1983

Tax Deductions for Parents of Children Attending Public and Nonpublic Schools: Mueller v. Allen

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Recommended Citation
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Tax Deductions for Parents of Children Attending Public and Nonpublic Schools:  

*Mueller v. Allen*

INTRODUCTION

The United States Supreme Court has granted certiorari to *Mueller v. Allen*, a case in which the Eighth Circuit Court of Appeals held that a Minnesota statute authorizing personal income tax deductions for tuition, textbook and transportation expenses incurred on behalf of dependents attending public and nonpublic elementary and secondary schools did not violate the establishment clause of the first amendment. In reaching its decision, the Eighth Circuit was aware that the First Circuit Court of Appeals had recently struck down a virtually identical Rhode Island statute in *Rhode Island Federation of Teachers, AFL-CIO*, 676 F.2d 1195 (8th Cir. 1982), cert. granted, U.S.L.W. 3253 (U.S. Oct. 5, 1982).

*MINN. STAT. ANN. § 290.09, subd. 22 (West Supp. 1982).* This statute provides for the following deduction from gross income:

_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 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.

*U.S. CONST. amend. I, cl. 1.*

*R.I. GEN. LAWS § 44-30-12(c)(2) (1980).* This statute provides the following deduction:
Moreover, the court in *Mueller* recognized that this conflict between the circuits over the troublesome issue of the constitutional limits of state aid to nonpublic education presents a significant problem that must be resolved by the Supreme Court. The purpose of this Comment is to determine whether the statute reviewed in *Mueller* violates the establishment clause. It concludes that the transportation deduction is permissible, but the tuition and textbook deductions are not.

I. THE ESTABLISHMENT CLAUSE TEST

During the past three decades, the United States Supreme Court has developed a three part test for deciding whether a statute is within the limits imposed by the establishment clause. As summarized in the Court's opinion in *Lemon v. Kurtzman*, the

(c) Modifications Reducing Federal Adjusted Gross Income. There shall be subtracted from federal adjusted gross income (2) amounts paid to others, not to exceed five hundred ($500) dollars for each dependent in kindergarten through sixth (6th) grade and seven hundred ($700) dollars for each dependent in grades seven (7) through twelve (12) inclusive, for tuition, textbooks, and transportation of each such dependent attending an elementary or secondary school 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. As used in this section, “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 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.

5 630 F.2d 855 (1st Cir. 1980).
6 676 F.2d at 1201.
7 403 U.S. 602, 612-13 (1971). This three part test will hereinafter be referred to as the *Lemon* test. The *Lemon* test has not provided “bright line” guidance in adjudicating establishment clause disputes. Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 760-61 (1973). One explanation is that the test is merely a “guideline,” *Tilton* v. Richardson, 403 U.S. 672, 678 (1971), and that no greater precision should be expected because the problem is one of “degree,” *Roemer* v. Board of Pub. Works, 426 U.S. 736, 766 (1976). Moreover, greater “analytical tidiness” would result in an absolute prohibition of aid to parochial schools, which would be contrary to the public interest. *Wolman* v. Walter, 433 U.S. 229, 262 (1977) (Powell, J., concurring in part and dissenting in part). A less charitable explanation is that the test is the result of ad hoc decisions which are not grounded on any constitutional principle. See Choper, *The Religion Clauses of the First
test requires a statute to: 1) have a secular legislative purpose; 2) have a primary effect that neither advances nor inhibits religion; and 3) not foster excessive government entanglement with religion. If a statute fails to meet any of these conditions, it must be struck down.8

A. The Secular Purpose Test

To meet the Lemon test of constitutionality, a statute must have a secular legislative purpose. Generally, the Court has tended to accept legislative statements of secular purpose at face value and has not struck down any legislation authorizing aid to nonpublic schools on this ground.9 Thus, even where a statute has been struck down because it violated the second or third parts of the Lemon test, the Court has accepted claims that the legislation served secular purposes, such as ensuring student health, welfare, or safety10 or providing a fertile educational environment.11

B. The Primary Effect Test

The second part of the Lemon test requires a finding that the government activity has a primary effect that neither advances nor inhibits religion. However, the Court has refrained from

Amendment: Reconciling the Conflict, 41 U. Pitt. L. Rev. 673, 680 (1980). Indeed, one commentator has suggested that the Constitution is “irrelevant” to the Court’s decisions. Kurland, The Irrelevance of the Constitution: The Religion Clauses of the First Amendment and the Supreme Court, 24 Vill. L. Rev. 3, 3 (1979).

