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# Casenotes: Constitutional Law — Income Tax Deductions for Tuition, Transportation, and Textbook Expenditures Made by Parents of Children Attending Public and Nonpublic Elementary and Secondary Schools Are Not Violative of the Establishment Clause of the First Amendment. Mueller v. Allen, 103 S. Ct. 3062 (1983)

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# CASENOTES

## CONSTITUTIONAL LAW — INCOME TAX DEDUCTIONS FOR TUITION, TRANSPORTATION, AND TEXTBOOK EXPENDITURES MADE BY PARENTS OF CHILDREN ATTENDING PUBLIC AND NONPUBLIC ELEMENTARY AND SECONDARY SCHOOLS ARE NOT VIOLATIVE OF THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT. *Mueller v. Allen,* 103 S. Ct. 3062 (1983).

A Minnesota statute permits taxpayers to deduct from gross income their dependents' tuition, textbook, and transportation expenses when computing their state income taxes.[1] The deduction is available to parents whose children attend public or private elementary and secondary schools located in a five-state area.[2] Minnesota taxpayers brought suit in federal district court challenging the statute as violative of the free exercise and establishment clauses of the first amendment to the Constitution.[3] The district court granted summary judgment for the defendant,[4] and on appeal the United States Court of Appeals for the Eighth Circuit affirmed.[5] The Supreme Court granted certiorari to resolve a circuit conflict[6] and to determine the constitutionality of tax deductions for tuition expenses.[7] The Court upheld the Eighth Cir-

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1. MINN. STAT. ANN. § 290.09(22) (West Supp. 1983). The statute provides for the following deductions from gross income:
   > The amount the taxpayer 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 . . . which is not operated for profit, and which adheres to the provisions of the Civil Rights Act of 1974 and chapter 363 [footnote omitted].
2. *Id.*
3. Mueller v. Allen, 514 F. Supp. 998, 999 (D. Minn. 1981), *aff'd,* 676 F.2d 1195 (8th Cir. 1982), *aff'd,* 103 S. Ct. 3062 (1983). The first amendment provides in pertinent part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I. The first amendment's religion clauses were made applicable to the states through the fourteenth amendment. Everson v. Board of Educ., 330 U.S. 1 (1947) (establishment clause); Cantwell v. Connecticut, 310 U.S. 296 (1940) (free exercise clause).
4. Mueller v. Allen, 514 F. Supp. 998, 999 (D. Minn. 1981), *aff'd,* 676 F.2d 1195 (8th Cir. 1982), *aff'd,* 103 S. Ct. 3062 (1983). The district court held that the statute was neutral on its face and in its application, and that it did not have a primary effect of either advancing or inhibiting religion. The court also found no violation of plaintiffs' free exercise rights. *Mueller,* 514 F. Supp. at 1003. This claim was not raised on appeal.
5. Mueller v. Allen, 676 F.2d 1195, 1196, 1206 (8th Cir. 1982), *aff'd,* 103 S. Ct. 3062 (1983).
6. The First Circuit had found a Rhode Island statute, R.I. GEN. LAWS § 44-30-12(c)(2) (1980), almost identical to MINN. STAT. ANN. § 290.09(22) (West Supp. 1983), unconstitutional under the establishment clause. Rhode Island Fed'n of Teachers, AFL-CIO v. Norberg, 630 F.2d 855, 857 (1st Cir. 1980).
7. Mueller v. Allen, 103 S. Ct. 3062, 3064 (1983). The constitutionality of the textbook and transportation deductions was considered to be settled by prior decisions. *Id.* at 3070 n.10. *But see id.* at 3076-77 (Marshall, J., dissenting)

cuit's decision based on a determination that the statute had a secular legislative purpose,[8] a primary effect that neither advanced nor inhibited religion,[9] and did not foster excessive entanglement between government and religion.[10]

