10-1982

Mueller v. Allen

Lewis F. Powell Jr.

This case could affect proposals pending in Congress

Discuss

9/23

CA 8 sustained validity of Minn. statute, on books since 1955, that allows a tax deduction up to $500 to parents of school children for various school expenses, including tuition.

Benefits parents of parochial school kids arguably more than those of parents whose kids attend public school.

Q left open in Nyquist

PRELIMINARY MEMORANDUM

Interesting case. Facts are conflicting to some extent, but do not affect principle.

September 27, 1982 Conference
Summer List 25, Sheet 3

No. 82-195-CFX

MUELLER, et al. (taxpayers) Cert to CA8 (Lay, Henley, Arnold)

v.

ALLEN, et al. (Minn. Comm'r of Revenue, parents of school children) Federal/Civil Timely

SUMMARY: Petrs challenge a Minnesota statute granting tax deductions for parents who pay tuition, busing, and textbook expenses for their children in grades K-12. Petrs claim that since they can show that the overwhelming benefit of the deduction flows to parents who send their children to parochial schools, the deduction violates the Establishment Clause.

Discuss. There is a strong case for granting. Even resps concede that the Rhode Island statute invalidated in Norberg is very similar to the statute upheld in this case.

FACTS AND DECISION BELOW: Minn. Stat. §290.09(22) authorizes Minn. taxpayers to claim income tax deductions for their dependents' tuition, textbook, and transportation expenditures up to a maximum of $500 for children in grades K-6 and $700 for children in grades 7-12. "Tuition" includes the cost of attending any private school; the amount that is charged parents for sending their children to a public school in a district other than the one they live in; summer school costs; private tutoring costs; costs of educating handicapped students; amounts charged parents by the public school for providing special lessons to slow learners; Montessori school tuition; the cost of the driver education cost given by the schools. The transportation deduction applies to the costs of transporting children to school in school districts that do not provide this service for free; transportation across district lines; transportation for children who live too close to their school to qualify for free transportation. Textbook deductions apply to the cost of all secular textbooks and also of necessary equipment like tennis shoes, sweatsuits; rental costs for cameras, ice skates, calculators; costs of materials for home economics, shop, art, music; cost of notebooks and pencils. The deduction serves to reduce the taxpayer's gross income, and according to the DC, is only of benefit if it moves the taxpayer into a lower income bracket.

Although this deduction has been part of Minn. law since 1955, it was never challenged until 1978, when a group of taxpayers unsuccessfully attacked it on constitutional grounds, Minn. Civil Liberties Union v. Roemer, 452 F.Supp. 1316 (D.Minn. 1978)(three-judge court). Undeterred by this loss, petrs (represented by the M.C.L.U.) filed this suit in 1980, claiming that Roemer was incorrectly decided and that subsequent case law and facts not before the Roemer court

establish that the statute is unconstitutional. They argued that the facial neutrality of the statute and the fact that its primary purpose is to enrich all children's educational experience, is insufficient to establish its constitutionality under Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971), because statistical evidence shows that the "primary effect" is to aid the parents of parochial school children. Their evidence, which was provided by the Minn. Dep't of Ed., indicate that in 1979-80, only 4.56% of the students attending nonpublic schools attended nonsectarian ones, and that in 1978-79, only 3.71% of the nonpublic-school students attended nonsectarian schools. Petrs projected that at a theoretical maximum, only 14-18% of the parents who could benefit from the deduction could be ones with children attending nonsectarian schools.

After dismissing plaintiffs who were involved in Roemer, the DC (Renner, J.) held that the remaining petrs were not barred by the former decision because that suit was not styled as a representative taxpayers' suit. The DC then went on to examine the statistical evidence presented by the petrs. It noted that this evidence was seriously misleading in that it implies that over 95% of the parents benefiting from the program send their children to religious schools when that is not in fact true. The DC pointed out that the flaw in petrs' presentation was that they failed to account for deductible tuition expenses paid to public schools, which amounted to over $2,000,000, and for deductions based on the textbook and transportation expenses of public school children. Finding that petrs lacked credibility, the DC reaffirmed Roemer, holding the statute facially neutral, having a primary effect that neither advanced nor inhibited religion, and non-entangling of the State in religious

affairs. Accordingly, the DC granted resp's motion for summary judgment.

On appeal, petrs submitted the same statistical data given the DC, this time stating that the deduction cost Minn. $2,400,000 in lost revenue, and that since 71% of this amount is attributable to benefits "paid" parents with children in parochial schools, the primary effect of the deduction was to aid secular institutions. In addition, petrs claimed that the DC's decision was in conflict with Comm. for Public Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 (1973) and with a decision of CA1 striking a Rhode Island statute almost indistinguishable from the Minn. law, Rhode Island Fed'n of Teachers v. Norberg, 630 F.2d 855 (1st Cir. 1980). Petrs also relied on a CA3 case, Public Funds for Public Schools v. Byrne, 590 F.2d 514 (3d Cir.), aff'd mem., 442 U.S. 907 (1979)(invalidating a flat $1000-per-dependent tax exemption).

After pointing out that petrs' statistics continue to suffer from the omission noted by the DC, CA8 examined the cases relied upon by petrs. Nyquist was distinguished on several grounds. First, the court noted that the credit at issue there was not based upon the amount of money that a parent spent on educating his children. Rather, the statute allowed parents, for each child in private school, to subtract from adjusted gross income an amount dependent solely upon the parents' gross income. Second, the benefit in Nyquist took the form of a direct reduction in tax liability, and was therefore essentially equivalent to a direct payment by the State to parents with children in private schools. The court felt that the benefit here is more remote than the Nyquist benefit because it reduces taxes only if it changes the taxpayers' bracket. In other words, there are parents who spend money on religious schools who fall in the class of

taxpayers who do not receive a deduction. Byrne was distinguished because the deduction there was independent of actual expenditures.

With respect to Norberg, the court noted that CA1 attempted to distinguish Roemer by the fact that the Rhode Island statute benefited all parents eligible for the deduction while the Minn. statute benefited only those parents who experienced a drop in their tax bracket. Finding that difference "somewhat dubious," CA8 then went on to reject Norberg and follow Roemer. It found that advancing religion was neither the aim nor the primary effect of the statute, that it provided a benefit to all citizens regardless of religious beliefs. Acknowledging that this statute falls within a gray area of the law, CA8 chose to rely on Everson v. Bd. of Ed., 330 U.S. 1 (1947) and Walz v. Tax Comm'n, 397 U.S. 664 (1970) to find the statute constitutional.

CONTENTIONS: (1) Petrs. Because the aid given to parents of public school children in de minimus and because few children in Minn. attend nonsectarian private schools, the overwhelming effect of the deduction is to advance religion by encouraging parents to send their children to parochial schools. The decision below is in conflict with Byrne (CA3) and Norberg (CA1), as well as this Court's decisions in Nyquist, Lemon, and their progeny. Even CA8 recognizes that this case should be examined by the S.Ct. The data is not seriously misleading because the expenditures not included in the calculations are necessarily small since the State pays the full cost of all public school students' transportation and tuition. Besides, the absence of better data is entirely attributable to the State, "which has designed the program and the tax forms implementing it in such a way as to make more specific evidence impossible to collect without individualized discovery of millions of taxpayers."

(2) Resps. CA8 distinguished Nyquist and Byrne correctly: this is not a flat credit unrelated to actual expenses and it is also remote in the sense that not every taxpayer who experiences deductible expenses gets a benefit. Norberg found that the aid to children in nonreligious schools was merely "windowdressing." Although they do not know if CA1 was correct, resps claim that the benefit to the families of secularly-educated children here is not windowdressing. Thus, CA8 was correct in finding neutral and constitutional a statute that "in effect, abstains from taxing that income which has been denoted by a broad class of Minn. citizens to their children's education." Since the statute is 27 years old, it falls within the "historical exception" rule of Walz, 397 U.S. at 678. Although resps do not challenge the res judicata ruling, one of the responses contends that a taxpayer suit should be considered a representative action that bars further litigation on the same subject.

DISCUSSION: The constitutionality of a true deduction was a question expressly left open in Nyquist, 413 U.S. at 790 n.49. This is a significant question because tax schemes like this one become more popular as states continue to grapple with pressure from parents who send their children to private schools. The chief obstacle to granting cert here is the defect in the data noted by the courts below. I am not, however, convinced that this is a serious problem. The real questions here are first, whether there is a difference of constitutional dimension between a flat tax benefit and a benefit that varies depending on the amount of expenditures, and second, whether a de facto analysis is appropriate in the face of a statute that by its terms extends benefits to a broad class of beneficiaries.

There are three responses.

The CA8 considered and rejected the CA1's Establishment Clause analysis in Norberg. The issue obviously is important; Nyquist left it open.

The problem is the disputed factual record. Petrs believe that the evidence shows that 71% of the $2.4 million lost through the tax deduction goes to parents with children in sectarian schools. This would violate Nyquist I suspect. Resps, on the other hand, convinced the district court that petrs' statistics were erroneous. Resps argued that only 14-18% of taxpayers who qualified for a tuition deduction sent children to sectarian schools. The DC unfortunately held only that petrs' statistics were flawed: it did not say why, nor did it find the facts. The CA8 did not rely on the facts of the case in upholding the statute.

The net result is some confusion as to the facts. I have a tentative view that resps' statistics are at least as problematic as petrs'. And the CA8 expressly found that the proofs offered here were "almost identical" to and "similarly uninformative" as the CA1 case's proofs. Thus I have doubt that factual differences nullify the split. Moreover, as the CA8 noted, (Pet at A-31) placing heavy reliance of local annual statistics could make the same statute constitutional in 1 state but not in another, or even constitutional one year and not the next. This would be undesirable.

Thus while this case may not be as good for resolving the issue as one might hope, the conflict is real. A grant seems in order. If cert is denied, the issue will be back soon.

Mark

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September 27, 1982

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on ....., 19...
Assigned ....., 19...
Announced ....., 19...

No. 82-195

MUELLER

vs.

ALLEN

WJB says there is conflict but. CAB.

Grant.

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Burger, Ch. J.			✓										
Brennan, J.		✓											
White, J.		✓											
Marshall, J.		✓											
Blackmun, J.		✓											
Powell, J.				Join 3									
Rehnquist, J.			✓										
Stevens, J.		✓											
O'Connor, J.			✓										
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Received 4/17 - Very helpful

job 04/16/83

BOBTAIL BENCH MEMORANDUM

No. 82-195

Mueller v. Allen

Jim April 18, 1983

I. Question Presented

Does a Minnesota statute that provides deductions of up to $500 and $700 per child for tuition, textbook, and transportation payments made by parents of children attending elementary and secondary schools violate the Establishment Clause?

