continuing surveillance."[28] The "political entanglement" aspect then inquires

---

purposes after the 20-year period had lapsed, and thus the program would *in part* have the effect of advancing religion. *Id.* at 682-83 (emphasis added).

25. Hunt v. McNair, 413 U.S. 734 (1973) (citing Tilton v. Richardson, 403 U.S. 672 (1971); Walz v. Tax Comm'n, 397 U.S. 664 (1970); Bradfield v. Roberts, 175 U.S. 291 (1899)).

26. Walz v. Tax Comm'n, 397 U.S. 664, 676 (1970). In *Walz* a New York taxpayer challenged state laws which provided tax exemptions for religious organizations. *Id.* at 666. In its analysis, the *Walz* Court noted that "[t]he exemption creates only a minimal and remote involvement between church and state. . . ." *Id.* at 676. The Court likened the benefit received by the religious institutions to such incidental benefits as police and fire protection which were accorded to everyone in the state. *Id.* Thus the Court upheld the exemption since it provided for less administrative entanglement between government and religion than direct taxation would have produced. *Id.* Similarly, in a case upholding publicly funded busing for parochial school children, the Court was careful to note that the establishment clause should not be construed to prohibit the states from extending general state law benefits to all citizens. *See* Everson v. Board of Educ., 330 U.S. 1, 16 (1947).

27. *See Lemon*, 403 U.S. at 615. Although there had been hints at a possible application of an entanglement inquiry in earlier opinions, this prong of the *Lemon* test was first implemented in a case where real estate tax exemptions for religious properties were challenged on establishment clause grounds. *See* Walz v. Tax Comm'n, 397 U.S. 664 (1970). For a discussion of *Walz*, see notes 56-58 and accompanying text *infra*. While the entanglement inquiry in *Walz* could have been seen as a slight modification of the primary effect inquiry, the Court's decision in *Lemon* made clear its independent status. *See* Ripple, *The Entanglement Test of the Religion Clauses—A Ten Year Assessment*, 27 U.C.L.A. L. REV. 1195 (1980).

28. *Lemon*, 403 U.S. at 619. The entanglement prong of the *Lemon* test is sometimes viewed as a concept employed by the Court "to accomplish two distinct, although analytically related, objectives." Ripple, *supra* note 27, at 1195. The first objective is to prevent "administrative entanglement" by seeking "to identify those legal and administrative relationships between civil and religious authorities which are likely to cause religiously-based discord or lead to an unacceptable degree of governmental support for religion." *Id.* For a discussion of the second objective, the "political entanglement" inquiry, see note 29 and accompanying text *infra*.

In *Lemon*, the Court characterized this administrative entanglement part of the test as an examination of "the character and purposes 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." *Id.* at 615. This standard was later applied in a lower court case involving a New Jersey statute which provided aid for textbooks, supplies, and instructional materials. *See* Public Funds for Pub. Schools v. Marburger, 358 F. Supp. 29, 31 (D.N.J. 1973), *aff'd mem.*, 417 U.S. 961 (1974). In order to assure that the state aid would not be diverted to religious uses, the statute also included a limitation that the material could only be used for purely nonideological, secular purposes. *Id.* at 36. However, the *Marburger* court found that in order to effectuate the limitation required by the statute, state supervision and

into the possibility that the statute may encourage political divisiveness through encouraging political debate and division along religious lines.[29]

---

negotiation with church authorities would be necessary. *Id.* The court thus held that such supervision or negotiations would be in direct contravention of the tri-partite administrative entanglement test enumerated in *Lemon*. *Id.* (citing *Lemon*, 403 U.S. at 620).

Although this three-tiered entanglement test has generally remained in the form originally articulated by the *Lemon* Court, it has sometimes been criticized for its subjectivity. *See* Ripple, *supra* note 27, at 1216. One problem is that in applying the three-tiered entanglement test, courts are required to go further than analyzing the simple facts of a given case. *Id.* They must evaluate subtle inferences from " 'constitutional facts' outside the record" in order to determine the " 'character and purpose of the institutions' and 'the resulting relationship between the government and the religious authority.' " *Id.* at 1216-17. The Court has also limited the usefulness of the entanglement test by tending to rely on the sort of standard profile of nonpublic schools that was developed in early cases rather than exploring the facts of the particular religious institution at issue. *Id.* at 1221-24. *See, e.g.*, Meek v. Pittinger, 421 U.S. 349, 369-70 (1975) (quoting *Lemon*, 403 U.S. at 618-19). The Court has further detracted from this prong of the *Lemon* test by ignoring it in analyzing several establishment clause cases. *See, e.g.*, Wolman v. Walter, 433 U.S. 229 (1977); Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756 (1973). *See also* Serritella, *Tangling with Entanglement: Toward a Constitutional Evaluation of Church-State Contacts*, 44 LAW & CONTEMP. PROBS. 143, 153 (1981).

Since governmental contacts that affect only nonreligious activities should not be a concern, it has been suggested that the test could be made more useful and effective by requiring a preliminary inquiry into whether the possibly entangling contacts affect religious or nonreligious activities. Serritella, *supra*, at 155-57. It has also been suggested that the frequency and the effects of government contacts should be considered together, so that there would only be a finding of entanglement where securing contacts caused the religious institution to alter its activity. *Id.* at 157-58. For further criticism and suggestions regarding the entanglement test, see Gaffney, *Political Divisiveness Along Religious Lines: The Entanglement of the Court in Sloppy History and Bad Public Policy*, 24 ST. LOUIS U.L.J. 205 (1980); Giannella, *supra* note 13, at 148, 170-76; Kurland, *supra* note 11, at 19-20; Laycock, *supra*, note 23, at 1384; Warner, *NLRB Jurisdiction Over Parochial Schools*: Catholic Bishop of Chicago v. NLRB, 73 NW. U.L. REV. 463, 471 (1978). *But see* Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 809-10 (1982) (defending the Court's multifaceted and sometimes inconsistent decisions).

29. *See Lemon*, 403 U.S. at 622. This "political entanglement" aspect of the test is sometimes seen as an attempt by the Court "to isolate those broader religious-civil relationships which might well lead to religiously-based political divisiveness in our society." Ripple, *supra* note 27, at 1195. Its origins are contained in a concurrence by Justice Harlan in an earlier establishment clause decision. *See* Walz v. Tax Comm'n, 397 U.S. 664, 695 (1970) (Harlan, J., concurring). *See also* Gaffney, *supra* note 28, at 210-12. In that concurrence Justice Harlan noted that "history cautions that political fragmentation on sectarian lines must be guarded against." *Walz*, 397 U.S. at 695 (Harlan, J., concurring). However, neither Chief Justice Burger nor Justice Harlan, nor Professor Freund cite any primary sources which support the asserted historical basis for the divisiveness test. Gaffney, *supra* note 28, at 212-15. Neither the annals of the first Congress, nor the debates at the state ratifying conventions, nor the writings of Jefferson or Madison, indicate that political division along religious lines was perceived as a threat. *Id.* at 215-24. *But see* Hitchcock, *The Supreme Court and Religion: Historical Overview and Future Prognosis*, 24 ST. LOUIS U.L.J. 183, 199-200 (1980) (noting that Jefferson viewed "all religious dogmas as positively harmful"). The value of the political divisiveness analysis has also been questioned because of its record of "incoherent and inconsistent use and nonuse." *Id.* at 230. However, the

In its application of the *Lemon* guidelines to determine the constitutionality of state aid to nonpublic schools,[30] the Court has emphasized several factors. One factor is the extent to which the aid program directly benefits nonpublic schools.[31] A second factor considered by the Court is the neutral availability of the aid to students attending both public and nonpublic schools.[32]

---

more persuasive criticism of the divisiveness test is that it lacks sound underlying policy. *See* R. CORD, *supra* note 9, at 235-39; Gaffney, *supra* note 28, at 232-34. "The discouragement of political controversy among divided religious groups implicit in the political divisiveness test is . . . not sound as a matter of political theory, for it misconstrues the purpose of the first amendment as a mandate for consensus politics." Gaffney, *supra* note 28, at 233. For these reasons it has been suggested that the divisiveness test should be abandoned so that religion-centered debates can again be seen as "[t]hat kind of public policy decisionmaking [that] is the very essence of democratic government itself." R. CORD, *supra* note 9, at 239. *See* Gaffney, *supra* note 28, at 236; Hitchcock, *supra*, at 203.

When the *Lemon* Court first introduced the inquiry into divisive political potential, it did so in the context of the Pennsylvania and Rhode Island statutes under consideration in *Lemon*, referring to divisive political potential as an alternative basis for finding entanglement. 403 U.S. at 622. The Court's inquiry into the potential of a statute to be politically divisive contemplated debate over the propriety of state aid to sectarian schools in political forums. *Id.* Although the statutes involved relatively moderate initial funding, they would both require continuing annual appropriations and the possibility of increased demands for funds as costs and populations increased. *Id.* at 623. The Court reasoned that because of the continuing need for funding decisions and the political nature of the funding process, such programs would inevitably lead to political division along religious lines. *Id.* The Court concluded that such "political division along religious lines was one of the principal evils against which the First Amendment was intended to protect." *Id.* at 622.

