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Mueller v. Allen: A Fairer Approach to the Establishment Clause

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MUELLER V. ALLEN: A FAIRER APPROACH TO THE ESTABLISHMENT CLAUSE

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I. INTRODUCTION

In *Mueller v. Allen*,[1] a five-to-four decision,[2] the United States Supreme Court upheld a Minnesota statute[3] permitting taxpayers to deduct the tuition, textbook, transportation, and instructional material expenses[4] of their children when calculating their state tax liability. This decision, written for the majority by Justice Rehnquist, heralds a new dawn in establishment clause jurisprudence. The Court has cleared the way for an accommodation between church and state that more equitably recognizes the principles and values that the religion clauses[5]

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1. 103 S. Ct. 3062 (1983).

2. Justices Brennan, Blackmun, Marshall, and Stevens dissented in an opinion written by Justice Marshall. *Id.* at 3071. For a discussion of this dissent, see *infra* notes 229-39 and accompanying text.

3. Minn. Stat. § 290.09(22) (1982). This statute provides:

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

Id. (footnote omitted).

4. 103 S. Ct. at 3065.

5. The Constitution of the United States, in pertinent part, states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exer-

were intended to protect.

The effect of *Mueller* on educational policy may not be seen for some time. *Mueller*, after all, merely enables the states to enact tuition tax laws. The decision may spur action in states such as New York, Rhode Island, and Hawaii, which have had tuition tax statutes repealed or held unconstitutional in the past ten years. At the present time, however, only Minnesota has a tuition tax deduction law on its books. On November 16, 1983, the United States Senate failed to pass legislation providing for federal tax credits. Although this legislation had the support of President Reagan and the leadership of the majority Republican party, its failure in the Senate in 1983 makes passage of federal tax credit legislation in 1984—an election year—unlikely. Several factors may be used as excuses to avoid the necessity of this form of tax relief. First, recovery of the states from the 1981-82 recession may be used as an excuse to refuse to pass state tax credit legislation. Second, the call to revamp the public school system also may be seen as an excuse to reject such legislation. Since educating our children is one of the most important state goals, these excuses should not be used to preclude enactment of such legislation. Nevertheless, it is likely that these excuses will be used to counter tuition tax proposals.

This Article suggests that the decision of the United States Supreme Court in *Mueller* correctly balanced the scales in favor of voluntarism in religious belief.[6] This Article will sketch the history of estab-

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cise thereof . . . ." U.S. CONST. amend. I.

6. *See generally* Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part II. The Nonestablishment Principle*, 81 HARV. L. REV. 513, 516-22 (1968). In this seminal article, Professor Giannella states that voluntarism and political noninvolvement with religion are the twin values of the establishment clause. *See also* Zorach v. Clauson, 343 U.S. 306, 313 (1952) ("We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. . . . We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma."); Note, *Government Neutrality and Separating Church and State*, 92 HARV. L. REV. 696, 697 (1979) [hereinafter cited as Note, *Government Neutrality*]. This Article argues that political noninvolvement is a handmaiden to the principle of voluntarism. Political noninvolvement, sometimes inaccurately called separation of church and state, promotes voluntarism in religious belief by preventing the state from intruding into religious affairs.

In Everson v. Board of Educ., 330 U.S. 1, 18 (1947) (upholding statute against constitutional challenge), the Court intoned that a "wall of separation" must exist between church and state. The originator of that phrase, Roger Williams, wanted it to be used not as a sword of the government, but as a shield against governmental interference. *See generally* M. HOWE, THE GARDEN AND THE WILDERNESS 5-10 (1965). If voluntarism is the principle value that the establishment clause is designed to protect, political noninvolvement and neutrality are essential, but when political noninvolvement is used to limit or undermine voluntarism, the religion clauses are not furthered. Voluntarism is undermined when political noninvolvement is used as the reason to prohibit any aid from government to individuals who, for example, use the aid to educate their

lishment clause case law, the history of tuition tax credits, and the decision and effect of *Mueller*.

II. ESTABLISHMENT CLAUSE CASE LAW

A. *Establishment Clause Case Law Before 1947*

Case law before *Everson v. Board of Education*[7] is sparse and generally unilluminative. In *Bradfield v. Roberts*,[8] the Supreme Court upheld a contract between the federal government and a Roman Catholic hospital that required the hospital to care for indigent patients residing in the District of Columbia in return for government financial help to build a wing onto the hospital. A decade later, in *Quick Bear v. Leupp*,[9] the Court upheld the expenditure of congressional appropriations from a trust fund to provide and support religious mission schools located on Indian reservations.

The most important pre-*Everson* case is *Pierce v. Society of Sisters*.[10] The Court in *Pierce* found that the due process clause of the fourteenth amendment protected the religious liberty of parents against infringement by the state. The particular law held unconstitutional required that all children in Oregon attend public schools.[11] The Court determined that this law infringed upon the liberty of parents to direct the education of their children.[12] While the doctrine of substantive due process on which *Pierce* rests appears to have been repudiated,[13] the holding in *Pierce* was reaffirmed in *Wisconsin v. Yoder*.[14] The *Pierce* rationale supports tuition tax credits because tuition tax credits permit parents whose children attend nonpublic schools to effectively use their constitutional right to direct their children's education. These tax credits redress the financial disincentives to parents who pay tuition expenses to support private schools and property or other taxes to support public schools.

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children at sectarian schools. The attitude implicit in this Article is derived from the belief that the religion clauses should be interpreted as protecting voluntarism. *See* Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673 (1980); Note, *Laws Respecting an Establishment of Religion: An Inquiry into Tuition Tax Benefits*, 58 N.Y.U. L. REV. 207, 207 n.5 (1983) [hereinafter cited as Note, *Inquiry*].

7. 330 U.S. 1 (1947).
8. 175 U.S. 291 (1899).
9. 210 U.S. 50 (1908).
10. 268 U.S. 510 (1925).
11. *See id.* at 530-31.
12. *Id.* at 534-35.
13. *See* Board of Regents v. Roth, 408 U.S. 564 (1972) (fourteenth amendment does not require opportunity for predischarge hearing absent a showing of deprivation of a "liberty" or "property" interest).
14. 406 U.S. 205 (1972).

The last important case involving religion and government decided before 1947 is *Cochran v. Board of Education.*[15] Although it did not rest this decision on establishment clause grounds, the Court nevertheless upheld a Louisiana law providing free textbooks to all school children.

The dearth of pre-*Everson* case law has led most commentators to concentrate their attention on establishment clause jurisprudence dating from 1947, the year in which the Supreme Court made the establishment clause applicable to the states under the fourteenth amendment.[16] This change made possible the review of state as well as federal statutes respecting the establishment of religion.

B. *Modern Establishment Clause Jurisprudence*

Modern establishment clause jurisprudence begins with *Everson v. Board of Education.*[17] There the Supreme Court held constitutional, against an establishment clause challenge, a New Jersey statute authorizing school districts to make rules regarding the free transport of children to and from schools, including nonprofit, nonpublic schools. The Court established several parameters important to future establishment clause jurisprudence. Initially, the Court incorporated the establishment clause into the fourteenth amendment.[18] The Court admitted that "[i]t is undoubtedly true that children are helped to get to church schools"[19] and that it was possible that some parents might not send their children to parochial schools if the aid did not exist.[20] The Court, however, characterized the statute as a health and safety measure[21] rather than as an aid to religion, thereby allowing it to uphold the aid. *Everson* has been interpreted as the high-water mark of judicial recog-

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15. 281 U.S. 370 (1930).

16. *See* Everson v. Board of Educ., 330 U.S. at 14-16.

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

18. *Id.* at 14-16. Incorporation of the establishment clause has been criticized, see Abington School Dist. v. Schempp, 374 U.S. 203, 254-58 (1963) (Brennan, J., concurring) (discussing criticism), and M. HOWE, *supra* note 6, at 137-39, but the important point under discussion is that this incorporation permitted federal review of state laws that arguably caused an establishment of religion. See also Flast v. Cohen, 392 U.S. 83 (1968), giving federal taxpayers standing to sue when claiming that a federal law violates the religion clauses—thereby overruling Frothingham v. Mellon, 262 U.S. 447 (1923).

19. 330 U.S. at 17.

20. *Id.*

21. *Id.* The Court noted that "parents might be reluctant to permit their children to attend schools which the state had cut off from such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks." *Id.* at 17-18. The Court interpreted the establishment clause to require neutrality when the services provided were separated from the religious function. *Id.* at 18.

nition of the "no-aid" philosophy.[22]

In the early case history of the establishment clause, the two competing methodologies were the principles of strict neutrality[23] and strict no-aid.[24] Strict no-aid appeared to have gained the upper hand in *Illinois ex rel. McCollum v. Board of Education.*[25] In *McCollum*, the first case involving an establishment of religion issue decided after *Everson*, the Court held that it was unconstitutional to release public school children from part of their regular school day so that they could receive religious instruction.[26] The effect of this case was tempered, however, by the Court's subsequent decision in *Zorach v. Clauson.*[27] In *Zorach*, the Court held constitutional a New York program releasing public school students during the school day to attend religious instruction elsewhere. The Court distinguished *McCollum* on the ground that the New York program involved neither religious instruction in the public school, nor the expenditure of funds by the state.[28] The Court stated that it was required to permit this type of program "unless separation of Church and State means that public institutions can make no adjustments of their schedules to accommodate the religious needs of the people. We cannot read into the Bill of Rights such a philosophy of hostility to religion."[29] Justice Black, author of the majority opinion in *Everson*, dissented in *Zorach.*[30] *Zorach* has been interpreted as sharply circumscribing the strict no-aid principle enunciated in *Everson* and followed in *McCollum.*[31]

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22. *See* Giannella, *supra* note 6, at 529. Giannella also notes that the decision on its facts diluted the value of the no-aid language in *Everson.* The Court permitted the aid, which was presumed to encourage parents to allow their children to attend private schools. 330 U.S. at 17. As a result the no-aid language was greeted skeptically.