Whatever the merits of these different but logically consistent explanations, the Court’s application of the Lemon test reveals a concern for certain fundamental problems which aids analysis of establishment clause cases. One of the Court’s major concerns has been to prevent three “evils” against which the establishment clause protects: “sponsorship, financial support, and active involvement of the sovereign in religious activity.” 413 U.S. at 772; Lemon v. Kurtzman, 403 U.S. at 612; Walz v. Tax Comm’n, 397 U.S. 664, 668 (1970). To avoid these evils, government activity must not have the purpose or primary effect of advancing or inhibiting religion, and it must not foster an excessive government entanglement with religion.

11 Wolman v. Walter, 433 U.S. at 236.
making the "metaphysical" judgments necessary to determine whether an effect is primary. Instead, it has upheld legislation that has only a "remote and incidental" effect of aiding religion. Whether a remote effect test is any less metaphysical than a primary effect test is doubtful. But the former is clearly more stringent than the latter, for the Court has said that it would strike down legislation that had a "direct and immediate" effect of supporting religion even if the primary effect were secular, e.g., a law requiring prayer or Bible reading in public schools for the secular purpose of promoting morality.

In practice, two criteria determine whether legislation will pass the primary effect test. First, and more important, the type of activity aided must be such that its secular aspects are "identifiable and separable" from its religious aspects. For example, the Court has scrutinized aid to elementary and secondary parochial schools more carefully than aid to church-related colleges because it regards the former as "religion-pervasive institutions." Because parochial schools teach and promote a particular religious faith and are an integral part of the mission of a sponsoring church, the secular and the religious aspects of education are inseparable, thus making it impossible to aid only the secular aspects. As a result, aid to such schools is frequently struck down. In contrast, the Court on three occasions has upheld aid to church-related colleges, in part because it does not regard them as "religion-pervasive" institutions. Their purpose is not to indoctrinate students, college students are thought to be

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12 413 U.S. at 783 n.39.
13 Id.
15 413 U.S. at 783 n.39.
16 Id.
18 421 U.S. at 366.
19 These characteristics of parochial schools are part of a standard profile of ten characteristics adopted by the Court. See id. at 356.
less susceptible to indoctrination, and there is more academic freedom.⁰

A corollary to the first criterion under the primary effect test is that the form of aid and the nature of the beneficiary must be such that a legislature can be certain that only secular educational activities are aided.⁲ But since the secular and the religious aspects of education in elementary and secondary parochial schools are difficult to separate, legislatures cannot be certain that direct aid to the educational function of such schools benefits only secular activities. Although teachers and administrators may well act in good faith, the possibility that aid will be used to advance religion in the classroom "inheres in the situation." For this reason, the Court has struck down various forms of aid to such schools, including loans of instructional materials and equipment, reimbursements to parents for the cost of field trip transportation, tuition grants and tuition tax deductions. On the other hand, reimbursements for the cost of transportation to and from school and for the cost of therapeutic and diagnostic services have been upheld because they are sufficiently remote from teaching activities. Legislatures can be certain that the latter services are not manipulated toward religious ends by requiring that they be provided by non-school personnel, given off school premises, or both. Even textbook loans are permissible because legislatures can require that texts deal only with subjects taught in public schools.³⁰

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²¹ 403 U.S. at 685-86.
²⁴ Wolman v. Walter, 433 U.S. at 229; Meek v. Pittenger, 421 U.S. at 349.
²⁵ 433 U.S. at 229.
²⁷ Id.
²⁹ Wolman v. Walter, 433 U.S. at 229.
The second criterion of the primary effect test is that the class of beneficiaries be broad.\textsuperscript{31} If the class is too narrow, the legislation is suspect because of its potential political divisiveness.\textsuperscript{32} Consequently, legislation providing aid only to nonpublic schools is more difficult to uphold than legislation providing aid to both public and nonpublic schools.\textsuperscript{33} However, unlike the first criterion, this criterion is not determinative. For instance, the court has upheld aid directed to nonpublic schools only\textsuperscript{34} and it has said that the facial neutrality of a statute would not in itself be sufficient to survive constitutional scrutiny in certain circumstances.\textsuperscript{35}