30. *See* Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 773 n.31 (1973). In its discussion of the three-pronged test, the Court in *Nyquist* noted that the test should not be treated as a precise constitutional caliper. "Rather these tests or criteria should be 'viewed as guidelines' within which to consider the 'cumulative criteria developed over many years and applying to a wide range of governmental action challenged as violative of the Establishment Clause.' " *Id.* at 773 n.31 (quoting Tilton v. Richardson, 403 U.S. 672, 667-68 (1971)).

31. *See, e.g.*, Committee for Pub. Educ. and Religious Liberty v. Regan, 444 U.S. 646 (1980) ("Establishment Clause problems would be posed under the Court's cases [if] it might be concluded that the state was directly aiding religious education"); Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 780 (1973) ("there [is] no question that these grants could not, consistently with the Establishment Clause be given directly to sectarian schools. . . ."); *Lemon*, 403 U.S. at 621 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 675 (1970) ("Obviously a direct money subsidy would be a relationship pregnant with involvement")).

32. For a discussion of this factor, see notes 53-74 and accompanying text *infra*. While the Court may have emphasized such factors as the directness and neutral availability of benefits in evaluating aid programs for nonpublic schools, commentators have suggested that such other factors as "the religion of federal judges [are] a better predictor of their rulings than any other factor. . . ." Hitchcock, *supra* note 29, at 194 (citing F. SORAUF, *supra* note 12, at 203-04). Professor Sorauf indicates "Jewish judges vote heavily separationist, Catholics vote heavily accommodationist, and Protestant divide." F. SORAUF, *supra* note 12, at 220. Some evidence of bias can be seen in opinions of the Supreme Court Justices themselves. Hitchcock, *supra*, at 193-201. One opinion by Justice Douglas that has aroused commentary seems to indicate a conviction that Catholic parochial schools are a threat to free-thinking

In its evaluation of the directness factor, the Court has noted that even though the indirectness of the aid is an important consideration, it is not in and of itself determinative of whether the aid program is constitutional.[33] In *Committee for Public Education and Religious Liberty v. Nyquist*,[34] the Court invali-

"Americanism": " 'The whole education of the child [in a Catholic School] is filled with propaganda . . . . Their purpose is not to teach Scripture truths and Americanism, but to make loyal Roman Catholics. The children are regimented, and are told what to wear, what to do, and what to think.' " *Lemon*, 403 U.S. at 635 n.20 (Douglas, J., concurring) (quoting L. BOETTNER, ROMAN CATHOLICISM 360 (1962)); Hitchcock, *supra* note 29, at 195. *Cf.* Laycock, *Civil Rights and Civil Liberties*, 54 CHI.-KENT L. REV. 390, 418-21 (1977) (severely criticizing the use and re-use of Boettner's "elaborate hate tract"). That Justice Black's anti-Catholic sentiments may have been a factor in his opinions has also been noted. *See* Hitchcock, *supra* note 15, at 8-9.

33. Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 781 (1973). It should be noted that the direct-indirect distinction has varied in importance in different cases. In *Nyquist*, the Court held that the aid program in that case was not sufficiently indirect to preclude the need for particularized guarantees of secular use. *Id.* at 781-83. However, in a later case the Court held that aid given directly to the nonpublic schools could be upheld because there were effective means to insure that the aid would cover only secular educational functions. Committee for Pub. Educ. and Religious Liberty v. Regan, 444 U.S. 646 (1980).

In *Regan*, a state program provided for direct reimbursements to nonpublic schools for the administration of state-prepared tests by nonpublic school teachers at the nonpublic schools. *Id.* at 654-56. The Court held that the state law provided ample safeguards against use for sectarian purposes, but noted that "under the relevant cases the outcome would likely be different were there no effective means for insuring that the cash reimbursements would cover only secular services." *Id.* at 659 (citing Committee for Pub. Educ. and Religious Liberty v. Nyquist, 413 U.S. 756, 774 (1973); *Lemon*, 403 U.S. at 619-22) (other citations omitted). For a discussion of *Regan*, see Note, *New York Statutory Scheme Directly Reimbursing Nonpublic School Personnel For Costs Incurred from Complying with State Requirements Not Violative of Establishment Clause*, 11 SETON HALL L. REV. 72 (1980).

34. 413 U.S. 756 (1973). When the *Nyquist* opinion was issued, it was seen as an important realignment of the separationists on the Court. *See* Morgan, *The Establishment Clause and Sectarian Schools*, 1973 SUP. CT. REV. 57. Although the opinion by Chief Justice Burger in *Lemon* was essentially separationist, under the standards set out there the possibility existed that an indirect aid program could be fashioned which would pass the entanglement test. *Id.* at 68-70. However, Chief Justice Burger never got the chance to complete the doctrine he initiated in *Lemon*. *Id.* at 75-77, 77 n.84. When his accommodationist sentiments surfaced in *Nyquist*, the separationist Justices who had backed him in *Lemon* apparently abandoned him. *Id.* at 77. Justice Powell, writing for the majority in *Nyquist*, rejected the accommodationist arguments for indirect aid. *Id.* at 78-79. By noting that indirectness was only one factor among many to be considered, he left the notion that the direct-indirect distinction could be controlling with the dissenters, and handed the accommodationists a major defeat. *Id.* at 75-81.

As well as an important realignment of the Court, *Nyquist* was also seen as "a far more effective trigger for political division along religious lines than any other single case in the aid to religious schools sequence." P. WEBER & D. GILBERT, PRIVATE CHURCHES AND PUBLIC MONEY 47 (1981). Catholics viewed the decision as anti-Catholic, and they were encouraged to greater political activism. *Id.* at 70 n.51. "In the meantime the Committee for Public Education and Religious Liberty, a collection of some 27 separationist and secularist groups, encouraged by its victory in New York, was reorganized on a national level to pursue its separationist interest more effectively." *Id.* The end-result of *Nyquist* was that the political and religious groups

dated a New York program involving tuition grants and reimbursements to parents of children in nonpublic schools.[35] The Court noted that one factor to be considered was that New York made the grants and reimbursements to parents rather than making them directly to the nonpublic schools.[36] However, the *Nyquist* Court ruled that this factor alone was insufficient to warrant a holding that the aid had the primary effect of furthering a secular end.[37]

In *Sloan v. Lemon*,[38] the Court invalidated a similar statute which provided tuition reimbursements to parents of children in nonpublic schools.[39] The *Sloan* Court found that the effect of the statute was to confer an eco-

---

there involved learned that "political militancy is effective in religion clause litigation." *Id.* (citing F. SORAUF, *supra* note 12).

35. 413 U.S. at 780. The statute under consideration in *Nyquist* provided for three distinct aid programs. *Id.* at 761-62. The first program allowed grants to nonpublic schools to cover repair and maintenance expenses of up to 50% of the comparable expenses in public schools. *Id.* at 762-63. The covered expenses included costs for heat, light, sanitary facilities, janitorial services, and other necessary repair and upkeep of buildings, grounds, and facilities. *Id.* at 763. The second program was a "tuition grant program" which provided a $50 to $100 grant per child for parents with annual taxable income of less than $5,000. *Id.* at 764. The third program was a "tax benefit program" that provided a fixed-amount deduction for parents who did not qualify for the tuition-grant program. *Id.* at 765-67.

36. *Id.* at 781. The Court noted that "[t]he controlling question here . . . is whether the fact that the grants are delivered to parents rather than schools is of such significance as to compel a contrary result [from cases involving direct aid to nonpublic schools]." *Id.* For commentary on the decision in *Nyquist*, see Piekarski, *Nyquist and Public Aid to Private Education*, 58 MARQ. L. REV. 247 (1975); Note, *Grants to Low-Income Area Parochial Schools for Certain Maintenance Costs and to Low-Income Parochial School Parents as Partial Reimbursement for Tuition Expenditures Violate Establishment Clause, but Tax Credits for Tuition Payments to Such Schools are Constitutionally Permissible*, 86 HARV. L. REV. 1081 (1973); Note, *Public Aid to Parochial Schools Held Unconstitutional*, 58 MINN. L. REV. 657 (1974).

37. 413 U.S. at 781-83. The *Nyquist* Court invalidated the three aid programs at issue on the ground that each had the primary effect of advancing religion. *Id.* at 779-94. In its analysis, the Court distinguished two prior cases in which indirect aid to nonpublic schools had been permitted by the Court. *Id.* at 781-82 (citing Board of Educ. v. Allen, 392 U.S. 236, 244-45 (1968); Everson v. Board of Educ., 330 U.S. 1, 17-18 (1947)). The aid programs in *Nyquist* did not fall within the scope of those cases in which indirect aid to nonpublic schools had been upheld, because the benefits at issue in *Nyquist* were not " 'so separate and so indisputably marked off from the religious function . . . ' that they [could] fairly be viewed as reflections of a neutral posture toward religious institutions." *Id.* at 782 (quoting Everson v. Board of Educ., 330 U.S. 1, 18 (1947)).

The Court also found that aid programs which were not so indirect as to fit within the scope of *Everson* and *Allen* would have to otherwise ensure that they provided benefits only to the separable secular educational functions of nonpublic schools. *Id.* at 782-83. Since the programs at issue provided no such assurances, the Court invalidated them. *Id.* For a discussion of *Everson* and *Allen*, see notes 59-62 and accompanying text *infra*.

38. 413 U.S. 825 (1973).