The Supreme Court first addressed the constitutionality of aid to nonpublic schools under the establishment clause in the 1947 case of *Everson v. Board of Education.*[11] The Court approved a New Jersey program that used tax-raised funds to reimburse parents for bus fares paid to transport their children to public or private schools.[12] The majority reasoned that although the establishment clause was intended to erect a "wall of separation" between church and state prohibiting tax funds from flowing to religious institutions, the free exercise clause precludes that state from denying its citizens the benefits of a general welfare program because of their religious beliefs.[13] The statute's purpose was to provide safe and expeditious transportation for all commuting school children, not to benefit sectarian schools.[14] While the statute assisted church-related schools in facilitating attendance at these schools, this benefit was deemed analogous to the incidental benefits resulting from any general governmental service such as police and fire protection.[15] Moreover, bus transportation, like police and fire services, was found clearly separate from the religious functions of sectar-

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(Minnesota textbook-loan program distinguishable from the one previously approved, and tax deductions for instructional materials, encompassed within definition of "textbook," not supported by prior decisions).

8. *Id.* at 3067.
9. *Id.* at 3067, 3071.
10. *Id.* at 3071.
11. 330 U.S. 1, 29 (1947) (Rutledge, J., dissenting); Note, *Public Funds for Sectarian Schools,* 60 HARV. L. REV. 793, 793 (1947); Note, *Constitutional Law—"The Law Respecting an Establishment of Religion"—Statute Authorizing Use of School District Funds to Provide Transportation for Parochial School Children,* 32 IOWA L. REV. 769, 770 (1947). While the Court has stated that the establishment clause means at least that neither the state nor the federal government "can pass laws which aid one religion, [or] aid all religions . . . ," *Everson*, 330 U.S. at 15, the school aid cases, discussed *infra* at text accompanying notes 12-58, indicate that not all aid flowing to religious institutions is forbidden. The boundaries of permissible assistance are influenced by what is perceived to be the proper relationship between church and state, which in turn is determined by the purposes and values underlying the establishment clause. *See generally* Freund, *Public Aid to Parochial Schools,* 82 HARV. L. REV. 1680 (1969); Gianella, *Religious Liberty, Nonestablishment, and Doctrinal Development: Part II. The Nonestablishment Principle,* 81 HARV. L. REV. 513 (1968).
12. Everson v. Board of Educ., 330 U.S. 1, 17 (1947).
13. *Id.* at 16. The first amendment requires a state "to be a neutral in its relations with groups of religious believers and non-believers." *Id.* at 18. This concept of neutrality, giving due deference to both the free exercise and establishment clauses, is embodied in the primary effect test. *See infra* note 24 and accompanying text.
14. *Id.* at 18. The *Everson* Court noted that the schools received no state funds.
15. *Id.* at 17-18.

ian schools.[16]

Relying in part on the "general welfare program" rationale of *Everson,* the Court in *Board of Education v. Allen*[17] found constitutional a New York statute authorizing public schools to lend secular textbooks to both public and private school children free of charge.[18] According to the Court, the law merely provided books to nonpublic school children as part of a general book-loan program,[19] and thus was properly neutral in its effect.[20] As in *Everson,* the program's financial benefit was viewed as accruing to parents and children,[21] and in the majority's opinion, the loan of secular textbooks did not aid the religious function of sectarian schools.[22]

In *Lemon v. Kurtzman,*[23] the Court next reviewed the constitutionality of salary supplements for teachers of secular subjects in nonpublic elementary schools. The Court noted that to avoid conflict with the establishment clause, a statute must meet a three-part test: first, the statute must have a secular legislative purpose; second, its primary effect must be one that neither advances nor inhibits religion; and third, the statute must not foster excessive governmental entanglement with religion.[24] The statutes before the Court were found unconstitutional under the third prong.[25]