C. The Entanglement Test

A statute must not foster excessive government entanglement with religion in order to meet the third requirement of the \textit{Lemon} test. Excessive entanglements can be fostered in two ways. The first is where administrative procedures used by the state to monitor a religious institution's compliance with the challenged statute would interfere or conflict too much with religion. For example, the Court has held unconstitutional a statute which provided for reimbursement for the cost of instructional material and equipment, because direct surveillance of classroom activities would be necessary to ensure that the material and equipment were not used for religious purposes.\textsuperscript{36} On the other hand, the Court has upheld tax exemptions for religious property used solely for religious worship on the ground that taxing such property would result in "tax valuation of church property, tax liens, tax foreclosures, and the direct confrontations and conflicts that follow in the train of those legal processes."\textsuperscript{37}

\textsuperscript{32} See 413 U.S. at 794.
\textsuperscript{33} See id. at 782 n.38; L. Tribe, supra note 14, at 845 n.33.
\textsuperscript{34} Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. at 646; Wolman v. Walter, 433 U.S. at 229.
\textsuperscript{35} In Roemer v. Board of Pub. Works, 426 U.S. at 747, the Court stated that a "state may not, for example, pay for what is actually a religious education even though it makes its aid available to secular and religious institutions alike."
\textsuperscript{36} Lemon v. Kurtzman, 403 U.S. at 619.
\textsuperscript{37} Walz v. Tax Comm'n, 397 U.S. at 674.
The second way in which legislation can foster excessive governmental entanglement with religion is by causing "continuing political strife over aid to religion" or "political divisiveness related to religious belief and practice." These "political entanglements" arise when legislatures must make annual appropriations to aid religion or there is otherwise continuing pressure to increase the amount of aid. Under these circumstances, the prospect might arise "of repeated confrontation between proponents and opponents" of aid, as well as competition among religious groups for government support. With a keen awareness of the political strife such conflicts caused in colonial America, the Court has attempted to prevent their recurrence.

40 L. TRIBE, supra note 14, at 866.
42 Meek v. Pittenger, 421 U.S. at 372.
43 See Everson v. Board of Educ., 330 U.S. at 8-11, for a discussion of such competition and the resulting persecution in colonial America.
44 Arguably, preventing political strife over aid to religion is the fundamental policy underlying the Lemon test. Under this view, the Court's concern is not just to prevent sponsorship, financial support and active involvement of government in religious activity, but also to prevent the perception that these evils exist. See L. TRIBE, supra note 14, at 844. In other words, the Court's concern is preventing the "symbolic identification" of government and religion. Id. at 843. If certain forms of aid symbolize government support of religion, then regardless of whether the government is truly supporting religion, the risk of political strife increases.

The Supreme Court's application of the Lemon test to cases involving aid to non-public schools reveals its concern about the symbolic identification of government and religion. This concern is obvious with regard to the secular purpose, breadth-of-class and political entanglement tests. But it also underlies the other parts of the test. For example, the requirement that secular activities be identifiable and separable from religious activities is best explained by the fact that aid to secular activities is not perceived as aid to religion. See id. at 844. Clearly, police and fire protection, student transportation, textbook loans, and diagnostic and therapeutic tests all aid religion "by rendering it more likely that children would attend sectarian schools and by freeing the budgets of those schools for use in other non-sectarian areas.” Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. at 775. Yet, such aid has been upheld after being characterized as merely "indirect and incidental," id., despite the actual benefit provided religion.