39. *Id.* at 828. The aid program in *Sloan* provided for reimbursements to parents who paid tuition for their children to attend nonpublic schools. *Id.* Qualifying parents would receive a specified amount for each dependent unless that amount exceeded actual tuition expenses. *Id.*

nomic benefit that was not so indirect and insubstantial as to preclude violation of the establishment clause.[40]

The Court also considered the effect of indirect aid to nonpublic schools in *Meek v. Pittinger*.[41] In *Meek*, the Court upheld the loan of textbooks to students in nonpublic schools in Pennsylvania,[42] but invalidated the loan of instructional material and equipment made directly to the nonpublic schools.[43] The Court based its decision to invalidate a portion of the Pennsylvania statute in part on a statistical analysis that was used to identify the recipients of the aid.[44] From this statistical analysis, the Court concluded that the primary beneficiaries of the material and equipment programs were "nonpublic schools with a predominant sectarian character."[45]

---

40. *Id.* at 832-33. As in *Nyquist*, the Court in *Sloan* found that the aid programs at issue were not so indirect as to obviate the need for further assurances that the aid would benefit only the secular functions of the nonpublic schools. *Id.* Thus, the Court held that the program violated the Establishment Clause. *Id.* For a discussion of the holding of *Nyquist*, see note 37 *supra*.

For commentary on *Sloan*, see Kauper, *The Supreme Court and the Establishment Clause: Back to* Everson?, 25 CASE W. RES. L. REV. 107 (1974); Robison, *Little Room Left to Maneuver*, 3 J. L. & EDUC. 123 (1974); Note, *Establishment Clause Analysis of Legislative and Administrative Aid to Religion*, 74 COLUM. L. REV. 1175 (1974); Note, *Pennsylvania Statute Providing for Reimbursement of Parents for Tuition Expenses at Nonpublic Schools Violates First Amendment Establishment Clause by Having Primary Effect of Advancing Religion*, 79 DICK. L. REV. 153 (1974).

41. 421 U.S. 349 (1975). The statute in *Meek* authorized the loans of qualifying textbooks without charge to students in nonpublic schools. *Id.* at 353. Qualifying textbooks included only those that were acceptable for use in the public schools. *Id.* at 354.

The statute also authorized the loans of instructional materials and equipment directly to the nonpublic schools. *Id.* Instructional materials included maps, charts, photographs, films, and similar material. *Id.* at 354-55. Instructional equipment included projection, recording, and laboratory equipment. *Id.* at 355.

42. *Id.* at 362 (Stewart, J., plurality opinion). In an opinion by Justice Stewart, in which Justices Blackmun and Powell joined, the plurality upheld the textbook loan provisions as identical in every material respect to the textbook loans upheld in an earlier case. *Id.* (citing Board of Educ. v. Allen, 392 U.S. 236 (1968)). Justice Rehnquist, with whom Justice White joined, likewise agreed that the textbook loan provisions of the statute in *Meek* were constitutionally indistinguishable from those upheld in *Allen*. 421 U.S. at 388 (Rehnquist, J., concurring in part and dissenting in part). For a discussion of *Allen*, see note 62 and accompanying text *infra*.

43. 421 U.S. at 363. The *Meek* Court concluded that "the direct loan of instructional material and equipment has the unconstitutional primary effect of advancing religion because of the predominantly religious character of the schools benefiting from the Act." *Id.* (footnote omitted).

44. *Id.* at 364. The Court in *Meek* noted that more than 75% of the nonpublic schools eligible for aid were church-related or religiously affiliated and concluded that the primary beneficiaries of the aid were sectarian institutions. *Id.*

Similarly, in *Lemon* the Court found that 96% of the students in nonpublic schools attended church related schools. 403 U.S. at 610. In *Sloan*, the Court also found that more than 90% of the children in nonpublic schools attended sectarian institutions. 413 U.S. at 830. Likewise, in *Nyquist*, the Court found that 85% of the nonpublic schools eligible for aid were church affiliated. 413 U.S. at 768.

45. 421 U.S. at 364 (footnote omitted). The decision in *Meek* was heralded as the end of any possibility that the states would be able to develop aid programs for

In light of the Court's decision in *Meek*, Ohio revised its school aid program in an attempt to conform to that decision.[46] That state's aid statute was similar to the statute considered in *Meek*, except that the amended sections provided for loans of instructional material and equipment to the parents of nonpublic school students rather than directly to the nonpublic schools themselves.[47] However, in *Wolman v. Walter*,[48] the Court again invalidated the loans of instructional material and equipment,[49] holding that the

nonpublic elementary and secondary schools. Nowak, *The Supreme Court, The Religion Clauses and the Nationalization of Education*, 70 NW. U.L. REV. 883 (1976). While the majority in *Meek* invalidated loans of instructional materials and equipment on the "aid-to-the-enterprise theory," it upheld textbook loan programs because they had been authorized by *Allen*, even though textbook loans are also a form of aid to the enterprise. *Id.* at 890-91. This patent inconsistency was viewed as a signal of the end of the use of precise tests by the Court in the evaluation of aid to nonpublic schools. *Id.* at 891-92. The last vestige of hope for the accommodationists seemed to be that a system of educational vouchers for low-moderate income families might still pass constitutional muster. *See id.* at 900-09. However, as long as the Court adhered to the aid-to-the-enterprise theory, the possibility that vouchers would be upheld depended, at least in part, on the directness factor as articulated in *Nyquist*. *See id.* at 903. As long as the Court meant to prohibit only aid that was indirect in form but direct in effect, and not genuinely indirect aid such as vouchers, the possibility that vouchers could be upheld still existed. *Id.*; Comment, *Educational Vouchers: Addressing the Establishment Clause Issue*, 11 PAC. L. J. 1061, 1074 (1980); Note, *Voucher Systems After* Nyquist *and* Sloan: *Can A Constitutional System be Devised?*, 72 MICH. L. REV. 893, 908-09 (1974).

For further commentary on *Meek*, see Kirby, Everson *to* Meek *and* Roemer: *From Separation to Detente in Church-State Relations*, 55 N.C.L. REV. 563 (1977); Skelly, Meek v. Pittinger: *Will it Precipitate a Solution?*, 20 CATH. LAW. 335 (1974); Underwood, *Permissible Entanglement Under the Establishment Clause*, 25 EMORY L.J. 17 (1976); Note, *Drawing the Line on Aid to Religious Schools*, 54 N.C.L. REV. 216 (1976).

46. *See* Wolman v. Walter, 433 U.S. 229, 233 (1977). At the time the Court invalidated the Pennsylvania statute in *Meek*, an appeal was also pending from a judgment upholding a similar Ohio statute. *Id.* at 233 n.1. On the basis of *Meek*, the Court vacated the judgment and remanded the case to the district court for further consideration in light of *Meek*. *Id.* By the time a final order was issued from the district court, however, the Ohio statute had been repealed and replaced by another statute. *Id.* The plaintiffs in the original action then shifted their challenge to the successor statute. *Id.* That challenge to the successor statute resulted in *Wolman v. Walter*. *Id.* For a discussion of the Pennsylvania school aid statute at issue in *Meek*, see note 41 *supra*.

47. Wolman v. Walter, 433 U.S. 229, 250 (1977). The statute in *Meek* provided loans directly to the nonpublic school. 421 U.S. 349, 354.

For commentary on *Wolman*, see Buchanan, *Governmental Aid to Sectarian Schools: A Study in Corrosive Precedents*, 15 HOUS. L. REV. 783 (1978); Young, *Constitutional Validity of State Aid to Pupils in Church-Related Schools—Internal Tension Between the Establishment and Free Exercise Clauses*, 38 OHIO ST. L.J. 783 (1977); Comment, Wolman v. Walter *and the Continuing Debate over Aid to Parochial Schools*, 63 IOWA L. REV. 543 (1977); Comment, *State Aid to Nonpublic Schools*, 25 N.Y.L. SCH. L. REV. 545 (1978); Note, Wolman v. Walter: *State Aid to Parochial Schools—Is the Wall Between Church and State Crumbling?*, 13 NEW ENG. L. REV. 545 (1978); Note, Wolman v. Walter: *Aid to Elementary and Secondary Schools and the Establishment Clause*, 5 OHIO N.U.L. REV. 543 (1978).

48. 433 U.S. 229 (1977).

49. *Id.* at 248-51. The statute at issue in *Wolman* provided for the loans of textbooks and textbook substitutes to students in nonpublic schools. *Id.* at 233. The

statutory amendments were insufficient to ensure that the aid would benefit only the secular educational functions of the nonpublic schools.[50] While the Court did not entirely disparage the indirectness of the aid, it did conclude that a formal change in technical bailee did not preclude a violation of the establishment clause.[51] Even so, one member of the Court expressed his dissatisfaction with distinctions based on the direct or indirect nature of the aid, advocating abandonment of the *Lemon* three-part test.[52]

The Supreme Court has also emphasized another factor in its application of the *Lemon* test to certain establishment clause cases: the neutral availability of the benefits of the aid program in question.[53] For example, in

---

Court found this program strikingly similar to the textbook loan programs involved in *Board of Education v. Allen* and *Meek v. Pittinger*. *Id*. at 237-38 (Blackmun, J., plurality opinion).