II. Facts and Proceedings Below

Minn. Stat. §290.09(22) grants a deduction from Minn. gross income for amounts paid by taxpayers to others for tuition, textbook, and transportation expenses of dependents enrolled in kindergarten through twelfth grades. For those dependents enrolled in grades K-6, up to $500 per dependent may be deducted. For those enrolled in grades 7-12, the maximum deduction per dependent for such expenses is $700. There is no limit upon the number of dependents for whom deductions may be taken. "Textbooks" for which deductions may be taken is defined to include instructional materials and equipment used in the teaching of subjects customarily taught in Minn.'s public schools, and which are not used in the teaching of religious tenets, doctrines, or worship. However, transportation or textbook expenses incurred in association with extracurricular school activities are not deductible. The claim for deduction is made on the standard Minn. State Income Tax Form and does not call for line itemization of separate expenses nor information concerning the nature of the school attended by dependents.

Loss of revenue as a result of the statute in 1978 was $2.4 million, but taxpayers claiming the deduction may not also claim Minn.'s standard deduction. Taxpayers will realize a tax benefit if they deduct $50 or more. But most of the benefits flow to those in private education. Of the 815,155 public school pupils attending public schools during the 1978-1979 school year, only 79 pupils were assessed a a tuition charge. On the other hand, the number of children enrolled in tuition-charging nonpublic schools in Minn. for the 1979-1980 school year was 90,954 (10.04%). Over 95% of this number

or 86,808 were enrolled in schools considering themselves to be sectarian. The total Minn. school population in 1956 was 719,490, with 125,490 (17.44%) in private schools.

The DC rejected resps' contention that the statute benefits only a narrow class of recipients, expressly finding that "the statute provides widely distributed tax relief" to Minn. taxpayers. The CA8 affirmed, stating that the "[t]he fundamental issue is not whether some or even a substantial benefit accures to a religious institution, but whether the principal or primary effect of the statute is to advance religion." Although recognizing that "the greater number of the class benefitted" under the statute are comprised of the 10% of taxpayer-parents of pupils attending church-related schools, the CA8 held that the statute was a permissible abstention from taxation.

III. Summary of the Parties' Contentions

A. Petr. For purposes of constitutional analysis, this Court has discerned a critical distinction between the deductibility of certain user fees paid by a taxpayer in return for a specified service, see Committee for Public Education v. Nyquist, 413 U.S. 756 (1973) (POWELL, J.), on the one had, and two other forms of "tax expenditures," the failure to tax an entity at all, e. g., Walz v. Tax Commission, 397 U.S. 664 (1970), or the deductibility of certain voluntary and disinterested payments in computing taxable income, e. g., I.R.C. §170. Unlike Walz exemptions, which are an inevitable concomitant of the need to define the tax base, or a §170 deduction, which is a legislative attempt to delegate broad discretion to individuals concerning the allocation of social resources, tax benefits

triggered by the payment of specified user fees are direct government rewards for performing a narrowly defined activity. The Court accordingly has treated deductibility of user fees as direct subsidies for the purpose of constitutional review. Nyquist, supra; Sloan v. Lemon, 413 U.S. 825 (1973) (POWELL, J.) (tuition reimbursement plan).

As conceded by the Minn. Dept of Revenue in a 1976 analysis provided to the legislature shortly before the maximum tuition deduction limits were increased, in practice, the tuition deduction law benefits only those taxpayers with children in nonpublic schools. Minn. public schools are forbidden by law from charging tuition; fewer than 10% of school age children attend nonpublic schools, and more than 96% of those attend sectarian schools. The benefits of the tuition deduction are disproportionately and overwhelmingly skewed in favor of parents of children in pervasively sectarian schools, and the deductions are thus unconstitutional. See Lemon v. Kurtzman, 403 U.S. 602 (1971).

Even if the benefits of the Minn. statute were equally available to children in public and nonpublic schools, the statute would be invalid as an establishment of religion, because it constitutes the provision of unrestricted funds to sectarian elementary or secondary schools. This Court has consistently struck down such unrestricted aid. See, e. g., Meek v. Pittenger, 421 U.S. 349 (1975) (w/POWELL, J.). And even if Minn. attempted, as it has not, to cure the problems inherent in its unrestricted subsidy to sectarian schools by a system of audits to ensure that state aid did not flow

to the sectarian functions of such schools, the statute would be invalid.

The inclusion of textbooks and school transportation expenses within the the category of expenditures that are deductible under the Minn. statute does not render the statute constitutional. The textbook deduction differs in critical respect from the program upheld in Board of Education v. Allen, 392 U.S. 236 (1968), because, unlike the law upheld in Allen, the "textbooks" for which deductions are available in Minn. are selected by sectarian schools (or parents with children at those schools) without any designation or approval by public school authorities; are available to sectarian schoolchildren on terms far more favorable than to public schoolchildren; and include educational equipment, whose provision to sectarian schoolchildren has been repeatedly struck down. See Wolman v. Walter, 433 U.S. 229 (1977). The Minn. statute's transportation deduction must also be struck down, because it goes beyond the benefits upheld in Everson v. Board of Education, 330 U.S. 1 (1947), authorizing benefits for field trip transportation.

B. Resps. To be constitutionally permissible, a statute must provide benefits on a neutral basis and not have the primary effect of advancing religion. Petrs' contention is that the statute's benefits are generally available only to the parents of nonpublic school children. Petrs' statistical evidence in support of that position, however, fails to take into account the substantial expenditures made by public school parents that are deductible under the statute.

The critical concern is that religious organizations do not receive favored or special treatment. Establishment clause policy does not require that religious organizations be isolated from benefits available to the general citizenry. Thus, the Court has never struck down any provision, such as the one here, that applies to the entire class of taxpayer-parents of schoolchildren.

The challenged statute does not provide for any direct grant or tax credits of the type struck down in Nyquist. Rather, it makes available to all eligible taxpayers deductions for the designated educational expenditures without regard to whether the expenditures were made on behalf of public school children, nonpublic nonsectarian school children, or nonpublic sectarian school children. It provides for a genuine tax deduction.

The purpose of the present statute is a properly secular one designed to promote adequate educational opportunity for all children who are required by Minn. law to attend schools. To that end, the challenged statute has a valid secular legislative purpose. The statute in question has been in existence for over 27 years, and because no evidence of entanglement of church and state has arisen during that period of time, it is reasonable to assume that the danger of excessive entanglement is not present.

IV. Discussion

Yes!

Many of the cases in this area are simply inconsistent, and I have much difficulty reconciling Walz and the constitutionality of §170 with the result in Nyquist. Taking Walz and Nyquist as the standards, it is clear that tax deductions for churches are constitutional and the tax "deduction" in Nyquist is unconstitutional.

The Minn. statute provides for something in between, and although in their effect I am not sure there is enough difference to justify declaring two constitutional and one not, I am inclined to think that the Minn. scheme is marginally closer to the Walz deductions than to the statute that gave rise to establishment clause concerns in Nyquist.

You have indicated that "[t]he State has...a legitimate interest in facilitating education of the highest quality for all children within its boundaries, whatever school their parents have chosen for them." Wolman, 433 U.S., at 262. Thus, you believe, I take it, that States may, under some circumstances, give aid to educate children in private, sectarian schools. Your concern is with the circumstances, not with the idea of aid itself. See Hunt v. McNair, 413 U.S. 734, 742-743 (1973) (POWELL, J.) ("[T]he proposition that the Establishment Clause prohibits any program which in some manner aids an institution with a religious affiliation has consistently been rejected.... Stated another way, the Court has not accepted the recurrent argument that all aid is forbidden because aid to one aspect of an institution frees it to spend its other resources on religious ends."). See also Wolman, 433 U.S., at 262 (POWELL, J., separate opn); Roemer v. Board of Public Works, 426 U.S. 736, 745-747 (1976) (w/POWELL, J.); Widmar v. Vincent, 454 U.S. 263, 275, and n. 15 (1981) (POWELL, J.).

Your opinion in Nyquist itself left open the question whether States could give some aid for sectarian education: "Since the program here does not have the elements of a genuine tax deduction, such as for charitable contributions, we do not have before us, and

do not decide, whether that form of tax benefit is constitutionally acceptable under the 'neutrality' test in Walz." 413 U.S., at 790, n. 49. According to the factors specified in Walz, a genuine tax deduction contains the requisite guarantee of "separation" and thus comes within the realm of permissible effects defined by cases such as Everson and Allen. Although I have some doubts whether the constitutionality of a government subsidy should turn on whether it comes in the form of a credit or a deduction, the Court apparently has given the form significance. In Walz, the Court stated:

> Granting tax exemptions to churches necessarily operates to afford an indirect economic benefit and also gives rise to some, but yet a lesser, involvement than taxing them.... Obviously a direct money subsidy would be a relationship pregnant with involvement.... [But] the grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state.... There is no genuine nexus between tax exemption and establishment of religion.

397 U.S., at 674-675.

It is not clear exactly how to label the NY tax benefit invalidated in Nyquist, see 413 U.S., at 789, but you concluded that "[i]ts effect...is more like that of a tax credit since the deduction is not related to the amount actually spent for tuition and is apparently designed to yield a predetermined amount of tax 'forgiveness' in exchange for performing a specific act which the State desires to encourage--the usual attribute of a tax credit." I think the NY subsidy fairly could be characterized as a tax credit, in contrast to the Minn. statute, which provides a pure tax deduction.

You also have attached significance to the fact that the disbursement is to individuals rather than to institutions. See

Nyquist, 413 U.S., at 781; Wolman, 433 U.S., at 263 (POWELL, J., separate opn). I have considerable doubt that this should play a role in Establishment Clause analysis, but the distinction has been used by the Court. See Everson, supra; Allen, supra. In Lemon v. Kurtzman, the Court stated that the statute's "defect" was that it provided "state financial aid directly to the church-related school. This factor distinguishes both Everson and Allen, for in both those cases the Court was careful to point out that state aid was provided to the student and his parents--not the church-related school." 403 U.S., at 621. Although this factor supports the constitutionality of the Minn. statute, it is not of much help in distinguishing Nyquist.

A more important distinction, I think, is that the Minn. statute provides benefits to a broad class of persons. This has been important to you. See Widmar, 454 U.S., at 274 ("[T]he...[benefit] is available to a broad class of nonreligious as well as religious...groups.... The provision of benefits to so broad a spectrum of groups is an important index of secular effect."); Nyquist, 413 U.S., at 783 n. 38 ("Allen and Everson differ from the present litigation in a second important respect. In both cases the class of beneficiaries included all schoolchildren, those in public as well as those in private schools."); L. Tribe, American Constitutional Law 845 & n. 33 (1978) ("The narrowness of the benefited class was a key factor in...Nyquist."). Walz also rests in part on the fact that the tax exemptions at issue were available to a broad class of beneficiaries. See 397 U.S., at 673 (exemption benefits "all houses of religious worship within a broad class of property).