23. The foremost authority explicating the principle of strict neutrality is Professor Philip Kurland. He argued that governmental action that is religiously neutral is constitutionally permissible, even if religion gains from such action. Therefore, state financial assistance to improve education may properly include aid to parochial schools. Kurland, *Of Church and State and the Supreme Court*, 29 U. CHI. L. REV. 1 (1961); *see* P. KURLAND, RELIGION AND THE LAW 80-85 (1962). Kurland's formula currently functions as the secular purpose prong of the tripartite test enunciated in Lemon v. Kurtzman, 403 U.S. 602 (1971). *But cf.* Pfeffer, *Book Review*, 15 STAN. L. REV. 389 (1963) (criticizing Kurland's approach).

24. Those who favor strict no-aid would deny governmental benefits to organized religions, and would forbid any state financial support for parochial schools. Giannella, *supra* note 6, at 514 (citing as an example L. PFEFFER, CHURCH, STATE AND FREEDOM 533-37 (rev. ed. 1967)).

25. 333 U.S. 203 (1948).

26. *Id.* at 212.

27. 343 U.S. 306 (1952).

28. *Id.* at 309.

29. *Id.* at 315.

30. 343 U.S. at 315 (Black, J., dissenting).

31. Giannella, *supra* note 6, at 530-31. Giannella criticizes Justice Douglas' opinion in *Zorach* on the ground that the emphasis on free exercise neutrality, as op-

In the early 1960's, the Court was required to interpret the establishment clause in cases involving Sunday closing laws[32] and prayer in public schools.[33] The Court found that the purpose of Sunday closing laws was secular in nature and, therefore, constitutional. The Court did hold, however, that prayer in public schools violated the first amendment. In *Engel v. Vitale*,[34] the Court held unconstitutional a local school board directive requiring daily recitation of a nondenominational prayer by students. In *Abington School District v. Schempp*,[35] the Court held that daily, commentless Bible reading and recitation of the Lord's Prayer violated the establishment clause. Of more continuing importance to establishment clause jurisprudence was the *Schempp* Court's addition of a test to determine the constitutionality of laws regarding religion.[36] The reformulated test asked "what are the purpose *and* the primary effect of the amendment?"[37]

In 1968, the Court held that a New York state law that required local school officials to freely lend textbooks to all students in grades seven through twelve did not violate the establishment clause.[38] The Court accepted the express purpose of the law, which, as stated by the New York legislature, was the secular goal of furthering educational opportunities available to children.[39] It noted that since the textbooks remained the property of the state, the only benefit under the law was to parents and children, not to parochial schools.[40] The Court recog-

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posed to political neutrality, gives the Court the appearance of acting as a super-legislature. Other commentators cited by Giannella interpret *Zorach* as expanding the meaning of neutrality. *Id.* at 531 n.42 (citing W. KATZ, RELIGION AND AMERICAN CONSTITUTIONS (1964); P. KAUPER, RELIGION AND THE CONSTITUTION 67-79 (1964)).

32. McGowan v. Maryland, 366 U.S. 420 (1961); Two Guys from Harrison—Allentown, Inc. v. McGinley, 366 U.S. 582 (1961).

33. Abington School Dist. v. Schempp, 374 U.S. 203 (1963); Engel v. Vitale, 370 U.S. 421 (1962).

34. 370 U.S. 421 (1962).

35. 374 U.S. 203 (1963).

36. Before the Court, in *Schempp*, added the primary effect test to establishment clause jurisprudence, it reviewed laws to determine whether their purpose was secular in nature. *See* Note, *Establishment Clause Analysis of Legislative and Administrative Aid to Religion*, 74 COLUM. L. REV. 1175, 1179 (1974) (asserting that the Court determined a statute's secular purpose in three ways). This "secular purpose" test recently has lost much of its vitality. *See* Mueller v. Allen, 103 S. Ct. at 3065 (limiting this test to a review of the statute on its face). The last case to hold a law violative of the secular purpose test was Stone v. Graham, 449 U.S. 39 (1980). In *Stone*, a Kentucky statute that required the Ten Commandments to be posted in public school classrooms was held to be unconstitutional.

37. *Schempp*, 374 U.S. at 222 (emphasis added).

38. Board of Educ. of Central School Dist. No. 1 v. Allen, 392 U.S. 236 (1968).

39. *Id.* at 243.

40. *Id.* at 243-44. *Allen* has been read as merely following the "child benefit" theory expressed in Everson v. Board of Educ., 330 U.S. at 17-18. *See, e.g.*, Note, *Statute Granting Tax Deduction for Tuition Paid by Parents of Sectarian and Non-*

nized the role played by private schools in raising levels of knowledge, competence, and experience.[41] It rejected the notion that instruction in religious schools tainted the use of textbooks.[42] Ultimately, the law was found constitutional.

In *Walz v. Tax Commission*,[43] the Court added a third test for determining the constitutionality of a law under the establishment clause. "We must also be sure that the end result—the effect—is not an excessive government entanglement with religion."[44]

Before addressing the issue in *Walz*, the Court briefly surveyed the general principles established in previous cases.[45] It concluded that the first amendment prohibits the government from either establishing or interfering with religion.[46] Beyond that, the Court acknowledged that there was room for laws producing a benevolent neutrality.[47] Under this analysis, the Court upheld the constitutionality of a New York Tax Commission decision exempting the properties of religious institutions, which were used exclusively for religious worship, from property taxes. Although it did not rely solely on historical practices in deciding the case, the Court did pay heed to Justice Holmes' statement that " 'a page of history is worth a volume of logic.' "[48]

Beginning with *Lemon v. Kurtzman*,[49] the Court decided a number of cases involving various forms of state aid to nonpublic schools. The Court invalidated laws providing: salary supplements to nonpublic school teachers;[50] reimbursement to sectarian schools for the costs of

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sectarian School Children Does Not Violate the Establishment Clause, 61 WASH. U.L.Q. 269, 275 n.49 (1983). But this interpretation overlooks the benefit to parents who otherwise would be required to buy textbooks for their children's education.

41. 392 U.S. at 248-49.

42. *Id.* at 244-45.

43. 397 U.S. 664 (1970).

44. *Id.* at 674. For a critique of this test, see K. Ripple, *The Entanglement Test of the Religion Clauses—A Ten Year Assessment*, 27 UCLA L. REV. 1195 (1980).

45. The Court refused to reexamine the history and development of the religion clauses as delineated in *Everson* and *Engel*, 370 U.S. 421 (1962). This refusal has been criticized because of the resulting distortion of establishment clause case law. *See* M. MALBIN, RELIGION AND POLITICS: THE INTENTIONS OF THE AUTHORS OF THE FIRST AMENDMENT 3-19 (1978).

46. 397 U.S. at 669.

47. *Id.*

48. *Id.* at 675-76 (quoting New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921)).

49. 403 U.S. 602 (1971).

50. *Id.* In *Lemon*, the Court profiled the sectarian elementary and secondary school and characterized these schools as substantially involved in promoting religious activity. *Id.* at 615-16. This characterization was proffered as a way to distinguish between aid given to sectarian colleges and sectarian elementary and secondary schools. The former were less religiously-pervasive and, thus, the aid would flow more to allow students the freedom to inquire. *See* Giannella, *supra* note 6, at 581-90; *see also* Tilton v. Richardson, 403 U.S. 672 (1971) (federal construction grants to sectarian colleges

secular textbooks and instructional materials;[51] reimbursement for those costs incurred by nonpublic schools for state and teacher prepared examinations;[52] loans of instructional materials to nonpublic schools;[53] auxiliary services to nonpublic schools;[54] and reimbursement of the cost of nonpublic school field trips.[55]

The Court, however, upheld a law paying nonpublic schools for correcting state-mandated, state-prepared tests and for costs incurred in complying with reporting and record keeping duties.[56] The Court also upheld various laws affecting religiously affiliated universities and colleges.[57]

III. TUITION GRANTS BEFORE *Mueller*

A. *Supreme Court Cases*

The issue of tuition tax credits and deductions has been debated in legislatures and argued in courts for over ten years. There are a variety of methods used to give parents of nonpublic school children tax benefits for tuition expenses. This variety reflects a perception of the need to lessen the financial burdens of those parents who choose to privately educate their children. Nevertheless, the case history of tuition tax legislation is checkered. Because of the unsettled state of establishment clause jurisprudence, courts have used a number of different rationales to uphold or invalidate tuition tax legislation. Even the opinions of the Supreme Court reveal inconsistencies in decision making.[58] It must be

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constitutional, in part because their atmosphere is less religiously-pervasive).

51. *Lemon*, 403 U.S. at 606.

52. Levitt v. Committee for Pub. Educ. & Religious Liberty, 413 U.S. 472, 474-75 (1973). The state also reimbursed the schools for other services, such as maintaining student health and enrollment records. *Id.* at 474.

53. Meek v. Pittenger, 421 U.S. 349, 354-55 (1975) (textbook loans were allowed). *See* Wolman v. Walter, 433 U.S. 229 (1977) (loan of instructional materials to students held to be unconstitutional). *But see* Mueller v. Allen, 103 S. Ct. 3062 (1983) (upholding a tax deduction for parents who buy instructional materials for their children's education).

54. Meek v. Pittenger, 421 U.S. 349 (1975). These services included counseling, testing, speech and hearing therapy, and teaching for extraordinary or remedial students. *Id.* at 352-53. *But cf.* Wolman v. Walter, 433 U.S. 229 (1977) (upholding a law that provided standardized tests and psychological services at private schools).

55. Wolman v. Walter, 433 U.S. 229 (1977).

56. Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646 (1980).

57. *See* Roemer v. Maryland Pub. Works Bd., 426 U.S. 736 (1976) (noncategorical grants to private colleges); Hunt v. McNair, 413 U.S. 734 (1973) (revenue bonds issued to finance construction at religiously-affiliated college); Tilton v. Richardson, 403 U.S. 672 (1971) (federal construction grants); *see also* Widmar v. Vincent, 454 U.S. 263 (1981) (prohibiting state colleges from denying students access to open classrooms for religious worship or discussion).