The statute in *Wolman* also provided for the loans of instructional material and equipment to students or parents of students attending nonpublic schools. Instructional material and equipment included projectors, tape recorders, maps, globes, etc. *Id*. at 248-49. All instructional material and equipment was required to be "incapable of diversion to religious use." *Id*. at 248-49.

For a discussion of the textbook-loan programs at issue in *Meek* and *Board of Education v. Allen*, see note 41 *supra* and note 62 *infra*.

50. 433 U.S. at 250-51. The *Wolman* Court reasoned that the loans of instructional material and equipment constituted "substantial aid to the educational function" of the nonpublic schools. *Id*. at 250 (citing *Meek v. Pittinger*, 421 U.S. at 366). Since the educational function and the religious function of the nonpublic schools were inextricably intertwined, the program necessarily resulted in aid to the sectarian school as a whole. *Id*. "Thus, even though the loan ostensibly was limited to neutral and secular instructional material and equipment, it inescapably had the primary effect of providing a direct and substantial advancement of the sectarian enterprise." *Id*. at 250.

51. *Id*. at 250. The *Wolman* Court rejected the argument that the loans should be upheld because they were only indirect aid to the nonpublic schools. *Id*. The Court found that the fact the loans were made to parents rather than to the nonpublic schools amounted to little more than a technical change in the legal bailee. *Id*. The Court then noted that "it would exalt form over substance if this distinction were found to justify a result different from that in *Meek*." *Id*. For a discussion of *Meek*, see notes 41-45 and accompanying text *supra*.

52. 433 U.S. at 265 (Stevens, J., concurring in part and dissenting in part). Justice Stevens noted that the distinctions which have evolved in establishment clause cases have left the Court with "corrosive precedents" that encourage the states "to search for new ways to achieve forbidden ends." *Id*. at 266. He found that because the cases have left no firm principles, the " 'high and impregnable' wall between church and state, has been reduced to a 'blurred, indistinct, and variable barrier.' " *Id*. (quoting *id*. at 233 (Blackmun, J., plurality opinion); *Lemon*, 403 U.S. at 614 (footnote omitted)).

The confusing state of precedent in this area was also recognized by the District Court for the District of Minnesota when it stated that "[t]here appears to be no discernible consistency in the decisions of the Court in Establishment Clause challenges to state school aid statutes." Minnesota Civil Liberties Union v. Roemer, 452 F. Supp. 1316, 1320 (D. Minn. 1978) (footnote omitted). In support of that proposition, the court noted that while the state could provide textbooks, it could not provide the maps which would supplement the information found in the textbooks. *Id*. at 1320 n.4. (citations omitted). For a discussion of *Roemer*, see notes 67-74 and accompanying text *infra*.

53. It has long been recognized that the establishment clause only "requires the

Nyquist,[54] the Court concluded that the aid program had the primary effect of advancing religion, because the aid at issue was only available to the parents of children in nonpublic schools.[55]

The neutral availability of the benefits conferred by a statute was also a factor in the Court's decision in *Walz v. Tax Commission*.[56] In *Walz*, a tax-

---

state to be neutral in its relations with groups of religious believers and nonbelievers . . . ." Everson v. Board of Educ., 330 U.S. 1, 18 (1947). *See also* Wolman v. Walter, 433 U.S. 229, 242 (1977) (quoting *Lemon*, 403 U.S. at 616-17) (citations omitted) (" 'Our decisions from *Everson* to *Allen* have permitted the states to provide church-related schools with secular, neutral or non-ideological services, facilities or materials.' "). Thus, the state may constitutionally provide benefits to nonpublic schools when those benefits are generally available to all citizens. However, when the benefits provided consist of some services where particularized guarantees of secular use may be impossible, such as teaching, the benefits provided will become suspect. *See* Anastaplo, *The Religion Clauses of the First Amendment*, 11 MEM. ST. U.L. REV. 151, 157-58 (1981). Therefore, the neutral availability of such forms of aid as Title I remedial education programs is especially important to its constitutionality. *Id.* at 160. While the current case law requires that these services be performed "off-site" for students at sectarian schools, it has been asserted that this is unnecessary under the establishment clause and that such restrictions seriously undermine the policy of Title I by providing significantly less help to nonpublic school students in need of remedial aid. *Id.* at 158, 194-95. For a further discussion of the need for state cooperation with churches and church-related schools in the provision of social services, see *"Religion as an Engine of Civil Policy:" A Comment on the First Amendment Limitations of the Church-State Partnership in the Social Welfare Field*, 44 LAW & CONTEMP. PROBS. 111 (1981).

54. 413 U.S. at 756. For a discussion of *Nyquist*, see notes 34-37 and accompanying text *supra*.

55. 413 U.S. at 764 & 794. For a discussion of the aid program under scrutiny in *Nyquist*, see note 35 *supra*. The *Nyquist* Court recognized that the establishment clause requires the state to assume a posture of neutrality toward religion. *Id.* at 792-93. The *Nyquist* Court also noted that the exemptions upheld in *Walz* were not restricted to religious institutions. *Id.* at 794. Rather, the exemptions in *Walz* were available for all property used for religious, educational, or charitable purposes. *Id.* The programs at issue in *Nyquist*, however, were available only to the parents of nonpublic school students. *Id.* The *Nyquist* Court distinguished *Walz* on that basis, and then refused to intimate whether the factor of neutrality alone could be controlling. *Id.* However, the Court concluded that "it should be apparent that in terms of the potential divisiveness of any legislative measure, the narrowness of the benefited class would be an important factor." *Id.*

56. 397 U.S. 664 (1970). In *Walz*, the Court dealt with the interface between the tax law and the establishment clause in the context of state real estate tax exemptions for churches. However, the interface between the tax law and the religion clauses extends beyond exempting church property from state taxes. For example, a recent attempt by the Internal Revenue Service to require church-related schools to file annual informational returns was met with stiff opposition from religious groups. Whelan, *"Church" In the Internal Revenue Code: The Definitional Problems*, 45 FORDHAM L. REV. 885, 893-99 (1977). Similarly, the propriety of allowing tax-exempt status for such non-profit organizations as churches, even when those entities do generate income, has sparked substantial criticism. Bittker & Rahdert, *The Tax Exemption of Nonprofit Organizations from Federal Income Taxation*, 85 YALE L.J. 299 (1976). There have also been numerous articles on the proposed federal tuition tax credit legislation. *E.g.*, Hunter, *The Continuing Debate over Tuition Tax Credits*, 7 HASTINGS CONST. L.Q. 523 (1980); McNulty, *Tax Policy and Tuition Credit Legislation: Federal Income Tax Allowances for Personal Costs of Higher Education*, 61 CALIF. L. REV. 1 (1973); Young &

payer raised an establishment clause challenge to a statute that allowed an exemption from New York state property taxes for property used solely for religious purposes.[57] The *Walz* Court upheld the statute, in part because its benefits were available to all "nonprofit, quasi-public corporations."[58]

In *Everson v. Board of Education*[59] and *Board of Education v. Allen*,[60] the Supreme Court again held that aid programs that were neutrally available

---

Tigges, *Federal Tuition Tax Credits and the Establishment Clause: A Constitutional Analysis*, 28 CATH. LAW. 35 (1983); Note, *Laws Respecting an Establishment of Religion: An Inquiry into Tuition Tax Benefits*, 58 N.Y.U. L. REV. 207 (1983). For a discussion of the recent proposals regarding Federal tuition tax credit legislation, see *Tuition Tax Credits*, 63 CONG. DIG. 3 (1984). For a discussion of the currently pending legislation, see note 123 *infra*.

57. 397 U.S. at 666-67. The statute in *Walz* allowed an exemption from the state property tax for any real property which met two criteria. Exempt property was required to be owned by a corporation that was organized exclusively for religious, charitable or other listed purposes, and the property was required to be used exclusively for those purposes. *Id.* at 667 n.1.

58. *Id.* at 673. In its analysis of the tax-exempt status of religious properties, the *Walz* Court focused upon the statute's neutral purpose, its indirect economic effects, and its long-standing acceptance. *Id.* at 672-74.

In its introduction, the Court stated that the establishment clause cases demonstrate its commitment to "an attitude on the part of government that shows no partiality to any one group. . . ." *Id.* at 669. The Court recognized that the statute in question did not single out any particular group. Rather, it granted the property tax exemption to a broad class of institutions. *Id.* at 672-73. The Court found this neutrality sufficient to demonstrate that the law was not an attempt to establish religion. *Id.* at 673.

In its effect analysis, the Court recognized that the exemption operated to afford an indirect economic benefit to religious institutions. *Id.* at 674. However, the Court noted that such indirect benefits were akin to the benefits of police and fire protection afforded to everyone in the state. *Id.* at 676. Such incidental benefits were not prohibited by the establishment clause. *Id.*

Finally, the Court recognized that the long-standing acceptance of the exemption made a strong argument for its constitutionality:

> It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it. Yet an unbroken practice of according the exemption to churches, openly and by affirmative state action, not covertly or by state inaction, is not something to be lightly cast aside.

Id. at 678.