See also Everson, supra; Allen, supra. And in Nyquist, you seemed to suggest that a statistical examination of the breadth of the benefited class was not of importance unless the benefited class was narrow. See 413 U.S., at 794. Cf. id., at 783, n. 38 (reserving question of constitutionality of "G.I. Bill"-type scholarships used at sectarian institutions).

A brief word on the deduction for textbook and transportation expenses. Everson upheld reimbursement to parents for transportation, and this case only involves deductions. Wolman is distinguishable, because there the aid was direct to the schools. The textbook deduction is hard to fault, because it prohibits deductions for sectarian texts.

V. Summary

I have not discussed at any length the many passages in Nyquist that would indicate a different result in this case. But I think Nyquist can be as fairly distinguished from this case as Walz can. I think of the two, Nyquist is the one that should be distinguished. If you believe that parents of children attending sectarian schools may receive any government aid for tuition, this case almost has to be affirmed. I would have difficulty writing a state statute that provides such aid and is more "neutral." Moreover, if this deduction is unconstitutional, I am unsure whether the §170 deduction can withstand principled constitutional scrutiny.

I recommend affirming, with recognition that this may limit Nyquist to its facts or perhaps to tax credits.

lfp/ss 04/18/83

82-195 Mueller v. Allen

The case relied upon principally by petitioners is my opinion in Nyquist, 413 U.S. 756. This memo records notes on that case.

The New York Act of 1972

Provided "three distinct financial aid programs for nonpublic elementary and secondary schools":

(i) Direct grants to the schools for "maintenance and repair of . . . school facilities and equipment to ensure the health, welfare and safety of pupils". These grants were to go to schools serving "low income families".

(ii) "Tuition reimbursements ($100 for each high school child) to parents whose income is less than $5,000.

(iii) A form of tax relief to parents who do not qualify for the tuition reimbursement (i.e. with income over $5,000). Such parents may subtract from their adjusted gross income for state income tax purposes a designated amount for each children for whom they have paid at least $50 in nonpublic school tuition. If the taxpayer's gross income is less than $9,000 he may substract $1,000 for each of as many as three dependents.

This is in addition to any deduction for other religious or charitable contributions.

Pertinent Excerpts from Opinion

"It is equally well established that not every law that confers an 'indirect', 'remote' or 'incidental' benefit upon religious institutions is . . . constitutionally invalid", citing McGowan v. Maryland, Walz v. Tax Commissioner.

The general standard was described by me as follows:

> "What our cases require is careful examination of any law challenged on establishment grounds with a view to ascertaining whether it furthers any of the evils against which the Establishment Clause protects. Primary among those evils have been 'sponsorship, financial support and active involvement of the sovereign in religious activity", citing Walz and Lemon v. Kurtzman.

My opinion recognized the state interest in "preserving a healthy and safe educational environment for all of its school children", and "the validity of the state's interest in promoting pluralism and diversity among its public and nonpublic schools."

New York's direct financing of "maintenance and repairs" had the "effect, inevitably, to subsidize and advance the religious mission of sectarian schools". In

addition, as presently written, this direct subsidy would flunk the "entanglement clause" because of the continuing and intrusive relationship between church and state.

We held that the tuition reimbursement program also fails the "effect" test for essentially the same reasons. Direct, unrestricted financial grants only to parents of children in sectarian schools are invalid.

The third benefit (described by me as "income tax benefits to parents") presented a closer question. The parties debated the "label best suited" to describe the law. Appellant called it a system of "tax credits"; the state, a system of income tax "modifications". The Solicitor General, as amicus, characterized it as a tax "deduction". The District Court found that the aid was "in effect a tax credit". I declined to adopt any "single traditional label lifted from the law of income taxation", but said that at least it is a "tax deduction since it is an amount subtracted from adjusted gross income". I noted that the amount of the deduction "is unrelated to the amount of money actually expended by any parent on tuition, but is calculated on the basis of a formula (in turn based on the income of the parent)." I also analogized the tax credit to a "tuition grant", as the

only difference is that "one parents receives an actual cash payment while the other is allowed to reduce by an aribrary amount the sum he otherwise would be obliged to pay to the state".

I recognize that Walz (exemption of church property from taxation) gave some support to New York, but distinguished it primarily because of the broad scope of the exemption that included "all property devoted to religious, educational or charitable purposes".

Emphasized entanglement. I also emphasize the "grave potential for entanglement in the broader sense of continuing political strife over aid to religion". (I observe here that in Minnesota, the aid was adopted in 1955 and there is no evidence of entanglement in the quarter century of the law's existence.

Quoting Justice Black's opinion in Everson, I again emphasize the "potential divisive political effect of an aid program". I also quoted Justice Harlan as saying in Walz that the Establishment Clause policy is to prevent the "kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point".

One interesting minor point: In footnote 55, noting that 20% of the school population in New York attends sectarian schools, I observe that "the constituent base supporting these programs is not insignificant" - thus enhancing potential for entanglement.

Question Left Open

In n. 49, Nyquist said:

> "Since the program here does not have the elements of a genuine tax deduction, such as for charitable contributions, we do not have before us, and do not decide, whether that form of tax benefit is constitutionally acceptable under the 'neutrality' test in Walz."

L.F.P., Jr.

ss

lfp/ss 04/18/83

82-195 Mueller v. Allen

Purpose of this memo simply is to identify briefly several of the relevant cases.

Everson: approved a provision for reimbursement of parents of public as well as parochial school children for bus fares of "transportation" to and from school.

Allen: upheld New York law authorizing the provision of "secular" textbooks for all children in gradies 7-12 attending public and nonpublic schools. (I should check to see whether public school children had to purchase textbooks).

Walz v. Tax Commissioner: property tax "exemptions" for church property descpite the fact that such exemptions relieved churches of a financial burden.

Tilton: upheld federal grants of funds for the construction of facilities to be used for secular purposes by public and nonpublic institutions of higher learning.

job 04/18/83

To: Mr. Justice Powell

From: Jim

Re: Mueller v. Allen, No. 82-195

I have great doubts that the distinctions I offer between this case and Nyquist are distinctions at all, much less that they should be of constitutional significance, and urge instead that the Court write a bold opinion giving the political branches new directions about parochial school aid. Such course would, however, almost certainly require overruling Nyquist. Absent this step, I recommend the analysis set forth on the attached page.

job 04/18/83

In assessing whether an otherwise neutral statute violates the Establishment Clause, the Court has considered whether the statute has a secular purpose; whether its primary effect is to advance religion; and whether it fosters an excessive entanglement of government with religion. That the Minn. statute has a secular purpose and avoids excessive entanglement cannot be seriously challenged. More important, the Minn. statute does not have a primary effect of advancing religion. Unlike the NY statute invalidated in Nyquist, the tax benefit here is not in the form of, or a substitute for, a direct subsidy for religious conduct. In Walz the Court recognized that a tax exemption stood on a far different footing than a direct monetary subsidy from the state to churches, and the education deduction here functions in precisely the same way as the deductions upheld in Walz. Pure tax deductions simply represent a judgment by the state that income devoted to any educational expense should not be subjected to the burden of taxation. Far from encouraging religion the Minn. deduction simply lessens the disparity between the burdens borne by two classes of state taxpayers.

Moreover, the statutory scheme here, unlike that in Nyquist does not limit benefits to parents of private school children. As we indicated last Term in Widmar, the provision of benefits to a broad spectrum of groups is an important index of secular effect. Regardless of the percentage distribution or dollar amount, the provision of benefits to a broad class affords significant assurance that any aid to religion is not only indirect, but also an incidental byproduct of a secular legislative program.

82-195 MUELLER v. ALLEN Argued 4/18/83

1. What increase in $500 + $700 deductions since '56?

2. Evidence of entanglement over quarter century?

3 Evidence that any Establishment has been strengthened?

4. 1956 -17.44%
1980 -10.4

83
56
1

91000
1400
364000
91000
$127400000

per pupil

Loss of Revenue from deduction $2.4

Cost of ~~e~~ these 91,000 pupils in pub. schools

State Ed. Budget? County? Fed?

Capital Budget?

Kampf (Peter)

~~Makes no difference whether funds were spent for Gov's yacht or for ...~~

"Primary function is to inculcate religion"

$19 million deducted

~~B~~ Contributions to religious schools are deductible

Four ways by which Est. Clause benefits religion.

1. Disproportionality

Entangles State in two ways:

1. audits of tax returns.
2. politics

"Fiscal crisis"

"per pupil cost" - $1400*

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* If State pd this, added cost to state would be $127,400,000 per year for operating costs.

Kemp

Blomgren (Sp A G Minn)
Difference between Nyquist & this case

JPS noted a main purpose of statute was to benefit sectarian schools & present a choice. (Of course)

There must be a "primary effect" to further Establishment of religion.

Another purpose was to relieve State of part of burden of public education

(18% attended in 1958/60 as compared in ~~1980~~ 1978 with 10%)

82-195 Mueller v Allen

1. Minn. secular/private school population.

1956	125,000	17.44%
1980	91,000	10.04%

2. Evidence of entanglement?
Any increases in deductions?

3. State loss of revenue from the deductions from gross income — 2.4 million

Is it a loss?

Operating expenses
- State budget?
- ~~Localities~~
- Counties (profit tax) contribution?

Capital budget?

Increase cost to State if the 91,000 were in pub/schs.

What specific use there of a "primary effect to further an Establishment of Religion

82-195 Mueller v Allen, et al

DC's op:

1. Is a true "tax deduction statute" - providing no "direct financial aid. Nor does it operate as a credit vs a tax already determined" - A61-2

Deductions allowed only in actual amounts - A62

2. Three categories: A62
   1. Tuition (8 categories) - A62-4
   2. Transportation - A64
   3. Text books (9 items) - A64-5

3. Of the three-part Lemon test, Peters have concentrated on the "primary effect" - A70

4. Resps (Δs' below) challenge TTS statistics - A74. $ million pd to State - 75

5. Most relevant case is ~~Lit~~ Walz - A77

6. Findings: (a) statute provides" widely distributed tax relief - A77

   (b) benefits widely distributed - benefits to religion limited & incidental & indirect - A77

7. Peters ev. "lacks credentiality" because of "omission of serious significance" - A81

82-195 Mueller v. Allen (Pre-Conference)

If we invalidated the Minn. deduction statute, it could be the "death knell" to any form of assistance to private schools.