The lower courts in *Lemon* had determined that the vast majority of nonpublic school teachers eligible for salary supplements were employed in sectarian schools with activities and purposes substantially religious in nature.[26] Therefore, the Court concluded that any attempt to ensure that a teacher's services remained nonideological, as required by the primary effect test, would necessarily involve the state in such comprehensive and continuing surveillance of church-related schools as to constitute excessive entanglement.[27] The *Lemon* Court also noted

16. *Id.* at 18. *But see id.* at 47-49 (Rutledge, J., dissenting) (payment for transportation is as essential to education as payment for tuition or teacher's salaries, and these state expenditures made for religious school education are equally unconstitutional under establishment clause).
17. 392 U.S. 236 (1968).
18. *Id.* at 238.
19. *Id.* at 243.
20. *See id.*
21. *Id.* at 243-44. The ownership of the books remained in the state and therefore no funds or books went to the schools.
22. *Id.* at 244-45. *But see id.* at 252-53 (Black, J., dissenting) (books can be used to teach religious viewpoints and thus are distinguishable from bus rides, which are nonideological in nature).

    The majority's conclusion was based on the premise that sectarian schools perform two separable functions—religious instruction and secular education—and that aid can be restricted to the latter.
23. 403 U.S. 602 (1971).
24. *Id.* at 612-13.
25. *Id.* at 614. A statute must meet all three parts of the test to be found constitutional.
26. *Id.* at 608, 610, 616, 620.
27. *Id.* at 619.

that a teacher's services can include religious instruction. Thus, aid in the form of salary supplements differs from secular, nonideological assistance such as bus transportation and loan of secular textbooks.[28]

In addition to fatal administrative entanglements, the *Lemon* Court identified a more broadly based entanglement in the form of political divisiveness that these programs might engender. Providing aid to religious schools that served a large number of the community's school children would encourage partisans of this aid to use the political processes to press ever-increasing demands for state assistance. Opposition would develop, with resultant political division along religious lines. This result, the Court observed, is one of the principal evils against which the establishment clause was intended to protect.[29]

Following *Lemon v. Kurtzman,* the Court used principles and tests developed in its prior decisions to review a variety of school aid programs,[30] and invalidated many programs under the primary effect test. Under this test, assistance provided to pervasively religious schools, or assistance not restricted to the secular functions of a sectarian school, has the primary effect of advancing religion.[31] This result obtains whether aid is provided directly to the schools themselves, or to parents.[32] Conversely, secular general welfare that cannot be diverted to furthering a school's religious mission has been upheld.[33] Aid programs were also found invalid because the oversight necessary to ensure segregation of aid to permissible purposes would result in

28. *Id.* at 616-17.

29. *Id.* at 622-23. *But see* Lynch v. Donnelly, 104 S. Ct. 1355, 1368-69 (1984) (O'Connor, J., concurring) (attempts to determine the potential political divisiveness inherent in a government practice are too speculative; entanglement prong properly limited to administrative entanglement).

30. *See, e.g.,* Wolman v. Walter, 433 U.S. 229 (1977) (field trip transportation, instructional materials, and equipment); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) (maintenance and repair grants); Levitt v. Committee for Pub. Educ. & Religious Liberty, 413 U.S. 472 (1973) (reimbursement for administering and grading state and teacher prepared tests).

31. *See, e.g.,* Wolman v. Walter, 433 U.S. 229, 253-54 (1977) (no guarantee field trips would be used for only secular education); Meek v. Pittenger, 421 U.S. 349, 363 (1975) (most assistance benefited schools of a predominately religious character); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) (no assurance funds for maintenance and repair would be used only for secular purposes); Levitt v. Committee for Pub. Educ. & Religious Liberty, 413 U.S. 472, 480 (1973) (no attempt to ensure teacher prepared tests would be used only for secular purposes).

32. *Compare* Wolman v. Walter, 433 U.S. 229, 250 (1977) (instructional materials provided to pupils or parents) *with* Meek v. Pittenger, 421 U.S. 349, 362-63 (1975) (instructional materials provided to schools).