58. *See* Grit v. Wolman, 413 U.S. 901 (1973) (affirming district court opinion

noted here that the majority of federal courts have declared tuition tax laws unconstitutional.[59] The case history in this area effectively began with *Committee for Public Education v. Nyquist*.[60]

In *Nyquist*, the Court invalidated a New York law allowing for tuition grants and deductions to parents whose children attended nonpublic schools. These grants were carefully structured to provide all eligible parents with approximately the same net benefit. That is, the amount received as a grant for those parents whose income was less than $5,000 was approximately equal to the reduction in state taxes to those parents earning $24,000.[61] The private school students constituted approximately twenty percent of all students, and eighty-five percent of those private students attended sectarian schools.[62] The Court refused to grant immunity to laws that aided parents, rather than schools.[63] It distinguished *Everson* and *Allen* on the ground that the laws at issue in those cases provided aid to all school children, not merely nonpublic school children.[64] The Court held that tuition grants to parents, as an incentive to send children to sectarian schools, were violative of the establishment clause, whether or not the dollars found their way to sectarian schools.[65]

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without comment); Wolman v. Essex, 409 U.S. 808 (1972) (affirming district court opinion in a memorandum decision). Both *Essex* and *Grit* concerned Ohio laws that provided for financial grants to parents of nonpublic school children. The refusal of the Court to provide an analysis in these cases perpetuated the turmoil surrounding the tuition tax issue until *Mueller*. As will be discussed, Committee for Pub. Educ. v. Nyquist, 413 U.S. 756 (1973) left open the question of a true tuition tax deduction.

59. The two exceptions to this line of cases are Wolman v. Essex, 342 F. Supp. 399 (S.D. Ohio), *aff'd mem.*, 409 U.S. 808 (1972), and Kosydar v. Wolman, 353 F. Supp. 744 (S.D. Ohio 1972), *aff'd, sub. nom.* Grit v. Wolman, 413 U.S. 901 (1973). *See supra* note 58.

60. 413 U.S. 756 (1973).

61. Parents received no benefit if their income was greater than $25,000. *Id.* at 765-66.

62. *Id.* at 768. Thus, sectarian school students comprised almost 17% of all students, or a total of between 595,000 and 680,000 students. In *Lemon*, the Court made a similar notation with regard to Rhode Island and Pennsylvania nonpublic school students. It stated that in Rhode Island, approximately 96% of those students attended Roman Catholic schools, *id.* at 608, and greater than 96% attended sectarian schools in Pennsylvania (where most schools were affiliated with the Roman Catholic Church). *Id.* at 610.

63. 413 U.S. at 781.

64. *Id.* at 782 n.38. It also noted that the statute did not contain the elements of a genuine tax deduction, reserving that issue until *Mueller*. *Id.* at 790 n.49.

65. *Id.* at 786. This appears to be the converse of the doctrine of unconstitutional conditions. *See* Sherbert v. Verner, 374 U.S. 398, 404 (1963) (leaving one the choice between religious belief that one must not work on Saturday and unemployment compensation benefits is unconstitutional). Instead of requiring one to forego a constitutional right, the *Nyquist* dicta said that permitting one to exercise his parental right to educate his child in an atmosphere according to the dictates of his religion, by use of state financial incentives, violates the establishment clause. *But cf.* Wisconsin v. Yoder,

In *Sloan v. Lemon*,[66] a similar tuition reimbursement grant to the parents of nonpublic school children was held unconstitutional. There the Court also rejected the argument that the equal protection clause would permit the law to be severed and held constitutional with respect to the parents of nonsectarian private school children.[67]

B. *Lower Court Decisions*

The lower court decisions generally followed the decision in *Nyquist*. Although the courts noted the cautionary language of the majority opinion, they nevertheless held that the aid in issue was unconstitutional in all but one case.[68] The *Nyquist* decision appeared to the lower courts to be a blanket statement forbidding any type of tuition tax law. This belief seemed well founded until *Mueller*.

A court in a pre-*Nyquist* decision, *Wolman v. Essex*,[69] held that a program of financial grants to parents of nonpublic school children was unconstitutional. The court cited statistics which showed that ninety-eight percent of eligible students attended sectarian schools.[70] It applied the three-pronged *Lemon* test and held that the primary effect of the law was to advance religion and that it accordingly was unconstitutional.[71] The opinion analyzed the class of beneficiaries in light of the above statistics and determined that the law was not neutral. It specifically acknowledged the need to discuss entanglement problems before it could determine the constitutionality of the law. Because there were few indicia of neutrality, the court used a stricter analysis under the excessive entanglement prong.[72] This analysis resulted in a finding that the law excessively entangled the state with religion.[73]

Prior to *Nyquist*, a successor statute to the one involved in *Essex* was held unconstitutional in *Kosydar v. Wolman*.[74] In *Kosydar*, the

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406 U.S. 205 (1972) (state's interest in educating children must be balanced against parental interest in the religious upbringing of children); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (parental right to direct the education of one's child). Further, in *Everson*, it was assumed that free transportation encouraged parents to send their children to nonpublic schools. This, however, did not violate the law. 330 U.S. at 17.

66. 413 U.S. 825 (1973).

67. *Id.* at 834. The equal protection clause may have required such a decision, if only to forestall a suit by sectarian school children claiming that such a statute would violate principles of equitable treatment and neutrality.

68. The one case in which the aid was not found to be unconstitutional was Minnesota Civil Liberties Union v. Roemer, 452 F. Supp. 1316 (D. Minn. 1978).

69. 342 F. Supp. 399, 403 (S.D. Ohio), *aff'd mem.*, 409 U.S. 808 (1972).

70. *Id.* at 403. 95% of these students attended Roman Catholic schools.

71. *Id.* at 412-13.

72. *Id.* at 413-19.

73. *Id.*

74. 353 F. Supp. 744 (S.D. Ohio 1972), *aff'd, sub. nom.* Grit v. Wolman, 413 U.S. 901 (1973).

statute at issue was a tax credit available to parents who incurred "educational expenses in excess of those borne by parents generally."[75] The tax credit permitted a taxpayer to receive up to ninety dollars to offset state and local property taxes. In no event, however, could the taxpayer receive money in excess of taxes paid.[76] The court found that the credit put parents of private school children at an economic advantage when compared to taxpayers generally. Therefore, it found that the class of beneficiaries was predominantly sectarian.[77] Such a finding meant that the statute was subject to strict scrutiny, which was, of course, fatal to the law.[78]

In *Minnesota Civil Liberties Union v. Roemer*,[79] a federal district court held that the statute later upheld in *Mueller* was constitutional. The decision noted that, unlike the laws discussed above, this statute was facially neutral. The court, however, did not rest on this point.[80] The statute had two desirable characteristics according to the court's analysis: 1) it was economically a more remote form of aid to parents than tax credits,[81] and 2) the law, unlike most tuition tax relief legislation, had been in effect since 1955.[82]

In *Public Funds for Public Schools v. Byrne*,[83] a law providing a $1,000 exemption for parents of dependent children who attended nonpublic schools on a full time basis was held unconstitutional. There, the appellate court relied on the district court's finding that ninety-five percent of nonpublic elementary and secondary schools were religiously affiliated.[84] Such a limitation of the class of beneficiaries to parents of nonpublic school children was held to be constitutionally impermissible.[85]

The final case discussing tuition tax benefits before *Mueller* was

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75. 353 F. Supp. at 748.

76. *Id.* at 750.

77. *Id.* at 761.

78. *Id.* The first case that used the term strict scrutiny was Korematsu v. United States, 323 U.S. 214 (1944). It is one of the few cases in which a classification survived such scrutiny. The standard is most often used when laws are written with regard to race. The *Kosydar* court distinguished the law before it from a Hawaii statute, Hawaii Rev. Stat. § 235-57(b) (repealed 1974), that granted tax credits to all parent-taxpayers based on an inverse relationship to income. 353 F. Supp. at 761 n.21.

79. 452 F. Supp. 1316 (D. Minn. 1978).

80. *Id.* at 1319-20.

81. *Id.* at 1321-22.

82. *Id.* at 1322. This historical bias was relied on in part to uphold property tax exemptions to religious institutions in *Walz*. The courts in *Mueller*, however, did not rely on this factor in their decisions. *See* Minnesota Civil Liberties Union v. Minnesota, 224 N.W.2d 344 (1974), *cert. denied*, 421 U.S. 988 (1975) (finding a Minnesota tax *credit* law unconstitutional).

83. 590 F.2d 514 (3d Cir.), *aff'd mem.*, 442 U.S. 907 (1979).

84. *Id.* at 516-17.

85. *Id.* at 517-18.

Rhode Island Federation of Teachers v. Norberg.[86] The statute at issue in *Norberg* was, for all practical purposes, identical to the statute involved in *Mueller*.[87] The First Circuit found the statute unconstitutional because its primary effect was to advance religion.[88] The court noted statistics showing that ninety-four percent of students attending nonpublic schools attended sectarian schools[89] and, therefore, although the law was facially neutral, a de facto analysis was used to assess the primary effect of the statute. Under this analysis, the court concluded that the tax benefit was conferred along sectarian lines.[90] The court distinguished *Roemer* by reasoning that *Roemer* stipulated that a lesser benefit be directed to private school students, only "some" of whom attended sectarian schools.[91] The *Norberg* court also held that textbook and transportation deductions were invalid.[92]

The state of the law was decidedly against tuition tax deductions when the issue arose in *Mueller*. *Roemer* provided the only judicial support for the tuition tax benefits permitted by Minnesota Statutes section 220.09(22). In *Norberg*, however, an equivalent law had been held unconstitutional. All other courts deciding cases that involved benefits to parents for tuition expenses had held the laws in issue to be unconstitutional. Thus, although the Minnesota law had first been enacted in 1955 (it was reenacted in 1975), its historical validity could not be guaranteed by *Roemer*.

IV. ANALYSIS OF THE *Mueller* CASE

A. *The Federal District Court Opinion*[93]

The *Mueller* case began in the same Minnesota federal district court that previously had upheld the Minnesota tuition tax deduction

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86. 630 F.2d 855 (1st Cir. 1980).

87. One of the Supreme Court's reasons for granting certiorari in the *Mueller* case was the conflict in decisions between the First and Eighth Circuits. 103 S. Ct. at 3064.

88. *Norberg*, 630 F.2d at 859-60.

89. *Id.*

90. *Id.*

91. *Id.* at 860-61. It was relying on the perceived difference in state tax schemes. Rhode Island piggybacked taxes on the federal tax system, thus providing a greater reduction in taxes. On average, the reduction was $33 per Rhode Island taxpayer. *Id.* at 859.