Many believe this is desirable. Although I was closely associated with pub. education for 19 yrs, I think the private school - including sectarian - has an important place in our country.

Nyquist: recognized the state's "interest in promoting the pluralism and diversity among public & non-public schools."

Private schools should not be unavailable to families of modest means.

Our cases have drawn fine lines. Compare E.g.:

Upheld	Invalidated
Walz	Lemon
Allen	Nyquist
Everson	Wolman
Tilton	~~Meek~~

In each, the Court has looked closely at the way the statute operated - applying largely subjective standards.

How does one measure the "primary effect" ~~in any~~?

?

The questions we have asked re to the law:

My quest: asked: Does it "further any of the evils against which the Estab. clause protects?

Wally (John Harlan): Estab. Clause policy is to prevent the "kind & degree of govt involvement in religious life that, as history teaches, is apt to lead to strife & frequently strain a political system to the breaking point."

This case: Can we say that the record – a quarter of a century of experience with this deduction statute – ~~clearly to lead to this kind~~ fostering gives any indication of these evils?

Per pupil cost $1,400.
91,000 pupils
$ 122,000,000

At argument, counsel could not answer the question as to what "primary effect" the deduction has had. No ev. in record that it has furthered any Establishment of religion.

It has benefited the State & provided more funding for the public schools.

Nyquist, of course, is a problem for me.

It involved three interrelated provisions: direct payment to schools for maintenance, direct grants to parents with low income, & tax deductions to parents with higher income that vary with income.

The last provision is close to this case.

There are distinctions:

1. ~~This~~ The Nyquist deduction was an essential component of a direct subsidy.

2. Its purpose - unabashedly - was to aid the 20% of N.Y. school children & their families in Catholic.

3. The Minn. statute - on its face - has a secular purpose. The case before us is a facial attack.

4. Minn. has 25 yrs of experience that indicates none of the evils ~~present~~ with which the Est. Clause is concerned. N.Y. had no experience.

If this is invalidated §170 may be next

x x x x

As I observed in Wolman, also 200 yrs of experience indicates our democracy is

Aff in 5-4

No. 82-195, Mueller v. Allen Conf. 4/20/83

The Chief Justice Affirm

Indirect subsidy — a deduction. *

Walz re closest case — exemption directly to churches & church schools *

State has leg. secular purpose. Financial load taken from State. Interest in diversity is important. Private schools often better & afford competition.

Can distinguish Nyquist.

"Primary effect" test not met here

* where churches operate schools.

Justice Brennan Rev

Agree with Rutledge's view that any aid - however small

Statute is distinguishable from Nyquist but principles of our cases require reversal.

Impermissible effect of promoting Establishment.

Justice White Affirm

Court has been "way off the course".

Would not extend Nyquist

Time to draw line

Justice Marshall Aff'm

Close Q and thus in ~~so far~~ as far as I'll go in invalidating aid to ~~sectarian~~ sectarian schools

Justice Blackmun Rev.

Agree with WJB.
My guest closest case
like Minn. Law Rev.
§ 170 in different

Justice Powell Aff'm

See my notes.

Justice Rehnquist Affirm

Cases have been decided on facts
- No precedent controls - [illegible] the Walz line.

Justice Stevens Rev.

Agree Q is close & reasonable people can agree.

But always have agreed with Rutledge & Jackson.

Nyquist can be distinguished but agree with WJB.

Justice O'Connor Affirm

I is difficult to distinguish Nyquist but it did reserve Q as to a true tax deduction. This is a true tax deduction.

On its face, this statute does allow

Received 5/31/83

At WHR's request, I have pre-viewed this draft. See my letter of 5/31/83

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: **Justice Rehnquist**

Circulated: _____

Recirculated: _____

1st DRAFT

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SUPREME COURT OF THE UNITED STATES

No. 82–195

VAN D. MUELLER AND JUNE NOYES, PETITIONER
v. CLYDE E. ALLEN, JR., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[June ——, 1983]

JUSTICE REHNQUIST delivered the opinion for the Court.

Minnesota allows taxpayers, in computing their state income tax, to deduct certain expenses incurred in providing for the education of their children. Minn. Stat. § 290.09 (22).[1] The United States Court of Appeals for the Eighth Circuit held that the Establishment Clause of the First and

[1] Minn. Stat. § 290.09(22) (1982) permits a taxpayer to deduct from his or her computation of gross income the following:

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."

Fourteenth Amendments was not offended by this arrangement. Because this question was reserved in *Committee for Public Education* v. *Nyquist*, 413 U. S. 756 (1973), and because of a conflict between the decision of the Court of Appeals for the Eighth Circuit and that of the Court of Appeals for the First Circuit in *Rhode Island Federation of Teachers* v. *Norberg*, 630 F. 2d 855 (CA1 1980), we granted certiorari. —— U. S. —— (1982). We now affirm.

Minnesota, like every other state provides its citizens with free elementary and secondary schooling. Minn. Stat. §§ 120.06, 120.72. It seems to be agreed that about 820,000 students attended this school system in the most recent relevant year. During the same year, approximately 91,000 elementary and secondary students attended some 500 privately supported schools located in Minnesota, and about 95% of these students attended schools considering themselves to be sectarian.

Minnesota, by a law originally enacted in 1955 and revised in 1976 and again in 1978, permits state taxpayers to claim a deduction from gross income for certain expenses incurred in educating their children. The deduction is limited to actual expenses incurred for the "tuition, textbooks and transportation" of dependents attending elementary or secondary schools. A deduction may not exceed $500 per dependent in grades K through six and $700 per dependent in grades seven through twelve. Minn. Stat. § 290.09.[2]

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[2] Both lower courts found that the statute permits deduction of a range of educational expenses. The District Court found that deductible expenses included:

"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.

Petitioners—certain Minnesota taxpayers—sued in the United States District Court for the District of Minnesota claiming that § 290.09(22) violated the Establishment Clause by providing financial assistance to sectarian institutions. They named as respondents the Commissioner of the Department of Revenue of Minnesota and several parents who took advantage of the tax deduction for expenses incurred in sending their children to parochial schools. The District Court granted respondent's motion for summary judgment, holding that the statute was "neutral on its face and in its application and does not have a primary effect of either advancing or inhibiting religion." 514 F. Supp. 998, 1003 (D Minn. 1981). On appeal, the Court of Appeals affirmed, concluding that the Minnesota statute substantially benefitted a "broad class of Minnesota citizens."

Today's case is no exception to our oft-repeated statement

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6. Tuition charged by a private tutor or by a school that is not an elementary or secondary school if the instruction 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." 514 F. Supp., at 1000.

The Court of Appeals concurred in this finding.

In addition, the District Court found that the statutory deduction for "textbooks" included not only "secular textbooks" but also:

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

2. Camera rental fees paid to the school for photography cleasses.

3. Ice skates 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.

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

9. Cost of pencils and special notebooks required for class." *Ibid.*

The Court of Appeals accepted this finding.

that the Establishment Clause presents especially difficult questions of interpretation and application. It is easy enough to quote the few words comprising that clause—"Congress shall make no law respecting an establishment of religion." It is not at all easy, however, apply this Court's various decisions construing the Clause to governmental programs of financial assistance to sectarian schools and the parents of children attending those schools. Indeed, in many of these decisions "we have expressly or implicitly acknowledged that 'we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law.'" *Lemon* v. *Kurtzman*, 403 U. S. 609, 612 (1971), quoted with approval in *Nyquist*, *supra*, at 761.

One fixed principle in this field is our consistent rejection of the argument that "any program which in some manner aids an institution with a religious affiliation" violates the Establishment Clause. *Hunt* v. *McNair*, 413 U. S. 734, 742 (1973). See, *e. g.*, *Bradfield* v. *Roberts*, 175 U. S. 291 (1899); *Walz* v. *Tax Commission*, 397 U. S. 664 (1970). For example, it is now well-established that a state may reimburse parents for expenses incurred in transporting their children to school, *Everson* v. *Board of Education*, 330 U. S. 1 (1947), and that it may loan secular textbooks to all schoolchildren within the state, *Board of Education* v. *Allen*, 392 U. S. 236 (1968).

so long as reimbursement is made for all

Notwithstanding the repeated approval given programs such as those in *Allen* and *Everson*, our decisions also have struck down arrangements resembling, in many respects, these forms of assistance. See, *e. g.*, *Lemon* v. *Kurtzman*, *supra*; *Levitt* v. *Committee for Public Education*, 413 U. S. 472 (1972); *Meek* v. *Pittenger*, 421 U. S. 349 (1975); *Wolman* v. *Walter*, 433 U. S. 229, 237–238 (1977).[3] In this case we

[3] In *Lemon* v. *Kurtzman*, *supra*, the Court concluded that the state's reimbursement of nonpublic schools for the cost of teacher's salaries, textbooks, and instructional materials, and its payment of a salary supplement to teachers in nonpublic schools, resulted in excessive entanglement of

are asked to decide whether Minnesota's tax deduction bears greater resemblance to those types of assistance to parochial schools we have approved, or to those we have struck down. Petitioners place particular reliance on our decision in *Committee for Public Education* v. *Nyquist*, *supra*, where we held invalid a New York statute providing public funds for the maintenance and repair of the physical facilities of private schools and granting thinly disguised "tax benefits," actually amounting to tuition grants, to the parents of children attending private schools. As explained below, we conclude that § 290.09(22) bears less resemblance to the arrangement struck down in *Nyquist* than it does to assistance programs upheld in our prior decisions and discussed with approval in *Nyquist*.

The general nature of our inquiry in this area has been guided, since the decision in *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971), by the "three-part" test laid down in that case:

> "First, the statute must have a secular legislative purpose; second, its principle or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster 'an excessive government entanglement with religion.'" *Id.*, at 612–613.

While this principle is well settled, our cases have also emphasized that it provides "no more than [a] helpful signpost" in dealing with Establishment Clause challenges. *Hunt* v. *McNair*, *supra*, 413 U. S., at 741. With this *caveat* in mind, we turn to the specific challenges raised against § 290.09(22) under the *Lemon* framework.

Little time need be spent on the question of whether the Minnesota tax deduction has a secular purpose. Under our

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church and state. In *Levitt* v. *Committee for Public Education*, *supra*, we struck down on Establishment Clause grounds a state program reimbursing nonpublic schools for the cost of teacher-prepared examinations. Finally, in *Meek* v. *Pittenger*, *supra*, and *Wolman* v. *Walter*, *supra*, we held unconstitutional a direct loan of instructional materials to nonpublic schools, while upholding the loan of textbooks to individual students.

prior decisions, governmental assistance programs have consistently survived this inquiry even when they have run afoul of other aspects of the *Lemon* framework. See, *e. g.*, *Lemon* v. *Kurtzman*, *supra*; *Meek* v. *Pittenger*, *supra*, 421 U. S., at 363; *Wolman* v. *Walter*, *supra*, 433 U. S., at 236. This reflects, at least in part, our reluctance to attribute unconstitutional motives to the states, particularly when a plausible secular purpose for the state's program may be discerned from the face of the statute.