33. *E.g.,* Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 655-57 (1980) (reimbursements made to sectarian schools for testing services constitutional since there was no substantial risk that examinations could be used for religious education purposes); Wolman v. Walter, 433 U.S. 229, 244 (1977) (speech, hearing, and psychological diagnostic services could be provided by public school personnel at sectarian schools since danger was minimal that contact with students could be used for religious purposes).

excessive entanglement between church and state.[34]

The constitutionality of tuition relief for parents of nonpublic school children reached the Supreme Court in 1973 in *Committee for Public Education & Religious Liberty v. Nyquist.*[35] The New York statute at issue provided partial tuition reimbursements and tuition tax deductions for parents of nonpublic elementary and secondary school children.[36] Both forms of assistance were found unconstitutional as having a primary effect that advanced religion.[37]

Since the majority of nonpublic schools in New York were church-related,[38] the statute in effect singled out parents of sectarian school children for assistance. The *Nyquist* Court characterized the statute as providing both financial support for religious schools[39] and incentives or rewards to parents sending their children to parochial schools.[40] A further defect was found in the unrestricted nature of the tuition reimbursements since no effort had been made to guarantee that the aid provided would support only the secular functions of the schools.[41] The tuition reimbursement program was thus found distinguishable from previously approved assistance because the program did not neutrally benefit parents of both public and nonpublic school children[42] and because it was not carefully restricted to a school's secular activities.[43]

While the tax relief provision was labeled a "deduction," the *Nyquist* Court stated that the provision operated more as a "credit"[44] calculated to provide net benefits comparable to the tuition

34. *See* Wolman v. Walter, 433 U.S. 229, 254 (1977) (excessive entanglement would result from supervision of teachers during field trips).
35. 413 U.S. 756 (1973). Lower courts have consistently struck down tuition aid to parents of nonpublic school students, regardless of its form. *See, e.g.,* Public Funds for Pub. Schools of New Jersey v. Byrne, 590 F.2d 514 (3d Cir.) (tax deductions), *aff'd mem.,* 442 U.S. 907 (1979); Rhode Island Fed'n of Teachers, AFL-CIO v. Norberg, 479 F. Supp. 1364 (D.R.I. 1979) (tax deductions), *aff'd,* 630 F.2d 855 (1st Cir. 1980); Minnesota Civil Liberties Union v. Minnesota, 302 Minn. 216, 224 N.W.2d 344 (1974) (tax credits), *cert. denied,* 421 U.S. 988 (1975); Kosydar v. Wolman, 353 F. Supp. 744 (S.D. Ohio 1972) (tax credits), *aff'd sub nom.* Grit v. Wolman, 413 U.S. 901 (1973); Wolman v. Essex, 342 F. Supp. 399 (S.D. Ohio) (grants), *aff'd mem.,* 409 U.S. 808 (1972).
36. Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 764 (1973).
37. *Id.* at 798.
38. *Id.* at 768.
39. *Id.* at 783.
40. *Id.* at 791.
41. *Id.* at 783.
42. *Id.* at 782 n.38.
43. *Id.* at 782-83; *accord* Sloan v. Lemon, 413 U.S. 825, 832-33 (1973).
44. Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 789 (1973). The tax benefit was in form similar to a deduction in that it was to be subtracted from gross income prior to computation of tax due; a credit is deducted from the amount of the tax owed. In effect, however, the tax benefit was found more similar to a credit since the amount to be deducted "is not related to the amount actually spent for tuition and is apparently designed to yield a predeter-

reimbursements.[45] The "deduction" and the tuition reimbursements were therefore subject to the same defects under the primary effect test, and both had the impermissible effect of advancing religion.[46]

In *Mueller v. Allen*[47] the Court addressed the question, left unanswered in *Nyquist,* of whether a "genuine tax deduction" for tuition expenses would be found constitutional under the establishment clause.[48] Using a three-part test enunciated in *Lemon v. Kurtzman,*[49] the majority readily found that the statute had a valid secular purpose[50] and caused no excessive entanglement between church and state.[51] A more difficult question was presented in regard to the statute's primary effect.