The Court's refusal to uphold a statute unless the legislature is certain that the aid provided will not be used to inject religion into the classroom also is consistent with its concern for symbolic identification of government with religion. For example, in several cases the Court has ignored evidence that teachers have not injected religion into the classroom. See Meek v. Pittenger, 421 U.S. at 392 (Rehnquist, J., dissenting); Lemon v. Kurtzman, 403 U.S. at 618. The Court also has ignored evidence revealing that the probability of aid being used to further religious ends will be minimal. 413 U.S. at 777-79, 787. This lack of
II. THE ESTABLISHMENT CLAUSE AND TAX DEDUCTIONS

A. Mueller v. Allen

In *Mueller v. Allen*, the Eighth Circuit Court of Appeals considered a challenge to a Minnesota statute which authorized deductions from gross personal income for tuition, textbook and transportation expenses incurred on behalf of dependents attending public and nonpublic elementary and secondary schools. The plaintiff, a Minnesota taxpayer, argued that the statute failed the *Lemon* test because the purpose and primary effect of the statute was to support and advance religion in that "the overwhelming percentage of tax relief granted under the statute was for tuition expenditures for religiously affiliated education."  

Concern for empirical evidence indicates a greater concern for whether the aid *appears* to benefit religion.

Finally, the administrative entanglement test also reveals a concern for symbolic identification, though the concern here relates primarily to a perception of government hostility toward religion. For example, the tax exemptions for church property upheld in *Walz v. Tax Comm'n* were upheld partly because taxing church property symbolizes hostility toward religion, while tax exemptions symbolize neutrality. 397 U.S. at 673-80; *id.* at 691 (Brennan, J., concurring). Further, the Court has approved imposing standards of public education on parochial schools, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), and issuing construction bonds for church-related colleges where, in case of default, the state could foreclose on the property, *Hunt v. McNair*, 413 U.S. 734 (1973). Since such state action requires or could require vast administrative interference with religion, a plausible explanation is that such interference is acceptable because it is not perceived as hostile to religion.

Thus, the principle of "symbolic identification" is much more useful in analyzing establishment clause cases than the principle of government "neutrality" toward religion which the Court and some commentators have advocated. See *Roemer v. Board of Pub. Works*, 426 U.S. at 766; *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. at 793; Giannella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part II, The Nonestablishment Principle*, 81 HARV. L. REV. 513, 517-19 (1968). Whatever its appeal as an ideal, the principle of neutrality is difficult to apply. If the focus is on aid to education, it is hard to see, on the one hand, how the principle of neutrality permits any aid to parochial schools, including police and fire protection. To argue that such minimal aid is permissible because it also is given to public schools proves too much because complete subsidization would then be justified. *See Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. at 782 n.38. On the other hand, it is hard to see how the principle of neutrality justifies only the minimal aid the Court has approved. Under current economic and social conditions, this policy leaves parochial schools at a serious competitive disadvantage as compared to public schools, thereby arguably inhibiting religion. Cf. *Note, Government Neutrality and Separation of Church and State: Tuition Tax Credits*, 92 HARV. L. REV. 696, 700-05 (1979).  

676 F.2d at 1195.

Id. at 1198-99. In support of this argument, the plaintiff alleged: 1) that only
The court rejected this argument. First, it agreed with the district court that the purpose of the statute was to enhance the quality of education in both public and nonpublic schools and thus benefit all taxpayers.47 Second, it held that the primary effect of the statute was not to support and advance religion because there were "substantial benefits flowing to all members of the public"48 and the benefit to religion was "remote and incidental."49 Finally, it held that "church-state contacts occasioned by normal tax administration procedures do not give rise to excessive government and religion entanglements."50

The court devoted most of its analysis to the issue of the primary effect of the statute. It quickly found51 that the deduction for transportation expenses was permissible under *Everson v. Board of Education*, which upheld reimbursements to parents for the cost of transportation to both public and nonpublic schools.

The court dealt with the textbook deduction at greater length. Although *Board of Education v. Allen*, which upheld textbook loans to students in public and nonpublic schools, is precedent for such aid, the Minnesota statute defined "textbooks" to include "instructional materials and equipment."54 The Supreme Court has held that loans of such instructional materials and equipment are unconstitutional,55 but the court of appeals in *Mueller* distinguished those cases because they concerned loans made directly to the schools, whereas the Minnesota statute gave the corresponding financial benefit to the "parent and the stu-

3.71% to 4.56% of the pupils attending nonpublic schools in Minnesota between 1978 and 1980 attended nonsectarian schools; 2) that the state lost $2.4 million from the deduction and 71% of the loss was due to deductions by parents of children in sectarian schools; and 3) that Minnesota public schools are free for most residents. *Id.*