92. The textbook deduction was invalid because, although the parents would purchase the books, it was unlikely that the parents would select the books. Thus, when determining the character of the book, the government and the religious institution would have to resolve the dispute. *Id.* at 862-63. The transportation deduction was invalid because it was not severable from the rest of the statute. *Id.* at 863.

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

statute in *Roemer*.[94] *Roemer* was influential in the initial portion of *Mueller* in that the court dismissed three of the *Mueller* plaintiffs under the doctrine of res judicata, finding that those plaintiffs had an interest in *Roemer*.[95]

The district court then moved to a discussion of the facts of *Mueller*. It determined that: first, section 290.09(22) was a " 'true tax deduction' " statute;[96] second, the statute did not provide direct financial aid to suspect beneficiaries;[97] third, the statute did not subsidize any activity;[98] fourth, the statute did not work as a credit against an already determined tax;[99] and last, the statute conferred a tax benefit only if the deduction moved the taxpayer to a lower tax bracket.[100] The court then defined tuition[101] and other allowable deductions.[102]

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94. Minnesota Civil Liberties Union v. Roemer, 452 F. Supp. 1316 (D. Minn. 1978). *Roemer* had been decided by a specially convened three-judge panel.

95. 514 F. Supp. at 999.

96. *Id.* at 1000.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. Tuition expenses were defined as:

1. Tuition in the ordinary sense.
2. Tuition to public school students who attend public schools outside their residence school districts.
3. Certain summer school tuition.
4. Tuition charged by a school for slow learner private tutoring services.
5. Tuition for instruction provided by an elementary or secondary school to students who are physically unable to attend classes at such school.
6. Tuition charged by a private tutor or by a school that is not an elementary or secondary school if the institution is acceptable for credit in an elementary or secondary school.
7. Montessori School tuition for grades K through 12.
8. Tuition for driver education when it is part of the school curriculum.

Id.

102. Transportation expenses included:

[T]he cost of transporting students in school districts that do not provide free transportation, the cost of transporting students who live in one district but attend school in another, and the cost of transporting students who attend school in their residence district but who do not qualify for free transportation because of proximity to their schools of attendance.

Id. Textbook and other instructional material deductions included:

1. Cost of tennis shoes and sweatsuits for physical education.
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.
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.

The court next determined that, although the basic issue was the same as that which was involved in *Mueller* and *Roemer*, it was not bound by stare decisis.[103] It further stated, however, that it need only discuss the primary effect prong of the *Lemon* test since the new facts offered by the plaintiffs affected only that aspect of the test.[104] It cited *Roemer* as controlling with regard to any question of the statute's constitutionality under the purpose[105] and entanglement prongs.[106] In other words, the court presumed that the law had a facially neutral purpose and that it did not create an excessive entanglement between religion and government.

The plaintiffs' primary argument can be characterized as an attack on the neutrality of the statute's effect.[107] They buttressed this attack with statistics showing that between eighty-two and ninety-six percent of students paying tuition attended sectarian schools.[108] Defendants argued that no Supreme Court decision required a factual inquiry into the breadth of the class affected when a facially neutral statute was in question.[109] The court found the latter argument unpersuasive, stating that the Supreme Court had never been faced with the issue framed by the defendants.[110]

The court reasoned that its decision rested on the question of whether the statute more closely resembled the provision in *Nyquist* or the one in *Walz*. The court concurred with the *Roemer* decision, finding that the statute bore a greater resemblance to that at issue in *Walz*.[111] The court found support for its decision in factual data[112] that

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8. Rental fees paid to the school for musical instruments.

9. Cost of pencils and special notebooks required for class.

Id.

103. "[A] court's decision is not binding upon courts of equal rank." 514 F. Supp. at 1001. The court then cited Farley v. Farley, 481 F.2d 1009, 1012 (2d Cir. 1973), for the proposition that the decision of a three-judge district court has no greater precedential value than any other district court decision and, therefore, is not binding on another district court.

104. 514 F. Supp. at 1001. *See* Abington School Dist. v. Schempp, 374 U.S. at 222 ("[The] test may be stated as follows: what are the purpose and the primary effect of the enactment?").

105. 514 F. Supp. at 1001.

106. *Id.* at 1002-03. *See* Walz v. Tax Comm'n, 397 U.S. at 674 ("We must also be sure that the end result—the effect—is not an excessive government entanglement with religion.").

107. *See* 514 F. Supp. at 1002.

108. *Id.* at 1001. The court further noted that the plaintiffs had asked it to focus its analysis on the tuition deduction since the textbook and transportation deductions were de minimis. *Id.*

109. *Id.* at 1002.

110. *Id.* The defendants argued alternatively that if the court chose to conduct a factual inquiry, the textbook and transportation deductions were not de minimis and should be considered. *Id.*

111. *Id.*

showed the statute to provide widely distributed tax relief.[113] The court stated that "a law does not advance religion when its benefits are neutrally and widely distributed and from which religious institutions benefit only incidentally and indirectly."[114]

The court quickly dismissed the plaintiffs' arguments of excessive entanglement and infringement of free exercise rights.[115] In its conclusion, the court wrote that the statistical argument put forth by the plaintiffs "lacks credibility by reason of omissions of serious significance."[116]

The district court refused to rule on the factual analysis argument as a disqualifying standard. In upholding the statute, the court relied on facts put forth by defendants regarding the distribution of benefits. The court did take note of the defendants' contention that, at its broadest, the statute would allow fourteen to eighteen percent of taxpayers to use the tuition deductions for nonsectarian tuition.[117] Although other tuition grant decisions[118] had seemed to indicate that a tuition deduction, tax credit, or exemption was unconstitutional if eighty-two to eight-six percent of the benefits accrued to those who paid sectarian school tuition,[119] the district court was not persuaded by

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112. *Id.* Tuition tax deductions were available for summer school tuition and driver education fees. An affidavit submitted to the court stated that over $2,000,000 in tuition was paid to *public* schools.

113. *Id.*

114. *Id.* (citing Walz v. Tax Comm'n, 397 U.S. at 672-76).

115. *Id.* at 1003.

116. *Id.* The court was referring to the plaintiffs' reliance on statistical data from the Minnesota Department of Education. Defendants had argued that part time tuition (*e.g.*, summer school and driver education), public school tuition, and textbook and transportation deductions should be added to the plaintiffs' statistics. This position cast doubt on both the validity of the plaintiffs' statistics and their argument, as well as helping to buttress the defendants' argument.

117. *Id.* at 1002.

118. In Rhode Island Fed'n of Teachers v. Norberg, 630 F.2d 855, 859-60 (1st Cir. 1980), the court stated that 94% of Rhode Island students attending nonpublic schools attended sectarian schools. It also noted that, although no evidence was received by the district court regarding the percentage of students whose parents were eligible for the deduction who attended parochial schools outside Rhode Island, 79% of students enrolled in New England nonpublic schools attended parochial schools. This latter percentage was less than the posited maximum of 82% argued by defendants in *Mueller*. Yet, the district court in *Mueller* held that an even greater percentage of the benefits was not a constitutional bar. *See* Public Funds for Pub. Schools v. Byrne, 590 F.2d 514, 517 (3d Cir. 1979) (The court noted in passing that the tuition grant statute held unconstitutional in *Nyquist* was a New York statute. There, 85% of nonpublic schools were religiously affiliated.). In other contexts, the Supreme Court has noted the percentage of sectarian school students compared to all nonpublic school students at the secondary and elementary school level. *See Meek*, 421 U.S. at 364; Sloan v. Lemon, 413 U.S. 825, 830 (1973); *Lemon*, 403 U.S. at 608, 610.

119. Although 82-96% of the students benefited by the Minnesota statute attended sectarian schools, the district court in *Mueller* found that this did not act as a

those numbers.

B. *The Court of Appeals Decision*

The district court's decision was appealed to the United States Court of Appeals for the Eighth Circuit.[120] The court of appeals began its opinion by summarizing the facts found by the district court. It listed the tuition deductions found available by the district court[121] and noted that the statute created a true tax deduction, not a credit.[122] It reiterated the fact that a taxpayer received a tax benefit only if the decrease in net taxable income moved him to a lower tax bracket.[123]

The appeals court noted that existing standards under the religion clauses did not afford "bright line" guidance.[124] It summarized establishment clause case law by stating that while a law may constitute an establishment of religion, despite equally aiding all religions and not promoting a state religion,[125] those laws indirectly benefiting religions are not per se unconstitutional.[126]

The court then analyzed the statute under the three-prong test enunciated in *Lemon v. Kurtzman*.[127] The court of appeals responded first to the plaintiffs' argument that the preeminent purpose of the statute was to aid religion since statistics showed that it aided those parents whose children attended sectarian schools. Noting the defendants' replies to this argument,[128] the court found the statute's manifest secular purpose to be the enhancement of the quality of education in all schools.[129]

The plaintiffs' argument regarding the primary effect of the stat-

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constitutional bar. 514 F. Supp. at 1001-03.

120. Mueller v. Allen, 676 F.2d 1195 (8th Cir. 1982), *aff'd*, 103 S. Ct. 3062 (1983).

121. 676 F.2d at 1996 nn.2-4.

122. *Id.* at 1197.

123. *Id.*

124. *Id.* (citing Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 760-61 (1973)).

125. *Id.* (citing *Everson*, 330 U.S. at 15).

126. *Id.* (citing Widmar v. Vincent, 454 U.S. 263 (1981); Wolman v. Walter, 433 U.S. 229 (1977); Hunt v. McNair, 413 U.S. 734 (1973); Tilton v. Richardson, 403 U.S. 672 (1971); Walz v. Tax Comm'n, 397 U.S. 664 (1970); Board of Educ. v. Allen, 392 U.S. 236 (1968)).

127. 403 U.S. 602 (1971). "First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; [and] finally, the statute must not foster an 'excessive government entanglement with religion.' " *Id.* at 612-13 (citation omitted).

128. The defendants had argued that the plaintiffs were attempting to bootstrap the secular purpose argument with a primary effect argument, and that the statute's purpose was to help parents provide their children with a safe, effective, and diverse educational environment. 676 F.2d at 1198.