A state's decision to defray the cost of educational expenses incurred by parents—regardless of the type of schools their children attend—evidences a purpose that is both secular and understandable. An educated populace is essential to the political and economic health of any community, and a state's efforts to assist parents in meeting the rising cost of educational expenses plainly serves this secular purpose of ensuring that the state's citizenry is well-educated. Similarly, Minnesota, like other states, could conclude that there is a strong public interest in assuring the continued financial health of private schools, both sectarian and non-sectarian. By educating a substantial number of students such schools relieve public schools of a correspondingly great burden—to the benefit of all taxpayers. In addition, private schools may serve as a benchmark for public schools, in a manner analogous to the "TVA yardstick" for private power companies. As JUSTICE POWELL has remarked:

> "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. The State has, moreover, a legitimate interest in facilitating education of the highest quality for all children within its boundaries, whatever school their parents have chosen for them. *Wolman* v.

Walter, 433 U. S. 229, 226 (POWELL, J., concurring in part, concurring in judgment in part, and dissenting in part).

All these justifications are readily available to support § 290.09(22), and each is sufficient to satisfy the secular purpose inquiry of *Lemon*.[4]

We turn therefore to the more difficult but related question whether the Minnesota statute has "the primary effect of advancing the sectarian aims of the nonpublic schools." *Committee for Public Education* v. *Regan*, 444 U. S. 646, 662 (1980); *Lemon* v. *Kurtzman*, *supra*, 403 U. S., at 612–613. In concluding that it does not, we find several features of the Minnesota tax deduction particularly significant. First, an essential feature of Minnesota's arrangement is the fact that § 290.09(22) is only one among many deductions—such as those for medical expenses, Minn. Stat. § 290.09(10) and charitable contributions, Minn. Stat. § 290.21—available under the Minnesota tax laws.[5] Our decisions consistently have recognized that traditionally "[l]egislatures have especially broad latitude in creating classifications and distinctions in tax statutes," *Regan* v. *Taxation with Representation*, —— U. S. —— (1983), in part because the "familiarity with local conditions" enjoyed by legislators especially en-

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[4] Section 290.09 contains no express statements of legislative purpose, and its legislative history offers few unambiguous indications of actual intent. The absence of such evidence does not affect our treatment of the statute.

[5] Deductions for charitable contributions, allowed by Minnesota law, Minn. Stat. § 290.21, include contributions to religious institutions, and exemptions from property tax for property used for charitable purposes under Minnesota law include property used for wholly religious purposes, Minn. Stat. § 272.02. In each case, it may be that religious institutions benefit very substantially from the allowance of such deductions. The Court's holding in *Walz* v. *Tax Commission*, 397 U. S. 664 (1970), indicates, however, that this does not require the conclusion that such provisions of a state's tax law violate the Establishment Clause.

ables them to "achieve an equitable distribution of the tax burden." *Madden* v. *Kentucky*, 309 U. S. 83, 87 (1940). Under our prior decisions, the Minnesota legislature's judgment that a deduction for educational expenses fairly equalizes the tax burden of its citizens and encourages desirable expenditures for educational purposes is entitled to substantial deference.[6]

Other characteristics of § 290.09(22) argue equally strongly for the provision's constitutionality. Most importantly, the deduction is available for educational expenses incurred by *all* parents, including those whose children attend public schools and those whose children attend non-sectarian private schools or sectarian private schools. Just as in *Widmar* v. *Vincent*, —— U. S. —— (1981), where we concluded that the state's provision of a forum neutrally "open to a broad class of nonreligious as well as religious speakers" does not

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[6] Our decision in *Nyquist* is not to the contrary on this point. We expressed considerable doubt there that the "tax benefits" provided by New York law properly could be regarded as parts of a genuine system of tax laws. Plainly, the outright grants to low-income parents did not take the form of ordinary tax benefits. As to the benefits provided to middle-income parents, the Court said:

"The amount of the deduction is unrelated to the amount of money actually expended by any parent on tuition, but is calculated on the basis of a formula contained in the statute. The formula is apparently the product of a legislative attempt to assure that each family would receive a carefully estimated net benefit, and that the tax benefit would be comparable to, and compatible with, the tuition grant for lower income families."

Indeed, the question whether a program having the elements of a "genuine tax deduction" would be constitutionally acceptable was expressly reserved in *Nyquist*, *supra*, 413 U. S., at 790, n. 49. While the economic consequences of the program in *Nyquist* and that in this case may be difficult to distinguish, we have recognized on other occasions that "the form of the [state's assistance to parochial schools must be examined] for the light that it casts on the substance." *Lemon* v. *Kurtzman*, *supra*, 403 U. S., at 614. The fact that the Minnesota plan embodies a "genuine tax deduction" is thus of some relevance, especially given the traditional rule of deference accorded legislative classifications in tax statutes.

"confer any imprimatur of State approval," so here: "the provision of benefits to so broad a spectrum of groups is an important index of secular effect."[7]

In this respect, as well as others, this case is vitally different from the scheme struck down in *Nyquist*. There, public assistance amounting to tuition grants, was provided only to parents of children in *nonpublic* schools. This fact had considerable bearing on our decision striking down the New York statute at issue; we explicitly distinguished both *Allen* and *Everson* on the grounds that "In both cases the class of beneficiaries included *all* schoolchildren, those in public as well as those in private schools." 413 U. S., at 782, n. 38 (emphasis in original).[8] Moreover, we intimated that "public assistance (*e. g.*, scholarships) made available generally

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[7] Likewise, in *Sloan* v. *Lemon*, 413 U. S. 825, 832 (1973), where we held that a Pennsylvania statute violated the First Amendment, we emphasized that "the State [had] singled out a class of its citizens for a special economic benefit." We also observed in *Widmar* that "empirical evidence that religious groups will dominate [the school's] open forum," —— U. S., at ——, might be relevant to analysis under the Establishment Clause. We address this below, pp. ————, *infra*.

[8] Our full statement was that:

"*Allen* and *Everson* differ from the present litigation in a second important respect. In both cases the class of beneficiaries included *all* schoolchildren, those in public as well as those in private schools. See also *Tilton* v. *Richardson*, *supra*, in which federal aid was made available to *all* institutions of higher learning, and *Walz* v. *Tax Comm'n*, *supra*, in which tax exemptions were accorded to *all* educational and charitable nonprofit institutions. . . . Because of the manner in which we have resolved the tuition grant issue, we need not decide 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.*, scholarship) made available generally without regard to the sectarian-nonsectarian, or public-non-public nature of the institution benefited. . . . Thus our decision today does not compel . . . the conclusion that the educational assistance provisions of the "G.I. Bill," 38 U. S. C. § 1651, impermissibly advance religion in violation of the Establishment Clause." 413 U. S., at 782, n. 38. See also, *id.*, at 775.

without regard to the sectarian-nonsectarian or public-nonpublic nature of the institution benefited," *ibid.*, might not offend the Establishment Clause. We think the tax deduction adopted by Minnesota is more similar to this latter type of program than it is to the arrangement struck down in *Nyquist*. Unlike the assistance at issue in *Nyquist*, § 290.09(22) permits *all* parents—whether their children attend public school or private—to deduct their childrens' educational expenses. As *Widmar* and our other decisions indicate, a program, like § 290.09(22), that neutrally provides state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause.

We also agree with the Court of Appeals that, by channeling whatever assistance it may provide to parochial schools through individual parents, Minnesota has reduced the Establishment Clause objections to which its action is subject. It is true, of course, that financial assistance provided to parents ultimately has an economic effect comparable to that of aid given directly to the schools attended by their children. It is also true, however, that under Minnesota's arrangement public funds become available only as a result of numerous, private choices of individual parents of school-age children. For these reasons, we recognized in *Nyquist* that the means by which state assistance flows to private schools is of some importance: we said that "the fact that aid is disbursed to parents rather than to . . . schools" is a material consideration in Establishment Clause analysis, albeit "only one among many to be considered." *Nyquist*, at 781. It is noteworthy that all but one of our recent cases invalidating state aid to parochial schools have involved the direct transmission of assistance from the state to the schools themselves. The exception, of course, was *Nyquist*, which, as discussed previously is distinguishable from this case on other grounds. Where, as here, aid to parochial schools is available only as a result of decisions of individual parents no

"imprimatur of State approval," *Widmar*, at ——, can be deemed to have been conferred on any particular religion, or on religion generally.

We find it useful, in the light of the foregoing characteristics of § 290.09(22), to compare the attenuated financial benefits flowing to parochial schools from the section to the evils against which the Establishment Clause was designed to protect. These dangers are well-described by our statement that "what is at stake as a matter of policy [in Establishment Clause cases] is preventing that kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point." *Nyquist*, *supra*, 413 U. S., at 796, quoting, *Walz* v. *Tax Comm'n*, 397 U. S., at 694 (Harlan, J., concurring). It is important, however, to "keep these issues in perspective":

> "At this point in the 20th century we are quite far removed from the dangers that prompted the Framers to include the Establishment Clause in the Bill of Rights. See *Walz* v. *Tax Comm'n*, 397 U. S. 664, 668 (1970). 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, ~~and~~ such risk seems entirely tolerable in light of the continuing oversight of this Court." *Wolman*, at 263 (POWELL, J., concurring in part, concurring in the judgment in part, and dissenting in part).

The Establishment Clause of course extends beyond prohibition of a state church or payment of state funds to one or more churches. We do not think, however, that its prohibition extends to the type of tax deduction established by Minnesota. The historic purposes of the clause simply do not encompass the sort of attenuated financial benefit, ulti-

mately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case.

Petitioners argue that, notwithstanding the facial neutrality of § 290.09(22), in application the statute primarily benefits religious institutions.[9] Petitioners rely, as they did below, on a statistical analysis of the type of persons claiming the tax deduction. They contend that most parents of public school children incur no tuition expenses, see Minn. Stat. § 120.06, and that other expenses deductible under § 290.09(22) are negligible in value; moreover, they claim that 96% of the children in private schools in 1978–1979 attended religiously-affiliated institutions. Because of all this, they reason, the bulk of deductions taken under § 290.09(22) will be claimed by parents of children in sectarian schools. Respondents reply that petititoners have failed to consider the impact of deductions for items such as transportation, summer school tuition, tuition paid by parents whose children attended schools outside the school districts in which they resided, rental or purchase costs for a variety of equipment, and tuition for certain types of instruction not ordinarily provided in public schools.