47 *Id.* at 1198.
48 *Id.* at 1205.
49 *Id.* at 1206.
50 *Id.* at 1202 (citing *Mueller v. Allen*, 514 F Supp. 998, 1003 (D. Minn. 1981)).
51 *Id.* at 1201.
52 330 U.S. at 1.
53 392 U.S. at 236.
54 See note 2 supra for the text of this statute.
dent and not to the school.” In addition, the court distinguished the cases because the type of instructional material and equipment useful to students, e.g., rulers and tennis shoes, differs from the type useful to schools, e.g., maps and globes. Because of these distinctions, the court held that the textbook deduction was permissible, reasoning that any benefit to religion was more “indirect” than benefits the Supreme Court had encountered in similar cases.

The tuition deduction presented the most difficult question for the court in Mueller because of the Supreme Court’s decision in Committee for Public Education & Religious Liberty v. Nyquist. Nyquist struck down a New York statute which provided, inter alia, direct tuition reimbursements to parents with an annual income less than $5,000 and a tax deduction for tuition expenses to parents with an annual income between $5,000 and $25,000. The court distinguished Nyquist on two grounds. First, it stated that the New York statute operated as a tax credit, not a true tax deduction, because it was designed “to assure that each family would receive a carefully estimated net benefit.” Conversely, the Minnesota statute operated to reduce an individual’s tax liability only if the allowable deductions from the individual’s gross income put him in a lower tax bracket. Thus, any benefit to “the school is more diffused and less certain.” Second, Nyquist was distinguished on the basis that the New York statute

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56 676 F.2d at 1202. The court incorrectly characterized the Wolman decision as one involving loans made directly to the schools. In Wolman, the loans were actually made to the pupils or their parents. 433 U.S. at 248. See notes 93-96 infra and accompanying text for a discussion of the Wolman decision as it relates to Mueller.
57 676 F.2d at 1202.
58 Id.
59 Id.
60 413 U.S. at 756.
61 Id. at 780-89.
62 Id. at 789-94.
63 676 F.2d at 1203.
64 Id. at 1204 (citing Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. at 790). Because the statute struck down in Nyquist did not provide merely a tax deduction, the Court in Nyquist expressly refrained from deciding whether a tax deduction “such as for charitable contributions” violated the establishment clause. 413 U.S. at 790 n.49.
65 676 F.2d at 1204.
66 Id.
gave a deduction only to parents of children attending nonpublic schools, whereas the Minnesota statute gave a deduction to parents of children attending either public or nonpublic schools. Thus, the latter statute "has not singled out a class of citizens for a special economic benefit. It is neutral on its face." 67

The court held that these differences were sufficient to uphold the tuition deduction. Otherwise, an "imponderable problem [is] presented if one is allowed to challenge a neutral statute made applicable to all citizens by a purely de facto analysis utilizing statistical proofs." 68 If this were allowed, the court concluded, charitable deductions and other programs which provide "a substantial benefit... to a religious institution" 69 could be challenged, even though they do not have the primary effect of advancing religion.

B. Analysis of Mueller v. Allen

1. The Tuition Deduction

a. The Primary Effect Test

Mueller held that the tuition deduction passed both the primary effect test and the entanglement test. With regard to the primary effect test, it held that the tuition deduction was constitutional largely because it provided benefits to parents of children attending either public or nonpublic schools. Thus the court approached the primary effect test by asking whether the statute meets the second criterion of the test, namely, that the benefitted class be broad. 70 It held that, in this case, the class was sufficiently broad because the statute was facially neutral. In contrast, Rhode Island Federation of Teachers, AFL-CIO v. Norberg 71 held that the benefitted class was too narrow because the overwhelming majority of people eligible for the deduction sent their children to sectarian schools. Thus, Mueller used a de jure inter-

67 Id.
68 Id. at 1205.
69 Id.
70 See notes 31-35 supra and accompanying text for a discussion of this criterion.
71 630 F.2d at 859-61.
interpretation of the breadth-of-class test, while Norberg used a de facto interpretation.