129. *Id.*

ute used the breadth of class factor in two distinct ways: first, the plaintiffs cited Minnesota Department of Education data showing that only 4.56% of the students attending nonpublic schools attended nonsectarian schools in 1979-80 school year;[130] second, the plaintiffs argued that the revenue lost through the tuition deduction exceeded $2,400,000 and that seventy-one percent of this money was attributable to benefits given parents whose children attended sectarian schools.[131]

The appeals court interpreted the Supreme Court decision in *Nyquist* as having turned on several factors. The statute at issue in *Nyquist* was held unconstitutional because the deductions were a type of "forgiveness" in exchange for sending children to sectarian schools. In this way, the statute acted more as a tax credit than as a deduction.[132] Further, the statute's applicability was limited to parents whose children attended nonpublic schools.[133]

Next, the court of appeals discussed the conflicting decisions in *Minnesota Civil Liberties Union v. Roemer*[134] and *Rhode Island Federation of Teachers v. Norberg*.[135] The court conceded that the statute held unconstitutional in *Norberg* was "nearly identical" to the statute before it.[136] It reviewed the *Norberg* court's method of distinguishing *Roemer*. In *Roemer*, the parties had stipulated that "some" students whose parents were eligible for the deduction attended sectarian schools.[137] The *Norberg* court emphasized that ninety-four percent of those students attending tuition funded schools attended sectarian schools.[138] The *Mueller* court stated in a footnote[139] that the *Roemer* stipulation was relevant only to deductions regarding textbook and transportation expenses. Thus, the *Mueller* opinion found this distinction "somewhat dubious."[140]

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130. *Id.* The court added the word "purportedly" before the phrase nonsectarian schools. The court also wrote that only 3.71% of nonpublic school students attended nonsectarian schools during 1978-79.

131. *Id.* at 1199. This argument is interesting because it appears to mean that 29% of all tuition deduction benefits were given to parents whose children did not attend sectarian schools. This contrasts sharply with the argument attributed to the plaintiffs in the district court opinion, which was that the maximum theoretical scope of parents who paid tuition for nonsectarian schooling was 14 to 18%. *See* 514 F. Supp. at 1002. While these two figures do not *directly* conflict with one another, the plaintiffs' reliance on this argument seems to support the district court's conclusion that the tax benefits were widely distributed.

132. 676 F.2d at 1199.

133. *Id.* at 1200.

134. 452 F. Supp. 1316 (D. Minn. 1978).

135. 630 F.2d 855 (1st Cir. 1980).

136. 676 F.2d at 1200.

137. *Id.*

138. *Id.*

139. *Id.* at 1200 n.11.

140. *Id.*

The court of appeals also noted that the district court in *Norberg*[141] found the statute unconstitutional because the deductions available for instructional materials and equipment[142] excessively entangled government with religion.[143] The court stated that the proofs in *Norberg* and *Mueller* were "almost identical and similarly uninformative."[144]

The court briefly reviewed the transportation and textbook[145] deductions before finding them constitutional. It did recognize, however, that deductions for equipment and other materials required it to distinguish *Meek v. Pittenger*[146] and *Wolman v. Walter*.[147] The court distinguished these cases on the ground that the tax benefit in *Mueller* accrued only to the parent, not to the sectarian school.[148] It also noted that *Nyquist* held that directing benefits to parents instead of schools did not immunize a statute from attack. *Nyquist*, however, did not require a contrary decision since the type of material available for deductions was not material that aided the religious schools. Instead the material aided the student. This indirectness of aid was held to distinguish the Minnesota statute from that at issue in *Meek*.[149] The court dismissed the excessive entanglement argument raised by the district court in *Norberg*[150] by indicating that any administrative entanglement created by the statute was negligible and that political divisiveness issues were inapplicable.[151]

The court then addressed the issue of the tuition deduction. It immediately stated that it disagreed with the decision in *Norberg*, and distinguished that case.[152] The court first noted that the question of whether a genuine tax deduction was constitutional was reserved by the

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141. 479 F. Supp. 1364, 1372 (D.R.I. 1979), *aff'd*, 630 F.2d 855 (1st. Cir. 1980).

142. The court of appeals noted that other allowable deductions, in addition to secular textbooks available under § 220.09(22) (1978), were listed by the *Mueller* district court. 676 F.2d at 1196 n.4 (citing 514 F. Supp. at 1000). *See supra* notes 101-02.

143. 676 F.2d at 1200.

144. *Id.* (footnote omitted). The court quoted the district court's review of the parties' statistical analysis in a footnote. It concluded with a paragraph advocating a review that was neither a de jure nor a de facto approach. *Id.* at 1200 n.13.

145. This "textbook" deduction included deductions for other instructional materials and equipment. *See supra* note 102.

146. 421 U.S. 349 (1975) (instructional material such as maps, charts, film, and laboratory equipment loaned to schools unconstitutional).

147. 433 U.S. 229 (1977) (purchases of instructional materials by state that, in turn, loaned the materials to nonpublic school students held unconstitutional).

148. 676 F.2d at 1202.

149. *Id.*

150. 479 F. Supp. at 1372.

151. 676 F.2d at 1202.

152. *Id.* at 1202-03.

Court in *Nyquist*.[153] It pointed out that *Nyquist* determined that directing a tax credit to parents rather than schools was not a controlling factor. Thus, unlike *Mueller*, *Nyquist* did not involve a genuine tax deduction. The court further emphasized[154] that the law at issue in *Nyquist* was limited in its application to parents whose children attended nonpublic schools, while the Minnesota statute did not limit eligibility in that manner.[155]

Moving to a deeper analysis of the character of the Minnesota deduction, the court tackled two assertions made by the *Norberg* district court:[156] one, that the tuition deduction was economically equivalent to the state providing at least a part of the tuition expenses; and two, that broadening the deduction to include the parents of all school children was "mere window dressing."[157] These assertions, if accepted, would have required a reversal of the decision of the *Mueller* district court.

The court of appeals acknowledged that the deduction benefited both parents and the schools that their children attended. The court, however, characterized the benefit to the schools in a manner that underscored its determination that such a benefit was attenuated and indirect: "[w]e are well aware that we are not dealing with secular textbooks or bus rides but with tax benefits for tuition payments to elementary and secondary institutions, some of which provide religious training along with secular education."[158]

The court then reiterated its belief that a facially neutral statute was significantly different for analytical purposes than a statute facially benefiting only private school parents. It further stated that because parents received a tax benefit only if the deduction moved them to a lower tax bracket, the benefit was more diffuse than in the Rhode Island statute at issue in *Norberg*. There, because of Rhode Island tax laws, the average parent-taxpayer owing federal taxes would receive a tax benefit of approximately thirty-three dollars.[159]

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153. *Id.* at 1203 (citing 413 U.S. at 790 n.49).

154. *Id.*

155. Minn. Stat. § 220.09(22) (1978) was applicable to all parents whose children attended elementary or secondary schools.

156. The *Norberg* court made these assertions in 479 F. Supp. at 1371.

157. 676 F.2d at 1204 (quoting *Norberg*, 497 F. Supp. at 1371).

158. *Id.* (footnote omitted). The court refused to accept the Minnesota Department of Education data as determinative of the outcome. It also refused to view sectarian schools as providing only a religious education so that the benefits could be deemed violative of the establishment clause. Instead of using the "permeated with religion" standard (*see, e.g.*, *Lemon*, 403 U.S. at 613; *Meek*, 421 U.S. at 364-65) that emphasized the religious mission of the schools, the opinion emphasized the separability of the functions, an analysis that also was used in *Allen*, 392 U.S. at 244-45.

159. Rhode Island's tax laws piggybacked the federal tax law. That is, state tax was based in part on one's federal tax liability. *See Norberg*, 630 F.2d at 859. This reason seems contradictory since the court in a previous footnote stated that a rule invalidating a law based on "statistical breakdown of sectarian and nonsectarian

The tuition deduction, according to the court, is akin to deductions for charitable contributions.[160] The court admitted that religious institutions could receive substantial benefits from the law, but found that this did not mean that the *primary* effect of the law was to advance religion.[161] The court provided an example by asking whether a law granting free bus rides or textbooks to public school children would be unconstitutional if it were amended to include parochial school children.[162] The court believed that, had the laws involved in *Everson*[163] and *Board of Education v. Allen*[164] been amended to include parochial students, the amendment would not have been invalid as having the purpose or primary effect of aiding religious schooling.[165]

C. *Analysis*

The opinion of the court of appeals is unsatisfactory in two respects. First, the court, in reasoning that the case fell in a gray area between unconstitutional tax credits (*Nyquist*) and constitutional tax exemptions (*Walz*), refused to attempt to decide *Mueller* on other than an ad hoc basis. It refused to engage in either a de facto or a de jure review of the statute. The only reason given for this rejection of traditional analysis was the lack of Supreme Court precedent.[166] Such an excuse ignores the duty of the court of appeals to provide guidance to lower courts within the circuit—particularly when there is no Supreme Court precedent.

Second, the court failed to recognize that a free exercise or equal protection right might be implicated in the case. In *Pierce v. Society of Sisters*[167] and *Wisconsin v. Yoder*,[168] the Supreme Court enunciated the right of parents to direct and choose a religious education for their

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schools would be rigid and arbitrary." 676 F.2d at 1200 n.13. It would seem just as arbitrary to find a law unconstitutional merely because the tax system is piggybacked to the federal system and, thus, allows all parents to benefit because the deductions are certain to reduce a taxpayer's state tax liability. It is likely that the court wished merely to demonstrate that, unlike the situation in *Nyquist*, the benefit was not carefully calibrated. *See* 676 F.2d at 1204.

160. *See Walz*, 397 U.S. 664 (holding constitutional a New York law permitting property tax exemptions for property belonging to religious organizations and used for religious worship). The Supreme Court has never passed on the issue of the constitutionality of tax deductions for charitable contributions to religious institutions.

161. 676 F.2d at 1205 (citing Tilton v. Richardson, 403 U.S. 672, 679 (1971)).

162. *Id.*

163. 330 U.S. 1 (1947).

164. 392 U.S. 236 (1968).