We need not consider these contentions in detail. We would be loath to adopt a rule grounding the constitutionality

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[9] Petitioners cite a "Revenue Analysis" prepared in 1976 by the Minnesota Department of Revenue, which states that "Only those taxpayers having dependents in nonpublic elementary or secondary schools are affected by this law since tuition, transportation and textbook expenses for public school students are paid for by the school district." Pet. Br., at 38. We fail to see the significance of the report; it is no more than a capsule description of the tax deduction provision. As discussed below, and as the lower courts expressly found, the analysis is plainly mistaken, as a factual matter, regarding the effect of § 290.09(22). Moreover, several memoranda prepared by the Minnesota Department of Revenue in 1979—stating that a number of specific expenses maybe deducted by parents with children in public school—clearly indicate that the summary discussion in the 1976 memorandum was not intended as any comprehensive or binding agency determination.

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 by which such statistical evidence might be evaluated. Moreover, the fact that private persons fail in a particular year to claim the tax relief to which they are entitled—under a facially neutral statute—should be of little importance in determining the constitutionality of the statute permitting such relief.

Finally, private educational institutions, and parents paying for their children to attend these schools, make special contributions to the areas in which they operate. "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." *Wolman*, at 262 (POWELL, J., concurring and dissenting). If parents of children in private schools choose to take especial advantage of the relief provided by § 290.09(22), it is no doubt due to the fact that they bear a particularly great financial burden in educating their children. More fundamentally, whatever unequal effect may be attributed to the statutory classification can fairly be regarded as a rough return for the benefits, discussed above, provided to the state and all taxpayers by parents sending their children to parochial schools. In the light of all this, we believe it wiser to decline to engage in the type of empirical inquiry into those persons benefited by state law which petitioners urge.[10]

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[10] Our conclusion is unaffected by the fact that § 290.09(22) permits deductions for amounts spent for textbooks and transportation as well as tuition. In *Everson* v. *Board of Education*, 330 U. S. 1 (1947), we approved a statute reimbursing parents of *all* schoolchildren for the costs of transporting their children to school. Doing so by means of a deduction, rather than a direct grant, only serves to make the state's action less objectionable. Likewise, in *Board of Education* v. *Allen*, 392 U. S. 236 (1968), we

Thus, we hold that the Minnesota tax deduction for educational expenses satisfies the primary effect inquiry of our Establishment Clause cases.

Turning to the third part of the *Lemon* inquiry, we have no difficulty in concluding that the Minnesota statute does not "excessively entangle" the state in religion. The only plausible source of the "comprehensive, discriminating, and continuing state surveillance," 403 U. S., at 619, necessary to run afoul of this standard would lie in the fact that state officials must determine whether particular textbooks qualify for a deduction. In making this decision, state officials must disallow deductions taken from "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." Minn. Stat. § 290.09 (22). Making decisions such as this does not differ substantially from making the types of decisions approved in earlier opinions of this Court. In *Board of Education* v. *Allen*, 392 U. S. 236 (1968), for example, the Court upheld the loan of secular textbooks to parents or children attending nonpublic schools; though state officials were required to determine whether particular books were or were not secular, the system was held not to violate the Establishment Clause. See also *Wolman* v. *Walter*, *supra*; *Meek* v. *Pittenger*, *supra*. The same result follows in this case.[11]

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competition for state funds — e.g. political pressure for increased deduction. See what I said in Nyquist. 413 U.S. 794 796

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approved state loans of textbooks to *all* schoolchildren; although we disapproved, in *Meek* v. *Pittenger* and *Wolman* v. *Walter* direct loans of instructional materials to sectarian schools, we do not find those cases controlling. First, they involved assistance provided to the schools themselves, rather than tax benefits directed to individual parents, see pp. ——, *supra*. Moreover, we think that state assistance for the rental of calculators, see J. App., at A18, ice skates, *ibid.*, tennis shoes, *ibid.*, and the like, scarcely poses the type of dangers against which the Establishment Clause was intended to guard.

[11] No party to this litigation has urged that the Minnesota plan is invalid

For the foregoing reasons, the judgment of the Court of Appeals is

Affirmed.

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because it runs afoul of the rather elusive inquiry, subsumed under the third part of the *Lemon* test, whether the Minnesota statute partakes of the "divisive political potential" condemned in *Lemon*, *supra*, 403 U. S., at 622. The argument is advanced, however, by amicus National Committee for Public Education and Religious Liberty *et al.* This variation of the "entanglement" test has been interpreted differently in different cases. Compare *Lemon* v. *Kurtzman*, 403 U. S. 602, 622–625, with *id.*, at 665–666 (WHITE, J., dissenting); *Meek* v. *Pittinger*, *supra*, 421 U. S., at 359–62, with *id.*, at 374–379 (BRENNAN, J., dissenting). Since this aspect of the "entanglement" inquiry originated with *Lemon* v. *Kurtzman*, *supra*, and the Court's opinion there took pains to distinguish both *Everson* v. *Board of Education*, 330 U. S. 1 (1947), and *Board of Education* v. *Allen*, 392 U. S. 236 (1968), the Court in *Lemon* must have been referring to a phenomenon which, although present in that case, would have been absent in the two cases it distinguished.

The Court's language in *Lemon I* respecting political divisiveness was made in the context of Pennsylvania and Rhode Island statutes which provided for either direct payments of, or reimbursement of, a proportion of teachers' salaries in parochial schools. We think, in the light of the treatment of the point in later cases discussed above, the language must be regarded as confined to cases where direct financial subsidies are paid to parochial schools or to teachers in parochial schools.

job 05/31/83

To: Mr. Justice Powell

From: Jim

Re: Mueller v. Allen, No. 82-195

In 1978-1979, 815,155 children were attending public schools. The number of children enrolled in tuition-charging nonpublic schools in Minn. for the 1979-1980 school year was 90,954 (10.04%). Over 95% of this number, or 86,808, were enrolled in schools considering themselves to be sectarian. The total Minn. school population in 1956 was 719,490, with 125,490 (17.44%) in private schools. Of the 554 nonpublic schools in Minn., 366 were Catholic, 151 were nonreligious, 13 were private, and 24 were "not reporting."

May 31, 1983

82-195 Mueller v. Allen

Dear Bill:

I think your opinion in this case is a good one. You have distinguished Nyquist about as well as one can.

My clerk Jim Browning (who did a bench memo for me in this case) also has read your draft and has no specific suggestions. I enclose a little memo that Jim prepared at my request. Your clerk can ascertain from Jim the sources of his statistics. If they check out - as I think they will - they may merit a footnote.

It is clear that the presence of the statute for more than a quarter of a century has not resulted in an increase in the patronage of private schools to the detriment of public schools. One can argue, I suppose, that these figures also rebut any inference that the statute encourages a religious establishment.

Of course, the dissent will have some very strong answers but you can wait to see exactly how they are advanced.

Sincerely,

Justice Rehnquist

lfp/ss

Sally -
Join note

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: **Justice Rehnquist**

Circulated: JUN 1 1983

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82–195

VAN D. MUELLER AND JUNE NOYES, PETITIONER
v. CLYDE E. ALLEN, JR., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[June ——, 1983]

JUSTICE REHNQUIST delivered the opinion for the Court.

Minnesota allows taxpayers, in computing their state income tax, to deduct certain expenses incurred in providing for the education of their children. Minn. Stat. §290.09 (22).[1] The United States Court of Appeals for the Eighth Circuit held that the Establishment Clause of the First and

[1] Minn. Stat. §290.09(22) (1982) permits a taxpayer to deduct from his or her computation of gross income the following:

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."

Fourteenth Amendments was not offended by this arrangement. Because this question was reserved in *Committee for Public Education* v. *Nyquist*, 413 U. S. 756 (1973), and because of a conflict between the decision of the Court of Appeals for the Eighth Circuit and that of the Court of Appeals for the First Circuit in *Rhode Island Federation of Teachers* v. *Norberg*, 630 F. 2d 855 (CA1 1980), we granted certiorari. —— U. S. —— (1982). We now affirm.

Minnesota, like every other state provides its citizens with free elementary and secondary schooling. Minn. Stat. §§ 120.06, 120.72. It seems to be agreed that about 820,000 students attended this school system in the most recent relevant year. During the same year, approximately 91,000 elementary and secondary students attended some 500 privately supported schools located in Minnesota, and about 95% of these students attended schools considering themselves to be sectarian.

Minnesota, by a law originally enacted in 1955 and revised in 1976 and again in 1978, permits state taxpayers to claim a deduction from gross income for certain expenses incurred in educating their children. The deduction is limited to actual expenses incurred for the "tuition, textbooks and transportation" of dependents attending elementary or secondary schools. A deduction may not exceed $500 per dependent in grades K through six and $700 per dependent in grades seven through twelve. Minn. Stat. § 290.09.[2]

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[2] Both lower courts found that the statute permits deduction of a range of educational expenses. The District Court found that deductible expenses included:

"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.

Petitioners—certain Minnesota taxpayers—sued in the United States District Court for the District of Minnesota claiming that §290.09(22) violated the Establishment Clause by providing financial assistance to sectarian institutions. They named as respondents the Commissioner of the Department of Revenue of Minnesota and several parents who took advantage of the tax deduction for expenses incurred in sending their children to parochial schools. The District Court granted respondent's motion for summary judgment, holding that the statute was "neutral on its face and in its application and does not have a primary effect of either advancing or inhibiting religion." 514 F. Supp. 998, 1003 (D Minn. 1981). On appeal, the Court of Appeals affirmed, concluding that the Minnesota statute substantially benefitted a "broad class of Minnesota citizens."

Today's case is no exception to our oft-repeated statement

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6. Tuition charged by a private tutor or by a school that is not an elementary or secondary school if the instruction 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." 514 F. Supp., at 1000.

The Court of Appeals concurred in this finding.

In addition, the District Court found that the statutory deduction for "textbooks" included not only "secular textbooks" but also:

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

2. Camera rental fees paid to the school for photography cleasses.

3. Ice skates 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.

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

9. Cost of pencils and special notebooks required for class." *Ibid.*

The Court of Appeals accepted this finding.

that the Establishment Clause presents especially difficult questions of interpretation and application. It is easy enough to quote the few words comprising that clause—"Congress shall make no law respecting an establishment of religion." It is not at all easy, however, apply this Court's various decisions construing the Clause to governmental programs of financial assistance to sectarian schools and the parents of children attending those schools. Indeed, in many of these decisions "we have expressly or implicitly acknowledged that 'we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law.'" *Lemon* v. *Kurtzman*, 403 U. S. 609, 612 (1971), quoted with approval in *Nyquist*, *supra*, at 761.