For further commentary on *Walz*, see Katz, *Radiations from Church Tax Exemption*, 1970 SUP. CT. REV. 93; Kauper, *The* Walz *Decision: More on the Religion Clauses of the First Amendment*, 69 MICH. L. REV. 179 (1970); Note, *The Constitutionality of Church Property Tax Exemptions Upheld by the "Benevolent Neutrality" of the Supreme Court*, 20 DEPAUL L. REV. 252 (1970); Note, *Tax Exemptions, Subsidies and Religious Freedom After* Walz v. Tax Commission, 45 N.Y.U. L. REV. 876 (1970); Note, *Property Tax Exemptions for Religiously Owned Property Used Solely for Religious Purposes Held Not Violative of the Religion Clauses of the First Amendment*, 16 VILL. L. REV. 374 (1970); Note, *The Establishment Clause and Property Tax Exceptions for Religious Organizations*, 12 WM. & MARY L. REV. 679 (1971).

59. 330 U.S. 1 (1946). For commentary on *Everson*, see Boyer, *Public Transportation of Public Pupils*, 1952 WIS. L. REV. 64; Cushman, *Public Support of Religious Education in American Constitutional Law*, 45 U. ILL. L. I. 333 (1956); Kauper, Everson v. Board of Education: *A Product of the Judicial Will*, 15 ARIZ. L. REV. 307 (1973); Mc-

to all students did not violate the establishment clause. In *Everson*, the Court upheld public funding for bus transportation of both public and nonpublic school students.[61] In *Allen*, the Court upheld a similar program in which New York State loaned secular textbooks to nonpublic school students.[62] In both cases the class of beneficiaries included all schoolchildren without regard to whether they attended public or nonpublic schools.

A more striking example of the Court's use of the neutrality factor can be seen in *Widmar v. Vincent*,[63] in which the Court found that neutrality was

---

Mahon, *State Aid to Education and the Doctrine of Separation of Church and State*, 36 GEO. L.J. 631 (1948).

60. 392 U.S. 236 (1968). For commentary on *Allen*, see Drinan, *Implications of the* Allen *Textbook Decision*, 14 CATH. LAW. 285 (1968); Freund, *Public Aid to Parochial Schools*, 82 HARV. L. REV. 1680 (1969); Valente & Stanmeyer, *Public Aid to Parochial Schools—A Reply to Professor Freund*, 59 GEO. L.J. 59 (1970); Comment, *Textbook Loans to Sectarian Schools—A Weathering of the Wall*, 1 U. TOL. L. REV. 117 (1969); Recent Decisions, *The New York State Statute Requiring the Lending of Textbooks to Private and Parochial School Students Does Not Violate the Establishment of Religion Clause of the Constitution*, 35 BROOKLYN L. REV. 286 (1969); Recent Cases, *New York's Textbook Loan Law Not a Law Respecting an Establishment of Religion in Violation of the First and Fourteenth Amendments of the United States Constitution*, 18 BUFFALO L. REV. 356 (1969); Note, *Free Textbook Loans to Pupils in Private Schools Held Constitutional*, 37 FORDHAM L. REV. 123 (1968); Note, *State Aid to Parochial Schools—Textbooks*, 15 LOY. L. REV. 338 (1969).

61. 330 U.S. at 17. The statute in *Everson* authorized local school districts to make contracts for the transportation of children to and from school, including to and from nonpublic schools. *Id.* at 3 n.1. Pursuant to that statute, the board of education in *Everson* authorized reimbursements to parents for money spent for the transportation of their children to and from parochial schools. *Id.* at 3.

The *Everson* Court upheld the program on the ground that the first amendment only "requires the state to be neutral in its relations with groups of religious believers and non-believers." *Id.* at 18. The Court found that this neutrality requirement did not preclude laws which benefit all citizens without regard to religious belief. *Id.* at 16-17. Since the bus transportation statute was such a neutral law, the Court held that it did not violate the establishment clause. *Id.* at 18.

62. 392 U.S. at 248-49. The statute in *Allen* required public school boards to purchase textbooks and lend them without charge to children in both public and nonpublic schools. *Id.* at 239. In order to qualify, the textbooks were required to be designated for use in public schools or approved by any board of education. *Id.* The *Allen* Court found that the statute evinced an acceptable secular legislative purpose and an acceptable primary effect in its neutral application to all students. *Id.* at 243-44. The Court stated that "[t]he law merely makes available to all children the benefits of a general program to lend school books free of charge." *Id.* at 243.

The *Allen* Court also recognized that the benefits of the program only indirectly benefited the nonpublic schools, and that such an indirect benefit would not violate the establishment clause:

> Books are furnished at the request of the pupil and ownership remains, at least technically, in the State. Thus no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not to schools. Perhaps free books make it more likely that some children choose to attend a sectarian school, but that was true of the state-paid bus fares in *Everson* and does not alone demonstrate an unconstitutional degree of support for a religious institution.

Id. at 243-44.

63. 454 U.S. 263 (1981).

"especially relevant."[64] In *Widmar*, the Court confronted a university's claim that the school's exclusion of religious groups from its open forum policy was compelled by the establishment clause.[65] The Court rejected that argument and concluded that there could be no establishment clause violation where a university provided the benefits of its forum "to a broad class of non-religious as well as religious speakers. . . ."[66]

Similarly, in *Minnesota Civil Liberties Union v. Roemer*,[67] the District Court for the District of Minnesota found the neutral availability of an aid program to be an important consideration.[68] In *Roemer*, the court addressed the constitutionality of a state tax deduction that was available to parents of public as well as nonpublic school students under section 290.09(22) of the Minnesota Code.[69] Although the Supreme Court in *Nyquist* had previously held that a tax program which provided relief to parents of children attending nonpublic schools was unconstitutional, the *Nyquist* Court explicitly reserved judgment on whether a bona fide tax deduction for parents of children attending nonpublic schools would be treated in a similar fashion.[70]

---

64. *Id.* at 274. For analysis and commentary on *Widmar*, see Note, *State University Regulation Prohibiting Use of Facilities for Student Religious Worship or Teaching Violates Free Speech Rights*, 66 MARQ. L. REV. 178 (1982); Note, *The Rights of Student Religious Groups Under the First Amendment to Hold Religious Meetings on the Public University Campus*, 33 RUTGERS L. REV. 1008 (1981).

65. 454 U.S. at 270-73. In *Widmar*, members of a religious group challenged a university practice of excluding religious groups from the university's open forum policy. *Id.* at 265-66. That policy made university facilities generally available to student groups. *Id.* The members of the religious group argued that the exclusion was a violation of their rights to free exercise of religion, free speech, and equal protection, under the first and fourteenth amendments. *Id.* at 266.

66. *Id.* at 274. Initially the *Widmar* Court recognized that the university had a compelling interest in complying with the establishment clause. *Id.* at 271. However, the Court concluded that giving equal access to religious groups did not violate the establishment clause. *Id.* at 277.

The Court focused on the effect of such a policy and found that allowing equal access to religious groups would only indirectly benefit the religious groups. *Id.* at 274. It noted that "[w]e are satisfied that the benefits of an open forum . . . would be 'incidental' within the meaning of our cases." *Id.*

One factor which the Court considered relevant was the neutrality of an equal access policy. *Id.* The Court recognized that such a policy did not imply university approval of religious groups or practices. *Id.* It also noted that the university students should be capable of realizing that an equal access policy is a policy of neutrality. *Id.* at 274 n.14.

67. 452 F. Supp. 1316 (D. Minn. 1978). While the focus of this note is federal establishment clause review of state aid to nonpublic schools, review of aid to churches and church-related schools under state constitutions is also an important consideration. For a review of this topic, see C. ANTIEAU, P. CARROLL & T. BURKE, RELIGION UNDER THE STATE CONSTITUTIONS (1965); F. SORAUF, *supra* note 12, at 25-26; STATE AND FEDERAL LAWS RELATING TO NONPUBLIC SCHOOLS (H. Jellison ed. 1975); A. Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 907-12 (1976).

68. 452 F. Supp. at 1318 n.2.

69. *Id.* at 1317. For a discussion of section 290.09(22), see notes 1-4 and accompanying text, *supra*.

70. 413 U.S. at 790 n.49. For a discussion of *Nyquist*, see notes 34-37 and accom-

In dealing with the "genuine" tax deduction provided in the Minnesota Code, the *Roemer* court upheld section 290.09(22) on the limited issue of whether it had the primary effect of advancing religion.[71] The court based its decision on the remoteness of the benefit to nonpublic schools,[72] and on the neutrality of the deduction in its availability to parents of public as well as nonpublic school students.[73] The court then concluded with an analogy to *Walz* by recognizing the longstanding acceptance of the deduction in Minnesota.[74]

It was against this background that the *Mueller* Court reviewed section 290.09(22)[75] of the Minnesota Code to determine if its provisions violated the establishment clause of the first and fourteenth amendments.[76] In an opinion authored by Justice Rehnquist, the majority of the Court applied the three-pronged *Lemon* test to hold that the Minnesota statute did not violate the establishment clause.[77] At the outset, the Court was quick to recog-

---

panying text *supra*. In its consideration of the effect of the tax benefit program there, the *Nyquist* Court distinguished genuine tax deductions. In that case, the aid program in question allowed a flat rate deduction which had the effect of a tax credit since the amount of the deduction was not related to the amount actually spent for tuition. *Id.* at 789. Since the amount of an available deduction did not depend on actual expenditures, but was "apparently designed to yield a predetermined amount of tax 'forgiveness,' " the benefit provided by the aid program could not be labeled a genuine tax deduction. *Id.* However, the *Nyquist* Court refused to select any label for the program. *Id.* The Court simply noted that "[s]ince the program here does not have the elements of a genuine tax deduction . . . we do not have before us, and do not decide, whether that form of tax benefit is constitutionally acceptable. . . ." *Id.* at 790 n.49. Thus the Court in *Nyquist* expressly reserved judgment on the constitutionality of a "genuine tax deduction." *Id.*

71. 452 F. Supp. at 1318. The plaintiffs in *Roemer* acknowledged the weakness of their case with respect to the first and third prongs of the *Lemon* test. *Id.* at 1318 n.1. Thus, the plaintiffs' contentions were directed solely at the second prong, the primary effect of the statute. *Id.* at 1318.