165. 676 F.2d at 1205.

166. *Id.* at 1200 n.13.

167. 268 U.S. 510 (1925). An article discussing the link between *Pierce* and tuition tax credits is Young & Tigges, *Federal Tuition Tax Credits and the Establishment Clause: A Constitutional Analysis*, 28 CATH. LAW. 35 (1983).

168. 406 U.S. 205 (1972).

children. The court of appeals, however, suggested that a law providing tuition deductions only to parents whose children attend public school would be constitutional.[169] Such a law could be considered unconstitutional under at least two theories. First, the refusal to extend the law to all parents may be construed as violative of either the establishment clause (by promoting secular education at the expense of religious education[170]) or the free exercise clause (by encouraging parents to forfeit their right under *Pierce* and *Yoder* to receive tax benefits[171]). Second, excluding a class of taxpayers from benefits on the basis of religion violates the equal protection clause[172] of the fourteenth amendment.[173]

Law review comments on the court of appeals decision were unfavorable.[174] Generally, commentators opined that the decision was not in a gray area, as claimed by the court,[175] but was controlled by *Nyquist*.[176] There were several reasons posited in support of this claim: first, that the *Mueller* court failed to separate religious and secular functions and, thus, the deduction impermissibly aided the former, violating the primary effect test;[177] second, that *Mueller* failed to recognize that making parents conduits of aid was not a bar to a finding of unconstitutionality in *Nyquist*;[178] third, that the court in *Mueller* failed

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169. 676 F.2d at 1205. *See* Sloan v. Lemon, 413 U.S. 825, 834 (1973) (refusing to sever a statute to permit only nonsectarian, nonpublic school children from receiving tuition reimbursements).

170. This type of law might be construed as unconstitutional since it would inhibit religion and, thus, would violate the primary effect prong. *See* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

171. *See* Sherbert v. Verner, 374 U.S. 398, 403-04 (1963) (government cannot condition the receipt of a benefit on one's giving up a constitutional right).

172. "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

173. Laws that affect individuals on the basis of religion would appear subject to strict scrutiny and not mere rationality since freedom of religion is a fundamental right. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 999-1003 (1978).

174. This author has found four articles that discuss the court of appeals decision in *Mueller*. They are: Comment, Mueller v. Allen: Do Tuition Tax Deductions Violate the Establishment Clause?, 68 IOWA L. REV. 539 (1983); Note, *Tax Deductions for Parents of Children Attending Public and Nonpublic Schools:* Mueller v. Allen, 71 KY. L.J. 685 (1983) [hereinafter cited as Note, *Nonpublic Schools*]; Note, *Inquiry*, *supra* note 6; Note, *supra* note 40.

175. 676 F.2d at 1205.

176. *See, e.g.*, Note, *Nonpublic Schools*, *supra* note 174, at 701.

177. *Id.* at 697.

178. *See* Note, *supra* note 40, at 286. This note also criticized the *Mueller* decision on the ground that parent benefit statutes (as opposed to statutes benefiting children, such as those present in Everson v. Board of Educ., 330 U.S. 1 (1947) (permitting as a health and safety measure the free transportation by bus of sectarian school children) and Board of Educ. v. Allen, 392 U.S. 236 (1968) (permitting the state to loan secular textbooks to sectarian school children)) have been consistently condemned. Note, *supra* note 40, at 286. It did this despite acknowledging that the Supreme Court had yet to adopt or reject such a theory. *Id.*

to recognize that *any* deduction would lower a taxpayer's tax liability—even if the taxpayer were not moved to a lower tax bracket;[179] fourth, that the *Mueller* court erred in using a de jure analysis rather than a de facto analysis;[180] and last, that the law in *Mueller* was invalid on excessive entanglement grounds.[181]

While persuasive arguments are made above, it is the contention of this author that the Eighth Circuit's decision in *Mueller* was correct. Even if elementary and secondary sectarian schools are inextricably bound with religion, parents have the right to educate their children at a religious school.[182] To declare unconstitutional a law that permits tuition deductions for *all* parents on the ground that some elementary and secondary schools utilized are religion-pervasive appears to severely restrict the right enunciated in *Pierce*. Further, such a result fails to adhere to the Supreme Court's principle of benevolent neutrality.[183] It shows a hostility to those who educate their children in accord with their religious obligations.[184] *Nyquist* opined only that directing benefits to individuals rather than religious institutions was not outcome-determinative.[185] It did not find that legislation benefiting parents need be deemed a ruse to benefit religious institutions. While it is true that a tuition deduction would reduce a taxpayer's liability, this point was not crucial to the court's decision. Instead, the *Mueller* court found that the Minnesota statute was a genuine tax deduction, not a calibrated, arbitrary benefit like the statute at issue in *Nyquist*.[186]

The decision in *Mueller* also has been criticized as adopting a de jure analysis instead of a de facto analysis. The court, however, refused to adopt either theory.[187] Instead, it analyzed *Mueller* on the basis of discerned distinctions from *Nyquist*.[188] The court did take note that the

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179. *See* Comment, *supra* note 174, at 552-53. The *Mueller* decision had noted that the law in *Nyquist* carefully calibrated the net benefit, while the instant law did not. 676 F.2d at 1204.

180. *See, e.g.*, Note, *Inquiry*, *supra* note 63, at 226-34.

181. One commentator has argued that the tuition deduction violates the political entanglement prong, *see* Note, *Nonpublic Schools*, *supra* note 174, at 698-99, and that the deduction for textbooks and other materials violates the administrative entanglement prong. *Id.* at 700-01. *See also* Comment, *supra* note 174, at 554-55. It also has been suggested that the tuition deduction promotes an excessive administrative entanglement. *See* Note, *supra* note 40, at 285.

182. *See* Pierce v. Society of Sisters, 268 U.S. 510 (1925).

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

184. *See* Wisconsin v. Yoder, 406 U.S. 605 (1972).

185. *See* 413 U.S. at 785-86.

186. 676 F.2d at 1199-1203; 514 F. Supp. at 1000; *see supra* note 64 and accompanying text.

187. *See* 676 F.2d at 1200 n.13. The court, however, did take note that the class of beneficiaries in *Mueller* was larger than in *Nyquist*.

188. *Id.* at 1203-05.

Thus, the New York statute in *Nyquist* can be distinguished from the Min-

class of beneficiaries in *Mueller* was larger than the class in *Nyquist*.[189] A strict de facto analysis would be erroneous since that analysis fails to take into account the reasons for the predominance of Roman Catholic schools in the United States. These reasons include the historical fact that many Catholic schools were organized as a response to the domination of public schools by Protestant sects[190] and that, for devout Catholic parents, educating their children with regard to Catholic precepts is a religious duty.[191] A de facto analysis would note only the proportion of sectarian school students to all nonpublic school students without noting the reasons why those percentages exist.[192]

The last argument made by several commentators was that the Minnesota statute excessively entangled government with religion either through administrative entanglements or by heightening the potential for political divisiveness. Neither of these arguments is convincing. As for the first prong of this argument, the only possible contact resulting from the statute would be an audit of the taxpayers by the state tax agency. In that case, the religious institution is not entangled with government, only the taxpayer is. The only other requirements for tuition eligibility are compliance with compulsory attendance statutes, nonprofit status, and adherence to state and federal civil rights statutes.[193] These secular requirements do not intrude excessively into religious matters. Regarding the "problem" of political divisiveness, one's religious beliefs need not be shed at the school house door.[194] Further, one must appreciate Justice Powell's concurrence in *Wolman*:

> *At this point in the 20th century we are quite far removed from the dangers that prompted the Framers to include the Establishment*

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nesota and Rhode Island statutes on the following basis: (1) the statute in *Nyquist* operated as a tax credit, not as a true deduction; and (2) the tax benefits in *Nyquist* were limited to the class of parents of private school children, as opposed to the broad class of parents with dependents in both public and nonpublic schools benefited under the Minnesota and Rhode Island states.

Id. (footnote omitted).

189. *Id.* at 1203.

190. C. ANTIEAU, A. DOWNEY & E. ROBERTS, FREEDOM FROM FEDERAL ESTABLISHMENT 71 (1964). *See also* Lemon v. Kurtzman, 403 U.S. 602, 645-47 (1971) (Brennan, J., concurring) (discussing the development of schools in 19th century New York City).

191. The Supreme Court recognized the importance of this value with respect to the Amish in Wisconsin v. Yoder, 406 U.S. 205 (1972).

192. *See, e.g., Norberg*, 630 F.2d at 859; *Byrne*, 590 F.2d at 516; *Wolman*, 342 F. Supp. at 403; *see also Nyquist*, 413 U.S. at 768. Each of these cases, while noting the percentages, nevertheless failed to explore the reasons for their existence.

193. 504 F. Supp. at 1003.

194. Support for this statement is to be found in Tinker v. Des Moines School Dist., 393 U.S. 503, 506 (1969) (upholding right of high school students to silently protest the Vietnam War while attending classes).

Clause in the Bill of Rights. . . . The risk of significant religious or denominational control over our democratic processes—or even of deep political division along religious lines—is remote, and when viewed against the positive contributions of sectarian schools, any such risk seems entirely tolerable in light of the continuing oversight of this Court.[195]

D. *The Supreme Court Decision*

The decision in *Mueller* made necessary the first extensive review of a tuition tax law by the Supreme Court since *Nyquist*. The issue left open for eleven years by *Nyquist*, whether a true tax deduction for tuition expenses was constitutional, finally was to be decided. By a slim margin, a majority held that such a deduction was constitutional.[196]

1. The Majority Opinion

The opinion of Justice Rehnquist began by noting that certiorari was granted because the decision in *Nyquist* reserved the question of the constitutionality of a genuine tax deduction[197] and because the *Mueller* decision caused a conflict between two circuits.[198] The opinion noted the following facts: Minnesota provides free elementary and secondary schools for its citizens; approximately ten percent[199] of all elementary and secondary school children attended nonpublic schools, ninety-five percent of which were considered sectarian; the statute in question was originally enacted in 1955, and revised in 1976 and 1978; the law limited the deduction to actual expenses for tuition, textbooks, and transportation in the amount of $500 for children enrolled in grades K through six and $700 for those enrolled in grades seven through twelve.[200]

Before citing the tripartite text enunciated in *Lemon*, the majority noted that the lines of demarcation in establishment clause jurisprudence were sometimes "dimly perceived."[201] The first principle enunciated by the Court that a program that aided a religiously affiliated institution was not per se unconstitutional.[202] It cited *Everson* and *Allen* as two examples of programs that in some allowable manner aided

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195. 433 U.S. 229, 263 (1977) (citation omitted).