In finding the tax deduction to have no impermissible effect, the majority distinguished the New York law struck down in *Nyquist.* While concededly having economic consequences similar to the tax benefits disapproved in *Nyquist,*[52] the Minnesota statute provided for a genuine tax deduction.[53] More importantly, the statute in *Nyquist* limited assistance to parents of nonpublic school children, most of whom attended sectarian schools. The Minnesota tax deductions were made available to parents of both public and private school children, and thus were analogous to the general welfare programs approved in *Everson* and *Allen.*[54] The majority rejected the taxpayers' argument that although the statute was facially broad and neutral in effect, it nevertheless primarily benefited religious institutions since tuition is the larg-

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mined amount of tax 'forgiveness' in exchange for performing a specific act which the State desires to encourage—the usual attribute of a tax credit." *Id.*

45. *Id.* at 790.
46. *Id.* at 794.
47. 103 S. Ct. 3062 (1983).
48. Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 790 n.49 (1973).
49. 403 U.S. 602 (1971); *see supra* note 24 and accompanying text.
50. Mueller v. Allen, 103 S. Ct. 3062, 3066-67 (1983). This purpose was to ensure both a well-educated citizenry and the continued vitality of private schools.
51. *Id.* at 3071. The Minnesota statute entailed no greater administrative entanglement than that existing in Board of Educ. v. Allen, 392 U.S. 236 (1968). The "politically divisive" variant of the entanglement test was found inapplicable, being properly confined to those cases in which financial subsidies are paid directly to parochial schools or to teachers in those schools. *Id.* at n.11 (dictum).
52. Mueller v. Allen, 103 S. Ct. 3062, 3067 n.6 (1983). While not calculated to provide a carefully estimated net benefit, the Minnesota law does ensure each taxpayer some financial benefit. Tax bills are reduced "by a sum equal to the amount of tuition multiplied by [the taxpayer's] rate of tax." *Id.* at 3072 (Marshall, J., dissenting).
53. *Id.* at 3067 n.6. The Court in Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973), did not delineate the elements of a "genuine tax deduction," but did give the example of deductions for charitable contributions. *Id.* at 790 n.49; *see* discussion *supra* note 44. The Minnesota deductions presumably would be "genuine" in that only actual expenditures were to be subtracted from gross income, and the deductions, by the statute's language, were made available to a broad group of beneficiaries.
54. Mueller v. Allen, 103 S. Ct. 3062, 3068-69 (1983).

est deductible expenditure, and since most of those eligible for tuition deductions are parents of children attending sectarian schools.[55] While proponents of the statute had challenged the taxpayers' factual findings,[56] the majority refused to base its decision on resolution of these factual conflicts, stating that the constitutionality of a facially neutral law should not be made to hinge on statistics contained in annual reports. Such a de facto approach would cause constitutional uncertainty and would provide no principled standards for evaluation. Since the Minnesota statute on its face benefited a broad class of parents, the majority would not consider statistical data proving that this was not its actual effect.[57]

The majority also found it significant that the direct beneficiaries of the program were parents and not parochial schools. While conceding that the ultimate economic effect of providing financial assistance to parents is comparable to giving aid directly to the schools, the majority felt that channeling assistance through parents attenuated the relationship between state financial assistance and religion. Funds reached schools only as a result of private choices of individual parents as to which schools their children would attend. The majority concluded there was little chance that this attenuated relationship would lead to the kind of political strife against which the establishment clause was designed to protect, and therefore financial benefits flowing to sectarian schools from such a relationship did not offend the Constitution.[58]

In evaluating the constitutionality of the Minnesota system of tax deductions, the majority identified the determinative issue to be whether this aid more closely resembled that struck down in *Nyquist,* or those programs approved in cases such as *Everson* and *Allen.*[59] The distinctions made and the analogies drawn, however, are subject to several criticisms.