The United States Supreme Court has never had occasion to decide which interpretation is correct. However, in light of the Court's view that the breadth-of-class test is an important factor "in terms of the potential divisiveness of any legislative measure," a de facto interpretation seems more appropriate because even a facially neutral statute can be divisive if perceived as aid to religion. The Minnesota statute arguably fails the breadth-of-class test when the de facto standard is applied. Because the overwhelming majority of people who would be eligible for the deduction have children attending religious schools, the statute could easily be perceived as aid to religion, with potentially divisive effects. In this respect, the statute differs from statutes that provide tax exemptions for church property, which have been upheld because churches belong to a large class of nonprofit institutions and there is little potential for divisiveness over such aid.

If a de facto standard is used in applying the breadth-of-class test, the Minnesota statute’s facial neutrality is not sufficient to distinguish it from the New York statute struck down in Committee for Public Education & Religious Liberty v. Nyquist. This leaves the second ground upon which the court in Mueller distinguished Nyquist, namely that the Minnesota statute merely provides a potential tax deduction while the New York statute operated as a tax credit designed to assure a certain benefit regardless of how much tuition the taxpayers had actually paid. The Mueller court believed that this distinction was relevant because

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72 In Nyquist, the Court expressly refrained from deciding "whether the significantly religious character of the statute's beneficiaries might differentiate the present cases from a case involving some form of public assistance (e.g., scholarships) made available generally without regard to the sectarian/nonsectarian, or public/nonpublic nature of the institution benefitted." 413 U.S. at 782 n.38.

73 Id. at 794. The Court refrained from "intimating whether this factor alone might have controlling significance in another context." Id.

74 See Walz v. Tax Comm'n, 397 U.S. at 664. In Nyquist, the Court distinguished Walz as follows: "The exemption challenged in Walz was not restricted to a class composed exclusively or even predominantly of religious institutions. As the parties here must concede, tax reductions authorized by this law flow primarily to the parents of children attending sectarian, nonpublic schools." 413 U.S. at 794 (emphasis added).

75 413 U.S. at 756.
it thought that the Minnesota taxpayer (and, indirectly, the non-public school) would benefit only if the deduction's effect was to place the taxpayer in a lower tax bracket. However, under the Minnesota tax law, any deduction from gross income would benefit a taxpayer by lowering his or her taxable income and, ultimately, his or her tax liability. Although the Minnesota statute is not designed to reduce by a predetermined amount the amount of tax due, it is clearly designed to confer some benefit on anyone who takes the deduction. Thus, for the purpose of determining whether the statute has the direct and immediate effect of advancing religion, it seems indistinguishable from the statute struck down in Nyquist.

In attempting to distinguish Nyquist, the court in Mueller ignored the first criterion of the primary effect test: the requirement that legislatures must be able to identify and separate the secular and the religious functions of religious institutions and be certain that only the former are aided. Even if the Minnesota and New York statutes are distinguishable, the Minnesota statute

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76 676 F.2d at 1203-04.
77 The Minnesota tax rate table for 1981 is:

<table>
<thead>
<tr>
<th>Taxable Income</th>
<th>Rates</th>
<th>Taxable Income</th>
<th>Rates</th>
</tr>
</thead>
<tbody>
<tr>
<td>$ 0 to $ 654</td>
<td>1.6%</td>
<td>$ 6532 to $ 9144</td>
<td>10.2%</td>
</tr>
<tr>
<td>654 to 1308</td>
<td>2.2%</td>
<td>9144 to 11,756.</td>
<td>11.5%</td>
</tr>
<tr>
<td>1308 to 2614</td>
<td>3.5%</td>
<td>11,756 to 16,327</td>
<td>12.8%</td>
</tr>
<tr>
<td>2614 to 3920</td>
<td>5.8%</td>
<td>16,327 to 26,121</td>
<td>14.0%</td>
</tr>
<tr>
<td>3920 to 5226</td>
<td>7.3%</td>
<td>26,121 to 35,915</td>
<td>15.0%</td>
</tr>
<tr>
<td>5226 to 6532</td>
<td>8.8%</td>
<td>35,915 and over</td>
<td>16.0%</td>
</tr>
</tbody>
</table>

ST. TAX GUIDE (CCH) ¶ 15-546. According to this table, any deduction from gross income will ultimately lower one's tax liability even if it does not put one in a lower tax bracket.