196. Mueller v. Allen, 103 S. Ct. 3082 (1983).

197. *See* 413 U.S. at 790 n.49.

198. 103 S. Ct. at 3064.

199. Approximately 820,000 students attended Minnesota public schools. Approximately 91,000 students attended nonpublic schools in Minnesota. *Id.* at 3064-65.

200. *Id.*

201. *Id.* at 3065 (quoting *Lemon*, 403 U.S. at 612).

202. *Id.* (citing Hunt v. McNair, 413 U.S. 734, 742 (1973)). *See, e.g., Allen*, 392 U.S. 236 (1968); *Everson*, 330 U.S. 1 (1947).

religiously affiliated institutions.[203] The Court, however, observed that several cases[204] resembling *Everson* and *Allen* had been found invalid under the establishment clause. In the Court's opinion, the Minnesota statute bore "less resemblance"[205] to *Nyquist* than to the assistance programs upheld in *Everson* and *Allen*.[206]

The Court cited the *Lemon* test, emphasizing that the test was no more than a "helpful signpost."[207] Nevertheless, the statute at issue in *Mueller* was analyzed under that test. The Court had no problem in finding a secular purpose underlying the law. The plausible, secular reason for the statute, to defray the educational expenses of parents, was discernible on its face.[208]

In discussing whether the tuition deduction had the primary effect of advancing religion, the Court relied on those factors that the court of appeals had relied on to determine that the primary effect was not to advance religion. First, the statute was merely one of many deductions available under Minnesota law,[209] and the Court noted that state legislators, because of their familiarity with local conditions, are entitled to substantial deference in attempts to equalize tax burdens.[210] These points are important because it would appear that a state tax system disallowing all deductions, except tuition deductions, may be constitutionally infirm. Second, the statute also was available to all parents of school children, not just parents of nonpublic school children.[211] In *Ny-*

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203. The Court's citation to *Everson* and *Allen* in this instance appears to undercut the commentary that views these cases as constitutional only because the laws benefited the school children. The Court appears to realistically view these laws as eventually aiding religious institutions, as does the law upheld in *Mueller*. The Court concluded that the Minnesota statute bore less resemblance "to the statute invalidated in *Nyquist* than to those upheld in *Everson* and *Allen*." 103 S. Ct. at 3066.

204. Wolman v. Walter, 433 U.S. 229 (1977) (lending to sectarian schools instructional material and auxiliary services); Meek v. Pittenger, 421 U.S. 349 (1975) (lending sectarian schools staff for auxiliary services and instructional material); Levitt v. Committee for Public Educ., 413 U.S. 472 (1973) (reimbursing sectarian schools for costs of teacher prepared tests); Lemon v. Kurtzman, 403 U.S. 602 (1971) (aid to sectarian schools—paying for part of teachers' salaries and supplying to schools other instructional materials).

205. 103 S. Ct. at 3066. This characterization of the statute is the Court's traditional response to those arguing for a de jure or de facto analysis.

206. *Id.*

207. *Id.* (citing Hunt v. McNair, 413 U.S. 734, 741 (1973)).

208. *Id.* The Court also enumerated other reasons to show that this law had a secular purpose: the state's interest in an educated populace; its interest in the financial health of private schools; and the value of private schools as a bench mark for public schools. *Id.*

209. The Court cited Walz v. Tax Comm'n, 397 U.S. 664 (1970), as supporting the constitutionality of deductions for charitable contributions.

210. 103 S. Ct. 3067 (citing Regan v. Taxation with Representation, 103 S. Ct. 1997 (1983); Madden v. Kentucky, 309 U.S. 83, 87 (1940)).

211. *Id.* at 3068.

quist, the Court had suggested that *Everson* and *Allen* were distinguishable specifically on this basis.[212] Because the provision of the statute permits all parents the deduction, the breadth of the benefited class was an important index of secular effect.[213] The Court then analogized the case of *Widmar v. Vincent*.[214]

These two factors were sufficient to distinguish *Nyquist* from *Mueller*. Although the Court admitted that the economic consequences of the programs were similar,[215] the genuineness of the deduction mollified the problem, because the Court accorded deference to statutorily defined classifications.[216]

To distinguish other cases invalidating statutes benefiting religiously affiliated institutions, the Court emphasized that the tax deductions were taken by parents, not sectarian schools.[217] Admitting that "ultimately" this aid will accrue to the religious institutions,[218] the Court relied on the fact that the aid would become available to such institutions only after numerous, private choices by the parents of school children.[219] Again using *Widmar*, the Court stated that because aid would come about only after individual decisions were made, there was no imprimatur of state approval toward religion.[220] The Court further stressed that the establishment clause was designed to prevent political strife that historically resulted from governmental involvement with religion.[221] Historic purposes of the establishment clause did not encompass the tax benefit at issue in *Mueller*.[222]

The statistical (or de facto) analysis advocated by the petitioners was given short shrift by the Court:

> *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. Such an approach would scarcely provide the certainty that this field stands in need of, nor can we perceive principled standards*

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212. 413 U.S. at 782 n.38.

213. 103 S. Ct. at 3068.

214. 454 U.S. 263 (1981) (state university policy of excluding religious groups from using available classrooms based on the establishment clause is discriminatory; equal access for both religious and nonreligious groups is neutral and would not violate the establishment clause). *See infra* text accompanying note 257.

215. *See* 103 S. Ct. at 3068 n.6 (economic consequences are "difficult to distinguish"); *cf. id.* at 3076 (Marshall, J., dissenting).

216. *Id.* at 3067 n.4.

217. *Id.* at 3066 (all cases decided previously directly aided sectarian schools).

218. *Id.* at 3069.

219. *Id.*

220. *Id.* at 3068.

221. *Id.* at 3069.

222. *Id.* The Court granted that the establishment clause extended beyond establishing a state or federal church and state payments to churches.

by which such statistical evidence might be evaluated.[223]

Furthermore, this approach would fail to account for those parents who did not take benefit to which they were entitled.[224]

The Court found other reasons to refuse to adopt this type of analysis. First, there were special contributions made by nonpublic schools and parents of nonpublic school children in the education arena.[225] Second, the unequal effect of the statute acted as a rough return of state benefits given by taxpayers who both pay taxes to support public schools *and* relieve the state of the burden of educating their children.[226]

The Court also quickly dismissed any entanglement question. It discussed only one "plausible" problem—the determination by state officials of whether particular textbooks qualified for a deduction. The Court found this analogous to *Allen*, in which state officials determined whether books were secular before they were loaned to students.[227] The Court lastly held that the political divisiveness element of the establishment clause is confined to cases in which direct financial subsidies are paid to parochial schools or to teachers in those schools.[228]

2. The Dissent

The dissent argued that *Nyquist* was controlling: "[t]he Establishment Clause of the First Amendment prohibits a State from subsidizing religious education, whether it does so directly or indirectly."[229] The dissenters stated that this "principle of neutrality" forbade the tuition deduction at issue in *Mueller*.[230]

Two points were made in the dissent before it analyzed *Nyquist*. First, the dissent noted that the "vast majority" of parents eligible for the deduction had children attending sectarian schools.[231] Second, because sectarian elementary and secondary schools are religiously-perva-

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223. *Id.* at 3070.

224. *Id.*

225. *Id.* "Parochial schools, quite apart from their sectarian purpose, have provided an educational alternative for millions of young Americans; they often afford wholesome competition with our public schools; and in some States they relieve substantially the tax burden incident to the operation of public schools." *Id.* (citing Wolman v. Walter, 433 U.S. 229, 262 (1977) (Powell, J., concurring)).

226. *Id.*

227. *Id. See* 392 U.S. at 244-45.

228. 103 S. Ct. at 3071 n.11. This important step will eliminate the Scylla and Charibdis problem between primary effect and entanglement in tuition deduction cases.

229. *Id.* (Marshall, J., dissenting) (joining the dissent were Justices Brennan, Blackmun, and Stevens).

230. *Id.*

231. *Id.* at 3072.

sive,[232] there are no effective means of ensuring that state aid will be used for secular, neutral, and nonideological services.[233]

The dissent reverted to the de facto analysis in criticizing the majority's reliance on the facial neutrality of the statute.[234] It also maintained that the tax credit in *Nyquist* and the tax deduction in *Mueller* were indistinguishable.[235]

The dissent wrote that it believed the tax deduction for secular textbooks was invalid.[236] Intimating that *Allen* was wrongly decided,[237] the dissent nevertheless found that the Minnesota statute was distinguishable from the statute at issue in *Allen*.[238] The Minnesota statue was infirm, according to the dissent, because the textbooks were not necessarily identical to those used in public schools.[239]

E. *Analysis of the Supreme Court Decision*

The majority opinion in *Mueller* correctly upheld a facially neutral law that provided for tuition tax deductions in computing state tax liability. Proper constitutional analysis of tuition aid requires that "neutrality" be examined in light of the true factual milieu in which parents find themselves when financing their children's education in religiously-affiliated schools.

The principle of neutrality is offended when government inhibits religion, even when it does so by use of financial incentives.[240] Government creates an incentive for parents to send their children to public, secular schools because those schools charge no tuition.[241] While the Court has never held that this manner of financing violates the first amendment,[242] neutrality is nonetheless infringed. If one accepts that the principle of neutrality has been infringed, one must weigh that infringement against the underlying need for political noninvolvement

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232. *See, e.g.*, Meek v. Pittenger, 421 U.S. at 366 (quoting Hunt v. McNair, 413 U.S. at 743 (1973)).

233. *See* 103 S. Ct. at 3073 (Marshall, J., dissenting).

234. *Id.* at 3073-75.

235. *Id.* at 3075-76.

236. *Id.* at 3076-77 (the dissent further concluded that the deduction for other instructional materials was invalid).