72. *Id.* at 1321-22. The first element considered by the *Roemer* court was the degree to which the tax benefit aided the religious institution. The court recognized that tax benefits could be categorized by degree of remoteness, with tax exemptions most remote, then exclusions, deductions, credits, etc. *Id.* at 1321. Since a deduction would be more remote than the credits that were invalidated in *Nyquist*, the court found that this factor weighed in favor of the constitutionality of the deduction. *Id.* at 1321-22.

73. 452 F. Supp. at 1322.

74. *Id.* The *Roemer* court recognized that the Minnesota statute in question had remained unchallenged since its enactment in 1955. *Id.* Noting that historical acceptance was an important consideration in *Walz*, the Court found that the longstanding acceptance of the deduction in Minnesota weighed in its favor as well. *Id.* For a discussion of the historical acceptance analysis in *Walz*, see note 58 *supra*.

75. For a discussion of section 290.09(22), see notes 1-4 and accompanying text *supra*.

76. 103 S. Ct. 3062 (1983). Justice Rehnquist delivered the opinion of the Court in which the Chief Justice, and Justices White, Powell and O'Connor joined. Justice Marshall filed a dissenting opinion in which Justices Brennan, Blackmun and Stevens joined.

77. 103 S. Ct. at 3064-71 (1983). For a discussion of the *Lemon* test, see notes 16-29 and accompanying text *supra*. In its introduction to the *Lemon* test, the Court

nize that there was no serious question as to the secular legislative purpose of the statute.[78] Thus, the Court found that section 290.09(22) satisfied the first prong of the *Lemon* test.[79]

The Court began its primary effect inquiry under the second prong of the *Lemon* test by noting that tax statutes are traditionally entitled to substantial deference when scrutinized for constitutional infirmity.[80] It then emphasized that the availability of the benefits of section 290.09(22) to the parents of students in public as well as nonpublic schools, was an important factor in reaching its conclusion that the program did not advance reli-

---

recognized the inherent difficulty in applying the establishment clause to cases such as *Mueller*. *Id*. at 3065. The Court then acknowledged that it could "only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law." *Id*. (quoting *Nyquist*, 413 U.S. at 761; *Lemon v. Kurtzman*, 403 U.S. at 609, 612).

The Court again recognized the limited value of the *Lemon* test when it noted that even though the test was a well-settled principle, the cases "emphasized that it provides 'no more than [a] helpful signpost' in dealing with Establishment Clause challenges." *Id*. at 3066 (quoting Hunt v. McNair, 413 U.S. 734, 741 (1973)). For a discussion of the Court's admonition to view the "tests" as "guidelines," see note 29 *supra*.

78. 103 S. Ct. at 3066-67. In its discussion of the first prong of the three-pronged test, the Court recognized that it had only infrequently been used as a basis for invalidating a statute. *Id*. at 3066. The Court then noted that this infrequent use was based in part on the Court's "reluctance to attribute unconstitutional motives to the states. . . ." *Id*. For a discussion of the fact that the first prong of the *Lemon* test is rarely used to invalidate a statute, see note 21 *supra*.

79. 103 S. Ct. at 3067. The *Mueller* Court found three justifications available to support its finding that § 290.09(22) had a valid secular purpose. First, the Court found that the program plainly served the secular purpose of ensuring that the state's citizenry was well educated. *Id*. The second justification the Court recognized was that the aid in question relieved the burden on the public schools by facilitating nonpublic education for a substantial number of students. *Id*.

The Court then noted that a third justification for the aid to nonpublic schools could be found in the wholesome competition that those schools afforded to the public schools. *Id*. Here, the Court recognized that the nonpublic schools provided a "benchmark" for public schools. *Id*. The Court concluded that each of these justifications was sufficient to satisfy the first prong of the *Lemon* test. *Id*.

80. *Id*. The *Mueller* Court found that a state legislature's effort to fairly equalize the tax burden among all citizens, and its attempt to encourage spending for education, are entitled to substantial deference. *Id*. " '[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*. (quoting Regan v. Taxation with Representation, 103 S. Ct. 1997, 2002 (1983); Madden v. Kentucky, 309 U.S. 83, 87 (1940)).

The Court then noted that *Nyquist* was not contrary precedent on this issue because that case was distinguishable. *Id*. at 3067-68 n.6. The Court noted that in *Nyquist*, the Court had expressed doubt as to whether the tax benefits there could be viewed as "part of a genuine system of tax laws. . . . Indeed, the question whether a program having the elements of a 'genuine tax deduction' would be constitutionally acceptable was expressly reserved in Nyquist." *Id*. at 3068 n.6. Since the program at issue in *Mueller* was a genuine tax deduction, the Court recognized that it deserved the deference that would have been inappropriate in *Nyquist*. *Id*. For a discussion of the issue expressly reserved in *Nyquist*, see note 70 and accompanying text *supra*.

gion.[81] The Court noted that a "program like [section] 290.09(22) which neutrally provides state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause."[82]

Additionally, the Court found it particularly important that the aid was directed towards individual parents rather than provided directly to parochial schools.[83] The Court recognized that while some benefit ultimately accrued to the sectarian schools, that benefit was so indirect as to preclude any violation of the establishment clause.[84] The Court emphasized that the primary effect inquiry must be kept in perspective and noted that "[t]he historic purposes of the clause simply do not encompass the sort of attenuated financial benefit . . . that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case."[85] In this analysis, the Court rejected the argument that the parents of children in sectarian schools

81. 103 S. Ct. at 3068-69. Initially the Court noted that the neutral availability of § 290.09(22) was most important to its evaluation of that section. *Id.* at 3068. The Court then recognized the applicability of its holding in *Widmar* to the neutrality of § 290.09(22). *Id.* The Court noted that in *Widmar* it had concluded that the neutral availability of benefits was "an important index of secular effect." *Id.* For a discussion of *Widmar*, see notes 63-66 and accompanying text *supra*.

The Court then pointed out that the tax scheme it struck down in *Nyquist* was considerably different from the tax program under review in *Mueller*. *Id.* The Court then noted that in *Nyquist* it had distinguished *Everson* and *Allen* on the grounds that the benefits provided in those cases were available to *all* students. *Id.* The Court then noted that in contrast, the program in *Nyquist* provided benefits only to parents in nonpublic schools. *Id.* Moreover, the Court in *Nyquist* had "intimated" that state aid made generally available to public as well as nonpublic schools "might not offend the Establishment Clause." *Id.* The Court then concluded that unlike the program in *Nyquist*, § 290.09(22) was the sort of neutral assistance that could survive an establishment clause challenge. *Id.* at 3068-69. For a discussion of *Nyquist*, see notes 34-37 and accompanying text *supra*.

82. 103 S. Ct. at 3069.

83. *Id.*

84. *Id.* The *Mueller* Court began its "indirectness" analysis by noting that the financial benefit which ultimately accrues to nonpublic schools becomes available "only as a result of numerous, private choices of individual parents. . . ." *Id.* The Court also noted that the means by which assistance flows to nonpublic schools had been recognized as a material factor in its decision in *Nyquist*. *Id.* The Court then recognized that almost every recent case invalidating state aid to nonpublic schools involved direct assistance to the schools themselves. *Id.* The single exception was *Nyquist*, but the Court had already distinguished that case on neutrality grounds. *Id.*

85. *Id.* at 3069. The Court then compared the attenuated financial benefit ultimately received by nonpublic schools as a result of § 290.09(22) with the "evils against which the Establishment Clause was designed to protect." *Id.* The Court found that § 290.09(22) did not promote the type of government involvement with religion that would strain a political system to the breaking point. *Id.* (quoting *Nyquist*, 413 U.S. at 756; *Walz*, 397 U.S. at 694). It noted that "[t]he risk of significant religious or denominational control over our democratic processes—or even of deep political division along religious lines—is remote, and when viewed against the positive contributions of sectarian schools, any such risk seems entirely tolerable. . . ." *Id.* at 3069 (quoting *Wolman*, 433 U.S. at 263 (Powell, J., concurring in part and dissenting in part)). The Court then concluded that the prohibitions of the establishment clause did not extend to the type of indirect aid provided by § 290.09(22). *Id.* at 3069.

were statistically the primary beneficiaries of section 290.09(22).[86] The Court stated, "We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law."[87] The Court also found that to whatever extent the deduction did benefit the parochial schools, that benefit could be upheld as a "rough return" for the secular educational benefits provided by parochial schools.[88] Section 290.09(22) thus passed the primary effect inquiry of the *Lemon* test.[89]