78 Even if a taxpayer were to benefit only if a deduction put him or her in a lower tax bracket, and even if any benefit to the taxpayer were less certain for the additional reasons that the taxpayer would benefit only if he or she "has made eligible expenditures, itemized deductions, [and] has taxable income after all other deductions have been taken," Minnesota Civil Liberties Union v. Roemer, 452 F. Supp. at 1321, arguably the tuition deduction would still fail the primary effect test. In Nyquist, the Supreme Court rejected several attempts to uphold the New York statute on the ground of "a statistical guarantee of neutrality." 413 U.S. at 787. The primary effect test requires that legislatures be certain that aid does not flow to the religious function of religious institutions, and a statistical argument purporting to show that not every parent with a child attending a parochial school will benefit from the Minnesota statute does not provide the requisite certainty.

79 See text accompanying notes 17-30 supra for a discussion of this requirement.
still must meet this requirement. In *Nyquist*, the Supreme Court held that the New York tax credit for tuition expenses at nonpublic schools was unconstitutional because the aid was not "sufficiently restricted to assure that it will not have the impermissible effect of advancing the sectarian activities of religious schools." The Minnesota tuition tax deduction seems unconstitutional for the same reason. The deduction is for tuition expenses at primary and secondary schools, institutions which the Court has found to be "religion-pervasive." If the tuition pays for basic educational needs such as teachers' salaries and instructional materials and equipment and not just for secular programs such as transportation or therapeutic and diagnostic services, the deduction—which will encourage people to send their children to religious schools—fails the primary effect test because legislatures cannot be certain that the sectarian activities of such schools are not being aided.

b. *The Entanglement Test*

*Mueller* also held that the tuition deduction satisfies the entanglement test because the church-state contacts resulting from normal tax administration procedures are not excessive. Here the court merely relied upon the district court's holding which, in turn, was based upon *Walz v. Tax Commission*. However, it is a mistake to rely on *Walz* for the proposition that tax benefits in general do not violate the entanglement test. First, *Walz* was decided primarily on the ground that taxing church property would create excessive entanglements with religion. As the Court noted in *Nyquist*, the *Walz* decision was an attempt "to minimize involvement and entanglement between Church and State . The granting of tax benefits, . unlike the exten-

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80 While such an assumption seems reasonable, the Supreme Court has not expressly ruled that both criteria of the primary effect test must be satisfied before a statute will be upheld.

81 413 U.S. at 794.

82 See text accompanying notes 18-21 *supra* for a discussion of the religion-pervasive nature of sectarian schools.

83 397 U.S. at 664.

84 See text accompanying note 37 *supra* for a discussion of *Walz*. 
sion of an exemption, would tend to increase rather than limit the involvement between Church and State." Second, tax exemptions for church property were justified in *Walz* because of the symbolism of the tax exemptions: churches are part of a large class of nonprofit institutions that receive property tax exemptions; thus, such exemptions symbolize a neutral state attitude toward religion, while taxing church property used for religious purposes would symbolize hostility. In contrast, tax deductions for parents of children attending nonpublic schools do not symbolize neutrality. Although the Minnesota tax deduction is also available to parents of children attending public schools, it will be perceived as aid to religion because the overwhelming majority of people who will benefit from the deduction have children who attend religious schools.

Not only is the *Mueller* analysis of the entanglement test deficient because of its reliance on *Walz*, it also is deficient because it focuses only on administrative entanglements, ignoring possible political entanglements. *Nyquist* held that such entanglements accompany tax benefits because of the "pressure for frequent enlargement of [tax] relief" and the state's desire to comply in order to relieve itself of the burden of educating more children in public schools. Since the evidence indicates that religious groups benefit more from this type of tax relief than other groups, they will have greater incentive to seek more relief, and this could result in the kind of lobbying by religious groups that the Supreme Court has sought to avoid.