237. *Id.* The dissent apparently believed that the decision in *Allen* was a result of the Court's inexperience and failure to take notice that secular textbooks loaned to nonpublic school children would be instrumental in the teaching of religion.

238. *Id.*

239. *Id.* at 3077.

240. *See* Note, *Government Neutrality*, *supra* note 6, at 701.

241. *Id.* at 700-01. Children do not have a fundamental constitutional right to education. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 35 (1973).

242. *See* Note, *Government Neutrality*, *supra* note 6, at 700-02 (citing Maher v. Roe, 432 U.S. 464, 477 (1977) (dictum) and Committee for Pub. Educ. v. Nyquist, 413 U.S. at 788-89).

when viewing a law that attempts to redress this imbalance.[243]

In the case of tuition tax deductions, the benefit is given to the individual taxpayer. Such a benefit affords the taxpayer the opportunity to educate his children in a religious atmosphere, as his religion may dictate. The financial disincentive to private education is lessened; thus, the parent is afforded a better opportunity to make an *individual* choice regarding religion. Government reduces its role as inducer of a choice. Political noninvolvement is only tangentially affected, since the benefits accrue to parents, not to religious institutions. While the religious institutions ultimately benefit, government and religion are not symbolically linked.[244]

The majority decision weighed the effect of the benefit of this deduction against the burden parents face when educating their children at a nonpublic school. The benefit was viewed in the context of the entire school financing system. In other words, this "incentive" to parents to have their children attend sectarian or other private schools was weighed against the disincentive of tuition-free, government-financed schools, which by law are required to be secular in nature.[245] This analysis should be contrasted with the erroneous refusal to engage in the weighing that resulted in the Court's rejecting the tax credit in *Nyquist*.[246]

It must be noted that the *Nyquist* Court looked only at the financial incentive side of the plan, holding that neutrality was violated because the plan aided religion.[247] This same approach was taken by the *Mueller* dissenters. The *Nyquist* analysis effectively erects political noninvolvement as the supreme, and perhaps sole, establishment clause value. If, on the other hand, the principal value of the establishment clause is to preserve voluntarism,[248] political noninvolvement must be balanced and weighed against government neutrality to determine a program's constitutionality.[249] The *Mueller* majority opinion implicitly

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243. *See generally* Note, *Government Neutrality*, *supra* note 236, at 698-702.

244. This symbolic identification between church and state is something that the establishment clause was designed to avoid. *See id.* at 699. *Compare* Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203 (1948) (released time for religious instruction *in* public school unconstitutional) *with* Zorach v. Clauson, 343 U.S. 306 (1952) (released time for religious instruction *outside* the public school constitutional).

245. *See* Abington School Dist. v. Schempp, 374 U.S. 203 (1963).

246. *See* Note, *Government Neutrality*, *supra* note 6, at 706-09; *see also* Kosydar v. Wolman, 353 F. Supp. 744 (S.D. Ohio 1972), *aff'd*, *sub. nom.* Grit v. Wolman, 413 U.S. 901 (1973).

247. Note, *Government Neutrality*, *supra* note 6, at 707 (citing *Nyquist*, 413 U.S. at 786).

248. *See supra* note 6.

249. *See* Note, *Government Neutrality*, *supra* note 6, at 708-09. That note states that the Court in *Nyquist* failed to balance neutrality and separation of church and state because it failed to see a conflict between those principles in *Nyquist*. That was a direct result of defining neutrality only within the context of the aid program and not

utilized this balancing analysis in approving the tuition deduction.[250]

The majority's implicit acceptance of a balancing analysis is demonstrated by the fact that, while the majority relied on the genuineness of the deduction and its availability to all parents in distinguishing *Mueller* from *Nyquist*, it also emphasized that this tuition tax deduction lessened the disincentive for parents to send their children to nonpublic schools.[251] On balance, lessening this disincentive was more important than maintaining a policy that forbade any program that aided a religiously-affiliated institution.[252] The same facts that distinguished *Mueller* from *Nyquist*, however, buttressed the Court's conclusion. Thus, the *Mueller* analysis can be seen as one that utilized the factual distinctions from *Nyquist*, as well as certain policy considerations, to implicitly remedy *Nyquist's* failure to properly integrate the policy of religious voluntarism into establishment clause analysis.

V. IMPLICATIONS FOR FEDERAL TUITION TAX LEGISLATION

The *Mueller* Court noted that the form of tuition aid must be examined for the light that it casts on its substance.[253] It used this same point to justify its reliance on the genuineness of the tax deduction. This point may be used by foes of tuition tax credits to oppose a federal law that differs, no matter how slightly, from the Minnesota statute. It also may be used, however, to support a bill differing from *Mueller*, when the substantive effect of that federal bill would be the same as that of the Minnesota statute.

If Congress were to pass tuition *tax deduction* legislation resembling the Minnesota statute, it would be easy for the Court to analogize *Mueller* to that case. If, however, the Congress passed legislation authorizing a *tax credit* for tuition, the legislation might be held to have departed from the dictates of *Mueller*. Nevertheless, the thrust of *Mueller* was that the values of neutrality and political noninvolvement should be balanced to support the overarching principle of voluntarism. If the tax credit is tied to a percentage of tuition paid and a maximum amount is set, there would appear to be no principled difference affecting the balance of the policies struck in *Mueller*.[254] That is, whether

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in the context of the whole school financing program.

250. 103 S. Ct. at 3067-70. The Court used the *Lemon* tripartite test to discuss the constitutionality of the tuition deduction, but it cautioned that this test was no more than a helpful signpost. In its discussion it emphasized the other factors that influenced its decision. "We find it useful . . . to *compare* the attenuated financial benefits flowing to parochial schools from [the statute] to the evils against which the Establishment Clause was designed to protect." *Id.* at 3069 (emphasis added).

251. *Id.* at 3069-70.

252. *Id.* at 3065 (citing Hunt v. McNair, 413 U.S. 734, 742 (1973)).

253. *Id.* at 3067 n.6 (citing *Lemon*, 403 U.S. at 614).

254. *Cf.* Public Funds for Public Schools v. Byrne, 590 F.2d 514 (3d Cir.), *aff'd*,

the relief is characterized as a "credit" or as a "deduction," so long as it is part of a general plan to aid taxpayers, it should be constitutional. The fact that a credit is a dollar-for-dollar reduction of taxes, while a deduction reduces a taxpayer's taxes only to the extent of his tax rate, is not sufficient to permit a court to distinguish *Mueller*.

Certainly, federal legislation also would be on safer constitutional ground if the statute were worded without regard to private-public distinctions, allowing all parents to take advantage of the legislation. Narrowing the class to only those parents whose children attend nonpublic schools probably should not invalidate the legislation, but it certainly would place one less chip on the balancing scale. Again, remembering that the establishment clause should promote the principle of voluntarism, with neutrality and political noninvolvement as counteracting weights to determine whether voluntarism is being achieved, the restriction of the class of beneficiaries to parents of nonpublic school children need not be fatal to the law. Under the *Lemon* test, the purpose of the statute still could be secular, given the deferential standards of review,[255] and the apparent applicability of the same benefit to education rationale emphasized in *Mueller*.

Nevertheless, a statute providing benefits only to private school parents could encounter problems under the "primary effect" test. Although the benefit to religious institutions under such a law would still be "attenuated," the statute could be more constitutionally suspect. The rationale of federal courts in similar situations before *Mueller* was that, under *Nyquist*, the restriction could be seen only as an impermissible aid to religion. While the facial neutrality of the law construed in *Mueller* was not the ratio decidendi for the Court's decision, it was a factor that mitigated arguments of unfairness and unequal treatment. The argument that facial neutrality is required to permit such a law, however, loses some force in light of the fact that state public education itself provides substantial aid to public school parents. There remain, however, nagging questions. Refusing to permit parents of public summer school students to deduct any special tuition expenses seems inherently unfair.

The constitutional question is whether a law written as suggested above evidences an imprimatur of state approval.[256] On balance, it could be argued strongly that it does not. For example, the *Mueller*

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442 U.S. 907 (1979) (holding unconstitutional a statute authorizing a $1,000 exemption from income for each dependent attending a nonpublic elementary or secondary school on a full time basis).

255. Since 1963 only two statutes have been held unconstitutional because of the secular purpose prong. *See* Stone v. Graham, 449 U.S. 39 (1980) (Ten Commandments posted in public school classrooms); Epperson v. Arkansas, 393 U.S. 97 (1968) (law prohibited the teaching of evolution).

256. *See* 103 S. Ct. at 3069.

decision noted that in *Widmar v. Vincent*[257] a law permitting all university student groups to meet at unused state university classrooms was not an unconstitutional establishment of religion simply because student religious groups wished to use those classrooms. Indeed, the Court held it impermissible to refuse to let those students use open classrooms.[258] Similarly, a recognition that public aid is already given to parents availing themselves of public schools should permit a smaller proportion of aid to be given to parents availing themselves of private schools. Such a law promotes neutrality by lessening financial discrimination against individuals who make the constitutionally protected choice to place their children in private schools. The same minimal effect on political noninvolvement that was present in *Mueller* exists in this situation. The political costs of passing a law benefiting only parents of nonpublic school children do not engender the type of involvement between government and religion for which the establishment clause was designed. Accordingly, it would appear that encouragement of voluntarism should permit the federal and state governments to choose to redress certain financial penalties incurred by parents choosing private education.

VI. CONCLUSION

The Supreme Court's decision in *Mueller v. Allen* correctly weighed all the relevant factors present in the case finding a state tuition tax deduction constitutional. By weighing the value of tuition tax deductions against the costs incurred by parents of nonpublic school children, the Court has more equitably aligned the principle of neutrality with first amendment values. The Court then weighed this more equitably aligned principle of neutrality against the statute's effect on political noninvolvement. The Court's holding that this method of analyzing relevant establishment clause policies better protected the overarching value of voluntarism was correct. It more fully implemented parents' rights to educate their children in a religious setting[259] in a society in which government plays a more pervasive role than in the past.[260]

257. 454 U.S. 263 (1981).
258. *Id.* at 276.
259. Pierce v. Society of Sisters, 268 U.S. 519 (1925).
260. *See* Giannella, *supra* note 6, at 513.