As the dissent in *Mueller* argued, the Minnesota statute is not significantly distinguishable from the New York law struck down in *Nyquist.* No meaningful difference exists, in constitutional terms, between a tax benefit labeled a "credit" and one denominated a "deduction" because the economic consequences of the two benefits are concededly hard to distinguish,[60] and both programs are designed to yield tax ben-

55. *Id.* at 3070. Statistical data presented by the taxpayers indicated that 96% of children enrolled in private schools attended church-related schools. *Id.* Public schools only charge tuition to students attending schools outside their regular school districts. In the 1978-1979 school year, only 79 out of 815,079 children fell into this category. *Id.* at 3072 (Marshall, J., dissenting).

56. *Id.* at 3070. Proponents of the tax benefit disagreed that public school tuition, transportation, and textbook deductions were de minimis. They noted that the categories of "textbooks" and "tuition" had been expanded, *see id.* at 3065 n.2, to include expenses that public school parents were likely to incur. *Id.* at 3070.

57. *Id.* at 3070.

58. *Id.* at 3069.

59. *Id.* at 3066.

60. *See supra* note 52 and accompanying text; *see also* Committee for Pub. Educ. &

efits in exchange for making expenditures for sectarian school education that the state wishes to encourage.[61] Furthermore, the beneficiary class in *Mueller,* like that in *Nyquist,* is composed predominately of parents whose children attend church-related schools.[62] Thus, the majority's conclusion that the Minnesota tax statute is analogous to the broad general welfare programs approved in *Everson* and *Allen*[63] seems inaccurate.

Even assuming the existence of a true "general welfare statute," however, prior Court decisions indicate that the assistance provided by the Minnesota law is unconstitutional. While not always logically consistent,[64] these decisions indicate that only those programs providing "secular, neutral, or nonideological services, facilities, or materials" to sectarian schools will be found constitutional.[65] Furthermore, those statutes upheld provided some effective means, not entailing excessive entanglement, of ensuring that state aid was channeled only to the secular functions of sectarian schools and could not be diverted to religious purposes.[66]

Clearly, assistance in the form of tuition subsidies is not, as the majority contends, analogous to nonideological bus trips or secular textbooks[67] that are clearly "marked off from the religious function" of sectarian schools.[68] Money derived from tuition payments form a major part of a school's general budget[69] and can be used for religious purposes as well as secular education. Hence, assistance flowing to parochial schools as a result of tuition subsidies to parents is not, and

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Religious Freedom v. Nyquist, 413 U.S. 756, 789-91 (1973) (impact of aid and not its form is determinative of whether it is constitutional).

61. Mueller v. Allen, 103 S. Ct. 3062, 3075-76 (1983) (Marshall, J., dissenting).
62. *See supra* note 55 and accompanying text. As Justice Marshall noted, there is no need to resort to uncertain statistical data to determine whether the effect of the statute is to benefit primarily parents of children attending religious schools, for most other parents are "simply ineligible to obtain the full benefit of the deduction except in the unlikely event that they buy $700 worth of pencils, notebooks, and bus rides for their school-age children." Mueller v. Allen, 103 S. Ct. 3062, 3074 (1983) (Marshall, J., dissenting).
63. Mueller v. Allen, 103 S. Ct. 3062, 3068-69 (1983).
64. For example, the distinctions drawn between impermissible instructional materials, such as weather charts and globes, and permissible textbooks does not seem logically tenable; both can be diverted to religious purposes. *Compare* Wolman v. Walter, 433 U.S. 229 (1977) (instructional material) *with* Board of Educ. v. Allen, 392 U.S. 236 (1968) (textbooks). The Court has acknowledged that the lines of demarcation between constitutional and unconstitutional forms of aid can only be dimly perceived. Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).
65. Lemon v. Kurtzman, 403 U.S. 602, 616 (1971).
66. Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 780 (1973).
67. Mueller v. Allen, 103 S. Ct. 3062, 3066 (1983). *But see* Wolman v. Essex, 342 F. Supp. 399, 414 (S.D. Ohio) (money paid as tuition to parochial school is not neutral or nonideological), *aff'd mem.,* 409 U.S. 808 (1972).
68. Everson v. Board of Educ., 330 U.S. 1, 18 (1947).
69. Wolman v. Essex, 342 F. Supp. 399, 414 (S.D. Ohio), *aff'd mem.,* 409 U.S. 808 (1972).