In its analysis under the third prong of the *Lemon* test, the Court found no basis for any claim of excessive entanglement.[90] The Court recognized that the only contacts between the state and the parochial schools would be those contacts incident to the determination by state officials of whether particular textbooks qualify for the deduction.[91] Such contacts had been clearly approved in earlier Court decisions.[92] The Court also noted that the statute also lacked the sort of divisive political potential which would require its invalidation.[93] The Court thus concluded that section 290.09(22) did not

86. *Id.* at 3069-70. The opponents of § 290.09(22) asserted that the parents of children in public schools do not incur any tuition expenses and that the other deductible expenses they do incur are negligible. *Id.* at 3070. They also asserted that 96% of the children in nonpublic schools in Minnesota attended religiously affiliated schools. *Id.* Thus, the opponents of § 290.09(22) argued that the bulk of the deductions allowable under that section will be taken by the parents of children in religiously-affiliated schools. *Id.*

87. *Id.* at 3070. The Court found that grounding its decision on the sort of statistical analysis advocated by the opponents of § 290.09(22) would not "provide the certainty that this field stands in need of. . . ." *Id.* The Court also noted that it could not "perceive principled standards by which such statistical evidence might be evaluated." *Id.* The Court then emphasized that whether private individuals claim the relief to which they are entitled "should be of little importance in determining the constitutionality of the statute. . . ." *Id.*

88. *Id.* Here, the Court recognized the societal benefits attributable to nonpublic schools. *Id.* The Court noted that nonpublic schools afford educational alternatives to many children as well as provide competition for the public schools. *Id.* The Court then concluded that the aid to parents provided by § 290.09(22) helped to equalize the financial burdens of the parents of nonpublic school children and those of parents of public school children. *Id.*

89. *Id.* at 3071.

90. *Id.*

91. *Id.* The Court recognized that the state's determination of which textbooks qualify for the deduction was the "only plausible source of the 'comprehensive, discriminating, and continuing state surveillance . . .' " that would be needed to support a finding of excessive administrative entanglement. *Id.* at 3071 (quoting *Lemon*, 403 U.S. at 619).

92. *Id.* at 3071 (citing *Allen*, 392 U.S. at 236). The Court noted that the contacts incident to § 290.09(22) did not differ substantially from the types of decisions approved in other cases. *Id.* The Court then recognized that the contacts incident to determining whether textbooks were purely secular had been upheld in *Allen, Meek*, and *Wolman*. *Id.* For a discussion of *Allen*, *Meek*, and *Wolman*, see respectively notes 62, 41-45 & 46-51 and accompanying text *supra*.

93. 103 S. Ct. at 3071 n.11 (citing *Lemon*, 403 U.S. at 602). The *Mueller* Court noted that the issue of potential political divisiveness was first addressed in *Lemon* and is subsumed under the third part of the *Lemon* test. *Id.* The Court also noted that the

violate the establishment clause of the first amendment.[94]

Writing for the four dissenting justices,[95] Justice Marshall criticized the majority's failure to recognize the importance of the Court's decision in *Nyquist*.[96] He argued that the unmistakable primary effect of the Minnesota statute was the impermissible advancement of sectarian schools.[97] Noting that ninety-five percent of the deductions authorized by the law would be available to parents of children in sectarian schools, Justice Marshall argued that the "substantial impact" of the aid primarily benefited sectarian schools.[98] He then concluded that the less direct nature of the aid was insufficient to distinguish *Nyquist*, and that the program was therefore unconstitutional.[99]

Lemon Court's discussion of political divisiveness was made in the context of statutes which provided for either direct payments or reimbursements of teacher's salaries in parochial schools. *Id.* The Court concluded that since the *Lemon* Court distinguished both *Everson* and *Allen*, which involved direct payments, the inquiry into political divisiveness must be confined to cases where the payments were made directly to sectarian schools or teachers. *Id.* (citing *Everson*, 330 U.S. at 1; *Allen*, 392 U.S. at 236).

94. *Id.* at 3071.

95. *Id.* at 3071 (Marshall, J., dissenting).

96. *Id.* at 3072 (Marshall, J., dissenting). The dissent could find no significant differences between the tax benefit program at issue in *Mueller* and the one struck down in *Nyquist* and therefore would have held § 290.09(22) unconstitutional under *Nyquist. Id.* For a discussion of *Nyquist*, see notes 34-37 and accompanying text *supra*.

97. 103 S. Ct. at 3072-73 (Marshall, J., dissenting). The dissent argued that § 290.09(22) was unconstitutional because it had the direct and immediate effect of advancing religion and it was indistinguishable from the tax benefit program stricken in *Nyquist. Id.* at 3072. (Marshall, J., dissenting). The dissent then used a statistical analysis of the beneficiaries of the aid to support this argument. *Id.* It noted that in a recent year only 79 of the 815,000 public school students in Minnesota could be charged tuition under Minnesota law. *Id.* Thus, the dissent concluded that since "the vast majority of the taxpayers who are eligible to receive the benefit are parents whose children attend religious schools . . . 'the effect of the aid is unmistakably to provide desired financial support for nonpublic, sectarian institutions.' " *Id.*

98. *Id.* at 3072-73 (Marshall, J., dissenting). The dissent then noted that past decisions on public aid to nonpublic schools established that church schools are an integral part of the religious mission of the church and that any general aid to those schools advances the general religious mission of the church. *Id.* Therefore, the dissent concluded, any aid to sectarian schools must be carefully restricted to ensure that it does not subsidize the sectarian functions of those schools. *Id.* at 3073 (Marshall, J., dissenting). Since the aid in this case was not properly restricted, the dissent would have held § 290.09(22) unconstitutional. *Id.* The dissent also argued that the indirect nature of the aid did not insulate sectarian schools from its benefit. It noted that "[w]hat is of controlling significance is the 'substantive impact' of the financial aid." *Id.* at 3073 (Marshall, J., dissenting) (quoting *Nyquist*, 413 U.S. at 786). Thus the dissent would have concluded that the unmistakable primary effect of the Minnesota program is the impermissible advancement of religion. *Id.* (citing *Nyquist*, 413 U.S. at 756).

99. *Id.* at 3074-75 (Marshall, J., dissenting). The dissent argued that neither of the reasons articulated by the majority to distinguish *Nyquist* were sufficient. It noted that the fact that the Minnesota program makes some small benefit available to all parents cannot alter the benefit bestowed by the program on parochial schools. The dissent also maintained that the fact that *Nyquist* did not involve a true deduction

In reviewing the *Mueller* Court's opinion, it is submitted that this decision must be viewed in light of the particularly difficult questions of interpretation that establishment clause cases present.[100] As the majority recognized, the lines of demarcation in this area of constitutional law are only dimly perceptible.[101] As the court in *Roemer* recognized, "There appears to be no discernible consistency in the decisions of the Court in establishment clause challenges to state school aid statutes."[102] Even the well-defined three-pronged *Lemon* test provides little real certainty since it is clearly "no more than a helpful signpost."[103] Moreover, the members of the Court have disagreed as to relevant criteria in the implementation of the test.[104]

Despite the uncertainty inherent in establishment clause cases, it is submitted that developments in the law are discernible from *Mueller*. While this case demonstrates the Court's increased willingness to invoke the touchstone that aid programs to nonpublic schools must be viewed "in light of the evils that the establishment clause was originally designed to prevent," it is by no means clear what those evils are.[105] Nonetheless, it is certain that *Mueller*

---

was similarly irrelevant. *Id.* at 3075 (citing *Sloan*, 413 U.S. at 825). It then noted that "[i]t was precisely the substantive impact and not its particular form, that rendered the programs in *Nyquist* and *Sloan* unconstitutional." *Id.* at 3076 (Marshall, J., dissenting). For a discussion of *Nyquist* and *Sloan*, see respectively notes 34-37 & 38-40 and accompanying text *supra*. For the grounds used by the majority to distinguish *Nyquist*, see note 81 and accompanying text *supra*.

100. 103 S. Ct. at 3065.

101. *Id.* (quoting *Lemon*, 403 U.S. at 612). For the views of a commentator who analyzes the imprecise nature of the three-pronged test, see Ripple, *supra* note 27, at 1195. The author notes that the entanglement prong of the *Lemon* test is particularly imprecise and allows the subjective beliefs of the Justices to determine establishment clause violations: "[B]y requiring the Justices to predict the probability of unconstitutional effect, the entanglement test has introduced . . . judicial subjectivity into the Court's assessment of the nature of religious institutions and of the relationships those institutions develop with governmental entities." *Id.* at 1218 (emphasis omitted).

102. *Roemer*, 452 F. Supp. at 1320 (citing *Wolman*, 433 U.S. at 229; *Allen*, 392 U.S. at 236; *Everson*, 330 U.S. at 1; Public Funds for Pub. Schools v. Marburger, 358 F. Supp. 29 (D.N.J. 1973)).

103. *Mueller*, 103 S. Ct. at 3066. For a discussion of the imprecise nature of the three-pronged test, see note 29 *supra*.

104. *Compare Mueller*, 103 S. Ct. at 3070 (rejecting the use of statistical evidence in considerations of primary effect) *with id.* at 3074 (Marshall, J., dissenting) (using statistical evidence to support the conclusion that the "deduction has the primary effect of promoting religion"). For a discussion of the majority's use of statistical evidence, see notes 107-14 and accompanying text *infra*.