One fixed principle in this field is our consistent rejection of the argument that "any program which in some manner aids an institution with a religious affiliation" violates the Establishment Clause. *Hunt* v. *McNair*, 413 U. S. 734, 742 (1973). See, *e. g.*, *Bradfield* v. *Roberts*, 175 U. S. 291 (1899); *Walz* v. *Tax Commission*, 397 U. S. 664 (1970). For example, it is now well-established that a state may reimburse parents for expenses incurred in transporting their children to school, *Everson* v. *Board of Education*, 330 U. S. 1 (1947), and that it may loan secular textbooks to all schoolchildren within the state, *Board of Education* v. *Allen*, 392 U. S. 236 (1968).

Notwithstanding the repeated approval given programs such as those in *Allen* and *Everson*, our decisions also have struck down arrangements resembling, in many respects, these forms of assistance. See, *e. g.*, *Lemon* v. *Kurtzman*, *supra*; *Levitt* v. *Committee for Public Education*, 413 U. S. 472 (1972); *Meek* v. *Pittenger*, 421 U. S. 349 (1975); *Wolman* v. *Walter*, 433 U. S. 229, 237–238 (1977).[3] In this case we

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[3] In *Lemon* v. *Kurtzman*, *supra*, the Court concluded that the state's reimbursement of nonpublic schools for the cost of teacher's salaries, textbooks, and instructional materials, and its payment of a salary supplement to teachers in nonpublic schools, resulted in excessive entanglement of

are asked to decide whether Minnesota's tax deduction bears greater resemblance to those types of assistance to parochial schools we have approved, or to those we have struck down. Petitioners place particular reliance on our decision in *Committee for Public Education* v. *Nyquist*, *supra*, where we held invalid a New York statute providing public funds for the maintenance and repair of the physical facilities of private schools and granting thinly disguised "tax benefits," actually amounting to tuition grants, to the parents of children attending private schools. As explained below, we conclude that § 290.09(22) bears less resemblance to the arrangement struck down in *Nyquist* than it does to assistance programs upheld in our prior decisions and discussed with approval in *Nyquist*.

The general nature of our inquiry in this area has been guided, since the decision in *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971), by the "three-part" test laid down in that case:

> "First, the statute must have a secular legislative purpose; second, its principle or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster 'an excessive government entanglement with religion.'" *Id.*, at 612–613.

While this principle is well settled, our cases have also emphasized that it provides "no more than [a] helpful signpost" in dealing with Establishment Clause challenges. *Hunt* v. *McNair*, *supra*, 413 U. S., at 741. With this *caveat* in mind, we turn to the specific challenges raised against § 290.09(22) under the *Lemon* framework.

Little time need be spent on the question of whether the Minnesota tax deduction has a secular purpose. Under our

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church and state. In *Levitt* v. *Committee for Public Education*, *supra*, we struck down on Establishment Clause grounds a state program reimbursing nonpublic schools for the cost of teacher-prepared examinations. Finally, in *Meek* v. *Pittenger*, *supra*, and *Wolman* v. *Walter*, *supra*, we held unconstitutional a direct loan of instructional materials to nonpublic schools, while upholding the loan of textbooks to individual students.

prior decisions, governmental assistance programs have consistently survived this inquiry even when they have run afoul of other aspects of the *Lemon* framework. See, *e. g.*, *Lemon* v. *Kurtzman*, *supra*; *Meek* v. *Pittenger*, *supra*, 421 U. S., at 363; *Wolman* v. *Walter*, *supra*, 433 U. S., at 236. This reflects, at least in part, our reluctance to attribute unconstitutional motives to the states, particularly when a plausible secular purpose for the state's program may be discerned from the face of the statute.

A state's decision to defray the cost of educational expenses incurred by parents—regardless of the type of schools their children attend—evidences a purpose that is both secular and understandable. An educated populace is essential to the political and economic health of any community, and a state's efforts to assist parents in meeting the rising cost of educational expenses plainly serves this secular purpose of ensuring that the state's citizenry is well-educated. Similarly, Minnesota, like other states, could conclude that there is a strong public interest in assuring the continued financial health of private schools, both sectarian and non-sectarian. By educating a substantial number of students such schools relieve public schools of a correspondingly great burden—to the benefit of all taxpayers. In addition, private schools may serve as a benchmark for public schools, in a manner analogous to the "TVA yardstick" for private power companies. As JUSTICE POWELL has remarked:

> "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. The State has, moreover, a legitimate interest in facilitating education of the highest quality for all children within its boundaries, whatever school their parents have chosen for them. *Wolman* v.

Walter, 433 U. S. 229, 226 (POWELL, J., concurring in part, concurring in judgment in part, and dissenting in part).

All these justifications are readily available to support § 290.09(22), and each is sufficient to satisfy the secular purpose inquiry of *Lemon*.[4]

We turn therefore to the more difficult but related question whether the Minnesota statute has "the primary effect of advancing the sectarian aims of the nonpublic schools." *Committee for Public Education* v. *Regan*, 444 U. S. 646, 662 (1980); *Lemon* v. *Kurtzman*, *supra*, 403 U. S., at 612–613. In concluding that it does not, we find several features of the Minnesota tax deduction particularly significant. First, an essential feature of Minnesota's arrangement is the fact that § 290.09(22) is only one among many deductions—such as those for medical expenses, Minn. Stat. § 290.09(10) and charitable contributions, Minn. Stat. § 290.21—available under the Minnesota tax laws.[5] Our decisions consistently have recognized that traditionally "[l]egislatures have especially broad latitude in creating classifications and distinctions in tax statutes," *Regan* v. *Taxation with Representation*, —— U. S. —— (1983), in part because the "familiarity with local conditions" enjoyed by legislators especially en-

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[4] Section 290.09 contains no express statements of legislative purpose, and its legislative history offers few unambiguous indications of actual intent. The absence of such evidence does not affect our treatment of the statute.

[5] Deductions for charitable contributions, allowed by Minnesota law, Minn. Stat. § 290.21, include contributions to religious institutions, and exemptions from property tax for property used for charitable purposes under Minnesota law include property used for wholly religious purposes, Minn. Stat. § 272.02. In each case, it may be that religious institutions benefit very substantially from the allowance of such deductions. The Court's holding in *Walz* v. *Tax Commission*, 397 U. S. 664 (1970), indicates, however, that this does not require the conclusion that such provisions of a state's tax law violate the Establishment Clause.

ables them to "achieve an equitable distribution of the tax burden." *Madden* v. *Kentucky*, 309 U. S. 83, 87 (1940). Under our prior decisions, the Minnesota legislature's judgment that a deduction for educational expenses fairly equalizes the tax burden of its citizens and encourages desirable expenditures for educational purposes is entitled to substantial deference.[6]

Other characteristics of § 290.09(22) argue equally strongly for the provision's constitutionality. Most importantly, the deduction is available for educational expenses incurred by *all* parents, including those whose children attend public schools and those whose children attend non-sectarian private schools or sectarian private schools. Just as in *Widmar* v. *Vincent*, —— U. S. —— (1981), where we concluded that the state's provision of a forum neutrally "open to a broad class of nonreligious as well as religious speakers" does not

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[6] Our decision in *Nyquist* is not to the contrary on this point. We expressed considerable doubt there that the "tax benefits" provided by New York law properly could be regarded as parts of a genuine system of tax laws. Plainly, the outright grants to low-income parents did not take the form of ordinary tax benefits. As to the benefits provided to middle-income parents, the Court said:

"The amount of the deduction is unrelated to the amount of money actually expended by any parent on tuition, but is calculated on the basis of a formula contained in the statute. The formula is apparently the product of a legislative attempt to assure that each family would receive a carefully estimated net benefit, and that the tax benefit would be comparable to, and compatible with, the tuition grant for lower income families."

Indeed, the question whether a program having the elements of a "genuine tax deduction" would be constitutionally acceptable was expressly reserved in *Nyquist*, *supra*, 413 U. S., at 790, n. 49. While the economic consequences of the program in *Nyquist* and that in this case may be difficult to distinguish, we have recognized on other occasions that "the form of the [state's assistance to parochial schools must be examined] for the light that it casts on the substance." *Lemon* v. *Kurtzman*, *supra*, 403 U. S., at 614. The fact that the Minnesota plan embodies a "genuine tax deduction" is thus of some relevance, especially given the traditional rule of deference accorded legislative classifications in tax statutes.

"confer any imprimatur of State approval," so here: "the provision of benefits to so broad a spectrum of groups is an important index of secular effect."[7]

In this respect, as well as others, this case is vitally different from the scheme struck down in *Nyquist*. There, public assistance amounting to tuition grants, was provided only to parents of children in *nonpublic* schools. This fact had considerable bearing on our decision striking down the New York statute at issue; we explicitly distinguished both *Allen* and *Everson* on the grounds that "In both cases the class of beneficiaries included *all* schoolchildren, those in public as well as those in private schools." 413 U. S., at 782, n. 38 (emphasis in original).[8] Moreover, we intimated that "public assistance (*e. g.*, scholarships) made available generally

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[7] Likewise, in *Sloan* v. *Lemon*, 413 U. S. 825, 832 (1973), where we held that a Pennsylvania statute violated the First Amendment, we emphasized that "the State [had] singled out a class of its citizens for a special economic benefit." We also observed in *Widmar* that "empirical evidence that religious groups will dominate [the school's] open forum," —— U. S., at ——, might be relevant to analysis under the Establishment Clause. We address this below, pp. ————, *infra*.

[8] Our full statement was that:

"*Allen* and *Everson* differ from the present litigation in a second important respect. In both cases the class of beneficiaries included *all* schoolchildren, those in public as well as those in private schools. See also *Tilton* v. *Richardson*, *supra*, in which federal aid was made available to *all* institutions of higher learning, and *Walz* v. *Tax Comm'n*, *supra*, in which tax exemptions were accorded to *all* educational and charitable nonprofit institutions. . . . Because of the manner in which we have resolved the tuition grant issue, we need not decide 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.*, scholarship) made available generally without regard to the sectarian-nonsectarian, or public-non-public nature of the institution benefited. . . . Thus our decision today does not compel . . . the conclusion that the educational assistance provisions of the "G.I. Bill," 38 U. S. C. § 1651, impermissibly advance religion in violation of the Establishment Clause." 413 U. S., at 782, n. 38. See also, *id.*, at 775.

without regard to the sectarian-nonsectarian or public-nonpublic nature of the institution benefited," *ibid.*, might not offend the Establishment Clause. We think the tax deduction adopted by Minnesota is more similar to this latter type of program than it is to the arrangement struck down in *Nyquist*. Unlike the assistance at issue in *Nyquist*, § 290.09(22) permits *all* parents—whether their children attend public school or private—to deduct their childrens' educational expenses. As *Widmar* and our other decisions indicate, a program, like § 290.09(22), that neutrally provides state assistance to a broad spectrum of citizens is not readily subject to challenge under the Establishment Clause.