cannot be, restricted to permissible uses without excessive entanglement.[70] The Court has consistently held that aid that is not subject to guarantees of nonideological use is unconstitutional as an advancement of religion.[71] Moreover, the Court's past decisions do not support the majority's view that otherwise impermissible aid will pass constitutional muster by being channeled through parents.[72]

Finally, it seems untenable that the purposes underlying the establishment clause are not violated by the "attenuated financial benefits" flowing to sectarian schools by operation of the Minnesota statute.[73] While the risk of political divisiveness may be diminished by a statute that benefits a truly broad-based class of recipients, this result does not follow when a facially neutral statute in actuality provides assistance along religious lines.[74] Moreover, the danger of religious-political strife is not necessarily diminished by providing aid indirectly to parents, rather than directly to sectarian schools.[75] In providing unrestricted financial assistance to parents of sectarian school children, and hence to the schools, the Minnesota statute also embodies one of the primary evils against which the establishment clause was intended to protect—financial support by the sovereign of religious activity.[76]

The majority's decision in *Mueller* upholding assistance that is not carefully restricted to secular purposes both departs from precedent and is inconsistent with the purposes underlying the establishment clause. Moreover, in refusing to look behind the Minnesota statute's facial neutrality for its operative effect,[77] the majority has rendered the primary effect test largely meaningless. Since courts already generally defer to legislative statements of secular purpose,[78] the door now seems

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70. Mueller v. Allen, 103 S. Ct. 3062, 3076 (1983) (Marshall, J., dissenting); *see also* Wolman v. Essex, 342 F. Supp. 399, 414 (S.D. Ohio) (tuition tax benefits lack effective means of ensuring that state aid will be used only for secular purposes), *aff'd mem.*, 409 U.S. 808 (1972).
71. *See supra* notes 30-46 and accompanying text.
72. Mueller v. Allen, 103 S. Ct. 3062, 3069 (1983). *But see* Wolman v. Walter, 433 U.S. 229, 250 (1977) (it would "exalt form over substance" to hold that while instructional materials may not constitutionally be provided directly to schools, they may be provided to pupils or parents); Committee for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 781-83 (1973) (tuition grants to parents will not render constitutional a program providing otherwise impermissible aid); School Dist. of Abington Township, 374 U.S. 203, 230 (1963) (Douglas, J., concurring) ("What may not be done directly may not be done indirectly lest the Establishment Clause become a mockery.").
73. Mueller v. Allen, 103 S. Ct. 3062, 3069 (1983).
74. *See supra* notes 55 & 62 and accompanying text.
75. *See* Morgan, *The Establishment Clause and Sectarian Schools: A Final Installment?*, 1973 SUP. CT. REV. 57, 95-96 ("allocations will be fought over no matter the route they take to the sectarian institutions . . . ." *Id.* at 96).
76. Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970).
77. *See supra* notes 55-57 and accompanying text.
78. Mueller v. Allen, 103 S. Ct. 3062, 3066 (1983) (government assistance programs consistently survive the secular legislative purpose inquiry).

open for further tuition assistance,[79] under the guise of facially neutral statutes, for parents of parochial school children.

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79. For example, proposed federal income tax credits for tuition expenses that are now limited to parents of nonpublic school children, S. 528, 98th Cong., 1st Sess., 129 CONG. REC. 1335-42 (1983), would probably pass constitutional muster if broadened to include parents of public school students.