As an additional variant, some of the inability to agree on criteria may stem from the religious biases of the Justices. For a discussion of the religious biases of the Justices, see note 32 *supra*.

105. 103 S. Ct. at 3069. Although the majority's emphasis on viewing establishment clause issues in light of the evils the clause was designed to prevent is laudable, the specific evils the founders sought to prevent is by no means certain. *See* R. CORD, *supra* note 9. If "the evils the clause was designed to prevent" becomes a shorthand for the evils the majority of the Court wants to deal with, the certainty that the Court sought to gain by reference to history will have degenerated into "ad-hoc-ery." For a

evidences a development in establishment clause analysis that will permit some types of aid to sectarian schools that prior decisions would have prohibited.[106]

Second, *Mueller* evidences the Court's decreased willingness to allow statistical evidence in establishment clause challenges to state aid to nonpublic schools.[107] Although the dissent relied upon a statistical analysis of the beneficiaries of the aid to bolster its argument,[108] the majority completely discounted the value of this type of analysis on the ground that "[s]uch an approach would scarcely provide the certainty that this field stands in need of. . . ."[109] However, this rejection of objective and quantifiable evidence seems not only inapposite in light of the Court's assertion that it "can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law,"[110] but also inconsistent with the Court's previous use of quantifiable evidence in aid to nonpublic school cases.[111] The majority's statement that it could not "perceive principled standards by which such statistical evidence might be evaluated," is similarly unclear in light of the objective nature of such evidence.[112]

---

discussion of the majority's consideration of the importance of keeping establishment clause cases in perspective, see note 85 and accompanying text *supra*.

The dissent was likewise willing to look beyond the three-pronged test to the "principles of neutrality embodied by the Establishment Clause." *Id.* at 3078 (Marshall, J., dissenting). However, the dissent used this recourse to underlying principles of neutrality to support its conclusion that the Minnesota statute was intended to provide and did provide substantial aid to sectarian schools. *Id.*

106. In the event that some consensus historical interpretation of the purposes of the religion clauses could be developed, it is submitted that an evaluation of establishment clause cases in light of the evils the clause was designed to prevent could help to eliminate the sort of arbitrary distinctions that have marked so many establishment clause decisions in the past. *See, e.g., Wolman*, 433 U.S. at 251 n.17 (noting that while the Court was willing to uphold textbook loans on stare decisis grounds, it was unwilling to extend the rationale to include other items similar to textbooks). For a discussion of the confusing state of precedent in this area, see note 52 and accompanying text *supra*. For a discussion of *Wolman*, see notes 46-51 and accompanying text *supra*.

107. For a discussion of the majority's refusal to consider statistical evidence, see notes 86-87 and accompanying text *supra*.

108. 103 S. Ct. at 3074-75 (Marshall, J., dissenting).

109. *Id.* at 3070.

110. *Id.* at 3065. It is submitted that one way to make the lines of demarcation more clearly perceptible would be to consider quantifiable evidence such as the statistical evidence at issue in *Mueller*.

111. *See Meek*, 421 U.S. at 364 n.14; *Sloan*, 413 U.S. at 830; *Lemon*, 403 U.S. at 610.

112. 103 S. Ct. at 3070. It is submitted that the Court is understandably wary of being forced to distinguish between minute differences in statistical analysis in future cases. However, such concern is unfounded in cases such as *Mueller* where statistical evidence that 96% of the taxpayers eligible for the aid sent their children to religious schools weighed so heavily towards one side. *See id.* at 3074 (Marshall, J., dissenting). For a discussion of the statistical evidence cited in *Mueller*, see note 86 *supra*.

It is further submitted that the Court could have avoided being forced to make constitutional decisions on insignificant statistical differences by a means less drastic

It is submitted, however, that the majority's assertion that the constitutionality of a state tax statute should not be based on the number of persons who actually claim benefits under it is more easily supported.[113] If the number of persons who claimed benefits under a statute determined its constitutionality, identical state statutes could be subject to different rulings merely because the number of persons who claim relief in one state differed from the number who claimed relief in another.[114] It is submitted that the majority's approach would avoid such an anamolous result.

It is also suggested that the majority has inserted a new element into establishment clause analysis by maintaining that the beneficial effects that an aid program may have on sectarian schools can be regarded as a "rough return" for the public benefits provided by those schools.[115] Although the Court has previously taken judicial notice of the special contributions of nonpublic schools,[116] the relevance of the societal value of a sectarian institution to the issue of separation of church and state is somewhat obscure. Indeed, recognizing and rewarding the societal value of such sectarian institutions would seem to be the first step toward actively supporting religious education.[117]

It is further submitted that the Court also added a new requirement for establishment clause analysis under the three-pronged *Lemon* test through its inquiry into divisive political potential.[118] In its analysis of this aspect of the

than excluding all statistical evidence. For example, the Court could have held that while statistical evidence is admissible it is only one factor among many to be considered.

113. 103 S. Ct. at 3070.

114. For example, assume that two states, X and Y, have enacted identical statutes similar to § 290.09(22). In state X, 50% of the parents of public school children and 50% of the parents of nonpublic school children claim a deduction under the statute. In state Y, however, none of the parents of public school children and 100% of the parents of nonpublic school children claim the deduction. If everything else were equal, a rule of decision that took into account the number of persons claiming the deduction would compel a finding in favor of the statute in state X and against that in state Y.

115. 103 S. Ct. at 3070. For a discussion of the Court's characterization of the benefits of the aid as a "rough return," see note 88 and accompanying text *supra*.

116. 103 S. Ct. at 3070 (quoting *Wolman*, 433 U.S. at 262). For a discussion of *Wolman*, see notes 46-51 and accompanying text *supra*.

117. The *Mueller* Court recognized that "whatever unequal effect may be attributed to [§ 290.09(22)] can fairly be regarded as a rough return for the benefits . . . provided to the state and all taxpayers. . . ." 103 S. Ct. at 3070. Implicit in this statement is the recognition that there is some unequal effect on nonpublic schools; that is, there is some benefit that accrues to those schools.

By discounting the "unequal effect" as a "rough return" for the benefits provided by sectarian schools, it is submitted that the Court has established precedent for weighing the benefits provided to sectarian schools against the benefits provided by those schools. *See id.* Thus, the Court implicitly acknowledges that the states may recognize the benefits provided to the state by sectarian schools and parents who send their children to them, and that the state can allow benefits to accrue to them to the extent that the benefits provided do not exceed the benefits received.

118. For a discussion of the Court's analysis of the divisive political potential of § 290.09(22), see note 93 and accompanying text *supra*.

third prong of the test, the Court noted that this inquiry must be limited to cases involving direct financial subsidies.[119] It is submitted that this requirement obscures the focus of the test. Since divisive political potential cannot be considered in cases involving indirect aid programs, it is submitted that this apparent grant of a *per se* exclusion to indirect subsidies exalts form over substance.[120]

The practical impact of *Mueller* will be two-fold. First, this case will encourage state legislatures that want to assist nonpublic schools to adopt measures similar or identical to the Minnesota statute. This decision gives state legislatures the guidance that will enable them to provide the aid to nonpublic schools that they have attempted to provide so many times before.[121] Whether such legislative attempts will spark the politically divisive debates that the *Lemon* Court feared, however, remains to be seen.[122]

It is submitted that the *Mueller* decision will also lead to federal income tax relief for taxpayers with dependents in nonpublic schools. Since the *Mueller* decision virtually removes all doubt as to the constitutionality of such legislation, Congress will be encouraged to enact the Tuition Tax Credit Bill that has been long considered by the legislature, but which has not gained approval.[123] It is important to remember, however, that while the *Mueller* Court gave substantial deference to *state* legislatures because of their familiarity with local conditions,[124] this judicial deference may not be equally applicable to Acts of Congress.

J. Edward Goff

---

119. 103 S. Ct. at 3071 n.11.

120. The *Mueller* Court clearly acknowledged that the divisive political potential inquiry "must be regarded as confined to cases where direct financial subsidies are paid to parochial schools. . . ." *Id.* Thus, an aid program for nonpublic schools that comes in a form that can properly be labeled indirect will survive this aspect of the third prong regardless of its potential for igniting political debate.

121. The long history of cases on state aid to nonpublic schools beginning with *Everson* in 1937 evidences the numerous attempts of state legislatures to enact such aid programs. Until *Mueller*, the only types of aid approved by the Court were the provision of transportation to and from school on the basis of *Everson* and the loans of textbooks on the basis of *Allen*. For a discussion of *Everson* and *Allen*, see notes 60-62 and accompanying text *supra*.

122. *See Lemon*, 403 U.S. at 622-23.

123. S. 528, 98th Cong., 1st Sess. (1983); H.R. 1635, 98th Cong., 1st Sess. (1983). The Senate Bill would provide a 50% credit for tuition expenses paid to private elementary and secondary schools that have a racially non-discriminatory policy. S. REP. NO. 98-154, 98th Cong., 1st Sess. 2 (1983). For commentary on the proposed legislation, see Hunter, *supra* note 56; McNulty, *supra* note 56; Young & Tiggs, *supra* note 56.

124. 103 S. Ct. 3067. For a discussion of the *Mueller* Court's deference to state legislatures, see note 80 and accompanying text *supra*.