We also agree with the Court of Appeals that, by channeling whatever assistance it may provide to parochial schools through individual parents, Minnesota has reduced the Establishment Clause objections to which its action is subject. It is true, of course, that financial assistance provided to parents ultimately has an economic effect comparable to that of aid given directly to the schools attended by their children. It is also true, however, that under Minnesota's arrangement public funds become available only as a result of numerous, private choices of individual parents of school-age children. For these reasons, we recognized in *Nyquist* that the means by which state assistance flows to private schools is of some importance: we said that "the fact that aid is disbursed to parents rather than to . . . schools" is a material consideration in Establishment Clause analysis, albeit "only one among many to be considered." *Nyquist*, at 781. It is noteworthy that all but one of our recent cases invalidating state aid to parochial schools have involved the direct transmission of assistance from the state to the schools themselves. The exception, of course, was *Nyquist*, which, as discussed previously is distinguishable from this case on other grounds. Where, as here, aid to parochial schools is available only as a result of decisions of individual parents no

"imprimatur of State approval," *Widmar*, at ——, can be deemed to have been conferred on any particular religion, or on religion generally.

We find it useful, in the light of the foregoing characteristics of § 290.09(22), to compare the attenuated financial benefits flowing to parochial schools from the section to the evils against which the Establishment Clause was designed to protect. These dangers are well-described by our statement that "what is at stake as a matter of policy [in Establishment Clause cases] is preventing that kind and degree of government involvement in religious life that, as history teaches us, is apt to lead to strife and frequently strain a political system to the breaking point." *Nyquist*, *supra*, 413 U. S., at 796, quoting, *Walz* v. *Tax Comm'n*, 397 U. S., at 694 (Harlan, J., concurring). It is important, however, to "keep these issues in perspective":

> "At this point in the 20th century we are quite far removed from the dangers that prompted the Framers to include the Establishment Clause in the Bill of Rights. See *Walz* v. *Tax Comm'n*, 397 U. S. 664, 668 (1970). 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, and such risk seems entirely tolerable in light of the continuing oversight of this Court." *Wolman*, at 263 (POWELL, J., concurring in part, concurring in the judgment in part, and dissenting in part).

The Establishment Clause of course extends beyond prohibition of a state church or payment of state funds to one or more churches. We do not think, however, that its prohibition extends to the type of tax deduction established by Minnesota. The historic purposes of the clause simply do not encompass the sort of attenuated financial benefit, ulti-

mately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case.

Petitioners argue that, notwithstanding the facial neutrality of § 290.09(22), in application the statute primarily benefits religious institutions.[9] Petitioners rely, as they did below, on a statistical analysis of the type of persons claiming the tax deduction. They contend that most parents of public school children incur no tuition expenses, see Minn. Stat. § 120.06, and that other expenses deductible under § 290.09(22) are negligible in value; moreover, they claim that 96% of the children in private schools in 1978–1979 attended religiously-affiliated institutions. Because of all this, they reason, the bulk of deductions taken under § 290.09(22) will be claimed by parents of children in sectarian schools. Respondents reply that petititoners have failed to consider the impact of deductions for items such as transportation, summer school tuition, tuition paid by parents whose children attended schools outside the school districts in which they resided, rental or purchase costs for a variety of equipment, and tuition for certain types of instruction not ordinarily provided in public schools.

We need not consider these contentions in detail. We would be loath to adopt a rule grounding the constitutionality

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[9] Petitioners cite a "Revenue Analysis" prepared in 1976 by the Minnesota Department of Revenue, which states that "Only those taxpayers having dependents in nonpublic elementary or secondary schools are affected by this law since tuition, transportation and textbook expenses for public school students are paid for by the school district." Pet. Br., at 38. We fail to see the significance of the report; it is no more than a capsule description of the tax deduction provision. As discussed below, and as the lower courts expressly found, the analysis is plainly mistaken, as a factual matter, regarding the effect of § 290.09(22). Moreover, several memoranda prepared by the Minnesota Department of Revenue in 1979—stating that a number of specific expenses maybe deducted by parents with children in public school—clearly indicate that the summary discussion in the 1976 memorandum was not intended as any comprehensive or binding agency determination.

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 by which such statistical evidence might be evaluated. Moreover, the fact that private persons fail in a particular year to claim the tax relief to which they are entitled—under a facially neutral statute—should be of little importance in determining the constitutionality of the statute permitting such relief.

Finally, private educational institutions, and parents paying for their children to attend these schools, make special contributions to the areas in which they operate. "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." *Wolman*, at 262 (POWELL, J., concurring and dissenting). If parents of children in private schools choose to take especial advantage of the relief provided by § 290.09(22), it is no doubt due to the fact that they bear a particularly great financial burden in educating their children. More fundamentally, whatever unequal effect may be attributed to the statutory classification can fairly be regarded as a rough return for the benefits, discussed above, provided to the state and all taxpayers by parents sending their children to parochial schools. In the light of all this, we believe it wiser to decline to engage in the type of empirical inquiry into those persons benefited by state law which petitioners urge.[10]

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[10] Our conclusion is unaffected by the fact that § 290.09(22) permits deductions for amounts spent for textbooks and transportation as well as tuition. In *Everson* v. *Board of Education*, 330 U. S. 1 (1947), we approved a statute reimbursing parents of *all* schoolchildren for the costs of transporting their children to school. Doing so by means of a deduction, rather than a direct grant, only serves to make the state's action less objectionable. Likewise, in *Board of Education* v. *Allen*, 392 U. S. 236 (1968), we

Thus, we hold that the Minnesota tax deduction for educational expenses satisfies the primary effect inquiry of our Establishment Clause cases.

Turning to the third part of the *Lemon* inquiry, we have no difficulty in concluding that the Minnesota statute does not "excessively entangle" the state in religion. The only plausible source of the "comprehensive, discriminating, and continuing state surveillance," 403 U. S., at 619, necessary to run afoul of this standard would lie in the fact that state officials must determine whether particular textbooks qualify for a deduction. In making this decision, state officials must disallow deductions taken from "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." Minn. Stat. § 290.09 (22). Making decisions such as this does not differ substantially from making the types of decisions approved in earlier opinions of this Court. In *Board of Education* v. *Allen*, 392 U. S. 236 (1968), for example, the Court upheld the loan of secular textbooks to parents or children attending nonpublic schools; though state officials were required to determine whether particular books were or were not secular, the system was held not to violate the Establishment Clause. See also *Wolman* v. *Walter*, *supra*; *Meek* v. *Pittenger*, *supra*. The same result follows in this case.[11]

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approved state loans of textbooks to *all* schoolchildren; although we disapproved, in *Meek* v. *Pittenger* and *Wolman* v. *Walter* direct loans of instructional materials to sectarian schools, we do not find those cases controlling. First, they involved assistance provided to the schools themselves, rather than tax benefits directed to individual parents, see pp. ——, *supra*. Moreover, we think that state assistance for the rental of calculators, see J. App., at A18, ice skates, *ibid.*, tennis shoes, *ibid.*, and the like, scarcely poses the type of dangers against which the Establishment Clause was intended to guard.

[11] No party to this litigation has urged that the Minnesota plan is invalid

For the foregoing reasons, the judgment of the Court of Appeals is

Affirmed.

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because it runs afoul of the rather elusive inquiry, subsumed under the third part of the *Lemon* test, whether the Minnesota statute partakes of the "divisive political potential" condemned in *Lemon*, *supra*, 403 U. S., at 622. The argument is advanced, however, by amicus National Committee for Public Education and Religious Liberty *et al.* This variation of the "entanglement" test has been interpreted differently in different cases. Compare *Lemon* v. *Kurtzman*, 403 U. S. 602, 622–625, with *id.*, at 665–666 (WHITE, J., dissenting); *Meek* v. *Pittinger*, *supra*, 421 U. S., at 359–62, with *id.*, at 374–379 (BRENNAN, J., dissenting). Since this aspect of the "entanglement" inquiry originated with *Lemon* v. *Kurtzman*, *supra*, and the Court's opinion there took pains to distinguish both *Everson* v. *Board of Education*, 330 U. S. 1 (1947), and *Board of Education* v. *Allen*, 392 U. S. 236 (1968), the Court in *Lemon* must have been referring to a phenomenon which, although present in that case, would have been absent in the two cases it distinguished.

The Court's language in *Lemon I* respecting political divisiveness was made in the context of Pennsylvania and Rhode Island statutes which provided for either direct payments of, or reimbursement of, a proportion of teachers' salaries in parochial schools. We think, in the light of the treatment of the point in later cases discussed above, the language must be regarded as confined to cases where direct financial subsidies are paid to parochial schools or to teachers in parochial schools.

June 1, 1983

82-195 Mueller v. Allen

Dear Bill:

Please join me.

Sincerely,

Justice Rehnquist

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 1, 1983

Re: 82-195 - Mueller and Noyes v. Allen

Dear Bill,

I agree.

Sincerely,

Justice Rehnquist

Copies to the Conference

cpm

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 1, 1983

No. 82-195 Mueller & Noyes v. Allen

Dear Bill,

Please join me.

Sincerely,

Sandra

Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 14, 1983

Re: No. 82-195, Mueller v. Allen

Dear Bill:

I join.

Regards,

WEB

Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 24, 1983

Re: No. 82-195 Mueller v. Allen

Dear Thurgood:

In this case, as in Barclay v. Florida, I very much appreciate your having furnished me an advanced copy of your dissent. Having read the dissent, I think the issue is fairly joined between us, and I do not anticipate changing my present draft.

Sincerely,

WER

Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 27, 1983

Re: 82-195 - Mueller v. Allen

Dear Thurgood:

Please join me.

Respectfully,

JPS

Justice Marshall

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 27, 1983

Re: No. 82-195 - Mueller v. Allen

Dear Thurgood:

Please join me in your dissent.

Sincerely,

Harry

Justice Marshall

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 27, 1983

No. 82-195

Mueller v. Allen

Dear Thurgood,

Please join me in your dissent in the above.

Sincerely,

Bill

Justice Marshall

Copies to the Conference

82-195 Mueller v. Allen (Jim)

WHR for the Court
1st draft 6/1/83
Joined by CJ, BRW, LFP, SOC

TM dissent
Typed draft 6/24/83
1st draft 6/27/83
Joined by WJB, HAB, JPS