2. The Textbook Deduction

   a. The Primary Effect Test

The Minnesota textbook deduction seems to violate both the primary effect test and the entanglement test. With regard to the former, the statute defines "textbooks" to include "instructional

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85 413 U.S. at 793.
86 397 U.S. at 673-80; id. at 691 (Brennan, J., concurring).
87 See *Rhode Island Fed'n of Teachers, AFL-CIO v. Norberg*, 630 F.2d at 861.
88 413 U.S. at 797.
89 See *Lemon v. Kurtzman*, 403 U.S. at 622.
materials and equipment," and the Supreme Court has held repeatedly that loans of, or reimbursements for, such equipment are unconstitutional because legislatures cannot guarantee that the equipment will not be used for sectarian purposes. The Mueller court attempted to distinguish these precedents primarily by arguing that they concerned aid given directly to schools, while the Minnesota statute granted the benefit to the parent and the student. However, a careful reading of Wolman v. Walter reveals that the statute in that case authorized "expenditures of funds for the purchase and loan to pupils or their parents upon individual request of instructional materials and instructional equipment." Yet the Court still held that the expenditures were unconstitutional. Moreover, it expressly rejected an attempt to justify the aid by distinguishing between aid to schools and aid to parents or pupils, stating that "it would exalt form over substance if this distinction were found to justify" the aid.

b. The Entanglement Test

With regard to the entanglement test, the Supreme Court has held that aid in the form of instructional materials and equipment violates the test because the measures that would be necessary to ensure that the aid is not used for sectarian purposes are too intrusive. That the benefit in Mueller is a tax deduction rather than a direct loan of equipment seems irrelevant. In either case, the legislature must be certain that the equipment is not used for sectarian purposes. Since this would create excessive ad-

90 See note 2 supra for the text of this statute.
91 See Wolman v. Walter, 433 U.S. at 229; Meek v. Pittenger, 421 U.S. at 349; Lemon v. Kurtzman, 403 U.S. at 602.
92 676 F.2d at 1202.
93 433 U.S. at 229.
94 Id. at 248 (emphasis added).
95 Id. at 250. The court in Mueller also distinguished these cases by arguing that the type of instructional materials and equipment available to pupils in Minnesota, e.g., rulers and tennis shoes, differed significantly from the type available in earlier cases, e.g., projectors, tape recorders, record players, and maps and globes, because the former were less useful to the schools than the latter. 676 F.2d at 1202. But to the extent that this distinction rests on a distinction between aid to schools and aid to pupils, it must be rejected for the reasons Wolman v. Walter rejected the latter distinction.
ministrative entanglements, the Minnesota textbook deduction violates the entanglement test.96

CONCLUSION

Contrary to the court's holding in Mueller, certain provisions of Minnesota's statute authorizing income tax deductions for tuition, textbook and transportation expenses fail to satisfy all three parts of the Lemon test97 and therefore violate the first amendment's establishment clause.98 The tax deduction for transportation expenses is permissible,99 but the deductions for expenditures for tuition and textbooks violate the establishment clause.100

The principal case regarding tax relief for parents of children attending nonpublic schools is Committee for Public Education & Religious Liberty v. Nyquist.101 Mueller attempted to distinguish Nyquist by focusing on the Minnesota statute's facial neutrality and the fact that the statute granted a tax deduction rather than a disguised tax credit. As the preceding discussion indicates,102 this attempt fails. Moreover, Mueller did not address the most important issue concerning the primary effect test, namely whether the legislature could be certain that only secular educational activities were aided. A legislature cannot be certain of this when the aid is a tax deduction for expenses on instructional materials and equipment and tuition at "religion-perva-

96 This is consistent with Lemon v. Kurtzman, 403 U.S. at 602, where the Court struck down a statute which provided schools with reimbursements for expenditures on instructional materials and equipment rather than loans of equipment. Whether the statute provides reimbursements to the school or tax deductions to the parents who purchase the items, the result would still be the excessive administrative entanglement which the Court has said must be avoided.

97 See notes 7-43 supra and accompanying text for an analysis of the three criteria which comprise the Lemon test.

98 See note 3 supra.

99 The U.S. Supreme Court upheld reimbursement for such expenses in Everson v. Board of Educ., 330 U.S. at 1.

100 Whether the unconstitutionality of the Minnesota statute warrants the conclusion that deductions for charitable contributions to religious institutions also are unconstitutional, as the court in Mueller feared, is unclear. Arguably, such deductions pass at least the primary effect test because religious institutions are members of a broad class of institutions which receive charitable support.

101 413 U.S. at 756.

102 See notes 73-78 supra and accompanying text.
sive” institutions. Thus the statute fails the primary effect test. However, even if it passed this test, arguably it would still violate the establishment clause because it fails both the administrative and political entanglement tests.

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